

# APPENDIX E

**From:** Roger Hendey [<mailto:> ]  
**Sent:** 13 April 2012 07:23  
**To:** Salmon, Phil  
**Cc:**  
**Subject:** RE: Village green application

Hi Phil,  
Thank you for your patience in respect of the application for the registration of Northwood Park as a Town or Village Green.  
The Town Council has now looked in some detail at the application and have decided that they do not wish to comment on it.  
Regards,  
Roger

NORTHWOOD



HOUSE

CHARITABLE TRUST

WARD AVENUE, COWES, ISLE OF WIGHT PO31 8AZ

Miss C Chalkley  
 Applications Officer, Tree Team  
 Directorate of Economy & Environment  
 Isle of Wight Council  
 Council Offices, Seaclose  
 Fairlee Road, Newport  
 Isle of Wight  
 PO30 2QS

Sent by E-mail and By Post

4<sup>th</sup> March 2012

Dear Miss Chalkley

**Proposal: Application submitted under Section 15 of the Commons Act 2006 for  
 Registration as Town or Village Green  
 Location: Land at Northwood Park, Cowes**

Dear Miss Chalkley

I enclose a 14 page paper setting out in detail the Objections of the Management Trustees of the Northwood House Charitable Trust to the application submitted by Mr Paul Taylor together with 14 separate attached documents. I would be very grateful for acknowledgement of safe receipt within the time limit permitted for Objections. If I can be of any further assistance to you please do not hesitate to contact me.

Yours sincerely

  
**David Christie**

Trustee NHCT

For and on behalf of all of the Management Trustees

**OBJECTIONS OF THE TRUSTEES TO THE APPLICATION DATED  
24.11.2011 MADE BY MR PAUL TAYLOR UNDER S.15 COMMONS ACT  
2006**

**Executive Summary**

**A. S 15 (2) of the Commons Act 2006 has not applied to the land for a period of at least 20 years in that no inhabitants of the locality or of a neighbourhood within the locality have indulged *as of right* in lawful sports and pastimes on the land because:**

- a. user by inhabitants of the locality (which it is admitted has taken place) has been by right<sup>1</sup>.**
- b. the land was dedicated to the public.**
- c. the public have been licensed ever since 1929 to access the land in accordance with the charitable purpose of the charity which owns the land.**

**B. Lawful sports and pastimes have not been indulged in on significant parts of the land, the subject of the application, for more than 20 years (if at all).**

**1. Background**

As stated in S 7 of the Application all of the land comprised in the application was gifted by Captain Herbert J. Ward to Cowes Urban District Council ("CUDC") as Trustee by a Deed of Gift dated 19.8.1929. This Gift was registered at the same time with the Charity Commission which applied its official stamp on the Deed of Gift<sup>2</sup>.

**2. The Deed of Gift contained the following express charitable gift:**

*"That the land surrounding the House as set forth on the said plan and thereon edged pink shall now or hereafter provided for be maintained exclusively as pleasure grounds and as a place of recreation for the inhabitants and visitors to Cowes and any district which may at any time hereafter be joined to and form part of Cowes. Provided that the Council may on any part of the land form Tennis Courts, Bowling Greens, Putting Courses and the like and may erect necessary Conveniences, Band Stands,*

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<sup>1</sup> See Note 4 to the Guidance Notes for Applicants issued by DEFRA (amended 2010)

<sup>2</sup> Copy original Deed of Gift with plan attached – for Charity Commission stamp - see page 8. A typed copy for ease of reference is also attached.

*Pavilions, Refreshment Rooms, Baths and the like and may make charges for the respective users of the same .....<sup>3</sup>”*

*“Provided also that the Council may within their statutory powers close the ..... Grounds or part thereof at such times and to such persons as they in their discretion shall think fit and may make byelaws and regulations with regard to the due and proper management and control thereof and with regard to the behaviour of persons using the same and to let the grounds and to make charges for admission thereto.....<sup>4</sup>”*

3. So far as the land gifted as pleasure grounds and as a place of recreation for the inhabitants and visitors to Cowes there can be no doubt at all that this constituted a charitable gift for the benefit of the public as identified and that as Trustee CUDC had a fiduciary duty to comply with the terms of the charitable gift. This is a fundamental principle of charity law.
4. Pursuant to its fiduciary duty CUDC did make much of the land edged pink (hereafter “Northwood Park”) available as pleasure grounds and a place of recreation for the inhabitants of Cowes and visitors to Cowes and this has remained the position to this day through all of the changes which are mentioned below.
5. Bye Laws were made by CUDC on 1.4.1930<sup>5</sup>. These and other evidence available to the Trustees demonstrates that CUDC did not charge for admission to Northwood Park itself (which as indicated it had power to do) but when it built tennis courts in the 1930’s charges were made for their user and the same applied to the putting course and the bowling green which was built in the 1960’s. Evidence available to the Trustees shows that until the Second World War Northwood Park was surrounded by iron railings but these were demolished and gifted to the war effort as it is understood happened to many other public parks. Certainly before 1939 and in all likelihood until the railings were removed Northwood Park used to close each evening at sunset and open at 9.00 am in winter and 8.00 am in summer<sup>6</sup>. Once the railings were removed it was obviously not possible to physically close the Park at night.
6. The Trustees understand the Bye laws are still in force although the regulations relating to opening and closing hours are obviously now otiose. Bye-Laws 13, 14 17, 22, 23, 24, 25 – 28 and 30 restrict the freedom of the inhabitants of Cowes and visitors to Cowes so far as to what they may or may not do in Northwood Park.

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<sup>3</sup> Highlighted on the hard copy of the typed Deed of Gift in yellow.

<sup>4</sup> Highlighted on the hard copy of the typed copy Deed of Gift in pink.

<sup>5</sup> Attached.

<sup>6</sup> See Bye Law 3.

7. If any confirmation of the charitable nature of the 1929 gift were required it is submitted the matter was placed beyond all doubt by the Recreational Charities Act 1958<sup>7</sup> which where relevant provided:

1. General provision as to recreational and similar trusts, etc.

(1) Subject to the provisions of this Act, it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare:

Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.

(2) The requirement of the foregoing subsection that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless—

(a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and

(b) either—

(i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or

(ii) the facilities are to be available to the members or female members of the public at large.

(3) Subject to the said requirement, subsection (1) of this section applies in particular to ..... the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.

8. Part of the land within the 1929 Gift was sold to provide sheltered Housing at Park Court in the 1960's. This area was added to in the late 1980's.
9. In 1974 CUDC merged with Ryde and Newport Borough Councils to become Medina Borough Council ("MBC"). Thereafter MBC was the trustee of the charity.
10. On 14.8.1978, pursuant to an application which was presumably made by MBC, Northwood House Charitable Trust was formally entered on the Register of Charities maintained by the Charity Commission (registered number 276153).

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<sup>7</sup> See also s 5 Charities Act 2011 which restates the 1958 Act with minor modifications – extracts from both Acts are attached.

11. In 1995 the Isle of Wight Council (“IWC”) became the statutory successor to MBC as trustee of the charity when MBC ceased to exist.

12. On 31.7.2002 pursuant to powers granted to them by the Charities Act 1993 the Charity Commission ordered that a new Scheme should affect the governing document of the charity<sup>8</sup>. Pursuant to the Scheme IWC became custodian trustee<sup>9</sup> and provision was made for 7 trustees of whom 4 were nominated and 3 co-opted. Amongst other things the 2002 Scheme varied the Deed of Gift so that it now read:-

*That the land surrounding the House as set forth on the said plan and thereon edged pink shall now or hereafter provided for be maintained exclusively as pleasure grounds and as a place of recreation for **the inhabitants of and visitors to Isle of Wight preference being given to inhabitants and visitors to Cowes.***

13. As indicated the charitable purpose of this part of the Gift, namely the exclusive maintenance of part of the land as pleasure grounds and as a place of recreation for the benefit of a section of the public (in this case the very community where the land was situated) is quite obvious.

14. By an Order of the Charity Commission dated 28.9.2011 IWC was removed as the custodian trustee of the land and the Official Custodian for Charities was put in its place<sup>10</sup>.

15. Although the 2002 Scheme provided for the 7 trustees to manage the charity and all of its land in fact IWC continued to perform this role until 30.9.2010 when it abandoned all interest in the governance of the charity and its land. The Trustees believe that IWC would claim that it acted as agent of the Trustees between 1.8.2002 and 30.9.2010. The precise basis on which it acted as it did is not material for the purposes of this application. It is the case, however, that since 1.10.2010 the only lawful decisions in relation to the charity have been those made by the Trustees appointed in accordance with the terms of the 2002 Scheme. The Trustees have continued to exclusively maintain Northwood Park as pleasure grounds and as a place of recreation for the inhabitants of and visitors to the Isle of Wight giving preference to the local community in Cowes.

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<sup>8</sup> Attached .

<sup>9</sup> A custodian trustee is appointed to have custody as distinct from management of trust property – the term was introduced by S 4 Public Trustee Act 1906 of which an extract is attached. As a local authority IWC in its corporate capacity held this strictly limited role. – See also Charity Commission Glossary of Terms used in its Operational Guidance attached.

<sup>10</sup> Order attached.

16. As referred to in the Application it is the intent of the Trustees, subject to Charity Commission approval, to operate the charity under a new Scheme. This has not yet come about and there have been substantial delays caused by personnel and operating changes in the Charity Commission. It is intended that the new Scheme will safeguard Northwood Park and provide for the charity's first mentioned object to be for the public benefit "*the provision, maintenance and support of a public pleasure garden or park (including the provision of facilities for playing games, sports and other recreational or leisure facilities and amenities) in the area of benefit*".

17. The above accords precisely with the Deed of Gift albeit that more modern legal language is used.

18. The purpose of the extensive background set out above is to demonstrate that the land in question was gifted in 1929 to Trustees for a charitable purpose and with minor modifications that charitable purpose has been followed to this day and certainly was followed in the 20 years prior to the Application by successive Trustees, firstly by MBC, then by IWC and latterly by the Trustees appointed under the 2002 Scheme. Although it has no relevance to the Application the Trustees wish it to be stated unequivocally that it is their intent that the charitable purpose as mentioned above applicable to Northwood Park should be followed in the future.

**19. First Objection by the Trustees**

It will be seen that the Objection of the Trustees is that S 15 (2) of the Commons Act 2006 has not applied to the land for a period of at least 20 years in that no inhabitants of the locality or of a neighbourhood within a locality have indulged *as of right* in lawful sports and pastimes on the land.

20. In fact the access allowed to local inhabitants to the land has been pursuant to the Deed of Gift and the charitable purpose under which the land was gifted whereby in accordance with their fiduciary duties each successive trustee has exclusively maintained the land as pleasure grounds and a place of recreation for the section of the public intended and that section of the public (including local inhabitants) have thus entered the land with the express licence and consent of the successive Trustees', such consent and licence being the very purpose of the charity. All access to the land has thus been "by right".

**21. The Application**

The Application states under S 7 that:

*"Under this Deed of Gift and through this gift the people of Cowes have inherited a beneficial interest and gifted ownership of the said grounds for their absolute recreational use and enjoyment in perpetuity. It does not belong to anyone else but them."*

*“The IW Council as eventual successors to Cowes Urban District Council were custodians on behalf of the residents of Cowes, the beneficial recipients of the Deed of Gift”*

*“The 1929 Deed of Gift bestowed exclusive rights to the people of Cowes to experience the pleasure grounds as gifted in perpetuity.”*

*“The net effect on the parkland of the 2002 Amendment to the Deed of Gift, while widening the scope of the beneficial interest never-the-less changed the status of the Park to one which “facilitated the House” which was a considerable change of emphasis away from the original Deed of Gift, and was therefore a watering down of the People’s rights.”*

*“Yet the people of Cowes were not consulted by either IW Council or the Town Council to determine their acceptance or rejection of this change to their rights as had been gifted.”*

*“The forthcoming amendment will have the net effect of further turning the parkland towards private ownership or status, which then will be in direct opposition to the Deed of Gift 1929, the spirit of which is still existent.”*

*“The People of Cowes have never relinquished their rights as gifted by the Deed of Gift 1929, nor have they been given by any council the opportunity to do so.”*

*“Therefore I submit that the Park requires the special protection of Village Green status to protect the open space and the rights of the People as gifted.”*

In an addendum to the Application it states:

*“In January 2011 the Friends of Northwood Park undertook a User Survey of the park and received responses from 305 individuals. The majority of these people filled in an online survey which was linked to the Friends website. We have included with this Village Green application a copy of 128 paper copies of filled in forms which were completed by people walking through the park.*

*The survey shows public use of the park on a regular basis and indicates members of the public feel very passionately about the park and we believe these results should have an impact on any Village Green application.”*

As the Registration Authority will be well aware the burden of proof in respect of the Application rests on the Applicant and he must prove his case on the balance of probabilities.

22. Each of the contentions above as stated by the Applicant demonstrate:-

- a. Complete misunderstanding of the law relating to charities;
- b. Confusion and misunderstanding as to the actual effect of the 1929 Gift;
- c. Confusion and misunderstanding as to the concept of inheritance;
- d. Over-statement and mis-statement so far as the position and rights of the local Community;
- e. Misunderstanding of the proper construction of the 2002 Scheme which did not change the status of Northwood Park in any material manner;
- f. Mis-statement in that Consultations did take place prior to the 2002 Scheme;
- g. A lack of appreciation that IWC was a Charitable Trustee before the 2002 Scheme and as to the obligations inherent in that role;
- h. A lack of appreciation of the nature of the rights inherent in being a person within the area of benefit of a charitable purpose;
- i. An understandable but nonetheless significant lack of knowledge and appreciation of the relevant statutory provisions.

23. The reference to the “Friends of Northwood Park” is noted. It is believed this is a reference to the “Friends of Northwood House and Park”, which the Trustees consider is the only unincorporated organisation with a name similar to the name mentioned by the Applicant. If ill-informed and misguided concerns have been spread by the Applicant and others as to the future of Northwood Park in the local community this is a matter of deep regret to the Trustees. The Trustees do not doubt that users of the Park want to retain it (and perhaps see it improved) and it is with that endeavour in mind that they have laboured with very limited resources to comply with the charitable purpose attaching to the Gift as amended of Northwood Park (as referred to above) and are intent on doing all they can to protect that position into the future.

24. However even following the Applicant’s misguided approach what he states does not begin to provide justification for the land being placed on the Register of Village Greens. He does not begin to address the issues required under S 15 (2) of the 2006 Act. He makes no attempt to demonstrate any user “as of right”. Indeed what he states taken in proper context demonstrates why the land cannot be registered as a Village Green. Specifically he does not

begin to demonstrate that the land has been used *as of right*, i.e. without compulsion, secrecy or licence. Everything he states supports the Trustees Objection, namely that the land has been enjoyed *by right*.

## 25. “As of Right”

This is the same term used in S 22 (1A) of the Commons Registration Act 1965<sup>11</sup>. In R (Beresford) v Sunderland City Council [2003] UKHL 60<sup>12</sup> Lord Bingham stated:-

*2 As defined in section 22 of the 1965 Act, before its amendment by section 98 of the Countryside and Rights of Way Act 2000, the expression "town or village green" means (for present purposes): "land ... on which the inhabitants of any locality have ... indulged in [lawful] sports and pastimes as of right for not less than 20 years." As Pill LJ rightly pointed out in R v Suffolk 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. These ingredients of the definition can give rise to contentious and difficult questions. But they do not do so in this case. The only difference between the parties, on which the appeal turns, is whether the admitted use of the land by the inhabitants of the locality for indulgence in lawful sports and pastimes for not less than 20 years was "as of right".*

*3 In this context it is plain that "as of right" does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired one by user for a stipulated period. It is also plain that "as of right" does not require that the inhabitants should believe themselves to have a legal right: the House so held in R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335, 354, 356. It is clear law, as summarised in the last-mentioned decision, that for prescription purposes under the Prescription Act 1832 (2 & 3 Will 4, c 71), the Rights of Way Act 1932 and the 1965 Act "as of right" means nec vi, nec clam, nec precario, that is, "not by force, nor stealth, nor the licence of the owner": see pp 350, 351, 353-354.*

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<sup>11</sup> Extract attached s 22 (1A)

<sup>12</sup> Copy of this authority attached

Lord Scott stated in his speech at paragraph 15 that:-

*“a valuable and scholarly exposition of the historical provenance of the expression "as of right" in the 1965 Act that is as pertinent to this case as to (R v Oxfordshire County Council Ex p) Sunningwell Parish Council [2000] AC 335. I cannot improve upon and need not repeat what Lord Hoffmann has said: see pp 349-355. It is accepted that:*

*‘the words 'as of right' import the absence of any of the three characteristics of compulsion, secrecy or licence—'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements ...’ (per Scott LJ in Jones v Bates [1938] 2 All ER 237, 245 cited by Lord Hoffmann [2000] 1 AC 335, 355).*

At paragraph 33 – 34 Lord Scott stated:-

*33 As Lord Hoffmann noted in the Sunningwell case [2000] 1 AC 335 **the concept of use as of right—nec vi, nec clam, nec precario—is derived from the law relating to the acquisition by prescription of private easements.** Section 2 of the Prescription Act 1832 refers to rights of way or other easements "actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years ..." The concept was imported into the law relating to the dedication of land as a public highway. \*902 Section 1(1) of the Rights of Way Act 1932 provided that "where a way ... upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way ..." (see now section 31(1) of the Highways Act 1980, which is in the same terms).*

*34 It is a natural inclination to assume that these expressions, "claiming right thereto" (the 1832 Act), "as of right" (the 1932 Act and the 1980 Act) and "as of right" in the 1965 Act, all of which import the three characteristics, nec vi, nec clam, nec precario, ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous.*

Of fundamental importance for purposes of this case at paragraph 40 he stated:-

*Town or village greens on the other hand must owe their existence to one or other of the three origins specified in section 22(1) of the 1965 Act. One of these is the 20 years' use as of right to which I have already referred. Alternatively, a town or village green may be "land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality", or "land ... on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes ..." In short, the origin of a town or village green must be either statute or custom or 20 years' use. Dedication by the landowner is not a means by which a town or village green, as defined, can be created. So acts of an apparently dedicatory character are likely to have a quite different effect in relation to an alleged public right of way than in relation to an alleged town or village green.*

Lord Walker states at paragraph 72:-

*72 It has often been pointed out that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closer to "as if of right" (see for instance Lord Cowie in Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SLT 1035, 1043, approving counsel's formulation). This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."*

26. In R. (Barcas) v. North Yorkshire County Council & Scarborough Council [2011] EWHC 3653 (Admin)<sup>13</sup> Langstaff J dismissed an application for Judicial Review of the decision of Mr Vivian Chapman QC who had ruled that user of a playing field was not “as of right” but was “by right” and accordingly could not be registered as a Village Green. In that case the field had been set out as a playing field under S 80 Housing Act 1936. Reference was made to part of the speech of Lord Walker in Beresford (supra) where he stated:

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<sup>13</sup> Copy of authority Attached .

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

In the main the case turns on the construction of the statute and the issue whether a local authority having power under S 80 of the 1936 Act to create recreational facilities for the working classes (Council House tenants) could open them for public use but it powerfully supports the decision of the Inspector that the user of the playing field was **“by right”**.

27. On the facts of this case it is submitted:-

- a. All public user of Northwood Park has been **by right** of the charitable gift made in 1929 as amended by the Charity Commission acting in accordance with its statutory powers.
- b. The legal right granted to the people of Cowes is simply a right to fall within the section of the public entitled to take advantage of the charitable purpose which underpins the existence of the charity.
- c. Frankly the views expressed by the Applicant are a nonsense both in law as well as factually.
- d. Legal title to the land comprising Northwood Park vests in the Custodian Trustee who holds it on trust for the charity.
- e. The Trustees who have managed Northwood Park throughout the 20 year period (MBC, IWC and the individual trustees since 2002) have

maintained the Park for the charitable purpose and have accordingly **licensed** its public user.

- f. There is a legal entitlement in the Bye Laws to close the Park. This is the same as the position referred to by Lord Walker in paragraph 72 of his speech in Beresford (supra) where he referred to the more powerful position of a landowner when he put up a notice stating: *"The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."*<sup>14</sup>
- g. Northwood Park was dedicated for the enjoyment of the local community and that dedication has existed ever since 1929. As referred to by Lord Scott dedication cannot come within the expression "as of right" meaning as it does *"without compulsion, secrecy or licence"*.
- h. None of the user of Northwood Park has been *"as of right"* or *"as if as of right"* applying the proper construction to the wording of the statute. It has been *"by right"*.

**28. There are parts of Northwood Park where the public have not indulged in lawful sports and pastimes for the minimum 20 year period required by the statute**

- a. As drawn the plan accompanying the Application is far too wide-ranging.
- b. The built environment at the Baring Road entrance is not a place where any lawful sports or pastimes have been conducted.
- c. The same observation as at (b) applies to the Nunnery Steps.

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<sup>14</sup> There can be little doubt that if closure was anything other than temporary, the Public would be entitled to challenge the trustees who made such a decision.

- d. Northwood Park has flower beds which the public are not permitted under the Bye Laws to enter onto. It is the opinion of the Trustees that the public do not enter onto these flower beds when indulging in lawful sports and pastimes (principally walking) thus they should have been omitted from the application.
- e. Significant portions of the Park comprise driveways and tarmac paths. The driveways (there are 2 principal driveways for vehicular traffic from Ward Avenue) are not places where lawful sports and pastimes are indulged in. The tarmac access paths principally comprise pedestrian access to Northwood House which in the early part of the 20 year period was used as Council offices and in the latter part until 2010 was used as the Registrar of Births, Marriages and Deaths Offices. Pedestrian access does not constitute indulging in a lawful sport or pastime. The Deed of Gift gave power to *“lay out form or widen such roads and paths in the grounds or bounding the same as they may deem necessary”*.
- f. The same observations as at (e) apply to Signs, Stone Information structures, Lamp standards, benches and a flag pole.
- g. Part of the Park is a War Memorial. No lawful sports or pastimes are or have been conducted on the War Memorial in the 20 year period.
- h. Some parts of the Park are deliberately overgrown for conservation purposes (for example the site of the Ice House). This and other parts of the built environment are not and never have been in the 20 year period indulged in for lawful sports and pastimes.
- i. Some parts of the Park have trees or shrubs planted occupying not insignificant areas of land. These parts of the Park are not and never have been within the 20 year period indulged in for lawful sports and pastimes. They exist for “show” purposes.
- j. Each year in Cowes Week and on other occasions the field along Ward Avenue is closed to the public and the land is used as a temporary Car Park. Accordingly there has not been 20 years uninterrupted user here.

- k. It is noted that the Bowling Green which has been let by the Trustees is excluded from the application. Within 20 years land used as a putting green and as a pitch and put area in the vicinity of the Bowling Green but outside the excluded area shown on the Plan were closed to public use unless a charge was paid. Accordingly there has not been 20 years uninterrupted user here.
  - l. At the rear of the Community Hall the plan follows the building line whereas there are derelict outbuildings which the plan ignores which were in use within the 20 year period and there was a large area used by gardeners for spoil which was not open to the public. Accordingly there has not been 20 years uninterrupted user here.
  - m. Other areas used by gardeners which were not open to the public or which were not used for lawful sports and pastimes exist to the North of the Rotunda car park and in divers other locations.
  - n. The plan fails to pay heed of the fact that until only a month ago land to the north of Park Court owned by the charity was fenced off and used by Park Court. The same applies to an area of land in the ownership of the charity which Park Court have used for car parking. Accordingly there has not been 20 years uninterrupted user here.
29. The list at 28 is not intended to be exhaustive. As will be understood the Trustees principal objection is as a matter of law set out above. The Trustees reserve the right to further identify and delineate the areas referred to at 28 if such should become necessary at any Enquiry.
30. This is a wholly misconceived and wrong-headed application which should be refused by the Registration Authority without further delay.

**DAVID CHRISTIE**

Trustee NHCT for and on behalf of all of the Trustees.

5.3.2012

#### Schedule of Documents Attached

1. Deed of Gift 19.8.1929 (original manuscript version with Charity Commission stamp showing registration in 1929)
2. Typed copy of Deed of Gift with part highlighted in yellow and part in pink
3. Byelaws 1.4.1930
4. Extract Recreational Charities Act 1958
5. Extract Charities Act 2011
6. 2002 Scheme
7. Order Charity Commission 28.9.2011
8. Extract Public Trustee Act 1906
9. Extract Operational Guidance of Charity Commission – Glossary of Terms
10. Extract Commons Registration Act 1965
11. R (Beresford) v Sunderland City Council [2003] UKHL 60
12. R (Barcas) v North Yorkshire County Council and Scarborough Council [2011] EWHC 3653 (Admin)

Witnessed by three

I CERTIFY THIS TO BE A TRUE  
COPY OF THE ORIGINAL  
AUTHORISED SIGNATORY  
ISLE OF WIGHT COUNCIL

Dated 19<sup>th</sup> August 1924

Herbert J Ward Esq.<sup>re</sup>  
of Northwood and The  
Trustees of C. G. Ward  
deceased

and

Cowes Urban District  
Council

**Deed of Gift**  
of

Northwood House  
and Grounds at  
Cowes Isle of Wight

(W)

J.C.W. DAWANT  
COWES

# This Conveyance

is made the thirteenth day of August One

thousand nine hundred and twenty nine Between Herbert Joseph Ward of Northwood Isle of Wight William Considine and Hugh Herbert Considine both of Edinburgh (hereinafter called the Grantors) of the one part and the Urban District Council of Cowes in the said Isle (hereinafter called the Council) of the other part Whereas under and by virtue of an Indenture of Settlement dated the eighth day of December One thousand eight hundred and twentyfour and made between William George Ward and Edmund Granville Ward of the first part the said William George Ward of the second part Francis Richard Wegg Prosser and John Garth Hooy of the third part and the Reverend William McQuigg and John Hops Kingsfield of the fourth part certain freehold property situate in the Parishes of Northwood and elsewhere in the Isle of Wight including the property known as Northwood House and grounds hereinafter assured stood limited at the death of the said Edmund Granville Ward hereinafter recited to such uses and upon such trusts and for such purposes as the said Edmund Granville Ward should by his Will or any Codicil or Codicils thereto appoint AND WHEREAS the said Edmund Granville Ward duly made his Will dated the twentyfourth day of August nineteen hundred and fifteen and thereby appointed the said William McQuigg and William Considine executors and trustees thereof and after making certain specific bequests and devises not affecting the property hereinafter assured the testator devised and bequeathed all the real and personal property whatsoever or wheresoever of or to which he should be seized possessed or entitled at his death or over which



he should then have a general power of appointment or disposition by will (except property thereby or by any special codicil thereto otherwise specifically disposed of) unto and to the use of his Trustees their heirs executors or administrators respectively upon trust to sell the same and to deal with the moneys arising from such sale as therein directed **And whereas** the said Edmund Granville Ward died on the second day of September One thousand nine hundred and fifteen without having revoked or altered his said Will which was on the twentieth day of April One thousand nine hundred and seventeen duly proved by the said William McAliffe and William Conside in the Principal Probate Registry **And whereas** by an Indenture dated the first day of November One thousand nine hundred and twenty-two and made between the said William Conside of the first part the said William McAliffe of the second part and the said Hugh Herbert Conside of the third part the said Hugh Herbert Conside was duly appointed by the said William McAliffe and William Conside to be a trustee of the said Will in the place of the said William McAliffe (who retired from the trusteeship thereof) for all the purposes for which the said William McAliffe was appointed a trustee by the said Will and the said William Conside and William McAliffe thereby declared that the trust estate and premises which were then subject to the trusts of the said Will should vest in the said William Conside and Hugh Herbert Conside as joint tenants for all such estate and interest as the said William Conside and William McAliffe or either of them had therein respectively immediately before the execution of the said Indenture and upon the trusts and subject to the powers and provisions applicable thereto by virtue of the said Will or otherwise **And whereas** by Deed of Appointment dated the twenty-second day of April One thousand nine hundred and twenty-seven and made between the said

William Conzidine and Hugh Herbert Conzidine of the one part and the said Herbert Joseph Ward of the other part the said William Conzidine and Hugh Herbert Conzidine appointed the said Herbert Joseph Ward to be an additional trustee of the said Will to act jointly with them for all the purposes of the said Will of the said Edmund Granville Ward deceased or such of the same purposes as were still subsisting and capable of taking effect And whereas the Grantors have agreed to convey to the Council by deed of gift the property known as Northwood House Offices and Grounds to the intent that the same should be held by them as local government offices and as public pleasure grounds for the inhabitants of Lower And whereas the Council in pursuance and by virtue of the powers enabling them so to do have agreed so to accept the same Now this deed witnesseth that in pursuance of the said agreement the Grantors as sellers do hereby convey unto the Council the property known as Northwood House Offices and Grounds including the lodges known as Church Lodge and Lower Lodge all as delineated on the plan annexed hereto and thereon edged with a Pink colour Together with the sides of the Roads as coloured Brown on the said plan and comprising an area of approximately twenty six acres but excluding the four doors to the Dining Room and Drawing Room Pilasters Framed Architraves and Boormantels on inside of Rooms and seven Mantelpieces in the house also Wall and ceiling Frescoes in the Drawing Room which the Grantors may remove within six months from the date hereof and in place of which substitute such other doors Framed Architraves etc and mantelpieces as they may determine and also substitute plain panels where Frescoes removed as necessary To hold the same unto the Council in fee simple for the purposes hereinafter expressed and declared concerning the same that is to say (1) That Northwood House and Offices

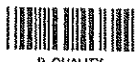
shall for ever hereafter be maintained for the use of the Council as Office's for the several departments of the Council for the housing of constables and for any other such local government purposes as to the Council from time to time seem proper. The Council to have power to alter the House and Office's or needful for Municipal purposes and to demolish unnecessary parts thereof. Provided that the Council may let such apartments in Northwood House as are suitable for Meetings Concerts and other entertainments and to exact and receive payments for such lettings and to make regulations for the due management thereof and also to sell refreshments on the premises and receive rental from Contractors for such refreshments (2) That the land surrounding the House as set forth on the said plan and thereon edged Pink shall save as hereinafter provided for ever be maintained exclusively as pleasure grounds and as a place of recreation for the inhabitants of and visitors to the said and of any district which may at any time hereafter be joined to and form part of the same. Provided that the Council may on any part of the land form Tennis Courts Bowling Green, Putting Green and the like and may erect necessary conveniences Band Stands Pavilions Refreshment Warm Booths and the like and may make charges for the respective uses of the same and the income derived therefrom together with the income derived from the letting of the House under Paragraph (1) hereof shall be applied in accordance with the statutory powers and obligations of the Council relating thereto. Provided that the Council shall not obtain a permanent license for sale of intoxicating liquors in respect of the premises conveyed but may obtain temporary or occasional licenses on the occasion of Fairs Entertainments and the like. Provided also that the Council may within their statutory powers close the House and Grounds or parts thereof at such times and to such persons as they see fit.

discretion shall think fit and may make byelaws and regulations with regard to the due and proper management and control thereof and with regard to the behaviour of persons using the same and to let the grounds and to make charges for admission thereto

And Provided further that the Council may from time to time lay out form or widen such roads and paths in the grounds or bounding the same as they may deem necessary and set aside spaces for parking places for vehicles and to make charges for the use thereof.

Such parking places shall be situated in the neighbourhood of Park Road and care shall be taken by the Council by means of regulations and otherwise to maintain the amenities of the House and grounds

AND in consideration of the Gift and Conveyance hereinbefore contained the Council do hereby covenant with the Grantors to observe the several provisions herein contained and within two years from the date hereof to construct a public roadway forty feet in width (but shall not be under any obligation to bank and channel the same) and to erect fences where necessary from the point marked E in Drain Road on the said place to the point marked A in Park Road (including the small section running westward marked C D) and to lay all necessary services that is to say sewer water and gas pipes in the same. Such roadway coloured Brown on the plan annexed hereto shall hereafter be repaired by the inhabitants at large and no charge in respect of same or for forming kerbs or channels if formed shall be demandable from the grantors or their assignees. Provided that in the event of the Council not being able to obtain adequate financial assistance from the Ministry of Transport and County Council towards the construction of the whole of the road between the points A and E on the place within the period of two years then the Council shall be entitled to delay



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constructing that portion of the Roadway from Northwood House to Park Road betwixt points marked B and C until the expiration of a further period of two years making four years from the date hereof but shall within the first said mentioned period of two years construct the portion of the roadway from the point marked A to the point marked B as well as the roadway from Northwood House to Moring Road C to E (including the small portion running westward betwixt the points marked C and D)

The Council further covenant within one year from the date hereof to carry out the following sewerage works (a) Lay a sewer from Mr. Mundy's house in Manning Road to the top of Castle Hill and lay or repair the sewer from there to Mrs. A Gonzalez's house in Castle Road (b) Lay a sewer from the Mount House to the entrance gates to DeBourne.

(c) Lay a sewer from the bottom of Kutter's Hill  
Garrison to Garrison Street. (d) Repair or relay  
the sewer from the Henry to the end of the old  
Esplanade. The sewers to be of such capacity and  
to be laid at such depth as to provide sewerage  
facilities adequate for the development of the properties  
to be served by such sewers —

In witness whereof the Grantors have hereunto set their hands and seals and the Council have caused their common seal to be hereunto affixed this day and year first above written.

Signed Sealed and Delivered  
by the said Herbert Joseph  
Ward in the presence of

*Adm. J. H. [illegible]*

*Signed, Sealed and Delivered*  
*by the said William Corbridge*  
*and Hugh Herbert Corbridge in*  
*the presence of*

James H. Thompson  
3000 West End Ave.

Herbert Joseph Ward

*Amorpha*

*A. H. W. Brundage*

The Business Deal of the  
Urban District Council of  
Lower was herewith offered  
in the presence of

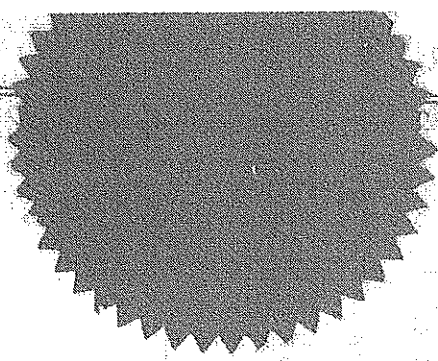
*[Signature]*

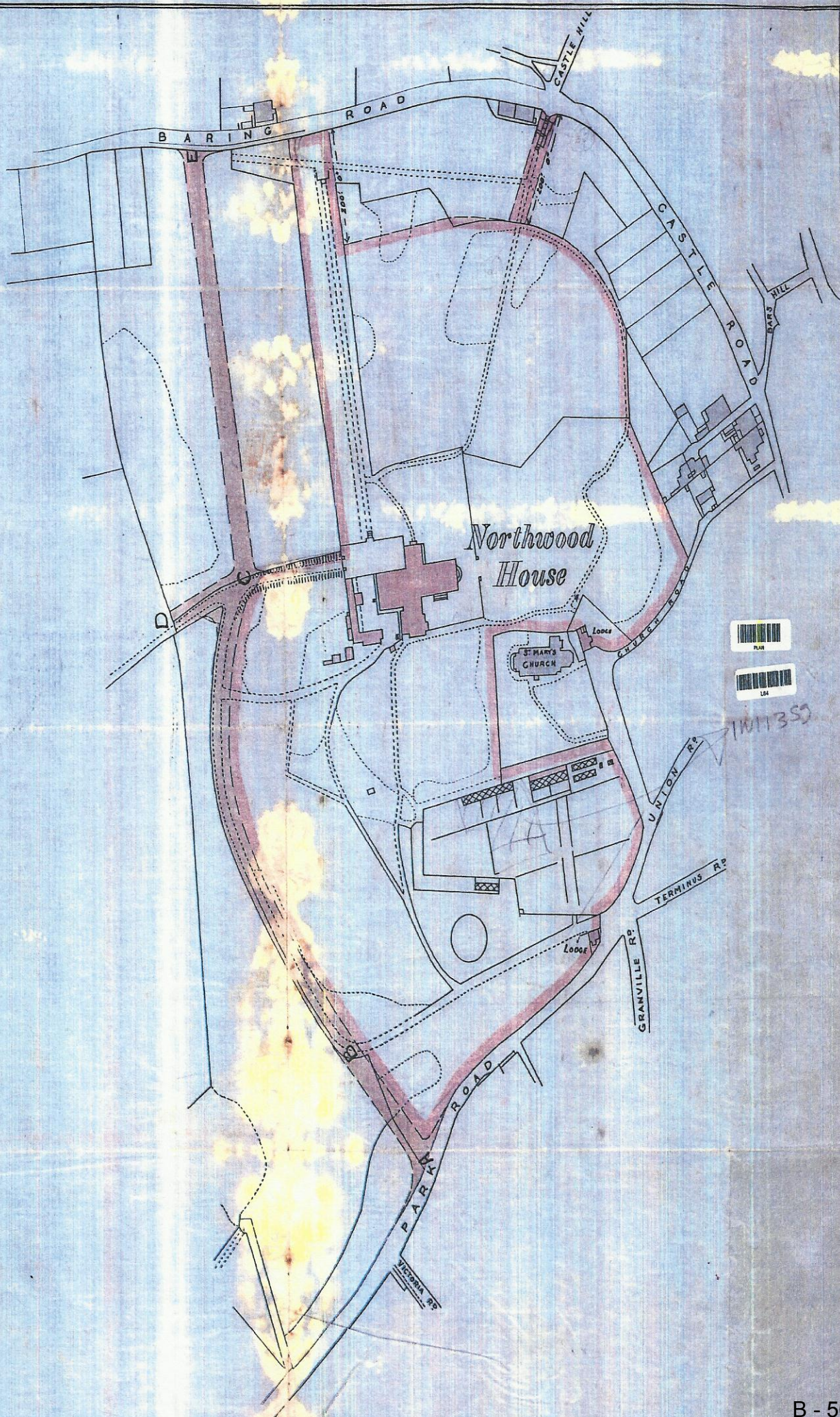
*[Signature]*

ENROLLED WITH RECORDS OF THE CHARTER COMMISSION  
FOR THE CITY OF NEW YORK  
THE OFFICE OF THE CHARTER COMMISSION  
100 NASSAU ST. NEW YORK 10038

*[Signature]*

9th 3rd 1890





## DEED OF GIFT

This conveyance is made the nineteenth day of August One thousand nine hundred and twenty nine Between Herbert Joseph Ward of Northwood Isle of Wight William Considine and Hugh Herbert Considine both of Edinburgh (hereinafter called the Grantors) of the one part and the Urban District Council of Cowes in the said Isle (hereinafter called the Council) of the other part. Whereas under and by virtue of an Indenture of Settlement dated the eighth day of December One thousand eight hundred and seventy four and made between William George Ward and Edward Granville Ward of the first part the said William George Ward of the second part Francis Richard Wegg Presser and John Cashel Hoey of the third part and the Reverend William McAuliffe and John Hope Wingfield of the fourth part certain freehold property situate in the Parish of Northwood and elsewhere in the Isle of Wight including the property known as Northwood House and grounds hereinafter assured stood limited at the death of the said Edmund Granville Ward hereinafter recited to such uses and upon such trusts intents and purposes as the said Edmund Granville Ward should by his Will or any Codicil or Codicil thereto appoint and whereas the said Edmund Granville Ward duly made his Will dated the twenty-fourth day of August nineteen hundred and fifteen and thereby appointed the said William McAuliffe and William Considine executors and trustees thereof and after making certain specific bequests and devises not affecting the property hereinafter assured the testator devised and bequeathed all the real and personal property whatsoever or wheresoever of or to which he should be seized possessed or entitled at his death or over which he should then have a general power of appointment or disposition by will (except property thereby or by any special codicil thereto otherwise specifically disposed of) unto and to the use of his Trustees their heirs, executors or administrators respectively upon trust to sell the same and to deal with the moneys arising from such sale as therein directed and whereas the said Edmund Granville Ward died on the second day of September one thousand nine hundred and fifteen without having revoked or altered his said Will which was on the twentieth day of April One thousand nine hundred and seventeen duly proved by the said William McAuliffe and William Considine in the principal probate registry and whereas an indenture dated the first day of November One thousand nine hundred and twenty two made between the said William Considine of the first part the said William McAuliffe of the second part and the said Hugh Herbert Considine of the third part the said Hugh Herbert Considine was duly appointed by the said William McAuliffe and William Considine to be a trustee of the said Will in the place of the said William McAuliffe (who retired from the trusteeship thereof) for all the purposes for which the said William McAuliffe was appointed a trustee by the said Will and the said William Considine and William McAuliffe thereby declared that the trust estate and premises which were then subject to the trusts of the said Will should vest in the said William Considine and Hugh Herbert Considine as joint tenants for all such estate and interest as the said William Considine and William McAuliffe or either of them had therein respectively immediately before the execution of the said Indenture and upon the trust and subject to the powers and provisions applicable thereto by virtue of the said Will or otherwise

and whereas by Deed of Appointment dated the twenty-second day of April One thousand nine hundred and twenty seven and made between the said William Considine and Hugh Herbert Considine of the one part and the said Herbert Joseph Ward of the other part the said William Considine and Hugh Herbert Considine appointed the said Herbert Joseph Ward to be an additional trustee of the said Will to act jointly with them for all the purposes of the said Will of the said Edmund Granville Ward deceased on such of the same purposes as were still subsisting and capable of taking effect. and whereas the grantors have agreed to convey to the Council by deed of gift the property known as Northwood House Offices and Grounds to the intent that the same should be held by them as local government offices and as public pleasure grounds for the inhabitants of Cowes and whereas the Council in pursuance and by virtue of the powers enabling them so to do have agreed so to accept the same. *Now this deed witnesseth that in pursuance of the said agreement the grantors as sellors do hereby convey onto the Council the property known as Northwood House Offices and Grounds including the lodges known as Church Lodge and Cowes Lodge all as delineated on the plan annexed hereto and thereon edged with a Pink colour. Together with the sites of the Roads as coloured brown on the said plan and comprising an area of approximately twenty six acres but excluding the four doors to the Dining Room and Drawing Room Pilasters Framed Architraves and Overmantels on inside of Rooms and seven mantelpieces in the house also Wall and Ceiling Frescoes in the Drawing Room which the Grantors may remove within six month from the date hereof and in place of which substitute such other doors framed architraves etc. and mantelpieces as they may determine and also substitute plain panels where Frescoes removed as necessary. To hold the same unto the Council in fee simple for the purposes hereinafter expressed and declared concerning the same that is to say (1) That Northwood House Offices shall forever hereafter be maintained for the use of the Council as Offices for the several departments of the Council for the housing of caretakers and for any other such local government purposes as to the Council from time to time seem proper. The Council to have power to alter the House and Offices as needful for municipal purposes and to demolish unnecessary parts thereof provided that the Council may let such apartments in Northwood House as are suitable for Meetings Concerts and other Entertainments and exact and receive payments for such lettings and to make regulations for the due management thereof and also to sell refreshments on the premises and receive rental from contractors for such refreshments (2) That the land surrounding the House as set forth on the said plan and thereon edged Pink shall now or hereafter provided for ever be maintained exclusively as pleasure grounds and as a place of recreation for the inhabitants and visitors to Cowes and of any district which may at any time hereafter be joined to and form part of Cowes. Provided that the Council may on any part of the land form Tennis Courts, Bowling Greens, Putting Courses and the like and may erect necessary Conveniences, Band Stands, Pavilions, Refreshment Rooms, Baths and the like and may make charges for the respective user of the same and the income derived therefrom together with the income derived from the lettings of the House under*

*Paragraph (1) hereof shall be applied in accordance with the statutory powers and obligations of the council relating thereto. Provided that the Council shall not obtain a permanent License for sale of intoxicating liquors in respect of the premises conveyed by may obtain temporary or occasional licenses on the occasion of Fetes, Entertainments and the like. Provided also that the Council may within their statutory powers close the House and Grounds or part thereof at such times and to such persons as they in their discretion shall think fit and may make byelaws and regulations with regard to the due and proper management and control thereof and with regard to the behaviour of persons using the same and to let the grounds and to make charges for admission thereto. And Provided further that the Council may from time to time lay out form or widen such roads and paths in the grounds or bounding the same as they may deem necessary and set aside spaces for parking places for vehicles and to make charges for the use thereof. Such parking places shall be situated in the neighbourhood of Park Road and care shall be taken by the Council by means of regulation and otherwise to maintain the amenities of the House and Grounds.* And in consideration of the Gift and Conveyance hereinbefore contained the Council do hereby covenant with the Grantors to observe the several provisions herein contained and within two years from the date hereof to construct a public road of forty feet in width (but shall not be under any obligation to kerb and channel the same) and to erect fences where necessary from the point marked E in Baring Road on the said plan to the point marked A in Park Road (including the small section running westward marked C D) and to lay all necessary services that is to say sewer water and gas pipes in the same. Such roadways coloured Brown on the plan annexed hereto shall thereafter be repaired by the inhabitants at large and no charge in respect of same or for forming kerbs or channels if formed shall be demandable from the grantors or their assignees. Provided that in the event of the Council not being able to obtain adequate financial assistance from the Ministry of Transport and County Council toward the construction of the whole of the road between the points A and E on the plan within the period of two years then the Council shall be entitled to delay constructing that portion of the Roadway from Northwood House to Park Road between points marked B and C until the expiration of a further period of two years making four years from the date hereof but shall within the first said mentioned period of two years instruct the portion of the roadway from the point marked A to the point marked B as well as the roadway from Northwood House to Baring Road C to E (including the small portion running westward between the points marked C and D). The Council further covenant within one year from the date hereof to carry out the following sewerage works (a) Lay a sewer from Mr Mundy's house in Baring Road to the top of Castle Hill and relay or repair the sewer from there to the Round House to the entrance gates to Debourne (c) Lay a sewer from the bottom of Tutton's Hill Gurnard to Gurnard Church (d) Repair or relay the sewer from the Briary to the end of the old Esplanade. The sewers to be of such capacity ad to be laid at such depth as to provide sewerage facilities adequate for the development of the properties to be served by such sewers

In witness whereof the Grantors have hereunto set their hands and seals and the Council have caused their common seal to be hereunto affixed the day and year first above written

CHARITY COMMISSION STAMP ON ORIGINAL DEED OF GIFT

Enrolled in the books of the Charity Commission for England and Wales pursuant to the provision of Section .... (?) of the Mortmain and Charitable Uses Act 1888 and Section 1 of the Mortmain and Charitable and Amendment Act (date unreadable) 1891.

Signed on 9 September 1929

# BYELAWS

MADE BY

THE URBAN DISTRICT COUNCIL OF GOWES

WITH RESPECT TO THE

## PLEASURE GROUNDS

KNOWN AS

THE NEW RECREATION GROUND

WOODYALE LAND

THE LITTLE GREEN

AND NORTHWOOD PARK

IN THE

URBAN DISTRICT

OF GOWES

# BYELAWS

MADE BY THE

## URBAN DISTRICT COUNCIL OF COWES.

with respect to the PLEASURE GROUNDS known as the NEW RECREATION GROUND, WOODVALE LAND, THE LITTLE GREEN and NORTHWOOD PARK.

1. Throughout these byelaws the expression "the Council" means the Urban District Council of Cowes and the expression "the pleasure ground" means, except where inconsistent with the context, each of the pleasure grounds known as the New Recreation Ground, Woodvale Land, The Little Green and Northwood Park aforesaid.

2. The provisions contained in the following byelaws numbered 4, 5, 7, 8, 10, 11, 12, 13, 14, 15, and 25, shall not be deemed to apply to any officer of the Council in the proper execution of his duty or to any person or servant of any person employed by the Council in the proper execution of any work in connexion with the laying out or maintenance of the pleasure ground.

3. The pleasure ground known as Northwood Park shall be opened at the hour of nine in the forenoon and shall be closed at sunset of every day during the months of October, November, December, January, February and March, and shall be opened at the hour of eight in the forenoon and shall be closed at sunset of every day during the months of April, May, June, July, August and September.

Provided always that this byelaw shall not be deemed to require the pleasure ground to be opened and closed at the hours hereinbefore prescribed on any day when, in pursuance of any statutory provision in that behalf, the Council may close the pleasure ground to the public.

4. On any day on which the pleasure ground known as Northwood Park is open to the public a person shall not enter it before the time or enter or remain in it after the time appointed in the foregoing byelaw.

5. A person shall not wilfully or improperly remove or displace any board, plate, or tablet, or any support, fastening, or fitting of any board, plate, or tablet used for exhibiting any notice in the pleasure ground.

6. A person shall not carelessly or negligently deface, injure, or destroy any wall or fence in or enclosing the pleasure ground, or any building, barrier, railing, post, or seat, or any erection or ornament in the pleasure ground.

7. A person shall not wilfully, carelessly, or negligently remove or displace any barrier, railing, post, or seat, or any part of any erection or ornament, or any implement provided for use in the laying out or maintenance of the pleasure ground.

8. A person shall not at any time bring or cause to be brought into the pleasure ground any beast of draught or burden.

9. A person shall not bring or cause to be brought into the pleasure ground any cattle, sheep, goats, or pigs, unless, in pursuance of an agreement with the Council, or otherwise in the exercise of any lawful right or privilege, he is authorized to do so for pasturage or other lawful purpose.

10. A person shall not bring or cause to be brought into the pleasure ground any barrow, truck, machine or vehicle, unless used for the conveyance of a child or children or an invalid :

Provided that, where the Council set apart a space in the pleasure ground for the use of bicycles, tricycles, or other machines and vehicles, this byelaw shall not be deemed to prohibit the driving or wheeling in or to that space of a machine or vehicle of the class for which it is set apart.

11. A person who brings a vehicle into the pleasure ground shall not wheel or station it over or upon

(a) any flower bed, shrub, or plant, or any ground in course of preparation as a flower bed, or for the growth of any tree, shrub, or plant :

(b) any part of the pleasure ground where the Council by a notice board affixed or set up in some conspicuous position in the pleasure ground prohibit its being wheeled or stationed.

12. A person shall not affix any bill, placard, or notice, to or upon any wall or fence in or enclosing the pleasure ground, or to or upon any tree, or plant, or to or upon any part of any building, barrier, or railing, or of any seat, or of any other erection or ornament in the pleasure ground.

13. A person shall not in the pleasure ground, walk, run, stand, sit, or lie upon any flower bed, shrub, or plant, or any ground in course of preparation as a flower bed, or for the growth of any tree, shrub, or plant.

14. A person shall not in the pleasure ground walk, run, stand, sit, or lie upon any grass, turf, or other place where adequate notice to keep off such grass, turf, or other place shall be placed.

Provided that this prohibition shall not apply to more than one-fourth of the area of the pleasure ground.

15. A person shall not in the pleasure ground remove, cut, or displace any soil, turf, or plant.

16. A person shall not in the pleasure ground pluck any bud, blossom, flower, or leaf of any tree, shrub, or plant.

17. A person shall not climb any wall or fence in or enclosing the pleasure ground, or any tree, or any barrier, railing, post, or other erection in the pleasure ground.

18. A person shall not bathe, or wash in any lake, pond, stream, or other ornamental water in the pleasure ground, or wilfully, carelessly, or negligently, foul or pollute any such water, or take, injure, or destroy, or attempt to take, injure, or destroy, or wilfully disturb any fish in any such water, or wilfully disturb or worry or illtreat any fowl in any such water, or elsewhere in the pleasure ground.

19. A person shall not in any part of the pleasure ground, wilfully displace or disturb, injure, or destroy any bird's nest, or wilfully take, injure, or destroy any bird's egg.

20. A person shall not in any part of the pleasure ground, take, injure, or destroy any bird, or spread or use any net, or set or use any snare or other engine, instrument, or means, for the taking, injury, or destruction any of bird.

21. A person shall not cause or suffer any dog belonging to him or in his charge to enter or remain in the pleasure ground, unless such dog be and continue to be under proper control, and be effectually restrained from causing annoyance to any person, and from worrying or disturbing any beast, and from entering any ornamental water, and from injuring or destroying, worrying or disturbing any fowl in the pleasure ground.

22. Where the Council set apart any such part of the pleasure ground, as may be fixed by the Council, and may be described in a notice board affixed or set up in some conspicuous position in the pleasure ground, for the purpose of any game specified in the notice board, which, by reason of the rules or manner of playing, or for the prevention of damage, danger, or discomfort to any person in the pleasure ground, may necessitate, at any time during the continuance of the game, the exclusive use by the player or players of any space in such part of the pleasure ground—a person shall not in any space elsewhere in the pleasure ground play or take part in any game so specified in such a manner as to exclude persons not playing or taking part in the game from the use of such space.

23. Every person resorting to the pleasure ground and playing or taking part in any game for which the exclusive use of any space in the pleasure ground has been set apart shall—

(1) not play on the space any game other than the game for which it is set apart :

(2) in preparing for playing and in playing use reasonable care to prevent undue interference with the proper use of the pleasure ground by other persons :

(3) when the space is already occupied by other players not begin to play thereon without their permission :

(4) where the exclusive use of the space has been granted by the Council for the playing of a match, not play on that space later than a quarter of an hour before the time fixed for the beginning of the match unless he is taking part therein :

(5) except where the exclusive use of the space has been granted by the Council for the playing of a match in which he is taking part, not use the space for a longer time than *two hours* continuously, if any other player or players make known to him a wish to use the space.

24. A person shall not in any part of the pleasure ground which may have been set apart by the Council for any game play or take part in any game when the state of the ground or other cause makes it unfit for use and a notice is set up in some conspicuous position prohibiting play in that part of the pleasure ground.

25. A person shall not except as hereinafter provided erect any post, rail, fence, pole, tent, booth, stand, building, or other structure in the pleasure ground.

Provided that this prohibition shall not apply where upon an application to the Council they grant permission to erect any post, rail, fence, pole, tent, booth, stand, building, or other structure, upon such occasion and for such purpose as are specified in the application.

26. A person shall not in the pleasure ground beat, shake, sweep, brush, or cleanse any carpet, drugget, rug, or mat, or any other fabric retaining dust or dirt.

27. A person shall not in the pleasure ground hang, spread, or deposit any linen or other fabric for drying or bleaching.

28. A person shall not in the pleasure ground sell, or offer or expose for sale, or let to hire, or offer or expose for letting to hire, any commodity or article, unless, in pursuance of an agreement with the Council, or otherwise in the exercise of any lawful right or privilege, he is authorized to sell or let to hire in the pleasure ground such commodity or article.

29. A person shall not in the pleasure ground wilfully obstruct, disturb, interrupt, or annoy any other person in the proper use of the pleasure ground, or wilfully obstruct, disturb, or interrupt any officer of the Council in the proper execution of his duty, or any person or servant of any person employed by the Council in the proper execution of any work in connexion with the laying out or maintenance of the pleasure ground.

30. Every person who shall offend against any of the foregoing byelaws shall be liable for every such offence to a penalty of *two pounds*.

Provided, nevertheless, that the justices or court before whom any complaint may be made or any proceedings may be taken in respect of any such offence may, if they think fit, adjudge the payment, as a penalty, of any sum less than the full amount of the penalty imposed by this byelaw.

31. Every person who shall infringe any byelaw for the regulation of the pleasure ground may be removed therefrom by any officer of the Council, or by any constable, in any one of the several cases hereinafter specified; that is to say—

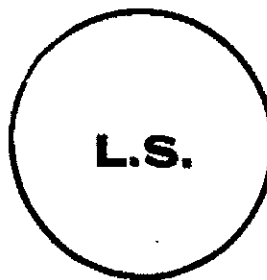
(i) Where the infraction of the byelaw is committed within the view of such officer or constable, and the name and residence of the person infringing the byelaw are unknown to and cannot be readily ascertained by such officer or constable:

(ii) Where the infraction of the byelaw is committed within the view of such officer or constable, and, from the nature of such infraction, or from any other fact of which such officer or constable may have knowledge, or of which he may be credibly informed, there may be reasonable ground for belief that the continuance in the pleasure ground of the person infringing the byelaw may result in another infraction of a byelaw, or that the removal of such person from the pleasure ground is otherwise necessary as a security for the proper use and regulation thereof.

GIVEN under the Common Seal of the Cowes Urban District Council at a Meeting held on the 1st day of April, 1930.

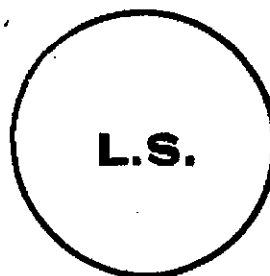
The Common Seal of the Cowes  
Urban District Council was here-  
unto affixed in the presence of

J. C. W. DAMANT,  
Clerk.



Allowed by the Minister of Health  
this First day of May, 1930.

R. H. H. KEENLYSIDE,  
Assistant Secretary,  
Ministry of Health.



Status:  Law In Force /  Amendment(s) Pending

## **Recreational Charities Act 1958 c. 17**

This version in force from: **April 1, 2008** to **present**

(version 2 of 4)

### **1.— General provision as to recreational and similar trusts, etc.**

(1) Subject to the provisions of this Act, it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare:

Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.

[(2) The requirement in subsection (1) that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.

(2A) The basic conditions are—

(a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and

(b) that either—

(i) those persons have need of the facilities by reason of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or

(ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.

] <sup>1</sup>

(3) Subject to the said requirement, subsection (1) of this section applies in particular to the provision of facilities at village halls, community centres and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.

1. S.1(2) and (2A) substituted for s.1(2) by Charities Act 2006 c. 50 [Pt 1 s.5\(2\)](#) (April 1, 2008 subject to transitional provisions and savings specified in SI 2008/945 arts 4 and 5)

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**Subject:** Charities **Other related subjects:** Social welfare

**Keywords:** Charitable trusts; Leisure industry; Social welfare



Status:  Not Yet In Force

## **Charities Act 2011 c. 25**

### **Part 1 MEANING OF "CHARITY" AND "CHARITABLE PURPOSE"**

#### **Chapter 1 GENERAL**

##### **Recreational trusts and registered sports clubs**

This version in force from: **March 14, 2012**

(version 1 of 1)

#### **5 Recreational and similar trusts, etc.**

(1) It is charitable (and is to be treated as always having been charitable) to provide, or assist in the provision of, facilities for—

(a) recreation, or

(b) other leisure-time occupation,

if the facilities are provided in the interests of social welfare.

(2) The requirement that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.

(3) The basic conditions are—

(a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended, and

(b) that—

(i) those persons have need of the facilities because of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or

(ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.

(4) Subsection (1) applies in particular to—

(a) the provision of facilities at village halls, community centres and women's institutes, and

(b) the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation,

and extends to the provision of facilities for those purposes by the organising of any activity.

But this is subject to the requirement that the facilities are provided in the interests of social welfare.

(5) Nothing in this section is to be treated as derogating from the public benefit requirement.

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AS 45-4

THE CHARITY COMMISSIONERS FOR ENGLAND AND WALES

Under the power given in the Charities Act 1993

Order that from today, the

31 July 2002

the following

SCHEME

will affect the governing document of the charity

known as

NORTHWOOD HOUSE (276153)

at

Cowes, Isle of Wight



This Scheme has been adjudged as not liable to stamp duty.

Commissioners' References:

Sealing: W127(S)02

Case No: 145869

ORIGINAL PRODUCED AND EXAMINED AT THE  
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DX 56361  
NEWPORT, I.W.

18/6/03



ASSISTANT COMMISSIONER

I CERTIFY THIS TO BE A TRUE  
COPY OF THE ORIGINAL

AUTHORISED SIGNATORY  
ISLE OF WIGHT COUNCIL

Case No: 145869 25/07/02

## **1. Definitions**

In this scheme:

“the charity” means the charity identified at the beginning of this scheme.

“the council” means the Isle of Wight Council.

“the governing document” means the conveyance dated 19<sup>th</sup> August 1929.

## **ADMINISTRATION**

### **2. Administration**

The charity is to be administered in accordance with the governing document as altered or affected by this scheme.

### **3. Alteration of the governing document**

The governing document will take effect with:

- (1) the following clause inserted immediately before clause (2):

(1)(a) Northwood House and Offices shall be used for such other charitable purposes as the trustees from time to time think fit and the trustees shall apply income received from such purposes towards the preservation and restoration of Northwood House and Offices for the benefit of the public.

- (2) the words “for the inhabitants of and visitors to Cowes and of any district which may at any time hereafter be joined to and formed part of Cowes” in clause (2) replaced with “for the inhabitants of and visitors to Isle of Wight preference being given to inhabitants and visitors to Cowes”.

## **POWERS OF THE TRUSTEES**

### **4. Powers of the trustees**

In addition to any other powers which they have, the trustees may exercise the following powers in furtherance of the objects of the charity:

- (1) Power to make rules and regulations consistent with this scheme for the management of the charity.
- (2) If and in so far as the land identified in part 2 of the schedule to this scheme and numbered 1 and 2 is not required for the purposes specified in clause 3 above, the trustees may lease all or any part of the said land. They must comply with the restrictions on disposal imposed by section 36 of the Charities Act 1993, unless the lease is excepted from these restrictions by section 36(9)(b) or (c) or section 36(10) of that Act.

- (3) Power to borrow money and to charge the property of the charity as security for any loan. (The trustees must comply with the restrictions on mortgaging imposed by section 38 of the Charities Act 1993.)
- (4) Power to raise funds. (The trustees must not undertake any permanent trading activity.)

## TRUSTEES

### 5. Custodian trustee

The council will be the custodian trustee of the charity

### 6. Trustees

- (1) There will be:

4 nominated trustees and  
3 co-opted trustees

appointed in accordance with clauses 7 and 8.

- (2) The first nominated trustees are the persons listed in part 1 of the schedule to this scheme. Subject to clause 12 (termination of trusteeship) they will hold office for the periods shown in the schedule.

### 7. Nominated trustees

- (1) The nominated trustees must be appointed by:

the council;

Cowes Town Council;

the Friends of Northwood House; and

the Cowes Community Partnership.

- (2) Any appointment must be made at a meeting held according to the ordinary practice of the appointing body.

- (3) Each appointment must be made for:

(a) 4 years; or

(b) if the appointment is being made to fill a casual vacancy, the unexpired term of the appointee's predecessor.

- (4) The appointment will be effective from the later of:

(a) the date of the vacancy; and

- (b) the date on which the trustees or their secretary or clerk are informed of the appointment.

(5) The person appointed need not be a member of the appointing body.

#### 8. Co-opted trustees

- (1) The appointment of a co-opted trustee must be made by the trustees at a special meeting called under clause 16.
- (2) An appointment may, but need not, be made before the date on which the term of office of an existing co-opted trustee comes to an end, to take effect on that date. In these circumstances:
  - (a) the appointment may not be made more than 3 months before the date on which the existing co-opted trustee's term of office is due to end; and
  - (b) any co-opted trustee whose term of office is about to come to an end must not vote in favour of their own re-appointment.
- (3) Each appointment must be for a term of 4 years.

#### 9. New trustees

The trustees must give each new trustee, on their first appointment:

- (1) a copy of the governing documents of the charity, including this scheme and any amendments made to it;
- (2) a copy of the charity's latest report and statement of accounts.

#### 10. Register of trustees

- (1) The trustees must keep a register of the name and address of every trustee and the dates on which their terms of office begin and end. Every trustee must sign the register before acting as a trustee, whether on their first appointment or on any later re-appointment.
- (2) The trustees must promptly report any vacancy in the office of nominated trustee to the appointing body.

#### 11. Trustees not to have a personal interest

Except with the prior written approval of the Commissioners no trustee may:

- (1) receive any benefit in money or in kind from the charity; or
- (2) have a financial interest in the supply of goods or services to the charity; or
- (3) acquire or hold any interest in property of the charity (except in order to hold it as a trustee of the charity).

**12. Termination of trusteeship**

A trustee will cease to be a trustee if he or she:

- (1) is disqualified from acting as a trustee by section 72 of the Charities Act 1993;  
or
- (2) is absent without the permission of the trustees from all their meetings held within a period of 6 months and the trustees resolve that his or her office be vacated; or
- (3) gives not less than one month's notice in writing of his or her intention to resign (but only if at least 3 trustees will remain in office when the notice of resignation is to take effect).

**OFFICERS**

**13. Chairman**

- (1) At their first ordinary meeting in each year the trustees must elect one of their number to be chairman of their meetings.
- (2) The trustees present at a meeting must elect one of their number to chair the meeting if the chairman is not present or the office of chairman is vacant.

**14. Secretary or clerk**

The trustees may appoint a secretary or clerk. The office may be held by:

- (1) a trustee (who must not receive any reward for acting and who may be dismissed as secretary or clerk at any time); or
- (2) some other suitable person (who may be employed upon such reasonable terms, including terms as to notice, as the trustees think fit).

**MEETINGS OF TRUSTEES**

**15. Ordinary meetings**

- (1) The first meeting after the date of this scheme must be called by Michael Fisher or, if they do not do so within 3 months from that date, by any 2 trustees.
- (2) The trustees must hold at least 4 ordinary meetings in each 12 month period.
- (3) Ordinary meetings require at least 10 days' notice.
- (4) The chairman, or any 2 trustees, may call an ordinary meeting at any time.

**16. Special meetings**

- (1) The chairman, or any 2 trustees, may call a special meeting at any time.
- (2) Special meetings require at least 4 days' notice, except that meetings to consider:
  - (a) the appointment of a co-opted trustee, or
  - (b) the amendment of this scheme under clause 23,require at least 21 days' notice.
- (3) The notice calling a special meeting must include details of:
  - (a) the business to be transacted at the meeting; and
  - (b) any amendment to be made to this scheme (under clause 23).
- (4) A special meeting may, but need not, be held immediately before or after an ordinary meeting.

**17. Quorum**

No business may be transacted at a meeting unless at least 3 trustees are present.

**18. Voting**

- (1) Every matter must be decided by majority decision of the trustees present and voting at a duly convened meeting of the trustees.
- (2) The chairman of the meeting may cast a second or casting vote only if there is a tied vote.

**19. Recording of meetings**

The trustees must keep a proper record of their meetings.

**20. Trustees to act jointly**

The trustees must exercise their powers jointly, at properly convened meetings.

**CHARITY PROPERTY**

**21. Transfer of property**

The title to the land described in part 2 of the schedule to this scheme is transferred by this scheme to the custodian trustee in trust for the charity.

## 22. Use of income and capital

- (1) The trustees must firstly apply:
  - (a) the charity's income; and
  - (b) if the trustees think fit, expendable endowment; and
  - (c) when the expenditure can properly be charged to it, its permanent endowment

in meeting the proper costs of administering the charity and of managing its assets (including the repair and insurance of its buildings).

- (2) After payment of these costs, the trustees must apply the remaining income in furthering the objects of the charity.
- (3) The trustees may also apply for the objects of the charity:
  - (a) expendable endowment; and
  - (b) permanent endowment, but only on such terms for the replacement of the amount spent as the Commission may approve by order in advance.

## AMENDMENT OF SCHEME

### 23. Amendment of scheme

- (1) Subject to the provisions of this clause, the trustees may amend the provisions of this scheme.
- (2) Any amendment must be made by a resolution passed at a special meeting of the trustees. The notice of the special meeting must include notice of the resolution, setting out the terms of the amendment proposed.
- (3) The trustees must not make any amendment which would:
  - (a) vary this clause;
  - (b) vary the definitions clause and the charity's purposes (including the purposes for which any property of the charity is required to be used in specie) clause 3 of this scheme.
  - (c) confer a power to dissolve the charity;
  - (d) enable them to spend permanent endowment of the charity.
- (4) The trustees must obtain the prior written approval of the Commissioners before making any amendment which would:
  - (a) affect the composition of the trustees or the terms on which they hold office;

- (b) vary clause 11 of this scheme (Trustees not to have a personal interest);
  - (c) vary the name of the charity.
- (5) The trustees must:
- (a) promptly send to the Commissioners a copy of any amendment made under this clause; and
  - (b) keep a copy of any such amendment with this scheme.

#### GENERAL PROVISIONS

##### 24. Questions relating to the Scheme

The Commissioners may decide any question put to them concerning:

- (1) the interpretation of this scheme; or
- (2) the propriety or validity of anything done or intended to be done under it.

#### SCHEDULE

##### PART 1

##### Nominated trustees

Name	Term of office
Reginald Barry	4 years
David Hill	3 years
Janet L Allan	2 years
Helen V Basford	1 year

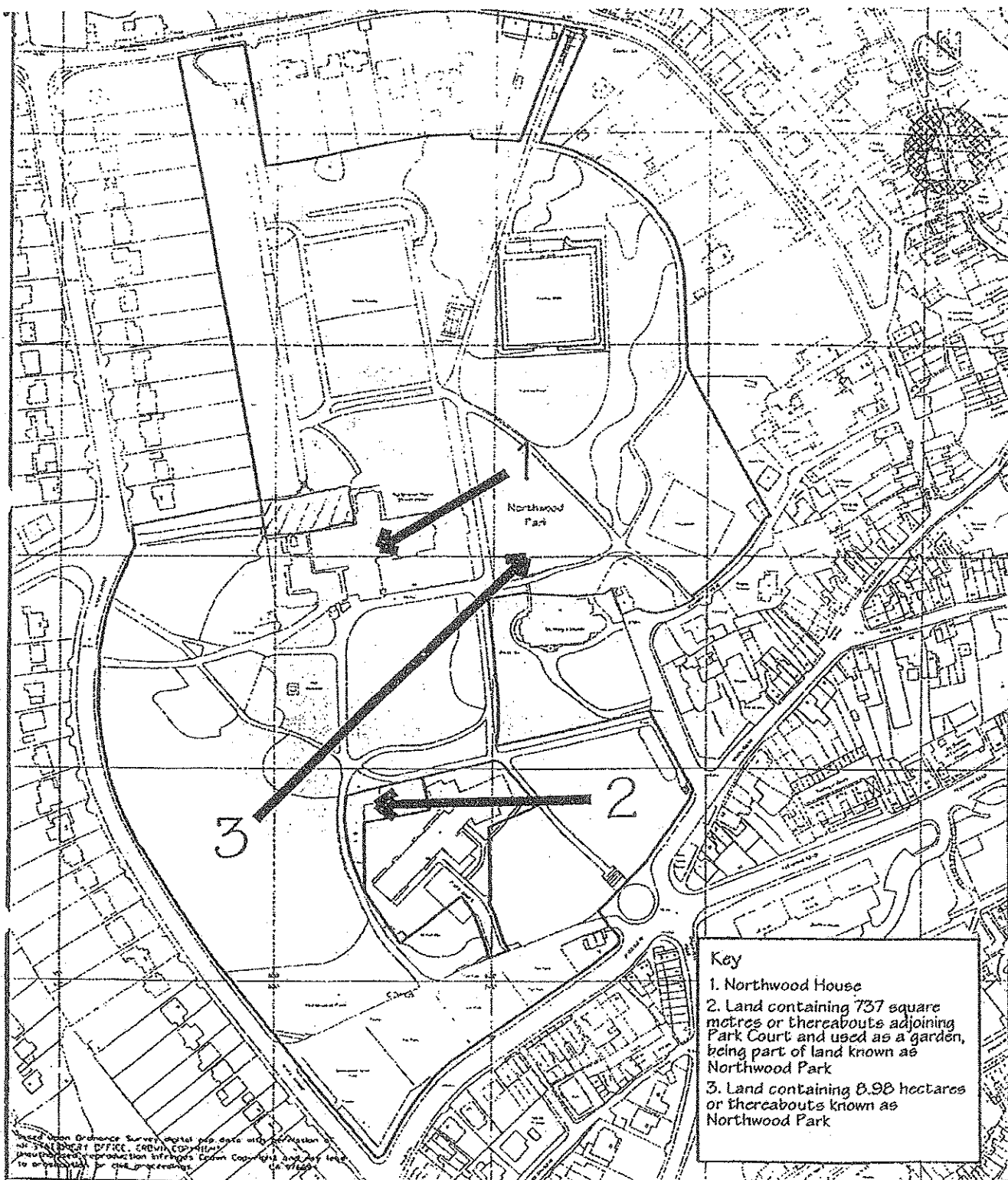
rest);

**PART 2**

made

The following land and buildings at Cowes, Isle of Wight, described in a conveyance of 19 August 1929 which was made between Herbert Joseph Ward and two others of the one part and the Urban District Council of Cowes of the second part:

1. Northwood House.
2. Land containing 737 square metres or thereabouts adjoining Park Court and used as a garden, being part of the land known as Northwood Park.
3. Land containing 8.98 hectares or thereabouts known as Northwood Park.



## Property Services

Property Services Manager  
A. J. Flower, BSc Dip FRICS

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Tel (01983) 823265  
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Project

Northwood House, Cowes

Drawing Title

Drawing No.

Revisions

Scale

Date

Drawn

1:2500

140901

**ORDER OF  
THE CHARITY COMMISSION FOR ENGLAND AND WALES**

to discharge a custodian trustee and to transfer land to the Official Custodian for Charities  
under the power given in sections 16 and 21 of the Charities Act 1993

dated the

**28 September 2011**

for the charity known as

**NORTHWOOD HOUSE (276153)**

at

Cowes, Isle of Wight

**ORDER**

1. The Isle of Wight Council is discharged from its custodian trusteeship of the charity.
2. When requested to do so by the trustees of the charity, The Isle of Wight Council must transfer the investments held (and accrued dividends) and any other documents or papers belonging to the charity to the trustees or their nominee.
3. The title to the land described in the schedule is transferred by this Order to the Official Custodian for Charities in trust for the charity.

**SCHEDULE**

The land and buildings known as Northwood House and Northwood Park registered at HM Land Registry under title number IW55215.

**Jane Grenfell**

**Authorised Officer**

Status:  Law In Force

## **Public Trustee Act 1906 c. 55**

### **Part II POWERS AND DUTIES OF PUBLIC TRUSTEE**

#### **(2) As Custodian Trustee**

This version in force from: **Date not available to present**

(version 1 of 1)

#### **4.— Custodian trustee.**

(1) Subject to rules under this Act the public trustee may, if he consents to act as such, and whether or not the number of trustees has been reduced below the original number, be appointed to be custodian trustee of any trust—

(a) by order of the court made on the application of any person on whose application the court may order the appointment of a new trustee; or

(b) by the testator, settlor, or other creator of any trust; or

(c) by the person having power to appoint new trustees.

(2) Where the public trustee is appointed to be custodian trustee of any trust—

(a) The trust property shall be transferred to the custodian trustee as if he were sole trustee, and for that purpose vesting orders may, where necessary, be made under the [\[Trustee Act 1925\]](#) <sup>1</sup>:

(b) The management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are herein-after referred to as the managing trustees):

(c) As between the custodian trustee and the managing trustees, and subject and without prejudice to the rights of any other persons, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property, but the managing trustee shall have free access thereto and be entitled to take copies thereof or extracts therefrom:

(d) The custodian trustee shall concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them (including the power to pay money or securities into court), unless the matter in which he is requested to concur is a breach of trust, or involves a personal liability upon him in respect of calls or otherwise, but, unless he so concurs, the custodian trustee shall not be liable for any act or default on the part of the managing trustees or any of them:

(e) All sums payable to or out of the income or capital of the trust property shall be paid to or by the custodian trustee:

Provided that the custodian trustee may allow the dividends and other income derived from the trust property to be paid to the managing trustees or to such person as they direct, or into such bank to the credit of such person as they may direct, and in such case shall be exonerated from seeing to the application

thereof and shall not be answerable for any loss or misapplication thereof:

(f) The power of appointing new trustees, when exerciseable by the trustees, shall be exerciseable by the managing trustees alone, but the custodian trustee shall have the same power of applying to the court for the appointment of a new trustee as any other trustee:

(g) In determining the number of trustees for the purposes of the [[Trustee Act 1925](#)]<sup>1</sup>, the custodian trustee shall not be reckoned as a trustee.

(h) The custodian trustee, if he acts in good faith, shall not be liable for accepting as correct and acting upon the faith of any written statement by the managing trustees as to any birth, death, marriage, or other matter of pedigree or relationship, or other matter of fact, upon which the title to the trust property or any part thereof may depend, nor for acting upon any legal advice obtained by the managing trustees independently of the custodian trustee:

(i) The court may, on the application of either the custodian trustee, or any of the managing trustees, or of any beneficiary, and on proof to their satisfaction that it is the general wish of the beneficiaries, or that on other grounds it is expedient, to terminate the custodian trusteeship, make an order for that purpose, and the court may thereupon make such vesting orders and give such directions as under the circumstances may seem to the court to be necessary or expedient.

(3) The provisions of this section shall apply in like manner as to the public trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the public trustee as custodian trustee.

[234](#)

1. Words substituted by virtue of Interpretation Act 1889 (c. 63), s. 38(1)
2. Act excluded by Chequers Estate Act 1958 (c. 60), s. 3(6), Public Trustee and Administration of Funds Act 1986 (c.57), s. 3(2); extended by Administration of Justice Act 1965 (c. 2), s. 2(3), (inserted by Judicature (Northern Ireland) Act 1978 (c. 23), s. 83(3))
3. S. 4(1) applied by Clergy Provisions Measure 1961 (No. 3), s. 30(2)
4. S. 4(2) applied by Clergy Provisions Measure 1961 (No. 3), s. 30(2)

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**Subject:** Trusts

**Keywords:** Custodian trustees; Public Trustee; Trustees' powers and duties



# Glossary of terms used in OGs

Term	Definition
<b>1960 Act</b>	The <b>1960 Act</b> means the Charities Act 1960, now repealed.
<b>1992 Act</b>	The <b>1992 Act</b> means the Charities Act 1992.
<b>1993 Act</b>	The <b>1993 Act</b> means the Charities Act 1993
<b>2006 Act</b>	The <b>2006 Act</b> means the Charities Act 2006
<b>Accounts</b>	<b>Accounts</b> means the statutory accounts required to be submitted to us in respect of the relevant financial year of a charity.
<b>Annual report</b>	<b>Annual report</b> means the trustees' annual report prepared under s.45 of the 1993 Act.
<b>Body corporate</b>	A <b>body corporate</b> is a collection of persons which, in the eyes of the law, has its own legal existence (and rights and duties) separate from those of the persons who form it from time to time. It has a name or title of its own and may also have a common seal for use on official documents. Also known as corporations, bodies corporate are not necessarily companies, but companies are by definition bodies corporate.
<b>Breach of trust</b>	<b>Breach of trust</b> means a breach of any duty imposed on a trustee. For charity trustees, these duties may be imposed by the provisions of a charity's governing document, laws and regulations, or Orders of the Court or the Charity Commission. A duty is something which trustees have to do. It is distinguished from a power which trustees may or may not choose to use.
<b>CDB</b>	<b>CDB</b> stands for the Charity Database, the Commission's computerised database which holds information on every registered charity.
<b>CDD</b>	<b>CDD</b> used to stand for Charity Database Division, the division in our Liverpool office which issues and processes Annual Returns, and records and vets charities' accounts. The section is now known as Compliance, part of the Compliance and Support function.
<b>CDF</b>	<b>CDF</b> means common deposit fund. CDFs are charities established by Scheme under s.25 of the Charities Act 1993.
<b>CIF</b>	<p>A <b>CIF</b> is a common investment fund established by scheme under s.24 of the 1993 Act. But the definition for the purposes of the Charities (Accounts and Reports) Regulations 1995, and the Financial Services and Markets Act 2000 (Exemption) Order 2001, and clause 38 of the Trustee Bill excludes such funds whose trusts provide for participation only by charities which have the same charity trustees as the fund (ie, pool charities).</p> <p>In a CIF a participating charity has a "share" or a number of the "units" in a portfolio of the CIF rather than an individual list of stock holdings of its own.</p>

CIFs are established as separate charities in themselves (ie aside from the individual participating charities), with trustees appointed in accordance with the Scheme.

<b>CMF</b>	<b>CMF</b> stands for Cyclical Maintenance Fund, a fund often set up by almshouse charities, and by some registered social landlords, to provide ordinary items of maintenance and repair which recur at infrequent but regular intervals, such as external and internal decoration.
<b>CMS</b>	<b>CMS</b> stands for Case Management System, a computerised system of recording casework and tracking its progress.
<b>CSM</b>	<b>CSM</b> stands for Customer Service Manager.
<b>Charitable company</b>	<p>A <b>charitable company</b> means a company:</p> <p>formed and registered under the Companies Act 2006; this will also include a company already registered under the Companies Act 1985, or one which was already in existence at that time;</p> <p>and which</p> <p>is established for <b>exclusively</b> charitable purposes.</p>
<b>Charitable institution</b>	This is defined by s.58(1) of the 1992 Act as a charity or an institution (other than a charity) which is established for charitable, benevolent or philanthropic purposes.
<b>Charity trustees</b>	<p><b>Charity trustees</b> has the same meaning as in s.97(1) of the Charities Act 1993, that is, the persons having the general control and management of the administration of a charity, regardless of what they are called.</p> <p>For instance, in the case of an unincorporated association the executive or management committee are its charity trustees, and in the case of a charitable company it is the directors who are the charity trustees.</p>
<b>Codicil</b>	A <b>codicil</b> is a document similar to a will but which amends a will. The same rules apply to it as to a will.
<b>Commercial participator</b>	A <b>commercial participator</b> is someone who carries on for gain a business other than a fund-raising business (ie one to which the provisions on professional fund-raising might apply), but in the course of that business engages in any promotional venture in the course of which it is represented that charitable contributions are to be given or applied for the benefit of any charitable institution(s). (Statutory definition – see s.58(1) of the 1992 Act).
<b>Community Trust or Community Foundation</b>	A <b>Community Trust or Community Foundation</b> is a fund-raising and grant making charity established to raise new resources for local charities in a specific geographic area (or "community") and to promote the effective use of these resources. Community Trusts are most commonly constituted as charitable companies limited by guarantee.
<b>Connected person</b>	The precise meaning of <b>connected person</b> for the purposes of s.36(2) of the 1993 Act (the disposal of charity land) is given in Schedule 5 to that Act. This includes:

a trustee of or for the charity, a donor of any land to the charity and close relatives of such trustees or donors;  
 employees, officers, or agents of the charity;  
 the spouses and civil partners of all such persons above;  
 institutions controlled by any of the persons above or companies in which such persons have a substantial interest.

The definition for the purposes of the Charities (Reports and Accounts) Regulations 1995 and the Charities (Annual Return) Regulations is different.

**Corporation**

See body corporate above.

**Court**

**The Court** means the High Court or any other court in England and Wales having concurrent jurisdiction or any judge or officer exercising that jurisdiction.

**Custodian**

A **custodian** is a person who holds for safekeeping the documentary evidence of the title to property belonging to a charity (eg, share certificates, title deeds to land, etc). The title to the charity's property remains vested in the charity trustees, or in their nominee(s), or custodian trustee, as the case may be. The custodian has no power to manage the property and no role in the administration of the charity.

(This is a narrow definition of the term as used within the Commission and in relation to charities. In the investment world the term may be used to cover a wider range of responsibilities particularly in relation to foreign investments).

See also custodian trustee which has a very particular meaning (although SORP 2005 uses this term in a more general way to include any other non-executive trustees).

**Custodian trustee**

A **custodian trustee** is a **corporation** appointed to have the custody, as distinct from the management, of trust property. (Exceptions are the Public Trustee, the Treasury Solicitor and the Official Custodian, the only **individuals** able to act as custodian trustees). Where a custodian trustee is appointed to hold property of a charity, the administration of the charity is left in the hands of the charity trustees. The term custodian trustee was introduced by s.4 of the Public Trustee Act 1906. A custodian trustee is **not** a charity trustee. See also holding trustee which has a related but different meaning.

**Cy-près**

**Cy-près** is a Norman French word meaning "near this". Application of the cy-près doctrine enables us and the Courts to prescribe new purposes for a charity whose existing trusts have "failed".

**De minimis**

The full expression is **de minimis non curat lex**. This is a Latin phrase which means "the law does not care about very small matters". It can be used to describe a component part of a wider transaction, where it is in itself insignificant or immaterial to the transaction as a whole, and will have no legal relevance or bearing on the end result.

**Designated funds**

Unrestricted funds are expendable at the discretion of the trustees in furtherance of the charity's objects. If part of an unrestricted fund is earmarked for a particular project it may be designated as a separate fund, but the designation has an administrative purpose only, and does not legally restrict

the trustees' discretion to apply the fund.

**Designated land** This is land required to be used for a particular charitable purpose as referred to in the 2006 Act. It is also sometimes referred to as specie land.

**Distinct charity** A **distinct charity** is:

a charitable institution having a **distinct foundation**. For example:

an **incorporated charity** - whose governing document will be a memorandum and articles of association, Royal Charter, or Act of Parliament - is always a distinct charity;

the permanent endowment, expendable endowment and income funds of a particular charity, although held on separate trusts, are not distinct charities;

any other special trust/restricted fund created by the trustees of an existing charity, under a power contained in its governing document, is not a distinct charity (unless it is the intention of the trustees to create one);

a designated fund is not a distinct charity. (Trustees are legally obliged to use the funds of the charity in the manner specified in the governing document, although for administrative convenience they may designate or " earmark " some of the funds of a distinct charity for some special purpose within its objects).

A distinct charity is **separately registrable** (subject to s.3(5) requirements) unless it has been the subject of a uniting direction with one or more other charities under s.96 of the 1993 Act.

It also **accounts as a single entity**, but its accounts may be grouped with those of other charities, if:

other charities been united with it for accounting purposes under s.96; or

it is a special trust of another charity; or

another charity is a special trust of it.

**ERA 1988** The **ERA 1988** is the Education Reform Act 1988.

**ERF** **ERF** stands for Extraordinary Repair Fund, a fund often set up by almshouse charities, and by some registered social landlords, to provide for major "one-off" repairs and improvements (such as re-roofing or providing a new central heating system) or for rebuilding.

**Ecclesiastical charity** **An ecclesiastical charity** (as defined by s.75 of the Local Government Act 1894) is a charity, the endowment of which, is held for one or more of the following purposes:

for any spiritual purpose which is a legal purpose;

for the benefit of any spiritual person or ecclesiastical officer;

for use, if a building, as a church, chapel, mission room or Sunday school or otherwise by any particular church or denomination;

for the maintenance, repair or improvement of such a building or for the maintenance of divine service in it;

otherwise for the benefit of a particular church or denomination or of any members of it.

<b>Ex gratia payment</b>	<p>A proposed payment is an <b>ex gratia payment</b> where the trustees:</p> <p>believe that they are under a <b>moral</b> obligation to make the payment;</p> <p>are under no <b>legal</b> obligation to do so;</p> <p>have no <b>power</b> under the governing document of the charity which they could properly exercise to make the payment; <b>and</b></p> <p>cannot justify the payment as being <b>expedient in the interests of the charity</b> within the meaning of s.26 of the 1993 Act.</p>
<b>Ex officio trustee</b>	<p><b>Ex officio trustee</b> means trustee by virtue of their office. Normally this relates to positions such as the vicar of a parish, the mayor of a town, etc. Ex officio trustees have the same responsibilities as other charity trustees.</p>
<b>Excepted charities</b>	<p>An <b>excepted charity</b> is one which does not have to register with us but, in most other respects, is fully within our jurisdiction. Under section 3(5) of the Charities Act 1993, as amended by the Charities Act 2006 the following charities fall into this category:</p> <ul style="list-style-type: none"> <li>(a) any charity which is excepted by order or regulations; and</li> <li>(b) any charity whose annual income from all sources does not amount to more than £5000.</li> </ul> <p>No charity is required to be registered in respect of any registered place of worship.</p>
<b>Exempt charities</b>	<p><b>Exempt charities</b> are:</p> <p>charities listed in Schedule 2 to the Charities Act 1993 (every institution listed is not necessarily a charity; the Act grants exempt status only "so far as they are charities"); and</p> <p>any common investment fund (CIF) or common deposit fund (CDF) in which its Scheme permits only exempt charities to participate; and</p> <p>any other charities which legislation declares to be exempt.</p>
<b>Expendable endowment</b>	<p>An <b>expendable endowment fund</b> is a fund that must be invested to produce income. Depending on the conditions attached to the endowment, the trustees will have a legal power to convert all or part of it into an income fund which can then be spent.</p> <p>An expendable endowment differs from an income fund in that there is no actual requirement to spend the principal for the purposes of the charity unless or until the trustees decide to. However, income generated from expendable endowment is no different from income generated from permanent endowment, and should be spent for the purposes of the charity within a reasonable time of receipt.</p> <p>If there is really no evidence, either direct or circumstantial, as to a donor's intention, then a gift should be treated as income. (See also Permanent endowment).</p>
<b>Express prohibition</b>	<p>An <b>express prohibition</b> refers to wording in a charity's governing document that clearly forbids a particular course of action. An example would be an instruction against paying trustees. This would</p>

usually be couched in negative terms, for example, "The trustees shall not pay ..." or "No trustee shall be paid ...". But a form of wording that says "All trustees must act gratuitously" would also be an express prohibition.

<b>FHEA 1992</b>	The <b>FHEA 1992</b> is the Further and Higher Education Act 1992.
<b>Financial Services Authority (FSA)</b>	The <b>Financial Services Authority</b> was established by the Financial Services and Markets Act 2000. Included in its functions is the regulation of the management and annual accounts of unit trusts - see the <a href="#">OG 49</a> series.
<b>Gift Aid</b>	<b>Gift Aid</b> is a tax relief for single outright cash gifts made to charity by individuals (including those carrying on a trade) and companies in the UK.
<b>Governing document</b>	A charity's <b>governing document</b> is any document which sets out the charity's purposes and, usually, how it is to be administered. It may be a trust deed, constitution, memorandum and articles of association, conveyance, will, Royal Charter, Scheme of the Commission, or other formal document.
<b>Gross income</b>	A charity's " <b>gross income</b> " for the purposes of the thresholds in charity legislation is defined as all the incoming resources of its income funds, together with any transfers from endowed funds of capital converted into income. It does not include receipts directly into endowed funds and capital gains on investments or disposal of functional fixed assets. This is because all capital gains and losses are disregarded in determining whether the financial thresholds, specified in the 1993 Act, as amended by The Charities Act 1993 (Substitution of Sums) Order 1995 (SI No.1995/2696), have been exceeded.
<b>Health Service body</b>	<p><b>Health Service body (HSB)</b> means any body established to carry out functions in relation to the NHS, in particular:</p> <p>any Regional, District or Special Health Authority;</p> <p>any Special Trustees;</p> <p>any NHS Trust; or</p> <p>any trustees appointed for an NHS Trust by Order made by the Secretary of State for Health under s.11 of the National Health Service and Community Care Act 1990.</p>
<b>Holding trustees</b>	<b>Holding trustees</b> , or some similar name, are individuals who are appointed to hold the legal title of charity property. The governing document may confer other duties or responsibilities on holding trustees and so it is important that it is consulted in every case. See also custodian trustee which has a related but different meaning.
<b>Homes and Communities Agency</b>	The <b>Homes and Communities Agency (HCA)</b> is a Non-Departmental Public Body, sponsored by the Department of Communities and Local Government. It's responsible for delivering new housing, community facilities and infrastructure in England and has taken over from the Housing Corporation. The Tenant Services Authority are responsible for the regulation of RSLs.
<b>Housing Corporation</b>	The <b>Housing Corporation</b> was a Non Departmental Public Body, sponsored by the Department of Communities and Local Government, which closed in November 2008. Its function was to promote,

finance and supervise Registered Social Landlords (RSLs) in England. The Tenant Services Authority is now responsible for the regulation of RSLs. The Homes and Communities Agency is now responsible for the Housing Corporation's role of funding. The National Assembly for Wales exercises an equivalent role in Wales, having taken over following the abolition of Housing for Wales.

<b>Housing for Wales</b>	<b>Housing for Wales</b> (Tai Cymru <i>or alternatively</i> Ty Cymru) was a Non Departmental Public Body created by the Housing Act 1988 and sponsored by the former Department of Environment, Transport and the Regions. It had the same powers and fulfilled the same functions as the Housing Corporation (see above) but operated throughout Wales. The Housing Corporation closed in November 2008 and was replaced by the Tenant Services Authority and Homes and Communities Agency. Housing for Wales was abolished in March 1999 (under the Government for Wales Act 1998), its powers and functions passing for a short time to the Secretary of State for Wales. On 1st July 1999, these powers and functions were then transferred to, and are currently carried out by, the National Assembly for Wales.
<b>Hybrid pool charities</b>	<p><b>Hybrid pool charities</b> are common investment funds. They are <b>not</b> pooling scheme funds within the meaning of the Financial Services and Markets Act 2000 (Exemption) Order 2001, or for the purposes of the Trustee Bill, or for the purposes of the accounting regulations. See <a href="#">OG 49 A1</a> and <a href="#">OG 49 B7</a>.</p> <p>See also pool charities.</p>
<b>ICR</b>	The <b>ICR</b> is the Independent Reviewer to whom Commission customers may complain if they remain dissatisfied having gone through our internal complaints procedure.
<b>IMRO</b>	<b>IMRO</b> means the Investment Management Regulatory Organisation, which is responsible for regulating the management and annual accounts of unit trusts. IMRO was abolished by the Financial Services and Markets Act 2000, and its functions were taken over by the Financial Services Authority (FSA). See <a href="#">OG 49 B7</a> .
<b>Income funds</b>	<b>Income funds</b> are all incoming resources that become available to a charity and that the trustees are legally required to apply in furtherance of its charitable purposes within a reasonable time of receipt (the proper exercise of a power of accumulation is an application).
<b>Independent examiner</b>	An <b>independent examiner</b> is an independent person who is reasonably believed by the charity trustees to have the requisite ability and practical experience to carry out a competent examination of its accounts.
<b>Land</b>	<p><b>Land</b> includes:</p> <p>buildings and other structures;</p> <p>land covered with water; and</p> <p>any estate, interest, easement, rentcharge or other right in or over land.</p>
<b>Linked charity</b>	A <b>linked charity</b> is one which is regarded, as the result of a uniting direction under s.96, or, in the

case of accounting, because it is a special trust, as being part of the "reporting charity" for the purposes of registration and/or accounting. The reporting charity and the linked charities will be registered under the same number. A single annual report and accounts, and annual return, will be prepared for the reporting charity and for any charities linked with it for accounting purposes, either under s.96 or because they are special trusts. Examples where charities are united will include:

a number of small charities with largely similar purposes for the benefit of a particular parish;  
two or more charities having common trustees as with NHS charities

<b>Local charity</b>	A <b>local charity</b> is defined in s.96(1) of the Charities Act 1993 as a charity established for purposes which are directed wholly or mainly to the benefit of a particular area (whether stated in the trusts of the charity or implicit in its purposes).
<b>Material/ materiality</b>	<p>Materiality is the final test of what information should be given in a particular set of financial statements. An item of information is material to the financial statements if its misstatement or omission might reasonably be expected to influence the economic decisions of users of those financial statements, including their assessments of stewardships. Immaterial information will need to be excluded to avoid clutter which impairs the understandability of other information provided.</p> <p>Whether information is material will depend on the size of and nature of the item in question judged in the particular circumstances of the case. Materiality is not capable of general mathematical definition as it has both qualitative and quantitative aspects. A fuller definition is given in paragraph 21 of Appendix 1 of SORP 2000 (page 71).</p>
<b>NHS Foundation Trust Charities/NHS Charities</b>	An <b>NHS foundation trust charity</b> or an <b>NHS charity</b> is a trust or charity whose trustees are a health service body.
<b>Nominated trustee</b>	A <b>nominated trustee</b> (sometimes known as a representative trustee) is a person appointed to a trustee body by some other person or body, eg a local authority. They have exactly the same duties and responsibilities as other charity trustees and must act independently of their nominating body.
<b>Non-company charity</b>	A <b>non-company charity</b> is a non-exempt charity other than those which are formed and registered under the Companies Act 1985 and the Companies Act 2006, or to which the provisions of those Acts apply.
<b>OC</b>	See below.
<b>Official Custodian for Charities</b>	The <b>Official Custodian for Charities</b> (the OC) is a member of the Commission's staff who is appointed by the Commissioners to hold land and, in a few special cases, investments on behalf of charities. See publication <a href="#">CC13</a> . Subject to the provisions of the 1993 Act, the OC has all the same powers, duties, and liabilities of a custodian trustee, is entitled to the same rights and immunities, and is subject to the control and Orders of the Court.
<b>Official Receiver</b>	The <b>Official Receiver</b> is appointed by the Secretary of State - in practice the DTI. In the case of bankruptcy, the Official Receiver investigates the conduct of the debtor, acts as interim receiver and

presides at the first meeting of the creditors. Where an organisation is to be wound-up, the Official Receiver acts as the provisional liquidator as soon as the winding-up order is made.

**Official Solicitor** The **Official Solicitor** is an official who acts for those involved in High Court proceedings who are under a disability, eg a child or a person with a learning disability. The Official Solicitor will appear as next friend where there is no other person willing or competent to do so. He may also defend a minor or patient, as a litigation friend in a court action.

**Order** An **Order** is a legal document made by us or the Courts authorising the charity trustees to carry out an act which otherwise they have no power to do. We cannot make an Order to do anything which overrides a specific prohibition in the charity's governing document.

**Parochial Church Council** The elected body or council dealing with the finance and organisation of the church in a parish or ecclesiastical district. The powers of PCC's are laid down in the Parochial Church Council (Powers) Measure 1956. The PCC is a body corporate with perpetual succession, but without a common seal.

**Payroll Giving** Payroll Giving is a tax effective way in which employees (and pensioners in an employer's occupational pension schemes) can give to charity. Employees can authorise their employer to deduct charitable donations from their pay. Because donations are deducted from pay before Pay As You Earn tax is calculated, the employee gets tax relief at his or her top rate of tax.

**PCC** A **PCC** is a Parochial Church Council - see above.

**Permanent endowment** **Permanent endowment** is property of the charity (including land, buildings, cash or investments) which the trustees may not spend as if it were income. It must be held permanently, sometimes to be used in furthering the charity's purposes, sometimes to produce an income for the charity. The trustees cannot normally spend permanent endowment without our authority.

The terms of the endowment may permit assets within the fund to be sold and reinvested, or may provide that some or all of the assets are retained indefinitely (for example, a particular building). (See also Expendable endowment).

**Pool charities** **Pool charities** are a particular type of common investment fund created by scheme under s.24 of the 1993 Act. The feature which distinguishes it from other common investment funds is that **all** charities eligible to participate **must, at the time when any contribution is made to the pool, be administered by exactly the same body of trustees** which the pooling scheme **appoints as the charity trustee(s) of the pool charity**.

Pool charities are pooling scheme funds within the meaning of the Financial Services and Markets Act 2000 (Exemption) Order 2001.

The individual participating charities are not amalgamated by such a scheme and will have to account separately unless they have been the subject of a uniting direction for accounting purposes, or are special trusts. Where the participating charities account separately they will normally also be registered separately. In these circumstances, the pool charity will also be given separate registration as a reporting charity. (See [OG 49, Pooling schemes](#) for further information).

See also hybrid pool charities.

<b>Primary purpose trading</b>	<p>Primary purpose trading is a trade exercised by a charity in the course of the actual carrying out of its primary purpose. The following are examples of what might be regarded as trading in this manner:</p> <p>The provision of educational services by a school or college in return for course fees.</p> <p>The provision of residential accommodation by a resident care charity in return for payment.</p> <p>A trade in which a primary purpose of the charity is carried out by beneficiaries.</p>
<b>Professional fund-raiser</b>	<p>A <b>professional fund-raiser</b> is a person (other than a charitable institution) who carries on a fund-raising business or otherwise for reward solicits money or other property for the benefit of a charitable institution. (Statutory definition – see s.58(1) of the 1992 Act).</p>
<b>RRA</b>	<p><b>RRA</b> means the Race Relations Act 1976.</p>
<b>Receiver and manager</b>	<p><b>Receiver and manager</b> means the person appointed by Order of the Commission under s.18(1)(vii) of the 1993 Act to act in respect of the property and affairs of a charity.</p>
<b>Registered place of worship</b>	<p>A <b>registered place of worship</b> means any land or building falling within s.9 of the Places of Worship Registration Act 1855.</p>
<b>Registered Social Landlord</b>	<p><b>Registered Social Landlord (RSL)</b> is the term for not-for-profit providers of social housing approved and regulated by the Tenant Services Authority in England (formally the Housing Corporation), and in Wales by the National Assembly for Wales. RSLs, rather than local councils, are now the main providers of new social housing.</p> <p>The vast majority are known as housing associations, and have objects which include the provision, improvement, or management of low-rent/low-cost housing for those on low incomes or in housing need. Others take the form of local housing companies, housing trusts, and co-operatives, fulfilling their objects by renting, sub-market selling, construction or rehabilitation. They may also undertake management or advisory services.</p> <p>By no means all RSLs are charitable, but the main feature in common is that they are all run as businesses, but do not trade for profit. Any surplus is ploughed back into the organisation to maintain existing homes and provide new ones.</p> <p>A body is eligible for registration (under section 2 of the Housing Act 1996) as a social landlord if it is:</p> <ul style="list-style-type: none"> <li>a registered charitable housing association;</li> <li>a registered Industrial and Provident Society which fulfils certain additional conditions; or</li> <li>a company registered under the Companies Act 1985 which fulfils those conditions.</li> </ul> <p>It is not compulsory for housing associations to register with the Tenant Services Authority, but this is usually essential to qualify for public funding and/or accept the transfer of local authority housing stock.</p> <p>The provision of housing is currently only considered charitable where it is provided for proper</p>

charitable beneficiaries. Charitable RSLs operate over a wide spectrum of activity. Examples include: the provision of housing for the homeless or persons in economic need; provision of sheltered accommodation for the elderly; homes for the chronically sick or disabled (mentally or physically); hostels for young single people; promoting urban or rural regeneration by provision or **improvement of housing in the public sector or in charitable ownership**.

Roughly half of all charitable RSLs are Industrial and Provident Societies, which are exempt from registration with us.

Almshouse charities (which total around 1800) are housing associations within the terms of section 1(1) of the Housing Associations Act 1985. Just over a quarter of them are RSLs. (Separate guidance on almshouse charities is contained in [OG 65](#)).

### **Rentcharge**

A **rentcharge** is (most commonly) an annual sum payable in respect of land, which is **not**:  
rent reserved by a lease or a tenancy;  
interest.

The person to whom it is paid is not the owner of the land. A rentcharge could be created by a person selling land to another but reserving to himself and his heirs or to some third party an annual sum payable by the purchaser and by any subsequent owner of the land. This was once a popular device for endowing or augmenting the endowment of a charity but since 22 August 1977 the creation of new rentcharges has been prohibited (except in a few particular circumstances) by the Rentcharges Act 1977. That Act provides that most of those which still subsist at that date will be extinguished on 21 July 2037.

### **Reporting charity**

A **reporting charity** is a distinct charity which is the focus for reporting and/or registration of linked charities.

The reporting charity will produce only one set of accounts and returns for the reporting charity and for any charities linked with it for accounting purposes.

**NB:** Reporting charities were formerly known as main charities (or in the context of NHS trusts, umbrella charities). Use of this term has been discontinued, since it implies a hierarchical relationship which may not legally exist, and which may be misleading in the context of group registration and accounting. Under a s.96(6) uniting direction charities can be linked for registration or accounting even though there is no relationship between them which can be labelled main/subsidiary, or anything similar.

### **Representative trustee**

A **representative trustee** (sometimes known as a nominated trustee) is a person appointed to a trustee body by some other body or person. They have exactly the same duties and responsibilities as other charity trustees and must act independently of the body which appointed them.

### **Reserves**

The term '**reserves**' has a variety of technical and ordinary meanings, depending on the context in which it is used. In our guidance we use the definition established by the charities (Accounts and Reports) Regulations 2008 and we use the term 'reserves' (unless otherwise indicated) to describe

that part of a charity's income funds that is freely available for its general purposes. 'Reserves' are therefore the resources the charity has, or can make, available to spend, for all or any of the charity's purposes, once it has met its commitments and covered its planned expenditure. See [OG 43 B1](#).

More specifically this defines reserves as income which becomes available to the charity and is to be spent at the trustees' discretion in furtherance of any of the charity's objects (sometimes referred to as 'general purpose' income); but which is not yet spent, committed or designated (ie, is 'free').

**Restricted funds** **Restricted funds** are funds subject to specific trusts which may be declared by the donor(s), or with their authority (eg, in a public appeal), but still within the objects of the charity. Restricted funds may be restricted income funds, which are expendable at the discretion of the trustees in furtherance of some particular aspect(s) of the objects of the charity, or they may be capital funds, where the assets are required to be invested, or retained for actual use, rather than expended.

Some charities have power to declare specific trusts over unrestricted funds. If such power is available and is exercised, the assets affected will form a restricted fund, and the trustees' discretion to apply the fund will be legally restricted.

**RME** **RME** stands for Register Maintenance and Enquiries Section, part of Regulatory Framework.

**ROM** **ROM** stands for Regional Operations Manager. A ROM at each of the Commission's offices was responsible for the work and management of staff in that office's operational divisions. The function of ROM was replaced in April 2003 by the Heads of Function and the Head of Customer Service.

**Royal Sign Manual** The signature or "royal hand" of the monarch when personally signing a letter giving directions as to administration. The Attorney General, the principal law officer of the Crown, now signs in place of the sovereign.

**SR&O** This stands for **Statutory Rules and Orders** and is the forerunner of the term Statutory Instrument (SI). Its use was discontinued in 1947, but staff may still come across it when referring to older legislation still in force.

**SSFA 1998** The **SSFA 1998** is the School Standards and Framework Act 1998.

**Scheme** A Scheme is a legal document which amends, replaces or amplifies the trusts of a charity.

It may be:

a fully regulating Scheme which deals with all aspects of a charity's administration and becomes the governing document of the charity; or

a non-regulating Scheme dealing with some particular aspect of the charity's purposes or administration by amending or amplifying the charity's governing document, or by authorising a particular action prohibited by the trusts of the charity.

**SOFA** **SOFA** stands for Statement of Financial Activities. A charity's SOFA shows all the incoming resources becoming available during the year and all its expenditure for the year, and reconciles all the changes in its funds. The SOFA should account for all the funds of the charity and should be

presented in columns representing the different types of funds.

<b>SORP - the Charities SORP</b>	<p>The <b>Charities SORP</b> means the Statement of Recommended Practice: 'Accounting by Charities', published by the Charity Commission under the auspices of the Accounting Standards Board. This is periodically updated and is named according to the year of issue.</p> <p>(Note: The Charities SORP applies to charities generally in the UK unless a more specific SORP applies, such as for the Higher and Further Education Institutions or Registered Social Landlords.)</p>
<b>SORP 2000 - the Charities SORP 2000</b>	<p><b>SORP 2000</b> means the Statement of Recommended Practice: 'Accounting and Reporting by Charities', published by the Charity Commission under the auspices of the Accounting Standards Board. This applies to accounting periods beginning on or after 1 January 2001.</p>
<b>SORP 2005 - the Charities SORP 2005</b>	<p><b>SORP 2005</b> means the Statement of Recommended Practice: 'Accounting and Reporting for Charities', published by the Charity Commission under the auspices of the Accounting Standards Board in March 2005. It superseded the SORP 2000 and applies to accounting periods beginning on or after 1 April 2005.</p>
<b>Special trust</b>	<p>A <b>special trust</b> means funds or property held and administered on its own separate trusts by or on behalf of a main charity for any special purposes of that charity. It follows that the objects of a special trust must be narrower than those of the main charity.</p>
<b>Special visitor</b>	<p>A <b>special visitor</b> is a person appointed by the founder of a charity to supervise and investigate a particular aspect of its internal affairs. Special visitors have no power to alter the statutes of a charity.</p>
<b>Specie land</b>	<p><b>Specie land</b> is land required to be used for a particular charitable purpose.</p>
<b>Statutory declaration</b>	<p>A <b>statutory declaration</b> is a signed statement made by virtue of the Statutory Declarations Act 1835 before an officer authorised to administer an oath, such as a justice of the peace, Commissioner for Oaths or a solicitor with a practising certificate. It has the same effect as a sworn document (an Affidavit).</p>
<b>TIA</b>	<p>The <b>TIA</b> means the Trustee Investments Act 1961 as amended.</p>
<b>TLAT</b>	<p><b>TLAT</b> is the Trusts of Land and Appointment of Trustees Act 1996.</p>
<b>Tenant Services Authority</b>	<p>The <b>Tenant Services Authority (TSA)</b> is a Non-Departmental Public Body, sponsored by the Department of Communities and Local Government. It has taken over from the Housing Corporation and is responsible for regulating social housing landlords and setting high standards of management for housing associations and local authority homes. The Homes and Communities Agency is responsible for funding.</p>
<b>Testator/ testatrix</b>	<p>A <b>testator</b> (male), or <b>testatrix</b> (female), is a person who has made a will.</p>
<b>Threshold for audit</b>	<p>The accounts of a charity should be audited if the gross annual income or expenditure exceeds £250,000 in the relevant year or in either of the two years immediately preceding the relevant year.</p>
<b>Total expenditure</b>	<p><b>Total expenditure</b> means the total gross recorded expenditure of the charity for the financial year. (This is the figure which Compliance enter on the Charity Database from information included in the</p>

Annual Return, supplied to us annually by registered charities.) It should include the expenditure of all other charitable entities united with the charity for the purpose of financial reporting. This figure (together with the figure for gross income) is used to determine the size of the charity for the purposes of Part VI of the 1993 Act.

General guidance on how to calculate total expenditure for the financial year is provided in the explanatory notes which accompany the annual return form sent out to each charity. These state:

You should include gross expenditure shown in the accounts of the relevant funds.

You should include the following in expenditure:

expenditure relating to the objects of the charity including grants, donations, cost of services provided and support costs;  
management and administration costs of the charity;  
fund-raising and publicity costs;  
interest payable; **and when accounts are prepared on an accruals basis:**  
depreciation or amortisation of assets held.

And you should exclude the following from expenditure;

making of a loan;  
repayment of a loan;  
purchase of investments and fixed assets;  
losses on disposal of investments and fixed assets.

Where accruals accounts are prepared, the figure for total expenditure is the total of the figures entered under paragraph 3(b) of Part 1 of Schedule 1 to the Charities (Accounts and Reports) Regulations 1995 (but leaving out any amount which represents losses on the disposal of functional fixed assets)..

<b>Trust corporation</b>	A <b>trust corporation</b> , as defined by s.68(18) of the Trustee Act 1925, is either a corporation appointed by the Court (or ourselves) to be a trustee, or one entitled by rules made under the Public Trustee Act 1906 to act as custodian trustee.
<b>Trustee for a charity</b>	A <b>trustee for a charity</b> is a person, not being a charity trustee, in whom legal title to the property of the charity is vested.
<b>Trustees</b>	<b>Trustees</b> means Charity trustees
<b>Ultra vires</b>	<b>Ultra vires</b> means beyond one's powers, unauthorised.
<b>Umbrella charity / umbrella organisation</b>	The terms <b>umbrella charity</b> and <b>umbrella organisation</b> are no longer in general use - except in the limited context of NHS charities. (See definition of reporting charities).
<b>Uniting direction</b>	A <b>uniting direction</b> is a direction made under either s.96(5) or s.96(6) of the 1993 Act allowing two or more charities to be linked for all or any of the purposes of that Act. The basis for a uniting direction is different in each case:

for a direction under s.96(5), the criteria rests on the **purpose** of the charities concerned: one of the charities must be established for any special purpose of or in connection with another. Under s.96(5) we can treat one or more charities as forming part of another whenever both or all of them are identified with the same charitably provided service **and** are administratively interdependent; for a direction under s.96(6) the criteria is **common trusteeship**; discretionary emphasis will also be placed on charities having broadly similar purposes.

The purpose of giving a direction is to achieve the administrative linking of charities where it is practical to do so. Where there is a close connection between the purposes and/or administration of two or more charities, we normally wish to encourage the preparation of a single annual report and statement of accounts.

## Will

A written document which disposes of the property of the person making it on his or her death. It must be signed by the person making it and in England and Wales must be witnessed by two witnesses. There are detailed rules about how that must be done. In Scotland a will may be valid if it is in the maker's handwriting. In any case of doubt advice from Legal Division should be sought.

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Status:  Law In Force /  Amendment(s) Pending

## **Commons Registration Act 1965 c. 64**

This version in force from: **October 13, 2003** to **present**

(version 3 of 3)

### **22.— Interpretation.**

(1) In this Act, unless the context otherwise requires, “common land” means—  
(a) land subject to rights of common (as defined in this Act) whether those rights are exercisable at all times or only during limited periods;

(b) waste land of a manor not subject to rights of common;

but does not include a town or village green or any land which forms part of a highway;

“land” includes land covered with water;

“local authority” means [...] <sup>1</sup> the council of a county, [...] <sup>2</sup>, London borough or county district, the council of a parish [...] <sup>2</sup>;

“the Minister” means the [Secretary of State] <sup>3</sup>;

“prescribed” means prescribed by regulations under this Act;

[“register of title” means the register kept under [section 1](#) of the [Land Registration Act 2002](#);

] <sup>4</sup>

“registration” includes an entry in the register made in pursuance of [section 13](#) of this Act;

“rights of common” includes cattlegates of beastgates (by whatever name known) and rights of sole or several vesture or herbage or of sole or several pasture, but does not include rights held for a term of years or from year to year;

“town or village green” means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes [“ or which falls within subsection (1A) of this section”.] <sup>5</sup>

[(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either—

(a) continue to do so, or

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.

(1B) If regulations made for the purposes of paragraph (b) of subsection (1A) of this section provide for the period mentioned in that paragraph to come to an end unless prescribed steps are taken, the regulations may also require registration authorities to make available in accordance with the regulations, on payment of any prescribed fee, information relating to the taking of any such steps.

] <sup>6</sup>

(2) References in this Act to the ownership and the owner of any land are references to the ownership of a legal estate in fee simple in any land and to the person holding that estate, and references to land registered [in the register of title] <sup>2</sup> are references to land the fee simple of which is so registered.

Words repealed by Local Government Act 1985 (c. 51), s. 102, Sch. 17

- 1.
2. Words repealed by Local Government Act 1972 (c. 70), Sch. 30
3. Words substituted by virtue of S.I. 1967/156 and 1970/1681
4. Definition inserted by Land Registration Act 2002 c. 9 [Sch.11 para.7\(5\)](#) (October 13, 2003)
5. Words substituted by Countryside and Rights of Way Act 2000 c. 37 [Pt V s.98\(2\)](#) (January 30, 2001)
6. Added by Countryside and Rights of Way Act 2000 c. 37 [Pt V s.98\(3\)](#) (January 30, 2001)
7. Words substituted by Land Registration Act 2002 c. 9 [Sch.11 para.7\(6\)](#) (October 13, 2003)

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**Subject:** Real property

**Keywords:** Commons; Interpretation; Land registration; Rights of common; Village greens



Status:  Positive or Neutral Judicial Treatment

**\*889 Regina (Beresford) v Sunderland City Council**

House of Lords

13 November 2003

**[2003] UKHL 60**

**[2004] 1 A.C. 889**

Lord Bingham of Cornhill, Lord Hutton, Lord Scott of Foscote, Lord Rodger of Earlsferry  
and Lord Walker of Gestingthorpe

2003 May 19, 20; Oct 3; Nov 13

*Commons—Town or village green—Registration—Land used by local inhabitants for sport and recreation for more than 20 years—Whether claim to use "as of right" defeated by implied licence—[Commons Registration Act 1965](#) (c 64), [ss. 13, 22\(1\)](#)*

In 1973 a new town development corporation created a town plan which identified an area of land as "parkland/ open space/ playing field". The land was grassed over and seating installed around part of the perimeter and it was used thereafter by local inhabitants for ball games and other lawful pastimes. The land was transferred in 1989 to the Commission for New Towns and in 1996 to the local authority, which continued its predecessors' practice of mowing the grass and allowing public access. At no time was the land fenced off and neither the council nor its predecessors displayed any sign setting out the basis of the inhabitants' use of the land. In 1998 the applicant applied for registration of the land as a town or village green under [section 13\(b\)](#) of the Commons Registration Act 1965<sup>1</sup> on the ground that it had been used "as of right", for the purposes of [section 22\(1\)](#) of that Act, for more than 20 years. The local authority, as the registration authority for the purposes of registering and maintaining a register of town and village greens within its boundaries pursuant to section 3 of the Act, refused the application on the ground that the land had not been used as of right but by the implied licence of the local authority and its predecessors as landowners. On an application for judicial review of the local authority's decision the judge held that an implied licence could be inferred from the acts of the local authority and its predecessors in mowing the grass and providing seating, and that that was sufficient to defeat a claim to use land "as of right". The Court of Appeal, dismissing the applicant's appeal, upheld the judge's decision.

On the applicant's appeal—

Held, allowing the appeal, that although a landowner might by overt conduct show that, notwithstanding the absence of any express statement, notice or record, use of its land was pursuant to its permission so as to amount to the implied grant of a revocable licence precluding a claim of use "as of right" under section 22(1) of the 1965 Act, the landowner having encouraged an activity on its land did not in itself indicate that it took place by virtue of a revocable permission; that user could be as of right even though it was not adverse to the landowner's interests; and that, accordingly, since neither the cutting of the grass nor the provision of seating were indicative of the grant of a revocable licence and no other evidence had been adduced of overt acts by the local authority or its predecessors from which a licence to use the land could be inferred, the use had been "as of right" in terms of section 22(1) and the **\*890** decision refusing the application for the land to be registered as a town green would be quashed (post, paras 5-8, 10, 11, 43, 48-50, 59-61, 67-69, 75, 83, 90, 92).

Decision of the Court of Appeal [2001] EWCA Civ 1218; [2002] QB 874; [2002] 2 WLR 693; [2001] 4 All ER 565 reversed.

The following cases are referred to in their Lordships' opinions:

[Attorney General v Poole Corpn \[1938\] Ch 23; \[1937\] 3 All ER 608, CA](#)

[Bridges v Mees \[1957\] Ch 475; \[1957\] 3 WLR 215; \[1957\] 2 All ER 577](#)

[Burrows v Lang \[1901\] 2 Ch 502](#)

[Bute, Marquis of v M'Kirdy & M'Millan Ltd 1937 SC 93](#)

[Cumberland and Kilsyth District Council v Dollar Land \(Cumbernauld\) Ltd 1992 SC 357; 1992 SLT 1035; 1993 SC\(HL\) 44, HL\(Sc\)](#)

Dalton v Henry Angus & Co (1881) 6 App Cas 740, HL(E)

[Davies v Du Paver \[1953\] 1 QB 184; \[1952\] 2 All ER 991, CA](#)

[Folkestone Corp v Brockman \[1914\] AC 338, HL\(E\)](#)

[Gardner v Hodgson's Kingston Brewery Co Ltd \[1903\] AC 229, HL\(E\)](#)

[Hall v Beckenham Corp \[1949\] 1 KB 716; \[1949\] 1 All ER 423](#)

[Herrington v British Railways Board \[1972\] AC 877; \[1972\] 2 WLR 537; \[1972\] 1 All ER 749, HL\(E\)](#)

[Ives \(E R\) Investment Ltd v High \[1967\] 2 QB 379; \[1967\] 2 WLR 789; \[1967\] 1 All ER 504, CA](#)

Jones v Bates [1938] 2 All ER 237, CA

Mann v Brodie (1885) 10 App Cas 378, HL(Sc)

[Mills v Silver \[1991\] Ch 271; \[1991\] 2 WLR 324; \[1991\] 1 All ER 449, CA](#)

Napier's Trustees v Morrison (1851) 13 D 1404

R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)

[R v Suffolk County Council, Ex p Steed \(1996\) 75 P & CR 102, CA](#)

Scottish Property Investment Co Building Society v Horne (1881) 8 R 737

Sturges v Bridgman (1879) 11 Ch D 852, Jessel MR and CA

The following additional cases were cited in argument:

Bright v Walker (1834) 1 CM & R 211

De la Warr (Earl) v Miles (1881) 17 Ch D 535, CA

[Hyman v Van den Berg h \[1907\] 2 Ch 516](#)

[Merstham Manor Ltd v Coulsdon and Purley Urban District Council \[1937\] 2 KB 77; \[1936\] 2 All ER 422](#)

Mills v Colchester Corp (1867) LR 2 CP 476

Monmouthshire Canal Co v Harford (1834) 1 CM & R 614

[R v Hereford and Worcester County Council, Ex p Ind Coope \(Oxford and West\) Ltd \(unreported\), 26 October 1994, Brooke \]](#)

[R v Secretary of State for the Environment, Ex p Billson \[1999\] QB 374; \[1998\] 3 WLR 1240; \[1998\] 2 All ER 587](#)

R (Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578 (Admin)

Tickle v Brown (1836) 4 Ad & E 369

## **APPEAL** from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Hutton and Lord Scott of Foscote), the applicant, Pamela Beresford, appealed from the decision of the Court of Appeal (Latham and Dyson LJ and Wilson J) upholding the decision of Smith J to dismiss her application for an order of certiorari to quash the decision of Sunderland City Council on

27 April 2000 that the sports arena adjacent to the Princess Anne Park in Washington **\*891** should not be registered as a town or village green pursuant to sections 13 and 22(1) of the Commons Registration Act 1965.

The facts are stated in the opinions of Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe.

*George Laurence QC* and *Douglas Edwards* for the applicant. [Section 22\(1\)\(c\) of the Commons Registration Act 1965](#) defines a town or village green as land on which the local inhabitants have indulged in lawful sports and pastimes "as of right" for not less than 20 years. The user has to be *nec vi, nec clam, nec precario*, in other words, not by force, nor stealth, nor the licence of the owner. There is no requirement for a subjective belief of the users in their entitlement to carry on the activity in question, but the activity must be open and in the manner to be expected of a person rightfully entitled to carry on such activity: see *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1993 SC(HL) 44; 1992 SC 357. The phrase "as of right" in the 1965 Act is to be given the same meaning as is accorded to it in the [Prescription Act 1832](#) and the Rights of Way Act 1932 (now the [Highways Act 1980](#)): see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 350-351, 353-354; *Bright v Walker* (1834) 1 CM & R 211, 219; *Mills v Colchester Corpn* (1867) LR 2 CP 476, 486 and *Jones v Bates* [1938] 2 All ER 237, 245.

Only an express permission is capable of rendering a use *precario*; an implied permission is not: see [Gardner v Hodgson's Kingston Brewery Co Ltd](#) [1903] AC 229 and [Folkestone Corpn v Brockman](#) [1914] AC 338. Use where a landowner encourages use of his land is not inconsistent with use "as of right", see [Cumbernauld and Kilsyth District Council v Dollar Land \(Cumbernauld\) Ltd](#) 1993 SC(HL) 44; 1992 SC 357. [Reference was also made to *Monmouthshire Canal Co v Harford* (1834) 1 CM & R 614; *Tickle v Brown* (1836) 4 Ad & E 369; *Earl De la Warr v Miles* (1881) 17 Ch D 535; *Dalton v Henry Angus & Co* (1881) 6 App Cas 740; [Hyman v Van den Bergh](#) [1907] 2 Ch 516 and [Merstham Manor Ltd v Coulsdon and Purley Urban District Council](#) [1937] 2 KB 77.] Once it appears to the landowner that the public are asserting a right to the land, it is for him to show his opposition to the alleged right, either by stopping the relevant user or expressly making it clear that the user is by his permission. The positive acts relied on by the local authority—the erection of seats and the cutting of the grass—were, in any event, equivocal and not capable of supporting the implication of permission.

*Philip Petchey* for the local authority. Use of land will be *precario* if there has been permission, whether written, parol or implied. Such use is to be contrasted with use that is tolerated or acquiesced in and as such is adverse to the landowner and therefore as of right: cf *R (Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC (Admin) 1578. The fact that use may be tolerated or acquiesced in does not make it less of a trespass: see [Mills v Silver](#) [1991] Ch 271.

The situation is different from that of highways, where if there is an intention to dedicate and use is not *precario*, use would not be adverse to the landowner. Although it might be difficult in a particular case, in the context of an intention to dedicate, to distinguish a situation where use is *precario* from one where it is of right, that cannot arise in the present case since land cannot be dedicated for use by the inhabitants of a locality.

### **\*892**

Implied licence was not argued in [Cumbernauld and Kilsyth District Council v Dollar Land \(Cumbernauld\) Ltd](#) 1993 SC(HL) 44; 1992 SC 357, which, however, deals with Scots law and does not reflect the law of England in its interpretation of *nec vi, nec clam, nec precario*.

[After taking time for consideration their Lordships invited counsel to make submissions on the question whether the statutory regimes applicable to land held by new town development corporations and the Commission for New Towns, or to land held by a local authority for the purposes of public recreation, conferred a right to use such land inconsistent with a claim under [section 22\(1\)](#) of the 1965 Act.]

*Petchey* The starting point is to ask why every park and recreation ground in England and Wales is not a town or village green. The answer is that use of the land by members of the public is by way of licence, although the licence may not have been communicated to them: see [R v Secretary of State for the Environment, Ex p Billson \[1999\] QB 374](#) and [R v Hereford and Worcester County Council, Ex p Ind Coope \(Oxford and West\) Ltd \(unreported\), 26 October 1994](#).

The question prefigures a second answer as to why such land cannot become a town or village green, namely, that, whatever statutory regime the land is held under by the local authority is inconsistent with such land becoming a town or village green. The use by way of licence answer is to be preferred as it is difficult to draw a line between situations where land has been made available for recreational use and where it has not, in terms of statutory powers, and the result of the second answer would be that section 22 does not apply to land held by local authorities in any circumstances. Parliament is not likely to have envisaged that.

*Laurence QC* Land acquired and held by a local authority under the [Open Spaces Act 1906](#) will not become a town or village green. Such land could be disposed of by the local authority after compliance with [section 123\(2A\)](#) without loss of its status as a green.

[Section 21](#) of the [New Towns Act 1981](#) permits a development corporation which has acquired open space, i e, any land laid out as a public garden or used for the purposes of public recreation or being a disused burial ground, to do anything with it for which planning permission has been obtained. However, the section only bites when the relevant land is a common or open space at the date of acquisition and has no relevance where, as here, the land begins to be so used only after the date of acquisition.

In any event, to read [section 22 of the 1965 Act](#) as applying to all land which has been used as of right by local inhabitants for lawful sports and pastimes for 20 years or more will not derogate from any provision in any earlier Act empowering a statutory body to use land in its ownership for a particular purpose inconsistent with its being a green. It is in the statutory landowning body's own hands to prevent its land becoming a town or village green. It may prevent use altogether or render it precarious by granting an express licence.

There is nothing in the statutory background which assists in defeating the claim, or adds anything to the implied licence argument.

*Petchey*, in reply, referred to [Hall v Beckenham Corpn \[1949\] 1 KB 716](#).

**\*893**

Their Lordships took time for consideration.

13 November. LORD BINGHAM OF CORNHILL

1 My Lords, the issue in this appeal is whether the Sunderland City Council erred in law in refusing to register as a "town or village green" under the Commons Registration Act 1965 an area of land known as the sports arena ("the land") close to the town centre of Washington, Tyne and Wear. I am indebted to my noble and learned friends Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe for their summaries of the relevant facts and the history of these proceedings, which I gratefully adopt and need not repeat.

2 As defined in [section 22 of the 1965 Act](#), before its amendment by [section 98](#) of the [Countryside and Rights of Way Act 2000](#), the expression "town or village green" means (for present purposes): "land ... on which the inhabitants of any locality have ... indulged in [lawful] sports and pastimes as of right for not less than 20 years." As Pill LJ rightly pointed out in [R v Suffolk 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. These ingredients of the definition can give rise to

contentious and difficult questions. But they do not do so in this case. The only difference between the parties, on which the appeal turns, is whether the admitted use of the land by the inhabitants of the locality for indulgence in lawful sports and pastimes for not less than 20 years was "as of right".

3 In this context it is plain that "as of right" does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired one by user for a stipulated period. It is also plain that "as of right" does not require that the inhabitants should believe themselves to have a legal right: the House so held in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 354, 356. It is clear law, as summarised in the last-mentioned decision, that for prescription purposes under the Prescription Act 1832 (2 & 3 Will 4, c 71), the Rights of Way Act 1932 and the 1965 Act "as of right" means *nec vi, nec clam, nec precario*, that is, "not by force, nor stealth, nor the licence of the owner": see pp 350, 351, 353-354. In this case there was no question of force or stealth. So the only question is whether the inhabitants' user was by the licence of the owner.

4 It was not suggested that the council had expressly licensed the inhabitants' use of the land, either in writing or orally. The argument was accordingly directed to whether it was ever possible to imply a licence by a landowner to use land in the manner prescribed by the statute and, if so, whether the facts here could properly be held to give rise to such an implication.

5 I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, \*894 I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use.

6 Authority, however, establishes that a licence to use land cannot be implied from mere inaction of a landowner with knowledge of the use to which his land is being put. In [Davies v Du Paver \[1953\] 1 QB 184](#), which concerned a private right, Morris LJ said, at p 210:

"Before Mr Davies could establish a claim based on prescription the evidence would have to show that the owner of the servient tenement had knowledge of what was happening, or as an ordinary owner must be taken to have had reasonable opportunity of knowledge, and that, having power to prevent it, he did not intervene."

In [Mills v Silver \[1991\] Ch 271](#), which also concerned a private right, Dillon LJ acknowledged, at pp 279-280:

"it would be easy to say ... that there is an established principle of law that no prescriptive right can be acquired if the user by the dominant owner of the servient tenement in the particular manner for the appropriate number of years has been tolerated without objection by the servient owner. But there cannot be any such principle of law because it is, with rights of way, fundamentally inconsistent with the whole notion of acquisition of rights by prescription. It is difficult to see how, if there is such a principle, there could ever be a prescriptive right of way."

Dillon LJ added, at p 281:

"It is to be noted that a prescriptive right arises where there has been user as of right in which the servient owner has, with the requisite degree of

knowledge ... acquiesced. Therefore mere acquiescence in or tolerance of the user by the servient owner cannot prevent the user being as of right for purposes of prescription."

Parker LJ, at p 290, was of the same opinion:

"The true approach is to determine the character of the acts of user or enjoyment relied on. If they are sufficient to amount to an assertion of a continuous right, continue for the requisite period, are actually or presumptively known to the owner of the servient tenement and such owner does nothing that is sufficient ... I add only this, that any statement that the enjoyment must be against the will of the servient owner cannot mean more than 'without objection by the servient owner'. If it did, a claimant would have to prove that the right was contested and thereby defeat his own claim."

In [R v Oxfordshire County Council, Ex p Sunningwell District Council \[2001\] 1 AC 335](#) it was held by the House that the landowner's toleration of the local inhabitants' user of the land in question was not inconsistent with **\*895** such user having been as of right, and so did not prevent registration of the land in question as a town or village green. As my noble and learned friends Lord Rodger and Lord Walker point out, some caution is required of English lawyers reading the Scottish authorities, since the applicable legislation is not the same and "tolerance" is used to mean not acquiescence but permission. It does however appear that the Scots approach to prescription, as applied to public rights of way, is close to the English. As the Lord President (Hope) put it in [Cumbernauld and Kilsyth District Council v Dollar Land \(Cumbernauld\) Ltd 1992 SLT 1035](#), 1041, in a passage expressly approved by the House of Lords [1993 SC \(HL\) 44](#), 47:

"where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance. If his position is to be that the user is by his leave and licence, he must do something to make the public aware of that fact so that they know that the route is being used by them only with his permission and not as of right."

7 Recognising that the authorities preclude reliance on mere inaction as giving rise to an implied licence to use the land, the council has placed reliance on its conduct in mowing the grass on the land and providing benches for the accommodation of spectators and other users of it. This, it was said, showed that the council was encouraging the public to use the land, from which its licence to do so could be implied. Both the mowing of the grass and the provision of benches are open to more than one explanation. But the argument is in my opinion open to a more fundamental objection. As already pointed out, the 1965 Act drew heavily on principles established under the Acts of 1832 and 1932, relating to private and public rights of way respectively, and in neither of these instances could acts of encouragement by the servient owner be relied on to contend that the user by the dominant owner had not been as of right. Such conduct would indeed strengthen the hand of the dominant owner. Here the conduct is in any event equivocal: if the land were registered as a town or village green, so enabling the public to resort to it in exercise of a legal right and without the need for any licence, one would expect the council to mow the grass and provide some facilities for those so resorting, thus encouraging public use of this valuable local amenity. It is hard to see how the self-same conduct can be treated as indicating that the public had no legal right to use the land and did so only by virtue of the council's licence.

8 In the decision under challenge, the council considered that there was evidence, which it accepted, of an implied licence, thus enabling the inference to be drawn that the use by local inhabitants for statutory purposes had not been as of right. In her clear and helpful judgment [\[2001\] 1 WLR 1327](#), 1340-1341, Janet Smith J accepted that conclusion. For

reasons given by Dyson LJ, with which Latham LJ and Wilson J agreed [2002] QB 874, 884-886 the Court of Appeal was of the same opinion. It is at this point that I respectfully differ from both the lower courts. Qualifying user having been found, there was nothing in the material before the council to support the conclusion that such user had been otherwise than as of right within the meaning of [section 22 of the 1965 Act](#).

**\*896**

9 The foregoing paragraphs of this opinion are directed to the issue which was contested before the lower courts and debated between the parties on the hearing of this appeal. After the House had reserved judgment at the conclusion of oral argument, however, the House became concerned to explore the possibility that, on the special facts of this case, the inhabitants of the locality might have indulged in lawful sports and pastimes for the qualifying period of 20 years or more not "as of right" but pursuant to a statutory right to do so. Such use would be inconsistent with use as of right. Counsel were invited to make written submissions on the point, which had not been raised or investigated below, and the House heard further oral argument on it. The House is grateful to counsel for responding so fully to its invitation, and consideration has been given to every statutory provision which appeared to be potentially relevant. In the event, I do not find it necessary to review these provisions in detail since it is to my mind clear that none of them, on the facts found or agreed, can be relied on to confer on the local inhabitants a legal right to use the land for indulgence in lawful sports and pastimes. Indeed Mr Petchey for the council, who had not himself sought to raise this contention earlier, found it hard to argue otherwise.

10 For these reasons and those given by my noble and learned friends, Lord Scott, Lord Rodger and Lord Walker, I would allow this appeal.

LORD HUTTON

11 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Walker of Gestingthorpe, and for the reasons which he gives, and also for the reasons given by my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry, I too would allow this appeal.

LORD SCOTT OF FOSCOTE

## Introduction

12 My Lords, the issue in this case is whether the use by the local inhabitants of a piece of land, commonly known as the sports arena, at Washington, Tyne and Wear, has turned that land into a "town or village green", as defined by [section 22\(1\)](#) of the Commons Registration Act 1965. Section 22(1) defines "town or village green" as including "land ... on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than 20 years".

13 Three years ago your Lordships had to consider the same issue. The case was *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335. It was the first time your Lordships had had to consider the section 22(1) definition. The present case is the second time.

14 The main issue in the Sunningwell case was whether the inhabitants, whose use of the land for sports and pastimes was relied on as constituting the requisite use "as of right", had to use the land in the belief that they had the right to do so. The House held that they did not have to have a personal belief in their right to use the land. It was sufficient that their use of the land, objectively evaluated, appeared to be a use as of right. The issue that arises in the present case is different. The issue is whether a use that is tolerated, and indeed encouraged, by the landowner, can none the less be a use "as of right" for the purposes of section 22(1). The issue is complicated in the **\*897** present case by the circumstance that the successive owners of the sports arena during the period over which the use relied on has taken place have been public authorities, holding the land for public purposes and whose tenure of the land has been subject to various statutory provisions whose relevance and effect I must later consider. Nonetheless, the core issue is whether

the use relied on has been use "as of right".

15 The leading opinion in the Sunningwell case was given by my noble and learned friend, Lord Hoffmann. Each of the other members of the Appellate Committee agreed with his opinion. It contains a valuable and scholarly exposition of the historical provenance of the expression "as of right" in the 1965 Act that is as pertinent to this case as to Sunningwell. I cannot improve upon and need not repeat what Lord Hoffmann has said: see pp 349-355.

16 It is accepted that:

"the words 'as of right' import the absence of any of the three characteristics of compulsion, secrecy or licence—'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements ..." (per Scott LJ in *Jones v Bates* [1938] 2 All ER 237, 245 cited by Lord Hoffmann [2000] 1 AC 335, 355).

The issue in the present case is whether the use by the inhabitants was "nec precario". Was there an implied permission given by the landlord? If so, is use pursuant to an implied permission fatal to the contention that the inhabitants' use was "as of right"? How, if at all, does the fact that the sports arena was, throughout the period of use, public land held by public authorities for public purposes bear upon the answer to the question whether the use was "as of right". These questions raise some difficult issues. But let me start with the facts.

## The facts

17 The sports arena is a grass arena of 10 acres or thereabouts. It was acquired by Washington Development Corporation (the "WDC") in the course of its development of Washington New Town pursuant to the New Towns Act 1965. The WDC's Washington New Town Plan 1973 identified the land as "parkland/open space/playing field". In 1974 the WDC, using excavated soil from the development of a shopping centre, laid out and grassed over the area. It would thereby have become recognisable as what is now the sports arena. It has never been fenced and it seems likely that public use of it for the purpose of recreation began shortly after the grassing over. In this litigation, however, the public recreational use contended for, and established by the evidence, is a use from 1977.

18 In 1977 the WDC installed a double row of wooden benches, sufficient to accommodate 1,100 people, around the north, west and south perimeters of the sports arena. This was done in order to provide seating for the public on the occasion of a Royal visit. A non-turf cricket wicket was laid down in 1979. And over the years the sports arena has been used for various recreational activities, ranging from team games to the walking of dogs.

19 Title to the sports arena was, in 1989, transferred by the WDC to the Commission for the New Towns ("the CNT") and, in 1996, was transferred by the CNT to the Sunderland Council. Throughout the period since the \*898 sports arena was grassed over in 1974, the owners for the time being, first the WDC, then the CNT and, since 1996, the council, have mowed the grass in the summer.

## The litigation

20 On 24 December 1998 the council granted planning permission for the erection of a college of further education on land which includes the sports arena. It is common ground that the council wants to dispose of the land for use for that purpose. This proposal has been opposed by a number of local residents who have been accustomed to use the sports arena for recreational activities and who want to go on doing so. Their opposition to the grant of planning permission having failed, they made an application on 18 November 1999 for the sports arena to be registered under the 1965 Act as a town or village green. The 1965 Act requires every "registration authority" to maintain a register of town or village greens ([section 3\(1\)\(b\)](#)). The registration authority for the area where the sports arena is situate is the council ([section 2\(1\)\(a\)](#)). [Section 13](#) of the 1965 Act enables the register to

be amended where any land becomes a town or village green. The applicants' contention is that the sports arena has become a town or village green as a result of the requisite use of it by local inhabitants for at least 20 years. The council refused the application. They did so on the ground that the local inhabitants' use of the sports arena for recreational purposes had not been "as of right" but pursuant to an implied permission given by the landowners. Therefore, it was said, the use was not "nec precario".

21 An application was made by the appellant for judicial review of the council's refusal of the registration application. Smith J [\[2001\] 1 WLR 1327](#) refused the application. She held that the use had been pursuant to an implied permission and that that was sufficient, on the facts of the case, to disqualify the use from being "as of right". She took into account that the land was publicly owned, at p 1340:

"In my judgment, the fact that the land is in public ownership is plainly a relevant matter when one is considering what conclusion a reasonable person would draw from the circumstances of user. It is well known that local authorities do, as part of their normal functions, provide facilities for the use of the public and maintain them also at public expense. It is not part of the normal function of a private landowner to provide facilities for the public on the land. Public ownership of the land is plainly a relevant consideration."

I respectfully agree with these comments.

22 The Court of Appeal [2002] QB 874 dismissed the appeal. Dyson LJ, with whose judgment the other two members of the court agreed, held, first, that as a matter of principle a claim that land had been used "as of right" could be defeated by showing that the use had been pursuant to an implied permission and, second, that the council's conclusion that there had been an implied permission was a conclusion the council, on the facts of the case, had been entitled to reach. On the point regarding the public ownership of the sports arena, Dyson LJ, while agreeing with Smith J that the public ownership was relevant, expressed the view, at p 885, para 30, that "on its own, it was a factor of little weight".

**\*899**

23 On the further appeal to your Lordships' House, Mr Laurence, who had not appeared below, concentrated on attacking the proposition that use pursuant to an implied licence or permission could ever suffice to defeat a claim that the use was "as of right". An express licence or permission was, he said, essential. Mr Petchey, counsel for the respondent council, contended in answer, that an implied licence would suffice to defeat an "as of right" claim and that the public use of the sports arena had been "precario". Neither counsel dealt with the implications of the public ownership of the sports arena. This point emerged later and the appeal was, therefore, restored for further written and oral submissions on the point.

### **The statutory provisions relating to public authority land used for the propose of public recreation**

24 The New Towns Act 1981 (a consolidating Act) sets out the functions and powers of development corporations such as the WDC and the CNT. [Section 21\(1\)](#) applies to: "Any land being, or forming part of, a common, open space or fuel or field garden allotment, which has been acquired for the purposes of this Act by a development corporation ..." "Open space", as defined by [section 80\(1\) of the 1981 Act](#), includes "any land ... used for purposes of public recreation." Under sub-paragraph (a) of section 21(1), land to which section 21(1) applies may be used by the development corporation "or by any other person, in any manner in accordance with planning permission". This provision demonstrates the breadth of the freedom that development corporations were intended to have in using or dealing with land they had acquired for their statutory purposes. Not only were they themselves free to use the land "in any manner in accordance with planning

permission" but so too were any persons to whom they might transfer the land, nb "or by any other person".

25 Part II of the 1981 Act provides for the eventual dissolution of a development corporation and the vesting of its property in the CNT ([section 41](#)). The function of the CNT is to "hold, manage and turn to account" the property of development corporations transferred to them under the Act ([section 36\(1\)](#)). The CNT must have regard, inter alia, to the "convenience and welfare of persons residing, working and carrying on business" in the new town ([section 36\(3\)](#)).

26 These provisions seem to me to give rise to a number of issues on the facts of the present case. Does section 21 apply to land which was not, when acquired by the development corporation, being used for public recreation but where use for that purpose commenced after its acquisition? Mr Petchey expressly disclaimed, in answer to a question from me, any reliance on section 21(1). In view of that disclaimer your Lordships cannot decide the point on this appeal. But, with respect to counsel, I do not think the answer to the point is plain. The sports arena was, at the date when the WDC transferred it to the CNT and at the date when the CNT transferred it to the council, land "used for purposes of public recreation" i.e. an "open space" as defined. The land had been acquired by the WDC for the purposes of the Act (or its statutory predecessor). So why does section 21(1)(a) not apply and entitle the council to use the land "in any manner in accordance with planning permission?" This question your Lordships must leave unanswered.

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27 Sections 122 and 123 of the [Local Government Act 1972](#) relate to land which has been acquired by a "principal council". The respondent council is a principal council (see [section 270\(1\)](#)). [Section 122\(2A\)](#) (added by amendment under the [Local Government, Planning and Land Act 1980](#)) deals with the power of a principal council to appropriate land of various descriptions including "open space" land to other uses. [Section 123\(2A\)](#) (also added by amendment under the 1980 Act) deals with the power of a principal council to dispose of "open space" land. "Open space" is given the same definition as appears in the 1981 Act, and includes land "used for the purposes of public recreation" (see section 270(1) of the 1972 Act and [section 336\(1\)](#) of the [Town and Country Planning Act 1990](#)). The two sections, 122 and 123, prescribe, however, special procedures that a council must follow if the "open space" land is to be appropriated to some other purpose or disposed of (as the case may be). The procedures include advertising the council's intention, allowing time for objections from members of the public and the giving of due consideration to any objections.

28 It was, as I understood it, suggested by Mr Laurence that if the "open space" land had achieved the status of a 1965 Act town or village green, then, notwithstanding the disposal of the "open space" land by a principal council, the [section 123\(2A\)](#) procedures having been duly complied with, the land would retain its status as a town or village green under the 1965 Act. Mr Petchey did not contend that this was wrong. Your Lordships do not need to decide the issue on this appeal but, speaking for myself, I regard the proposition as highly dubious. An appropriation to other purposes duly carried out pursuant to section 122 would plainly override any public rights of use of an "open space" that previously had existed. Otherwise the appropriation would be ineffective and the statutory power frustrated. The comparable procedures prescribed by section 123 for a disposal must surely bring about the same overriding effect.

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

"A local authority who have acquired any estate or interest in or control over any open space ... under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—(a) hold and administer the open space ... in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and (b) maintain and keep the open space ... in a good and decent state ..."

"Open space", as defined in section 20, includes "land ... which ... is used for purposes of recreation ..." [Section 123\(2B\)\(b\) of the Local Government Act 1972](#) enables open space land held under a 1906 Act trust to be disposed of freed from that trust.

30 It is, I think, accepted that if the respondent council acquired the sports arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of [section 22\(1\) of the Commons Registration Act 1965](#). But Mr Petchey accepted that Mr Laurence was correct in contending that the sports arena **\*901** had not been acquired "under the [1906] Act" and that section 10 did not, therefore, apply. Here, too, although your Lordships cannot, in view of this concession, conclude that Mr Laurence's contention is wrong, I do not, for myself regard the point as clear. Is it necessary in order for open space land to have been acquired under the Act, for it to be expressly so stated, whether in the deed of transfer or in some council minute? [Attorney General v Poole Corpn \[1938\] Ch 23](#) is interesting on this point. The open space land in question had been conveyed to Poole Corporation "in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use". There was no express reference in the conveyance to the 1906 Act but the Court of Appeal thought it plain that the Act applied. Indeed counsel on both sides argued the case on the footing that that was so (see Sir Wilfrid Greene MR, at p 30). It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (cf counsel's argument in the [Poole Corpn](#) case, at p 27). But your Lordships cannot take the argument to a conclusion in the present case.

31 The various statutory provisions to which I have referred are, in my opinion, whatever other relevance they may have, relevant as background against which the implications of the recreational use of the sports arena made by the local inhabitants from 1977 to, say, 1999 ought to be assessed. The sports arena, throughout that period, was, and remains, land in public ownership, held for public purposes, maintained at public expense and used by the public for recreation.

### **Was the use "as of right" for section 22(1) purposes?**

32 It is accepted that the sports arena has been used for "lawful sports and pastimes", that the level of use has been sufficiently regular to satisfy section 22(1), that the use has been made predominantly by inhabitants of the locality and that this use has continued for more than 20 years. What is in issue is whether the use has been "as of right". To that I must now turn. Before I do so, however, I would like to pay tribute to the council's director of administration who prepared an admirably clear report dated 19 April 2000 for the benefit of the special meeting of the council convened to deal with the registration application. I have drawn heavily on the report in describing the history of the sports arena and reciting the other facts relevant to this appeal.

33 As Lord Hoffmann noted in the *Sunningwell* case [2000] 1 AC 335 the concept of use as of right—*nec vi, nec clam, nec precario*—is derived from the law relating to the acquisition by prescription of private easements. [Section 2 of the Prescription Act 1832](#) refers to rights of way or other easements "actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years ..." The concept was imported into the law relating to the dedication of land as a public highway. **\*902** Section 1(1) of the Rights of Way Act 1932 provided that "where a way ... upon or over any land has been actually

enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way ..." (see now [section 31\(1\) of the Highways Act 1980](#), which is in the same terms).

34 It is a natural inclination to assume that these expressions, "claiming right thereto" (the 1832 Act), "as of right" (the 1932 Act and the 1980 Act) and "as of right" in the 1965 Act, all of which import the three characteristics, *nec vi*, *nec clam*, *nec precario*, ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous.

35 If a private right of way is to be acquired by prescription, by 20 years enjoyment by someone "claiming right thereto", use pursuant to a licence or permission from the owner of the land will usually—not invariably, but usually—be use that does not satisfy the *nec precario* condition.

36 The acquisition of a private easement is the acquisition of a right in rem over land. If such a right is to be granted by a landowner it must be granted by deed and the grant will usually be express. An easement can only be acquired by implied grant if the implication can be derived from the contents of a deed. A conveyance of land, for example, may carry with it the implied grant of easements necessary for the enjoyment of the land. But the conveyance will have been by deed and, accordingly, capable of effecting the grant of an easement. A mere agreement for the grant of an easement cannot by itself grant the easement.

37 Where private easements are concerned there are, however, two exceptions to the requirement that the right must be granted by a deed. First, if permission to enjoy a right, capable of constituting an easement, is given by the landowner in terms likely to lead, and that do lead, the beneficiary of the permission to believe he is entitled on a permanent basis to enjoy the right and in that belief he sufficiently alters his position to his detriment, by expenditure of money or otherwise, he may become entitled in equity to the easement by proprietary estoppel (see [E R Ives Investment Ltd v High \[1967\] 2 QB 379](#)). The landowner would not be able to withdraw the permission he had given. Twenty years' enjoyment of the equitable right would surely enable the beneficiary of the permission to claim a legal easement under the 1832 Act. In such a case it is easy to regard the enjoyment of the right pursuant to the original permission as enjoyment by a person "claiming right thereto". In such a case the original permission would be the foundation of the claim of right but the enjoyment would not have been *precario*.

38 Second, if an agreement to grant an easement were entered into for good consideration and the consideration were fully paid, the purchaser of the easement would at once become absolutely entitled in equity to the easement and would become entitled at law after 20 years' use. His enjoyment of the easement, although deriving from permission, would not **\*903** have been *precario* and, in my opinion, would have been enjoyment by a person "claiming right thereto" (cf [Bridges v Mees \[1957\] Ch 475](#), 484-485). It follows that the proposition that use pursuant to permission given by the landowner is always *precario* and cannot ever be as of right for prescription purposes is not correct.

39 The same is true of use of a public way, or a would-be public way, following upon permission given by the landowner. A public right of way is not created by grant. It is created by dedication. The dedication does not have to be by deed and need not even be in writing. It can be evidenced by conduct. An implied permission for the public to use a particular path or track may be no more than a temporary, terminable permission but equally it may indicate an intention to dedicate. An implied permission that sufficiently evidences an intention to dedicate creates the public right of way immediately. Twenty years' use by the public is not necessary. But 20 years' use "as of right" following a permission by a landowner that is indicative of an intention to dedicate will produce a

deemed intention to dedicate unless the landowner can produce sufficient evidence that he had no such intention (see section 1(1) of the 1932 Act and [section 31\(1\) of the 1980 Act](#)).

40 There are differences, too, between public rights of way on the one hand and town or village greens on the other. Public rights of way are created by dedication, express or implied or deemed. Town or village greens on the other hand must owe their existence to one or other of the three origins specified in [section 22\(1\)](#) of the 1965 Act. One of these is the 20 years' use as of right to which I have already referred. Alternatively, a town or village green may be "land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality", or "land ... on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes ...". In short, the origin of a town or village green must be either statute or custom or 20 years' use. Dedication by the landowner is not a means by which a town or village green, as defined, can be created. So acts of an apparently dedicatory character are likely to have a quite different effect in relation to an alleged public right of way than in relation to an alleged town or village green.

41 The present case is concerned with implied permission. The installation and maintenance of the double rows of wooden benches round three sides of the sports arena and the regular cutting of the grass by the owners of the sports arena evidenced a clear enough willingness that the public should resort to the sports arena for recreational purposes. Indeed, it can reasonably be said that these acts encouraged the public to do so. Mr Petchey has submitted that since the public resorted to the sports arena pursuant to an implied permission from the landowners, their use of it during the 20 year period failed the *nec precario* requirement and was not "as of right".

42 Mr Laurence submitted that although use pursuant to an express permission would negate use "as of right", use pursuant to a permission that was merely to be implied would not do so. Implied permission, he submitted, was to be equated with mere acquiescence or toleration on the part of the landowner. None of these, he submitted, would disqualify the use from being use "as of right". Only an express permission would render the use *precario*.

**\*904**

43 My Lords, I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear enough that merely standing by, with knowledge of the use, and doing nothing about it, i.e. toleration or acquiescence, is consistent with the use being "as of right". That that is so is accepted by Mr Petchey. But I am unable to accept either that an implied permission is necessarily in the same state as mere acquiescence or toleration or that an implied permission is necessarily inconsistent with the use being as of right. Indeed, I do not, for the reasons I have given, accept that even an express permission is necessarily inconsistent with use as of right.

44 Lord Hoffmann in the *Sunningwell* case [2000] 1 AC 335 made clear that the section 22(1) requirement of 20 years' use as of right did not require the users of the land to give evidence of their personal belief in their right of use. He said, at p 356:

"A person who believes he has a right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not."

It is sufficient, therefore, if the use is "apparently as of right". But, of course, if the users do have a personal belief in their right to use the land, so much the better.

45 Permission for the public to use land for recreational purposes, or to pass along a path or track, may, depending on the terms of the permission, if it is express, and on the surrounding circumstances, whether or not it is express, indicate to the public that the permission is temporary only, may be withdrawn, and is therefore *precatory*, or may indicate to the public that their right of use is intended to be permanent. In the case of a path or track, a sufficient indication, express or implied that the right of the public to use

the path or track was intended to be permanent would usually constitute a dedication and create a public right of way. The members of the public using the way would be unlikely, not having perused the *Halsbury* volume dealing with public highways, to know anything about dedication or the manner in which public rights of way can come into existence. They would simply use the way, following the indications that they could do so or following the example of others who were using the way. Their use would at least be "apparently as of right". Their actual state of mind would not matter. The dedicatory nature of the permission that the public could use the path or track would positively support the contention that their user was as of right rather than contradict it.

46 Where a town or village green is concerned, however, a sufficient indication, express or implied, that the right of the public to use the land for recreational purposes was intended to be permanent could not itself endow the land with that status. But the quality of the use of the land by the public, following the dedicatory indications in question, would surely be "as of right". It seems to me to be quite unreal to draw a distinction between the quality of use of a path or track by members of the public following an express or implied dedication and the quality of the recreational use by members of the public of a piece of land following permission given by a \*905 landowner that, if dedication of land as a town or village green had been possible, would have constituted a dedication. In each case the quality of the use, entirely consistent with the nature of the permission that had been given, would have been "apparently as of right". The only difference would have been that in the case of the public right of way the landowner could not, once the dedication had been accepted by public use, terminate the use, but in the case of the land used for recreational purposes the landowner could, provided the 20 years had not expired, terminate the use. But this difference does not seem to me to bear upon the quality of the use of the land by the public in the meantime.

47 Let me try to illustrate the point I am making by examples. If a landowner puts up a notice which says "The public may use this path as a public highway", use by the public thereafter would surely be use as of right. If a landowner puts up a notice which says "The public may use this land for recreational purposes as a village green", use by the public thereafter, until the landowner cancelled the notice and/or excluded the public, would similarly be use as of right. Whether express or implied, permission to use a path over land or to use land for recreational purposes may be of a sufficiently dedicatory character to justify the same conclusion, namely that use by the public thereafter is use "as of right".

48 I agree with Mr Petchey that, in the present case, the attitude of the successive owners of the sports arena to the public use of the land for recreation was more than mere acquiescence or toleration. There was, I agree, positive encouragement. The provision of the rows of benches was to make more comfortable the watching of the activities of others. The cutting of the grass was in order to enhance the enjoyment of the sports arena by those using it. I am receptive to the submission that the successive owners had impliedly consented to the recreational use of the land by the public. The users were, in my opinion, certainly not trespassers. But this does not, in my opinion, answer the question whether the use was "as of right" or "nec precario".

49 Was there any sign that the permission was intended to be temporary or revocable? There was none. The fact that the land was publicly owned seems to me highly material. Neither the WDC nor the CNT nor the council were, or are, private landowners. Their respective functions were and are functions to be discharged for the benefit of the public. The provision of benches for the public and the mowing of the grass were, in my opinion, not indicative of a precatory permission but of a public authority, mindful of its public responsibilities and function, desirous of providing recreational facilities to the inhabitants of the locality. In these circumstances there seems to me to have been every reason for the inhabitants of the locality who used the sports arena to believe that they had the right to do so on a permanent basis.

50 Accordingly, the nature of the implied permission from the landowners that the evidence shows to have been present was not, in my opinion, such as to prevent the use of the sports arena by the public from being use "as of right". The positive encouragement to

the public to enjoy the recreational facilities of the sports arena, constituted, in particular, by the provision of the benches, seems to me not to undermine but rather to reinforce the impression of members of the public that their use was as of right.

**\*906**

51 Smith J and the Court of Appeal were, in my respectful opinion, led astray by according the concept of permission and, thus, of implied permission, a rigidity of character and effect that is not justified. They concluded that because use pursuant to permission will sometimes, or often, or usually, be inconsistent with use as of right, it will always be inconsistent with use as of right. The conclusion, my Lords, must in my opinion depend upon the nature of the permission, objectively assessed or construed. To conclude that use pursuant to implied permission is inconsistent with use as of right may in most cases be correct. But the conclusion is an evidentiary one; it is not a rule of law. And in the present case it is not, in my opinion, a correct evidentiary conclusion.

52 For these reasons I would, on the basis on which the case has been argued before your Lordships, allow the appeal. I am, however, for reasons which will have appeared, uneasy about this conclusion. Where "open space" land comes into the ownership of a "principal council", I think there to be strong arguments for contending that the statutory scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or [section 21\(1\) of the New Towns Act 1981](#) are applicable, excludes the operation of [section 22\(1\)](#) of the Commons Registration Act 1965. But these arguments have not been addressed to your Lordships. I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by [section 123 of the 1972 Act](#) will trump any "town or village green" status of the land whether or not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion.

LORD RODGER OF EARLSFERRY

53 My Lords, the town of Washington lies within the jurisdiction of the Sunderland City Metropolitan Borough Council ("the council"). From at least 1977 members of the public have used an area near the town centre—referred to as "the sports arena"—for recreation. In truth it is just an open, flat area of grass of some 13 acres which the Washington Development Corporation laid out in about 1974. In the Washington New Town Plan 1973 the land was identified as "parkland/open space/playing field". In 1977, around the time of the Queen's Silver Jubilee visit to the ground, the development corporation constructed wooden seats along much of the perimeter. A hard-surface cricket pitch was laid out in 1979. For the rest, the public bodies who have owned the land—most recently, the council—have done little except keep the grass cut. Local people have used the ground in their different ways. Toddlers have played there, children of all ages have kicked a ball around or played cricket and other games, a Sunday league football team have used it for their matches. Many have simply treated it as a place to picnic, socialise, take their ease in the sunshine or walk the dog.

54 In 1999 the appellant, Mrs Beresford, sought to register the area as a town or village green under the Commons Registration Act 1965. In terms of the relevant part of the definition in [section 22\(1\)](#), as it then stood, a town or village green means land on which the inhabitants of any locality have indulged in lawful sports and pastimes "as of right" for not less than 20 years. Having considered a well-reasoned and objective submission by their director of administration, the council, acting as the registration authority, refused Mrs Beresford's application—but only on the ground that, although the land had indeed been used for lawful sports and pastimes for over **\*907** 20 years, the use had not been "as of right" but by virtue of an implied licence from the owners.

55 In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 Lord Hoffmann explained in illuminating detail why the words "as of right" are to be interpreted in the same way in section 22(1) of the 1965 Act as in [section 5 of the Prescription Act 1832](#) (as amended) and section 1(1) of the Rights of Way Act 1932. Long before, in [Gardner v Hodgson's Kingston Brewery Co Ltd \[1903\] AC 229](#), 238, 239 both Lord Davey, impliedly, and Lord Lindley, expressly, had held that these words in the 1832 Act were intended to have the same meaning as the older expression "nec vi, nec clam, nec

precario". Lord Hoffmann adopted that interpretation and translated the phrase as "not by force, nor stealth, nor the licence of the owner": [2000] 1 AC 335, 350h. So, if the inhabitants of any locality have engaged in lawful sports and pastimes nec vi nec clam nec precario for at least 20 years, they have engaged in them "as of right" and the land can be registered as a town or village green in terms of the 1965 Act.

56 It is not suggested that members of the public used the sports arena vi, by force: the owners did not try to stop them and so there was no question of them overcoming any resistance on the owners' part. Equally, the public were not enjoying themselves clam, by stealth: on the contrary, they used the land openly and the owners knew what was going on. The council concluded, however, that the local residents and others enjoying the land had been doing so precario, by virtue of the licence of the owners of the land. Admittedly, there was nothing to show that the owners had given any express permission or licence to the public. But the facts as a whole, and cutting the grass and constructing the seating in particular, showed that the owners had actively encouraged the use of the area for recreation and so had impliedly granted a licence, or given permission, for it to be used in that way. Use of the land by virtue of this licence or permission could not constitute use "as of right" for purposes of section 22(1) of the 1965 Act. Smith J [\[2001\] 1 WLR 1327](#) dismissed Mrs Beresford's application for certiorari to quash the council's decision, and the Court of Appeal [2002] QB 874 dismissed her appeal.

57 In Roman law "precarius" is the name given to a gratuitous grant of enjoyment of land or goods which is revocable at will. The arrangement is informal and is based on the grantor's goodwill, whether more or less enthusiastic. But, however informal, the arrangement does involve a positive act of granting the use of the property, as opposed to mere acquiescence in its use. The name suggests, and the Digest texts indicate, that in Roman law the paradigm case is of a grant in response to a request. The arrangement lasts for only so long as the grantor allows, tamdiu quamdiu is qui concessit patitur: D.43.26.1 pr, Ulpian 1 institutionum. The concept of precarium crops up in different areas of Roman law, but importantly in connexion with interdicts. The praetor protects someone from interference if he has taken possession of land, or begun carrying out work, nec vi nec clam nec precario.

58 In *De legibus et consuetudinibus Angliae* Bracton took over the noun precarium and its congeners from the vocabulary of Roman law and used them in a number of contexts, but always with reference to a gratuitous grant which is revocable at any time at the grantor's pleasure. See, for instance, lib 2 ff 52 and 52b. In lib 4 f 221 Bracton discusses the acquisition \*908 of easements by use for some time nec vi nec clam nec precario—the last being, the author says, the same as de gratia, of grace. Under reference to the second of these passages, in speaking of the use of a watercourse in [Burrows v Lang \[1901\] 2 Ch 502](#), 510, Farwell J asked "What is precarious?" and answered his own question: "That which depends, not on right, but on the will of another person." Some years before, in *Sturges v Bridgman* (1879) 11 Ch D 852, 863, Thesiger LJ had indicated that, if a man "temporarily licenses" his neighbour's enjoyment, that enjoyment is precario in terms of the civil law phrase "nec vi nec clam nec precario". It is important to notice that, in this regard, English law distinguishes between an owner who grants such a temporary licence or permission for an activity and an owner who merely acquiesces in it: Gale on Easements, 17th ed (2002), para 4-83. Someone who acts with the mere acquiescence of the owner does so nec precario.

59 The council were, accordingly, entitled to refuse Mrs Beresford's application for registration of the area as a town or village green only if those who used the sports arena did so by the revocable will of the owners of the land, that is to say, by virtue of a licence which the owners had granted in their favour and could have withdrawn at any time. The grant of such a licence to those using the ground must have comprised a positive act by the owners, as opposed to their mere acquiescence in the use being made of the land. Prudent landowners will often indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only. But I see no reason in principle why, in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant

circumstances.

60 In the present case the owners did not expressly license the use of the land by the public. The council rely on two circumstances, however, as justifying the inference that those who used the sports arena did so precario, merely by licence from the owners of the land. The first is that the owners cut the grass. But that is at least equally explicable on the basis that the owners were concerned, as many owners would be, for the appearance of such a large and prominent area of open land in the heart of the town. Like charity, care of amenities begins at home. The second matter relied on is the, now rather dilapidated, wooden seating along the perimeter. Whatever may have been its original purpose, the continued existence of the seating is consistent with the owners of the land having acquiesced, perhaps quite happily, in people using the area for football or other games which their friends or relatives would wish, or feel obliged, to watch. To an extent the owners may thus have encouraged these activities. The mere fact that a landowner encourages an activity on his land does not indicate, however, that it takes place only by virtue of his revocable permission. In brief, neither cutting the grass nor constructing and leaving the seating in place justifies an inference that the owners of the sports arena positively granted a licence to local residents and others, who were then to be regarded as using the land by virtue of that licence, which the owners could withdraw at any time.

61 In these circumstances I would conclude that local people used the land *nec precario*.

62 After the first hearing of the appeal, however, your Lordships invited further written and oral submissions from counsel on whether any of the **\*909** statutes that may apply to local authority land had conferred on the local residents and others a right to use the sports arena—with the result that their use would be "of right", as opposed to being "as of right" in terms of [section 22\(1\)](#) of the 1965 Act. Having considered those submissions, for the reasons given by my noble and learned friend, Lord Walker of Gestingthorpe, I am satisfied that, on the agreed facts, neither the designation of the land as "open space" in the New Town Plan nor any of the statutes conferred any such right in this case.

63 It follows that the local residents and others indulged in their sports and pastimes on the sports arena "as of right" in terms of section 22(1). Mrs Beresford is accordingly entitled to have the land registered under the 1965 Act as a town or village green.

64 In a memorable passage in *Napier's Trustees v Morrison* (1851) 13 D 1404, 1409, dealing with a public right of way, Lord Cockburn deprecated the citation in the Court of Session of authorities from England. He really wished, he said—taking a swipe at a future Lord President among others—that Scottish counsel and judges:

"could imitate the example set us by the counsel and the judges of that kingdom, who decide their causes by their own rules and customs, without exposing themselves by referring to foreign systems, the very language of which they do not comprehend."

Times change: in the course of the hearing of this appeal well-informed counsel on both sides referred your Lordships to a number of Scottish authorities on the acquisition of servitudes and public rights of way. In *Mann v Brodie* (1885) 10 App Cas 378, 385-387, Lord Blackburn analysed some of the differences between the English and Scots law on the topic. Lord Hoffmann referred to that discussion in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 352. While exercising all due caution, and at the risk of disturbing the shade of Lord Cockburn, I believe that the Scottish authorities can provide some assistance in this case, at least by way of confirming the conclusion that I have already reached.

65 The phrase "*nec vi nec clam nec precario*", taken over from Roman law, has resounded just as powerfully among Scots lawyers and judges as among their brethren south of the Border. But in reading the Scottish cases a linguistic point must be noted. English judges have tended to use "tolerance" as a synonym for acquiescence. See, for instance, [Mills v Silver \[1991\] Ch 271](#). Scottish judges, on the other hand, have tended to use "tolerance" as a synonym for permission and as a translation of *precarius*. This is perfectly

understandable since an owner who, perhaps somewhat reluctantly, decides to permit the public to walk across his land until further notice may be said to "tolerate" them doing so. That is what Lord Cockburn has in mind when he says in *Napier's Trustees v Morrison* 13 D 1404, 1408 that the defenders have possessed the road "by no trespass or tolerance, but as a public road". Similarly, in a different context, in *Scottish Property Investment Co Building Society v Horne* (1881) 8 R 737, 740 Lord President Inglis says that to warrant the remedy of summary ejection, the defender's possession of premises has to be vicious, i.e. obtained by fraud or force, or precarious possession. He adds: "A precarious possession is a possession by tolerance merely." It is in this sense that Lord Kinneir, a recognised authority on **\*910** Scottish land law, uses the phrase "tolerance or permission" in [Folkestone Corpn v Brockman \[1914\] AC 338](#), 356.

66 In [Marquis of Bute v M'Kirdy & M'Millan Ltd 1937 SC 93](#), for some 70 years the public on the Isle of Bute had used a track to pass from a public road to part of the foreshore for purposes of bathing and recreation. The Marquis of Bute, who owned the relevant land, contended that the use of the track by the public should be attributed to the tolerance of himself and his predecessors in title. He therefore sought interdict against a bus company who had been bringing large numbers of trippers to the point on the public road from which they could use the track to get to the beach. Rejecting the pursuer's contention, Lord President Normand held, at pp 119-120, that the proper question was whether:

"having regard to the sparseness or density of the population, the user over the prescriptive period was in degree and quality such as might have been expected if the road had been an undisputed right of way. If the public user is of that degree and quality, the proprietor, who fails for the prescriptive period to assert or to put on record his right to exclude the public, must be taken to have remained inactive, not from tolerance, but because the public right could not have been successfully disputed or because he acquiesced in it."

The First Division of the Court of Session, having concluded that the bus company had proved the existence of a public right of way for pedestrians, pronounced decree of absolvitor in their favour.

67 In [Cumbernauld and Kilsyth Council v Dollar Land \(Cumbernauld\) Ltd 1992 SC 357](#) the council raised an action of declarator that a public right of way existed over a raised walkway crossing the centre of Cumbernauld. The walkway, which the defenders had bought along with other properties from the Cumbernauld Development Corporation, was extensively used by the public to get from one part of the town to another. Holding that a public right of way had been established, Lord President Hope observed, at p 368:

"the occasional or irregular use of a path by hill walkers or by others who resort to the countryside can readily be distinguished from the continuous use of it by members of the public as a route from one public place to another. It seems to me to be clear, on an examination of all the later authorities, that a proprietor who allows a way over his land to be used by the public in the way the public would be expected to use it if there was a public right of way cannot claim that that use must be ascribed to tolerance, if he did nothing to limit or regulate that use at any time during the prescriptive period."

In dismissing the appeal to this House from the decision of the First Division, [1993 SC \(HL\) 44](#), 47a-d, Lord Jauncey of Tullichettle adopted and approved both this passage from the opinion of Lord President Hope and the passage that I have quoted from the opinion of Lord President Normand in [Marquis of Bute v M'Kirdy & M'Millan Ltd](#). Lord Jauncey went on to note, at pp 47h-48a, that there is no principle of law which requires that there be conflict between the interest of the users of the right of way and those of a proprietor. If acquiescence could lead to a public right of way being **\*911** established, "encouragement can even more readily be said to have the same consequences".

68 Similarly, in the present case, for at least 20 years before Mrs Beresford made her

application the inhabitants of Washington had played and passed the time on the sports arena in the way they could have been expected to do as of right on a town or village green. Therefore, in the absence of any act on the owners' part to regulate the activities on the land or otherwise to show that the inhabitants were disporting themselves only by the owners' revocable leave or licence, it is proper to infer that the owners had acquiesced in the inhabitants' use of the land as of right. The same result follows if the owners are thought to have encouraged the activities.

69 For these reasons, as well as those given by my noble and learned friends, Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, I would allow the appeal.

LORD WALKER OF GESTINGTHORPE

70 My Lords, the crucial issue in this appeal turns on the words "as of right" in the definition of "town or village green" in section 22(1) of the Commons Registration Act 1965. I set out the definition with the insertion of paragraph numbers which are not in the Act but are often used as a convenient means of denoting its three limbs:

"[a] Land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."

71 It might be supposed that there is, after the magisterial speech of Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, little more to be said on the subject. Certainly any consideration of the subject must start with Lord Hoffmann's speech, in which the rest of your Lordships' House concurred. But on the undisputed facts of this case (as to which I gratefully adopt the summary in the speech of my noble and learned friend, Lord Scott of Foscote) a new issue has been raised, that of implied licence (or permission, or consent). That was the ground on which the Sunderland City Council succeeded before the judge [2001] 1 WLR 1327 and in the Court of Appeal [2002] QB 874.

72 It has often been pointed out that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closer to "as if of right" (see for instance Lord Cowie in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035, 1043, approving counsel's formulation). This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."

73 In *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, 231 the Earl of Halsbury LC referred to the phrase "as of right" used in *\*912 section 5* (and reflected in *section 2*) of the Prescription Act 1832, and observed:

"I cannot help thinking there has been a certain play upon words in commenting upon them. In a certain sense a man has a right to enjoy what he has paid for, and, therefore, if the appellant here at any time during the year when she had paid for the right to use this way had been hindered, she would have had a right to complain that what I will call her contract had been broken, and that during the year she had a right to use the way. I do not think that this would have established a right in the proper sense, because, being but a parol licence, it might be withdrawn, and her action would be for damages, but she would have no *right* to the way. And in no sense could the right be the right contemplated by the Act. That right means a right to exercise the right claimed against the will of the person over whose property it is sought to be exercised. It does not and cannot mean an user enjoyed from time to time at the will and

pleasure of the owner of the property over which the user is sought."

74 In that case the party claiming a right of way through the yard of a neighbouring inn, and her predecessors in title, had for well over 40 years used the inn yard (the only means of access with carts and horses to her premises) and had paid the annual sum of 15 shillings to the innkeeper. The most likely explanation of this payment was as an acknowledgement of the innkeeper's title, amounting (as it was put by Lord Lindley, at p 239) to: "a succession of yearly licences not, perhaps, expressed every year, but implied and assumed and paid for." So to make a charge for entry to land is one way of making clear that entry is not as of right. The paying entrant would be there by licence, even though he would (as Lord Halsbury pointed out) have the right to complain if the landowner broke the terms of his contract.

75 An entry charge of this sort can aptly be described as carrying with it an implied licence. The entrant who pays and the man on the gate who takes his money both know what the position is without the latter having to speak any words of permission (although he may qualify the permission by saying that no dogs, or bicycles, or radios are allowed). Similarly (especially in a small village community where people know their neighbours' habits) permission to enter land may be given by a nod or a wave, or by leaving open a gate or even a front door. All these acts could be described as amounting to implied consent, though I would prefer (at the risk of pedantry) to describe them as the expression of consent by non-verbal means. In each instance there is a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass.

76 The authorities contain many references (which can be identified and understood more readily since Sunningwell) to the importance of looking at the overt conduct of those involved, including what the landowner said and did from time to time during the period which the court has to examine. If the landowner found that his land was being used as a footpath by his neighbour (in a private right of way case) or by the whole village (in a public right of way case) and he suffered in silence, he would be treated as having acquiesced in what was going on. As Fry J (one of the judges who advised the House of Lords in *Dalton v Henry Angus & Co* (1881) 6 App Cas 740) said in that case, at p 773: **\*913**

"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 acquiescence and nothing else is the principle upon which these expedients rest."

(Lord Blackburn took a different view about acquiescence—see pp 817-818—but the view expressed by Fry J seems to have prevailed.)

77 A landowner who wishes to stop the acquisition of prescriptive rights over his land must not acquiesce and suffer in silence. The Lord President, Lord Hope, put the point clearly in the Inner House in [Cumbernauld 1992 SLT 1035](#), 1041 (that case was concerned with [section 3](#) of the [Prescription and Limitation \(Scotland\) Act 1973](#), which does not use the phrase "as of right"; but it is common ground that there is still such a requirement under the law of Scotland):

"where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance. If his position is to be that the user is by his leave and licence, he must do something to make the public aware of that fact so that they know that the route is being used by them only with his permission and not as of right."

Lord Jauncey of Tullichettle quoted that passage with approval when the case came before your Lordships' House on a further appeal [1993 SC \(HL\) 44](#), 47; the rest of the House concurred in the speech of Lord Jauncey.

78 Later in his judgment in the Inner House Lord Hope said, at p 1042:

"a proprietor who allows a way over his land to be used by the public in the way the public would be expected to use it if there was a public right of way cannot claim that that use must be ascribed to tolerance, if he did nothing to limit or regulate that use at any time during the prescriptive period."

Mr Laurence (for the appellants) emphasised Lord Hope's repeated references (in the two passages set out above, and again at p 1042I) to the need for the landowner to *do* something.

79 Acquiescence, by contrast, denotes passive inactivity. The law sometimes treats acquiescence as equivalent in its effect to actual consent. In particular, acquiescence may lead to a person losing his right to complain of something just as if he had agreed to it beforehand. In this area of the law it would be quite wrong, in my opinion, to treat a landowner's silent passive acquiescence in persons using his land as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct) to those persons. To do so would be to reward inactivity; despite his failing to act, and indeed simply by his failure to act, the landowner would change the quality of the use being made of his land from use as of right to use which is (in the sense of the Latin maxim) precarious.

**\*914**

80 This point was put very clearly, and to my mind very compellingly, by Dillon LJ in [Mills v Silver \[1991\] Ch 271](#), 279-280. After referring to what the judge at first instance had said about tolerance Dillon LJ observed:

"The topic of tolerance has bulked fairly large in recent decisions of this court dealing with claims to prescriptive rights, since the decision in [Alfred F Beckett Ltd v Lyons \[1967\] Ch 449](#). If passages in successive judgments are taken on their own out of context and added together, it would be easy to say, as, with all respect, it seems to me that the judge did in the present case, that there is an established principle of law that no prescriptive right can be acquired if the user by the dominant owner of the servient tenement in the particular manner for the appropriate number of years has been tolerated without objection by the servient owner. But there cannot be any such principle of law because it is, with rights of way, fundamentally inconsistent with the whole notion of acquisition of rights by prescription. It is difficult to see how, if there is such a principle, there could ever be a prescriptive right of way. It follows that the various passages in the judgments in question cannot be taken on their own out of context. If each case is looked at on its own and regarded as a whole, none lays down any such far-reaching principle."

81 Parker and Stocker LJ both agreed with Dillon LJ, although each added some further reasons. Parker LJ referred to what Lord Halsbury had said in [Gardner \[1903\] AC 229](#), 231 (in the passage which I have already quoted) and said [\[1991\] Ch 271](#), 289, that by "against the will of the person" Lord Halsbury meant no more than "without the licence of the owner". Stocker LJ stated, at p 293:

"It seems clear from the passage in the judgment cited by Dillon LJ that the judge in the instant case failed to recognise the very limited circumstances in which the word 'toleration' has been used in the cases cited which might be summarised as relating to the exercise of a purported right which was casual or trivial or in respect of which some form of consent for the user was established

so that acquiescence did not arise."

I respectfully agree with both these observations. Stocker LJ was making the same point as Dillon LJ, that in this context consent is not a synonym for acquiescence, but almost its antithesis: the former negatives user as of right, whereas the latter is an essential ingredient of prescription by user as of right.

82 Smith J referred to [Mills v Silver](#) although it had not been cited to her. It was cited in the Court of Appeal but was not referred to by Dyson LJ. It was referred to with approval by Lord Hoffmann in Sunningwell. For my part I have found it, after Sunningwell, the most helpful guide to the relevant principles.

83 In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and demonstrate that their access to the **\*915** land, when they do have access, depends on the landowner's permission. But I cannot agree that there was any evidence of overt acts (on the part of the city council or its predecessors) justifying the conclusion of an implied licence in this case.

84 The grounds of the licencing committee's decision, based on the report by the director of administration, were:

"(a) Members were satisfied that evidence showed the use of the sports arena for 'lawful sports and pastimes' by the inhabitants of Washington for a period of at least 20 years prior to the making of the application, the level of use being more than trivial or sporadic. The real issue for consideration was whether there had been permission or a licence to use the site in this way. (b) Having taken legal advice, members were satisfied that an implied licence would be sufficient to defeat the application, provided that there was sufficient evidence to support the existence of a licence. (c) Members considered that there was evidence of an implied licence since the site is publicly owned land, specifically laid out as an arena with seating, which is adjacent to the Princess Anne Park and which has been maintained by the council and the Washington Development Corporation before it. Members agreed with the comment in the report that 'it is difficult to conceive that anyone could have imagined that this was other than a recreational area, provided for use by the public for recreation'. The other information contained in section 2 of the report, whilst not in itself conclusive, supported the view that the sports arena was intended for public use."

85 In my opinion this reasoning, and the fuller reasoning in the director's report which it was based on, must be regarded as erroneous. The fact that the city council and its predecessors were willing for the land to be used as an area for informal sports and games, and provided some minimal facilities (now decaying) in the form of benches and a single hard cricket pitch, cannot be regarded as overt acts communicating permission to enter. Nor could the regular cutting of the grass, which was a natural action for any responsible landowner. To treat these acts as amounting to an implied licence, permission or consent would involve a fiction, like the fiction under which the placing or maintaining on land of an "allurement" was regarded as an implied licence which might lead to a straying child being treated as an "invitee" rather than a trespasser for the purposes of occupiers' liability: see generally [Herrington v British Railways Board \[1972\] AC 877](#), especially the speech of Lord Diplock, at pp 932-936. For the reasons given by Dillon LJ in [Mills v Silver \[1991\] Ch 271](#), to add the fiction of implied licence to the unavoidable fiction of presumed grant would reduce this part of the law to a state of incoherence.

86 I would however add that I feel some sympathy for the view taken by the courts below.

The city council as a local authority is in relation to this land in a different position from a private landowner, however benevolent, who happens to own the site of a traditional village green. The land is held by the city council, and was held by its predecessors, for public law purposes. A local resident who takes a walk in a park owned by a local authority might indignantly reject any suggestion that he was a trespasser unless he obtained the local authority's consent to enter. He might say that it was the community's park, and that the local authority as its legal owner **\*916** was (in a loose sense) in the position of a trustee with a duty to let him in. (Indeed that is how Finnemore J put the position in [Hall v Beckenham Corpn \[1949\] 1 KB 716](#), 728, which was concerned with a claim in nuisance against a local authority, the owner of a public park, in which members of the public flew noisy model aircraft). So the notion of an implied statutory licence has its attractions.

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

88 Those situations would raise difficult issues but in my opinion they do not have to be decided by your Lordships on this appeal, and would be better left for another occasion. The undisputed evidence does not establish, or give grounds for inferring, any statutory trust of the land or any appropriation of the land as recreational open space. Counsel for Sunderland rightly did not argue for some general implied exclusion of local authorities from the scope of [section 22 of the Commons Registration Act 1965](#).

89 It is worth summarising the salient points of the evidence.

(a) The land was first acquired by the Washington Development Corporation ("WDC") as part of what seems to have been an extensive acquisition under the very wide powers in the New Towns Act 1965. The WDC did not acquire this particular area of land for any specific purpose, and was not under an obligation to appropriate it for any specific purpose (such as housing, public buildings, or open space). The plans for the new town provided for the area to be included in a sports complex consisting of an indoor leisure centre and an indoor swimming pool (both of which were built) and a tartan running track (enclosing a football field) and a grandstand (which were not built). Had the track and the grandstand been built, public access to them would no doubt have been regulated in some way (probably including charging an entrance fee). The area would have been devoted to recreation but local inhabitants would not have used it as of right.

(b) The ambitious plans for the sports complex have never been fully realised, but they still seem to have been regarded as at least a possibility in 1982 (when a manuscript draft report referred to an unencouraging opinion from the Sports Turf Research Institute) and in 1983 when the city council, although not yet owners of the land, referred to "the accommodation of a running track" in a report entitled 'Open Space Recreation'. In the meantime recreational use of the area by local inhabitants was tolerated (but not, for reasons which I have already stated, enjoyed by any overt licence).

**\*917**

(c) The land was transferred by the WDC to the Commission for the New Towns ("CNT") in 1989 as part of a general disposal of WDC's assets. It appears that the CNT retained the land in 1991 (when other assets were transferred to the city council) because it was regarded as having potential for commercial development (see para 2.4 of the report by the director of administration).

(d) When the land was eventually transferred by the CNT to the city council in 1996, its use

was restricted by covenant to "the provision of magistrates' courts and/or community health facilities and/or community leisure/recreation and/or other similar community related uses and developments" (see para 2.7 of the same report).

90 In short there is no evidence of any formal appropriation of the land as recreational open space by the city council or its predecessors. Nor is there material from which to infer an appropriation. Such action by the WDC or the CNT would have been unnecessary, and at or after the city council's acquisition in 1991 an appropriation as open space would have been inconsistent with the site's perceived development potential. It is true that the public's interim use of the land for recreation was not inimical to the city council's interests. But user can be as of right even though it is not adverse to the landowner's interests.

91 That was established by the decision of this House in [Cumbernauld 1993 SC \(HL\) 44](#), 47-48 where Lord Jauncey said:

"senior counsel for the appellants argued that unless a public user of a way was adverse to the interests of the proprietor it must necessarily be ascribed to tolerance and that since the user of [a pedestrian walkway in the middle of a new town] had been positively encouraged by the development corporation, it could not amount to user as of right. For a user to be so considered there must, it was argued, be conflict between the interest of the users and that of the proprietor. For this somewhat stark proposition counsel could produce no authority. There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor. As Lord President Normand pointed out in [Marquis of Bute v M'Kirdy & M'Millan](#) acquiescence on the part of a proprietor in continued user throughout the prescriptive period without taking steps to assert or record his right of exclusion will result in the constitution of a public right of way against him. If acquiescence in these circumstances produces such a result encouragement can even more readily be said to have the same consequences."

92 For these reasons, and for the further reasons set out in the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry, I would allow this appeal and quash the decision which the city council took by its licensing committee. I reach this conclusion with mixed feelings. The campaigning group named Washington First may feel that they have won a famous victory, and saved an important public amenity from being built on. That seems to be the likely consequence of this case. But the campaigners have achieved that end by a route which has bypassed normal development controls, and in a way which may be thought to stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended. Any change in the law is of course a matter for Parliament but I respectfully agree with Lord Bingham's \*918 observations as to the need for care on the part of decision-makers, whose conclusions as to the existence of a town or village green may have very important practical consequences. I also respectfully agree with Lord Rodger's observations as to the assistance to be derived from the Scottish authorities, provided that note is taken of the different meanings in which "tolerance" has been used in England and Scotland respectively.

*Appeal allowed. Decision of licensing committee refusing application for registration quashed. Direction that licensing committee give effect to application for registration in light of opinions expressed in House. Question of costs adjourned pending written submissions.*

## Representation

Solicitors: Southern Stewart & Walker, South Shields; Legal and Democratic Services, Council of the City of Sunderland. C T B

Commons Registration Act 1965, s. 13: "Regulations under this Act shall provide for the amendment of the registers maintained under this Act where ... (b) any land becomes common land or a town or village green ..." S 22(1): "In this Act ... 'town or village green' means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."

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**Barkas v North Yorkshire CC**

**2011 WL 6329205**

CO/122/2011

Neutral Citation Number: [\[2011\] EWHC 3653 \(Admin\)](#)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Leeds Combined Court Centre

Oxford Row

Leeds LS1 3BG

Tuesday, 20th December 2011

B e f o r e:

MR JUSTICE LANGSTAFF

Between:

R (BARKAS)

Claimant

v

NORTH YORKSHIRE COUNTY COUNCIL & SCARBOROUGH COUNCIL

Defendant

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400 Fax No: 020 7404 1424

Official Shorthand Writers to the Court)

Mr Ormondroyd (instructed by Richard Buxton Sols) appeared on behalf of the Claimant

Miss Stockley (instructed by North Yorkshire County Council In House) appeared on behalf of the Defendant

J U D G M E N T

(As Approved)

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47. MR JUSTICE LANGSTAFF: The Haredale playing field at Haredale Road, Whitby, became used as a playing field as long ago as 1948. On 12th October 2007 an application was made by some of those living close to the playing field to register the land as town or village green.

47. As one leaves Whitby toward Scarborough, the Haredale Road will take one past the playing field. It is as an inspector, Vivian Chapman QC, who was later to describe a field which was bell shaped in plan view. There were housing estates to the east and to the west. At the foot of the bell, the southern side of the field, there was further housing.

47. A non statutory Inquiry was heard in April 2010 with Mr Vivian Chapman QC as the inspector. In his report on 28th July 2010, he came to the conclusion that the use of the land on the evidence that he had received, which broadly he accepted, in so far as it came from the local residents, had been exercised without forcible entry by them onto the land, had not been exercised secretly and was not precarious in the sense of being expressly permissive. However, he declined to advise registration of the land because of the

Commons Act 2006, section 15 provides an obligation to register where a significant number of the inhabitants of any locality 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 continued to do so at the time of the application (section 15(2)(a) and (b)). He concluded that the use made by the residents was not as of right, which implies that there is no actual statutory right, but it was by right.

47. The claimant takes issue with that conclusion. She argues that the use was upon a proper understanding of the applicable legislation as of right and not by right, at least by some of those who used the playing field and therefore the inspector's advice was flawed.

47. The defendant council received the inspector's report and a further report dealing with matters which had been raised by the applicants in October 2010 and proceeded to a decision of which formal notification was given on 29th October 2010. Both parties before me, the interested party taking no active part in the proceedings on the basis that it stands by the approach of the defendant and does not wish to make separate submissions, ask me to accept that the local authority adopted the views of the inspector. Accordingly, if he was in error, the local authority was in error and its decision to refuse to register was legally flawed.

#### The Issue

47. The issue for me arising out of that brief synopsis is whether the Inspector was wrong in law to conclude that the public had a legal right to use the land for recreational purposes when it was laid out and maintained as a recreation ground, open to the public, pursuant to the Housing Acts.

47. This question was addressed by the Inspector at paragraph 121 of his report of July 2010. He said:

"In my view, the critical issue in this case is whether recreational user of the Field by local people was 'by right' or 'as of right'."

He then went on to say:

"Although the discussion of the point was obiter, there is strong guidance from the House of Lords in *Beresford* [that being a reference to [R \(On the application of Beresford v Sunderland County Council, 2003 UKHL 60](#) also reported [\[2004\] 1 AC 889](#)] that user which is under a legal right is not user 'as of right'".

With that proposition, Mr Ormondroyd, who appears for the claimant agrees. The Inspector went on to say at paragraph 122:

"It appears to me to be a reasonable inference that the Field was set out and maintained as a recreation ground pursuant to s 80 of the 1936 Act. Provided that the Field benefited council tenants (which it clearly did) it did not matter that it also benefited other people within the local community: [HE Green & Sons v The Minister of Health \(No 2\) \[1948\] 1 KB 34](#). This principle would, in my view, justify the council in allowing use of the Field by the Sunday League, even if its players were not all council tenants. Accordingly, it was within the power of Whitby UDC under s 80 to set out and maintain a public recreation ground provided that it benefited its tenants.... In any event, a local authority had power to lay out public open spaces on council estates under s 79(1) (a) without ministerial consent. If there had been no ministerial consent to setting out the Field as a recreation ground, it seems to me that the Field would fall to be regarded as a public open space. The 1936 Act contains no definition of 'recreation ground' or 'open space' for the purposes of these sections."

The reference to section 80 of the 1936 Act was a reference to section 80 of the Housing Act 1936, under which the land was acquired by the local authority in 1948, as I have described.

47. Section 80 comes in a part of the Act, Part 5 entitled "Provision of housing accommodation for the working classes". It is common ground that between the parties before me, that those words set out the purposes of the Part. Section 80 reads as follows:

"(1) 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 and if desired jointly with any other person, in connection with any such housing accommodation, any building adapted for use as a shop, 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."

47. Section 79(1) (a) to which the Inspector made reference is in the same part and reads:

"Where a local authority have acquired or appropriated any land for the purposes of this Part of this Act then without prejudice to any of their other powers under this Act the authority may (a) lay out and construct public spits or roads and open spaces on the land."

I shall return to the decision in Green shortly.

47. The Inspector postulated at paragraph 124 that the question that arose was whether local people had a legal right to use a recreation ground which was set out under section 80 of the 1936 Act and during the relevant 20-year period maintained under section 12 of the 1985 Act as a recreation ground open to the public. The reference to section 12 of the 1985 Act is a reference to the Housing Act of 1985, which is the statutory successor of section 80. It makes no reference to the working classes, but in section 12 reads:

"Provision of shops, recreation grounds.

(1) A local housing authority may, with the consent of the Secretary of State, provide and maintain in connection with housing accommodation provided by them under this Part-

(a) buildings adapted for use as shops,

(b) recreation grounds, and

(c) other buildings or land.

which, in the opinion of the Secretary of State, will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided."

The power is thus though not identically expressed in materially the same terms as was section 80 of 1936 Act.

47. The Inspector reasoned, further in paragraph 124, that the Open Spaces Act 1906, created by section 10 and expressed statutory trust for public recreation. However, he observed:

"... there is authority that where a statute empowers a local authority to acquire and lay out land for public recreation, the public have a legal right to use it. This point has been explored in relation to the Public Health Act 1875 s 164 (which contains no express trust for public recreation) in a series of cases..."

He set them out, and added:

"The same principle must apply to a recreation ground laid out under statute as an area for public recreation on a council estate. Council tenants, who are the primary objects for the provision of recreation must have had a legal right to use the land for harmless recreation. It would be absurd to think of them as trespassers unless they first obtained the permission of the council to use the land for harmless recreation. Where the recreation ground, as in the present case, is laid out and maintained as a recreation ground open to the public pursuant to statutory powers, it seems to me that the public must similarly have a legal right to use the land for harmless recreation. Again, it would be absurd to regard them as trespassers. This view is supported by the obiter comments of Lord Walker in para 87 of Beresford. I therefore consider that at least until 2003, when SBC [that was being a reference to the interested party] ceased to be owner of the remaining council houses, recreational use of the Field by local people was by right and not as of right."

47. The obiter comments of Lord Walker in paragraph 87 of Beresford, which support the Inspector's views, he thought as to the absurdity of concluding that some using the ground for recreation in the particular circumstances of this case should be treated as trespassers was a reference to the following passage in Lord Walker's speech in Beresford:

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

That was plainly obiter, but the Inspector regarded it as supportive of his view, as to the absurdity of holding that those who were local residents could be regarded as trespassers on the land and similarly, if they were not trespassers but entitled to use the property, that it would be absurd to treat the public generally as also being trespassers.

#### Submissions

47. Mr Ormondroyd, for the claimant, argues, in an argument of subtlety and care, that the Inspector in those passages which I have cited made a mistake of law. He wrongly introduced the word "public" into paragraph 122. The power under section 80 of the 1936 Act was a power to provide a recreation ground, the word "public" does not appear. Yet the Inspector said, in a relevant passage:

"Accordingly, it was within the power of Whitby UDC under s 80 to set out and maintain a public recreation ground..."

If the local authority had power to set out and maintain a public recreation ground, he accepts that the public would use that ground by right and not as of right. But his argument is that the only power which section 80 conferred was a power to provide a recreation ground for those whose houses were being provided under Part 5.

47. The power expressly was to be exercised to serve a beneficial purpose in connection with the requirements of the persons for whom the relevant Housing accommodation is provided. Those persons, he submits, were the council tenants of the Western Estate, who belonged to the working classes. It was for them and them only that the recreation ground could be provided under section 80. Although he was prepared to accept that the local authority had power to allow others onto the land, should it wish to do so, they would not come onto that land by right those who lived in the housing estate in respect of which the recreation ground was provided where those who had the right under statute to use the recreation ground.

47. As a matter of fact it is accepted that the recreation ground was acquired by the local authority and laid out as a recreation ground, in connection with the Western Estate not the Eastern nor the Southern Estates. Accordingly, any person from either of those two latter estates who used the land, and the evidence before the Inspector was that many such persons did, would not use the land by right on the findings of the fact of the Inspector they would use it as of right. There would thus be persons who would be entitled to make an application under the Commons Act 2006, upon a proper application of that Act therefore, since the requirements of the Act were met, the land should have been registered as a town or village green.

47. He submits that the Inspector was not entitled to draw the conclusion he did from the Green case. I now return to examine that case in the light of the submissions made by Mr Ormondroyd. In that case, what was centrally in issue was, first, whether the local authority, by section 73 of the Housing Act 1976 had the power to acquire any land, as the site for the erection for houses for the working classes, if the local authority intended that some of those houses should be occupied by persons who are not members of the working classes. A second issue arose under section 80. That was whether, if the local authority intended that buildings intended for use as shops, recreation grounds and other buildings would be available to the general public and not just the council house occupants, who were of the working class, the local authority had power to do what it wished to do.

47. Denning J (as he then was) dealt with the first question by stating that he was satisfied that the local authority did not mean to restrict itself in its letting of the houses, it was to build on the land it was attempting to acquire, to those who were of any particular class. He did not however, regard that as invalidating the exercise of the powers. He then said this, page 41:

"The next question is whether the order [that was the compulsory purchase order] is invalid because, in addition to houses being put up on this land, the co-operation proposed to put up nurseries, a health centre, a youth centre, shops, a public house, and so forth. It is said, and truly said, that in providing or contemplating the provision of those amenities, the co-operation intend that they should be available, not only to the persons living in the houses that are going to be put up in this estate, but also for persons from the neighbouring areas. It is said that makes the proposal invalid. This contention depends on the true interpretation of s 80. That section, contemplates that, providing the Minister consents, the land may be used, not only for houses, but also for shops, recreation grounds, and other buildings, which 'will serve a beneficial purpose in connexion with the requirements of the persons for whom the housing accommodation is provided.' It is said if this proposed health centre, shops, etc, are in connexion with the requirements of other persons, in addition to those of this estate, that makes it outside the powers of s 80. I do not think that is a correct interpretation. The fact that it will also serve a beneficial purpose for other persons does not make it any the less a beneficial purpose for the persons in this housing estate. I see no reason for introducing the limitation which is suggested, and I do not think the proposed development is invalid."

47. Mr Ormondroyd argues that that case considered whether the exercise of the power of compulsory purchase was invalid because of the intention of the local authority that the facilities to be built upon the land so purchased would be used not just by residents of the council accommodation but also by others. It was not also authority for the proposition that members of the public, outside the council tenants had a statutory right to use the facilities to be provided under that section. The question of user rights was not relevant and it was not discussed even in passing. He accepted however that on the basis of *Green*, the council could allow use of the land by persons other than its tenants.

47. He argued that the analogy with the cases under section 164 of the Public Health Act 1875 was not a proper analogy which could be of any assistance to the Inspector. That is because the 1875 Act, within its terms, provides that a local authority may purchase "... lands for the purpose of being used as public walks or pleasure grounds ..." That is a power expressly to provide a pleasure ground for public use. Where there is a power, which may be exercised to provide land for public purposes, the public have, or may have a right to use the land for those purposes. But section 80 contains no word "public" qualifying "recreation grounds". He was therefore happy to accept that the case law under section 164 says what the Inspector concluded it did but argued that this was beside the point. In my view, his contention here has some force. In order to decide whether the land at Haredale playing field is land which the public more generally than those who occupy council housing in the nearby estate to the west were entitled to. It cannot assist to begin, by regarding the recreation ground as a public ground because that begs the question. He notes that section 79, by contrast uses the word "public". He submits that there is no proper assistance to be gained, as the Inspector purported to gain it, from the observations that Lord Walker made in *Beresford*. The reasoning in Lord Walker's speech is contained in the paragraphs up to including paragraph 85, beyond that including paragraph 87. His remarks are obiter. The reference by Lord Walker to the Open Spaces Act 1906 was beside the point here, where neither party was asking the court to conclude that the Open Spaces Act 1906 applied, the statutory power which was being exercised, so the Inspector found was that under section 80 of the Housing Act. Secondly, his observation, at the conclusion of paragraph 87.

"The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation."

That could be a reference to the 1875 Act but it was unclear. There had been here, no

formal appropriation which was recorded in any document. There was a contrast between this approach by Lord Walker and that adopted by Lord Scott (see paragraphs 29 and 30 of his speech). The latter did not talk about appropriation.

#### Discussion

47. In my view the first question is whether on the facts as set out by the Inspector and which are not subject to challenge, the provision of a playing field at Haredale came within section 80 of the Housing Act. Plainly, in my view, it did. The local authority were empowered to provide and maintain "any recreation grounds" in connection with the Housing Act accommodation, in this case the western estate; which would serve a beneficial purpose in connection with the requirements of the persons in that estate.

47. This requires a court to ask whether the land was acquired in connection with that accommodation, plainly on the findings of fact by the Inspector it was. But was it a recreation ground? Plainly it was. Did it serve a beneficial purpose in connection with the requirement of the persons who were council tenants of the working class in the western estate? Plainly it did. Accordingly, those persons, in my view, were entitled to use the recreation ground under the Housing Act 1936. Thus far Mr Ormondroyd would agree.

47. The question then arises whether those who were not council tenants in that class, in that estate, but lived elsewhere would also be entitled to use the land.

47. This is a general question, applicable to all cases in which section 80 of the Housing Act 1936 and its statutory successors have been used.

47. Here, it is plain from the decision in *Green* that the local authority had power to permit other people to use the recreation ground at the very least. When I invited Mr Ormondroyd to say what the power was, he could point only to section 80. The context is, as the Inspector observed, that a local authority is a statutory body. It can only act if it has statutory power to do so. It could therefore only permit the use of the recreation ground if it had power to do so. The argument that the recreation ground is provided so as to confer an entitlement only upon those in the Western estate is therefore an argument that there is no power to provide the same facility for others, even although the recreation grounds provision is within the four corners of the wording of the Act. This, it seems to me, is directly analogous to the situation which presented itself before Denning J in the case of *Green*. He concluded, in reasoning, which I gratefully adopt, that the fact that a local authority intended, in his case, that the land be used by those other than the persons for whose principal benefit the statutory power existed did not invalidate the exercise of that power.

47. Accordingly, as it seems to me, the local authority had power to set out a recreation ground which might be intended for use by the public if that is what the local authority so chose. Here, it seems to me that there is a finding of fact by the Inspector that the ground was set out as a public recreation ground. The local authority set it out. When it did so, according to the Inspector's report, it provided entrances and exits to and from the recreation ground, to the northeast, the northwest, the southeast and the southwest. Those exits and entrances did not lead to and from the Western estate alone.

47. He described the playing field as having all the appearance of a typical municipal recreation ground with easy access from the surrounding estate (paragraph 6). He described the entrances to the field as being four public entrances. He had an accompanied site view. He was therefore plainly of the view, from that material, and from his visit, that this field had all the characteristics of a field open to the public and could only have concluded that it was set out in that way.

47. His observations about section 79 of the Housing Act 1936 were to the effect that the local authority could provide a public recreation ground in pursuance of its powers in respect of that Part of the Act and therefore for the purposes of that Part which I have already described. He bolstered that view, rightly in my judgment, by considering the observations of their Lordships in *Beresford* (see paragraph 121) for all the passages which he considered. But essentially he took the comments of Lord Walker as demonstrating support for the view that it would be absurd to draw a distinction between classes of use by

different classes of people, in circumstances in which the recreation ground was set out with every appearance of it being for public use, under a power which permitted it and in pursuance of a section which, as Mr Ormondroyd accepts, does not draw any distinction between the council house tenants and others when it came to the use of facilities provided under the power contained in that section.

47. Accordingly I accept that the construction which I prefer of the applicable legislation is exactly that which commended itself to the Inspector and this avoids the absurd consequence of distinctions having to be made between those who are working class and those who are not, at least while that unfortunate description could be said to apply for those who were tenants of the council in council houses and others for at least as long as they did. The analysis conducted by Mr Ormondroyd, in my view, misses the point.

47. The point is whether or not a recreation ground could be provided. If it was and if it was laid out for general public use, there would be nothing that would prevent it. That does not mean in my view that some of those using it were trespassers, whether to be regarded as tolerated trespassers or not, nor does it mean that they were permitted to be there and, I should add, if they had been permitted or were held to be permitted to be there, then they would be in no position to make an application under the 2006 Act because their position would be precarious within the traditional meaning of that word.

47. The conclusion I reach is furthermore consistent with the position of a local authority as a public body. Its powers and its duties are related to the fact that it is representative of those who come within its area of authority. That area is far larger and wider than a housing estate on part of the local authority's area.

47. The emphasis in the sections of the Housing Act is on public provision, it is not, as I read it, essentially upon making provision for classes of the public distinct from one another, even though a recreation ground may only be set up under section 80 if it will be of benefit to people in housing accommodation to which that is related. The point I make about the general functions of a local authority is amply supported by considering other statutes, which demonstrate that the public policy is in emphasising the public provision which local authorities may make (see for instance the Open Spaces Act and the 1875 Act) to the extent that they may be regarded as of any assistance at all.

47. Accordingly, the conclusion which the Inspector came to at paragraph 124 and 125 was, as it seems to me, one reached not in error of law but with a careful and proper regard to the facts, to the authority so far as it was of assistance and upon a proper application of the statute. It follows that in conclusion, this application, despite its subtle and careful nature is one which has to fail and does.

47. MR ORMONDROYD: My Lord, just before my learned friend addresses you on costs there was one point which your Lordship did not deal with in your judgment, the point about the charge of the football teams to use the field.

47. MR JUSTICE LANGSTAFF: I took the view that was not of any assistance one way or the other for this reason. It is not I think argued by either of you that it is inconsistent with the land being a public recreation ground. You, for your part could not I think say that those who used it would have any right themselves to apply for registration because plainly their use would be permissive in so far as it was use at all. The way in which the Inspector dealt with that, as it seems to me, was appropriate. It did not seem to be centrally relevant to the interpretation of section 80 which this case depended upon.

47. MR ORMONDROYD: Yes.

47. MR JUSTICE LANGSTAFF: Thank you for mentioning it.

47. MISS STOCKLEY: My Lord, in those circumstances, in relation to costs I do have an application for the defendant's costs. However I understand the claimant is legally aided and therefore I make an application for the usual order that the appropriate assessment of section 11 of the Access to Justice Act.

47. MR JUSTICE LANGSTAFF: Mr Ormondroyd, you want to presumably--

47. MR ORMONDROYD: That is right detailed community legal funding assessment my

Lord.

47. MR JUSTICE LANGSTAFF: Thank you both for your assistance.

47. MR ORMONDROYD: There is also a matter of an appeal. I think I need to seek permission from your Lordship to appeal now. My Lord, excuse me for if my thoughts are not the clearest, having just heard your Lordship's judgment that in essence, my Lord this is an important point. Your Lordship's judgment says in terms that this is a reasoning which applies anywhere section 80 is relied on and that is not an uncommon, it is not an uncommon occurrence of village green enquiries for this to be relied upon, and my Lord, yes, I do seek permission to appeal on that basis.

47. MR JUSTICE LANGSTAFF: Whereas I am happy to accept that the case turns upon an interpretation on section 80 and that there has been no direct authority since Green as to the meaning of section 80, to which I have been referred, I do not think that the case is sufficiently arguable for me to grant leave. If you wish to have leave you have to go to the Court of Appeal for it.

47. MR ORMONDROYD: My Lord, yes.

(Short Adjournment)

47. MR ORMONDROYD: I am very sorry to have to call you back in. My instructing solicitor pointed out to me, on a practical note, that 21 days to prepare an appellant's notice is going to be scuppered by the Christmas period. I just wanted to ask that we could have 21 days to file the appellant's notice, after receiving a copy of the transcript. My learned friend consents to that application.

47. MR JUSTICE LANGSTAFF: Yes, very well, 21 days after receipt of the approved judgment.

47. You will find when the approved judgment comes out that I will say a little more about some of the consequences which have occurred to me and I had meant to include in my judgment but did not that would flow if you are right in your construction, not least that, for instance, people who live in the same household as council tenants, if one ceases to become working class because they have some other job which is not working class, they would then no longer use the land as of right but as a trespasser. That is an example. But I will mention that when I approve the judgment.

47. MR ORMONDROYD: Yes, thank you.

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