APPLICATION TO REGISTER LAND AT HESKETH MEADOWS, HESKETH MEADOWS LANE, LOWTON, WARRINGTON AS A TOWN OR VILLAGE GREEN
APPLICATION NUMBER: GN2076/Q-1292

REPORT

By
Alan Evans
Kings Chambers
36 Young Street
Manchester
M3 3FT

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REPORT

Recommendation: the application should be rejected.

Introduction

1. I have been instructed by Forbes Solicitors of Rutherford House, 4 Wellington St. (St. Johns), Blackburn, BB1 8DD, on behalf of Wigan Borough Council in its capacity as registration authority for town or village greens in order to assist it in determining the application of Mrs Janice Johnston (on behalf of the Hesketh Meadows Action Group ("HMAG")) for the registration of land at Hesketh Meadows, Lowton, Warrington as a town or village green.

2. My instructions were to hold a public inquiry to hear and consider the evidence and submissions both in support of the application and in objection thereto and, after holding the inquiry, to prepare a written report to the Council containing my recommendation for the determination of the application.

3. I held the inquiry at Leigh Sports Village from 4th – 7th May 2010. I made an unaccompanied site visit to Hesketh Meadows on 3rd May 2010 before the inquiry began and several further unaccompanied site visits (including to the surrounding area) over the course of the period when the inquiry sat. The parties agreed that there need not be an accompanied site visit.

4. The advocacy at the inquiry on behalf of HMAG was conducted by a local resident, Mr Edward Thwaite. Mr Philip Petchey of counsel represented the Council in its capacity as objecting landowner.

5. I thank Mr Thwaite and Mr Petchey for the assistance that they provided to me at the inquiry in putting forward their cases and for their courteous and good-humoured conduct of proceedings.

6. I also thank Mr Robert Irvine of the Council for his administrative support during the inquiry.

7. The key issues in this case concern the issue of locality and more particularly of a neighbourhood within a locality and whether use has been as of right. The report is written with an emphasis to reflect those issues.

The application

8. The application was made on form 44 and stamped as received by the registration authority on 14th September 2009. It was made by Mrs Janice Johnston of 14 Horncastle Close, Lowton, Warrington, WA3 2DL on behalf of HMAG.

9. The application sought the registration of land to the rear of Lowton Civic Hall, Hesketh Meadows Lane, Warrington, WA3 2AH (known variously as Hesketh Meadows, the Meadows, the Civic, the Field).

10. The application was made under section 15(1) of the Commons Act 2006 ("the 2006 Act") on the basis that section 15(2) applied. Section 15(2) provides that it applies where –
    (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes on the land for a period of at least 20 years; and
    (b) they continue to do so at the time of the application."

11. Question 6 on the application form relating to the locality or neighbourhood in respect of which the application was made was answered by reference to "Lowton St Mary's Parish" and a map was attached identifying the area in question. The area delineated on the map did not in fact correspond with any parish boundary.

12. The application was supported by 126 completed evidence forms.

13. Two objections were forthcoming in respect of the application. The first objection was by the Council in its capacity as the owner of the land subject to the application. The second was by Electricity North West Limited ("ENWL") by way of a letter of 15th December 2009 from their solicitors, Hill Dickinson. ENWL is the registered leasehold proprietor (under a lease with the Council in 1995) of a very small part of the land subject to the application, namely, some 16 square metres adjacent to Hesketh Meadow Lane south of the Civic Hall occupied by an electricity sub-station. This land is registered with title number GM711255.

14. In its objection the Council contended, *inter alia*, that it was not entirely clear what locality was relied upon and that, whilst reliance was not placed by the applicant on use by the inhabitants of a neighbourhood, if reliance was subsequently placed on such use, the Council would respond in due course. The Council also argued that notices were erected at various prominent locations around the land subject to the application in about July 2009 with the following wording: "This land is owned by Wigan Borough Council and use of the land by members of the public is permitted only with the express consent of the Council." It was argued that, whatever may have been the position before the erection of these notices, use of the land thereafter was contentious and not as of right so that qualifying use did not continue until the date of the application.

The amended application

15. On 21st April 2010 Mrs Johnston submitted an amended application which sought to address the objection made by ENWL and the particular matters raised by the Council which I have mentioned in the preceding paragraph. Thus the application was amended in the following respects. First, in order to deal with ENWL's objection, the ENWL land registered under title number GM711255 was excluded from the application.

16. Secondly, in order to address the Council's contention (which was not accepted), that use did not continue as of right after the erection of the July 2009 notices an alternative basis for the application was put forward, namely, that section 15(3) of the 2006 Act applied. Section 15(3) of the 2006 Act provides that it applies "where –

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

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

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

17. Thirdly, the answer to question 6 on form 44 (in relation to the locality or neighbourhood within a locality in respect of which the application was made) was amended so that it read that the "neighbourhood is in the parish of Lowton St Mary's. Lowton St Mary's parish covers two neighbourhoods; Lowton St Mary's and Pennington. Our claim is for a village green in the neighbourhood of Lowton St Mary's." This neighbourhood was then shown on a plan, "plan D", accompanying the amended application.

18. It was made clear by Lord Hoffman in *Oxfordshire County Council v Oxford City Council*[1] that the registration authority (acting by its inspector) is empowered to allow amendments to the application provided that it is fair to the parties to do so. The proposed amendments were uncontentious as far as the parties represented at the inquiry were concerned and the Council's consent thereto in its capacity as objecting landowner was indicated in paragraph 1 of Mr Petchey's written opening submission. Further, by removing the ENWL land from the claim, the

[1] [2006] 2 AC 674 (at paragraph 61). Lord Hoffman's remarks were made in relation to The Commons Registration (New Land) Regulations 1969 made under section 13 of the Commons Registration Act 1965 but there is no reason why what he said should not also hold true for applications made under the 2006 Act and regulated by The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

amended application achieved that which ENWL had sought by their objection.[2] In those circumstances I allow the amendments and proceed on the basis that the application is so amended.

19. Henceforward I will refer to the land which is the subject of the amended application (that is, the land subject to the original application less the ENWL land) as the Application Land.

The Application Land

20. The Application Land is a large, green open space which consists in the main of an extensive, flat playing field area with short, cut grass.

21. To the northern part of its western boundary the Application Land is bounded by Lowton Civic Hall and its car parking and, to the very northern part of this western boundary, by the rear of part of a housing estate to the north west of the Civic Hall. South of the Civic Hall there is a parcel of the Application Land which is directly bounded by Hesketh Meadow Lane on its west and which is separated from the rest of the Application Land to the east by a block of planting which curves round it from south of the Civic Hall in a south and south westerly direction to Hesketh Meadow Lane. This parcel of land forms a discrete area. It is flat and grassed but has a wooded character around much of its perimeter which lends it a more enclosed feel than the rest of the Application Land. The ENWL sub-station is situated on this parcel of land. For the sake of convenience I will refer to this parcel of land as the Hesketh Meadow Lane Parcel.[3] South of the Hesketh Meadow Lane Parcel a track gives access to (and leads across) the rest of the Application Land from Hesketh Meadow Lane to the west.

[2] See paragraph 31 of ENWL's solicitors' letter to Forbes Solicitors of 15th December 2009 which invited the removal of ENWL's property from the application.
[3] There were occasional references to this area of the Application Land at the inquiry as "The Orchard" (owing, it would seem, to the presence of what were said to be apple trees in the planting block).

22. The southern part of the Application Land is bounded by development on Hesketh Meadow Lane and Newton Road but, in the very south east corner of the Application Land, there is a small parcel of land which leads through to Newton Road itself and which can be accessed by a flight of concrete steps leading up a banking to the footway of Newton Road. This area of land was referred to as "the Nib" at the inquiry.[4] The Nib is planted on its west and east sides with trees. There is also a block of tree planting to its north, but south of the track I have referred to in the preceding paragraph, and this block of planting runs in a north-south direction parallel to, but separated from, the eastern boundary of the Application Land. The combination of these planting areas tends to mark the Nib off as an area which is discrete from the rest of the Application Land.

23. The eastern boundary of the Application Land is marked by hedgerow planting which to its north follows a gently curving alignment[5] to the north west which represents the eastern boundary of a former railway line to St Helens. About half way along the eastern boundary of the Application Land access is possible by a track from the east and a footpath and bridleway also branch off to the north at this point.

24. The northern boundary of the Application Land is marked by the edge of the grassed playing field area beyond which to its north lies an area of much coarser vegetation outside the Application Land.

25. At the time of my visits to the Application Land there were 2 full size football pitches in its northern half with goal posts in situ.

26. There is unimpeded access to the Application Land throughout.

[4] This was simply a phrase coined at the inquiry by Mr Petchey and not one in general usage but it is convenient to adopt it here for the purposes of exposition.
[5] This gently curving alignment was agreed by the parties at the inquiry to represent the correct eastern boundary of the Application Land rather than the line shown on plan A accompanying the amended application.

27. The Council owns the whole of the Application Land which forms the bulk of the title numbered MAN133176.

History of the Application Land

28. I turn next to consider the history of the Application Land. I derive this account in the main from historical information supplied by HMAG in support of the application, the evidence of Mr Stephen Mooney on behalf of the Council and documentary material adduced by the Council but also draw on other strands of evidence given at the inquiry. The purpose of this section is to describe the main "landmarks" in the history of the Application Land rather than to deal with the use of the Application Land by local residents.

29. Originally the majority of the Application Land consisted of farmland and, on its eastern side, the Wigan to Glazebrook and St Helens railway lines, which formed a junction north of Newton Road, and associated sidings. At about the time of the outbreak of the Second World War land in the area to the west of the railway lines and sidings (including what is now the major part of the Application Land) was compulsorily purchased by the government to provide accommodation for munitions workers at Risley. This accommodation, which also included communal facilities in the form of, amongst other things, a hall, was then built. However, the accommodation was never put to the use originally intended. Instead it became HMS Cabbala, a Royal Navy signals training centre. This use ended in 1946 and the accommodation was then used to house European Volunteer Workers. This use ceased by about 1948 and the accommodation was then occupied by US Air Force personnel who were stationed at Burtonwood. In its turn this use ceased in about 1960.

30. On 12th April 1961 Golborne Urban District Council acquired that part of what is now the Application Land but which then consisted of the accommodation

complex from the Minister of Aviation.[6] The accommodation then entered yet a further phase in its life and was used to provide council housing for local people. For the sake of convenience, I will call this part of the Application Land the Former Military Camp Land.

31. On 21st December 1970, some time after the railways had fallen victim to the Beeching axe, Golborne Urban District Council acquired the remainder of what is now the Application Land, that is, the eastern part of what is now the Application Land, which had been occupied by the railway lines and sidings, from the British Railways Board. For the sake of convenience I will call this part of the Application Land the Former Railway Land.[7]

32. Some local residents speak of a little park or rose garden having been laid out by Golborne Urban District Council on that part of the Application Land immediately north of Newton Road, that is, on the Nib.[8]

33. On 31st March 1974 Golborne Urban District Council ceased to exist under local government reorganisation and on 1st April 1974 its former assets, including the Former Military Camp Land and the Former Railway Land, which now together form the Application Land, were vested in the newly created Wigan Metropolitan Borough Council.

34. The accommodation complex on the Former Military Camp Land continued to be used by Wigan Metropolitan Borough Council to provide council housing for local people until 1980 when all tenants were re-housed elsewhere. In 1981 the

[6] The April 1961 conveyance was supplemented on 12th September 1967 by a further conveyance, this time from the Minister of Technology, to Golborne Urban District Council in respect of a small parcel of land adjoining the south east boundary of the land previously conveyed in April 1961 which had mistakenly been omitted from that earlier conveyance.

[7] There was in fact a small strip of land on the eastern side of the Application Land (but to the west of the Former Railway Land) which had been a former farm occupation road which was not acquired at this time. This was acquired by the Wigan Metropolitan Borough Council by a deed of exchange with the Legh Family Estate on 2nd April 1986 in order to allow the satisfactory completion of the reclamation scheme which I refer to below in paragraphs 35 and 36.

[8] This feature disappeared in the later reclamation scheme.

accommodation complex, apart from the hall, was demolished. The hall was converted into what is now Lowton Civic Hall and associated car parking was provided. However, resource constraints at the time were such that a proper scheme of land reclamation was not able to be undertaken at this stage.

35. Eventually planning permission was granted by the Council on 29th August 1984 to its Planning & Development Committee for "reclamation of former railway line and military camp for housing development (3.21 hectares) (outline only) and details of playing field complex (4.8 hectares), tree planting and informal open space (5.65 hectares)." A plan of the "site treatment" dating from August 1984 (drawing number LR.220/35/A) shows the proposed general configuration of the playing field area and intended planting to be very much as is now found on the Application Land. 6 sports pitches are shown as proposed on the playing field area. The Nib and a strip of land in the south east of the Application Land appear to lie outside the playing field area and to form a linear piece of open space on the edge of this area which was to then continue by way of extension along the former railway lines beyond the Application Land. The housing area relates mainly to an area outside the Application Land to the west and north west of the Civic Hall and north of Burnsall Avenue but the Hesketh Meadow Lane Parcel is also shown as such an area.

36. Shortly after planning permission was obtained an application for derelict land grant was made by the Council and on 22nd January 1985 the Departments of the Environment and Transport approved such a grant for the reclamation scheme. Correspondence from around the same time addressed by the Council to neighbouring occupiers indicates that a tender had been accepted by P. Casey (Land Reclamation) Limited for the work. Work was then carried out on site - a press report from the Newton and Golborne News of 1st March 1985 refers to the reclamation scheme having been begun - and the playing field area and open space that exists today, together with their associated planting, were created. As I have already mentioned in footnote 7 above, on 2nd April 1986 a deed of exchange

was made between the Council and the Legh Family Estate in order to bring within the Council's ownership a small strip of land which had been a former farm occupation road on the eastern side of the Application Land (but to the west of the Former Railway Land) and thus to enable the successful completion of the reclamation scheme. On 27th May 1986 Leigh Magistrates' Court made an order for the permanent closure of highways on the site. After expiry of the contractor's maintenance period on the playing field, open space and planting on 30th June 1987, the Council's Leisure Department became responsible for maintaining the Application Land on 1st July 1987.

37. It is not clear whether 6 sports pitches were provided initially but all the contemporaneous documentation refers to 6 pitches.[9] A surviving grounds maintenance sheet for "The Meadows Playing Field, Hesketh Meadow Lane, Lowton" of 3rd July 1990 refers to 4 pitches, 2 football and 2 rugby. Local witnesses tended to remember no more than 3 full size pitches at any one time of which only 2 would be used.

38. Documentation shows that a play space, with children's play equipment, existed immediately to the south east of and adjacent to the Civic Hall, but within the Application Land, from approximately 1990 to 1995.

39. Part of the land which was purchased by Golborne Urban District Council in 1961 and which had been reclaimed with the intention of it being used for housing was marketed and sold to Beazer Homes Limited on 16th June 1993. This land does not form part of the Application Land. It is the land which lies to the west and north west of the Civic Hall and north of Burnsall Avenue which is referred to in paragraph 35 above and which now consists of a housing estate (which I have

[9] See: report of Director of Technical Services to Planning and Development Committee of 23rd July 1984; press report in Newton & Golborne News of 27th July 1984; report of Director of Leisure to Recreation and Amenities Committee of 1st October 1984; press report in Newton & Golborne News of 1st March 1985; letter from Director of Technical Services to Councillor Holt of 14th February 1985; memorandum from Director of Technical Services dated 22nd May 1985; list of outstanding and remedial works dated 13th November 1986.

already referred to in paragraph 21 above). The original intention to develop the Hesketh Meadow Lane Parcel for housing as shown by the August 1984 plan (referred to in paragraph 35 above) was never acted upon and the Hesketh Meadow Lane Parcel has remained undeveloped.

40. On 15th December 1995 a lease was granted to ENWL's predecessor, Norweb plc, in respect of the land on which the sub-station stands. According to ENWL's objection, the present sub-station is a replacement for a previous one which had stood on the Hesketh Meadow Lane Parcel a short distance away from the present location of the sub-station.

41. The Application Land is now the subject of a proposal to build a new school as part of the Building Schools for the Future Programme in Wigan. In about July 2009, as mentioned in paragraph 14 above, the Council erected notices at various access points to the Application Land which were in the terms which I have also set out in that paragraph. When I visited the Application Land a single such notice survived on a pole immediately to the rear (east) of the Civic Hall.

<u>The purposes of the Council's holding of the Application Land and the arrangements for holding and managing it and for access thereto</u>

42. I turn next to consider the purposes of the Council's holding of the Application Land and the arrangements for holding and managing it and for access thereto. I deal with this in some detail given that these matters bear on one of the key issues in this case in respect of whether use was as of right.

Purposes of, and arrangements for, holding the Application Land

43. It seems reasonably clear that the Former Military Camp Land was acquired by Golborne Urban District Council when originally purchased in 1961 for housing purposes. As I set out in paragraph 30 above, the accommodation on this part of

the Application Land was used to provide council housing for local people.[10] It is not clear from the evidence what the original purpose was in respect of the purchase by Golborne Urban District Council of the Former Railway Land in 1970 although there is some evidence that the acquisition may have been for recreational purposes because, as referred to in paragraph 32 above, some local residents recall the Nib having been laid out as a little park or rose garden.

44. The history of the Application Land which I have dealt with above plainly shows that use of any part of it for housing ceased as a matter of fact in 1981 when the accommodation was, as referred to in paragraph 34 above, demolished. Minutes of the Council's Housing Committee from 3rd June 1980 reveal that, following the demolition of the existing buildings on the Hesketh Meadows site, it was recommended that "the land be deemed to be no longer required for housing purposes and that the question of its disposal be referred to the Planning and Development Committee and that that Committee and the Recreation and Amenities Committee be requested to give consideration to the future use of part of the land for leisure activities in view of its situation adjacent to the Lowton Civic Hall."[11]

45. Further minutes for 1980 of both the Planning and Development Committee and the Recreation and Amenities Committee confirm that it was determined at this time that land at Hesketh Meadows would no longer be required for housing purposes. However, no clear determination appears to have been reached at this stage as to the new purpose for which the land was in fact to be held and used thereafter. This seems to be linked to the fact that the Recreation and Amenities Committee had no money available for the provision of recreational facilities on

[10] There is also a minute of the Finance and General Purposes Committee of Golborne Urban District Council of 26th January 1961 which refers specifically to 14.140 acres of land and buildings being used for housing purposes.

[11] The Civic Hall itself is stated in a memorandum of the Council's Director of Finance to the Council's Director of Technical Services of 31st July 1980 to have been "brought into the books of the Recreation and Amenities Committee".

the land.[12] The matter eventually appears to have been referred by the Policy Committee to the Planning and Development Committee with the proposal that a report be submitted to that committee by the Director of Technical Services in relation to methods of dealing with the land.[13] As early as January 1981 the Council's Director of Leisure was suggesting that the land be reclaimed for playing field purposes and appropriated to the Recreation and Amenities Committee at a reasonable cost.[14]

46. Proposals for land reclamation, formulated to take advantage of the availability of derelict land grant, were then developed over a period of time and ultimately approvals were given by the Planning and Development Committee in 1984 to a scheme which took the form of that which gained planning permission in August 1984 and was commenced in 1985 as I have described in paragraphs 35 and 36 above. The role of the Planning and Development Committee in giving the approvals[15] suggests that it was the relevant holding committee at this point. I have already indicated in paragraph 35 above that that part of the reclamation scheme which was designed to bring forward land for housing purposes related in the main to an area outside the Application Land but did include the Hesketh Meadow Lane Parcel.

47. At around this time, that is, 1984/85 there are some references in the documentation to disposal of/appropriation of the land to the Council's Leisure Department or Recreation and Amenities Committee. The derelict land grant application form of 13th September 1984, when dealing with the question of proceeds from the disposal of the site, refers to a sum of £14,000 arising from "notional disposal to the Leisure Dept." A capital project report form prepared for the Planning and Development Committee of 15th July 1985 states that certain of

[12] As revealed by a minute of the Recreation and Amenities Committee of 4th August 1980 which records a statement of the Director of Leisure pointing out that the Committee had no money available for the provision of recreational facilities on the land.
[13] As shown by the minutes of the Policy Committee of 18th August 1980.
[14] Memorandum of the Director of Leisure to the Director of Technical Services of 2nd January 1981.
[15] I refer to approvals other than the decision to grant planning permission.

the capital costs of the reclamation project "will be incorporated within the appropriation charge to the Recreation and Amenities Committee."

48. 1988 minutes from the Recreation and Amenities Committee show this committee considering a request which had been received from the Leigh Model Flying Club to use part of the grassed area at Hesketh Meadows as a regular venue to fly their aircraft. This suggests that the Recreation and Amenities Committee was now the committee which had responsibility for the grassed area in question.

49. Mr Mooney, a Senior Estates Surveyor of the Council, who gave evidence on behalf of the Council in support of its objection as landowner, originally stated that the Application Land had always appeared on the Council's asset register as land in the control of the old Recreation and Amenities Department and had done since it was first created in Wigan in 1998. He explained that the basis for this statement was what was shown on the computerised version of the asset register which had been started in 1998 and that the "terrier" cards showed historic information.

50. The full position, as became clear as Mr Mooney's evidence progressed and when further documentation was produced, is somewhat different. The card copy of the Council's asset register shows the Former Military Camp Land being held by the Housing Committee. This no doubt reflects the historic position, as Mr Mooney indicated, and the fact that the Council had originally used the accommodation on this part of the Application Land as council housing. However, as I have already indicated in paragraphs 44 and 45 above, the Housing Committee determined in 1980 that land at Hesketh Meadows would no longer be required for housing purposes. Moreover, the up-to-date computerised version of the asset register – produced by Mr Mooney at the inquiry at my request - shows the Former Military Camp Land as being held by "Policy – Chief Executive – Leisure" and categorised as "community – recreational park". This land-holding and categorisation extends to include the Hesketh Meadow Lane Parcel which, as I

explained in paragraph 39 above, was never developed for housing in accordance with the original intention in 1984.

51. Some further light is cast on the property-holding role of the Chief Executive's Department of the Council by a report to the Council's Cabinet on 27th March 2003 in relation to the setting up in 2003 of the Wigan Leisure and Culture Trust to manage Wigan's leisure and cultural facilities (which I deal with in more detail in paragraphs 53 to 55 below). Paragraph 7.8.1 of the report states that "the Council will, of course, continue to own all of those properties allocated to the Leisure portfolio, and what is actually being transferred is a service provision role facilitated through the creation of various property interests in assets of the Council." Paragraph 7.8.2 of the report explains that "given that, effectively, the whole of the Leisure and Cultural Services Department will cease to exist any properties which were managed by the Department will need alternative holding arrangements identifying, following the vesting date. The Chief Executive's Department has been identified as the new 'host' Department to which the Council's retained property interests in those former Leisure & Cultural Services Department's assets which are to be made available for use by the Trust will be assigned."

52. Turning to the Former Railway Land, this is shown on the card copy of the Council's asset register as being held by the Planning Committee. On the computerised version of the asset register it is shown in the same way. Mr Mooney said that its property type classification in this register is "miscellaneous". This holding arrangement appears somewhat anomalous given that this part of the Application Land is indistinguishable in terms of its layout, function and use from the rest of the Application Land and that the 2 full size pitches on the Application Land at present extend across both the Former Military Camp Land and the Former Railway Land.

Arrangements for management of and access to the Application Land

53. So far as concerns the management arrangements for the Application Land, Mr Bond, the Regeneration Manager of Wigan Culture and Leisure Trust, stated in giving evidence on behalf of the Council in support of its objection as landowner, that the Application Land had been maintained by the Council's Leisure Department since 1987 following the reclamation works until this responsibility was taken over by the Wigan Leisure and Culture Trust in 2003.

54. The Wigan Leisure and Culture Trust was set up in 2003 in order to deliver leisure and cultural services within the Borough in a cost effective way by taking advantage of the opportunities for financial savings created by its charitable status. On 4th August 2003 a Licence Agreement was concluded between the Council and the Trust. The Licence Agreement contains a grant to the Trust by the Council of a licence to occupy, inter alia, various parks and playing fields in the Borough of Wigan for the purpose of exercising management and control over them. Included within the licence granted by the agreement is "Lowton Civic Playing Field, Hesketh Meadow Lane, Lowton", that is, the Application Land.[16] The "permitted user" under the Licence Agreement is "use as a public park or playing field in accordance with the provisions of the Partnership Agreement."

55. The Partnership Agreement is a document which was concluded between the Council and the Trust on 28th March 2003 to formalise the partnership working arrangements between them. For present purposes it is relevant to note in particular Schedule 1 of the Partnership Agreement which consists of a Delivery Plan. This states in its section 4 that the Trust will manage a number of facilities in Wigan, including recreational/amenity green space, playing fields and sports pitches, all of which are open to the general public apart from allotments which

[16] The relevant map showing the area of the licence at Hesketh Meadows appears to indicate that the north east section of the playing fields, and thus a section of the Application Land, is not included in the licence. This would seem to be an error on the plan because it must clearly have been the intention of the licence arrangement that the whole of the playing field area should be the subject of the licence.

are rented. Schedule 2 to the Partnership Agreement identifies Lowton Civic Playing Field at Hesketh Meadow Lane, Lowton, that is, the Application Land, as one of the facilities in question.

56. Mr Michael Fishwick, the Parks Activities Co-Ordinator (Community Sector) of Wigan Leisure and Culture Trust, one of whose roles was to allocate pitches to teams who wished to use the Trust's facilities, stated in his evidence on behalf of the Council as objecting landowner that the pitches at Hesketh Meadows were let to a number of football teams and that the Trust (and formerly the Council) charged these teams for using the pitches. He had checked records held and was able to produce documents going back to the 1996/97 season showing pitches at Hesketh Meadows being rented out for a fee by the Council and, latterly, the Trust to various football teams. The playing fields were not for the exclusive use of the amateur teams which rented the pitches but were open to others as well. There was an "open field" policy which applied throughout the borough.

57. Mr Bond also gave evidence in relation to the Council's "open field" policy. The effect of his evidence was to establish that this policy was in fact one which related to school playing fields and had been established by the Council's Education Committee (which Mr Bond was able to evidence by producing a Council report). I did not understand Mr Bond to say that an "open field" policy was as such written down in those terms in respect of other playing fields provided by the Council but that the provision of open access to such playing fields was taken as a given by the Trust. In this respect Mr Bond pointed to the provision of Schedule 1 to the Partnership Agreement which I have referred to in paragraph 55 above in respect of facilities being open to the general public. Mr Bond also produced the "Borough of Wigan Grass Playing Pitch Strategy" (2000), which deals with quantitative and qualitative aspects of the provision of grass playing pitches rather than the question of access to them, but does nevertheless

recognise informal recreational use of pitches.[17] Thus paragraph 7.1 provides that "given the construction of most of the borough's pitches the ideal usage level would be no more than 2 games per weekend for most Leisure pitches (plus informal recreational use at other times which is not formally managed)." [Emphasis added] There is also paragraph 13.2 which identifies that "many Leisure pitches are overplayed for their construction (3 or more games per week, plus informal recreational use)." [Emphasis added again]

58. Mr Fishwick stated that the existence of open access had not been advertised and Mr Bond confirmed that no site notices had been put up at playing fields to indicate such access.

Evidence in support of the application

59. I heard 18 live witnesses in support of the application at the inquiry.[18] In addition to this HMAG also put forward a further 15 signed witness statements. As I have already mentioned in paragraph 12 above, the application was originally supported by 126 evidence forms.[19] The general picture painted by the evidence, both "live" and "written", is of extensive use of the Application Land for a period of at least 20 years for informal recreation. Activities indulged in include walking, dog-walking, children's play, ball games, bicycle riding, kite flying, picnics and picking blackberries from the hedgerows.

60. No real challenge was mounted by Mr Petchey in cross-examination to the fact of use of the majority of the Application Land by local residents although those who gave "live" evidence were questioned about use of 2 particular areas: the Hesketh Meadow Lane Parcel and the Nib. It was clear from the answers given by local

[17] The detailed assessment of provision contained in the Strategy includes reference to the Hesketh Meadow facility which is shown as having 2 football pitches and one rugby pitch let annually by Wigan Council (Leisure and Cultural Services).
[18] Mrs Johnston, Mr Maskery, Mr McMillan, Mrs Walker, Mr John Robert Craine, Mrs Turner, Mr Steven Craine, Mr Parry, Mr Galloway, Mr Johnston, Mr Young, Mr Kilbryde, Mr Walsh, Mr Thwaite, Mrs Hatton, Mrs Roberts, Mr Franzen and Mr Newton.
[19] 21 persons completing an evidence form also signed a witness statement.

residents that both these areas had also enjoyed significant informal recreational use.

61. Witnesses were also questioned by Mr Petchey as to whether they had ever interrupted formal games of football when these were played on the football pitches. No-one had (although Mr Franzen indicated that he would cut across a pitch avoiding the run of a game if it was convenient to do so). The evidence given at the inquiry was to the effect that the extent of the formal football usage was of the order of a couple of hours or so on both Saturday and Sunday with some use on weekday evenings when the days were longer and light permitted. In recent times the Application Land had provided 2 full size football pitches and, to the south of this area, mini-pitches were set out for junior football. Some dog-walkers indicated that it was not their practice to walk their dogs on the formal pitches to avoid the risk of the animals fouling those areas. Otherwise the "live" evidence indicated that the pitches had also been well-used for informal recreation when formal games were not in progress. A few witnesses recollected a rugby pitch on the Application Land.

62. The evidence established that use has been open and without force or challenge by the landowner and that access has been physically unrestricted and not subject to any site notices until those which I mentioned in paragraph 14 above were erected by the Council in about July 2009.

63. Witnesses were also questioned by Mr Petchey about their understanding of the neighbourhood which was relied on to justify the application. The claimed neighbourhood is marked on "plan D" which accompanied the amended application. The western and southern boundaries of the area so marked represent the western and southern boundaries of the ecclesiastical parish of Lowton St Mary's. It became clear in the course of the evidence that the eastern boundary of the neighbourhood relied upon represents the historic boundary between the

former Golborne Urban District Council area to the west and Leigh to the east.[20] The neighbourhood is thus that part of the ecclesiastical parish of Lowton St Mary's which lies within the former Golborne Urban District Council area. It also became apparent that the eastern boundary of the claimed neighbourhood marks a change in postcodes, that to the east being a Wigan (WN) postcode and that to the west (where the claimed neighbourhood is located) being a Warrington (WA) postcode. There was some limited evidence of the use of Lowton St Mary's as a postal address by a few residents. Plan D also contains a dotted line which marked a proposed parish boundary change, mostly by way of extension of the parish to the west but with some contraction to its east at one point to the north west of the Application Land. No-one was able to cast much light on this proposal or the reasons behind it.

64. Beyond the above, the questioning of the local residents did not in my view yield any clear evidence from them in relation to what it was that marked the claimed neighbourhood out as such other than the boundaries drawn on plan D, where the extent and limits of this neighbourhood lay (such as why Laburnum Road should fall outside the neighbourhood other than because it lay outside the western boundary of the ecclesiastical parish) or where the area known as Lowton St Mary's started and ended. No-one appeared to me to provide evidence that so much of the ecclesiastical parish of Lowton St Mary's as lay within the former Golborne Urban District Council area was in some way a cohesive area in terms of its geographical extent or functional characteristics or by reference to it being understood to be the area of Lowton St Mary's. Some witnesses referred to an old boundary stone on St Helens Road in the vicinity of the Shepherds Inn marking the boundary between Lowton (as opposed to Lowton St Mary's) to the west and Leigh to the east. Some local inhabitants also mentioned a similar modern sign welcoming the traveller to Leigh at roughly the same point. It would seem that such markers are located where the old Golborne Urban District boundary lay.

[20] Save to the immaterial extent that the historic boundary ran across the corner of Pennington Flash to the north whilst the boundary line on plan D follows its shore.

Other than detecting some degree of local perception that beyond the eastern boundary of the claimed neighbourhood lay Leigh, I did not gain the impression from the evidence that the claimed neighbourhood was recognised as such in terms of any particular community identity.

The Council's evidence

65. I need to deal with the Council's evidence as objecting landowner in a little more detail than the evidence in support of the application given the nature of the issue in the case as to whether use was as of right and given that much of the Council's evidence was directed to this issue.

66. The first witness I heard from was Mr Alan Cartwright, the Head of Service in the Revenues Division of the Chief Executive's Services Department. Mr Cartwright said that he had inspected the Council's copy of the 1973 Valuation List and any subsequent relevant directions issued by the Valuation Officer. The Valuation List for the former urban district of Golborne contained a number of entries in respect of "The Meadows" including 123 domestic dwellings, all bungalows, stores, shops, library, offices, Civic Hall and 28 private garages. The Valuation List showed that these properties remained unchanged from how they had been assessed in 1973 until 1st December 1981 when, with the exception of the Civic Hall and one of the garages, the Valuation Officer issued a direction to delete all assessments from the list as "being taken out of rating". I add by way of interpolation here that the bungalows were clearly the former accommodation which had been used as council housing after their wartime and post-war uses and which were demolished in 1981 as I have described in the "history" section of this report above. The one remaining garage was "taken out of rating" by direction issued on 9th May 1984. The Civic Hall remained in the list and was still in rating today. Mr Cartwright also stated that he had identified a commercial heraditament being added to the list in respect of Hesketh Meadow Lane insofar as a "compound and premises" shown as being in the occupation of P. Casey (Land

Reclamation) Limited was brought into rating from 1st April 1985. This was, however, only a short term assessment, being "taken out of rating" by direction issued on 28th July 1986. This assessment reflects the implementation of the land reclamation scheme which I have described in paragraph 36 above.

67. Mr Cartwright went on to explain that since 1990 Rating Lists (as they were now known in respect of business premises) had been compiled every 5 years and thus had been so compiled in 1990, 1995, 2000, 2005 and 2010. Mr Cartwright pointed out that public parks and similar land had long been exempt from rating if they were "available for free and unrestricted use by members of the public". He cited paragraph 15 of schedule 5 to the Local Government Finance Act 1988 (which had replicated similar provision in the General Rate Act 1967) which provides that:

"(1) A heraditament is exempt to the extent that it consists of a park which –

(a) has been provided by, or is under the management of, a relevant authority or two or more relevant authorities acting in combination, and

(b) is available for free and unrestricted use by members of the public.

(2) The reference to a park includes a reference to a recreation or pleasure ground, a public walk, an open space within the meaning of the Open Spaces Act 1906, and a playing field provided under the Physical Training and Recreation Act 1937.

(3) Each of the following is a relevant authority - … (b) a district council …

(4) In construing sub-paragraph (1)(b) above any temporary closure (at night or otherwise) shall be ignored."

68. Mr Cartwright stated that, if land which was used as a recreation ground or playing field did not meet the above exemption criteria, then it would be entered in the Valuation List (as it formerly was) or (since 1990) in the Rating List and rated accordingly. Mr Cartwright stated that he could confirm that there were no such entries in the lists relating to any recreation grounds or playing fields at "The Meadows" or in respect of Hesketh Meadow Lane. He could infer from this only

that the Application Land was exempt from rating on the basis that it was available for free and unrestricted use by members of the public. Mr Cartwright stated that he could also confirm that there were entries in both the 1973 Valuation List and the 1990 Rating List relating to playing fields (both private and local authority) where use was restricted so the exemption criteria were not met and thus rates were payable. Mr Cartwright said that he thought that the system which was in place was effective in picking up any properties which needed to be brought to the attention of the valuation officer for rating purposes.

69. Mr Chris Gore, the Deputy Venue Manager, (currently acting Leisure Venues Manager) Wigan Leisure and Culture Trust, said that he was very familiar with an annual event which was known as "Ginger's Egg Run" which takes place at Lowton Civic Hall and Hesketh Meadows. This event is referred to in many of the witness statements and evidence forms provided in support of the application. To his knowledge it had taken place every year that he had been employed by the Trust and the Council (13 years) and he believed that it had been organised for over 20 years. The booking was made directly with the Civic Hall but he would then approve it and personally attend on site during the festivities. The event consisted of scooter enthusiasts meeting on the Lowton Civic Hall car park on a Saturday, usually in March, whilst inside the building there were stalls selling scooter parts and bar facilities were provided. The scooters would then all leave the Civic Hall en masse, travelling along a planned route and, on the way, collecting eggs which were then taken to a children's hospital. There could be up to 1,000 riders and passengers taking part. There was a social event on the Friday evening before the Saturday scooter rally and another such event on the Saturday evening after it. A number of people would camp on the field for the evening and outside portaloos were arranged for them. The camping was allowed anywhere on Hesketh Meadows apart from the football pitches owing to the fact that matches would invariably be taking place during the weekend. The venue charged a fee for the event and this had always included the use of the playing fields. Mr Gore was

also aware of the fact that biker rallies had also taken place at the Civic Hall under similar arrangements.

70. I have already dealt with the main substance of the evidence provided by Mr Michael Fishwick in paragraphs 56 and 58 above. I should add at this point that Mr Fishwick confirmed that there had been 2 football pitches and 2 mini-pitches on the Application Land and that he agreed, when cross-examined, that there might be 5½ hours formal usage of each of the pitches per week during the football season[21] although teams did not play at home every week. Mr Fishwick also agreed that there was potentially more non-paying use of the pitches.

71. I have also set out the main points of the evidence of Mr Andrew Bond in paragraphs 53 and 57 to 58 above. To that account I add here that Mr Bond stated that a number of football teams used the Application Land and that the Trust marked out and maintained a number of pitches. At present there were 2 full size pitches immediately to the rear of the Civic Hall and 2 mini-pitches to the south east. The position of the full size pitches did not change owing to the permanence of the goal post foundations but the mini-pitches were moved from time to time depending upon ground conditions and usage.

72. Mr Stephen Mooney provided a history of the Application Land. I have drawn extensively on Mr Mooney's evidence in those sections of the report set out above dealing with the history of the Application Land and the purposes of, and arrangements for, holding it. I need not rehearse Mr Mooney's evidence at this point. All I need to add here is that Mr Mooney stated in respect of the notices which were erected by the Council in about July 2009 that they were vandalised and removed frequently. The Council had subsequently spent significant amounts of time and resources reinforcing the footings and replacing the signs.

[21] Based on 11 teams shown on a list compiled by Mr Fishwick as having used the pitches in the 2009-2010 season and taking 2 hours per match, giving (11 x 2) 22 hours per week, divided by 4 (the number of pitches).

73. The Council in its capacity as objecting landowner also put in as evidence a witness statement by Anne Cockram, a Parks Officer employed the Wigan Leisure and Culture Trust. I do not need to summarise this evidence as it does not, in my view, add materially to the objector's case.[22]

Submissions

On behalf of the Council as objecting landowner

74. Mr Petchey concentrated his submissions on behalf of the Council as objecting landowner on two matters: the issue of neighbourhood and the issue of as of right.

75. Mr Petchey submitted that HMAG had not put forward an appropriate neighbourhood which would justify registration. He submitted that, whilst the ecclesiastical parish of Lowton St Mary's was a locality which in principle could sustain registration, in this case the ecclesiastical parish could not sustain registration because it was too big. Therefore it was incumbent on HMAG to rely upon a neighbourhood. Whilst the claimed neighbourhood had defined boundaries, which he contended was a prerequisite for registration, the problem was that it relied on historic boundaries to define a present day neighbourhood existing over the relevant qualifying period and reflected nothing on the ground save the historic boundary marker/modern Leigh sign. The neighbourhood lacked the required cohesion. The artificiality of its construct was demonstrated by the fact that some users did not come from within the area in question and that any realistic neighbourhood would have included all of Elm Tree Road (which lay

[22] In one respect Ms Newton's evidence also appears inconsistent with the rest of the Council's evidence, that is, in stating that the access track across the Application Land (which I refer to in paragraph 21 above) delineated the land managed by the Leisure Department which was towards the Civic Hall and that managed by the Planning Department which was towards Newton Road. This account of the demarcation of responsibility does not fit with the split of the holding of the Application Land between the Chief Executive's Department and the Planning Committee shown by the computerised version of the asset register nor does it appear to reflect the position since 2003 when the Trust has been responsible for the management of the whole of the Application Land.

part within and part without the claimed neighbourhood) and Laburnum Road, from where several users were drawn. Mr Petchey also submitted that, were any other potential neighbourhood to be put forward drawn more widely to the west than the claimed neighbourhood, any such potential neighbourhood would lack defined boundaries and would fall within more than one locality. In this latter respect he submitted that Lord Hoffman in *the Oxfordshire case* was wrong to say that "neighbourhood within a locality" did not mean that the neighbourhood had to be within a single locality and that the statutory words could be read to mean "within a locality or localities."[23]

76. In respect of the issue of use as of right, Mr Petchey submitted that, in this case, the use was not as of right. He argued that land made available for recreational use by local people by a local authority under statutory powers was not as a generality registrable because there was a statutory entitlement of such local people to use the land. This was why parks and recreation grounds were not registrable. Mr Petchey relied for this proposition on paragraph 9 of Lord Bingham's speech in the case of *R (Beresford) v Sunderland City Council.*[24] The relevant statutory power might be found in the Public Health Act 1875, the Open Spaces Act 1906, the Physical Training and Recreation Act 1937 or the Local Government (Miscellaneous Provisions) Act 1976. The identification of the relevant statutory power might, however, not in itself be sufficient to demonstrate the entitlement because, for example, the case could be one where there was unauthorised use of a playing field provided under the 1937 Act for which a charge was raised. It might therefore be necessary to look at the background circumstances and what happened on the ground.

77. In some circumstances it might be demonstrated that land was made available for recreational use by local people by a local authority under statutory powers by showing that the land had been acquired for that purpose. However, in the present

[23] [2006] 2 AC 674, at paragraph 27.
[24] [2003] UKHL 60.

case, the Former Military Camp Land had been acquired for housing so this was not a case where the circumstances of the acquisition would demonstrate that the local authority was intending that the land should be made available for use by local people.

78. Another way in which it might be demonstrated that land was made available for use by local people under statutory powers was by pointing to an appropriation in this respect and in this connection Mr Petchey referred to the speech of Lord Walker in *the Beresford case* at paragraph 87. He argued that, on the facts of the present case, by reference to many of the matters I have set out in the section of the report above dealing with the purposes of the Council's holding of the Application Land and the arrangements for holding and managing it and for access thereto, the conclusion could be drawn that there had been an appropriation for public recreation even though it was not possible to point to an express minute recording this.

79. Mr Petchey said, however, that, whilst if such an appropriation were found that would be conclusive in demonstrating that use was not as of right, the matter did not turn on appropriation. There could be cases where, absent such appropriation, the background circumstances and the fact of what had happened on the ground would be sufficient to demonstrate that the land had been made available by the Council for use by local people for recreation under statutory powers. This was such a case. The Former Military Camp Land had been declared surplus to the requirements of the Housing Committee of Wigan Council and after the reclamation works the appropriate financial adjustments for it to become playing field land seemed to have been made. Planning permission was granted for the land to be laid out as playing fields and open space and it was so laid out. The land was rated on the basis that it was freely available to the public. It was maintained by the Recreation and Amenities Committee as playing fields and open space. Local people hired out the pitches. The electronic version of the old terrier card was adjusted accordingly. Latterly the Application Land was the

subject of a licence to the Wigan Leisure and Culture Trust as playing fields. It was obvious that the Council intended that the pitches on the playing fields were to be freely available for use by local people for informal recreation when they were not being used as pitches. There was no need for any open field policy in relation to the Application Land because its free availability was assumed by everyone in any event. The Council's intention in this regard was put beyond doubt by the Partnership Agreement. To view the land other than as playing fields provided by the Council, latterly through the Wigan Leisure and Culture Trust, was completely unrealistic. Many of the matters which Mr Petchey identified were, he contended, matters of public knowledge.

80. The situation was to be distinguished from *the Beresford case* because that case concerned development land which was made available *pro tem* for recreational use. This case was about playing field land made available for use by the public. The users of the land were evidently not trespassers and a reasonable landowner, with the characteristics of a local authority, would not consider them to be asserting a right.

81. As to the statutory power in question in the present case, although this had not ever been identified in the Council's documentation, the most apt power was to be found in the Physical Training and Recreation Act 1937. This was a case where the Council had exercised their power to provide playing fields without charge for informal use. The entitlement of users here should be no different from the entitlement of users in respect of pleasure grounds under section 164 of the Public Health Act 1875 in respect of which sections 122(2B) and 123(2B) of the Local Government Act 1972 referred to a trust for public enjoyment even though this concept was not found in the 1875 Act itself. Local people were not trespassers and their use was not use as of right. Mr Petchey was not arguing that, just because the power was to be sourced from the 1937 Act, that in itself meant that the land which was subject to the power could not become a town or village green. However, when the use of that power was considered in the light of all the

relevant circumstances and when, as here, the land had been laid out as playing fields and had been made freely available for use, then registration would not be possible because use would not in the circumstances be use as of right. The case could also sit naturally under the Local Government (Miscellaneous Provisions) Act 1976. Mr Petchey further said that the application of the Public Health Act 1875 and the Open Spaces Act 1906 were not necessarily precluded.

82. Mr Petchey said that his argument could be regarded as one where use was to be considered to take place by right under statute, and thus it would not be not as of right by virtue of failing the *nec precario* requirement of the formula *nec vi, nec clam, nec precario*. The right was derived from outside the formula. The argument might alternatively be put on the basis of a statutory revocable licence so that use would not be as of right because it was *precario* and thus the claim would be defeated by application of the formula.

83. As to the Former Railway Land, Mr Petchey submitted that the treatment of this part of the Application Land was essentially parasitic on the correct treatment of the rest of the Application Land. This part of the Application Land read as part of the playing field area, was maintained as part of the playing field area and actually provided part of the football pitches. In these circumstances it was appropriately treated as part of the larger whole. There was no good reason why it was still with Planning.

84. The only other submission that Mr Petchey made was in relation to the non-interruption of football matches by local people. He acknowledged that, following *R (Lewis) v Redcar and Cleveland Borough Council*[25] there was not open to him an argument on "deference". What he did contend, however, was that use which did not interrupt such games was much weaker than use which did interrupt and thereby contest the use of the landowner.

[25] [2010] UKSC 11.

On behalf of HMAG

85. On behalf of HMAG Mr Thwaite confirmed that the locality relied upon was the ecclesiastical parish of Lowton St Mary's. He submitted that this parish was divided by the historical Lowton/Leigh boundary and to the east of the boundary was the neighbourhood of Pennington whilst to the west was the neighbourhood of Lowton St Mary's. The application related to the neighbourhood of Lowton St Mary's. He argued that HMAG's written and oral evidence had confirmed the necessary facts. Mr Thwaite submitted that the fact that inhabitants showed deference to those playing football would be unlikely, in the light of *the Lewis case*, to prevent use being as of right. HMAG's witnesses had participated on the Application Land in activities which were to be classified as lawful sports and pastimes, had seen others doing the same and use had been by a significant number. Evidence from all witnesses confirmed that the Hesketh Meadow Lane Parcel and the Nib were used by local inhabitants for recreational purposes. As to use as of right, the Application Land was open and accessible at all times with no fences, barriers or signage. HMAG's witnesses had never been challenged as to their presence on the field nor did they ever seek permission to use it. There was no dispute that use was neither with force nor secret. Reference to *the Beresford case* showed that matters such as cutting of the grass by the Council reinforced the case that inhabitants' use was as of right.

86. The evidence presented by the Council in its capacity as objecting landowner in relation to the holding of the Application Land was inconsistent and confusing and the evidence eventually produced by Mr Mooney in relation to the Council's computerised asset register did not match the earlier evidence. There was no evidence that the Playing Pitch Strategy had ever been made public. The licence to the Wigan Leisure and Culture Trust could not be used to defeat the claim.

Findings of fact in relation to local inhabitants' use of the Application Land

87. In this section of the report I make certain findings of fact in relation to local inhabitants' use of the Application Land on the basis of the evidence which has been put before me. I do not make findings of fact here in relation to the history of the Application Land, the purposes for which it was held by the Council and the arrangements for holding and managing it and for access thereto because I have already effectively set out my findings of fact on those matters in the relevant sections of the report above. I also do not make findings here in relation to the question of locality and neighbourhood within a locality as these matters are considered in detail subsequently.

88. I find that the Application Land in its present form came into being in or about 1986/1987 following the completion of the reclamation works which had begun in 1985 and that, since that time, there has been extensive use of the whole of the Application Land for informal recreation by local inhabitants for a period of at least 20 years which continues to the present. I specifically include the Hesketh Meadow Lane Parcel and the Nib in this finding.

89. I find that the informal recreation which has taken place has consisted of a variety of activities such as walking, dog-walking, children's play, ball games, bicycle riding, kite flying, picnics and picking blackberries from the hedgerows and that these activities consist of lawful sports and pastimes for the purposes of section 15 of the 2006 Act.

90. I find that access to the Application Land by local inhabitants has always been physically unrestricted and has not been subject to any site notices until those which were erected by the Council in about July 2009. I find that use by local inhabitants has been non-forcible and unchallenged (*nec vi)* and open *(nec clam)*. I do not make further findings here on the issue of whether the use has been as of right because I consider this matter in detail subsequently.

91. I find that the Application Land has always been laid out as a playing field area and maintained by the Council as such since 1987 and since 2003 by the Wigan Leisure and Culture Trust under the Licence Agreement with the Council and that there have always been formal sports pitches on the Application Land, in more recent years being 2 full size football pitches with 2 mini pitches also being utilised. I find that the formal pitches have been rented out for a fee by the Council and, latterly, the Wigan Leisure and Culture Trust, to local teams for playing formal games. I find that the level of this formal use of the pitches would have amounted to no more than 5 to 6 hours per week. I find that local inhabitants did not interrupt formal games of football but that, when pitches were not so in use for formal games, extensive use has been made of the pitches for informal recreation.

Analysis

Introduction

92. In this section I deal with the 2 key issues of locality and neighbourhood within a locality and use as of right.

93. I do not consider that Mr Petchey's submission (paragraph 84 above) that use which did not interrupt formal games on the Application Land was much weaker than use which did interrupt and thereby contest the use of the landowner is of avail to the Council's case as objecting landowner in the light of my findings as to the limited use of the pitches for formal games and that when they were not so in use extensive use has been made of them for informal recreation (paragraph 91 above).

94. There is one other matter I should also mention before turning to the 2 key issues and that relates to the alternative bases on which the application is advanced in the light of the amendment made to it in April 2010, that is, either on the basis that

section 15(2) of the 2006 Act applies or, in the alternative, on the basis that section 15(3) applies. It will be recalled from paragraph 16 above that the amendment to rely on section 15(3) was made in order to address the contention of the Council in its original objection as to the effect of the notices it had erected in about July 2009.

95. I set out in paragraph 14 above the wording of the notices (which I need not repeat here) and also set out there the original contention of the Council which was that, whatever may have been the position before the erection of the notices, use of the land thereafter was contentious and not as of right so that qualifying use did not continue until the date of the application.

96. I do not consider that it is necessary for me to come to any view on the meaning of the notices or their effect, if any, on use of the Application Land after they were erected precisely because the amendment to the application makes the issue academic. The use of the Application Land by local inhabitants had lasted for a period of at least 20 years prior to the erection of the notices. If the effect of the notices was therefore to bring to an end use which had previously been as of right over that period so that such use did not continue until the time of the application under section 15(2), any such difficulty would be overcome by section 15(3) which allows the application to be made within 2 years of the cessation of the qualifying use. It was no doubt because nothing turned on the point that the notices received scant attention at the inquiry. The real issue in respect of use as of right in this case is whether use prior to the erection of the notices was as of right.

Locality and neighbourhood within a locality

97. In my view there is no difficulty in concluding that the ecclesiastical parish of Lowton St Mary's is a locality for the purposes of section 15 of the 2006 Act. I refer, for example, to the judgment of Harman J in *Ministry of Defence v Wiltshire*

County Council[26] where the following was said: "*Other points were argued. In particular, Mr Drabble QC argued that it was impossible for a village green to be created by the exercise of rights save on behalf of some recognisable unit of this country – and when I say recognisable I mean recognisable by the law. Such units have in the past been occasionally boroughs, frequently parishes, both ecclesiastical and civil, and occasionally manors, all of which are entities known to the law, and where there is a defined body of persons capable of exercising the rights or granting the rights.*

The idea that one can have the creation of a village green for the benefit of an unknown area – and when I say unknown I mean unknown to the law, not undefined by a boundary on a plan, but unknown in the sense of unrecognised by the law – then one has, says Mr Drabble, no precedent for any such claim and no proper basis in theory for making any such assertion. In my belief that is also a correct analysis".

98. However, I accept Mr Petchey's submission that the application could not be successful simply on the basis of the locality of the ecclesiastical parish of Lowton St Mary's. In my view the application could not succeed on this basis because there is no evidence that there has been a spread of users across the parish. There is simply no evidence at all there has been any significant use made of the Application Land by users drawn from that part of the ecclesiastical parish which lies within the former area of Leigh and which effectively makes up the eastern part of the parish.

99. The notion of a spread of users across the relevant qualifying area is, in my opinion, recognised in paragraph 90 of the judgment of Judge Behrens in the case of *Leeds Group plc v Leeds City Council*.[27] The judge there stated that *"If … Yeadon* [the claimed locality] *cannot be a locality for the purpose of limb (ii)* [i.e., neighbourhood within a locality], *I would hold that the parish of St Andrew is the*

[26] [1995] 4 All ER 931 at 937.
[27] [2010] EWHC 810 (Ch).

relevant locality. I see no reason to limit the meaning of 'locality' in limb (ii) in the manner suggested in paragraph 37 of Mr Laurence QC's skeleton argument [which had contended that in limb (ii) a locality had to be of a size and situation such that, given the particular activities which had in fact taken place, it might reasonably have been capable of accommodating a proper spread of qualifying users undertaking activities of that type]. *There is nothing in the wording of the 2000 Act which refers to the size of the 'locality'. Furthermore one of the main purposes of the amendment, as it seems to me, was to allow inhabitants in a neighbourhood to qualify in a situation where the locality itself was too big. It cannot, in my view, have been the intention of Parliament that both the neighbourhood and the locality had to be small enough to accommodate a proper spread of qualifying users."*

100. This passage appears to me in its last 2 sentences to give some support to the proposition that, if a locality alone is relied upon, there is a requirement that the locality must not be too big in the sense that it is of such a size that it cannot accommodate a proper spread of qualifying users (although Judge Behrens clearly thought that the same requirement was not to be imported into the notion of locality in a "limb (ii)" case where reliance was placed on a neighbourhood within a locality). If that is right, it seems to me that it follows that, in a case where locality alone is relied upon, even if that locality were not too big and were of such a size that it could accommodate a proper spread of qualifying users, if there were not in fact such a spread, the case for registration would not be made out.

101. On the facts of the present case there is not, as I have already stated in paragraph 98 above, a proper spread of qualifying users over the ecclesiastical parish because there is no evidence of any significant use of the Application Land by users from that part of the ecclesiastical parish which lies within the former area of Leigh.

102. To my mind another way of looking at this matter is suggested by the observation of Sullivan J in paragraph 71 of the judgment in *R (on the application of Alfred McAlpine Homes Ltd) v Staffordshire County Council*.[28] Here Sullivan J said that what mattered in judging whether use had been by a significant number was that "the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than use by individuals as trespassers." If the local community were to be equated here with the residents of the ecclesiastical parish of Lowton St Mary's it could not in my view be said in this case that there was general use by that community because there is no significant evidence of any use of the Application Land by residents of the eastern, Leigh half of the parish.

103. I turn therefore to the question of neighbourhood within a locality. It is on this basis that the application is put forward by HMAG. The word neighbourhood is undefined in the 2006 Act as was also the case under section 22 of the Commons Registration Act 1965 as amended by section 98 of the Countryside and Rights of Way Act 2000. However, there are various judicial observations which need to be considered.

104. In *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire District Council*[29] Sullivan J said at paragraph 85: *"It is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood. For the reasons set out above under 'locality', I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word 'neighbourhood' would be stripped of any real*

[28] [2002] EWHC 76 (Admin).
[29] [2003] EWHC 2803 (Admin).

meaning. If Parliament had wished to enable the inhabitants of <u>any</u> area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."

105. Lord Hoffman in *the Oxfordshire case* pointed out at paragraph 27 that the expression *"any neighbourhood within a locality"* was *"obviously drafted with a deliberate degree of imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries."*

106. In *Oxfordshire and Buckinghamshire Mental Health Trust v Oxford City Council*[30] Judge Waksman QC had the following to say at paragraph 69: *"The area from which users must come now includes a neighbourhood as well as a locality. On any view that makes qualification much easier because it was accepted that a locality had to be some form of administrative unit, like a town or parish or ward. Neighbourhood is on any view a more fluid concept and connotes an area that may be much smaller than a locality."*

107. At paragraph 79 Judge Waksman QC also observed that: *"While Lord Hoffman said that the expression* [sc. "neighbourhood within a locality"] *was drafted with deliberate imprecision, that was to be contrasted with the locality whose boundaries had to be legally significant – see paragraph 27 of his judgment in Oxfordshire (supra). He was not saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality … but, as Sullivan J stated in R (Cheltenham Builders Ltd) v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing cohesiveness). To qualify therefore, it must be capable of meaningful description in some way."*

[30] [2010] EWHC 530 (Admin).

108. Judge Behrens in *the Leeds Group plc case* said at paragraph 103: *"I shall not myself attempt a definition of the word 'neighbourhood'. It is, as the inspector said an ordinary English word and I have set out part of the Oxford English Dictionary definition.* [Sc 'A district or portion of a town; a small but relatively self-contained sector of a larger urban area; the nearby or surrounding area, the vicinity']. *I take into account the guidance given by Lord Hoffman in paragraph 27 of the judgment in the Oxfordshire case. The word neighbourhood is deliberately imprecise. As a number of judges have said it was the clear intention of Parliament to make easier the registration of Class C TGVs. In my view Sullivan J's references to cohesiveness have to be read in the light of these considerations."*

109. In respect of the issue of boundaries, Judge Behrens had the following to say at paragraph 105: *"I agree with Miss Ellis QC that boundaries of districts are often not logical and that it is not necessary to look too hard for reasons for the boundaries."*

110. Turning to discussion of the present case in the light of the above, I have no difficulty in accepting Mr Petchey's submission that a neighbourhood must have defined boundaries. So much appears to me to have been recognised in both *the Oxfordshire and Buckinghamshire Mental Health Trust case* and *the Leeds Group plc case* (notwithstanding that, in the latter case, Judge Behrens was of the view that it was not necessary to strain unduly to ascribe reasons for the boundaries). It seems to me that there is force in Mr Petchey's contention that, as a matter of principle, it is necessary for a neighbourhood to have defined boundaries on the basis that, since registration of land as a town or village green creates rights for local inhabitants to use the green, it is necessary to be able to say of any particular person whether he has such a right or not by reference to whether or not he resides within the relevant area.

111. In this case the claimed neighbourhood has defined boundaries. The real issue is whether those boundaries serve to define a neighbourhood. In approaching this question I have borne firmly in mind that the intention of Parliament in amending the Commons Registration Act 1965 by the Countryside and Rights of Way Act 2000 and introducing the notion of a neighbourhood within a locality – which notion has been carried forward into the 2006 Act - was to ease the task of those seeking to have greens registered. Notwithstanding that important consideration, I do not think that the evidence establishes an appropriate neighbourhood in this case. It seems to me that the claimed neighbourhood is an artificial construct assembled in one part from an ecclesiastical parish boundary and in the other from an historic administrative boundary simply for the purposes of the claim.

112. I consider that Sullivan J was correct in *the Cheltenham Builders case* to state that "*the registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word 'neighbourhood' would be stripped of any real meaning."* I do not consider that Lord Hoffman intended in *the Oxfordshire case* to cast doubt on this matter in referring to the *"deliberate degree of imprecision"* attaching to the phrase *"neighbourhood within a locality".* Given that Lord Hoffman ventured in express terms to disagree with Sullivan J in *the Cheltenham Builders case* in relation to the question of whether a neighbourhood had to be within a single locality, I take the view that it is likely that, if he had disagreed on the issue of cohesiveness, he would have taken the opportunity to say so. I am fortified in this view by the reliance which was placed by Judge Waksman QC in *the Oxfordshire and Buckinghamshire Mental Health Trust case* on the continuing correctness of Sullivan J's view that there is a need for a sufficient degree of pre-existing cohesiveness. Insofar as there may be any nuanced difference between the approach of Judge Waksman QC and Judge Behrens in *the Leeds Group plc case* to the issue of cohesiveness, I prefer the view of Judge Waksman QC.

113. On the facts of this case, I do not think that a sufficient degree of pre-existing cohesiveness has been shown. I refer to paragraph 64 above where I indicated that there was a lack of evidence that so much of the ecclesiastical parish of Lowton St Mary's as lay within the former Golborne Urban District Council area was in some way a cohesive unit in terms of its geographical extent, functional characteristics or by reference to it being understood to be the area of Lowton St Mary's. I also pointed out there that, other than detecting some degree of local perception that beyond the eastern boundary of the claimed neighbourhood lay Leigh, I had not gained the impression from the evidence that the claimed neighbourhood was recognised as such in terms of any particular community identity.

114. I also consider that there is some force in the submission of Mr Petchey that the claimed neighbourhood does not match the reality of development on the ground. On both its western and eastern boundaries the claimed neighbourhood appears to me to merge without any real distinction into adjoining areas. This seems to me to reflect that the boundaries are not drawn in such a way that they demarcate a cohesive area. Even on the basis that some perceive the eastern boundary to mark the start of Leigh and that such a perception bears on the issue of cohesiveness, the eastern boundary of the claimed neighbourhood still appears to me to be more rooted simply in a former administrative division than anything else. The western boundary of the claimed neighbourhood, whilst corresponding with the ecclesiastical parish boundary, appears to me entirely arbitrary in marking the limit of any cohesive area.

115. I do not think that any solution is to be found in seeking to extend the neighbourhood by re-defining its western boundary as that of the proposed parish boundary on plan D even if this might take in the addresses of some further users of the Application Land. First, no such alternative neighbourhood was put forward by HMAG, although this does not, of course, prevent me from considering it. Secondly, as I have already pointed out in paragraph 63 above, the evidence was

not able to cast much light on this proposal or the reasons behind. I do not consider therefore that I would be able to regard the proposed boundary change as any more than another arbitrary line on a map rather than a realistic way of marking off a cohesive area. Thirdly, any amendment to the western boundary of the claimed neighbourhood would do nothing to resolve the fact that the eastern boundary is also one which merges without any real distinction into the adjoining area. However, had I otherwise thought that the proposed parish boundary change would enable the identification of a neighbourhood with a sufficient degree of cohesiveness, I would not have rejected such neighbourhood on the basis that it part lay outside the ecclesiastical parish of Lowton St Mary's and would thus fall within 2 localities (Lowton St Mary's and the adjoining ecclesiastical parish of Lowton St Luke's). On the contrary, I consider that I would have been bound to follow the view of Lord Hoffman in *the Oxfordshire case* that a neighbourhood can fall within 2 localities and that it is not for me to say that he was wrong in this respect.

116. Given that I have found that the evidence does not establish an appropriate neighbourhood in this case, I need not deal with the issue of a significant number of the inhabitants of the neighbourhood.

<u>As of right</u>

117. In this case the Application Land is land in public ownership, held for public purposes, maintained at public expense and used by the public for recreation, as was the land which was the subject of *the Beresford case.* The assessment of whether use of the Application Land was as of right has to be made in that context although it is clear that there can be no general implied exclusion of local authority land from the scope of section 15 of the 2006 Act.[31]

[31] See Lord Walker's speech at paragraph 88 in *the Beresford case.*

118. More specifically, however, I consider that use of land by local inhabitants for lawful sports and pastimes for the requisite qualifying period will not be as of right if that use has been pursuant to a statutory right. This proposition is to be derived from the speeches of the Law Lords in *the Beresford case.* Whilst it is true that their Lordships did not decide this issue, and that what they had to say on the matter was thus *obiter*, the tenor of their Lordships' speeches points to a clear distinction between use as of right and use pursuant to a statutory right. I consider that this distinction is good law and that use pursuant to a statutory right cannot be a qualifying use which is as of right for the purposes of section 15 of the 2006 Act.

119. At paragraph 9 of the judgment in *the Beresford case*, after explaining that the case was not one where a licence to use the land could be implied, Lord Bingham raised the question of whether the inhabitants had a legal right to use the land. He said this: *"After the House had reserved judgment at the conclusion of the 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.* [Emphasis added] *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 right to use the land for indulgence in lawful sports and pastimes."*

120. In the above passage Lord Bingham recognises in terms that use pursuant to a statutory right is not use as of right and is inconsistent therewith. There is no

further analysis of the circumstances in which such a statutory right will arise given that, on the facts found or agreed in *the Beresford case,* none of the statutory provisions considered by the court could be relied upon to confer such right. Lord Bingham appears to treat a statutory right as being distinct from a licence from the landowner (the existence of which he rejected on the facts of the case) but it seems clear from Lord Bingham's reference in paragraph 9 to *"the facts found or agreed"* that the question of whether a statutory right arises cannot be divorced from the facts of the particular case.

121. It is also worth citing Lord Bingham's remarks in respect of the meaning of the phrase as of right which provide the background to what Lord Bingham said in paragraph 9 about use pursuant to a statutory right. At paragraph 3 of the judgment Lord Bingham explained that it was *"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."*

122. Lord Rodger expressed himself at paragraph 62 of the judgment in similar terms to Lord Bingham: *"After the first hearing of the appeal, however, your Lordships invited further written and oral submissions from counsel on whether any of the 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. [Emphasis added] *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."*

123. Lord Scott said at paragraph 30 that it was, he thought, "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."

124. Lord Walker went into more detail. His speech contains the following passages:

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 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 purposes 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."*

125. Lord Walker then summarised the evidence in the case before saying this at paragraph 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* [Washington Development Corporation] *or the CNT* [Commission for the New Towns] *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 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."*

126. I do not consider that Lord Walker was taking any materially different approach from that of Lords Bingham, Rodger and Scott in relation to the matter presently under consideration. Indeed, both Lord Bingham (at paragraph 10) and Lord Rodger (at paragraph 69) agreed with the reasons given by Lord Walker.[32] It is my view that when Lord Walker referred to the difficulty of regarding as trespassers those who use a park or other open space which was vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, he was employing the notion of a trespasser to denote someone who lacked a legal right and who would therefore have to rely on prescription to acquire one.

[32] Lord Hutton also agreed with Lord Walker as well as Lord Bingham and Lord Rodger.

Doubting that such users would be trespassers is therefore simply the obverse of recognising that those users would have a right to do what they were doing and were not doing it as of right. The point is the same as that made by Lord Scott in paragraph 30 of the judgment.

127. However, it is to be noted that Lord Walker considered that the same difficulty of regarding as trespassers would obtain in the case of those who were using land which had been appropriated by a local authority for the purposes of public recreation even if there were no statutory trust in the strict sense. It is true that Lord Walker expressed himself with some tentativeness in paragraph 88, suggesting that difficult issues were raised which were better left to be decided on another occasion given that the evidence in the case did not establish, or give grounds for inferring, any statutory trust of the land or any appropriation of the land for the purposes of public recreation. I consider, however, that Lord Walker's views are highly persuasive and that they represent an explanation of the legal position which should be followed.

128. I turn then to consider the facts in the present case against the above legal background. It seems to me that the first issue to consider is the question of what statutory power would have enabled the laying out of the Application Land as playing fields in 1985/86/87 and authorises their continuing provision. The Council's documentary records do not identify the relevant power. I do not consider the appropriate power is to be found in the Physical Training and Recreation Act 1937. It is true that section 4(1) of this act authorised a local authority to lay out, maintain and manage playing fields. However, this section was repealed by schedule 2 to the Local Government (Miscellaneous Provisions) Act 1976.

129. I consider that section 19 of the 1976 Act is the most relevant power. This provides in subsection (1) thereof that "a local authority may provide, inside or outside its area, such recreational facilities as it thinks fit and, without prejudice to

the generality of the powers conferred by the preceding provisions of this subsection, those powers include in particular powers to provide - … (b) outdoor facilities consisting of pitches for team games". Subsection (2) provides that "a local authority may make any facilities provided by it in pursuance of the preceding subsection available for use by such persons as the authority thinks fit either without charge or on payment of such charges as the authority thinks fit."

130. Whilst I think that section 19 of the 1976 Act is the most relevant power, it seems to me that section 164 of the Public Health Act 1875 is also relevant. That section[33] provides that any local authority may "lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds". The terms "public walks and pleasure grounds" sounds somewhat archaic to the modern ear but I do not see why it could not encompass the Application Land, the main functions of which include use for walking by the public (with or without dogs) and other recreational pleasures. I also note that the "permitted user" of the Application Land under the Licence Agreement is, as I have already referred to in paragraph 54 above, "use as a public park [emphasis added] or playing field in accordance with the provisions of the Partnership Agreement" whilst the description on the Council's computerised version of its asset register of the Former Military Camp Land is a "community - recreational park" as I have already noted in paragraph 50 above. I should add at this point that the notion of a statutory right of the public to use public walks or pleasure grounds under section 164 of the 1875 Act is supported by the judgment of Finnemore J in *Hall v Beckenham Corporation*[34] who observed that, in such a case, *"the corporation are the trustees and guardians of the park, and … they are bound to admit to it any person who wishes to enter it within the times when it is open."*[35] Lord Walker seemed to endorse this analysis (albeit describing the owner as being a trustee "in a loose sense") in *the Beresford case.*[36] It is also to be

[33] As amended by paragraph 27 of part II of schedule 14 to the Local Government Act 1972.
[34] [1949] 1 KB 716.
[35] At page 728.
[36] At paragraph 86 cited in paragraph 124 above.

noted that sections 122(2B) and 123(2B) of the Local Government Act 1972 proceed on the basis that land held for the purpose of section 164 of the 1875 Act is "held in trust for enjoyment by the public".

131. Section 10 of the Open Spaces Act 1906 provides that "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." Section 20 of the 1906 Act provides that, "unless the context otherwise requires, - The expression 'open space' means any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied". The Former Military Camp Land plainly did not satisfy the definition of open space when it was acquired in 1961 (nor did it satisfy that definition when ownership passed to the Council on local government reorganisation in 1974). This part of the Application Land was clearly not acquired under the 1906 Act. As to the Former Railway Land, it does not seem to me that there is evidence which would allow the conclusion that this was open space when acquired[37] nor is there any evidence that it was acquired under the 1906 Act.

132. Returning to the 1976 Act, it seems to me that the way in which the Council has chosen to exercise its power to provide recreational facilities and pitches under the 1976 Act is by charging for the hire of pitches for formal games of football (or rugby) but otherwise by making no charge or any other distinction between that part of the Application Land which consists of pitches and the

[37] This part of the Application Land was not at the time of acquisition laid out as a garden, nor is it clear that it was then used for recreation and I am not convinced that it could be said to have been lying waste and unoccupied simply because the railway had recently closed.

remainder of it. It also seems to me that the Council has chosen to exercise its power by making the pitches on the Application Land freely available for other recreational activities at the times when the pitches were not in use for formal games. This latter conclusion is consistent not just with the fact of how the pitches have been used but is consistent with documented material. It is consistent with the "permitted user" of the Application Land under the Licence Agreement which, as I have already noted in paragraph 54 above, is "use as a public park or playing field in accordance with the provisions of the Partnership Agreement." It is consistent with section 4 of the Delivery Plan scheduled to the Partnership Agreement which, as I have already noted in paragraph 55 above, states that the facilities which the Trust will manage (including the Application Land) are open to the general public. It is consistent with the description on the Council's computerised version of its asset register of the Former Military Camp Land as a "community - recreational park" as I have already noted in paragraph 50 above. The fact that there is informal recreational use of playing fields is also recognised in the Playing Pitch Strategy (paragraph 57 above). It seems to me that it would be quite unrealistic in these circumstances to regard use of the pitches for informal recreation at times when formal games were not being played on them as being unauthorised notwithstanding the absence of advertisement of authorisation by way of site notice.

133. I next consider the question of whether there has been any appropriation of the Application Land for the purposes of public recreation, the matter which Lord Walker raised in paragraphs 87 and 88 of *the Beresford case*. There is no formal or express record of any such appropriation of any part of the Application Land. However, Lord Walker clearly though that in certain circumstances an appropriation could be inferred. I consider that this is a case where the inference should clearly be drawn that the Former Military Camp Land has been appropriated for the purposes of public recreation. I set out the reasons for this in the following paragraphs.

134. First, as set out in paragraphs 44 and 45 above, Council minutes from 1980 confirm that it was determined at this time that this part of the Application Land would no longer be required for housing purposes. Plainly this would not in itself be sufficient to infer an appropriation to any other specific purpose but it is a necessary precondition to any such appropriation that the land has been freed from its original housing purpose.

135. Secondly, as set out in paragraphs 35 and 36 above, the Application Land as a whole (including the Former Military Camp Land) was laid out as a playing field area in 1985/86/87 pursuant to planning permission granted in 1984 and with the assistance of derelict land grant monies from central government. There are contemporaneous documentary references which are suggestive of an appropriation. As I pointed out in paragraph 47 above, the derelict land grant application form of 13th September 1984, when dealing with the question of proceeds from the disposal of the site, refers to a sum of £14,000 arising from "notional disposal to the Leisure Dept." Further, a capital project report form prepared for the Planning and Development Committee of 15th July 1985 states that certain of the capital costs of the reclamation project "will be incorporated within the appropriation charge to the Recreation and Amenities Committee."

136. Thirdly, there are, as referred to in paragraph 48 above, the 1988 minutes from the Recreation and Amenities Committee which show this committee considering a request which had been received from the Leigh Model Flying Club to use part of the grassed area at Hesketh Meadows as a regular venue to fly their aircraft. This suggests that the Recreation and Amenities Committee was now the committee which had responsibility for the grassed area in question. This is consistent with the evidence given by Mr Mooney originally in respect of the controlling function of the Recreation and Amenities Committee.[38]

[38] See paragraphs 49 and 50 above. Mr Mooney was wrong in thinking that all the Application Land had been shown since 1998 in the Council's computerised version of its asset register as being under the control of the Recreation and Amenities Committee. The Railway Land is shown as residing with Planning. The Former Military Camp Land is shown as residing with the Chief Executive's Department as the successor

137. Fourthly, as set out in paragraph 50 and mentioned again in paragraph 132 above, the computerised version of the Council's asset register describes the Former Military Camp Land as a "community - recreational park".

138. Fifthly, as set out in paragraphs 54 and 55 and mentioned again in paragraph 132 above, the permitted user" of the Application Land under the Licence Agreement is "use as a public park or playing field in accordance with the provisions of the Partnership Agreement" whilst section 4 of the Delivery Plan scheduled to the Partnership Agreement states that the facilities which the Trust will manage (including the Application Land) are open to the general public.

139. Sixthly, the exemption of the Application Land from rating would appear to be on the basis that it is a park available for free and unrestricted use by members of the public.[39]

140. I consider that Mr Petchey is right to say that the treatment of the Former Railway Land is essentially parasitic on the correct treatment of the rest of the Application Land. The Former Railway Land is part of the playing field area, is maintained as part of the playing field area and actually provides part of the football pitches. Its permitted user under the Licence Agreement is no less "use as a public park or playing field" than the Former Military Camp Land and the provision of section 4 of the Delivery Plan scheduled to the Partnership Agreement that, as a facility managed by the Wigan Leisure and Culture Trust, it is open to the general public is no less applicable. It is as much a part of the "community - recreational park" as the rest of the Application Land even though not appearing on the computerised version of the Council's asset register as such. In these circumstances it is in my view appropriate to treat it as part of the larger whole. The fact that it is held by the Planning Committee appears somewhat anomalous as I mentioned in paragraph 52 above. Notwithstanding this holding

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holding body for the former Leisure & Cultural Services Department's assets – see paragraphs 50 and 51 above.

[39] See paragraphs 67 and 68 above.

arrangement, I would regard the inference of appropriation for the purposes of public recreation as one which should be drawn also in respect of the Former Railway Land. The classification on the computerised version of the Council's asset register of the property type as being "miscellaneous" (see paragraph 52 above) is not inconsistent with the inference that this part of the land is held for the purposes of public recreation.

141. The matters I have identified above both explain why it is appropriate to draw the inference in this case that the Application Land has been appropriated for the purposes of public recreation and provide the reasons why this case is to be distinguished from *the Beresford case.*

142. Having concluded that the Application should be inferred to have been appropriated for the purposes of public recreation, I further conclude, on the basis of Lord Walker's reasoning in *the Beresford case,* that local inhabitants who have used the Application Land for informal recreation have not been trespassers lacking a legal right whose use has been as of right. Their position is the same as if there had been a statutory trust in the strict sense under section 10 of the Open Spaces Act 1906 and the users have thus been users whose use has been pursuant to a statutory right. My conclusion is put on this basis rather than on the basis of use by way of landowner licence.

143. Mr Petchey, although arguing for appropriation, put his submissions on the basis that land made available by a local authority under statutory powers for recreational use by local people was not as a generality registrable because there was a statutory entitlement of such local people to use the land even in the absence of an appropriation, whether express or inferred. Whilst the factual material which has led me to my conclusion on why appropriation for the purposes of public recreation should be inferred is very much the factual material which Mr Petchey urged upon me, for my part I prefer to rest my conclusion on

that inference of appropriation and not to express a view on Mr Petchey's wider submission.

Conclusion and recommendation

144. I consider that the application should fail because:

(a) the evidence does not establish an appropriate neighbourhood in this case and there is no evidence that there has been a spread of users across the ecclesiastical parish of Lowton St Mary's to enable reliance on a locality;

(b) use of the Application Land by local inhabitants for informal recreation has not been as of right but pursuant to a statutory right.

145. I thus recommend to the registration authority that the application should be rejected.

Kings Chambers
36 Young Street
Manchester M3 3FT

Alan Evans
29th July 2010

APPLICATION TO REGISTER LAND AT HESKETH MEADOWS, HESKETH MEADOWS LANE, LOWTON, WARRINGTON AS A TOWN OR VILLAGE GREEN

APPLICATION NUMBER: GN2076/Q-1292

REPORT

Forbes Solicitors
Rutherford House
4 Wellington St
(St. Johns)
Blackburn
BB1 8DD