COMMONS ACT 2006

REPORT

IN RESPECT OF VILLAGE GREEN APPLICATION No. 2009/10(1)

RELATING TO LAND AT MERTON GREEN AND ASH TREE ROAD, CAERWENT

MRS S M ARNOTT FIPROW

(An Inspector with the Planning Inspectorate)

Monmouthshire County Council Reference: C50/1.0007

Planning Inspectorate Reference: APP/E6840/P/10/515367

Date of Report: 7 January 2011

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Case Details

- The application was made by the Merton Green Action Group and is dated 23 July 2009.
- It is made under the provisions of section 15 of the Commons Act 2006.
- The application is for land at Merton Green and Ash Tree Road, Caerwent, to be registered as a village green.

Recommendation: That the application land (excluding area D) is registered as village green.

Preliminary Matters

1. I have been appointed by Monmouthshire County Council, the commons registration authority (hereinafter referred to as MCC, the County Council or the registration authority), to hold a non-statutory public inquiry and to write a report in respect of an application to register land at Merton Green and Ash Tree Road in Caerwent as a village green and to make a recommendation as to whether or not the application should be granted.

2. The main issue to be considered is whether the requirements of section 15 of the Commons Act 2006 (the 2006 Act) have been met such that the application to register the land in question as a town or village green should be granted. The relevant statutory provisions are set out more fully in paragraphs 15 to 26 below.

3. However there is a secondary issue that will need to be considered here. This concerns the effect of section 241 of the Town and Country Planning Act 1990 on any decision to so register the land.

4. An application, signed by Mrs Spooner, was submitted on 23 July 2009 by the Merton Green Action Group (referred to here as MGAG, 'the Action Group' or the applicant).

5. In accordance with the requirements of the Commons (Registration of Town and Village Greens)(Interim Arrangements)(Wales) Regulations 2007 ("the 2007 Regulations"), notice of the application was given and a period given for the submission of any objections to the requested registration.

6. One objection was received to the application from the landowner, BDW Trading Ltd as 'Barratt Homes' (referred to here as 'Barratts' or the objector).

7. To examine the evidence relating to the application, I held a public inquiry[1] at Caerwent Village Hall on 16 and 17 November 2010.

8. At the inquiry Mr D Hughes of Counsel presented the case in support of the application on behalf of the applicant, calling a number of witnesses. The objector was represented by Mr A Porten QC.

9. There was agreement between the parties that it was not necessary for all the witnesses listed as intending to give evidence to the inquiry to do so. For

[1] A short pre-inquiry meeting was held on 5 August 2010 to discuss arrangements for the event.

the objector, Mr Porten agreed to accept the evidence of those people who were willing to present themselves as witnesses available for cross-examination to be taken as if it had been, and be weighed accordingly. This included the written evidence of Mrs K Dally, Mrs C Harvey, Miss K L Jones, Mr A R Lewis and Mr M Smith. To a large extent, the facts of the case were not challenged and, in the circumstances, there was no need for additional witnesses to present more of the same or similar evidence.

10. Similarly, for the applicant, Mr Hughes accepted the written evidence of the objector's witness, Mrs J Carter, as predominantly matters of fact which were not being challenged.

11. I also heard evidence from an individual (Mr Harris) who presented his evidence in a neutral capacity.

12. I visited the site alone on two occasions: very briefly on 4 August 2010 before the pre-inquiry meeting and again during the afternoon of 15 November before opening the inquiry the following day. I carried out a formal inspection of all parts of the application land on 18 November accompanied by Mr Candler, Mrs Spooner, and twelve[2] other supporters of the application; Mr Harris; Messrs Morgan, Llewellyn and Ellis (representing the objector to the application), and Mrs Perkins on behalf of MCC.

13. A procedural matter was raised in relation to an amendment of the application requested by the applicant. This is explained in more detail below in paragraphs 38 to 67. As it concerns the basis on which the claim for village green status is founded, I set out below details of *all* the subsections of section 15 containing qualifying criteria which may be relevant when making an application, although in this case the application form clearly indicated that subsection 15(3) was considered to apply.

14. This is one of three main issues which are pivotal in the determination of this application. The second concerns the effect of notices erected on the site and the third relates to the implications of appropriation of the land for development purposes. I have highlighted these three issues in the index for easy reference and within this report so as to focus attention on the heart of the case.

Statutory Provisions

15. On 6 September 2007 the Commons Act 2006 (Commencement No.1, Transitional Provisions and Savings) (Wales) Order 2007[3] brought into force the provisions of section 15 of the Commons Act 2006 in Wales. The accompanying regulations[4] set out the procedures to be followed.

16. The application was made on 23 July 2009 and therefore falls to be determined in accordance with the provisions of the 2006 Act.

17. Subsection 15(1) of the 2006 Act provides that "any person may apply to the commons registration authority to register land … as a town or village green in a case where subsection (2), (3) or (4) applies."

[2] The exact number fluctuated during the course of the visit
[3] Statutory Instrument 2007 No. 2386
[4] Statutory Instrument 2007 No. 2396: The Commons (Registration of Town and Village Greens)(Interim Arrangements)(Wales) Regulations 2007 ("the 2007 Regulations")

18. Thus, there are three sets of criteria which may justify an application being made under subsection 15(1), as listed in subsections 15(2), 15(3) and 15(4).

19. Subsection 15(2) applies where:

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

(b) they continue to do so at the time of the application.

20. Subsection 15(3) applies where:

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

(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).

21. Subsection 15(4) applies[5] where:

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

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

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

22. In determining the 20 year period of use, subsection 15(6) states that any period during which access to the land was prohibited to members of the public by reason of any enactment is to be disregarded and treated as though use was continuing. This is intended to allow for situations such as that experienced during outbreaks of Foot and Mouth Disease, where access to land is temporarily prevented. No such circumstances have been raised as an issue in this case.

23. Where subsection 15(2)(a) is satisfied, subsection 15(7) provides that for the purposes of subsection 15(2)(b):

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6) those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land “as of right”.

[5] Subsection 15(4) is subject to subsection (5) which applies in circumstances where planning permission has been granted, and construction works commenced, before 23 June 2006. Since outline planning permission was issued on 23 June 2006 for development of the site, the provisions of subsection 15(5) do not apply here.

24. The task of proving the case in support of registration of the land as a village green rests with the person making the application, and the burden of proof is the civil standard: the balance of probability. Each element of the qualifying criteria must be satisfied.

25. Subsection 24(4) provides that an application made for the purposes of section 15 (and others) "shall, subject to any provision made by or under this Part[6], be granted". Therefore if the evidence is found to satisfy the statutory tests such that a village green can be shown to exist, the application must be granted and the village green registered.

26. Village greens, including those newly registered, are protected by

- Section 12 of the Inclosure Act 1857 against injury or damage or interruption to their use or enjoyment as a place for exercise and recreation. Causing injury to village greens is a criminal offence; and
- Section 29 of the Commons Act 1876 which makes encroachment or inclosure of a green, and interference with or occupation of the soil, a criminal offence unless it is with the aim of improving the enjoyment of the green.

27. The effect of certain sections of the Town and Country Planning Act 1990 (the 1990 Act) are argued (by the objector) to be relevant here.

28. Section 241 provides as follows:

> (1) Notwithstanding anything in any enactment relating to land which is or forms part of a common, open space or fuel or field garden allotment or in any enactment by which the land is specially regulated, such land which has been acquired by a Minister, a local authority or statutory undertakers under this Part or under Schedule 2 Chapter V of Part 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990 or compulsorily under any other enactment, or which has been appropriated by a local authority for planning purposes -
>
> (a) if it has been acquired by a Minister, may be used in any manner by him or on his behalf for any purpose for which he acquired the land: and
>
> (b) in any other case, may be used by any person in any manner in accordance with planning permission.
>
> (2) Nothing in this section shall be construed as authorising any act or omission on the part of any person which is actionable at the suit of any person on any grounds other than contravention of any such enactment as is mentioned in subsection (1).

29. Subsection 246(3) of the 1990 Act provides: "Any power conferred by section 238, 239 or 241 to use land in a manner mentioned in those sections shall be construed as a power so to use the land, whether or not it involves the erection, construction or carrying out of any building work or the maintenance of any building work."

[6] Part 1 of the 2006 Act. It was not argued that any such provision should be considered relevant in this case.

30. The land in question here was appropriated under the provisions of section 122 of the Local Government Act 1972, the relevant subsections being:

> (1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.
>
> (2A) A principal council may not appropriate under subsection (1) above any land consisting or forming part of an open space unless before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them.

31. The same land was subsequently disposed of by MCC under the provisions of section 233 of the 1990 Act. The relevant subsections of that section are:

> (1) Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient in order -
>
> > (a) to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it (whether by themselves or by any other person), or
> >
> > (b) to secure the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of the area of the authority.
>
> (2) Land which consists of or forms part of a common[7], or formerly consisted or formed part of a common, and is held or managed by a local authority in accordance with a local Act shall not be disposed of under this section without the consent of the Secretary of State.

The application

The statutory requirements

32. An application must be made in accordance with the 2007 Regulations. Paragraph (3) requires that an application must:

> (a) be made in Form 44;
>
> (b) be signed by every applicant who is an individual, and by the secretary or some other duly authorised officer of every applicant which is a body corporate or unincorporated;

[7] Defined in Section 366(1) as including any town or village green

(c) be accompanied by, or by a copy or sufficient abstract of, every document relating to the matter which the applicant has in his possession or under his control, or to which he has a right to production;

(d) be supported:

(i) by a statutory declaration as set out in Form 44, with such adaptations as the case may require; and

(ii) by such further evidence as, at any time before finally disposing of the application, the registration authority may reasonably require.

33. The statutory declaration made in support of the application must be made by either:

(a) the applicant, or one of the applicants if there is more than one;

(b) the person who signed the application on behalf of an applicant which is a body corporate or unincorporated; or

(c) a solicitor acting on behalf of the applicant.

34. Paragraph 5(4) of the 2007 Regulations states that:

"Where an application appears to the registration authority after preliminary consideration not to be duly made, the authority may reject it … but where it appears to the authority that any action by the applicant might put the application in order, the authority must not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action."

The application details as submitted

35. The application made by MGAG dated 23 June 2009 complied with the 2007 Regulations: it was made in Form 44, it was signed by Mrs Spooner on behalf of the Action Group, a statutory declaration was signed by her before a solicitor and Commissioner for Oaths[8] and attached, and a number of supporting documents were submitted including plans identifying the application land and the locality or neighbourhood within a locality. Also provided[9] were statements and letters from key witnesses and other users in support of registration; schedules summarising periods of use of the application land by individuals, their period of residence and address, the areas utilised and the period over which different types of activities were undertaken. Two papers were submitted setting out a brief local history; one is headed "The Ups and Downs of Village Life in One Lifetime" and the other, "Merton Green" was written by Shirley Nettleship in June 2008 and was published by the Caerwent Historic Trust.

36. Regulation 4[10] requires that, on receiving an application, a registration authority must allot a number to it and stamp the application form indicating the date it was received. This application was numbered 2009/10 (1) and was date-stamped as received by MCC on 25 July 2009. Consultation letters

[8] Mr R Covell of St Mary's Chambers, Monk Street, Abergavenny, NP7 5ND
[9] Full details of the supporting evidence are set out below at paragraph 92, including the two aerial photographs submitted after the close of the inquiry.
[10] Of the 2007 Regulations

were sent to various interested parties on 5 October 2009 and notice of the application was published in the local press on 7 October 2009. Objections to registration of the application land as village green were to be lodged with MCC before 27 November 2009. One objection (dated 23 November 2009) was submitted by Mr Morgan of Hugh James Solicitors acting for Barratts.

37. There is no evidence to indicate that at any stage the application was considered to have been other than 'duly made'.

The grounds for the application

38. On the application form question 4 invites the applicant to state which one of three possible qualifying criteria listed separately in subsections (2), (3) and (4) of section 15 applies. Only one box may be ticked.

39. In this case, the applicant ticked the box to indicate subsection 15(3) was applicable. The applicant was (and is still) satisfied that the evidence shows a significant number of the inhabitants of the locality (Caerwent), or of any neighbourhood within a locality (Caerwent Village), indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years and that they ceased to do so in May 2008, that is after September 2007 but before July 2009 and the application was made within two years of the date on which the use ceased.

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40. In objecting to the case for registration, the objector's legal representatives highlighted the evidence confirming the fact that notices were erected around the Merton Green area on or around 30/31 May 2005 effectively granting permission for recreational use of the application land on foot. It is argued that this notice renders all subsequent use by the public 'with permission' so that it cannot qualify for the purposes of subsection 15(2) because use in the last 4 of the relevant 20 years was not 'as of right'.

41. In response, the applicant sought (and still seeks) to amend the application if necessary. Whilst the existence of these notices and their wording is accepted as fact, their effect in relation to subsection 15(3) is not agreed. In short, the applicant relies on the provisions of subsection 15(7)(b) to rebut the objector's argument.

42. This issue is discussed in detail below in paragraphs 160 to 177. However the applicant submits that, if its arguments in relation to the effect of the notices are rejected, it should not be prevented from relying on the alternative criteria in subsections 15(2) or 15(4) simply because the application form (not the underpinning legislation) requires the matter to be pre-judged by the applicant at the outset.

43. Mr Hughes argued that it would be objectionable in principle for the rights of the inhabitants to be lost as a result of the wrong box being ticked on the form. It must be reasonable to accept arguments made in the alternative, following a finding on a disputed matter. The wording of section 15 of the 2006 Act does not preclude this. It is only the application form (Form 44) that requires the pre-selection of only one of the three possible criteria for registration that are identified in the 2006 Act.

44. The applicant submitted that, provided the objector has had a proper opportunity to address any arguments raised in the alternative, there is nothing to prevent an amendment being made to an application form. In this case the objector was given ample notice[11] that the applicant intended to request amendment of the application form (if necessary) and of its intention to make submissions in respect of subsections 15(2) and 15(4) as well as 15(3).

45. In response, Mr Porten drew attention to the comments of Lord Hoffman in the case of *Oxfordshire County Council v Oxford City Council & another [2006] UKHL 25, [2006] 2 AC 674* (known as *the Trap Grounds case*): "*the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties*."

46. Whilst he conceded that, as a matter of principle, an amendment to rely on a different subsection might be permissible, this should only be allowed where other parties would not be prejudiced. In his submission the critical test is whether, at the date of the amendment, it would be open to the applicant to make a fresh application relying on the alternative subsection. This was reflected in the approach taken by Lord Hoffman (at paragraph 61) in *the Trap Grounds case* and the guidance applicable in England published by *Defra* (at paragraph 7.14.4). Mr Porten highlighted the passage: "*It would be pointless to insist on a fresh application (with a new application date) if no prejudice would be caused by an amendment, or if any prejudice could be prevented by an adjournment to allow the objectors to deal with the points for which they had not prepared*."[12]

47. He accepted that it may (theoretically) be possible for a new application to be made on the grounds specified in subsection 15(2) (if qualifying use could be shown to be continuing). However, it was the objector's submission that the opportunity to re-apply on the basis of subsection 15(4) has now passed since this would require the application to be made within five years of use ceasing where this occurred before September 2007. This could only apply if use was found to have ceased in May 2005 when the notices were erected, in which case the deadline was May 2010. Consequently, he submitted an application based on subsection 15(4) would be manifestly out of time. Thus to allow the amendment requested would prejudice the objector and "would drive a coach and horses through the express provisions of the statute".

48. Mr Hughes accepted that arguably it would be too late now to accept a wholly new request for amendment of the application. However the request had first been made in February 2010 after the matter of the notices had been raised; further, there had been no determination of the request at that time.

49. Mr Porten agreed the possibility of an amendment was floated in February (and objected to by the objector) but Mr Hughes had, in his opening address to the inquiry, invited me to treat his written submissions "*as an application to amend the application form (if necessary)*". In his view the request to amend the application was therefore made in November 2010, not February.

[11] By letter to MCC dated 24 February 2010, to which the objector responded by letter dated 12 March 2010
[12] I note also the preceding sentence: "… it seems to me that the registration authority should be guided by the general principle of being fair to the parties."

50. Mr Hughes responded that the request made by him at the inquiry was simply an intention to regularise the position first raised in February.

51. My views on these submissions are as follows:

52. Firstly, it should be appreciated that the difficulties which prompt the applicant's request to switch from the grounds on which it originally intended to rely (in subsection 15(3)) will only arise if (a) it is accepted, as a matter of fact, that notices were erected in May 2005 purporting to grant permission for use of the land, and (b) these notices have the effect of rendering all use by the public thereafter 'with permission' as opposed to 'as of right'.

53. The existence of the notices from that date (and the wording used) is not disputed by the applicant; their interpretation clearly is. If the applicant's interpretation is accepted, there will be no need to consider the request for amendment of the application. If the objector's position is preferred, the issue will need to be addressed.

54. There is no express guidance (either statutory or judicial) relating to the specific circumstances in this case. In the "Guidance to commons registration authorities and the Planning Inspectorate for the pioneer implementation (of Part 1 of the Commons Act 2006: September 2010" *Defra* refers to *the Trap Grounds case*[13] and the view of Lord Hoffman (quoted by Mr Porten). It also notes the words of Baroness Hale (in the same case): "*the registration authority may allow amendments or deal with an application in accordance with the evidence before them, provided always that they have given every person who might wish to object (or who otherwise has a legitimate interest in the process) a fair opportunity to consider what is proposed and make representations about it*."

55. At paragraph 7.14.4, Defra suggests that "*a good rule of thumb is that, where the registration authority considers the amendment to be so significant that a new notice of the application as amended ought to be published (assuming that notice of the original application has already been published), then the authority may decide to refuse the amendment, on the grounds of possible prejudice to other parties. But each case will need to be considered on its merits (and in some cases, the acceptance of a significant amendment may be the fairest way of proceeding, if the alternative would be to start all over again)*." Whilst this guidance is drafted for England, there is no reason to suggest the statute or relevant caselaw should be interpreted differently in Wales.

56. It seems to be recognised that it is for the registration authority to decide whether an amendment should be accepted or not, and that the decision must be guided by fairness to all parties.

57. It is hard to believe it was the intention of Parliament that the 2006 Act should be designed to wipe out rights acquired by the public over twenty years or more solely because facts came to light after the application was submitted that countered the applicant's case even though the application could have succeeded on different grounds. Given the caveat that all

[13] In which amendment of the extent of the application land was at issue

interested parties (and in particular any potential objectors) should be offered adequate time to respond to any amendments in the light of new evidence, it seems (to me) that it would be unfair to the applicant to refuse to consider an amendment unless the result were a substantially different application.

58. Defining 'substantially different' is no easy task but, in my view, in the light of the limited guidance and submissions in this case, the wording of subsection 15(1) (set out in paragraph 17 above) does not preclude consideration of substantially the same evidence under different criteria in the alternative.

59. The burden of proof is on the applicant. It is not for the registration authority to make or re-make the applicant's case. Yet if the applicant wishes to re-formulate its own case in response to new evidence put forward by an objector, would it be fair to resist? In my view it would be inequitable to do so, provided other parties have the chance to respond.

60. The prescribed application form does not appear to anticipate any ambiguity over the date on which use ceased. The published notice of receipt of the application (in Form 45) stated: "*The application seeks the inclusion in the register of town and village greens of the land described in the Schedule below which is claimed to have qualified for registration as a town or village green in May 2008 by virtue of the land concerned being used "as of right" by the local community for lawful sports, pastimes and general recreation for over twenty years until May 2008*." It continues: "*If the registration authority is satisfied that the land described below qualifies for registration as a town or village green, it will so register the land"*.

61. If an amendment to alternative grounds were accepted, arguably the former sentence in the notice would no longer apply although it was clearly a true statement at the time it was published. The second sentence would remain true, whether the application were dealt with on the grounds applied for or if amended.

62. However, even if the switch to different criteria were to be judged a significant alteration, accepting the requested amendment may still be the fairest way to proceed.

63. Mr Porten suggested that an amendment should only be accepted where there is nothing to be gained by either party from starting the process again with a new application. He makes the point that a fresh application made in November 2010 (at the inquiry) on the grounds specified in subsection 15(4) would be time-barred; on that basis he argues that an amendment should not be accepted. Mr Hughes contends that the relevant point at issue is when the amendment was first requested which he argues was February 2010. At that time a new application under subsection 15(4) would have been possible, had the applicant been informed that his request was rejected; however it was not.

64. It might also be appropriate to consider whether the date of the application is the relevant point in time at which the clock stops and from when any amendments should be judged to apply.

65. In reaching a conclusion I would reject the objector's submission that amendment of the application should be refused. I do not consider it would be unfair to the objector to accept the amendment requested by the applicant since the essential facts remain unchanged and the objector has been given ample time and opportunity to consider the evidence in relation to the alternative criteria. In my view it would be unfair to the applicant to reject the request to amend when the delay in responding to the request has resulted in it being impossible to re-submit the application.

66. It is therefore my recommendation that the registration authority accepts the applicant's request to consider the evidence in relation to subsections 15(2) and 15(4) in the alternative if the requirements of 15(3) are not satisfied.

67. Consequently I shall examine the evidence in relation to all three subsections although clearly, if my recommendation is not accepted, only subsection 15(3) will be relevant.

The application land

Description of the site

68. The application form identifies the area in question as 'Land at Merton Green and Ash Tree Road' and describes its location as Caerwent, Monmouthshire.

69. For ease of reference the attached map sub-divided the application land into nine smaller parcels labelled A-I although Mr Hughes emphasised that the inhabitants made use of all parts of area without conscious reference to these artificial boundary lines.

70. The description I can offer from my personal experience of visiting the site on three occasions in 2010 (in August and November) will be of limited assistance since the construction works which began earlier in the year have changed the character of most of the application land.

71. In essence, this site lies immediately north of the A48 which separates it from the rest of Caerwent village. To the north is the boundary with Ministry of Defence land, secured by means of steel railings. Ash Tree Road weaves through the site linking Dinham Road to the east with Llanvair Road in the west; both of these roads link with the A48. To the north and south of Ash Tree Road are seven two-story blocks of residential flats. Also to the south and adjacent to the A48 is Green Lane Farm with 2 recently constructed dwellings located within the former farm yard.

72. Areas A, B and C are now separated from Ash Tree Road by security fencing and the land has been levelled in preparation for construction works. Area D is also secured by fencing and appears to be used as a storage compound. Area E remains open and largely unchanged other than the loss of some trees. A (non-definitive) footpath apparently used by the public runs through area F, linking the A48 footway with Ash Tree Road. To the east of this, area F together with G and a part of H are fenced off from Ash Tree Road with houses under construction. New houses now stand on parts of areas H and I.

73. The description of the area before construction works began is quite different. I heard evidence from local witnesses who gave verbal accounts of the nature

of each of the nine difference areas within the application land. All these descriptions tally with the picture so clearly illustrated in an aerial photograph taken in 1993 which was brought to the inquiry[14].

74. In addition to its present extent, Ash Tree Road continued in a loop surrounding an elliptical shaped open grassed area which was referred to by many witnesses as being "Merton Green". This is marked on the application map as area C.

75. Area B was also open grassland whilst both A and D were predominantly covered by groups of trees and bushes with grassed areas and walkways between. Area E was mostly open, mostly grassed with the remains of hard-standings which once formed the foundations of storage buildings on the site. There were trees and bushes on the south side of Area F but grass adjacent to Ash Tree Road. Area G was open grassland with a post and wire fence separating it from the pasture land associated with Green Lane Farm. Area H was known as 'the Ditch' or 'the Ditches'. This was the former route of the road to Shirenewton; it was a tree-covered sunken lane but under the canopy the ground was worn by children playing. Area I was grassed on the west side and covered by trees on the east.

76. Access to all parts of the application land could be gained directly from Ash Tree Road (including the loop around Merton Green) since there appear to have been no physical barriers to prevent it, other than trees and bushes in places. Whilst it seems this road is not recorded as maintainable at the public expense on the highway authority's list of streets, (and it is not for me to determine its status in law) the evidence submitted indicates it was used freely by people on foot, with bicycles and in motor vehicles.

77. My view as an impartial observer is that the site is not an area which members of the general public are likely to come across by chance. It is not visible from the A48, being largely screened by trees, and there are no signposts directing people to it. Consequently it seems reasonable to assume that those people who have used it lived in the area or visited people in the area and thus became aware of its existence through word of mouth and by seeing others use it.

78. I observed one notice on my visits, positioned at the westernmost point of Area I on the north side of Ash Tree Road. It is not disputed that this is one of 9 such signs put up by MCC at the end of May 2005. The wording states as follows:

"*These grounds may be used for sports, pastimes and other recreational purposes on foot only. Exercising of animals is strictly forbidden. This permission may be withdrawn at any time. Whilst the Council permits access as stated, all persons coming onto the land do so at their own risk. The Council will not accept responsibility for loss or damage to property or responsibility for injury unless it is caused by the Council's negligence*."

[14] And copies subsequently provided by the applicant

History of the application land

79. The application land is owned by the objector, Barratts, together with other adjacent land to which the application does not relate but which is also subject to planning permission for residential development.

80. The whole site was owned by the Ministry of Defence until 1976 when it was sold to the County Council. The site had once consisted of MOD housing and associated amenity land, including 7 blocks of flats and several residential 'Nissen Huts' although, by the time of sale, the last of the latter had been demolished. The original intention of the purchase appears to have been to develop land for social housing purposes. The flats are now occupied by a mixture of Council tenants and others who have bought their properties under the 'right to buy' scheme.

81. MCC formed the view the land was suitable for housing and so applied to itself for planning permission for residential development of the land on 22 October 2003.

82. On or around 1 June 2005 the Council[15] erected signs in prominent positions around the various parts of the application land, permitting the use of the land concerned for sports, pastimes and other recreational purposes, indicating the permission may be withdrawn at any time. Photographs of these signs appear in the evidence of Mrs J Carter, the wording is set out in paragraph 78 above and details of their locations are provided.

83. On 15 February 2005 a report on the Council's capital programme considered proposals to sell council-owned property in four locations, including "Merton Green". The recommendation to pursue this as part of a sustainable capital 3-year programme was agreed.

84. Since the land consisted of or included land which was arguably 'open space' and was no longer required by the Council for any other purpose, before disposing of the land the Council (in its corporate capacity) went through the process of appropriating the land for planning purposes pursuant to section 122 of the Local Government Act 1972 and then resolving to sell the land once so appropriated pursuant to section 233 of the Town and Country Planning Act 1990.

85. According to the evidence of Mrs Carter, appropriation of the land was reported to have been required by the prospective purchaser as a preliminary step before sale to better safeguard its position in respect of development of the land.

86. The Council duly followed the statutory requirements associated with procedures for appropriation and disposal of Council-owned housing land including the advertisement of its intentions[16] and the consideration of any objections thereto. Resolutions both to appropriate the land for planning purposes and then to sell it once so appropriated for re-development were

[15] On the advice of Eversheds (Solicitors)
[16] With notices published in the local press under section 122 on 20 December 2006 and again on 27 December 2006, and under section 233 on 7 and 14 February 2007.

duly made on behalf of the Council[17] on 7 March 2007. The Council subsequently disposed of the land to the objector on 15 October 2007.

87. Full planning permission was granted by the Council on 18 June 2008 (under reference DC/2007/00986) for the development of 147 new dwellings on the land at Merton Green, Caerwent. This constituted approval of matters reserved under the outline permission issued on 23 June 2006 (reference MM09253). On 1 February 2010 the Council issued an 'Approval of Reserved Matters' (reference DC/2009/00725) thereby authorising a substitute scheme encompassing the construction of 132 dwellings and associated works on the site. The development site included the application land.

88. Condition 8 of the outline planning consent issued in June 2006 made reference to a section 106 agreement [18] required "to ensure adequate infrastructure and public amenities are provided in relation to the overall site area". I have neither seen any such agreement, any plans to which it may relate, nor have I requested such details since I do not consider it has any bearing on the matters on which I shall base my recommendation. However I have noted it here since it may be considered relevant to concerns expressed by the applicant about a lack of information available to local residents during the process of formulating plans for development of the site.

89. Development has commenced and, at the time of my site visits in August and November 2010, construction work was in progress.

90. Future plans for the site are not relevant to determination of this application (although they underline the significance of the decision). However it may be helpful to understand the reasons behind the appropriation of the land by the County Council in March 2007 and the context in which the application was made in July 2009.

91. It also seems reasonably clear from the written evidence that from 1976 until the summer of 2008 the application land was maintained by MCC as an area for informal recreation, although land ownership transferred to the objector in October 2007.

The evidence

Documents submitted in support of the application

92. With the application submitted in July 2009 MGAG included 28 statements (dated August/September 2008) from witnesses together with a schedule summarising their periods of use of the application land, their periods of residence and addresses, the areas utilised and the period over which different types of activities were undertaken. Also included was a graphic analysis of the use of each of the 9 areas within the application land.

93. Further, two letters of support were submitted (from Mr Fyfe and Mrs Fyfe).

94. Two local history papers were attached to the application setting out the background to the Merton Green site. One paper is headed "The Ups and

[17] By means of Cabinet Individual Decision by County Councillor R J W Greenland (Recording Log dated 7 March 2007) on the basis of a Principal Valuer's Report and Recommendations dated 7 March 2007
[18] Section 106 of the Town and Country Planning Act 1990

Downs of Village Life in One Lifetime" and the other, "Merton Green" was written by Shirley Nettleship in June 2008 and was published by the Caerwent Historic Trust.

95. Additional second statements were prepared by 2 witnesses for the inquiry and statements from another 10 individuals were submitted, together with updated analyses covering the new statements.

96. A number of photographs dating back to 1980 from various personal collections were submitted, showing friends and family members using different areas of the application land for recreational and social activities.

97. Also letters, emails and evidence forms (3) from a total of 45 more people were submitted, some recounting use of the land and others lending support for the application. 3 new letters and one form came from people who had already made representations.

98. A summary list of all the evidence submitted by MGAG is included at the front of the applicant's inquiry bundle.

99. This omits the two aerial photographs showing Merton Green that were produced just before the proceedings closed. Having ensured that the objector has had an opportunity to comment on this evidence, I propose to treat it as part of the applicant's case.

100. It had been the applicant's intention to call 13 witnesses to give evidence to the inquiry. As explained at paragraph 9 above, 5 of these did not do so although they were willing and prepared to be cross-examined if required. All the supporting witnesses from whom I did hear evidence at the inquiry (listed at the end of this report) made themselves available for cross-examination.

101. All the documents submitted in support of the application are listed at the end of this report.

Documents submitted opposing the application

102. In response to notice of the application, on 22 January 2010 a detailed objection was submitted to MCC on behalf of Barratts opposing the registration of the land at Merton Green and Ash Tree Road as village green.

103. Since the grounds for objection related largely to matters of law, and matters of fact relating to the history of the site were within the direct knowledge of MCC in its capacity as the former owner of the land, and also as the planning authority, no additional evidence was submitted at that stage.

104. However, for the inquiry, a bundle of supporting documentation was provided including the statement of Mrs J Carter as Principal Estates Valuer for MCC together with a number of maps, documents and photographs annexed thereto. This included:

- Documentation confirming the submission of the outline planning application in October 2003;
- A plan showing the areas for 'quiet enjoyment' which certain householders in Ash Tree Road are entitled to use;

- A copy of a report to the MCC Cabinet dated 15 February 2005 concerning the capital programme 2005/6 – 2007/8 and the cabinet decision recording log noting the decision to recommend to the full Council the sale of land at Merton Green;
- A plan showing the position of the notices erected at Merton Green and Ash Tree Road with photographs (taken 1 June 2005) confirming their installation and the disappearance of some on 12 June 2006;
- Minutes of MCC Planning Committee dated 18 October 2005 at which it was resolved to grant outline planning permission for development of land at Merton Green subject to a number of conditions;
- Details of an advertisement placed in the local press in February 2006 giving notice of MCC's intention to dispose of land at Merton Green and inviting comments;
- Details of an advertisement (under the Local Government Act 1972 subsections 123(1) and (2A)) placed in the local press in March 2006 giving notice of MCC's intention to sell land at Merton Green "which forms part of an open space" and inviting objections;
- Copies of advertisements (under the Local Government Act 1972 subsection 123(1) and (2A)) placed in the local press on 20 and 27 December 2006 with the heading "Appropriation of Land at Merton Green, Caerwent", giving notice of MCC's intention to appropriate land at Merton Green, "which forms part of an open space" for planning purposes and inviting objections;
- A copy of an email to MCC from Mr A Spooner expressing concerns over the development; a response to the email from MCC[19], and a reply from Mr Spooner;
- A copy of an advertisement (under the Town and Country Planning Act 1990 section 233) placed in the local press on 7 and 14 February 2007 with the heading "Sale of land at Merton Green, Caerwent" giving notice of MCC's intention to sell (for development) land at Merton Green "which forms part of an open space" and to appropriate the land for planning purposes (as previously advertised) having first considered any duly made objections thereto. The advertisement also noted that whilst planning permission had already been granted for residential development, proposals for the detailed design of the scheme would be the subject of full consultation once the plans had been submitted;
- A copy of a report for a decision by a single member of the MCC Cabinet (Cllr R J W Greenland) dated 7 March 2007 concerning appropriation and sale of land at Merton Green and the cabinet individual decision recording log noting the decision to proceed with both appropriation and sale;
- A copy of the planning permission (ref MM09253) for residential development of land at Merton Green, Caerwent issued on 23 June 2006.

[19] This stated: "It is our intention to transfer the ownership of the property from Housing to Planning internally within the Council. It is this to which we are seeking comments."

With the exception of the roads and one small area which lies between Areas C, D, E and F, the area for which outline planning permission was granted matches the (village green) application land[20];

- A copy of the planning permission (ref DC/2007/00986) for reserved matters relating to outline planning permission M/9253 - development of 147 new dwellings on land at Merton Green, Caerwent issued on 18 June 2008;
- A copy of the planning permission (ref DC/2009/00725) for reserved matters for the construction of 132 dwellings and associated works on land off A48 known as Merton Green, Caerwent (substitution of 145 unit scheme approved under DC/2007/00986) issued on 1 February 2010.

105. A summary list of all 26 exhibits submitted by Mrs Carter is included at the front of the objector's inquiry bundle and is listed at the end of this report.

106. It had been the objector's intention to call Mrs Carter as a witness to present her evidence to the inquiry. As explained in paragraphs 9 and 10 above, it was not necessary for her to do so since the matters of fact on which she was to speak were not challenged.

Other relevant documentary evidence

107. In addition to the evidence submitted by the supporters and objectors, Monmouthshire County Council provided a copy of "The Stopping up of Highways (County of Monmouth)(No.7) Order, 1959" which extinguished a number of highways in the area, including the road from Caerwent to Crossway Green which became known as "the ditches" and two footpaths across this site.

108. MCC supplied an extract from a plan showing the highways included in the Authority's 'list of streets'. As I have already noted, neither Ash Tree Road nor Merton Green are included.

109. Whilst I understand a number of parties were notified of the application, no responses or other representations have been provided to me. I was told by some of the applicant's witnesses that the Caerwent Community Council had decided not to support the registration although no specific reasons were given and no written evidence was available to confirm this.

Evidence of use from inquiry witnesses

110. I heard from ten users[21] of the application land at the inquiry although, as explained above, I have accorded equal weight to the written evidence of five other people who were prepared to, but not required to, give evidence in person.

111. The following is a brief summary of the main points I noted from the evidence of each of these witnesses.

[20] No-one at the inquiry could offer an explanation as to why this small patch of ground had been omitted from the application for registration.
[21] This included Mr T M Jones who had not prepared an inquiry statement but had submitted a letter.

112. **Mrs C H Guscott** has lived at 13 Llanvair Road for 9 years and previously in Lawrence Crescent for a further year. She and her family live on the north side of the A48 but regularly cross the road to access services in the village on the south side. Her sons (born in 1987 and 1994) have used the land since 2001, especially areas B, C and D for ball games, football, cricket and golf; areas C, E, G and H for riding bikes and roller blading, and areas A and H for making dens and playing hide & seek. It was generally regarded as a safe area for children to play, especially on summer evenings.

113. Until 2008 Mrs Guscott personally used the whole area to exercise her dog at least every other day and saw others doing likewise. She used to take her grandchild in a pushchair to see the sheep adjacent to areas F and G. She also picked blackberries, like many other people. Her family and friends joined the village celebration on area C for the Queen's Golden Jubilee in 2002 which included playing rounders although she had often seen others having firework parties and barbeques there.

114. Mrs Guscott recalls areas C and G being mown by the Council but no others.

115. **Mrs K L D Cousins** has lived at 9 Ash Tree Road since 2007 but had been a frequent visit to friends at 10 Ash Tree Road since 2002. She and her family would visit the Hammacotts for picnics, picking plums and blackberries (in areas A, B, D and E), and for firework and bonfire parties (on areas B and E). Area D was full of blackberries but the Council replaced many of the bushes with grass (around 2005).

116. On their regular visits since 2007, her 10 grandchildren have played on all areas of the application land. They played football and cricket on areas B and C, flew kites and learned to ride bikes on area C and rode their bikes in "the ditch" (area H). Mrs Cousins herself had personally used all areas for dog-walking since 2007. She often saw people playing golf on area C and recalled an informal football match organised by Mencap taking place in 2007.

117. Mrs Cousins had herself cut the grass on areas B and E after the summer of 2008 so children could carry on playing there. Prior to that she recalled MCC mowing parts of areas F, G, H and I near the road, areas B and C, and area D after the bushes had been removed.

118. **Mrs M E Jones** has lived at 5 Ash Tree Road since 1977.

119. Initially her husband had one of several allotments on area D (rented from MCC) amongst the remains of the Nissen huts (see Mr T M Jones' evidence) but she recalled he gave this up around the end of the 1980s. She also remembered garages on area E that were used for storing logs (although not when the buildings were demolished).

120. Mrs Jones personally used several areas for picking blackberries and plums; she had attended community parties on areas C and D for both the Golden Jubilee (in 2002) and the Silver Jubilee (in 1977, just after they moved to Ash Tree Road). Her daughters (born in 1975 and 1979) had played on the land as children and teenagers, especially in areas H (making dens in 'the ditch' and swinging on ropes) and areas C and G (where they played ball games such as rounders and cricket with other school children on summer

evenings and in school holidays). They also made snowmen and went sledging on the slope of area I in winter. Mrs Jones saw many children playing on the green and outside the flats and was aware of other families having summer parties and bonfires on the land.

121. When her daughter saw the notices erected in 2005, she rang the Council about them and was told to walk her dog alongside the A48 (but had carried on as before). She had walked the dog on areas A, B, C, D, E and G twice a day until 2008 when it died. Their use of the land had declined after 2008 although they saw others continuing do so.

122. Mrs Jones recalled the Council mowed areas B, C, E, F, G, H (above ditch) and I, and in front of flats (for which residents still pay); they did not mow area A or parts of area D because of the bushes.

123. Mrs Jones had not been aware of the appropriation procedure but knew other members of MGAG had made enquiries and were told by a local councillor not to worry about it.

124. **Mrs B E Thomas**[22] has lived at Green Lane House since 1996, opposite Merton Green but on the south side of the A48. She frequently took her grandchildren across the road to play on the land in summer, particularly to areas B, C, D and E for kite flying, riding bikes, football, tag, hide & seek and other ball games; the children learned to ride bikes on the grass on area C, and there were small mud banks on area E they liked to ride over. This continued until summer 2008 when the grass became too long for some activities though they continued to ride their bikes on area E and in "the Ditch" at H.

125. Mrs Thomas also saw other children playing and adults walking, with or without dogs. She personally had picked blackberries with her daughter and grandchildren in areas A, B and D though those in the west part of D were cut down in 2006/7 when she recalls the Council clearing this area. She remembers the Queen's Golden Jubilee celebration in 2002 on area C when approximately 70-80 local people attended.

126. Mrs Thomas and husband regularly walked their dog 2-3 times a day from 1996 until 2007 (when the dog died) and had seen other local people doing the same. She had seen people practicing golf on area C; seen children pitch tents on area D and had witnessed private family parties on bonfire night. She had been aware of notices in 2005 but believed these were a response to problems generally in the village with dog-fouling so presumed that it would be acceptable to walk the dog so long as she cleaned up any mess.

127. **Mrs A M Spooner** has lived at 6 Centurians Court since 1999 but between 1963 and 1981 in East Gate Crescent, Caerwent and 1981-1982 at 13 Ash Tree Road with her grandmother. As a child, she used the land almost every day between 1967 and 1971 with school friends, particularly butterfly catching, drawing and picnicking on areas C and D and riding bikes on areas

[22] Mrs Thomas also made a submission highlighting the lack of awareness amongst local residents of the various procedures carried out in association with development of the site, criticising the lack of communication from the County and Community Councils and misleading information provided by both about the implications of appropriation. This is addressed below at paragraph 307.

E and F. In 1969 (at age 11) she regularly visited friends who lived at Green Lane Farm and recalls picking blackberries in area A, picking raspberries, gooseberries and wild flowers in areas B, C, D and F, and exploring the old Nissen huts on areas A, B and D with their overgrown gardens. She remembers some huts still standing on area D between 1969 and 1973 but does not recall these being demolished. She also recalls buildings on area E but did not think these were used and was uncertain when they disappeared. Whilst living in Ash Tree Road she would accompany her grandmother on walks across area G to look at flowers and to area A to collect blackberries. Her brothers (and many others) played football on area C all year round after school and Mrs Spooner remembers other people walking, cycling, running and dog-walking mainly on areas C and G. She recalls a village bonfire party in the 1970s on east side of area C organised by people from Llanvair Road which was attended by over 100 people.

128. Mrs Spooner has continued to visit relatives in Ash Tree Road to the present day. She has seen children playing all over the application land and riding bikes in the ditch; she has even seen people circuit training and doing timed sprints on area C. She has personally used area C for exercising her dog since 2007 and her husband has done likewise. Although she saw the 2005 notice, she saw other people still walking their dogs so she also continued to do so.

129. In 2007 she had seen the notices in the local paper advertising the appropriation and her husband had been to County Hall to find out more but when he had raised concerns with a local councillor he had been assured there was nothing to worry about.

130. **Mrs K J Lloyd** has lived at 19 Ash Tree Road since 1999. Between 1987 and 1990 she lived at No. 6. As a child she rode bikes and played ball games in areas C, G, H and I; she picked blackberries in areas A, B and D, sometimes with her brother; sledging and snowball fights were on area I. She recalled her brother playing football, golf, rounders and cricket after school on areas G, H and I.

131. Since 1999 she personally used the land (especially areas G, H and I) to take her young son for walks and to walk her dog until 2008 when the grass began to get too long.

132. **Mrs D C I Hammacott** lived at 10 Ash Tree Road between 2002 and February 2010 and since then has been a visitor to friends living there.

133. She has regularly picked blackberries in areas D, E and F; she walked her dog on all areas except E (although not in 'the ditch') and has seen many others do the same. Although she saw the notices in 2005, she continued to walk her dog as before. In 2005 her family had a bonfire party on the green and a 21st birthday party which included a rounders match and tents pitched for camping. Most weekends her grandchildren would visit and play on the land, learning to ride bikes and playing football on areas B and C, and riding their bikes in 'the ditch' (area H). Mrs Hammacott has also seen people playing golf on areas B and C and football, rounders and cricket on areas B, C and G.

134. **Mrs E J May** has lived at 5 Llanvair Road since 1987. During that time she has seen areas B, C, D and E used on a regular basis for walking, cycling, jogging, dog-walking, blackberry picking, golf and football; she has also seen people camping on it. However she does not remember any allotments on area D or buildings on area E.

135. Mrs May has personally used area C with her children, grandchildren and neighbouring families for snowball fights and building snowmen in winter and for children to learn to ride bikes; areas B and D were used to pick black-berries and areas A and E for building dens. She was involved in organising the Queen's Golden Jubilee party in 2002 which was attended by about 90 people from all areas of Caerwent village. Mrs May did not recall anyone asking permission to hold the event there. She continued to use the land for walking and playing with her grandsons until building work started in 2010.

136. **Mr T M Jones** has lived at 5 Ash Tree Road since 1976. He acquired an allotment on area D in 1977 for which he paid rent to the Council; he kept this for 6-7 years. There were 8-12 people who also had allotments there but all finished around 1985 (+ or – one year) because of problems with the water supply. After that, the area quickly reverted back to nature and became overgrown. He recalled the Council clearing this and sowing grass around 1990 which it then mowed every fortnight. Mr Jones did not remember any Nissen huts but the concrete bases were still evident.

137. He recalled two garages/sheds on area E that were wood stores from which the MOD supplied wood to local people but this burnt down and was gone by 1982/3.

138. **Mr R J Smith** has lived at 4 Ash Tree Road since 1978. In fact he has lived in Caerwent since 1948 when, at age 6, his family moved to the area. In the 1950s he regularly played football, cricket and other games on area C in the evenings after school, at weekends and in school holidays with his friends. They also played on areas H and I, swinging from ropes tied to trees in H.

139. Between 1978 and 1984 his children played regularly on the land, particularly areas A, B, C, D, G and H including football, rounders, cricket, tag, hide and seek and riding bicycles. After 1984, he saw many other children doing as his children had done (and adults too) including kite flying, model aeroplane and model helicopter flying, golf, dog walking, and community activities including bonfires attended by residents of Caerwent. He personally has picked blackberries and mushrooms in areas A, B, D and E and has seen others doing likewise. In 2008 his grandson (who lives in Pound Lane Caerwent) played regularly in area H (the ditch) with his friends.

140. Over the last 20 years, Mr Smith has seen disabled children from Mountain House School near Chepstow (a MCC establishment) use the green (areas C and G) for rounders, cricket and just running about having fun.

141. Mr Smith sees many people using the land from his first floor flat. He believes some are from outside area the area (for example from Caldicot), people who come to use the land for walking dogs and practising golf. However most people are from Caerwent.

142. **Mr A R Lewis** has lived at Ten Elms Farm, Caerwent since 1954. In the late 1950s and early 1960s he played with friends a couple of times each week, playing games such as hide and seek and tag on area C, ball games on areas C, G and I, cowboys and indians on area F. Between 1959 and 1961 he helped his grandfather on his milk round, delivering to the old Nissen huts and flats in Ash Tree Road. Between 1969 and 1971 he had a paper round which took him around the same area where he saw children playing football on area C, G and I, and riding bikes on areas H and I. He saw people walking dogs on areas C, D, G and I; he recalls community events such as bonfires and fireworks (on C and I) and the Queen's Silver jubilee celebrations on area C in 1977.

143. **Miss K L Jones** has lived at 5 Ash Tree Road all her life, that is since 1979. Between 1984 and 1990 she regularly played cricket, football, rugby, go-karting, roller skating, hide and seek, kite flying and bicycle riding on all areas of the land. Team games were played on area C and cycle races took place around that area. There were wooden ramps on area E over which children rode bikes and in the ditch (area H); they played tag on area G. Many children who lived on Ash Tee Road also had friends from the village south of the A48 who came to the land to play. She recalls camping on areas B and G and Halloween gatherings in the ditch. Every year families held private parties around a communal bonfire on area C; her family let off fireworks on area G. She recalls the Queen's Golden Jubilee celebration in 2002 which brought the community together and was enjoyed by many local people. Since 1995 she has regularly seen children of all ages playing on the land just as she and her friends did. Her father has used areas B and C for practising golf. She personally has continued to use the land for running and walking her dog, seeing others doing likewise until summer 2008 when the grass-cutting stopped.

144. **Mr M Smith** resides at 37 St Tathans Place and has lived in Caerwent all his life (that is since 1974). In his teens and twenties his family dog was taken for walks all over the village including on the land at Merton Green. He recalls picking blackberries on areas A, B and E. He remembers a community bonfire in the late 1970s or early 1980s which seemed to be attended by the entire village. As children, he and many friends would practise golf, go-karting, skate-boarding, ride bikes, camp out, climb trees, build dens, play hide and seek, and generally play in areas A, B, C, D, G and H. Part of area H became known as the ditch, 'Ditchy' and 'Ditchwood', and provided endless hours of fun with obstacles and trees that were perfect for hiding, climbing and for BMX courses. He continued to use the area up to 2007 for jogging and practising golf but began to notice a gradual change in the land, the grass becoming more unkempt and rough. He recalled seeing signs deterring people using the land for certain activities but doesn't remember the details though people still seemed to use the area.

145. **Mrs C Harvey** has lived at 7 Llanvair Road since September 2009 but lived at 1 Llanvair Road between 1999 and 2006. After moving to Caerwent in 1999, she used areas B, C and D for dog walking, blackberry picking and bike riding and, with her sister, walking through areas D, C, E, F, G, H and I to keep fit. Her husband regularly practised golf on area C and saw others do the same. Between 1999 and 2002 she took her dog on daily walks on areas

B, C and D and saw others doing likewise. Mrs Harvey recalls a barbeque party in 2002 on area C organised by neighbours in Llanvair Road. When her first son was born in 2002 she used areas D and C much more, indeed he learnt to ride a bike here. The family used area C for football and rugby every week-end in dry weather, for flying kites and paper aeroplanes, building snowmen and pulling sledges, and for picking blackberries. Mrs Harvey has seen a minibus of disadvantaged young people and their carers use area C for picnics and rounders in the summer months.

146. **Mrs K Dally** has lived at 3 Llanvair Road since 1994 when she moved to the village. She has used areas A, B, C and D until the present day[23] for various activities: she would walk her dog twice (sometimes three times) a day on areas A, B and C and saw others doing likewise. In summer she played cricket, rounders and pitch and putt with family and friends on area C. Areas A and B were used for picking blackberries (also in area D), raspberries and plums. Mrs Dally's first son was born in 2005 and, as he got older, used area C for snowball fights with the neighbours' children and grandchildren, for testing out new toys, kicking a football around and for learning to ride a bike without stabilisers. He also used areas A and B for exploring, climbing trees and making dens.

147. **Mr Harris** (whose evidence was given in a neutral capacity) now lives in Caldicot but, in 1989, lived for a short time in Caerwent near the Cenotaph. His wife is from Caerwent, (they married in 1987) and, since 1987, her cousin has lived at 1 Llanvair Road. Mr Harris and his family have visited regularly since then. His son also visited Merton Green (and used areas A, B, C, D and E) with a Mencap group which met in The Gym then played games on area C even though playing fields have been in existence near the village hall since 1974. Mr Harris first knew Merton Green when he worked in the area in 1972 and recalled Nissen huts on the site but no allotments.

Main points emerging from the evidence of use

148. In addition to the ten supporting witnesses who gave evidence to the inquiry, there is written evidence in various forms from a further 74 people provided by the applicant to support the application.

149. This evidence, being untested through cross-examination, would normally attract less evidential weight. However I find nothing in these letters, emails, questionnaires and statements to conflict in any significant way with evidence given by the applicant's witnesses at the inquiry. Indeed, Counsel for the objector did not challenge any specific aspects of the user evidence.

150. The main points I note from this evidence are as follows:

- Many people report picking fruit (blackberries, raspberries and plums) in areas A, B and D.
- Children learned to ride bicycles on the grass on areas C and G but then rode them in all areas, especially area E where there were jumps and area H which presented many 'off-road' type challenges.

[23] Her statement is dated 27 July 2010.

- Several families held parties and barbeques on area C.
- Ballgames (especially those played as team games) such as football, cricket, rounders and rugby mostly took place on areas C and G.
- Areas G and F were used by parents with young children to walk across to see the farm animals kept in the adjacent field.
- Children used areas A and H to build dens in the bushes and trees.
- The slopes in areas B and I were used for sledging in winter snow.
- Dogs were exercised over all areas but not in 'the ditch' part of area H.
- Many claimants recall a celebration attended by people from all over Caerwent for the Queen's Golden Jubilee in 2002 held on areas C and D.
- The application land was used mostly (although not exclusively) by people from Caerwent, particularly children who would play there with friends from the village on summer evenings, week-ends and school holidays.
- No-one asked the Council for permission to undertake any of the various activities reported on the land, or seems to have been aware of any others doing so.
- The notices erected by the Council in 2005 did not cause anyone to alter their use of the land; in particular, dog-walkers continued as before.
- No-one mentions any other notices being erected at any time before (or since) those erected in 2005 (other than those with identical wording replacing ones that had been removed or damaged).
- The grass on most of (but not all) the application land was mown by the Council until, in the summer of 2008, mowing ceased and the grass became too long for many play activities to continue[24]. The grass in parts of areas B and E were mown by residents thereafter.
- The buildings on area E and the allotments on area D appear to have been removed by the mid-1980s although precise dates remain uncertain.

Analysis of the evidence

151. In reaching my conclusions I have taken into consideration all of the material noted above, apportioning weight as appropriate.

152. The application was made on the basis of subsection 15(3) of the 2006 Act. On the assumption the applicant's request to have subsections 15(2) and 15(4) considered in the alternative[25] is accepted, I set out the requirements that would need to be satisfied in the case of all three possibilities.

153. In each case it will be necessary to show (a) a significant number of (b) the inhabitants of any locality, or of any neighbourhood within a locality, indulged

[24] It is not entirely clear whether or not the grass was actually mown in the spring of 2008 or whether mowing ceased after ownership was transferred to Barratts in October 2007. However, it remains a fact that by June 2008 the grass had become too long for some activities to continue.
[25] I have set out the arguments in relation to this, the first issue in dispute, in paragraphs 40 to 66 above.

(c) as of right (d) in lawful sports and pastimes (e) on the land (f) for a period of at least 20 years.

- In the case of subsection 15(2), that use must have been continuing in July 2009;
- In the case of subsection 15(3), that use must have ceased after September 2007 but before July 2009. Since the application must be made within two years of the date use ceased, this element could only be satisfied if use ceased after July 2007 although the preceding criterion requires use to have ceased after September 2007;
- In the case of subsection 15(4), that use must have ceased before September 2007. Since the application must be made within five years of the date use ceased, this element could only be satisfied if use ceased after July 2004.

154. To establish twenty years of use in the case of 15(2) would require qualifying use to date back to 1989 at least, for 15(3) back to 1987 at the earliest and for 15(4) potentially back as far as 1984. However it will be necessary to establish when the use ceased before considering whether it had continued for the required twenty year period.

155. In its original submission, the applicant claimed that use of the application land ceased in the summer of 2008, primarily because the Council stopped its grass-cutting regime, resulting in the grass growing too long for many of the activities which previously took place. That is still the position of the applicant although some of its witnesses and other claimants say they continued to use some parts of the land for some activities until the time of the application and since. Clearly use has not been possible since earlier in 2010 when Barratts' security fences partitioned the land from the road.

156. It is the objector's submission that qualifying use (that is use 'as of right') ceased at the end of May 2005 when the notices were erected, effectively granting permission for most types of recreational use on foot.

157. It is a well established principle that in claims for prescriptive rights, the use upon which any such claim is founded must be 'as of right', that is without force, without secrecy and without the licence of the owner (either express or implied).

158. As far as I am aware from the evidence provided, the land has no formal designation as 'public open space' and was not acquired by the County Council under the Open Spaces Act 1906 such that use by the public for recreation could not qualify as being 'as of right'.

159. I therefore propose to examine the effect of these notices first in order to then address the question of when use of the land ceased.

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The effect of the notices

160. The wording on the notices is set out in paragraph 78 above and has remained unaltered since first erected in 2005 (although some signs were replaced following damage).

161. Mr Porten submitted these signs are in part prohibitory and in part permissive. In particular, any use of the land for walking dogs after May 2005 was strictly prohibited and consequently "it would not be acceptable for someone to acquire rights against the owner"[26] by doing so. Mr Porten relied upon the judgement of His Honour Judge Waksman QC in the case of R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council (and others) [2010] EWHC 530 (Admin) addressing the principles to be applied to prohibitory notices:

"The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known."

162. Further, once in position, the signs have continuing effect and there is nothing to require the notices to be supported by additional means of enforcement. The wording on the notices was explicit and it is clear the claimants saw the notices and understood what they meant.

163. To qualify as use 'as of right', the use by the local inhabitants must have been without force, without secrecy and without permission[27]. In *the Redcar case* Lord Rogers concluded: "*In short … user is only peaceable (nec vi) if it is neither violent nor contentious*." Whilst the claimed use was not violent, it was Mr Porten's submission that some use (for instance the dog-walking element) was clearly contentious since it contravened the landowner's stated prohibition.

164. In response to this argument, Mr Hughes accepted that the fundamental question is what the notice conveyed to the user but drew attention to the further principles highlighted by HHJ Waksman: that the nature and context of the notice must be examined, and that if it is suggested the owner should have done something more than simply erect the notice, what would be proportionate to the user in question.

165. He submitted that the signs conveyed no message of any importance to the users. They saw them and they ignored them. Put into context, there had been many years of open and unrestricted use of the land by the inhabitants prior to the notices, and no attempt to regulate use after they were erected.

[26] The words of Lord Rogers in the case of R (Lewis) v Redcar & Cleveland Borough Council [2010] UKSC 11 (*the Redcar case*)
[27] "Nec vi, nec clam, nec precario"

In those circumstances, the inhabitants formed the view they were entitled to continue their use as before.

166. As the landowner (at the time) MCC erected the notices following legal advice and with a view to the subsequent development of land. Mr Hughes argued it would have been proportionate to expect further steps to be taken to challenge the continued use of the land by the inhabitants 'as of right'.

167. Turning to the permissive element of the notice, Mr Porten submitted that revocable permission for activities on foot had been granted, thus rendering all such use subsequent to May 2005 (if not before) 'with permission' and therefore precarious. The wording clearly stated '*This permission may be withdrawn at any time'.* The use on foot by local inhabitants from June 2005 onwards could not have been 'as of right' since it took place with the express permission of the owner of the land.

168. As regards use by people on bicycles, Mr Porten submitted that people coming onto the land to ride a bike did so on foot, that the majority of cycling described by the claimants appeared to be as part of other activities on foot, and that in any event the evidence does not support a case that there was continuous use by cyclists throughout the period 2005 to 2008 or by a significant number of local inhabitants.

169. For the applicant, Mr Hughes argued that even if the notices did render use thereafter not 'as of right', use before the date the notices were erected must have been so.

170. He submitted that even after the notices went up, people continued to use the land to exercise dogs and on bicycles, neither of which were expressly permitted. Thus these openly observable activities would have appeared to the landowner as the assertion of a right. Further, a reasonable observer would conclude, from the owner's failure to do anything to stop the continued use of the land for cycling and dog walking, that the signs were not intended to grant permission for the use of the land.

171. In any event, he argued that where qualifying use continues after the erections of such notices (as here) subsection 15(7)(b) operates so that any permission is to be disregarded in considering whether the use is 'as of right'. If the signs are disregarded, there can be no question that the use of the land was 'as of right'.

172. My views on this issue are as follows:

Dealing firstly with the prohibitory element of the notices, the words "*Exercising of animals is strictly forbidden"* effectively prohibits dog-walking. Whilst there is mention of at least one person bringing a horse onto the land, it is the evidence from those people who, after May 2005, continued walking their dogs that, in my view, cannot qualify as being use 'as of right, since it was forbidden[28] and therefore contentious.

[28] It is a moot point as to whether it was in fact the dog or the person walking the dog (or both) that is prohibited but the issue was not argued here and I have not explored it further.

173. Secondly, the notice permitted "*sports, pastimes and other recreational purposes on foot only"* but that permission could be withdrawn at any time. Whether or not users of the land took heed of its instructions, it seems to me that the inquiry witnesses all understood what it said but, for various reasons, chose to ignore it. Whether they were justified in doing so will be established by the outcome of this application. However the fact they ignored it, and no-one from MCC enforced it other than to maintain at least some of the notices, does not alter the fact that permission was clearly and expressly given for some of the activities enjoyed by the local inhabitants and others were forbidden.

174. I find there is a degree of ambiguity over the exact area to which permission was to apply; the notices simply referred to "*these grounds*" and "*the land*" but no maps were attached nor precise boundaries described. There is no distinction made between the area now the subject of this application (areas A-I), the grassed areas between the flats and Ash Tree Road excluded from the application (also including the area immediately north of Green Lane Farm), and those areas subject to this application but over which certain residents had (and have) a private right to quiet enjoyment[29] as described in Mrs Carter's evidence. The positions of the notices indicated by her plan (JC6) do not suggest any distinction was being made.

175. Having heard and read the evidence of the many claimants, there is nothing to suggest that in practice this lack of clarity had any material effect in terms of how people reacted to the notices. At most it may have created a degree of confusion in the minds of those tenants enjoying private rights over certain areas but there is no evidence it did so.

176. I draw the conclusion that all the activities enjoyed by the claimants on foot (from which I exclude cycling) after the end of May 2005 were either 'with permission' or prohibited and consequently cannot qualify as being 'as of right'.

177. Whilst the overwhelming majority of the claimed recreational activities were on foot, some were not. Many claimants said they had cycled on the land and some such use is noted after 2005. I see no reason to regard this as being other than use 'as of right' since it was neither prohibited nor permitted.

When the claimed use of the land ceased

178. The point in time to be determined is when the local inhabitants ceased to indulge, as of right, in lawful sports and pastimes on the land. Various dates have been canvassed.

179. The application asserted this occurred in May 2008 when the grass got too long for many uses to continue. In the alternative, Mr Hughes submitted that a degree of use was still continuing at the time of the application in July 2009.

180. The objector submits the use 'as of right' ended in 2005 when the notices were installed on the 30 or 31 May.

[29] See paragraph 236 below

181. Mr Porten went on to highlight the inconsistencies in the applicant's case. Attached to the application, Mrs Spooner had made a solemn declaration that its contents were true – including the statement that the use ceased in May 2008 - yet some of the applicant's witnesses said they did not stop in 2008. For example, Mrs Thomas' grandchildren still used area H and Mrs Dally used areas A, B, C and D until 2010.

182. My interpretation of the legislation is that the continuing use must be 'as of right', the only exception being in the case of a claim for registration under subsection 15(2)(b) where subsection 15(7) comes into play.

183. On the basis of my conclusion that use after May 2005 was not 'as of right' (other than where bicycles were being ridden) I regard the date of the notices as being the date qualifying use substantively ceased, although in practice people clearly did continue to make use of the land as before until the long grass caused the level of activity to gradually tail off.

184. I exercise a degree of caution over some of the evidence of cycling since it is not clear in every case whether people are referring to riding on the road or pavement, or on the grass. Clearly children did play on the grass with bicycles, especially in Areas C and H, and many seem to have learnt to ride on the land, but in total I am reluctant to regard this activity alone as sufficient, either in terms of its quantity or extent, to constitute evidence that qualifying use did continue after 2005.

Identification of the relevant twenty years

185. Whether on the basis of subsections 15(2), (3) or (4), each requires evidence that a significant number of the inhabitants of the locality or neighbourhood indulged in lawful sports or pastimes on the land, as of right, for a period of 20 years. The matter of which twenty years is determined by the different additional requirements of each of these three subsections.

186. The requirements of **subsection 15(3)** (on which the application as made is based) are set out above at paragraph 20.

187. If my finding that qualifying use ceased in May 2005 is accepted, this would not satisfy the requirements of either 15(3)(b) or (c). Cessation occurred before the time of the application (July 2009) but not after the commencement of this section (September 2007), and the application was not made within the ensuing period of two years (before May 2007).

188. However, if the applicant's submission that use ended in May 2008 is preferred, this would satisfy both requirements in 15(3)(b) and (c). In this case qualifying use would need to date back at least to 1988.

189. The requirements of **subsection 15(2)** are set out above at paragraph 19.

190. Again, if my finding that qualifying use ceased in May 2005 is accepted, this would not satisfy the requirements of 15(2)(b) – that use was continuing at the time of the application - *unless* the provisions of subsection 15(7) (set out above in paragraph 23) can be applied.

191. Mr Hughes submitted that it can. He argued[30] that where, as here, use was in fact continuing at the time of the application, then subsection 15(7) enabled the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land 'as of right'.

192. Mr Porten challenged this, submitting that the provisions of the 2006 Act did not come into operation until September 2007 and therefore could only be relevant if the notices had been erected after that date, which they were not. He argued that it cannot have been intended to have retrospective effect on the actions of landowners who had taken steps, before that date, to bring an end to use 'as of right'.

193. In the guidance provided for England[31], *Defra* supports Mr Porten's submission. Since there is no published guidance specifically applicable to Wales or any relevant caselaw on which to rely, despite some personal reservations I would recommend the *Defra* advice be followed. Doing so would result in a finding that use 'as of right' was not continuing at the time of the application (even if actual use until July 2009 is accepted) and therefore this element of subsection 15(2) must fail.

194. The alternative would be to seek a further opinion specific to Wales. An interpretation contrary to *Defra*'s view could raise the possibility that use of the land after 2005 could still qualify for the purposes of subsection 15(2) despite not being 'as of right' but only if use continued beyond the date stated in the application (May 2008) and until July 2009. In this scenario qualifying use would need to date back at least to July 1989. There is some evidence that other activities continued after 2008 but this is quite limited, partly because the majority of the written evidence was gathered in 2008/9 for submission with the application, but also because all dog-walking after 2005 must be disregarded since this was prohibited by the notices; sub-section 15(7) applies to the 'permission' element only. [I should make clear it is not my recommendation that such a course of action be followed.]

195. If the applicant's original submission that use ended in May 2008 is preferred, this would not satisfy subsection 15(2)(b).

196. The requirements of **subsection 15(4)** are set out above at paragraph 21.

197. If my finding that qualifying use ceased on 30 or 31 May 2005 is accepted, this would satisfy the requirements of both subsections 15(4)(b) and (c); cessation occurred before September 2007 and the application was made before 30/31 May 2010. In this case qualifying use would need to date back at least to 1985.

198. However if the applicant's original submission that use ended in May 2008 is preferred, or in the alternative use continued to July 2009, neither could satisfy subsection 15(4)(b).

199. **The only situations in which the evidence in this case could possibly justify registration would be under subsection 15(3) if the qualifying**

[30] In the alternative, and without prejudice to his main submissions.
[31] 'Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning inspectorate for the pioneer implementation' (September 2010 version)

use was found to have ceased in May 2008 (which in my view it did not), under subsection 15(2) if the *Defra* guidance in relation to the operation of subsection 15(7) were to be disregarded (which I advise it should not), or under subsection 15(4).

200. My conclusion is that a claim founded on subsection 15(4) is the only option with any realistic prospect of success. However, since this was not the applicant's original proposition but an alternative put forward in response to submissions from the objector, consideration of the evidence on this (amended) basis must be subject to a preliminary decision to accept an amendment to the application[32].

201. My report continues on the presumption that amendment is found to be acceptable in the circumstances of this case.

202. In relation to subsection 15(4), use throughout the period May 1985-2005 needs to be examined.

203. If subsection 15(3) is to be considered, the relevant period would be June 1988-2008, and for 15(2), July 1989-2009.

Identification of 'the locality' or 'neighbourhood within the locality'

204. On the application form the applicant identified the relevant locality or neighbourhood within a locality as "Caerwent Village" and ticked the box to indicate a map was attached showing the extent of Caerwent village.

205. The area included does not constitute a recognised administrative area but it is geographically discrete and clearly illustrated on the map submitted. It extends westwards as far as The Arches and eastwards to Slough Farm, encompassing all the built-up areas of the village on both sides of the present A48. South of this road it includes properties north and south of the old A48 and the area on which the remains of the Roman town are located. On the north side the area identified includes the application land at Merton Green and properties in Ash Tree Road, Llanvair Road, Dinham Road and Lawrence Crescent.

206. There are no statutory definitions contained within the 2006 Act for either 'locality' or 'neighbourhood'. Guidance from case law most relevant to this point indicates that if a locality or neighbourhood is not coextensive with an administrative area (such as a community or parish, borough or electoral ward), nor comprises a geographical area with easily definable boundaries (such as an isolated village), then a map must be included although it cannot be defined by an arbitrarily drawn line.

207. In my view Caerwent village is sufficiently distinct to qualify either as a locality in itself (being a clearly defined entity) or as a neighbourhood (within the locality of Caerwent Community).

208. This aspect of the application was not challenged by the objector although submissions were made in relation to the evidence to demonstrate use by a significant number of the inhabitants of Caerwent.

[32] Paragraphs 40 to 66 above refer.

Whether the claimed use qualifies as 'lawful sports and pastimes'

209. *'Lawful sports and pastimes'* are normally regarded as including informal recreation such as walking[33], with or without dogs, and children's play activities although no list is included in the legislation. In the case of *R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 AC 335*, Lord Hoffman said (at p357D): *"I agree with Carnwath J. in R v Suffolk County Council Ex p. Steed (1995) 70 P&CR 487, 503 when he said that dog walking and playing with children were in modern life the kind of informal recreation which may be the main function of a village green"*.

210. The activities identified by those who claim use of the application land include football, rugby, cricket, rounders, other ball games, hide and seek, tag, roller-blading, go-karting, skate-boarding, cycling, fruit-picking (blackberries, raspberries and plums), flying kites, children learning to ride bikes, picnics, camping, building snowmen, snowball fights and sledging, dog walking, running/jogging, barbeques, bonfires and firework displays, and community events such as celebrations for the Queen's Silver and Golden Jubilees. There is little doubt that these 'sports or pastimes' all constitute qualifying types of activity where they took place actually on the land.

211. I recognise that some did not but were probably carried out partly on the road (such as cycling, go-karting, roller blading and skate-boarding), not wholly on the grass, although the extent of the local inhabitants' rights over the road and pavement have not been established and are not entirely clear.

Whether the claimed use extended over the whole of the application land

212. The applicant's case was that although the land had been divided into separate areas (labelled A-I) for the purposes of describing it in the application, and because different parts of it had been put to different recreational uses depending on the physical characteristics of the land, the evidence suggests that the inhabitants viewed the application land as a single amenity for their use.

213. The applicant provided graphs summarising the use of each area of the application land claimed by the witnesses originally providing statements. A revised graph also included the evidence of the additional people submitting statements so that use by a total of 38 people is illustrated.

214. In summary these show the following numbers of people claiming use back in 1985: for area A:14; area B:12; area C:16; area D:7; area E:5; area F:6; area G:13; area H:10; area I:1. Whilst the original graph did not record use beyond 2008, the second graph did so, recording the number of people still using the land in 2010 as: area A:5; area B:5; area C:5; area D:4; area E:3; area F:2; area G:2; area H:2; area I:2.

215. These figures are bolstered by the evidence of others submitted by letter although this carries less weight, being untested. Nevertheless, it does seem reasonably clear that all areas within the application land were used, to a greater or lesser extent, continuously between 1985 and 2008. After 2008 use did continue although the evidence suggests it was much reduced.

[33] But not along a single line which may more properly be considered as a possible public right of way.

216. From my examination of the evidence I am satisfied all these areas were used by the local inhabitants at various times and for varying activities as described by the witnesses. Indeed, generally speaking, that was not challenged by the objectors.

217. However there are two points to note: firstly that after 2005 dog walking should be excluded from the summary which I calculate eliminates some (though by no means all) of the claimed use of fourteen people included in the above figures (reducing the numbers for 2010 to 3, 3, 2, 2, 2, 1, 1, 1 and 2 respectively). Secondly, the evidence for areas A, B, C, G and H is greater than that for areas D, E, F and I.

218. A great many of the witnesses speak of seeing other people using the land and it seems quite reasonable to accept there was more activity than is accounted for solely in the written statements and letters.

219. I heard that areas C, E, G and I were mown regularly by MCC until the summer of 2008, as were parts of areas B, D, F and H. Whilst there were no physical restrictions designed to deliberately prevent access onto the application land until Barratts' site works commenced early in 2010, there is evidence of restrictions on areas D and E that require further consideration.

220. I heard from Mr T M Jones that from about 1976 until 1984 (give or take a year) he rented from the Council one of several allotments situated in area D. These were interspersed between the foundations of the former Nissen huts that stood on the site until the early 1970s. A photograph taken around 1980 shows Mr Henry Jones and family members on the allotments. A few of the other witnesses recalled the allotments but the consensus seemed to be that they had gone by the early-mid 1980s. Mr Jones recalled that the last of the allotments was vacated sometime between 1984 and 1986, their usefulness having been brought to a halt by problems with a water supply.

221. There is also evidence that buildings once stood on area E. I was told these were used as a store for firewood provided free of charge to local residents by the Ministry of Defence. The exact date these buildings were removed could not be established but Mr Jones recalled it being around 1982/3; it seems they had gone by the time Mrs May came to live in Llanvair Road in 1987.

222. It would be open to the registration authority to register a lesser area than that applied for if it was considered the levels of use of some parts of the application land was not sufficient to meet the required criterion of a 'significant number of the inhabitants'. However I note again the submission of Mr Hughes on behalf of the applicant that local people viewed it and used it as one piece of land, not segregated parcels.

223. I conclude that the whole of the application land was used by local people until 2008, after which many activities became too difficult because of the un-mown grass (especially in areas C, G and I) whilst some dog-walking, fruit picking and children's adventure play continued until finally prevented by fencing in the spring of 2010. However, use of area D whilst operating as allotments and parts of E whilst buildings stood on that area seems unlikely.

Whether there has been use by a significant number of the inhabitants of the claimed locality or neighbourhood

224. Firstly I draw attention to the approach of Mr Justice Sullivan to this issue in the case of *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC 76 (Admin) (the McAlpine case)* where he said: *"Dealing firstly with the question of a significant number, I do not accept the proposition that significant in the context of section 22(1)*[34] *as amended means a considerable or a substantial number. A neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to be properly described as a considerable or a substantial number… whether the evidence showed that a significant number of the inhabitants in the locality or of any neighbourhood within the locality had used (the area) for informal recreation was very much a matter of impression."*

225. He continued: *"It is necessary to ask the question: significant for what purpose? In my judgment … what matters is 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 occasional use by individuals as trespassers."*

226. In *the Redcar case* Lord Justice Dyson (at paragraph 35) cited a passage from *Hollins v Verney* [1884] 13 QBD 304 in which Lindley J stated "*No use can be sufficient which does not raise a reasonable inference of such a continuous enjoyment*" such that "*the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended*." However Dyson J further stated (at paragraph 41): "*user of the kind required to found an entitlement to registration is in its nature intermittent. Thus, where the owner does not put the land to any competing use, a claim founded on activities such as walking, picnicking and kicking a football about does not fail just because those activities are not carried out all the time."*

227. These passages provide helpful guidance for assessing the significance of the number of users in context.

228. There are two main aspects of the user evidence that need to be considered here: the quantity of use and the origin of the users. It must be established that the number of users who are inhabitants of the relevant 'locality or neighbourhood within a locality' (in this case the village of Caerwent) is significant.

229. In his submissions for the objector, Mr Porten argued that the test of significance should be measured proportionately to the population of the identified locality or neighbourhood. In this case he quoted a figure from a 2008 study[35] of 951 for the population of Caerwent. This was not disputed by the applicant and no other figures have been volunteered.

[34] Of the Commons Registration 1965 Act which was superseded by the 2006 Act
[35] The Monmouthshire LDP Function and Settlements Study (October 2008)

230. The applicant contends that from the evidence emerges a picture of extensive use by the inhabitants of Caerwent, as a community rather than just as individuals, thus satisfying the requirements set out by Sullivan J in *the McAlpine case*.

231. The applicant submitted a summary table analysing the evidence of the main witnesses both in general terms over time and by area. Combined with all other written evidence Mr Hughes submitted that this shows significant use back to the 1970s (as illustrated by the evidence of Mrs M E Jones, Mr A R Lewis and Mr M Smith) and continuing through to the present day. Although the level of use decreased after May 2008 it continued to be significant up to and beyond the date of the application, demonstrated by the evidence of Mrs D C I Hammacott, Mrs B E Thomas and Mrs K Dally.

232. Whilst he acknowledged that there is more evidence of use in recent years (prior to the summer of 2008), use of the land made by inhabitants arriving in Caerwent in the 1980s, 1990s and 2000s is likely to have been informed by impressions gained from those already resident in the village, that is of use by all members of the Caerwent village community.

233. There is no evidence that the placing of the notices on the application land in May 2005 made any difference to the levels of use, most inquiry witnesses confirming that they continued as before, exercising dogs and taking part in recreational activities (though not solely on foot), with no attempt by MCC to enforce the restrictions.

234. In her evidence on behalf of the objector, Mrs Carter had suggested that the need to cross the A48 would limit use of the land to those living on the north side of the road. However Mr Hughes submitted the evidence showed otherwise and indeed would be inconsistent with the fact that residents on the north side needed to cross the road to reach a variety of services within the village such as the shop, the church, the pubs and the village hall.

235. The objector accepts that the application land has been used by numbers of local people for lawful sports and pastimes but challenges the significance of those numbers. Mr Porten cautioned against a simple 'head-count' approach. He highlighted certain uses which would not qualify, such as those which took place on the road, not the claimed land (such as some cycling); use that took place outside the relevant twenty year period; activities which are not sports or pastimes (such as walking from A to B), and use by people who are not inhabitants of Caerwent (such as the Mencap football team and people described by Mr R Smith as 'outsiders').

236. I endorse all of the categories of use highlighted by Mr Porten that need to be excluded from the calculation (including dog-walking post-2005) and would add another: in her evidence, Mrs Carter highlighted a number of smaller areas within the application land over which some of the residents of the flats in Ash Tree Road had granted to them in their leases rights to quiet enjoyment. The wording quoted by Mrs Carter was as follows: "*the right and liberty for the tenant and all persons authorised by him (in common with all other persons now entitled to the like right) to use the grassed area hatched green on the plan for the purpose of quiet enjoyment only (but not for the purpose of playing games or for any other purpose likely to cause offence or*

constitute a nuisance to other tenants". It therefore seems to me that some of the use claimed by these leaseholders or others enjoying these particular areas (which include part of areas E, H and I) ought to be disregarded since these people had been expressly granted a right to do so.

237. Mr Porten went on to argue that the evidence does not show that the application land has been in general use by the community, or by a significant proportion of them. He highlighted the separation of the application land from the main part of Caerwent village caused by the busy and dangerous A48 road. Whilst several witness statements were from people living on the south side of the road (or outside Caerwent altogether) the majority had at some time lived on the north side. Mr Porten submitted that there is little or no evidence of those who have lived continuously in the main (south) part of the village using the land.

238. I cannot disagree with that last sentence. However I do not agree that this devalues the evidence of those people who have lived at different addresses within Caerwent. The question is where they were living at the time they used the land during the relevant period.

239. Of the ten witnesses giving direct evidence of use, nine live (or lived) in Ash Tree Road or Llanvair Road, as do three of the five witnesses prepared to speak at the inquiry. Mrs B E Thomas lives at Green Lane House, Mr A R Lewis lives at Ten Elms Farm and Mr M Smith lives in St Tathans Place in Caerwent, all on the south side of the A48. Of the 23 other claimants who provided witness statements, 9 give Caerwent addresses (or former addresses) on the north side of the A48 and 7 on the south side but 7 have lived both north of and south of this road at various times. Whilst the details given by others who wrote letters or sent emails are not as clear as regards past addresses, it seems that the proportions of those north and south of the road are broadly similar as far as I can judge.

240. It seems to me unsurprising to find people living in the streets nearest to the application land have used it more than people who live a slightly longer walk away. However the evidence shows users were not exclusively from north of the road but a reasonable proportion crossed the A48 from other areas of Caerwent village.

241. In total I have counted 84 people who have recorded use at some time or other of the application land. I take care to avoid placing too much reliance on a simplistic mathematical calculation of such a generalised nature but 84 out of a population (in 2008) of 951 is, in my opinion, a proportion of quite reasonable significance.

242. Mr Porten also highlighted the existence of the village playing fields on the south side of the village near to the village hall, suggesting that this is used by a significant number of local inhabitants (although no evidence was submitted to support his claim). He made the point that the lack of support for the application from either the Community Council or the Playing Fields Committee should be interpreted as casting doubt on the claimed use, a point which has not been addressed by the applicant.

243. As I have noted above (at paragraph 109), in the absence of any written statement from the Community Council (or the Playing Fields Committee) I consider it unwise to attach any weight at all to the lack of support for (or indeed objection to) the application.

244. My overall impression is that the number of people resident in Caerwent using the application land constituted a significant number of people and represented a significant proportion of the total population of the village. Although I am unable to quantify exactly the number of post-2005 dog-walkers that need to be excluded from the sum, following the guidance of Mr Justice Sullivan set out above, I would still take the view that even after the notices prohibited the exercising of animals in 2005 the number of people using the land in question would have been sufficient to signify that it was in general use by the local community for informal recreation, at least until the summer of 2008 when use began to dwindle because of long grass.

Whether the use continued through the relevant 20 year period

245. It is my recommendation, on the basis of my analysis of the evidence that use throughout the period 30/31 May 1985 to 30/31 May 2005 needs to be examined if the requirements of subsection 15(4) of the 2006 Act are to be satisfied. No other period of user will qualify. This use must be without interruption during the twenty years otherwise the requisite user period will not have been achieved. However, the extent of any interruption and whether it proves fatal to the application is a question of fact and degree.

246. Of the 15 witnesses presenting evidence to the inquiry, 14 claimed to have used the land themselves and with their families and friends between 1985 and 2005. Six of these witnesses said they had used it throughout all twenty years. Of the other 24 people who provided written statements, 12 used the land throughout the period and 8 during parts of it. The remaining claimants who provided evidence by letter or email contribute additional use during this period building a strong picture of continuous use of all areas within the application land throughout all twenty years. These were mostly children and people exercising dogs but included a myriad of recreational sports and pastimes, by people in groups and as individuals, even as a community for occasional events such as bonfire night and the Queen's Golden Jubilee.

247. I have not been able to establish with absolute certainty when the use of area D for allotments ended but I consider the evidence of Mr T M Jones (who held an allotment himself) to be the most reliable. It was his recollection that the final allotment was vacated sometime between 1984 and 1986. Whilst it is entirely possible that this occurred before May 1985 so that it could have been in use by local inhabitants thereafter, from the evidence I have heard I am not convinced that it would immediately have been used to an extent that would have suggested to any reasonable land owner the assertion of a right.

248. It is therefore my view that for area D, on a balance of probability, the evidence of use falls just short of the full twenty year period required and accordingly I recommend that this area is excluded from registration as village green.

249. However for area E where a similar question arises over the use of the land during the early 1980s because of buildings on the land, I am satisfied that the evidence leads to a conclusion that the stores were gone from the site by 1982/3 and the area was open land by 1985 such that the use demonstrated by the evidence from claimants would have been unrestricted over the whole of that area.

250. I have considered whether the parts of areas E, H and I over which certain tenants are entitled to 'private enjoyment' of the land should be separated from the remainder but have concluded that, other than disregarding some of the use contributed by those particular residents on the basis it was not 'as of right', there is no good reason to do so. I have seen no evidence these areas were marked out on the ground or used in any different way by the majority of the claimants and I find no reason to treat the claimed use of them otherwise than as part of the application land as a whole.

251. Accepting the difficulties of assessing the claimants' evidence with many differences in frequency and patterns of use, my own assessment leads me to conclude there was considerable use of the application land between 1985 and 2005 with the exception of area D where there is insufficient evidence to support the required levels of use in the early part of the relevant period.

252. If subsection 15(3) is to be considered, the relevant period would be June 1988 - June 2008. In relation to area D, I note that in 1987 Mrs May recalled no sign of any allotments when she first moved to Caerwent. This leads me to believe that by 1988 the use of this area claimed by local residents, in particular for fruit picking was in progress, Mr T M Jones noting that it quickly reverted back to nature and blackberry bushes were soon re-established.

253. I would therefore find little difficulty in concluding from the evidence that all areas of the application land were (in fact) in use by the local inhabitants continuously from 1988 until 2008 although post-2005 dog-walkers need to be excluded. Of the 39 people presenting evidence to the inquiry and/or submitting written statements, 19 had used the land throughout the twenty years and 15 over part of the period. However, my conclusion is that after 2005, the Council's notices meant that the majority of this use was not 'as of right' and therefore cannot contribute towards the required period of 20 years of uninterrupted use.

254. Finally, if subsection 15(2) is to be considered, July 1989 – July 2009 is the relevant period. As regards the period from 1989 to 2008, I would reach the same conclusions as for subsection 15(3) above. After 2008, discounting dog-walkers, and acknowledging the declining numbers of other users deterred by the long grass, it is my impression that the level of use declined significantly with the exception of area A, areas B and E (which were still mown) and area H (the ditch) which still continued to a limited extent. Although it must be remembered that the application land constitutes one area, not nine separate areas, it is debateable whether the limited use of these four parts can be considered sufficient to complete the full twenty year period up to July 2009. In my view the lengthening grass from 2008 (which originally prompted the application to be made on the basis that use ceased at that time) did cause the otherwise continuous use to be interrupted over

the final year of this period. Further, I repeat my conclusion that after 2005, the effect of the Council's notices was that the majority of this use was no longer 'as of right' and therefore cannot contribute towards the required period of 20 years of uninterrupted use. As I noted in paragraph 193 above, I recommend acceptance of the *defra* guidance that the provisions of subsection 15(7) do not apply in this case.

Summary of analysis

255. If my conclusions on the effect of the 2005 notices are accepted, all the claimed use after 2005 must be discounted (other than the limited evidence of cycling).

256. It follows from this that I find use of the application land ceased on 30/31 May 2005 when these notices were erected. That leads to a conclusion that only subsection 15(4) is capable of being satisfied.

257. The relevant period for consideration is therefore 1985 - 2005. Caerwent is identified as the relevant 'locality or neighbourhood within a locality'. I find all the activities claimed qualify as lawful sports or pastimes. With the exception of area D, I find the evidence supports use of different parts of all the land for various activities from time to time throughout the whole of the twenty year period by a significant number of people resident in Caerwent.

258. **On the basis of my findings, it is my conclusion that the requirements of subsection 15(4) are satisfied by the evidence in this case such that, subject to consideration of ISSUE 3 below, the application land should be registered as village green with the omission of area D**.

259. If my conclusions on the effect of the notices are not accepted, there are two possible dates on which the claimed use may be found to have ceased. The applicant originally submitted this occurred in June 2008 when the un-mown grass got too long for most activities. In the alternative, it was submitted that use was in fact continuing to a reduced degree at the time of the application in July 2009.

260. In the case of use ceasing in June 2008, only subsection 15(3) would be relevant. 1988 to 2008 would be the period in question, the evidence supporting use of all the application land for lawful sports and pastimes by a significant number of the inhabitants of Caerwent (even discounting dog-walking after its prohibition in 2005). However qualifying use must be 'as of right'. It is my view that the effect of the 2005 notices renders all subsequent use on foot 'with permission' and therefore incapable of contributing towards a finding of continuous use through the relevant twenty years.

261. If use is judged to have been continuing in July 2009, only subsection 15(2) would be appropriate. The relevant period would be 1989-2009. All the conclusions in my previous paragraph apply here too but there is doubt over the extent of use between June 2008 and July 2009. In my view the applicant cannot expect its original submission that use ceased in June 2008 to be entirely disregarded. Use is a question of fact and the evidence shows some use continued but in my view the evidence is not sufficient, either in quantity

or extent (again disregarding dog-walking) to confidently support a finding that use of the application land was continuing at the time of the application.

262. **I conclude that the requirements of neither subsection 15(3) or 15(2) are met in this case.**

ISSUE 3

The effect of 'appropriation'

263. In paragraph 27 to 29 above I set out the relevant provisions of the Town and Country Planning Act 1990 in respect of the process known as 'appropriation'.

264. Distilled into its relevant components, section 241 of that Act provides that 'notwithstanding anything in any enactment relating to land which is or forms part of a common or open space, such land which has been appropriated by a local authority for planning purposes may be used by any person in any manner in accordance with planning permission'.

265. This carries the caveat that the above should not be construed as authorising any act or omission which is actionable at the suit of any person on any grounds except in contravention of any such enactment as mentioned above.

266. It is not disputed that the land in question was appropriated, and disposed of, under the provisions of the 1990 Act and the Local Government Act 1972.

The objector's submissions

267. For the objector, Mr Porten submitted that any village green rights which might otherwise have accrued on the application land have been displaced by the objector's rights to develop the land in accordance with planning permission.

268. He argues the effect of sections 241 and 246(3) is that where the land has been appropriated for planning purposes, the local authority or any subsequent owner is entitled to develop the land in accordance with planning permission, and that right to develop the land overrides its open space status and any actual or putative village green rights.

269. In this case, the land was appropriated in March 2007 by MCC for planning purposes in accordance with section 122 of the Local Government Act 1972; notice of disposal was given in accordance with section 233 of the 1990 Act; planning permission was granted for its development; and development is proceeding in accordance with that planning permission.

270. These facts are confirmed by the (unchallenged) evidence of Mrs J Carter. Any period for judicial review of either the appropriation process or the grant of planning permission has long since expired.

271. Mr Porten submits that it follows from this that the application land should not be registered as village green since entry in the register would indicate the local inhabitants have rights over it, and that any interference with those rights would be actionable; in his submission that is not the position in law.

272. However he acknowledged there is no authority from the Courts directly on this point but highlights the observations of Lord Scott (at paragraph 28 and 52) in the case of R (Beresford) v Sunderland City Council [2004] 1 AC 889:

"An appropriation to other purposes duly carried out pursuant to section 122 would plainly override any public rights of use of an "open space" that previously had existed. Otherwise the appropriation would be ineffective and the statutory power frustrated. The comparable procedures prescribed by section 123 for a disposal must surely bring about the same overriding effect."

"I think there to be strong arguments for contending that the statutory scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or section 21(1) of the New Towns Act 1981 are applicable, excludes the operation of section 22(1) of the Commons Registration Act 1965. But these arguments have not been addressed by your Lordships. I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by section 123 of the 1972 Act will trump any "town or village green" status of the land whether or not it is registered."

273. Mr Porten points out that there has been no decision from any other Court that has contradicted or doubted Lord Scott's observations which, he submits, must carry considerable weight. In his view, the registration authority could only allow the present application and determine to register the land if it were to hold that Lord Scott's opinion was wrong in law; he submits there are no such grounds on which to do so.

274. In response to the objector's submissions, the applicant had advanced two counter arguments, neither of which (in Mr Porten's view) has any validity in law.

275. For the applicant Mr Hughes had argued (a) that the effect of registration is not provided for by any enactment but only by judicial pronouncements, and (b) that section 241 does not apply because the Commons Act 2006 post-dates the 1990 Act and so section 241 yields by the doctrine of implied repeal ('later laws abrogate earlier contrary laws').

276. As regards (a), all expressions of opinion by the House of Lords and Supreme Court confirm that the right of user by reason of registration, if it exists, flows from statute.

277. In response to (b), the wording of section 241 is unambiguous: it does not say "any earlier enactment" or "any prior enactment" as it could have done if that had been intended.

278. There is nothing in the 2006 Act to dis-apply the provisions of section 241 of the 1990 Act. Again, if that had been intended, it could have said so.

279. On the doctrine of implied repeal, the authorities establish that the Courts presume Parliament does not intend an implied repeal of an earlier statute; the presumption against implied repeal is stronger where modern precision drafting is used, and the presumption is also stronger the more weighty the enactment said to have been repealed. Further, this presumption is subject to the well recognised countervailing presumption that a general provision

does not derogate from a special one. In other words "*Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is to be presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly, the earlier specific provision is not treated as impliedly repealed*."[36]

280. In the present case, the starting point is to presume against repeal. The presumption is strengthened because the 2006 Act is an example of modern precision drafting and further because the 1990 Act is the principal Act regulating the planning system for the whole of England and Wales. Section 15 of the 2006 Act is a general provision dealing with applications for registration in all situations. In contrast section 241 of the 1990 Act applies only where a public authority intervenes in specific circumstances. It must follow that the doctrine of implied repeal cannot apply here.

281. The objector's position is clear: that the application land should not be registered as a town or village green, since entry on the register would indicate that the local inhabitants have rights over the land and that any interference with those rights would be actionable whereas, for the reasons given, that is not the position in law.

The applicant's submissions

282. The applicant's position is also clear: that on registration as a village green, the owner of the registered land loses the right to use it in any way that would prevent its use by the inhabitants for recreation.

283. Acceptance of the objector's argument would mean that the land could be lawfully developed even if it is registered as a village green; that would be absurd and would render the registration process pointless, which cannot be right.

284. In the words of Lord Hoffman, commenting[37] on the effect of registration in *the Trap Grounds case*[38]: "*This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants*."

285. The effect of registration was further described by Lord Brown in *the Redcar case* when he stated[39]: "*on the proper construction of section 15 of the Commons Act 2006, the only consequence of registration of land as a green is that the locals gain the legal right to continue to "indulge" in lawful sports and pastimes upon it (which previously they have done merely as if of right) – no more and no less*."

286. Mr Hughes submitted that the effect of registration as a village green is not provided for by any "enactment" (which includes the whole or any part of an Act or an instrument of subordinate legislation). The 2006 Act is not explicit as to the consequences of registration under section 15. In his submission,

[36] From 'Bennnion on Statutory Interpretation', 5th Edition 2008
[37] At paragraph 51
[38] Quoted, with approval, by Lord Walker in the Supreme Court in *the Redcar case*
[39] At paragraph 101

"any enactment" should not be understood to encompass judicial pronouncements that are merely interpretive of the 2006 Act.

287. Mr Hughes submitted that there is no indication in the Commons Act 2006 (under which this application is made) that the consequences of registration as a village green must yield to the provisions of the 1990 Act. Section 241 of the 1990 Act does not operate to prevent registration. At most, it creates some ambiguity as to the effect of registration.

288. In his submission, the wording of section 241 of the 1990 Act relied on by the objector ("Notwithstanding anything in any enactment relating to land which is or forms part of a common, open space, …") cannot be understood to refer to subsequent statutes that might be enacted. It may oust the effect of Victorian statutes relating to commons and public open spaces but not the judicial statements (*in the Redcar case* and the *Trap Grounds case*) as to the effects of registration which are not contained in 'any enactment'.

289. To the extent that there is any inconsistency between the two Acts of Parliament, the earlier yields to the latter under the doctrine of implied repeal.

290. Section 15 of the 2006 Act is concerned with the registration of land as a town or village green, rather than the effect of such registration. It provides criteria which, if met, mean the land is to be registered. It provides no discretion not to register land if those criteria are met. Section 241 does not touch upon whether the section 15 criteria are met.

My conclusions

291. This issue, the effect of 'appropriation', is not reliant on the evidence in this case although the facts put the matter into context. The arguments are almost entirely matters of law on which there is little direct judicial authority and no published statutory guidance (for England or Wales).

292. I recognise that, in the light of my earlier conclusions based on an analysis of the evidence leading to my recommendation, this particular issue may be the determining factor.

293. Consequently I consider it important to make clear that I am not a lawyer. Nevertheless, as an experienced practitioner in this field, I have read the submissions of both parties, I have listened to their respective arguments and I have understood the points they make, all of which are summarised above. My conclusions are therefore offered in that context.

294. There seems to be little disagreement between the parties over the effect of registration of land as generally understood and as was expressed by Lord Brown (above). In essence, once recorded on the register as village green, the lawful sports and pastimes proven to have been enjoyed on the land by a significant number of the inhabitants of the locality or neighbourhood may continue, limited by the activities of the landowner to no greater extent than occurred during the qualifying twenty year period.

295. The point at issue is whether the provisions in the 2006 Act for registering land as village green are overridden by the effect of appropriating the land for development under the 1990 Act (even where the specified criteria in section 15 are satisfied), such that inclusion of the land in the register would mis-represent the extent of any rights acquired by the local inhabitants and therefore cannot be justified.

296. It is accepted as fact that the land in question here was formally appropriated in March 2007. Whilst the evidence submitted by some claimants does raise questions about the openness of the procedures followed by MCC in carrying out the prescribed procedures, it cannot be disputed that the period for challenge has now passed.

297. As I read section 241, in the context of this case, it provides that any land which has been appropriated for planning purposes by a local authority may be used by anyone in any manner in accordance with a valid planning permission irrespective of anything in any enactment relating to land which is or forms part of a village green, common or open space.

298. It seems to me quite reasonable to consider the Commons Act 2006 as such an enactment. Yet the argument advanced by Mr Hughes is that any rights of the inhabitants to use the land do not derive expressly from this enactment. Nowhere in the 2006 Act does it state that, upon registration, the activities enjoyed for twenty years by the local inhabitants '*as of right'* thereafter continue '*by right'*. In his submission, this is the situation deduced from close examination of the statute and relevant caselaw by the Courts, but it cannot qualify as being "anything in any enactment relating to land…" (because it is not expressly <u>in</u> it) and therefore is not to be disregarded for the purposes of section 241.

299. I have some sympathy with Mr Hughes' strict interpretation of the wording of section 241, yet I follow the logic of Mr Porten's broader explanation of the intention of the appropriation process: if a public authority determines that land should be used for development, and the intention to dispose of the land for development is brought to the attention of those local people who may wish to oppose it, say because they used it for lawful sports and pastimes, but no-one submits that the land should be registered as village green and no-one opposes the planning proposals on the basis that use as a village green would be compromised, it would be unfair to the purchaser of that land who intended to develop it in accordance with planning permission if a village green application were to materialise at that late stage and thwart all previously agreed plans.

300. That is virtually the scenario that has occurred here (although again I express reservations about information given to local people by way of an explanation of the appropriation process.) Having considered this issue very carefully I have formed the view that the intention of section 241 is (potentially) to render in-exercisable any pre-existing rights acquired by the local inhabitants. However the legislation is completely silent as to how this is to take effect in relation to an application to register such rights.

301. The application at issue here is made under the 2006 Act. Subsection 24(4) of that Act[40] expressly states that any application made under section 15 shall be granted if it meets the stated criteria. There is no ambiguity in its wording. The registration authority has no discretion.

302. As regards the matter of 'implied repeal' argued by Mr Hughes, I prefer Mr Porten's submission that it is not applicable here. However there is clearly a conundrum, the answer to which may ultimately lie with the Courts.

303. Nevertheless I have been commissioned to make a recommendation to the registration authority, and I do so with the submissions of Counsel for both parties at the forefront of my mind. Mr Hughes advocated a strict interpretation of the wording of section 241 of the 1990 Act whilst Mr Porten described the 2006 Act as an example of modern precision legislative drafting. I adopt both approaches in forming my conclusions.

304. In the absence of any scope within the 2006 Act for the exercise of discretion[41] or consideration of the expediency of registering land as village green, I recommend MCC takes a strict approach to the interpretation of subsection 24(4) of that Act. If the evidence fulfils the criteria set out in subsection 15 (2), (3) or (4), an application made under subsection 15(1) "shall … be granted".

305. On that basis, I conclude there is no opportunity in this process to take account of the effect of appropriation in March 2007 of the application land.

306. Accordingly, and on the basis of my earlier conclusions, I recommend that this application be granted.

Other matters

307. In paragraph 88 above I noted that concerns had been expressed by the Action Group about a lack of information available to local residents during the process of formulating plans for the site.

308. Two of the claimants submitted evidence highlighting what they suggest was wholly misleading information given to them at various stages in the process of appropriating, disposing of and granting planning permission for development of the application land. As a result of being misinformed about the effect of appropriation and the opportunity to influence the development at a later stage, they took no further action to assert their (claimed) rights at that time.

309. Although this information may help to explain the reason for the submission of the application at a relatively late stage in the process of planning for the development of the land at Merton Green and Ash Tree Road, the matters raised are not relevant to consideration of this application and I have not taken them into account. Nevertheless I draw to the attention of the registration authority comments in the evidence of Mr Spooner (also referred to in the evidence of his wife at paragraph 129 and briefly noted in footnote 19) and that of Mrs B E Thomas.

[40] See paragraph 25 above
[41] Even the provisions of Section 14 (Statutory Dispositions) appear to envisage only registered rights being considered for removal, not an application for registration of proven but in-exercisable rights being rejected.

Summary of conclusions

310. The application was duly made and publicised in accordance with the 2007 Regulations.

311. The application land was owned and maintained by MCC from 1976 until October 2007 when it was sold to Barratts, the present owners.

312. Prior to the sale, MCC followed the statutory procedures for appropriation and disposal of the land.

313. Planning permission for residential development of the area (including the application land) exists and is being implemented.

314. Notices were erected on the site on 30/31 May 2005 giving revocable permission for recreational use of the land on foot and excluding the exercising of animals.

315. In addition to the ten supporting witnesses who gave evidence to the inquiry, there is written evidence in various forms from a further 74 people provided by the applicant to support the application. The main points I note from this evidence are set out in paragraph 150.

ISSUE 1

316. The application was made on the grounds set out in subsection 15(3) of the 2006 Act. In response to submissions made by the objector as to the effect of the notices posted in May 2005, the applicant has requested the grounds for registration set out in subsection 15(2) and 15(4) are also considered.

317. The applicant's request to switch grounds will only arise if the notices are found to have the effect of rendering all subsequent use by the public 'with permission' as opposed to 'as of right'.

318. Having addressed the arguments put forward by both the applicant and objector, I have concluded that it would not be unfair to the objector to accept the amendment requested by the applicant because the essential facts remain unchanged and the objector has been given ample time and opportunity to consider the evidence in relation to the alternative criteria. In my view it would be unfair to the applicant to reject the request for amendment, especially when the delay in responding to the request has resulted in it being impossible to re-submit the application.

319. It is therefore my recommendation that the registration authority accepts the applicant's request to consider the evidence in relation to subsections 15(2) and 15(4) in the alternative if subsection 15(3) is not satisfied.

ISSUE 2

320. The notices included the words "*Exercising of animals is strictly forbidden"*. In my view the use by people who continued walking their dogs after May 2005 cannot qualify as being use 'as of right' since it was expressly prohibited and therefore contentious. Consequently it should be discounted when considering use of the application land by inhabitants of the locality or neighbourhood from that date.

321. The notices also permitted "*sports, pastimes and other recreational purposes on foot only"* but that permission could be withdrawn at any time. Having considered the submissions of both parties, I have reached the conclusion that all the activities enjoyed by the claimants on foot (from which I exclude cycling) after the end of May 2005 were either 'with permission' or prohibited (as mentioned above) and consequently cannot qualify as being 'as of right'.

322. On the basis of this conclusion I regard the date of the notices (May 2005) as being the date qualifying use substantively ceased, although in practice people did continue to make use of the application land as before until the long un-mown grass caused the level of activity to gradually tail off.

323. Evidence shows children still cycled on the land - an activity that was neither permitted nor prohibited and therefore 'as of right'. However I would not regard this activity alone sufficient, either in terms of its quantity or extent, to constitute evidence that qualifying use did continue beyond May 2005.

324. At paragraph 255 above, I have summarised the main conclusions from my examination of the evidence in relation to the criteria in subsections 15(2), 15(3) and 15(4) of the 2006 Act.

325. In my analysis, the only situations in which the evidence in this case could possibly justify registration would be under subsection 15(3) if the qualifying use was found to have ceased in May 2008 (which in my view it did not), under subsection 15(2) if the *Defra* guidance in relation to the operation of subsection 15(7) (in England) were to be disregarded (which I advise it should not), or under subsection 15(4).

326. My conclusion is that a claim founded on subsection 15(4) is the only option with any realistic prospect of success. However, since this was not the applicant's original proposition, consideration of the evidence on this (amended) basis must be subject to a preliminary decision to accept an amendment to the application (ISSUE 1).

327. In relation to subsection 15(4), use throughout the period May 1985-2005 needs to be examined. If subsection 15(3) is to be considered, the relevant period would be June 1988-2008, and for 15(2), July 1989-2009.

328. In my view Caerwent village is sufficiently distinct to qualify either as a locality in itself (being a clearly defined entity) or as a neighbourhood (within the locality of Caerwent Community). This aspect of the application was not challenged by the objector.

329. There is little doubt the activities described by the claimants all constitute qualifying 'sports and pastimes' where they took place actually on the land.

330. The map attached to the application sub-divided the land into nine smaller parcels (A-I), but the evidence shows the inhabitants made use of all parts of area without conscious reference to these artificial boundaries. However, area D was used for allotments until some time between 1984 and 1986.

331. My overall impression is that the number of inhabitants of Caerwent using the application land constituted a significant number of people and represented a significant proportion of the total population of the village.

332. In relation to the period relevant under subsection 15(4), 1985-2005, my assessment leads me to conclude there was considerable use of the application land between 1985 and 2005 with the exception of area D where, given the doubt over when the allotments ceased, I find insufficient evidence to support the required levels of use in the early part of this period.

333. In relation to the period relevant under subsection 15(3), 1988-2008, I conclude that all areas of the application land were (in fact) in use by the local inhabitants continuously even though post-2005 dog-walking must be disregarded. However, my conclusion is that after 2005, the effect of the Council's notices was that the majority of this use was not 'as of right' and therefore cannot contribute towards the required period of 20 years of uninterrupted use.

334. In relation to the period relevant under subsection 15(2), 1989-2009, it is my view that the lengthening grass from 2008 onwards (which originally prompted the application to be made on the basis that use ceased at that time) did cause the otherwise continuous use to be interrupted over the final year of this period. Further, I repeat my conclusion (above) that after 2005, the effect of the Council's notices was that the majority of this use was not 'as of right' and therefore cannot contribute towards the required period of 20 years of uninterrupted use. As I noted in paragraph 193 above, I recommend acceptance of the *defra* guidance (for England) that the provisions of subsection 15(7) do not apply in this case.

ISSUE 3

335. It is not disputed that the land in question was appropriated, and disposed of, under the provisions of the 1990 Act and the Local Government Act 1972.

336. The point at issue is whether the provisions in the 2006 Act for registering land as village green are overridden by the effect of appropriating the land for development under the 1990 Act (even where the specified criteria in section 15 are satisfied), such that inclusion of the land in the register would mis-represent the extent of any rights acquired by, and still available to, the local inhabitants and therefore cannot be justified.

337. In the absence of any scope within the 2006 Act for the exercise of discretion[42] or consideration of the expediency of registering land as village green, I recommend a strict approach to the interpretation of subsection 24(4) of that Act. Following its provisions, if the evidence fulfils the criteria set out in section 15 (2), (3) or (4), an application made under subsection 15(1) "shall … be granted".

338. On that basis, I conclude there is no opportunity in this process to take account of the effect of appropriation in March 2007 of the application land.

339. On the above findings, I conclude the applicant has proved that the land in question (with the exception of area D) satisfies the statutory requirements for registration as a village green as set out in subsection 15(4) of the Commons Act 2006.

[42] Even the provisions of section 14 (Statutory Dispositions) appear to envisage only registered rights being considered for removal, not an application for registration of proven but in-exercisable rights being rejected.

Recommendation

340. I recommend that the application land (excluding area D) be registered as village green.

Sue Arnott

INSPECTOR

The Planning Inspectorate
Crown Buildings
Cathays Park
CARDIFF
CF10 3NQ

31 December 2010

APPEARANCES

For the Applicant:

Mr D Hughes	Of Counsel; instructed by Mr A H B Candler of Gabb & Co, Solicitors, 32 Monk Street, Abergavenny, Monmouthshire, NP7 5NW acting for the Merton Green Action Group

Who called:

Mrs C H Guscott	Rosewood, 13 Llanvair Road, Caerwent NP26 5NY
Mrs K L D Cousins	9 Ash Tree Road, Caerwent, NP26 5NU
Mrs M E Jones	5 Ash Tree Road, Caerwent, NP26 5NU
Mrs B E Thomas	Green Lane House, Caerwent, NP26 5NZ
Mrs A-M Spooner	6 Centurions Court, Caerwent, Monmouthshire, NP26 5FG
Mrs K J Lloyd	19 Ash Tree Road, Caerwent, NP26 5NU
Mrs D C I Hammacott	11 Wiesenthal Close, Caldicot, NP26 [Formerly of 10 Ash Tree Road, Caerwent, NP26 5NU]
Mrs E J May	5 Llanvair Road, Caerwent, NP26 5NY
Mr T M Jones	5 Ash Tree Road, Caerwent, NP26 5NU
Mr R Smith	4 Ash Tree Road, Caerwent, NP26 5NU

For the Objector:

Mr A Porten QC	Of Counsel; instructed by Mr N Morgan of Hugh James, Solicitors, Hodge House, 114-116 St Mary Street, Cardiff, CF10 1DY acting for Barratt Homes (BDW Trading Ltd)

Appearing in a neutral capacity:

Mr J Harris	178 Newport Road, Caldicot, NP26 4AA

DOCUMENTS SUBMITTED IN SUPPORT OF APPLICATION

1. Application with supporting documentation including:
    - 28 statements from witnesses
    - Schedule summarising periods of use of the application land, periods of residence and addresses, areas utilised and periods over which different types of activities were undertaken;
    - A graphic analysis of the use of each of the 9 areas within the application land;
    - Two letters of support
    - Two local history papers ("The Ups and Downs of Village Life in One Lifetime" and "Merton Green" written by Shirley Nettleship, June 2008, published by the Caerwent Historic Trust)
2. Second statements of 2 witnesses and statements from another 10 people with updated analyses covering the new statements
3. Photographs dating back to 1980 submitted by various witnesses
4. Letters, emails and evidence forms (3) from 45 people
5. Two aerial photographs showing Merton Green

DOCUMENTS SUBMITTED ON BEHALF OF OBJECTOR

6. Detailed objection submitted to MCC on behalf of Barratts on 22 Jan 2010
7. Statement of Mrs J Carter, Principal Estates Valuer, MCC
8. Documentation confirming the submission of the outline planning application in October 2003
9. Plan showing the areas for 'quiet enjoyment' which certain householders in Ash Tree Road are entitled to use
10. Copy of a report to the MCC Cabinet dated 15 February 2005 concerning capital programme 2005/6 – 2007/8 and cabinet decision recording log
11. Plan showing position of notices erected at Merton Green and Ash Tree Road with photographs (taken 1 June 2005 and 12 June 2006)
12. Minutes of MCC Planning Committee dated 18 October 2005
13. Details of advertisement placed in the local press in February 2006
14. Details of an advertisement (under the Local Government Act 1972 subsections 123(1) and (2A)) placed in the local press in March 2006
15. Copies of advertisements (under the Local Government Act 1972 subsections 123(1) and (2A)) placed in the local press on 20 and 27 December 2006

16. Copy of email to MCC from Mr A Spooner, response from MCC and reply from Mr Spooner

17. Copy of advertisement (under the Town and Country Planning Act 1990 section 233) placed in the local press on 7 and 14 February 2007

18. Copy of a report for a decision by a single member of the MCC Cabinet (Cllr R J W Greenland) dated 7 March 2007 concerning appropriation and sale of land at Merton Green and cabinet individual decision recording log

19. Copy of planning permission (ref MM09253) for residential development of land at Merton Green, Caerwent issued on 23 June 2006

20. Copy of planning permission (ref DC/2007/00986) for reserved matters relating to outline planning permission M/9253 issued on 18 June 2008

21. Copy of planning permission (ref DC/2009/00725) for reserved matters for the construction of 132 dwellings & associated works issued 1 Feb 2010

DOCUMENTS PROVIDED FOR REFERENCE BY MONMOUTHSHIRE CC

22. Copies of press advertisements and photographs confirming erection of site notices posted in connection with the inquiry

23. Copy of The Stopping up of Highways (County of Monmouth) (No.7) Order, 1959

24. Large scale showing Ash Tree Road and Merton Green (scale not given)

25. Map extract from highway authority 'list of streets'

CASES RELEVANT TO THIS REPORT

R v Suffolk CC ex parte Steed [1995] 70 P&CR 487

R v Suffolk CC ex parte Steed [1998] 75 P&CR 102, CA

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

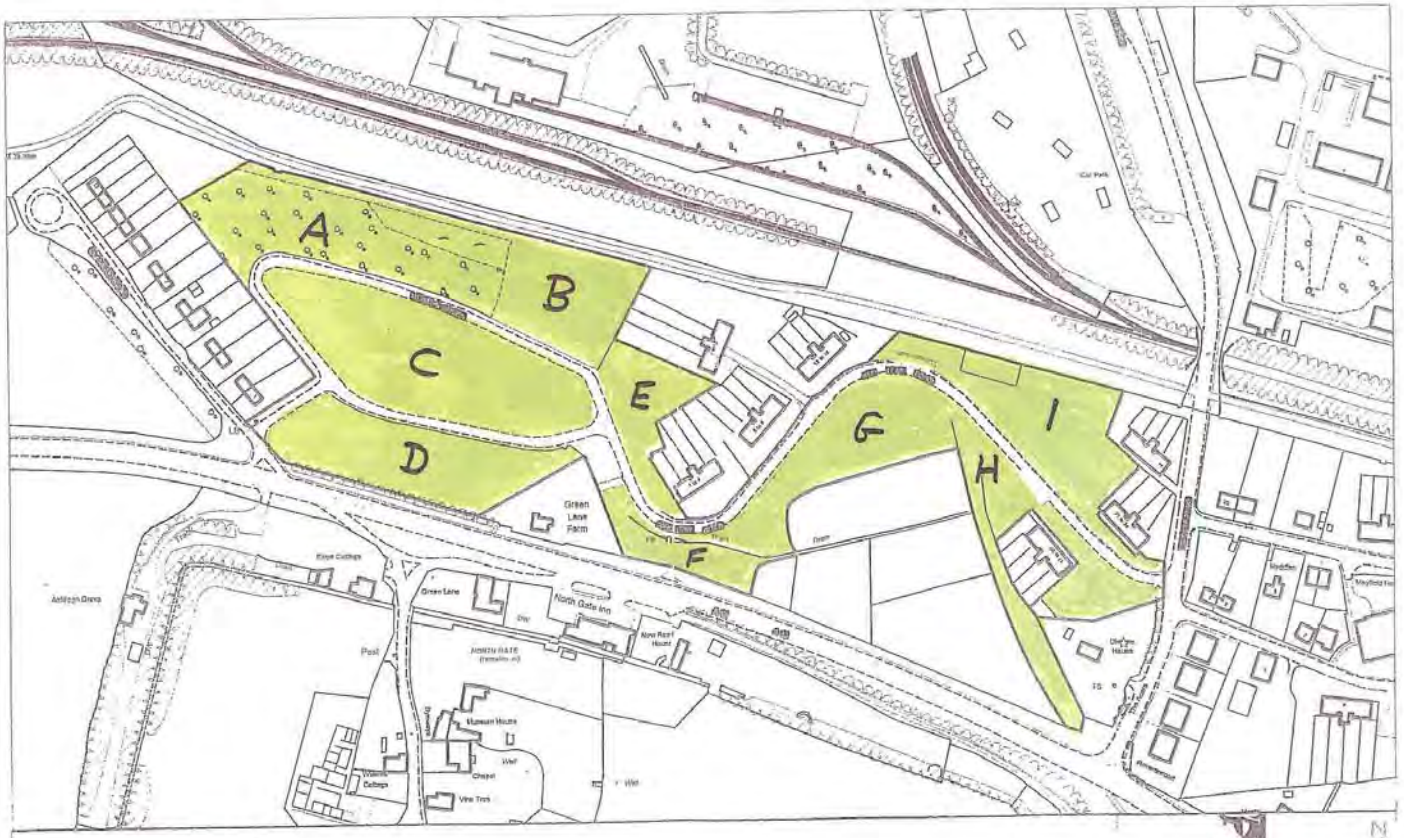
R (Alfred McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC 76 (Admin), [2002] 2 PLR 1

R (Beresford) v Sunderland City Council [2004] 1 AC 889, HL(E)

Oxfordshire County Council v Oxford City Council & another [2006] UKHL 25, [2006] 2 AC 674

R (Lewis) v Redcar & Cleveland Borough Council [2010] UKSC 11

R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council (and others) [2010] EWHC 530 (Admin)



Land at Merton Green

Map prepared by: Asset Management

Date: 1 November 2006

Scale: 1:2,500

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