Devon
County Council

COMMONS ACT 2006 SECTION 15
KNOWLE SIDMOUTH

The Application

Devon County Council as the Commons Registration Authority ("the CRA") has received an application from the Knowle Residents Association ("the Applicant") to register the land known as Knowle Sidmouth ("the Application Land") as a town or village green under Section 15 (2) of the Commons Act 2006.

Section 15(2) enables registration of land as a village green where:-

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

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

Evidence of the use of the Application Land has been provided in the form of questionnaires completed by those who live in the locality. The locality has been identified as north, south, east and west wards of Sidmouth.

The application has been publicised as specified under Regulations 21 and 22 of the Commons Registration (England) Regulations 2008 giving a period of 42 days for representations to be submitted.

Representations

The CRA has received one objection from East Devon District Council (EDDC).

Comments

The objector is the land owner. The objection is on the grounds that EDDC does not accept that north, south, east and west wards of Sidmouth Town Council constitutes a "neighbourhood" for the purposes of Section 15 of the Commons Act 2006.

The land which is the subject of the application was appropriated as a pleasure ground pursuant to Section 164 of the Public Health Act 1875.

As specified under Regulation 26 (3) of the Commons Registration (England) Regulations 2008 the Applicants have been provided with a copy of the Objection and the opportunity to comment.

The CRA instructed Counsel to provide advice on the Application. Counsel advised that the CRA should hold a 1 day non-statutory public inquiry to address the issues set out in paragraph 9 of the Inspectors Report. A copy of the Inspectors Report dated 5 June is attached.

Conclusion

Mr Paul Wilmshurst of Counsel sat as the Inspector at the non-statutory public inquiry held at the Knowle, Sidmouth in April 2014. The Inspector recommended that the Application be rejected for the reasons set out in his report. The CRA accepts the recommendation of the Inspector.

Decision

The Application is rejected for the following reasons:

- The majority of the Application site was expressly appropriated to the purposes of Section 164 of the Public Health Act in 1973.
- The remainder of the Application site was implicitly appropriated to the purposes of Section 164 of the Public Health Act in 1984.
- It is settled law that use pursuant to Section 164 of the Public Health Act 1875 will be user *by right* and not *as of right* within the meaning of Section 15(2) of the Commons Act 2006.

County Solicitor

Dated: 1 July 2014

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS KNOWLE, SIDMOUTH AS A NEW TOWN OR VILLAGE GREEN (REF: NEWLAND 49)

REPORT OF THE INSPECTOR ON THE ISSUES IDENTIFIED FOR PRELIMINARY TREATMENT

MR PAUL WILMSHURST

5 JUNE 2014

APPLICATION NO: NEW LAND 49

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INTRODUCTION

1. On 10/12/2012 an application was made by the Knowle Residents' Association ("the Applicant") to Devon County Council ("the Registration Authority") to register land described as "Knowle, Sidmouth" as a new town or village green pursuant to s.15(2) of the Commons Act 2006 ("the 2006 Act"). East Devon District Council ("the Objector") is the registered owner of the freehold[1] and objected to the application.

2. Sidmouth is a town, a well known tourist resort, situated on the Devon Coast. "The Knowle" is, as the evidence to which I shall refer later conclusively shows, the widely used common name for the application land together with the office buildings that currently serve as the headquarters of the Objector. The Knowle is a relatively large site, about a 10-minute walk from the sea front and bounded by Station Road, Knowle Drive and Broadway. On a sunny Devon day it is a very pleasant place to be. The Objector's offices sit on top of a hill with a formally set out garden area to the south. It is possible to walk through this more formally set out area on a path that leads to Knowle Drive. Along the way there is, to the west of the path, a reasonably sized works area used by the Objector for maintenance of the land. When leaving the office buildings, to the immediate south, there are steps to enable walkers to descend down 3 levels of terraced lawn. The lawns lead out towards the west and wrap around the office buildings

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[1] Objector's Bundle ("OB") at p.4

somewhat. This top section of this terraced lawn area will be referred to later as the "raised lawn area" or the "upper lawns."

3. A row of trees and an embankment separate this formally set out area and the council offices from a much larger flat grassy area to the east bounded by Station Road. There is a vehicular access on Station Road in the north of the Knowle. From here as one drives in and up a considerable incline to the offices, there is currently a small car park area near to the entrance (in a southern direction) and then a much larger car parking area further along the road. There is also a hard-standing car parking space near to the offices themselves, between the offices and the embankment leading down to the large grassy area. There are a number of good plans of the Knowle that have been produced by the Objector.[2]

4. The site as a whole is of some historical interest. There was first a thatched 40 room "marine villa" built on the site in *circa* 1805 under the supervision of Thomas Stapleton the 6th Lord le Despencer. In 1880 the grounds and the house (which had been developed from its earlier origins) were purchased by the Knowle Hotel and Baths Company. The site was then operated as a hotel until it was purchased by the Sidmouth Urban District Council in 1968 and the buildings were thereafter used as council offices for the Sidmouth Urban District Council. After the 1974 reorganisation of local government the office buildings were opened as the headquarters for the Objector and this use continues to the present time.[3]

5. The Applicant's original application sought to register as a green nearly all of the land at the Knowle, save for the office buildings and small pieces of land in and around those buildings.[4]

6. Subsequent to the application I was instructed on two occasions to advise the Registration Authority on various matters arising out the application. I produced an Opinion dated 25/06/2013 and a further Opinion dated 25/02/2014 (see **Appendix 1 & 2**). Both of these Opinions were distributed to the Applicant and the Objector.

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[2] OB at p. 86b

[3] Registration Authority Bundle ("RA") at pp. 138 – 140

[4] Applicant's Bundle ("AP") at p. 2

7. I concluded that the issue of the public-law status of the application land, in continuous public ownership from 1968 to date, during the relevant qualifying period was an issue that could be dealt with as a preliminary issue without the need for an immediate full-blown inquiry into all of the qualifying requirements of s.15(2) of the 2006 Act. Evidence was produced by the Objector that clearly showed that the majority of the Knowle was expressly appropriated in 1973 to the purposes of the Public Health Act 1875.[5] The area of land appropriated in 1973 was shown on a plan that accompanied council minutes recording the appropriation. It was apparent to me that not all of the application land had been expressly appropriated in 1973. The Objector also produced evidence that byelaws had been imposed over "the Knowle" in 1984 and 1996 pursuant to the Public Health Act 1875 and/or the Open Spaces Act 1906. I considered whether or not these amounted to an implicit appropriation of the remainder of the application land but was unable to come to a conclusion on the evidence then to hand.

8. However, the matter was not at that time as simple as whether just the areas not appropriated in 1973 were subsequently implicitly appropriated. This is because of the impact the then pending appeals before the Supreme Court in the *Barkas* and *Newhaven* cases may have, in my opinion, arguably have had *viz* s.15(7)(b) of the 2006 Act. To repeat the full terms of my Opinions here would greatly add to the length of this Report, readers are invited to refer to those Opinions for full detail.

9. In light of my advice I was instructed by the Registration Authority as Inspector to convene a 1-day non-statutory inquiry to address the discrete preliminary issues that I had identified. The issues I identified were as follows:

   - Which areas of the application land were not appropriated in 1973 or have been subsequently built on (the Objector should produce a plan to assist the Registration Authority)?
   - Is the land built on or otherwise developed excluded from the application?
   - Did the byelaws (1984 and 1996) implicitly appropriate any land not expressly appropriated in 1973? If not, what statute is the remaining land held under?

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[5] OB at p. 30 - 31

- Should the Registration Authority wait until after the determination of the *Newhaven* and *Barkas* appeals in the Supreme Court to determine this application? (what is the proper legal approach?)
- Should a full inquiry be proceeded with in relation to any portion of the land?

THE INQUIRY

10. I issued Directions for the inquiry on 25/02/2014 (which replaced those made on 10/02/2014 because the parties asked for more preparation time) and these provided an opportunity for either side to produce evidence to the inquiry and to call any witness evidence if this was so desired. However, as will be seen from what follows there is not a great dispute about the relevant evidence on these preliminary points and my recommendation therefore largely turns on the proper application of the relevant legal principles. To this end I issued a document entitled "Inspector's preliminary view of the issues at stake in the pending *Barkas* and *Newhaven* appeals before the Supreme Court" (**Appendix 3**) to the parties prior to the inquiry in which I sought to ensure that the issues to be dealt with at the inquiry were clearly understood by all concerned.

11. At the inquiry, held in the Council Chamber at the Knowle on 10 April 2014, the Applicant was represented by Mr Christopher Maile (who is not a lawyer but has nonetheless represented a considerable number of village green applicants at public inquiries). Mr Alun Alesbury of counsel represented the Objector. I conducted both an unaccompanied and an accompanied site view.

12. As it turned out the Supreme Court handed down judgment in *R (Barkas v North Yorkshire County Council* [2014] UKSC 31 (*"Barkas"*) on 21/05/2014. In the interest of fairness I gave the parties an opportunity to study the judgment and to make written submissions on it. Both parties made very brief written submissions. I should also say that I was greatly assisted at the inquiry by both advocates who had in fact watched the submissions before the Supreme Court on the live television feed that is now in operation. Thankfully, speculation has now given way to a concrete judgment.

CONCESSIONS MADE BY THE APPLICANT

13. At the public inquiry Mr Maile made a number of concessions on behalf of the Applicant.

14. First, it is was said that the Applicant would not wish to pursue a case based on s.15(7)(b) of the 2006 Act even if the Supreme Court were to reverse the judgment of the Court of Appeal in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2014] QB 186 & 282 ("*Newhaven*") that this provision only applies where permission has been granted <u>after</u> the coming into force of s.15 to the 2006 Act. It was said that it would be "very difficult" for the Applicant to produce evidence going this far back in time. As it turned out the Supreme Court in *Barkas* appear to have said that use *by right* is (contrary to Sullivan LJ's view in the Court of Appeal) merely a form of permissive use. If this concession is accepted then there is no need for the Registration Authority or me to consider the preliminary point I identified as to whether the Registration Authority ought to wait until after the determination of the *Newhaven* appeal.

15. Second, Mr Maile also conceded that the byelaws imposed over the land applied from their coming into force, over the entire application land. He did not give any particular reason for this.

16. On the basis of these concessions, were they to be binding, and the legal principles that I outlined in my two Opinions my recommendation should obviously be the immediate rejection of the application. The key point that I was concerned about in this first place was whether the whole of the application land had been made subject to the byelaws and thus implicitly appropriated.

17. However, the determination of the application by the Registration Authority of this application is not *inter partes* litigation and there is a clear public interest in the matter overall: see for example on the point the Report of Mr Vivian Chapman QC in the matter of an application to register land known as the Triangle, Gosport at [94].

18. I accept that in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 ("*Trap Grounds*")[6] it was said that that the registration authority has no investigative duty in relation to town or village green applications which requires it to find evidence or to reformulate the applicant's case. In this regard I would make a distinction between the two concessions offered by the Applicant. In the first case, it seems to me that the concession is equivalent to the Applicant saying that it will not or will not be able to

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[6] at [61]

produce evidence at an inquiry to support a claim under s.15(2) & s.15(7)(b) of the 2006 Act. The Applicant cannot be compelled to do this but, as is established, it has no absolute right to withdraw the application.[7] In the second case, the concession is one of a highly legal character. In my view, while evidential concessions are perhaps more readily accepted it is open to the Registration Authority to disregard a legal concession of the kind offered in the instant case. I will therefore consider for myself what the correct position is *viz* the byelaws and recommend accordingly. I should add that I accept that the concession on s.15(7)(b) has been made on the Applicant's own, informed, assessment of the evidence in this case and ought to be accepted by the Registration Authority.

CLARIFICATION OF EXTENT OF APPROPRIATION & AREAS OTHERWISE CLEARLY NOT AVALIABLE FOR REGISTRATION

19. In his witness statement before the inquiry Mr Kelvin Dent[8] – the Vice Chair of the Applicant - exhibited a plan showing two areas hatched red that he sought to exclude from the application. One area he described as being around the western access to the Council's offices – comprising a grass triangle adjacent to the offices that are fully enclosed, two small buildings and the western access road itself. The second area Mr Dent described as the works area, which has a number of structures on it including a portacabin and polytunnels and incapable of registration. Having looked at both areas I regard these as sensible concessions.

20. There was, at the time of the inquiry, some debate between the Objector and the Applicant as to the exact boundaries of the land covered by the application *viz* the inclusion of a small area in front of the council offices. After the conclusion of the inquiry, I was provided on 29 April 2014 with an agreed plan of the application site that had been plotted by the Objector. The e-mail, from the Objector's solicitor, containing the said plan stated as follows:

    "Further to the inquiry of 10th April in respect of the above matter, the Applicant and the Objector have been able to agree a further plan for your use.

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[7] See *Oxfordshire County Council v Oxford City Council and another* [2005] 3 W.L.R. 1043 at [104] *per* Carnwath LJ

[8] AP at p. 14 – 15 (and see below)

I attach the same (a hard copy will also follow in the post) and would ask you to note the following;

The blue line (application boundary) has been amended to remove the two areas shown on KD1 (Applicant's bundle page 16). The grey hatching represents the areas removed.

There is also an amendment to the south eastern corner of the building (to exclude the path around the raised patio area as discussed on the site visit) but it is not possible to identify this change on the plan in any meaningful way. Comparison between this latest plan and the plan contained at page 86a of the Objector's bundle will hopefully assist in identifying the change – it is pretty much dead centre of the plan."

21. The result of all this was that – subtracting the land appropriated in 1973 and the land the Applicant no longer maintains its application over – that only a very small percentage of the Knowle remains for consideration. The areas are shown well on the plans produced by the Objector for the inquiry and the subsequent plan agreed between the parties referred to above. Principally, the area includes a small raised lawn area to the immediate south of the office buildings and a further piece of irregularly shaped land to the south. It also includes an area to east of the office buildings that is now a hard-surfaced car park area, together with the road that winds down to the vehicular entrance on Station Road. It includes the large car park in the north of the land. I should say also that it includes the very small verges to these area listed. At the inquiry there was, naturally, a focus on the raised lawn or upper lawn area as it seemed the most plausible area in which the inhabitants might have enjoyed recreation.

EVIDENCE

Documentary evidence

22. Much of the evidence that was before of the inquiry took the form of documents. Rather than refer to the documents each witness produced I shall attempt to chronologically describe them here.

23. On 24 July 1973 there was a meeting of the Finance Committee Sidmouth Urban District Council that was recorded in a minute.[9] It is an important document and so is worth setting out in full:

> *"<u>Adaptation of Knowle as Headquarters for the East Devon District Council</u>*
>
> *The Committee further considered the proposals in connection with the above which envisaged the adaptation of the present offices, the erection of two system-built buildings, one in the gardens and one on the rear car park, an access road to Knowle Drive and a car park in the northern part of the field.*
>
> *The proposed system-built buildings are sited on land held under Part V of the Housing Act 1957 and it would seem that there ought to be an appropriation to Section 125 of the Local Government Act 1933. A payment would be required from the General Rate Fund to the Housing Revenue Fund...*
>
> *The gardens and the field, through technically held for the purposes of the Local Government Act 1933, have since acquisition been treated as open spaces to which the public have access. It will moreover be recalled that a principal reason for the acquisition of Knowle was to preserve the gardens and the field as an amenity for the district. Members have suggested that this intention ought to be given legal effect. The best method would seems to be for the portion of the field not required in connection with the above adaptations to be appropriated for the purposes of Section 164 of the Public Health Act 1875 (which relates to the provision of public walks or pleasure grounds) by a simple resolution of the Council. And it would seem that no adjustment of accounts would be necessary as both properties were financed out of the General Rate Fund.*
>
> *<u>RECOMMEND</u> that:*
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> *(1) Under the powers contained in Section 163 of the Local Government Act 1933, 1933 as amended by Section 23 of the Town and Country Planning Act 1959, the land coloured green and green hatched black on the plan (which will be available for examination at the meeting of the Council), being land not required for the purposes for which it was acquired or has since been appropriated, be appropriated as a public*

[9] OB at p. 30

open space for the purposes of Section 164 of the Public Health Act 1875 and that insofar as a small part of this land (i.e. the land coloured green hatched black on the said plan) is at present held under Part V of the Housing Act, 1957 such adjustment of the Accounts of the Council be made as the Secretary of State for the Environment may direct;"

24. A copy of the plan referred to in this 1973 minute has survived and is produced by the Objector.[10] The key to the plan refers to "proposed appropriation" but as is pointed out by Mr Gordon Lennox in his evidence (see below), it would have been logical to prepare the plan prior to any meeting considering the appropriation. This plan clearly shows in my view that the overwhelming majority of the Knowle was expressly appropriated, as per the decision outlined in the minute, to the purposes of the Public Health Act 1875 (as *per* my preliminary advice). There is a handwritten reference *"R.27.7.73"* on another copy of the minutes of 24 July 1973.[11] Below the key on the plan it has been handwritten *"appropriated by resolution of the Council 27.7.73."* It appears to me that this is either simply a mistake, as the meeting had of course taken place on 24 July 1973, or that there was another meeting but this minute has been lost. On either account, I am satisfied that the plan is the correct plan because it was produced at about this time, the handwritten reference matches the minute and the hatching and colouring is as described in the relevant minute.

25. The plan does not show that there was a proposal to appropriate all of the land at Knowle. There was, as it were, a border left out around the building to the immediate south (raised lawn area), east (car park) and west of the office buildings. A further area of some size was left out, the majority of which today is the works yard. The road and incidental verges that lead to Station Road were left out. The area that forms the large northern car park was also left out.

26. I was also referred to a newspaper article dated 28/07/1973 entitled "Council Move To Safeguard Knowle Grounds." It states: *"All the grounds around Sidmouth Council Offices at Knowle should be dedicated for ever as a public open space, the U.D.C's Finance Committee decided last week."*

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[10] OB at p. 9; see also the original size version: RA at p. 16
[11] OB at p. 31

27. In 1980 and 1983 there are copies of proposed byelaws that were sent to the Home Office.[12] On 7 December 1983 it was recorded in the minutes of the Objector's Policy Committee that there had been detailed correspondence with the Home Office in relation to the introduction of new byelaws in respect of, *inter alia*, pleasure grounds. Of note in this minute is that it was stated that, *"with particular reference to the extended list of pleasure grounds recommended by the Committee"* that *"Although it makes no practical difference to control, it has been necessary to investigate title to all the pleasure grounds to identify whether Public Health Act or Open Spaces Act powers apply to each individual ground..."* The committee resolved to submit a set of *"Byelaws as to Pleasure Grounds to the Home Office"* for confirmation. I was shown a copy of the proposed byelaws and "Knowle, Sidmouth" is listed under Schedule 1, which is recorded as meaning that the byelaws were made under section 164 of the Public Health Act 1875.[13]

28. On 15 February 1984 the minutes of the Policy Committee of the Objector noted that the Home Office had accepted the pleasure ground byelaws subject to some alterations in respect of *"invalid carriages."*[14]

29. These new byelaws were apparently sealed on 2 February 1984[15] and came into effect, with the Secretary of State's approval, on 2 May 1984. The byelaws are typical byelaws that are made by local authorities to preserve good order on public open spaces. Importantly, it is stated in Part 1 that the byelaws apply to *"Pleasure Grounds with respect to which Byelaws are made under Section 164 of the Public Health Act 1875"* of which *"Knowle, Sidmouth"* is one such pleasure ground.

30. In a Report to the Policy Committee of the Objector, meeting held on 3 July 1996[16], it was stated that:

    The current Byelaws covering various parks and public open spaces were made in 1984. Since this date Members will be aware that a number of large areas have been adopted by the District Council which are not covered by these Byelaws.

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[12] OB at pp. 33-40 & pp. 41 – 47
[13] OB at pp. 50 – 54
[14] OB at p.55
[15] OB at p.56
[16] OB at p. 64

It was recorded that the Home Office had been approached with a view to approving revised byelaws. It was, so the minutes stated[17], recommended that permission be given to the Chief Executive to seal the byelaws that had been agreed with the Home Office and that the process of confirmation be proceeded with.

31. On 3 October 1996 the Secretary of State confirmed[18] a large number of byelaws, relevant to a large number of sites, contained within a document entitled *"BYELAWS relating to PLEASURE GROUNDS."*[19] The byelaws were to come into force on 13 October 1996.[20] These byelaws state in their preamble that they have been made *"by the Council of the District of East Devon under section 164 of the Public Health Act 1875, section 15 of the Open Spaces Act 1906 and sections 12 and 15 of the Open Spaces Act 1906, with respect to pleasure grounds and open spaces."* These are defined at Schedule 1 as including various named sites including one described as *"Knowle"* under the heading *"Sidmouth."* There is no plan attached purporting to show the extent of the land covered by these byelaws. The byelaws are perfectly typical and regulate behaviour on matters including: opening times, vehicles, climbing, removal of structures, camping, trading, games, noise, ball games and the like. The Applicant does not challenge in the validity of these byelaws in any way – indeed it was conceded that they apply to the whole of the application land.

32. The Registration Authority also produced to the inquiry documents[21] in relation to two applications under Schedule 14 of the Wildlife and Countryside Act 1981 made with the aim of adding a number footpaths within the Knowle to the Definitive Map. In accordance with its statutory duty Devon County Council, being the relevant Highway Authority, considered the applications and a Report was prepared for a meeting of the Public Rights of Way Committee on 21 June 2013. The Report is informative about the

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[17] OB at p.70

[18] A copy of the version sealed by the Objector was also produced: OB at pp. 73 – 84.

[19] OB at pp. 10 – 13

[20] There is also a letter from the Home Office dated 3 October 1996 confirming this: OB at p. 85

[21] RA at pp. 133 - 151

general history of the Knowle. It came to the conclusion that no modification order ought to be made. The Report was approved at that meeting.[22]

33. It appears that the applicant for these modification orders pursued the matter further. Devon County Council, as highway authority, was compelled to produce a Statement of Reasons dated 6 September 2013.[23]

34. On 13 November 2013 an Appeal Decision was issued by Sue M Arnott FIPROW (Planning Inspectorate) an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs.[24] The appeal was allowed but only in relation to routes *"A-x and B-y."* The Inspector noted that the main tracks and paths through the grounds of the Knowle have remained in place since their origins in the late 1880s. The Inspector's conclusion referred to the evidence, recited above, that there were some areas that had not been appropriated in July 1973:

    "I find that there appears to be a sufficient quantity of use by the public during the twenty years between May 1992 and May 2012 of all the claimed routes but parts were not 'as of right' on account of the land having been appropriated for the purpose of public walks and pleasure grounds. For those parts of the appeal route which do not fall within the appropriated area, I regard the use to be sufficient to raise a presumption of dedication."

35. It is clear to me that the Inspector proceeded on the basis that those areas not expressly appropriated in 1973 were not subsequently appropriated although there is no mention in the decision of the imposition of byelaws and any potential implicit appropriation. A modification order was made by Devon County Council, on the direction of the Secretary of State, on 27 March 2014.[25]

36. I should add here that any decision of the Secretary of State as to footpaths is not binding on the Registration Authority in relation to the village green application.

Witness evidence

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[22] RA at p. 152
[23] RA at pp.156 - 164
[24] RA at pp. 165 – 169
[25] RA at p. 175

37. The summary of evidence below is not intended, nor should it be considered, a transcript of the evidence but rather only a summary of what seemed to me to be the most important and relevant points arising from the evidence of each witness. The witnesses are set out in alphabetical order rather than the order in which they appeared.

Witnesses called to give evidence for the Applicant

Kelvin Dent

38. Mr Kelvin Dent made a statement dated 24 March 2014[26] in which he states that he submitted the application to register the Knowle as a village green as he is the Knowle Residents' Association's Vice Chair.

39. Mr Dent summarised the procedural history of the application, but I do not need to deal with that here. Mr Dent requested that it would be fairer to all concerned to wait until the outcome of the *Barkas* and *Newhaven* judgments in the Supreme Court.

40. Mr Dent also outlined those areas that he sought to exclude from the application, attaching a helpful plan. I have dealt with that above.

41. In brief oral evidence, Mr Dent clarified that he is a local councillor. In cross-examination he conceded that almost all of the very many evidence questionnaires that he had submitted in support of the application referred to the application land as "the Knowle." Further, he agreed that those people filling out evidence questionnaires did not distinguish between one part of the Knowle from another.

42. Mr Dent also made reference to the fact that he had seen some use of the "raised area" himself and gave further details. He was at pains to point out that he had not produced evidence of actual use for this inquiry because of the Directions that I gave. Mr Dent was of course, entirely correct that the levels of use of the Knowle was not an issue I had specified for preliminary treatment. It would be wrong of me to deal with this issue in relation to the witnesses that I heard from and I do not do so here.

43. I found Mr Dent to be entirely honest and straight with his answers. I accept his evidence as referred to.

Michael Temple

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[26] AP at p.12

44. Mr Michael Temple, who lives at The Pippins, Knowle Drive, Sidmouth made a statement dated 19 March 2014.[27] Mr Temple also gave an evidence questionnaire.[28] He told the inquiry that he had lived in Sidmouth since 1982. He said in his statement that he had not been aware of any rights of way signs until May 2012 but that he had been aware of a number of notices on the land relating to byelaws.[29] He helpfully attached a photograph of such a sign.[30] It is a typical sign that one might find in a public park.

45. In oral evidence Mr Temple told the inquiry that he had used the "upper lawn" to watch badgers and that his son had practiced tai chi there. Mr Temple said that *"everybody understands that the upper lawns are part of the park."* He further described how he had used the area with his disabled daughter for some 30 years, mushroom picking on the lawns themselves but most often above the polytunnels.

46. Mr Temple also produced a press cutting from 24 August 2012[31] that described a "people's picnic" that, he said, had been organised on the upper lawns area.

47. In cross-examination Mr Temple agreed that he thought the byelaws applied to the whole of the site and said that all of the land is part of the pleasure ground. It also seems that Mr Temple has asked permission from the Objector to hold a picnic and a treasure hunt on the upper lawns but this was in and around September 2013 once the status of the land had become in issue.

48. I found Mr Temple to be a pleasant witness, who was obviously doing his best to assist the inquiry and to answer all the questions posed to him to the best of his ability. I find him to be an honest witness and I accept his evidence.

<u>Witnesses called to give evidence for the Objector</u>

<u>Bob Capon</u>

49. Mr Bob Capon made a statement dated 26 March 2014 that he produced to the inquiry.[32] As he clarified in his oral evidence he has worked for the Objector since 1

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[27] AP at 17
[28] AP at p.92
[29] For a plan showing locations of signage see OB at p. 113
[30] AP at 18
[31] AP at 18a
[32] OB at p. 18

March 1976 and has been based at the Knowle from the spring of 1978 to date. Mr Capon's evidence can be summarised as follows:

- He has regularly walked around the buildings and its immediate surrounds and more widely the grounds. He has also visited the site during weekend and bank holidays.
- He is aware that there are signs located around the grounds that indicate that the grounds are subject to byelaws. He states that *"As for as I have been, aware, the Knowle is a name which has always been known locally as the entire area of the grounds."*
- He has had a number of different offices of the years with views over different parts of the Knowle and has used the "middle" and "upper" car parks.
- He refers to a plan, which has a large irregular shaped area coloured orange, which includes all the areas not appropriated in 1973. It is then stated that he has never seen anyone using any of these areas apart from the occasional dog walker using the route along the drive from Station Road past the offices and from there through to the parkland (or *vice versa*).
- He states that the areas coloured orange have also appeared to him to have been treated *"as part and parcel of the grounds specifically associated with the office buildings on site"* – rather than park of the *"open parkland setting at the Knowle."*

50. In oral evidence he stated that he had not seen the upper lawn area being used by members of the public. Mr Capon was also challenged forcefully in cross-examination about the fact that the words that appear in his statement are almost exactly the same as appear in other statements produced to the inquiry by the Objector. Mr Capon's reply was that these were not his own words but he agreed with the content. There was some discussion about the location of signage on the land.

51. I must say that the fact that the wording is near-enough exactly the same as a number of other witnesses is a matter that I cannot simply dismiss and I found Mr Capon's answer that he *"agreed with the content"* to be extremely lame. I therefore approach his evidence with some caution. Of most interest, was Mr Capon's response to my question as to what he would say if someone asked him where he worked. He did not hesitate to answer *"The Knowle."* I do accept his evidence about this.

Anna Herbert

52. Mrs Anna Hebert made a statement dated 26 March 2014.[33] She has been employed by the Objector since 6 September 1988, during which time she has been worked at the offices at the Knowle.

53. Her statement thereafter uses almost exactly the same words as Mr Capon and makes the same points as I have set out in bullet points when dealing with his evidence.

54. In cross-examination she was asked why the wording was almost exactly the same in her statement as to be found in a number of other witnesses. Mrs Herbert's reply was that she agreed with the words.

55. Similarly to Mr Capon, I was less than impressed that Mrs Herbert's statement was a blatant repetition. I did not find her answer that she agreed with the words to be a sufficient or convincing explanation. I therefore approach her evidence with some caution.

56. Like Mr Capon, of most interest was her response to my question as to what he would say if someone asked her where she worked. She answered: *"The Knowle."* I do accept her evidence about this.

Henry Gordon Lennox

57. Henry Gordon Lennox made a number of witness statements that were presented to the inquiry dated 26 March 2014 and 4 April 2014.[34] He has been, since April 2013, the Principal Solicitor of the Objector. In his first witness statement he exhibited most of the documents that I have referred to above and provided a helpful description of what they show.

58. Mr Gordon Lennox stated that the lower car park (shown hatched blue on a plan produced) was constructed following planning permission being granted in January 1994.[35] He further stated that the *"upper"* and *"middle"* (shown hatched red on a plan prepared for the inquiry[36]) car parks were constructed in and around the end of 1974

[33] OB at p. 87
[34] OB at p.21; p.23a
[35] OB at 86b
[36] Ob at p 86b

and into early 1975, but *"certainly after East Devon District Council had taken ownership of the land. The contractor who carried out work has confirmed this orally to employees at the Council."* There is an aerial photo dated 22 June 1975 that shows both car parks in existence.[37]

59. Mr Gordon Lennox referred to the imposition of byelaws and points out that the paperwork available shows that the Knowle was first subject to byelaws in 1984, with new byelaws being made in 1996. He helpfully told the inquiry that there was nothing on the file that can be found that indicates the extent of the area intended to be covered by the byelaws.

60. Mr Gordon Lennox also refers to a number of signs located around the Knowle which indicate that the land is subject to byelaws. He argues that had it been the intention for the byelaws to cover a smaller area then he would have expected there to be a plan or that the signage would have carried a plan showing this reduced area. He contends that the whole of the site is open, with no fencing and that as such it is reasonable and appropriate to accept that the intention was for the byelaws to apply all over the Knowle.

61. In oral evidence Mr Gordon Lennox clarified the position as to the footpath applications in that it had been the Objector's stance to allow Devon County Council to defend its decision not to make a modification order. As such, it was not clear that the issue of implicit appropriation had been raised before the Planning Inspector. However, the process of confirming the order will allow the Objector to actively oppose these applications. In cross-examination Mr Gordon Lennox confirmed that he had not had any personal involvement with the documents that he had produced to the inquiry.

62. I found Mr Gordon Lennox to be most helpful and he has obviously diligently prepared the material he located in the Objector's archives for the consideration of the inquiry. The legal effect of these documents is obviously a matter for argument.

<u>Witnesses not called to give evidence for the Objector</u>

<u>Sue Parkinson</u>

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[37] OB at p. 86d

63. Ms Sue Parkinson made a statement to the inquiry but did not give oral evidence. She states that she was first employed by the Honiton Town Council but following the local government re-organisation she was transferred to the East Devon District Council from 1 April 1973, whom she continued to work for until 17 February 2014. All this time she was based at the Knowle. She is now retired.

64. Her statement is a near exact repetition of the contents of Mr Capon's and Mrs Herbert's statements, the main points of which I have put in a bullet point list when dealing with Mr Capon's evidence. In light of this and with regard to the fact she has not been cross-examined I will disregard her evidence.

Francis John Vallender

65. Mr Francis John Vallender made a statement to the inquiry. He was employed by the Objector between August 1984 and June 2002. Between August 1988 and June 2002 he was the Chief Executive.

66. He states in the statement that at the time the current byelaws were made by the Council he was the Chief Executive and that as far as he is concerned the byelaws apply to the whole of the Knowle grounds, at least to the extent that it comprises open land. He states that:

    "had it been the intention for them to cover a smaller area then I would have expected there to be a plan to show the area they related to or for the signage to show the area which the byelaws covered. This is not the case. Moreover there is no other demarcation, for example fencing, to show where the byelaws do and do not apply."

67. Mr Vallender was not cross-examined as he did not give oral evidence and I do not think it would be right to give his evidence much weight. I note the points that he makes about the byelaws, they are really points of argument.

FINDINGS OF FACT

68. The findings of fact that it is necessary for me to make in this case are not extensive. However, as is so often the case, it was not until the inquiry itself that the evidence

became at all clear. I should add that in coming to these findings I have applied, where necessary, the normal civil standard: on the balance of probabilities.

69. First, I find that the Objector took an express decision to appropriate the large majority of the Knowle in 1973 to the purposes of the Public Health Act 1875 but that, as per the plan presented to the inquiry, large parts of it remained un-appropriated.

70. Second, I accept the Applicant's evidence, which also concurred with the Objector's evidence, that "the Knowle" is the commonly used name in Sidmouth to describe the full extent of the grounds (not just that section subject to the village green application) without qualification.

71. Third, It appeared to me that there was some attempt to distinguish between the different areas of the Knowle in the Objector's evidence when the following phrase was used in respect of some of the areas not appropriated in 1973:

    "To the best of my knowledge and belief the areas coloured orange have always simply appeared and been treated as part and parcel of the grounds specifically associated with the office buildings on site (being internal roads, footpaths, car parks or landscaped areas)... rather than part of the open parkland setting at the Knowle."

72. I cannot blandly accept this evidence and have already expressed my caution about approaching the evidence tendered by the Objector's witnesses. I prefer the evidence of the Applicant who did not seek to make any artificial distinction between different parts of the land. For example, Mr Temple was clear that *"everybody understands that the upper lawns are part of the park."*

73. Equally, I have accepted the unhesitant, categorical evidence that was orally given by the two Objector witnesses to the extent that they told the inquiry that they would tell other people that they worked at *"the Knowle."*

74. In light of the above, I find that "the Knowle" or "Knowle" is the name for the entirety of the land, including the office buildings, car parks and hard surfaced areas. It might be possible to speak of "the Knowle" as workplace or as a park but this would only appear from context and I do not think that it would change the fundamental definition as being, I find, commonly understood in Sidmouth as referring to the whole of the land. There is no proper basis, in my opinion, for breaking "the Knowle" down into pieces.

75. I further find, on the basis of the unchallenged evidence, that byelaws were validly imposed over the land described as "Knowle, Sidmouth" in 1984 and again 1996. Those byelaws were imposed, in the first instance, expressly with reference to and pursuant to s.164 Public Health Act 1875.

LAW & ANALYSIS

The 1973 appropriation

76. As matters turned out, the central issue on which I now advise the Registration Authority is whether those areas of the Knowle that were not expressly appropriated in 1973 and which the Applicant maintains its application in respect of, where subsequently appropriated so as to render the use of those areas *by right*.

77. As above, I have found that prior to the formal appropriation in 1973 the entirety of the Knowle was held under the provisions of s.125 of the Local Government Act 1933 and that subsequent to that quite deliberate and careful appropriation, the areas not within the areas shown by the appropriation plan referred to in the minutes, remained held for the purposes of s.125 of the 1933 Act. That provision provided as follows:

> *"(1) A local authority, other than a parish council, may acquire or provide and furnish halls, offices and other buildings, whether within or without the area of the local authority, to be used for the purpose of transacting the business of the local authority and for public meetings and assemblies.*
>
> *(2) Any such local authority may be authorised to purchase land compulsorily for the purpose of providing any such halls, offices or buildings."*

78. In my view this provision clearly has nothing to do with recreation and does not i) provide a power for the local authority to provide recreational facilities or ii) provide a legal right for any inhabitant to recreate over the Knowle. It was not suggested otherwise to me. It also clearly makes sense, as there is a match between the statutory provision under which the land was held and the actual use of the land as the offices of the Objector, together with the connected parking facilities (but see below for the legal relevance of the factual use of the land).

The Public Health Act 1875

79. Section 164 of the Public Health Act 1875 provides that byelaws can be imposed over land that is held under that provision. The section currently reads as follows (but it was not suggested that there have been any material amendments):

> ***164. Urban authority may provide places of public recreation.***
>
> *Any [local authority] may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.*
>
> *Any [local authority] may make byelaws for the regulation of any such public walk or pleasure ground, and may by such byelaws provide for the removal from such public walk or pleasure ground of any person infringing any such byelaw by any officer of the [local authority] 1 or constable.*

The law on "appropriation" after Barkas in the Supreme Court

80. As is well established it is necessary for qualifying user to have been *as of right*. Use *as of right* will satisfy the tripartite test of being use without force, without secrecy or without permission (*nec vi, nec clam, nec preacrio*).[38]

81. The approach that practitioners had previously sought to apply to issue of land in public ownership had been based on the House of Lords decision in *R (Beresford) v Sunderland City Council [2004] 1 AC 889* ("*Beresford*"). From that case it had appeared that the question to ask was whether the public had made use of land pursuant to a statutory right or licence conferred by the statute under which the local authority owned the land.[39] It was held in *obiter dicta*[40] that use of land held under s.164 of the Public Health Act 1875 or s.10 of the Open Spaces Act 1906 would be incompatible with registration as a village green.

82. Surprisingly, in the recent *Barkas* case the Supreme Court ruled that the *Beresford* case was wrongly decided and should be overruled. It appears to me from a study of the two

[38] *R. (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31 at [16]
[39] For example, Lord Bingham said at [3] that user *as of right* does not mean that the inhabitants should already have a legal right since the question is whether a party who lacks a legal right has acquired one by use over a stipulated period.
[40] See Lord Walker at [87] and Lord Scott at [30]

judgments provided by Lord Neuberger and Lord Carnwath that the court has shifted away from an analysis of whether a particular statute conferred a "legal right" on the inhabitants and towards an approach focused on whether a particular statute provided a power for a local authority to provide land to be used, by the public, for recreation. Where use is made of land in public ownership in these circumstances it can be said that the use has been *by right* or *of right* and not *as of right*.

83. Was the area outside of the 1973 appropriation later "appropriated" so as to render use of it *by right*? The stating point, as I see it, is that there are now at least 4 and possibly 5 different types of "appropriation" known to the law.

84. First, there is an express appropriation that takes the form of a formal resolution of the local authority pursuant to the relevant statutory power appropriation (today found in s.122 of the Local Government Act 1933). This is what happened, I have found, in respect of the 1973 appropriation of the majority of the Knowle.

85. Second, there is implicit appropriation. The case *Oxy-Electric v Zainudden* (1990) (unreported), which is often cited at village green inquiries, is supportive of the proposition that where local authority makes a decision or resolves to use land in a way that would only be lawful if there were an appropriation then such an appropriation will be implicit in the decision or resolution. The judge said:

   "I am quite prepared to accept that, if the local authority dealt with the land in such a manner that it could only have dealt with it lawfully if it had made an appropriation, then the resolution need not record such appropriation."

86. Third, in the case of lost records (e.g. minutes) an inference might be drawn from surrounding evidence that a particular lost minute or record would have recorded a decision to appropriate the land. The evidential inference that would be drawn in these circumstances would be of a decision that amounted to an express or an implicit appropriation had actually been taken. It is not contended in this case that there are any material documents missing.

87. Fourth, there is a non-statutory "appropriation" in the sense used by the Supreme Court and Court of Appeal in the *Barkas* case. The *Barkas* case concerned land held under

successive Housing Acts in circumstances where such land had been laid out as a recreation ground. In his judgment Lord Neuberger stated at [46]:

> *"The Field was, as I see it, 'appropriated', in the sense of allocated or designated, as public recreational space, in that it had been acquired, and was subsequently maintained, as recreation grounds with the consent of the relevant Minister, in accordance with section 80(1) of the 1936 Act: public recreation was the intended use of the Field from the inception."*

88. Lord Neuberger had previously made clear at [42] that *"I agree with Sullivan LJ at para 34 in the Court of Appeal that Lord Walker was plainly not limiting the word 'appropriate' to a case covered by section 122 of the Local Government Act 1972)."* The reference to Lord Walker was a reference to his *Beresford* judgment.

89. Lord Neuberger said at [50] that his reasons very similar to those of Sullivan LJ in the Court of Appeal. It is of note that Sullivan LJ had said the following[41]:

> *"The Minister's consent having been obtained and the Field having been laid out and thereafter maintained as a recreation ground initially under that express statutory power, and thereafter under its successor, section 12 of the 1985 Act, it seems to me that it would be wholly unreal to conclude that the Field had not been 'appropriated for the purpose of public recreation' in the sense in which Lord Walker referred to "appropriation" in paragraph 87 of his opinion in Beresford."*

90. I take it as important to the reasoning of Lord Neuberger and Sullivan LJ (particularly at [42] – [43]) that there had been a decision made and ministerial consent obtained to the setting out of the land as a recreation ground under the Housing Act and that the Housing Acts contained a power to do this. I think that is possible to summarise what Lord Neuberger and Sullivan LJ have said into the following test:

    - Did the local authority hold land pursuant to a statute the provisions of which were broad enough to encompass and enable the local authority to make the land available for recreational use? (i.e. a statute that provided a power to provide land for recreational purposes)

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[41] At [37]

- Did the local authority make a decision to use that land for recreational purposes?

91. If the answer to these two questions is "yes" then this will amount, in my view and based on the based jurisprudence, to a non-statutory appropriation sufficient to render use *by right*.

92. This is supported I think by what Lord Neuberger and Lord Carnwath said in *Barkas* as to why *Beresford* was wrongly decided. Lord Neuberger agreed at [49] with the reasons given by Lord Carnwath. Lord Carnwath explained the effect of the New Towns Act, stating in respect of a 1973 New Town Plan that identified the *Beresford* application land for "parkland/open space/major playing field":

    This statutory framework in my view provides a complete answer to Lord Walker's concern as to the lack of any "formal appropriation" of the land as recreational open space (para 90). As Lord Neuberger has observed, he does not seem to have been using the word appropriation in any specific statutory sense. In any event, the general powers conferred by section 3 were amply sufficient to include making land such as this available for public recreation, pending any further development proposals. Assuming (in the absence of any indication to the contrary) that the 1973 plan was duly submitted to and approved by the Minister under section 6, the proposal for recreational use of the arena area would have become a formal and approved part of its proposals for the use of the land in its area. Planning permission would have been required for the change of use for that purpose, but would normally have been granted as a matter of course by special development order pursuant to section 6(2).

93. However, Lord Carnwath said expressly at [70] that his judgment went further than Lord Neuberger. Rather confusingly, Lord Carnwath referred to *Beresford* again in the penultimate paragraph of his judgment and said this:

    "If 'appropriation' in that sense was required, then the new town plan provided it. However such legal analysis is not necessary to support the registration authority's decision. As I have said, on the material before them they were clearly entitled to reach the conclusion that the use by the public was implicitly approved by the corporation; indeed there was no reason to infer anything else."

94. Given that all of Lord Carnwath's judgment was agreed with in its entirety by all the other Justices save Lord Neuberger these words merit close examination. On one view what Lord Carnwath says here seems close to the proposition that where land is set out for public use then it will be, by inference, with the permission of the local authority (i.e. the reverse of the position set out in *Beresford*). In my view, reading the judgment as a whole what I take Lord Carnwath to be saying (see particularly [81] – [86]) is that where land has been set out for recreation by a local authority and maintained as such there will be a strong inference that this has been done lawfully and pursuant to statutory powers. It seems to me however that if it can be demonstrated (or evidence produced that puts the matter in issue) that the authority did not provide the land under statutory powers or that a decision was never taken to lawfully allocate the land for recreation then any such inference will be destroyed (see also Lord Carnwath's treatment of the *Trap Grounds* case at [66]). In my view, if Lord Carnwath had meant to say that wherever land is maintained by the local authority as a recreational area it can never be registered as a green he would have done so in very clear terms and one would have expected Lord Neuberger to have remarked on this point of departure.

95. I should also make reference to *Third Greytown Properties Ltd v Peterborough Corporation* [1973] 3 All ER 731 which is authority for the proposition that land is not appropriated, or held, for a particular statutory purpose simply because this has been the factual purpose for which the land has been put to. In that case, land continued to be held under the Open Spaces Act 1906 even though it had been covered with buildings.

<u>Did the byelaws "appropriate" the remainder of the application land?</u>

96. I will now seek to apply the legal principles that I have outlined above to the facts of this case on the byelaw issue. In doing so I have taken account of the skeleton arguments produced by both sides (albeit the Applicant conceded the point) and, with respect to those arguments and discussions at the inquiry, I shall try and state the matter as simply as I can.

97. The starting point it seems to me must be that this is not a case of an express or inferred appropriation, even if one broadens the latter out to cover the broader circumstances suggested by Lord Carnwath in *Barkas*. This is a case where, in my view, there is a relatively full evidence trail in terms of the Objector's treatment of the land over the

years. Looking at the factual use of the land will, I think, in this case lead nowhere because some of the land left un-appropriated in 1973 is now, for example, used for car parking. Mr Alesbury, for example, conceded in oral argument that it is was unsatisfactory "in terms of clarity" that the car parking areas were in place at the time of the byelaws being imposed and that the situation, "was less than perfect." I do not derive any assistance therefore from the factual use of the land, but I should stress that in my view this is not legally relevant to the question of implied appropriation: *Oxy-Electric* (see particularly the proposition advanced by Robert Carnwath QC (as he then was) and *Third Greytown Properties Ltd* apply.

98. Neither, I should say, does a *Barkas* style appropriation apply – the un-appropriated land in 1973 was, I find, not held for a purpose broad enough to encompass recreation. In my view, the only possible way in which it can be said that use of the land not appropriated in 1973 has been *by right* can be if the Objector took a decision to appropriate the land that carried with it an implicit appropriation to the purposes of the Public Health Act 1875 in the *Oxy-Electric* sense.

99. Mr Alesbury submitted that the imposition of the byelaws must be seen as a "fresh decision" as this was the first set of byelaws imposed. Further, that everyone in the local area would know what "the Knowle" meant and that, as a matter of fact, the byelaws were certain and the relevant land could be identified. This it was said was sufficient to make the "pill easier to swallow" despite the "quirky" factual situation.

100. There are a number of counter arguments that were discussed during oral submissions:

- The byelaws made under the Public Health Act 1875 should be taken as referring to that land already appropriated to that statutory purpose and not as an implicit decision to appropriate the remainder of the Knowle to that purpose.
- If "the Knowle" is the common name for the offices as well as the land then no sensible distinction can be made between the offices, the car parks and the green space. Are the byelaws said to apply to all of these areas?

- Some of the land, for example around the office buildings, has been used for car parking and this would not have been lawful if such land is held under the Public Health Act 1875.

101. In my view, it is crucial that the decision taken to expressly appropriate the majority of the land in 1973 did not redefine or define what the "the Knowle" was or is. That place-name, as I have found as a matter of fact, refers to the entire site, including all of the buildings. I would therefore hold that it would be erroneous to refer back to the 1973 decision as in some way defining the terms used within the byelaws: I agree that it was a "fresh decision." It is my conclusion that the entirety of the land described "Knowle, Sidmouth" in the 1984 byelaws was appropriated to the purposes of the Public Health Act 1875 when those byelaws came into force. Although, there is no reference to the express reference to the Knowle byelaws being pursuant to the 1875 Act in the 1996 byelaws, the land was already appropriated to that provision and so, I think this to be of no importance.

102. It is true to say that, by taking the definition of "the Knowle" (as I have) as including all the land (including the office buildings) this has certain consequences. It means that the Objector's use of parts of "the Knowle" for car parking purposes or even as offices may well have been strictly unlawful. In my view, I should not allow this consequence to become a starting point, as I consider that the central principle here is to simply identify what land is covered by the 1984 / 1996 byelaws and this is a strictly factual exercise. Further, there is a very good chronology of the relevant facts and no need, in my view, to infer anything. To illustrate with an example, if an offence contrary to the byelaws had taken place on the raised lawn area or even one of the car parks, I consider that the Magistrates hearing the case, with their local knowledge, would have convicted the defendant and that a defence that he was not on "the Knowle" would have been very unlikely to succeed (and, I think, very unlikely to be advanced in the first place).

103. I have not thought it necessary to go behind the byelaws to try and ascertain what was intended by the Objector as, I have found the byelaws to be intelligible on their face. Of course, it might be that there would be some kind of "blue pencil" applied to the byelaws in so far as they would otherwise apply to the office buildings. This is not a concern for me in this Report. To summarise, I am in agreement with the Objector that

the imposition of the byelaws ought to be seen as a fresh decision and that the definition of what counts as the Knowle, is a matter of fact to be determined. I have made the necessary findings of fact (with very little difficulty having heard from the witnesses) and this leads me to the conclusion that the byelaws do apply and amounted to an implicit appropriation to the purposes of s.164 of the Public Health Act 1875 in the *Oxy-Electric* sense.

104. As such I find that any recreational use of parts of the Knowle not appropriated in 1973 was *by right* or *of right* and not *as of right* upon the byelaws being imposed in 1984.

<u>The combined effect of the Barkas and Newhaven appeals</u>

105. One of the original issues I identified was whether the Registration Authority ought to wait for the outcome of both the *Barkas* and *Newhaven* appeals in the Supreme Court. However, as identified above i) the Applicant has conceded that it does not wish to pursue a case under s.15(7)(b) of the 2006 Act and ii) this ought, in my view, be accepted. It is not therefore my recommendation to wait until after *Newhaven* has been decided or consider the import of s.15(7)(b) further.

106. I should also, record here, that the Objector made it clear that it was not relying on the signage placed around the Knowle setting out that the land was subject to byelaws as giving an implied permission to use the land. The issue of byelaw signs is another issue before the Supreme Court in the *Newhaven* case.

<u>Should a full inquiry be proceeded with in relation to any portion of the land?</u>

107. It follows from the above, that my recommendation is that is it unnecessary to consider the additional requirements of s.15(2) of the 2006 Act at a further public inquiry and that the application can be rejected on the basis that the use of the whole of Knowle has been *by right* since 1984.

CONCLUSON

108. My recommendation is that this application be rejected. The Registration Authority is required to give reasons to the parties for any decision that it takes. The reasons should be expressed to be "for the reasons outlined in the Inspector's Report." The reasons can be summarised thus:

- The majority of the application site was expressly appropriated to the purposes of s.164 of the Public Health Act in 1973.
- The remainder of the application site was implicitly appropriated to the purposes of s.164 of the Public Health Act in 1984.
- It is settled law that use pursuant to s.164 of the Public Health Act 1875 will be user *by right* and not *as of right* within the meaning of s.15(2) of the Commons Act 2006.

109. Finally, I would record my thanks to the officers of the Registration Authority for making all the necessary arrangements for the inquiry and liaising with the parties.

Paul Wilmshurst

05/06/2014

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