Report No: Public Agenda Item: **Yes**

Title:	**Determination of Application to Register Land known as Paignton Green or Greens (North, South and Middle) as a new Town or Village Green under Section 15(2) of the Commons Act 2006**
Wards Affected:	**Roundham with Hyde; Goodrington and Roselands; Clifton and Maidenway; Preston; Churston and Galmpton**
To:	**Deputy Chief Executive** On: **12 May 2011**
Key Decision:	**No**
Change to Budget:	**No** Change to Policy Framework: **No**

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1. What we are trying to achieve and the impact on our customers

1.1 This Application is made under the Commons Act 2006, Section 15(2) in respect of the undeveloped portions of Paignton North, Middle and South Green as indicated on the map supporting the Application (see attached).

1.2 It will be noted that this land is in the ownership of the Council and accordingly, the Council in its capacity as Landowner and the Council in its capacity as Registration Authority have received separate internal legal representation with a Chinese "wall" operating between the 2 lawyers. Such a procedure was approved by the Inspector in the Bristol City Castle Parks Inquiry 2009.

1.3 The Council must consider this Application solely in its capacity as Registration Authority. The substance of the decision cannot be impacted by any consideration of the merit of the Application nor the consequences of registration. The Registration Authority must simply apply the statutory criteria to the evidence and interpretation presented by the Applicant. In this context it must then consider the objections of the Landowner insofar as they validly relate to the criteria and upon this basis evaluate whether or not each element of the statutory criteria is fulfilled.

1.4 This report was first prepared in February 2011, however at that time it was agreed that advice from Independent Counsel would be obtained in relation to the Application. The advice received is annexed to this report at Appendix 7.

Please note that the reasoning from the original report is retained so as to ensure consistency with comments from Counsel. Please note that although the reasoning in the advice from Counsel is different to that given by the Solicitor for the Council below, the conclusions of both are in agreement. This is expressed by Counsel at paragraph 57 of his advice.

2. Recommendation(s) for decision

2.1 That the Deputy Chief Executive in consultation with the Monitoring Officer accepts the interpretation of law set out by Counsel in his advice dated 5 May 2011 and annexed to this report (as Appendix 7) and in consequence agrees that the application to register the Application site (namely Paignton Green North, South and Middle (as indicated on the signed plan attached to the Application form)) as town or village green is rejected because it fails as a matter of law.

3. Key points and reasons for recommendations

3.1 The Application is made under Section 15(2) of the 2006 Act in reliance upon 20 years and continuing uninterrupted user as of right of the Application site for lawful sports and pastimes by a significant number of inhabitants of the locality or neighbourhood within the locality. In this context, lawful sports or pastimes may simply be children's play or dog walking provided that such activities are not confined to passage through the site to access other land. User as of right is a technical legal term meaning without actual permission but openly and without force. It equates to **"as if a right already existed"**.

3.2 The Legal principles settling the meaning of "as of right" in Section 22 of the 1965 Act were stated by the House of Lords in *R v Oxfordshire County Council ex parte Sunningwell Parish Council (2000) 1AC335* in particular in the speech of Lord Hoffman. Lord Hoffman also considered the requirement that the use be "as of right" in the context of acquisition of private easements by prescription and, in particular, prescription under the Prescription Act 1832. He considered the meaning of the same words in the Right of Way Act 1932 now incorporated into Section 31 of the Highways Act 1980. He said at 350H-351B:

> *"It became established that such user had to be, in the latin phrase, nec vi, nec clam, nec precario i.e. not by force, nor stealth, nor the licence of the owner. The unifying element in these three officiating circumstances was that <u>each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right</u> – in the first case because rights should not be acquired by the use of force, in the second, because the owner could not have known of the user and in third because he had consented to the user, but for a limited period."*

Quoting from a 19th century House of Lords case, he said:

> *"The whole law of prescription and the whole law which governs the presumption of inference for grant or covenant rest upon <u>acquiescence</u>. The Courts and Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the*

principle upon which these expedients rest."

This statement as to the meaning of "as of right" in Section 22 of the Commons Registration Act 1965 has since been applied by the *House of Lords in R (Beresford) v Sunderland City Council (2001) 1AC889* and by the *Supreme Court in R (Lewis) v Redcar and Cleveland Borough Council (No. 2) (2010) 2AC70* "the Redcar Case".

3.3 The Applicant approved the following summary of the claimed grounds for registration of Paignton Green (extracted from the Summary of Case, Paragraph 7 of the Application Form and approved by the Applicant for use in the Section 45 Public Notice of Application):

> *"[Paignton Green] is claimed to have qualified for registration as a town or village green on 18 December 2008 by virtue of over 140 years use as the village green with all major outdoor events taking place such as annual regatta, carnival, fairground, many local and national charity events and sporting activities. This is continuous to this day with regattas, sports, national and international sailing events attracting many boats on South Green. The most use is by visitors for football, cricket, rounders, volleyball but also as somewhere to move to when the tide is high. Donkey rides are provided in Middle Green and one evening a week Bikers Night takes place with many hundreds of motorbikes from near and far. The duration of use is evidenced by local history postcards and photographs."*

3.4 The Council as Landowner on the 4 May 2009 submitted a statement in objection based on four grounds as detailed in Part A1 of this Report. Having regard to decided case law and guidance as particularised in Part A1 of this Report, the writer is of the view that a valid objection has been submitted and supported by evidence in respect of the existence of a **statutory right of access** to the site for the public under Section 164 of the Public Health Act 1875. The basis of the Council's ownership entails a guaranteed right of public access subject to controls imposed by Torbay Council Bylaws made under the powers within the 1875 Act in September 1972.

3.5 It is recommended that the Registration Authority should accept the inference from decided cases as endorsed by leading specialist independent Counsel (detailed in Part A1 of this Report) that an Application in such circumstances can be properly rejected because it fails as a matter of law. The Commons Act Section 15 is the latest codification of historical common law prescriptive rights acquired by use over time. This is conceptually inconsistent with the exercise over the Application site of a public right of access under Section 164 of the Public Health Act 1875.

For more detailed information on this proposal please refer to the supporting information attached.

Executive Head of Commercial Services – Anne-Marie Bond.

Supporting information to Report

A1. Introduction and history

A1.1 Part of Paignton Green (Middle) which is the subject of this Application is also the subject of a planning consent regarding the construction of a children's play area. It must be understood that whilst the practical effect of granting the town or village green Application would be that lawful implementation of the consent may be precluded the existence of the consent is not material to this decision. Legally and conceptually the decision making process for the determination of a village green Application is entirely distinct and the existence of the consent cannot be considered. There is no scope for administrative discretion or the balancing of competing interests. Determination is a quasi-judicial function directed purely by the statutory criteria as specified in Section 15(2).

A1.2 The Commons Act 2006 Section 15 states as follows :

> *"(1) Any person may apply to the Commons Registration Authority to register the land to which this part applies [ie. all land in England and Wales with very limited irrelevant exceptions] as a town or village green in a case where sub-section (2), (3) or (4) applies.*
>
> *(2) This section applies where:*
>
> *(a) a significant number of inhabitants of any locality or 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."*

A1.3 The Application received on 18 December 2008 and made by Mr Anthony Moss relates to the entirety of the grassed area of the green between Eastern Esplande and Esplanade Road. It excludes the area occupied by the Apollo Cinema and the Miniature Golf Course (see copy Application plan attached). The Application is based on the use by inhabitants of 5 contiguous electoral wards of the Application site for a variety of organised events and informal games. The Applicant refers to such use extending over a 140 year period and evidences this with extracts from an official local history "Paignton in 6 Reigns" and 24 historical postcards dating from 1904 to 1978. 148 statements in support from local inhabitants were also provided. (see attached evidence in support of the Application).

A1.4 The receipt of a duly made Application was publicly advertised in accordance with the Statutory Regulations. An objection was received within the stated period signed by the Executive Head of Residents & Visitors Services on behalf of the Council in its capacity as Landowner of the Application site and dated 18 May 2009

A1.5 The objections were stated to be upon the following grounds :

- *That there has not been sufficient user by inhabitants of the claimed locality or neighbourhood within a locality* ***as a matter of law*** *to justify*

registration.

- *Such user as there has been has not been such as to bring the claimed right to the attention of the Landowner.*

- *As a result of repeated interruption, such user has not been for a period of 20 years and continuing.*

- *Such user has, in any event, at no time been "as of right" but "by right" under statute (Public Health Act 1875, Section 164).*

A1.6 The objector produced copies of the following documents :-

1. Registered Title.
2. Conveyances dated 16 March 1867 and 4 August 1879.
3. Borough of Torbay Pleasure Grounds Bylaws made 18 September 1972.
4. Sample selection of Licences and hire Applications to 10 different operators.

A1.7 With reference to "user as of right" the objector detailed the history of the acquisition of title by the Council's predecessor in title, the Paignton Local Board. Under the first Conveyance dated 16 March 1867, Polsham Green was acquired "as and for a public park pleasure or recreation ground" and concluded that "it would appear" that the Local Board laid out Polsham Green by virtue of powers contained in Section 74 of the Public Health Act 1848. It states that:-

> *"the Local Board of Health, with the approval of the said General Board may provided maintain lay out plant and improve premises for the purposes of being used as public walks or pleasure grounds and appoint or contribute towards any premises provided for such purposes by any person whomsoever.*

A1.8 The second Conveyance dated 4 August 1879 was of adjoining Paignton Green, which was acquired "for a public park or ground for pleasure or recreation". The objector concludes that Paignton Green must have been acquired by the Local Board under Section 164 of the Public Health Act 1875. This states :

> *"any urban authority may purchase or take on lease lay out plant improve and maintain the land for the purpose of being used for 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 Urban Authority may make bylaws for the regulation of any such public walk or pleasure ground and may by such bylaws, provide for the removal from such public walk or pleasure ground of any person infringing any such bylaw by an officer of the Urban Authority or constable."*

The objector sets out detailed arguments in relation to the other 3 grounds cited above but concludes at Paragraph 8 that the Registration Authority should refuse the Application on the basis of written submissions alone since the Applicant's case is fatally flawed as a result of an issue of law ie. of the quality of user. If it is accepted that as a matter of law the Application and is accessed by members of the public by statutory right, this has the legal consequence that user cannot be "as of right and so the Application must be refused".

A1.9 In January 2010, the Applicant responded by making an expressly clarificatory 12 page supplementary submission (see attached). Pages 5-9 of this submission included the following challenges to the concluding submission of the objector by :-

- Asserting in reliance upon quoted historical resolutions of Paignton Local Board contained in Paignton in 6 Reigns that whilst the ownership of the land changed, the informal status of public user ie. “as of right” continued.

- Claiming that the objector’s argument that the public use was by right under Section 164 of the Public Health Act 1875 was essentially speculative.

- Claiming that since public use pre-dated the Conveyance to the Council’s predecessor in title, the effect of Section 15(6) and Section 15(7) is at this 20 year period of user would justify registration. Section 15(6) permits disregard of a period during which access to land is prohibited by reason of any enactment. Section 15(7)(a) permits the Registration Authority to consider use where Section 15(6) requires to be deemed as continuing and Section 15(7)(b) similarly prevents permission for use after the accrual of 20 years user as of right from vitiating continuity.

- Members of the public were not excluded from any area of the Green as a result of the organised events and therefore user was not “interrupted”.

A1.10 On 4 May 2010 the objector made a response to the Supplementary Submission making amongst others, the following points :-

- The ability to rely on rights acquired pre-1970 was extinguished by operation of the Commons Registration Act 1965, Section 1(2). Any such historical rights were required to be registered under the 1965 Act during a period of grace terminating on 31 July 1970 or would cease. The relevant period on which the Applicant must therefore rely would be the 20 years prior to 18 December 2008.

- Members of the public as a result of licensed regular organised activities and events, were physically excluded from entry to certain areas or prevented from entering except upon the licensee’s terms eg. Payment donkey rides and fairs. In the case of some, for example, the Waste Management Conference, they could enter but could not freely indulge in recreational sports or pastimes.

A1.11 In June 2010, a further 30 page Second Supplementary Submission was made by the Applicant (see attached) which was intended to “update and supercede the 14 January 2010 submission”. This raised, amongst others, the following additional points:-

- At paragraph 3.9 there is further detailed consideration of recreational use going back to 1765.

- It is claimed that the objector is wrong as a matter of law to reject the conclusion from the submitted evidence that a significant number of local

inhabitants used the land for informal recreation. A breakdown of witness statements containing the evidence of local inhabitants is included on page 11, paragraph 3.19(G) with details at Appendix 4.

- The boundaries of the electoral wards in relation to which the right of use is claimed "fit together to form a single geographical entity" (map at Appendix 9).

- Paragraph 3.19 A-F sets out a detailed justification for the selection of the area.

- Viewing of the Waste Management Exhibition would be a qualifying pastime.

- The existence of a 1972 Bylaw does not of itself bring user as of right to an end.

- Local use rights have been asserted by challenges to the erection of boundary fencing and to the playground proposal.

- The Supreme Court in *R (ex parte Lewis) –v- Redcar & Cleveland BC 2010* supports the Applicant's proposal that the use of the Green for short periods of time for organised activities is compatible with the inhabitants' continuing use as of right as is payment for entry to certain activities.

- Section 1(2) of the 1965 Act is not relevant because the land has continued to be used as of right since 1970.

A1.12 The Applicant's second supplementary submission also included (pages 25-27) comment on the determination process. This comment refers to correspondence with the solicitor for the Registration Authority (see attached original legal file for background context). The following concerns are expressed:-

- The Council has a dual capacity and as Landowner has a direct interest in the outcome.

- The Application site is a prominent location at the centre of the community and the outcome is of significant public interest.

- The procedure for determination has been delegated by Members to Officers.

- The Council has not confirmed that a non-statutory public inquiry is appropriate bur rather has indicated that it has "an absolute discretion regarding the method of determination".

- The Registration Authority has referred to previous Counsel opinions regarding procedure (obtained in relation to other Applications) but has relied on legal advice privilege not to disclose the same.

- The Application might be refused without an opportunity for a fair hearing. This is claimed to be a breach of European Convention Article 6(1) as

incorporated into UK law by Human Rights Act 1998.

A1.13 On this basis, the Applicant requests the following :-

- An opportunity to rectify any correctable defect in the Application by way of notification of the same and deferral of determination. (The Interim Regulations SI 2007/457 Regulation 5(4) require the Registration Authority to do this in any event. Regulation 6(4)(b) precludes the Registration Authority from rejecting the Application without giving the Applicant a reasonable opportunity of dealing with matters raised in statements in objection and "any other matter in relation to the Application which appears to the Authority to afford possible grounds for rejecting the Application".)

- That the Registration Authority obtain an independent external legal opinion to "provide an opportunity for the Applicant to receive and comment upon the questions put and comments received before moving to determination of the Application".

- If the Registration Authority is minded to refuse the Application given the context of dual capacity and public interest to proceed to a hearing or non-statutory inquiry having regard to the advice of DEFRA (based on *R v Whitmey and the Charity Commissioners 2004 EWCA CW 951*) in order that an independent legally trained inspector may evaluate areas of factual dispute and apply the relevant law.

<u>Conclusions Drawn by the Solicitor to the Registration Authority</u>

A1.14 Both parties are in agreement as to the extent of the Application site. In the Second Supplementary Submission, the Applicant (paragraph 3, page 27) states:

> *"It is not until 1972 that the Council objector **has shown** that lands were held under the Public Health Act 1875."*

It would therefore appear that there is also agreement as to the basis upon which the Council has owned and managed the land at least since September 1972.

A1.15 The Applicant disputes the effect of the 1965 Act regarding extinction of unregistered historical rights and asserts that it is relevant that the statutory criteria were first satisfied at some point in the 19th Century and therefore any subsequent physical or legal interruption may be disregarded. Additionally, the Applicant argues that post-September 1972, the user continues to be of the requisite quality ie. as of right. These are areas of dispute which, on the objector's contrary view, "fatally flaw" the Application. The writer has already expressed to the Applicant the view that there are 2 preliminary legal points to be evaluated before the appropriate procedure for determining of the Application could become apparent (see paragraph 2.13 Applicant's second supplementary submission). These are, first, the relevance of any historical use prior to the Council's acquisition of the land under the Public Health Act 1865 and secondly, the effect of this acquisition upon the quality of subsequent public user. Both

these points are considered by the Registration Authority's solicitor to be capable of evaluation as a matter of general legal principle.

A1.16 Considering first the question of whether the historical use prior to the acquisition by the Local Board or later by the Council can be relied on to satisfy the criteria under Section 15(2) : It is clear that the objecting Landowner is correct and that the answer must be that no use prior to 31 July 1970 may be relied upon. Upon this date, the registration period under the Commons Registration Act 1965 ceased and no land which would formerly have been capable of being registered under the 1965 Act could be deemed to be a common or town or village green unless it was so registered. The current position is therefore that no **historical** town or village green or common rights exist, other than those registered under the Land Registration Act 1925-2002 or under the 1965 Act.

A1.17 In *Oxfordshire County Council v Oxfordshire City Council 2004 EWA C 12* Wrightman J decided that the provision in Commons Registration Act 1965 Section 1(2) (that non-registration had the effect that the land shall not be deemed to be a green) meant that the right of local inhabitants in respect of greens registerable but unregistered by 31 July 1970 were extinguished and a fresh 20 year period of qualifying user was required to "revive the green". In the Court of Appeal, Carnwath LJ accepted that even if a green did enjoy historical rights, they would be extinguished by Section 1(2).

A1.18 It is perhaps worth clarifying at this juncture that Section 1(2) 1965 Act remains in force and that Commons Act 2006, Section 15(6) and Section 15(7) (relied on by the Applicant in the supplementary submission in January 2010) do not assist the Applicant. The Parliamentary debates made clear the statutory intent behind deemed continuity where there was a "prohibition on access" as a result of an enactment was directed at physical exclusion on public health grounds for example, foot and mouth pedestrian exclusion zone. Section 15(6) therefore cannot be interpreted in such a manner as to offset the operation of Section 1(2) of the 1965 Act. Section 15(7) of the 2006 Act applies to deemed continuity by disregarding a permission only after the 20 years user has already been acquired ie. in a case where Section 15(2)(a) is satisfied. It therefore does not assist the Applicant in any way.

A1.19 Turning to the second issue, the effect of the statutory power under which the Council has held the land during the qualifying period for the purposes of the 2006 Act; the objector recites in his statement (Section D, pages 2 and 3 as set out above) the terms of the Conveyances under which the green was originally transferred to the municipal authority stating that "*it would appear that*" the Local Board laid out Polsham Green expressly as a public park in 1867 in exercise of powers under Section 74 of the Public Health Act 1848 and that the remaining area of Paignton Green "*must have been*" expressly acquired for use as a public park in 1879 under Section 164 of the Public Health Act 1875.

A1.20 The objector is dismissive of these inferences on the basis that they lack the requisite certainty. However, the references in the historical evidence produced by the Applicant to motions of the Paignton Board together with the fact that the areas were expressly stated to be acquired for recreational uses amounts to more than speculation. It is recognised that land may be impliedly appropriated for recreational use under the 1875 or 1906 Acts even where it is expressly

acquired for non-recreational purposes but subsequently laid out and made available for recreational purposes. In *Oxy-Electric Limited –v- Zainuddin (22 October 1990 unreported)* the Judge held 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".*

This concept was proposed at the Bristol City inquiry into the Castle Park Town or Village Green Application in May 2009 and accepted by the Inspector. Accordingly, it is reasonable to conclude that during the qualifying period post-1988 (as the Applicant appears to accept as a result of the enactment of the 1972 Torbay Pleasure Ground Bylaws) the objector held the land under the Public Health Act 1875.

A1.21 In a paper given to the Association of Commons Registration Authorities on 17 May 2010 Douglas Edwards, QC stated as follows :-

> *"it is now generally accepted that where a Local Authority holds land under one of the expressed statutory provisions which provide for the establishment and maintenance of recreational open space or parks then* ***any use would not be as of right****. The Open Spaces Act 1906 and the Public Health Act 1875 are particular examples……...for those proposing to apply for registration of Local Authority land or those opposing it, to establish the power under which the land is held would be an obvious starting point".*

He went on to suggest that in a case where such a statute was found to apply the Local Authority could determine the Application without a Public Inquiry.

A1.22 The distinction between the concepts of user "by right" and "as of right" is considered by *Walker LJ* in *R (Beresford) v Sunderland City Council 2004* I ALL ER 160 in the Appeal to the House of Lords (paragraph 86):-

> *"a local resident who takes a walk in a park owned by a Local Authority might indignantly reject any suggestion that he was a trespasser unless he obtained the Council's consent to enter. He might say that it was the community's park and that the Local Authority as its legal owner was (in a loose sense) in the position of trustee with a duty to let him in".*

In the same case, Lord Bingham at paragraph 3, said that in the context of town and village green law, user "as of right" does not mean that inhabitants should have a legal right since the question to be decided is whether a party who lacks a legal right has acquired one by use for a stipulated period. In paragraph 9 he went on to say that user as of right would be inconsistent with use pursuant to a statutory right to do so. Lord Scott at paragraph 30, concurred with this conclusion with specific reference to Section 10 of the Open Spaces Act 1906.

A1.23 Section 164 of the Public Health Act 1875 remains in force (with inconsequential alterations). Under Section 164, a Local Authority is authorised to purchase land for public recreation and make bylaws in respect of such land. **An individual has an enforceable right to go onto land held under this power**. This was recognised by Finnemore J in *Hall –v- Beckenham Corporation 1949*

1KB 716 (which concerned a claim in nuisance against a Local Authority owner of the public park in which members of the public flew noisy model aircraft).

A1.24 The burden lies on the Applicant to establish each element of the test set out in Section 15(2) Commons Act 2006. (That is, that the land has (subject to statutory exceptions not applicable here) been used for a 20 year continuous period prior to the date of the Application as of right for lawful sports and pastimes by a significant number of the inhabitants of a locality or a neighbourhood within the locality). The objector correctly sets out that each element must be properly and strictly proved. However, Pill LJ in *R –v- Suffolk County Council ex parte Steed 1996 75P & CR102* at page 111, indicates this requires simply that each must be proved on the balance of probability by evidence. The evidence that can establish these facts need not be direct or oral evidence; it can be proved by way of documentation and also by inference from that evidence. *R –v- Staffs CC ex parte McAlpine 2002 2PCR 1* at paragraph 185.

A1.25 The key area of dispute here is the "as of right" element of the qualifying criteria. If the quality of user evidence was not "as of right" then the objector is correct that the Application is "fatally flawed". If the user is qualitatively deficient (ie <u>not</u> as of right) then factual evidence of the extent of use cannot correct this deficiency. The decision of the Supreme Court in the <u>*Redcar*</u> case in March 2010 (for reference see above) confirms that only the core criteria under Section 15(2) need to be considered. There is no additional test of "deference" where evidence suggests that competing uses are in conflict.

A1.26 This report does not propose a finding of fact in relation to any aspect of the case other than as regards material relating to the existence of a statutory power in relation to ownership viz Public Health Act 1875 Section 164. Both the parties' evidence supports this conclusion as discussed above. In the Oxford City Council "Trap Grounds" case referred to above at para 62 it is made clear that the Registration Authority has no investigative duty which requires it to find evidence or to reformulate the Applicant's case. The Registration Authority can legitimately exercise its discretion to deal with the Application and submissions as presented by the parties and to make a decision upon the basis of written submissions.

A1.27 If the land was held under Public Health Act 1875 Section 164 as the Conveyances, the history of Paignton Local Board and the bylaws indicate, it follows that the entirety of the Application site has been subject to informal public recreational use since the late 19th Century by statutory right. It follows that there has been no use of the requisite quality to satisfy the registration criteria. Equally, the objecting Landowner has produced evidence which suggests that the fetes, carnivals, fairs, regattas and other organised activities relied upon by the Applicant have been expressly licensed or otherwise permitted to take place upon the land and therefore have occurred by contractual right or with express permission. The Council as Registration Authority must therefore find that the statutory criteria have not been satisfied and the Application must therefore be rejected.

A1.28 For the sake of completeness, note that two cases in 2010 have affected the interpretation of the locality or neighbourhood criteria. These were decided after the receipt of the attached submissions. This criteria is not relevant to the

determination of this Application if the foregoing argument regarding the conceptual impossibility of "user as of right" taking place within the requisite period is accepted.

A1.29 The same reasoning applies to the Supreme Court's judgement in the *Redcar* case. This case involved a municipal golf course upon Coatham Common to which the public did not have a statutory right of access. It was, however, widely anticipated that the Supreme Court would take the opportunity to make obiter comments relating to local authority land as had previously occurred in the Beresford case. This did not occur and for the reasons stated above in the preceding paragraph the other aspects of the judgement are not considered. Equally, this report does not contain any analysis of the "give and take" between public recreational use and organised activities referred to in the parties' submissions. It is noted there is no analysis of the evidence in respect of actual conflict or compatability of use either from the perspective of the Council or from the organisers of such events despite the fact that control of portions of the site was expressly delegated on a temporary and restricted but regular basis. However, prime facie it appears that the public has acquiesced in the erection of structures and consented to the restrictions consequent on such delegation e.g. by payment for entry and respect for temporarily fenced off areas. The public use has not on the evidence produced to date, as a matter of fact, provided the Landowner or his temporary licensees with the necessary impression or appearance of assertion of a right of use, even if this were possible as a matter of law. If it is not accepted that the Application is fatally flawed by the existence of the statutory public right of access for recreational user, further detailed evidence regarding the interaction of uses will be necessary to fully assess user as of right.

A2. Risk assessment of preferred option

A2.1 Outline of significant key risks

A2.1.1 The Commons Act 2006 gives the Applicant no statutory right of appeal. However, the Applicant could apply for judicial review of the process by which the decision to reject the Application was reached. The Applicant would need to establish an error of law, a procedural irregularity or that the decision was "Wednesbury" unreasonable ie. so manifestly unreasonable that no reasonable authority could reach such a decision upon the basis of the findings of fact. An allegation of breach of the Human Rights Act 1998 would undoubtedly be incorporated into allegations of procedural irregularity.

A2.1.2 There is no specific statutory procedural requirement regarding the method of determination, except openness and transparency. The written submissions evidence that the Registration Authority has voluntarily accommodated supplementary submissions to allow the parties ample opportunity to explain and support by way of evidence their respective positions inter alia in relation to user of right. As indicated above, there is no requirement for oral evidence to be presented (Laing Homes). A determination of this Application does not preclude the Applicant in the event of a refusal from submitting a further Application supported by evidence raising issues of law or fact not considered in connection with this Application. This context, together with the availability of judicial review as a route for challenging the decision, makes a procedural challenge based on

breach of convention rights Article 6(i) unlikely to succeed.

A2.1.3 *R v Whitmey and the Charity Commissioners* established the desirability of holding an independent non-statutory Inquiry in certain circumstances where matters of fact are in dispute. These include where the land is Local Authority land and where there is significant public interest in a contentious Application. In the Registration Authority's view the lack of Public Inquiry does not necessarily constitute a procedural irregularity in the determination of this Application. This is supported by Charles Mynors, Barrister of Frances Taylor Buildings Chambers in "The Decision to hold an Inquiry", a seminar paper presented to the ACRA Conference on 15 May 2010. He accepted that this was entirely at the discretion of the Registration Authority. He stated :-

> *"there is little point in an Inquiry [inter alia] where the objectors have made a point that proves a knockout blow to the Applicant's case … it is wrong to hold up development where there is no valid reason to do so.*

He also states:

> *"It will generally be prudent to hold an Inquiry where the Registration Authority itself owns the land in question or has some involvement in its development in order to minimise the appearance of bias. Even here, however, Authorities have a duty to the Council Tax payers not to hold costly Inquiries where an Application is clearly misconceived."*

A3 Other Options

A3.1 The Council, did defer in February 2011 to obtain Counsel's opinion. The opinion is attached to this and addresses previously held concerns on behalf of the Applicant regarding the neutrality of legal advice.

A3.2 Not to determine the Application: The Application has been "duly made" under Article 5(4) of the Interim Regulations 2007/457 and therefore the Council could be in breach of its duties under the Regulations to determine the Application as soon as possible if, neither a final determination nor a deferral (on specified reason grounds) was made in default.

A3.3 Register the Application. If the weight of legal opinion in cases and material cited in this Report have been correctly applied to the Application evidence in this case. This decision would be wrong as a matter of law and therefore susceptible to Judicial Review.

A4. Summary of Resource Implications

None.

A5. What impact will there be on equalities, environmental sustainability and crime and disorder?

A5.1 None

A6. Consultation and Customer Focus

A6.1 The Application was supported by 148 statements by local inhabitants. A six week period for inspection of the Application and receipt of representations was publicly advertised by the Registration Authority.

A7. Are there any implications for other Business Units?

A7.1 The Executive Head of Residents and Visitors Services is developing an adventure playground on a portion of the middle green adjacent to the Apollo Cinema. Registration as a Town or Village Green would preclude development. This is not a factor which can be taken into account, as indicated above. However, the writer has been advised that Lottery funding will, in any event, be lost if a decision regarding the Application cannot be made and communicated forthwith. It is the writer's view that this fact can legitimately be taken into account in identifying a fair and reasonable route to determination. The objecting Landowners would be disproportionately adversely prejudiced by a delay to accommodate the procedures requested by the Applicant, including any further opportunity for submissions. The impact on the Landowner must be weighed against any adverse effect upon the Applicant of proceeding to a determination. This would not, on the basis of the legal interpretation expressed above and taking into account Counsel's advice, prejudice the Applicant.

Appendices (can be found within the cardboard box)

Appendix 1 Application of Mr Tony Moss under Section 15.2, Commons Act 2006 with Statutory Declaration and plan (supporting evidence by way of 148 Witness Statements available for inspection upon request).

Appendix 2 Statement in objection.

Appendix 3 Supplementary submission by Applicant.

Appendix 4 Response to supplementary submission by objecting Landowner.

Appendix 5 Second supplementary submission by Applicant.

Appendix 6 Tabular analysis of Witness evidence.

Appendix 7 Counsel's Advice dated 5 May 2011

Background Papers

Various documents on Legal Services file reference EA 0045(a) (containing information exempt under paragraph 5 of Part 1 of Schedule 12(A) to the Local Government Act 1972 (as amended)).