

THE COMMONS ACT 1990  
IN THE MATTER OF LAND AT THE SANDS DURHAM

DURHAM COUNTY COUNCIL

Applicant

and

THE FREEMEN OF THE CITY OF DURHAM

Objectors

THE CITY OF DURHAM PARISH COUNCIL

CITY OF DURHAM TRUST

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CLOSING SUBMISSIONS ON BEHALF OF THE FREEMEN,  
PARISH COUNCIL & CITY OF DURHAM TRUST

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## INTRODUCTION

1. Before 1066 people lived in self-supporting communities and used waste land for grazing, fodder and fuel. After the Norman Conquest all land became vested in the lords of the manor or in the citizens and burgesses of towns who protected those working the land. The benefits enjoyed became rights of common protected by law and custom. In the 19<sup>th</sup> century battles were fought against inclosure and to ensure rights of common and public access were maintained.
2. The City of Durham Freemen date back to at least 1179<sup>1</sup> and have long enjoyed rights over The Sands, then owned by the Bishop of Durham. In 1800 the Freemen and the Bishop were skirmishing over this land. By the mid-19<sup>th</sup> century it was leased to the Council which recognised the Freemen's common rights of herbage and other rights to hold fairs<sup>2</sup>.
3. It is plain that longstanding common rights are incredibly valuable to those who enjoy them and any decision to re-register common land should not be taken lightly.

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<sup>1</sup> the Charter granted by Bishop Hugh of le Puiset

<sup>2</sup> Susan Robinson §2.3 p.1127

## THE LAW AND POLICY

4. The application falls to be considered under s.16 and having regard to the following criteria -
  - (a) The interest of the person having rights over the release land;
  - (b) The interests of the neighbourhood
  - (c) The public interest in :
    - (i) nature conservation
    - (ii) conservation of the landscape
    - (iii) protection of public rights of access
    - (iv) protection of archaeological remains and historic features
  - (d) Any other matter considered to be relevant.
  
5. Section 40(1) of the Natural Environment and Rural Communities Act 2006 imposes a duty on every public authority when exercising its functions (including the relevant Minister in this case) to have regard to the conservation of biodiversity.
  
6. Government policy objectives as set out in the Common Land Consents policy (November 2015) include the aims to:
  - safeguard commons for current and future generations to enjoy;
  - ensure that that the special qualities of common land, including its open and unenclosed nature, are properly protected; and
  - improve the contribution of common land to enhancing biodiversity and conserving wildlife
  
7. The Secretary of State's primary objective in determining applications under section 16(1) is to ensure the adequacy of the exchange of land in terms of the statutory criteria. The expectation of the Secretary of State is that the interests (notably the landowner, commoners, and the wider public) will be no worse off in consequence of the exchange than without it. That expectation is more likely to be realised where the replacement land is at least equal in area to the release land, and equally advantageous to the interests. So the Secretary of State will wish to evaluate the exchange in terms of both quality and quantity<sup>3</sup>.

### The Neighbourhood

8. The expression "interests of the neighbourhood" is not statutorily defined in commons legislation, despite being a consideration bearing on the expediency of applications under the Commons Act 1876<sup>4</sup>. However published guidance makes it clear the term should be

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<sup>3</sup> Commons Land Policy 5.1a

<sup>4</sup> Commons Act 1876 s.7

taken to refer to the local inhabitants to the common as a whole<sup>5</sup> and Gadsden and Cousins states that neighbourhood “should be construed as likely to mean the local inhabitants”<sup>6</sup>.

9. The interpretation of neighbourhood is “quintessentially a matter for the judgment of the Inspector”<sup>7</sup>. However absent any statutory definition the most useful material and case law will come from other areas of law which have common elements. The case law relating to village greens is the most useful by analogy having common threads, concepts and issues.
10. This case law in relation to neighbourhood and village greens has developed from other statutory regimes, such as housing. These earlier cases ask whether areas are “sufficiently distinctive to constitute a neighbourhood of its own”<sup>8</sup> and whether they have a feeling of community or neighbourhood<sup>9</sup>.
11. In the absence of case law directly on the point, the dictionary definition can be a starting point. In *Northampton v Lovatt*, quoted in Gadsden and Cousins, a dictionary definition included concepts of “a community...people living close together...a district or portion of a town...a small but relatively self-contained sector of a larger urban area”.
12. The modern definition found in the Oxford English dictionary is as follows –  
  
*1. A district, esp one forming a community within a town or city. b the people of a district; one’s neighbours*  
*2. Neighbourly feeling or connect.*
13. In the context of greens the issue came before Sullivan J in *Cheltenham Builders*<sup>10</sup>. He held that “*The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word “neighbourhood” would be stripped of any real meaning*”.
14. The degree of cohesiveness test was applied in *Paddico* where Vos J summarised the position by saying that “*a neighbourhood is understood to be a cohesive area which must be capable of meaningful description in some way*”<sup>11</sup>.
15. The Commons Act 2006 introduced the concept of neighbourhood within a locality and was seen as a relaxation of the requirement for a locality to be some form of administrative unit

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<sup>5</sup> Deregistration of Common Land and Greens (Procedure) (England) Regulations 2007 – Explanatory Memorandum

<sup>6</sup> Gadsden and Cousins Third Edition 10-27

<sup>7</sup> *Ibid* 15-44 R (*Tadworth and Walton Residents Association*) v SSEFRA [2015] EWHC 972 §83

<sup>8</sup> *ibid* 15-44 Re Lings Application (1957) 7 P&CR 233

<sup>9</sup> *ibid* Re Davies’s Application

<sup>10</sup> *Cheltenham Builders* [2003] EWHC 2803 admin at §85

<sup>11</sup> Gadsden 15-45 *Paddico* §97

(see Wacksman J in the Oxfordshire & Buckinghamshire NHS Trust case<sup>12</sup>) Further he noted that “Neighbourhood is on any view a more fluid concept and connotes an area that may be much smaller than a locality”.

16. The Localism Act 2011 provided a new statutory regime for neighbourhood planning and the Town and Country Planning Act now has a definition of “neighbourhood area”<sup>13</sup> (not neighbourhood) which makes it irrelevant even by analogy. Given the purpose of the TCPA is to “consolidate certain enactments relating to town and country planning (excluding special controls in respect of buildings and areas of special architectural or historic interest and in respect of hazardous substances) with amendments to give effect to recommendations of the Law Commission” it is of no relevance to this case.
17. In any event the designation of a ‘neighbourhood area’ is plainly for the purposes of neighbourhood planning and not the management of common land.

#### THE APPLICATION

18. The Objectors do not dispute that the Applicant has made a valid application in that the correct forms and documents were completed. However there are no standing orders in evidence to prove that officers of the Council have the relevant delegated powers in relation to common land applications and were authorised to make the application.
19. As stated in opening it is noted that the delegated authority was made on the basis of scant evidence<sup>14</sup> at pages 795-806 in the bundle, which was then submitted with the application in August 2019<sup>15</sup>. In making and pursuing this application the officers of the council failed to consider any evidence as to the ecological value of the release land and failed to heed the advice of the County Ecologist that there would be harm on the replacement land. The evidence provided on landscape impact by Mr Lawson was six sentences which started with the comment “is this the kind of thing you need?”<sup>16</sup>. The Rights of Way Team Leader noted the replacement land was adjacent to a permissive cycle route but couldn’t recall if there was any public access. Finally Mr Sparkes entire contribution to the process at that stage was one sentence which concluded “...there would appear to be no heritage impact”<sup>17</sup>.

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<sup>12</sup> Gadsden 15-45

<sup>13</sup> TCPA 1990 s61G

<sup>14</sup> Pages 795-806

<sup>15</sup> Appendices to application p.664

<sup>16</sup> p.797

<sup>17</sup> p.806

20. This scant evidence on which council officers relied in making the application is in stark contrast to the case put at the public inquiry where evidence was retrofitted. It is naïve to assume that the evidence led by the council has not been influenced by the obvious need for the council to deliver the HQ project on the adjacent site.

#### BASELINE FOR ASSESSMENT OF APPLICATION

21. In this case the point in time at which the common land should be assessed is important. From around the 1990s until 2019 the release land was occupied by a coach park, trees and vegetation<sup>18</sup>. Since 12 August 2019 it has been used by the applicant as a builder's compound.
22. The Applicant has given different reasons for this trespass including the installation of an electricity supply cable<sup>19</sup> and for health and safety reasons<sup>20</sup> but has failed to provide any evidence.
23. This is an application made under s.16(1). The Common Consents policy guide specifically states in relation to such applications –
- 5.5 In considering an application under section 16(1), the Secretary of State will assume that the release land is correctly registered. Where access to the release land is limited by inclosure (e.g. by a fence or hedge), or the release land is occupied by buildings or other works, she will assume that such inclosures or works are unlawful (unless the contrary is shown, e.g. by reason of a consent previously granted) and that they will not endure. Accordingly, in those circumstances, she will consider the proposed exchange as if the release land were an integral part of the common, and properly available for public use.*
24. It should be noted the Applicant accepts the relevance of this assumption in its application<sup>21</sup>.
25. In the distant past there were buildings on The Sands, which did not appear to affect its status as common land, in fact the rents were shared between the owner and the Freemen. The release land was provisionally registered on 3 December 1968 and became final on 27<sup>th</sup> October 1981. During that period it was occupied by the ROC building and car park. The physical condition of the release evidently did not prevent it being registered as common

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<sup>18</sup> See photographs A994 - 997

<sup>19</sup> Response to Objections §2.18 - 28 October 2019 p.930

<sup>20</sup> Robinson XX

<sup>21</sup> Supporting Statement §4.4.1 p.659 (first para with this number)

land and did not trouble the Chief Commons Commissioner who made this decision<sup>22</sup>. It is not asserted by any party to the Inquiry that the release land was wrongly registered and applying the above advice the Secretary of State will assume it is correctly registered. This implies that the coach park, previously on the release land, is not unlawful.

26. The Council's case is that the coach park is/was an unlawful use and this application will regularise the *de facto* position. The case of AG v Southampton was decided on 14 November 1969 and the Chancery Court held that proposed works for the construction of car parks on common land would be unlawful unless the Ministers consent was obtained. This was held on the basis that the public could not use the car parks for air and exercise when cars were parked on them. However in the subject case access to the release land (for the public and those with rights) has not changed since it was registered. In that context the baseline position for assessing the application is with a temporary car park on it.
27. This baseline would also include the sylvan appearance of the release land with mature trees and vegetation on all boundaries, as shown on the tree survey of 2018.<sup>23</sup>
28. In the alternative if the coach park is found to be unlawful then the baseline and the permanent (reversionary) position would be the land returning to grass as an integral part of the common and available for public use.

#### THE NEW ADMINISTRATION

29. The applicant's whole rationale for the exchange of common land was, until 2 July 2021, its position as set out in the original Statement of Case. The Council has consistently asserted that *"the benefits of the new Council HQ at The Sands are so significant that the public benefit in securing these benefits outweighs any relevant harm arising from the loss of the Release Land as Common Land"*.
30. In May 2021 the council changed to a Joint Administration. It appears that on 15 June 2021 the JA decided to continue with the s.16 application but no details of the basis of that decision are available. The Cabinet meeting of 16<sup>th</sup> June resolved to review "all options for the use of the new building, including its proposed use as a new HQ for the Council".
31. It is obvious that review process will not be completed before the close of the Public Inquiry and the outcome of the review cannot be prejudged or predicted.

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<sup>22</sup> Decision letter 25 July 1980 p.711

32. The Council's latest position<sup>24</sup> is that the building and car park will be built irrespective of the outcome of this s.16 application. This is in stark contrast to the assertion that the coach park was unlawful and rather prejudices the outcome of the public inquiry.
33. It is obviously no part of the Objectors case that the HQ building will not be completed, as this is not on common land.

#### THE STATUS OF WITNESSES

34. The Applicant repeatedly questioned the authority of those appearing at the Inquiry to give evidence. Mr Wills, in his capacity as Clerk to the Freeman, was instructed by them to advise, make objections and give evidence to the inquiry. This does not have to be proved by minutes of meetings as suggested for the Applicant. In any event the Freeman are not legally obliged to produce minutes of all their meetings.
35. Mr Hurlow explained that he was instructed by the Chair of the City of Durham Trust ("the Trust") in January 2021 to give evidence on its behalf. He is professionally qualified and experienced (with specific experience as Team Manager in Durham) to give evidence as an expert on landscape and heritage matters. He confirmed that his evidence had input from trustees and was "signed off" as representing their objection to this Application.
36. Mr Roger Cornwell was a member of the Parish Council ("PC") and Chair of the PC Planning Committee until May 2021 when he lost his seat. He continued to give evidence as a resident of Durham on behalf of the PC.

#### THE OBJECTORS CASE

##### The interest of persons having rights over the release land

##### The Landowner

37. The Applicant is Durham County Council, also the commons registration authority, which has been well aware of the status of the common land since it was registered in 1980. Further ownership of the common land passed to Durham County Council on local government reorganisation and the council has had possession and control of it since 2009. Whilst the Council asserts that this application is made for a number of reasons, including to regularise use of the land as a car park, it should be noted that no such action was taken for over 10 years. In my submission it is the perceived need for the members car park which has triggered this application.

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<sup>24</sup> Response to adjournment application

38. As owner of the release land the Council has embarked upon a comprehensive redevelopment on the adjacent land for a new Council HQ. The Council granted planning permission to its preferred developer for the HQ on 1 April 2019<sup>25</sup>. The approved plans for the HQ show the felling of trees and removal of vegetation from the release land and its complete redevelopment as a *members car park* with a barrier controlling entry.<sup>26</sup>
39. The permission for the HQ does not include any conditions which require the scheme to be completed in a particular way or in its entirety and the release land can remain as it is. The 2019 HQ permission includes a MSCP with 277 spaces. Condition 25 of the permission requires 136 of those spaces to be allocated for short stay parking. There will be 141 unallocated spaces which the Applicant accepts could be used by the members. There is also provision for accessible spaces in the MSCP.
40. Condition 26 of the 2019 permission requires submission of a car park management plan to be approved by the Council before use of the car park commences. This condition has not been discharged as yet and a management plan could accommodate members parking. The statutory decision period on an application to discharge this condition is 8 weeks and this is not a barrier to securing members parking in the MSCP.
41. The Objectors position is that there is no need or demand for the members, or any other, car park to be built on the release land. The council accepts there is physical capacity for the members parking in the MSCP. If this displaces other parking, or there is a requirement for more accessible spaces in the MSCP, this could be dealt with by a variation of the plans condition on the 2019 permission. It is now the case that the HQ may be occupied by a different user and the case for a car park on the release land is even less convincing.
42. As at the date of the inquiry the HQ is well advanced and its completion is planned for September/October 2021.<sup>27</sup> It was accepted by the Council in evidence that the claimed socio-economic benefits of the HQ and of the Aykley Heads Business Park would come to fruition notwithstanding whether the common land exchange was approved or not.<sup>28</sup> All of these claimed benefits are therefore irrelevant to assessment of the s.16 application.
43. Further the claimed socio and economic impacts of the application being refused, including “financial and social cost” to the Council of losing car parking spaces in the MSCP and the inconvenience to Council employees (whatever that may mean in practice) must also be discounted for the same reason.

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<sup>25</sup> DM/18/02369/FPA

<sup>26</sup> Hardworks Drawing p.58

<sup>27</sup> Henry Jones XX

<sup>28</sup> Timmiss proof Allum XX



44. It is the objector's case that there is no need for the members car park on the release land as there will be a MSCP within 100m of the entrance and ample parking nearby in the city centre. The objectors led evidence of over 1500 spaces in the area with ready access to the new HQ. The Council has provided no evidence of the need for the release land to be deregistered to allow for car parking.
45. The Council assert that refusal of the s.16 application would necessitate relocation of the water tank and sprinkler system. The evidence of Mr Timmiss is this is physically possible but at "substantial cost". However Mr Allum who adopted this evidence from Mr Timmiss' proof could provide no details of the losses claimed. The applicant has therefore not proven any such loss will occur, or the quantum of it.

### The Freeman

46. The Freeman have common rights of grazing going back centuries and recorded since 1860. The grazing may not have been exercised for a number of years, perhaps as far back as 1897 but is important to the Freeman. The Release Land is a modest area of the wider Sands but has a functional role in the area. The hard surface is used by the Freeman to support the wider common land for its own events and Council events. If the application was successful there is no guarantee that the release land would be made available by the Council in the future. Further the proposed Members car park as approved with its barrier and tightly laid out parking spaces is unlikely to be as useful as the existing coach park.
47. The Freeman have only ever suspended their common rights for temporary fixed periods and for specific purposes in the public interest, including the ROC depot, a sports centre and a municipal car park. The Freeman have repeatedly refused other requests (from the Council) to relinquish their rights permanently or to allow for other uses on the Release Land<sup>29</sup>. The Freeman view the coach park use for up to 80 years as temporary when viewed in the context of common land rights stretching back to Medieval times.
48. The Lease of 1897 also records reserved rights to hold the Easter Fair (a period of 2 weeks), and to occupy The Sands for other purposes. The evidence of Mr Wills shows that a wide range of events take place on The Sands<sup>30</sup>. Whilst these are not common rights the hardstanding on the Release Land provides parking for large vehicles and equipment and supports these other permitted uses. Its loss would diminish the Freeman's income from such events.

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<sup>29</sup> See correspondence 1969 & 1970 O-85 to O-76

<sup>30</sup> Wills para 4.8 O-25

49. The Freeman have always contemplated the reversionary position as being the release land returning to grassland<sup>31</sup> as part of the wider common land. This is reflected in correspondence with the Council and has never been questioned. If the application is successful then this land and part of the common will be lost forever.
50. The replacement land would not fulfil the function that the present coach park does. The suggestion that it could be used for grazing is spurious. Whilst it is not certain that the grazing rights will be re-established on the common land this cannot be discounted in the long term and if the common land were split into two this would make it less useful to the Freeman.
51. The replacement land is wholly unsuitable for grazing with no public highway access. It is no answer to say as the council does that the yellow lines could be taken off Aykley Heads Road.
52. Further the council assert that the grazing rights would be apportioned to the replacement land *pro rata*. This is not accepted as a matter of law as the Freeman are free to exercise their rights as they wish on the existing common. This restriction would diminish the Freeman's rights. The objectors say this is a device by the council to overcome the unsuitability of the land for unrestricted all year round grazing and the obvious conflict between grazing cattle and ground nesting birds identified by Mr Hurlow as "not achievable on this site".<sup>32</sup> This was not challenged by the Council who accepted that any grazing regime would have to be limited.
53. The release land has been used for parking from the 1960s, either to support the common land, for visiting showmen or to keep vehicles off the grass<sup>33</sup>. The overwhelming concern of the Freeman is that over the years, both before and after registration, the constant and concerted efforts by the Council to permanently take common land for other purposes. The new development has marched inexorably up the riverside and reduced the common land. Land has been released for temporary uses (often parking) or uses said to be in the public interest and is then lost to permanent development. The vast HQ on the car park being the latest development. The release land is the buffer between more development and the open common. If this application is successful the parking area is lost and there will be increased pressure to park on the grassed common in the short term. In the medium to long term the release land will inevitably be redeveloped.

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<sup>31</sup> Wills 4.5 O-24

<sup>32</sup> Hurlow §49 O-95

<sup>33</sup> Wills DCF4 O-45

54. The Council makes payments to the Freemen for the municipal car park use on the release land under the 1995 agreement<sup>34</sup> (not the 1985 agreement as asserted by Susan Robinson in evidence). These reflect the open market value of the use and are a significant source of income to the Freemen. The Council has asserted the payments will continue but even in the short term the end user of the HQ could change and this leaves the Freemen in an uncertain position with no guarantees the income will continue.

#### The Interests of the Neighbourhood

55. The dictionary definitions of neighbourhood include terms such as community, district or by reference to feelings of connection. The case law from village greens is the most useful as it uses similar terminology (local inhabitants) and it is by reference to particular land and its function in the surrounding area.
56. The size and configuration of the neighbourhood will vary enormously, depending on the size of the common, its physical configuration, its surroundings etc. In this case the release land is modest in size and plainly accessible to a small area. It is physically discrete; bounded by and contained by strong physical features such as the city centre to the south, the river to the west, Claypath and the A690 to the east and Keping Lane to the north. It is not necessary to be an area known to the law or to draw this area on a map.
57. The local people who gave evidence identified the neighbourhood as a small area. Dr Banks said it was “where I can walk to” and the area covered by the SNCF community. Professor Harrington said it was your immediate environment including Claypath, Gilesgate, The Sands but did not include the whole city or Aykley Heads. Victoria Ashfield said it was from the city to Keping; included Hillcrest, The Sands, Providence Row, lower Gilesgate and Claypath. It was equivalent to the St Nicholas Parish and over the Pennyferry Bridge was not in her neighbourhood. Janet George identified the neighbourhood as the area covered by the St Nicholas Forum which included Claypath, The Sands, the four streets up the riverside. Providence Row, Finney and Wanless Terrace and the Market Place flats.
58. It is striking that the local inhabitants described the neighbourhood in different terms, by reference to the church area, SNCF or a collection of street names, but it is the same area being identified. In my submission the local inhabitants are best placed to identify their neighbourhood as they can identify their own neighbours and the sense of cohesiveness they have to people and the area.

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<sup>34</sup> p.692

59. The evidence of Roger Cornwell was illuminating. He lives about 1 mile from the release land and would identify his neighbourhood as the Crossgate area which is a subdivision of the Conservation Area<sup>35</sup>. He would not consider himself to be in the neighbourhood of the common. The oral evidence of Mr Ogden the Council's Rights of Way officer was that the whole city could be the neighbourhood. But Mr Ogden did not write this evidence in his proof and it is a groundless assertion.
60. The longstanding cohesiveness of The Sands neighbourhood is demonstrated by the previous 'The Sands Residents Association' in the 1980s, when registration of the release land was decided,<sup>36</sup> the Save our Sands group formed to object to the previous s.194 public inquiry and the current St Nicholas Community Forum.
61. It is accepted the neighbourhood could include the plural, as in the Tadworth and Walton Residents Association case relied on by the applicant. However it should be noted that the common land in *Tadworth* was extensive and therefore the local inhabitants to the common as a whole included four or five settlements. The release land was almost 20 acres (8 ha) and would plainly serve a large area whereas the release land in the subject case is around 0.4 acre (0.17 ha) which is 1/20<sup>th</sup> of the size.
62. The Objector's case is that the local inhabitants to The Sands common land as a whole (applying the test from *Tadworth*) is the area as described in evidence; the city centre to the south, the river to the west and north (with four streets running up from the river) and Claypath and the A690 to the south and east.
63. The evidence given for the applicant that the neighbourhood is the whole of Durham<sup>37</sup> lacks local input and knowledge, lacks any assessment of community cohesiveness and feeling of belonging. Further the case law derived from village green cases plainly identifies the "neighbourhood" as a unit which is likely to be smaller than the town or city and probably smaller than the locality. This unarguably points to a smaller more intimate area than the whole city of Durham which covers a substantial area.
64. The City of Durham parish was drawn for the purposes of planning and the neighbourhood plan. It is widely drawn extends south as far as the B6300. This is a much larger area than identified by the local inhabitants as their neighbourhood and was not made out in any evidence. In any event the majority of housing around the replacement land (such as Newton Hall) which the council claims would benefit by using the replacement land is not in the City of Durham parish. If the neighbourhood is found to be the parish area then

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<sup>35</sup> sub character map page 245

<sup>36</sup> Professor B Smythe of The Sands RA appeared at the commons hearing – p.711

<sup>37</sup> Ogden in chief

registration of the replacement land would be of very little benefit to the interests of that neighbourhood.

65. If the neighbourhood is held to be the area identified by the users of the common land then this is the relevant singular neighbourhood for the purposes of s.16. The inquiry was publicised and has been reported widely in the local press and no one came to the inquiry from outside The Sands area to assert the neighbourhood was different, or that they lived elsewhere in the parish or in wider Durham and used the release land.
66. The use of the release land by local people was given by various witnesses. Janet George of the SNCF asked if people wanted to make a statement and regular members of the community forum chose freely to do so. The evidence was also corroborated by local resident Victoria Ashfield whose home of 30 years, Hillcrest, overlooks the release land and who used the release land with her children and more recently has walked the area daily at different times with dogs.
67. The overall evidence was of use by various local people at different times across the whole land. The activities included the following -
- i. Walking with and without dogs, babies in buggies, children and friends
  - ii. Walking to the riverside footpath or cutting in away from the busy roadside
  - iii. Looking at the trees and collecting conkers
  - iv. Skateboarding
  - v. Recreation such as riding bikes, skateboarding, riding scooters
  - vi. Sports including knocking a ball around, basketball and netball practice
  - vii. Watching wildlife on the site and adjacent land including hedgehogs, swans, herons, otters and bats
  - viii. Throwing the ball for dogs
  - ix. Walking back from school
68. Dr Banks of Ferens Close used the land most days at different times (before breakfast, mid-morning and afternoons) with family. With a toddler it would be a 10 minute walk but 5 minutes when they were older. They would use it for walking, pushing a buggy, learning to ride a bike, skateboarding, looking at the trees (a favourite pastime of her children). Further she would recognise three of four other local families that she “saw a lot” on the land.
69. Professor Harrington lives on Wearside Drive a 3 minute walk to the release land. She used the land with her family (2 children) daily for various activities set out in her e-mail<sup>38</sup>, including pushing her babies in a buggy and collecting conkers was a favourite pastime of her children.

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<sup>38</sup> 0-128

70. This picture of use by the local inhabitants is further corroborated by e-mails submitted by the Objectors to the earlier consultation process and to the Inquiry<sup>39</sup>. Not everyone can attend a public inquiry but these e-mails add weight to the overall evidence of use.
71. The Objectors duly submitted evidence of their use of the release land at the initial stage of consultation on the s.16 application in 2019 so the Council was put on notice of this use<sup>40</sup>. The Council's Head of Corporate Property dismissed this evidence and recorded "*the land is in use as a coach park so it is not accepted that it can be in daily use by local residents*".<sup>41</sup> It is not for a council officer who has no knowledge of the release land to dismiss the evidence of users.
72. The replacement land is not in any way suitable for use by the local inhabitants of The Sands for recreation. A number of witnesses gave compelling evidence on the following points –
- i. The land is too far away at around 1.8 kms (as accepted by the Council)
  - ii. The walk takes at least 30-40 minutes, more for children or slow walkers
  - iii. The route is uphill by around 60m (180 feet)
  - iv. It is rough and uneven with cobbles in places and narrow in places
  - v. The under bridge is unattractive and cycles come down at speed
  - vi. It is inaccessible for buggies and unsuitable for children and the elderly
  - vii. The path along the main road is unattractive and unsuitable
  - viii. It is a long way there and back...would not be enjoyable...the route is not safe or pleasant<sup>42</sup>
  - ix. It would be a road walk, not an amble, and would not choose to use it<sup>43</sup>
73. Secondly the physical characteristics of the replacement land would make it unattractive for use by the local inhabitants. For example the ground nesting birds would be a limitation on wandering around the land with children or letting dogs off the lead for 6 months of the year. Users would be encouraged to stay on the mown path and this would diminish their enjoyment<sup>44</sup>. This evidence was unchallenged at the Inquiry.
74. The Council agrees that the replacement land may well be used by a different neighbourhood. Taken as a whole the evidence of the local users is that the replacement land would be rarely, if ever, used by them. The applicant led evidence that it would be accessible to people living in the Aykley Heads and Newton Hall area. However Newton Hall and most of Aykley Heads is not in the parish.

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<sup>39</sup> Included in application bundle and Objectors bundle at 0-117 to 0-152

<sup>40</sup> See Appendix 3 p.678-682

<sup>41</sup> Paraa 29 page 672

<sup>42</sup> Dr Banks chief

<sup>43</sup> Professor Harrington chief

<sup>44</sup> Dr Banks chief

75. Given the replacement land is part of a much larger area of open space already available to residents around Aykley Heads and County Hall and to the general public the actual benefit arising directly from the addition of the replacement land to the wider supply of accessible land is low.

### The Public Interest

#### Nature Conservation

76. The nature conservation value of the release land is to be measured before August 2019. The physical condition of the land can be seen in photographs and was described by those using it at that time as verdant including trees and vegetation. The unlawful enclosure and occupation of the release land by the Council as a building compound for over 18 months and the impact of this on the nature conservation value should be discounted.

77. The decision to make the s.16 application and delegated authority to do so was based on the report of Stuart Timmiss<sup>45</sup> and responses from council officers<sup>46</sup>. The Applicant has led no evidence in the application or before the Inquiry as to the ecological value of the release land at the appropriate stage. Mr Ogden stated that he relied on the data gathered in 2017 for the planning application, but this was not before the inquiry. It is for the applicant to make its case with evidence and simply because the HQ was given planning permission by the Council, it does not follow that constructing the proposed new car park would not cause harm to biodiversity.

78. The e-mail of 19 October 2018 from the County Ecologist is confined to the replacement land. This advises of adverse impacts on the habitat quality through trampling and on breeding birds by disturbance. This would be the case for six months of the year. It was asserted for the applicant that any harm could be mitigated by management including a mown path and keeping dogs on leads<sup>47</sup>. Of course these measures would reduce the enjoyment of the land by those entitled to use it. This was confirmed in evidence by Janet George (a committed dog walker) and Dr Banks.

79. The loss of biodiversity interest is a separate consideration under s.40(1) of NERC 2006 and it is difficult to see how the relevant Minister can have proper regard to this duty without a survey of the ground nesting birds on the replacement land which will be affected and disturbed by public use. The Council's own ecologist stated on 19 October 2018 *"increased public access to the site is considered likely to have some adverse impacts upon the habitat quality of the Replacement Land through trampling and further impacts are expected upon*

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<sup>45</sup> p.787

<sup>46</sup> p.795-806

<sup>47</sup> Priestley §3.8

*breeding birds during the relevel season as a result of displacement and disturbance especially by dogs*". The mitigation proposed (mown path and signs) is not guaranteed to happen and cannot be imposed on the Council by any reliable mechanism in the future.

### The Conservation of the Landscape & Historic Features

80. These two issues are taken together as they are interlinked. The applicant's original position on Historic Features / heritage impact, by e-mail of 8 October 2018, was a single sentence; "there would appear to be no heritage impact"<sup>48</sup>. Mr Sparks for the Council admits that he did not do any assessment of the impact on heritage assets until November 2020 in preparation for the inquiry. In writing his proof Mr Sparkes admits to undertaking "a narrow view of the site itself" and writing his description of the release land "from memory". This is despite agreeing the relevance of the land in the wider Conservation Area, that views and vistas are key in the Conservation Area and trees make a contribution to the wider setting. His evidence that trees are of no heritage significance but important in the conservation area shows muddled thinking.
81. Mr Hurlow is a Chartered Landscape Architect and a Design Council Built Environment Expert who has worked professionally in Durham and is well qualified to give evidence on both landscape and heritage matters. The Objectors rely on his evidence of the landscape value of the Release Land which is closely tied to its heritage value and its screening value in the wider area.
82. The landscape evidence of Mr Lawson for the Council was on a narrow basis and not substantially different to the starting point of Mr Hurlow. Mr Lawson only assessed the effect of the consented HQ and car park, as opposed to assessing the impact of permanent de-registration which he said was unknown.
83. The release land is in the setting of the WHS, a site of outstanding universal value, and in his evidence Mr Hurlow undertakes assessments of the individual and cumulative *value* of the release land. The objectors say this is a reasonable approach and more useful to the public inquiry than the narrow approach of the applicant's experts. The overall assessment at paragraph 51 concludes that the replacement land would perform less well when compared to the release land on five criteria and equally on one (grazing).
84. The landscape value of the Replacement Land would be unaffected by the proposed registration.

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<sup>48</sup> Sparkes p.806



## Protection of Public Rights of Access

85. It is agreed between the main parties that the public has the right to use the release land for air and exercise<sup>49</sup> in reliance on s.193 LPA 1925. These are legal rights and not “technical” as described by the Applicant.
86. The Objectors led evidence on this issue from locals who used the land at various times of day and saw people they recognised from the local area and people they did not. Professor Harrington who would be on the release land most days specifically mentioned people arriving on coaches and other tourists “heading into town” that would then use the land through the day for activities such as wandering about, sitting or perhaps eating, all of which fall within ‘air and exercise’.<sup>50</sup>
87. Dr Banks would see a few coaches on the land and people going back gradually to the release land after a walk around Durham (as distinct from the locals who she described as using it differently). She also saw pupils from the Durham Sixth Form Centre which draws pupils from County Durham and the wider area. The activities seen include standing around and kicking a ball which qualify as air and exercise.
88. Mrs Ashfield led evidence of use by tourists to Durham, sixth form pupils, children whom she did not recognise and dog walkers<sup>51</sup>. None of this use was challenged by the Applicant. The activities included wandering about, basketball practice, sitting in the summer and children walking back from school.
89. The use by the public is as described by the witnesses and uncontested. The public use of the release land arises from its location near the city centre and the public are unlikely to use the replacement land in the same way. This would represent a loss of public rights.
90. The replacement land is rough grazing land already used by the public. It is included in the Council’s OSNA as natural green space *open to public use and enjoyment* (in the paper document) and accessible open space (on the electronic version)<sup>52</sup>. On the face of the document it is said that sites of natural green space were “assessed on an individual basis”<sup>53</sup>. It is also the case that the Council’s electronic version of the OSNA distinguishes between natural open space accessible on this land and natural open space – less accessible – on land

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<sup>49</sup> DCC SoC §26 p.8

<sup>50</sup> Dr Banks and Professor Harrington

<sup>51</sup> O 160 §2

<sup>52</sup> Cornwell O-174

<sup>53</sup> OSNA 5.1.5 p.56

to the north<sup>54</sup>. This document was prepared by independent consultants and gives weight to the Objectors' assertion that this land is already categorised and used as accessible natural green space.

91. Further there is physical evidence to corroborate the assertion that the replacement land is being used by the public, as is evident from the fences being stretched and desire lines crossing the land. The most obvious desire lines link up with footpaths running to the north west and south east of the replacement land. Whilst the proposed registration would formalise public access it is not adding particularly to the overall supply.
92. The public access to the replacement land is also precarious as there are no public rights of way, pedestrian or vehicular, to it. It is accepted there are routes linking to it, but as these are well maintained and signposted by the Council they are permissive and could be withdrawn. These routes are characterised as "permissive" in numerous council documents, including the delegated report seeking authorisation to make the s.16 application<sup>55</sup>. The evidence of Mr Ogden that these routes are not permissive but may will ripen into dedicated footpaths by prescriptive use is not accepted and such events cannot be pre-judged by this inquiry.
93. Given the land at Aykley Heads may be developed by the Council in the future for business parks then there is a likelihood that these paths will be reconsidered as part of any major redevelopment and the routes and status of the paths could change.

#### Protection of Archaeology

94. There are no known archaeological remains which would be affected by the Application.

#### Any other relevant matter

95. The Freemen led evidence of the value of the coach park on the release land to support events reserved under the agreement of 1897. If the new car park is built as per the plans then this facility for larger vehicles and equipment will be lost. In any event there is no guarantee that a members car park will be made available for public use, there is no condition on the planning permission securing this and no s.106 legal agreement is in place.
96. Historically the Freemen and the Council had a good working relationship and the Freemen have acted as custodians of the common land. This goes way back and continues today, whereby the Freemen assist with Council promoted events such as Lumiere and Gay Pride.

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<sup>54</sup> Cornwell chief

<sup>55</sup> P.670

The coach park is an important facility for these events. If the application was successful the Freemen would be less able to assist in these events which have a value to the city and are in the public interest.

97. The Objectors led evidence from the Chair of the Parish Council's Business Committee and from the Managing Director of the Durham Markets Company Limited on the impact of the Application on market traders and the local economy.
98. Mr Wilkes has been instrumental in promoting Durham as a successful venue attracting coach trips to the city and setting up the 'Pointers' service. He emphasised the importance of parking for coaches and market traders in proximity to the market and city centre.
99. Elizabeth Scott a native of Durham is both well qualified and experienced to give evidence on the economic impact of the application on Durham city centre. Her evidence the loss of coach parking, a major concern of bus operators in the area, would impact on day tourists which comprise 89% of visitors and 48% of expenditure in Durham is unchallenged.<sup>56</sup>
100. Ms Scott, a member of the Cabinet and now Portfolio Holder for Economy and Partnerships, also noted the obvious point that a members car park is not necessary or justified on the release land. Members could and should park in the MSCP or use alternative modes of transport.
101. The Objectors case is that the builder's compound can be removed, in all probability by October 2021, and the existing coach park surface remain as it is. There never was a compelling need for the members car park and this is more so the case given the HQ building may be occupied by a different end user.
102. The Council's case now is that a new car park will be built in accordance with the approved scheme and that is the *de facto* position. The Objectors strongly disagree with this assertion. The previous coach park co-existed with the use by locals and the public. The evidence for the Objectors is daily use for a variety of uses (see above) which would be lost if the approved car park scheme was built.
103. The evidence to this Inquiry that relocation of the Council HQ to The Sands and the redevelopment of the present County Hall at Aykley Heads will bring significant economic benefits<sup>57</sup> must be discounted. Firstly this may never happen as a matter of fact and secondly following Mike Allum's evidence the council can no longer rely on the claimed benefits as part of its case.

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<sup>56</sup> Scott O-115

<sup>57</sup> Timmiss proof

104. The assertion that the Council will be in difficulty with their development partner Keir if the car park is not built and “substantial financial compensation payable” was not substantiated. The proof of a witness who does not attend for cross examination carries little weight and Mike Allum could not plug this gap. The council has always known the coach park is common land and would have to be de-registered before the car park was built, otherwise what is the reason for this application. If as it appears the council has entered into a poor contract with Keir then it is not for the de-registration process to rescue that error. In my submissions this point should carry no weight.

### The Overall Balance

105. The Secretary of State’s primary objective in determining applications under s.16 is to ensure the adequacy of the exchange, in terms of both quality and quantity, and ensure those with interests in the land are no worse off. This is a balancing exercise.

106. The Objectors case is that the release land is well used by the local inhabitants of the neighbourhood and this use can co-exist with the coach park or a similar municipal car park, as it has done for years. This is of significant value to the people living in the close-knit urban area known as The Sands. The replacement land will not be used by the inhabitants of the neighbourhood, but by other people from a different neighbourhood of Durham.

107. Secondly if the members car park is built then the barrier, tightly packed parking spaces, narrow landscaping and lack of room will render the release land less accessible and less attractive to the locals.

108. The Freemen have the grazing rights to the release land. Although these are not exercised they are valuable in the long term and guarantee compensatory payments which are applied to charitable causes. The Clerk to the Freemen gave evidence that these payments may be lost or changed as a result of the exchange.

109. The release land as a coach park has benefits to the market traders of the city which is a public benefit.

110. The remainder of the Council’s case on benefits can only be that de-registering the release land is desirable to save money on relocating the sprinkler and water tank. On its own evidence this would be in the region of £60,000 and the objectors do not accept that this can be categorised as a significant financial cost when the overall cost for the HQ is reported in the region of £50m.

111. There is no reason why the coach park and the common land rights cannot co-exist on the release land, as has been the case historically before the common land was registered. The Applicant's continued assertion that de-registration is necessary (as opposed to simply desirable) is not accepted.
112. The replacement land will not be used by the local inhabitants of The Sands for all of the reasons given in evidence. The fact it may be used by people who live in and around Aykley Heads, outside of the neighbourhood, is irrelevant.
113. In my submissions de-registration of the release land will be of little benefit to the Council, it will not hinder the HQ building which is almost complete and the only evidence is that it will add a bit to the overall project cost. In fact if the s.16 is refused and the car park is not built the overall project cost may reduce.
114. On balance there would be modest benefits to de-registration of the release land and significantly more by way of loss to the Freeman, locals and public. The replacement land would be of no benefit to the Freeman or the locals (as set out above) and the balance is very much against the s.16 application.
115. The reality is the Council as landowner has granted permission for a car park on this land to support a wholly unpopular new HQ building which may never be occupied as such. Mature trees that were in good quality (by the Council's own evidence) were felled to make way for a builder's compound and the common land has been enclosed and the users kept off it for almost 2 years without legitimate reason.
116. The Council has shown blatant disregard for proper process and presented the public inquiry with a *fait accompli*. Its case has changed with the wind and there remains one overwhelming question; if the Council is simply going to go ahead and build the car park anyway (as stated on 2 July 2021), why was this application made and what is the purpose behind it?
117. It is the Objectors' case that the Council has come before the Inspector and asked for free rein. It is in effect saying de-register the release land permanently so we are free to use it for whatever we wish in the future, disguised as a duty to deliver the HQ project.

MISS NICOLA ALLAN  
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Dated this sixth day of July in the year 2021