

ENVIRONMENTAL SERVICES SUB-COMMITTEE
3rd October, 2001

COMMONS REGISTRATION ACT 1965 (as amended)
APPLICATION FOR THE REGISTRATION OF A TOWN OR
VILLAGE GREEN : PEN-LEIGH PARK, WESTBURY

Purpose of Report

1. To inform the Sub-Committee of an application which has been received to register land at **Penleigh** Park, Westbury, as a town green under the Commons Registration Act 1965, and to seek a decision on the application.

Background

2. The Commons Registration Act, 1965 required all common land and town or village greens to be formally registered. County Councils were charged with compiling the register of such land.

Failure to register any land within the prescribed period, which expired in 1970, resulted in that land ceasing to be common land or town or village green.

3. Further registrations may be made in certain very specific circumstances.

Under Section 22(1 A) of the Commons Registration Act, 1965 (inserted with effect from 30th January 2001 by Sections 98 and 103(2) of the Countryside and Rights of Way Act 2000) land will be a town or village green:

“... if it is land on which for not less than twenty years a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged in lawful sports and pastimes as of right and either:-

- (a) continue to do so; or
- (b) have ceased to do so for not more than such period as may be prescribed or determined in accordance with prescribed provisions.”

No regulations have yet been made under paragraph (b)

If any application to register land as common land or as a town or village green is submitted, the County Council as Registration Authority is required to advertise the application in the local press and on site, inform the other local authorities in the area, and the owner, lessee, tenant or occupier of the land concerned. A period of not less than six weeks is allowed for objections to the application to be lodged.

The application and objections must then be considered by the Registration Authority and a decision made as to whether the land is to be registered or not. Whilst there is no formal right of appeal against a rejected application, it is open to the applicant to seek a judicial review of the Authority's conduct if he believes it to constitute an abuse of power or to be wrong in law, unreasonable, procedurally improper, biased, or contrary to legitimate expectations.

Detail

4. The application site measuring 6.45 acres is known as **Penleigh** Park Recreation Ground. The area shown hatched on the attached plan is in the ownership of West Wiltshire District Council and Persimmon Homes (Wessex) Limited are owners of the land shown cross-hatched on the plan.
5. The application dated **19th February** 2001 was made by Mr. Patrick Taylor, of 12, Lilac Grove, Westbury, Wiltshire. Mr. Taylor's case is that the land has been used as of right for not less than twenty years and that it became a town green on or about 3 **1st** October 1991. Mr. Taylor's full statement is annexed to this report as Appendix One.
6. Thirty three inhabitants of **Westbury** signed a statement accompanying the application, maintaining that **Penleigh** Park Recreation Ground has been **used** freely and at liberty and without any restriction or permission by the public for over 20 years (up to the present) for recreation and sport. A further eight affirmed to a similar use for periods of from 16 to 5 years, (up to the present).
7. Following public notice of the application, objections were received from the following: West Wiltshire District Council, Persimmon Homes (Wessex) Ltd., **Westbury** Town Council, Mr. J.D. Annetts, Deputy Town Mayor, Mr. R. Arnold, Acting Secretary, **Westbury** Youth Football Club, Mrs. J.J. Carpenter, Mr. N. Hawker, Mrs. D. Pearce, Mr. M. Pearce.
8. A copy of the first three representations listed above (but not the plans and appendices referred to) extracts from the remaining representations (Appendix Two) and the applicant's observations on the representations (Appendix Three) are annexed to this report. Copies of the application, the objections in full and the applicants' observations are available for inspection in the Members' Room.

Issues for Consideration

9. In order to meet the requirements of the Commons Registration Act 1965 (as amended), the applicant must demonstrate that the land has been used by a significant number of local inhabitants for lawful sports and pastimes as of right for not less than 20 years. To qualify 'as of right' the use must have been open. It must have been achieved without the use of force. Finally it must not have been use under licence from the owner. Each of these requirements is examined below.

Actual Use for Lawful Sports and Pastimes

10. The statements in support of the application for registration assert that the land has been used for recreation and sport as of right. The objectors contend that whilst the land may have been used for these purposes, the use has been with the permission of and under the management of West Wiltshire District Council.

It is further contended that the inhabitants do not continue to use the whole of the site for lawful sports and pastimes.

Local Inhabitants

11. The use must be mainly, but need not be solely, by a significant number of inhabitants of any locality or of any neighbourhood within a locality.

As of Right for Not Less than 20 years

12. The applicant claims that the land became a town green on or about 31st October 1991 by the actual use of the land by the local inhabitants for **lawful** sports and pastimes as of right for not less than 20 years.

In order to **qualify** for use “as of right” the users need not necessarily believe that they have any right to go on the land. It is, however, necessary to provide evidence to satisfy the tests of the use without force, without secrecy and without permission.

On behalf of West Wiltshire District Council and Persimmon Homes (Wessex) Limited, it is claimed that the making of bylaws and the provision of signs, fencing, play equipment, a pavilion and litter bins and the letting and maintenance of sports pitches make it clear that the Recreation Ground is a facility provided for public recreation.

The applicant, in his two letters of 22nd June 2001, and his letter of the 8th August 2001 (Appendix Three) disputes both the factual claims made and the inferences which are to be drawn from them. Members will need to consider the relevant weight to be given to the District Council’s assertions and the letters refuting them.

In giving consideration to these matters, members’ attention is drawn to a recent Court of Appeal decision (the Beresford Case) in which it was held that if it was apparent from the circumstances of that case that the land had been made available to the public, and their use had not simply been tolerated but in effect encouraged, then a licence should be implied **from** the circumstances.

Conclusion

13. In considering this application, members need to consider and determine whether, on the evidence, local people have as of right used Penleigh Park Recreation Ground for lawful sports and pastimes for the required period of time, or whether the use has been by licence. If it is considered that the use has been of right, the application for registration should be approved; if it is considered that the use has been by licence the application should be rejected.

14. Members have, in the past, especially where there has been a conflict of interest, authorised the appointment of an independent legally qualified inspector to hold a Public Inquiry. The cost to the County Council of holding an inquiry, based on a one day's hearing is estimated to be in the region of £2,500 which comprises advertising, hire of accommodation and Inspector's fees and expenses.
15. Given the legal position, following the Beresford Case and in the absence of a conflict of interest, it is not recommended that a Public Inquiry be held in this case. Members are asked to determine whether or not the land should be registered as a Town Green.

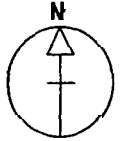
PETER SMITH
Director of Corporate Services

Unpublished documents relied upon in the production of this report: The application for registration and representations received.

Environmental impact of the recommendations contained in this report: Approval of the application for registration would result in **Penleigh** Park Recreation Ground being registered as a Town Green under the Commons Registration Act 1965.

LR

TITLE NUMBER



ORDNANCE SURVEY MAP REFERENCE:

ST9651SW

SCALE 1:2500

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APPLICATION SITE



This plan shows information taken from the index map. It is illustrative only and does not define the extent of the land in any individual title. For information about the general boundaries of a title please refer to the register and filed plan.



APPENDIX ONE

APPLICATION WITH APPENDICES A, B and C

Part 9 Other facts relating to the application.

Penleigh Park Recreation Ground, **Westbury** (the application land) is an open space of some six-and-a-half acres, shown edged pink (part) and coloured solid yellow (part) on the attached plan marked "Appendix A".

The application land became open space shortly after 7 October 1971, when it was acquired by the former **Westbury** Urban District Council under the powers conferred by the Physical Training and Recreation Act 1937, that is, for the purpose of providing recreational facilities.

The application land passed into the ownership of West Wiltshire District Council (WWDC) in or about 1974 as a result of local government re-organization. The area of the **Penleigh** Park Recreation Ground was then 6.45 acres, and it **was numbered** 1926 in the **Ordnance** Survey sheets for Westbury.

Since 31 October 1971, at the latest, being for more than twenty years, the application land **has** been used as of right for lawful sports and pastimes by local **inhabitants**. It became a Town Green on or about 31 October 1991.

As some of the attached statements make clear, the application land was to some extent used as of right for lawful sports and pastimes by local inhabitants before it came into the ownership of **Westbury** Urban District Council, but this application does not seek to rely on that earlier period.

WWDC has acknowledged that the application land is open space by advertising in the *Wiltshire Times* on 5 and 12 January 2001 (Appendix C) its intention to dispose of it, stating in its public notice "This Notice is posted pursuant to S. 123 (2A) Local Government Act 1972". That sub-section relates only to disposal of open space. The notice and the notice map made available at the Council Offices were misleading, in that they referred to the intended grant of an option to dispose of land already sold.

WWDC is a principal council and its power to dispose of land is subject to the provisions in Section 123 (2A) of the Local Government Act 1972, which requires a principal council before disposing of open space to advertise its intention to do so in two consecutive weeks in a local newspaper and to consider any objections made to the intended disposal

In July 1994, WWDC's Leisure and Recreation Committee and its Resources sub-committee agreed to dispose of approximately half-an-acre of the application land, being at the north-west corner of the **Penleigh** Park Recreation Ground and adjoining the railway line there, the **Westbury** Avoiding Line (shown cross hatched at Appendix B).

On 24 July 1998, a member and an officer of WWDC entered into a transfer of some **two-and-a-half** acres of the application land (that is, the whole of the **Penleigh** Park Recreation Ground including and lying to the west of the new road shown coloured solid yellow on the plan at Appendix A) to Persimmon Homes (Wessex) Ltd. WWDC had not complied with its duties under Section 123 (2A) of the Local Government Act 1972, and thus had no

power to dispose of any part of this land. The officer and member of WWDC who signed the deed of transfer had authority to dispose of that half-an-acre (approximately) of the land at the north-west corner of the recreation ground, adjoining the railway line (Appendix B) but had no authority to dispose of the remainder of the land which they intended to be transferred, being some two acres. For these reasons, Persimmon Homes (Wessex) Limited is referred to above as the purported owner of part of the application land.

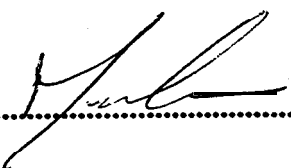
The transfer *ultra vires* of 24 July 1998 did not **affect** the status as a Town Green of any part of the application land, and the land purportedly transferred to Persimmon Homes continued to be used by local inhabitants as of right for lawful sports and pastimes.

Between about September 2000 and about February 2001, Persimmon Homes (Wessex) Ltd constructed a metalled road at the eastern edge of the land purportedly transferred to it, **after** obtaining planning permission from WWDC to do so.

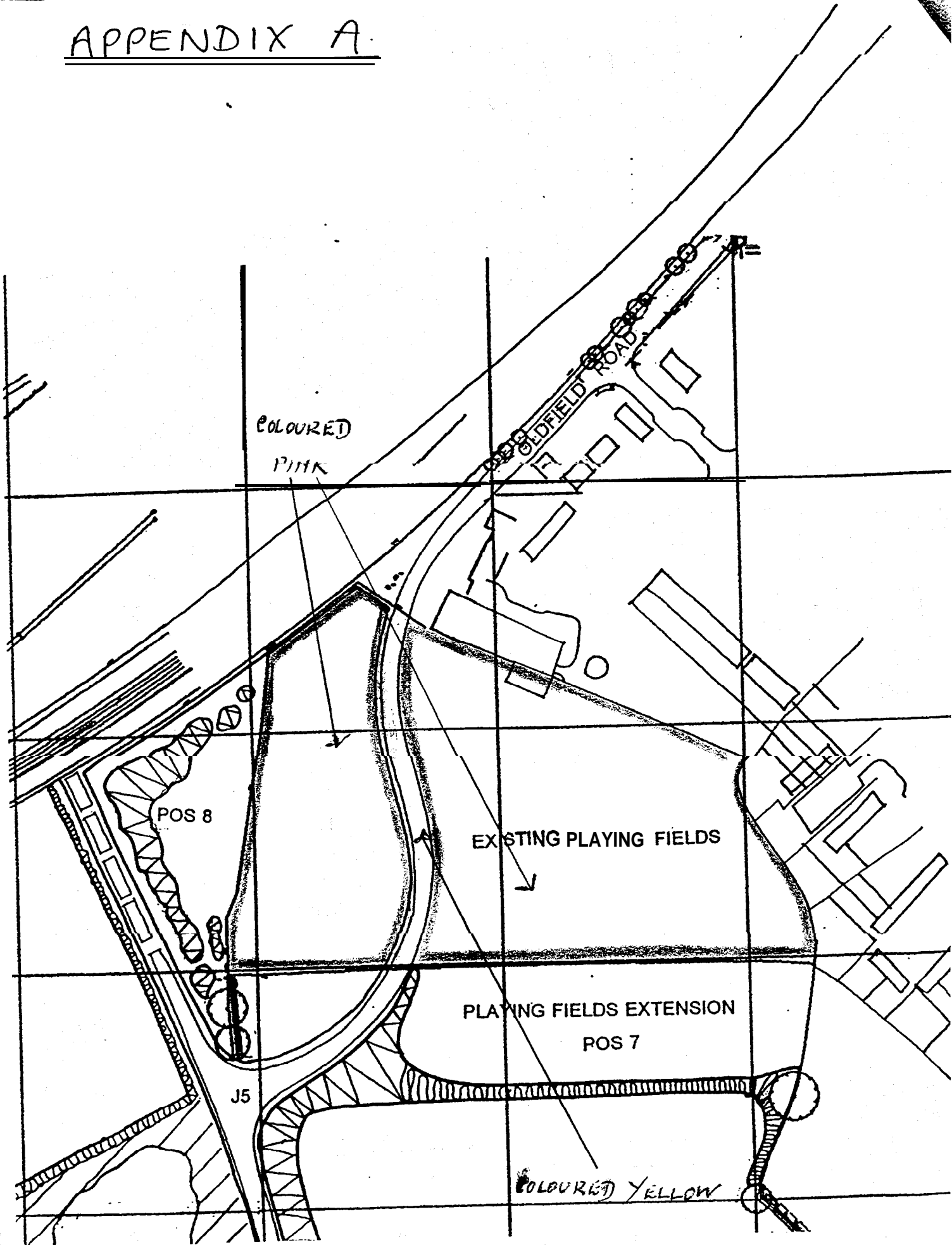
Land can be simultaneously open space and highway, and the Applicant asks Wiltshire County Council to consider registration of the land shown edged pink in the plan and also of the land coloured solid yellow, now occupied by a roadway believed to be not yet adopted by the Council as highway authority. The two areas are identified separately in case the registration authority might wish to consider their registration separately.

Supporting statements by users of the application land are attached (Appendix D).

Dated 19- 2 - 01

Signature..........
Patrick Taylor, Applicant

APPENDIX A.



isused)

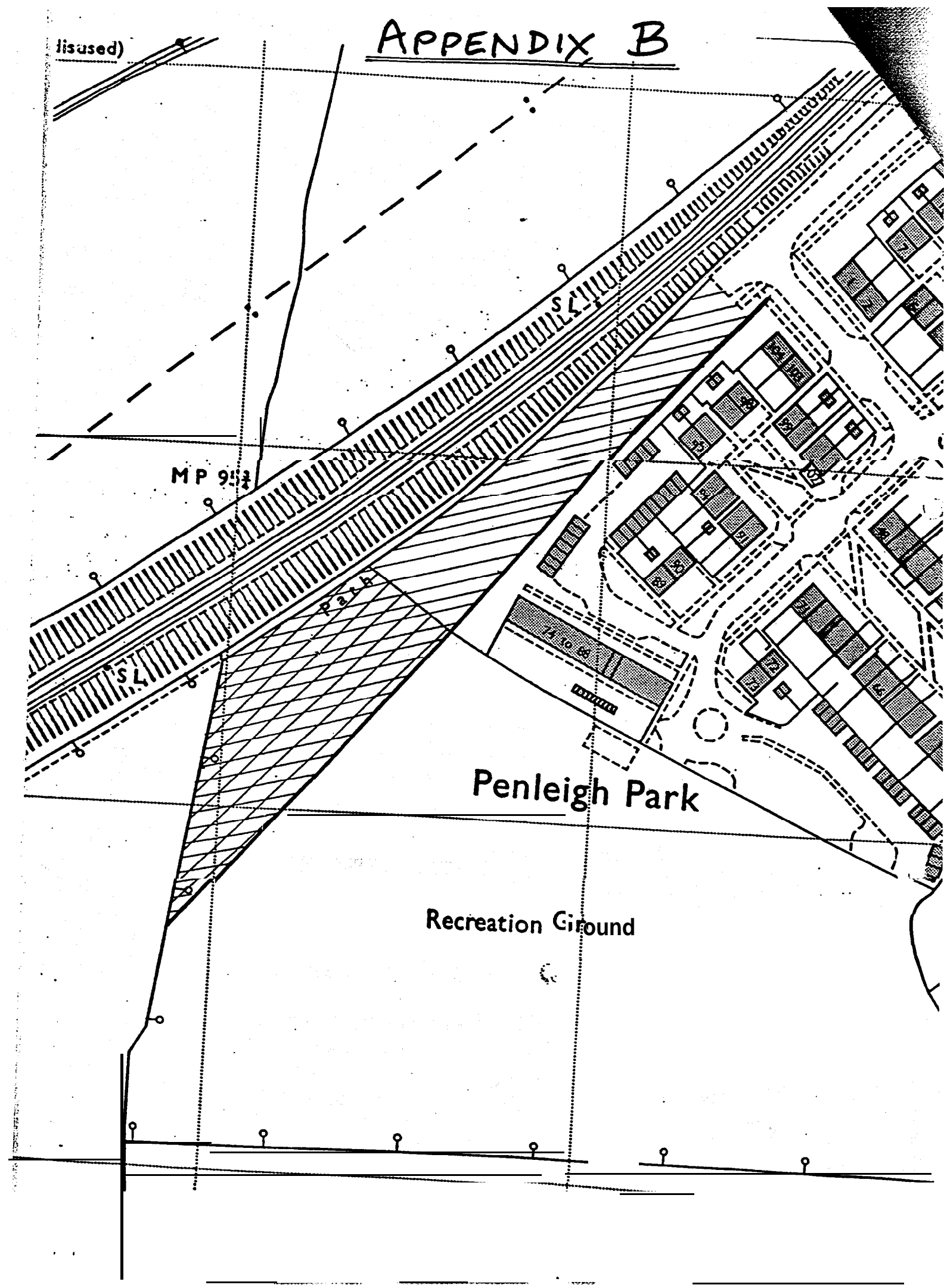
APPENDIX B

MP 957

Path

Penleigh Park

Recreation Ground



APPENDIX C

50 ■ FRIDAY, JANUARY 5, 2001

Public Notices



LAND AT PENLEIGH PARK PLAYING FIELDS'

The Council is considering **granting** an option to dii of land known as **Penleigh** Park Playing Field to the developers of **Westbury** Leigh.

The intention is to work with the community, local sports organisations and the **developers** to achieve a 25 acre development on the western side of the proposed **WESTBURY** LEIGH, Diiributer Road. The money received **from** the disposal of this land and the adjoining **Redlands** site belonging to **Matravers School** will enable a larger sized area to be developed.

This option will **oblige** the **Council** to sell the Playing Field to the developers at a future. date. The **Council** will only grant the option if terms and conditions are agreed with the **developers** for replacement public open space land.

The option will not be exercised (i.e. the land will not be sold) if planning permission is not forthcoming for the development of the new recreation area.

A map showing the precise area of land to be sold and the proposed replacement land is **available** at the offices of West Wiltshire Dii **Council** and **Westbury** Town Council. **Dilton** Marsh Parish Council also has a copy of the proposals.

The land over which the Council will grant the option is currently used for **recreation**. The **Council** therefore wants your views on whether it should grant thii option.

If you would **like** to make any **comment** please write to Trevor Savage, Head of Leisure, at the address below before 9 February 2001.

West Wiltshire District Council, **Bradley** Road, Trowbridge, **Wiltshire**, BA14 ORD.

This Notice is posted pursuant to S.123(2A) Local Government Act 1972.

66751001/26

APPENDIX TWO

COMMONS REGISTRATION ACT 1965

APPLICATION FOR REGISTRATION OF LAND KNOWN AS PENLEIGH PARK PLAYING FIELDS WESTBURY WILTSHIRE AS A TOWN OR VILLAGE GREEN

THIS STATEMENT is WEST WILTSHIRE DISTRICT COUNCIL'S ("the Council") response to the application to register the **Penleigh** Park Playing Fields ("the Land") as a town or village green pursuant to the Commons Registration Act 1965 ("the Act")

Introduction

- 1.) The statement is made in the Council's capacity as landowner and as a concerned authority. The comments in this statement therefore relate to the whole of the land, including the land that was sold to Persimmon Homes Limited ("Persimmon").
- 2.) This statement contains:
 - a) A description of the land
 - b) A summary of the Legal Framework and comments on what must be proved to register the land
 - c) Comments on the application
 - d) Conclusions

Description of the Land

- 3.) The land is held by the Council under S.19 Local Government (Miscellaneous Provisions) Act 1976. This is the successor legislation to the relevant part of the Physical Training and Recreation Act 1937.
- 4.a) The solicitors for Persimmon have provided the Council photographs of the Land. These were taken on the 1 May 2001 and show many of the features described in this statement.

A copy of the photographs is attached as Appendix 1. A map showing the locations from which each photograph was taken is Appendix 1A.

- 4.b) The land also contains 2 play areas for children and a skateboard ramp (Photographs 19,20,23,24). These areas are surrounded by safety fencing. The play areas were installed before 1978 possibly as early as the 1950's or 1960's. The skateboard ramp was constructed in (late 1990's approximately 1998).

A map showing the layout of the land is attached as Appendix 2. Although the base map is to scale the features marked on it are not.

- 4.c) Part of the land is laid out as a football pitch (Photographs 3,4,6,10,11,12,20,21). There were previously 2 such pitches ("the pitches"), but the land on which the second pitch was located has now been sold (see below).

The approximate location of the remaining pitch is shown on Appendix 2.

- 4.d) The remainder of the land is grassed apart from the area on which the new road has been constructed (Photographs 7,8,10,11,12,13,14).

The approximate route of the road is marked on Appendix 2.

- 4.e) At some point a pavilion was constructed just inside the northern boundary of the Land (Photographs 5,10,16,17). From the method of its construction (pre-cast concrete) it appears to have been built at some time in the 1970's.

The location of the pavilion is shown on Appendix 2.

- 5.) **Westbury** Urban District Council enacted bye laws over the land on 6 February 1973. These were repealed and replaced by further bye laws ("the bye laws") enacted on 16 September 1983 by the Council. It is a legal requirement that signs reproducing bye laws in full be displayed on any land to which they relate.

A copy of the bye laws is attached as Appendix 3.

- 6.) On 24th July 1998 the Council transferred part of the land to Persimmon. The applicant claims the sale was ultra vires for various reasons. An application challenging the validity of the sale on those grounds was dismissed by the High Court on 19th April 2001.

A copy of the court's decision is attached as Appendix 4.

Legal Framework

- 7.) Registration of land as a town or village green is possible under the Act (and regulations made under the Act) where:
- (i) land has been used for lawful pastimes
 - (ii) by inhabitants of a locality
 - (iii) "as of right"
 - (iv) for not less than 20 years

Use of Land for Lawful Pastimes

- 8.) The application contains a number of supporting statements which detail the various activities, which have taken place on the Land. The Council accepts that the bulk of these pastimes are of a type that might (but for the matters outlined below) justify registering the Land as town or village green ("qualifying pastimes").
- 9.) The Council notes that some supporting statements refer to cycling. Since the introduction of the bye laws cycling on the Land has been a criminal offence and thus not capable of being a qualifying pastime.
- 10.) The parts of the land set aside for children's play areas and a skateboard ramp are physically incapable of being used for qualifying pastimes owing to the

presence of equipment fixed to the ground (Photographs 19,20,23,24). It would likewise have been difficult or impossible to carry out qualifying pastimes on the land used for the construction of the road.

By inhabitants of a locality

- 11.) Arguably some of the people submitting supporting statements reside outside of “the locality”. The Council accepts, however, that the bulk of supporting statements are from inhabitants of the locality in which the land is located.

As of Right

- 12.) The House of Lords defined the phrase “as of right” as meaning use that was not conducted by force stealth or with the permission of the landowner (R –v- Oxfordshire County Council ex parte Sunninnwell Parish Council [2000] AC 335).
- 13.) That definition has been further refined by the High Court (R –v- City of Sunderland ex parte Beresford, The Times 16 January 2001). Smith J held that the permission of the landowner could be implied permission as well as being expressly granted. Such permission may be implied having regard to the circumstances of each case.
- 14.) The Council submits that its permission for the qualifying activities described in the supporting statements can be clearly implied in the circumstances of this case. The Council has summarised below the most pertinent points, which when taken together clearly demonstrate its implied permission for the use of the land.
- Public Ownership
 - the land is held by the Council for the purpose of public recreation
 - Bye laws
 - the imposition of bye laws demonstrates a clear intention to allow (and control) the use of land.
 - the bye laws expressly grant permission to play games in areas set aside for that purpose (i.e. the pitches) when they have not been booked
 - Signage
 - Signs (there are currently 3 on the land) have been displayed at prominent locations since the introduction of the bye laws to demonstrate that the use of the land is permitted subject to the requirements of the bye laws (which are set out on those signs). (Photographs 15,17,19,22)
 - there are also signs on the play areas showing that the land is provided for public use(Photograph 23).
 - Provision of play equipment
 - the provision of play equipment for use by children and skateboarders is a clear invitation to enter and use the land (Photographs 19,20,23,24).

- Provision, management and maintenance of the land
 - the land is maintained and the pitches are cut, lined and managed by the Council. Local clubs must book and pay for the use of the pitches.
 - the bye laws permit use of the pitches at times when they have not been booked. it is locally known that a formal system of booking the pitches for formal league fixtures is in operation.
- Access
 - the land is fenced in on all boundaries by 6' high chain link fencing (with a further 1' of fencing pointing in towards the pitches at an angle of 45°)
 - the fence has been punctuated by a number of access ways over its life. In the past there was also a purpose built vehicular access. Currently, there is a purpose built pedestrian access only. Access through this point is unrestricted (apart from measures to prevent access on **cycles**)(**Photograph 22**). This is a clear invitation to use the land.
- Pathway
 - a metalled path runs from the pedestrian access to the play areas, showing that the Council is facilitating the use of the land (**Photograph 22**).
- Pavilion
 - a pavilion containing showers and toilets has been provided on the land for use by people playing on the pitches (photographs 5,10,16,17). Its use is controlled by the Council.
- Litter bins
 - bins are provided across the land showing that the Council expects people to be using all of the land and has provided facilities for their enjoyment and use (**Photographs 19,22,23**).

For 20 years

- 15.) Qualifying uses must have been continuing for 20 years up to the date of application i.e. 19th February 2001. Parts of the land were incapable of being used for qualifying uses at the date of the application. These include:
- (i) the pavilion
 - (ii) the play areas and skateboard ramp
 - (iii) the land on which Persimmon constructed the road was fenced off between August and December 2000. During the period of construction it was clearly impossible to conduct a qualifying use on that part of the land.

Davies and Partners Solicitors

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Wiltshire County Council
County Hall Trowbridge
Wiltshire
BA14 8JN

Your ref: **TSS/PMN/0406 1**

Our ref: **MSM/ch**

14 May 2001

For the attention of T Slack Esq

Dear Sirs

Town Green Application – Penleigh Park, Westbury

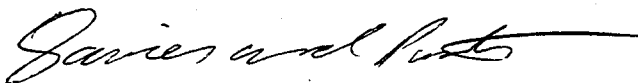
We object to the above application on behalf of our client, Persimmon Homes (Wessex) Limited. The grounds of objection are set out in the attached document.

One of the grounds (c) on which our client objects to the application is that use of the site sought to be registered ((the site”) **was not** as of right. If that contention is right the application is bound to fail. Whether the application is bound to fail for that reason is essentially a matter of law which can, we believe, be determined on paper without the need for a non-statutory inquiry or a detailed investigation of the facts. We contend, in fact, that the same is self-evidently true of grounds (a) and (b) also set forth in the attached document.

We therefore invite the Council to reject the application at the earliest possible opportunity.

If the Council is not minded to deal with the application in the manner suggested, we reserve the right to add further objections at a later stage if necessary. In particular, the applicant has not yet identified the “locality” or “neighborhood within a locality” whose inhabitants he claims have used the site and Persimmon Homes may wish to make objections on that head in due course.

Yours faithfully



DAVIES AND PARTNERS

Website www.daviesandpartners.com

Partners: Barrie Davies LL.B. Peter Mitchell M.A.(Oxon.) Adrian Smith LL.B.
Thomas Brennan M.A.(Cantab.) Geoffrey Hand M.A. (Oxon.) FCI Arb. Julian Bourne M.A.(Oxon.) Mark James LL.B. Stephen Fletcher M.A.(Cantab.)
Simon Rowland LL.B. Richard Maisey B.A. Nigel Tillott LL.B. Roger Gibbs LL.B. Ewan Lockhart LL.B.
James Summerfield LL.B. David Stokes LL.B. Tracy Edwards LL.B. Michael Morgan LL.B. Consultants: Peter Robins O.B.E. Howard Johnson

Also at: 135 Aztec West, Almondsbury, Bristol BS32 4UB Tel 01454 619619 Fax 01454 619696 DX 35007 Almondsbury
5 Highlands Court, Cranmore Avenue, Solihull, W. Midlands B90 4LE Tel 0121 711 7107 Fax 0121 711 4851 DX 715358 Solihull 19
Associated Office: 77, rue de l'Assomption 750016 PARIS

Comments on the Application

- 16.) The Applicant refers to the Land as "open space". The Council does accept that the land is "open space". The Council provides such areas of open space for recreational use by the public with its permission.
- 17.) The application refers to the transfer of part of the Land to Persimmon. The Council maintains that such issues are irrelevant other than to confirm that Persimmon is indeed the lawful rather than purported owner. For the reasons set out above they are also incorrect.
- 18.) Should the Applicant demonstrate the relevance of his assertions then the Council reserves the right to comment further. However, the Council maintains that none of the issues raised support the application nor do they prevent its dismissal in accordance with the submissions set out in this statement.

Conclusion

- 19.) For the reasons outlined above the Council would invite the registration authority to conclude that:
 - the Council has given implied permission (and in respect of some qualifying activities, express permission) for the public to use the land; and
 - not all of the land has been subject to qualifying uses over the period of 20 years up to the date of the application; and
 - the land should not be registered as a town or village green.

Signed: 

Dated: 11 May 2001

Gareth Owens LL.B, Barrister
Legal Services Manager
West Wiltshire District Council
Bradley Road
Trowbridge BA14 ORD

PENLEIGH PARK RECREATION GROUND

APPLICATION FOR REGISTRATION AS TOWN OR VILLAGE GREEN

OBJECTIONS ON BEHALF OF PERSIMMON HOMES (WESSEX) LIMITED

Introduction

1. In these objections the application for registration of certain land as a town and village green made by Mr Patrick Taylor ("the applicant") by application notice dated **19th** February 2001 is referred to as "the application". The land sought to be registered is referred to as "the site".
2. Persimmon Homes (Wessex) Limited ("Persimmon") owns that part of the site which is outlined in red on the plan attached hereto (within appendix one), having acquired it (together with a strip of land to the east and north outlined in blue on the attached plan) from West Wiltshire District Council on **24th** July 1998. West Wiltshire District Council acquired the site from **Westbury** Urban District Council on local government reorganisation on **01/04/1974**. In the rest of this document, "the council" should be taken as indicating whichever of the two councils was the landowner at the relevant time. The land outlined in red and blue on the attached plan is referred to herein as "**Persimmon's** Land".
3. Under s. **22(1A)** of the Commons Registration Act 1965 (inserted with effect from **30th** January 2001 by sections

98 and 103(2) of the Countryside and Rights of Way Act 2000) land will be a town or village green

“ ... if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either -

- (a) continue to do so, or
- (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.”

No regulations have yet been made under paragraph (b).

4. Persimmon Homes objects to the registration of the site for the following reasons:

- (a) There has not been user of the site by a significant number of the inhabitants of a locality or any neighbourhood within a locality during the 20 year period relied on by the applicant.
- (b) The inhabitants do not continue to use the site for lawful sports and **pastimes**.
- (c) Any user of the site has not been user as of right.

(a) There has not been user of the site by a significant number of the inhabitants of a locality or neighbourhood within a locality during the 20 year period relied on by the applicant.

5. It is stated **in** Part 4 of the application that the site became a town or village green on or about 31st October

199 1. The twenty year period of use relied on therefore commences on or about 31st October 1971.

6. Of the 41 evidence of user forms appended to the application, only 4 (S Parker, A Morgan, H **Rendall** and M Timbrey) unequivocally claim to have used the site as long ago as 1971. Four people are not a “significant number” and accordingly use of the site by a significant number of the inhabitants of a locality or neighbourhood cannot be shown for the twenty year period relied on.

(b) The inhabitants do not continue to use the site for lawful sports and pastimes

7. Between 29th August and December 2000 a fence was in place in the position shown on the attached plan (see the letter attached as appendix one). The effect of the fence was to exclude the public from the whole of Persimmon’s Land. Between those dates it was not possible for the inhabitants to use that part of the site which is owned by Persimmon for lawful sports and pastimes.
8. Further, since 3rd November 2000 a road has been physically in place in the position shown marked on the plan. The road has been in use by construction vehicles (and therefore not available for use for lawful sports and pastimes) since 29th August 2000. It will shortly become available for public use as highway and will thus continue not to be usable for lawful sports and pastimes.
9. Section 22(1A) requires, we submit, a continuation of use of the whole of the site sought to be registered, for lawful sports and pastimes as of right by the inhabitants of a locality or neighbourhood within a locality, from the

expiry of the twenty year period relied on to the determination of the application.

10. In the present case the inhabitants have not so continued to use the whole site. There was a four month interruption of the use of the whole of Persimmon's Land owing to the erection of the fence. Further that part of Persimmon's Land over which a road has been constructed has since December 2000 remained, and will continue to be, unavailable for recreational activity.
11. Accordingly, the inhabitants have not continued to use "the site" which is claimed to have become a town or village green within the meaning of **s.22(1A)(a)**. The relevant criteria not being satisfied, registration must be refused. The registration authority must either accept or reject the application. It is not open to them to register part only of the site. See the report of Mr Gerald Ryan QC dated **03/05/2000** in his advice to Cambridgeshire County Council in the matter of Spring Common, Huntingdon (attached) at paragraphs 39, 58, 59. The only power of amendment is that conferred by regulation **5(7)** of the Commons Registration (New Land) Regulations 1969. That power arises only in relation to applications not "duly made", a power plainly inapplicable in the present case. See and compare *Lasham Parish Meeting v Hampshire CC* [1993] JPL 84 1.

(c) Any user of the site for lawful sports and pastimes has not been user as right.

12. Use will be "as of right" if it is "**nec vi, nec clam, nec precario**" i.e. without force, without secrecy, and without permission: *R v Oxfordshire County Council, ex p. Sunningwell Parish Council* [2000] 1 AC 335.

13. Permission may be implied as well as express. See:
- (a) **Mills v Silver** [199 1] Ch 271, per Dillon LJ at 282 B-D (regarding as falling within the category of “user under a temporary licence” use which was clearly not pursuant to an express permission)
 - (b) **R v City of Sunderland ex p Beresford** (Administrative Court 14th November 2000).

Further, a permission may defeat a claim to user as of right even though it has not been communicated to users: **R v Secretary of State for the Environment etc. ex p Billson** [1999] QB 374.

14. An implied permission has been held to have existed where land was owned by a local authority which had provided seating and a cricket wicket (but no marked pitches or goalposts) (**Beresford**, supra). In that case the fact that land was in public ownership was held to be very relevant to the question of whether permission could be implied. And in an earlier case, use of a path was held to have been by invitation and not as of right where notices stated that land was “open to the public subject to the byelaws on the back of this notice” and other notice’s stated that the land was “an open space for people to enjoy” and later referred to “public access for people to enjoy” and “you may roam freely” (**National Trust v Secretary of State for the Environment** [1999] JPL 697). Further, Charles George QC, advising Leeds City Council on an application for registration of land at Hill Top, as a town or village green, stated that “where a local authority, having acquired land for recreational purposes, uses it as a recreation ground, then it impliedly permits potential users, indeed the public at large, to recreate there” (p.38, copy supplied).

15. In this case, the site was acquired by **Westbury** UDC (the predecessors in title of West Wiltshire District Council) in 1971 by virtue of its powers under s.4 of the Physical Training and Recreation Act 1937. Section **4(1)** of that Act provides that

“a local authority may acquire, lay out, provide with suitable buildings and otherwise equip, and maintain lands . . . for the purpose of gymnasiums, playing fields, holiday camps or camping sites, or for the purpose of centres for the use of clubs, societies or organisations having athletic, social or educational objects, and may manage those lands and buildings themselves . . .”.

The Local Government (Miscellaneous Provision) Act 1976 **s.19(5)** provided that all land held under **s.4** of the 1937 Act was henceforth to be held under s. 19 of the 1976 Act. Section **19(1)** entitled a local authority to provide “such recreational facilities as it thinks fit”.

16. Various recreational facilities were provided on the site by the council. Details of these are given in the council's objections. These amount to an invitation by the council to the public to use the site for recreation.
17. The site having been acquired by the council, and at all times until part of it was sold to Persimmon held, for recreational purposes, any use by members of the public for lawful sports and pastimes was with the implied permission of the council.
18. Further since 1983 use of the site has been governed by **byelaws** (a copy is enclosed at appendix two). The **byelaws** regulated certain activities and prohibited others. Notices giving details of the **byelaws** were erected at the site. By implication, all activities which were not

prohibited by the **byelaws** were permitted by the council and therefore not as of right.

19. Breach of the **byelaws** was, by **byelaw** 16, made an offence carrying a fine not exceeding **£50**. Any activities which were prohibited by the **byelaws**¹ (and therefore not impliedly permitted) would not be *lawful* sports and pastimes and therefore not capable of founding a claim to a town or village green. In any event, criminal activities are not capable of founding a claim to prescriptive rights: *Hanning v Top Deck* (1995) 68 P&CR 14, *Stevens v Secreta y of State* (1998) 78 P&CR 503.
20. Therefore, at least since 1983 when the use of the site has explicitly been governed by **byelaws**, there has been no use of the site for lawful sports and pastimes as of right. There has not, therefore, been user for lawful sports and pastimes as of right either during the twenty years prior to October 3 1st 199 1; or during any later period during which use has, as **s.22(1A)** of the 1965 Act now requires, continued.

Conclusion

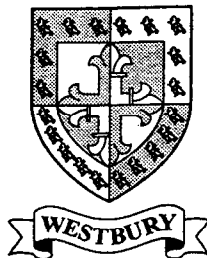
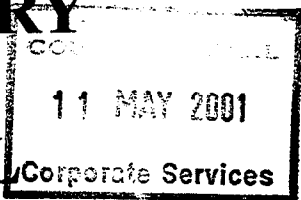
21. For the reasons given above, Persimmon contends that registration of the site as a town and village green should be refused without first holding any non-statutory inquiry.

George Laurence QC
Louise Davies

1 1th May 2001

¹ E.g. cycling, which is claimed as an activity in some of the user evidence forms but is prohibited by **byelaw 5(iii)**.

WESTBURY TOWN COUNCIL



The Laverton, Bratton Road,
Westbury, Wiltshire
BA13 3EN
Tel & Fax: (01373) 822232
Town Clerk and
Responsible Financial Officer:
Leslie J. Fry

Our ref.

T.8
Your Ref: TSS/PMN/04061 TSS

10th May 2001

Mr S Gerrard
Solicitor to the County Council
Wiltshire County Council
County Hall
Trowbridge
Wiltshire
BA14 8JD

For the attention of Mr T S Slack

Dear Mr Gerrard

Re: Town Green Application – Penleigh Park, Westbury.

The Town Council objects to this application.

- (a) The application is premature.
- (b) Will, if successful, jeopardise possible long term sports developments of benefit to the people of Westbury.
- (c) The area is already clearly signed and designated as a playing field within the ownership of West Wiltshire District Council with rules and regulations displayed.
- (d) Sees this ground as no way under threat.

Yours sincerely

Town Clerk

EXTRACTS FROM REPRESENTATIONS

Mr. J.D. Annetts, Deputy Town Mayor, says:

I wish to record my vote against the proposal to have land at **Penleigh** Park turned into a Town Green at this time there are delicate discussion between the Town and the West Wiltshire District Council to bring much needed extra sports fields to our Town and this Town Green status will put these negotiations in jeopardy.

Mr. R. Arnold, Acting Secretary, Westbury Youth F.C. says:

We are the largest youth organisation in Westbury, with over 250 young children from ages 6-15. We are as a group totally opposed to granting of Town Green status to **Penleigh** football fields. Should the failure of the land swap deal not go ahead, then we will have no option but to disband teams, as there are no facilities in the district to use. Youth league games are held on Sundays and we do not have enough pitches to play games. The new proposal would make us the envy of most towns and we want to be part of it. We do not use **Penleigh** pitch as it is poorly maintained and covered in dogs mess. Should the proposal not go ahead, the current 2 pitches at Redland Lane will be taken back for use by the school (by law), if Persimmon Homes feel that the deal is not worth carrying on with just one piece of land.

Mrs. J.J. Carpenter, says

I wish to register my objection to the **Penleigh** Recreational Area becoming a Town Green. My reasons are that the whole area is clearly the property of West Wiltshire District Council, and that as Town Green status would prevent it being part of the land exchange for additional facilities at Leigh Park, the status of Town Green is not in the interests of the Town.

Mr. N. Hawker, says

I am writing to you against the proposal to put **Penleigh** Playing fields as town green status. My son is heavily involved in sport in the **Westbury** area, and constantly has to go out of town and county use facilities that could be built if this land becomes part of the land swap deal for new facilities. This land at **Penleigh** Park has been used by teams from all over and it is in poor state, it has poor changing facilities, dog mess all over, is never cut correctly and teams try not to use it.

Mrs. D. Pearce, says

I do not believe that the proposal to grant Town Green status to **Penleigh** Park is being made for the correct purposes. The meetings which have previously been held by the group named **Westbury Open Spaces Protection Group** have deliberately targeted only a minority of **Westbury's** inhabitants, namely the people living in close proximity to these areas. These meetings were not publicised beforehand for the remainder of **Westbury's** general public to attend, therefore correct opinions cannot be evaluated. **Westbury** urgently requires additional sports facilities for the entire community, it would be so short-sighted of the County Council to pass these proposals for Town Green status, thereby preventing sensible discussion/development to be allowed to take place.

Mr. M. Pearce, says

I would like to register my objection to the proposal to grant town green status to land at Penleigh Park and the Redland Lane areas of Westbury. In discussion with the town and district councillors, spokespersons for Matravers School and the Westbury Leigh Park development group, I am led to believe that Town Green status would jeopardise the much required sports grounds and facilities our town so desperately needs. A full debate will be held once the terms of the development of the estate are put before the local councils, and the entire town will then be asked their views. I believe that granting Town Green Status at this stage is not the correct course.

APPENDIX THREE

APPLICANTS' OBSERVATIONS ON

THE OBJECTIONS

12 Lilac Grove,
Westbury
Wilts. BA13 3NL.

Your ref: TSS/PMN/0406 1

22nd June 2001.

For the attention of Mr. T.S. Slack,
Solicitor to the County Council,
Wiltshire County Council,
County Hall,
Trowbridge. BA14 8JN.

Dear Sir,

Commons Registration Act 1965

Application to register Land known as Penleigh Park Recreation Ground as a Town or Village Green. (No 2001/2)

Thank you for your letter of 17th May 2001 with enclosures.

My comments on the statement of West Wiltshire District Council ("the Council") are as follows: -

3) Applies only to the 4 acres still owned by the Council.

4.b) These features occupy a small part of the area claimed (paragraph 16 and 17 of Getting Greens Registered ("GGR")). On the plan at appendix 2, the road is drawn quite wrongly. As stated, the features are not to scale.

4.e) This structure occupies a very small part of the area claimed (Paragraph 16 and 17 of GGR).

5) No copy of Westbury Urban District Council's alleged bylaws is provided showing how they might have affected Penleigh Park Recreation Ground ("PPGR"). It is clear from 41 supporting statements to the application that no such **signage** was actually in place at PPGR until after the application was made.

7) (ii) Predominantly (per Sunningwell case).

8) It is helpful that the Council concedes **this** important point. For the avoidance of doubt, the number of supporting statements is 41.

9) None of the 41 supporting statements relies entirely on cycling. Only 3 of them refer to it. However, unless the council can demonstrate that the principles of *Harming v Top Deck Travel Group Ltd.*, are applicable to this application then cycling is a lawful sport and pastime claimed "as of right" (Paragraph 39 of GGR).

10) Firstly, part of a single unit of land (paragraph 16 and 17 of GGR).

Secondly, the qualifying period of not less than 20 years had already accrued before either the skateboard ramp or the road came into existence (paragraph 56 and 61 of GGR).

Thirdly, these uses are not inconsistent with Town or Village Green status (paragraph 38 of GGR).

Fourthly, the road is not at present a public highway, but even that would not be inconsistent with Town or Village Green status (paragraph 87 and 88 of GGR).

Fifthly, temporary inaccessibility of part of the area claimed (e.g. during the road construction) is no bar to registration (paragraph 18 of GGR).

11) It is helpful that the council concedes this important point. For the avoidance of doubt, the number of supporting statements is 41.

12) Although the applicant relies on the Sunningwell case, he does not accept that it is authority for the grossly over-simplified definition postulated by the council (see attached commentary).

13) From the brief report currently available, the applicant does not consider that the Beresford case is consistent with the Sunningwell case, and believes that its approach will be overruled shortly by the Court of Appeal (see attached commentary). In any event the council has failed to demonstrate that the facts relating to PPRG are comparable with those in the Beresford case.

14) Public Ownership – the ownership of the area claimed is not all held by the council. In any event, the identity of the owner is irrelevant to the application (paragraph 51 and 89 of GGR).

Bylaws – firstly the council has failed to demonstrate that any bylaws were applicable to PPRG in the relevant qualifying period (see attached commentary). Secondly, regulations do not negate a claim (paragraph 50 of GGR). Thirdly, bylaws have no intentions. By their terms, they may control the use of land, but they do not thereby “allow” lawful sports and pastimes. Fourthly, the application does not rely on the use of pitches for formal games by express permission, but such activities are not inconsistent with Town or Village Green status and do not invalidate the application (paragraph 47 of GGR).

Signage – the assertion by the council that signs have been displayed at prominent locations on the land in question since the introduction of the bylaws is untrue. The council’s contention is rebutted by all 41 signed supporting statements to the application.

Provision of play equipment – firstly, no evidence is given as to who provided or funded the provision of play equipment or when. The council has failed to demonstrate any linkage between its ownership of part of the land and the provision of play equipment. Secondly, the area occupied by the play equipment is a small part of the area claimed (paragraph 16 and 17 of GGR). Thirdly, was it directed predominantly at the inhabitants of the locality (paragraph 47 of GGR)?

Provision, management and maintenance of the land – firstly, the maintenance and use of the pitches by others does not invalidate the application (paragraph 47 of GGR). Secondly, the evidence of other objectors is that the pitches are “poorly maintained and covered in dogs mess” and “is never cut correctly and teams try not to use it”. Thirdly, there is no evidence that the booking and paying for use of pitches

involves the inhabitants of the locality and all 41 signed supporting statements to the application say otherwise. Fourthly – as regards bylaws, see above.

Access – firstly, no evidence is given as to who provided or funded the fencing or accesses, or when. Secondly, it is difficult to understand how the fencing constitutes a clear invitation to use the land, or indeed how the specific nature of the accesses to the land could do so either. Whatever restrictions on access to the land are alleged, the supporting statements to the application demonstrate that they have not prevented the use of the land by the claimants “as of right”. Thirdly, the council’s land was fenced on all boundaries but is no longer. The vehicular access remains, although it is no longer owned by the council. Cycle access is not prevented at that point.

Pathways – firstly, no evidence is given as to who provided or funded this pathway or when. Secondly, what is the justification for dealing with this aspect separately from “Provision of play equipment” and “Access” (see above)? Thirdly, de **minimus** (paragraph 16 and 17 of GGR). Fourthly, does this post-date the application?

Pavilion – firstly, no evidence is given as to who provided or funded the pavilion, or when. The council has failed to demonstrate any linkage between the pavilion and its ownership of part of the land. Secondly, it is in any event in an extremely run down state. Thirdly, its use by others does not invalidate the application (paragraph 47 of GGR). Fourthly, de **minimus** (paragraph 16 and 17 of GGR).

Litter bins – firstly, these are not inconsistent with a town green, see on Warminster Common. Secondly, do these post-date the application?

15) Firstly, the statutory requirement is simply for “not less than 20 years”. It appears that the council is confusing this requirement with Section 3 1, Highways Act 1980 regarding public rights of way. Secondly, the date stated in part 4 of the application is not required to be the date of the application. Thirdly, the pavilion, play areas and skateboard ramp are de **minimus** (paragraph 16 and 17 of GGR). Fourthly, the 20 year period had already accrued before either the skateboard ramp or the road came into existence (paragraph 56 and 61 of GGR). Fifthly, the temporary fencing of part of the area claimed during the construction of the road does not negate the application (paragraph 18 of GGR).

16) Even a formal open space designation of all or part of the area claimed does not negate the application (paragraph 9 1 of GGR).

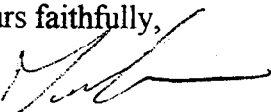
It is not clear how the council can now give its permission in respect of all the area claimed, nor has it been demonstrated that the claimants ever received or required its permission for the relevant uses “as of right” in the qualifying period.

17) The applicant agrees with the council that the ownership of the area claimed is irrelevant to the application (paragraph 5 1 and 89 of GGR).

18) The application is accompanied by 41 signed supporting statements none of which have been significantly disputed by the council.

19) Rebutted in its entirety.

Yours faithfully,



Patrick Taylor

COMMENTARY ON SUNNINGWELL CASE

Lord Hoffman's lucid explanation of the principles of prescription in English Law in the Sunningwell case makes clear that it is based on the presumption or inference that prescriptive rights have a lawful origin. In the case of prescriptive easements, this was normally achieved by the presumption or inference of a lost modern grant by the freehold owner. In the case of public rights of way, it was achieved by the presumption or inference of actual dedication to public use by the freehold owner. In the case of customary rights, it was based on the presumption or inference that the custom had existed in 1189.

The statutory words "as of right" were found to have the same meaning in all three circumstances, and to be equivalent to the older expression "**nec vi, nec clam, nec precario**".

However, in the case of "**nec precario**" it is clear that without some limitation on its meaning it would destroy the underlying presumption or inference of prescriptive rights having a lawful origin. Hence, the interpretation of its meaning as without consent for a limited period.

COMMENTARY ON BERESFORD CASE.

The principal difficulties of the Beresford judgement are firstly, that it entirely overlooks the temporary and limited nature of "**nec precario**" and secondly, that it invites Courts to reject claims to prescriptive rights on the basis of a presumption or inference (i.e. of implied permission) which is entirely at odds with the underlying presumption or inference in English Law of prescriptive rights having a lawful origin. By superimposing one presumption or inference on top of a completely contradictory one, it is difficult to see how any contested claim could thereby ever succeed in the future.

That is why the decision in *Mills v Silver* that there must be clear evidence of resistance to a continuous right to enjoyment and not merely implied permission to the enjoyment, otherwise "no one could ever establish an easement by prescription or by the fiction of lost modern grant" (per Parker LJ at 290B), and in the Sunningwell case against toleration or any synonym for it being an adequate defence to prescriptive claims, should be preferred to the fundamentally flawed Beresford judgement. It is a great pity that so soon after the *Steed* case has finally been overruled, yet another unjustified shackle on prescriptive claims is invented.

COMMENTARY ON BYLAWS.

1. Is there any evidence that **Westbury** Urban District Council's 1973 bylaws were applicable to PPRG?
2. Is there any evidence that the council's 1983 by laws were submitted to and confirmed by **the** Secretary of State?
3. Can a breach of these bylaws be a criminal offence even if there is no notice on site (41 signed supporting statements all answered "no" to the question "did you ever see a sign forbidding your use?")?
4. The case of *Harming v Top Deck Travel Group Ltd.*, turned on section **193(4)** Law of Property Act 1925, and is applicable solely to "conduct which, at the time the conduct takes place, is prohibited by a public statute" and "which on each occasion constituted a criminal offence". Do the bylaws in question satisfy both these tests?
5. What was the effect on any extant bylaws of the transfer of part of PPRG to Persimmon Homes (Wessex) Ltd., on **24th July 1998**?
6. What is the precise relationship between bylaws, which by their nature are explicit and express, and the alleged principle of implied licence, which by its nature is neither explicit or express?

12 LILAC GROVE

WESTBURY

WILTS

BA13 3NL

Your ref: TSS/PMN/04061

22nd June 2001

For the attention of Mr T S Slack
Solicitor to the county council
Wiltshire county Council
County Hall
Trowbridge Wilts
BA14 8JN

Dear Sir

Commons Registration Act 1965

**Application to Register Land known as Penleigh Park Recreation Ground
As a Town or Village Green (No. 2001/2)**

Thank you for your letter of 1 7th May 2001 with enclosures.

My comments on the statements of the lay objectors are as follows:-

Westbury Town Council

- a. Copious evidence of usage for in excess of the statutory period has been included with the application.
- b. Speculative at best. In any event, not relevant to the application.
- c. The **signage** referred to is of very recent origin, and not less than twenty years usage in accordance with the relevant statutory provisions had certainly already accrued long before that **signage** was put in place. No doubt, if required, the District Council should produce its works orders and invoices for that **signage**. In any event, the area claimed is substantially larger than what is now the subject of that **signage** or within the current ownership of West Wiltshire District Council. The current applicability and enforceability to the area claimed of the alleged rules and regulations displayed is a matter of considerable uncertainty. The ownership of the area claimed is irrelevant to the statutory provisions under which the application is made.
- d. Not consistent with (b) of the Town Council's statement. In any event, it overlooks the recent construction of a roadway across the area, and the severance to the land caused by that. This assertion is also inconsistent with the submissions

of other objectors as to the recent erection of fences etc. Presumably “this ground” is therefore not the entirety of the area claimed.

Mr J D Annetts, Deputy Town Mayor

It is not clear whether this is a freestanding individual objection or an addition to that of **Westbury** Town Council.

The outcome of whatever are the proposals alleged to be under “delicate” discussion (and hence presumably in secret) is speculative at best, and in any event, not relevant to the application.

For whatever motive, the implication of this objection is clearly that the portion of the area claimed remaining in the ownership of West Wiltshire District Council & “under threat”.

Westbury Youth Football Club

The reasons given for the objection are not relevant to the application. The application is not based on usage of the area claimed for formal football games and nor is the club’s objection to it. Indeed, its objection specifically states that it does not use the area claimed for this purpose and does not regard it as suitable for that purpose either. However, it is clear **from** the objection that some or all of the area **claimed is** “under threat” from a proposed land swap deal with Persimmon Homes.

Although not disclosed in its objection, the objector is sponsored by Persimmon Homes (Wessex) Limited, another objector to the application (see enclosed piece from the Wiltshire Times issue of March 30th 2001).

Neil Hawker

The reasons given for the objection are not relevant to the application. It is clear that some or all of the area claimed is “under threat” from a “land swap deal for new facilities” supported by the objector. How that can be consistent with his call to “keep it as it is” is not explained.

His assertions about the condition and usage of sports pitches within the area claimed are not inconsistent with the application. Clearly, “teams from all over” are **not** predominantly inhabitants of the locality, so any express permission granted to them does not prejudice the usage claimed by the **application**, and “in poor state”, “dog mess all over”, “is never cut correctly” **etc.** runs counter to the assertions by other objectors of a course of action by owners preventing usage “as of right” by the claimants.

Michael Pearce

The application does not include any land at Redland Lane, **Westbury**.

Presumably "the **Westbury Leigh Park** development group" referred to is in fact Persimmon Homes (Wessex) Limited, which is itself an objector to the application.

Whilst the proposals referred to are speculative at best, it is clear **from** the objection that, contrary to **Westbury Town Council's** objection (d), **some** or all of the area claimed is "under threat" from them. The stated opinion of the objector that there would first be a **full** debate involving the entire town is of little reassurance to the claimants in view of the parallel objections of both West Wiltshire District council and **Westbury Town Council**.

In any event, none of the reasons given for the objection are relevant to the application.

Mrs D Pearce

The application has already been received by the Registration Authority and acknowledged as duly made, its purpose being in accordance with the relevant statutory provisions.

The application does not include any land at Redland **Lane, Westbury** or at **Westbury Leigh**.

The objector confirms that the use **s** claimed are predominantly by inhabitants of the locality as required by the relevant statutory provisions.

The subjective beliefs of **users** "as of right" are not relevant to the **matter**, nor indeed is the motive of the applicant in making the application.

Whilst the proposals referred to are speculative at best, it is clear **from** the objection that, contrary to **Westbury Town Council's** objection (d), **some** or all of the area claimed is "under threat" **from** them. The stated opinion of the objector that there would first be a **full** debate involving the entire town is of little reassurance to the claimants in view of the parallel objections of both West Wiltshire District Council and **Westbury Town Council**.

In any event, none of the reasons given for the objection are relevant to the application.

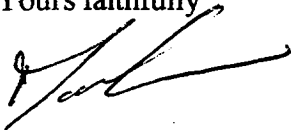
Mrs J J Carpenter

The area claimed is not now wholly the property of West Wiltshire District Council. In any event, the ownership of the area claimed is irrelevant to the statutory provisions.

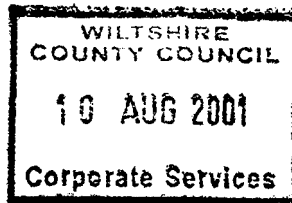
Whilst the land exchange referred to is speculative at best, it is clear from the objection that, contrary to **Westbury** Town Council objection (d), some or all of the land claimed is "under threat".

The reasons given for the objection are not relevant to the application.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Patrick Taylor', written over the typed name.

PATRICK TAYLOR



12 Lilac Grove
Westbury
Wiltshire BA13 3NL

Mr T S Slack
Wiltshire County Council
County Hall
Trowbridge

Your refs. TSS/PMN/04061 and TSS/LLW/04061

8 August 2001

Dear Sir,

Commons Registration Act 1965
Application to register land known as Penleigh Park Recreation Ground
as a Town or Village Green (No. 2001/02)

Thank you for your letters of 17 May and 3 July 2001, with enclosures.

Here are my comments on the objections of Persimmon Homes (Wessex) Limited, made by Davies and Partners' letter of 14 May 2001 and in the attached document by George Lawrence QC and Louise Davies dated 11 May 2001.

My application was made on 19 February 2001 and was formulated in accordance with 'Getting Greens Registered' and Section 22 (1) of the 1965 Act. However, new law now at Section 22 (1A) of the 1965 Act was inserted by Sections 98 and 103 (2) of the Countryside and Rights of Way Act 2000 ("the 2000 Act") and came into effect shortly before the date of my application.

The application was made in the prescribed form, which remains Form 30, set out in the Schedule to the Commons Registration (New Land) Regulations 1969 (S.I. 1969 No. 1843) ("the 1969 Regulations").

Under the previous law, there **was obiter dicta** in *New Windsor Corporation - v - Mellor* (1975) 1 Ch 380 at 387 and 395 and *Ministry of Defence - v - Wiltshire County Council* (1995) 4 All ER 93 1 at 938 that there was an unstated constraint on the generality of the meaning of the words 'for not less than twenty years' in the 1965 Act, to the effect that the period in question must end on the application date and no other.

In completing Form 30, I followed the view of 'Getting Greens Registered' that this was an unjustified shackle on the statutory language of the 1965 Act, and I stated in Part 4 of the Form that the land became a Town or Village Green on or about 31 October 1991. The question of whether continued use between the 'Part 4' date and the date of the application was required under the previous law has been clarified by the new subsection (1A), which offers two alternatives, (a) and (b).

The proper interpretation of these amendments made by the 2000 Act is that they do not cut down the expressed scope of the 1965 Act unless and until Regulations are made under Section 22 (1A) (b) and come into effect. Therefore, even if the use and enjoyment of any part of the claimed area by the inhabitants has ceased (which is not admitted), so as to disentitle the application under the new sub-section (1A) (a), they have not ceased for more than the

prescribed period, so as to disentitle the application under the new sub-section (1A) (b), because no such period has yet been prescribed.

For the avoidance of repetition, please treat the comments in my letters of 22 June 2001 on other objections, wherever appropriate, as made also in respect of these objections, and vice *versâ* in respect of the comments in this letter.

So far as possible, I shall address my comments on the objections stated in paragraph 4 of the counsels' document under the paragraph numbers in **that** document.

5. Form 30 was not **drafted** to correspond with the present requirements of Section 22 (1A) of the 1965 Act, and neither it nor the 1969 Regulations which prescribed it can derogate **from** the requirements of the Act itself

A date stated in Part 4 of Form 30 does not restrict the admissibility of evidence that the requirements of the Act have been satisfied by the date of the application. Further or alternatively, the twenty-year period of user required to be demonstrated by an applicant is not determined solely by the entry made in Part 4

6. Thirty supporting statements (out of a total of forty-one) claim use 'for not less than twenty years', in accordance with Section 22 (1A) of the 1965 Act (as amended).

Both Mark Timbrell's and Mrs. M.K. Timbrell's supporting statements show they used the land in 1971, making a total of five such statements by users, not four.

The 'significant number' requirement was added by the 2000 Act. However, prescriptive use is by its nature cumulative, and therefore in the first or second year of the prescription period, any number of users is 'significant' even a very small number. If the numbers remained small throughout the prescription period, then the statutory requirement might not be met. However, forty-one evidence of user statements is clearly a 'significant number', particularly when no fewer than thirty of them assert a period of continuous use in excess of twenty years. On a proper analysis of the intention of the statutory words, the requirement is met and the objection is not sustainable.

In replying to paragraphs 7 – 10, I rely on paragraph 18 of 'Getting Greens Registered', which states that the temporary inaccessibility of part of the land will not **affect** the registrability of the application land; and I rely on paragraphs 56 and 61 which state that once there has been twenty years' continuous use, subsequent interruption will not be fatal to the claim. *Lewis – v – Thomas* (1950) 1KB 438 further explains the meaning of 'interruption' for the purposes of a statutory twenty-year period, and the *Billson* case (1998) 2 All ER 587 at 607d shows that 'a very short period' during a statutory twenty-year period can be disregarded *as de minimis*.

7. Whatever the precise state of the temporary **Heras** fence to the east of the new road (shown by Martin Packer's plan to have been outside Persimmon's part of the field) at any point during the period between 29 August 2000 and the beginning of December 2000, when Mr Packer says this fence was removed, local inhabitants were throughout that time able to gain access to the land **from** other directions, as the previously-existing fencing of Persimmon's part of the recreation ground on the other side of the new road was incomplete and out of repair, and a public footpath runs past that land.

8. I do not agree that the physical presence of a road prevents the land **from** being used for lawful sports and pastimes. I confirm that the road is still not in use as public highway, but

remains freely accessible to local inhabitants. In this connection I draw attention to paragraphs 16, 17, 38, 47, 87 and 88 of 'Getting Greens Registered'.

9- 11. My case is that the use continues, in accordance with Section 22 (1 A) (a). Alternatively, the use has ceased for not more than the prescribed period, in accordance with Section 22 (1A) (b), because no such period has yet been prescribed.

11. The report by Gerald Ryan QC, on which the objector relies, does not have the force of law, and except for a general and *obiter* comment by Pill LJ in the Steed case, Mr Ryan quotes no statutory or case law authorities for his contentions. As regards the points he takes in his report about Spring House, the case of R - v - Plymouth City Council *ex parte* Freeman (1987) 19 HLR 328, which found that a house and garden at the Mount Edgcumbe Country Park were part of a public open space, suggests that the presence of a dwelling is not necessarily inconsistent with a Town or Village Green, and so too does paragraph 16 of 'Getting Greens Registered'. In any event, I do not believe Mr Ryan is correct in his view that a Commons Registration Authority has no power to amend an application, to correct an error. The Courts certainly have inherent powers to amend all manner of applications coming before them, and exercise such powers often in the interests of justice. As a quasi-judicial body, one would expect a Commons Registration Authority to have similar powers to achieve a just outcome, and that the Courts would not interfere provided that the Registration Authority had exercised such powers in a fair and reasonable manner. There are many other similar application procedures (such as licensing and planning) and quasi-judicial bodies administering them, which do not follow Mr Ryan's view on their jurisdiction. Furthermore, right up to the point of final determination, there can surely be no bar to an applicant amending his own application, to correct an error or otherwise, subject to fairness to consultees.

12. "Without permission" is an inadequate analysis of the meaning of '*nec precario*'. See Lord Hoffman in the **Sunningwell** case.

13. I do not agree with this proposition. In the field of prescriptive rights, the extent to which this principle of contract law can be applied is unclear. Based on Earl de la Warr - v - Miles (188 1) 17 ChD 535 at 596 and the Commons Commissioner's decision re Rodmersham Green, Kent (1976) 219/D/19-22, paragraph 46 of 'Getting Greens Registered' inclines to the view that only express permission can defeat a claim that use was 'without permission' and therefore as of right. Paragraph 46 points out that the boundary between acquiescence and toleration (which do not defeat a claim that use was as of right) and permission (which does) is otherwise exceedingly difficult to define, and could make it impossible ever to establish an opposed Town or Village Green application

13a. Contrary to the objector's contention, Mills - v - Silver is clear authority that, in respect of prescriptive easements, neither acquiescence nor toleration are sufficient to defeat a claim that use is as of right, as Dillon LJ's judgement in that case makes clear - (1991) Ch 271 at 279E to 285F. He says (at 281G) "Therefore mere acquiescence in or toleration of the user by the servient owner cannot prevent the user being user as of right for the purposes of prescription". The objector's contention that in the passage at 282B (where he said "User under a temporary licence") Dillon LJ meant to say "User pursuant to an implied permission" is completely untenable and fanciful. He was doing no more than repeating the words of Thesiger LJ in Sturges - v - Bridgman which he had already quoted at 280E.

13. The permission relied on in the **Billson** case was granted by deed and was clearly express and not implied.

14. I am **doubtful** that the Beresford case is wholly consistent with the House of Lords decision in the Sunningwell case, and pending clarification of its authority in higher courts I suggest it should be treated as **sui generis**. As to the suggested relevance of part of the land being in public ownership, paragraphs 51 and 89 of 'Getting Greens Registered' say it is not, and so too does the Advice of Charles George QC which the objector seeks to rely on. At paragraph 13 of that Advice, he states unequivocally that "land ownership is entirely irrelevant".

The issue in the National Trust case (which concerned prescriptive rights of way) was not whether the land was in public ownership nor implied permission, but whether an Inspector's decision that user was "as of right" was consistent with his finding that use of the path was by express invitation (by notices). The court found it was not and quashed his decision.

As already pointed out above, the Advice of Charles George QC relied on by the objector is not consistent, and in any event it does not have the force of law, and except for a general and **obiter** comment by Carnwarth J in the Steed case, he quotes no statutory or case law authority for his contention

15. Whatever status the land had prior to 24 July 1998, by virtue of the provisions quoted, the land in the ownership of the objector surely cannot rely on that status now.

16. There is little or no evidence that the facilities in question were provided by the Council, and its own objections do not claim that they were. Accordingly, even if the contention could stand in law (which is not admitted) the factual evidence for it is lacking.

17. I do not agree that the mere recital of the statutory provisions under which the land was acquired and held by the Council is **sufficient** to show that the user claimed was either with the Council's implied permission or otherwise not as of right.

18. The mere existence of the 1983 bylaws does not preclude the user being as of right. The only force of those bylaws is to prohibit certain activities in certain stipulated circumstances

The bylaws cannot have the effect of giving implied permission to do anything they do not prohibit, any more than can any statutory provision.

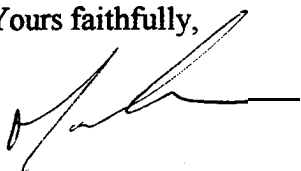
I shall be submitting evidence to show that no notices displaying the bylaws were erected on any part of the land before the date of my application. In any event, there are no notices on the part of the application land now in the ownership of the objector, and the Council declines to give any opinion as to the continuing applicability of the bylaws (if any) following the transfer of part of **Penleigh** Park Recreation Ground completed on 24 July 1998. The objector does not say whether the alleged implication arises by virtue of the erection of notices or by virtue of the mere existence of the bylaws. For the reasons stated, I reject both possible lines of argument.

19. As said above, I do not accept that activities which are not prohibited by the bylaws are "impliedly permitted" by them. Despite the objector's close perusal of the supporting evidence (indicated in paragraph 6 of its document), it does not identify any activities claimed as not being 'lawful sports and pastimes', so the argument it is seeking to make may be entirely academic. In any event, the Harming case (concerning prescriptive easements) does not on the face of it apply to breaches of bylaws. Dillon LJ (at page 20 of that judgement) defined the rule of law as applying only to "conduct which, at the time the conduct takes place, is prohibited by a public statute". Breaches of bylaws are not that. The Stevens case confirmed that the same rule of law applies to prescriptive rights of way, but did not otherwise extend its scope in any way

20. For the reasons stated above, I do not accept any of the objector's contentions **summarized** in this paragraph.
21. Rebutted in its entirety.

As regards Davies and Partners' letter dated 14 May 2001, I cannot address objections they have not yet made, but if the "locality" point is pursued, I would be minded to respond that the locality in question is the town of **Westbury** and that the neighbourhood is the **Oldfield** Park estate and its environs.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Patrick Taylor', with a long horizontal stroke extending to the right.

Patrick Taylor.