Easter Term
[2014] UKSC 31
On appeal from: [2012] EWCA Civ 1373

JUDGMENT

R (on the application of Barkas) (Appellant) *v* North Yorkshire County Council and another (Respondents)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Reed
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

21 May 2014

Heard on 2 April 2014

Appellant
Douglas Edwards QC
Philip Petchey
(Instructed by Richard Buxton Environmental and Public Law)

1st Respondent
Nathalie Lieven QC
Ruth Stockley
(Instructed by North Yorkshire County Council Assistant Chief Executive Legal and Democratic Services)

2nd Respondent
George Laurence QC
William Hanbury
(Instructed by Scarborough Borough Council Legal Services)

LORD NEUBERGER (with whom Lady Hale, Lord Reed and Lord Hughes agree)

Introductory

1. Helredale playing field ("the Field") is situated in Whitby, North Yorkshire, and it is owned by Scarborough Borough Council. The specific issue raised on this appeal is whether it should be registered as "a town or village green" under section 15 of the Commons Act 2006. The point of principle which this issue raises concerns the meaning of the expression "as of right" in section 15(2), and, more precisely, whether use is as of right when it is contemplated by the statutory provision under which a public body acquired and holds the land in question. This point, in turn, requires this Court to consider the reasoning of the House of Lords in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889.

The factual and legal background

2. The factual background to the appeal is set out very fully in an excellent report prepared by Vivian Chapman QC, dated 28 July 2010, whose findings are accepted as accurate by the parties to these proceedings. For the purpose of this appeal, it is only necessary to set out his conclusions in very summary terms.

3. The Field is some two hectares in extent, and it was acquired as part of a larger parcel of land, amounting to some fourteen hectares, under a conveyance dated 20 June 1951, by the statutory predecessor of Scarborough Borough Council, Whitby Urban District Council (and I shall refer to the two Councils simply as "the Council"), acting pursuant to their powers under section 73(a) of the Housing Act 1936, which permitted a local authority "to acquire any land … as a site for the erection of houses".

4. The Council then developed most of the fourteen hectares for housing, and laid out and maintained the Field as "recreation grounds" pursuant to section 80(1) of the 1936 Act, with the consent of the Minister as required by that section. Sections 73 and 80 of the 1936 Act were repealed and substantially re-enacted in the Housing Act 1957, whose provisions were in turn repealed and substantially re-enacted (albeit with more amendments) in the Housing Act 1985.

5. Section 12(1) of the 1985 Act (which is in Part II, concerned with "provision of housing accommodation") is in virtually identical terms to section 80(1) of the 1936 Act (save that "the Minister" has been replaced by "the Secretary of State"), and it provides as follows:

> "A local housing authority may, with the consent of the Secretary of State, provide and maintain in connection with housing accommodation provided by them under this Part-
>
> (a) buildings adapted for use as shops,
>
> (b) recreation grounds, and
>
> (c) other buildings or land which, in the opinion of the Secretary of State, will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided."

(Denning J explained in a case on the effectively identically worded section 80(1) of the 1936 Act, *HE Green and Sons v Minister of Health (No 2)* [1948] 1 KB 34, 41, that the section did not require the use of "buildings", "recreation grounds" or "other buildings or land" to be restricted to "the persons for whom the housing accommodation is provided", and that the use could also validly extend to other members of the public.)

6. Subsequent to the acquisition of the fourteen hectares, the Council acquired other land adjoining or close to the Field, which it then developed for housing.

7. For at least the last fifty years, the relevant facts relating to the Field are as follows. It is surrounded by land consisting of three residential estates which were developed as local authority housing. It has four entrances, which are open at all times, and which have notices requiring dogs to be kept on leads and dog-owners to clear up after their dogs. It has the appearance of a municipal recreation ground, mostly laid to grass, including a football pitch, and it is crossed by a hard-surface path. The Council maintains the Field, in the sense of arranging for the regular mowing of the grass in summer and the marking out of the football pitch (currently once a year, but previously more frequently). The Field is used extensively and openly by local inhabitants for informal recreation, largely, but not exclusively, for children playing and walking dogs. Until 2005, the football pitch was used for local league football matches with the Council's licence.

The procedural history

8. On 12 October 2007, Vivienne Wright, acting on behalf of the Helredale Neighbourhood Council, of which she was secretary, applied to the North Yorkshire County Council ("NYCC") to register the Field as a town or village green under section 15 of the 2006 Act.

9. Section 15 of the 2006 Act provides, so far as relevant to this appeal, as follows:

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2)…. applies.
> (2) This subsection applies where –
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
> (b) they continue to do so at the time of the application."

10. In order to determine the application, NYCC decided to appoint Mr Chapman to conduct an inquiry, which he duly held over two days in April 2010. Following that, he produced a report in July 2010, as mentioned above. (It was followed by a supplementary report in September 2010, but nothing hangs on that for present purposes). Apart from making detailed findings, including those summarised above, Mr Chapman concluded in his report that, although "a significant number of the inhabitants of [the] locality … [had] indulged … in lawful sports and pastimes on the land for a period of at least 20 years" their use had not been "as of right". In other words, as Sullivan LJ put it in the Court of Appeal, the inspector concluded that "although the use of the Field met all of the other requirements of section 15(2), the local inhabitants' use of the Field for recreational purposes had been 'by right' and not 'as of right'" – [2013] 1 WLR 1521, para 3.

11. Accordingly, Mr Chapman recommended that the application to register the Field as a town or village green be rejected. This recommendation was considered and accepted by NYCC on 8 October 2010. Christine Barkas, a member of the Neighbourhood Council applied for judicial review of this decision. Her application failed before Langstaff J – [2011] EWHC 3653 (Admin), and her appeal to the Court of Appeal was dismissed for reasons given by Sullivan LJ in a judgment with which Richards and McFarlane LJJ agreed. She now appeals to this Court.

The issue raised by this appeal

12. The basic issue which the appeal raises is a short one: where land is provided and maintained by a local authority pursuant to section 12(1) of the Housing Act 1985 or its statutory predecessors, is the use of that land by the public for recreational purposes "as of right" within the meaning of section 15(2)(a) of the Commons Act 2006?

13. NYCC, with the support of the Council, contend that the answer is "no", whereas Ms Barkas, on behalf of the Neighbourhood Council, argues that the answer is "yes". In the course of her argument, Ms Lieven QC, who appears for NYCC, and is supported by Mr Laurence QC, who appears for the Council, made it clear that she challenged part of the reasoning, and the ultimate decision, of the House of Lords in *Beresford*, although her primary contention is that it is distinguishable. As explained below the decision is on any view not without its difficulties. Accordingly, I propose first to consider the issue by reference to principle and one or two earlier decisions of the House of Lords, and only then to turn to *Beresford*.

The meaning of "as of right"

14. The origin of the expression "as of right" in the definition of "town or village green" in section 22(1) of the Commons Registration Act 1965, which is effectively for present purposes the statutory predecessor of section 15(2) of the 2006 Act, was authoritatively discussed by Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 349D-351H. As he said, it originates from the law relating to the acquisition of easements by prescription. Before examining what Lord Hoffmann said, it is, I think, helpful to explain that the legal meaning of the expression "as of right" is, somewhat counterintuitively, almost the converse of "of right" or "by right". Thus, if a person uses privately owned land "of right" or "by right", the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is "as of right", it is without the permission of the landowner, and therefore is not "of right" or "by right", but is actually carried on as if it were by right – hence "as of right". The significance of the little word "as" is therefore crucial, and renders the expression "as of right" effectively the antithesis of "of right" or "by right".

15. In his discussion on the point in *Sunningwell*, Lord Hoffmann began by explaining that "[a]ny legal system must have rules of prescription which prevent the disturbance of long-established *de facto* enjoyment", and went on to explain that a combination of statutory and common law had resulted in such enjoyment having to be twenty years "*nec vi*, *nec clam*, *nec precario*; not by force, nor stealth, nor the licence of the owner". He went on to explain that each of "these three vitiating circumstances" would amount to "a reason why it would not have been reasonable to expect the owner to resist the exercise of the right", namely, "in the first case, because rights should not be acquired by the use of force, in the second, because the

owner would not have known of the user and in the third, because he had consented to the user, but for a limited period". For the avoidance of doubt, I should interpose that the reference to "a limited period" clearly includes an indefinite period (as would arise under an unlimited but revocable permission), and that the word "limited" was meant to be contrasted with "permanent". Lord Hoffmann ended his discussion by citing with approval Lord Lindley's statement in *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, 239 that "the words 'as of right' were intended 'to have the same meaning as the older expression *nec vi, nec clam, nec precario*", a view also expressed by Lord Davey at [1903] AC 229, 238.

16. In the subsequent case of *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, which was concerned with the 2006 Act, Lord Walker confirmed at para 20 that "'as of right' is sufficiently described by the tripartite test *nec vi, nec clam, nec precario* [as] established by high authority". (I would be prepared to accept that it is possible that, as Lord Carnwath suggests, there may be exceptional cases involving claims to village greens where this does not apply, but I am doubtful about that). And at para 30, Lord Walker accepted as a "general proposition" that, if a right is to be obtained by prescription, the persons claiming that right "must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him".

17. In relation to the acquisition of easements by prescription, the law is correctly stated in *Gale on Easements* (19th edition, 2012), para 4-115:

> "The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is 'as of right'; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not 'as of right.' Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence."

18. The concept of acquiescence in this context was explained in the opinion delivered by Fry J (with which Lord Penzance expressed himself as being "in entire accord" at p 803), in *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 774, where he said:

> "… I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain…"

19. Further in the recent case of *Lawrence v Fen Tigers Ltd* [2014] 2 WLR 433, para 43, I expressed the view that, as the Court of Appeal held in *Sturges v Bridgman* (1879) 11 Ch D 852, it appeared to accord with principle that:

> "[T]ime does not run for the purposes of prescription unless the activities of the owner (or occupier) of the putative dominant land can be objected to by the owner of the putative servient land. The notion that an easement can only be acquired by prescription if the activity concerned is carried on 'as of right' for 20 years, ie *nec vi*, *nec clam*, *nec precario*, would seem to carry with it the assumption that it would not assist the putative dominant owner if the activity was carried on 'of right' for 20 years, as no question of force, stealth or permission could apply."

Was the public use in this case "as of right"?

20. In the present case, the Council's argument is that it acquired and has always held the Field pursuant to section 12(1) of the 1985 Act and its statutory predecessors, so the Field has been held for public recreational purposes; consequently, members of the public have always had the statutory right to use the Field for recreational purposes, and, accordingly, there can be no question of any "inhabitants of the locality" having indulged in "lawful sports and pastimes" "as of right", as they have done so "of right" or "by right". In other words, the argument is that members of the public have been using the Field for recreational purposes lawfully or *precario*, and the 20-year period referred to in section 15(2) of the 2006 Act has not even started to run – and indeed it could not do so unless and until the Council lawfully ceased to hold the Field under section 12(1) of the 1985 Act.

21. In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise. In *Sunningwell* at pp 352H-353A, Lord Hoffmann indicated that whether user was "as of right" should be judged by "how

the matter would have appeared to the owner of the land", a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the Field was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.

22. It is true that this case does not involve the grant of a right in private law, which is the normal issue where the question whether a use is *precario* arises. Indeed, the fact that the right alleged in this case is not a conventional private law right, but a public law right, was rightly acknowledged by Ms Lieven. Thus, it is a right principally enforceable by public rather than by private law proceedings. It is also a right which is clearly conditional on the Council continuing to devote the Field to the purpose identified in section 12(1) of the 1985 Act (and it is unnecessary for present purposes to go into the question of what steps the Council would have to take to remove the Field from the ambit of the section). Accordingly, the right alleged by the Council to be enjoyed by members of the public over the Field is not precisely analogous to a public or private right of way. However, I do not see any reason in terms of legal principle or public policy why that should make a difference. The basic point is that members of the public are entitled to go onto and use the land – provided they use it for the stipulated purpose in section 12(1), namely for recreation, and that they do so in a lawful manner.

23. It is worth expanding on this. Section 12(1) of the 1985 Act and its statutory predecessors bestow a power on a local (housing) authority to devote land such as the Field for public recreational use (albeit subject to the consent of the Minister or Secretary of State), at any rate until the land is removed from the ambit of that section. Where land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct. Of course, a local authority would be entitled to place conditions on such use – such as on the times of day the land could be accessed or used, the type of sports which could be played and when and where, and the terms on which children or dogs could come onto the land. Similarly, the local authority would clearly be entitled to withdraw the licence permanently or temporarily. Thus, if and when it lawfully is able, and decides, to devote the land to some other statutorily permitted use, the local authority may permanently withdraw the licence; and if, for instance, when the land is still held under section 12(1), the local authority wants to hold a midsummer fair to which the public will be charged an entrance fee, it could temporarily withdraw the licence.

24. I agree with Lord Carnwath that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights.

25. I draw support from observations in *Hall v Beckenham Corporation* [1949] 1 KB 716, a case which concerned the liability for nuisance of a local authority in respect of activities by members of the public on land held by the local authority under section 164 of the Public Health Act 1875. That section permits a "local authority" to acquire and maintain "lands for the purpose of being used as public walks or pleasure grounds" and to make bye-laws as to their use, which can include the power to remove those who disobey the bye-laws. Finnemore J said at p 727 that the local authority had "no general right to turn people out because they do not like them", and could "only act against people in the park who offend against their bye-laws, or who commit some offence". At p 728, he observed that "So long as a member of the public behaves himself in the ordinary way, committing no criminal offence and observing the bye-laws, the [local authority] cannot stop his doing what he likes in this recreation ground".

26. This conclusion followed from a pithy opinion given by Lord Halsbury LC in *Lambeth Overseers v London County Council* [1897] AC 625, which concerned the question whether the county council, which owned and maintained a park under a power accorded by a local Act of Parliament, were in rateable occupation of it. At pp 630-631, Lord Halsbury said that: "there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it." In other words, members of the public had the statutory right to use the land for recreational purposes.

27. It was suggested by Mr Edwards QC in his argument for Ms Barkas that, even if members of the public were not trespassers, they were nonetheless not licensees or otherwise lawfully present when they were on the Field. I have considerable difficulty with that submission. As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some

shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a "tolerated trespasser" is still a trespasser.

28. Furthermore, the fact that the landowner knows that a trespasser is on the land and does nothing about it does not alter the legal status of the trespasser. As Fry J explained, acquiescence in the trespass, which in this area of law simply means passive toleration as is explained in *Gale* (or, in the language of land covenants, suffering), does not stop it being trespass. This point was well made by Dillon LJ in *Mills v Silver* [1991] Ch 271, 279-280, where he pointed out that "there cannot be [a] principle of law" that "no prescriptive right can be acquired if the user … has been tolerated without objection by the servient owner" as it would be "fundamentally inconsistent with the whole notion of acquisition of rights by prescription." Accordingly, as he added at p 281, "mere acquiescence in or tolerance of the user … cannot prevent the user being user as of right for purposes of prescription."

29. Thus, if a trespass has continued for a number of years, then the fact that it has been acquiesced in (or passively tolerated or suffered) by the landowner will not prevent the landowner claiming that it has been and is unlawful, and seeking damages in respect of it (subject to the constraints of the Limitation Act 1980). For the same reason, if such a trespass has continued for 20 years and was otherwise as of right, it will be capable of giving rise to a prescriptive right. On the other hand, if the landowner has in some way actually communicated agreement to what would otherwise be a trespass, whether or not gratuitously, then he cannot claim it has been or is unlawful – at least until he lawfully withdraws his agreement to it. For the same reason, even if such an agreed arrangement had continued for 20 years, there can be no question of it giving rise to a prescriptive right because it would clearly have been *precario*, and therefore "by right".

30. For these reasons, I would hold that this appeal should fail, but before reaching a final decision, it is necessary to address the decision in *Beresford*, which forms the lynch-pin of the case advanced for Ms Barkas.

The proceedings in Beresford

31. The relevant factual basis on which *Beresford* was decided (as opposed to the fuller facts as explained by Lord Carnwath in his judgment below) are contained in paras 17-19 and 24 of Lord Scott's judgment and paras 89-90 of Lord Walker's judgment. The land in question had been acquired under what Lord Walker called

"very wide powers" contained in the New Towns Act 1965 by Washington Development Corporation, for no "specific purpose", although they gave active consideration to the possibility of developing the land as a sports centre, for which an entry fee would be charged. In 1973, the land was identified as "parkland/open space/playing field" for planning purposes in the local "New Town Plan". In 1974, it was grassed over, following which it was continuously used by the public for recreational use. In 1977, the development corporation had placed some benches on the land, and arranged for the mowing of the grass in the summer (which was continued by their successors). The possibility of a sports centre had not been abandoned in 1989, when the land was transferred to the Commission for the New Towns, who considered that it also had commercial development potential. Seven years later the land was acquired by the city council under a transfer which restricted its use to that of courts, health facilities, leisure or recreation, or "other similar community related uses".

32. Section 3 of the 1965 Act empowered a development corporation "to acquire, hold, manage and dispose of land and other property", "to carry on any business or undertaking", and "generally to do anything necessary or expedient" for the purposes or incidental purposes of the new town. Section 21(1) of the 1965 Act provided that "[a]ny land being, or forming part of, a common, open space or fuel or field garden allotment, which has been acquired for the purposes of this Act by a development corporation … may … be used by them, or by any other person, in any manner in accordance with planning permission". "Open space" is defined in section 54 of the 1965 Act as "any land laid out as a public garden, or used for purposes of public recreation, or land being a disused burial ground". The 1965 Act was repealed and replaced by the New Towns Act 1981, and sections 4 and 21(1) of the later Act are effectively in identical terms to their statutory predecessors, and section 80 of the 1981 Act has a similar definition of "open space" to section 54 of the 1965 Act.

33. At first instance and in the Court of Appeal, although the city council raised no argument based on the 1981 Act, they successfully argued that the land had been used by the public with the licence of the city council and their predecessors, on the basis that such a licence should be implied from their providing seating and mowing the grass. That was the only issue when the appeal was first argued before the House in May 2003. After argument had concluded, the House asked to be addressed on the point that members of the public had a statutory right to use the land for recreation.

34. Having heard further argument, the House of Lords allowed the appeal, rejecting the city council's case both on the implied licence found below and in so far as it was based on statute. In other words, the House of Lords rejected the city council's case on the first and original point, namely that mowing the grass or erecting benches could justify the judge's finding that there was an implied licence,

and they also rejected the city council's case on the second point, raised by the House itself, and based on statute.

The first point in Beresford*: the meaning of "as of right"*

35. The observations of three of the four Law Lords who gave reasoned opinions on the first of those two issues are supportive of the reasoning set out in paras 14-28 above. Lord Bingham accepted at para 5 that a licence could be implied if the facts warranted it, but said in the following paragraph that such an implication could not be justified "from mere inaction of a landowner" and quoted with approval the observation of Dillon LJ in *Mills.* Lord Rodger at para 58 explained that "English law distinguishes between an owner who grants … a temporary licence … and an owner who merely acquiesces", citing the passage quoted in para 17 above from an earlier edition of *Gale.* Lord Walker said at para 79 that "[a]cquiescence … denotes passive inactivity" and added that "it would be quite wrong … to treat a landowner's silent passive acquiescence … as having the same effect as permission communicated". At para 80, he quoted what, as he put it, Dillon LJ "very clearly, and to my mind very compellingly" said in *Mills.*

36. Mr Edwards contends, however, that Lord Scott's analysis in paras 43-50 justifies the argument which I have described and rejected in paras 27 and 28 above, namely that there can be cases where a person uses land with the permission of the landowner, but is nonetheless using the land "as of right" rather than "by right". In para 43, Lord Scott rightly accepted that "merely standing by, with knowledge of the use, and doing nothing about it", which he described as "toleration or acquiescence", "is consistent with the use being 'as of right'". But he then said that he was "unable to accept … that an implied permission is necessarily in the same state as mere acquiescence or toleration": the word "necessarily" is rather odd, because, as was explained in the other three opinions, "implied permission" and "mere acquiescence or toleration" are clearly and fundamentally different in this area of law. Lord Scott then said that he was "unable to accept … that an implied permission [or "even an express permission"] is necessarily inconsistent with the use being as of right". I must confess that I find it hard to understand the basis upon which this was said, but, if it was intended to have the effect argued for by Mr Edwards, it is wrong in principle and unsupported by, indeed I think inconsistent with, the other opinions.

37. I find paras 44-50 of Lord Scott's opinion problematical. To subject them to a detailed exegesis in this judgment would result in an unnecessarily lengthy judgment, as, while they contain statements which are correct, they also contain some statements which are in my opinion wrong and a number of others which are questionable. For present purposes, it suffices to identify two points of disagreement. First, I do not agree with Lord Scott's view in para 47 that public use

of a site, on which the owner has erected a sign permitting use as a village green, would be "as of right". It would amount to a temporary permissive use so long as the permission subsists, as the public use would be "by right". Secondly, Lord Scott's conclusion in para 48 that, when using the land for recreation, members of the public were "certainly not trespassers" should ineluctably have led him to decide that the public's use of the land had been "by right" and not, as he did decide, "as of right".

38. It is true that Lord Hutton (who gave no reasons of his own) agreed with the reasons of Lord Bingham, Lord Rodger and Lord Walker; Lord Rodger agreed with the reasons of Lord Bingham and Lord Walker; Lord Walker agreed with the reasons of Lord Rodger and Lord Bingham; and Lord Bingham agreed with the reasons of Lord Scott, Lord Rodger and Lord Walker. Accordingly, I suppose it could be argued that Lord Scott's opinion represented the view of all five Law Lords. However, while Lord Bingham's agreement with Lord Scott's reasoning is admittedly somewhat mystifying, that argument cannot stand in the light of the reasoning in the other three reasoned opinions. Even if the argument has any substance, I would still hold that paras 43-50 in *Beresford* cannot be relied on, as they include passages which are simply wrong in principle and contrary to well-established authority, as well as being inconsistent with the other reasoned opinions.

The second point in Beresford*: the effect of statute*

39. I turn, then, to the more difficult aspect of the decision in *Beresford*, namely the rejection of the city council's case based on the 1981 Act. Lord Bingham dealt with the point very shortly in para 9, simply saying that none of the statutory provisions to which the House had been referred conferred a right on members of the public to use the land for recreation, adding that counsel for the city council "who had not himself sought to raise this contention earlier, found it hard to argue otherwise". Lord Hutton, as mentioned, simply agreed with Lord Bingham, Lord Rodger and Lord Walker. At para 62, Lord Rodger agreed with Lord Walker's reasons for holding that "neither the designation of the land as 'open space' in the New Town Plan nor any of the statutes conferred [a] right [to use the land] in this case". The only two Law Lords who considered the issue in any detail were Lord Scott and Lord Walker.

40. At paras 24-30, Lord Scott considered various arguments, based on section 21(1) of the 1981 Act and section 10 of the Open Spaces Act 1906. He plainly thought that there was force in the argument that either statutory provision may have justified the conclusion that the public use of the land was "by right". However, he did not consider that it was open to the House to consider either argument as it had been expressly disclaimed by counsel for the city council (see paras 26 and 30).

41. As for Lord Walker, at para 86, after referring to *Hall*, and observing that "A local resident who takes a walk in a park owned by a local authority might indignantly reject any suggestion that he was a trespasser", he said that "the notion of an implied statutory licence has its attractions". At para 87, he mentioned cases where land is vested in local authorities under section 10 of the 1906 Act, which, he explained, expressly provides that "inhabitants of the locality are beneficiaries of a statutory trust of a public nature"; in such cases, he thought, "it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers)" (a view shared by Lord Scott – para 30). In para 88, he said that such a case would "raise difficult issues", but as the facts of the *Beresford* case did not give rise to a trust, those issues did not arise.

42. After setting out the facts in para 89, Lord Walker said at para 90 that "[i]n short, there is no evidence of any formal appropriation of the land as recreational open space", and that there was no "material from which to infer an appropriation", adding that "appropriation as [an] open space would have been inconsistent with the site's perceived development potential". (And I agree with Sullivan LJ at para 34 in the Court of Appeal that Lord Walker was plainly not limiting the word "appropriate" to a case covered by section 122 of the Local Government Act 1972). He then went on to say in paras 90-91 that the fact that the recreational use by the public of the land was not "inimical to the city council's interests" did not prevent that use from being "as of right". He concluded at para 92 that he would allow the appeal for the reasons which he had given as well as those of Lord Bingham and Lord Rodger, although he added that the decision "may be thought to stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended".

43. As I see it, detailed consideration was given in none of the opinions in *Beresford* to any argument which could have been raised by the city council on specific statutory provisions. Lord Bingham and Lord Rodger dismissed the relevance of any statutory provision out of hand, not least, no doubt, because the city council did not rely on any of them. Lord Scott mentioned two provisions, section 21 of the 1981 Act and section 10 of the 1906 Act, but decided that neither could be considered because the city council disclaimed reliance on them. And Lord Walker ultimately simply relied on the fact that the city council (and their predecessors) had acquired the land under very wide powers for no specific purpose, had never subsequently appropriated the land for any specific purpose, and had envisaged an ultimate use of the land which was not for free public recreation.

Should Beresford *be followed, distinguished or disapproved on the second point?*

44. In the light of the decision on this second point in *Beresford*, there are, in principle, three possible courses open to us. The first, urged by Mr Edwards, is to

hold that the facts of this case are, in principle, indistinguishable from those in *Beresford*, and to follow the reasoning in *Beresford*, and allow this appeal. The second, which was the approach adopted by the Court of Appeal and is the primary case advanced by Ms Lieven, is that we should distinguish *Beresford*, and dismiss this appeal. The third possible course, which is the alternative case of Ms Lieven, and which was not open to the Court of Appeal, is that we should overrule this aspect of the decision in *Beresford.*

45. Even assuming *Beresford* was rightly decided on this point, I am wholly unpersuaded that it would undermine the conclusion I have provisionally reached at para 29 above. It is said that the views of Lord Walker at para 87 and Lord Scott at para 30, when they opined that land held as open space under section 10 of the 1906 Act is used by the public "by right", do not support NYCC's case because they were *obiter* and because such land is expressly stated by section 10 to be held "in trust to allow, and with a view to, the enjoyment thereof by the public as an open space". No doubt, those observations were *obiter*, but they are still worthy of respect, and once land is statutorily held by a council for the purposes of public recreation, it is hard to see why members of the public only have the right to use the land for that purpose if there is a super-added trust to that effect.

46. Be that as it may, I consider that the significant point for present purposes is that Lord Walker plainly thought that it was an important, indeed, it would appear, a crucial, factor in his reasoning that the land in *Beresford* had been acquired for no particular purpose and had never been appropriated for public recreational use. Not only was there no evidence of any such appropriation, but, he said at para 90, such an appropriation would have been inconsistent with the desire to develop the land. The facts of the present case are very different. The Field was, as I see it, "appropriated", in the sense of allocated or designated, as public recreational space, in that it had been acquired, and was subsequently maintained, as recreation grounds with the consent of the relevant Minister, in accordance with section 80(1) of the 1936 Act: public recreation was the intended use of the Field from the inception.

47. I am clearly of the view, therefore, that *Beresford* can, and ought to, be distinguished. In the present case, the land concerned was acquired and maintained by the local authority as public recreation grounds under a specific statutory power namely section 80(1) of the 1936 Act, now section 12(1) of the 1985 Act, and accordingly members of the public have used the land for recreation "by right". By contrast, in *Beresford*, at least as the House of Lords concluded, the land concerned was neither acquired nor appropriated for any specific use, and, in so far as there was an intended use it was not for free public access; therefore there was no basis for justifying the view that the use of the land by the public was "by right".

48. The more difficult question, to my mind, is whether we should go further and hold that *Beresford* was wrongly decided on this point. I was considerably attracted by the notion that, as it was unnecessary to do so in order to dispose of this appeal, we should not positively say that the reasoning in *Beresford* should no longer be relied on, but should merely express considerable concerns about the decision, and emphasise its very limited scope in the light of the unsatisfactory nature of the arguments which were and were not taken. However, having considered the matter further, and in particular having considered the points made in argument by Lady Hale and the points made by Lord Carnwath in paras 70-86 of his judgment, I am satisfied that this would be unnecessarily cautious. I am quite satisfied that we should grasp the nettle and say that the decision and reasoning in *Beresford* should no longer be relied on, rather than leaving the law in a state of uncertainty, and requiring money and time to be expended on yet further proceedings.

49. I consider that *Beresford* was wrongly decided for the reasons given by Lord Carnwath, and, while it would be wrong to repeat those reasons, it is right to express my reasoning in summary form, especially in view of my hesitation in giving the decision its *quietus*. It seems to me clear on the facts, which are helpfully summarised by Lord Carnwath in para 73, that the city council and its predecessors had lawfully allocated the land for the purpose of public recreation for an indefinite period, and that, in those circumstances, there was no basis upon which it could be said that the public use of the land was "as of right": it was "by right". The point made in para 24 above applies. I should add that, quite apart from this, I also share the mystification expressed about the reasoning in *Beresford* by Sullivan LJ in the Court of Appeal in this case in the passage quoted by Lord Carnwath in para 85 below.

Conclusion

50. For these reasons, which are very similar to those of Sullivan LJ in the Court of Appeal, I would dismiss this appeal.

LORD CARNWATH (with whom Lady Hale, Lord Reed and Lord Hughes agree)

51. I agree that, on the arguments presented to us, the appeal should be dismissed for the reasons given by Lord Neuberger. Those arguments have proceeded on the footing that in effect the sole issue is whether the use of the recreation ground by local inhabitants has been "as of right" or "by right", the latter expression being treated as equivalent to "by licence" (or "precario") in the classic tripartite formulation (nec vi, nec clam, nec precario) as endorsed by Lord Hoffmann in the

Sunningwell case. On that basis, I have no doubt that the use by the local inhabitants in this case was "by right" as Lord Neuberger has explained (para 20-29).

52. That would be sufficient to dispose of this appeal. However, since the underlying issue is of some general importance and as we are being asked to review the decision of the House in *Beresford*, I think it desirable also to look at the matter in a wider context. Before turning to the speeches in that case in more detail I shall make two more general points about the context in which the rights are here asserted.

Local rights

53. I start with an important, if obvious, point. The Commons Registration Act 1965 was concerned with town or village greens, not with public open space in general. Three categories were defined in section 22: "land [a] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years." The common feature was the link in each case with the inhabitants of a particular "locality". The mischief towards which the Act was principally directed was the uncertainty over the extent and nature of land subject to such rights. Category (c), as the only one which had continuing effect, is reproduced in amended form in the 2006 Act.

54. There was no suggestion in the Act itself, or any of the preceding reports or debates, of any intention to include within its ambit other forms of public open space, owned and managed by public authorities under statutes such as the Open Spaces Act 1906. (As explained by Lord Neuberger, para 5, even the apparently restrictive wording of the statute in the present case did not prevent its use by the public generally.)

55. The link with a locality was material not only to proof of qualifying user, but also to the rights resulting from registration. The 1965 Act itself gave no indication on that issue. However in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 it was established that the rights so created were available to "the relevant inhabitants" (para 69 per Lord Hoffmann). I take that to mean that in principle they were available to the inhabitants of the relevant locality ("the local inhabitants": per Lord Scott para 104-106), rather than to the public at large.

56. That case was decided by reference to events before the amendments made by the Countryside and Rights of Way Act 2000. It was unnecessary for the House

to decide whether it would make any difference if the registration was attributable to use by inhabitants of a "neighbourhood" under the amended definition, rather than of a locality. It may be that in practice, once land is registered under the Act, no attempt is (or can realistically be) made by owners or others to distinguish between different groups of users. However, it seems clear in principle that a local link of some kind remains an essential feature both of the use and of the resulting rights.

57. For present purposes, it is enough to emphasise that local recreational land, ancient or modern, within the scope of the 1965 Act was conceptually different from land held by public authorities for general recreational use. There was no indication then or since of any intention to include the latter within its ambit. That fact cannot itself govern the issue of statutory interpretation, but it justifies some caution before accepting an interpretation which significantly widens the scope of the legislation beyond what was intended.

The "as of right" test in context

58. The "as of right"/"by right" dichotomy is attractively simple. In many cases no doubt it will be right to equate it with the *Sunningwell* tripartite test, as indicated by judicial statements cited by Lord Neuberger (paras 15-16). However, in my view it is not always the whole story. Nor is the story necessarily the same story for all forms of prescriptive right.

59. This was a point made by Lord Scott in *Beresford*:

> "It is a natural inclination to assume that these expressions, 'claiming right thereto' (the 1832 Act), 'as of right' (the 1932 Act and the 1980 Act) and 'as of right' in the 1965 Act, all of which import the three characteristics, nec vi, nec clam, nec precario, ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous." (para 34)

60. On the same theme he commented on the differences between public rights of way on the one hand and town or village greens on the other:

> "Public rights of way are created by dedication, express or implied or deemed. Town or village greens on the other hand must owe their existence to one or other of the three origins specified in section 22(1) of the 1965 Act… Dedication by the landowner is not a means by which a town or village green, as defined, can be created. So acts of an apparently dedicatory character are likely to have a quite different effect in relation to an alleged public right of way than in relation to an alleged town or village green." (para 40)

While I share Lord Neuberger's reservations on other parts of Lord Scott's speech, his observations on this point appear to me both valid and important.

61. Lord Scott's analysis shows that the tripartite test cannot be applied in the abstract. It needs to be seen in the statutory and factual context of the particular case. It is not a distinct test, but rather a means to arrive at the appropriate inference to be drawn from the circumstances of the case as a whole. This includes consideration of what Lord Hope has called "the quality of the user", that is whether "the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right" (*R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, para 67). Where there is room for ambiguity, the user by the inhabitants must in my view be such as to make clear, not only that a public right is being asserted, but the nature of that right.

62. This is not a live issue in most contexts in which the tripartite test has to be applied, whether under this legislation or otherwise, because there is no room for ambiguity. It was not an issue in *Sunningwell* itself, where the land was in private ownership, and there was no question of an alternative public use. Twenty years use for recreation by residents, the majority of whom came from a single locality, was treated as an effective assertion of village green rights.

63. Similar considerations apply in highway cases. Thus, for example, in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SC 357 (Inner House); 1993 SC 44 (HL):

> "it was common ground that there was here a clearly delineated route, that it had been used for at least 20 years since at least May 1967, that it connected two public places and that the public use was sufficient in quantity throughout that period to constitute a public right of way." (Inner House p 362)

This was sufficient to meet the requirements of the relevant section 3(3) of the Prescription and Limitation (Scotland) Act 1973, by which a public right of way was established if it has been "possessed by the public for a continuous period of twenty years openly, peaceably and without judicial interruption…" Where members of the public have travelled regularly between two points along a defined route for twenty years, the natural and only reasonable inference was the assertion of a highway right.

64. The same cannot necessarily be said of recreational use of land in public ownership. Where land is owned by a public authority with power to dedicate it for public recreation, and is laid out as such, there may be no reason to attribute subsequent public use to the assertion of a distinct village green right.

65. The point can also be tested by reference to the "general proposition" (cited by Lord Neuberger, para 16) that, if a right is to be obtained by prescription, the persons claiming that right –

> "must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him."

It follows that, in cases of possible ambiguity, the conduct must bring home to the owner, not merely that "a right" is being asserted, but that it is a village green right. Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to "warn off" the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights.

66. This does not mean of course that land in public ownership can never be subject to acquisition of village green rights under the 2006 Act. That is demonstrated by the "Trap Grounds" case (*Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674). Although the land was in public ownership, it had not been laid out or identified in any way for public recreational use, and indeed was largely inaccessible ("… 25% of the surface area of the scrubland is reasonably accessible to the hardy walker": para 1, quoting the inspector's report). It was held that the facts justified the inference that the rights asserted were rights under the 1965 Act.

67. The differences between different forms of prescriptive right may also be relevant to the evaluation of the owner's conduct. As Lord Scott pointed out, most forms of prescription are based on the fiction of a notional grant, or (in the case of

highways) dedication, at or before the commencement of the relevant period of use. (The implications of this "powerful and troubling idea" in the law of easements, are discussed in the Law Commission report: *Making Land Work: Easements, Covenants, and Profits à Prendre* Law Com No 327 para 3.87.) That fiction starts from the assumption that the equivalent rights could have been created by voluntary act of the owner.

68. In the present context, by contrast, there is, as Lord Scott pointed out, no equivalent means at common law of creating a village green, whether by dedication or by other voluntary act of the owner. Nor was such a power created by the Commons Registration Act 1965. As noted above, village greens arising from statute or custom, the only two means of creation of such rights before the Act, were dealt with separately. The modern village green resulting from 20 years user was an entirely new statutory creation. The rights came into being only upon registration following the qualifying period of use. There was no notional grant at the beginning of the period. On the contrary the underlying assumption is that before registration there was no such right, real or notional. In this context the concept "as of right" is more than usually artificial: the asserted right not only did not exist but could not have existed. I will return to this point below when commenting on the approach of Lord Bingham and Lord Rodger in *Beresford* to the issue of "encouragement".

Beresford

69. Against that background I turn to consider the judgments of the House in *Beresford* itself.

70. For the most part I am content to adopt the comments of Lord Neuberger on the speeches in that case. However, I would go further. It is important to bear in mind that the proceedings were by way of judicial review of the decision of the county council, as registration authority, not to register the land as a village green. Subject to issues of law or of rationality, the factual issues were for the authority to resolve on the material before it. In my view, when the factual and legal background of the case is properly understood, it is apparent that there was no error of law in the authority's approach to the case, nor that of Smith J at first instance.

71. In that respect it is necessary to look beyond the speeches in the House, which do not give the full picture. Partial, but not wholly consistent, accounts appear in the speeches of Lord Scott (paras 17-19), Lord Rodger (para 53), and Lord Walker (para 89). Lord Scott and Lord Rodger focussed principally on the identification of the land in the 1973 New Town Plan as "parkland/open space/playfield", following which in about 1974 it was laid out and grassed over (using excavated soil from the development of the shopping centre), and public recreational use began. Lord

Walker by contrast did not mention the New Town Plan as such, noting only that the land was not acquired for any particular purpose, and that the corporation was "not under an obligation to appropriate it for any specific purpose" (para 89(a)). He attached more importance to the "ambitious" but unrealised plans for a sports complex, pending which, as he put it, "recreational use of the area by local inhabitants was tolerated (but not… enjoyed by any overt licence" (para 89(b)).

72. The fullest account of the factors leading to the authority's decision is in the judgment of Smith J at first instance ([2001] 1 WLR 1327). Having summarised in general terms the history of what became known as the "Sports Arena" site, she referred in more detail to the material before the authority. This took the form principally of a report from its Director of Administration having taken legal advice. (The authority do not seem to have thought it necessary to organise any form of public local inquiry, such as has been seen in other cases, including the present.)

73. The main points in the Director's report and the authority's reasoning based on it (paras 11-15) can be summarised as follows:

i) Over a number of years there had been discussion of a sports and recreation centre development, dating back to a "planning brief" of 1967.

ii) The Arena site was identified as "parkland/open space/major playing field" in the 1973 New Town Plan.

iii) The "most informative document in the archive" had been a handwritten draft report to the Corporation's Chief Officer's Committee, dated 1982, which showed that "at that time, the upgrading of the Arena was under consideration". It had referred to a 1977 board paper indicating that -

> "until a sports complex could be provided, the arena was to be used for `recreational sporting use and other activities on a town scale such as jazz band parades, displays and sporting events'."

In 1980 the Board had requested that the level of publicity for the Arena should be increased, and "some minor works of improvement were carried out in anticipation of increased usage".

iv) The 1982 draft report advised that complete reconstruction of the Arena would be required if it were to be developed as an athletic field and football pitch, and that the alternative would be to leave the arena "in its current little-used condition until such time as a sports hall facility is built".

v) In 1989 the site was transferred to the Commission for New Towns ("CNT"). It was retained by them, as having potential for commercial use, when Princess Anne Park was transferred to the Sunderland City Council in 1991. Documents compiled by that council in 1992 and 1994 described the land respectively as "an amenity open space", and as "'an unused track' which belonged to the CNT and whose future use was uncertain".

vi) In 1996, the land was transferred to the council subject to a covenant restricting any future development to a community-related purpose. In 1998, the council granted planning permission for the erection of a College of Further Education on a site including the Arena, with a view to sale to the City of Sunderland College. The application to register the land as a village green, at the instance of a group of local residents including Mrs Beresford, followed shortly afterwards.

vii) The Director advised the committee (in terms no doubt reflecting legal advice) that the determining issue, in accordance with *Sunningwell* was whether the user had been "as of right", and that it was not enough to defeat the claim that the use had been tolerated by the landowner. He added:

> "In `traditional' parks which are fenced and have opening hours, enjoyment by the public (inhabitants of the locality) will be by virtue of a licence during the hours of daylight. However, not all parks conform to this `traditional model' - the Princess Anne Park for example- and it would be bizarre if these were all town and village greens.
>
> This would suggest that if it is apparent from the circumstances that the land in question has been made available to the public, and that their use has not simply been tolerated but in effect encouraged, a licence should be implied (sic) from the circumstances…

> [In this case] everyone using the site would have been aware of the perimeter seating and that the grass was kept cut. It is difficult to conceive that anyone could have imagined that this was other than a recreational area provided for use by the public for recreation. Against this background, the `implied licence' argument is strong and it is considered that on this basis the enjoyment has not been `as of right'…."

viii) The committee agreed:

> "Members considered that there was evidence of an implied licence since the site is publicly owned land, specifically laid out as an arena with seating, which is adjacent to Princess Anne Park and which has been maintained by the Council and the Washington Development Corporation before it. Members agreed with the comment in the report that `it is difficult to conceive that anyone could have imagined that this was other than a recreational area, provided for use by the public for recreation'. The other information contained in section 2 of the report, whilst not in itself conclusive, supported the view that the Sports Arena was intended for public use."

74. Smith J at first instance confirmed that decision. Like the authority she attached importance to the fact of public ownership:

> "In my judgment, the fact that land is in public ownership is plainly a relevant matter when one is considering what conclusion a reasonable person would draw from the circumstances of user. It is well known that local authorities do, as part of their normal functions, provide facilities for the use of the public and maintain them also at public expense. It is not part of the normal function of a private landowner to provide facilities for the public on the land. Public ownership of the land is plainly a relevant consideration." ([2001] 1 WLR 1327, para 45)

I have set out this reasoning in some detail, because in my view the approach of the authority, and that of Smith J, were unimpeachable in common sense and in law.

75. Unfortunately, by the time the case had reached the House of Lords this simple approach had become obscured. As appears from Lord Scott's account (paras 20-23), the presentation of the arguments before the House, seems to have led to an artificial separation of the "implied licence" issue, from the issues raised by the public ownership of the land. He notes that in the Court of Appeal ([2002] QB 874) Dyson LJ, while upholding Smith J's reasoning in general, had expressed the view that public ownership "on its own ... was a factor of little weight" (para 30). Possibly in response to that indication, the parties in the House of Lords concentrated their arguments on the implied licence issue, and "Neither counsel dealt with the implications of the public ownership of the sports arena".

76. It was left to the House itself, after the conclusion of the hearing, to call for further argument on that aspect. Even at that stage counsel for the authority preferred to maintain the original implied licence argument as a distinct issue, without reference to public ownership. This seems to have been based on a concern that reliance on public ownership would have the improbable implication that such public land could never not be subject to modern village green rights (see the arguments as reported at [2004] 1 AC 889, 892D-E). As I have shown (by reference to the Trap Grounds case) that concern was misplaced. Further the public ownership issue seems to have been seen as one going, not so much to the quality of the user and the inferences to be drawn from it (as Smith J had held), but to the distinct question whether any of the relevant statutes had "conferred on the local residents and others a right to use the sports arena" (per Lord Rodger para 62).

77. Furthermore, none of the speeches looked in detail at the powers of the New Towns Act 1965 (or the replacement 1981 Act), under which the new towns authority was acting. I share Sullivan LJ's surprise (para 36) at the limited attention given to this aspect in the speeches in the House. I can only assume that this was because the very full material apparently provided to the House on this aspect concentrated on powers specifically dealing with open space (see paras 9, 24ff, 87), rather than other matters relevant to the authority's use of its land. Lord Scott (para 24) referred to the provisions of the 1981 Act (sections 21, 80) relating to "open space" as defined, noting "the breadth of the freedom" given to new town corporations in dealing with such land. However, in my view, there was no reason for resort to those specific provisions to justify or explain the use which the corporation made of the land.

78. The statutory powers of new town corporations under the 1965 Act, as compared with many other forms of public authority at the time, were indeed set very wide. Their purposes under section 3 were to secure the laying out and development of the new town "in accordance with proposals approved in that behalf under the following provisions of this Act", and their powers included "power ... generally to do anything necessary or expedient for the purposes of the new town or for purposes incidental thereto". Section 6 provided for the submission and approval

by the Minister of their proposals for the development of land within the area of the new town. By subsection 6(2) it was envisaged that planning permission for the development proposals so approved would be granted by special development order under the Town and Country Planning Act 1962.

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

80. It was immaterial that this use might have been seen as temporary pending implementation of the more ambitious proposals described in the 1982 draft report. It was a valid exercise of the corporation's powers to permit such temporary use, and the public's enjoyment was no less real and authorised. I can see no basis, with respect, for Lord Walker's observation that, as he put it, recreational use of the area by local inhabitants was merely "tolerated". It was contradicted by the Director's conclusion, accepted by the authority, that the use by the public had "not simply been tolerated but in effect encouraged" (para 24(vii) above).

81. Finally I come back to the relevance of the acts of "encouragement" by the authority, in the light of comments by Lord Bingham and Lord Rodger. In his concurring judgment, Lord Bingham rejected arguments that the encouragement of public use by mowing the land and laying out benches was inconsistent with the use "as of right". He noted that the 1965 Act had drawn heavily on principles relating to the acquisition of public or private rights of way, observing:

> "in neither of these instances could acts of encouragement by the servient owner be relied on to contend that the user by the dominant owner had not been as of right. Such conduct would indeed strengthen the hand of the dominant owner…" (para 7)

Similarly, Lord Rodger noted that the authority "may ... have encouraged these activities", but commented:

> "The mere fact that a landowner encourages an activity on his land does not indicate, however, that it takes place only by virtue of his revocable permission." (para 60)

82. However, the parallel is not direct. If the inference is to be of a notional public right during the period of user, it is easy to see why acts of encouragement may be seen as lending weight to that inference. But the same thinking cannot readily be applied in the context of the creation of a modern village green. There is no basis for inferring a prior public right, real or notional, and therefore no reason for the owner's acts of encouragement to be treated as lending force to such an inference. On the contrary, where they are acts of a public authority, they lend force to the alternative inference that they are done under other statutory powers.

83. For the same reason I cannot accept Lord Bingham's following comment. He continued:

> "Here the conduct is in any event equivocal: if the land were registered as a town or village green, so enabling the public to resort to it in exercise of a legal right and without the need for any licence, one would expect the council to mow the grass and provide some facilities for those so resorting, thus encouraging public use of this valuable local amenity. It is hard to see how the self-same conduct can be treated as indicating that the public had no legal right to use the land and did so only by virtue of the council's licence." (para 7)

84. I find this hard to follow. If land in the ownership of a public authority had been validly registered as a village green, it might well be a reasonable inference that acts of maintenance were attributable to that status. But that has no relevance to the position during a period of public use before registration, when there were no village green rights, actual or notional. The explanation for acts of maintenance by the authority during that period has to be found elsewhere. The reasonable inference was not that the public had no rights, but that the land had been committed to their use under other powers.

85. In conclusion I note what Sullivan LJ said about the decision in *Beresford* in the present case:

> "I confess that I find it difficult to understand why the statutory approval of the corporation's new town plan 1973 by the minister, which had the effect of granting planning permission for the development of the land as 'parkland/open space/playing field', when

> coupled with the subsequent laying out and grassing over of the land, was not sufficient to amount to an 'appropriation' of the land as recreational open space in the sense in which Lord Walker used that word." (para 36)

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

86. For these reasons, I would not only dismiss the present appeal, but I would hold that the decision and reasoning of the House of Lords in *Beresford* should no longer be relied on.