The Planning Inspectorate

Application Decision

Inquiry opened 14 June 2016

By Martin Elliott BSc FIPROW

An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 5 October 2016

Application Ref: COM 344R
Eastern Fields, Exeter

Registration Authority: Devon County Council

- The application, dated 1 September 2011, is made by Mr G Eaton and Miss S Edwards under Section 15(2) of the Commons Act 2006 ("the 2006 Act") to register land known as Eastern Fields, Exeter as a town or village green.

Decision

1. The application is approved in part. The land hatched red and the land coloured green within the application land as shown on the attached plan should be added to the register of town and village greens. This is with the exception of 'the compound' area located to the north east of the access onto Eastern Fields from Exhibition Way highlighted yellow and hatched on the second attached plan.

Preliminary Matters

2. I opened a public local inquiry at the Exeter Saracens Rugby Club on 14 June 2016. The inquiry sat for four consecutive days and was adjourned on Friday 17 June. I continued the inquiry on 28 and 29 July to hear the closing submissions of the parties. I carried out an unaccompanied site visit of the application land on the afternoon of 13 June and a subsequent accompanied site inspection on the morning of 17 June.

3. The application attracted two objections one from Exeter City Council and the other from Devon County Council. Only Exeter City Council made a case in opposition to the application, for convenience I shall refer to them as the objector. Devon County Council did not take any part in the proceedings although representatives of the Council as Commons Registration Authority were in attendance at the public inquiry and assisted in administrative matters.

4. An Inspector (the first Inspector) was appointed by the Secretary of State to determine the application by way of a public inquiry (the first inquiry) opened on 5 March 2013. The first Inspector refused the application and the decision was challenged by the applicants. On 30 July 2015 the decision was quashed in the High Court[1]. The purpose of this inquiry (the second inquiry) is to re-determine the application.

[1] R(oao Goodman) v Secretary of State for Environment Food and Rural Affairs [2015] EWHC 2576 (Admin) (Goodman)

5. The application was initially referred to the Planning Inspectorate in accordance with Regulation 27 of the Commons Registration (England) Regulations 2008 as Devon County Council, as well as being the Commons Registration Authority has an interest in the development of the application land.

6. The application was made under paragraph 15(3) but at the first inquiry the application was amended to be made under paragraph 15(2).

7. Following the close of the Inquiry the objector made further submissions in relation to the issue of the competency of the objector to grant a licence for public recreation. These, and subsequent submissions were circulated to the parties. I consider this matter further at paragraph 81 below.

The application land

8. The application land is an area of about 22 acres (8.9 hectares). To the north the land is bounded by Beacon Heath, to the south by the Exeter to Waterloo railway line, to the north east by Pin Brook and by the Exeter Arena to the south west. The application land is owned by Exeter City Council most of which was acquired in 1951 apart form a small area in the south eastern corner, formerly a railway sidings, which was acquired in 1990. Only part of the former railway sidings falls within the application land, the boundary being Pin Brook. The application land, apart from the railway sidings land, was acquired for recreational purposes although in 1989 the southern part of the land amounting to 6.6 acres (2.7 hectares) was appropriated for industrial development. The railway sidings were acquired for highway purposes. The land appropriated for industrial development and the land occupied by the former railway sidings is identified (hatched red and coloured solid green respectively) on the plan approved between the objector and applicant (inquiry document 6 replacing page 21 of tab 2 of OBJ/1).

The Statutory Requirements

9. Paragraph 15(1) of the 2006 Act provides that any person may apply to the relevant commons registration authority to register land as a town or village green where subsection (2) (3) or (4) applies. As noted at paragraph 6 the application is made under subsection (2).

10. Subsection (2) 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.

11. The standard of proof to be applied to the evidence is the normal civil test, on the balance of probabilities.

Main Issue

12. As noted above the decision of the first Inspector was quashed in the High Court. The first Inspector concluded that the use of the application land was 'by right' and this conclusion was the basis of ground 1 of the challenge to the High Court. However, following the decision in the High Court in *Barkas v North Yorkshire County Council [2014] UKSC 31* (*Barkas*) the focus of the challenge was in relation to the land appropriated for development and the

former railway sidings falling within the application site. Dove J concluded that this land had not been held as public open space.

13. The objector does not make any case that the application land has not been used by a significant number of the inhabitants of the locality (Pinhoe electoral ward) or that they have not indulged in lawful sports and pastimes for a period of at least 20 years and continued to do so at the time of the application. The relevant period in this case being August 1991 to August 2011. Having considered the evidence before me, which includes the evidence submitted to the first inquiry, I am satisfied that the application land, subject to my observations at paragraph 16 below, has been so used.

14. The objector contends that the only issue for decision is whether use was 'as of right' or 'by right'. It is asserted by the objector that use was 'by right' on the basis that use was by virtue of an implied licence and was therefore non-qualifying. In respect of this the objector relies on various licensed activities taking place on the application land.

15. Bearing in mind the above, the main issue is whether the application land appropriated for industrial purposes and the land forming part of the railway sidings was used 'by right' or 'as of right'. Use of the remainder of the application land, which was held for recreational purposes, is by right and the application in respect of this land should be refused. The applicant did not argue that the remainder of the application land should be registered as a town or village green.

16. The applicant concedes that use of a rectangular area of hard standing just to the north east of the railway bridge (referred to at the first inquiry as 'the compound') had been interrupted and not subject to use throughout the relevant 20 year period of 1991 to 2011. As such, if I am minded to approve the application, I will sever this land from the application. However, the objector argues that the use and history of the compound is relevant in respect of whether use of the land was by right. I consider this matter further below.

Reasons

Background issues

17. The objector raised concerns that the applicant's witnesses may have been coached in their written evidence and may have not come to the matter with an open mind. The applicant also made the point that the evidence provided by the objector was informed on the process and met equal criticism. In regard to the concerns of the objector I note that the statement of Miss Edwards indicates that when she gathered statements from the various witnesses she read through a list of events supplied by the objector and, to the best of her legal knowledge, described the legal arguments surrounding the issue of implied licence.

18. Whilst I can appreciate the concerns of the objector, and the view of the applicant, there is nothing to indicate that witnesses, both in support and in opposition to the application, did not give an honest recollection of events or that their evidence was in any way coached such as to influence their evidence. It is accepted that those giving evidence in support of the application feel strongly about any development of the land but again there is nothing to suggest that their evidence, which was subject to cross examination by Counsel, was not a true account of events.

19. In considering the evidence I have given regard to the fact that the objector's lead witnesses to the first inquiry are no longer able to give evidence as they are no longer with the authority. Whilst the objector's evidence was limited to two witnesses they vouched for the evidence of the previous witnesses. Much of that evidence was based on factual documents. It is also accepted that the focus of the inquiry is a twenty year period which, at the time of the second inquiry, ended nearly five years ago. I accept the difficulties witnesses may have in recalling events which have occurred some time ago. Nevertheless, whilst some witnesses were uncertain as to the exact dates of events, there is nothing to suggest that their recollections were not given to the best of their knowledge such that their evidence cannot be relied upon.

20. I am aware that the application is driven by a desire to protect an area of 'open space' from development. I also note the aspirations and the need to use the application land for development purposes. However both these factors are not considerations which I can take into account in reaching my decision.

Licenced events

21. The objector contends that a number of licenced events took place on the application land without regard to the position of the local inhabitants. It is argued that when those events are considered in the round they demonstrate overwhelmingly the use of the land by the landowner whenever it wished. The use would have clearly impacted in a negative way on the use of the whole of the application land by local inhabitants for informal recreation. It is asserted that this was a case of an owner doing something which showed to a reasonable onlooker that a right to exclude was being exercised. This gave rise to an implied permission over the whole of the application land. The conduct of the owner was inimical with user as of right.

22. I firstly consider the evidence relating to the various activities which took place on the application land which, the objector contends, infers an implied permission to use the land.

Circuses

23. Eleven circuses are identified as taking place during the relevant twenty year period. These included Circus Starr, the Netherlands National Circus, Billy Smarts Circus and the Moscow State Circus. All circuses would include a big top, vehicles and other paraphernalia associated with the circus. The big top tent used by Circus Starr was identified as having a floor area of 840m² and a construction extending to some 28m x 30m. The tent used by the Netherlands National Circus and Billy Smart's Circus was 36 metres in diameter with the entire set up for the circus being 80m x 60m.

24. It is contended by the objector that the circuses would have been present for a period of 40 days; this included two days for any circus to be set up and taken down. Whilst I broadly accept the number of days on which circuses were present on the field it appears from the evidence that the Circus Starr events in 2004, 2006 and 2007 only lasted 1 day not the 3 days identified in the chronology of events set out by the objector. Other Circus Starr events appear to have been three days.

25. A number of witnesses for the applicant recalled the circuses. It was accepted that it would not have been possible to walk through the big top or any of the vehicles and paraphernalia associated with the circus. However,

notwithstanding the fact that vehicles may have been placed in an 'L' shape around the east and north sides of the circus site, access was available through the area occupied by the circus. Some did not walk through the area but saw others using the land. Mr A Hampton and Mr Beales accepted that the circus disrupted normal activity but said that it was still possible to walk through the area occupied by the circus. Mr Hill acknowledged that the circus was a minor accepted inconvenience. There is nothing to indicate that use of the area occupied by the circus was challenged when the circus was in operation.

Funfairs

26. The David Rowlands Funfair visited Eastern Fields in 2006, 2007 and 2011 and occupied part of the application land for a total period of 47 days. Additional evidence from Mr Faulkner is that David Rowlands Funfair did not visit the site in 2010 and his recollections as to there being a fair on site in 2010 was incorrect; the date should be 2011. Mr Carson agreed with the previous evidence of Mr Moor (to the first inquiry) that the funfair in 2011 extended to around 2 acres. Mr Carson thought that this was just short of a third of the land appropriated to industrial development. Evidence from the applicant is that the fair extended northwards to the dog 'poo bin', this was measured as 25 metres from the area of tree planting. This is consistent with the aerial photographs of 2013 and, although outside the relevant period, there is nothing to suggest that the layout of the funfair varied significantly. To the eastern side Mr Carson accepted that the funfair extended over the southern end of footpath 54 which runs from Exhibition Way to Beacon Heath.

27. Looking at the evidence as a whole the funfair would have occupied the south western corner of the land and at times this would have extended to the area adjacent to the railway bridge. From 2011 funfairs, including the one in February and March of that year, were fenced around their perimeter with Heras fencing. The fencing of the site was industry led and not a requirement of Exeter City Council as landowner. It is suggested by the objector that before 2011 there would be partial exclusion from the funfair site and full exclusion thereafter.

28. The evidence from those who spoke in support of the application is that prior to the fencing in 2011 it was possible to walk through the area occupied by the funfair. There was nothing to prevent access other than the rides and associated paraphernalia. No one was prevented from using the site. However, the fair did disrupt normal activities to some extent. Mr Eaton said that access was hindered no more than by a tree or a puddle although in my view there was likely to be more disruption than these features. Mr J Hampton said that there was nothing preventing people from walking through the caravans associated with the fair (at the inquiry Mr Hampton marked on an aerial photograph the route which he used between the caravans (inquiry document 4)). The objector suggested that this was most unlikely when there would have been open grass to walk on. I accept that it is more likely that people would use a more open grassed area in preference to walking between caravans. However, Mr Hampton only walked through the caravans on a couple of occasions. His evidence indicates that it was possible to walk through the caravans and I attach no more weight to his evidence than this. Mr Beales sometimes walked through the fairground area but he would respect the privacy of the fairground workers. Miss Edwards considered the funfair as part

of a cultural tradition. She never felt the need to question or complain about it being held on Eastern Fields.

29. As noted above, from 2011 the fairground area was fenced. Mrs Mitchell thought this was to prevent people from gaining access because you could not go on a ride without a wrist band. It seems that the fair in 2011 was managed more intensively with a need to pass through an entrance gate. Those wanting to use the rides had to purchase a wristband which gave access to most of the rides. It was nevertheless possible to enter the site without a wristband; Mr J Hampton explained that supervising adults did not need a wristband although his evidence on this was not consistent as he also said that you would be challenged if you attempted to enter the funfair without a wristband. Mr Hampton did ask at the gate if it was alright to go into the funfair just to buy some candyfloss; he did this out of politeness. Mrs Mitchell said that adults could go into the funfair without paying only if they did not want to use the rides. Mr Carson, for the objector, recalled visiting the funfair in 2011 with his children when he had to pay at the gate, he did not recall wristbands. Although Mr Carson did not recall wristbands this is contrary to the evidence given by a number of the applicant's witnesses. The fact that he doesn't recall the issue of wristbands does not mean that he did not receive wristbands on payment. The evidence suggests that if you wished to use any of the rides it would be necessary to purchase a wristband but there was nothing to prevent access if you were a supervising adult or did not want to use the rides.

30. As regards the fencing, this prevented access through the fairground site although Miss Edwards suggested that there were gaps in the fence which were closed when the fair was operating. When the fair was operating you had to gain access through the main entrance. However, Mr Hill suggested that you could access through the gaps but that you wouldn't be able to go on any of the rides because you did not have a wristband. Again the fair did disrupt normal activities but people accepted the presence of the fair and just walked another way.

Cross Country running events

31. In the relevant period the land was used for eight cross country running events including six Devon Cross Country Championships. The event in 2008 had eight races with 40 runners in each event and took place between 9am and 2pm. Numbers expected were between 300 and 400. Race plans for 2010 and 2012 show the layout of the course and there is nothing to indicate that the layout of the course for events during the relevant period differed significantly. The course in effect crossed all of the application land. No details have been provided by the objector as to the scale and extent of the other two events held in December but the results sheet for the event in December 2005 indicates in excess of 130 entrants.

32. Miss Cook competed on Eastern Fields as part of the Exeter Cross County Westward League which took place on the first Sunday in December. She could not provide any information on the school's cross country event as she had not attended these events. She advised that tape was used to mark the route although only to prevent competitors taking a short cut, tape was also used on trees so as to mark the route. Her evidence is that the public continued to use the field as normal although people avoided the course when the event was on. She did not recall minibuses on the hard standing area at the southwest corner of the application land but did recall the area being used

by the St John's Ambulance Service, parking for the event was in the Arena car park.

33. Other witnesses for the applicant indicated that the cross country running events did not prevent access over the application land although Mr Beales would not go on the field when events were taking place. Some put their dogs on a lead because their dogs were too friendly. Mr Wilkes said that people would go and watch the racing. There were some recollections as to the parking of vehicles on the land during events but the majority of any parking was on the Arena car park.

Tree planting

34. In 2006/07 the eastern side of Eastern Fields was planted with trees. A further area was planted on the western side in 2007/08. Witnesses for the applicant said that the trees did not restrict access to the land except for where a tree had been planted; paths developed through the tree planting areas. Mr A Hampton was advised by the person planting the trees that their purpose was to make a wildlife haven and so that the Council did not have to cut the grass. Some considered that the tree planting had enhanced the area.

Other events

35. The objector contended that other events took place over 5 days on the lower part of Eastern fields. In 2003 an 'It's a knock-out' event for cadets took place. The nature of the event is not clear although correspondence provided by the objector indicates that the event took place on 21 June 2003 with cadets camping overnight, access being required from Beacon Heath and Exhibition Way. In 2004 Eastern Fields were used as an overflow car park for a British Heart Foundation cycle event. The extent of that use is not known. In July 2011 the Meteorological Office held a sports day at Eastern Fields. This was a 5000m run effectively around the southern, eastern and northern sides of the perimeter of the field and along the north-south path. The objector identified a further two days for a Korfball tournament although Mr Faulkner thought that this took place elsewhere. Mr Eaton said that this activity was held on a basketball court. The objector no longer relies on this event. These additional events therefore only occurred on 3 days and not the 5 as asserted.

Use of hard standing area

36. To the south west corner of the application land is a hard standing area. This has been used for the temporary parking of trailers and cars. Between 1 October 1991 and 15 September 1992 the land was leased by Express Dairies for the parking of vehicle trailers. An aerial photograph of 7 July 1992 shows the land being used for trailer parking. On 7 September 1993 the land was used for the parking of approximately 100 cars belonging to staff from J Sainsbury on the day of the opening of a new store in Pinhoe. T J Brent Limited leased the hard standing from 13 March 1995 for a period of 6 months (less one day) for the storage of materials associated with the company's activities.

37. The statements submitted by the applicant do not recall the hard standing being used for the parking of trailers, cars or storage. Many referred to mounds of earth in the area which were used by children on BMX bikes. However, in evidence Mr Beales said he was not so sure that he had seen vehicles on the hard standing. He did remember trailers on the land although

not on a regular basis. Mr A Hampton recalled seeing trailers on the hard standing overnight but this did not interfere in his use of the main field. Mrs Mitchell could not recall trailers on the hard standing but in re-examination said that she remembered something but not how often. Mr Eaton accepted that vehicles would park on the hard standing. He said that when vehicles were brought for servicing at Harry Moore on Exhibition Way they would be parked there before servicing.

Compound

38. The compound is an area of land (1350 m² (0.135 hectares)) to the north east of the access onto Eastern Fields from the railway bridge leading from Exhibition Way. From 2 April 1991 to 1 September 1991 a lease provided for Express Foods Group (International) Ltd to use the compound as a temporary trailer park. In December 1991 Grand Metropolitan plc sold its dairy business to Northern Foods plc and on 6 March 1992 Exeter City Council gave notice to Express Foods Group (International) Ltd to vacate the land by 17 March 1992. A new licence to use the land came into effect on 18 March 1992 which expired on 20 June 1992; this was extended to 15 September 1992.

39. On 8 September 1992 Northern Foods plc entered into a three year lease ending on 8 September 1995; the lease prohibited use of the land for any other purpose than a trailer park. On 27 October 1992 Exeter City Council are informed of a notice which had been affixed to the barrier on the railway bridge stating:

'*Express Dairy*

Anyone entering the trailer park without permission do so entirely at their own risk. Any unauthorised entry shall be treated by the company as trespass and the company accepts no responsibility for damage to the trespassers property, or for any injuries sustained wholly as a result of the trespassers own negligence.'

40. Despite some initial resistance to the request of Express Dairy, Exeter City Council subsequently approved the erection of a fence. Correspondence from Express Dairy indicates that the notice would be removed when the fence was erected. The fence was confirmed as being in place on 10 May 1993. The lease was terminated on 31 July 1995 although having regard to the licence for T J Brent Ltd (paragraph 41 below) it would appear that Express Dairy may have vacated the compound by March 1995. Following a site meeting on 2 June 1995 relating to the termination of the lease it was agreed that the fencing should remain in situ.

41. From 13 March 1995 to 10 September 1997 the compound was occupied under licence by T J Brent Ltd for the storage of materials, containers and machinery.

42. There is no evidence of any further tenancies until July 2001 when Interframe Ltd occupied the land. Interframe Ltd had been granted a temporary planning permission allowing the siting of 6 containers. Interframe Ltd vacated the site at the end of March 2002.

43. Overall the evidence indicates licenced occupation of the compound from April 1992 to September 1997. There was a further nine months of occupation between July 2001 and March 2002. Although a fence was erected in May 1993 it is apparent that the fence eventually became dilapidated. The evidence

as to when the fencing became dilapidated is unclear. Mr J Hampton thought that in 2005 there was a hole big enough in the fence to get through. Mr A Hampton thought that the fence was damaged when used by T J Brent Ltd and Interframe Ltd had to use storage containers because the fence was no longer secure. Mrs Mitchell also thought that the fencing was not intact when the containers were present but that the area was still out of bounds. Mr Eaton thought that the fence was in a dilapidated state when the compound was occupied by Interframe Ltd and that people did access the site to get old frames.

44. Looking at the evidence before me it suggests that by the time the compound was occupied by Interframe Ltd in 2001 the fence had fallen into disrepair. However, gaps may have appeared in the fence during the occupation by T J Brent Ltd between 1995 and 1997. The evidence of Mr Faulkner is that the remnants of the fencing were removed when the footpath/cycle path from Chancel Lane to Exeter Arena was constructed; this was around 2008/09.

45. Many of the applicant's witnesses recalled the compound although exact recollections varied. A number referred to the fencing, and it becoming dilapidated, and the existence of tree trunks being left in the area. Mr Beales recalled dairy lorries in the compound and Mr Eaton recalled Express Dairy and T J Brent Ltd using the compound. The area was not used when securely fenced but some did go into the area once the fence allowed, this does not appear to be a regular occurrence.

Implied licence

46. The question of an implied licence finds its root in *R (Beresford) v Sunderland City Council [2004] 1 AC 889* (*Beresford*). Lord Walker said (at paragraph 83) *'In the Court of appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct by the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends on the landowner's permission. But I cannot agree that there was any evidence of overt acts (on the part of the City Council or its predecessors) justifying the conclusion of an implied licence in this case.'* In *Beresford* it was ruled that the mowing of grass and the provision of seating could not, without more, justify the inference of an implied licence.

47. It was held by Lord Rodger (at paragraph 59) that the grant of a licence '*must have comprised a positive act by the owners, as opposed to mere acquiescence in the use being made of the land. Prudent owners will often indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only. But I see no reason in principle why, in an appropriate case, the implied licence of such a revocable licence or permission could not be established by inference from the relevant circumstances.'*

48. Lord Walker said (at paragraph 75) that '*An entry charge of this sort can aptly be described as carrying with it an implied licence. The entrant who pays and the man on the gate who takes his money both know what the position is without the latter having to speak any words of permission (although he may*

qualify the permission by saying that no dogs, or bicycles, or radios are allowed). Similarly (especially in a small village community where people know their neighbours' habits) permission to enter land may be given by a nod or a wave, or by leaving open a gate or even a front door. All these acts could be described as amounting to implied consent, though I would prefer (at the risk of pedantry) to describe them as the expression of consent by non-verbal means. In each instance there is a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass.'

49. Earlier at paragraph 5 Lord Bingham said that '*A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use.'*

50. In *R (Barkas) v North Yorkshire County Council [2015] AC 195* (*Barkas*) Neuberger PSC approved the statement of law in relation to the acquisition of easements by prescription in Gale on Easements[2] that '*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 use 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 owners 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.'*

51. The objector refers to the case of *R(Newhaven Port & Properties Ltd) v East Sussex County Council [2015] UKSC 7* (*Newhaven*) at paragraph 68 '*That is certainly the normal rule where one is concerned with a private land-owner (subject to the point discussed in paras 41-43 above, namely where it is possible or appropriate to infer a consent or licence from the surrounding circumstances, even though there is no communication of a consent, a point which may well require reconsideration in the light of the cases referred to in para 45 above). Support for such a proposition can be found in R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28, [2008] AC 221,* paras 32, 56, 68, 74 and 81. *The basis of this principle is explained in a number of cases including, Sunningwell, R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] UKSC 11, [2010] 2 AC 70, and, most recently, Barkas, where, at para 21, Lord Neuberger quoted from Lord Hoffmann's opinion in Sunningwell that "whether user was 'as of right' should be judged by 'how the matter would have appeared to the owner of the land', adding that that question should be assessed objectively*.' And at 69 '*However, as the decision in Barkas demonstrates, it is not always necessary for the landowner to show that members of the public have to have had it drawn to their attention that their use of the land concerned was permitted in order for their use to be treated as*

[2] 19th Edition (2012) paragraph 4-115

being "by right" rather than "as of right". In Barkas, land had been acquired and in part developed by a local authority for housing purposes under a statute which permitted any undeveloped part of the land so acquired to be used as "recreation grounds" if appropriate ministerial consent was obtained, which it was. The undeveloped part of the land was then used for recreation by members of the public, to whom the statutory purpose was not communicated. Despite the absence of any communication of a licence, it was held that local inhabitants were using that undeveloped part of the land "by right", and not "as of right".

52. It should be noted that in *Barkas* and *Newhaven* (as supported in *Lancashire County Council v Secretary of State for Environment Food and Rural Affairs and Janine Bebbington [2016] EWHC 1238 (Admin) (Bebbington))* it was considered that a publicly based licence did not have to be communicated. However, in respect of Eastern Fields the land appropriated for industrial use and the railway sidings land is not so held. The issue is whether licence to use the land can be inferred by the actions of the landowner.

53. As regards *Sunningwell*[3] it was held that "as of right" did not require subjective belief in the existence of any right. As of right is use *nec vi, nec clam and nec precario* (without force, secrecy or permission). In respect of *Godmanchester*[4]*,* a case considering section 31(1) of the Highways Act 1980, as outlined in paragraph 74, the landowner's intention had to be objectively established as to whether a reasonable user would have understood that the landowner intended to disabuse the user of the notion that the way was a public highway. The objector refers to *Bebbington* at paragraph 93 that the question as to whether an owner had done enough to convey to a reasonable user is a matter '*for the inspector's rational conclusion'*; I note this was an observation of Tim Buley, Counsel for the Secretary of State.

54. The applicant argues that paragraph 75 of *Beresford* makes it clear that '*overt acts*' must be '*intended*' to communicate that use was with the landowner's permission. This was, in the applicant's view, endorsed in *London Tara Hotel Ltd v Kensington Close Hotel Ltd [2011] EWCA Civ 1356* at paragraph 86 by repeating paragraph 75 from *Beresford*.

55. Having regard to the above, I take the view that although *Beresford* refers to an intention, the issue to be considered is whether a landowner by their positive actions conveys to a reasonable user that their use of the land was by permission. Whilst at paragraph 75 of *Beresford* reference is made to an 'intention', from my reading of the paragraph, it appears that this is in the context of the examples cited. I do not think it supports a general proposition that the actions of the landowner should have been intended to confer permission to use the land.

56. I note the representations of the objector in relation to give and take by reference to *Oxfordshire County Council v Oxford City Council and another [2006] 2 AC 674* and *R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and another (Respondents) [2010] UKSC 11* (*Redcar*) in the context of post registration rights. In *Redcar* Lord Hope states that where two uses co-exist then public use may well justify registration but that where the uses cannot sensibly co-exist the position will be otherwise.

[3] R v Oxfordshire County Council, ex parte Sunningwell [2000] 1 AC 335
[4] R (Godmanchester Town Council) v Secretary of State for Environment, Food and Rural affairs [2008] 1 AC 221

However, *Redcar* does not address the issue of an implied licence. Nevertheless, as pointed out by the applicant, the concept of deference as considered in *Redcar* remains good with the interplay between the use of the land for lawful sports and pastimes and the activities of the landowner being fact sensitive.

Mann v Somerset County Council EWHC B14 (Admin) (*Mann*)

57. The objector contends that the licenced activities, '*Mann* type exclusions', identified at paragraphs 23 to 45 are sufficient to demonstrate an implied licence to use the land. The land in *Mann* was 1.2 hectares (2.96 acres) and was used on occasions to hold ticketed beer festivals in a large marquee, the land was also used for the occasional funfair. The issue in *Mann* was whether the conduct of the landowner was sufficient to establish the grant of an implied licence or permission to use the land.

58. In *Mann* the exclusion only affected part of the land, however, the Judge states at paragraph 72 '*In the absence of clear reason to suppose otherwise an act by the owner relating to part of the land, as occurred in this case, may be taken as referable to the whole of the land…*'

59. *Mann* concerned an owner who evidently maintained a commercial interest in the land. The judge noted at paragraph 73 that the land was in private ownership, a fact which must have been known to the local inhabitants. The use of the land by the owner could not be regarded as insignificant and involved an act of exclusion. The owner acted without regard to the local inhabitant's views in a way that the local inhabitants might reasonably have appreciated that they had no right to the land. It was held by HH Judge Owen QC that the land was not capable of registration and the decision not to register the land was upheld.

60. The applicant contends that a distinction must be applied between that of publicly and privately owned land. In *Goodman* Dove J, having regard to *Mann*, made the point that the first inspector had failed to take into account the fact that the land at Eastern Fields was in public ownership as distinct from the private ownership which bore heavily in *Mann*. Further, Dove J said that, in the context of events on Eastern Fields, '*the nature and character of the events were further important and distinct material considerations. Those events – although charged for – were at least arguably not inconsistent with a public entitlement to use the land. This is in sharp contrast with the commercial uses of the land, consistent with the trading of the public house in Mann*'. Dove J took the view that these were both important circumstances bearing on whether the owner, Exeter City Council, had clearly signified, by allowing occasional activity, that at all other times use was undertaken by licence.

61. The objector is unclear as to the licenced activities ('*Mann* evidence'), before Dove J in *Goodman*. Dove J refers to '*eleven visits of the circus and three visits of the funfair – two events in twenty years*'. The applicant stated that the schedule of activities was included in the Judicial Review bundle. Whilst it is not clear what *Mann* evidence was before Dove J he is clearly alive to licenced activities taking place on the land. Dove J pointed to two relevant considerations, namely that Eastern Fields is in public ownership and that the fairs and circuses were not inconsistent with the public entitlement to use the land.

62. I note the applicant's reference to paragraph 74 in *Barkas* where Lord Carnwath endorses the view in *Beresford* that the fact that land is in public ownership is a relevant matter. However, that was addressing the issue of implied licence on the basis of the management of the land by the local authority. I do not consider that this paragraph supports a view that the fact that the land is in public ownership is a relevant consideration in determining an implied licence.

63. In my view, having regard to *Goodman,* the fact that Eastern Fields is in public ownership is a material consideration in determining whether use of the land was by implied licence. The public ownership is in contrast to the land in *Mann* which was in private ownership and used for commercial activities consistent with the running of a public house. A further consideration in respect of the implied licence issue is whether the licenced activities were inconsistent with a public entitlement to use the land. I don't accept the point made by the objector that the second point raised by Dove J (see paragraph 60 above) is fatal to the case by reference to *Barkas*. Dove J was clear that the land appropriated for industrial development was not held as public open space for recreational purposes.

64. As stated above, in *Mann* it was determined that the act of exclusion from part of the land was referable to the whole of the land. However, in *Goodman* Dove J recognised the fact sensitive nature of the evaluation required. In *Mann* the land was privately owned and there was no encouragement to the local inhabitants by the owner to use the land, or any suggestion to reinforce an assertion that use was as of right. As noted previously Dove J points out that Eastern Fields was in public ownership and that the licenced activities were not inconsistent with a public entitlement to use the land and that this was in sharp contrast to the commercial activities in *Mann.* Both these elements were considered important by Dove J when considering an implied licence. Although *Mann* refers to the exclusion of part of the land affecting the whole of the land I take the view that whether any exclusion is referable to the whole of the land depends on the circumstances of each case.

65. In respect of the application land it is significant that, apart from the former railway sidings land, it was acquired by Exeter City Council in 1951 for recreational and playing field purposes. In 1989 the southern third of the land was appropriated for industrial development. However, Eastern Fields continued to be managed for public recreation as one parcel of land and there is no evidence of any changes to the land following the appropriation to industrial development. Any exclusion arising from the various licenced activities should be seen in this context. I do not consider that any exclusion from the land in consequence of the licenced activities can be seen as referable to the whole of the land.

Consideration of implied licence

66. Having regard to paragraphs 46 to 65 above, for the use of the land to be in consequence of an implied licence the landowner must, by overt conduct, demonstrate to a reasonable user that use of the land depends on the landowner's permission. That overt conduct should be understood as permission to do something which would otherwise be an act of trespass.

67. Whilst the only part of the application land now susceptible to registration is the land appropriated for industrial development and the former railway sidings

the consideration of the evidence should relate to the whole of the application land. Noting that the northern part of the application land is not susceptible to registration, Eastern Fields is held under a single title and forms one parcel of land. Some of the events relied upon by the objector took place over the whole of the application land, except for the former railway sidings land.

68. I note the point made by the applicant that it is wrong to consider that the act of giving someone a licence to hold organised events implies a licence for informal recreation. I accept that the granting of a licence to hold an organised event by itself does not imply a licence to use the land for lawful sports and pastimes. It is also the case that the inhabitants were not charged for access to the land, any charges were for the attendance at the event such as the circus performances and the use of fair rides. Charges to the public were not for the use of the land for lawful sports and pastimes. However, the issue is whether the activities licenced by the landowner had an impact on the members of the public such as to demonstrate that access to the land was dependent on the permission of the landowner.

69. As noted above, the objector relies, amongst other events, on the visits of the circuses and the funfair. The evidence before me is that whilst the land occupied by the big top, the funfair rides and the associated paraphernalia could not be accessed by the inhabitants the land covered by the events could still be accessed. It was accepted that this was of some inconvenience and some went elsewhere.

70. From 2011 the funfair was fenced; this was in response to industry led requirements and not a requirement of Exeter City Council; the fencing was therefore not an action taken by the landowner but by the fairground owner. Clearly the fencing of the site would have restricted access although there is limited evidence that access could be gained through gaps in the fence, particularly when the fair rides were not operation. However, access to the funfair was still possible and during opening hours, whilst those who wanted to use the rides had to purchase a wristband, others, including supervising adults, could enter the fairground site. I am aware that Mr J Hampton did ask at the entrance if he could go into the fairground to purchase candyfloss; he did this out of politeness.

71. Overall whilst the circuses and funfairs had some effect on the use of the land by the inhabitants that effect was limited. People accepted the presence of the circuses and the funfairs and although some continued to use the land occupied by the circuses and funfairs others went elsewhere on the land. Miss Edwards thought that the funfair was part of the cultural tradition. Evidence suggests that fairs have been held at Eastern Fields since 1978 with other fairs being held at Venny Bridge. The appearance of a fair at Eastern Fields would therefore not be unexpected. Given that the land was effectively managed as public open space, with no changes following appropriation to industrial use, I do not consider that these events were inconsistent with the use of the land for recreation such as to make it apparent to a reasonable user that use was with implied permission.

72. As regards the cross country running events, whilst some inhabitants avoided the application land when such events took place, others went to watch. Access was restricted when any race was taking place but access before and after the races was not restricted. In my view events such as these are not

inconsistent with the recreational use of the land such as to demonstrate an implied permission.

73. Tree planting took place on the land on two occasions. The tree planting did not restrict access, other than where a tree had been planted. The evidence suggests that the tree planting was for the management of the land and was seen as enhancing the facilities being provided by the Council. The tree planting was entirely consistent with the management of the land as open space and in my view cannot infer permission to access the land.

74. The objector relies on three other events, the cadets 'It's a Knockout', the Meteorological Office sports day which was limited to a 5000 metre race and use as an overspill car park. There is nothing to indicate that these events limited the access to the application land to any extent. Consequently I do not consider that these events would have demonstrated an implied permission to use the land.

75. As regards the use of the south west corner of the application land for the parking of trailers and cars and for storage, there is little evidence that this had any impact on the use of the land. In any event the use of the land as a car park was limited to one day and was in connection with the opening of a new supermarket. The public were certainly not excluded from the land although it must be accepted that the public would not be able to recreate on the land occupied by trailers, cars or stored materials.

76. I note the applicant's reference to the licence to T J Brent Ltd for the use of the land for storage and the provision relating to causing nuisance to the public (see OBJ A tab 14 page 229). This suggests that the Council anticipated the use of the land by the public and were concerned that the licenced activity should not cause a nuisance to the public. It is of note that complaints were received about the use of the land and that the Council pursued the matter with T J Brent Ltd. The letter from Exeter City Council to T J Brent Ltd refers to complaints being received and that Eastern Field is an area open to the general public for recreational purposes and Exeter City Council had responsibilities for such users (see OBJ A tab 14 page 238).

77. Given the limited impact on the users of the land there is nothing to indicate that use of the land for these activities would have brought it home that use of the land was with permission.

78. The compound adjacent to the access from Exhibition Way had an impact on access to the land occupied by the compound and the evidence is that the compound was fenced from 1993 to 2008 although falling into disrepair in the late 1990s. The impact on access is recognised by the applicant's witnesses and acknowledged by the applicant as sufficient to constitute an interruption in use. The issue is whether the use of the compound was sufficient to infer a permission to use the application land.

79. It is clear that the fencing would have excluded access to the land occupied by the compound, that area being 0.135 hectares. It would also have been apparent that the compound area was being used for various commercial activities. However, given the relatively small area concerned when compared to the whole of the Eastern Fields, which had, for a considerable number of years, been used for public open space, I do not consider that it would have brought home to a reasonable user that use of the remainder of the land was

with the implied permission of the landowner. Nevertheless I consider the exclusion of access to the land by way of the fencing amounts to an interruption such that the compound area should be severed from the application. The extent of the compound is clearly depicted, highlighted in yellow and hatched, on the plan to be found at OBJ F at page 1552.

80. Having regard to all of the above, whilst the objector used the land for various licenced activities these had limited effect on access to the land. There is no evidence that, although some inhabitants went elsewhere on the land, and in limited instances did not access the land, when licenced activities were taking place that there was any conflict between the licenced events and inhabitants. Further there is no evidence that use by the inhabitants was challenged. The use by the inhabitants and by the landowner co-existed. Given the public nature of the land and its long standing effective management as public open space I do not consider that any of the licenced activities, individually or as a whole, when considered objectively, would have been sufficient to have brought it home to a reasonable user that use of the land was with the permission of the landowner. Consequently the conclusion I reach is that the use of the land, held for industrial development and the former railway sidings, for lawful sports and pastimes was as of right. The application in respect of this land should be approved with the exception of the land occupied by the compound over which use was interrupted during the relevant twenty year period.

81. Given my findings it is not necessary to address the issue of the competency of Exeter City Council to grant a licence for public recreation. In either event the licenced activities are, on the balance of probabilities, insufficient to infer an implied licence to use the land for lawful sports and pastimes.

Conclusion

82. Having regard to these and all other matters raised at the inquiry, and all other evidence and written submissions, I conclude that the application should be allowed in part. The land to be registered is the land hatched red and marked green on the plan approved between the parties (inquiry document 6) excluding the compound area which can be identified on the plan at OBJ F at page 1552.

Martin Elliott

INSPECTOR

APPEARANCES

For the Objector:

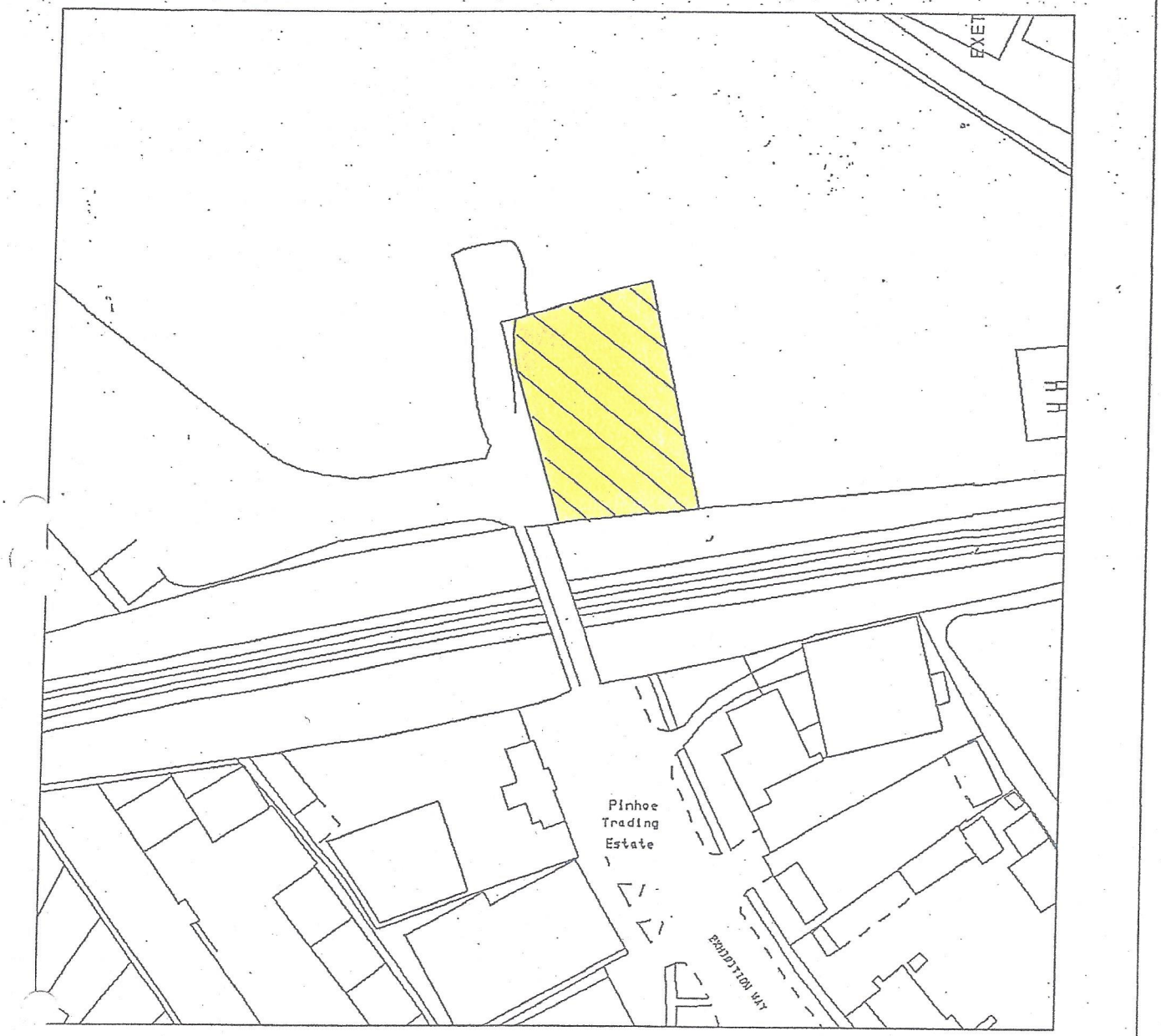
Mr W Webster	Of Counsel, instructed by Exeter City Council
who called	
Mr P Faulkner	
Mr M Carson	

For the Applicant:

Mr S Lane	Of Counsel, on behalf of the applicant
who called	
Mr R Beales	
Miss K Cook	
Mr A Flay	
Mr Tremain	
Mr J Hampton	
Mr A Hampton	
Mr A Wilkes	
Ms J Mitchell	
Miss T Goodman	
Mr G Eaton	applicant
Miss S Edwards	applicant
Mr K Hill	

DOCUMENTS

1 Street plan (OBJ/1)
2 Index of commercial user (OBJ/2)
3 Standard conditions to the granting of permission for organised use of Council owned land, Exeter City Council
4 Annotated copy of aerial photograph (original in bundle OBJ/1 page 33)
5 Plan of Eastern Fields (OBJ/3)
6 Agreed Plan of Eastern Fields (also in bundle tab 2 OBJ/1 page at 21)
7 Additional statement of Mr P Faulkner (inserted in OBJ/1 at pages 159 d, e and f)
8 Notes taken for applicants closing submissions (28/07/2016)



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CHIEF ESTATES OFFICER
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CIVIC CENTRE
EXETER
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DRAWING No:

DATE: 10/03/92

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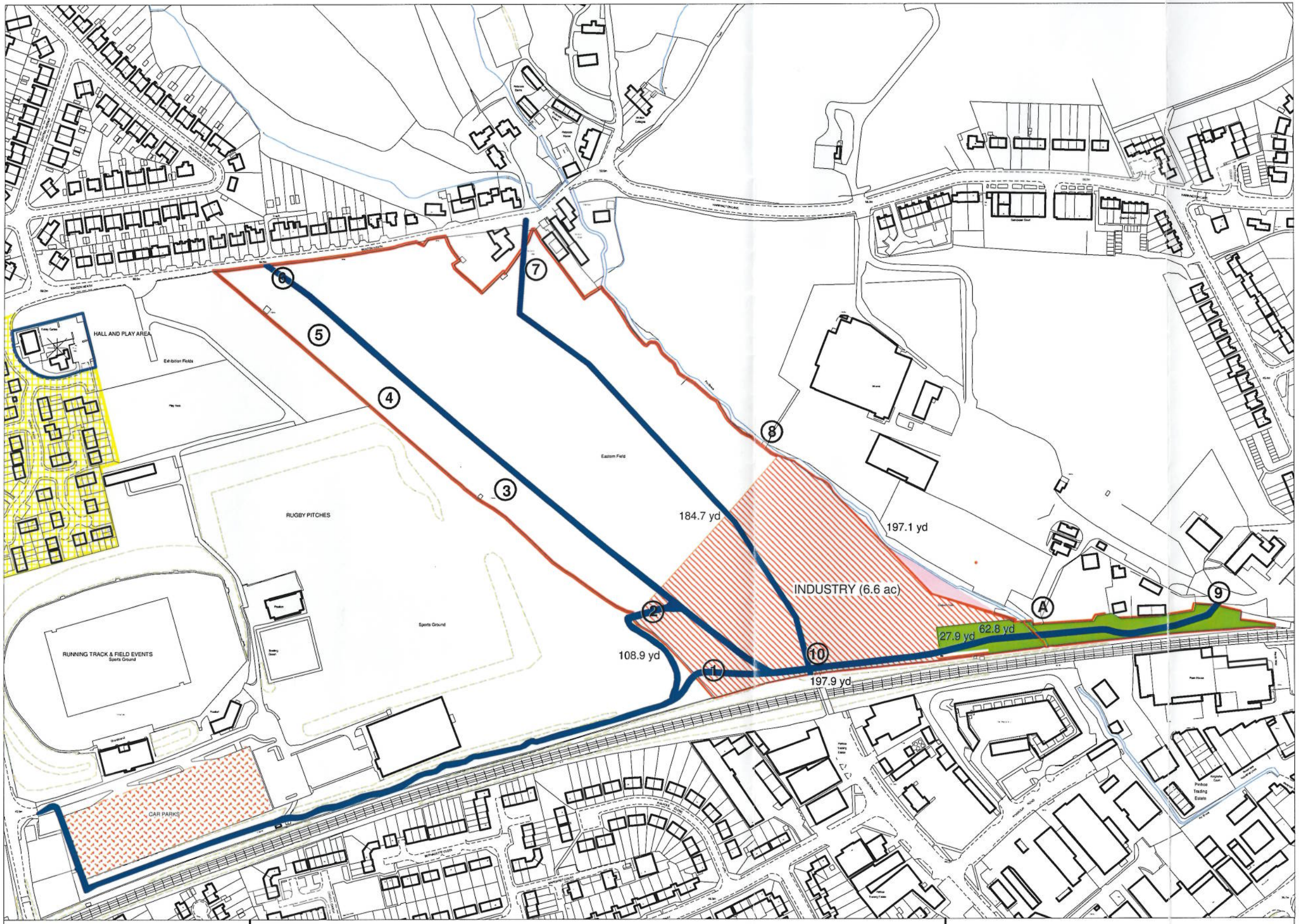

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LEGEND

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Eastern Fields, Exeter

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