

**In the matter of the application to register the land  
known as Wellington Hill Playing Field as New Town or  
Village Green.**

**Response to the Council's Reply to the Applicant's Observations  
October 2011**

The Council's submission is that the use of the Wellington Hill Playing Fields has not been by right (BR) but has been as of right (AOR) because use of the Playing Fields has been either:

- (a) With the Council's permission, or
- (b) by force, as evidenced by broken fencing and the ignoring of notices which have made the use contentious.

We will deal with these issues as follow:-

- 1. The giving of permission.
- 2. The use by force by breaking fences.
- 3. The use in contravention of notices which made any such use contentious.

**1. The giving of permission.**

The Council has produced evidence that it gave permission for certain uses of the Playing Fields. However, the vast majority of the support statements submitted with the application make it clear that the users have never sought permission to use the Playing Fields, and that the many activities for which they have used the field fall outside the purposes contemplated under the Education Act. Such other uses have not, therefore, been with permission and are not thereby precluded from being use by right.

**2. The use by force in the breaking of fences.**

The Council's own evidence confirms that there has not been a fence where the Playing Fields abut Wellington Hill since 1980. Therefore, use of the Playing Fields since 1980, accessed from Wellington Hill, the main entrance to the field, cannot have been over through or around a fence. Such use cannot, therefore, be argued to be by force.

Similarly, when the Council agreed in 2008 to allow part of the Playing Fields to be temporarily enclosed by a developer an Concorde Lodge, they stipulated that the entrance from Kellaway Avenue should be maintained by an alleyway crossing the main site access. If entrance via Kellaway Avenue had been entrance by force, then there would have been no need to preserve that entry point during the development phase at Concorde Lodge.

**3. The use has been by force because the use of signs has made the use contentious.**

The main point of the case law quoted by the Council is whether, in the light of the principles set out in the Oxford & Buckinghamshire case, the notices that the Council refer to were sufficient to make any use of the Playing Fields contentious.

We comment on the notices as follows:-



## Response to the Council's Reply to the Applicant's Observations

The notices that the Council claim have at some time been in place (which we do not admit) state:

*"Members of the public are warned not to trespass on this playing field"*

The wording is not: "The use of this playing field without permission will be considered trespass". Nor does the notice make it clear what use would constitute a trespass.

Those entering the field and seeing the notice would immediately see that it was a playing field, unfenced and, therefore, open to public use without that use constituting a trespass. It is a warning not to trespass without clearly prohibiting what can be done.

A member of the public would most likely take such wording as a public safety warning rather than a warning against use of the Playing Fields by the public, warning against danger to the public.

The notice goes on to list specific activities which "*causes or permits nuisance or disturbance to the annoyance of persons lawfully using the playing field...*" Those uses are not prohibited per se, but only when they cause or permit nuisance or disturbance to the annoyance of persons lawfully using the playing field. The notice states that the consequence of such unauthorised use is also a liability to prosecution. It does not clearly state that the listed used are in themselves prohibited.

The implication is precisely that ordinary members of the public should be allowed to use and enjoy the Playing Fields without nuisance, disturbance or annoyance.

In addition, there is no statement that use of the Playing Field by ordinary members of the public constitutes anything other than lawful use. And an ordinary member of the public would reasonably conclude that he or she can walk, picnic, play games, read, or sunbathe, as the evidence shows they have done for at least 20 years.

The notice goes on to state that "Requests for authorised use should be made to the Director of Education". It makes no statement as to unauthorised use and that it might be considered trespass. A reasonable member of the public would conclude, as they have done, that use of the Playing Field which is not authorised is still lawful. The implication is that if you want a formal right to use the football pitch, e.g. to secure a timed slot to use the marked out soccer pitch, then a formal authorisation would be best so as to ensure availability. However, use of the space for a "kick about" required no formal authorisation.

We put the Council to proof as to what efforts, if any have been taken to enforce the construction of these notices which they now claim. Has anyone been prosecuted or warned not to use of the Playing Field? If so, has such warning or legal action been based on anything other than interference with the lawful enjoyment of the Playing Field by ordinary members of the public?

In the Cleveland case the notices on the golf course read:

*Cleveland Golf Course. Warning. It is dangerous to trespass on the golf course."*

Sullivan J held that they were ambiguous and therefore ineffective. This was also true of the signs in the Oxford a& Buckinghamshire case.

## Response to the Council's Reply to the Applicant's Observations

For signs to be effective they have to indicate clearly that entry is with permission that can be withdrawn. A sign simply saying "Private Land Keep out" is ineffective because if a trespasser is able to enter peaceably and openly there is no contention and he can acquire the relevant rights. However, if a notice indicates that "The public may enter on foot for recreation but this permission may be withdrawn at any time" then the owner is in a stronger position because his position is clearly and unambiguously stated.

The notices in this case are ambiguous at best, and do not state or imply that the use of the field is by permission that can be withdrawn. As such they are not sufficient to make the use as evidenced in the application contentious and, therefore, by force.

The evidence submitted with the application shows that for over 20 years there have been uses that have been without permission and without force and, therefore, exercised by right as of right.

We put the council to proof as to where and when these signs were in place around the Playing Fields. Mr. Perkins of 104 Church Road Horfield, one of the properties nearest to the entrance on to Wellington Hill will state that he cannot recall having seen any such notices at the Wellington Hill entrance since moving into the property in Nov 1982. This is the largest entrance onto the Playing Fields and if the notices are to be effective they must be clearly displayed in all points of entry. However, no such notices have been displayed at the largest of the entrances, and no one entering and using the Playing Fields from Wellington Hill will have seen any notices.

We don't admit that any sign as shown in the photographs contained in the Council's reply has been in place. We, therefore, call upon the Council to prove that the notices were displayed at all entrances, and when they were put up and removed (since they are not there now).

For all these reasons, therefore, we submit that the Council's reply goes to confirm that use of the Playing Fields by the public has been by right and not as of right.