



COMMONS REGISTRATION ACT 1965

Reference No: 268/D/449

In the Matter of The Foreshore,
on east bank of the River Ouse,
Naburn, Selby District,
North Yorkshire

DECISION

These disputes relate to the registration at Entry No. 1 in the Land Section of Register Unit No. VG50 in the Register of Town or Village Greens maintained by the North Yorkshire (formerly East Riding) County Council and are occasioned by Objection No. 16 made by George Bryan Palmes and noted in the Register on 5 November 1970 and by Objection No. 29 made by Yorkshire River Authority and noted in the Register on 25 August 1972.

On 9 July 1985 at Selby Mr Commons Commissioner L J Morris Smith held a hearing for the purpose of inquiring into the disputes. At this hearing (1) Yorkshire Water Authority were represented by Mr R Simpson, one of their Senior Assistant Solicitors; and (2) Naburn Parish Council who applied for the registration were represented by Captain P W Shamler one of their members and Mr John Dykes their Clerk. Mr Simpson said Objection No. 29 was no longer being maintained. There was no appearance in support of Objection No. 16, it being said that Mr G B Palmes had died.

After the hearing letters dated 3 and 16 September and 2 October 1985 were received by the Commons Commissioners from Bailey and Haigh, Solicitors of Selby for Yacht Service Limited saying in effect that they purchased the land (the Foreshore) in this Register Unit from Commander Palmes and that they had no knowledge of any hearing until after 9 July, and asking if the Commissioner would be prepared to reopen it. Also received were letters dated 1 and 5 October 1985 from Dr J C M Yuill of Clock Cottage, Front Street, Naburn, dated 1 October 1985 from Mr and Mrs G K Webster of Shelloch House, Front Street, Naburn, and 7 October 1985 from Solicitors for Mrs J L Hyde, owner of Fisherman's Cottage, Naburn: all for various reasons suggesting that the registration should not have been made.

In letters dated 6 January 1986 all concerned were advised that the Commons Commissioner had agreed to re-open the hearing. —————→ After notice of the day of the adjourned hearing had been given, a letter dated 8 October 1986 was received from Yorkshire Water Authority saying that they withdrew their Objection at the July 1985 hearing and that they lay no claim to ownership of the Foreshore.

I held the adjourned hearing for the purpose of further inquiring into the disputes at Selby on 22 October 1986. At the hearing: (1) Naburn Parish Council were represented by Mr John Dykes, their Clerk; (2) Yacht Service Limited as one of the successors of Mr G B Palmes, were represented by Mr Keith Haggerty, solicitor with Parker March Charlton & Eastman, Solicitors of Selby as agents for the said Bailey & Haigh; (3) and (4) the said Dr Judith Cecily Yuill and Mrs Judith Lesley Hyde attended in person; and (5), (6) and (7) Mr John Charnock of Holly Cottage, Front Street, Naburn, Mr Roger Wilford Ingamells of The Homestead, Front Street, Naburn and Mr Thomas Edward Ruston and Mrs Jane Heather Rushton of Newstead, Front Street, Naburn, attended in person.

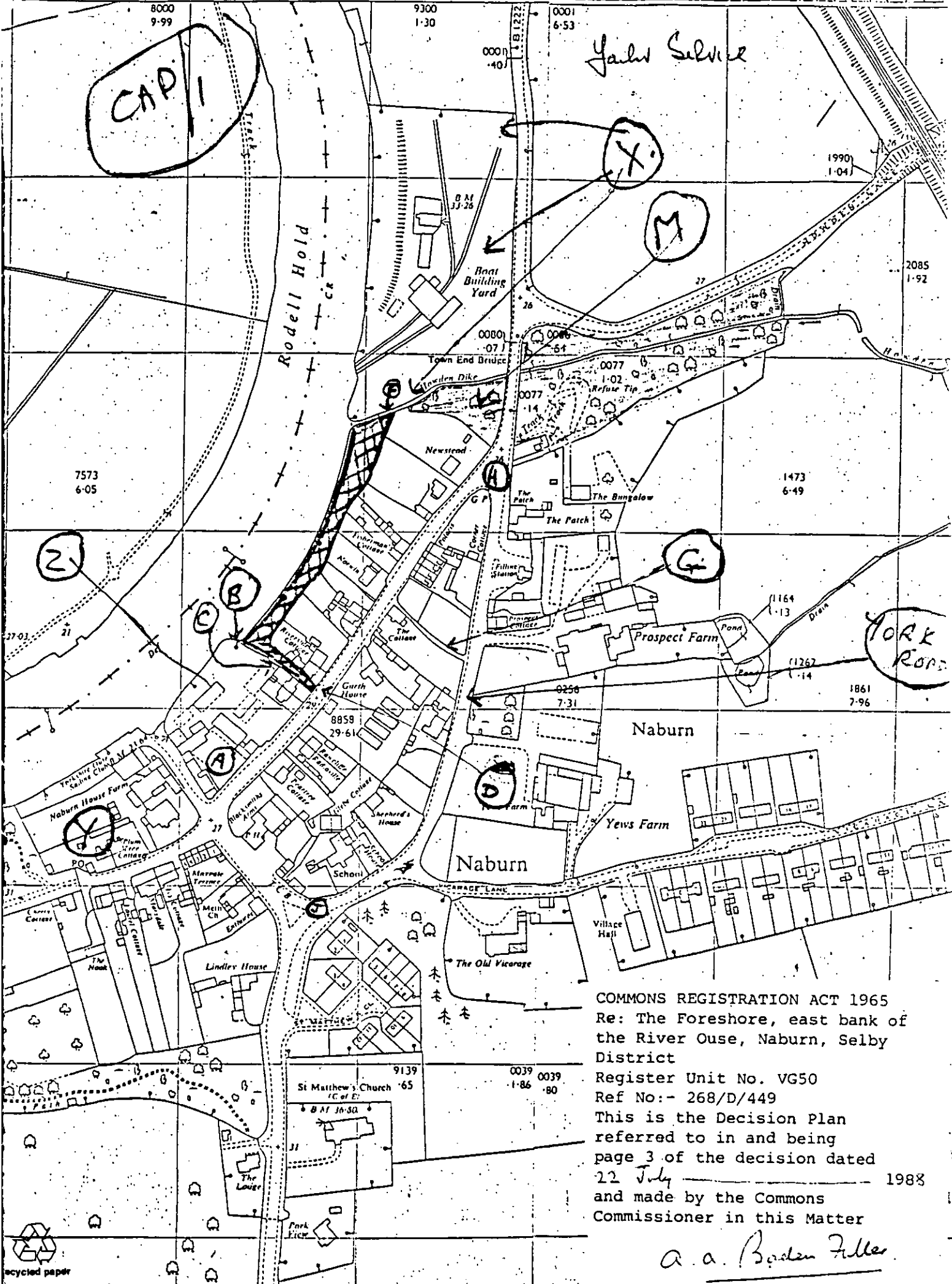


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Much of the evidence given at the hearing was given by reference to the plan (CAP/1) enclosed with the said letter of 3 September 1985 on which the Foreshore is edged and crossed hatched in green. In the course of the hearing, I marked in pencil the plan "A, B, C, D, G, H, M, X, Y, Z, and YORK ROAD"; an uncoloured copy ('The Decision Plan') of such plan (my pencil marks thickened in black) is page 3 of this decision. There have been changes since the making of the OS map on which the Decision Plan is based, in that (among others) 9300 (north of X) together with more than 25 acres adjoining (north of the map and west of the B122 road) up to the Naburn Bridge over the River Ouse (formerly for railway and now a footpath and for bicycles) has been developed as a marina accommodating pleasure boats (some hundreds I would say) for use on the River; and the area Z has been developed by the erection of dwelling houses and the making of a road leading to them from Front Street.

Course of the 1986 proceedings

Oral evidence was given by Mr Charles Anthony Pool who is the managing director of Yacht Services Limited ("YSL") and Naburn Marina Limited ("NML"), who had known the Foreshore since 1958 when he joined YSL as a director and who (among other things) said, (in effect):- The property now occupied as a boat yard and a marina, before the war (1939-45) was land then or formerly called "the Cockle Croft" which during the war was taken by the Army as a bridging school; the Foreshore was a strip of land connecting Ferry Farm (on the south) to the Cockle Croft (on the north); then (1958) the Cockle Croft was owned (as tenant of Commander Palmes) by YSL and the Foreshore was owned by Commander Palmes himself. YSL purchased the Foreshore in 1976 from Mr Bray, nephew of Commander Palmes who inherited the whole of his estate. As to this purchase, YSL had 3 acres adjoining the Foreshore (the Cockle Croft as lessees from 1950 for 99 years); they then bought the lease (meaning the reversion to the lease) and purchased the Foreshore as well (CAP/4). He understood that the Army gave up the Cockle Croft to Commander Palmes in 1946, who turned it into a boat yard and leased it to YSL; and that at that time the Foreshore "was just a walkway, a right of way along there". As to the condition of the Foreshore in 1958 (when he joined YSL), "it was rubbish and grown up, it could not be used to play on, there was too much rubbish all round". They (YSL) had a boat on it for which Commander Palmes gave permission, but because for this use there was no planning permission, it was given up. He (the witness) identified the Cockle Croft as "X" on the Decision Plan. Before the war (1939) there was approximately 21 acres of Ings land; they (YSL and ? NML) owned the other 19 acres which were developed as a Marina by Commander Palmes and YSL; he (the witness) bought out Commander Palmes at a later period, 1974 or thereabouts. As to games on the Foreshore before 1974, prior to their coming there (meaning before 1958), "it was just rubbish, hemlock etc." As to a right of way from where to where, from entrance from Front Street to all the Front Street houses which backed on and adjoined the Foreshore. As to this use being by grant, not just usage. As to it being a tow path, at this point it is on the west bank (the other side of the Ouse). As to the use of the Foreshore, not games, fishing from there occasionally, one or two children or adults, so overgrown impossible to get to it. As to where from, "always local people". YSL purchased the Foreshore "because it was all just part of the Cockle Croft, a continuation of it, and we could keep it clear and tidy". As to this being much effort, "no, just a machine: it was fairly overgrown before". As to YSL since 1976 being solely



COMMONS REGISTRATION ACT 1965
Re: The Foreshore, east bank of
the River Ouse, Naburn, Selby
District
Register Unit No. VG50
Ref No:- 268/D/449
This is the Decision Plan
referred to in and being
page 3 of the decision dated
22 July 1988
and made by the Commons
Commissioner in this Matter

a. a. Basten Fuller

Commons Commissioner



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responsible for keeping it tidy, "yes". As to since 1976, "we have just kept it tidy, and control people and rubbish; we have had a problem of people putting garden rubbish so we put a gate between it and Front Street. As to this preventing all access, "no, it is locked but the tenants of Front Street have a key: we wanted to control the rubbish problem". As to Parish Council being warned they were going to lock it, the witness produced and explained letters CAP/3 and 4 specified in Part I of the Schedule hereto. The gate mentioned in the November 1985 letter was put up in December 1985 (as appeared during my inspection, this gate even if locked is no obstruction to access on foot because there is a gap of about two feet between the post at the south west end of the gate and the east corner of the fence enclosing the front garden on the south-west side of the access part of the Foreshore). There had been no complaint about the gate either from the Parish Council or anyone else. As to anybody using the Foreshore since YSL bought it, for ball games or for exercising dogs, "not since I had control of it; I would think there is a walkway; I assume there is a walkway". As to how often the Foreshore is mown, about 3 times a year at the Company's expense. As to the effect of the Foreshore being declared a village green, "I fear it being used for camping, overnight fishing: I don't see how the Parish Council could control it. I have no authority to stop them: there would be a security risk through the back yards of the houses in Front Street". As to his seeing any benefit if the Foreshore was registered as a Village Green, "it would be open to all". As to there being a security risk to the properties adjoining it, "it would be increased -- a great risk".

Questioned by Mrs Hyde, Mr Pool said:- On the Decision Plan, Y was formerly a stack yard which ceased to be such in 1982-1984, A was a cattle shed and the rest of Z was private farm land which had since 1982 been developed as private housing. There had been cottages between the Foreshore and Front Street (as appear on the Decision Plan) as long as he could remember.

Questioned by Mr Charnock, Mr Dykes and Mr Ruston, Mr Pool said (among other things):- The Foreshore is regularly in part flooded about 3 or 4 times every year. The mooring of a boat on the Foreshore to which he had referred was for a year or a very short time, there was an objection, no planning permission, so it was removed. Howden Dyke is between 18 inches and 2 feet wide, not enough to prevent people walking across from the Foreshore to the boat-yard. He did not remember the old Stack Yard (Y) being used for cattle; in 1946 it was taken over by the Yacht Club (Yorkshire Ouse Sailing Club marked on Decision Plan). The gate at D was mentioned at a Parish Meeting which he (the witness) attended; he informed the meeting: "I was putting the gates at the entrance to my land: my land began at Front Street". As to there being an ash tree by Howden Dike, he did not know, but the hedge is on the south side.

Mr John Dykes who has been clerk of the Parish Council since 1948 and lived at Naburn since 1945 in the course of his oral evidence said (in effect):- The Parish Council did not dispute the YSL ownership of the Foreshore. The reason for the registration was to ensure that the public and more particularly the parishioners of Naburn continue to enjoy the use of the Foreshore for walking, fishing and the occasional picnic. He was a regular visitor to Naburn before 1945 back to 1940 and



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had for the 5 years after 1945 lived at Homeslea, next door to Riverside Cottage (near D on the Decision Plan) and had personally used the Foreshore for walking and fishing since 1940 until the present day. His knowledge of it before 1940 was from what had been said to him by old inhabitants and neighbours. In about 1930 a bridge was built from the Foreshore to Cockle Croft so cattle could be moved from Naburn House Farm to Cockle Croft safely; before then cattle were moved along the roadway, but increase in the road traffic made this exercise dangerous; the bridge was removed about 1950. The public and the people of Naburn have continued to use the Foreshore in spite of the fact that prior to 1948 they had access along the Riverside to the north as far as the Railway Bridge (since 1949/50 only as far as Howden Dike). The Foreshore was up to the turn of the century used for loading and unloading boats; there was a way from the middle of the Foreshore to Front Street and there is now a way (G on the Decision Plan) in continuation of it to York Road; to about 5 years ago there was a gap the remains of a way marked on the Decision Plan between Norwin and the cottage adjoining it on the south. As regards keeping the Foreshore neat and tidy

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 during the tenancy of Mr Wilson, he cut the Foreshore by tractor-reaper on a regular basis until such time as it became dangerous to do so due to the fact that the width of the Foreshore at its southern end was being eroded. Access from Front Street into the stock yard was made on occasions at harvest time by means of this road; it was not the main access, it avoided backing tractors →
 → into the stack yard and this continued up to Mr Wilson giving up the farm and → the land being sold round about 1980. "So far as I know there is no evidence of the lane or the land (meaning the Foreshore land) being used for any other reason than walking, fishing and picnicing; and that is all I have to say".

Questioned by Mr Haggerty, Mr Dykes said (in effect):- He knew what happened before 1945 because he was a regular visitor. He did not know anything about before 1940 except what he had been told by old inhabitants of Naburn; "yes, it was hearsay, but if it is needed I can obtain signed statements to overlap what I have said for the period before 1940; they are not available today but they can be got". As to Mr Wilson keeping the Foreshore tidy by tractor reaper, that was since he (the witness) had been there. This became dangerous when it became too narrow; Mr Wilson could explain, he is the present chairman of the Parish Council and said he would attend the hearing. As to the Foreshore being overgrown, it has been overgrown but has not been inaccessible for walking or fishing; when it was overgrown there was a track which could be walked. As to the Foreshore being built-up (after it had become too dangerous to cut, "yes it has been built-up again but not completely". As to it being built-up naturally, "no". What he said about loading and unloading boats on the Foreshore was hearsay; there is evidence that the villagers used it; there was a ferry and that was why it was called Cockle Croft; it depended where you lived at Naburn which one you used. As to the Naburn Ferry marked on the OS Map (1/10,560) not being what he was talking about, "yes but there has been a landing on the Foreshore as is evidenced by the lane now lost by Norwin; it could be used for landing passengers, he had seen people using the river and getting off on the Foreshore. There is an existing ferry the land by which →
 → belongs to the Yorkshire Ouse Sailing Club. Ferry Lane was owned half by Commander Palmes and the other half by the Wenlock Estate, Commander Palmes gave his half to Club and the Wenlock Estate sold their half to the Club. For many years the Club to restrict access to the ferry had put up barricades until in 1958 the



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North Yorkshire County Council declared Ferry Lane a right of way. He had seen people picnicking on the Foreshore in the 1940s and 1950s; some with a bottle of pop and packets of crisps. As to this being restricted to villagers of Naburn, there was no notice restricting it. As to anybody from anywhere could go onto the Foreshore, "yes it always has been so".

Next Mr Haggerty produced the 1976 conveyance, the abstract and the declaration (CAP/4, 7, 8) specified in the Schedule hereto. Mr Dykes then produced the statement (PC/1) signed M Wilson, who is chairman of the Parish Council and was originally occupier and tenant of Naburn House Farm. After some discussion Mr Haggerty conceded PC/1 is true but submitted it was not relevant.

Next in reply to a question by Mr Dykes, Mr Pool said that YSL had not bought the Foreshore before 1976 because it was known that Commander Palmes would not sell any land, they bought it in 1976 from Commander Palmes' nephew because it was convenient from the Marina and they wanted to keep it tidy; Naburn Hall (by the river south-west of 'Y' marked on the OS Map 1/10,560) was in 1976 bought by NML and used as a boat club by YSL and associated companies as appeared in his 1976 statutory declaration (CAP/8).

Next oral evidence was given by Mr Thomas Edward Ruston who described a conversation he had had with Commander Palmes about his reason for not selling land which the boatyard people might want to purchase, and confirmed that the Foreshore flooded regularly (last on 18 April 1986).

Questioned by Mr Dykes, Mr Ruston said (among other things) he had known the land for 25 years before May 1986 and knew of no misuse of it or any problems connected with it, nevertheless he felt that misuse was more likely to happen if it was common land. To Mr Dykes' suggestion that YSL could continue to look after it as they had done since 1976 and Mr Wilson had done before, Mr Ruston seemed unable to explain his misuse fears.

Questioned by Mr Haggerty as to the Foreshore being overgrown, Mr Ruston said it was 2 or 3 years when it was neglected, he could not say when. Questioned by Mr Haggerty as to whether he knew of any problem youngsters riding motorcycles there, he said "not up to now". He thought that Robert Wilson and Malcolm Wilson had a right of way over the Foreshore because the former took horses there and the latter had tractors; they were work horses and Mr Robert Wilson did not exercise the horses on the Foreshore, they went out to graze on the Cockle Croft after they had been worked and until they were worked again. Members of the public had not put cattle onto the Foreshore.

Mr Dykes having said that Mr Wilson (now Parish Council chairman) would have come to the hearing but for the illness of his wife, I concluded the hearing by saying I would inspect the Foreshore and if possible take the evidence of Mr Wilson in Naburn.

Later on the same day I made this inspection in the presence of Mr Haggerty. Mr Dykes and Dr Yuill who had been present at the hearing and of Mr Malcolm Wilson.

After my inspection at Clock Cottage Mr Robert Malcolm Wilson who has been chairman of the Parish Council for the last 6 or 7 years, been a member of it since 1966 and lived in the village for 55 years (born 1928) gave oral evidence in the course of which he said (in effect):- His father Mr Robert Wilson came to Naburn House Farm in 1933; he (the witness) on the death of his father in 1964 succeeded him. He used the Foreshore to run horses from the farmyard (Z on the Decision Plan) to the land





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(X on the Decision Plan) which was a field until the boat yard was started in 1948; their use of it was just to run the horses into the field which was called the Cockle Croft; so called (before his time only hearsay!) because there was a wharf at one time at the corner where the boatyard now is and shells were thrown onto the field. There was a Mr Leaf who lived in Fishermans Cottage; he was a salmon fisherman and had a boat all the time he could remember; he was a salmon fisherman by trade, a tenant of his cottage and 2 fields: they netted the fish. As to sports and pastimes on the Foreshore, "we used to fish along there". As to inhabitants of a locality, nothing more than fishing and mooring boats and walking up to Cockle Croft to swim in the River where there is a small sandy beach used by cattle to drink. There used to be a sleeper bridge over Howden Dike used by farm horses but not there now; it went about when the boat yard came.

Questioned by me as to inhabitants of the locality indulging in sports and pastimes, Mr Wilson said "I don't think so". Questioned by Mr Dykes about other boats, he said Mr Hemingbrough had helped Mr Leaf and then after him probably fished the same boat. He knew the lane between York Road and Front Street which is still there and from hearsay that it had at one time continued between Norwyn and Rose Cottage; even since he could remember, it had not continued from Front Street to the Foreshore.

Questioned by Mr Haggerty Mr Wilson said:- As to Commander G B Palmes owning Cockle Croft, The Foreshore, Naburn House Farm and the cottages on Front Street, "he owned the lot". Mr Leaf must have had his permission "because you could not do anything without his permission ... If he wanted you to move a boat, you moved it! ... He owned the Village" When the Parish Council registered the Foreshore as a village green, Commander Palmes said to him (the witness): "you are paying rent for it and it is my land" and he hauled me over the coals!

Afterwards

After the 1986 hearing, the twelve letters dated and written by the persons specified in Part III of the Schedule hereto were received in the office of the Commons Commissioners; they are all to the same effect: for various reasons, the writer wishes the Commissioner to confirm the registration at the hearing disputed by YSL. In a letter dated 30 March 1986 the Clerk of Naburn Parish Council was given notice by the Clerk of the Commons Commissioners that (for the reasons therein set out) unless within 6 weeks (or such extended time as a Commons Commissioner may allow) an application was made by the Parish Council or some other person to the Commons Commissioner to continue his October 1986 hearing I would complete my decision as soon as practicable disregarding as best I could the contents of the letters. In a letter dated 30 April 1987 the Clerk of Naburn Parish Council requested "that the Commissioner should continue his October 1986 hearing in order that he can hear the evidence of the writers of the letters referred to and possibly others in the presence of a representative of Yachts Services Ltd".

On 7 May 1987 each of the writers of the said twelve letters was sent a copy of the said March 1987 letter. No communication from any of them has been received in the office of the Commons Commissioner.

Consequential on the letters mentioned in the preceding paragraph solicitors for YSL wrote to the Clerk of the Commons Commissioner a letter as set out in Part IV of the Schedule hereto.



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About the said March and June 1987 letters I gave an interlocutory decision dated 16 June 1987, and in accordance with it held a hearing at Naburn on 19 April 1988. At this hearing: (1) Naburn Parish Council were represented by Mr Malcolm Wilson their chairman and Mr John Dykes their clerk; (2) Yacht Services Ltd ("YSL") were represented by Mr K Haggerty (as at my October 1986 hearing); (3) and (4) Dr Judith Yuill of Clock Cottage, Front Street and Mr Roger Wilford Ingarnell of the Homestead, Front Street, attended in person as before.

After some introductory discussion, I said I would first consider whether I should continue my October 1986 hearing as requested by the Parish Council in their said April 1987 letter. None of the writers of the said twelve letters was present and it appeared that no useful purpose could be served by continuing the hearing immediately. Mr Wilson asked for an adjournment so that he and Mr Dykes could consider the position.

After a short adjournment Mr Wilson said that he did not think that there was any point in carrying on these proceedings further and apologised for taking up my time. There followed a discussion in which I mentioned the possibility of my continuing the hearing later on the same day or on one of the following days, during which some of the writers in the said twelve letters could be asked, or if need be summoned to attend the hearing, or perhaps arrangements could be made for me to hear them at their home. After further discussion, Mr Wilson said that the request in April 1987 letter to continue the hearing is withdrawn.

Next Mr Haggerty asked me to infer that the writers of the said twelve letters must have done so in response to a circular letter from the Parish Council and that nothing had been done for the hearing to secure their attendance; he submitted that the costs of YSL of and occasioned before the 1987 request be taxed and paid by the Parish Council.

After some discussion Mr Pool on behalf of YSL (he being a member of the Parish Council) directed Mr Haggerty to withdraw his submission.

In the foregoing circumstances, it appearing that the continuation of my October 1986 hearing could not serve any useful purpose, I recorded that the request of the April 1987 letter for the continuation of the hearing was refused and that by consent about it there would be no order as to costs.

The question: law

In the 1965 Act, a town or village green is defined as: "... land ... on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years"; see Section 22.

The customary right referred to has for more than 300 years been recognised by law although not always described in → the same words, see *New Windsor v Mellor* 1975 1Ch 380. The 20 years mentioned in the definition ends with 5 August 1965, the date of the passing of the Act, see SC at pages 391, 395 and 396.



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As to proof of a customary right: "Rights or alleged Rights which have been long enjoyed are deemed to have had a legal origin, if such be possible, which, in the absence of proof that it is modern, is deemed to have commenced beyond legal memory.... A regular usage of twenty years unexplained and uncontradicted is sufficient to warrant a jury in finding the existence of an immemorial custom ... And from such modern usage unless the contrary appear, the jury ought to presume the immemorial existence of the right ..." See *Brocklebank v Thompson* 1903 2Ch 344 at page 350.

Mr Dykes submitted (in effect) that the use of the Foreshore by the inhabitants of Naburn for walking, fishing and picnicking was enough to justify the instant registration. So I must consider whether the walking, fishing and picnicking if it happened as he described could be a pastime within the relevant legal meaning of this word.

To be within a customary right as before 1965 by law recognised, the land need not be suitable for all possible sports and pastimes: one was enough eg dancing, *Abbot v Weekly* (1666) 1 Lev 176; cricket, *Fitch v Rawlings* (1797) 2HBl 393; and horse riding, *Lancashire v Hunt* (1894) 10 TLR 310. From *New Windsor v Mellor* supra, I deduce that the section 22 definition is generic, that is it includes every species of the customary right recognised under the law as it stood before 1965 and as it still is.

As to the present state of the Foreshore (meaning on 22 October 1986 when I saw it):- It is a strip about 150 yards long and has an average width of about 12 yards; access to the south-west end of this strip is by another narrower strip (included in the registration) about 30 yards long leading to Front Street, where there is a gate which even if kept locked so as to prevent vehicles, is no hindrance to access on foot from Front Street (there being a gap by it). Visually, the most striking feature of the Foreshore is the River Ouse running along its west boundary: a river with all such traffic as might be expected from its importance in the County and the amount of water carried by it, and having (at the appropriate time of the day or night) plant and other life of great variety, and to a discerning beholder, views of much interest or beauty, certainly if he looked westwards at the riverside part of the Foreshore, at the river itself and beyond and across to its west bank. The circumstance that such a beholder on the Foreshore might not for long look in any other direction, → is not against the conclusion I reached on my inspection that the Foreshore if (as it apparently is) available to the inhabitants of Naburn for walking, fishing and picnics, is now an amenity of great value. As to "walking" the appearance of the Foreshore is against it being the beginning of a walk northwards; Howden Dike is an obstruction and the boat repair yard is uninviting for a northwards riverbank walk (the more convenient access to the yard is from the public road on its east side); the Foreshore is not apparently ordinarily used as access to the backlands of the nearby houses fronting on Front Street, although it might be so used (if the key to the gate were available) for some extraordinary purpose. So I must understand the walking, fishing and picnicking described by Mr Dykes in the context of enjoying all that goes with the Foreshore being by an important and interesting River.



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In the context of the appearance and situation of the Foreshore, I understood Mr Dykes by "walking, fishing and picnicing" to mean doing these things while idling by the River. Idling by a river is a pastime within the ordinary meaning of this word: indulged in by many people as is easily observable on many river banks. I assume (although the contrary may be arguable) that a customary right to fish or a customary right to walk or a customary right to picnic without any qualification is not by law recognised. Nevertheless in my opinion a customary right for the inhabitants of Naburn to indulge in the pastime of idling by a river is within the above quoted 1965 Act definition, and may by law be proved by fishing, walking and picnicing as of right on the Foreshore by usage. I am guided to this opinion by *Abercromby v Fermoy* 1900 1IR 302 in which the Ireland Court of Appeal held that a strip of land between 8 and 12 yards wide by a river used by the inhabitants of a town as a promenade was subject to a customary recreational right, "to walk, to saunter, to lounge, to chat and to meet their friends", and observed "popular amusement takes so many shapes and there is no outdoor recreation as general and perennial as the promenade". This case was cited with approval in the England High Court, see *Attorney-General v Antrobus* 1905 2Ch 188 at page 207. So I must consider the evidence for and against the usage as of right of the Foreshore for idling by a river.

Commander Palmes

These proceedings arose out of the Objection made by Commander Palmes, the grounds of which are simply: "That the land was not a Village Green at the date of registration". Because he was not sure, I disregard Mr Dykes' thought that Commander Palmes before he died withdrew the Objection. Of his reason for objecting, the only evidence I have is that of Mr Wilson who said that about the registration he was "hauled over the coals" by Commander Palmes, who said "You are paying rent for it: it is my land". If this was his sole reason for objecting, he was mistaken; both at common law and under the 1965 Act the inhabitants of a locality may have a customary recreational right over the land of another; — the inclusion of the Foreshore in an agricultural tenancy is not against such a right, unless there is something in the lease inconsistent with its recreational use.

The Foreshore appears now to be a distinct piece of land, and Commander Palmes treated it as such because it was not included in the 1950 lease. I decline to infer from the evidence of Mr Ruston of a conversation he had with Commander Palmes in the course of which he said "I cannot sell any land at the moment", that he thought the Foreshore was either land which was not distinct from or was in any now relevant respect the same as the Cockle Croft.

Commander Palmes did not in his Objection express any reason, and from the evidence given at the hearing I am unable to infer that he ever had any reason other than that by him stated to Mr Wilson. So his making of the objection provides me with no reason for not acting on what Mr Dykes said and what I saw on my inspection.



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Reasonableness

Against the registration, much was said about the good things which had been done by YSL on the Foreshore for the benefit of Naburn generally and for those who lived in the Front Street houses backing on to it particularly, and about the bad things which might happen if the registration was confirmed and everything came under the control of the Parish Council.

I accept that YSL under the management of Mr C A Pool have since he became a director improved the appearance of the Foreshore and have prevented the deposit of rubbish on it; but I do not accept that the necessary, or even likely consequence of registration will prevent them continuing as he has done in the past; many village greens are looked after by persons who live near them. That land is subject to a right for the inhabitants of a locality to indulge in pastimes, does not mean that any inhabitant merely by alleging that he was indulging in a pastime can legally exercise the right destructively or unreasonably, see *Fitch v Fitch* (1797) 2Esp 543, where the jury found for the plaintiff owner against persons who were spoiling hay alleging their activities were a pastime. I reject the suggestion impliedly made by Mr McGerty when questioning Mr Ruston, that a motor cyclist could under the pretence that he was exercising a pastime, ride backwards and forwards along the Foreshore destroying the surface and disturbing the enjoyment of others.

Further if the Foreshore is a village green, it will be subject to Section 12 of the Inclosure Act 1857, under which depositing rubbish may be the concern of the local justices.

Further however beneficial towards the inhabitants of Naburn the present intention of Mr C A Pool may be, he and YSL may be succeeded by another less benevolent; or may simply change their minds. A customary right, subject to some not now relevant exceptions, lasts for ever.

I conclude that the registration is not unreasonable in any sense which could now be relevant.

Miscellaneous

Although Mr Dykes conceded that there was nothing to prevent the public (meaning persons other than inhabitants of Naburn) going on to the Foreshore, as I understood him, the usage he described was by inhabitants.

I have not overlooked that there cannot be a customary right to fish in the water of another. By finding a customary right to idle by a river on usage including fishing, I do not find, and I need not consider whether, the fishing was lawful as against the owner of the River or of the fish right in it. Having regard to the



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appearance of the Foreshore and its surrounding and the nearness of it to the water of the River affected by the tides, it is unlikely that any such owner would object to any fishing likely to be attempted from the Foreshore. Nobody at the hearing suggested any person was concerned with the legality of the fishing; and I am not concerned with fishing for commercial purposes such as was mentioned by Mr Wilson.

Mr C A Pool and Mr R M Wilson while expressing opinion against sports and pastimes on the Foreshore, had in mind I think such activities as cricket and football, and were not at all considering a pastime such as idling by a river: for this reason I disregard this part of their evidence.

I disregard the brief period when by neglect after Mr R M Wilson left and before YSL took over the Foreshore was less agreeable for recreational use, because at no time was such use impossible or interrupted.

Mr Dykes

Upon the considerations above set out, I conclude that each of the points against the registration made by Mr Hagerty and others at the hearing are of no significance. So I am left with the evidence of Mr Dykes.

From his conversations with others who knew Naburn before he came there in 1940, Mr Dykes inferred that the use now being made of the Foreshore by the inhabitants at one time extended over the adjoining land and that both were at one time used by the inhabitants additionally for other purposes. These circumstances even if proved by persons who remember Naburn as it was before 1940, do not prevent me from having regard to what has happened since and determining the status of the Foreshore according to the circumstances as they were known when it was first questioned in 1970 when Commander Palmes made his Objection; see *Copstake v West Sussex* 1911 2Ch 331 at page 340, cited in *Attorney-General v Beynon* 1970 Ch 1.

Mr Dykes gave his evidence carefully. His personal knowledge goes back as a resident to 1945 and before as a visitor to 1940. What he said accords with the probabilities as I deduce them from my 1986 inspection. I accept his evidence as reliable, and conclude that I can give effect to every inference which can reasonably be made from it.

From his evidence I find that many inhabitants of Naburn have at least since 1940 walked along the Foreshore, fished from there and picniced there, and that the River was always an essential part of the enjoyment associated with these activities. I also find that these things were done by the villagers as of right within the legal meaning of these words as explained in *De la Warr v Miles* (1881) 17 ChD 536, and in *Beckett v Lyons* 1967 1Ch 449.



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As to the right so being exercised, I conclude in accordance with the law above summarised, that the inhabitants were exercising a right to indulge in a pastime, which I can best describe as idling by a river, comparable with a right of promenade upheld in *Abercomby v Fermoy supra*.

My decision is therefore that the registration was properly made.

Final

Upon the above considerations, my decision is: I confirm the registration without any modification.

As I at my 1988 hearing said I would, I have above given my decision disregarding as best I can the letters specified in Part III of the Schedule hereto. Nevertheless I call attention to the letter set out in Part IV of the said Schedule which although written for another purpose confirms my decision in an important respect, in that in it YSL impliedly admit that there has been a long usage of the Foreshore by the villagers for walking along the riverbank, fishing from the riverbank and picnicing on the riverbank, and that such usage was such as would established rights (in legal language "was as of right"). I have not overlooked that the writer impliedly claims the villagers were not exercising a right to indulge in a lawful sport or pastime, but exercising either a right to walk, or a right to fish, or a right to picnic. The judgements in *De la Warr v Miles supra* show that the circumstances that the villagers (or any others who saw them) thought they were exercising one or more of these three rights (possibly not recognised by law) does not prevent me from concluding as a matter of law that they were exercising a customary right such as I have decided here exists, see Brett LJ at page 594 and Cotton LJ at page 596.

Further it would be strange if in this village by the River Ouse there was no place where the inhabitants could conveniently and agreeably idle by it. the access for this between A and Y on the Decision Plan is \longrightarrow not agreeable; no other place was suggested at the hearing. When after my inspection I motored around, I saw no other \longrightarrow within at least half a mile in both directions, and maybe the nearest convenient and agreeable places were more distant.

Although the ownership of YSL was admitted by the Parish Council, I have in these proceedings under section 5 of the 1965 Act no jurisdiction to direct their ownership to be registered in the Ownership Section. Ownership claims can be considered in proceedings under section 8 of the Act, which will in due course be started by a reference made by the County Council as registration authority. To reduce the chance of their claim being overlooked, YSL or their solicitors should write a letter to the County Council asking them to note their claim and to attach a copy of their letter to the reference when made.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.



SCHEDULE
(Documents produced or referred to)

Part 1: on behalf of Yacht Service Limited

- CAP/1 3 September 1985 Extract from OS map (? 1/2,600), enclosed with letter from Bailey & Haigh.
- CAP/2 14 August 1980 Copy letter to Clerk of Naburn Parish Council from Yacht Service Limited:- "... trouble from people tipping rubbish on our land on the River Bank - the land adjacent to the boatyard downstream ... we are ... fencing the entrance ... with provision for people to gain access by foot, in order to prevent this becoming the regular tip for the district".
- CAP/3 18 November 1985 Copy letter to M Wilson Esq, Chairman Naburn Parish Council from C A Pool:- "... we have put a gate on entrance to our land on the river front with access left for people on foot. In spite of notices displayed, we are still unable to stop people from tipping rubbish on the river bank. Way back in August 1980 we sent you a letter ... he did not act immediately, in the hope that this practice would cease".
- CAP/4 2 June 1976 Conveyance by Benedict Eustace Charles Tevery Bray as executor of George Bryan Palmes to Yacht Services Limited of first land described in Part I of the First Schedule subject to lease particularised in Part II and secondly of land described in Part III in fee simple in possession. Part I, close of land at Town End Bridge about 3 acres OS No. 85. Part II lease dated 16 September 1950 made between Testator and Company for 99 years. Part III, freehold land adjoining River Ouse containing .430 acres, part OS 95 and OS 94 "subject to such rights and covenants as may now affect the same". Note:- recital of death of G B Palmes on 10 November 1971
- CAP/7 1954 Abstract of the title of Commander George Bryan Palmes commencing with Settlement dated 17 April 1882 made between (1) the Rev George Palmes (2) Eva Blanche Harrison (3) the Rev William Lindsay Palmes and (4) Charles William Empson, Guy St Maur Palmes and Dalton Harrison. The parcels are:- "all that the Manor or Lordship of



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Naburn in the East Riding of the County of York and all the capital and other messuages farm lands tenements and herein site in the Parish of Naburn aforesaid and in the Township of Acaster Malbis in the said East Riding of the County of York the Partlars whereof were cont in the schedule thereto and site being or arising in Naburn in the County of York of or to which the S George Palmes was seised in possession reversion remainder or expectancy".

CAP/8 2 October 1976

Statutory declaration by John Atkinson, solicitor, partner of Drivers of York; he acted for G B Palmes and his executor B E C T Bray for 19 years; he was familiar with Naburn Estates; lands by two conveyances dated 2 June 1976 conveyed to Yacht Service Limited and Naburn Marine Limited (except property comprised in conveyances of 26 April 1928, 6 April 1929 and 25 October 1932) where part of the Naburn Estate described in the Schedule to the Settlement dated 17 April 1882 of the whole of the property comprised in the said two 1976 conveyance the late G B Palmes was in possession.

Part II: on behalf of Naburn Parish Council

PC/1 22 October
(1986)

Statement by Mr M Wilson of Naburn House. "The Foreshore in question was originally used by my father as a means of access for the farm horses to the field where the Marina is now. When the boat yard became established there, we no longer used this facility but I continued to mow the grass there for Commander G B Palmes until it got too narrow in one place to be safe to use a tractor. This would be some time in the early seventies. The gateway at the end of the farm yard continued in use by me until I vacated the farm yard, when Mr B E C Bray sold the land for development in 1976 or thereabouts."



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MW/1

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Copy inset map (1/2,500) of Register map.

Part III: letters received since hearing

11 November 1986	From Mrs Raye Chance of Chapel House, Naburn. Lived in Naburn since 1973 (from 1973 to 1982 in Riverside Cottage).
11 November 1986	From Messrs R C and J H Hargreaves of 1 Palmes Close, Naburn. Lived in Naburn for 8 years.
12 November 1986	From Mr G B Dinsdale of Shepherds Cottage. Lived in Naburn since October 1960.
12 November 1986	From Messrs C and T Hirst of Plum Tree Cottage. Resident in Naburn for 22 years.
14 November 1986	From Mr J G A Nisser of 3 Palmes Close, Naburn. Lived in Naburn since 1977.
17 November 1986	From Mr/Ms Lofthouse of Lilac Cottage, Front Street, Naburn. Lived in Cottage since 1926.
17 November 1986	From Mr W Norman of 10 Vicarage Lane, Naburn. Lived in Naburn 66 years except 6½ years war service, 26 years in a farm labourers cottage adjoining the lane to the Foreshore.
Undated (received 21 November 1986)	From Mr A Lofthouse of Callan, Front Street, Naburn. Lived 43 years of his life in property overlooking the Foreshore.
24 November 1986	From Mrs C M Lambden of 2 Palmes Close, Naburn. Lived in Naburn Village for 10 years.



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26 November 1986

From Mrs E Robinson of
Honeysuckle Cottage,
5 Ferry Farm Close, Naburn. The last
9 years that I have lived here.

27 November 1986

From Mr G W and Mrs F Thompson of
Laurel Cottage, Naburn. He now 83 years
old born in Naburn; she lived there
52 years.

6 January 1987

From Mrs J Gray of Enthorpe, Main Street,
Naburn. Lived in Naburn over
30 years.

Part IV: Letter of 5 June 1987 from YSL's Solicitor

Your letter of 26th instant addressed to our Agents, Messrs Parker, March, Charlton & Eastham of Sherburn-in-Elmet has been handed to us for attention and we have discussed the matter with our Client.

Our Clients feel that the request by the Naburn Parish Council to continue the October hearing should be refused on the grounds that the writers of the 12 letters would have been available to attend the October hearing had they been called and the Parish Council are not seeking to produce fresh evidence which has come to light since the hearing in October but are merely requesting an extension of the original hearing in order to present a better case than they did in fact present at the original hearing and our Clients feel that the application is merely to enable them to have two bites at the same cherry.

A further point that our Clients have asked us to make is that by extending the original hearing they will require to be represented again and will be faced with a further count for legal costs through no fault of their own and having already borne the expense of the hearing being moved from Selby to Naburn in order to hear the evidence of one of the Parish Council witnesses who could not attend at Selby they feel strongly that if the request for a further hearing be granted then as it is purely at the convenience of the Parish Council their additional costs should be borne by the Parish Council.



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Having perused the letters referred to it seems apparent that the various letter writers are apprehensive that if the land is not designated as Common land they will lose their rights of walking along the river bank, fishing from the river bank and picnicing thereon. This is certainly not the case as for very many years Commander Palmes raised no objection to the villagers walking, fishing and picnicing on this stretch of riverbank and our Clients when the property was purchased was fully aware that these rights existed by long usage and there is no attempt by Yacht Service Ltd to discontinue them. While it is correct that the access has been gated it does not interfere with pedestrian traffic and the sole purpose of the gate was to prevent vehicles being driven on to the river bank for the purpose of dumping garden refuse.

We therefore will be pleased if you could treat this letter as a formal objection by Yacht Service Ltd to the request to reopen the hearing being granted.

Dated this 22nd _____ day of July _____ 1988

A. A. Baden Fuller.

Commons Commissioner