Response to Mr Rhodri Williams' further advice (9March 2015) in respect of Mr Alesbury's report on the application to register Castle Acre Green as a TVG

(A) INTRODUCTORY COMMENTS

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1) We note that the further advice provided by Mr Williams was sent to the Legal Dept in Swansea, as landowner, on 9 March 2015, yet only released to us via the Registration Authority on 15 May 2015. We can only speculate as to the reasons for the delay.
2) We further note the refusal of Swansea, the landowner, to release earlier advices made by Mr Williams and to which he refers in his paragraphs 2 and 3 of his March 9 advice, which we are advised is highly irregular because they provide context for the 9 March advice. It is long established in law that if privilege is waived in respect of one document in a series then it is waived in respect of the remainder. This rule is necessary to prevent a party from unfairly indulging in selective disclosure or "cherry picking" among the privileged material.
3) We also note the irregularity by Swansea as Registration Authority, in allowing the Council as landowner to put before the committee an opinion from the landowner's legal counsel, Mr Rhodri Williams, that **re-visits the arguments already considered and dismissed by the inquiry inspector. The Council, as landowner, has already argued its case at the public enquiry and lost. The Planning Committee is not a Court of Appeal. This opinion has prompted our further response contained within this note.**
4) **We would remind the Planning Committee that Mr Alesbury's report is a demonstrably independent assessment of the facts presented at the inquiry whereas Mr Williams' response is partial in that it simply re-visits the case already presented on behalf of the landowner that was considered and rejected by the independent inspector. It should be given little weight for that reason.** Far be it from us to challenge Mr Alesbury's legal judgement of the case for registering Castle Acre Green as a Town or Village Green, nor revisit in detail the arguments in favour of registration, that we presented and which were accepted, at the Hearing. Mr Alesbury's reasoning on the "as of right" issue is clearly set out after taking into account the Barkas judgement in paras 11.25 and those following. We accept the validity of Mr Alesbury's judgement, in that he is both a highly

respected, experienced barrister and an expert inquiry inspector in this specialist field **(see biographical notes attached in Appendix).**

5) At the public inquiry, we noted that **Mr Alesbury's specialist expertise was openly acknowledged by Swansea's counsel, Mr Rhodri Williams,** to the extent that he invited, for example, Mr Alesbury to consider a recent **(post Barkas)** judgement of a Village Green application **made by Mr Alesbury as inspector** (Naylor vs. Essex CC (2014)) in which **his (Mr Alesbury's) reasoning was subsequently upheld by the judgement of the High Court** (See paragraphs 11.29 and 11.31 in Mr Alesbury's report). We also note that, while such challenges of inspectors' recommendations are extremely rare, there was the same outcome **again favouring Mr Alesbury's judgement**, **when an opposing QC challenged Mr Alesbury's decision in the Court of Appeal in the landmark Yeadon Banks Case (Leeds Group plc v Leeds City Council 2010 and 2011). Clearly, Mr Alesbury's recommendations tend to be upheld as sound in law even on the exceptionally rare occasion they are challenged in higher courts.**
6) **Furthermore, we note that Mr Alesbury has enjoyed the full confidence of the Registration Authority of the City and County of Swansea for some years: he has acted, and continues to act, as a non-statutory inspector on its behalf on several occasions.** Recent local examples of his determinations include the "Slipway", Llanmorlais, and Winch Wen Village Green applications, while one relating to land at Llangefelach, was dismissed by Mr Alesbury without the need for an inquiry. Other VG applications made to the Swansea Registration Authority await Mr Alesbury's determination at inquiry.
7) Finally, we note that Mr Alesbury's conclusions and recommendations have been accepted by the Registration Authority of Swansea (like other local authorities), rightly, without question in the past.

(B) ISSUES OF FACT AND LAW

8) We wish to comment on, and dispute, some issues presented as "fact" in Mr Williams' further advice in respect of Mr Alesbury's judgement.
9) We note that **at no point** does Mr Williams challenge the facts presented by the Friends of Castle Acre Green relating to the **use of the land**: he conceded at the outset that the use criteria appropriate for the registration of the land as a village green had been met. We had clearly demonstrated use

of the land by a significant number of the residents of the neighbourhood (acknowledged to be Norton) for a period of at least 20 years for lawful sports and pastimes (see paragraph 11 in Mr Williams' further advice). In fact, there were 115 completed witness forms from which 15 witnesses were ready to personally attest at the inquiry to their use of the land for lawful sports and pastimes**. So it's not surprising that the landowner conceded these points at the start of the Hearing. Furthermore, referring to other elements of our evidence, Mr Williams concedes (also in paragraph 11), that "it is difficult to take issue with the inspector's finding of fact …or the weight he attaches to matters such as the medieval tournament camping "etc.**

10) Mr Williams points out the clerical error in that the dates in Paragraph 11.1 of Mr Alesbury's report are incorrect. The actual dates are: Application was dated: September 2012; received by the Council: 20 September 2012;use of the land "as of right" ceased on 12 April 2012. This clerical error, does not materially affect the reasoning or the conclusions because the details of our application and the Hearing are correct in all other respects. We might also refer to a similar clerical error in Mr Williams' advice at his paragraph 32 in which he refers to "Wednesday" unreasonableness.
11) In paragraph 14 and elsewhere, Mr Williams refers to land as "recreational", "open space" or "greenspace" as though these terms are synonymous and interchangeable in a VG sense. **They are not.** Mr Williams is incorrect. **The statutory powers under which the land was held**, and its clearly committed use for recreation in the Barkas case (which he frequently cites) **is in stark contrast** to Swansea Council's inability to demonstrate the same for Castle Acre Green (see for example para 11.28, 11.32 and 11.56). By unjustifiably conflating these terms, Mr Williams attempts to establish that designating a piece of land "greenspace" implies its use is dedicated to recreation. **This is clearly not generally true. It is certainly not proven in the case of Castle Acre.(see paragraph 13 below)** There are many examples of greenspace that are not specifically designated for recreational use.
12) In paragraph 16 of Mr Williams' further advice, the claim that the subject land was acquired for a dual purpose and that we had conceded that point at the inquiry, **is incorrect on two counts. The subject land was not acquired for a dual purpose and we never conceded that point at the inquiry**. Yet again Mr Williams is confusing the purchase of the larger portion of land (the 10.323 acres that Mr Alesbury refers to as the "1965 land") with the subject

land (Castle Acre Green). The latter represented only a small portion (2.94 acres or 28%) of the total purchased by the Council in 1965. (See for example para s 11.40 and 11.41). While part of the "1965" land **lying outside the application land may** have been acquired for an open space, it is clear from drawings and documents presented as part of our evidence, and accepted by the objector, that the land to which we refer as "Castle Acre Green" (the subject of our application) **was designated for highway construction.** Moreover, while, as claimed by Mr Williams, the highways purpose may have "fallen away by 1998", it is clear from our evidence that even in 2005 (see pages 71 and 72 to 74 of my evidence and Mr Alesbury's para 11.46) **that a substantial part of the land was under active consideration for car parking**. **So Mr Williams' claim that the Open Spaces Act 1906 "must have been engaged by 1998" is clearly wrong.** In fact, we would dispute that the Open Spaces Act was **ever** engaged for the application land. **It does not follow that any land**, which may or may not have been zoned as greenspace must have been held specifically under the Open Spaces Act of 1906. **There is no evidence** that this was ever the case for our land. **Therefore, use of the land could not have been under a statutory trust**. Mr Alesbury acknowledged this in his judgement.

13) In paragraph 17 of Mr Williams' advice, he refers to the zoning of the land under the generic heading of EV24 in the 2008 UDP (just like numerous other sites so zoned in the UDP at that time). This particular land was not highlighted as worthy of any special mention in the UDP. This was much discussed at the Hearing and was clearly addressed by Mr Alesbury in his conclusions set out in paras 11.46-11.48. Inter alia, such a designation does not in itself preclude registration of the land as a Village Green. **We note that the City and County of Swansea voluntarily registered land zoned as EV24 in the UDP as a village green on two separate occasions within the UDP time frame** (App Nos 2711(s) and 2727(s)) at West Cross in 2011/2012 (Minutes of Rights of Way Sub-Committee 5 Dec 2012 and 26 Oct 2011). **So this label clearly does not in itself preclude Village Green registration, otherwise they might have reasonably blocked the registration of the prime sites in front of the West Cross housing estate.** At the Hearing, we clearly distinguished between Swansea's **choice** to zone the application land as EV24 rather than HC23; **significantly**, **they deliberately chose NOT to explicitly zone it as HC23 land (para 11.48). In contrast to EV24 land , HC23 land is clearly and expressly designated in its Greenspace Policy**

as "community recreation land" i.e. <u>for the purpose of public recreation</u>. Neither did the Council invite the public to use the land as witness the fact that **they have chosen to omit it from their published and on-line literature on open green spaces in Mumbles (see 7.101 and 11.48)** .As shown at the **Hearing in documents supplied by the objector** and acknowledged by Mr Alesbury, the **EV24 generic designation has wide applicability and interpretation and is quite different from HC 23 land**. Paragraphs 11.47 and 11.48 are relevant. Clearly, in contrast to HC23, designation as EV24 does **NOT** imply an appropriation to recreational purposes. Paragraph 11.56 in Mr Alesbury's report is relevant.

14) In paragraph 22 Mr Williams claims that "**part of the application land** formed part of the southern portion transferred to the notional ownership of the Council's Parks and Leisure Committee after 1965". **This statement is clearly incorrect.** We would respectfully refer to Swansea Council's evidence given by Mr James and specifically the map labelled AAJ2 which clearly shows that **<u>none</u> of the application land was <u>ever</u> under the notional ownership of Parks and Leisure: quite the reverse, Swansea chose NOT to allot notional ownership of the land to Parks and Leisure. Instead, they deliberately <u>chose</u> to allot notional ownership of the application land to the Estates Dept along with an area beyond its boundaries, thereby further distinguishing the land from that specifically zoned for public recreation.** So these comments should be disregarded because **they are factually incorrect.** Paragraph 11.43 that refers to Ms Parkin's evidence is relevant in this respect and Mr Alesbury's conclusion in 11.54 and 11.55

15) At paragraphs 26 to 29, Mr Williams refers to the decision of the Supreme Court in the <u>Newhaven</u> case published in February 2015. That case was concerned with a beach owned by a company operating the port in Newhaven **under statutory powers**. The village green application failed, partly because of the doctrine of statutory incompatibility, that is that **the statutory purpose** for which the land was held, (the operation of the port of Newhaven), **was incompatible with its registration** as a village green. **However the Court made it clear that <u>it did not follow</u> that village green applications would fail for all publicly owned land.** Specifically they said, in paragraph 101 "*The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility*." That point re-enforces the reasoning of Mr Alesbury in his paragraphs 11.56 and 11.57. **Note that this**

judgement was given by Lord Neuberger, who gave the lead judgement in the Barkas case. So he re-iterates in the Newhaven judgement that publicly - owned land can be registered as a village green, notwithstanding the Barkas judgement. This supports Mr Alesbury's analysis in, for example, paragraph 11.32 in his report.

16) Furthermore, in paragraph 28 Mr Williams expresses the view: "I consider that "recreation" **can** *(my emphasis)* include the use of land which comprises open space….. for the purposes of recreation…. with exactly the same legal consequences". This logic is strained: just because something **"can"** be true **does not make it necessarily nor universally true. In the case of the Castle Acre it is not true.** In fact, the Inquiry clearly established in paragraph 11.56 of the report, that the Council **had not** "validly and visibly **committed** the land for public recreation" (borrowing Mr Williams' quote from Lord Carnwath). **See also our comments in paragraph 13 above.**

17) Finally, in para 32 (and previously in para 11), Mr Williams states in his last sentence "the applicants would only succeed in getting this quashed if they could show that the decision taken was **Wednesday (sic)** unreasonable". While we cannot claim to be as expert in the detail of all aspects of the law, we *are* familiar with **Wednesbury** unreasonableness, no matter which day of the week it applies. It applies to unreasonable decisions made by public bodies. I can confirm that should Mr Alesbury reconfirm his original judgement, as we expect he will, the residents of Norton will expect the City and County of Swansea to endorse his recommendation by registering the land as a Village Green. Here, Mr Williams is right: failure to do so would signal an act of bad faith on the part of the committee and be regarded as Wednesbury unreasonableness. It would indeed be subject to further challenge by our legal counsel by way of Judicial Review. Mr Williams appears implicitly to invite the Council to reject the recommendation out of hand, on the assumption that the applicants may lack the resources to pursue natural justice through Judicial Revue. This emphatically is not the case.

18) We expect Mr Alesbury's recommendation, whatever it may be, to be upheld by the Planning Committee. Otherwise, it negates the purpose of a public enquiry led by an experienced and highly qualified expert in this specialised field. Furthermore, rejection of an expert's recommendations by elected members devalues the inquiry process in the eyes of the electorate.

Dr Robert Leek on behalf of The Friends of Castle Acre Green

APPENDIX: Alun Alesbury MA Cornerstone Barristers (pen profile)

Education: Fitzwilliam College, Cambridge. University of Seville
Career: called to the Bar Inner Temple 1974.

He specialises in all areas of Planning, Local Government and Administrative law, both advocacy and advisory work.

The majority of his work covers:

- **Town and Village Greens'** – a very major part of his practice (SEE BELOW)
- **Common Land issues** which do not relate to 'Town or village green' claims.
- **Public or Private Rights of Way**
- **Highways -** rights of way, promotion of road schemes.
- **Restrictive Covenants** and their discharge or modification through the Lands Tribunal procedure.
- **Rating** – Alun has very extensive experience in Rating law and practice, including numerous appearances in the courts (from the Magistrates to the House of Lords) and the relevant tribunals (Local Valuation Tribunal and Lands Tribunal).
- **Open Spaces, parks and pleasure grounds and allotments**
- **Compulsory Purchase and Compensation** E.g. Promoting CPOs for Swansea and the Vale of Glam.

Commons, Town and Village Greens

Alun Alesbury has very extensive experience in this field, in a variety of different roles. He has on numerous occasions been appointed by Commons Registration Authorities (County or Unitary Councils) to hold (as Inspector) Inquiries or hearings on their behalf into town or village green claims. He has also frequently been instructed to act for local authorities (and others) as landowners in such cases.

Cases where Mr Alesbury has been instructed by Registration Authorities,
Examples include:

Essex C.C. Mill Lane, Walton-on-the-Naze (Naylor v Essex C.C. 28.07.14)
Swansea C & C. Winch Wen, Bonymaen ,Swansea
Swansea C & C. Llangyfelach, Swansea
Swansea C & C. Slipway Maritime Quarter, Swansea
Caerphilly C.B.C. Hawtin Park
Essex C.C. Everest Way,Heybridge
Essex C.C. Brighton Road ,Holland on Sea.
Essex C.C. Wethersfield Way, Wickford
Calderdale M.B.C. Oakville Rd, Charlestown
Widmer End, nr. High Wycombe – Buckinghamshire
Winnersh, Berks. (surplus education land) – Wokingham
Wargrave Old Chalk Pit, Berks. – Wokingham
Land at Newbold Hill – Rochdale
Yeadon Banks – Leeds [decision successfully defended in High Court and Court of Appeal – [2010] EWCA Civ 1438]
Highbury Mission Land – Leeds
Linnet Close, Tilehurst – West Berkshire
Bull Lane Playing Field – Enfield
Pincents Hill, Tilehurst - West Berkshire
Dyffryn Cellwen - Neath-Port Talbot
Groby Road, Ratby – Leicestershire CC
Oakville Road, Charlestown, Hebden Bridge – Calderdale MBC

He has also been instructed by local authority landowners to represent them at village green inquiries/hearings. Examples include:

Knowle, Sidmouth for Devon County Council (10.04.14)
Pakefield Old Golf Course, Lowestoft – for Suffolk C.C.
Oak Victoria site, Oldham – for Oldham M.B.C.
Ffordd yr Eglwys, North Cornelly – for Bridgend C.B.C.
Runnymede Paddocks, Thundersley – for Castle Point B.C.
Gooshays – for London Borough of Havering
Lee Chapel North, Kent View Road, and Pound Lane (three inquiries) – all for Basildon B.C.

He has also frequently advised private sector and local authority landowners in relation to actual or potential village green 'problems', including advising on (lawful) schemes aimed at minimising or overcoming such problems. Notable examples have arisen in Berkshire, East Sussex, Greater London, Monmouthshire and other parts of South Wales, North-West England, and in other locations. Notably, a scheme devised by Alun Alesbury for the developers Barratts was successfully defended in the High Court in BDW Trading Ltd (t/a Barratt Homes) v Spooner [2011] EWHC 290 (QB)

He has also spoken on village green law at numerous conferences, seminars, etc.

Judicial Reviews

He has very frequently been involved in Judicial Review proceedings relating to public law decisions, whether these have the formal status of "Judicial Review" under the Civil Procedure Rules, or are the analogous provisions for the quashing of decisions for error of law under the various relevant statutory codes, e.g. the Town and Country Planning Acts, or the Highways and Compulsory Purchase legislation.

Planning

He has a varied and active practice, at inquiry, in court, and with advisory work. In the area of pure planning, as well as extensive residential/retail work, he has worked on projects involving airports, nuclear plants etc etc.

Publications

Halsbury's Laws

He was responsible for the section "Property in and Rights on Highways" in the Highways volume of Halsbury's Laws (4th edition, original version)

Associations

He was a founder member of the Planning & Environment Bar Association (PEBA).

Member of the Compulsory Purchase Association

Member of the Administrative Law Bar Association (ALBA)

Member of the Parliamentary Bar Mess

Member of the Ecclesiastical Law Society

Member of the British-Spanish Law Association

Other relevant information

Career: called to the Bar Inner Temple 1974, legal corr The Architect 1976-80, Memb Panel of Jr Treasy Counsel (Lands Tbnl) 1978-, memb Supplementary Panel Common Law (Planning) 1991-2000; Memb: Parly Bar Mess, British-Spanish Law Assoc, Admin Law Bar Assoc, Ecclesiastical Law Soc; founder memb Planning and Environment Bar Assoc 1986 (hon sec 1986-88); appointed to hold inquiry into: Palmeira Avenue fire Hove 1992, Lake Windermere speed limit inquiry 1994-95, Canbury Gardens Kingston 1998-99, Chardon LL (GM seed licensing) 2000-02, numerous village green registration inquiries; memb: South Downs Jt Ctee (formerly Sussex Downs Conservation Bd) 2001-11, South Downs Nat Park Authy 2010