

# Appeal Decision

Inquiry held on 7 December 2004

by **Karl P Moxon** BA(Hons) MRTPI Solicitor and  
Notary Public

an Inspector appointed by the First Secretary of State

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31 DEC 2004

Date

30 DEC 2004

**Appeal Ref: APP/W9500/X/04/1152764**

**Uplands Playing Field, Hay Lane, Scalby, North Yorkshire**

- This appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act) against a refusal to grant a certificate of lawful development (LDC).
- The appeal is made by Mr M C Hamilton against the decision of the North York Moors National Park Authority (the NPA).
- The application (referenced NYM/2004/0032/CLE and dated 14 January 2004) was made under section 191(1)(b) of the Act.
- The application was refused by notice dated 19 March 2004.
- The development for which an LDC is sought is the installation of three radio masts.

**Summary of Decision: The appeal is allowed, and a certificate of lawful development is issued in the terms set out in the Formal Decision below.**

## Procedural Matters

1. The inquiry sat for the full day on 7 December 2004. An inspection of the appeal site and surrounding area was carried out the following morning.
2. To ensure consistency with the evidence given at the inquiry, I shall in this decision refer to the several masts by the names then attributed to them.

## Background

3. The appeal site is a "certified location" caravan site. It is rectangular in shape, and lies on the south side of Hay Lane in a part residential and part rural area. The masts are used mainly by visiting caravanners who are also amateur radio enthusiasts.
4. All of the masts are telescopic. When not in use, their telescopic sections are retracted; the masts are then tilted downwards from a hinge mechanism located some two to three metres above their bases. Remaining visible following these operations are thus their base sections which extend from ground level to the hinge mechanism, and their compressed telescopic sections which extend from the hinge to a point on the ground a few metres wide of their bases.
5. Despite those common features, there are however some differences between the masts:
  - Mast 1 is of lattice-type construction. It rests on a small, single-axle trailer, and is located in the south western corner of the site.

- Mast 2 is also of lattice type construction. It, however, is bolted to a concrete plinth. It is located in the south eastern corner of the site.
- Mast 3, known as a "Tennamast", is constructed from solid metal tubes. It has no base as such, but is simply embedded in to the ground. This mast is located amongst the trees and bushes about half way down the site's western boundary.

### Preliminary Matter

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6. At the inquiry, the Authority confirmed that their case is founded on the premise that the masts are fixed, permanent structures; their installation involved a building operation, and hence constituted development. Their lay witness Mr Butterworth, on the other hand, has submitted evidence to the effect that "over the past three years the masts have been removed, altered and their position on the land changed."
  7. But if that were so, the presence of the masts in the field would not, I believe, amount to development: in line with the principles in *Barvis Limited v Secretary of State for the Environment*<sup>1</sup>, the masts would not have a sufficient degree of affixation to the land to have become buildings or other structures; neither would a material change of use of the field have taken place, because in terms of the planning unit as a whole the masts are, it seems to me, as a matter of fact and degree self-evidently no more than incidental to its primary use.
  8. I do not, however, need to determine the matter. Mr Hamilton does not contest the Authority's view that development has in fact taken place; on the contrary, it is a material part of his case that none of the masts have moved since they were originally installed.
  9. I shall therefore approach this appeal on the bases that the masts are fixed, permanent structures, and in consequence that building operations have indeed been carried out.

### The Gist of the Appellant's Case

10. Mast 1 was installed in 1989, Mast 2 in 1995 and Mast 3 in 1996.
11. Letters from Wilfred Scruton Limited, agricultural engineers of Foxholes, confirm that
  - in May 1989, they sold to Mr Hamilton one telescopic, lattice radio mast, and delivered it to Uplands Playing Field, Scalby; and
  - photographs attached to their letter of 18 November 2004 show the same mast, which has since had wheels fitted.

These photographs self-evidently show Mast 1 in its current position.

12. A receipt dated August 1995 confirms the time of Mr Hamilton's purchase of a telescopic, lattice radio mast from a Mr J E Fletcher of Scarborough. The price paid included delivery to Uplands Playing Field.
13. A letter of even date from Mr Fletcher confirms that he visited the field on 18 November 2004, and as a result was able to verify that the mast he supplied remains, as in August 1995, installed in (looking down the field from the gate on the road) its bottom left corner.

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<sup>1</sup> (1971) 22 P&CR 710.

14. The "bottom left corner" is the south eastern corner of the field. Mr Fletcher's evidence therefore refers to Mast 2. NVMNPA

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15. Letters from Mr R A Neal of Scarborough confirm that

- he sold a Tennamast to Mr Hamilton in 1996, and in the autumn of that year helped him erect it approximately half way down the right hand side of Mr Hamilton's field at Hay Lane, Scalby; and
- from a visit to the field on 12 November 2004, he can verify that this same mast is still in the same position as originally installed.

16. By virtue of both its name and its position, Mast 3 is clearly the one Mr Neal to which Mr Neal is referring.

17. Several other people confirm that they have, at various times since 1989, seen one or more of the masts on the appeal site. These include

- Mr Neal, who, in the first of his letters relating to Mast 3, recalls that there were two lattice-section masts already installed in the field: one in the bottom left corner near an old shed, and the other across in the right hand corner.
- Mrs Noakes, who has been cutting and baling hay in Uplands Playing Field since 1987. In a letter dated September 2002, she recalls that following the removal of old goalposts, she saw radio masts both in the bottom corners of the field, and near a gate leading to a lane that runs down the side of the field. At that time, the masts would have been there for around five to six years at least.
- Mr M Lomax, the manager of nearby Low Hall Hotel. While refurbishing the roof of Low Hall during the summer of 1994, he saw a radio mast at the bottom of Mr Hamilton's field. Since then, he has seen two further masts which have been there for a long time, and definitely for more than four years.
- Mr and Mrs B R Andrew, the former owners of Mr Hamilton's present house at 2 Wordsworth Close, Scalby. This couple recall a conversation with Mr Hamilton in the early part of 2000, when they mentioned being able to see from the house a radio mast in Uplands Playing Field. This was located directly across to the west, and about half way down the field.
- Mr P Catterall, who recalls attending a barbecue in Uplands Playing Field in the summer of 1996. At that time, there were two masts on the field: one in the far right hand corner (looking from the field gate) and one towards the left hand corner.

#### **The Gist of the Authority's Case**

18. No complaints about any radio masts at Uplands Playing Field were received until October 2001.

19. Mrs O M Appleton, whose house at No 3 Wordsworth Close overlooks Uplands Playing Field, advises that there were no relevant masts there before her husband died in January 2000.

20. Mr I M Butterworth, who lives on Hay Lane directly opposite the appeal site, states that all three of the masts first appeared in October 2001. His next door neighbour, Mr M G Kent, recalls the date as either October or November 2001. This evidence is consistent with the onset of complaints.
21. Both the NPA's then Enforcement Officer Mr Duerden and their then Planning Officer Miss Castledine saw two relevant masts in the field when they visited in, respectively, November 2001 and January 2002. Mr Duerden's contemporaneous photographs and Miss Castledine's contemporaneous sketch both indicate the masts they saw as Masts 1 and 2.
22. Mr Hamilton's evidence has been gathered from friends and acquaintances, and hence cannot be regarded as independent.
23. On balance, therefore, there is sufficient doubt about the reliability of the appellant's case to endorse the NPA's view that their decision to refuse an LDC was well founded.

### Assessment

#### *Preliminary Matters*

24. The NPA accepted before the inquiry opened that, contrary to the submissions of some of their witnesses, none of the masts at issue here came from Mr Hamilton's former home at Scalby Road, Scarborough.
25. In addition to the evidence summarised above, there is a substantial volume of other material, principally in the form of letters written either to the NPA or to Newby and Scalby Parish Council. Much of this evidence is, however, either hearsay or conjecture; in parts it is irrelevant because it concerns the masts Mr Hamilton had at his former home, and in other parts is difficult to follow because it is unclear to which mast(s) its author is referring. Where, nevertheless, a point of significance can be with reasonable certainty be identified, I refer to it appropriately in what follows. Also referred to below is, where relevant to this decision, additional evidence which was given to the inquiry in oral form only.

#### *The Appellant's Case*

26. The written evidence from Mr Hamilton's suppliers backs up the story he verbally gave to the NPA when first approached about the masts in late 2001. The written evidence from others is, furthermore, entirely consistent with this story, and - importantly - also internally consistent. For example
  - Mr Lomax saw but one mast in Uplands Playing Field in 1994. Later, however, he saw two further ones. All of this would be correct if, as Mr Hamilton alleges, Mast 1 was installed in 1989 whereas Masts 2 and 3 were not installed until 1995 and 1996.
  - From Mrs Noakes' evidence, it can readily be deduced that she dates the installations of all three masts to, at the latest, 1997. Again, this corresponds to Mr Hamilton's story.
  - In the summer of 1996, Mr Catterall saw only two masts in the field. This agrees with the evidence of Mr Neal, who did not install Mast 3 until the autumn of that year.
  - Mr Neal confirms that, by the time of his installation, two other masts were already in situ in the field. His descriptions of their form ("lattice-section"), and of their respective

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positions (namely in the bottom corners of the field), support Mr Hamilton's version of events.

27. In a letter to the NPA dated 28 February, Dr G T Whitfield, who otherwise strongly opposes this appeal, states "It is known that there has been a pole-type aerial on the western border of the field for many years, perhaps since 1989." Mr Butterworth believes him to have been mistaken as to the date. Mr Hamilton agrees; that matter aside, however, this piece of evidence does appear strongly supportive of Mast 3 having been in situ for longer than four years. That the same applies to Masts 1 and 2 can be readily deduced from the evidence of Mrs Noakes and Mr Catterall.
28. From these considerations the conclusion to which I am drawn is that if there were no evidence to the contrary, Mr Hamilton's evidence would justify the LDC he seeks. The matter does not, however, rest there, and I accordingly turn to assess the case against him.

### *The NPA's Case*

29. The main plank of the Authority's case is that, as both Mr Butterworth and Mr Kent state, all three masts first appeared in late 2001. I can see the force of that argument: given the proximity of their homes to the site, and hence the views they could well have of it, these gentlemen's evidence appears highly credible; the date they give also corresponds to the onset of complaints. Their story is, furthermore, corroborated until at least January 2000 by Mrs Appleton, as well as by a letter from a Mr Brinkler (the purchaser of part of the garden of Mr Hamilton's former home in Scalby Road) which records there being no masts in the field off Hay Lane in July 2000.
30. If that argument were correct, this appeal would fail: the masts could by definition not have been in situ for the four years next before the date of the application (i.e. by 14 January 2000), nor, indeed, for any other continuous, four-year period. The key question, then, is how reliable is the evidence on which the Authority's case is based?
31. When Mr Duerden visited the appeal site in November 2001, he found only two masts. It seems unlikely that he would not have noticed a third one had it been there, because - as the NPA indicated at the inquiry - he was an experienced Enforcement Officer. His findings are, furthermore, corroborated by those of Miss Castledine who called a couple of months later. Those findings are, however, in direct conflict with the evidence of Messrs Butterworth and Kent that all three masts had, by then, been installed.
32. For similar reasons, the evidence of Dr Whitfield conflicts with that of Messrs Butterworth and Kent.
33. Mr Butterworth's proof of evidence is written in authoritative terms. Amongst other things, he is quite definite as to how views of the appeal site from his main bedroom window have changed since he moved into his home in December 1996, due to the ever-increasing height of the hedge on the site's southern boundary. Yet when I pressed him on the matter, he did not know whether Mast 3 could or could not now be seen from this very vantage point.
34. Mr Butterworth stated in evidence-in-chief that Mast 3 "was completely removed as at the date of the application." He knew this, because he had verified it by looking into the site from its gate on Hay Lane. When questioned more closely, however, Mr Butterworth conceded that as 14 January 2004 was a Wednesday, he would have been at work on that day; it would, furthermore, have been dark by the time he returned home. He accordingly

modified his evidence on this topic to "I think I would at some time have looked into the field. But I do not know for certain that I did."

35. The site inspection established that because of the height of the blackthorn hedge on the site's southern boundary there is currently no line of sight between Mast 1 or Mast 3 and Mr Butterworth's main bedroom window. From the base of Mast 2, the window can however just be made out because along this line of sight the hedge is a metre or two lower and somewhat less dense. Looking the other way confirmed the position: from this window I could, even using binoculars, see nothing whatsoever of Masts 1 and 3. Mast 2 was just - but only just - discernable. And the inspection took place, of course, in winter-time when the hedge would be at its barest.
36. Blackthorn is slow growing. In the three years since Messrs Butterworth and Kent allege that all three masts first appeared, the height of the hedge on the appeal site's southern boundary will not have increased by more than a few centimetres. In these circumstances, there must, I believe, be considerable doubt about the reliability of the former's insistence that prior thereto the subject masts were not on site at all.
37. Finally under this head, Mr Butterworth acknowledged at the inquiry that an approach he had made to Mr Brinkler had been similar in nature to that Mr Hamilton had made to his witnesses: both had simply contacted people with whom they were acquainted and who, they surmised, might be able to provide evidence to substantiate their respective cases.

### *Conclusions*

38. From these considerations the conclusion to which I am drawn is that the Authority's evidence is not reliable. Put briefly:
- the on-site findings of Mr Duerden and Miss Castledine conflict with the evidence of Messrs Butterworth and Kent;
  - so, too, does part of the evidence of Dr Whitfield; and
  - Mr Butterworth's evidence did not in the event come up to proof, because
    - on the two points I pressed him about his answers were found wanting; and
    - my site inspection cast material doubt on other aspects of his proof.
39. Mr Hamilton's evidence, on the other hand, supports his case with a remarkable degree of consistency. I accept entirely the Authority's submission that it does not answer every question that could be asked of it. That matter, however, is beside the point: the onus on the appellant is not (as the Authority's planning witness twice said at the inquiry) to provide "conclusive evidence" of the matters he needs to establish for his appeal to succeed, but merely to demonstrate - as I believe he has done - that they are more likely than not to have occurred.
40. I attach little weight to the Authority's submission that Mr Hamilton's evidence is less credible because it has been given by friends and acquaintances. It scarcely behoves them to sustain this allegation when one of their own witnesses has done precisely the same thing.

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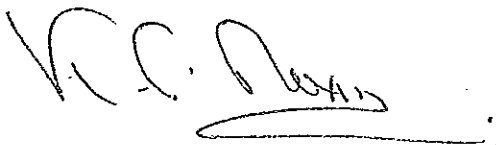
41. My final conclusion, therefore, is that, for the reasons given above and having regard to all other matters raised during the course of this inquiry, the Authority's refusal of the application was, on the evidence now available, not well founded. I in consequence make my decision accordingly.

**Other Matters**

42. I am aware that this decision will not be welcomed by a number of people who, for various reasons, feel strongly that Mr Hamilton's masts should not be permitted. They will however appreciate that this case has been concerned only with the lawfulness or otherwise of the masts, and that I have for that reason not been able to consider their planning merits. Matters such as the appearance of the masts and the antennae sometimes attached to them, possible interference with radio and television broadcasts, perceived health risks and any other development which may from time to time have occurred at the appeal site have thus been outside the scope of this appeal.

**Formal Decision**

43. I hereby allow the appeal, and attach to this decision a certificate of lawful development describing the extent of the existing operations which I consider to be lawful.



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INSPECTOR

## APPEARANCES

### FOR THE APPELLANT:

Mr M C Hamilton    2 Wordsworth Close, Scalby, North Yorkshire YO13 0SN.

He gave evidence himself, but called no other witnesses.

### FOR THE NATIONAL PARK AUTHORITY:

Miss C Gattrell    Solicitor, North York Moors National Park Authority.

She called

Mrs J Clarke BSc (Hons) MRTPI                      Senior Planning Officer (Enforcement), North York Moors National Park Authority.

Mr I M Butterworth                                         "Strathearn", Hay Lane, Scalby, North Yorkshire YO13 0SP.

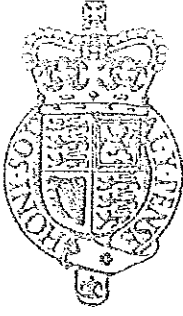
## DOCUMENTS

- Document    1                      List of persons present at the inquiry.
- Document    2.1-2.25              Appendices to Mrs Clarke's proof of evidence.
- Document    3.1-3.5                Appendices to Mr Butterworth's proof of evidence.
- Document    4.1-4.3                Letters submitted by Mr Hamilton, from:
- Mr R A Neal, dated 12 November 2004
  - Mr J E Fletcher, dated 18 November 2004
  - Wilfred Scruton Limited (with photographs attached), dated 18 November 2004.
- Document    5                      Copy of Mr Hamilton's letter of 29 December 2003 to The Manager, Low Hall Hotel, Scalby, submitted by the Authority.

## PHOTOGRAPHS

- Photographs    1.1-1.3                Photographs annexed to Mr Hamilton's proof of evidence.
- Photographs    2.1-2.3                Originals, and copies, of photographs of Masts 1 and 2 taken by Mr Duerden in November 2001, submitted by the Authority.
- Photographs    3.1-3.8                Copies of photographs received from Mr Brinkler in October 2002, submitted by the Authority.





# Plan

This is the plan referred to in the Lawful Development Certificate dated:

30 DEC 2004.

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4/09 Kite Wing  
Temple Quay House  
2 The Square  
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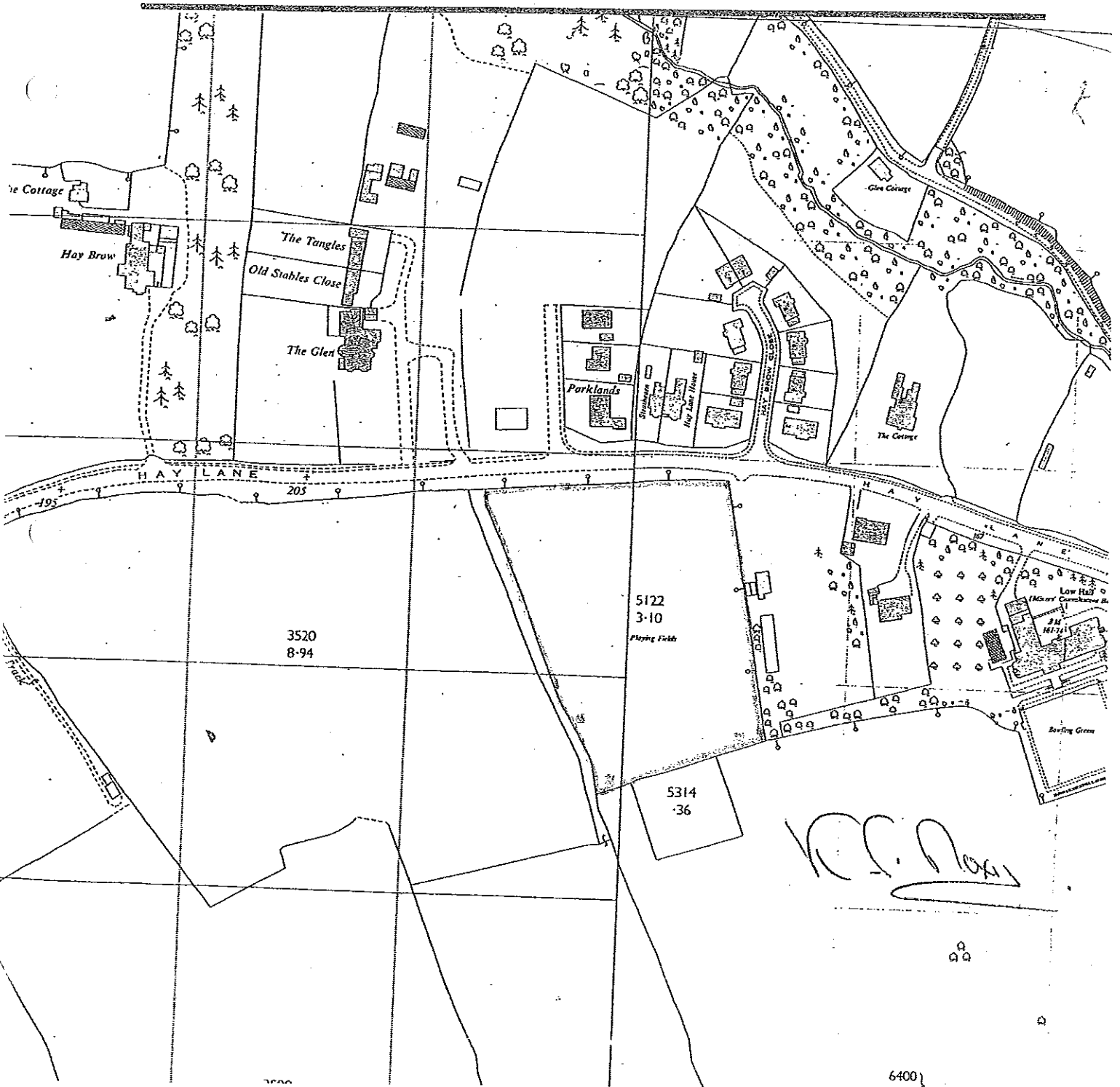
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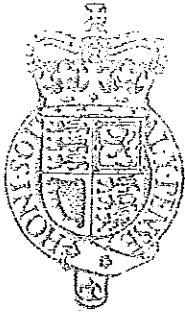
**Uplands Playing Field, Hay Lane, Scalby, North Yorkshire**

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Reference: APP/W9500/X/04/1152764





Lawful Development  
Certificate

31 DEC 2004

The Planning Inspectorate  
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Temple Quay  
Bristol BS1 6PN  
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TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191  
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT  
PROCEDURE) ORDER 1995: ARTICLE 24

**IT IS HEREBY CERTIFIED** that on 14 January 2004 the operations described in the First Schedule hereto were, in respect of the land specified in the Second Schedule hereto and shown edged black on the plan attached to this certificate, lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The operations had been substantially completed for a period of at least four years.

Signed

INSPECTOR

Date 30 DEC 2004

Reference: APP/W9500/X/04/1152764

***The First Schedule***

The installation of three radio masts in the approximate positions indicated on the said plan.

***The Second Schedule***

Uplands Playing Field, Hay Lane, Scalby, North Yorkshire.

IMPORTANT NOTES – SEE OVER

## CERTIFICATE OF LAWFULNESS FOR PLANNING PURPOSES

### NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 (as amended).
2. It certifies that the operations described in the First Schedule which had taken place on the land specified in the Second Schedule were lawful on the certified date, and thus were on that date not liable to enforcement action under section 172 of the 1990 Act.
3. This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use or operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the National Park Authority.