IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BELL AVENUE, SUTTON AS A TOWN OR VILLAGE GREEN

AND IN THE MATTER OF THE COMMONS ACT 2006

PRELIMINARY ADVICE

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1. I am instructed by Cheshire East Borough Council (in its capacity as the relevant **registration authority** under the Commons Act 2006) in respect of an application dated 8th March 2013 (the **Application**) to register land at Bell Avenue, Sutton in Macclesfield, Cheshire (the **Land**) as a town or village green.

2. I am asked to act as an independent inspector in relation to the Application. I am a self-employed barrister in private practice who specialises in, among others, the law relating to village greens and open spaces. I am aware that this preliminary advice will be disclosed to the parties to the Application.

3. In the first instance, I am asked to consider whether it is appropriate for the matter to be dealt with by way of a non statutory public inquiry or whether the matter can be dealt with by way of a written report prepared by myself after consideration of the written representations and evidence filed and served by the relevant parties.

4. This preliminary advice therefore primarily addresses what I consider to be the appropriate procedure by which the Application should be determined by the registration authority together with other relevant procedural matters. I have been provided with a copy of all relevant evidence and correspondence filed both in support of and against the Application, forwarded to me under cover of correspondence dated 25th March 2015. Nothing contained in this preliminary advice should be taken to be a determination of any factual or legal issue in respect of the Application. Equally, this advice is not intended as an full rehearsal of all evidence but rather summarises the key matters at this stage.

5. The Application was made for and on behalf of Sutton Parish Council (the **Applicant**). The Application is made on Form 44 and completed with a statutory declaration completed by a Mr. Trevor Maddock in his capacity as the clerk and responsible financial officer of the Applicant. The Land is identified on an attached plan as an area of mature open space adjacent to Bell Avenue which forms part of a residential estate including the roads Morton Drive and Tunnicliffe Road. The locality is identified as an area delineated by a blue line which encompasses the housing estate and the Land insofar as it extends around the residential houses on the three aforesaid roads. Registration is sought under section 15(2) of the Commons Act 2006 (as amended), the relevant provision of which provides the following statutory test for registration:- *"(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and (b) they continue to do so at the time of the application."*

6. The Application states that the Land has been used for a wide range of recreational purposes for in excess of 20 years and that such user has been open user without permission. The prominence of the Land as the only green open space in the vicinity of this area is cited together with the loss of amenity which would be caused by any development on the Land; in this respect, the Application cites an application for planning permission which had been made in relation to the Land sometime previous to the Application (the Application pre-dates the imposition of the trigger event amendments to the 2006 Act).

7. In support of the Application are a significant number of questionnaires and correspondence otherwise from local residents (not all of whom are from the three aforementioned residential roads), as well as the Bell Avenue Residents Group. The questionnaires and correspondence on their face make an evidential case that there has been user of the land by local residents (a term I use without prejudice to the 'locality' relied upon by the Applicant in the Application) for a number of lawful sports and pastimes for well in excess of 20 years.

8. The Land is owned by the Peaks and Plains Housing Trust (the **Trust**). The Trust has objected to the Application in a detailed objections statement filed on its behalf by Planning and Law Limited on 6th December 2013. In its objections, the Trust identifies that the Land was transferred to its ownership pursuant to a wider housing stock transfer from Macclesfield Borough Council (as it then was) on 17th July 2006.

9. Appended to the objections are a number of plans which delineate the transferred stock. They do not include any documentation otherwise relating to the execution of the transfer.

10. The Trust avers that the land is landscaped land which forms part of an area of a garage court. The Trust takes a number of objections which include (non-exhaustively) that a locality or neighbourhood has not properly been identified, that there is not evidence of significant user and that given the nature of the Land as very much ancillary to the garage court that any user must have been of a low level and by implied permission of the Trust. The Trust also answers the Applicant's case that this is the only green open space in the nearby vicinity and makes the point that the Application is, in its view, motivated by preventing any development.

11. The Applicant was afforded the opportunity to respond to the objections of the Trust and did so in further representations dated 24th July 2014 in which, inter alia, the extent of user alleged by the Trust was rebutted.

12. I have seen photographs of the Land (which I understand were provided in support of the Application) which show that is indeed a small area of open grassed space with a number of mature trees present on it (seven in total as I understand from the Bell Avenue Residents Group letter dated 2nd December 2013).

13. As a starting point, I am satisfied that there are no procedural irregularities in how the Registration Authority has dealt with the matter to date with the application processed in accordance with the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) **Regulations** 2007 (including in particular the consultation exercise prescribed by regulation 5).

14. I am therefore satisfied that I can properly move on to address the question of whether the matter should be considered at a non statutory public inquiry or by a written report.

15. There is no statutory duty or obligation placed upon a registration authority to determine a town or village green application by way of a public inquiry. A non statutory public inquiry will typically take place if there are material questions of fact which need to be determined in order for the town or village green application to itself be determined.

16. An obvious case would be where there is a substantial dispute as the extent and nature of the use of the material land over the course of the relevant 20 year period upon which the determination of the application will itself turn. In such cases, it would generally be sensible to hold an inquiry as the ultimate decision to register or not register is susceptible to challenge by judicial review on all the usual grounds.

17. If, however, there are narrow or no factual issues, or alternatively questions of law which may determine the application (notwithstanding any factual issues), a registration authority may choose to instruct a planning inspector or independent specialist to provide written advice and recommendations as to the merits of the application.

18. I summarised the objections to the Application by the Trust very briefly earlier in this advice. I have considered all objections raised to the Application. The question of whether there has been sufficient user of the Land in the 20 year period immediately pre-dating the Application would fall properly to be determined after the taking of evidence at a public inquiry. The Applicant would be entitled to adduce evidence in support of the same and the Trust to seek to rebut it. Regardless of whether or not I considered the Applicant's case to be strong in this respect on the papers, I would consider it an issue that I could only determine properly after the taking of evidence (particularly where there are a large number of questionnaires).

19. Prima facie, the Application is likely deficient in that it identifies the triumvirate of streets as the locality when it is settled law that the locality must be an administrative area recognised by law and a distinct and recognisable community as might lay claim to a town or village green: **Ministry of Defence v Wiltshire CC [1995] 4 All E.R. 931**. It is in fact a neighbourhood within a locality that is likely intended to be relied upon the Applicant.

20. A neighbourhood need not be a recognised administrative unit. However, a neighbourhood cannot be an area simply delineated on a map. It must have a sufficient degree of cohesiveness: **R. (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC [2003] EWHC 2803 (Admin); [2003] 4 P.L.R. 95.**

21. It would not be proper for the Application to be rejected on the basis that it does not correctly identify a locality or a neighbourhood within a locality as it is a matter manifestly capable of remedy by the Applicant and likely simply an error which may have arisen due to a misunderstanding of the statutory test. The Regulations expressly provide at regulation 6(4) that in such circumstances the Applicant should be afforded a reasonable opportunity to remedy the position. I consider that the question of whether the triumvirate of streets which is likely intended to be the neighbourhood relied upon has a sufficient degree of cohesiveness would be a matter for determination after a public inquiry.

22. In my view, no point of law is otherwise taken in the objections which would, in my view, be determinative of the Applications; the objections taken are for proper consideration after an inquiry. This is not to pre-judge the merits of the Application either way. In terms, on the face of the objections to the Application I would not be satisfied that the Application could be disposed of without a public inquiry (subject to the remedying of the 'neighbourhood' point).

23. There is, however, a further matter which is raised by the Trust's objections. For the substantial balance of the relevant 20 year period (which extends from 1993 through to 2013) during which user of the Land must be evidenced, the Land was owned by a local authority, namely Macclesfield Borough Council. Local authorities are creatures of statute and hold land for prescribed statutory purposes. In the absence of any evidence to the contrary, it would appear likely on its face that the Land was laid out under the Housing legislation (as enacted by section 12 of the Housing Act 1985 at material times) by Macclesfield Borough Council (or its predecessors in title) in connection with the provision of housing accommodation as open space for use by the public.

24. If this was the case, the Supreme Court has now ruled in **Barkas v North Yorkshire County Council & Ors [2014] UKSC 31** that where the owner of land is a local, or other public, authority which has lawfully allocated the land for public use such use is "by right" and not "as of right" and that it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right" simply because the authority has not objected to their using the land. In that case, land had been allocated as recreational space pursuant to section 12(1) of the Housing Act.

25. I also direct the parties to the case of **R. (Newhaven Port and Properties Limited) v East Sussex County Council [2015] UKSC 7**.

26. In that cases arguments relating to the ownership and maintenance of land by local authorities were also given further consideration. In particular, the Supreme Court in **Newhaven** considered the question of whether the imposition of byelaws gave rise to user not being "as of right" but rather under licence, the question being answered in the affirmative.

27. Equally, the housing transfer documentation may evidence that the Trust holds the Land on trust on an equivalent basis for the public.

28. If user of the Land has not been "as of right" but "by right", regardless of the extent of user over the last twenty years for lawful sports and pastimes, this would likely be determinative of the Application.

29. It is important that to the extent possible the basis upon which the former local authority held the Land is established. Further, it is proper that the parties have a reasonable opportunity to deal with this issue: per regulation 6 of the Regulations.

30. For the avoidance of doubt proper in every application under section 15(2) of the 2006 Act, regardless of any objection, the registration authority must be satisfied that the applicant has strictly proved each constituent part of the test under section 15(2) on the balance of probabilities before determining that the application is successful: see, for example, the *Defra Guidance from February 2011*.

31. The Regulations further expressly provide at regulation 6 for an opportunity to be afforded for the Applicant to respond to any further point not raised in an objection. I am therefore satisfied that there is no barrier to the taking of this issue and indeed that it is proper that the issue is dealt with.

32. Upon the said opportunity being afforded to the parties to deal with the issue, it is my view that the registration authority may obtain in the first instance written advice and recommendations as regards the merits of the Application without proceeding with a non statutory public inquiry. This is because the question of whether user has been "as of right" or "by right" is potentially determinative of the Application and it is an issue which can properly be considered without a public inquiry, even taking the Applicant's case at its highest.

33. In coming to this conclusion, I express no view as regards the merits or otherwise of the Application. My full written advice and recommendations will be detailed in my written report in due course.

34. I add that taking such a course of action does not preclude a non statutory public inquiry from later taking place if issues arise which make it prudent for such an inquiry to take place or I conclude in my written report that an inquiry is necessary especially as my opinion will be subject to further evidence and representations relating to the "by right" issue.

Directions

35. I would ask that the following direction be notified to the parties. These directions are primarily directed at affording the opportunity to the parties to deal with the question of the basis of ownership of the Land by the Trust and Macclesfield Borough Council and the consequences of the same.

35.1 Any further evidence relied upon by any party be filed and exchanged by Friday, 15th May 2015.

35.2 The registration authority will disclose any further evidence relating to the statutory basis of ownership that it obtains through further inquiry by Friday, 15th May 2015.

35.3 Any written representations of the parties in response to the same to be filed and exchanged by Friday, 29th May 2015.

35.4 Any request for an extension by the parties to any of the above deadline should be made in writing with reasons why an extension is sought as soon as it reasonably becomes clear that the deadline cannot be met.

35.5 The parties' attention is drawn to the case law I have identified above.

36. Upon completion of the above directions, I will prepare my written report and recommendations. I repeat what I have said above at paragraph 34. The parties should be warned that the failure to produce any further evidence and representations in accordance with the above timetable may lead to the same not being taken into account.

37. I ask my instructing solicitor to note paragraph 35.2 and I would advise that the registration authority should make suitable further evidential enquiries.

38. Please do not hesitate to contact me with any queries.

James Marwick

Trinity Chambers

21st April 2015