

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BANKY
FIELDS, CONGLETON, CHESHIRE AS A TOWN OR VILLAGE GREEN**

AND IN THE MATTER OF THE COMMONS ACT 2006

PRELIMINARY ADVICE

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 Banky Fields, Congleton in 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. The Application is opposed by Cheshire East Borough Council in its capacity as **land-owner** and a Chinese Wall has been put in place by the Council to ensure there is no internal information sharing between the separate teams dealing with the Application as registration authority and land-owner respectively. This is in accordance with established practice where a council has a dual interest in an application to register land as a town or village green.

4. It is equally well established that it is acceptable and proper practice for a registration authority with such a conflict to appoint an independent expert to consider the application for registration. Such an approach was endorsed by the Court of Appeal in **R. (Whitney) v Commons Commissioners [2005] QB 282**.
5. In this advice, references to **registration authority** and **land-owner** are references to Cheshire East Borough Council acting in those respective capacities.
6. 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. 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.
7. 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.

8. The Application was made by a Mr. Gordon Mellor, a resident of Banky Fields, and accompanied by 13 letters of support from other local residents. The Application is proper in form, being made on Form 44 and completed with a statutory declaration. The Land is primarily a grass field which is owned and maintained by the land-owner. There are also some garages located on the southern part of the Land. 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.”*
9. The Application states that the Land has been used for a wide range of sports and pastimes for well in excess of 20 years and a plan is annexed to it which identifies the neighbourhood relied upon by a relatively arbitrary circle encompassing the area around the Land.
10. The registration authority undertook a consultation exercise from 12th September 2013 to 6th December 2013 as part of which the Application was advertised and in particular any objections to it were invited from the land-owner. The land-owner did not respond to that consultation exercise.

11. There was then a delay, for unexplained reasons, in the subsequent consideration of the Application. I am instructed that because of this a renewed consultation exercise in November and December 2014 was undertaken which invited any further submissions from interested parties.
12. The land-owner did respond to that second consultation exercise by submissions dated 15th December 2014.
13. Mr. Mellor was allowed the opportunity to respond to those submissions and did so under cover of letter dated 26th January 2015, having in the meantime sought support from his local member of parliament, Fiona Bruce MP, who wrote to the registration authority under cover of letter dated 9th January 2015.
14. The primary objections of the land-owner are two-fold.
15. First, that the Application does not evidence a recognised neighbourhood within the meaning of the established case law.
16. Second, that the Land is held by the Council as open space under the Open Spaces Act 1906 and therefore that any use of the Land by local residents has been by right rather than as of right as the Land is held for public recreation purposes by the land-owner under a statutory trust. The land-owner avers that user alternatively has been by express and/or implied licence.

17. These propositions were rejected by Mr. Mellor in his said letter dated 26th January 2015 in which he also took exception to the procedural course adopted by the registration authority and in particular the second consultation exercise. Both Ms. Bruce and Mr. Mellor have questioned the entitlement of the registration authority to allow the land-owner what is perceived to be an unfair second bite of the cherry.
18. An unopposed application for registration as a town or village green does not lead to automatic registration of the land in question as a green. In each case, 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*.
19. The registration authority has followed the procedural steps prescribed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) **Regulations** 2007 (including the consultation exercise prescribed by Regulation 5). The procedure provided for by the Regulations is directed towards ensuring that a fair opportunity is given to any relevant party to put its case and to respond to any matter raised during the course of consideration of the application. Regulations 6(2) to 6(4) expressly provide that the registration authority may take into account any further evidence or submissions filed after the close of its consultation period so long as the applicant is afforded the opportunity to consider and respond to the further evidence or submissions prior to determination of the application.

20. With regard to the above, I am satisfied for three reasons that the registration authority has acted properly and in accordance with a fair procedure in the present case:-

20.1 It has an express power under the Regulations to admit late evidence or submissions and an opportunity has been provided to the Applicant to respond to the same.

20.2 An application under section 15(2) must be considered on its own merits regardless of whether it is opposed or unopposed by the land-owner, which precludes the argument that the second consultation exercise has in itself frustrated the Application; it would face the same hurdles with or without the objection by the land-owner.

20.3 Finally, by my appointment as an independent inspector and by the imposition of a Chinese wall internally, the registration authority has acted in accordance with established good practice.

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

22. 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.

23. 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.
24. 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.
25. I summarised the objections to the Application very briefly earlier in this advice. The question of whether the Applicant has identified a sufficiently cohesive neighbourhood for the purposes of the Application would fall properly to be determined after the taking of evidence at a public inquiry as part of which the Applicant would be entitled to adduce evidence in support of the same. 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.
26. However, in contrast, the question of whether the use of land has been "by right" rather than "as of right" in that it has been used by local residents pursuant to a statutory trust by which the land is held as open space by the

land-owner for recreational purposes is a legal point which is potentially determinative of the Application without the need for an inquiry.

27. Recent case law has confirmed that in certain cases where land is held on trust, or laid out otherwise by statute for recreational purposes, the land is used by the local community “by right” and not “as of right”: **R. (Barkas) v North Yorkshire County Council [2014] UKSC 31** (see for example, paragraph 23 of the Judgment per Lord Neuberger). I also direct the parties to the cases of **R. (Beresford) v Sunderland City Council [2003] UKHL 60** and **R. (Newhaven Port and Properties Limited) v East Sussex County Council** in which 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.

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

29. It is therefore my view that it is a proper, reasonable and fair approach for the registration authority to 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” is potentially determinative of the Application and

it is an issue which can properly be considered without a public inquiry, taking the Applicant's case at its highest.

30. 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.

31. My recommendation is therefore that the matter can proceed by consideration of the Application on the basis of written representations and material evidence with a written report to be prepared thereafter for consideration by the registration authority.

32. 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.

33. My written report will consider whether there are any issues of law which, even when taking the Applicant's case at its highest, allow for the summary determination of the Application. The written report will therefore not be an exhaustive examination of when and how often the local community has used the Land but rather primarily a consideration of whether such user has been "as of right".

34. I would ask that the parties be invited to file and serve any further written evidence and written representations which they consider are relevant to my consideration of the Application, and in particular the question of whether user of the Land has been “by right” or “as of right”.

35. Although the opportunity has already been afforded to the parties to make representations, on the basis of my flagging of the “by right” issue they should be entitled to make further representations as they see fit. Of particular relevance may be any further documentation which evidences the basis upon which the Land is held by the land-owner, albeit the key documentation appears to have been filed previously.

36. I should be grateful if my instructing solicitor could also collate any further relevant documentation in this respect.

Directions

37. I would ask that the following direction be notified to the parties:-

37.1 Any further evidence and written representations relied upon by any party be filed and exchanged by Monday 20th April 2015.

37.2 Any written representations in response to the same to be filed and exchanged by Monday 27th April 2015.

37.3 Any request for an extension to any of the above deadlines 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.

38. Upon completion of the above directions, I will prepare my written report and recommendations. 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.

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

James Marwick
Trinity Chambers
30th March 2015