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

AND IN THE MATTER OF THE COMMONS ACT 2006

WRITTEN REPORT

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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 Banky Fields, Congleton in Cheshire (the **Land**) as a town or village green.

2. In a preliminary advice dated 30th March 2015 (which has been disclosed to the interested parties to the Application), I concluded that the Application could be considered by way of a written report after the filing of further representations and evidence rather than following a non-statutory public inquiry. This was because I considered there were issues which were potentially determinative of the matter even when taking the Applicant's case at its highest. The parties were duly afforded the opportunity to make further representations by the Registration Authority and I have been provided with copies of the same.

3. As foreshadowed in my preliminary advice, I am now duly instructed by the Registration Authority to prepare a written report in respect of the Application. In settling this written report, I have been provided with copies of the Application and all the material (including correspondence and statements) provided in support of it; the objections duly made to it; and further correspondence, submissions and evidence from all concerned with the Application, including such further representations as I invited in my preliminary advice. I have had regard to all of that material in compiling my report and recommendations.

The Application

4. The Application is dated 8th March 2013 (date-stamped by the Registration Authority on the same date) contained within Form 44 and completed with an appropriate statutory declaration by Mr. Gordon Mellor, who is named as the applicant in the Application (the **Applicant**).

5. The relevant land identified for registration is named as the playing field at Banky Fields, as identified in outline in red on a plan (scale 1:1000) appended to the Application. The neighbourhood relied upon in support of the Application is delineated on a separate plan by, on its face, a fairly arbitrary circle encompassing the wider vicinity to the Land. The Land is a large area of open recreational space which is crossed by public paths. There are also a number of garages located on the southern part of the Land.

6. There were a number of supporting statements by way of letter (thirteen in all) appended to the Application (as listed in section 10 of the Application). The statements, in broad terms, are from local residents and speak to extended user of the Land for well in excess of 20 years for a wide range of activities. There is a summary of the user appended to the Application which avers user for the full spectrum of activities, including, among others, football, kite flying and dog walking. Unlike as is sometimes seen, the supporting evidence is not in a questionnaire form which speaks to user without permission or force and the extent of user. However, suffice it to say that the Application, prima facie, establishes a case that there has been extensive user of the Land for lawful sports and pastimes for in excess of 20 years immediately prior to the date of the Application.

Objections by the Land-Owner

7. The Land is owned by Cheshire East Borough Council (in its capacity as Land-owner[1]): registered under title number CH420768. By objections dated 15th December 2014, it objected to the registration of the Land as a town or village green. Its primary objections can be summarised as follows:-

7.1 The Land at material times has been allocated as open space by the Land-owner in its capacity to do so as a local authority. In accordance with section 10 of the Open Spaces Act 1906 and **R (on the application of Barkas) v North Yorkshire County Council [2014]**

[1] My preliminary advice dealt with matters regarding the question of a conflict and the Land-owner's change in position during the course of the processing of the Application. For present purposes, I do not repeat that earlier advice and I use the distinct definitions of **Registration Authority** and **Land-owner** to delineate between its involvement in two capacities.

UKSC 31, any user of the Land has therefore been "by right" rather than "as of right".

7.2 Further, user of the Land is controlled by signs making clear that it is an offence not to clean up after your dog pursuant to the Dogs (Fouling of Land) Act 1996 (a subsequently repealed statute but in force at material times up to 2005).

7.3 The Application fails to identify a legally recognised administrative unit or cohesive neighbourhood within the meaning ascribed to the terms locality and neighbourhood by established case law.

7.4 Further and in the alternative, the Council avers that it has permitted user of parts of the Land, namely, the erection of garages (and access thereto) for use by licensees.

Further Representations

8. The Objector made no further representations after the issuing of directions pursuant to my preliminary advice. It repeated its original objections as summarised above (confirmed by email dated 5th May 2015).

9. In his further representations (contained in emails dated 29th April 2015, and then from 8th May 2015 onwards), the Applicant addressed issues predominantly concerning the licensing of the garages. As I will deal with below, the licensing of the garages is not, in my view, a central matter in relation to the Application.

Statutory Framework: The Commons Act 2006 (the **2006 Act**)

10. The Application is made under section 15(2) of the 2006 Act. That section provides the following test for registration of land as a town or village green[2]:-

"(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."

11. The burden of proving that the Land has become a town or village green lies with the Applicant. The standard of proof is the balance of probabilities. All the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on the balance of probabilities, per the guidance given by Lord Bingham in **R v. Sunderland City Council ex parte Beresford [2004] 1 AC 889.**

12. The motivation of the Land-owner in terms of any intended future development the Land is not a material consideration in considering whether the test under section 15(2) has been satisfied. Any future allocation of the Land by the Land-owner is also a matter outside the scope of my report.

[2] The Growth and Infrastructure Act 2013 (partly in force as from 25th April 2013) introduced a number of further significant measures to the law on registering new town and village greens under the 2006 Act, which require consideration in addition to the provisions of section 15(2) above, but which are not engaged in the circumstances of this Application. Section 15C of the 2006 Act took effect on 25th April 2013 and excludes the right to apply for the registration of land in England as a town or village green where a trigger event has occurred in relation to the land. The right to apply for registration of the land as a green remains excluded unless and until a terminating event occurs in relation to the land. Trigger and terminating events are set out in Schedule 1A to the 2006 Act.

13. There are a number of issues which would properly need to be determined at a non-statutory public inquiry. For example, the question of whether the Applicant has identified a neighbourhood within a locality within the meaning of section 15(2)[3] as challenged by the Land-owner is a matter, in my view, which could only be determined after the hearing of evidence at a public inquiry. Likewise, whether there has been sufficiency of user by a significant number of local inhabitants for the relevant 20 year period would be a matter properly for determination after a public inquiry, albeit that in a case where the Land has been laid out for recreational use by the Public this may readily be proven. For present purposes, I take the Applicant's case at highest; namely that it has established a prima facie case in these respects.

14. I say at this point that the parts of the Land on which the garages have been erected would undoubtedly fall not to be registered due to the presence of the building structures. It is well-established that this does not prevent an application succeeding in relation to other parts of the Land insofar as user of the balance of the Land can be shown (and the statutory test is otherwise satisfied). Equally, user of the Land for access to and from the garages would very likely fall outside of user for lawful sports and pastimes. However, I advise for present purposes on the basis that the Applicant would establish prima facie at a public inquiry that there has been significant user of the Land for lawful sports and pastimes (discounting any user associated with the

[3] A neighbourhood need not be a recognised administrative unit (unlike a locality), 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. The question of whether there is such cohesiveness typically falls to be established at an inquiry. Whereas under the customary law, a right to indulge in activities could only attach to a single defined area, under the 2006 Act, "neighbourhood" can mean two or more neighbourhoods: Leeds Group Plc v Leeds City Council [2010] EWCA Civ 1438; [2011] Ch. 363.

garages and those parts of the Land upon which the garages have been erected).

15. The issue I identified as potentially determinative of the Application is whether user of the Land has been "as of right" and I now go on to address this issue and the relevant law in respect of the same. If user of the Land has not been "as of right" for the relevant 20 year period then the Application would fall to be rejected.

Qualifying User

16. The Applicant must prove, among others, on the balance of probabilities that there has been sufficient qualifying user (i.e. user as of right for lawful sports and pastimes) during the 20 year period (being the 20 years immediately prior to the date of the Application) to allow the Land to be registered.

17. User "as of right" means not by force, nor stealth, nor the licence of the owner. The most authoritative discussion of the term was that of Lord Hoffmann in **R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335** (at para 351A):-

"The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right- in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."

18. The term was further considered by the Supreme Court in **R. (Barkas) v North Yorkshire County Council [2014] UKSC 31**. Per Lord Neuberger (at para 14):-

"…it is, I think, helpful to explain that the legal meaning of the expression "as of right" is, somewhat counterintuitively, almost the converse of "of right" or "by right". Thus, if a person uses privately owned land "of right" or "by right", the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is "as of right", it is without the permission of the landowner, and therefore is not "of right" or "by right", but is actually carried on as if it were by right – hence "as of right". The significance of the little word "as" is therefore crucial, and renders the expression "as of right" effectively the antithesis of "of right" or "by right"."

19. In **Barkas** the Supreme Court was considering whether user of land allocated for public recreation under the Housing Act 1985 by a local authority was user "by right" or "as of right". In finding that such user was "by right", Lord Neuberger held as follows (at para 21):-

"In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise."

20. Lord Neuberger further elaborated upon the reasons why user of land allocated for use by the public by a local authority would fall to be considered in these terms (at para 24):-

"I agree with Lord Carnwath that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), 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 using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."

21. The Supreme Court expressly endorsed the view of Lord Walker in **Beresford** as regards local authority land held under section 10 of the Open Spaces Act 1906 for the enjoyment of the land by the public as an open space (per Lord Walker at para 87):-

"...where land is vested in a local authority on a statutory trust under section 10 of the Open Space Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers."

22. In more straightforward terms, the consequence of the case law is that it is now settled law that where land is held by a local authority as allocated open space under section 10 of the Open Spaces Act 1906 then the public have had a right to use it and therefore user cannot be "as of right"[4].

23. **Beresford** is an earlier House of Lords case where there had been uncertainty as regards the specific statutory power under which the land in that case had been laid out as open space by the city council (albeit that there was contemporaneous evidence that it was undoubtedly demarcated as open space by the city council) and the majority of the House of Lords had therefore found that user "by right" could not be made out. **Beresford** was found to have been wrongly decided by the Supreme Court in Barkas: per judgments of Lord Neuberger and Lord Carnwath.

24. Lord Neuberger held as follows at paragraph 49:-

[4] Section 10 provides: *"A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—*
(a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and
(b) maintain and keep the open space or burial ground in a good and decent state,
and many inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them."

"I consider that Beresford was wrongly decided for the reasons given by Lord Carnwath, and, while it would be wrong to repeat those reasons, it is right to express my reasoning in summary form, especially in view of my hesitation in giving the decision its quietus. It seems to me clear on the facts, which are helpfully summarised by Lord Carnwath in para 73, that the city council and its predecessors had lawfully allocated the land for the purpose of public recreation for an indefinite period, and that, in those circumstances, there was no basis upon which it could be said that the public use of the land was "as of right": it was "by right". The point made in para 24 above applies. I should add that, quite apart from this, I also share the mystification expressed about the reasoning in Beresford by Sullivan LJ in the Court of Appeal in this case in the passage quoted by Lord Carnwath in para 85 below."

25. The Supreme Court in **R. (Newhaven) v East Sussex County Council and another [2015] UKSC** considered the extent to which the imposition of a byelaw by a local authority (even if not brought to the attention of users of land) could amount to a grant of a revocable implied permission for the public to use the land. In finding that a byelaw which prohibited certain activities, by implication, inferred a permission to do other activities (citing the example that a byelaw which states that dogs must be kept on a lead in a public park implies a permission to bring dogs into the park, provided that they are kept on a lead: per paragraph 58), it was held that byelaws could confer such permission even if not brought to the attention of the public (drawing an analogy with user by right pursuant to statute: per paragraph 71).

Analysis

26. The Land-owner avers that the Land is open space regulated under the Open Spaces Act 1906. There is no direct documentary evidence in this case that there has been any appropriation for this or any other purpose. However, pursuant to **Barkas**, it is plain that no such direct evidence of an appropriation is needed: per Lord Carnwath at paragraph 85. Equally, the evidence is all one way in this case that the Land has at all material times been laid out as open recreational space; it is known as the playing field at Banky Fields and the evidence of the Applicant is that it has been laid out as such for well in excess of twenty years. This is not a case where (save for the small area where the garages are situate) it can be reasonably contended that the Land has been laid out for any other purpose by the Land-owner (and its predecessors in title).

27. The Land-owner (and its predecessors in title) had wide powers at material times to hold land out for recreational purposes: the Open Spaces Act 1906, the Local Government (Miscellaneous Provisions) Act 1976 and the Local Government Act 1972 (in terms of its wide appropriation powers in particular) conferred such power to provide land as open space. In the context of both the statutory framework of powers available to the Land-owner (in particular under the Open Spaces Act 1906) and the manner in which the land was held out, I am satisfied on balance that the Land at material times was held out for a statutory purpose for use as open space by the public.

28. Such a conclusion is supported by Lord Carnwath's approval of the first instance Judge's decision in **Beresford** (per paragraph 74) in similar circumstances where there was no express evidence of an appropriation:-

"Smith J at first instance confirmed that decision. Like the authority she attached importance to the fact of public ownership:

"In my judgment, the fact that land is in public ownership is plainly a relevant matter when one is considering what conclusion a reasonable person would draw from the circumstances of user. It is well known that local authorities do, as part of their normal functions, provide facilities for the use of the public and maintain them also at public expense. It is not part of the normal function of a private landowner to provide facilities for the public on the land. Public ownership of the land is plainly a relevant consideration." ([2001] 1 WLR 1327, para 45)

I have set out this reasoning in some detail, because in my view the approach of the authority, and that of Smith J, were unimpeachable in common sense and in law."

29. Pursuant to **Barkas** (a decision of the most senior court in England & Wales), it is now well established that where land is allocated as open space in such circumstances then user by it by the public will amount to user "by right" and not "as of right". I have cited a number of paragraphs from **Barkas** which elaborate upon this distinction and in particular land held under the Open Spaces Act 1906. In essence, where land is laid out under statute for recreational purposes as open space, the public do not use it "as of right" but "by right". I have concluded that this is such a case given the Land-owner is a local authority which has held the Land at material times as open space.

30. I am fortified in this view by the presence of the signs on the Land controlling its use. The Dogs (Fouling of Land) Act 1996 entitled a local authority to control the fouling of its land in such a way where access to it was afforded to the public by entitlement or permission: per section 1 of the said Act. Furthermore, pursuant to **Newhaven**, the control of user of land in such a way pursuant to statute can amount to the granting of an implied revocable permission to use the Land. The presence of the signs pursuant to the said Act when read with the Act would imply to the public that they had a right or permission to use the Land as it is in only in such circumstances that the Act would apply. Thus, even if I was wrong on my first conclusion as regards user by right, I would be satisfied that the imposition of the signs controlling user of the Land would be sufficient to defeat any finding of user "as of right".

31. It follows that the Application must fail, in my view, because any user of the Land has been "by right" and not "as of right" for the reasons I have given above. For the avoidance of doubt, insofar as garages have been constructed on small plots of the Land and present during the relevant 20 year period those parts of the Land would in any event, in my view, fall not to be registered as no user for lawful sports and pastimes was possible and user of those parts of the Land has been by an express licence. However, the balance of the Land is otherwise open space and for the reasons I have given, the Application fails in relation to such open space.

Conclusion and Recommendations

32. I have concluded as follows:-

32.1 User of the Land has not been "as of right" but "by right" at material times (save where garages have been constructed where no user can be established).

32.2 I recommend that the Application be rejected for the reasons I have given and for the reasons for rejection to be recorded as those stated in this report.

33. If there are any queries with this report, please do not hesitate to contact me.

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