- 2017 -

IN THE MATTER OF AN APPLICATION TO REGISTER LAND ADJOINING SWIFT ROAD, BAMFORD, AS A VILLAGE GREEN

JANICE LESLEY ARDEN

Applicant

and

ROCHDALE METROPOLITAN BOROUGH COUNCIL

Objector

OPINION

Timothy Jones

686852

Director of Legal Services,
Cheshire East Council,
First Floor (Westfield's),
C/o Municipal Building,
Earle Street,
Crewe, CW1 2BJ.

OPINION

1. I am asked to advise in respect of a town or village green ("TVG") application to register land adjoining Swift Road, Bamford, Rochdale, as a town or village green ("the Land").

2. On 25th April 1983 Rochdale Borough Council ("RBC") granted planning permission for 68 dwellings on land at Martlett Avenue, Bowling Green Farm, Bamford, subject to 6 conditions. Condition 8, which relates to the Land, stated:

> *The area of public open space shown on the approved plan shall be landscaped as shown on the approved plan and provided for use by the general public concurrent with the carrying out of the approved development and shall be maintained to the satisfaction of the Local Planning Authority thereafter.*

3. A further planning permission was granted on 14th November 1985 subject to 6 conditions. Condition 6, which relates to the Land, stated:

> *The area of public open space shown on the approved plan shall be provided for use by the general public concurrent with the carrying out of the approved development and shall be maintained to the satisfaction of the Local Planning Authority thereafter.*

4. RBC bought the land from Whelmar Homes in 1988. Nothing in the papers that I have seen indicates a legal change since then that is material to this Opinion. The purpose of acquisition is stated as the Town and Country Planning Act 1971 without specifying any section, but with attention being drawn to the statement *"The Council are to maintain the land as a landscaped area."*

5. On 23rd June 2015 Ms Janice Lesley Arden applied to RBC to register the land as a TVG, specifying the locality or neighbourhood that is served as *"Moor Park Development"*. The application makes it clear that this comprises houses adjoining Swift Road, Teal Court, Kestrel Mews, Fulmar Garden and part of Swallow Drive.

6. There has been no "trigger event" in respect of the Land.

7. Cheshire East Council has accepted RBC's delegation of powers under the Local Government Act 1972 s101 to determine this and another TVG application.

8. The application is made under the Commons Act 2006 s15(2). Section 15 provides for the registration of greens. Its subsections 15(1) and (2) state:

> *(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*
>
> *(2) This subsection applies where–*
> *(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. RBC[1] in its capacity as owner of the land has objected to the application on two grounds, the second of which is that he land has been used *"by right"* rather than *"as of right"*. I shall not consider the first reason in this Opinion, since, if it stood alone, it would necessitate a public inquiry. RBC rightly says that, in order to pass the *"as of right"* test, the land must have been used without force, without stealth and without permission. It then avers that the land has been used with permission, giving the following reasons:

> The development of the surrounding housing estate was subject to the following condition: *"The area of public open space shown on the approved plan shall be provided for use by the general public concurrent with the carrying out of the approved development and shall be maintained to the satisfaction of the local planning authority thereafter."*

10. RBC also relies on a no dog fouling sign. This is capable of being evidence of permission to use the land. However there is no evidence as to when this sign was on the site and, on the photographs I have seen, which postdate the application, it looks new. In the absence of any such evidence I shall ignore this for the purpose of this Opinion. Apart form the statement recorded in paragraph 7 above, RBC does not specify the statutory power under which it holds the land.

---

[1] Under the description RMBC Property Services.

11. I have read all the statements in support of the application. Not surprisingly and not unusually, since this seems to be an application by a lay-person with no legal qualification, they do not fully address the *"as of right"* or *"by right"* issue and they often deal with the planning merits, more than the TVG issues. Some do say that they were told the Land would be for communal or residents' use. The applicant's response includes the following:

(1) *"The residents... had no idea that the Council owned the land until January 2015... Having no idea of who owned the land up to that point, logically it cannot follow that the residents were using it with anybody's permission."*

(2) *"The planning permission... contains a reason... for the imposition or that particular condition, namely it was added... for the purpose of protecting the 'visual amenity'... the condition was actually only imposed top protect the visual aspects of the development"*

(3) *"... the local people have in fact used it in a much broader way and fundamentally in excess of any possible implied permission"*.

Relevant Case Law

12. In *R* (Barkas) *v* North Yorkshire County Council,[2] the Supreme Court reconsidered the reasoning of the House of Lords in R (Beresford) *v* Sunderland City Council[3]. Barkas related to a field laid out as a recreation ground serving a 14-hectare council-housing development created in the 1950s. The basic issue in the case was: *"where land is provided and maintained by a local authority pursuant to section 12(1) of the Housing Act 1985 or its statutory predecessors, is the use of that land by the public for recreational purposes "as of right" within the meaning of section*

---

2 [2014] UKSC 31, [2015] AC, 21st May 2014.

3 [2003] UKHL 60, [2004] 1 AC 889.

15(2)(a) of the Commons Act 2006?".[4] Answering that question Lord Neuberger of Abbotsbury PSC (with whom the other judges of the Supreme Court agreed) said:

> *"21... 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. In Sunningwell at pp 352H-353A, Lord Hoffmann indicated that whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the Field was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.*
>
> *22. It is true that this case does not involve the grant of a right in private law, which is the normal issue where the question whether a use is precario arises... Thus, it is a right principally enforceable by public rather than by private law proceedings. It is also a right which is clearly conditional on the Council continuing to devote the Field to the purpose identified in section 12(1) of the 1985 Act... Accordingly, the right alleged by the Council to be enjoyed by members of the public over the Field is not precisely analogous to a public or private right of way. However, I do not see any reason in terms of legal principle or public policy why that should make a difference. The basic point is that members of the public are entitled to go onto and use the land – provided they use it for the stipulated purpose in section 12(1), namely for recreation, and that they do so in a lawful manner.*
>
> *23. ...Section 12(1) of the 1985 Act and its statutory predecessors bestow a power on a local (housing) authority to devote land such as the Field for public recreational use (albeit subject to the consent of the Minister or Secretary of State), at any rate until the land is removed from the ambit of that section. Where land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct. Of course, a local authority would be entitled to place conditions on such use – such as on the times of day the land could be accessed or used, the type of sports which could be played and when and where, and the terms on which children or dogs could come onto the land. Similarly, the local authority would clearly be entitled to withdraw the licence permanently or temporarily. Thus, if and when it lawfully is able, and decides, to devote the land to some other statutorily permitted use, the local authority may permanently withdraw the licence; and if,*

---

4 Judgment of Lord Neuberger PSC, paragraph 12.

> *for instance, when the land is still held under section 12(1), the local authority wants to hold a midsummer fair to which the public will be charged an entrance fee, it could temporarily withdraw the licence."*

13. The basic issue related to land *"maintained by a local authority pursuant to section 12(1) of the Housing Act 1985 or its statutory predecessors"*. It is however clear from comments within the judgment that Lord Neuberger consider that the same principle applied to land held by local authorities under section 164 of the Public Health Act 1875 and various sections of the New Towns Acts of 1965 and 1981. Lord Neuberger then considered the effect of the decision of the House of Lord in Beresford, stating:

> *46... The facts of the present case are very different. The Field was, as I see it, "appropriated", in the sense of allocated or designated, as public recreational space, in that it had been acquired, and was subsequently maintained, as recreation grounds with the consent of the relevant Minister, in accordance with section 80(1) of the 1936 Act: public recreation was the intended use of the Field from the inception.*
>
> *... 48 ... I am quite satisfied that we should grasp the nettle and say that the decision and reasoning in Beresford should no longer be relied on...*

14. However one part of Beresford was not overruled and continues to be applied. Lord Bingham of Cornhill stated:

> *"... As Pill LJ rightly pointed out in R v Suffolk County Council, Ex p Steed (1996) 75 P & CR 102, 111: "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green..." It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met."*

Analysis

15. The Town and Country Planning Act 1990 now defines *"open space"* as meaning *"any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground"*. The same definition applied in s290(1) of the Town and Country Planning Act 1971. In the absence of good reason

to the contrary *"open space"* in condition 8 of the 1983 permission will be interpreted in accordance with this definition.[5] I am not aware of any such reason. Of the three elements to this definition it is clear in this case that neither the first, nor the third applies and that the second *"used for the purposes of public recreation"* does apply.

16. It follows from the part of the speech of Lord Bingham quoted in paragraph 14 above that, if one of the ingredients of the definition is clearly not established, there is no need for a public inquiry.

17. It is clear from Barkas that some types of publicly owned land is used for lawful sports and pastimes *"by right"* and therefore not *"of right"*. Where this is clearly the case on the papers, there is no need for a public inquiry and the registration authority (or another authority acting on its behalf) can reject the application after considering them on the papers. Before doing so, the authority should, of course, give careful consideration to as to whether the conclusion that the use was by right depends on a disputed factual issue. If it does, Somerford Parish Council v Cheshire East Borough Council[6] makes it clear that should be an inquiry.

18. It follows that in determining whether there should be an inquiry (but not for other purposes) statements of primary fact made by and in support of the applicant should be assumed to be true. This does not extend to unevidenced generalised assertions.

19. It is clear *"how the matter would have appeared to the owner of the land"* is important, but not whether local people know the identity of the owner. There is no prospect of the point quoted in paragraph 11(1) above succeeding.

---

5 Wyre Forest District Council *v* Secretary of State for the Environment and Allens [1990] 2 AC 357, HL(EW).

6 [2016] EWHC 619 (Admin), Stewart J, 21st March 2016.

20. As to the point raised in paragraph 11(2) above, inadequate reasons for planning permissions are commonplace and do not alter the meaning of conditions if they are unambiguous as is the case here. The land was not intended solely for visual amenity.

21. As to the point raised in paragraph 11(3) above, this is a mere generalised assertion for which no justification is given. The intended use of the land was *"for the purposes of public recreation"*. No example of any use that goes beyond this is given or is apparent from the witness statements. Rather those statements record uses that are consistent with that purpose.

22. It would have helped if RBC had been more specific about the statutory power under which the land was held beyond stating a lengthy Act. Nonetheless I am satisfied that, applying the principles established by Barkas, RBC was giving permission to the public to use the Land and that those residents who were told that the land was from communal or residents' use were correctly informed.

23. In these circumstances a public inquiry would not assist. I advise rejection of the application without one.

TIMOTHY JONES

No. 5 Chambers,
Birmingham - London - Bristol - Leicester
Tel. 0845 210 5555

18th May 2017.