

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT
PICKMERE AS A TOWN OR VILLAGE GREEN**

AND IN THE MATTER OF THE COMMONS ACT 2006

PRELIMINARY ADVICE

1. I am instructed by East Cheshire Borough Council (in its capacity as the relevant registration authority under the Commons Act 2006) in respect of an application dated 4th February 2013 (the **Application**) to register land at Pickmere (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 advice will be disclosed to the relevant parties to the Application and that, so far as I am aware, no party presently has legal representation. I have settled this advice with both these factors in mind.
3. I have been provided with a copy of all relevant evidence and correspondence filed both in support of and against the Application. Nothing contained in this preliminary advice should be taken to be a determination of any factual or legal issue in respect of the Application. Further, the summary of matters I set out below is intended as a brief and non-exhaustive overview of the issues.

The Application and Objections

4. The Application was made by Mrs. Catherine Plowden on behalf of the Pickmere Friends of the IROS group. There are a substantial number of statements and correspondence in support of the Application. The Application is made under section 15(2) of the Commons Act 2006. That section provides the following test for registration of land as a town or village green:-

“(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.”

5. It is well established that the burden of proof is upon the Applicant to prove each of the constituent parts of the above statutory test on the balance of probabilities.
6. The Applicant’s case, in broad terms, is that the Land is well-established recreational land which has been used by the local community for well in excess of 20 years as of right. Additional arguments are cited as regards the impact upon the local community if the Land is not preserved as a village green.
7. The Application has been objected to by, among others, Pickmere Parish Council, who I understand is the owner of the Land and has been so since the execution of a deed of agreement dated 10th March 1997 in pursuance of section 106 of the Town and Country Planning Act 1990.

8. As well as raising a number of other objections, Pickmere Parish Council argues in light of the said agreement, and the circumstances generally by which it became custodian of the Land and has managed it, that any use of the Land has not been “as of right” because any user has been permitted by it.
9. The Applicant has been afforded the opportunity to respond to the objections and has done so in detailed further representations.

My Instructions

10. 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. I have been asked to provide East Cheshire Borough Council with a written advice as to whether I consider the matter is suitable for a written disposal or whether a non statutory public inquiry should take place.
11. 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. 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.

12. 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.

13. 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.

My Conclusions

14. As I have set out above, Pickmere Parish Council maintains that any user of the land has not been “as of right” but in fact permitted user by virtue of the arrangements in place by which it holds the Land.

15. 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.**

16. There is an argument in this case that the use by the local community of the Land since 1997 has been “by right” and not “as of right” in that the right to use the Land has been extended to them by virtue of the Land being held for that purpose by Pickmere Parish Council pursuant to the said agreement.

17. Similarly, and closely overlapping with the above, there is the argument that any user of the land has been by permission which is the way the position is phrased by Pickmere Parish Council.
18. In either event, if user of the Land has not been “as of right”, this would likely on balance be determinative of the Application.
19. It is therefore my view that it is a proper, reasonable and fair approach for East Cheshire Borough Council 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.
20. This is because the question of whether user has been “as of right” is potentially determinative of the Application. 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.
21. 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 East Cheshire Borough Council. 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.

22. 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.
23. 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".
24. 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", "by permission" or "as of right". 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 see fit.
25. Of particular relevance may be any further documentation which evidences the basis upon which the Land is held by Pickmere Parish Council, albeit the key documentation appears to have been filed previously.
26. I should be grateful if my instructing solicitor could also collate any relevant documentation in this respect.

Directions

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

27.1 Any further evidence and written representations relied upon by any party be filed and exchanged by Monday 13th April 2015.

27.2 Any response to the same to be filed and exchanged by Monday 20th April 2015.

27.3 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.

28. 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.

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

James Marwick
Trinity Chambers
24th March 2015