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

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) (the **Registration Authority**) 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 settled a preliminary advice dated 24th March 2015 which concluded that the Application could in the first instance be considered by way of a written report prepared after the filing of further representations and evidence rather than following a public inquiry. This was because I considered there were issues which were potentially determinative of the matter on the papers. I am instructed by the Registration Authority that the parties were afforded the opportunity to make further representations and I have been provided with copies of the same. As set out in my preliminary advice, I am now instructed to prepare a written report in respect of the Application.

3. 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.

4. I identify for all concerned at the outset (recognising that no interested party is legally represented) that the purpose of this report is the consideration of certain legal arguments which may be determinative of the Application and in particular the question of whether user has been "as of right". Matters of future development of the Land are not issues which fall to be considered as part of my determination as to whether the Land should be registered as a town or village green.

The Application

5. The Application is dated 4th February 2013 (date-stamped by the Registration Authority on 5th February 2013) contained within Form 44 and completed with an appropriate statutory declaration by Mrs. Catherine Plowden, who is named as the applicant in the Application but who acts on behalf of a local community group, the Pickmere Friends of the IROS group, members of which have counter-signed the Application (per the appended signatory list at Appendix B). For ease of reference, I shall refer to Mrs. Plowden and the Pickmere Friends of the IROS as the **Applicant**.

6. The relevant land identified for registration is named as the Pickmere Informal Recreational Space, as identified in outline in green on an Ordnance Survey plan (scale 1:2500) forwarded by the Applicant to the Registration Authority under cover of correspondence dated 15th February 2013. A summary of the background was appended to the Application at appendix B. Appendix B of the Application asserts that the land is informal recreational open space which has been used by the local community for in excess of 80 years as of right for lawful sports and pastimes and which since 1997 has been expressly held on trust by Pickmere Parish Council as informal recreational open space for the benefit of the local community.

7. A number of evidence questionnaires were filed in support of the Application which are set out in pro formas provided by the Open Spaces Society which speak to user of the Land for lawful sports and pastimes as of right.[1] There were also a number of photographs (both more recent and historic) evidencing user of the Land.

8. The locality or neighbourhood within a locality for the purposes of the Application is identified as Pickmere and at appendix D, an area encompassing Pickmere and an area beyond it is outlined in red as showing the same.

Objections of the Land-owner

9. The Land is owned by Pickmere Parish Council.[2] By objections dated 7th November 2013, it resisted the registration of the Land as a town or village green. Its primary objections can be summarised as follows:-

   9.1 The Land was primarily used as a business site from 1927 to 1997 as evidenced by relevant land registry documents. Such land registry documentation also evidences the presence of domestic dwellings and commercial premises on the Land which would have prevented any accessibility to those parts of the Land at certain material times.

   9.2 The Land was transferred to the ownership of Pickmere Parish Council in 1997 pursuant to a section 106 agreement for the purposes of its management and maintenance as an informal recreational open space and any user since that time has not been "as of right" but permissive in nature. The Objections particularise how it is said that user has been permissive and exhibits to the same relevant supporting documentation.

[1] Nine such statements were enclosed with the Application.

[2] There is a challenge made to this by the Applicant in its latest objections but an ultimate recognition that the documentary evidence shows that Pickmere is the owner of the land. In my analysis whether Pickmere Parish Council was owner or custodian of the land would not impact upon my conclusions.

Consultation

10. I have been provided with copies of further correspondence in support of the Application which were filed during the Registration Authority's consultation period. Whilst some of the correspondence asserts support for the registration of the Land without reference to evidence of user, in broad terms, the further correspondence speaks to user of the Land as informal recreational open space by local residents.

11. A Mrs. Judy Tarrant objected to the Application in correspondence dated 25th October 2013. Suffice it to say, that Mrs. Tarrant challenged certain matters relied upon in the Application but her objections do not otherwise assist me in considering the legal issues which are central to this written report.

The Land

12. The Land was acquired by Pickmere Parish Council from Turnfuture Limited in accordance with a section 106 agreement[3] dated 10th March 1997.

13. The salient parts of the section 106 agreement were as follows:-

    13.1 Turnfuture Limited undertook to lay out the Land as an informal recreational open space in accordance with a master plan to be submitted to Macclesfield Borough Council for approval: paragraph 2 of schedule 2.

    13.2 Turnfuture Limited would pay the sum of £7,500 to Pickmere Parish Council upon the completion of the informal recreational open space for its future maintenance, it being anticipated that by that time Pickmere Parish Council would be the owner of the Land.

    13.3 Pickmere Parish Council undertook to permit that it would during daylight hours permit unrestricted access on foot to the

[3] An agreement made under section 106 of the Town and County Planning Act 1990 is a mechanism used to ensure that a development is acceptable in planning terms.

IROS from designated points as shown on the master plan: paragraph 2 of schedule 3.

14. In further representations forwarded to the Registration Authority, the Applicant states, inter alia, that

"The community of Pickmere were represented at the final negotiations for transfer of the land from Wainhomes by Pickmere Parish Council. Macclesfield Borough Council then designated the land as IROS. The then parish council simply considered itself to be custodians of the land, to be managed per pro the community."

15. It is common ground that the Land has been maintained as recreational open space by Pickmere Parish Council and it has been used by members of the local community for recreation. It is also common ground that some control has been exerted over access to the Land by way of the locking of certain gates.[4]

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

16. 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[5]:-

"(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

[4] I note that the Applicant in its response to the objections (dated 10th September 2014) avers that only certain gates are locked and access is not prevented on foot. It is not for me to determine the extent of such control as part of this exercise but merely to note that there is some control exercised over access to the Land by Pickmere Parish Council.

[5] 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.

(b) they continue to do so at the time of the application."

17. 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.**

18. There are a number of issues which would properly need to be determined at a public inquiry. These include whether any part of the Land was occupied by buildings during the relevant 20 year period as *prima facie* shown on the Land Registry Documents, whether the Applicant has identified a locality or neighbourhood within a locality within the meaning of section 15(2)[6] and whether there has been sufficiency of user by a significant number of local inhabitants[7] for the relevant 20 year period.

19. 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.

[6] 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**.**

[7] Given it is common ground that the Land has been used as informal recreational open space, the question of sufficiency of user may be a matter readily established at a public inquiry in respect of the period of 1997 onwards. However, there would need to be established continuous use in the years from 1993 to 1997 onwards. These are matter properly for an inquiry.

Qualifying User

20. The Applicant must prove, inter alia, on the balance of probabilities that there has been sufficient qualifying user (i.e. use 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.

21. 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."*

22. 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"."*

23. 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 use "by right" or "as of right". In finding that such user was "by right", Lord Neuberger contrasted the position with that of land in private ownership (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 "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."

24. In the context of user by permission, Lord Neuberger endorsed the commentary in Gale on Easements (19th Edition) as correct (para 17):-

"*The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is 'as of right'; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not 'as of right.' Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence."*

25. Lord Neuberger further held (at para 27):-

> *"It was suggested by Mr Edwards QC in his argument for Ms Barkas that, even if members of the public were not trespassers, they were nonetheless not licensees or otherwise lawfully present when they were on the Field. I have considerable difficulty with that submission. As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a "tolerated trespasser" is still a trespasser."*

26. In the context of where land had been laid out by as private land-owner for use as open space recreational space, Lord Neuberger held (at para 37):**-**

> *"…I do not agree with Lord Scott's view in para 47 [in Beresford] that public use of a site, on which the owner has erected a sign permitting use as a village green, would be "as of right". It would amount to a temporary permissive use so long as the permission subsists, as the public use would be "by right"."*[8]

27. Lord Carnwath in his concurring judgment agreed that the dedication of land as a village green would have a decidedly different effect to that of dedication as a public right of way (citing with approval part of the otherwise much-criticised speech of Lord Scott in **Beresford**) (at para 60):-

> *"Public rights of way are created by dedication, express or implied or deemed. Town or village greens on the other hand must owe their existence to one or other of the three origins specified in section 22(1) of*

[8] At paragraph 49 of his judgment, Lord Neuberger held that Beresford v Sunderland City Council [2003] UKHL 60 was wrongly decided

the 1965 Act… Dedication by the landowner is not a means by which a town or village green, as defined, can be created. So acts of an apparently dedicatory character are likely to have a quite different effect in relation to an alleged public right of way than in relation to an alleged town or village green." (para 40)

28. Both Lord Neuberger and Lord Carnwath endorsed the following general proposition (at para 16 and 65 respectively):-

"…that, if a right is to be obtained by prescription, the persons claiming that right "must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him."

29. In **R. v Hereford and Worcester CC, Ex p. Ind Coope [1994] CLY 380**, there existed an express licence between the landowner and the local authority making the land available as recreational open space. In those circumstances, user by the public was not "as of right" notwithstanding that it had not been communicated to the wider public that there existed a licence by which the land was laid out as recreational open space. Brooke J held:-

"…if there is an express licence for the use of the land, then the land is used pursuant to that right. There can be no question of a right being established, adverse to the landowner, apart from the rights he may be granting under the licence."

30. Support for this proposition is also found in the case law relating to rights of way. In **R. v Secretary of State for the Environment, Ex p. Billson [1999] QB 374**, no right of way could arise because the use was one which was expressly permitted by a deed. Again, the existence of the deed had not been communicated to the users. The basis of such decisions is that it is the grant of permission which renders the use *precario*.

31. However, the Supreme Court in **R. (Newhaven) v East Sussex County Council and another [2015] UKSC 7** in considering the question of whether byelaws needed to be brought to the public's attention to make use "by right", were of the view that the normal rule for a private land-owner was that a licence be communicated to the inhabitants of the locality before it could be said that usage was "by right", save where it was appropriate to infer a consent or licence from the surrounding circumstances, even where there is no communication of a consent: per para 68, with **Billson** considered and disapproved in certain respects. The Supreme Court, drawing an analogy, with **Barkas** went on to find that as the byelaws in question imposed a statutory right to use the land in question there was no need for it to be communicated to the users of it.

32. More generally, I consider that **Billson** and **Ind Coope** are consistent with paragraph 27 of Lord Neuberger's judgment in **Barkas** where he held that if a person had a right to be present on land (whether under private or public law rights) then such use under that right amounted to permissive user.

Analysis

33. In the present case, there existed an express written agreement between, among others, Pickmere Parish Council and the relevant local authority, Macclesfield Borough Council (and their successors in title), that public use of the Land was to be permitted for recreation: per the section 106 agreement. The execution and validity of the agreement has not been challenged by the Applicant (indeed the Applicant has positively confirmed the circumstances of the land transfer in or about 1997) and I otherwise have no reason to doubt the veracity of the documentation provided on behalf of Pickmere Parish Council.

34. It follows that at all material times since the laying out of the Land as informal recreational open space a right to use the land as recreational open space has existed pursuant to the express licence by which the Land came to be owned and maintained by Pickmere Parish Council under the section 106 agreement.

35. **Barkas** now represents settled law as regards whether user has been permissive for the purposes of registration as a town or village green and it requires some positive act by the land-owner (or custodian of the land in question) beyond mere acquiescence in accordance with the commentary in Gale on Easements (12th Edition).[9] Undoubtedly, on balance, the existence of the licence is a relevant act. However, pursuant to **Newhaven**, the normal rule is that such permission must be communicated to the local inhabitants but that this can be a matter of inference in all the circumstances with emphasis on the land-owner's objectively assessed intention. It is also clear that the general rule may also be departed from per **Newhaven** and that a different approach may be necessitated when elements of public law are relevant. Certainly, the general rule in **Newhaven** will not likely avail the land-owner who makes his own written agreement to provide a licence and then locks it in a private drawer. However, we are very much in different circumstances in the present case with an express agreement reached between third parties and a statutory authority to grant a licence.

36. Whilst **Newhaven** is authority that the existence of any licence is a matter which must as a normal rule be communicated by a private land-owner to the users of the proposed village green,[10] this is an unusual case in that the permission is contained on an agreement made pursuant to statute (the Town and Country Planning Act 1990) with the intention of protecting certain land within a local authority

[9] Per paragraph 17 as set out above.

[10] The extent of any positive communication to the wider community of the existence of the agreement would properly be a matter of determination at a public inquiry. However, prima facie, the Applicant's position is that the community appears to have had an active role in the laying out of the Land as recreational open space under the section 106 agreement and that Pickmere Parish Council has engaged with the local community in terms of its maintenance of the Land.

area from development. It is therefore more closely analogous in many ways to the grant of a statutory right to use the Land than to an agreement made directly with users of the Land.

37. I am of the view that on balance it would represent an appropriate case to depart from the normal rule given the quasi public/private nature of a section 106 agreement and therefore not require any communication to users of the Land to be effective in accordance with the decision in **Newhaven** as regards byelaws. In this respect, I note that the decision in **Billson** insofar as the land-owner's deed gave a statutory right to use the land was approved by the Supreme Court in **Newhaven**. I also attach weight to the judgment in **Newhaven** insofar as it made clear that there would be circumstances in which there was no need to communicate permission. Lastly, I also bear in mind the authority of **Ind Coope** which is on all fours with the present case in material respects but which has not been judicially considered further after **Newhaven**.

38. However, even if I were wrong in this respect (and it would be a relatively novel point for determination by the Court) in any event, I consider on balance that such are the circumstances by which the Land has been laid out as recreational open space, that it is likely that the overt acts of Pickmere Parish Council in maintaining the land as informal recreational space, acting as the known custodian of the same (taking the Applicant's case at its highest) and exerting a measure of control over access to the Land would amount to sufficient positive acts as to confer an implied permission to the local community to use the land. In coming to this conclusion I bear in mind that Pickmere Parish Council is not a local authority with the power to lay out land under statute as informal recreational space in the manner referred to in the above authorities (in contrast to, for example, a County, Borough or District Council or Unitary Authority) and therefore the laying out of land as informal recreational space would more clearly represent to

such users that they were being granted a permission to use the land rather than user "as of right". Thus, on this secondary ground I consider that user of the land is not "as of right" on balance.[11]

39. In circumstances, where Pickmere Parish Council had entered into an agreement to permit the user of land as recreational open space and had subsequently done so, the conduct of those using the land would not bring home to it that they were doing so "as of right" as they had a permission to use the land and therefore it was "by right".[12]

40. For the reasons I have given in the foregoing paragraphs, in my view, user of the Land has not been "as of right" at material times since the laying out of the land as informal recreational open space (a fact I infer occurred within a matter of months of the execution of the section 106 agreement) has been "by right". Whilst there is some ambiguity as regards the need of communication of any licence to local inhabitants in the established case law, I am fortified in my conclusion by the likely existence of an implied permission in all the circumstances.

41. On balance, I conclude that user has been permissive and that the local community have had the right to use the land pursuant to the section 106 agreement.

42. I add for the Applicant's benefit that it was apparent that Pickmere Parish Council's custodianship of the Land (and the nature of the section 106 agreement) was well known to the local community and that they engaged in the process. I would envisage that the Application may only have become weaker after a public inquiry, although of course I can make no formal findings in this respect at this stage.

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[11] Albeit Beresford has been held to be wrongly decided, I consider that the circumstances in which the Land has been laid out in the present case are sufficiently distinct from the limited acts of the local authority in that case that I can properly reach a conclusion that there was an implied permission in the present case, bearing in mind that this is privately owned land.

[12] Sunnywell makes clear that the subjective understanding of the users of the land is not of relevance.

Conclusion and Recommendations

43. I have concluded as follows:-

43.1 User of the Land has not been "as of right" but permissive for a large balance of the requisite 20 year period.

43.2 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.

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

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