APPENDIX A

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT WOOD PARK, ALSAGER 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 East Cheshire Borough Council (in its capacity as the relevant **Registration Authority** under the Commons Act 2006) in respect of an application dated 19th September 2012 (the **Application**) to register land at Wood Park in Alsager, Cheshire (the **Land**) as a town or village green.

2. In a preliminary advice dated 31st March 2015 (which I understand was 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. 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.

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 3rd September 2012 (date-stamped by the Registration Authority on 19th September 2012) contained within Form 44 and completed with an appropriate statutory declaration by Mr. Andrew Barnard, who is named as the applicant in the Application (the **Applicant**).

5. The relevant land identified for registration is named as Wood Park, as identified in outline in green as the "application plot" on an Ordnance Survey plan (scale 1:5000) appended to the Application. The neighbourhood relied upon in the Application is delineated on the said plan, being land bordered by Sandbach Road North, Lawton Road and the open space which is to the north of the Land which marks the edge of the residential area of this part of Alsager. The Land is a large area of open recreational space; on the said plan it is identified as a playing field.

6. There were twenty two supporting statements appended to the Application (as listed in a covering index). The statements are contained within a pro-forma questionnaire completed with a signed declaration which authorises, among others, the disclosure of the statement when reasonably required in relation to the Application. They are not completed with a statement of truth albeit for the purposes of this written report that is immaterial. The statements were all completed in or around July 2012 and speak to various periods of use of the Land for typical activities such as dog-walking, football and games generally from 1968 onwards until the time of completion of the statement. The statements state that user of the Land has not been permitted nor prevented at any material time.

7. Support for the Application was also received from Alsager Town Council by letter dated 26th March 2013 albeit the letter did not speak to user of the Land but only to the Town Council's support of the Application.

Objections by the Land-Owner

8. The Land is owned by East Cheshire Borough Council (in its capacity as Land-owner[1]).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:-

[1] My preliminary advice dealt with matters regarding both 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 rely upon that earlier advice and I use the distinct definitions of **Registration Authority** and **Land-owner** to delineate between the Council's involvement in two capacities.

8.1 The Land at material times has been registered as Open Space on the Register of Open Spaces. In accordance with section 10 of the Open Spaces Act 1906 and **R (on the application of Barkas) v North Yorkshire County Council [2014] UKSC 31**, any user of the Land has therefore been "by right" rather than "as of right".

8.2 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.

8.3 Further and in the alternative, the Council avers that it has permitted user of the Land by members of the public (citing the example of the hiring of football pitches laid out on the Land) and has regulated its use by the putting up of various signs which, among others, forbid certain activities on the Land. A number of photographs were appended to the Objection in support of these matters.

Further Representations

9. The Land-owner made no further representations after the issuing of directions pursuant to my preliminary advice. It repeated its original objections as summarised above.

10. In his further representations (contained in an email dated 7th May 2015), the Applicant accepted that the Land-owner had maintained the Land and erected signs thereon.

11. He queried, among others, whether users such as motor bike riders would be regarded as using the Land "as of right" if they were not permitted to do so and re-iterated that he considered that the Land-owner's position was motivated by planning interests (citing a draft planning document). I address these particular concerns below.

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

12. 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."

13. 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

[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.

probabilities, per the guidance given by Lord Bingham in **R v. Sunderland City Council ex parte Beresford [2004] 1 AC 889.**

14. 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. Equally (save where section 15(C) is engaged), any future development plans of the Land-owner cannot serve so as to defeat an application. It follows that the references to the same made by the Applicant are not matters which I need to take into account.

15. 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.

[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.

16. I do not in this written report therefore seek to determine such matters. The issue I identified as potentially determinative of the Application is whether user of the Land has been "as of right" and I do 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 regardless of whether, for example, a cohesive neighbourhood might be established at a public inquiry. .

Qualifying User

17. 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.

18. 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."

19. 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"."

20. 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."

21. 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."

22. 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 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."

23. 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].

Analysis

24. The Land is allocated as open space under the Open Spaces Act 1906 and registered as open space on the Register of Open Spaces of the Land-owner. This means that the Land has been laid out for use by the public for their enjoyment as open space under an express statutory trust: per section 10 of the

[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."

use of the Land which would not be use under the statutory right but user "as of right" for lawful sports and pastimes under the Commons Act 2006.

28. It has not been necessary for me to consider whether there has been any express consent to use the Land beyond the statutory right granted to the public to use the Land or whether the regulation of user by the Land-owner is sufficient to mean user has not been "as of right"[5].

29. Suffice it to say, that the Land-owner's actions prima facie are consistent with the Land being held as open space for public recreational use and further weigh against any user being "as of right".

Conclusion and Recommendations

30. I have concluded as follows:-

    30.1 User of the Land has not been "as of right" but "by right" at material times.

    30.2 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.

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

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11th June 2015

[5] It is plain from **Barkas**, for the avoidance of doubt, that any licencing of the Land for organised football games is consistent and compatible with its allocation as open space land for user by the Public.

Open Spaces Act 1906. There has been no challenge to the Land-owner's case that the Land has been laid out at material times under the Open Spaces Act 1906 and the documentation the Land-owner has disclosed (in particular the Open Space Survey) supports this conclusion.

25. Pursuant to **Barkas** and **Beresford** (decisions of the most senior courts in England & Wales at the material times they were respectively handed down), it is now well established that where land is allocated as open space in such circumstances then user 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. In more straightforward terms, section 10 of the Open Spaces Act 1906 is regarded as giving a statutory right to the public to use the land and therefore it falls outside the definition of user "as of right".

26. 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" at material times. The Applicant must prove his case on the balance of probabilities. In my view, he has no real prospect of success of doing so in relation to this issue.

27. The Applicant cited a number of examples such as the user by motor-cyclists of the Land which may fall outside use "by right". Such user falls to be discounted from the test as it would not amount to user for lawful sports and pastimes as regards the activity being undertaken. To put it another way, it is very difficult to envisage any user by members of the public for recreational