

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BELL AVENUE, SUTTON AS A TOWN OR VILLAGE GREEN

AND IN THE MATTER OF THE COMMONS ACT 2006

WRITTEN REPORT

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 8th March 2013 (the **Application**) to register land at Bell Avenue, Sutton in Macclesfield, Cheshire (the **Land**) as a town or village green.
2. I settled a preliminary advice dated 27th April 2015 which invited further representations and evidence from the parties in respect of the statutory basis upon which the Land was held by Macclesfield Borough Council (and/or its predecessors in title). This is because where land has been lawfully allocated by a local or public authority for public use, it is now established that user of the land is “by right” and not “as of right”: R. (Barkas) v North Yorkshire County Council [2014] UKSC 31. Thus, I considered that examination of this issue might prove determinative of the Application, notwithstanding that the Applicant had put forward a case which was otherwise properly to be determined at a non-statutory public inquiry.
3. I gave directions (subsequently amended) which provided for the parties to serve any further evidence and representations they sought to rely upon in respect of this issue.

4. The Objector subsequently disclosed documentation relating to a conveyance of the land in 1947 and an indenture from 1920 under cover of an email dated 14th July 2015 which invited a finding that the Land was laid out under relevant statutory housing legislation. This was later supplemented by an advice from Counsel (Mr. John Hunter) dated 27th July 2015 which dealt with the further evidence and the inference to be drawn from the same. The Applicant was afforded the opportunity to deal with the further evidence and representations from the Objector, and did so in an email dated 3rd September 2015 which queried the absence of the Land from any development plan or any later planning application.
5. I am satisfied that I am in a position now to deal with the issue raised in my preliminary advice and that it is proper for me to do so based upon the written evidence. As well as the above representations and evidence, 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. I have had regard to all of that material in compiling my report and recommendations.
6. This report and its recommendations are concerned with the issue of whether user of the Land has been "as of right" at material times. As I have advised above, I consider that the balance of the constituent parts of the test laid down by section 15(2) of the Commons Act 2006 (the **2006 Act**) would properly be matters for determination at an inquiry.¹

¹ Section 15(2) provides:-

*"(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."*

7. The burden of proving that land has become a town or village green lies with the applicant. The standard of proof is the balance of probabilities and I apply this standard in the findings I make in this report. 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.
8. The documentation relating to the 1947 conveyance evidences that the Land was acquired by Macclesfield Rural District Council (a predecessor in title to Macclesfield Borough Council and Cheshire East Borough Council) as part of a larger conveyance of land executed on or about 21st March 1947. The indenture dated 10th July 1920 and its accompanying plan identify the Land as being part of the wider area conveyed in 1947.
9. It does not appear to be in dispute that an area, encompassing the Land, was subsequently laid out as a housing estate sometime in the post-war period. Even if this was in dispute, I would be satisfied by (i) the stock transfer of social housing and land to the Objector in 2006 and (ii) the private sales of properties within the estate from 1973 onwards listed as memoranda in the 1947 conveyance documentation, that a housing estate had been laid out by Macclesfield Rural District Council and subsequently held as such by it and its successor(s) in title at material times up to the stock transfer in 2006.
10. There is no express reference in the documentation to the statutory basis upon which the Land was laid out as part of a wider housing estate or the basis upon which the land was acquired in 1947. The Objector relies upon the case of Naylor v Essex CC [2014] EWHC 2560 (Admin) as authority for the proposition that an inference can be drawn in the absence of any direct evidence as to the basis upon local authority land has been laid out, applying the statutory

presumption of regularity: per paragraphs 11 to 13 of Mr. Hunter's advice dated 27th July 2015.

11. I accept this proposition which is supported by the Supreme Court's decision in Barkas, where it was held that the case of R. v Sunderland City Council ex parte Beresford [2004] 1 AC 889, in which there was no direct evidence of the basis upon which the open space in question was laid out, was wrongly decided with Lord Neuberger concluding at paragraph 49 that it was clear on the facts that that land must have been lawfully allocated. I am therefore satisfied that I may draw such inference as I consider reasonable in the absence of any direct evidence, an approach which was affirmed in Naylor.
12. I find that the Land was laid out by Macclesfield Rural District Council, and subsequently held by its successor(s), under statutory housing legislation. Although there is no direct evidence of this in the conveyance or otherwise, local authorities are creatures of statute and must act in accordance with their statutory powers. I have already concluded that the Land was laid out as part of a wider housing estate, and applying the presumption of regularity, I am satisfied that this was, as matter of inference, pursuant to the statutory housing legislation in force at material times (including the Housing Act 1936 as at 1947, the Housing Act 1957 and more lately the Housing Act 1985). At all material times, a local authority was entitled to lay out open space in connection with the laying out of the housing estate: section 80 of the Housing Act 1936 and later provided for by section 12 of the Housing Act 1985 which was the relevant statute in force during the 20 year period. I am satisfied that the Land was laid out as open space in connection with the laying out of the estate generally. It has at all material times been an area of open space used by the public on the Applicant's case.

13. I have taken account of the Applicant's representations that there is an absence of direct evidence relating to the purpose for which the Land was held and a lack of reference in later development plans and planning consent(s). However, I am satisfied that I am entitled to draw the inference I have set out above pursuant to the authorities and that the evidence supports the conclusion I have reached.
14. It is established from Barkas that any member of the public using land laid out and held as open space under section 12 of the Housing Act 1985 does so by right. 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."*²

15. The relevant 20 year period in the present case is that immediately preceding the date of the Application. From the commencement of that period in March 1993 until the stock transfer in 2006, I have concluded that the Land was laid out as open space under Macclesfield Borough Council's (and any predecessors) statutory housing spaces.

² As to the distinction between "by right" and "as of right", Lord Neuberger in Barkas (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"."

16. Applying Barkas, I am satisfied that user of the Land during this period has been "by right" rather than "as of right", and the Application must therefore fail as qualifying user cannot be shown during the relevant 20 year period.

Conclusion

17. I have concluded as follows:-

17.1 User of the Land has been "by right" and not "as of right" from 1993 to 2006 in circumstances where qualifying user must be shown from 1993 to 2013.

17.2 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 the report.

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

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29th October 2015