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

AND IN THE MATTER OF THE COMMONS ACT 2006 (AS AMENDED)

ADVICE

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1. I am instructed by Caerphilly County Borough Council (in its capacity as the relevant registration authority under the Commons Act 2006) to advise in relation to an application dated 15th September 2015 for registration of land situate at and known as Snowdon Close Field, Risca in Caerphilly (the **Land**) as a town or village green.

2. My advice in summary is as follows:-

   2.1 It is well established that a registration authority which has an interest in the outcome of an application ought to appoint an independent expert to consider the application for registration: per R. (Whitmey) v Commons Commissioners [2005] QB 282. There is such a conflict in this case as the application is opposed by Caerphilly County Borough Council in its capacity as the owner of the Land under its statutory powers. I have duly considered the application as such an independent expert. References herein to the **Registration Authority** and to the **Council** are to the respective capacities of registration authority and land-owner.

   2.2 There is no obligation upon a registration authority to conduct a non-statutory public inquiry if it is satisfied that as a matter of law the application can be summarily determined without the resolution of any conflicts of fact at such an inquiry. There is now Supreme Court authority that where land has been held as open space by a local authority pursuant to its powers under the Housing Act 1985 (or the earlier housing statutes) that any user of that land is "by right" and not "as of right" (the latter being one of the constituent requirements for registration under section 15(2) of the Commons Act 2006): per R. (Barkas) v North Yorkshire County Council [2014] UKSC 31. If the Land was laid out and held by the Council under the prevailing Housing legislation as it contends, therefore any user would have been "by right". If this was the case, the application would be bound to fail as the statutory test could not be satisfied (with the two strips of the Land not owned by the Council so minor in nature that they could not be registered otherwise).

2.3 Accordingly, the application is *prima facie* capable of summary determination. However, the Applicant should be afforded a reasonable opportunity of making further representations directed in particular at the question of whether the Land has been held under the prevailing Housing legislation at material times and the consequences of the same, in accordance with the Commons (Registration of Town or Village Greens) (Interim Arrangements) (Wales) Regulations 2007 (the **Regulations**).

2.4 Subject to those further representations, I will then provide a final recommendation as to whether the matter can be determined on a summary basis and, if so, my recommendation of how the matter should be determined.

Instructions

3. I have been provided with a copy of all relevant material and correspondence filed both in support of and against the application as particularised in my instructions dated 16th June 2016. This includes an original application dated 2nd October 2013 and the application dated 1st July 2015 which I am now asked to consider (the **Application**) together with a copy of the objections of the Council dated 29th April 2016. My instructions ask me to advise on whether the matter is capable of summary determination with regard to the issues raised by the Council or whether the Registration Authority should hold a non-statutory public inquiry. I am also asked to advise on pertinent matters otherwise.

Overview

4. The Application is for registration of the Land as a town or village green pursuant to section 15(2) of the Commons Act 2006. It is made by Ms. Margaret Thomas, correspondent for the Open Spaces Society. The Land is green open space adjacent to residential housing, in particular Snowdon Close. The Application is supported by a number of questionnaires of residents and former residents of the housing which neighbours the Land. The Application sets out that there has been user of the Land for a significant number of years by local residents for numerous leisure activities, which is supported by the questionnaire evidence. The Application is not clear as to the relevant neighbourhood or locality relied upon, but this is something which would be capable of clarification in due course if so required; Risca and Risca East ward are both cited in the Application.

5. Save for two small strips of Land (one of which is unregistered land, the other of which is in private ownership), the Land is owned by the Council. No representations have been made by any interested party in relation to those other parts of the Land. The Council's objections take a number of points including whether the Application has identified a relevant neighbourhood within the established legal meaning of that term and that the evidence adduced in support of the Application is not indicative of sufficient user by a significant number of inhabitants for lawful sports and pastimes. The principal argument relied upon by the Council is, however, that the land was acquired by Risca Urban District Council (a statutory predecessor in title to the Council) by a conveyance dated 24th June 1964 pursuant to its statutory powers under the Housing Act 1957 and that therefore any user has been "by right" rather than "as of right" at all material times.

Procedure

6. The chronology of the Application is not entirely straightforward as Ms. Thomas had initially sought registration of the Land as a town or village green pursuant to an application received on 2nd October 2013. For reasons I am unaware of, there was a delay in dealing with that application until 2015 at which point Ms. Thomas was advised that the application was not duly made in certain respects. This ultimately led to receipt of the Application which was a perfected version of the original application. Since receipt of the Application, the Registration Authority has followed the procedural steps prescribed by the Regulations, including a consultation exercise, which has led to objections being received on behalf of the Council dated 29th April 2016 and which I have summarised above.

7. Ms. Thomas criticises the delay from October 2013 onwards in her Application and reserves her right to argue that the material test for registration ought to be applied on the basis of the relevant facts as they presented in late 2013/early 2014 rather than September 2015 with particular regard to any subsequent planning events which might prejudice her application. For the reasons I set out in this advice, I am satisfied that the material issue for present purposes is whether the Land has been held by the Council pursuant to the Housing legislation and *prima facie* this is not an issue which is impacted by the period of delay because it is the Council's case that the Land at all times since its acquisition has been held pursuant to the Council's statutory powers under the Housing legislation (and therefore over the course of any 20 year period immediately preceding either October 2013 or September 2015). It follows that I am satisfied that my consideration of matters at this stage does not prejudice the position of Ms. Thomas.

8. Caerphilly County Borough Council as land-owner has an interest in the outcome of the Application and has raised positive objections to the Application. This gives rise to a direct conflict with its role as registration authority in relation to the Application. It is well established that a registration authority with such a conflict ought to appoint an independent expert to consider the application for registration. Such an approach was endorsed by the Court of Appeal in R. (Whitmey) v Commons Commissioners [2005] QB 282. There are transitional provisions in England & Wales, which do not apply to the Registration Authority, which require a conflicted registration authority to refer a matter to the planning inspectorate but the Whitmey approach remains the endorsed approach in relation to applications governed by the Regulations. As I have indicated at the outset, I have therefore considered these instructions in my capacity as an independent expert.

9. 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. 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. 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.

10. I am duly instructed to consider whether the matter is capable of summary determination or whether it is appropriate for a non statutory public inquiry to take place.

Statutory Framework: The Commons Act 2006

11. 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."*

12. 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**.**

13. The Growth and Infrastructure Act 2013 in England (partly in force as from 25th April 2013) and the Planning (Wales) Act 2015 (in force as from 6th July 2015) introduced a number of further significant measures to the law on registering new town and village greens in England & Wales under the Commons Act 2006. Section 15C of the Commons Act 2006 took effect on 25th April 2013 and excluded 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 Commons Act 2006, and are in essence where certain defined planning steps have been taken in relation to the land (the purpose being to avoid the bringing of applications to frustrate planned development). Although not initially extended to Wales, the trigger events regime was extended to Wales by the above legislation although the trigger event regime is more limited in Wales. I do not presently have relevant information to allow me to consider whether there has been any trigger or terminating event in relation to the Land. Ms. Thomas would undoubtedly contend that the trigger event regime was not in place at the time of her original application and therefore she would be unfairly prejudiced if the delay in considering the application allowed her application to be defeated by the subsequent introduction of the trigger event regime prior to the filing of her perfected application. Accordingly, for the purposes of this advice, I do not consider the positon any further, particularly as the question of whether user of the Land has been "by right" may prove determinative of the Application.

14. Thus, the relevant constituent elements of section 15(2) fall for consideration. Whilst the Council has taken a number of points in terms of the evidence of user (as is commonly the case in any contested application for registration under section 15(2)), I consider that the only objection which allows for summary determination of the Application is the question of whether user has been "by right" rather than "as of right". Issues as to the extent of user of the Land at material times would properly be matters for findings after the hearing of evidence at a public inquiry.

"By Right" or "As of right"

15. It was established in 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" (i.e. with permission) rather than "as of right". The Supreme Court in that case was considering whether user of land purchased and allocated as open recreation space pursuant to statutory powers under the Housing legislation (at the relevant time held under the Housing Act 1985) by a local authority was user "by right" or "as of 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."*

16. This is the contention relied upon by the Council. Its case is that the Land was acquired by a deed of conveyance dated 24th June 1964 by Risca Urban District Council under powers contained in the Housing Act 1957 and continued to be laid out as recreational space by the relevant statutory successor in accordance with the provisions subsequently embodied under section 12(1) of the Housing Act 1985.

17. I have not seen a copy of the conveyance or any documentation which expressly refers to allocation of the Land pursuant to any Housing legislation. However, the Council is a creature of statute and even in the absence of any direct evidence of allocation, applying the presumption of regularity, the inference can be drawn that the Land was lawfully allocated pursuant to the prevailing provisions of the relevant Housing legislation: see Naylor v Essex CC [2014] EWHC 2560 (Admin). This was the case in Barkas where there was no such contemporaneous documentation.

18. *Prima facie*, the Land appears to have been laid out by Risca Urban District Council and held by its successors under the prevailing Housing legislation (the Cabinet minute dated 1st July 2015 is consistent with this suggestion). In accordance with Barkas, this would be fatal to the Application. Notwithstanding the extent of user of the Land by local residents, such user would have been "by right" and not "as of right" at material times during the relevant 20-year period (whether preceding October 2013 or September 2015). The Application would accordingly fall to be dismissed on a summary determination.

19. The Regulations provide that an applicant ought to be provided with a reasonable opportunity to address any points raised in objections or by the registration authority. Therefore, before any summary determination, Ms. Thomas must be afforded the opportunity to address this issue. My recommendation is that the matter can proceed by consideration of the Application on the basis of written representations and material evidence with a final report to be prepared thereafter for consideration by the Registration Authority.

20. I would propose the following directions:-

    20.1 The Council do serve and file any further evidence it seeks to rely on, in particular any documentation relating to the purchase and/or allocation of the Land related to the issues set out in this advice, by no later than Friday, 2nd September 2016.

    20.2 Ms. Thomas do serve and file any further written representations or evidence relating to the purchase and/or allocation of the Land related to the issues set out in this advice, by no later than Friday, 23rd September 2016.

    20.3 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.

21. Upon receipt of any further evidence and/or written representations, I will consider whether the matter is capable of summary determination. The outcome of my subsequent advice might be that I recommend that the Application is dismissed.

22. Please do not hesitate to contact me with any queries. This advice can be disclosed to the interested parties.

James Marwick
St John's Chambers
James.marwick@stjohnschambers.co.uk
2nd August 2016