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)

FINAL REPORT

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1. I am instructed by Caerphilly County Borough Council as an independent inspector for the purpose of considering and making recommendations in respect of an application dated 15th September 2015 for the registration of land situate at Snowdon Close Field, Risca in Caerphilly as a town or village green under the Commons Act 2006.

2. This final report and recommendation(s) is to be read in conjunction with my advice dated 2nd August 2016. I adopt the same definitions and references used in that advice.

3. I identified in that advice that the question of whether the Land had been laid out and held as open space under powers prescribed by the Housing Act 1957 (and subsequent housing legislation) was potentially determinative of the Application and accordingly provided for directions dealing with the service of further representations and evidence in respect of that issue by the interested parties. In accordance with those directions, the Council disclosed a copy of the material conveyance dated 24th June 1964 under cover of correspondence dated 2nd September 2016. A copy of that conveyance was forwarded to the Applicant by email dated 16th September 2016 with the Applicant to make any further representations and/or to disclose any evidence relied upon by 10th October 2016. I am instructed that no further representations or evidence have been relied upon by the Applicant.

4. I am satisfied that the Applicant has been afforded a reasonable opportunity to make further representations in accordance with the material provisions of the Regulations and that I am now in a position to provide a final report and recommendation(s) to the Council. I have had continued regard to all of the material forwarded in my original instructions (as summarised in my advice) in compiling my report and recommendations.

5. This report and its recommendation(s) are concerned with the issue of whether user of the Land has been "as of right" at material times. As I advised previously, I consider that the balance of the constituent parts of the test laid down by section 15(2) of the 2006 Act would properly be matters for determination at an inquiry.

6. 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.

7. The conveyance dated 24th June 1964 expressly references that Risca Urban District Council (a predecessor in title to the Council) was acting in its capacity as a housing authority under the Housing Act 1957 and that the purpose of the purchase of the land under the conveyance was in pursuance of its function as a housing authority: the second recital on page one of the conveyance. This is in accordance with the fourth submission of the Council in its letter of objections dated 29th April 2016 and the references in the Council's agenda document dated 1st July 2015. That agenda summarises that the acquired land was laid out as part of the Ty Sign Housing Estate development. There were subsequent private sector developments but at all times the Land remained undeveloped and was laid out as open space. This is consistent with the evidence in support of the Application which speaks, in general terms, to the Land being laid out as open space for in the region of fifty years: for example, reference to nearly a half century of use on a daily basis in the Application at question seven.

8. I have not been provided with any contemporaneous local authority resolutions which confirm the purpose of the acquisition in 1964. This is no doubt because of the considerable passage of time since the acquisition. No other statutory purpose for the acquisition of the land has been suggested. In the circumstances, with regard to the direct evidence in the conveyance that the acquired land was purchased with express reference to powers under the Housing Act 1957 and with regard to the fact that the acquired land, in significant part, was subsequently developed for the provision of housing, I am satisfied that I can safely reach the conclusion that the land (including the Land) was acquired by the Council's predecessor in title under statutory housing legislation. I infer that there were resolutions in existence authorising the acquisition of the land for the contemporaneously evidenced purpose in the conveyance, applying the statutory presumption of regularity: per Naylor v Essex CC [2014] EWHC 2560 (Admin) which is 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.

9. This proposition 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.

10. Therefore, I find that the Land was laid out by Risca Urban District Council and subsequently held by its successor(s) in title under the statutory housing legislation. 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 107 of the Housing Act 1957 and later provided for by sections 12 and 13 of the Housing Act 1985 which was the relevant statute in force during the 20-year period.

11. I am satisfied that the Land was laid out as open space in connection with the laying out of the housing estate generally. It has at all material times been an area of open space used by the public on the Applicant's own case.

12. 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."*[1]

13. The relevant 20-year period in the present case is that immediately preceding the date of the Application. Whichever date is taken (whether under the original application in 2013 or the later perfected application in 2015), I am satisfied that user of the Land has been "by right" rather than "as of right" at material times, and the Application must therefore fail as qualifying user cannot be shown during the relevant 20-year period.

14. I therefore reach the conclusion which was foreshadowed in my advice. The Application is, in my view, capable of summary determination for the reasons I have stated above.

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[1] 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"."*

Conclusion

15. I have concluded as follows:-

(a) User of the Land has been "by right" and not "as of right" at material times in circumstances where qualifying user must be shown in the 20-year period prior to the date of the Application

(b) 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 read in conjunction with my advice dated 2nd August 2016.

(c) This report should be circulated to the interested parties with an opportunity to make comments. I understand that the report will be then be considered by committee.

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

James Marwick

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31st October 2016