COMMONS ACT 2006, Section 15

CITY AND COUNTY OF SWANSEA
(Registration Authority)

RE: LAND KNOWN AS CWM GREEN,
WINCH WEN,
SWANSEA

INTERIM REPORT OF THE INSPECTOR MR ALUN ALESBURY, M.A., Barrister at Law

into

AN APPLICATION TO REGISTER THE ABOVE-NAMED AREA OF LAND

as

TOWN OR VILLAGE GREEN

CONTENTS:

1. INTRODUCTION

1.1. I have been appointed by the Council of the City and County of Swansea ("the Council"), in its capacity as Registration Authority, to consider and report on an application, received by the Council on 7th October 2011, for the registration of an area of land known locally as Cwm Green, at Winch Wen, Swansea, as a Town or Village Green under ***Section 15*** of the ***Commons Act 2006***. The site is within the administrative area for which the Council is responsible, and (as the site was originally formulated in the application) was also almost entirely within the freehold ownership of the Council.

1.2. The Council, in its capacity as owner of the site concerned, was the principal, and by the time of the Inquiry the only, Objector to the application. It is important to record that my instructions in relation to this matter have come from the Council solely and exclusively in its capacity as Registration Authority under the Commons Act. I have had no involvement with the Council in its capacity as landowner or objector, other than in the context of receiving evidence and submissions from the Council in those capacities, as one of the parties to the disputed issues relating to the application.

1.3. I was in particular appointed to hold a non-statutory Public Local Inquiry into the application, and to hear and consider evidence and submissions in support of it, and on behalf of the Objector(s). Hence I was provided with copies of the original application and the material which had been produced in support of it, the objections duly made to it, and such further correspondence and exchanges as had taken place in writing from the parties. Save to the extent that any aspects of that early material may have been modified by the relevant parties in the context of the Public Inquiry, I have had regard to all of it in compiling my Report and recommendations.

2. THE APPLICANT AND APPLICATION

2.1. The Application was itself dated, and also noted as received by the Council on 7th October 2011; it was made by Mr Brian Walters, of 228 Mansel Road, Winch Wen, Bonymaen, Swansea, SA1 7JT. Mr Walters is therefore "the Applicant" for the purposes of this Report. The application form indicated that the application was based on ***subsection (2)*** of ***Section 15*** of the ***Commons Act 2006***.

2.2. The form as submitted did not make it entirely clear what the applicant's views were in relation to the question of the relevant 'locality' or 'neighbourhood within a locality' for the purposes of the application, although the Applicant's answer to the relevant part of the form did include the sentence: *"The green is in the community of Winch Wen within the Ward of Bonymaen".* At the Inquiry it was agreed between the parties that in fact the claimed green lies within the Community (in the Welsh local

government/legal sense) of Bonymaen [which may well be coterminous with a local government electoral ward of Bonymaen], and that this Community area should be taken as the relevant 'locality'. The Applicant further produced for the Inquiry a plan showing the suggested "neighbourhood" [within the Community area of Bonymaen] from which it was claimed that a significant number of the local inhabitants had used the claimed green in a manner which met the relevant statutory criteria. No party to the inquiry objected to this refinement or clarification of the original application. Accordingly it is on the basis of this clarified 'neighbourhood within a locality' that I have gone on to consider this application, and it is my advice and recommendation to the Council as Registration Authority that it should do likewise. A copy of the Applicant's plan showing the suggested 'Neighbourhood' is appended as 'Plan B' at the end of this Report.

2.3. As far as the application site itself was concerned, boundaries were shown on a plan which accompanied the application. As originally drawn, these boundaries included a relatively small piece of land (in the north-western part of the overall site) which I understand to be the property of the estate of the late Mr John Gwyn Thomas (the remainder of the site being entirely in the ownership of the Council itself). An objection to the application was made by solicitors acting on behalf of Mr Gwyn Thomas's estate. It was made clear at the Inquiry that that small area (which is completely enclosed) had been included in the application site inadvertently, and the Applicant produced a plan showing a revised, slightly smaller site excluding that area. This further minor change to the application was acceptable to all parties, and indeed produced the result (I was given to understand) that the objection on behalf of the late Mr Gwyn Thomas's estate was no longer pursued. Accordingly, from now on in this Report (unless the sense requires otherwise), when I refer to 'the application site', or just 'the site', I am referring to the slightly reduced area of land as shown on the Applicant's revised plan dated 26th February 2014. A copy of this plan is appended at the end of this Report as 'Plan A'.

2.4. The site is currently (as I was able to see it) a reasonably well maintained area consisting mostly of mown grass, but with some tarmac paths, and an area devoted to play equipment. It slopes generally down from the south-east to the north-west. It is completely unfenced from Mansel Road along its south-east boundary, and also from the roadway (and pavement) along its south-western side. It is however generally fenced and/or hedged along its boundaries with residential curtilages on its north-eastern and north-western sides. I note in passing that there is another area of open grassland to the south-west of the application site, separated from it by the roadway just referred to, but that area is not included within this current application; I was informed that this land also belongs to the Council, and that it had been appropriated to the Education Department of the Council's predecessor in 1972.

3. THE OBJECTOR(S)

3.1. As I have already noted, by the time of the Inquiry, the only remaining objector to the application was the Council of the City and County of Swansea itself, as the owner of the area of land covered by the application. The Council in that capacity is therefore *"the Objector"* for the purposes of the remainder of this Report.

4. DIRECTIONS

4.1. Once the Council as Registration Authority had decided that a local Inquiry should be held into the application [and the objection(s) to it], it issued Directions to the parties, drafted by me, as to procedural matters in November 2013. Matters raised included the exchange before the Inquiry of additional written and documentary material, such as any further statements of evidence, case summaries, legal authorities, etc. The spirit of these Directions was broadly speaking observed by the parties, and no material issues arose from them, so it is unnecessary to comment on them any further.

5. SITE VISITS

5.1. As I informed parties at the Inquiry, I had the opportunity on the day before the Inquiry commenced to see the application site, unaccompanied. I also observed the surrounding area generally.

5.2. At the close of the Inquiry on 26th February 2014 I made a formal site visit to the site, accompanied by representatives of both the Applicant and the Objector. In the course of doing so, I was again able to observe parts of the surrounding area more generally. The Inquiry venue was also close to the application site, so I was also able to familiarise myself in a general way with the area on a number of other occasions during the inquiry period.

6. THE INQUIRY

6.1. The Inquiry was held in a room provided at the Cefn Hengoed Leisure Centre, Caldicot Road, Winch Wen, on 25th and 26th February 2014.

6.2. At the Inquiry submissions were made on behalf of both the Applicant and the Objector, and oral evidence was heard from witnesses on behalf of both sides, and subjected to cross-examination, and questions from me as appropriate. With the agreement of the parties participating in the Inquiry, all of the oral evidence was heard on oath, or solemn affirmation.

6.3. As well as the oral evidence, and matters specifically raised at the Inquiry, I have had regard in producing my Report to all of the written and documentary material submitted by the parties, including the material submitted in the earlier stages of the process, which I have referred to above. I report on the evidence given to the inquiry, and the submissions of the parties, in the following sections of this Report, before setting out my conclusions and recommendation.

7. THE CASE FOR THE APPLICANT – EVIDENCE

Approach to the Evidence

7.1. As I have already noted above, the original Application in this case was supported and supplemented by a number of documents; these included a plan, witness statements, some photographs, and other supporting material.

7.2. Other written or documentary material was submitted on behalf of the Applicant [and also the Objector] in the run-up to the Inquiry, in accordance with the Directions which had been issued. Some of this consisted of written statements from witnesses who would in due course give evidence at the Inquiry itself.

7.3. I have read all of this written material, and also looked at and considered the photographs and other documentary items with which I was provided, and have taken it all into account in forming the views which I have come to on the totality of the evidence.

7.4. However, as is to be expected, and as indeed was mentioned in the pre-Inquiry Directions, and at the Inquiry itself, more weight will inevitably be accorded (where matters are in dispute) to evidence which is given in person by a witness, who is then subject to cross-examination and questions from me, than will be the case for mere written statements, etc, where there is no opportunity for challenge or questioning of the author.

7.5. With these considerations in mind, I do not think it is generally necessary for me specifically to summarise in this Report such evidence as was contained in the statements, letters, etc by individuals who gave no oral evidence. In general terms it was broadly consistent with the tenor of the evidence given by the oral witnesses, and nothing stands out as particularly needing to have special, individual attention drawn to it by me.

7.6. In any event all of the written and documentary material I have referred to is available to the Registration Authority as supplementary background material to this Report, and may be referred to as necessary.

The Oral Evidence for the Applicant

7.7. ***Mr John Hague*** lives at 283 Bonymaen Road, Bonymaen, Swansea. He has had a close association with Cwm Green over many years. His evidence was given, he said, as a lifelong resident of Bonymaen, a former Swansea City Councillor and Deputy Leader of that local authority.

7.8. Around 1980 the present application site was transformed from an ugly coal tip surrounded by Japanese knotweed.

7.9. Between 1950 and 1955 Mr Hague had attended Cwm Primary School, and the coal tip at the back of the school was the only open space, and so became a natural and ready-made play area. He and the other youngsters would play there and slide down the tip, regardless of what their parents of the teachers thought about it. That was more or less where the application site now is. There was nowhere else to play. That is just like today because there is nowhere else for kids to play other than what is now the transformed green and pleasant Cwm Green.

7.10. Mr Hague said that he understood that the village green application was being made in order to protect this valuable green parkland from any form of future physical development. As an experienced builder he is aware that the former tip would need raft foundations which would add significantly to the cost of any building project there.

7.11. Over the years, at Cwm Green the local authority has developed an enclosed playground for the very young. Its swings, slide and roundabout are very popular. The wider parkland is also very well used by older boys and girls for informal sports. The council has also developed a hardstanding area for netball and basketball.

7.12. When he was young there were three parks in the area. One was at the junction of Jersey Road and Bonymaen Road; that has long since been removed. Bonymaen Park still exists but has been the subject of much vandalism, and is some distance from Cwm Green. The third park is opposite the Halfway public house at Trallwyn. That features a soccer pitch maintained by the council. But swings, a roundabout and a slide for the youngsters disappeared years ago.

7.13. So the play facilities for local children have dwindled quite considerably over the years. That is why local residents and those who occasionally visit from further afield treasure the facility at Cwm Green. It would be a sorry day for the community and the youngsters if this important parkland were to be lost.

7.14. Over the years the community has grown tremendously but the facilities have not. There was once a park on Cefn Road which has now become a reservoir. Many facilities in the area have been lost.

7.15. Mr Hague asked where these recreation facilities would be replaced if they were lost. He pointed out that there also had been an old airshaft which came up through the present application site. It was filled in, but he queried how well that was done. This land was not well used until it came into use as parkland. Any idea of developing on this land seriously needs reconsidering because there are not a lot of public facilities here on the east side of the river in northern Swansea.

7.16. The parkland on the application site is used every day quite extensively, albeit maybe not in bad weather. This extensive use is to his own knowledge. He passes by along the road beside the site frequently and he sees it being used. It has been well used over many years.

7.17. *In cross-examination* Mr Hague said that in 1956 he was aged 11; he remembers the area around the site being developed by the local authority. But the Cwm Green was deliberately left undeveloped. In the period from 1956 to 1970, which was before the area was landscaped, children did nevertheless play there, sliding down the coal tip; the land was largely waste and unoccupied.

7.18. He could remember when the local authority had landscaped the land. The council then maintained the area; it was their property. It was a park area that the council provided for the benefit of local inhabitants, like all the other parks in Swansea. The previous park which had existed at the junction of Jersey Road and Bonymaen Road went in the 1960s he thought. The Cefn Road park went in the late 1950s. The soccer pitch opposite the Halfway public house went about 9 years ago.

7.19. He confirmed that he had seen people using Cwm Green. He could not say offhand if he knew the people he had seen using it while he was driving past. He acknowledged that it is possible to park on the road adjacent to the application site. One does see both adults and children playing on the land.

7.20. He acknowledged that people could possibly come from all around to use this land, but his view was that people would not travel very far to play there. Therefore the people using it would tend to be from the relatively close area. He did not know however if he had always seen the same people using the land.

7.21. ***Mr Ian Challacombe*** lives at 20 Cefn Llwyn. He said that he had lived bordering Cwm Green since 1969, when it was an eyesore coal tip. He

lived at 292 Jersey Road from 1969 until 1982, living at home with his parents, and has lived at 20 Cefn Llwyn from 1984 to the present day, with only a 2 year gap when he moved briefly to Morriston.

7.22. There have always been ball games such as football, rugby, cricket etc, along with various other leisure activities, at Cwm Green with no restriction on access at any time. He, his children and now his grandson have used the lovely open green area and the playground equipment. Also during the winter children use the natural slope of the green to sledge down in the snow. This area has been transformed from the ugly coal tip of 1969 to the park area since 1980, and it must be preserved for future generations to enjoy.

7.23. He explained that he has a good view of Cwm Green from where he lives. He thought there could be more than 100 people who use the green regularly. The play area is used extensively and football goes on there. The youngsters who use it he was sure were from around the local area because of their age. He has lived backing onto the green for 45 years.

7.24. *In cross-examination* Mr Challacombe said that he did remember the site as it was as a coal tip up until 1969. He did use the site when it was still the tip, and could clearly remember when it was landscaped in the 1970s. It has always been well maintained by the council since then. It had always been his impression that the council wanted members of the public to use this land.

7.25. Generations of local people have grown up using this land, he said. His own generation used it, and his children. He knew those who were using the land personally at those stages. Now however it is a new generation and his grandson uses it. He does know that the children using it are from the local area, that is not just an assumption on his part. And by the local area he means the whole estate up to Cefn Hengoed. And from there down to the old park at Bonymaen, and Cwm. One does see familiar faces using it, he said, and he recognised them.

7.26. He mentioned that his own postal address used to be Winch Wen, but that was changed by the Post Office to Bonymaen.

7.27. He himself had only ever used this land for recreation, and the access to it had never been restricted.

7.28. As for the previous mine working on the land, his understanding was that there used to be a concrete cap on the ventilation shaft, but trees fell down into it on two occasions, so that the shaft was eventually filled in.

7.29. He also mentioned that the local Family Centre hold a fun day in summer months on the green, and the green is extensively used by them.

7.30. ***Mrs Pauline O'Brien*** lives at 237 Mansel Road, Winch Wen, Bonymaen. She had written one of the statements which accompanied the application in this case.

7.31. She and her husband Peter have lived at their present address for more than 51 years. They live in one of 12 semi-detached houses which adjoin Cwm Green, and they were one of the first couples to occupy a property there. When all the 12 houses were occupied there were 19 children living there, and three of the women were expecting as well.

7.32. It was a lovely location, the only downside being the eyesore coal spoil tip covering a large area of land at what is now known as Cwm Green.

7.33. The council of the day told them it was intended to transform this land to parkland, but there was no action on the part of the council for several years. It was left to the residents to campaign for the promised parkland, and they did that after about 7 years. Eventually it happened. The mineshaft was capped, the colliery spoil removed, and the area was grassed. All that happened about 30 – 35 years ago.

7.34. Naturally the local people were delighted, for it provided a green and safe environment for the community which was growing all the time. The land has been well maintained by the city council and there is little or no vandalism.

7.35. Her grandchildren visit her with her daughter regularly, and they love going over to the playground. There has always been free and easy access to the green, and they even have picnics there in the summer. The green was particularly well used in the previous summer, although the fine weather may have had something to do with that. Cwm Green is local people's pride and joy, and it is a feather in the council's cap that it is so well maintained.

7.36. Mrs O'Brien said she dreaded to think what would happen if Cwm Green became a development site. The nearest other park would involve crossing four or five roads. Cwm Green is the only bit of greenery in Winch Wen where children can play safely.

7.37. When she moved into her house she had three boys who played on the land when it was a tip, because there was nowhere else to play. It was heaven when it was made into a park. Nowadays her three grandsons play there.

In fact all local boys play there every day of the week. They have done that for the whole time the land has been laid out as parkland. She confirmed that they have indeed had picnics there themselves. When they are playing on the land children do all sorts of things there; there is always lots of activity there the whole time.

7.38. *In cross-examination* Mrs O'Brien confirmed that she and her husband moved in in 1962; when they bought the house they were told that the council would make a park there; in fact the estate agent told them that there would be a chemists, a Co-op and a park in the area, but the park took a long time to appear. The capped shaft was a nightmare while it remained like that. The council turned the land into a park in about the early 1970s, and since then it has been very well maintained. The Council intended the land to be used by the residents of the area. There had been no attempts to restrict use of the land, but rather to encourage it if anything.

7.39. Every time she looks out at that land she sees people using it. Many of them are people she knows, but not all of them. She thought a lot come from down in the Bonymaen area. This park has always been nicer than the Bonymaen park.

7.40. *In re-examination* Mrs O'Brien confirmed that the parkland had been well used last summer due to the good weather. Both morning and afternoon children in large numbers would meet there to play.

7.41. She estimated that probably one might see about 20 children playing there in the morning and another 20 in the afternoon. They could be the same children or different ones.

7.42. ***Mr Derek Bellamy*** lives at 220 Mansel Road, Winch Wen, Bonymaen. He had provided one of the written statements which accompanied the original application.

7.43. In his evidence Mr Bellamy said he is probably the only resident of the area to have lived at two addresses overlooking Cwm Green – 220 Mansel Road, his current address, and at Cefn Llwyn next to the park. He has lived at those two houses for a total of more than 40 years.

7.44. When they moved to the area the only downside was the eyesore state of the Cwm Green land, which of course was not known as Cwm Green in those days. Coal spoil heaps dominated the landscape and it was not a pretty scene.

7.45. In the absence of any official information from the council, he would estimate that the area was transformed from the previous eyesore state to a green and pleasant piece of land at least 30 years ago, around about 1980. Since then it has been widely used for a variety of informal sporting activities – football, cricket, basketball and rounders are the most popular pastimes. The younger children have their own enclosed playground which, like the wider green, is well maintained by the council. His own son used to play there. Now his two daughters make a beeline for the green when they visit his wife and himself.

7.46. Over the years he has witnessed many families picnicking on the green in the summer months, countless pet owners exercise their dogs there, and people just stroll and chat. It is in every sense a true village green and he hopes it is designated as such.

7.47. *In cross-examination* Mr Bellamy acknowledged that the land has always been maintained well by the council. He thought the land had been completely transformed by what the council did.

7.48. Local people had never had to seek permission to use the land, and it certainly has benefited the local residents.

7.49. His own son actually played football on there before it had been cultivated by the council. Since then the council have encouraged people to use it by maintaining it to a high standard. No-one has ever tried to prevent anyone from using it or to restrict that use.

7.50. He could not put a figure on the number of people using it, but the parkland is well used. People walk their dogs, children including his own grandchildren played there in large numbers at all sorts of different times. And also families would play there after children had been picked up from the nearby buildings when they were in fact a school.

7.51. His view was that most of the people who use the park are local people on foot. And the children using it are mostly from the local area.

7.52. There were a lot of other children who were the same age as his own children, so they tended to know those children, but now it is his grandchildren who use the land.

7.53. *To me* Mr Bellamy confirmed that the usage pattern on the land has been much the same since about 1980, but of course it depends on the weather.

7.54. ***Mr Brian Challacombe***, lives at 292 Jersey Road, and he and his family moved into that bungalow in 1969. At that time the coal tips which bordered the bottom of their garden had not been removed. That took place some years later, in 1976, prior to the development of houses at Cefn Llwyn, which was adjacent to the tips.

7.55. When the tips were removed the area was landscaped and footpaths were created. A hardstanding was laid with netball posts being erected and also benches provided. Then came a soft area with swings, roundabouts, a slide and other facilities for younger children. It was in all but name a park.

7.56. One of the problems the authorities had faced concerned an old colliery air shaft which terminated just short of Mansel Road. It took several attempts by the Coal Board and the council to fill it in. That proved difficult because the shaft was on a slope and not a vertical drop. It ran diagonally under Cwm Green.

7.57. For generations Cwm Green has been a recreational area for both children and adults. Today and for a long time it has been a place of beauty, and it is delightful to see children playing games or just running around in the knowledge that they are in a safe environment. The green is used all the year round.

7.58. *In cross-examination* Mr Challacombe said that although when they first moved into their house the coal tips were still there children nevertheless played there, especially in the winter in order to slide down the tips. Since the park was created the council has maintained the land to a very high standard.

7.59. Everyone locally thought that this was a long stay park which would remain there indefinitely. He had always thought that it was a park where all members of the public were invited to use it.

7.60. From his back window he can see all the children playing on the land because of the way it slopes towards him. He does not necessarily know all the children but he just sees them playing. They come from all the various surrounding areas and obviously he does not know all of them.

7.61. *To me* Mr Challacombe said that all of his own children and also his grandchildren, and now indeed his great-grandchildren, have played there on the park. They have played there with local friends. All but one of a total of six of his grandchildren and great-grandchildren live in Bonymaen or Winch Wen.

7.62. ***Alderman Mair Gibbs*** lives at 180 Mansel Road. She said that she is a former Councillor who had represented the Bonymaen Ward, which includes Winch Wen. She has lived near the application site all her life. In 1936, when she became of school age, she had to pass some very large and ugly coal tips spreading from Jersey Road to Mansel Road. Those tips were most unsightly and unhealthy, but to the children of the time they were their playground. They would often find tin sheets, planks of wood or whatever and slide down the colliery spoil slopes.

7.63. When she joined Swansea City Council in 1986 she became a member of a committee responsible for regeneration. Money became available for regeneration projects in areas of deprivation, and Bonymaen was one such area. It became known as the Swansea Valley Project. They managed to find sufficient funds to upgrade the children's playground at Cwm Green and properly maintain it. Of course the park had been established many years before that, and unlike a lot of playgrounds the one at Cwm Green has never been vandalised.

7.64. Cwm Green is a favourite among young children and mums from the adjoining Family Centre, and the new Welsh Medium Primary School which backs onto Cwm Green. Cwm Green attracts children of all ages, especially during the school holidays. The community needs to retain this area for the future of their children and for future generations.

7.65. She explained that during the time she was Lord Mayor of Swansea she was often asked to appear at school sports days which were held on Cwm Green. She had represented the area for 28 years, so there are not many people in the area she does not know. She does tend to know the people who live in this Ward, she said. Thus she tends to know all the families who use the park.

7.66. It is important to protect what the local area has got now. The council has maintained the area really well, there has been first class maintenance of it.

7.67. *In cross-examination* Alderman Gibbs said that all the local people had used this land for recreation even when it did consist of coal tips. She had not been politically minded at the time when the land was restored, but she did recall that there had been a lot of these tips around Swansea. When the council started developing the houses around here, that was an important activity that was undertaken after the Second World War.

7.68. As for the period from 1956 to the early 1970s, she was not on the local authority at that time, but that was a time when money had been needed to build houses for the people. She reiterated that since the parkland at Cwm Green was landscaped it had always been well maintained.

7.69. The council's positive actions had changed the area, and money was spent on the area in order to improve it; it would be a terrible waste if that was lost.

7.70. As far as the local area is concerned, people would tend to use the name Winch Wen for the part which was to the north of Caldicot Road, and Bonymaen for the area to the south of Caldicot Road.

7.71. It was her understanding that equipment had been removed from the former Halfway park because it was unsafe, but that was a sad event. In the early 1970s she herself had not been on the council but she was involved in the local area. She recalls that the council landscaped Cwm Green as a park for the benefit of the local public. Since then the local people have used the park regularly.

7.72. Bonymaen park is rather different from Cwm Green, and somewhat off the beaten track. Her own observation would be that families with children come to the Family Centre near Cwm Green and then go into the parkland there. In her view the whole area of Bonymaen, which includes Winch Wen, is rather like a big family. Cwm Green is roughly at the point where one could say that Bonymaen meets Winch Wen.

7.73. Children from the school go to the park to kick around after school. She was referring to children from Cefn Hengoed School. During the school holidays one can also see lots of children playing down there. Sometimes there could be close on 50 children playing there or maybe more.

7.74. On a bank holiday or during the school holidays, whenever she passes there would be children playing down there, it is very well used.

7.75. The children at the local school know that the green is currently under threat and are concerned about it, she said.

7.76. She would say that there are more than 20 children usually there playing. She could not identify precisely who they are because she would not ask them, but she knows them by sight.

7.77. ***Mr Brian Walters***, the Applicant, lives at 228 Mansel Road. He has lived in Mansel Road from 1986; previously to that he had worked in Yorkshire. It was his understanding too that local people regarded Winch Wen as being the part of the area to the north of Caldicot Road, and Bonymaen to the south of that road.

7.78. One selling point for his house when he bought it was the fact that it faced this green of Cwm Green. It is lovely to see so many children using the green, especially in the Spring and during the Summer holidays.

7.79. He does not know all the children who use the land but he sees many of them time and time again. He does sometimes see cars pull up and youngsters get out of them in order to play on the parkland. However he would say that well over 90% of the youngsters using the parkland are locals. The people who use the park come from both the north and the south side of Caldicot Road. On the last day of good weather before the Inquiry Mr Walters estimated that about 35 to 40 youngsters had been playing on the green.

7.80. At the height of the summer holidays one is looking at very many more children than that playing there.

7.81. Old mine workings are always a worry and they were never properly filled in so there is a real concern that house building might take place there on this land.

7.82. When his grandchildren visit they make a beeline for the green. The use of the green has been consistent since 1986, much as it is now. However the children's playground on the green has been upgraded on at least one occasion.

7.83. He himself had not been aware of the old mine workings on Cwm Green when he moved in.

7.84. *In cross-examination* Mr Walters said that nowadays he does not personally know the youngsters who are using the green. However he does very often see the same children there from one week to the next. They are sometimes there with their parents. It is reasonable to assume that they are local.

7.85. The Village Green application was made in 2011. The application was made in part because the land had been identified as a possible area for future development in the Council's Development Plan. The local people had thought it wise to try to secure the future of the site. This land had been a *"candidate site"* for 33 houses.

8. **The Submissions for the Applicant**

8.1. In opening submissions the Applicant stressed that although the application had been lodged in his name, it has the endorsement of the communities of Winch Wen and Bonymaen. A public meeting had been held in September 2011. It was well attended and the proposal to seek Village Green status received the unanimous support of the packed audience who were present.

8.2. Village and Town Greens come in all sorts of shapes and sizes. However Cwm Green actually looks like a village green, it serves as a village green and meets the specific legal meaning of village green that applies in Wales and England.

8.3. It is regrettable that the council has not been able to produce documentation which would assist the case. The original conveyance is said to have been lost, but there is no doubt that the site was bought by the then local authority in the mid-1950s. Today's council does not have a record of who installed the original playground equipment, nor who authorised the installation.

8.4. The council is correct in saying that the current children's playground equipment was installed in 1997/1998 when new health and safety guidelines decreed that playgrounds must have a soft surface and be enclosed. The original playground equipment, two swings, a slide and a roundabout were installed on the hardstanding that is now the netball pitch a number of years earlier. Residents who have lived there for many years recollect that the original equipment was installed some 40 years ago.

8.5. However local people are not just concerned about the playground but the whole site, and these same residents are certain that the transformation of the site from colliery spoil tips to a lovely park area happened in the late 1970s, since when the land has been widely used, mainly by youngsters from the community and further afield.

8.6. So the land in question falls entirely within the ***Commons Act 2006*** definition. A significant number of the inhabitants of the area have indulged as of right in lawful sports and pastimes for at least 20 years, and continue to do so. People wander onto the green, not requiring the council's permission, and there is no record of the number of people, including children, who use the green, but in the Spring and Summer months it is a most significant number.

8.7. A Welsh Medium Primary School backs onto the green, and the Bonymaen Family Centre overlooks the site. Around 300 families a year benefit from visiting the Centre at Cwm Green.

8.8. The inhabitants of Winch Wen have already lost a number of amenities including a children's playground on land opposite the Halfway public house, and the closure of the swimming pool in the building where the Inquiry was held.

8.9. The witnesses being called for the Applicant are respectable and reliable witnesses most of whom have lived in the Cwm Green locality for many years, in one case more than half a century. Mr Walters said he could have called 60 or more witnesses but they would all be giving the same basic evidence. He had tried to avoid repetition of more or less identical evidence as the Directions for the Inquiry had suggested.

8.10. In closing submissions Mr Walters referred to the fact that the Objector had pointed out that the burden of proof lies with the Applicant, and that the standard of proof is the balance of probabilities. The Applicant believed that it had been shown to that standard that Cwm Green meets all the criteria for designation as a Village Green.

8.11. At the Inquiry much emphasis had been placed by the Council's representative on where the children and adults who use the green came from. They might indeed come from near and far, but logic dictates that the vast majority come from the more immediate locality.

8.12. The criteria of the ***Commons Act*** stipulate that a significant number of the inhabitants of a locality or a neighbourhood within a locality should have indulged as of right in lawful sports and pastimes on the land for at least 20 years, and that is the case here.

8.13. However the local authority maintains that Cwm Green is held on trust for the public to use for recreation, and so argues that the use of Cwm Green has been by right and not as of right. The Applicant's understanding of the case-law points which had been made on behalf of the authority is that where local authorities hold land expressly as open space or parkland that land cannot be registered as a village green. That gives rise to a question as to the status of Cwm Green.

8.14. There is no question of doubt that Cwm Green was purchased compulsorily by the local authority of the day as part of a wider area of potential residential development. Indeed the Council's case summary had acknowledged that the purpose of the ***1953 Compulsory Purchase Order*** and the subsequent conveyance was for the local authority to build housing. The underlying scheme had been referred to as the Bonymaen and Winch Wen Housing Scheme.

8.15. However the site now known as Cwm Green was not developed. Mr Stephenson for the council had stated that the inference to be drawn therefore was that the local authority intended that this land should be used for the enjoyment of the public. However the Applicant says that the inference to be drawn is that the land, with the old mine workings below ground, was considered unsuitable for development.

8.16. Houses now stand at the Cwm Green end of Cefn Llwyn, making vehicular access to that point impossible. Residents have failed to get an answer to the question: *Why wasn't the Cefn Llwyn housing development continued into the site now known as Cwm Green?* In the same way, why did the development of houses in Mansel Road come to an abrupt stop at number 231? The local authority has failed to provide any documentation or evidence showing that the land now known as Cwm Green was originally intended to be recreational land.

8.17. Mrs O'Brien in her evidence had stated that it was only after a concerted campaign that the local authority agreed to remove the colliery spoil heaps and to grass the area. Former Councillor John Hague recalled the transformation of the site more than 30 years ago. Mr Hague is a builder by trade and is in no doubt that the former tip would require raft foundations to accommodate any development above ground. That he said would add significantly to the cost of any development, and probably render it cost-prohibitive. That probably explains why we don't see developers queuing up to build on Cwm Green.

8.18. The Applicant's witnesses are good, honest, decent people who are genuinely concerned about the future of this site.

8.19. Cwm Green is the only piece of greenery in Winch Wen where children can play safely. The Applicant strongly hopes that it continues as a safe haven for youngsters for many years to come. It is believed that the vast majority of the local community share that hope.

9. THE CASE FOR THE OBJECTOR – Evidence

9.1. Oral evidence (supported by a bundle of documents) for the Objector (the City and County of Swansea as landowner) was given at the Inquiry by ***Ms Jane Harries***, the Landlord Services Manager of the Council, employed by the Council's Director of Place in the Housing and Public Protection Services of the Council. Ms Harries had held her present post for the previous 8 years and had worked for the Council within its Housing Service since June 1986.

9.2. She explained that she made her statement essentially from the records of the Council's Corporate Building and Property Services, and also the Council's Culture and Leisure Services. She acknowledged that she did not have first hand knowledge of the site, although it forms part of the portfolio of housing land for which she has operational responsibility. She is aware that the local community use the site for recreation purposes, and that there is a children's play area and a basketball/netball court there.

9.3. The Council's records show that the site was originally acquired on 4th January 1956, by the County Borough of Swansea, which was the present Council's predecessor. Prior to that there had been a compulsory purchase order called the Swansea (Bonymaen and Winch Wen) Housing No.45 Compulsory Purchase Order 1953. Ms Harries produced a plan showing the area of land which the Council acquired.

9.4. While the conveyance was silent as to the purpose of the original acquisition, the Council's acquisition records showed that the relevant land referred to in the Compulsory Purchase Order plan had been acquired for the housing department, and it would seem that is was acquired for the Bonymaen and Winch Wen Housing Scheme. Other records show that some of the acquired housing land adjoining the nearby school, along with the site of that school (not on the present application site) was subsequently appropriated to the Education Department of the Council. However these records reaffirm that the purpose of the original acquisition of land under the CPO plan had been for housing.

9.5. Ms Harries produced a plan which showed the housing land still owned by the council in the vicinity of the site. That plan shows the land of the present application site marked as *"Housing"*.

9.6. The Council's records show that children's play equipment and a netball and basketball court were installed on the site in approximately 1997/1998. The records of the Council's Parks Service show that the Council has maintained the land since August 1998. However she noted from most of the statements supporting the application that the Council would seem to have started to maintain it some considerable time before 1998. That evidence seemed entirely credible. Indeed she accepted that it would have taken some time to landscape and lay out the land from its original state as colliery spoil tips. The Council continues to maintain and inspect the play equipment and mow the grass on the site on a regular basis.

9.7. Ms Harries said that she believes that the Council has set out the site to provide recreation for its council tenants and other people in the community, although she accepted that there are no formal council records available to support that. In general terms that understanding of what had

happened was consistent with aerial photographs which had been found, and also with the evidence of local residents in support of the application.

9.8. The Council maintains the area of Cwm Green as part of its general maintenance of open spaces and play areas. That meant that the grass was cut about 13 or 14 times a year. That maintenance responsibility is met from the Council's general funds, and not from its housing revenue account. That she said would be because this land is recognised as being open space and a play area. In contrast the housing revenue fund would maintain grass verges and the like within a housing area.

9.9. *In cross-examination* Ms Harries said that she could not herself comment on why Cwm Green had not been built on, in spite of being 'housing' land. She thought it could have been because of the presence of colliery air shafts but she did not know. It could possibly have been because of the nature of the land in some other respect.

9.10. She could not explain why it was that no records could be found as to why or how the land had been restored and converted to parkland.

10. The Submissions for the Objector

10.1. In submissions on behalf of the Objector provided before the Inquiry began, it was argued that the land here was held on trust for the public to use for recreation. Therefore the use of the land would have been *"by right"* and not *"as of right"*, and the application should be dismissed for that reason. Additionally the Applicant should be put to proof as to whether a significant number of the inhabitants of the locality have in reality used the land for sports or pastimes.

10.2. As to the history of the land, in 1956 the local authority had purchased the land now known as Cwm Green as part of a wider housing project for Bonymaen and Winch Wen. The area surrounding Cwm Green was thereafter developed into housing. Cwm Green itself however was not developed for housing.

10.3. The Applicant's own evidence suggested that there had been a campaign which had succeeded some 30 or 40 years ago to get the site turned into parkland. Therefore, based on the Applicant's own contentions, it was argued on behalf of the Objector that Cwm Green is an open space for the purposes of the ***Open Spaces Act 1906***. There is no suggestion of any building having been present on the land. The land was previously waste and unoccupied until it was landscaped into an area for recreation around 1970, and it has been maintained as an area for recreation since then. That

meets the definition for open space as defined in ***Section 20*** of the ***Open Spaces Act 1906***.

10.4. The land being classified as open space would mean that the local authority was under a duty to hold and administer the land in trust for the public, by virtue of ***Section 10*** of the ***Open Spaces Act 1906***.

10.5. It is settled law that the public does not use a recreation ground *"as of right"* if the public already has a statutory or other legal right to use it. The cases of ***R (Beresford) v Sunderland City Council*** [2004] AC 889, and ***Barkas v North Yorkshire County Council*** [2012] EWCA Civ 1373 were referred to. Therefore the persons who have used Cwm Green have done so as beneficiaries of the Council holding the land on trust for their use and enjoyment as open space. This is not use *"as of right"*.

10.6. As for the requirement for a significant number of inhabitants to have used the land in cases of this kind, whether the number of people is significant or not is a matter of degree relative to the size of the population of the locality. With this application there was very limited evidence of how many people had in fact used this recreation ground. This was not the Objector's major point, but the Applicant must still prove his case. The local authority was aware that there were currently 4,987 persons registered on the Electoral Roll in the Bonymaen Ward.

10.7. In opening submissions at the Inquiry itself, the history of the site following the ***1953 Compulsory Purchase Order*** was referred to. The site was initially waste land, with no buildings on it, and unoccupied. It was landscaped in about 1970 and thereafter maintained as an area for recreation which was then enhanced in 1997/1998 with a playground.

10.8. As to the status of the Council's acquisition, it was argued that the land was initially acquired as open space, albeit as part of a wider transaction for housing. Therefore the land met the criteria described in ***Section 20*** of the ***Open Spaces Act 1906***. Then the land was developed to become a different type of open space, but still within ***Section 20*** of the ***1906 Act***, it was suggested.

10.9. In the alternative, the Objector's argument was that the acquisition had been under the 'umbrella' of housing purposes, but had been for open space use on this land. In other words the effect of the classification of this land as housing land was largely inconsequential.

10.10. If the land was held as open space then ***Section 10*** of the ***Open Spaces Act 1906*** would apply. If the true position was that the land was held for housing, then the provision of a recreation ground here would have been

under ***Section 80*** of the ***Housing Act 1936***. In either of these ways, the decision of the Court of Appeal in the ***Barkas*** case would tell us that use here had been by right and not as of right.

10.11. On the question of the extent of the use of the land, the point was reiterated that there was an important evidential requirement for the Applicant to prove his case. The Objector would not itself assert a positive case, but in the documents to date there had been very little evidence that the persons who used Cwm Green were from the locality, or a neighbourhood within the locality, and also limited evidence as to how many people had in fact used the land.

10.12. In closing submissions at the end of the Inquiry, Counsel for the Objector said that the starting point was that the acquisition here had been under a Compulsory Purchase Order. The wider area around the present application site had been developed extensively following that. The inference must be that this land had been deliberately left as public open space. The local authority would have known about the landscape here, and deliberately not used this land as land for housing or development.

10.13. It was clear that this land was then landscaped in the 1970s for recreation, and further enhanced in 1997/1998 with a playground and basketball/netball court.

10.14. Therefore it was said that the ***Open Spaces Act 1906*** applied, although the land had been purchased under housing legislation. It had never in fact been used, or it seems intended to be used, as actual housing. This land meets the definition in ***Section 20*** of the ***Open Spaces Act*** of *"open space"*. It was both *"waste"* and *"unoccupied"*.

10.15. After it had been landscaped it was used for the purposes of recreation, and indeed still as open space. Therefore the land has been used by those people who have used it *"by right"*.

10.16. In the alternative if the land is not an 'open space' as such but is held for housing – this is not the Council's primary case but it is accepted it is a conclusion open to the determining authority – then this is a case like ***Barkas***. In other words it was a case where the local authority had power to lay out the land as a recreation ground, but no obligation to do so. There is no dispute at all that the local authority had laid out this land for the benefit of the public.

10.17. The case of ***Barkas*** says that in such circumstances the local people who use the land to engage in pastimes do so by right and not as of right. Also it can be said that the members of the public here clearly had *permission* to

use the land, and were not asserting a right. The local authority actively encouraged the use of this land.

10.18. It needed to be recalled where the burden of proof lies in a case of this kind. The Objector's view is that this burden of proof has not been satisfied. Applications of this kind must be taken seriously, and must be strictly proved. There had been very limited evidence from people who used the land, as opposed to people who have seen other people using the land. There had been very limited evidence as to the number of people using the land. They might have been the same 20 people using the land both mornings and afternoons, or they might have been different people.

10.19. Mr Ian Challacombe had said that over 100 people might be seen on the land. Mr Walters said that he saw many of them time and time again.

10.20. As to the neighbourhood of Winch Wen/Bonymaen, there had in fact been very limited evidence if any of where the people using the green actually came from. Bonymaen/Winch Wen is quite a large area. One can legitimately ask, are the 20 or 50 people using the land the same people coming back time and again?

10.21. The Electoral area of Bonymaen had been shown to be quite a big area, and there was limited if any evidence of a significant number of those people using the land. Thus the Objector's position is that this has been an honest but mistaken application, and that the core issue here is really local people's concerns over the planning of this land. It follows that the land should not be registered as a town or village green.

10.22. It was acknowledged that the case of ***Barkas*** was going to the Supreme Court, but there may be a delay of several months before any judgment is issued, and it is unclear if it will have any impact on this present case. The Court of Appeal decision in that case therefore is still good law.

10.23. The majority of the evidence in the present case had not suggested any knowledge of where the people using the green had come from. For example, where did the people using the Family Centre come from?

10.24. It was accepted that it was difficult to distinguish this case in some ways from the ***Beresford*** case in the House of Lords. However, when this land was acquired, it was a different type of land. It had coal tips on it, but could be regarded as 'open space' land because it met the definition. In the ***Beresford*** case however the land appeared to have been created for the specific purpose it was being used for.

10.25. It was accepted that there was nothing more solid than inference on which the Objector could hang the *'Barkas'* point. The land had been acquired for housing purposes 60 years ago, and it remains held for that purpose today. There is nothing concrete, it was accepted, to say that it was under statutory powers that it became provided as recreational land.

10.26. In further submissions it was argued that the case of ***Beresford*** could be distinguished, because here the land had not been acquired for public recreation but as part of an extensive acquisition. In ***Beresford*** it seemed that, had the originally envisaged development been carried out, public access would have been regulated and fees charged for use, but that those plans were never fully realised. Therefore the use by local inhabitants in the ***Beresford*** case had in effect been 'in the meantime'. It should be noted that in the ***Beresford*** case the court had been unable to infer an appropriation for a recreational open space, because that would have been inconsistent in that case with the site's perceived development potential. So it was reiterated that what had happened in ***Beresford*** had been some sort of interim arrangement, during which the local public had used the land as of right.

10.27. In contrast, in the present case the coal tip had always been kept as open space, with a deliberate lack of development. The ***Beresford*** case lends support to the proposition that inferences can legitimately be drawn.

10.28. It was clear from the ***Barkas*** case as well that one can infer that various Acts apply to particular pieces of land. In any event, in the ***Barkas*** case it appeared that the land had been acquired under statutory powers for housing. The CPO in this case would almost certainly have been under the ***Housing Act 1936***, which was generally similar to the ***Housing Act 1957*** which followed it. Therefore this land was governed by the ***Housing Acts***, and the power to provide recreation land would have fallen within the relevant ***Housing Act***. Therefore this case and this land would have fallen squarely into the principles enunciated in ***Barkas***. So it can be inferred that the local authority exercised powers under the ***Housing Act*** to lay out and provide this land for recreation, exactly as had happened in ***Barkas***. Consequently the village green application here should be rejected.

10.29. On the question of the extent of the use that had been demonstrated, the well known ***McAlpine*** case had shown that it was required that general use by the local community must be demonstrated. In this case the local authority owner had wanted the community to use the land, that was true, but it was still legitimate to ask whether the evidence had in fact shown general use by that community.

11. DISCUSSION AND RECOMMENDATION

11.1. The application in this case was made under ***Subsection (2)*** of ***Section 15*** of the ***Commons Act 2006***. That section applies where:

> *"(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."*

The application was dated and marked as received by the Council as Registration Authority on 7th October 2011. That date therefore is the 'time of the application', from which the relevant 20 year period needs to be measured (backwards).

The Facts

11.2. In this case there was relatively little dispute in relation to the underlying factual background as to the history of this site, or indeed as to the use which had been made of it over the years – although the Council as Objector did correctly take the point that the law in this field puts the onus on an applicant in fact to prove and therefore justify his/her case that the various aspects of the statutory criteria set out in ***Section 15(2)*** have in reality been met on the piece of land concerned.

11.3. To the extent that any of the facts were in dispute, it is necessary to reach a judgment as to the disputed aspects of the evidence given, insofar as that evidence was relevant to the determination whether those statutory criteria for registration have been met or not.

11.4. Where there were any material differences of that kind, or questions over points of fact, the legal position is quite clear that they must be resolved by myself and the Registration Authority on the balance of probabilities, from the totality of the evidence available. In doing this one must also bear in mind the point, canvassed briefly at the Inquiry itself (and mentioned by me earlier in this Report) that more weight will (in principle) generally be accorded to evidence given in person by witnesses who have been subjected to cross-examination, and questioning by me, than would necessarily be the case for written statements, questionnaires and the like, which have not been subjected to any such opportunity of challenge.

11.5. I will say at this point that I do not think that the nature of the evidence given to me in this case necessitates my setting out in my Report, in a formal way, a series of 'findings of fact'. Rather, what I propose to do, before explaining my overall conclusions, is to consider individually the various particular aspects of the statutory test under ***Section 15(2)*** of the ***2006 Act***, and to assess how my conclusions (on the balance of probabilities) on the facts of this case relate to those aspects. It should not however be assumed that any facts I mention under one heading are only relevant to that heading. I have taken into account the totality of the underlying facts in reaching my conclusions under all the headings, and (of course) in reaching my overall conclusions as well.

11.6. Before discussing and setting out my conclusions on the various statutory criteria, it is however appropriate that I should re-state the point that it is only those criteria under the ***Commons Act*** which I am considering. As I made clear at the Inquiry, the question of what *ought* (or ought not) to be the future of this particular piece of land, in terms of potential planning proposals, or of what might be thought desirable in the (local) public interest, is entirely outside the scope of these proceedings under the commons legislation. These proceedings only relate to the facts as what use has been made of this piece of land during the relevant period in the past, and the legal consequences of those facts in the particular circumstances of this case.

"Locality"* or *"neighbourhood within a locality"

11.7. I have mentioned earlier, in Section 2 of this Report, that the application form as originally submitted did not make it entirely clear what the Applicant was claiming in regard to this particular aspect of the statutory criteria. I did not find this surprising or unusual, as in my view neither the 'standard' form [Form 44] on which applications of this kind are required to be made, nor the explanatory notes within the form, make it very clear to a lay applicant what is required in this respect.

11.8. The application form as completed made mention of *"the community of Winch Wen within the Ward of Bonymaen*". As noted in section 2 above, Winch Wen, whatever it may be in terms of colloquial usage and local understanding, is not a *"Community"* in the particular sense that this term has in the framework of Welsh local government.

11.9. There is, it seems, a City Council electoral ward of Bonymaen. However it also emerged at the Inquiry (and this was a matter of agreement on all sides) that there is in fact a 'Community' area of Bonymaen, in the full Welsh legal and local government sense. It may well be that this has exactly the same area as the electoral ward just referred to, but I am not certain of that. In any event, at the Inquiry both parties agreed that the

Community of Bonymaen met the criteria required in order to be the relevant *"locality"* for the purpose of ***Section 15*** of the ***Commons Act***.

11.10. However that 'locality' appears to cover an area rather wider than that from which the evidence suggested that users of the claimed green would typically come, including areas of open countryside stretching away to the east. At the inquiry the Applicant produced a plan showing the suggested 'neighbourhood', within that wider 'locality', from which users of the claimed green would normally come.

11.11. I believe that the Registration Authority retains a copy of this plan, but for the avoidance of doubt I attach a copy at the end of this Report, as 'Plan B'. It was suggested, after some discussion among the local residents who gave evidence, that this 'neighbourhood' could be appropriately called 'Bonymaen/Winch Wen' [or possibly the other way round]. This clarification was in any way objected to by the Objector.

11.12. In my view, having familiarised myself with the area, and heard the evidence, the suggested 'neighbourhood' of Bonymaen/Winch Wen thus defined was an entirely appropriate area to be regarded as a 'neighbourhood within a locality' for the purpose of ***Section 15*** of the ***Commons Act 2006***. It seemed to me to be a cohesive area with its own identity.

"A significant number of the inhabitants"

11.13. The law is quite clear in this context that 'significant' does not necessarily mean or imply a large number, or some fixed proportion of the inhabitants of the relevant area: see, notably, ***R (Alfred McAlpine Homes Ltd) v Staffordshire County Council*** [2002] EWHC 76, [2002] 2 PLR 1. Nor do there need to be a large number of actual witnesses giving oral statements, or providing written ones. It is (potentially) just as relevant to hear evidence of what witnesses have observed other local people doing on a claimed green, as to know what those witnesses claim to have done there themselves.

11.14. As was said by Sullivan J (as he then was) in the ***McAlpine*** case, *"what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers"*. On this basis I have to say that I have concluded that there was abundant evidence of use of the claimed green by quite large numbers of the local inhabitants, especially but not only

children, over many years. There was also abundant evidence to justify the conclusion that most of these users have come from within the 'neighbourhood' whose identity I have discussed.

11.15. Many of the Applicant's witnesses accepted that use has been more intense when the weather has been good, and during times when children of school age would be more free to play. None of that is surprising. Indeed the Objector did not really argue that the Applicant's claim in this regard was incapable of being justified; it merely required that the Applicant be put to proof as to the elements of his case.

11.16. The fact that the Objector's own case was that it has made the land available and maintained it well, for informal recreational use, also makes it entirely unsurprising that this substantially unfenced, attractive grassy area should actually have been used by the local inhabitants for that purpose.

11.17. My conclusion on the evidence therefore is that it has been clearly established that significant numbers of the inhabitants of the identified neighbourhood have used the claimed land over many years.

"Lawful sports and pastimes on the land"

11.18. The evidence was also clear, in my view, that this use by local people has been for the sort of informal recreation that the courts have indicated should be regarded as falling within the expression *"lawful sports and pastimes"*. Again, this was not really a matter of dispute at the Inquiry.

11.19. I would further say that, in my judgment, the evidence supported the view that it has been the whole of the application site (as eventually clarified by the Applicant), rather than some lesser part of it, that has been in regular use by the local inhabitants.

"For a period of at least 20 years; and ... continue to do so"

11.20. My conclusion on this aspect is that it was quite clear that this land has been well used by local people for recreation for a period very considerably in excess of the requisite period of 20 years, measured back from October 2011 (and that the use was continuing at the date of the application). The evidence was convincing that this recreational use had certainly gone on for the whole period since the land had been restored and

laid out in a way that was suitable for that purpose, which happened at some time around the late 1970s.

11.21. Indeed there was evidence, which seemed to me to be entirely credible, that local children in particular had quite often used this land for some recreational purposes (e.g. sliding down on tin trays, or when there was snow on the ground) even when there had been colliery spoil tips there. However it is not necessary for me or the Registration Authority to form any view as to the legal significance of that type of use, as the regular use of the land in more or less its present attractive form has been demonstrated over a period well in excess of what the statute requires.

"As of right"

11.22. The classic legal test, supported in a considerable number of judicial decisions, as to whether a use has been 'as of right' or not, has been whether the use complies with the Latin maxim *"nec vi, nec clam, nec precario"*. This requires that the use should have been 'without force' – not, for example, by breaking down the owner's fence in order to get on to a piece of ground, or in defiance of prohibitory notices. The use must have been 'without secrecy' – sneaking into an owner's land under cover of darkness, for example, would not constitute 'as of right' use.

11.23. And the use has to have been 'without permission' [*nec precario*]. It is clear that express permission from a landowner, whether given orally, or (for example) by a notice, is something which, if established, would counter a claim of 'as of right' use. It seems, from the pronouncements of the House of Lords in the leading case of ***R (Beresford) v Sunderland City Council*** [2003] UKHL 60, [2004] 1 AC 889, that an *implied* permission from a landowner to use his/its land might also be sufficient for it to be concluded that any use of the land was not 'as of right'.

11.24. But it is clear from that case itself that, in order to have that effect, i.e. the implied grant of a revocable licence or permission, there would need to have been some specific overt conduct by the landowner showing that a revocable permission was being given. It is not sufficient (to negative a claim of 'as of right' use) that the landowner should appear to have encouraged use of its land, or to have laid out or maintained its land in a way which would facilitate or encourage its use. To be 'as of right', the use by local people does not have to be adverse to the landowner's interests.

11.25. Thus, in ***Beresford*** itself, the land concerned had been owned by the local authority, and was laid out with recreation in mind, with seats for people to sit on, and with the grass regularly cut and well maintained. None of that was sufficient, it was held, to constitute an implied revocable permission, so the use by local people had been 'as of right'. The land concerned was therefore rightly to be registered as 'town or village green' under the predecessor to the ***Commons Act 2006***.

11.26. Turning to this present case at Cwm Green, there is no question of the regular use by local people having been 'by force', or in secret. The land was clearly well used, in broad daylight, by a considerable number of local people. Being entirely unfenced on two sides, it was openly available for use without the slightest degree of 'force' being required; nor were there any prohibitory notices.

11.27. The facts on the ground were in reality quite similar in many ways to those which had applied in the ***Beresford*** case, and indeed Counsel for the Objector was unable to identify anything in terms of those 'facts on the ground', in relation to the manner in which the Council in this case had made the land suitable and available for use, and in which the local people had in fact used it, which made the circumstances in any way distinguishable, at that level, from those in ***Beresford***.

11.28. However in ***Beresford*** itself their Lordships, while deciding that the land there should be registered, made a number of *obiter* observations which implied that there might be certain categories of land owned by local (and possibly other public) authorities, and made available for public use, where members of the public have an actual ***right*** to be on and to use the land. In such circumstances the public (including local inhabitants) would be there 'by right', and therefore not (it seems) 'as of right'. This latter term should in this context be understood as meaning *"as* ***if*** *of right"*, i.e. people had to have been using land ***as if*** they had a right to be there, ***when in fact they did not***.

11.29. The most obvious example of this point, which was referred to by their Lordships in ***Beresford***, is land held as 'Public Open Space' under the ***Open Spaces Act 1906***. Land in that category is held by a local authority under a statutory trust for the public to use it, and it was strongly implied by the House of Lords that local people's use of such an area could not have been 'as (if) of right', because people had an actual right to be on the land ('by right').

11.30. Since the time of the ***Beresford*** judgment, a considerable jurisprudence has grown up, in the decision-making of Registration Authorities on ***Commons Act*** claims, and supported to a degree by the lower courts, based on those *obiter* observations of the House of Lords which I have referred to. This has produced the result that there have been many decisions (with no successful challenge to them through the courts) to the effect, first, that land held by local authorities as 'Public Open Space' cannot be registered under the ***Commons Act***.

11.31. Secondly, a considerable number of cases have turned upon the point that there is quite long established judicial authority to the effect that members of the public also have a ***right*** (subject only to any byelaws which might exist) to go onto and use land which is held as a public park or pleasure ground under ***Section 164*** of the ***Public Health Act 1875***. Later amending legislation also meant that many 'recreation grounds' were provided under ***Section 164*** as well.

11.32. In consequence many local authority landowners have successfully defeated 'village green' claims on land held under ***Section 164*** of the ***1875 Act***, or indeed in cases where, although the formal basis of the local authority's holding of the land was somewhat unclear, the best inference from the evidence available was that it was held either under ***Section 164,*** or the ***Open Spaces Act 1906***.

11.33. That this has been the correct view of the law after ***Beresford*** has been implicitly supported by a number of decisions in the courts, e.g. ***R (Malpass) v Durham County Council*** [2012] EWHC 1934 (Admin); and in the well-publicised litigation about a beach at the port of Newhaven in Sussex, at least at the level of the High Court. Of more specific relevance here, this approach has been expressly supported by the courts so far in the case of ***R (Barkas) v North Yorkshire County Council,*** to which I shall return shortly.

11.34. I should say at this point that I am entirely unpersuaded by one of the arguments argued on behalf of the Council as Objector in this present case. This was to the effect that I and the Registration Authority should conclude that the land had been held by the Council as 'Public Open Space'. This argument was (in essence) that because the land had previously (as the old colliery spoil tips) laid 'waste' and 'unoccupied', it had fallen within one of the potential statutory definitions of 'open space'; then latterly it had been used for recreation, and so met another of those potential definitions [see ***Section 20*** of the ***Open Spaces Act 1906***].

11.35. I regard this argument as unsound, not least because it was completely clear from the Council's own evidence and documents that the land concerned was originally acquired by the Council's predecessor for housing purposes, under (or at least because of) a Compulsory Purchase Order under the housing legislation in force in the 1950s. Further, it was confirmed by the evidence produced by Ms Harries, the Objector's only witness, that the land here is ***still*** held, in the Council's records, for housing purposes.

11.36. Thus I conclude that there is no convincing basis at all for thinking that the land here is held as statutory 'Public Open Space', or indeed as a public park or pleasure ground under ***Section 164*** of the ***Public Health Act 1875***. To this extent, therefore, the land can be seen as being 'like' that owned by the local authority in the ***Beresford*** case.

11.37. On the other hand, however, the fact that the land concerned here was acquired by the Council (or its predecessor authority) for housing purposes, but has in fact since then been made available for use as a park or recreation ground, within an area that was (previously, from the evidence here) a council housing estate, means that the circumstances here are an even more direct parallel to those which applied in the ***R (Barkas) v North Yorkshire County Council*** case.

11.38. In terms of decisions issued as at the time of writing this Report, that case has reached the level of the Court of Appeal, where the reference is: [2012] EWCA Civ 1373. In ***Barkas*** a recreation ground had been provided in what had been a council housing estate, on land which had been held for housing purposes. It was established that, under powers contained in the successive ***Housing Acts*** of ***1936, 1957*** and ***1985***, local housing authorities had had the statutory power to provide recreation grounds, on 'housing' land which was otherwise devoted to housing accommodation.

11.39. The Court of Appeal held (as had the High Court in the case) that in these circumstances the use of the recreation ground by local people – even ones who did not live in the nearby 'council houses', had been *"by right"*, and not *"as of right"*, and therefore the land could not be registered as a 'town or village green', even if it had as a matter of fact been used for lawful sports and pastimes for more than 20 years.

11.40. If this judgment of the Court of Appeal were the last word on the matter I would necessarily have to advise the Registration Authority in the present case that the circumstances here are so closely similar to the facts in

Barkas that the Applicant's claim must be rejected, in spite of all of the other criteria under ***Section 15(2)*** of the ***2006 Act*** having been met.

11.41. However, permission was given by the Supreme Court to take the ***Barkas*** case on to that court, on a further appeal, on the same point which I have been discussing in the three preceding paragraphs. Furthermore, the Supreme Court's hearing of that appeal has in fact taken place, on 2nd April 2014 [I note by way of an aside that I did in fact have the opportunity myself to observe those proceedings taking place].

11.42. It follows therefore that a decision from the Supreme Court is now imminent, on the very point which in the event I have concluded is the critical one in terms of reaching a legally correct decision, one way or the other, on the present case. Clearly I do not know exactly when the Supreme Court's decision on ***Barkas*** will be handed down, although I note that in another 'village green' case heard by that court in early 2014, the judgment was given slightly less than 2 months after the hearing date.

11.43. In many circumstances it is not thought appropriate that legal proceedings in one case should be delayed because a judgment *might* emerge on an appeal in other, unrelated proceedings which could change the law in some relevant way. However in my view, and I so advise the Registration Authority, the circumstances here are particularly striking ones in terms of their potential significance. The Supreme Court appeal in ***Barkas*** was precisely on the point on which (in my judgment) the determination of the present case depends, and the appeal has already in fact been heard.

11.44. In these unusual circumstances my recommendation to the Council as Registration Authority is that it should not actually reach or issue a determination of the Applicant's application until the Supreme Court's decision in the ***Barkas*** case has been issued. There would then need to be a short opportunity for both parties (the Applicant and the Objector) to make submissions as to what effect the Supreme Court's decision should have on the result in this case. My present advice is that it would be perfectly appropriate, and fair to both sides, if those submissions were invited to be in writing, rather than through a reopening of the inquiry.

11.45. I would then advise that I ought to provide a short Addendum Report to the Registration Authority, having had the opportunity myself to see the Supreme Court's judgment in ***Barkas***, and any submissions or representations which the parties make in the light of it.

11.46. In that way a proper decision can be taken by the Registration Authority, without any risk of its becoming apparent shortly thereafter that it was at odds with a newly issued Supreme Court decision.

Conclusion

11.47. For the reasons explained in the previous paragraphs, and most unusually, this present Report can only be an interim one, pending the imminent issue of the Supreme Court's decision in the case of ***R (Barkas) v North Yorkshire County Council***.

11.48. My recommendation therefore is that the Council as Registration Authority should not at this present moment issue a determination of this present case. It is entirely appropriate however, in my view, that copies of this Interim Report should be made available to the parties to these proceedings, so that they might be aware of what the situation is, and of the potential need for them to submit further representations once the Supreme Court's decision in the ***Barkas*** case has been published. I emphasise that such further representations should be confined to the implications of that decision, rather than a reopening of the case more generally.

ALUN ALESBURY
9th May 2014

Cornerstone Barristers
2-3 Gray's Inn Square
London
WC1R 5JH

APPENDIX I – APPEARANCES AT THE INQUIRY

FOR THE APPLICANT

Mr Brian Walters (the Applicant) of 228 Mansel Road, Winch Wen

He gave evidence himself, and called:

Mr John Hague, of 283 Bonymaen Road, Bonymaen

Mr Ian Challacombe, of 20 Cefn Llwyn, Winch Wen

Mrs Pauline O'Brien, of 237 Mansel Road, Winch Wen

Mr Derek Bellamy, of 220 Mansel Road, Winch Wen

Mr Brian Challacombe, of 292 Jersey Road, Winch Wen

Alderman Mair Gibbs, of 180 Mansel Road, Bonymaen

FOR THE OBJECTOR – the Council of the City & County of Swansea as landowner

Mr Simon Stephenson, Counsel
- Instructed by Mr Patrick Arran, Head of Legal Services

He called:

Ms Jane Harries, Landlord Services Manager, Housing and Public Protection Services, City & County of Swansea, c/o Civic Centre, Swansea

APPENDIX II

LIST OF NEW DOCUMENTS PRODUCED TO THE INQUIRY

N.B. This (intentionally brief) list does not include the original application and supporting documentation, the original objection, or any material submitted by the parties or others prior to the issue of Directions for the Inquiry. It also excludes the material contained in the prepared bundles of documents produced for the purposes of the Inquiry on behalf of the Applicant and Objector, and provided to the Registration Authority (and me) as complete bundles.

FOR THE APPLICANT

Revised Application Site Plan [Plan A to this Report]

Plan showing suggested 'Neighbourhood' [Plan B to this Report]

Written note of opening submissions

Written note of closing submissions

FOR THE OBJECTOR

No new documents submitted