IN THE MATTER OF LAND AT CASTLE ACRE, NORTON

AND IN THE MATTER OF A VILLAGE GREEN APPLICATION No. 2741(S) UNDER SECTION 15(3) OF THE COMMONS ACT 2006

FURTHER ADVICE

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1. I am asked to advise Swansea City Council ("the Council") further on the merits of "challenging" the recommendations made by the Inspector appointed to hear the public inquiry into the application (app. no. 2731(S)) made on 7th January 2013 for registration of land at Castle Acre, Norton, West Cross, Swansea ("the Land") as a town or village green pursuant to section 15(3) of the Commons Act 2006 ("the 2006 Act"). The matter was listed for a three day public inquiry which started on 2nd December 2014 and the Inspector finally produced his report on 4th March 2015.

2. This Further Advice is given pursuant to the instructions received by email on 5th March 2015 and my telephone conversation with my Instructing Solicitor on 6th March 2015. I have previously advised in writing in relation to the merits of maintaining the Council's objection to the application by an Advice dated 27th February 2013 and by Further Advices on 2nd June 2014 and 16th October 2014.

Background

3. The full background to this matter is set out in my previous Advices dated 27th February 2013, 2nd June 2014 and 16th October 2014 and I do not reiterate the same here. Since the public inquiry held on 2nd – 4th December 2014, the Council has now received the Inspector's Report dated 4th March 2015.

4. The Inspector's Report, having dealt with the preliminaries, confirms that the only substantive objector to the application was the Council, as owner of the area of land covered by the application. Having set out the evidence called and submissions made on behalf of both the applicant and the Council, the Inspector's Report then deals with what he refers to as "Discussion and Recommendations" at paragraphs 11.1 – 11.72.

5. It is worth noting that paragraph 11.1 which sets out the provisions of section 15(3) of the Commons Act 2006, includes a paragraph which relates to some other application and appears to have been included in the Report by mistake. The Council should point this out to the Commons Registration Officer when submitting its suggested corrections.

6. Given the concessions made by the Council in respect of various parts of the test under section 15(3) Commons Act 20006 (the locality or neighbourhood, a significant number of inhabitants, lawful sports and pastimes, for a period of at least twenty years, on the land) the most, if not only, significant part of the report is that dealing with the issue of use "as of right" (paragraphs 11.25 – 11.70).

7. The key finding the Inspector makes is at paragraph 11.56 where he holds:

> *"The judgment which I have come to therefore on this aspect of the matter is that, taking a balanced view of all the considerations involved, the land of the application site here is more akin to a piece of open local authority land, acquired for a different purpose and not laid out or identified for public recreational use, but which, just happens, through circumstances, to have been available (in a practical sense) for use by local people for "lawful sports and pastimes". That view, in my judgment, more accurately reflects the circumstances of this particular land than seeing it as land which the Council and its predecessors had somehow "allocated" for public recreational purposes, even by some less formal process of appropriation or allocation."*

8. As a result of this, the Inspector therefore concludes (at paragraphs 11.71 – 11.72:

> *"In the light of all the matters which I have discussed and considered above, my conclusion is that the Applicant succeeded in making out the case that there was 'as of right' use for lawful sports and pastimes of the whole of the application site by a significant number of the inhabitants of the neighbourhood of Norton (as identified by the Applicant in his documents produced for the Inquiry) for at least the relevant period of 20 years.*
>
> *Accordingly my recommendation to the Council as Registration Authority is that the land of the application site* ***should*** *be added to the Register of Town or Village Greens, under* ***Section 15*** *of the* ***Commons Act 2006****."*

Analysis

9. The first issue to point out is that, as confirmed by the Inspector at paragraph 13 of his Directions to Parties dated 11th September 2014 (and reiterated orally at the start of the public inquiry), he was appointed to conduct a non-statutory inquiry into the application for registration and to produce for the Commons Registration Authority a Report on the evidence and submissions which he heard and received, with conclusions and recommendations as to the resolution of the application in this case. The final, formal decision on the applicants' application, therefore, is not one that is made by the Inspector, but rather by the Registration Authority, in the light of the Inspector's Report. At the inquiry, the Inspector added that usually, though not always, the Registration Authority would agree with his conclusions and follow his recommendations. It should be added here that that would indeed normally be the case, unless, of course, there were good reasons not to do so.

10. There is therefore no decision which the Council could usefully challenge at this stage, since the decision is yet formally to be taken by the Registration Authority, either by virtue of its Commons Registration Committee under delegated authority, or by the Cabinet or Full Council itself, in accordance with the Council's constitutional rules for making such decisions. It would, in theory, be perfectly possible for the relevant Committee (or the Cabinet or full Council) to decide to reject the Inspector's conclusions and not to follow his recommendations, with the result that it might decide not to allow the application to register the site as a Town or Village Green, provided, as stated above, that it has good reason to do so.

11. In the instant case, whilst it is difficult to take issue with the Inspector's findings of fact (there was in fact little really in dispute at the inquiry and instead much turned on the interpretation of uncontroversial facts) or the weight he attaches to matters such as the issue of the "medieval tournament camping", the dog fouling sign or the Mumbles Development Trust (and other) signs, I do consider that there is a good argument that the Inspector has misinterpreted the law and the way the Council put its case based on the law on the basis of the correct interpretation of the law. If the Council agrees with this conclusion, this would be a justifiable reason for not following the Inspector's recommendation and for not allowing the application and registering the land as a Town or Village Green. It must be recognised, however, that should the Council take this course of action, there may well be a risk that the applicants might seek to challenge the decision by way of judicial review.

12. In my previous advices, I referred to the decision of the Supreme Court which handed down judgment on 21st May 2014 in *R (on the application of Barkas)-v-North Yorkshire County Council [2014] UKSC 31; [2014] 2 WLR 1360* where, by its judgment, the Supreme Court defined the phrase "*as of right*" in the Commons Act 2006 s.15(2)(a) and held that people enjoying recreational activities on land held by a local authority pursuant to section 12(1) of the Housing Act 1985 did so under a licence, rather than "*as of right*". Consequently, the land could not be registered as a town or village green because the 20-year period in section 15(2)(a) would only start to run if the land was removed from the ambit of s.12(1).

13. I referred, in particular, to paragraph 24 of the judgment of Lord Neuberger in *Barkas*, where he held that:

"where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."

14. I stated that I was conscious of the fact that the Inspector appointed by registration officer in this case, had previously held in a case[1] in which the Council had objected, that in absence of evidence of formal appropriation by the Council under section 9 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875, the principle under what was then the Court of Appeal decision in *R (oao Barkas)-v-North Yorkshire County Council [2012] EWCA Civ 1273* did not apply. However, in the light of the decision of the Supreme Court in *Barkas,* and in particular the judgments of Lord Neuberger[2] and Lord Carnwath[3], I considered, and still consider, that informal "appropriation" in the sense of allocation or designation as recreational or open space, by virtue of acquisition and maintenance as recreation grounds or of open space, is in fact

1 In the matter of Site 9, Maritime Quarter, Swansea (2013) (unreported) of 23rd July 2103
2 At paragraphs 24, 42 and 45 – 46 of his judgment
3 At paragraphs 57, 64 – 65, 74 and 79 – 86

sufficient and that therefore the previous decision of the Inspector on this issue should, on balance, now be regarded as incorrect.

15. In the instant case, by its Case Summary and its opening to the inquiry, the case on behalf of the Council was put by me in the alternative, namely that there was no use of the land as of right, either because of the existence of a statutory trust (and thus permitted user) under sections 9 – 10 of the Open Spaces Act 1906, or under section 164 of the Public Health Act 1875, or as a result of a licence which was to be implied from all the circumstances. By the time of formal submissions at the closing of the inquiry, and in the light of the planning evidence which had come out during the inquiry, the submissions in respect of the statutory trust were put solely on the basis of the provisions of the Open Spaces Act 1906[4].

16. It was submitted on behalf of the Council that the documentation evidencing the purchase of the land in 1965 indicated a dual purpose (which was moreover conceded by the applicants), namely for highways purposes and for the purposes of open space land, that by 1998 the highways purpose had fallen away and that even if sections 9 and 10 of the Open Spaces Act 1906 had not been immediately applicable in 1965, they must have been engaged by 1998. This would mean that a statutory trust had arisen, at the latest by that stage, giving rise to a statutory right for the public to use the land.

17. Various submissions were made as to what was required by way of an implied appropriation for land use purposes and reference was made to the extensive planning policy background as evidenced by the various policies between 1955 and 1999 and leading up to the extent UDP adopted in 2008. It was expressly submitted that by virtue of the formal adoption by the Cabinet by resolution in

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[4] There was still an alternative submission that there was a licence to be implied from the circumstances, including the grant of the express licence to the MDT in 2006, the grant of the licence to the battle re-enactors for camping in 1996ff, the grant of the licence to the hoteliers for advertising, the restrictions imposed by the erection of the dog fouling notices after 2000 and by the erection of the permissive notices in 2012

August 2008 and by the full Council in November 2008 of the UDP in general, and of policy EV24 (Urban Greenspace) for the application land in particular, there was an implied appropriation of the land to open space purposes by that date at the latest.

18. In those circumstances, it was submitted, referring to the judgments in *Barkas* of Lord Neuberger at paragraphs 24 – 30, 37 – 38 & 42 – 49 and of Lord Carnwath at paragraphs 57, 64 – 65, 74 – 75 & 79 – 86, that the use of the land by the applicants was not "*as of right*". Rather it was *by right.* It was, for instance, submitted that, if the question, as postulated by their Lordships in *Barkas*, had been posed, as to whether one would consider that the members of the public who used the land in the period between 1992 and 2012 did so as trespassers, then the answer would clearly have been that they had not, as had been vehemently stated by one of the applicants' witnesses (Mrs. Thomas).

19. In the light of this, it was submitted that whilst land belonging to a local authority was not automatically be exempt from an application under section 15 of the Commons Act 2006, it would only be in exceptional circumstances that it would be potentially capable of registration and that those exceptional circumstances certainly did not exist on the facts of the present case, which fell clearly within the *Barkas* principles.

20. In his Report, whilst conceding (at paragraph 11.28) that the substantive judgments of Lords Neuberger and Carnwath range consider more widely than just in relation to recreation grounds under the Housing Act 1985, the Inspector's summary of the judgment merely sets out (at paragraph 11.30) that "*where a local or public authority, having statutory powers to do so, has deliberately provided a piece of land <u>for public recreational purposes</u>, it can be taken to have "appropriated" the land to such purposes, even if it has not gone through a formal process of appropriation under section 122 of the Local Government Act 1972*" and (at paragraph 11.36) that "*where land has not been laid out or identified for public recreational use, it might still be registrable..*" (emphasis added).

21. It was never part of the Council's principal case that the land had ever been laid out or identified for public recreational use. Rather it was the Council's case that the land had been originally acquired for two purposes, for highways purposes and for open space purposes, and that the former purpose had, by 1998, been abandoned and that from 2008 at the latest, the land was therefore held solely for open space (urban green space) purposes. This was evidenced not simply by reference to the various applicable planning policies, though the policies and other documentary evidence available were certainly consistent with this interpretation, but also by the documentation surrounding the original purchase in 1965 and various memoranda in respect of the issue of development of the land by the construction of a new by pass road.

22. The Inspector in his Report simply does not deal with this aspect of the Council's case, nor its significance in the light of the judgment of *Barkas* as referred to above. Nor does he deal with the fact (as recognised by him at paragraph 11.43) that part of the application land formed part of the southern portion transferred to the notional ownership of the Council's Parks and Leisure Committee after 1965, nor with the consequences of his finding (at paragraph 11.45) that the larger area of land extending southwards was subject to policy aspirations for intended "informal incidental open space" after 1989, nor that the southern generally more wooded part was included in an area identified as a landscape protection area after 1999 (paragraph 11.46) nor, finally, that the entirety of the site was made subject to the urban greenspace system from 2008 (paragraph 11.47).

23. Despite the Inspector's expressed misgiving at giving too much importance to the planning policy status (paragraph 11.50), he wholly failed to deal with the Council's express submission that this evidence was wholly consistent with its

case that the land was held for open space purposes for a significant period of time within the requisite twenty year period and, notably, after 2008. That the planning policy context was relevant was also contended for by the applicants, albeit that they drew difference inferences from the documents available.

24. Finally, whilst the Inspector acknowledges that the points arising from the evidence pull in different directions (paragraph 11.53) and that there was plainly a long term aspiration that at least some of the overall area of land acquired in 1965 should "*go to a 'public open space' type use*", nowhere does he deal with the issue of the dual purpose for which the land was held becoming a sole "public open space" purpose, once the plan to develop the highway was dropped in 1998 and his conclusion in paragraph 11.56 only deals with the "*land acquired for a different purpose and not laid out or identified for public recreational use*" argument, which, as I have said was far from being the Council's principal case on its objection.

25. In the light of the above, I consider that there are good reasons to conclude that the Inspector has not properly applied the law as established in *Barkas* either to the facts of this case, or to the case as submitted on behalf of the Council as objector. This is without prejudice to the Council's argument that there was also an implied licence granted by the Council to use the land, which the Inspector deals with in paragraphs 11.58 – 11.70. The conclusion on the interpretation of *Barkas* would, in my view, justify the Commons Registration Authority, be it the relevant committee or the Cabinet or the full Council, were the matter to be called in for a decision by it, deciding not to accept the Inspector's conclusions or follow his recommendation, but, instead, to decide not to register the land in question as a town or village green under section 15(3) of the Commons Act 2006.

26. There has been only one decision of real relevance since the public inquiry was heard in December 2014 and this is the further judgment of the Supreme Court in *R (oao Newhaven Port and Properties Ltd)-v-East Sussex County Council*

[2015] UKSC 7, but I do not consider that this alters the above interpretation of the decision in *Barkas*, which was expressly applied.

27. Rather the Supreme Court in *Newhaven* expressly approved[5] of paragraph 23 of the judgment of Lord Neuberger where he held:

> *"Where land is held [by a local authority] for [the statutory] purpose of [recreation], and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of recreation would be trespassing on the land, which cannot be correct."*

28. I consider that "recreation" can include use of land which comprises open space and that members of the public may equally use land which simply comprises of open space (as opposed to land consciously laid out for recreation, such as by the creation of football pitches or tennis courts) for the purposes of recreation such a walking with or without dogs, with exactly the same legal consequences. Moreover, the Supreme Court in *Newhaven* also expressly approved[6] paragraph 65 of Lord Carnwath where he had held:

> *"It follows that, in cases of possible ambiguity, the conduct must bring home to the owner, not merely that "a right" is being asserted, but that it is a village green right. Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to "warn off" the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights."*

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5 See paragraph 70 of the judgment of Lord Neuberger and Lord Hodge

6 Ibid

29. In the light of what Lord Neuberger went on to say at paragraphs 37 – 38 and 42 – 49 of his judgment in *Barkas*, I consider that it is relatively uncontroversial, therefore, that land which is allocated or designated as public recreational or open space, even land which is subsequently merely maintained as such by regular mowing rather than being formally laid out for recreational purposes, will not able to be used by members of the public "as of right" for the purposes of section 15 of the Commons Act 2006. In failing to recognise this, the Inspector, in my view, fell into error in reaching his conclusions in his Report and in making his recommendation.

Conclusion and Next steps

30. In conclusion, I consider that the Inspector misinterpreted the law applicable to the application under section 15(3) of the Commons Act 2006 and thus misapplied the law in respect of the Council's objection to the application made on behalf of the applicant. Clearly, however the Council views this issue, it will first need to consider how the Report of the Inspector should be considered by it and which body will formally be exercising the Council's role as Commons Registration Authority under the Commons Act 2006 in order to make a final decision on the application.

31. If, on the basis of all the evidence available to it, including this Further Advice, the Council, or whatever body is delegated authority to make the decision, comes to the conclusion that the statutory test under section 15(3) Commons Act 2006 is not fulfilled, then it would be perfectly justified in not accepting the Inspector's conclusions or in following his recommendation and in deciding

not to accede to the application and register the land in question as a town or village green. On the other hand, should it consider that the Inspector has correctly applied the law and that his conclusions are therefore sound, the Council should logically accept his recommendation and determine that the application to register the land as a town or village green should be allowed.

32. The Council should bear in mind that if it comes to the former conclusion and thus determines not to register the land as a town or village green, it is possible, subject to the issue of available resources, that the applicants may seek to bring a claim in the High Court against the Council by way of judicial review. The High Court will review the issues of law and the correct interpretation of the judgment of the Supreme Court in *Barkas* anew. However, apart from the question of the correct interpretation of the applicable law, in relation to the decision not to accept the conclusions and recommendation of the Inspector, the applicants would only succeed in getting this quashed, if they could show that the decision taken was *Wednesday* unreasonable.

33. I should be happy to discuss this Further Advice with my Instructing Solicitor before it is put before the relevant decision making body, if that is considered necessary.

Rhodri Williams QC

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Thirty Park Place Chambers
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FURTHER ADVICE

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