CITY & COUNTY OF SWANSEA

COMMONS ACT 2006, SECTION 15

APPLICATION TO REGISTER LAND KNOWN AS PARC Y WERIN, GORSEINON, AS A ‘TOWN OR VILLAGE GREEN’

ADVICE AND RECOMMENDATION

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1. I am asked to advise the Council of the City & County of Swansea (‘the Council’), in its capacity as Registration Authority under the ***Commons Act 2006***, in relation to an application received on 23rd November 2015, for an area of land known as Parc y Werin, at Gorseinon, to be registered under ***Section 15(2)*** of the Act as a ‘town or village green’. The land is in the freehold ownership of the Council itself, and as its name implies, it has

(it seems) been laid out for many years as a public park or recreation ground.

2. The Council in its landowner capacity has in fact objected to the application, and there are also a number of other objectors. The Applicants have responded in writing to the objections. Part of the background to this situation is that there are plans to develop some of Parc y Werin as the site for a new Primary School; planning permission for that development was granted on 8th December 2015. Rather earlier than that, it seems that a Cabinet decision was taken within the Council in July 2015 (with no objections having been lodged at the time), whose aim was to appropriate the intended school site from a 'park or recreation' purpose to a purpose associated with the provision of the new school (presumably therefore a holding 'for the purposes of education').

3. Although there are prospective amendments to ***Section 15*** of the ***Commons Act***, whose effect when implemented will be to make it impossible for a 'town or village green' application to be made where a planning application for development is in process, it appears that those amendments have not been brought into effect in Wales at a time which is relevant to this present application.

4. The Council as Registration Authority under the ***Commons Act*** has in place procedures which include the possibility of holding a non-statutory inquiry, under an independent inspector, into 'village green' applications where there are issues of fact in dispute, and/or where the land in question is owned by the Council. Clearly at least the latter of those criteria applies in the present case. The questions which I am asked to address at the present stage are as to the most appropriate process in order to determine the application, and in particular whether this might be a case where it is appropriate, in the light of the detailed objections and responses submitted, for the application to be determined 'on paper', without the need to convene a public inquiry.

5. Clearly, if this were a case where there was a substantial dispute of fact, whose resolution one way or the other is likely to determine the application, as well as the land belonging (as it does) to the Council itself, it is unlikely, given the Registration Authority's adopted procedure for 'village green' applications, that it would ***not*** be a case where the normal assumption would be that an inquiry should be held. In reality therefore the present question becomes whether or not, on such of the facts as are undisputed (or not materially disputed), there are clear legal grounds for concluding that, whatever the Applicants may argue, the land concerned *cannot* as a matter of law be registered under ***Section 15*** of the ***2006 Act***.

6. I should perhaps at this point note that, although other objections have been lodged than that of the Council as landowner, and other letters sent in support of the application, beyond the material directly provided by the Applicants [all of which I have read, on both sides], I have formed the clear view that the above question can in fact be answered by addressing the points which have been put forward on behalf of the Applicants themselves, and the Council in its role as the main Objector.

7. The task of consideration of the issues here is rendered rather more straightforward by a number of clear concessions which have been made by the Council as Objector, in its representations. Thus the Council as Objector has expressly accepted that the application site at Parc y Werin has been extensively used since the 1920s as a park for recreation by local people and the general public; that there have been no 'permissive' signs at the park; and that the gates of the park were not (at any material time) closed or locked.

8. Nevertheless the Council as Objector has raised three main lines of argument as to why the application site is still not eligible to be registered under ***Section 15(2)*** of the ***Commons Act***. In brief they are that the use of the park by the local public was not *"as of right"*, in the sense required by the legislation; that there is a 'statutory incompatibility' between the basis

on which the Council has in fact held the land concerned over the years, and registration under the ***Commons Act***; and finally that the Applicants had not identified an appropriate 'Locality' [or 'Neighbourhood'] in respect of whose inhabitants the claim for registration was made. It will however in fact be most convenient if I now consider these three lines of argument in the reverse order to the one in which I have just set them out.

'Locality'

9. The application had put forward the administrative area of the Gorseinon Town Council as the relevant 'Locality'. That area is plainly capable of being a 'locality', in the rather particular legal sense which the courts have said should be applied in interpreting that term. However the Council as Objector questioned whether that Town Council area had been in existence for the whole relevant 20 year period (November 1995 to November 2015).

10. Material provided in response by the Applicants convinces me, sufficiently for the purposes of this present Advice, that what is now the Town Council has been in existence, covering the same area, since at least 1986, initially calling itself the Gorseinon Community Council. This particular ground of

objection therefore seems to me, on the material provided on paper, not to be a sound one.

Statutory Incompatibility

11. This objection is based on the line taken by the Supreme Court in its relatively recent judgment in the case of ***R (Newhaven Port and Properties Ltd) v East Sussex County Council*** [2015] AC 1547, [2015] UKSC 7. That case related to the somewhat unusual factual circumstance of a 'village green' claim having been made in respect of a tidal 'beach' which was itself within the territory of a working port or harbour. The working of that harbour was both governed and empowered by various pieces of local and more general harbour legislation. It was held by their Lordships in the Supreme Court that registration of the piece of land concerned as a 'village green' was incompatible with the statutory empowerment, under other more specific provisions, of the use of the same piece of land as part of a working harbour.

12. I have to say that I do not find the reasoning and explanation of the principal judgment in ***Newhaven***, given by Lord Neuberger and Lord Hodge jointly (with Lady Hale and Lord Sumption agreeing), entirely easy

to follow, in terms of the intended scope of any principle that they were laying down. I also note in passing that Lord Carnwath did not agree with the majority on this point. It is clear that a 'statutory incompatibility' principle applies when there is an active, statutorily empowered current use (in that case the harbour use) whose continuation is manifestly at odds with registration under the ***Commons Act***. But on the other hand, as the Applicants in this present case point out in their Response, Lords Neuberger and Hodge did specifically say (***Newhaven***, para. 101): *"The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility."*

13. The precise basis on which the Council, and its local government predecessors as owners, have held the various parts of the land at Parc y Werin since their original acquisition (to put it simply) in 1921 and 1924 respectively, has been the subject of considerable, and interesting, comment in the submissions in this case from both the main parties. I do not intend to repeat or report all of that material here. Suffice it to say that on the basis of the written representations so far, there is not in my judgment a clear and compelling argument that a 'village green' registration would be incompatible with some general principle to be extracted from the ***Newhaven*** judgment.

14. I do not reject the argument of the Council as Objector; I merely say that in my judgment, if this were the issue on which the whole case turned, it would need to be argued more fully, on the basis of the clearest possible exposition and understanding of the background historical facts. This may well require the issue of some sort of Directions on the part of the Registration Authority, directing the parties' attention to aspects of the issue on which further submissions and clarification would be encouraged. Whether that would in practice be achievable through a further exchange of written representations, or whether it would in reality require the convening of a local inquiry to consider the arguments and underlying facts more fully, I leave to one side for the moment.

15. I note also that, in part at least, the Objector's argument on this point relies on a purported 'appropriation' of a substantial part of Parc y Werin which was carried out in July 2015 by the Council's Cabinet, which (it seems) was intended to appropriate the relevant land to educational purposes (with a view to building the proposed school) from the purposes for which it had been held by the Council before. July 2015 was of course within (even if only by a few months) the 20 year period to which the Applicants' claim under ***Section 15(2)*** relates.

16. As a matter of impression, from the documents provided with the Objector's submissions, I am not satisfied that the purported appropriation was carried out properly or effectively; the apparent wording of the Cabinet resolution concerned did not even mention the purposes to which (or indeed from which) the land was being purportedly appropriated from one 'Director' (of Place) to another one (of People). I have considerable reservations about the effectiveness of that as an appropriation, and in my view the Registration Authority ought certainly to seek further submissions and clarification, before there could be any reliance on this 'appropriation' as part of a basis for rejecting the Applicants' application.

17. In summary then, on the 'statutory incompatibility' argument, my advice is that there is not at present a clear basis on which it would be appropriate or right to reject the Applicants' claim, without calling on the parties to provide further submissions, and (where practicable) further evidence in clarification.

"As of Right"

18. Leaving aside the potential argument about statutory incompatibility, the concessions made by the Council as Objector (noted at my paragraph 7 above), together with other aspects of the factual background which appear to be uncontested, would appear to indicate that, on the face of things, all the ingredients of the statutory criteria in ***Section 15(2)*** have been met here, provided only that use of the park by local people had been *'as of right'*. These three words within the statutory criteria have received a great deal of attention from the courts, and indeed their implications for the present case have been quite fully addressed by the parties in their representations.

19. It has been completely clear, since the decision of the Supreme Court in ***R(Barkas) v North Yorkshire County Council*** [2015] AC 195, [2014] UKSC 31 (and was fairly obvious even before that), that where land is owned or provided by a public authority, in circumstances giving rise to a *right* for the public to make use of the land, then such land cannot have been used 'as of right', for example by the 'local public'. In other words *'as of right'* effectively means *'as **if** of right'*; to meet the statutory criterion, local people have to have been using the land concerned *as if* they had the right to do so, but when in fact they did not have the right.

20. Their Lordships in ***Barkas*** equated having a statutory right to use a piece of land to having *permission* to use it, in the context of the classical definition and understanding of 'as of right' use as being use 'without force, without secrecy, and without permission'. This means that if there is something about the basis on which the Council (or its predecessors) held the land concerned which gave the public a right, or a permission, to use the land, in particular during the relevant 20 year period, then that land *cannot* be registered as 'town or village green'. It cannot have been used so as to meet the 'as of right' test.

21. As far as I can see, there is not any material dispute between the parties as to the basic facts in relation to the original acquisition of the two main parts of the application site at Parc y Werin by the Council's predecessors. The part acquired as a leasehold in 1921, and then enlarged to a freehold in 1944, appears indisputably to have been acquired under the ***Public Health Act 1875***, with the assistance of the ***Local Government Act 1894***, for the express purpose of being laid out as 'public walks or pleasure grounds or a recreation ground'.

22. It is true, as is pointed out for the Applicants, that neither the 1921 Lease nor the 1944 Indenture (making it up to a freehold) expressly mention ***Section 164*** of the ***1875 Act***. The 1921 Lease makes a number of

references to the land being intended for use for public walks or pleasure grounds (or a recreation ground); the 1944 Indenture calls it 'the Purchaser's Pleasure or Recreation Ground'; and additionally some 1932 Byelaws refer to Parc y Werin as a 'pleasure ground' within the Llwchwr Urban District. Although the Applicants argue against this view, there can in my judgment be no reasonable basis for concluding that the land which both parties have called the '1921 Land' has been held for any other purpose than as a public walk or pleasure ground under ***Section 164*** of the ***Public Health Act 1875***, right through until 2015 at least; and my preliminary view is that it is probably still so held by the Council at the present time.

23. I do not regard the Applicants' arguments in relation to the 1921 Land as having any cogency. It is simply obvious, in my view, that the land has been held by the Council and its predecessors on a basis which Supreme Court authority says cannot have allowed for 'as of right' use by the local public which could have given rise to a successful 'town or village green' claim under the ***Commons Act***. It follows that, as far as the 1921 Land is concerned, the present application in my judgment cannot possibly succeed. In these circumstances there is no justification (as far as this part of the land is concerned) for holding a public local inquiry to hear further

evidence and argument, in my opinion. The issue can be properly decided on the basis of the material which has already been provided on paper.

24. It seems clear however that the part of the present Parc y Werin that was purchased by the old Swansea RDC under an Indenture of 1924 (the '1924 land') was acquired under different statutory powers, under the ***Housing Acts 1890 to 1919***. It is clear from the historic plans produced by both sides that the part of the 1924 land which is in the present application site (and the present Parc y Werin) is only a relatively small proportion of the total land then acquired; presumably the rest of that land was indeed used for the provision of actual housing.

25. I am not however impressed by the Applicants' argument that the plan to the 1924 Indenture shows that the part of the land within the present application site was specifically envisaged as housing plots, and intended to have actual houses built on it. It seems to me much more probable, indeed almost certain, that the plots shown on the 1924 plan indicated the previous (or previously intended) state of subdivision of the land concerned, rather than having anything to do with the detail of the local authority's then intended housing development.

26. The Objector's argument is clearly correct (in my view) that there were statutory powers in the housing legislation (as there still are to this day) to

provide areas within land held for housing purposes, to be used as ‘open spaces’, or ‘places of recreation’. Indeed that was precisely the nature of the piece of land which the Supreme Court were considering in the ***Barkas*** case.

27. Rather contrary to what the Applicants seem to argue, there does not appear to be any evidence or suggestion that the part of the 1924 land within the application site was ever laid out with actual houses, rather than as part of a park or recreation ground. There is no suggestion, for example, that houses were first built there, and then demolished. On the contrary, the clear impression given by the totality of the material, and not contradicted by any of the evidence which I have seen, is that, to the extent that this land was laid out for anything after 1924, it has always been laid out as part of the larger area of park/recreation ground.

28. In these circumstances, and given that the land has been continuously owned (and maintained it seems) by the relevant local authority throughout, in my view the Objector must be correct in its argument that it can be assumed from the circumstances that the area concerned was properly provided, under statutory powers, as an open space or recreation ground within an overall larger area being developed for housing.

29. As such, it is correct to say that the situation here is effectively on all fours with that considered in the ***Barkas*** case. The arguments put forward on behalf of the Applicants on this point are not in my view at all convincing. Thus in my judgment the correct conclusion to reach on the largely undisputed facts is that, in the case of the 1924 land as well, recreational/leisure use of the relevant part of Parc y Werin by the local public will have been 'by right', not 'as of right', during the whole of the period being considered.

30. It follows, in my view, that there is no justification for the convening of a local public inquiry in order to consider the matter further. The application simply cannot succeed, in my judgment as a matter of law, because the use of the application site cannot have been 'as of right', in the sense required by the law.

31. I ought perhaps to state, for the benefit of all who read this Advice and my Recommendation, that what I say relates only to the statutory criteria under ***Section 15*** of the ***Commons Act 2006***. The question of what *ought* to happen in the future at Parc y Werin is wholly outside the scope of my consideration, and is a matter for local political decision.

Recommendation

32. My recommendation to the Registration Authority accordingly is that no part of the application site at Parc y Werin should be added to the statutory register of town or village greens, for the reasons given in this Advice, and that this decision can properly be taken without convening a public local inquiry.

ALUN ALESBURY
19th February 2016

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CITY & COUNTY OF SWANSEA

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PARC Y WERIN, GORSEINON,
AS A 'TOWN OR VILLAGE GREEN'

ADVICE AND RECOMMENDATION

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