COMMONS ACT 2006, Section 15

CITY AND COUNTY OF SWANSEA
(Registration Authority)

RE: LAND KNOWN AS CASTLE ACRE GREEN,
NORTON,
SWANSEA

ADDENDUM TO THE 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

ADDENDUM REPORT

1. Following the issue of my Report into this matter, dated 4th March 2015, I was made aware that Counsel for the Objector at the Inquiry which I had held – the City and County of Swansea in its capacity as landowner – had produced an Opinion or Advice questioning the correctness in law of some of the conclusions I had reached in that Report, and that this Opinion or Advice was being put forward to the Council, in its *quasi-judicial* capacity as Registration Authority under the ***Commons Act 2006***, by way of argument that the Registration Authority should not follow the principal recommendation in my Report.

2. I personally saw the 'Further Advice' to the Council (as landowner) of Mr Rhodri Williams QC (itself dated 9th March 2015) on 15th May 2015. On that same day the Council as Registration Authority very correctly also provided a copy of it to Dr Robert Leek, who (on behalf of 'the Friends of Castle Acre Green') had been the Applicant in this matter, and had acted as the principal 'advocate' for the Applicant's side at the inquiry. The accompanying letter from the Registration Authority gave Dr Leek the opportunity to make any further comments or representations he wished to, in response to the Further Advice of Mr Williams QC.

3. I understand that for personal reasons Dr Leek was given an extended period in which to do this, and in the event I received Dr Leek's Response document, incorporating also a 'Summary Response' in late July of this year (2015); the documents are not themselves dated. I have given very careful consideration both to Mr Williams's Advice, and to Dr Leek's Response documentation, in reaching the views which I now express in this Addendum Report.

4. The first, comparatively minor, point I ought to make is that Mr Williams in his Further Advice at paragraph 5 has correctly noted that some wrong and mistaken wording had somehow crept in (through a typing/production error) to the last part of paragraph 11.1 of my original Report of 4th March 2015. The dates quoted for the making of the application etc were entirely the wrong ones for this present case. The correct relevant dates had in fact been quoted properly earlier in the Report at paragraph 2.1, and in order to be accurate the wording of the *last sub-paragraph of paragraph 11.1* of my Report (after the statutory quotation) *needs to be corrected to read*:

"The application was dated 19th September 2012, and stamped as received by the Council as Registration Authority on the following day, 20th September 2012. The latter date therefore is the 'time of the application'. The application suggests that use of the claimed land 'as of right' ceased on 12th April 2012, which was less than two years before the time of the application. 12th April 2012 is therefore the date from which the relevant 20 year period needs to be measured (backwards)".

5. This relatively minor (but necessary) correction however has no bearing on the substance of the main points made in the 'Further Advice' of Mr Williams QC, which are the subject of the remainder of this Addendum Report. I shall first make some general observations on the situation which arises as a result of Mr Williams's Advice being submitted to the Registration Authority, before dealing in more detail with the points Mr Williams has raised (and, where appropriate, Dr Leek's responses to them).

6. I noted above that Mr Williams's 'Further Advice' is dated 9th March 2015, only a few days after the issue of my Report dated 3rd March. It is not perhaps entirely unusual for an advocate who has just been told that he/she was unsuccessful in some adjudication or hearing to continue to express the view that he/she was in the right, and that the conclusions or decision of the adjudicator were therefore in error. I make this point not in order to trivialise what Mr Williams had to say, but as part of stressing to the Council, in its Registration Authority role, the great legal importance of 'standing back' entirely from whatever the Council's other interests might be (in this case as landowner), in cases of this kind where the law requires the Council itself to act as 'adjudicator' or determining authority, in a situation where the self-same Council, 'wearing another hat' (as the saying is) is also one of the active parties to the dispute.

7. Plainly it is possible in principle that where a council has, in a case of this kind, appointed an independent person (in this case myself as Inspector) to assist it in carrying out its *quasi-judicial* role, that person might produce a report or recommendation containing or based on some identifiable or obvious error. If that were to happen, it must in principle be open to those representing the same council as an interested party to point out the apparent error, in the hope that an unsound decision can be avoided. That is preferable to a council getting into a situation where one of its 'arms' might wish that it could launch Judicial Review proceedings against the other 'arm' of itself acting in its quasi-judicial role.

8. However this is a set of circumstances where I would advise the Council as Registration Authority that very great care is required; indeed I would

advise as a matter of principle that an authority in its quasi-judicial role should not readily go against the conclusions of its independent legal adviser on such a matter (except in a case where all are agreed that there has been an error which plainly requires correcting), unless there are clearly evident, convincing reasons to do so. Certainly an authority should not readily do this (I would advise) solely or simply on the basis of arguments put forward by one of the 'partisan' advocates at a previous contested hearing or inquiry, albeit that the advocate had represented the same authority itself in another capacity. I therefore have given very careful consideration, from my own neutral and non-partisan standpoint, to the further points raised by Mr Williams QC, balanced against the case made on behalf of the Applicant, both at the original Inquiry, and in Dr Leek's more recent Response.

The substantive issues raised

9. The points of substance raised in Mr Williams's Further Advice relate entirely to the consideration given in my Report to what is known as the 'as of right' test; that term refers to the aspect of the statutory criteria for designating town or village greens which requires evidence that local people have used the land 'as of right' for the requisite period. There is much case law relating to the proper understanding of these three words, but in brief they are generally understood to mean that local people have to have been using the land ***as if*** they had the right to be there doing so, when in reality they did *not* have such a right.

10. Issues around the meaning of this term arise particularly commonly in cases of land owned by a local authority, because one of the prime circumstances where land is often held ***not*** to have been used 'as of right' by local people is when the evidence supports the view that those people actually had a ***right*** to be there, or were there by virtue of a permission which had been expressly or impliedly given to them. The law is quite clear, for example, that public parks and pleasure grounds maintained by a local authority, or public open spaces, are places where the public has a *right* to be (subject only to obeying any byelaws there may happen to be). The same applies to most recreation grounds, and the like. Such places

can *not* be registered as town or village greens; they are used by the public 'by right', not 'as of right'.

11. More difficult cases however (in terms of the application of the 'as of right' test in the ***Commons Act***) arise in circumstances where there is open land belonging to a local authority which has not been deliberately provided or allocated in any obvious way for public use, but where evidence shows that local people have in fact used it for informal recreation. The difficulty arises partly from the fact that the courts of the UK, up to the highest level (the Supreme Court), have made it completely clear that there is *not* any general exemption for local-authority-owned open land from the town or village green provisions of the ***Commons Act*** – a point which was specifically accepted by Mr Williams QC at the Inquiry [see Report paras. 10.31 and 11.32].

12. Far and away the leading case on this area of the law is the Supreme Court's relatively recent decision in the case of ***R(Barkas) v North Yorkshire County Council*** [2014]UKSC 31, which I refer to at some length in the relevant paragraphs of my Report (paras. 11.25 to 11.58) dealing with the 'as of right' question. I must say I am rather surprised therefore that Mr Williams in his Further Advice seemed to imply that I in my Report had failed to appreciate the significance of the ***Barkas*** judgment (in limiting the circumstances where local authority open land can be registered). In fact that is a point which I had considered with the greatest care, and indeed which I had (as noted in the Report) asked the advocates on both sides specifically to deal with in their arguments. [In that regard I also note, for example, at Report para. 8.47 that Dr Leek in his submissions had accepted (quite correctly) that *"**Barkas** has raised the barrier for village green applicants in the case of local authority land"*].

13. The application of the newly stated, and more exacting, tests (from the Supreme Court ***Barkas*** decision) to the facts of the present case at Castle Acre Green is precisely what I was considering and addressing in the relevant part of the 'Discussion and Recommendation' chapter of my Report. I would be repeating myself to set out all those considerations again here. Nothing in what Mr Williams says in his Further Advice contains, in my judgment, any new or persuasive points which suggest that I applied the legal tests wrongly to the facts and evidence here, in coming to the conclusion that in this particular instance the Applicant's side had had the better of the argument.

14. The reality is that what Mr Williams sets out in his Further Advice is effectively a repeat in writing of the arguments he had already put orally at the Inquiry, and which I as a matter of judgment on the evidence had concluded were not as persuasive as the case which had been presented for the Applicant. However Mr Williams does specifically suggest that my Report failed to consider or deal with some of his points, so I need to address in a little more detail these aspects of what he says.

15. Mr Williams seeks at several points to suggest that the Report had failed to deal with an argument of his about the larger area of land acquired by the old Swansea Corporation in 1965 having been bought for two purposes – for a highway scheme, and for some kind of open space use, and that the highway purpose had later fallen away, leaving 'open space' as the purpose for which the Council had been holding the land. In fact this was an argument that I considered with some care, notably (but not only) at paras. 11.53 to 11.56. The more accurate view is that on this point I concluded in the Report that the arguments put forward from the Applicant's side were the more convincing ones. The working out of any dual purpose to the original acquisition was more convincingly understood, I found, by reference to the fact that a large part of the '1965 land' was in the 1970s/early 1980s transferred to the Council's Parks & Leisure Department, whereas the more northerly land was retained by the Estates Department (Report at 11.55/6).

16. Mr Williams at his para. 22 wrongly says that part of the current application land was in the southern portion transferred to 'Parks & Leisure', and that I in the Report had failed to deal with this. The evidence was to the opposite effect. Both of the Council's (as landowner) main witnesses, Ms Wendy Parkin and Mr Adrian James, had expressly confirmed in their evidence that none of the Parks & Leisure Department's land is included within the present application site (as noted at Report 9.9 and 9.52).

17. Mr Williams goes on to suggest that the Report had failed to deal with the various planning aspirations which had been stated over the years for land including the application site, and the consequences of those aspirations. In fact this was an area of the debate which I considered at some length (e.g. Report paras. 11.45 – 11.51), while expressing the judgment, which I believe to be correct, that planning aspirations about future use of pieces of land are not necessarily of key significance to an area of law (under the ***Commons Act***) which turns much more on the actual facts of what happened, during the relevant period of past history.

18. Mr Williams appears to attach great significance to what he sees as a failure to recognise the importance of a planning designation of this land under Policy EV24 of the Council's Unitary Development Plan of 2008, as part of a 'Greenspace system'. In fact this was a point specifically mentioned in the Report (e.g. at para. 11.47), and indeed was one which had been very effectively refuted by the Applicant, who had correctly pointed out that an area's designation under this policy did not necessarily imply anything about the land being provided for public recreational use. The Applicant had gone on to point out (again correctly) that the application land had ***not*** been designated under UDP Policy HC23 as 'Community Recreation Land', whereas significant areas of other nearby Council-owned open land, such as that around Oystermouth Castle, had been.

19. In summary then, the points made by Mr Williams in his Further Advice really are, as I see them, a re-run of the arguments he had put unsuccessfully to the Inquiry – unsuccessful because in this particular case the evidence and arguments put forward for the Applicant's side were in my judgment the better and more convincing ones.

20. The purpose of the Council's procedure (as Registration Authority) for the holding of local inquiries into ***Commons Act*** applications, under an independent legal advisor, is to secure a proper and just hearing of disputed cases, even when the Council itself (as landowner) is one of the parties. Against that background my advice to the Council as Registration Authority, having considered the 'new' representations from both sides (i.e. Mr Williams's 'Further Advice', and Dr Leek's Response), is that the conclusions and recommendations I came to in my Report of 4th March 2015 remain the correct ones, on the basis of the evidence and arguments which have been put forward from all sides. In particular nothing which Mr Williams has put forward causes me to need to change any aspect of the conclusions I set out in my previous Report, except for minor change to paragraph 11.1 of the Report, set out at paragraph 4 above (which does not go to the substance of the matter).

Overall conclusion and recommendation

21. My final conclusion and recommendation to the Council as Registration Authority remains that, for the reasons given in my Report of 4th March

2015, as supplemented and clarified by this Addendum Report, the land of the application site in this case ***should*** properly be added to the Register of Town or Village Greens, under ***Section 15*** of the ***Commons Act 2006***.

ALUN ALESBURY
4th September 2015

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