

IN RE: AN APPLICATION TO REGISTER LAND KNOWN AS THE TRACK,  
KAYNTON MEAD, LOWER WESTON, BATH AS A NEW TOWN OR VILLAGE

GREEN

OPINION

**Introduction**

1. Bath and North East Somerset Council ('BANES') are the Registration Authority for their area under the provisions of the Commons Act 2006. An application made by Ms. Vanessa Lopez, Ms. Pam Richards, and Ms. Karen Hill to register land known as 'The Track' at Kaynton Mead, Newbridge, Bath, as a Town or Village Green under the provisions of section 15 Commons Act 2006 was received by BANES on 1<sup>st</sup>. April 2010. BANES advertised the application on 3<sup>rd</sup>. June 2010 pursuant to The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. It was advertised in Form 45 in the Bath Chronicle; and notices placed around perimeter of site on 9<sup>th</sup>. August 2010.

2. As well as being the Registration Authority, BANES is also the freehold owner of the application land. As such, it made an objection to the application on 16<sup>th</sup>. July 2010. Because BANES both has the responsibility of deciding whether the application should be permitted, and an interest in objecting to the application, it instructed me to hold an inquiry, and to advise it as to whether it should accede to an application. Where I refer to BANES in its capacity as Registration Authority, I shall refer to it as 'the Authority', and where I refer to it in its capacity as landowner, I shall refer to it as 'the Objector'. If I refer to its historical activities, I shall refer to it as 'BANES'.
3. The application was made on the basis that the application land had been used by the inhabitants of the neighbourhood of Lower Weston and Newbridge in the electoral wards of Newbridge and Kingsmead for a period of twenty years until the 5<sup>th</sup>. April 2008 as of right for lawful sports and pastimes. The application was made under the provisions of section 15(3) of the 2006 Act.
4. BANES made its objection by letter dated 16<sup>th</sup>. July 2010. It objected to the registration for the following reasons:

- (1) The Application Land was acquired by BANES by a conveyance dated 21<sup>st</sup>. September 1987 from the British Railways Board to Bath County Council. The Objector contends that the land was acquired, and subsequently held by BANES under the statutory purposes of the Open Spaces Act 1906. The consequence of this, asserts the Objector, is that the usage of the land by the local inhabitants for lawful sport and pastimes was not 'as of right'.
- (2) It did not admit that the neighbourhood asserted in the application is a valid neighbourhood within the meaning of the Commons Act;
- (3) It asserted that the application land was used as a right of way, and not as a Town or Village Green.

5. The Applicants responded on 27<sup>th</sup>. August 2010, stating that they did not admit that the application land was held for the purposes of the Open Spaces Act 1906. They stated that the Authority had to consider all of the evidence that was available in order to discover the power under which the land was held. Moreover, they suggested that even if the land was held under the purposes of the Open Spaces Act 1906, the consequence of such a finding had not been conclusively decided in the Courts.

6. The Applicants have amended their application by substituting a map for the map original served with the application showing the extent of the land that was to be subject to the application. The purpose of the Amended map was to reduce the area of land that was subject to the application, and in particular to exclude a fenced area that was part of Hartwells motor dealership, and indeed was fenced off.

### **The Inquiry**

7. I held a public inquiry into the application over three days. At the Inquiry the Applicant was represented by Mr. Christopher Maile of Planning Sanity, a pressure group. The Objector was represented by Mr. Vivian Chapman QC. I also held an accompanied view of the site and its surrounding area.
8. At the outset of the Inquiry Mr. Maile applied to make amendments to the application. The first was again to alter the area of land the subject of the application. It was suggested that the amended plan excluded two narrow strips of land that ran between obvious fences<sup>1</sup>, and they should be included. Mr. Chapman indicated that he had

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<sup>1</sup> They are shown on the plan at page 18A in the trial bundle.

no objection to that course of action, so long as the Applicant confirmed that the new areas of land fell within the land firstly conveyed by the 1987 conveyance to BANES. The Applicant, through Mr. Maile, confirmed this was so. In those circumstances the amendment was uncontroversial, and I would advise the Authority to allow it accordingly.

9. Next, Mr. Maile sought to amend the definition of 'neighbourhood' and 'locality' relied upon. He wished to rely on the locality of the parish of St. John's Lower Weston; the neighbourhood was described as 'Locksbrook' which runs between the Southern side of Newbridge Road and Westfield Park/Brassmills/Locksbrook Road<sup>2</sup>. Again Mr. Chapman did not object to this amendment, and it seems to me that in the circumstances it is an amendment that the Authority should consider. I should stress that on behalf of the Objector Mr. Chapman made it plain that the proof of the amended neighbourhood remained very much in issue.

10. Thirdly, Mr. Maile took up the objector's assertion that the usage had continued up to the date of the application, and sought to amend the application so as to formally bring it under section 15(2) of the

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<sup>2</sup> The area is shown hatched in black on the plan at 18B in the trial bundle.

Commons Act 2006. Mr. Chapman did not object to this, and again I advise the Authority to permit this amendment to be made. The consequence is that the relevant twenty year period runs from 1st. April 1990.

11. Mr. Chapman suggested to me that the Applicants were under a factual difficulty in proving their case in that this application is one of three linked applications (the others being at Newbridge Meadows and Rudmore Park); and that the evidence might be something of a 'job lot' (although he did not put it as inelegantly) where supporters of one application land their names to the others. This is an aspect of the evidence that I have been aware of throughout the three Inquiries. I would add that the Inquiries have also thrown up similar issues - as to whether residents recreational usage of land can be, as the statute requires, 'as of right' where a local authority holds land for the purposes of the Open Spaces Act 1906; whether the land designated as a neighbourhood is such as a matter of fact. I have born in mind that legal questions should be answered consistently, and I have written my advices to the Authority after the conclusion of the last hearing of the three. However although issues as to 'neighbourhood' are similar in the three applications, they are not

identical. I must therefore treat each of these applications quite separately in this regard.

## **The Land**

12. The land is approximately 0.15 acres in size. It is substantially a length of the former Midland railway line running from Bristol into Green Park Station, Bath. The general lie of the surrounding land is that it rises slightly from South to North. The track bed itself is reasonably level. The northern boundary of the application land is a rough fence line running near the bottom of houses to the South of Newbridge Road. There are some gates leading to various gardens. The boundary of the land to the South is the modern housing development of Kaynton Mead. Access can be obtained up a bank, but the main means of access lies up two flights of stairs, each leading to a part of Kaynton Mead. The Western boundary of the land is a mesh fence separating the land from Hartwells Garage. The surface of the land is grassed, with a narrow gravel path running through the Eastern part of the land. The path becomes more rough as one travels progressively Westwards. There is no public right of way shown on the definitive map held by BANES under the provisions of the Wildlife and Countryside Act 1981, although one runs immediately to the South of the land at Kaynton Mead.

### **Ownership of the Land**

13. As I indicated above, before the 1960s the land was part of a functioning railway line. It appears that it closed at the end of that decade, and for much of its length it has been converted into a cycleway. The part of the line used as a cycleway leaves the former railway line at a point to the west of Newbridge, and then proceeds into Bath by way of other highways and paths.
14. By a conveyance dated 21<sup>st</sup>. September 1987 the land, together with other land, was conveyed by the British Railways Board to the Bath City Council, BANES' predecessor in title. The conveyance conveyed three categories of land. That which was described as 'First' in the conveyance was said to be held for the purposes of the Open Spaces Act 1906.

### **The Oral Evidence**

15. I set out below not a complete record of the oral evidence that I heard, but sufficient for the Authority, and anyone interested, to follow the reasoning and recommendation that I make at the conclusion of the Opinion. Mr. Chapman on behalf of the Objector did not suggest to any witness that they had deliberately sought to embellish their evidence, although he noted that some were central



to the application to register, and plainly committed to that end. Rather than commenting on the evidence of each, I advise the Authority that I found all of the witnesses, both for and against the application, to be honest witnesses.

16. Pam Richards is one of the Applicants, and has lived in Station Road for 37 years. She told me that houses in Newbridge Road and Clarence Place had their own gates giving access on to the application land. She has seen local residents children regularly using the land for den-making and play, and more generally for walking and dog-walking. Her own children played there. She, as did a large number of witnesses, stressed that the land was a haven for wild life such as birds and foxes. I note that the amenity value to the environment of the land is not a ground for registering it as a TVG, but of course if an area is a 'haven for wildlife', then that may assist in a conclusion that for some local people that would be an attractive feature, and they would go on to the land in order to see the wildlife as part of the rural feel of the land. For my part it seems that the strip of land was something of a green corridor, being in part open and to the margins wooded. What would make it attractive to young children would also make it attractive to wildlife. Neither Mrs. Richards nor any other witness was cross-examined on this point. I accept Mrs.

Richards' evidence on this point as accurate, and it is for that reason that I will not refer to the similar evidence given by other witnesses in my review of the evidence.

17. Mrs. Richards said that when she moved in to her address, she was told that her postal address was 'Locksbrook'. The postal address now is more often referred to as Lower Weston. The land has had three fences – when it was disused railway land although it was used for recreation, there was no through route. When the Council acquired land and Kaynton Mead was developed, which she thought was in or after 1994, an access to Kaynton Mead was put in. Wessex Water put new sewerage work in 2004. Some play equipment was removed at that time and not replaced. There was a rain shelter and a bar you could balance on, and a picnic table that were put there by Soma Housing. The land was not reinstated in the same way – it was more bumpy. The community activities that took place were firework parties in November; the Queen's Jubilee; and a sports day. They were largely organised by the local community with support by the local councillors. She thought that the land was mainly a children's area. Her neighbours use it on a daily basis.

18. Mrs. Richards described the neighbourhood as the area where you know your neighbours and share communal activities and characteristics. Locksbrook is constrained by the river and Newbridge Road. It is a mixed area, both with private and social housing, and a lot of industry. There is a local pub – the Dolphin. There were two corner shops but they have now gone. Mrs. Richards is a sociologist by qualification, and regards the area as a neighbourhood. 'Locksbrook' derives its name from Locksbrook Road, which pre-dates 1900. There is a Locksbrook Trading Estate nearby, and many businesses call themselves 'The Locksbrook something'.
19. Mrs. Richards accepted that Locksbrook Cemetery is a Victorian cemetery in the proximity of Locksbrook, very close to the end of Locksbrook Road. Brassmill Lane is within Locksbrook. The Dolphin pub is by the junction of Avondale Road and Locksbrook Road. There used to be a shop and off license at the corner of Ashley Avenue and Station Road; and a shop-come-general store in Locksbrook Rd. At the Eastern end there was a newsagents, but that is now closed. There is no local police station, but there is a community police officer.

20. I then heard from the Revd. Dora Frost, who has lived in Clarence Place since 1964. She told me that the land was taken up for recreational use soon after the cessation of the railway use. She walked her dogs there, and picked blackberries; as did many others. Children have played there and make bonfires on November 5<sup>th</sup>. Locksbrook is a residential area between two industrial sites.
21. Cross-examined, Revd. Frost told me that she thinks of the area as Locksbrook. When she bought her house in Clarence Place the area was scheduled for industrial development. She and others set up a residents' association to fight the proposals, and that brought them together as a community between two industrial trading estates. The neighbourhood was bounded by the river on the South and the road to the North. She accepted that this Residents Association covered the whole of Newbridge. As time went on those residents in the Locksbrook area realised they needed to get together to deal with local problems – such as traffic in Locksbrook Rd. She did not regard the cemetery as being within Locksbrook, although Locksbrook Road ends near there. Rudmore Park is on the fringe of Locksbrook.
22. Ms. Jane Larcombe lived in Kaynton Mead between 1996 and 2004. Her children played with others from the nearby area on the land.

There could be up to 50 on the land during school holidays. A sports day was held there one year (of which there were photographs<sup>3</sup>), as well as a Jubilee party arranged by the Kaynton Mead Residents Association, but other locals attended. She described meeting dog walkers and runners, commenting that the track was a 'very nice cut through' to Station Road. There was a balancing log and a covered table on the land, installed by Knightstone Housing Association or the Council.

23. In Mrs. Larcombe's view 'Locksbrook' is a neighbourhood. It takes in Rudmore Park, but there are few houses to the western end. She did not think it extended to the North of Newbridge Rd. She did not regard Locksbrook Cemetery as being in Locksbrook. Locksbrook was bounded and cut off by the road and the river.

24. Suzanne Davies lives in Kaynton Mead, and has done so for thirteen years. Her children, other children, and local residents regularly use the land for recreation; she remembered to bonfire night events, organised by the residents, and the Jubilee celebration party. There were snowball fights and snowmen during the winter. When Kaynton Mead was constructed the builders put in a balancing pole; a table;

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<sup>3</sup> Bundle, p.118A.

a rain shelter and bench on the land, all made with timber logs The only time use was restricted was when Wessex Water dug it up to lay a pipe.

25. Ms. Davies refers in conversation to 'Locksbrook' as an area, and that is a term that is generally used. On Station Road there is a gym, a dog-grooming and a post-office on the corner. It is a sub-post office – it is a general store. The area 'Locksbrook' was historically nothing to do with the lock that restricts part of the Avon nearby. The High Street at Weston Village was fed by 6 streams, which formed Loxbrook – it came out at what is now Locksbrook Cemetery
26. Vicky Drew lived in Kaynton Mead from 2001 to 2007. Her mother lived there for much of that period, and would walk her dog over the land, letting it off the lead. She would meet many dog walkers from Locksbrook there. The land was very beneficial to the residents of Kaynton Mead because they did not have a great deal by way of garden attached to their flats. Besides dog walking and children's play, she had seen children riding bicycles on it, using the undulating land as jumps. This must have been after the Wessex Water work took place. She is a member of the RSPB – lots of people went to the land to see the wildlife. The Lane was for her also the shortest route to the

shops; pupils from the local school would also use the track as a short cut to houses in the neighbouring areas.

27. Ms. Drew would describe Kaynton Mead as being in Locksbrook. She thought that people tended to put 'Locksbrook Rd.' into their address. In her view 'Locksbrook' did not extend as far to the West as it was shown on the Applicant's amended application<sup>4</sup>. The boundary was she thought by Avon Park, although that may have been because she herself would go no further. She thought Locksbrook cemetery is in Locksbrook.

28. Karen Hill has lived in Newbridge Road since January 1990. At the time she had two young children, and told me that the family, neighbours and friends played all sorts of games on the land. She witnessed significant use of the land by local people of all ages, playing and walking. She would gain access to the land via the footpath at Station Road, or from Locksbrook Road via Kaynton Mead. She had never given her 'neighbourhood' a name, but she sometimes thought of it as Newbridge, sometimes as Lower Weston. Her neighbourhood comprises the people she mixes the most with; in her case, it ran from the clock works by the Post Office, up to Mr. Gill's

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<sup>4</sup> Bundle, p.18B.

corner shop at Osborne Road. Behind her house her neighbourhood comprised Locksbrook Rd and continuation of the road to Newbridge Rd at either end. She thought Avondale Rd and Station Rd were the boundaries, but said that the neighbourhood obviously larger than that because there are industrial units and factories as well, besides those places that are where your neighbours live.

29. Mark Price has lived on Ashley Road since February 2001. He has walked a friends' dog on the land, letting them run off of the lead there. He does that because it is the area with no 'through traffic'. When He took the dog there it might be as part of a journey; or it could be to let the dog run around. He has seen other people walking their dogs there, and he sees children play there. He picks blackberries from the bushes on the land. He had been to three bonfire night parties, which were very well organised. The residents of Kaynton Mead invited other people to come along. It was quite well known function in the area. His neighbourhood is to the South of Newbridge Road, extending to the river. To the East it is where Locksbrook Road joins Newbridge Road. To the West it is where Brassmills Lane joins Newbridge Road. 'Locksbrook' is interchangeable with 'Newbridge'. They are similar and they overlap a great deal. He thought the area shown on p. 18B of the bundle was



a fair description He thought that Locksbrook Cemetery was outside the neighbourhood.

30. Steve Richards has lived in Station Road since 1973. At that time the land that is presently occupied by housing at Kaynton Mead was a British Telecom depot. He used the land since he moved to the area, originally obtaining access through a gap in the perimeter fencing. The occupiers of houses that back on to the land at Newbridge Road have made their own individual accesses on to the land. In 1973 the old level crossing gates were still in place, and people would go over or round them. The fence only appeared some years later. Mr. Richards presently goes on to the land for recreation once or twice a month. In the past it was more often. He would see people exercising dogs, blackberrying; children playing; it was overgrown and exciting for the children. One would walk thought to the end. The usable space was larger at the time. Kaynton Mead was constructed in 1996. The community use of the land really started then; prior to that, the usage was by individuals and families. As far as other available public open space was concerned, there is a small playing field to the South of Brassmill Lane and to the West of Osborne Road., by the weir. To people living in the Western end of the neighbourhood there is some land at Rudmore Park.

31. Mr. Richards did not see the neighbourhood in which he lived as having a very precise boundary, and had described his address as Locksbrook or Lower Weston. 'Locksbrook' as an area is smaller than Lower Weston. Locksbrook is to the South of Newbridge Road, includes the cemetery and extends to Brassmill Lane. He referred me to a Victorian parade of houses adjacent, Locksbrook Terrace. The central part is from Station Road to Osborn Road. He thought that there was a feeling of cohesion about the area relied on as a neighbourhood in the application. Prior to that it was very much a case of individuals and families. All the families there would send their children to Newbridge schools; they would all use the shops in Chelsea Road; and a lot will work at the Royal United Hospital.

32. Dr. Fiona Mayne has lived in Clarence Place since 2007, and for the previous 16 years lived elsewhere in Bath, visiting the area regularly. She uses the land regularly for walking, describing her usage as 'meandering' over the land, and sees and talks to people who walk their dogs there. Dr. Mayne picks blackberries on the land. She has seen children playing, hiding, and riding bicycles there. After school there is usually a small group of children there, depending on the weather. She would call her neighbourhood Locksbrook. It is situated

North of the river; West of Station Road; South of Newbridge Road and up to the point where Brassmill Lane meets Newbridge Road. She acknowledged that the supporters of the application had discussed the issue of 'neighbourhood' before she gave her evidence, but only as to its name, not its boundaries. She would not regard Locksbrook Cemetery as being in Locksbrook because it is on the other side of the main road.

33. Len Davey lives on Newbridge Road and has done so since 1992. He has gone on to the land regularly during that period, to pick blackberries and to watch wildlife. His children used the land in the past for recreation; his grandson still does. Children use the uneven parts of the land for BMX jumps. People walk their dogs on the land. At any time after school there can be between five and twenty children there. Mr. Davey told me that before the area to the South of the land was allocated for the housing estate at Kaynton Mead, the land itself was a lot more rugged than it presently is, but children found that attractive. Before Kaynton Mead was constructed the land was more overgrown but it was accessible and used – very definitely.

34. His neighbourhood runs between Newbridge Road and to Brassmill Lane, going towards Locksbrook. It might extend as far as Locksbrook Road. He would regard Rudmore Park as being within my neighbourhood. He uses the shops in Chelsea Road and would regard them as being in his neighbourhood.
35. Alice Rigby has lived in Newbridge Road since 1984. She has used the land since 1984, walking her dog there. Her children and other children play on the land. She too mentioned the BMX jumps. She picks blackberries there. Her access to the land is either from Station Road or from Kaynton Mead. Her own children made tree houses. Mrs. Rigby told me that the land was used a lot before Kaynton Mead was built. She can hear the children playing as well as see them from her garden; it is very busy on weekends. Her neighbourhood is to be found North of the river, as far as The Weston public house, to the South of Newbridge Road and then as far West as Brassmill Lane. She uses the shops on Chelsea Road, but does not think that they are part of her neighbourhood. Her 'neighbourhood' is the area that she walks with her dog, and also describes the facilities she uses in her everyday life.

36. Mrs. Vanessa Lopez is the applicant for registration, and has lived on Ashley Avenue since February 2001. She told me that local residents considered their application to register the land as a TVG in response to BANES' proposal that it be incorporated into the proposed Bus Rapid Transit system to be constructed and serving the West of Bath, in March 2008. She produced a basic questionnaire for use by potential witnesses. She said that she and her partner have used the land for blackberrying, watching firework displays and photographing the natural environment. She went on to the land every couple of months or so. Children use the land for ball games, and hide and seek type games. She had been told by the older residents of the area that, before the construction of Kaynton Mead, access to the land was via the back gardens of many residents of Newbridge Road, who used it for blackberrying, teaching their children to cycle and observing wildlife. At present it is accessed either from Station Road or from Kaynton Mead. Many residents use it as a through-route to the post office and shops in Chelsea Road. There is a strong sense of neighbourhood in the area, with local shops and facilities.

37. Richard Morris has lived on Newbridge Road since 1975. He has used the land since then, as a footpath getting to and from his place of

work on the Lower Bristol Road. His children played there when they were growing up. Other children played there, and dogs were exercised there. He has seen children cycling there, and using the land for bike 'jumps'. Until recently he could access the land from his garden. Before the estate at Kaynton Mead was built, it was occupied by British Telecom. At that time the land was quite wild. But one could find a dozen or more people down there from time to time. The use of the land increased after Kaynton Mead was built; it opened up the Southern boundary.

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38. Mr. Morris's neighbourhood is Locksbrook you would call it, from Station Road to the Dolphin Pub, and between the main road and the river, extending from Station Road in the East to Osborne Rd in the West. He did not regard the cemetery as being in Locksbrook as it is on the other side of the main road. 'Locksbrook', 'Lower Weston' and 'Newbridge' are overlapping areas. 'Locksbrook' was a more common description years ago, but it is still used to describe an area nowadays.

39. Margaret Gore-Langton has lived in Ashley Avenue since 1982. She used the land for recreation since then, in the early years with her young daughter, playing and riding her bicycle. She walks friend's

dogs there nowadays, letting them run off of the lead. She has seen children from Kaynton Mead play there. In the early morning and evening one sees other dog walkers there. There is usually someone about. Mrs. Gore-Langton thought that Lower Weston, Newbridge and Locksbrook are all in the same neighbourhood, from church at one end to school at the other. It would extend to Locksbrook Cemetery in the East; Charmouth Road, Hartwells Garage, in the West.

40. Marion Page also lives on Ashley Avenue, having lived there since July 1989. She and her late husband used the land for walking their dogs; and picking blackberries. She had seen other people, adults and children, play there. She did not recall having access to the land prior to the building of the Kaynton Mead estate. Children had played on the green part of the land – there were some wooden erections for the children to play there. She had friends in Kaynton Mead and in Locksbrook Road. The old school is now a WRVS area. Locksbrook is a community. Her neighbourhood runs to the end of Brassmill Lane, where it reaches the end of Newbridge Road. I think Locksbrook could extend to the end of Brassmill Lane. The area at the end of Westfield Park she would probably call Newbridge. She would

not say where it starts. 'Locksbrook' refers to the Lock; the Brook is a culverted stream at Station Road.

41. Susan Greco has lived on Newbridge Road since 1980. Since then she has used the land as a footpath to walk from her home to Station Road. Her children played on the land when small; she has seen people walking their dogs there and children playing ball games and riding bikes there. Her property bounds the land, and there is a wire fence separating the two. If she wants access she simply lifts the fence up. When Kaynton Mead was developed she saw a lot more activity on the area from the children at Kaynton Mead. She still uses the land for blackberry picking, and takes her grandchildren there.

42. Cllr. Lorraine Brinkhurst MBE has lived at Newbridge Road since 1977. Her house backed on to the land, and her children played there since 1977. They built a tree house there. Her grandchildren now play there. She used to walk her dog there, before his death, and now walks her partner's dog there. She would go on the land every day at different times, and would pass half a dozen people every time; people with children, people walking dogs. You would see children on the land during school holidays. In 1999 as the Ward Councillor she organised a 're-planting' day on the land. Local children re-planted



the land, in conjunction with work from the Parks Department. Those helping came from Newbridge Rd as well as Kaynton Mead. A picnic was also organised, and play equipment was (either then or earlier) installed. A further re-planting occurred in 2008 consequent upon the pipe works carried out by Welsh Water on the land. The residents of Kaynton Mead held a Jubilee party there in 2002. Councillor Brinkhurst uses the path to get to her office in Locksbrook Road; and many residents use the path to get to the Chelsea Road shops.

43. The land was used before Kaynton Mead because one could access it from Station Road. It was not accessible from Locksbrook Road. It was only accessible from the one area. The land was not publicly accessible from the Western end. People could go on to the land via the private gardens to the North. Before Kaynton Mead was constructed, as far as the public were concerned, Station Road was the only access.

44. Nadine Geary lived on Hungerford Road between 1993 and 1999, and since then on Ashley Road. Ms. Geary owns large breed rescue dogs, and exercises and trains them there daily. There are no cyclists passing through and the boundaries are secured by some hedging. She has seen picnics taking place there, and children playing in tree-

houses and dens. It is the only available green space nearby. There are usually several dogs down there. Depending on the weather there could be half a dozen dogs and children. There may be five or six children, some in their dens. Ms. Geary always referred to the area as Locksbrook. She did not think that Locksbrook cemetery would be in Locksbrook. She would not regard Rudmore Park as being in my neighbourhood.

45. Ms. Lee Paget has lived at Kaynton Mead since 2001, and since then she and her family have used the land for informal recreation. In the morning there may be 20 people using the track – dog walkers; the trees give shelter and there are children's' dens there. It is safe for children to play on. Her neighbourhood is Kaynton Mead, and she would consider Locksbrook Rd to be part of her neighbourhood.

46. Robert Andrew Scott BSc FRICS is employed as a Client Services Manager by BANES, and was called by them to give evidence. He told me that the land lies within the Newbridge Ward of the City, and is about 1.25 miles from the city centre. He produced a number of helpful photographs and maps of the area. He also analysed the addresses of the supporters of the application, locating their addresses on a map, and calculating that those claiming personal

use of the land represented only 1.06% of the claimed neighbourhood. At the time that Mr. Scott's witness statement was produced, the neighbourhood was said to be that of Lower Weston and Newbridge. Mr. Scott also produced an analysis from historical documents and his personal understanding of the locations of Lower Weston and Newbridge. In view of the amendment made to the application by Mr. Maile, this analysis could be of background use only. Mr. Scott has lived in Fairford Park and Alton Park. He told me that he did not think he had heard of the area of Locksbrook before this Inquiry, but accepted it was possible it did exist. Mr. Scott's evidence was not challenged by Mr. Maile.

47. Simon Memory is a Parks and Green Spaces Officer employed by BANES. He produced documentation showing the work carried out by the Council to the track. The grassed area was cut once a month with hedge and shrub maintenance being carried out once a year. Litter bins are provided by the steps leading to Kaynton Mead which, suggested Mr. Memory, was consistent with the land being made available for use by the public for recreational purposes. They are emptied 2 or 3 times a week.

48. I also heard from Mr. Andrew Reed who is a Solicitor and employed as a Property Law Manager for BANES. He took me through the documentation held by BANES in connection with its acquisition of the land and its subsequent dealings with it<sup>5</sup>. His evidence was accepted by Mr. Male.

### **Written Evidence**

49. I have been supplied with a quantity of written evidence in this case, the bulk of which is in the hearings bundle. I have also been supplied with more documentation as the hearing has continued; this has been numbered and inserted into the hearing bundle as we proceeded. The written documentation is divisible into two categories. The first relates to formal, historic documentation. There is no dispute about the validity of this documentation, although its meaning may be subject to debate. The second is more immediate documentation that has been produced for the purpose of this inquiry, such as evidence questionnaires or letters. Although that is evidence that the Authority must have regard to in so far as it is relevant in assessing whether the statutory test has been made out, I have to bear in mind that it has not been tested by cross-examination. It may therefore not be appropriate to give it the same

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<sup>5</sup> Hearing bundle, pp.444 and following.

weight as evidence that has been tested. Insofar as documentary evidence is of particular assistance or relevance, I shall refer to it in the course of this Advice.

### **Other Inquiries**

50. As I have mentioned above, this Inquiry is one of three linked Inquiries, the other two being concerned with land at Newbridge and at Rudmore Park. It is necessary for the Authority to consider its decision as regards each application separately. Success or failure of any one or more application does not necessarily mean that the others will succeed or fail. For this reason I have written three advices to the Authority, each one dealing with a separate application.

### **The Standard and Burden of Proof**

51. The practical consequences of registration are substantial, and restrictive of the possibilities of future use. It is not to be regarded as a trivial matter to have a TVG registered over land. It is necessary for the Applicants to strictly and properly prove their claim. To do so they must establish his claim by the production of evidence leading to the conclusion on the balance of probability that each element of the statutory test set out in section 15(2) of the Commons Act 2006 has been established. Section 15(2) states:

“(2)This subsection 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”

### **A Neighbourhood within a Locality**

52. Mr. Chapman accepted that the claimed 'neighbourhood' falls within a 'locality'. The first issue is whether the claimed neighbourhood exists as a neighbourhood, or not. The neighbourhood within the locality that is relied upon is 'Locksbrook' as defined on the plan at p.18B of the Inquiry Bundle.

53. Mr. Chapman contended that because registration as a TVG confers rights on the inhabitants of the neighbourhood, the neighbourhood must have a fixed boundary, and a landowner must be able to determine at any time whether any particular person is entitled to use the land for recreation. It therefore followed that if the boundaries are vague, the claimed neighbourhood would not qualify.

54. I do not agree with that analysis. In Oxfordshire County Council v. Oxford City Council [2006] 2 AC 674 Lord Hoffmann said (at [27]) that the phrase:

“‘Any neighbourhood within a locality’ is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries’

Where an area does not have legally significant boundaries, it is likely to follow that there may be factual disputes about its precise bounds. As a matter of common English, a 'neighbourhood' is an intrinsically uncertain area. I do not think it matters whether the boundary is precise. It may, after registration, be necessary for someone to work out where the boundary is (if the neighbourhood is simply described by name) but in the present case we have a description of a neighbourhood that is precise. The issue is whether that area is properly and fairly described as a neighbourhood.

55. Having considered the evidence, and seen the area for myself, I am of the view that the area described by Mr. Maile is a 'neighbourhood' within the meaning of the Commons Act 2006. I come to this view for the following reasons:

(1) The area has obvious and defensible boundaries; particularly Newbridge Road to the North and the River to the South. There is little in the way of residential accommodation between the Southernmost roads running adjacent to the river and the river itself.

(2) The character of the area is artisanal. There remains industry especially in the Western end; Kaynton Mead is the site of a former BT depot; houses to the East of Kaynton Mead are quite modest; those abutting the line of the former railway line appear later in date - perhaps early Victorian, and a little more grand.

(3) The area is served by public houses and a post office. There were general stores in the area, but they appear to have shut in relatively recent years. Local shopping is now carried out on Chelsea Road and Newbridge Road.

(4) Locksbrook is identified as a neighbourhood on the Ordnance Survey. That the name is placed near Locksbrook Cemetery and Locksbrook Terrace (which are both a little to the East of the claimed neighbourhood) is not altogether surprising. The Ordnance Survey does not plot neighbourhoods save in the most general manner, and one would expect to see the neighbourhood plotted about those places that bear the name. From the evidence that I have heard it does seem that historically Locksbrook may have been thought of as an area extending to and based in the East of that presently



claimed. I am satisfied however that over time the perception of the area has been sited further West. It may be that the explanation from this arises because 'Locksbrook' was originally named after streams running into the Avon, and people now associated it with the lock at a canalisation of the river. Be that as it may, although I have hesitated over this evidence because it was acknowledged that a number of the witnesses had, shortly before the Inquiry, discussed the neighbourhood they wanted to establish; and because a number of them described their neighbourhood as simply the area they were familiar with (which is not the correct test) I conclude that the general perception of the location of 'Locksbrook' of which I heard is a correct one, and that the claimed neighbourhood is a sufficiently cohesive area to justify that description, throughout the relevant period of twenty years.

### **For twenty years for Lawful Sports and Pastimes**

56. There is no doubt that informal recreation of the sort described here - walking, dog walking, children playing, riding bicycles, ball games, blackberrying - is sufficient user to engage the requirement that the land be used for 'lawful sports and pastimes' for the relevant period - see R v. Oxfordshire County Council ex. p. Sunningwell P. C. [2000] 1 AC 335 at 357 per Lord Hoffmann. Litter picking or tree planting is not

of itself a sport or pastime, although it may be evidence that indicates that the local community viewed the land as a community resource, from which one might infer that it was used by local residents.

57. In the present case I accept the evidence of a number of the witnesses, that the land has been used since beyond the commencement of the twenty year period for these purposes, and that the usage continues up to the present day. Indeed, it did not appear to me that Mr. Chapman contended to the contrary.

58. Mr. Chapman did contend however that if the use of the land was referable to the use of the land as a highway, it should not be registered as a TVG; for such use would only at best establish footpath use. Whilst I accept that this submission is based on a correct premises (see the judgment of Lightman J. in Oxfordshire County Council v. Oxford City Council [2004] EWHC 12 (Ch) at paras. [102] to [103]), I do not accept that the user in the present case would have given the landowner the impression that the land was being used as a footpath. Whilst some of the witnesses referred to the land being used as a through route, to get to shops or to some other convenient place, the great majority of evidence as to user related

to usage for recreational purposes. Before Kaynton Mead was constructed in the early 1990s, the land would only have been a through route to those passing to private back gardens on Newbridge Road, or through holes in the fencing by the BT depot. After that date the land was laid out in part as a play area, and I have no doubt was used as such. In my view the usage that there was would have been substantially referable to usage for recreational purposes.

**By a significant number of the inhabitants of the neighbourhood**

59. There is no requirement that any particular number, of the majority of inhabitants of the neighbourhood, have used the land during the relevant period. According to Sullivan J. in R. v. Staffordshire County Council ex p. Alfred McAlpine Homes Ltd. [2002] EWHC 76, considering what usage by 'a significant number' of inhabitants meant;

“...what matters is that the number of people using the land in question has to be significant to indicate that their use of the land signifies that it is in general use by the local community for informal recreation”.

It is a question of impression from the evidence available to the Inquiry as to whether this test is satisfied; it is not necessary that the

number of users from the neighbourhood be considerable or substantial. In coming to my conclusion I am not limited to the evidence of the users themselves; I can draw inferences from the character and location of the land as to likely use. Nor am I limited to their evidence of their own use. Indeed it is noteworthy that many of those who gave evidence themselves stated that the land was used by others. For these reasons I derive little assistance from Mr. Scott's statistical ratio of users to inhabitants, even if modified to refer to the neighbourhood finally claimed in the application.

60. I do bear in mind that the pattern and degree of usage must have changed on the construction of Kaynton Mead (which took place in 1995, within the relevant twenty year period). This both established a residential community immediately to the South of the land, which had little in the way of garden and improved the land with play facilities it seems in recognition of this; and it opened up access to the land to the South and West. Before 1995 the only access to the land was via Station Road. The access to the houses from the gardens at Newbridge Road was access of a private, not a public nature. Whilst some people might have gained access through broken fencing to the South, that must have been a very limited number. Lastly it appears that the land was much less cultivated and

more wild at that time. Whilst I have no doubt that this would have made the land attractive to some, it would also have had the effect of making it less attractive, or even hiding it, from others.

61. If land is in general use by the local community, that is the impression that must be given; the opposite is that user is a series of intermittent trespasses. It is a question of fact and degree.

62. I have no doubt that after 1995 and the construction of Kaynton Mead BANES would have been of the view, had they enquired after the position, that the land was in general recreational use by the local community. I also think that had they made enquiries, that local community would have been considered to be approximately the neighbourhood that presently asserts the right. This would not have surprised BANES, given that the land was laid out for recreation in 1995, and re-planted to that end subsequently.

63. Matters are far more difficult and finely balanced when it comes to usage before 1995. For obvious reasons, only some of the witnesses had a direct recollection of matters and usage that far back. I therefore specifically asked them what they could recall of the usage. With one exception, their evidence was that usage was

substantial even during that period. I bear in mind that the land had been disused since the late 1960s (although I do not know when the rails were lifted). Access to the land from the East was unobstructed, and would have been known in the community. Given that these were in my view honest witnesses, whose evidence did not appear unreliable, I do not think that I would be justified in preferring my own doubts arising from the surrounding circumstances to their direct testimony. I conclude therefore that a significant number of inhabitants of the community have used the land for recreation for the relevant period of twenty years.

### **As of right**

64. Mr. Chapman argues that where land is held by a local authority under the provisions of section 9 Open Spaces Act 1906, the local authority holds it on trust for the purpose of permitting the public to use it; and subject to effective by-laws being enacted the public is so entitled to use it. Next, where the public does something on land that they are entitled to do, their usage is not 'as of right', because that means 'as if of right', and here they already have that right right. The consequence of this, analysis, he submits, is that applicants cannot succeed in a claim to register a TVG where the land has, during the

relevant twenty year period, been held by a local authority under the provisions of section 9 Open Spaces Act 1906.

65. Mr. Maile accepts that the land was acquired under the provisions of the Open Spaces Act 1906. He contends that the fact that land was acquired under that Act does not necessarily mean that a trust for recreational use arises. He contended that this only arose where the land was covered with buildings. Next he contends that the purpose for which the land was acquired by the Council in 1987 was for use as a footpath, and not as a general open space for the public. Lastly, he contends that comments of various of the law lords in R v. Sunderland City Council ex p. Beresford [2004] 1 AC 889 are not binding. The law has changed by reason of the introduction of the Commons Act in 2006. There is no evidence of the local authority licensing or giving the public any right to go on to the land.

66. In my view Mr. Chapman's submissions are correct as a matter of principle:

(1) Section 15 Commons Act 2006 requires the public's user to be 'as of right'. The same requirement is to be found in the corresponding provisions in section 13 Commons Registration Act 1965. It is to be

presumed that Parliament used the same terms expecting them to have the same meaning.

(2) The meaning of 'as of right' was considered by the House of Lords in R v. Oxfordshire County Council ex p. Sunningwell PC [2000] 1 AC 335, which considered that it bore the same meaning (in the commons registration legislation) as it did in legislation dealing with prescription and deemed dedication of a highway by virtue of section 31 Highways Act 1980. Their Lordships also considered that the concept underlying prescriptive rights was that of acquiescence by the landowner. Plainly, where the claimant already has a right to do the thing he is doing, the landowner cannot stop him from doing so. It follows that the landowner does not 'acquiesce' in the use.

(3) User 'as of right' has frequently been judicially described as 'as if' of right, the inference being that no right to do the act otherwise exists.

67. Mr. Maile is correct to state that the comments of their Lordships in Beresford to the effect that where a claimant to a prescriptive-type right already has the right to do the act, his use cannot be 'as of right' were not part of the reasoning of the case, because they were not necessary for the decision. However, they were considered comments and are entitled to great weight. They have not been



judicially doubted. In my view the Authority should be guided by them.

68. The next issue is whether the land was acquired under the provisions of section 9 of the 1906 Act. In my view it was, for the following reasons:

(1) It is immaterial that there were no buildings on the land. Under section 20 of the 1906 Act land may be acquired as open space where it has not more than one-twentieth of its surface area covered with buildings. This land had less.

(2) It is a question of construction of the documentation to ascertain what power the council exercised when it acquired the land. The obvious documentation that is pertinent to this task is the conveyance, and the conveyance here plainly stated that the land was acquired under the 1906 Act. The land was transferred to the local authority either under the provisions of section 7 of the 1906 Act, or under the provisions of section 9 *ibid*.

(3) The contemporaneous documentation indicated that this land was being acquired for public open space purposes<sup>6</sup>.

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<sup>6</sup> See the Council minute for the Land and Buildings Committee, 7th. January 1986 at bundle pp.449-450.

69. If that is so, as I advise that it is, the next issue is whether that created a right in the local inhabitants to use the land for the purposes of recreation. I am of the view that it did. Where land is held by a local authority under the 1906 Act, section 10 states that it holds it in trust to allow the enjoyment of it by the public as an open space. The consequence of that is that user is not 'as of right'. There is substantial authority to this effect - see Beresford *supra*. at paras. 3 & 9 per Lord Bingham; para. 11 per Lord Hutton; para 29 per Lord Scott; para. 62 per Lord Rodger; and paras 72 and 87 per Lord Walker. See also section 122 Local Government Act 1972 (as amended) that assumes that land held under the Open Spaces Act 1906 establishes a trust to this effect. There is no need for the fact of that trust to be communicated to the residents. Their right arises as a consequence of the land being held as it was.

70. I conclude therefore that local inhabitants were at all times during the relevant twenty year period, until and appropriation of the land for highway purposes, entitled to go on to the land for the purpose of carrying on lawful sports and pastimes. It follows that their usage of the land has not been 'as of right' as required by the statute.

## **Conclusion**

71. I conclude therefore that the Authority should decline to register this land as TVG. The reason for not registering the land is that the usage of the land has not been 'as of right' but has been by virtue of the land being held during that period by BANES on the trust contained in section 10 Open Spaces Act 1906.

72. As a postscript I should note that Mr. Chapman had a further argument in his locker. Although the Applicants apply under the Commons Act 2006, that Act superseded in different terms the provisions of the Commons Registration Act 1965, which had itself been amended by the Countryside and Rights of Way Act 2000. That amending Act allowed applicants to rely on usage by the inhabitants of a neighbourhood to establish a TVG, whereas they had previously been limited to relying on the usage of inhabitants of a locality. The argument is that the present Commons Act does not allow an applicant to rely on usage by inhabitants of a neighbourhood where the usage, as here, predates the coming into force of the 2006 Act. Had the applicants' case otherwise succeeded, I would have made further enquiries as to whether and when the Court of Appeal might have heard the argument, and I would have considered advising the

Authority to defer its decision until judgement was given. But in the circumstances it is pointless to delay matters further.

73. Lastly, can I extend my thanks to Mr. Simon Elias and Mr. Graeme Stark who facilitated the hearing and took care of all of the parties at it. I am very grateful also to Mr. Chapman and Mr. Maile for their helpful, thoughtful and measured submissions throughout.

29th. September 2011

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