Appendix 6

IN RE: AN APPLICATION BY MR. J. SPARROW TO REGISTER THE BATH RECREATION GROUND AS A TOWN OR VILLAGE GREEN PURSUANT TO SECTION 15 COMMONS ACT 2006

AND IN RE: APPLICATION NUMBER TVG12/1

ADVICE

Instructions

1. I have been asked to advise Bath and North East Somerset Council ('BANES') as to the manner in which it should deal with an application made on 18th. November 2012 by Mr. J. Sparrow to register land at the Recreation Ground, Bath, as a Town or Village Green ('TVG') pursuant to section 15 Commons Act 2006. BANES is a Registration Authority pursuant to the provisions of the Commons Act 2006.

Application

2. Mr. Sparrow's application pursuant to section 15(1) Commons Act 2006 asserted that the inhabitants of the City of Bath had used the land 'as of right' for lawful sports and pastimes for the twenty years preceding the application; and that it should therefore be registered as a TVG.

The Land

3. The land the subject of the application is known generally as 'The Rec', and a significant part of it presently forms the home stadium of Bath Rugby Football Club. It is approximately 15 acres in area and situated in the centre of Bath. It is shown on the application plan as being broadly bounded to the West by the River Avon; to the North by Johnstone Street and Pulteney Mews; to the East by the Bowling Green and St. John's Catholic Primary School, and to the South by North Parade Road, The Pavilion and the Magistrates Court.

4. The usage of the land is shown on a plan annexed to the application and marked Map A/3. It shows that the Rugby Club is situated on the Western part of the land, adjacent to the River Avon. I shall refer to the usage made of the land by the rugby club in more detail below. The Sports and Leisure Centre is a substantial built structure to the South of the land close to North Parade Road[1]. The North Western part of the land is marked 'Croquet Club' whilst the South Western part is marked 'Tennis Club'. The middle of the land has been marked 'Lacrosse and Volleyball'. To the East of the area marked 'Lacrosse and Volleyball' are three buildings situated in a slight arc[2]. The main area is also used for cricket from time to time.[3]

[1] It is best shown on the photograph at A3 annexed to Mr. Sparrow's application..
[2] The tennis courts, croquet lawn and stands are helpfully shown on the plan NJB.1 annexed to Mr. Blofeld's witness statement.
[3] See for example the statutory declaration of Darren Ball, paras 24 & 25.

Evidence

5. The Application has been supported by seven witness statements that assert recreational usage of the land from the 1930s to the present day. These statements are substantially in the standard form provided by the Open Spaces Society, and whilst they set out information of usage in a helpful tabular form, such pro-formas tend to be lacking on details of use – for example, as to which parts are used when – unless the witnesses have deliberately set that information out. A further sixteen letters of support have been received since the application, of which two refer to factual recreational user on the land; the remainder simply approve the application.

6. BANES publicised the application by circulating it in a local newspaper and publishing a notice of the application on 10th. January 2013. These notices required any person who wished to object to the application to make representations to BANES.

7. Objections to the Application have been received from Mr. Darius Mehta; Ms. Zoe Tarrant RIBA on behalf of the Seasons Hotel, Bath; Mr. Jason Curtis on behalf of Aquaterra Limited; Mr. Ian Wilson; Mr. Philip Dunning; Mr. Andrew Pate on behalf of BANES as trustee of the Recreation Ground Trust; and Messrs. Travers Smith LLP on behalf of Bath Rugby Limited. Where I refer to BANES in its capacity as objector, I shall refer to it as 'The Trustee'.

8. Bath Rugby Limited have also filed a large number of witness statements setting out in particular the factual usage made by that entity of the part of the Land used by them in recent years.

Position of BANES

9. It will be noted that BANES is both the registration authority tasked by statute with determining the validity of the application, and an objector to the application. Mr. Sparrow has complained that this should preclude BANES from taking any part in the determination of the application[4]. However, a conflict of interest is not that uncommon a situation with such applications, where the local authority may be both the registration authority and have an interest in the application, either by reason of ownership of the land or by reason of some other more strategic interest in a development of the land contrary to that which could occur if the application were resolved in any particular way. Despite this potential conflict, a registration authority is obliged to make such decisions as are required by the Commons Act 2006 and subordinate legislation. It will however seek to ensure so far as is possible that any reasonable concern as to a conflict of interest is removed prior to any final decision being made.

10. As I understand it BANES has taken steps to ensure that those officers who are involved with the determination of the application are in no way involved in the running of the trust, or the objection to the application. The decision to ask for my advice, as a specialist practitioner in the area of TVG registration, in private practice

[4] Counter-response, p.3.

and independent of the parties, is also a means of ensuring that any perception of a conflict of interest is removed. But I stress that although I have been asked to advise BANES on the steps it should take to determine this application, and I do so below, the duty for making that determination remains that of BANES.

The Grounds of Objection

11. Although the objectors have set out their objections in, in some cases, considerable detail, I set out my summary of them as follows.

Mr. Mehta

12. Use of the land has been permissive, in that the land is held by Trustees whose consent to its usage is required, and who charge for its use. It has been built on as to part by the construction of a Leisure Centre which allocates or charges for usage; and the land cannot be used when used for other pastimes (such as rugby or tennis).

Seasons Hotel

13. Ms. Tapper objected solely on the basis that the land as shown on the application map included a strip of land owned by the Hotel and was enclosed by a boundary wall and to which there was no public access.

Aquaterra

14. (1) The application land is not 'land' for the purposes of section 15 Commons Act 2006 as there is a building on it; and

(2) Use has not been 'as of right' as use of the Leisure Centre has been permissive and charged for.

Ian Wilson

15. (1) Sporting activities on the Rec have been with the permission of the Trust, and therefore the usage is not 'as of right'.

(2) The Leisure Centre is not open to the public at all times;

(3) The tennis courts and other facilities do not have free public access;

(4) At periods when the pitch is in use, access to the pitch and stands is also restricted.

Philip Dunning

16. Mr. Dunning deprecated the current state of the sports buildings at the Rec, and suggested that the application should be rejected and proposals for an improved arena pursued.

The Trustee

17. (1) Those parts of the land which are subject to built structures are either inaccessible to the public, or are used pursuant to the permission of the Trustees. In the first case there has been no usage at all; in the latter there has been no usage 'as of right'.

(2) There has not been qualifying usage of the land for lawful sports and pastimes by a 'significant number' of the inhabitants of the claimed locality, the City of Bath.

(3) Usage by tenants or licensees of the Trustees has been by permission, and not 'as of right'.

(4) There are occasions during the year when members of the public have been excluded from part of the land by the owners or lessees, for example during rugby matches. This periodic exclusion means that insofar as the public have access to other parts of the land at other times, they do so by implied permission of the Trustee – see R v. Somerset County Council (oao Mann) [2012] EWHC B14 (Admin).

(5) The land is held by the Trustee on the trusts of a conveyance dated 1st. February 1956. This document created a charitable trust of which the public were beneficiaries, and the trust is a trust for public recreation. The usage of the land by the public for informal recreation is therefore 'by right' and not 'as of right'.

Bath Rugby Ltd

18. (1) Informal public access to that part of the property comprising the built development (leisure centre, sports stands, clubhouse) is not possible and has not taken place;

(2) Formal usage of the sports pitches is with the permission of the Trust and hence not as of right.

(3) Access to the rugby ground is controlled and informal recreation prevented.

(4) Any usage that has taken place has been in the nature of a short cut, rather than for recreational purposes. Such usage is not qualifying use for the purposes of TVG registration (see Oxford City Council v. Oxfordshire County Council [2004] Ch. 253).

(5) During rugby match days and at other times, access to the application land is controlled and permissive only.

(6) The whole of the site has not been used 'as of right' or indeed at all;

(7)The land is held pursuant to a charitable trust created by the conveyance of 1st. February 1956. The statutory powers are now those contained within section 19(1) Local Government (Miscellaneous Provisions) Act 1976. Although that Act confers a power on the Trustee to provide recreational facilities for permissive use, other recreational use by members of the public amounts to use 'by right' and not 'as of right' – see R. v. North Yorkshire CC oao Barkas [2012] EWCA Civ. 1373.

(8) The frequent exclusion of the public from part of the land by the landowner indicates that on those occasions when the public do use the land for informal recreation, they do so by implied permission of the landowner – R v. Somerset CC oao Mann (*supra*.)

(9) Usage is not by a 'significant number' of inhabitants of the claimed neighbourhood, as required by statute.

19. As I have mentioned above, Bath Rugby Ltd. has also filed a large number of witness statements dealing with the use of the Rugby Ground and to a lesser extent the remainder of the land. It has also served a large number of documents including but not limited to what appear to be the complete minutes of the Committee of the Board of Trustees from 2005 to 2102. Unsurprisingly, it details the usage that it made of the rugby ground, including the dismantling at the end of each season of two dismantleable stands, and the usage that is made not only of the Rugby ground, but of ancillary areas outside of it such as the beer tent and various practice pitches. This evidence seeks to demonstrate that the usage of the land let to the Rugby Club is different in nature (to the extent that it occurs at all) to that occurring on other

parts of the Rec. It states that any public usage of that land is limited to access across the land as if in the nature of a footpath; and that any public access to the pitch or the stands out of season or other than on match days has been deterred by club officers and employees.

Response

20. Mr. Sparrow responded to these objections on 1st. April 2013. The letter is lengthy, and so I summarise its material parts.

(1) The terms of the 1956 conveyance cannot prevent the land from gaining TVG status, as the land should have acquired TVG status prior to 1956;

(2) The trust established by the 1956 conveyance in any event requires the Trustee to retain the land as open space for the benefit of the citizens of Bath.

(3) The decisions taken by the Trustee and/or the Charity Commissioners since a ruling by Hart J. as to the meaning and effect of the covenants in the 1956 conveyance[5] have been illegal or contrary to the terms of the Court's judgment;

(4) The construction of the Leisure Centre, the usage of the land by Bath Rugby Club as a professional organisation, and the construction of spectator stands[6] were all illegal acts, contrary to the terms of the charitable trust set up under the 1956 conveyance.

(5) The restriction of use of the land against the public on the match days is also illegal.

[5] BANES v. A-G [2002] 5 ITELR 274

[6] I understand this not to refer to the original West stand, or to the original clubhouse. – Counter response, para. 8r,

(6) The intermittent closure of the land for example at night time is not inconsistent with usage by the public of the land 'as of right'. It is instead consistent with a desire to prevent vandalism and inappropriate usage.

(7) The usage of the Leisure Centre is not permissive; it is rather usage coupled with payment to compensate for the cost of running the centre. Such payment falls within the terms of the 1956 conveyance. The building is open to use by the public.

(8) Usage of the croquet and tennis pitches amounts to usage by the public because although the clubs control entry on to and usage of those pitches, they are open to new members and those members may be inhabitants of the City of Bath.

(9) Mr. Sparrow appears to accept that there has been no factual qualifying use of the land subject to the Rugby Club's lease since 1996 [7]

21. Mr. Sparrow has also sought to amend the plan annexed to his application to exclude the land owned by Seasons Holidays PLC.

22. Mr. Sparrow has raised three further matters that he asserts are relevant and should be taken into account in determining the application. First, he states that the Trustee and/or the Charity Commissioners have presently proposed a scheme for the sale, leasing and/or development of the land, which he suggests would be contrary to the terms of the 1956 conveyance. Secondly, he asserts that BANES are wrongfully seeking to have the Recreation Ground designated as a development area. This is a reason why BANES should have no part in determining the TVG

[7] See Section 8[s][u][y][gg]

application. Thirdly he has referred to a circular issued by the CEO of Bath Rugby Club[8] to certain residents of the vicinity which is said to ask for a positive or negative response as to whether the recipient supported a further attempt to make application to the High Court. This was said to be intimidatory behaviour causing 'upset, fear, disgust and general concerns amongst the small section of citizens contacted by unsolicited mail.'

Disposal of the Application

23. The 2007 Regulations[9] govern the procedure for determining this application. They do not set out the procedure for resolving a dispute where the Authority considers that an application has been 'duly made'. It is not uncommon for the matter to be referred to an independent advisor to conduct a further hearing to resolve the dispute, and to give directions to all interested parties to provide for the efficient holding of an inquiry.

24. Such an inquiry would normally involve the hearing of evidence, and the resolution of disputed matters of fact. Where the dispute is a legal one, however, such a hearing may not be necessary. It may also not be necessary where the evidence is purely documentary, or where the Registration Authority is fairly of the view that the evidence does not realistically satisfy the statutory requirements. It is necessary first to consider what the inquiry has to decide, and then to consider whether the

[8] I have not seen this document.
[9] Commons (Registration of Town and Village Greens)(Interim Arrangements)(England) Regulations 2007/457

nature of the dispute requires a hearing; and if so, what is the appropriate form of hearing to direct.

Section 15 Commons Act 2006

25. Section 15 Commons Act 2006 provides that:

> "(1)Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (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".

26. It is important to bear in mind that this test is a purely factual test, which considers historical matters only. It is immaterial to the success or failure of an application whether it would, in the overall scheme of things be better for the community if the application succeeded, or for that matter if it failed. Indeed, a registration authority would be acting improperly if it allowed its consideration of the application to be coloured or swayed by such matters.

Land Ownership and Usage

27. By an Indenture dated 6th. April 1922 Captain Francis Forester conveyed the land to The Bath and County Recreation Ground Limited for a consideration of £6,050.

28. The Bath and County Recreation Ground Limited conveyed the land to The Mayor Aldermen and Citizens of the City of Bath by a conveyance of 1st. February 1956, for a consideration of £11,155. The habendum sets out the basis on which the Corporation was to hold the land:

> "TO HOLD the same unto the Corporation in fee simple upon trust that the Corporation for ever hereafter shall manage let or allow the use with or without charge for the whole or any part or parts of the property hereby conveyed for the purpose of or in connection with games and sports of all kinds tournaments fetes shows exhibitions displays amusements entertainments or other activities of a like character and for no other purpose and shall maintain equip or lay out the same for or in connection with the purposes aforesaid as they shall think fit but so nevertheless that the Corporation shall not use the property hereby conveyed otherwise than as an open space and shall so manage let or allow the use of the same for the purposes aforesaid as shall secure its use principally for or in connection with the carrying on of games and sports of all kinds and shall not show any undue preference to or in favour of any particular game or sport or any particular person club body or organisation ..... AND SUBJECT TO and with the benefit of the Leases ... the short particulars of which are set out in the Schedule hereto."
>
> The Schedule included a Lease dated 17th. October 1933 of the Bath Football Ground to two gentlemen on behalf of the Bath Football Club. It is plain from the contract dated 2nd. January 1933 that the Bath Football Club was a rugby football club[10].

29. On the 9th. January 1973 the Corporation and the Trustees of Bath Football Club executed a Surrender and Lease. This document surrendered the remaining term existing on the 1933 lease. It then granted a new lease of part of the Recreation

[10] See clause 11.

Ground, being the part of the Rec historically used as a Rugby Football Ground, together with the West and North stands and the clubhouse[11]. The demise of the land together with ancillary rights was for a term of 75 years from 1st. September 1972, at a rent of £475 per annum with a rent review every fifteen years. The lease contained covenants:

- against using the premises for any purpose other than for playing practising or watching the game of rugby football under the rules of the Rugby Football Union (cl. 4(2)).
- against the use of the Ground (other than the Clubhouse) for any other matches than Bath Football Club matches without the consent of the Corporation but such consent would not be unreasonably withheld (cl. 4(8)).

30. In about 1975 BANES constructed the Leisure Centre on the Southern part of the land.

31. It appears that Bath City Council granted Bath Football Club leases of the rugby football ground on 23rd. May 1995 and 25th. March 1996[12]. I have not been supplied with copies of these leases. Mr. Nicholas Blofeld states that Mr. Sparrow has them[13]. Mr. Sparrow for his part has complained that no copies of any post 1973 leases to Bath Rugby plc have been made available by the Trustees despite a number of

[11] Which appears to have been a chattel if it was not a tenant's fixture (see cl.5(a)(b)).
[12] Evidence of Nicholas Blofeld, para. 7.
[13] Witness statement, para. 8.

requests on the basis that they are commercially sensitive documents[14]. For the reasons I set out below, I have no reason to believe that the content of these leases is of relevance to the application; their existence is common ground between the parties, although their legal relevance to this application is not. Bath Rugby plc is the assignee of the leases[15].

32. Legal title to the freehold land passed to BANES in 1996. Bath had become assimilated in Avon County Council as part of the 1974 local government re-organisation, although I understand that legal ownership of the land passed to Bath City Council. In 1996 a further re-organisation resulted in Bath becoming a part of BANES[16] and legal title to the freehold of the land passed to BANES, who presently hold it.

33. In 2002 BANES entered into an express tenancy at will with Bath Rugby plc of an additional part of the Rec, some 555 square metres in area. Unfortunately the plan noted as being[17] annexed to the copy of the document supplied by Mr. Sparrow has not been supplied. The extent of the land was sufficient to (and intended to) permit the siting of a metal stand adjacent to the rugby pitch on its Eastern side. A manuscript note on the front of the document states 'Terminated 14.05.03'. I

[14] Application, Appendix 8. In the particular passage Mr. Sparrow suggests that no such leases have been made available to the Trustees. I assume that is a slip, as the Trustees as parties to any such lease (or their successor in title) should have them anyway.
[15] Judgment of Hart J. in BANES v. A-G [2002] 5 ITELR 274 para [5]
[16] The devolution is set out in BANES v. A-G para. [3].
[17] See clause 1.4 of the tenancy at will

understand that since then the Trustee has granted the Rugby Club an annual lease of that land so as to enable the East stand to be erected[18].

34. In 2002 BANES[19] brought proceedings against the Attorney General seeking declaratory relief as to the basis on which it held the land pursuant to the 1956 conveyance. In an illuminating judgment, Hart J. held that BANES as successors to Bath Corporation held the land on charitable trusts, although it is plain from the judgment that his Lordship found the analysis uncertain[20]. His Lordship also found, although again not without some hesitation, that the statutory power that permitted Bath Corporation to declare such a trust was to be found in section 4(4) Physical Training and Recreation Act 1937[21]:

> "A local authority may contribute towards expenses incurred by another local authority, whether under this or any other Act, or by a voluntary organisation, in providing or maintaining within the area of the contributing authority, or on a site where it will benefit any of the inhabitants of that area, anything mentioned in subsection (1) of this section, or a swimming bath or bathing place."

Section 4(1) gives a local authority power, inter alia, to acquire, lay out and maintain land for the purpose of gymnasiums, playing fields, holiday camps etc., and to let them at a nominal or other rent for any such purpose.

35. What prompted the application to the Court was a proposal for:

[18] Witness statement of Mr. Nicholas Blofeld para. 5.
[19] Acting not as registration authority but simply as the owner of the land.
[20] See the conclusion at [47] – [48]
[21] Judgment para. [55]

> 'a redevelopment of the recreation ground so as to provide, inter alia, a modern stadium in which professional rugby and association football can be played and the creation, partly on the site of the recreation ground and partly on the adjoining land owned by the claimant of a new Sports and Leisure Centre with conference facilities. These proposals, first given publicity in March 2000, raise a wide range of sensitive planning, environmental and traffic issues. They have excited considerable local opposition, particularly from residents in the immediate locality who have already been troubled in various ways by the perceived consequences of the commercial use of that part of the Recreation ground now let to Bath Rugby plc…under a 75 year lease granted in 1995.'[22]

The learned judge made it plain that he was not deciding whether the Council's historic use of the land, or the 1995 lease, were compatible with the charitable trusts[23].

36. According to Mr. Sparrow's addendum to his application[24] "Throughout the year the rugby pitch and all the permanent stands on three sides of the pitch are out of bounds, unless permission is given by the Rugby Club and fees paid to them and not the Trust. From September to May a 'temporary' stand is erected on the fourth side of the pitch, which has the effect of bisecting the Recreation Ground and making it inaccessible to all but employees of the Rugby Club."

Other Uses

[22] Judgment para. [5].
[23] At para. [49].
[24] Dated 15th. December 2012

37. Both in the application and in his addendum Mr. Sparrow has set out the identity of the other occupiers/leaseholders of parts of the Rec, as he understands the position. I list those entities as follows:

- Bath Croquet Club – 'an amateur club with a 10 year lease which expires in 2011 and is now renewed on an annual basis including a few parking spaces'
- Bath Drama Society – 'which have a permanent lease on one small area and their own access gate'
- Whitefield Volleyball Club – 'which have an annually renewable lease for their annual event…providing it does not clash with other events organised by the Rugby Club (i.e. professional cricket)'
- Bath Spa Tennis Club – 'who now annually renew their lease for three grass tennis courts which include a few parking spaces'.
- Southdown Tennis Club – 'with a lease for two grass courts'
- Bath Leisure Centre, run as a not for profit organisation by Aquaterra.

Discussion

38. Some of the assertions made by the Applicant and the Objectors do not take the decision that BANES must make any further to a conclusion. The three matters referred to by Mr. Sparrow in his response[25] are in my view of no relevance to the issues to be determined:

(1) The plans for the Trustee or the Charity Commissioners as to the future use of the land cannot affect the extent, nature and quality of the use prior to the date

[25] See para. 22 herein.

of the application, which is the scope of the test under section 15 Commons Act 2006

(2) The suggestion that BANES should not consider the application I have dealt with above. In my view the steps taken by BANES thus far are correct and it is fully entitled and indeed obliged to consider the application.

(3) Lastly I am in no position to conclude as to whether apparently lawful circulars distributed by Bath Rugby are intimidatory or otherwise. But on the basis of the information supplied Mr. Sparrow there is in my view no reasonable ground for suggesting that these circulars have had any material effect on the application.

39. Equally, the suggestion that the application should necessarily be dismissed insofar as it relates to buildings is not correct. There is nothing in the wording or structure of the Act to indicate that such rights cannot accrue in respect of a built structure, although the circumstances in which a regulated and enclosed space could be used 'as of right' for twenty years must be rare indeed.

40. Next, I consider Mr. Sparrow's suggestion that BANES should only have regard to usage, certainly as regards the Rugby Ground, and possibly as regards the land as a whole up to the date of the 1956 conveyance; or from 1996 when game played at the Rec became professional. As I understand it the argument here is that because the letting or usage was unlawful (in breach of the term of the charitable trust) and that as a consequence the public were prevented from using part of the Rec for lawful sports and pastimes, it would frustrate the intention of Parliament if a claim under section 15 could be defeated by such acts. Therefore section 15 should be interpreted so as to exclude

the practical consequences of such wrongful acts. Mr. Sparrow has not set out his reasoning in this way, but it seems to me that this is the legal argument that he puts forward.

41. Whilst I understand why Mr. Sparrow would come to this view, in my view it is not a correct analysis of how section 15 Commons Act 2006 operates. I come to this conclusion for the following reasons:

- Any town or village green that was not the subject of registration under the Commons Registration Act 1965 by 1970 was deemed not to be a town or village green – see section 1(2)(b) *Ibid.*
- Thereafter, a town or village green would only come into being if there were twenty years recreational usage continuing up until the date of application – see sections 13, 22 *Ibid.* and Oxfordshire County Council v. Oxford City Council [2006] 2 AC 674 at [44] per Lord Hoffmann.
- It follows that even if under the 1965 Act a Registration Authority should have considered registration of the Rec as a TVG by reason of 20 years usage prior to 1970, as no application to register had been made by then, Parliament considered that the Rec was certainly not a TVG.
- It is unlikely that Parliament intended, in enacting section 15 of the Commons Act 2006, that land that had formerly been deemed not to be TVGs should be reinvestigated by reference to their pre- 1970 historic usage. There is no indication in the Act that it was intended to have this effect, save in respect of matters falling within certain specified circumstances (which this application does not).

- By way of contrast, Parliament has made provision for certain periods to be ignored in assessing the twenty year period. Those periods include periods of usage by permission (see section 15(7)(b)); and where usage is precluded by statute (see section 15(6)). The Act does not permit periods of wrongful or unlawful exclusion on the part of the landowner to be ignored.
- In the present case, an application being made under section 15(2), the qualifying activity must be demonstrated to occur during the twenty years prior to the date of the application. If it does, then the land should be registered as a TVG; if it does not, it should not. This is what the statute requires.
- In order to qualify, usage must be 'as of right'. Usage which is contentious is not 'as of right' (see Newnham v. Willison (1987) 56 P&CR 8). It does not matter that the opposition to the usage is itself, in some manner, unlawful. It is sufficient that the opposition exists. It follows therefore that Parliament intended Registration Authorities to have regard to periods of time during which the possessor of the land prevented public usage, even if that prohibition was itself unlawful.

42. There are a number of issues raised that may not be readily resoluble on the documentation. These are:
    - Whether the use of part of the land for restricted recreation (e.g. by the creation of a beer tent) impliedly indicates that use of the remainder of the land at other times is by the license of the landowner. This was considered in R v. Somerset CC oao Mann [2012] EWHC B14 (Admin). HHJ Robert Owen QC sitting as a High Court Judge refused to overturn a factual finding by an Authority that

intermittent licensed use of part of the application land gave rise to the inference of a license in respect of public recreational use over the remaining parts of the land at other times. However, whether such a license should be inferred at all in any particular case will normally require consideration of all of the evidence.

- Whether recreational usage of the land has been by a significant number of the inhabitants of the locality. This test is not satisfied merely by comparing the number who give evidence of usage with the total number of inhabitants in the locality, but is a nuanced assessment of fact – see Sullivan J. in R v. Staffordshire County Council ex p. McAlpine [2002] 2 PLR 1 at 15-16. Where there is a serious dispute between the Applicant and Objectors, it will normally be necessary to adduce evidence at an informal inquiry, so that the evidence relied upon by both sides could be properly challenged.
- Whether recreational usage of the land is in the nature of highway, rather than village green usage. Again, the boundary between the two types of usage may be indistinct, and detailed examination of the evidence may be necessary before a conclusion can be drawn.

43. The issue arises as to whether the application can be resolved on the present documentation, without the need for such a further inquiry. Any Applicant is under a burden to prove each element of the statutory test set out in section 15 (see R v. Suffolk County Council ex p. Steed [1997] 1 EGLR 131). So the matter can be put in this way – is there any particular aspect of the Application on which it appears that it must necessarily fail? If the answer is 'yes', then the Authority ought to dismiss the

application now, subject to the Applicant being able to remedy the difficulty either by the production of evidence, or by submission, or by amendment.

44. There appear to be three discrete issues that might be susceptible to such analysis. These are:

(1) Whether use by the public of the land for informal recreation was use 'by right' and not 'as of right'?

(2) Whether use by the public of land that is in the sole control of another – and I refer here to the tennis courts, the leisure centre and other areas – is permissive and hence not 'as of right'?

(3) Whether there is any relevant recreational use throughout the relevant period of the land demised to Bath Rugby?

It is also necessary to stand back and consider the merits of the application in the light of the proper consideration of these issues.

Use of the land 'by right'

45. Where the use of land that is relied upon to constitute a TVG is use that the public have an existing right in law to perform, then that use is not 'as of right' as required by section 15 Commons Act 2006, but (in contrast) 'by right'. In R. v Sunderland County Council ex p. Beresford [2004] 1 AC 889 the House of Lords considered, *obiter*, that the existence of such a right would preclude usage consistent with it as being user 'as of right' - see Lord Bingham at paras. [3] & [9]; Lord Scott at para. [30]; Lord Rodger at para. 62; and Lord Walker at para. [86] onwards.

46. Since Beresford the Court of Appeal has considered the existence of the 'by right' defence in R v. North Yorkshire County Council oao Barkas [2012] EWCA Civ. 1373. There, the Court held that land held by a landowner pursuant to section 80(1) Housing Act 1936 was held for the purposes of public recreation, and that public recreational use of the land was 'by right' and not 'as of right'. Most recently, in R v. East Sussex County Council oao Newhaven Port and Properties Limited [2013] EWCA Civ 213 the Court of Appeal has again accepted, *obiter*,[26] that use 'by right' is inconsistent with use 'as of right' (per Richards LJ at [82] to [85]).

47. I understand that permission to appeal to the Supreme Court has been sought in Barkas and granted[27], but I am not aware of the basis that it would be sought to argue such an appeal. I therefore advise the Authority that as the law presently stands, where recreational usage of land by the public is referable to an existing right so to do, then that usage must be treated as being 'by right' and not 'as of right'.

The position of a charitable trust

48. None of the authorities that I have referred to above were cases involving the existence of a charitable trust. There is no present binding legal authority that establishes that a public right of recreation arising from a charitable trust is such a right that will prevent use from being 'as of right'. A charitable trust differs from a proprietary right, or a statutory right, in that in the former case (i.e. a proprietary

[26] That is, in a part of the decision that is not binding on other courts. It was not binding in Barkas because the parties agreed that the 'by right' defence did exist in law.
[27] UKSC 2013/0035, permission granted 3rd. May 2013

right) the individual member of the public may enforce his right; and in the latter case (i.e. a statutory right) he may enforce it (by judicial review) if he has sufficient standing, or interest in the right, to do so. In the case of a charitable trust members of the benefitted class are not beneficiaries of the right. Indeed, there are no 'beneficiaries' in the conventional sense that that word is used when referring to a trust. Equally, those members of the public who would benefit from it cannot enforce it (see Hauxwell v. Barton-on-Humber UDC [1974] Ch 432). There is a right to bring 'charity proceedings' by a person interested, if authorised by the Charity Commission (see section 33 Charities Act 1993). The right to enforce a charitable trust is vested in Crown, acting through the Attorney-General – see A-G. v. Cocke [1988] Ch 414 at 419 per Harman J.

49. Does this make a difference? It seems to me that the basis of the 'by right' defence can be put in either of two ways. First, that where the user is entitled to carry out his recreational activities on the land, the freeholder is unable to prevent him from doing so. The basis of the acquisition of rights by long usage is acquiescence by the landowner in long-asserted rights (see R v. Oxfordshire County Council ex p. Sunningwell Parish Council [2000] 1 AC 335 per Lord Hoffmann at 351 B-D; 353A-B). Where the user has his right, it would not only be pointless, it would be illegal for the landowner or possessor of the land to intervene to prevent it. In those circumstances, for such non-intervention to result in the creation of a TVG would be absurd. All parks would become TVGs, and that would not be a rational view of the intention of Parliament. The alternative way of putting it is that the quality of use 'as of right' is that is demonstrates the assertion of the claimed right; and a landowner

would not perceive such use to be the assertion of a right of a TVG against him, because he would assume, understandably, that the public activity was being carried on pursuant to that existing and acknowledged right. As he would have no rational reason to intervene to prevent usage, then his failure to do so would not indicate or evidence the existence of any further TVG type right, beyond the existing right.

50. Whichever way the 'by right' defence is put, in my view it does not matter that the right asserted arises under a charitable trust. In such a case the right of the public to carry out lawful sports and pastimes, if interfered with, can be enforced by the Attorney General. The interference would still be a wrong. The public would, in that broad sense, have the 'right' to be there. It would be a very formalistic approach to consider that Parliament intended use within charitable trusts to give rise to TVG status because the rights of the public could only be vindicated by a third party. There is support for this view in the approach taken to the statutory 'right' of the public to enter upon land that is held as public open space under section 164 Public Health Act 1875 – see Hall v. Beckenham Corporation [1949] 1 KB 716 at 728 per Finnemore J., as approved by Lord Walker in Beresford (*supra*) at [86]. The statutory right is not a proprietary right, but a right not to be treated as or considered as a trespasser, and appears therefore to be analogous to the rights arising under a charitable trust. I therefore advise the Authority that where the activities relied upon are justified by the terms of a charitable trust, then those activities will not amount to use 'as of right' within section 15.

Do the public have a right to use the land for recreation?

51. In BANES v. A-G Hart J. concluded that the 1956 conveyance did create an effective charitable trust of the land. The conveyance provides that the land shall be held:

> ".....for the purpose of or in connection with games and sports of all kinds tournaments fetes shows exhibitions displays amusements entertainments or other activities of a like character and for no other purpose and shall maintain equip or lay out the same for or in connection with the purposes aforesaid as they shall think fit but so nevertheless that the Corporation shall not use the property hereby conveyed otherwise than as an open space....."

There is in my view no doubt that the purposes declared by the conveyance impose a duty on the Trustee to provide the land for the public recreation specified, subject to a power to manage the use of the land. The next question, therefore, is whether the use made of the land by the public insofar as it falls within the description of 'lawful sports and pastimes' falls within the scope of the charitable purpose. If it does, it is 'by right'; if not, then it may be 'as of right'.

52. The charitable purpose provision in the conveyance can be divided into two parts. The second is I think a little easier to construe than the first. The second part is: "tournaments fetes shows exhibitions displays amusements entertainments or other activities of a like character". These are all references to more or less formal performances on the land. Even an 'amusement' requires a degree of public interaction. 'Games and sports of all kinds' is a wide definition of recreational activity, and is capable of including informal as well as formal games and sports. However there is a limit to the sort of activity that falls within its scope. It need not

be competitive itself, but as an activity it must be competitive in some form. Thus, solitary running is a 'sport', on the footing that competitive running is a sport. A game must also be competitive, although the competition may be solitary – against oneself. It must have some rules.

53. In these circumstances it seems to me to be readily apparent that the vast majority of the activities referred to in the questionnaires provided by the Applicant's witnesses are 'games and sports'. Any form of team game, however informal, would be 'by right'. Kite flying would also be a sport. Fetes and community celebrations would fall within the second part of the charitable purpose.

54. In Sunningwell the House of Lords held that 'lawful sports and pastimes' extended to very informal recreation, such as dog walking (see per Lord Hoffmann at 357B-E). The various activities referred to in the Open Space Society questionnaires supplied in support of the application refer to some informal recreational usages that do not fall within the scope of the charitable purposes. It is not possible to quantify with precision the usage from the documentation that I have, although it is fair to say that my general impression of the evidence that I have is that it is not substantial. Question 23 of the evidence questionnaires has not been filled in so as to give any impression of the quantity or frequency of the various activities at all. I have put the evidence of usage into a table which I annexe to this Advice as Annex A.

55. In my view it follows from the above analysis that where members of the public have carried out lawful sports and pastimes on the land where that land is not under

the control of the Trustee, then such usage is usage 'by right' and not 'as of right'. I would add that this is consistent with the approach adopted by Mr. Sparrow. Mr. Sparrow asserts that the effect of the 1956 conveyance is that the public should have the right to carry out lawful sports and pastimes on the land. It seems to me that his analysis is correct; the 1956 conveyance did entitle the public to carry out such activities on the land. However the consequence of this is that those activities were 'by right' and hence not 'as of right'. I next consider the effect of the existence of third party rights of possession of the land, and in particular Bath Rugby.

Land in the Possession or Occupation of third parties

56. The land is in the possession or occupation of various third parties. First, the Leisure Centre is run by Aquaterra, and usage of the Leisure Centre is controlled by Aquaterra, to the extent of permitting members of the public to use the Leisure Centre and charging for such use. Secondly, there are other bodies, a tennis and a croquet club, that occupy specified and demarcated areas of land. Access to and use of those areas of land appears to be limited to members of the various clubs or those permitted by the clubs to use the land on an *ad hoc* basis. Thirdly Bath Rugby plc occupies a significant part of the land under one or more tenancies.

The Leisure Centre

57. Use by the public of the Leisure Centre is at first glance a classic example of use by way of a license or permission, and hence for that reason is not use 'as of right'. I have no reason to consider that the manner in which the public use the Leisure Centre is not the conventional one, namely that the management of the Leisure

Centre (let to Aquaterra) is contacted by the user who asks to use part of its facilities, and if Aquaterra agrees, does so. The license will almost certainly be a contractual license, which may contain provisions for payment, and otherwise will contain terms as to conduct in respect of the use of the facilities. But even if there are no specific obligations imposed on the public, the use would be pursuant to a license. The user would not be a trespasser because, although he was entering a regulated and controlled environment, he was doing so with the consent of Aquaterra.

58. Mr. Sparrow's response is a subtle one: that members of the public do not use the Leisure Facility by reason of the consent of the Trustee, but because of their entitlement or right arising under the 1956 conveyance. I doubt that this is right. If Aquaterra operate the Leisure Centre under a lease from BANES (even a not-for-profit lease) then unless Aquaterra is itself bound by the terms of the trust[28], or it has so committed itself to act pursuant to a covenant in the lease or other agreement, Aquaterra would be free to decline to permit usage of the Leisure Centre as it saw fit. But even if Aquaterra was bound by the terms of the trust, and Mr. Sparrow's analysis were correct, then usage would be 'by right', and for the reasons I have set out above would not be 'as of right'.

Croquet Pitches & Tennis Courts

[28] Pursuant to the provisions of the Land Charges Act 1972, or the Land Registration Act 1925 or 2002 depending on whether title to the land was registered when the lease was created.

59. The Croquet Pitch and Tennis Courts are I understand in a slightly different position. I do not know the basis on which they occupy their respective premises[29]. But it appears to be plain from the evidence supplied that the only persons who use their designated areas or pitches for sport are those who do so pursuant to their regulation and with their consent. In my opinion such users are either licensees or (if Mr. Sparrow's contention is correct) users of the land 'by right'. In each case they do not use the land 'as of right'.

The Rugby Club

60. I first consider whether the 'by right' defence can operate as regards the land that is let to the club for the duration of the lease, assuming the lease to be valid. I am of the view that it does not. Although the public may have a right to carry out sports and games as against the freeholder, it does not have such a right as against the leaseholder unless the leaseholder is itself bound by the terms of the charitable trust. If the leaseholder is bound by the charitable trust, then, again, it would follow that any public use of the land so demised in a manner authorised by the charitable trust would be 'by right' and not 'as of right'.

61. However, the evidence that I have been supplied with, and Mr. Sparrow's application, indicates that the land so demised (and this would appear to extend to the area of land demised for the East Stand) has not been used for public sports and games. The only usage has been pursuant to Bath Rugby's permission (in which case the users are licensees and the use is permissive, and not 'as of right') or use for the

[29] The suggestion from Mr. Sparrow is that they are lessees, but the Council has not given particulars of the occupation.

purposes of footpath type access along the riverside. In my view, that sort of access is plainly usage in the nature of a footpath[30], and not usage that is referable to use of land as a TVG.

Usage over the Rec as a whole

62. In some circumstances, the fact that all of the land over which a TVG is asserted is not directly used for lawful sports and pastimes will not prevent those other parts from being registered. One example, given by Lord Hoffmann in Oxford City Council v. Oxfordshire County Council (*supra*) at [67] is that of ornamental flower beds in a green. Although there is no recreational activity on the flower beds, the recreation that takes place occurs by reference to those flower beds; they are part of the recreational activity.

63. It is a question of fact and degree whether areas of land that are not used for lawful sports and pastimes are to be regarded as part of a single TVG. In the present case the various separated areas of land – the Rugby pitch and stadia; the Leisure Centre; the tennis courts and croquet pitches; are separate and distinct areas that are treated differently as far as their usage is concerned to the remainder of the Rec. As those areas are certainly not used 'as of right' for lawful sports and pastimes, I advise the Authority that even if the remainder of the Rec were to be registered as a TVG, those areas should be omitted from registration.

[30] Indeed the route is shown at Mr. Sparrow's Appendix 9.

Assessment of qualifying usage

64. It is more convenient to consider what is not qualifying usage under the evidence supplied, and then to assess what is left. The following is not qualifying usage:

    (1) Usage of the footpath alongside the River Avon;

    (2) Usage of the Rugby pitch and stadia, leisure centre, tennis or croquet pitches;

    (3) Use of any part of the Rec for organised team games;

    (4) Use of any part of the Rec for informal games;

    (5) Any informal use of the Rec ancillary to games and sports.

    (6) Any performance or entertainment on the Rec, including bonfire parties.

65. The only usages that are referred to in evidence that might qualify as lawful sports and pastimes are:

    - Strolling with family and friends/walking (Mr. Greenwood; Ms. Kilner; Mr. & Mrs. Deacon; Mr. White)
    - Drawing and painting (Mr. Greenwood; Ms. Kilner; Mr. White)
    - Picking blackberries (Mr. Greenwood; Ms. Kilner; Mr. & Mrs. Deacon).

66. Of these I doubt whether picking blackberries is anything other than trivial, and is not of itself a sport or pastime. It may however be something that occurs whilst there is general recreation going on.

67. The applicable test is whether there has been usage of the Rec for lawful sports and pastimes by a significant number of the inhabitants of Bath, which is the asserted locality. There is no mathematical test or yardstick to satisfy, but the usage has to

be sufficient to demonstrate (to the reasonable landowner) that the land is in general use by the local community[31]. The difficulty arises where, as here, land is substantially used by the local community for uses that are 'by right', the application must succeed or fail by reference to such further recreational usage as can be established that is not 'by right', but is 'as of right'.

68. Bearing in mind that the burden lies on the Applicant to establish his case, even having regard to the possibility of drawing inferences as to usage, it is my view that the extremely limited evidence adduced in support of the application does not establish even an arguable case of use of the Rec as TVG by the inhabitants of Bath which goes beyond local usage of this land as a ground for public events, games, sport and recreation. Rather, the evidence that has been adduced demonstrates that save to the extent of the land demised to Bath Rugby, the land has been used by locals as a sports ground, pursuant to the terms of the 1956 conveyance.

69. Should the matter be referred to an inquiry? On the evidence so far adduced it appears to me to be of no utility. I am of the view that the Authority should determine the application on the evidence before it, and that plainly fails to establish the statutory criteria.

70. Should a decision be made now? As I have indicated, Barkas is due to be heard on appeal by the Supreme Court. The Authority may therefore decide not to make a decision until after that appeal has been heard. However, as I have said above I am

[31] See Leeds Group plc v. Leeds City Council [2011] 2 WLR 1010 at [32] per Sullivan LJ; R v. Redcar and Cleveland BC ex p. Lewis [2010] AC 70.

presently unaware of the scope of the appeal; and I would not suppose that any appeal would be heard for a year or so. The Applicant in that case (who was the appellant to the Court of Appeal) has not argued that the 'by right' defence is simply inapplicable, and whilst the Supreme Court is not bound by concessions of law made in lower courts, it does render it unlikely that some wholesale change in the law is being argued. My advice is that the Authority should make its decision on the basis of the law as it presently exists. If prior to the making of that decision I become aware of any more relevant information regarding the appeal (and I have made enquiries of the parties involved), I will advise those instructing me.

Advice

71. I therefore advise the Registration Authority that it should dismiss the Application for Registration of The Rec, Bath as a Town or Village Green pursuant to section 15 Commons Act 2006 on the following grounds:

    (1) That usage of The Rec for lawful sports and pastimes 'as of right' has not been by a significant number of the inhabitants of Bath;

    (2) That usage of the land demised to Bath Rugby plc, and of the Leisure Centre and the tennis and Croquet Courts has not been 'as of right'.

72. This advice should be supplied to the Applicant and the Objectors, who should have an opportunity of commenting upon it before the Authority makes any final decision.

73. If I can assist those instructing me in any respect, they should not hesitate to contact me in chambers.

Leslie Blohm QC

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10th. June 2013