

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

FURTHER ADVICE

**Instructions**

1. On 10<sup>th</sup>. June 2013 I advised Bath and North East Somerset Council ('BANES') acting as registration authority under the Act, that it should, on the evidence presented to it, refuse to register the Recreation Ground, Bath, as a Town or Village Green ('TVG') pursuant to section 15 Commons Act 2006. I also advised BANES that my advice should be circulated to all interested parties, who should have the opportunity to comment upon it before BANES made its final decision.
2. BANES circulated my Advice to the objectors and the Applicant, and asked that any further submissions be made to them by 19<sup>th</sup>. July 2013. I have received the further communications that were sent to BANES. I have been instructed to consider this further information and to (if appropriate) re-consider my Advice.

## Further Information

3. I have been supplied with the following documents:

(1) a letter from Mr. Steve Osgood RTPI RIBA, which asserted:

- (i) That any decision taken by BANES should not pre-date the first meeting of the new Board of Trustees of the charitable trust, in the light of the Decision Review of the Charity Commission dated 20<sup>th</sup>. June 2013<sup>1</sup>.
- (ii) The advice overlooked the fact that use as of right by the beneficiaries of the charitable trust over the last twenty years had in fact been restricted by BANES' erection of permanent or temporary boundaries, in particular the barring of free access from the popular riverside walk to the West.

(2) An E-mail from the Applicant Mr. Sparrow dated 15<sup>th</sup>. July 2013. This enclosed:

- (i) Mr. Sparrow's response to my advice. I set out the gist of that information separately below.
- (ii) Additional information coming to light after November 2012;
- (iii) A copy of the a Lease dated 23<sup>rd</sup>. May 2013 of part of the Rec from Bath City Council to The Trustees of Bath Football Club;
- (iv) The Heads of Terms for the Rugby Club (being the indicative basis of the Recreation Ground Trust's proposals for the Rec).
- (v) The Heads of Terms for the Leisure Centre (being the indicative basis of the Recreation Ground Trust's proposals for the Leisure Centre).
- (vi) Further documents in support of the application from Robin Davies, Susan Macdonald, Susan Johnson, Steve Cossey, Mike Hare, Vanessa

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<sup>1</sup> The decision was in fact dated 12<sup>th</sup>. June 2013. It can be found at:  
[http://www.bathrec.co.uk/bathrec/images/Future\\_of\\_the\\_Rec/20130612\\_-\\_Decision\\_document.pdf](http://www.bathrec.co.uk/bathrec/images/Future_of_the_Rec/20130612_-_Decision_document.pdf).  
The scheme that was approved can be found at:  
[http://www.bathrec.co.uk/bathrec/images/Future\\_of\\_the\\_Rec/20130612\\_-\\_Bath\\_Scheme.pdf](http://www.bathrec.co.uk/bathrec/images/Future_of_the_Rec/20130612_-_Bath_Scheme.pdf)

Light<sup>2</sup>, Reg Midwinter<sup>3</sup>, Roland Griffiths, Vanessa Poole, Sally Roche, William Williamson, and Eleanor Swift.

(3) An undated letter from Mr. Andrew Pate, the Trust Advisor to The Bath Recreation Ground Trust. Although this does not dispute the conclusion that I came to, Mr. Pate suggested that my analysis of the terms of the Charitable Trust Deed<sup>4</sup> was too narrow, and it should have been construed, or interpreted, as permitting informal recreation. If that was so, then the consequence would be that there would be a further and alternative ground on which to refuse the application – namely that there was no relevant use ‘as of right’ at all on the land during the relevant period.

4. The indicative Heads of Terms sent to me by Mr. Sparrow appear to have been overtaken by the Charity Commission’s proposal for the Scheme, and the decision review subsequently carried out<sup>5</sup>. In very broad terms, the Scheme will vary the terms of the trust to give the trustees certain additional powers to deal with the trust property in future. It does not validate past dealings to the extent that they were in breach of trust. The Review acknowledges that the 1995 Lease if effective was not in accordance with the terms of the trust; as was the construction of the indoor sports centre in part on trust land<sup>6</sup>.

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<sup>2</sup> On behalf of Mrs. Diana Light

<sup>3</sup> On behalf of Gerrard Buildings (Bath) Ltd and Mr. Roy Hatch.

<sup>4</sup> Advice, paras. 51 to 53

<sup>5</sup> It is possible that that decision will be subject to further challenge. For that reasons I have set out in this further advice, that will not have any effect on the outcome of this application.

<sup>6</sup> Para. 1.5. Hart J in the BANES case did not make such a finding – see para. [49].

### **Mr. Sparrow's Comments**

5. Mr. Sparrow's covering letter sets out his broad view which is that if (as he contends) the terms of the 1995 lease are inconsistent with the terms of the charitable trust, then the lease is invalid, and the local inhabitants have full 'as of right' access to the Rec.
  
6. Mr. Sparrow's formal response is 13 closely typed pages long. I annexe it to this Advice as Annexe B. For convenience and ease of reference I would summarise the various points that Mr. Sparrow makes in that document as follows:
  - (1) The 1956 conveyance gave the local inhabitants rights to enjoy sports and pastimes on the Rec. The 1995 Lease, all subsequent leases and the construction of the Leisure Centre were all illegal acts, being contrary to the terms of the 1956 Conveyance<sup>7</sup>. Therefore, the residents of Bath have had 'as of right' access since 1956. Other persons who have carried on sports and pastimes on the land have had 'by right' access. Mr. Sparrow has made specific submissions to me referring to the 1922 and 1956 conveyances; Hart J.'s judgment in 2002; and the subsequent scheme set up by the Charity Commission in respect of the Rec.
  - (2) I should have regard to the proposals being made for the future development of at least part of The Rec before coming to my conclusion; Mr. Sparrow suggests that if I am unable to consider these matters I should recommend that a Public Enquiry be held, at which such matters can be ventilated.

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<sup>7</sup> The assertion of illegality, and a contention that virtually all of the dealings with the Rec that related to Bath Football Club after that date were both illegal and (either on occasion or throughout) made in bad faith is to be found developed by Mr. Sparrow in his Document 2: 'Additional information on the Town Green Application for the Bath Recreation Ground for consideration by the Barrister'.

- (3) My advice should uphold the charity rules relating to the Rec; and if it fails to do so then the Attorney-General will be obliged to bring further proceedings against the BANES.
  - (4) Because BANES have been responsible for illegal dealings with the Rec, they should not be part of the process of determining this application.
7. I propose to consider the additional information and submissions in the following sequence:
- (1) Mr. Sparrow's objections to the approach adopted in determining this Application;
  - (2) Bath Rugby's submissions as to the scope of permitted recreation under the 1956 Conveyance;
  - (3) Consideration of the merits of the Application in the light of further evidence submitted.

**The Correct Approach to the Application.**

8. Any use of or development on the Rec has potentially engaged three areas of law. There may be more but for present purposes these are the relevant ones. The first is that any development on the property should have complied with the relevant planning legislation. The local planning authority is supposed to supervise breaches of that legislation, and to consider applications for planning permission. The second arises because the Rec is subject to charitable trusts. The person in whom the land is vested may either be restricted in the manner in which he can lawfully deal with the land; or obliged to deal with it in a certain way; or certain persons might have

particular rights in respect of the land. The third is that because the Rec is to a large extent open land, TVG status may have been acquired in respect of it.

9. There may be a degree of overlap between these areas of law. Thus, in the present case, those citizens of Bath who carry out sports or games on the land may do so (whether they know it or not) pursuant to the charitable trusts on which the land is held. That, in turn, may affect whether the land should be registered as a TVG, or not. But it would in my view be quite wrong to assert that because certain activity is in breach of the charitable trust, then it necessarily follows that it is relevant to the question as to whether it should be registered as a TVG. Whether it does, or does not, depends solely on what Parliament has laid down as the test for a TVG, and whether that test is satisfied.
  
10. If it does not matter for the purposes of the present TVG Application whether the complained about activity was or was not a breach of trust, then it would be unhelpful for me to try to come to a decision as to whether it was a breach of the terms of the charitable trust. My view would not matter, and it might well be made on incomplete evidence. The remedy, if a citizen of Bath is aggrieved by what is said to be a breach of trust, is for the trustees to take action; and if they will not, for the Attorney-General to bring proceedings if he thinks fit.
  
11. There is no basis for the Authority to act other than in a manner that I advised in my previous advice. Specifically:

- (1) The Authority must not take into account the consequences of any prospective future development. That is immaterial to its considerations. That is not part of the statutory test contained within section 15 of the Commons Act 2006.
- (2) The Authority should not have regard to whether the construction and use of the Rugby Stadium and/or the Leisure Centre amounted to a breach of the terms of the charitable trust. That too is immaterial to its decision. The Authority is required to consider what use was made of the Rec by the inhabitants of the locality, and to the extent that it was made, why it was made; not why use was not made of the Rec.
- (3) The Authority is under a statutory duty to consider this application, and to do so fairly and properly. But decide it, it must.
- (4) The Authority, acting as TVG Registration Authority, does not have a general power to refer the historic and/or future use of the Rec to a public enquiry. If the Authority is of the view that there should be a public enquiry for the specific purpose of its deciding whether or not to register the land as a TVG (and such an enquiry would be for the purpose of considering the extent and quality of use of the land, and not a general review of matters such as the propriety of the leasehold arrangements entered into between Bath Rugby and BANES) then it may do so.

12. There are some aspects of Mr. Sparrow's further submissions that flatly contradict the legal advice that I have given the Authority. Whilst I might simply say that my legal advice stands, it may be that my advice was not have been as clearly expressed

as it might have been. Therefore, in respect of certain legal matters raised by Mr. Sparrow, I advise as follows:

(1) Mr. Sparrow has confused the terms 'by right' and 'as of right'. This is understandable as these are legal terms of art, and they do not bear the meaning that they might be thought to have if used in ordinary speech. 'As of right' refers to the quality that the use of the land must have in order for it to count towards the test for registration. It means 'as if of right', or to put it another way, in the same manner as a person would use the land if he was entitled to do so. It presupposes that the person doing the act does not have a right to do it at that time. 'By right' by contrast means 'by reason of a pre-existing right'. Therefore, if a person already has a right to use the land for recreation, then the law does not allow him to count his usage towards use 'as of right'. Mr. Sparrow suggests that citizens of Bath who are beneficiaries of the charitable trust have a right to carry out sports and games on the Rec, and that therefore their use should be considered to be 'as of right'. That is not correct. Their use of the Rec for such purposes would be 'by right' and not 'as of right'.

(2) By contrast, Mr. Sparrow suggests that those who use of the Leisure Centre use it 'by right', because they had the right to use the land pursuant to the charitable trust. The fact is that they used the land because they were permitted to do so by the proprietors of the Leisure Centre. They were, considered objectively, to be entering on to that part of the Rec by virtue of a license, either express or implied. Because they were licensees, then their use of the land could not be 'as of right'. I would add that even if Mr. Sparrow's analysis were correct, and the



users of the Leisure Centre were to be treated as being on the Rec 'by right', then their use of the land would also not be 'as of right' – see (1) above.

- (3) Mr. Sparrow suggests that the effect of the construction and use of the Rugby facilities after 1995, and the construction of the Leisure Centre, should be ignored because they were contrary to the terms of the charitable trust. Section 15 of the Commons Act 2006 can only be satisfied if there has been appropriate qualifying use of the land over the relevant twenty year period. If not, it does not (in my view) matter why there has been no sufficient use over that period.

### **The Construction of the 1956 Deed**

13. I turn next to consider the terms of the charitable trust arising under the 1956 Deed. Mr. Pate contends that the 1956 Deed should be construed so as to extend to any form of informal recreation at such times as it is made available by the Trustees for informal games and sports. The basis of this contention is the suggestion that (in the alternative):

- (1) The right to carry out 'games and sports of all kinds' should extend to informal recreation. All recreational use is in some form 'competitive';
- (2) Informal recreation is ancillary to the right to use the land for 'games and sports of all times'. The trustees cannot in practice prevent such informal recreation taking place;
- (3) In BANES v. A-G at [48] Hart J held that it was necessary to read into the 1956 conveyance the words 'to maintain the same as a recreational facility available for the benefit of the public of large'. On that basis, the trust is wide enough to include non-competitive informal recreation.

**14.** In my view:

- (1) The express provisions of the 1956 conveyance permits the carrying on of games and sports. On its true construction those are the only expressly permitted uses. The phrase 'of any kind' indicates that this is to be construed widely. A wide construction is not sufficient to make the words refer to conduct that is not in its nature at least potentially competitive in the manner that I indicated in my previous advice.
- (2) It is right that informal recreation may be ancillary to an authorised use, and if so it is 'by right'. Thus, if the public attend to watch sport or a carnival and in the course of so doing have a picnic, that would I think properly so called an ancillary use. However, the public do not have a right (for example) simply to have a picnic on the land, or to conduct a *passagiata*<sup>8</sup> per se. It is a question of fact whether any particular act of informal recreation falls within the scope of the 1956 conveyance, either by being within the expressly authorised uses, or ancillary to them.
- (3) The description of the land as a 'recreational facility' in BANES was not used by Hart J. as a means of defining the charitable purpose arising under the 1956 conveyance. The case did not consider the precise limitation on the trusts in question, and in my view Hart J. uses the description as shorthand for a facility for the carrying out of sports and games of all kinds.

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<sup>8</sup> A stylish and leisurely ramble – noted as a potential feature of TVG use by Lord Hoffmann in R v. Oxfordshire County Council ex p. Sunningwell PC [2000] 1 AC 335.

**The merits of the Application in the light of further evidence submitted.**

15. There is some further evidence of use of the land that might not (on my analysis of the scope of the 1956 conveyance) fall within permitted user of the land, and which might therefore be use 'as of right' and not 'by right'. This is contained within Mr. Sparrow's Document 7, and I have tabulated it at Annex C to this Advice. It should be read together with Annexe A of my earlier Advice.
  
16. Having considered the evidence afresh, I remain of the view set out at paragraphs 64 to 70 of my earlier Advice. Indeed, the additional evidence supplied in my view seems to confirm it. The character of the Rec is plainly that of a ground for sports, games and public functions. The usage of the Rec for lawful sports and pastimes falling outside of the authorised 'by right' uses under the charitable trust appear to me to be minimal. That may in part be explained by Mr. Griffiths' evidence that the Rec is a dog-free environment. In many such applications, often in respect of rougher ground than one finds at the Rec, dog-walking forms a substantial part of the basis of the claim. That is absent here.
  
17. It follows therefore that my advice remains as it was in my earlier advice. There is no reasonable prospect of Mr. Sparrow's application succeeding even if an Enquiry is held. The Authority should therefore determine the application on the evidence before it, and (I advise) should dismiss the application for the reasons set out in paragraph 71 of my earlier advice.

18. If there is any matter arising from this further advice that the Authority would wish to have clarified or explained, please do not hesitate to contact me in chambers.

Leslie Blohm QC

27<sup>th</sup>. September 2013

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