ADVICE

Application to register land as a new town green in Walton-on-Thames under the reference number 1871

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1. I am instructed by Surrey County Council in its capacity as commons registration authority (the registration authority) to advise on an application to register land in Walton-on-Thames (the application land) as a new town or village green (TVG) under the Commons Act 2006, s.15(2) (the 2006 Act).

2. The application land is located at the junction of Severn Drive and Rydens Road on the north-west side of the care home known as Sherwood House. Its freehold is vested in the Official Custodian for Charities which holds it on behalf of the trustees of The Walton-on-Thames Charity (the charity).

3. It is not, I think, in dispute that the application land had been used by the public for lawful sports and pastimes for more than 20 years before the date of the TVG application (which is dated 31/09/2014 and whose receipt was acknowledged by the registration authority on 3/10/2014) and that such use was continuing at that date. Evidently prohibitory signage was erected sometime in October 2014 but nothing turns on this.

4. The only contentious issue is whether the public's use of the application land was "as of right" which is one of a number of pre-conditions which has to exist if registration is to be justified. It is, I think, being contended that, following the decision of the Supreme Court in *R (Barkas) v North Yorkshire County Council [2015] AC 195*, as the application land had been made available by Elmbridge Borough Council (EBC) for public recreation in the exercise of its statutory powers user was "by right" and not "as of right" and so non-qualifying. As a matter of law, once the application land has been committed for public recreation under statutory powers (which have nothing to do with the acquisition of village green rights) EBC were not obliged to draw to the

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public's attention that their use of the application land was permitted in order for it to be "by right" rather than "as of right".

5. The basic point is that where local inhabitants recreate on land which has been made available to them as recreational open space in the exercise of statutory powers, they enjoy a public right, or a publicly based licence, to do so (see *Barkas* at paras [20]-[30] – *Barkas* was applied in *R (Newhaven Port and Properties Ltd) v East Sussex CC [2015] AC 1547* – where it was found that byelaws (of whose existence the public were unaware) had conferred an implied revocable permission to go onto the land) such that the use will be permissive and will not justify registration as a TVG).

6. I have had a good look at the land on *Google earth* and can see that we are dealing with amenity open space enclosed by hedgerows and trees. The land is open and flat and is eminently suitable for informal recreation. There are two benches and (I believe) three bins for dog faeces. There is no evidence that the public's access was hindered or interrupted in any way and in view of its location in a populous area with an evident dearth of green space elsewhere, it seems unarguable that the land would have been used for qualifying purposes for the requisite period. I might perhaps add that the aerial photo shows a cross-field path the effect of which is to enable pedestrians to cut the corner at the road junction. At all events, until fairly recently the application land was actively managed by EBC and there is a large volume of written evidence (which I have read) which confirms its long-standing use for informal recreation by a significant number of the inhabitants of the relevant locality which is the electoral ward of Walton South. For the record, the application is supported by the written evidence of 124 witnesses (there are many joint statements) of whom (by my reckoning) more than 50 individuals have lived locally for more than 20 years.

7. There is only one objector and that is the charity who say that in 1966 the application land was included with land which was leased by the charity to Walton and Weybridge Urban District Council for a term expiring in 1973. I have not seen this deed but we are told that there was a user covenant limiting the use of the land as a children's play area.

8. We are then told that in 1977 the entire site (including the application land) was repossessed by the charity in order to facilitate the construction of the neighbouring care home. In 1988 the charity granted EBC (in return for a nominal consideration) a licence to use the application land as a public open space which was evidently renewed annually until 1992. I have not seen these documents.

9. In 1994 (being 20 years before the application to register was made) the charity leased the application land to EBC for a term of 5 years commencing on 1/01/1992 and expiring on 31/12/1997 at a rent of £350 pa. A copy of this lease is with my instructions. The lease included covenants which imposed a duty on EBC to keep the land tidy and in proper repair and condition and not to use it for any purposes other than as a recreation ground. We are also provided with copies of both the lease and counterpart dated 26.6.1997 showing that for a term of 5 years expiring on 31/12/2002 the application land was again leased by the charity trustees to EBC for a rent of £350 pa. The lease also included covenants which imposed a duty on EBC to keep the land tidy and in proper repair and condition and not to use it for any purposes other than as a recreation ground. The 1997 lease was renewed on virtually the same terms in 2002. We are provided with an unsigned lease but an executed counterpart in the same terms dated 4/12/2002. The renewed lease was for a term expiring on 31/12/2006 at a slightly increased rent of £400 pa. I also observe that there was a landlord-only break clause. The lease was again renewed in 2008 for a term expiring on 31/12/2012. Again, we have an unsigned lease but an executed counterpart lease dated 28/02/2008. This time there is an either party break clause. I should perhaps also mention that in the 2002 and 2008 leases the charity trustees expressly contracted on behalf of the Official Custodian for Charities who, as previously indicated, holds the application land on behalf of these trustees.

10. It follows that from 31/12/2012 the charity held over on a tenancy at will until its termination on 30/09/2014 by a solicitor's letter of the same date. This letter also mentions the fact that in July 2013 the charity took steps to remove travellers from the application land. The letter also flagged up the prospect of

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imminent prohibitory signage which, of course, is what occurred. There were (as I have discovered myself from EBC's planning register) three withdrawn applications by the charity to obtain planning permission for office development and associated infrastructure on the land (under reference nos: 2014/3062; 2014/4008; 2014/4512) which appear to have come up against a wall of local opposition. It seems obvious that the application to register is aimed at preventing development of any kind on the application land.

11. As the application in this case followed the reforms contained in the Growth and Infrastructure Act 2013, I ought perhaps to mention trigger and terminating events under s.15C of the 2006 Act. The effect of s.15C (which came into force on 25th April 2013 – and the provision applies whether a trigger event occurs before or after this date) is that the right to apply to register land as a TVG ceases where a trigger event relating to the development of the land occurs, and becomes exercisable again only if a corresponding terminating event occurs. The trigger and terminating events are identified in the new Sch.1A to the 2006 Act. What we have here is a statutory pause in that the right to apply to register only revives on the occurrence of one of the terminating events specified in the Sch.1A.

12. Under s.15C, applications to register will not be possible in the case of land which has planning permission or where there has been a publicised planning application or is identified for potential development in a local or neighbourhood plan (including draft development plans). However, land would still be available for registration where no development is either proposed or else is the subject of on-going community consultation. The statutory pause would, however, be lifted in a case where an application for planning permission was withdrawn or refused and where the refusal was not challenged or where all means of challenging the refusal had been exhausted or in circumstances where, if permission had been granted, any period within which the development must be begun had expired without the development having been begun. If the trigger event has been ended by a terminating event any period of interruption under section 15C is to be disregarded (see s.15C(8)). As I say, there were three publicised planning applications all of

which ended up being withdrawn and in such circumstances the law presumes that qualifying user continued until the date of the application on 31/09/2014, from which it follows that this was an application made under s.15(2) of the 2006 Act.

13. In short, the application land was leased to EBC for the whole of the qualifying period (less one day) on the basis that it would be used and maintained by EBC and their lawful visitors as a recreation ground. In my view, these arrangements involved the exercise by EDC of their powers under the Public Health Act 1875, s.164, and the Open Spaces Act 1906, ss.9 and 10.

14. The 1875 Act enables a local authority to "purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds". Sections 9/10 of the 1906 Act authorises the acquisition or lease of land and its management with a view to its enjoyment by the public as an open space. Under s.10 open space under the 1906 Act is to be held and administered in trust to allow such land to be enjoyed by the public as an open space and for no other purpose (this is the so-called recreation trust). Land held for the purposes of these Acts confers a right on members of the public to use the land for open air recreation and accordingly falls outside the ambit of the 2006 Act on the principle of *Barkas*.

15. It follows from the above that the application land is not registrable on the ground that use throughout the qualifying period was not "as of right" but was "by right", namely pursuant to the statutory right of the public to be on the land and to use it for recreational purposes given that it was held and maintained by EBC pursuant to the Acts of 1875 (s.164) and 1906 (ss.9/10). Clearly the application land had been allocated for public use and for no other reason. The position is obviously different from that of a private owner, with no legal duty and no statutory power to allocate land for public use.

16. Because the applicant has failed to satisfy all the elements necessary to justify the registration of the land as a TVG my recommendation to the registration authority is that the application to register should be rejected.

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17. Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be *"the reasons set out in the advice of counsel dated 22/06/2016".*

William Webster

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22nd June 2016