ANNEX 2

In the Matter of

An Application to Register

Land at Mercury Close Play Park, Bampton

As a New Village Green

OPINION

of Mr. VIVIAN CHAPMAN Q.C.

5th. March 2008

Oxfordshire County Council

Legal & Democratic Services

County Hall,

New Road,

Oxford OX1 1ND

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Introductory

[1] In this case I am asked to advise Oxfordshire County Council ("OCC") on its duties as commons registration authority in relation to an opposed application under s. 15 of the Commons Act 2006 ("CA 2006") to register land known as Mercury Close Play Park, Bampton as a new village green.

The application

[2] By an application dated 30th May 2007 in prescribed Form 44, Mr Paul Simmons, Mr Gary Gummer and Ms Rose Snow applied to OCC under CA 2006 s. 15(2) to register Mercury Close Play Park as a new green. The case put forward in the application is that a significant number of the inhabitants of the parish of Bampton have indulged in lawful sports and pastimes on the application land as of right for a period of at least 20 years and continued to do so at the date of the application. The application was supported by (a) the prescribed statutory declaration, (b) a written Justification for Application and (c) a number of letters from local inhabitants.

[3] On 1st August 2007, I advised that the application was "duly made" and OCC proceeded to publicise the application, inviting objections.

The objection

[4] There has only been one objection and that is from Bampton Parish Council ("BPC") as owner of the application land. The objection is contained in a letter dated 1st October 2007.

[5] The objector does not dispute that the application land has been used for lawful sports and pastimes by a significant number of the inhabitants of Bampton for a period of at least 20 years or that such use was continuing at the date of the application. The objection takes one point only, i.e. that recreational use of the application land has not been use "as of right" because it was use by permission of the landowner.

[6] The objector does not rely on any express grant of permission. Instead it contends that permission should be inferred from two circumstances:

- When BPC purchased the application land in 1985, it was fenced on four sides except for an opening the size of a farm gate on one side. BCC subsequently installed a barrier-rail across the opening to prevent children from running into the road.
- In August 2000 BPC erected two signs on the application land which remained in position until August 2006. They read (so far as relied upon):

BAMPTON PARISH COUNCIL

Welcome to this Play area

NO CYCLING
OR DOGS PLEASE

Reply to objection

[7] On 5th November 2007, the applicants replied to the objection. The applicants have researched the minutes of BPC and contend that there is no evidence that the alleged signs were erected on the application land. However, they accept that the minutes show that a "No Dogs Allowed" sign was erected on the application land in 1988 and was recorded as missing in 2006.

[8] I find it odd that the applicants rely on the minutes in relation to the alleged signs. I would have thought that if a significant number of local inhabitants had used the application land for recreation for over 20 years, some of them would recollect whether or not there were any signs on the land and, if so, what they said.

The "by right" issue

[9] The issue raised by the objector is whether recreational use of the application land was permissive. However, it appears to me from the papers that have now been produced that there is another, and logically prior, issue. That issue is whether the circumstances in which the application land was purchased conferred on the public a legal right to use the application land for recreation. If so, there is authority that recreational use of the land by local people would be "by right" rather than "as of right". This was the issue mentioned in para. 16 of my Opinion of 1st August 2007.

[10] It appears that the application land was designed as a children's play area to serve the Mercury Close development by the MoD in the 1960s. Subsequently, there was more development around the application land. It appears from extracts from BPC's minutes in the applicants' letter of 29th October 2007 that in 1985 BPC decided to purchase the application land (described as "the playground") at a valuation by the District Valuer, with the assistance of a loan sanctioned by the Department of the Environment.

[11] By a Conveyance dated 29th January 1987 the application land was conveyed by the Secretary of State for Defence to BPC for a consideration of £250. The 1987 Conveyance does not specify the statutory power under which the land was purchased. Clause 3 of my copy of the 1987 Conveyance is only partly copied. It contains a restrictive covenant and this may contain some relevant evidence as to the purpose of the purchase. I ought to see a full copy of the 1987 Conveyance.

[12] A parish council is a creature of statute and it can only buy land under some statutory power. It is not necessary for the conveyance to specify precisely under what statutory power the land was purchased: *A-G v Poole Corporation* [1938] Ch 23. It is therefore necessary to consider the 1987 Conveyance and the surrounding circumstances in order to infer the statutory power that was in fact used. It seems to me material that the land was already a children's playground and BPC clearly purchased the land in order to continue, and indeed enhance, its use as a children's playground.

[13] It seems to me that there are three statutory powers which are in point.

[14] The first statutory power is s. 9 of the Open Spaces Act 1906. This section empowers any local authority to purchase any open space. By s. 1 of the 1906 Act, a parish council is a local authority for the purposes of the Act. By s. 20, an open space is defined as "any land, whether inclosed or not, on which there are no buildings or of which no more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied". It seems to me that the application land was "open space" as so defined before it was purchased by BPC. By s. 10, any open space purchased under the Act is held "in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act...".

[15] It seems that if land is held on a statutory trust for public recreation it cannot be registered as a new green since the essence of the requirement that user should be "as of right" is that user is trepassory and not pursuant to any legal right. This point was discussed by the House of Lords in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889. See:

- Lord Bingham at paras. 3 & 9
- Lord Scott at paras.29-30 (who expressly discussed the effect of purchase under the 1906 Act)
- Lord Walker at paras 87-88.

[16] The second statutory power is s. 164 of the Public Health Act 1875 which gives power to any urban authority to purchase land for the purpose of being used as public walks or pleasure grounds. By Local Government Act 1972 s 180 Schedule 14

Pat II para 27 a parish council can exercise this power. Although s. 164 does not expressly create a statutory trust for public use, it has been construed in a series of cases as giving the public a legal right to use the land: see e.g. *Hall v Beckenham Corporation* [1949] 1 KB 717. It is also to be noted that both s. 10 of the 1906 Act and s. 164 of the 1875 Act are treated as creating statutory trusts for the purposes of Local Government Act 1972 s 126(as amended) which in certain circumstances gives a parish council power to override the statutory trusts by appropriation.

[17] The third statutory power is s. 124 of the Local Government Act 1972 which gives power to a parish council to acquire any land by agreement *"for the purposes of (a) any of their functions under this or any other public general Act or (b) the benefit, improvement or development of their area."*

[18] It seems to me that the powers under s. 9 of the 1906 Act and s. 164 of the 1875 Act are the powers which most closely fit the purchase of an existing children's play area for the purpose of continuing and enhancing that use.. Section 124 of the 1972 Act is a general power of acquisition not restricted to the purchase of land for recreational purposes.

[19] The Report of Mr Ian Dove QC as a non-statutory inspector appointed by Bath & North East Somerset Council in the case of The Recreation Ground, Keynsham (undated but delivered earlier this year) is in point. There was an application by local residents to register the Recreation Ground as a new green. The Recreation Ground was already in existence when it was conveyed to Keynsham UDC in 1949. The 1949 Conveyance did not specify the statutory power relied upon but the inspector held that the conveyance must have been entered into by the council under some statutory power and that the power under s. 164 of the 1875 Act was the most obvious power to have been used. Accordingly, use by local people was "by right" rather than "as of right" and he recommended that the application failed.

[20] I am inclined to think that the most probable inference on present evidence is that:

- the application land was purchased either under s. 9 of the 1906 Act or s. 164 of the 1875 Act,
- it is accordingly subject to a statutory trust for public recreation, and
- the land is not registrable as a new green because user has been "by right" rather than "as of right".

The permission issue

[21] If I am wrong on the "by right" point, it is necessary to consider the objector's case that recreational use of the application land was permissive.

[22] It was established by the decision of the House of Lords in the *Beresford* case that:

- permission can be implied as well as express
- permission cannot be inferred from acts which encourage or facilitate recreational use of the application land, and
- to preclude user "as of right" permission must be revocable or temporary: an open-ended permission is consistent with use "as of right".

[23] Thus the fact that BPC maintained the application land as a children's playground cannot amount to implied permission of such a character as to render use not "as of right". This was precisely the position in the *Beresford* case.

[24] Nor can I see how the fencing of the application land amounted to the grant of implied permission. It is not suggested that local people were ever prevented by fencing from entering the application land. The barrier erected by BPC was not to prevent access but to safeguard children from rushing out into the road. It encouraged and facilitated recreational use of the land.

[25] This leaves the signs. There are four aspects of the signs to consider:

- The words "Brampton Parish Council",
- The words "Welcome to this Play area"
- The prohibition on cycling, and
- The prohibition on dogs.

[26] The applicants seem to deny that there were signs bearing the words "Brampton Parish Council". However, I cannot see how those words in themselves can amount to the giving of implied temporary or revocable permission to use the land for recreation. They are simply a statement as to ownership of the land. All land is owned by somebody and so every new village green is created by trespass on someone else's land. I do not see that it is relevant whether the users know the identity of the landowner or not.

[27] The applicants also seem to deny that there were signs bearing the words "Welcome to this Play area". However, I do not think these words are capable of giving rise to an inference of temporary or revocable permission. The words simply encourage users to enjoy the land.

[28] The applicants also seem to deny that there were signs which contained a prohibition of cycling. If the case turned on this point, I think that there would have to be a public inquiry to ascertain whether there were signs bearing those words or not. However, even if it were found that there were signs on the application land bearing these words, I find it difficult to infer from them the grant of temporary or revocable permission for the non-cycling recreational activities which were encouraged and facilitated. It has been established by the decision of the House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 that land can be registered as a new green based on limited recreational activities. In these circumstances, the effect of a sign prohibiting cycling seems to be that other recreational activities are tolerated, but without any time limit or reservation of a power of revocation.

[29] It seems to be common ground that there were signs prohibiting dogs during at least part of the relevant 20 year period. Precisely the same point arises as in relation to the prohibition on cycling. There seems to have been encouragement of non-dog recreational activities which was neither temporary nor time limited. Further, it appears from the minute of 9th November 1988 that these signs may well have been erected pursuant to bye-laws. I think that it will be necessary to obtain and examine the relevant bye-laws before reaching any definite conclusion on this point.

[30] My view, on present evidence, is that the objector has not put forward evidence which negatives user "as of right" by giving rise to an inference of permission.

Action

[31] In my opinion, it would be wrong either to accede to or reject the application on present evidence. Equally, it would be wrong to proceed straight to a public inquiry. Neither side has yet considered the important "by right" point and they must be given a reasonable opportunity to do so. It may well be possible to dispose of the application on paper consideration.

[32] In my view, a copy of this Opinion should be circulated to the applicants and objector and they should be requested to consider the implications of this Opinion and to supply to OCC such further evidence and submissions as they think fit within 6 weeks of circulation.

[33] I would like to study a full copy of the 1987 Conveyance to see if clause 3 throws any light on the case.

[34] I would like to see a copy of the bye-laws mentioned in the minutes of 9th November 1988.

[35] If any party says that anything turns on any of the BPC minutes, I think that I ought to see a copy of the actual minute relied upon rather than rely on a summary of its contents.

[36] When all further evidence and submissions are to hand, I would be glad to advise further as to whether the application can be disposed of in writing or whether a public inquiry is necessary.

The specific questions

[37] I therefore deal with the specific questions in para 14 of my Instructions as follows;

- (a) I do not consider that the application can be said definitely to stand or fall based on the existing evidence and representations of the parties
- (b) It seems to me that the only factual issue between the parties (on present evidence) is the existence of the signs alleged by BPC. However, for the reasons discussed above, I am not persuaded that, even if BPC proved the existence of the signs, that would get BPC home on a case of implied permission. I think that the case is therefore likely to turn on legal issues.
- (c) I do consider that, since neither side has considered the "by right" point, it is essential that an opportunity should be given to the parties to produce further written evidence and representations and that it would be wrong at this stage to proceed directly to a public inquiry.
- (d) Written directions accompany this Opinion.

- (e) I am happy to prepare in due course a written Report to OCC advising whether the application should be accepted or rejected (or whether any further investigations are required).
- (f) Generally, I have nothing to add.

Vivian Chapman QC
5th March 2008
9, Stone Buildings,
Lincoln's Inn,
London WC2A 3NN