In the matter of the Commons Act 2006
And in the matter of land at Blackbird Leys Fields, Oxford

Further advice

Introduction

The application for registration

1. The County Council, in its capacity as registration authority under the Commons Act 2006 ("the Registration Authority"), has received an application to register as a town or village green certain land at Blackbird Leys, Oxford ("the Application Land"), made by Mr William Clark of 108 Pegasus Road. The application was registered on 25 July 2011 as having been duly made. It was supported by representations from various local residents as to the use they had made of the Application Land. The Applicant subsequently submitted a "petition" (in reality, further evidence) from himself; also letters from two others.

2. An objection has been made to the application by Oxford City Council, dated 5 October 2011 ("the Objection").[1] That letter requested that certain matters be dealt with as a preliminary issue. This was followed by further representations from the City Council, undated but sent under cover of a letter dated 26 October 2011.

3. The County Council, in its capacity as freehold owner of part of the Application Land, has submitted an objection to the Application, dated 6 October 2011, which adopted and agreed with the objection submitted by the City Council. It also supported the request for certain matters to be dealt with as a preliminary issue.

[1] Note that the letter enclosing this objection was produced in such a way that the date is altered each time it is printed, so that it is referred to in the papers as having been written on various dates.

4. The Oxford Sports Council also objected to the application, by a letter dated 2 October 2011, although it did not offer any evidence or legal argument to support its objection. Ms Porter, of 18 Trinity Road, in a letter dated 27 September 2011, wrote to support the construction of a new swimming pool on part of the Application Land, but did not formally object to the Application as such.

My preliminary advice

5. I have already briefly considered this matter, in a preliminary advice dated 21 December 2011.

6. I noted that, on the basis of the material supplied by the Applicant, there seemed to be at least a reasonably strong likelihood that all or some of the Application Land had been used by local people for lawful sports and pastimes for the relevant period. Whether that was so, how much of the Land was used, and whether those who used it were the inhabitants of a neighbourhood or a locality, in the sense in which those terms are used in the 2006 Act, would need to be tested at an inquiry.

7. However I also noted that, even assuming that the Land (or at least some of it) had indeed been used for lawful sports and pastimes for the relevant 20-year period by inhabitants of a qualifying locality or neighbourhood, it would be necessary to consider carefully the legal basis on which such use had taken place, to see whether or not it had been, or even could have been, "as of right". And on the basis of the material supplied by the City Council, it seemed to me that there was at least a reasonably strong likelihood that all or some of the use of the Application Land for lawful sports and pastimes had not been "as of right", in that it has been by permission.

8. Clearly it is for the Applicant to demonstrate that the use relied upon has been as of right. The Objector has put forward arguments to suggest that that the use has been by permission; at the time of giving my preliminary advice, I had seen nothing from the

Applicant to refute this. However, as I noted, there might have been other documentary material relevant to this matter. And both parties should be given an opportunity to make legal or other submissions. But if the Applicant were to be unable to make out his case on this issue, there would be no point in going on to hold an inquiry – which could be both time consuming and expensive – into the nature and duration of the use of the Land.

9. I therefore suggested that the parties be invited to make written submissions on this preliminary issue – namely, what was the legal basis of any use of the Application Land by local people for lawful sports and pastimes over the relevant 20-year period, and in particular was such use by permission? On receipt of those representations, I would then advise further as to whether the application could be determined without further ado, or whether it needed to go on to an inquiry.

10. The Registration Authority accordingly invited the parties to make written submissions in the light of that preliminary advice; and both took advantage of that invitation. I am accordingly now asked to re-visit the matter in the light of the material initially before the Registration Authority and those further submissions. For ease of reference, this advice incorporates (so far as still relevant) and supersedes my preliminary advice.

The documentary evidence

11. The Objection and the further representations by the City Council between them referred to a number of documents, of which copies were enclosed, as follows (in date order):

16 April 1963, approved by full Council, 22 April 1963	Minutes of the City Council's Estates Committee	Objection, Appendix 2
2 August 1984	Agreement relating to Redfield Sports Hall, between County Council and City Council	Further representations

26 August 1987	Joint User Agreement between County Council and City Council	Objection, Appendix 5
26 August 1987	Lease between County Council and City Council	Objection, Appendix 6
8 July 1996; confirmed by Secretary of State, 23 September 1996	Byelaws made by City Council	Objection, Appendix 3
18 January 2006	Licence for alterations to Leisure Centre	Further representations, Annex (c)
9 November 2010	Deed of termination, between County Council, City Council and Oxford and Cherwell Valley College	Further representations, Annex (b)
9 November 2010	Deed of surrender of lease, between County Council and City Council	Further representations, Annex (b)
9 November 2010	Lease between County Council and City Council	Objection, Appendix 6.

12. In the event, no challenge to the validity of any of these documents has been made by the Applicant; and he has chosen not to make any comments on them, nor to submit ant further documents. I have therefore examined the position as to the ownership of the Application Land as disclosed by the Objectors' documents, as listed above, taking them at face value.

13. Approximately two fifths of the land that is the subjection of the application is owned freehold by the Oxford City Council. This land was acquired by the City Council in the 1890s, and was apparently appropriated in 1963 for "public walks and pleasure grounds purposes in accordance with section 164 of the Public Health Act 1985". Byelaws were then apparently made under section 164 and under the Open Spaces Act 1906, regulating the use of the land by the public. I say "apparently" in both cases because the relevant papers produced by the City Council do not identify the land concerned with precision – although the City Council has subsequently clarified that

matter, and I am satisfied, at least on the balance of probability, that the papers do indeed refer to the land in question.

14. As for the remainder of the Application Land not owned by the City Council, most of it was the subject of a joint user agreement entered into in 1987 by the County Council, as freehold owner, and the City Council. The land involved was indicated on the amended plan (originally Appendix 4 to the Objection) produced with the further representations from the City Council, and in more detail on the plan forming part of the agreement. The latter plan identified three areas of land, bounded in green, blue and red (referred to as "the Red Land, the Blue Land" and "the Green Land"), which together constituted the whole of the Application Land other than the portion owned by the City Council.

15. The substantive parts of the agreement itself applied to the Red Land and the Green Land. The recitals to that agreement provided that the City Council wished to provide recreational facilities for the inhabitants of the district, under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 and all other powers in that behalf. Clause 1 of the agreement provided that the Red Land and the Green Land were jointly to be used for educational, recreational and community purposes.

16. The Red Land and the Blue Land were the subject of lease granted by the County Council to the City Council, also in 1987. That lease did not contain recitals equivalent to those in the joint user agreement, and did not state the power under which the city Council leased the land. But it did contain a restriction (in clause 2(16)) that the City Council should not use the premises other than as a recreation education social and leisure centre.

17. The joint user agreement and the 1987 lease were both superseded by a further lease dated 9 November 2010, for a term staring on 1 October 2006, which thus applies to all of the application land other than the portion owned freehold by the City Council – that is, the Red Land, the Blue Land and the Green Land. This lease contained a

restriction (in clause 2.17) that the City Council shall not use the land other than as a recreation education social and leisure centre. The 1987 agreement superseded a similar agreement, albeit relating to a smaller area, made in 1984.

The submissions of the parties

The Applicant's submissions

18. In his initial application, the Applicant did not deal with the issue of the legal basis for the use of the Application Land by local people. In his supplementary representations, as I have noted above, he did not submit any further documentary evidence, but relied on brief legal submissions. These were to the effect that nothing had ever been done that formally and overtly made it plain to users of the Land that their use of it had been with or by permission. He relied in particular upon the judgment of Janet Smith J in *R (Sunderland) v Beresford* [2001] 1 WLR 1327 and the speech of Lord Hoffmann in *R (Godmanchester Town Council) v Secretary of State* [2008] 1 AC 221.

19. Given that I had set out in my preliminary advice the position as I understood it on the basis of the documentary material supplied by the Objectors, summarised at paragraphs 11 to 17 above, and given that no further evidence was supplied by the Applicant, I assume that he is content to accept as accurate the material to which I have already referred, and also my analysis of it.

20. As for legal authorities, *Beresford* has of course been the subject of a decision of the House of Lords ([2004] 1 AC 889), which overturned both the judgment of Janet Smith J referred to by the Applicant and that of the Court of Appeal. The passage most favourable to him is perhaps this, in the speech of Lord Scott:

> "[46] Where a town or village green is concerned, however, a sufficient indication, express or implied, that the right of the public to use the land for recreational purposes was intended to be permanent could not itself endow the land with that status. But the quality of the use of the land by the public, following the dedicatory indications in question, would surely be "as of right". It seems to me to be quite unreal to draw a distinction between the quality of use of a path or track by members of the public following an express or implied dedication and the quality of the recreational use by

members of the public of a piece of land following permission given by a landowner that, if dedication of land as a town or village green had been possible, would have constituted a dedication. In each case the quality of the use, entirely consistent with the nature of the permission that had been given, would have been "apparently as of right". The only difference would have been that in the case of the public right of way the landowner could not, once the dedication had been accepted by public use, terminate the use, but in the case of the land used for recreational purposes the landowner could, provided the 20 years had not expired, terminate the use. But this difference does not seem to me to bear upon the quality of the use of the land by the public in the meantime.

[47] Let me try to illustrate the point I am making by examples. If a landowner puts up a notice which says "The public may use this path as a public highway", use by the public thereafter would surely be use as of right. If a landowner puts up a notice which says "The public may use this land for recreational purposes as a village green", use by the public thereafter, until the landowner cancelled the notice and/or excluded the public, would similarly be use as of right. Whether express or implied, permission to use a path over land or to use land for recreational purposes may be of a sufficiently dedicatory character to justify the same conclusion, namely that use by the public thereafter is use "as of right".

[48] I agree with Mr Petchey that, in the present case, the attitude of the successive owners of the sports arena to the public use of the land for recreation was more than mere acquiescence or toleration. There was, I agree, positive encouragement. The provision of the rows of benches was to make more comfortable the watching of the activities of others. The cutting of the grass was in order to enhance the enjoyment of the sports arena by those using it. I am receptive to the submission that the successive owners had impliedly consented to the recreational use of the land by the public. The users were, in my opinion, certainly not trespassers. But this does not, in my opinion, answer the question whether the use was "as of right" or "nec precario".

[49] Was there any sign that the permission was intended to be temporary or revocable? There was none. The fact that the land was publicly owned seems to me highly material. Neither the WDC nor the CNT nor the council were, or are, private landowners. Their respective functions were and are functions to be discharged for the benefit of the public. The provision of benches for the public and the mowing of the grass were, in my opinion, not indicative of a precatory permission but of a public authority, mindful of its public responsibilities and function, desirous of providing recreational facilities to the inhabitants of the locality. In these circumstances there seems to me to have been every reason for the inhabitants of the locality who used the sports arena to believe that they had the right to do so on a permanent basis.

[50] Accordingly, the nature of the implied permission from the landowners that the evidence shows to have been present was not, in my opinion, such as to prevent the use of the sports arena by the public from being use "as of right". The positive encouragement to the public to enjoy the recreational facilities of the sports arena, constituted, in particular, by the provision of the benches, seems to me not to undermine but rather to reinforce the impression of members of the public that their use was as of right.

[51] Smith J and the Court of Appeal were, in my respectful opinion, led astray by according the concept of permission and, thus, of implied permission, a rigidity of character and effect that is not justified. They concluded that because use pursuant to permission will sometimes, or often, or usually, be inconsistent with use as of right, it will always be inconsistent with use as of right. The conclusion, my Lords, must in my opinion depend upon the nature of the permission, objectively assessed or construed. To conclude that use pursuant to implied permission is inconsistent with use as of right

> may in most cases be correct. But the conclusion is an evidentiary one; it is not a rule of law. And in the present case it is not, in my opinion, a correct evidentiary conclusion.
>
> [52] For these reasons I would, on the basis on which the case has been argued before your Lordships, allow the appeal.

21. In other words, the difference is not between express and implied permission, but between permission (which will be revocable) and quasi-dedication (which will not).

22. As for *Godmanchester*, this was a right of way case, relating to the proper interpretation of section 31(1) of the Highways Act 1980, which provides as follows:

> "Where a way over any land … has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

23. Lord Hoffmann at paragraph 32, held as follows:

> "I think that upon the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in *Mann v Brodie* 10 App Cas 378 , 386, to "disabuse [him]" of the notion that the way was a public highway. The Court of Appeal said that this would involve reading words into the Act; placing a gloss on the statute. But, outside the criminal law and parts of the law of torts, it is common to use the word intention in an objective sense, as in the intention of Parliament, the intention of the parties to a contract and, even in Latin, the *animus possidendi* which a squatter must have to acquire a title by limitation."

24. The Applicant accordingly argued that in the present case the Owners of the Land had failed to communicate their intention not to dedicate the Land to local people for recreation. The Land was therefore used not by permission, but as of right.

The Objectors' submissions

25. The City council wrote to clarify one or two specific points raised in my preliminary advice – notable as to the identity of the land referred to in the 1963 appropriation

and the 1996 byelaws (see paragraph 14 above). Otherwise, it was content to rely on its original objection and the subsequent representations.

26. The land owned freehold by the City Council was acquired in the 1890s, and had been held for public walks and pleasure ground purposes, under section 164 of the Public Health Act 1875. Further, byelaws have been made under the 1875 Act and under the Open Spaces Act 1906. On that basis, members of the public have a right to use the land for such purposes – see *Att-Gen v Loughborough Local Board* The Times, 31 May 1881; *Hall v Beckenham Corpn* [1949] 1 KB 716; and *Blake v Hendon Corpn* [1962] 1 QB 283. Such use is therefore not "as of right".

27. Reference was also made to the speech of Lord Walker in *Beresford*, at paragraph 87:

> "After that approach had been suggested there was a further hearing of this appeal in order to consider the effect of various statutory provisions which were not referred to at the first hearing, including in particular section 10 of the Open Spaces Act 1906, sections 122 and 123 of the Local Government Act 1972 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976. Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation."

28. The land subject to the leases of 1987 and 2010 was the subject of restrictions in each lease that the City Council should not use it other than as a recreation education social and leisure centre". Such leases, it is argued, must have been under the section 19 of the Local Government (Miscellaneous Provisions) Act 1976. As with the land held under the 1875 Act, therefore, its use must be by right and not as of right. Again, see the speech of Lord Walker in *Beresford* at paragraph 87.

29. And the same is true for the land that was the subject of the joint user agreement of 1987. That agreement explicitly stated that recreational facilities were to be provided on the land under section 19 of the 1976 Act.

30. Accordingly, in respect of each of the three categories of land, use for lawful sports and pastimes was not “as of right”.

Analysis

The Beresford *case*

31. I have considered carefully the speeches of the Judicial Committee of the House of Lords in *Beresford*. At first blush, the facts are similar to those in the present case – an open space, owned by a public authority, on which members of the public indulge in lawful sports and pastimes with the active encouragement of the authority. It was agreed by all in *Beresford* that those using the land in that case were not trespassers – and in that sense they had a perfect right to be on the land on a permanent basis. They were thus there not by virtue of a revocable permission, or an implied licence, but as of right (see, for example, Lord Scott at paragraph 49; Lord Rodger at paragraph 60; Lord Walker at paragraph 83).

32. However, the speeches in *Beresford* did note that the position would be different if there could be shown to have been an appropriation of the land in question as open space for recreation – in that case, there had been no such appropriation. Thus Lord Scott agreed that the position would be different if it could be shown that the land had been held under a trust under the Open Spaces Act 1906 (even if only by implication) (paragraphs 30, 52). Thus at paragraph 30 he said:

> “It is, I think, accepted that if the respondent council acquired the sports arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(1) of the Commons Registration Act 1965.
>
> But Mr Petchey accepted that Mr Laurence was correct in contending that the sports arena had not been acquired "under the [1906] Act" and that section 10 did not, therefore, apply. Here, too, although your Lordships cannot, in view of this concession, conclude that Mr Laurence's contention is wrong, I do not, for myself regard the point as clear. Is it necessary in order for open space land to have been acquired under the Act, for it to be expressly so stated, whether in the deed of transfer or in some council minute? *Att-Gen v Poole Corpn* [1938] Ch 23 is interesting on this point. The open space

land in question had been conveyed to Poole Corporation "in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use". There was no express reference in the conveyance to the 1906 Act but the Court of Appeal thought it plain that the Act applied. Indeed counsel on both sides argued the case on the footing that that was so (see Sir Wilfrid Greene MR, at p 30).

> It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (cf counsel's argument in the *Poole Corpn* case, at p 27). But your Lordships cannot take the argument to a conclusion in the present case."

(I have subdivided the paragraph in the reported judgment into three sections, for ease of comprehension).

33. And at paragraph 52, immediately following the longer passage quoted at paragraph 20 above, Lord Scott said:

> … I am, however, for reasons which will have appeared, uneasy about this conclusion. Where "open space" land comes into the ownership of a "principal council", I think there to be strong arguments for contending that the statutory scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or section 22(1) of the New Towns Act 1981 are applicable, excludes the operation of section 22(1) of the Commons Registration Act 1965. But these arguments have not been addressed to your Lordships. I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by section 123 of the 1972 Act will trump any "town or village green" status of the land whether or not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion."

34. Lord Rodger indicated that if the land was used by virtue of one of the statutes applying to local authority land, the result would be use "of right", not "as of right" (paragraph 62). He also agreed with Lord Walker, who held as follows:

> "[87] After that approach had been suggested there was a further hearing of this appeal in order to consider the effect of various statutory provisions which were not referred to at the first hearing, including in particular section 10 of the Open Spaces Act 1906, sections 122 and 123 of the Local Government Act 1972 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976. Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the

same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation.

[88] Those situations would raise difficult issues but in my opinion they do not have to be decided by your Lordships on this appeal, and would be better left for another occasion. The undisputed evidence does not establish, or give grounds for inferring, any statutory trust of the land or any appropriation of the land as recreational open space. Counsel for Sunderland rightly did not argue for some general implied exclusion of local authorities from the scope of section 22 of the Commons Registration Act 1965.

[89] It is worth summarising the salient points of the evidence.

….

[90] In short there is no evidence of any formal appropriation of the land as recreational open space by the city council or its predecessors. Nor is there material from which to infer an appropriation. Such action by the WDC or the CNT would have been unnecessary, and at or after the city council's acquisition in 1991 an appropriation as open space would have been inconsistent with the site's perceived development potential. It is true that the public's interim use of the land for recreation was not inimical to the city council's interests. But user can be as of right even though it is not adverse to the landowner's interests."

35. This appears to lead to the slightly paradoxical result that an authority that appropriates land explicitly as recreational open space is in a strong position if it wishes to resist the land being registered as a town or village green, in order to enable it to develop the land for some other purpose. But if an authority declines to appropriate a site because of its "perceived development potential", it may be vulnerable to the site being registered as a green, thus preventing the hoped-for development.

36. However, be that as it may, the speeches in Beresford seem to make a clear distinction between land that has been explicitly appropriated for use as recreational open space – including in particular land held under the 1906 Act or the 1976 Act – and land that was acquired and is still held for some other purpose.

An article in The Conveyancer

37. A recent article in *The Conveyancer* argues forcefully that this distinction is incorrect. In *Uncommon confusion: parallel jurisprudence in town or village green applications* [2012] Conv 1, 55, Richard Austen-Baker and Ben Mayfield examine at length the speeches in *Beresford*, and conclude that there is no basis for the position, often taken

by inspectors in relation to local authority land, that land used "by right" – that is, in pursuance of a public right – cannot be eligible to be registered as a green.

38. The authors cite paragraph 30 of the speech of Lord Scott, quoted above, and suggest that this seems "shaky ground" on which to build the edifice of "By right". They argue (at p 60) that

> "First, the point was made obiter and all parties accepted that this was not germane to the issue, so there was no reason for the point to be properly argued. (Counsel had in fact been called back to the House to deal with this point but it had quickly become evident that it was not a live issue in the case.) Secondly, the point is a narrow one and depends entirely on the original acquisition of the land being made expressly under powers in the 1906 Act, which will only apply in a limited number of cases."

However, it is markworthy that they only quote the first two sentences of that paragraph in Lord Scott's speech (that is, the first sub-paragraph as set out above). And in the remainder of that paragraph Lord Scott makes it plain that it is at least arguable that section 10 of the 1906 Act would apply even if not explicitly referred to.

39. The authors of the article go on to consider Lord Walker's speech, arguing (at p 62) as follows:

> "There is no doubt that Lord Walker expressed concern over the operation of the law in this area, in particular its use as a weapon against the development of local authority land. His Lordship contended that the applicants in *Beresford* were able to "stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended" (para [92]). Closing the case with this ungenerous statement, Lord Walker betrays the concerns of local authorities who would rather develop urban green spaces than preserve them. He felt this to be a usurpation of conventional planning laws and a device which was used to bypass regular development controls.
>
> Non-statutory inspectors might have had similar concerns when drafting their opinions to authorities, and will no doubt have been heartened by Lord Walker's reservations. This ought not to mean that inspectors can take it upon themselves to change the law, however, and should not be taken as authority for the imposition of a limitation on registration of town or village greens, using the device of "by right". If this were the case it would be practically impossible for applicants to claim user as of right over authority-owned land. Indeed, much of the land owned by local authorities is held under local government statutes which give wide powers for the authority to permit access, exclude access and deal with the land as they wish. The fact that these authorities are capable of granting a permissive right should not be taken as support for an argument that public use is "by right". Any rights in such instances are the property of the authority, not the property of the users."

40. They conclude (at p 64):

> "Much of the land across which locals may enjoy rights is in the hands of local authorities. The race to develop this land has been observed and commented upon by a number of objectors. It is no surprise that the closing and development of land is capable of galvanising local groups formed to oppose the loss of their open spaces. Development controls in planning law might not always be sufficient to prevent the loss of green spaces but this is not the only tool at the disposal of local objectors. The law on town or village greens was expressly designed to supplement existing laws on development and its use does not usurp or avoid planning law. The application of an imaginary test at local enquiries and a statutory test in the House of Lords creates two tiers of justice for these local groups. The eradication of the virus of "use by right" is essential to the proper administration of the registration process for town or village greens."

This at least makes plain the ideological standpoint of the authors. But their thesis is nevertheless worthy of careful consideration.

The Barkas *case*

41. However, since that article in *The Conveyancer* was written, the matter has been considered (again) by the courts, in *R (Barkas) v North Yorkshire County Council* [2011] EWHC (Admin), unreported. The judgment in that case was handed down on 20 December 2011.

42. This concerned land that had been laid out as a recreation ground, open to the public as well as to those living in nearby Council estates, under the Housing Acts. An application had been made to register it as a town or village green. The inspector (Mr Vivian Chapman, QC) considered that the critical issue in the case was whether recreational user of the land by local people had been "by right" or "as of right".

43. Mr Chapman concluded that the land had been set out and maintained under section 80 of the Housing Act 1936, which enabled local authorities to provide open space in connection with housing (the statutory successor to that is section 12 of the Housing Act 1985). He reasoned, in paragraph 124 of his report, that the 1906 Act created (by section 10) and expressed a statutory trust for public recreation. However, he observed:

> "… there is authority that where a statute empowers a local authority to acquire and lay out land for public recreation, the public have a legal right to use it. This point has been explored in relation to the Public Health Act 1875 s 164 (which contains no express trust for public recreation) in a series of cases … "

He set them out, and added:

> "The same principle must apply to a recreation ground laid out under statute as an area for public recreation on a council estate. Council tenants, who are the primary objects for the provision of recreation must have had a legal right to use the land for harmless recreation. It would be absurd to think of them as trespassers unless they first obtained the permission of the council to use the land for harmless recreation. Where the recreation ground, as in the present case, is laid out and maintained as a recreation ground open to the public pursuant to statutory powers, it seems to me that the public must similarly have a legal right to use the land for harmless recreation. Again, it would be absurd to regard them as trespassers. This view is supported by the *obiter* comments of Lord Walker in para 87 of Beresford. I therefore consider that at least until 2003, when SBC [that was being a reference to the interested party] ceased to be owner of the remaining council houses, recreational use of the Field by local people was by right and not as of right."

He thus recognised that the passage in Lord Walker's speech in *Beresford*, at paragraph [87], quoted above, was plainly obiter, but considered that it supported his view that neither local people nor the public generally had used the land as trespassers.

44. Langstaff J agreed that the land in that case had been provided under section 80 of the 1936 Act. Further, he accepted that not merely Council tenants but those who lived elsewhere had been entitled to use the land – which, he noted (at para 23), was a general question, applicable to all cases in which section 80 and its statutory successors had been used. He concluded:

> "[29] The point is whether or not a recreation ground could be provided. If it was and if it was laid out for general public use, there would be nothing that would prevent it. That does not mean in my view that some of those using it were trespassers, whether to be regarded as tolerated trespassers or not, nor does it mean that they were permitted to be there and, I should add, if they had been permitted or were held to be permitted to be there, then they would be in no position to make an application under the 2006 Act because their position would be precarious within the traditional meaning of that word.
>
> [30] The conclusion I reach is furthermore consistent with the position of a local authority as a public body. Its powers and its duties are related to the fact that it is representative of those who come within its area of authority. That area is far larger and wider than a housing estate on part of the local authority's area.
>
> [31] The emphasis in the sections of the Housing Act is on public provision, it is not, as I read it, essentially upon making provision for classes of the public distinct from one another, even though a recreation ground may only be set up under section 80 if it will be of benefit to people in housing accommodation to which that is related. The point I

> make about the general functions of a local authority is amply supported by considering other statutes, which demonstrate that the public policy is in emphasising the public provision which local authorities may make (see for instance the Open Spaces Act and the 1875 Act) to the extent that they may be regarded as of any assistance at all.
>
> [32] Accordingly, the conclusion which the Inspector came to at paragraph 124 and 125 was, as it seems to me, one reached not in error of law but with a careful and proper regard to the facts, to the authority so far as it was of assistance and upon a proper application of the statute. It follows that in conclusion, this application, despite its subtle and careful nature, is one which has to fail and does.

45. In short, he upheld the hypothesis that land used by the public in the exercise of a right – as it happened, in that case as right under the Housing Act – is not used "as of right". He thus supported the view of Mr Chapman, and disagreed with the authors of the article in *The Conveyancer*. That conclusion of Langstaff J is plainly not *obiter*, and is binding on the County Council as Registration Authority.

Application to the present case

46. In this case, each part of the Application Land has been provided and maintained by the City Council or County Council under statutory powers relating to open space and recreation, as pointed out by the Objectors (see paragraphs 25 to 29 above) and not disputed by the Applicant. Members of the public using the land thus did so by right, and not "as of right".

Conclusion

47. It follows that the present application must necessarily fail, regardless of the extent of any use of the land by local people. The Registration Authority should therefore reject it forthwith, and may do so without first holding an inquiry.

CHARLES MYNORS

FRTPI, FRICS, IHBC, Barrister

17 February 2012

In the matter of the Commons Act 2006
And in the matter of land at Blackbird Leys Fields, Oxford

Further advice

Peter G Clark,
County Solicitor and Head of Legal and Democratic Services,
County Hall,
New Road,
Oxford, OX1 1ND

tel. 01865-323917
(Richard Goodlad)
fax. 01865-783362

DX. 4310 Oxford

email: richard.goodlad@oxfordshire.gov.uk

17 February 2012

Chambers ref: 50259
– Advice 2