

Division(s): Marston & Northway

PLANNING & REGULATION COMMITTEE – 12 JANUARY 2015

COMMONS ACT 2006: IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT FOXWELL DRIVE, NORTHWAY, OXFORD AS A TOWN OR VILLAGE GREEN

Report by the County Solicitor & Head of Law & Culture

Introduction

1. On 14 December 2012, Miss Georgina Gibbs of 12 Saxon Way, Northway, Headington in Oxford applied to the County Council as Registration Authority under Section 15 of the Commons Act 2006 to register land known as Foxwell Drive open green space, Northway, Headington in Oxford (“the Application Land”) as a Town or Village Green. This application, a copy of which is attached at Annex 1, was submitted formally in pursuance of the Act and has now to be determined by the County Council.
2. The Planning & Regulation Committee have delegated powers to determine such applications, provided they are ‘duly made’.
3. The application was considered initially by Legal Services who provided advice as to whether the application was ‘duly made’. In light of such advice the application was accepted as ‘duly made’ and was subsequently publicised in accordance with the statutory requirements.
4. One substantive objection was received during the statutory 6-week objection period from Oxford City Council (the landowner and “Objector”). The objection raised several factual and legal issues in relation to the application and so an independent public inquiry was held. Miss Ross Crail (“the Inspector”), a barrister experienced in the area of law was appointed to chair the Inquiry.
5. The Inquiry sat between 29 September 2014 and 7 October 2014 at St Columba’s United Reformed Church, Alfred Street, Oxford with an accompanied site visit on 6 October 2014.
6. A copy of the Inspector’s Report is appended at Annex 2. The main points to note are summarised below.

The Application Site: Land at Foxwell Drive, Headington in Oxford

7. The application form describes the Application Land as land 'between the bottom of Dunstan Road Park & the top of Borrowmead Road, along the full length of Foxwell Drive'. The Application Land is shown edged red on 'Map A' included as part of Annex 1.
8. The Application Land is an elongated strip of predominantly grassed land lying between the Northern Bypass Road to the north-east and Foxwell Drive to the south-west. There is no fence between Foxwell Drive and the Application Land. At its northern end, the Application Land extends behind houses in Borrowmead Road, between their rear fences and the boundary of the Court Place Farm Nature Park.
9. The Application Land's boundary with the Northern Bypass Road is marked by an iron railing fence for much of its length although there are points of access through to the Bypass.
10. At its eastern end, the Application Land meets Dunstan Park, at which point the boundary is marked by concrete posts. There is also a farm gate near this point providing access to an adjoining field.
11. There is a fenced and gated children's' play area approximately halfway along the Foxwell Drive frontage of the Application Land. Nearby are two wooden benches and a set of aged metal football goalposts.
12. There is a small brick building near the Borrowmead Road end of the Application Land with signage identifying it as a Southern Gas Networks installation.
13. The whole of the Application Land is registered at HM Land Registry under title number ON291789. The registered proprietor is Oxford City Council.
14. The locality or neighbourhood relevant to the application is described as the Northway Estate within the electoral ward of Headington Hill and Northway in the City of Oxford.

The Town Green Application

15. The application form was duly signed by Ms Gibbs and supported by the prescribed Statutory Declaration. The Applicant submitted several additional pieces of information in support of her application, including a supporting statement and some 15 evidence questionnaires by other local residents who used the land. Further evidence and statements were also submitted by the Applicant in response to the objection and in preparation for the public inquiry.

The Determination of the Application

16. Having been received by the County Council and accepted as 'duly made', the application was duly published in accordance with Regulation 5 of the Commons Registration (Registration of Town and Village Greens) (Interim Arrangements) (England) Regulations 2007 by publication in a local newspaper, posting notices on site, and placing copies on public deposit. A copy of the statutory notice, application and plan was also served on Oxford City Council as landowner.
17. The statutory objection period expired on 5 August 2013. An objection was received from the Objector on 5 August 2013.
18. The principal grounds for objection were as follows:-
 - a. The application was defective as being made under s15(3) Of the Commons Act 2006 when no date of the use ending had been given (this objection was withdrawn at the Inquiry after the Registration Authority confirmed that it had later accepted the application under s15(2);
 - b. The majority of the Application Land had until March 2012 been held by it for open space purposes and laid out for recreational purposes and therefore any use by the public was by right and not as of right;
 - c. There was insufficient evidence of user in respect of land not expressly held under the Public Health Act 1875 or the Open Spaces Act 1906;
 - d. There was insufficient evidence of user generally;
 - e. The evidence did not demonstrate a qualifying neighbourhood; and
 - f. On 1 March 2012 a substantial part (but not all) of the Application Land had been appropriated by it to planning purposes and therefore (following the case of *BDW Trading Ltd (t/a Barratt Homes) v Spooner* [2011] EWHC 1486 (QB)) could be developed in accordance with planning permission under s241 Town and Country Planning Act 1990 and that the application should therefore be refused as registration would serve no purpose.
19. A written response to these issues from a firm of solicitors on behalf of the Applicant was received dated 18 October 2013.

20. The County Solicitor consulted Counsel on these issues. It was considered that the issues raised were ones of fact as well as law and that a public Inquiry would need to be held.
21. At the Inquiry, the Objector only pursued ground (b) of its objections above, contending that at no point during the 20-year period had the Application Land been used 'as of right'. The Inspector summarises the Objector's case at (131-144) of her Report and the Applicant's case at (145-153).
22. It is important to note at this stage that the Council as Commons Registration Authority is essentially neutral in this matter. It is simply concerned to assess the application and register the Application Land if it qualifies properly for registration. In carrying out this assessment it must look back over the use of the land and apply the statutory test under s15 Commons Act 2006. The potential future use of the land, or its desirability in planning terms, is not relevant to the assessment that the Council as Commons Registration Authority needs to make.

The Public Inquiry

23. A public Inquiry chaired by an independent barrister (Miss Ross Crail of New Square Chambers) was therefore held between 29 September 2014 and 7 October 2014 at St Columba's United Reformed Church, Alfred Street, Oxford with an accompanied site visit on 6 October 2014.
24. The Applicant represented herself in person and the Objector was represented by leading Counsel. Both parties called witnesses to give evidence in person and further written evidence was also given to the Inquiry.
25. The Inspector subsequently submitted her Report and recommendation to the County Solicitor on 11 November 2014 a copy of which is attached at Annex 2.

The Inspector's Recommendations

26. The Inspector's findings are set out at the conclusion of her Report and are briefly as follows:
 - a. The Inspector considers each part of the statutory test in turn and concludes that the Objector's decision not to contest the majority of these was well made. She thinks there is clearly evidence that, except for the 'as of right' element, the test under S15(2) Commons Act 2006 is made out by the Applicant.
 - b. In respect of 'as of right' the Inspector notes that all her previous findings are also consistent with the Objector's case that the Application Land was deliberately made available by the Objector for public recreation under a statutory power to do so. If

that is correct, then following the Supreme Court's decision in the case of R. (on the application of Barkas) v North Yorkshire CC [2014] UKSC 31 all the use was permissive and not therefore 'as of right' and the application must fail.

- c. The Inspector considers the Application Land in two separate sections, namely the land marked 1A on the Northway Plan (attached as Annex 3) and the remainder. Both areas were originally acquired for the purposes of the Housing Act 1936 on 30 June 1948.
 - d. In respect of the area marked 1A on the Northway Plan, the Inspector finds that nothing in the 1948 Conveyance prevented or restricted the development of the land, whether for housing or any other purpose. Nor did it impose any covenants or public trust requiring the land to be used for public recreation. The Inspector found that the land was later appropriated from housing to open space purposes by a resolution of the City Council dated 1 December 1952 and that the requisite Ministerial consent under s163(1) Local Government Act 1933 had been obtained. Applying Barkas therefore, it was clear that the local people had not used the Application Land 'as of right' and the application must therefore fail for this area.
 - e. In respect of the remainder of the Application Land, this was apparently appropriated to allotment purposes in 1953 and then re-appropriated back to housing in 1959. It is evident from the minutes of the relevant City Council meetings that the land was to be used as public open space, pursuant (so the Inspector finds) to s107 Housing Act 1957. Again applying the Barkas case, all use of this land after the re-appropriation was therefore not 'as of right' and the application must fail in respect of this area also. It is worth noting at this point that the relevant Housing Act power in use here was the same one as at issue in Barkas.
27. In view of these conclusions and the more detailed discussions of the law and evidence in her Report, the Inspector recommends that the application be rejected.
28. The County Solicitor supports these conclusions.

RECOMMENDATION

26. **Having received the Opinion of the Inspector set out in Annex 2 to this report, the Committee is RECOMMENDED to REJECT the application for registration as a new Town or Village Green that plot of land known as Land at Foxwell Drive, Northway in Oxford that site being indicated clearly on "Map A" of the application submitted by Miss Georgina Gibbs and dated 14 December 2012.**

PETER CLARK
County Solicitor & Head of Legal Services

Background papers: Appendices to Form 44
 Additional Evidence Questionnaires
 Objections by Oxford City Council dated 5 August
 2013
 Deighton Pierce Glynn letter dated 18 October
 2013
 Procedural Directions of the Inspector dated 29
 September 2013
 Inquiry Bundles and parties' closing submissions
 In Members' Resource room from 5 January 2015
 until the conclusion of the meeting.

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