

PLANNING & REGULATION COMMITTEE – 27 JANUARY 2020

COMMONS ACT 2006: IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT WILDING PARK ROAD, WALLINGFORD AS A TOWN OR VILLAGE GREEN

Report by Interim Director for Community Operations

RECOMMENDATION

1. **The Planning & Regulation Committee is RECOMMENDED to reject the Application, for the reasons outlined in Counsel’s Opinion dated 29 November 2019 and included at Annex 3 to this report.**

Executive Summary

2. An application was made to Oxfordshire County Council acting in its capacity as the Commons Registration Authority to register land off Wildling Road, Wallingford as a Town or Village Green on 12 February 2018. This was advertised in accordance with the statutory requirements on 20 June 2019. One objection was received from the landowner, South Oxfordshire District Council.
3. The objection was made on the basis that the public’s use of the land had not been ‘as of right’ because it had been ‘by right’ due to the Application Land having been held and maintained by the District Council as a public recreation ground under the provisions of the Housing Act 1936 and the successive Housing Acts made in 1959 and 1985.
4. Counsel’s opinion was obtained on whether the County Council is able to reject the application on the basis of the evidence submitted by the landowner. This opinion indicated that the application should be rejected on this basis without any further process being adopted to consider the evidence, such as a non-statutory public inquiry.

Introduction

5. On 12 February 2018, Mr Anthony Hurford of 1 Sinodun Road, Wallingford, OX10 8AA (“the Applicant”) applied to the County Council as Commons Registration Authority under Section 15(1) of the Commons Act 2006 to register land known as Wildling Road Park/Green in Oxfordshire (“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.

6. The Planning & Regulation Committee have delegated powers to determine such applications, provided they are 'duly made'.
7. The application was considered objectively by the Countryside Records Team as to whether it was 'duly made'. The applicant was contacted in order to clarify or rectify certain technical points in the application. The application was accepted as 'duly made' on 10 June 2019 and was subsequently publicised in accordance with the statutory requirements on 20 June 2019, with a deadline of 2 August 2019 for responses.
8. An objection together with a bundle of supporting documents was received during the objection period from South Oxfordshire District Council ("the Objector"). The objection is dated 2 August 2019 and is included at Annex 2. The supporting documents are included as part of the background papers.
9. The objection and bundle of supporting documents were sent to the Applicant on 14 August 2019 and allowed 21 days within which he could submit any comments he wished to make on it. The Applicant did not submit any comments either during or after the 21 day period that was allowed for a response.

The Application

10. The application form describes the Application Land as Wilding Road Park/Green. The Application Land is shown edged red on the Application Map included as part of Annex 1.
11. The whole of the Application Land is registered at HM Land Registry under title number ON280319. The registered proprietor of this title is South Oxfordshire District Council of Council Offices, Benson Lane, Crowmarsh Gifford, Wallingford, Oxfordshire, OX10 8QS.
12. The locality relevant to the application is described as 'Wallingford Parish'. No map was attached to show the extent of the claimed locality.
13. The application form was duly signed by the Applicant and supported by the prescribed Statutory Declaration. The Applicant submitted additional pieces of information in support of his application, including a supporting statement and 8 evidence questionnaires that had been completed by users of the Application Land.
14. The evidence questionnaires showed that 8 individuals had used the land, over a period spanning 54 years between 1965 and 2018. Two of those who provided evidence did not use the land during the twenty-year period preceding the making of the application in 2018. A bar chart summarising this use is at Annex 4.
15. Of those who used the land between 1998 and 2018, one used it on a daily basis, one used it more than once a week and four used it on a weekly basis. Those who provided evidence indicated which activities they had seen taking

place on the land. All of them had seen children playing, dog walking and football games taking place on the land. Five of those who provided evidence had also seen games of rounders, community celebrations, picnicking and people walking on the land. The evidence was provided on standard forms produced by the Open Spaces Society. Copies of the original forms are available for members to view if required as part of the background papers.

16. A consultation, checking whether any trigger and terminating events had occurred in relation to the Application Land was undertaken in May 2018. South Oxfordshire District Council, Oxfordshire County Council's Development Management Team and the Planning Inspectorate replied to say that no trigger or terminating events had occurred on the land.
17. The applicant was informed in writing that there had been no trigger events affecting the Application on 21 December 2018.
18. Having been received by the Commons Registration Authority 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 the landowner, South Oxfordshire District Council.
19. The statutory objection period expired on 2 August 2019. An objection was delivered by hand to the County Council by the landowner on 2 August 2019.
20. The principal ground for objection was as follows:
 - a). The use of the land has not been "as of right", because the land concerned was held pursuant to the powers contained in the Housing Act 1936 and successive Housing Acts of 1957 and 1985. This meant that use of the land could not have been "as of right", which was held to be the case in the case of *R (on the application of Barkas) (Appellant) v North Yorkshire County Council and another (Respondents)*, [2014] UKSC31 which concerned the holding of land under the same Act. A copy of this case is included in the background papers.

The Legislative Tests

21. The application was made under section 15(2) of the Commons Act 2006. This applies where 'as of right' use of the land continues at the time of the application.
22. In this case, there is no record of any actions being taken on the part of the landowner that would have had the effect of stopping as of right public use of the land, such as the deposition of a Landowner Statement under section 15A(1) of the Commons Act 2006 at any time before the application was submitted.

23. Section 15 of the Commons Act 2006 allows that: -
- (1) any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
 - (2) This subsection applies where –
 - (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
 - (b) they continue to do so at the time of the application.
24. The evidence provided by the Applicant and the Objector has been examined to establish whether the application meets the legal tests set out above as follows:
- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years***
25. It is necessary for each constituent part of this test to be considered individually as follows: -
- A significant number...**
26. The applicant supplied 8 user questionnaires that had each been completed by different people who resided within the claimed locality of the parish of Wallingford during the time that they had used the Application Land.
27. Six of those who provided evidence used the Application Land during the whole of the period of twenty years leading up to the submission of the application in 2018.
28. It is questionable whether six users constitute a significant number of the inhabitants of the claimed locality of the parish of Wallingford. It is, therefore, unclear whether this element of the legislative test has been made out.
- ...of the inhabitants of any locality, or any neighbourhood within a locality...**
29. In this case, the applicant is relying on the parish of Wallingford as the locality. 6 of the 8 individuals who completed user questionnaires in support of the application have addresses that are situated within this locality. Of the remaining two users, one used the route between 1966 and 1973 and lived within the locality during that period but has since moved away. The other used the route between 1969 and 1985 when they lived in the locality but had also moved away since that time.

30. All those who provided evidence of use lived within the claimed locality of the parish of Wallingford at the time when they were using the land. It would therefore appear that this element of the legislative test has been made out.

...indulged as of right...

31. For public use to have been 'as of right', use must have been without force, secrecy or permission. This test is broken down into these three elements below: -

Without force

32. The use of the Application Land would appear not to have been by force, because there is a clear public entry point to the land adjacent to Wildling Road. A litter bin and dog waste bin are also situated on the land which has the outward appearance of being public. This element of the 'as of right' test would therefore appear to have been made out.

Without secrecy

33. There is no evidence that use of the land has taken place in secret, for example during the hours of darkness so that the landowner would not be aware of it. Use of the land is not, therefore, considered to have taken place in secret. This element of the 'as of right' test would therefore appear to have been made out.

Without permission

34. The landowner states that the land was acquired by the Wallingford Borough Council in 1945 from the previous landowner who had farmed the land. A copy of the Conveyance has been provided by the Objector. The conveyance itself does not include any information about the purpose for which the land was being acquired.
35. A planning application was subsequently made by the Wallingford Borough Council to develop the land for housing in 1952. The plans that accompanied the Planning Application documents described the Application Land as 'Children's Playing Field'. The Objector states that the land would have been developed pursuant to section 73(a) of the Housing Act 1936, which also contained a section (80) which gave a supplementary power to local authorities to provide and maintain a recreation ground.
36. The South Oxfordshire District Council inherited the land from Wallingford Borough Council on local government reorganisation in 1974. The Objector states that it has continued to hold the land as a space for public recreation and maintained it in a manner to facilitate such use. It, therefore, asserts that use has not been "as of right" as a result.
37. The Supreme Court case of *R (on the application of Barkas) (Appellant) v North Yorkshire County Council and another (Respondents)*, [2014] UKSC31

concerned land which was owned by the local authority and in use as a playing field. It was held in this case that if land is held under a provision such as section 12(1) of the 1985 Housing Act, the public have a statutory right to use it for recreational purposes and, therefore, use it ‘by right’ rather than ‘as of right’.¹

38. It is, therefore, clear that this element of the ‘as of right’ test has not been made out in this case.

...in lawful sports and pastimes...

39. The individuals who completed evidence questionnaires in support of the application, quoted activities they had undertaken on the land from a tick-box list included on the standard evidence form which is produced by the Open Spaces Society. All 8 of those who completed evidence questionnaires indicated that they had indulged in lawful sports and pastimes.

40. This element of the ‘as of right’ test would therefore appear to have been made out.

...on the land...

41. There is no reason to believe that any of the witness evidence that has been submitted in support of this application was not on the land to which the application relates. This element of the test would, therefore, appear to have been made out.

...for a period of at least 20 years.

42. 6 of those who provided evidence of their use of the land indicated that they had used it during the whole of the relevant period of 20 years which precedes the making of the application.

43. This element of the legislative test would, therefore, appear to have been made out.

(b) they continue to do so at the time of the application.

44. The Application Land is open and available for public use and no evidence has been provided to show that public access to the land has been challenged or prevented. At the time when site notices were erected on the Application Land for the consultation in July 2019, the land was freely accessible.

45. This element of the legislative test would, therefore, appear to have been made out.

46. Part of the legislative test contained in section 15 of the Commons Act 2006 has not been met in that use of the land has not been “as of right”, as it has

¹ See paragraph 21 of the judgment at Annex 4 for the actual wording used by Lord Neuberger

been pursuant to a right conferred by the provisions of the Housing Act 1936 and its successor Acts of 1957 and 1985.

Financial and Staff Implications

47. There are no financial or staff implications associated with this decision.

Equalities Implications

48. There are no equalities implications associated with this decision.

JASON RUSSELL

Interim Director for Community Operations

Annexes to Report:

1. Copy of Application including plan showing claimed TVG and locality
2. Objection from landowner
3. Counsel's Opinion – Mr Alan Evans, King's Chambers, Manchester
4. User Evidence Bar Chart showing details of use of the land

The following Background Papers are available for Members to view if desired:

1. User Evidence Questionnaires submitted with application
2. Supporting evidence bundle submitted with landowner objection
3. Case Law: *R (on the application of Barkas) (Appellant) v North Yorkshire County Council and another (Respondents)*, [2014] UKSC31.

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