

APPLICATION BY MRS CATHERINE BAKER TO REGISTER

LAND AT LONGBRIDGE ROAD, BRAMLEY

AS A TOWN OR VILLAGE GREEN

SUPPLEMENTARY REPORT

Preliminary

1. I was previously instructed by Hampshire County Council ('the Council') to make a recommendation in respect of the application dated 1st November 2008 ('the Application') submitted by Mrs Catherine Baker ('the Applicant') seeking the registration of land at Longbridge Road, Bramley ('the Land') as a town or village green pursuant to section 15(2) of the Commons Act 2006 ('the 2006 Act'). The Application was the subject of objections by a company known as Radiotropic Ltd and by Mr John Bell ('the Objectors').
2. Pursuant to my instructions, I held a public inquiry ('the Inquiry') which sat for five days on 26 – 28 April, 21 June and 28 June 2010 at Bramley Village Hall, The Street, Bramley, following which I produced a report dated 14 September, which was subsequently updated ('the Report')¹.
3. This Supplementary Report has been produced following the submission by the Objectors of representations made in respect of my Report² ('the Representations'). I am now asked to consider the Representations, and comment regarding the criticisms of the Report which they contain. For ease of reference, I have adopted the headings used in the Objectors' document.

¹ It subsequently became apparent that I had neglected to include the evidence of four of the Applicant's witnesses. Accordingly I provided a revised version of the Report, dated 28 September 2010, which included the evidence of these four witnesses. As such, the total number of the witnesses called by the Applicant was correctly recorded as 26 (rather than 22, as erroneously noted in the earlier version of the Report).

² It appears that the Objectors' representations have been made in relation to the earlier version of the Report, dated 14 September, rather than the later version which included the totality of the Applicant's evidence.

'Use of whole application land' (paras 4 & 5)

4. It is right to say that the *extent* of the Land which was available and in use for lawful sports and pastimes is not a matter which is the subject of detailed discussion in the Report. This omission reflects the lack of emphasis placed on this issue in the closing submissions delivered on behalf of the Objectors.
5. For the avoidance of doubt, it is my view that a sufficient part of the Land was used for lawful sports and pastimes during the Relevant Period, so as to justify its registration as town or village green. In reaching this conclusion I had regard to the decision in Oxfordshire County Council v Oxford City Council and Robinson³ in which at first instance Lightman J noted that, following an inquiry held to consider the application in that case, the inspector⁴ had recommended that an area of land be registered as a town or village green notwithstanding that "*by reason of impenetrable growth only 25% of that part was accessible...*"⁵. I considered the comments of Lightman J (paragraphs 92-95) and also the Opinions of the House of Lords (in particular the comments of Lord Hoffman at paragraph 67) in Oxfordshire. Having regard to what is said in the various judgments, it was and indeed remains my view that in the present case the registration of the entirety of the Land is justified.
6. In expressing this view I should state that I am of course aware that the facts in Oxfordshire were different to those in the present case. Further, I should also state that I accept that at certain times during the Relevant Period (at the latter end of it), there would have been limited areas of the Land which were covered in undergrowth so as to render access onto them difficult if not impossible. However, I do not consider that these areas were so substantial as to mean that the Land did not continue to be used for sports and pastimes 'as a whole' throughout the Relevant Period.
7. Further, it is my view that the presence of undergrowth on the Land was in some respects integral to the way in which it was used for sports and pastimes. For example, I consider that the vegetation would necessarily have made the area more attractive to wildlife; some of the witnesses gave evidence to the effect that one of the pastimes they engaged in on the Land was nature observation (eg Mrs Baker and Mrs Owen). Similarly, a number of the

³ The House of Lords decision is reported at [2006] 2 AC 674, the first instance decision of Lightman J being reported at (2004) Ch 253.

⁴ Mr Vivian Chapman QC.

⁵ Per Lightman J at paragraph 92.

witnesses spoke of blackberrying on the Land (eg Mrs Squibb and Mrs Watkins). Such activity is only possible where there are brambles on land.

8. For these reasons, whilst I acknowledge that there were certain limited areas of the Land where the undergrowth was thick, I do not think that the presence of such undergrowth was such as to mean that the Land as a whole was not used for lawful sports and pastimes.

The Dry Ditch

9. I note that in this context the Objectors make specific complaint of what they perceive as a failure *"to acknowledge the fact that a substantial element of the recreational user described by the applicant's witnesses in evidence occurred in the area of a ditch...which forms neither part of the Objectors' landholding, nor the so-called village green"*.
10. As regards this complaint, it is right to say that at certain points in the Report I record activity having taken place in the ditch. However, in reaching my conclusion that the Land had been used for sports and pastimes, I did not have any regard to any such activity. It has always been and indeed remains my view that the ditch lies outside the Land so that any activity taking place in the ditch cannot contribute towards the Applicant's case.
11. In the course of the Inquiry I asked questions of some of the Applicant's witnesses regarding the ditch and the extent to which the activities they had engaged in or witnessed had taken place there, as opposed to on the Land. Such questions were asked expressly for the purpose of identifying activity which should be excluded from my deliberations. There are limited references to such activity in the Report (e.g. den-making in the ditch – see evidence of Mr Green), but for the most part I did not record the evidence of such use (e.g. use of the rope swing over the ditch) in the Report precisely because I did not consider that the Applicant could rely on it in support of the Application
12. As such, in making my recommendation in respect of the Application and forming the view that the Applicant had demonstrated that the Land was indeed used for sports and pastimes throughout the Relevant Period, I have not had regard to any activity taking place in the ditch, as opposed to the Land.

The “significant number” test (paras 6 & 7)

13. As is noted in the Representations, the locality relied upon by the Applicant was the civil parish of Bramley. There is no dispute that the civil parish is capable of amounting to a locality for the purposes of the 2006 Act.
14. As is stated in the Report (and indeed acknowledged in the Representations), it is my view that the correct test to apply as regards use of land by ‘a significant number’ is that identified by Sullivan J in R (Alfred McAlpine Homes Ltd) v Buckinghamshire County Council (2004) 1 P&CR 573; namely that an applicant must demonstrate use by a number “*sufficient to indicate that their use of the land signifies that it is in general use by the local community...rather than occasional use by individuals as trespassers*”.
15. Notwithstanding the census information contained in paragraph 7 of the Representations, it is my view that the evidence of user that I heard at the Inquiry was more than sufficient to demonstrate that the Land had been in use for lawful sports and pastimes by a ‘significant number’ of the inhabitants of Bramley.
16. I note that the census information which the Objectors rely upon in this context, states that in 2001 the population of Bramley was 3,393, with a projection of 3,670 in 2008. I heard oral evidence from 26 witnesses at the Inquiry, of whom at least 5 could speak to the entirety of the Relevant Period⁶. I consider this compares favourably with the facts in McAlpine, where the court upheld the decision of the County Council to register land as a town or village green in circumstances where, in a locality of 20,000 inhabitants, 16 witnesses gave oral evidence in support of the application, of whom only 6 could speak to the whole of the relevant 20 year period. Importantly, both in McAlpine and in the present case, those witnesses who were able to speak to the entirety of the period gave evidence not only that they had themselves used the land in question, but that they had seen others doing so.
17. Accordingly, I do not accept the criticism made by the Objectors that registration of the Land is not justified owing to the fact that the Applicant failed to demonstrate use by ‘a significant number’.
18. The other point made by the Objectors in this context, is that in making my recommendation I have failed to have regard to the ‘distribution’ of the Applicant’s witnesses throughout the locality – what is sometimes described as a ‘Spread & Fit’ argument.

⁶ These witnesses being Mrs Squibb, Mr Watkins, Mrs Watkins, Mr Constantinidou and Mr Brailey.

19. It is right to say that nowhere in the Report do I address the question of 'Spread & Fit'. However, once again that omission is due to the fact that at no point during the Inquiry did the Objectors raise any objection to the Application on this basis. In particular, the matter was not raised in the closing submissions delivered on their behalf.
20. In reaching my conclusion as to the Application, I had regard to the distribution of the alleged users throughout the claimed locality. As one would expect, the majority of users hailed from those streets closest to the Land, in particular Longbridge Road. However, as I note in the Report, the evidence was to the effect that use of the Land for sports and pastimes had been carried on by the inhabitants of a large number of streets within Bramley. In this context I note that in addition to inhabitants on Longbridge Road, I heard evidence of use from persons living on Sherfield Road (Sharon Barrett), Farrier's Close (Simon Watts), The Smithy (Janice Spalding⁷), Moat Close (Paula James) and Lane End (Scott Naylor). Further, Mrs Alison Cooper spoke of having seen children from Campbell Road and Campbell Court playing on the Land, while Mrs Cathy Baker gave similar evidence in respect of children living on Bromelia Close, Ringshall Gardens, Coopers Lane and Strawberry Fields.
21. Having regard to the totality of this evidence, I am satisfied that the users of the Land are sufficiently spread throughout Bramley in order to demonstrate use by the inhabitants of that locality.

Contentious use (paragraphs 8-10)

22. As regards the question of whether or not the user of the Land was 'contentious', I note the Objectors allege that I *"lost sight of the principle...recognised in para.207 of [the] Report"*. That principle concerns the need to have regard to how matters would have appeared to the owner of the land.
23. I do not accept this criticism. Having considered all the evidence provided to me, both written and oral, it is my view that the Objectors, in particular Mr Bell, did not do enough to render the Land contentious. I reached that view, and indeed maintain it, having applied what I consider to be the appropriate test, namely: 'how would matters have appeared to a reasonable landowner?' I consider that such a landowner, when considering whether he had done enough to render use of the land for sports and pastimes contentious, would himself

⁷ The use in this instance being by the 16yr old boy living with her and her husband.

consider how matters would have appeared to a reasonable member of the local community, seeking to make use of the land.

24. I do not consider that such a reasonable landowner, in the present case, would have concluded that he had done enough to communicate to local people that their use of the land was contentious.

25. I am aware of, and indeed set out in the Report, all the steps taken by Mr Bell which the Objectors relied upon as having rendered use of the Land contentious. However, in this context I also note the following, namely:

- At no time during the Relevant Period did the owner of the Land take steps to secure the entirety of its boundary. In particular, no effort was made to fence the eastern boundary of the Land, notwithstanding I consider it would have been apparent that people were accessing the Land through that boundary.
- When in January 2002 works were undertaken comprising the erection of a fence alongside the Cinder Track and the installation of a gate at the LR Entrance, no sign was erected stating the Land was private and that entry onto it was not permitted.
- When signage was eventually erected later in 2002, it comprised a single sign which read only 'Private Property'. The sign was not erected at an entrance point giving access onto the Land, but rather in the middle of the fence running along the boundary with the Cinder Track. No attempt was made to secure the Land at the time when the sign was installed.
- At no time during the Relevant Period did Mr Bell inform any local resident or organisation (such as the Parish Council) that entry onto the Land was prohibited, or else that entry was permitted only for the purpose of exercising a right of way
- When the logs were deposited on the eastern boundary of the Land, at the point where a path leads to the Forge Field Estate, no sign was erected indicating their purpose, nor was any attempt made to secure the remainder of the Site at that time notwithstanding it was apparent that the Land was in use by local people.

26. With reference to paragraph 10 of the Representations, I note the submission as to how matters appeared to Mr Bell. However, for the purposes of my analysis I am not concerned only with how matters appeared to Mr Bell, but rather how they would have appeared to a

reasonable landowner. In this context, whilst I note his evidence was that he had been to the Land on “countless” occasions, Mr Bell accepted in terms of their frequency, his visits only took place once a month. I do not consider that the ‘reasonable landowner’ should be considered to have only such knowledge of what takes place on his land, as he/she might witness during a visit once a month, especially given that such visits could generally be expected to take place during the working day.

27. Lastly in this context, I simply do not accept that in the course of his dealings with the planning department “*at no time was the objector ever informed that the site was subject to recreational use*”, as alleged in paragraph 10 of the Representations. The evidence does not support such a contention; indeed, I referred at paragraph 261 of the Report⁸ to:

- BDBC’s letter of 3 May 2001 to Mr Bell (“*...the land has obviously taken on an amenity space function over the passage of time*”); and
- The officer’s report in respect of the 2004 planning application (records grounds of objection to the proposal as including “*loss of play area*” and “*danger to children finding other play areas*”, whilst also noting that “*The site is considered to be informal open space*”, and that “*The land is used for recreational purposes*”).

28. Accordingly, I remain of the view that I correctly applied the relevant test when considering the evidence as regards whether use of the land was ‘contentious’, and that having applied the test correctly to the evidence in this case, my conclusion was justified.

The “by right/as of right” issue (paragraphs 11-14)

29. This ground of objection to the Application concerned the maintenance of the Land by BDBC, during the early part of the Relevant Period.

30. It is right to say that, in the course of the closing submissions delivered on behalf of the Objectors, I did not understand it to be submitted that section 164 of the Public Health Act 1875 (‘PHA 1875’) and section 10 of the Open Spaces Act 1906 (‘OSA 1906’) would be engaged in circumstances where maintenance of the Land had been undertaken other than with the consent of the landowner. Rather, I understood the Objectors’ case to be that those provisions would only engage had such consent had been granted in respect of the scheme

⁸ See paragraph 231 of the version of the Report dated 14 September 2010.

of maintenance, but that such consent could be assumed in the present case. It is on that basis that I expressed the conclusions set out in the Report.

31. I can now consider the alternative basis on which the Objectors' case is put in paragraphs 11-14 of the Representations, namely that "*the statutes applied even if BDBC acted without the consent of the landowner and by mistake*".
32. I am not aware of any authority which deals directly with this submission. Certainly none is cited by the Objectors in support of the argument which they seek to advance.
33. I do not accept the Objectors' contention. Quite simply, I am unhappy with the proposition that the public have the right to make use of land, and that the OSA 1906 and the PHA 1875 are necessarily engaged, simply because a public authority maintains land – regardless of the circumstances in which that maintenance comes to be carried out. In particular, I do not consider that the public would be entitled to use such land 'by right' where the maintenance is carried out without the knowledge – or indeed against the wishes – of the landowner.
34. Further, I do not consider that the proposition contained in paragraph 14 of the Representations – namely "*if a local authority spends public money on maintaining a public open space, the public have the right to use it*" – sits easily with the decision of the House of Lords in R (on the application of Beresford) v Sunderland City Council [2003] UKHL 60. In that case the City Council (and its predecessors) had maintained land throughout a relevant 20 year period, and this did not prove a bar to its registration as town or village green.

Concluding Remarks

35. Therefore, for the reasons set out in the foregoing paragraphs, having considered the Representations I remain of the view that the registration of the Land is justified.

Alexander Booth

13 October 2010

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