IN THE MATTER OF S.15 COMMONS ACT 2006

AND IN THE MATTER OF AN APPLICATION FOR THE REGISTRATION OF LAND AT LONGBRIDGE ROAD, BRAMLEY AS A TOWN OR VILLAGE GREEN

A D V I C E

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1. INTRODUCTION

1.1. I am asked to advise the Council as Commons Registration Authority ("CRA") in connection with an application to register a piece of land known as the Longbridge Road Play Area as a Town or Village Green ("TVG").

1.2. The background to my Instructions is that a public inquiry into the application was held in April and June 1910. It was presided over by Mr Alexander Booth of Counsel ("The Inspector"), who, in due course, reported to the Council. His initial Report, which omitted to deal with the

evidence of several witnesses, was replaced by a revised Report, dated 28th September 2010. He recommended that the application be granted, and the land registered as a TVG. The landowning Objectors, who were represented by Mr Vivian Chapman QC, made representations on the Report on 8th October. Amongst other things, they requested that the RA take a second opinion. The Inspector responded to these representations by way of a Supplementary Report dated 13th October. The Objectors submitted further representations, taking issue with the Inspector's approach to the user evidence and seeking a fresh public inquiry and/or a second opinion.

1.3. The representations of 8th October raised a number of issues, including allegations that the Inspector:

(i) failed to consider whether user was proved over the whole land or only part of it;

(ii) failed to apply the *"significant numbers"* test properly, particularly having regard to the geographical size and population of Bramley, the chosen Locality;

(iii) failed to reach the right conclusion on the question of contentious user;

(iv) misconstrued s.164 Public Health Act 1875 ("PHA") and ss. 9 and 10 Open Spaces Act 1906 ("OSA") and/or failed to deal with the

question of whether or not those provisions meant that user up to 1999 was by right, not *"as or right"*.

1.4. The Inspector responded in his first Supplementary Report. In essence, he reiterated and explained further his factual conclusions and disagreed with the Objectors' submissions on PHA and OSA.

1.5. As my Instructing Solicitor recognises, I cannot comment on the user evidence. My advice is sought solely in relation to the *"as of right"/"by right"* issue and the question of *"spread"* of users in relation to the chosen locality.

2. *"AS OF RIGHT"* / BY RIGHT

2.1. There appears to be no dispute between the Inspector and the Objectors about the basic proposition that where user is attributable to a legal right, then it cannot constitute qualifying user for the purposes of s.15 CA. The Inspector, however, aligns the Objectors' submission to the concept of user by permission ("*precario"*): 28.09.10 Report, para 294. For sake of completeness, I should say that in my opinion it is clear from R (oao Beresford) v Sunderland City Council [2003] UKHL 60 that the two concepts are distinct: see Lord Bingham, paras 3, 8:

> *"... it is plain, that 'as of right' does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired one by user, for a stipulated period...*

> *... the House became concerned to explore the possibility that ... the inhabits of the locality might have indulged ... not 'as of right' but pursuant to a statutory right to do so. Such use would be inconsistent with use as of right".*
>
> (Emphasis added)

The remainder of Lord Bingham's speech was taken up with examining whether the facts warranted the implication that permission had been granted. In the event, it was held that the particular circumstances justified neither a finding of user by right nor that permission might be implied from the landowner's conduct, but it is clear from all the speeches and, indeed the adjournment in Beresford, that their Lordships were asking themselves the two separate questions.

2.2. The Inspector continued at para 299:

> *"There is no decision of the courts whose ratio directly addresses the proposition that where land is held/operated by a public authority pursuant to"* s.164 PHA and/or ss. 9 and 10 OSA *"it cannot be used in such a way as would justify registration as a TVG. However, notwithstanding this lack of authority, I readily accept the submission that where land is held by a public authority expressly for the purpose of providing a recreational facility for members of the public, those same members of the public cannot use the land in such a way so as to acquire the right to use it as a village green."*

I agree with that paragraph.

2.3. The factual situation in this case, however, is more complex and subtle. The evidence, such as it is, appears to establish that the land was never *"held"* by the local authority, Basingstoke RDC and/or its successor

bodies, Basingstoke DC and Basingstoke and Deane BC ("BDBC"). Outline planning permission ("OPP") was granted on 19th July 1972 upon the application of Norwest Housing Ltd for *"the erection of 52 dwellings with estate roads and footpaths and soil drains to main sewer at Sherfield Road, Bramley in accordance with your application dated 4th April 1972 and the plans and particulars submitted in connection therewith"* and subject to conditions. Condition 6 provided:

> *"The children's play area to be levelled and seeded to the satisfaction of the Local Planning Authority by the time all dwellings on the estate are occupied."*

The reason for this condition was stated as being:

> *"To ensure that the play area is available for use when required."*

The application form did not mention the play area, though it is shown on the approved plans.

2.4. Unsurprisingly for the time, there appears to have been no s.52 Agreement relating to provision or maintenance of the play area. Therefore whilst Condition 6 required the laying out of the area prior to full occupation, there was no continuing obligation to retain the land unbuilt or provision for its maintenance. There was subsequent correspondence in 1975-6 from which it is apparent that it was projected that the then District Council might purchase the area from Norwest and take over its maintenance. The correspondence fizzled out and a Memo from the District Council's Director of Technical Services to the Director of

Planning dated 11th October 1979 states that he could not recommend that the Council take over the land and that he would expect them to decline to *"take on additional maintenance responsibilities at this particular time"*. A letter to the Objectors from the Director of Planning and Transportation dated 3rd May 2001 confirms that there was no requirement for transfer.[1]

2.5. Notwithstanding that Memo, it seems clear that the land was in fact maintained by BDBC. Several of the Applicant's witnesses spoke of the Council having mown the grass until c.2000. In a comment, presumably pursuant to internal consultation on one of the Objectors' planning applications, the Parks and Open Spaces Officer stated:

> *"It is a fact that the land was used by local residents for informal recreation from the time of the building of the original estate until recently when the landowner fenced and gated the site. It can also be confirmed that the land was maintained by BDBC from 1991 to 1999, apparently it seems now in error, and for this reason was included in the open space audit."*[2]
>
> (Emphasis added)

The 3rd May 2001 letter also states that the Council had *"managed"* the land for some years, despite its not being in their ownership. Furthermore, a report dated 20th March 2008 stated that maintenance had been undertaken *"in the mistaken belief that it had become Council land"*.[3]

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1 Objector's Bundle p.88
2 Applicant's Bundle p.187
3 Objector's Bundle p.286, para 25

2.6. The argument as put in the Objectors' written submissions was based on OSA and involved the drawing of an inference *"that BDBC cared for, maintained and controlled the application land not as trespassers but with the permission of the landowner pursuant to s.9(a): omnia rite praesumuntur case acta"*.[4] Evidently a similar point was made orally in relation to s.164 PHA.

2.7. The Inspector rejected these arguments on the basis that he was not prepared to infer that permission had been granted to BDBC to manage the land when the opinion of officers of the relevant department was that this had been done in the mistaken belief that the Council owned the land. Accordingly, he decided that the presumption of regularity was rebutted[5] and rejected the submissions that user was by right pursuant to OSA or PHA.

2.8. SS.9 and 10 OSA (as amended) provide as follows:

> "9.
>
> *A local authority may, subject to the provisions of this Act,—*
>
> *(a) acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or burial ground, whether situate*

[4] Applicant's Bundle p.203
[5] Report 28.09.10, para 306

within the district of the local authority or not; and

(b) undertake the entire or partial care, management, and control of any such open space or burial ground, whether any interest in the soil is transferred to the local authority or not; and

(c) for the purposes aforesaid, make any agreement with any person authorised by this Act or otherwise to convey or to agree with reference to any open space or burial ground, or with any other persons interested therein."

10.

" A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—

(a) hold and administer the open space or burial ground 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 and under proper control and regulation and for no other purpose: and

(b) maintain and keep the open space or burial ground in a good and decent state.

and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them."

2.9. *"Open space"* is defined by s.20 OSA as:

"*any land, whether inclosed or not, on which there are no buildings or of which not 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 the purposes of recreation, or lies waste and unoccupied."*

2.10. S.164 PHA 1875 (as amended) provides as follows:

" Any local authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.

Any local authority may make byelaws for the regulation of any such public walk or pleasure ground, and may by such byelaws provide for the removal from such public walk or pleasure ground of any person infringing any such byelaw by any officer of the local authority or constable".

2.11. Whether or not it was accepted at the inquiry that, for these provisions to be engaged it was necessary to infer the landowner's consent, the Inspector in his supplementary Report considered and rejected the submission that the statutory powers applied even if BDBC acted without the consent of the landowner and by mistake. He said that he was unaware of any authority dealing directly with the point. He went on to reject the submission, saying:

"Quite simply, I am unhappy with the proposition that the public have the right to make use of the 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."

2.12. I agree with the Inspector that this difficult point has not been considered in any reported court case. Nor am I aware of any relevant registration authority decisions. If there were any, I have no doubt that the researches of the Inspector and Counsel for the Objector would have disclosed them. Therefore it is necessary to approach the question from first principles.

2.13. Working on the conventional basis that either or both of the statutory powers could, in the case of land established to have been held by a local authority for such purposes, confer recreational rights inconsistent with the s.15 CA concept of *"as of right"*, the first step is to decide whether or not the facts fit within any of the provisions.

2.14. Ss.9, 10 OSA

2.14.1. S.9(a) grants wide acquisition powers in respect of *"any open space or burial ground"*. S.9(b) confers powers of care, management and control *"of any such open space or burial ground ... whether any interest in the soil is transferred to the local authority or not."* (emphasis added). The power of making agreements in s.9(c) applies with reference to *"any open space"* (emphasis added). Pausing there, the qualification *"such"* which is present in (b) must have the effect of relating and confining the control to interests, rights and easements in or over open space acquired under

(a). S.9(c) is a specific power of making agreements *"for the purposes aforesaid"*, which qualification must relate to the undertaking of care, management and control of an open space or burial ground in which an interest or right has been acquired under (a).

2.14.2. S.10 OSA imposes a statutory trust where a local authority have acquired *"any estate, or interest or control over <u>any</u> open space ... <u>under this Act</u>"* (emphasis added). The reference to acquisition *"under this Act"* must include s.9. (There are other acquisition powers in OSA, but none of them is relevant here).

2.14.3. I agree with the Inspector that such evidence as there is about the maintenance of the land rebuts the presumption of regularity. The first time when BDBC were described as having *"managed"* the site despite its *"apparently not being in the Council's ownership"* was in May 2001, which was only about two years after the mowing ceased. Later explanations use the term *"error"*. Given the controversy which ensued and the political interest (e.g. there was a report to the Planning Portfolio holder following a petition in 2008), I do consider it most unlikely that if there had been a formal agreement (even if only oral), nobody would have recalled or produced it. The possibility of taking on maintenance of the site had been considered in the 'seventies and apparently rejected. On the facts that have emerged, I consider it more probable than not that the Council's Leisure service simply took to mowing the land in the belief

that it was an area which the Council had taken over after development, if, indeed, anyone thought about it at all. Such practical action on the ground, unaccompanied by a high level rationalisation, is not unusual in these cases, in my experience.

2.14.4. Therefore I consider that the land in question did not fall within s.10 OSA because no *"estate or interest or control over"* it was *"acquired under this Act"* – that is, under s.9(a). Whilst s.9(b) expressly extends beyond situations in which an interest in the soil is transferred, nevertheless the words *"any right"* in s.9(a) are broad enough to include a mere contractual right, such as a licence to occupy/maintain. Therefore even mere "*control of any <u>such</u> open space*" in (b) is capable of relation back to one of the power of acquisition by agreement in (a). Not only is there an absence of evidence to support the taking of action under s.9(a) but, as I have said, such evidence as there is indicates the contrary.

2.14.5. It follows that I do not consider that the statutory trust pursuant to s.10 OSA applied to the land. Therefore user was not attributable to any right under an OSA trust.

2.15. <u>S.164 PHA 1875</u>

2.15.1. S.164 PHA is rather different from ss.9 and 10 OSA. In the style of its time, it deals with several different matters without dividing them into subsections. There are, in fact, three groups of powers: acquisition, laying out and maintaining; support or contribution to support of walks or

grounds *"provided by any person whomsoever"*; regulation by byelaw. The second group of powers expressly governs situations where the local authority[6] is not the provider of the facility, but merely *"supports"* or *"contributes to the support"* of it. None of the key terms – *"public walks or pleasure grounds"*, *"support"* or *"contribute"* is defined. I find nothing in the section itself, however, which suggests that the power of support only applies where the provider has expressly consented.

2.15.2. In this case, the facility was provided pursuant to a planning condition. Such an arrangement would not have been in contemplation in 1875, but I do not think that this matters. The situation plainly constitutes *"provision"* by a *"person"*, namely the developer. For as long as the land was made available to the public, it continued to be provided by the landowner/developer. The land was provided with the intention of its being laid out as a children's play area. Such a use, in my opinion, clearly falls within the statutory term *"pleasure grounds"*. It appears that play equipment was never provided, but that the Council began mowing the grass. The space, whilst described in 20th/21st century planning jargon as an *"amenity area"*,[7] still, in my view, fell within the statutory description *"public walks or pleasure grounds"*. As a matter of fact, many of the Applicant's witnesses described how the mowing facilitated leisure activities of walking and playing with children, so it seems to me that the Council's activities plainly *"supported"* and/or *"contributed to the support"*

6 *"Urban authority"* is similarly extended to all local authorities by Local Government Act 1972.

7 Letter, May 2001, eg.

of the recreational facility. On the Inspector's factual findings (upon which I cannot comment), the land appears to have been fully open to the public in the period of the Council's maintenance. On the face of it, therefore, the Council's actions were, as a matter of law, capable of rationalisation by reference to s.164 PHA 1875.

2.15.3. Three points about this construction trouble me. Firstly, the effect of any of the first two groups of elements comprising s.164 being engaged is that the third will have come into play – the power to make byelaws, including the power of removal from the land of any person infringing such byelaws. Therefore, hypothetically, the Council could have prosecuted or removed the landowner or his representative if he had exercised some right of ownership on the land which happened to contravene the byelaws.[8] Secondly, such a construction in the twenty first century sits ill with the interpretative obligation imposed by s.3 Human Rights Act 1998 and the Convention rights concerning peaceful enjoyment of possessions. Arguably, however, the answer to both these points is that the landowner could have taken steps to prevent the Council from *"supporting"* the facility; moreover, the developer had, as a condition of its planning permission, become subject to an obligation to provide (though not maintain, or *"support"*) the play space, so public intervention in pursuit of that objective might be said to have been proportionate in relation to any legitimate interest of the owner. Thirdly,

[8] Trivial examples, bearing in mind the sorts of matters often covered by such byelaws, might have been the consumption of alcohol or bringing a horse onto the land, or going onto the land after dark.

and most problematic of all, there is the difficulty that the Council was mistaken, or at least agnostic, about what it was doing and why. The maintenance staff evidently assumed that they were tending a Council-owned facility. On my construction of the facts, it appears as though nobody in authority had approved their actions – the only available evidence, dating from 1979, is to the contrary. Doubtless had somebody thought to ratify the expenditure on the land it could have been done on the basis that an appropriate power existed, but there is no evidence that this was done. The actions of the maintenance staff were therefore undertaken without authority and were not in fact those of BDBC. Although they can be rationalised as a matter of law after the event by reference to s.164 PHA, the rationalisation is merely that – a piece of legal theorising. On the other hand, this set of facts appears to me to fit exactly within Lord Walker's paraphrase in Beresford of the words *"as of right"*: closer to *"as if of right"*.[9] (For sake of completeness, however, I should add that I do not regard the Inspector's objection to Mr Chapman's submission on the basis of general inconsistency with Beresford as overriding, because the facts were actually very different; in that case the land had been acquired and was expressly held by the local authority for development purposes although the House of Lords found that they had acquiesced in recreational user such as to give rise to the creation of a TVG).

[9] Para 72

3. LOCALITY

3.1. The Applicant amended her application to rely on the Locality of the civil parish of Bramley, having originally specified as the Locality or Neighbourhood *"Longbridge Road in the Parish of Bramley"*. There are various maps among the papers, one of which, *"Map 3 + 3A"* purports to show the whole parish with the homes of supporting witnesses marked on it, as well as certain local facilities; in fact, only parts of the parish boundary appear to be shown. I suspect that this is the map referred to in Section 6 of the application form 44. The Inspector recorded that the application was proceeding on the basis of the parish, rather than Longbridge Road.[10]

3.2. In his Report of 28.09.10, the Inspector concluded that he was *"satisfied that use of the land for sports and pastimes was carried on by a 'significant number' of local people."*[11] Before reaching this conclusion, the Inspector referred to some of the caselaw on this point, noting that Sullivan J in R (McAlpine Homes Ltd) v Staffordshire CC (2002) PLR, 1 had said that *"significant"* does not necessarily mean *"substantial"*, or *"significant"*, but rather, *"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"*. He also rightly referred to some of the guidance on path user in R (Laing Homes) v

10 Report, 28.09.10, para 9
11 Op cit. Para 2.40

Buckinghamshire CC (2004) 1 P&CR 573 and at first instance in Oxfordshire County Council v Oxford City Council (2004) Ch 253 (*"Oxfordshire"*), specifically quoting a passage from Lightman J's judgment in the latter case.

3.3. In their comments on the Report, the Objectors submitted that the Inspector *"failed to consider the geographical size and population of Bramley or whether users could realistically be regarded as 'the local community of Bramley' as opposed to the inhabitants of Longbridge Road and a small number of other roads in the close vicinity"*. Statistics are then given concerning the Parish which demonstrate that in numerical terms only some 0.6% of inhabitants had given evidence to support the application. The Inspector accepted in his Supplementary Report that he had not covered this matter in his Report because he did not understand it to have been advanced at the Inquiry. He then went on to deal with the numerical aspect of what he termed the *"Spread and Fit"* point by reference to comparison with the actual facts in McAlpine.

3.4. McAlpine is the only case which has dealt directly with *"significance"*. It is important to bear in mind that it was a judicial review rather than an application under s.14 Commons Registration Act 1965. Accordingly the Court's role in relation to matters of fact and judgment was limited. Sullivan J pointed out that, as well as the oral evidence, there had been written statements and that the Inspector had also properly had regard to

the geographical position of the land beside a "*well-known local attraction*"[12] with footpaths leading to it rendering it within easy walking distance of the centre of Leek (the Locality).[13] I respectfully consider that the Inspector's mathematical approach to McAlpine in his Supplementary Report is an inappropriate way to use a judicial review judgment and only deals with part of the material to which the Court had regard in finding that the inspector's findings were legally supportable.

3.5. Questions concerning locality and neighbourhood have recently been the subject of litigation in Leeds Group plc v Leeds City Council [2010] EWCA Civ 1438 and R (Oxfordshire and Buckinghamshire Mental Health Trust) v Oxfordshire CC [2010] EWHC 530 (Admin) ("Mental Health Trust"). In both cases, the judges considered carefully dicta of Lord Hoffmann in R v Oxfordshire CC ex parte Sunningwell PC [2000] 1 AC 335 and in Oxfordshire. In Sunningwell, the question arose as to whether user was *"too broad"* because, although *"predominantly"* by inhabitants of the village, outsiders sometimes used the green. Lord Hoffmann said that he thought it *"sufficient that the land is used predominantly by inhabitants of the village";* this case, of course, preceded the amendments introduced in the Countryside and Rights of Way Act 2000 ("CROW"). Subsequently,

12 A well, in a part of Derbyshire where such features have traditionally been and remain of considerable cultural significance.

13 Op cit, para 76

the House of Lords in Oxfordshire considered the amended definition. Lord Hoffmann said:[14]

> "*Any neighbourhood within a locality" is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries. I should say at this point that I cannot agree with Sullivan J in R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2004] JPL 975 that the neighbourhood must be wholly within a single locality. That would introduce the kind of technicality which the amendment was clearly intended to abolish. The fact that the word "locality" when it first appears in subsection (1A) must mean a single locality is no reason why the context of "neighbourhood within a locality" should not lead to the conclusion that it means "within a locality or localities"*

3.6. A point related to *"fit"* was taken by the landowner in the Mental Health Trust case, though HHJ Waksman QC redefined it as the issue of whether or not the CROW amendments had abolished the common law requirement that users should *"predominantly"* come from the qualifying area, in that case, a neighbourhood. He held that the new provision was *"clear in its terms and provided that a significant number of the inhabitants of the locality or neighbourhood are among the users it matters not that many or even most come from elsewhere"*. In Leeds, the landowner submitted that the common law requirement for a single locality, which Lord Hoffmann had reaffirmed in the case of the CROW definition at para 27 of his speech in Oxfordshire, must also apply to the

[14] At para 27

new concept of *"neighbourhood"*. The Court of Appeal (by a majority) rejected this argument, Sullivan LJ saying:[15]

> *"The fact that Parliament chose to retain the 'Common Law baggage' associated with 'locality' in limb (i) of the subsection is not a reason to infer that it intended that all aspects of the common law locality rule were to be grafted onto the new concept of 'neighbourhood within a locality' in limb (ii)."*

(Emphasis added)

3.7. All the judges in the post-amendment cases discussed above recognised, having considered both the amendment and the underlying Hansard material, that the Parliamentary objective in changing the definition had been to make registration easier. The result is that there is a choice between a *"locality"*, which must have *"legally significant boundaries"* and a *"neighbourhood"* (or neighbourhoods: Leeds) *"within a locality"*, which must be established by the applicant to have had a pre-existing significance: Mental Health Trust, para 79, where HHJ Waksman QC referred with approval to Sullivan J's *"cohesiveness"* test in R (Cheltenham Builders) Ltd v South Gloucestershire Council [2004] JPL 975.

3.8. It is relevant to bear in mind the pre-amendment approach of the Courts to the identification and definition of a qualifying locality. In MoD v Wiltshire [1995] 4 AER 931 at 937 b-d Harman J approved a submission that it was not possible to create a TVG for the benefit of an area unknown to the law. Similarly, Carnwath J at first instance in R v Suffolk CC ex parte Steed (1995) 70 P&CR 487 at 501-502 said that *"locality"* connotes

[15] At para 26. He was in the majority and gave the leading judgment.

"something more than a place or a geographical area – rather, a distinct and identifiable community, such as might reasonably lay claim to a TVG as of right ... there was some suggestion that a smaller unit could be taken, perhaps the streets adjoining the land ... in the present statutory context I do not think that a piece of land used only by the inhabitants of two or three streets would naturally be regarded as a 'TVG'. The word 'locality' in the definition ... should be interpreted with regard to its context." Clearly Steed must be treated with some caution in view of Sunningwell and the disinclination of a majority of the Law Lords in Oxfordshire to limit the types of land which might become TVGs. Nevertheless both those mid-'nineties judgments are significant for understanding the background against which the CROW amendments were made. The introduction of *"neighbourhood within a locality"* reflected the constraints on the meaning of *"locality"* which both the common law and the first two post-1990[16] judgments imposed.

3.9. Turning back directly to *"significant number"*, this element of the statutory definition was also introduced in the CROW amendment. It has recently been seen variously:

(i) as doing *"no more than state what was obvious anyway – that there needed to be a significant number from the locality, rather than just a handful"*;

[16] The significance of 1990 was that it was then that s.13 Commons Registration Act 1965 began to produce applications to register new TVGs.

(ii) being a *"requirement that the users include a significant number from it so as to establish a clear link between the locality (or now neighbourhood) and proposed TVG* ***even if*** *such people do not comprise most of the users"*

(Option (ii) was the interpretation adopted by HHJ Waksman QC in deciding that the former Predominance Test had been removed in favour of the new *"Significant Numbers"* test, rejecting Option (i) which had been urged on him by the Claimant landowner)

(iii) as a balancing factor imported by Parliament when liberalising the qualifying area rule; in the words of Sullivan LJ in Leeds, *"However Parliament while abolishing technicalities in the limb (ii) of Class C, also made it clear that in respect of both limbs only user by a significant number of the inhabitants of the locality, neighbourhood or neighbourhoods, ... will suffice"*.[17]

3.10. Notwithstanding recent caselaw on neighbourhood and predominance, Sullivan J's question in McAlpine: *"significant for what purpose?"* and Counsel's answer, which he adopted: *"sufficient to indicate that their user of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers"* remain definitive.

[17] Leeds para 26

3.11. In so holding, Sullivan J rejected the idea that significance was to be judged purely in numerical terms.[18] Furthermore, as I noted above, the inspector in that case had regard to more than simply the number of witnesses, and the judge plainly found those other factors to be important. The formulation makes clear that the assessment is not to be undertaken in vacuo. Significance has to be assessed by reference to *"the local community"*, which must mean the unit chosen by the applicant, whether a locality or a neighbourhood/s within a locality; what the decision maker has to consider is whether there is *"a clear link between the locality....and proposed TVG"*.

3.12. The Applicant had a choice under the amended definition, whether to base her case on locality or neighbourhood. She was aware of the scope for such a choice and the importance of it, as is evident from her decision to *"switch horses"*. My purpose in reviewing the caselaw and the background and effect of the amendment has been to set the exercise of applying the statutory words in context. Whilst the overall judgment is a matter of impression, as both the inspector and the Judge recognised in McAlpine, the impression must be based on a proper appreciation of the significance of the test. In a *"limb (i)"*/locality case, *"significant numbers of the inhabitants"* must bear a sensible relationship to the locality. *"Locality"* where it first appears (i.e. *"limb (i)"*) is to be understood in its pre-amendment context – the term retains its *"Common Law baggage"*.

[18] Para 71... emphasis added.

The law was relaxed because Parliament considered the locality rule too harsh and a *"neighbourhood"*, accordingly, might be constituted by *"a collection of few streets"*, where evidentially justified on *"pre-existing/cohesiveness"* principles. But if an applicant chooses a locality, then the user evidence should reflect 'significance' by reference to something which the law recognises to be a locality; otherwise, an applicant could bypass the *"pre-existing/cohesiveness"* requirement by simply specifying a locality but leading evidence confined to an area of no legal significance which would have failed prior to the CROW amendment on Wiltshire / Steed principles. Therefore I consider that an applicant should, as a matter of law, demonstrate a genuine relationship between user and the claimed locality or neighbourhood/s. In my view, relevant factors in the assessment will be numbers, geographical spread and physical/functional links between the claimed green and the whole of the specified locality/neighbourhood. Whilst it is not for me to comment on purely factual matters, it does seem as though the Inspector has not reached his conclusion on the basis of what I regard as the correct legal principles. In particular, on the strength of the material which I have seen, I cannot detect the underlying factual basis for finding that the amended application, founded upon the locality of a populous and geographically extensive parish, had been justified. As Lord Hoffmann observed in Oxfordshire,[19] it is not for the RA to reformulate an application; the

[19] Para 61

amendment was made at the Applicant's request and no evidence was led to support a *"neighbourhood"* of Longbridge Road.

4. CONCLUSIONS

4.1. Accordingly, I would recommend against registration on the basis that user has not been proved by significant numbers of the inhabitants of the claimed locality.

4.2. I shall be happy to advise further if necessary. In particular it might be helpful to discuss with my Instructing Solicitor the procedural implications of my advice and the Objectors' evidential concerns.

MORAG ELLIS QC
3 March 2011

2-3 Gray's Inn Square
London WC1R 5JH

IN THE MATTER OF S.15 COMMONS ACT 2006

AND IN THE MATTER OF AN APPLICATION FOR THE REGISTRATION OF LAND AT LONGBRIDGE ROAD, BRAMLEY AS A TOWN OR VILLAGE GREEN

A D V I C E
