

## REGULATORY COMMITTEE

### AGENDA ITEM 10 : APPLICATION TO REGISTER LAND AT THE PADDOCKS, WOUGHTON ON THE GREEN, MILTON KEYNES, UNDER THE PROVISIONS OF SECTION 15 OF THE COMMONS ACT 2006.

DATE OF MEETING : 2 DECEMBER 2015

#### **NOTE TO THE MEMBERS OF THE REGULATORY COMMITTEE PREPARED ON BEHALF OF THE COUNCIL AS OBJECTOR TO THE REGISTRATION OF THE LAND AS A TOWN OR VILLAGE GREEN**

1. As the freehold owner of the land the subject of the application to register the Paddocks – Woughton-on-the-Green as a town or village green, the Council is entitled, to object to the application for registration of the land identified as a town or village green.
2. We were appointed in the July 2015 to act on behalf of the Council, in its capacity as landowner, to object to the application for registration.

#### **What the applicant must prove to have land registered as a town or village green**

3. In order to register land as a town or village green the applicant for registration must prove that the land has been used for lawful sports and pastimes, by the local inhabitants or inhabitants of any neighbourhood within the locality, as of right and for over a twenty year period.
4. In the context of this application the land is split into two parts the northerly part of the land which is referred to in the objection as the Transport Corridor Land and the southerly part, referred to as the Southern Land.
5. Dealing firstly with the northerly part, this is incapable of registration as a town or village green by virtue of section 15C Commons Act 2006. This is because the land is earmarked for development in the Council's saved Local Development Plan 2005.
6. Dealing secondly with the southerly part, the landowner's case is that the land is not capable of registration as a town or village green. This is because the land is held for recreational purposes pursuant to the Council's statutory powers. This follows the decision in the Supreme Court case of *Barkas*<sup>1</sup>. In such cases, where this principle is raised, the key question is on what basis the land is held by the local authority landowner. This question comes before any analysis of how the land has been used and is purely a legal exercise. If the Registration Authority concludes that the land is held for statutory recreational purposes, by the landowner, then it is incapable of registration as a town or village green.
7. It is on this basis that we contest the need for the Registration Authority to hold a local public inquiry into this matter.

#### **Reasons why a non-statutory public local authority is not required**

8. Government guidance issued to local authorities advising them as to when they should hold a public local inquiry to consider whether to register land as a town or village green is set out

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<sup>1</sup> *R (on the application of Barkas) v North Yorkshire County Council [2014] UKSC 31*

in guidance entitled “*Part 1 of the Commons Act 2006; Guidance to commons registration authorities and the Planning Inspectorate – December 2014*”.

9. The guidance provides at paragraph 5.11.33 that Registration Authorities are advised,

“...that for contested applications to register new town or village greens under Section 15(1), the courts have commended independent inquiries. In *R (on the application of Whitmey) v The Commons Commissioners*, Arden LJ said that, in relation to an application for registration of a new green under Section 13 of the 1965 Act, the registration authority “*should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority’s request held a non-statutory public inquiry. ...The authority may indeed consider that it owes an obligation to have an inquiry if the matter is of great local interest.*” More nuanced views were expressed by the High Court in *R v Suffolk County Council, ex parte Steed*, where Carnwarth J said: “*Some oral procedure seems essential if a fair view is to be reached where conflicting recollections need to be reconciled*”; and in *R (Cheltenham Builders Limited) v South Gloucestershire District Council*, where Sullivan J said: “*...discretion is not unfettered. It must be exercised in a manner which is fair to applicants and objectors. What fairness requires by way of procedure will depend upon the circumstances of the particular application. Coupled with the obligation to act fairly, the registration authority is also under an obligation not merely to ask the correct question under the Act, but to ‘take reasonable steps to acquaint [itself] with the relevant information’ to enable it to correctly answer the question:....*”
10. The particular point to note about these cases is that they were all decided before the *Barkas* case referred to above. Before *Barkas*, objections to the registration of a town or village green would in almost all cases be on the basis of a challenge to the applicant’s evidence of use for recreational purposes.
11. In these circumstances the Courts have rightly advised Registration Authorities of the need to have that evidence properly tested through the medium of an Inquiry.
12. However, where the evidence of sufficiency of use is not relevant and the question is purely one of law, that is, in a case where, irrespective of the use made of the land it cannot be registered as a village or town green, it is difficult to see why it is necessary to convene an Inquiry, especially as there would still be an Inquiry if the preliminary legal question were to be determined in the applicant’s favour. This case falls into that category.
13. In these circumstances the preliminary questions, which are relevant in this case are:
  - 13.1. Is the land comprised in the Transport Corridor capable of being registered as a town or village green as a matter of law?
  - 13.2. Is the southern land capable of being registered as a town or village green as a matter of law, i.e. is the land held by the landowner, a local authority, for recreational purposes?
14. Although it is accepted that these questions would need to be considered by a party independent of the Council – if for no other reason than to avoid the perception of possible bias, even if that were highly unlikely – that does not mean that it is necessary for the

Registration Authority to incur the time and expense of an Inquiry as the preliminary questions could as easily be dealt with by way of written representations. This would still involve an independent person considering the evidence, but on paper rather than at an Inquiry.

15. On this basis we do not accept the Registration Authority's reasons for convening an Inquiry as set out in paragraphs 5.5 to 5.8 of the Report prepared by officers as follows:

15.1. The issue of usage is completely irrelevant, the only relevant point in issue is to apply the relevant legal tests and determine whether the land is capable of registration as town or village green for the reasons set out above. If that question is answered in the affirmative then it is at that stage that it would be appropriate to convene an Inquiry.

15.2. Written representations would be entirely appropriate as there is no need to test the evidence as it is largely documentary in nature. Once the question of usage is put to one side, as it would be in this case, then there is no obvious reason why live evidence is helpful since it would focus (as it did in the recent Woughton-on-the-Green Inquiry) on how the land was used for recreational purposes which is not relevant to the legal question of whether the land is capable of being registered as a town or village green in the first case.

16. In these circumstances we respectfully suggest that instead of holding an Inquiry at this stage it would be more cost-effective and appropriate to appoint an external party (possibly a lawyer, e.g. barrister) to review the evidence and reach a preliminary view on the basis upon which the land is held. If the conclusion of that process is that:

16.1. the land is held for statutory recreational purposes then the case need proceed no further and the application refused; or

16.2. in the alternative, if the view reached is that the land is not held for statutory recreational purposes by the Council, it is then that it would be appropriate to convene an Inquiry to properly consider the use made of the land by those that claim it should be registered.

**Freeths LLP**

**1 December 2015**