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SOLICITORS

DATE: SEPTEMBER 2018

COMMONS REGISTRATION ACT 1965 & COMMONS ACT 2006 – SECTION 15 (1)

APPLICATION BY MR RICHARD AMY FOR THE REGISTRATION OF LAND AS A TOWN OR VILLAGE GREEN

LAND AT HILLCREST, ABERHAFESP, NEWTOWN

COUNCIL REF: RCCS/TVG/SB/16-001VG

CASE SUMMARY OF LEGAL ARGUMENTS AND AUTHORITIES

ON BEHALF OF THE LANDOWNER IN OBJECTION

FBC MANBY BOWDLER LLP
ROUTH HOUSE
HALL COURT
HALL PARK WAY
TELFORD
TF3 4NJ
NB/MT/979001/1

1. These submissions are made on behalf of Mr Frank Davies in relation to the application by Mr Richard Amy ('the Applicant') under s15 of the Commons Act 2006 for a Town or Village Green ('the Application') on land at Hillcrest, Aberhafesp ('the Land').

2. The Application has been allocated reference RCCS/TVG/SB/16-001VG by the Council and the validity of the Application will be considered at a hearing on 10 and 11 October 2018 ('the Hearing').

3. The Land is owned by Mr Davies ('the Owner') and his late brother's wife Mrs Carol Margaret Davies. The Owner objects to the Application and the submissions in this document set out the legal arguments and authorities upon which the Owner intends to rely at the Hearing. We are not formally instructed by Mrs Davies but are advised that she is content for the Owner to instruct us to resist the Application. We are not, at present, instructed to appear on the Owner's behalf at the Hearing.

The Law

4. The Commons Act 2006 s15 provides that any person may apply to the commons registration authority to register land as a town or village green where 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**.

5. The requirements of s15 of the Commons Act 2006 are dealt with separately below. Each component part of the legal test must be satisfied in order for the Application to succeed.

6. It is for the Applicant to discharge the burden of proof in this case. The standard of proof is the balance of probabilities.

"significant number of the inhabitants"

7. This requirement was the subject of judicial discussion in R (Alfred McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC 76 (Admin), where Sullivan J held:

> "*71. Dealing firstly with the question of a significant number, I do not accept the proposition that significant in the context of section 22(1) as amended means a considerable or a substantial number. A neighbourhood may have a*

very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to be properly described as a considerable or a substantial number. In my judgment the inspector approached the matter correctly in saying that "significant", although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that what matters is that the number of people using the land in question has to be sufficient to indicate that their use 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."

8. In other cases the Court has established that what constitutes 'significant' will depend on the context of the locality or neighbourhood and the circumstances of the case.

9. In the Evidence Questionnaire attached to the Application, the Applicant confirms that the claimed locality/neighbourhood is 'Hillcrest'; it is assumed that he is referring to the Hillcrest housing estate ('the Estate').

10. The test therefore is whether the Land has been used by a significant number of the inhabitants of the Estate. As per Sullivan J's dicta above, the question which needs to be asked is whether the number of people using the Land has been sufficient to indicate that their use signifies general use rather than occasional use. It is submitted that the evidence submitted with the Application does not come close to establishing that.

11. Firstly, the evidence suggests that at the time of the Application (and for some years prior to that) a large number of the users of the Land did not reside on the Estate (and were not therefore inhabitants of the locality or neighbourhood):

    i) Eluned Jones (who at the time of writing her letter had moved off the Estate) says that her children (who presumably live with her and therefore not on the

Estate) play on the Land when she takes them to visit her parents, who live on the Estate;

ii) Elizabeth Davies says that she lives on the Estate and that her children (who used to play on the Land) now bring their children to play on the Land 'when they visit'; again, presumably Ms Davies' grandchildren do not live on the Estate and are not therefore 'inhabitants';

iii) Mrs P Bound also says that her grandchildren play on the Land when they visit her;

12. The evidence also suggests that the use of the Land by children who were resident on the Estate decreased significantly in the years immediately prior to the submission of the Application: one example is the Evidence Questionnaire attached to the application, in which the Applicant says (at 21) that his children no longer play on the Land because they got too old; in the document attached to the Application and referred to by the Applicant as his 'Fuller Summary' he states that a few families have remained living at Hillcrest after their children have departed.

13. In his letter to the Council dated 7 September 2018 the Owner states that the children of many of the current residents living on the Estate used to play on the Land years ago, but have since grown up and moved off the Estate. The Owner also says that there were only 2 children living on the Estate when the Application was made, and produced evidence confirming that the nearest school closed on 31 December 2011.

14. Looking at the evidence holistically, it is clear that prior to the Application being submitted the Land was primarily played on by children who were not resident on the Estate, and were not therefore inhabitants of the locality/neighbourhood.

15. The evidence of use of the Land by adults residing on the Estate must also be assessed. Overall, the evidence of adult inhabitants of the Estate engaging in lawful sports or pastimes on the Land too is vague and unsupported for the Council to be satisfied on the balance of probabilities. There is no documentary evidence (e.g. photographs) of such events, which one would expect; the evidence of the few inhabitants who do refer to social gatherings suggests that they are extremely rare. Examples include:

i) John and Diane Law say that they have attended two 'get togethers' of the residents' in the couple of years preceding their letter, which suggests that the get togethers are very rare. They are also not specific as to whether the get togethers were meetings, or sports or pastimes – the phrase could fall into either bracket;

ii) D.R. Jones says that the whole community use the Land to have a neighbourhood get together; however, they are not specific as to whether they are lawful sports or pastimes or in fact are the meetings referred to by others. Again, the phrase could fall into either bracket.

16. Even if one was to assume that some of the gatherings referred to were indeed 'lawful sports or pastimes', only a small percentage of the residents who made submissions actually refer to adult activities; the vast majority refer only to children playing.

17. The evidence does not, therefore, establish on the balance of probabilities, that a significant number of the inhabitants of the Estate were using it. The impression gleaned from the evidence is very much one of occasional use by younger inhabitants, rather than general use by a significant number of inhabitants.

"Any locality, or any neighbourhood within a locality"

18. The Land must have been used by inhabitants of a "locality" or of "any neighbourhood within a locality". The locality/neighbourhood claimed is the Estate.

19. In Ministry of Defence v Wiltshire County Council [1995] 4 All ER 931 the Court held that a 'locality' needs to be an area capable of being defined by some division known in law such as a parish or local government area, and that the Court held that the residents of three streets did not constitute a locality. The Court in R (Laing Homes) v Buckinghamshire CC [2003] PLR 60 confirmed that a "locality" must be some legally recognised administrative unit and not an arbitrary line on a map.

20. The second limb to the test ("any neighbourhood within a locality") is more flexible than the first but the Court in R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2003] EWHC 2803 (Admin) held that a 'neighbourhood' "*has to be….a sufficiently cohesive entity that is capable of definition. Merely drawing a line on a plan does not thereby create a "locality*".

21. The Applicant has not made it clear whether his claim is based on use by inhabitants of a locality or of a neighbourhood within a locality. It is assumed, given the limited extent of the Land, that it is the latter, and that the neighbourhood claimed is the Estate, and the locality claimed is Aberhafesp.

22. It is submitted that the Estate does not constitute a neighbourhood within a locality, and the submissions in this regard made in Wace Morgan's letter of 28 June 2017 on behalf of the Owner are repeated.

"As of right"

23. In R v Oxfordshire County Council, ex p Sunningwell Parish Council [2000] 1 AC 335 ('Sunningwell') the House of Lords held that use is not "as of right" unless it is nec vi, nec clam, nec precario; Lord Hoffmann confirmed that that meant not by force, nor stealth, nor the licence of the owner.

24. In Sunningwell, Lord Hoffmann cited with approval a passage of Fry J from Dalton v Angus (1881) 6 App Cas 740 in which the doctrine of lost modern grant was established:

> *"in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest."*

25. In R (Lewis) v Redcar and Cleveland Borough Council [2010] UKSC 11 Lord Walker (at para 30) referred to the proposition relied on by Counsel in that case that "*if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him*."

26. Lord Walker added (at para 36) that he had ". . . *no difficulty in accepting that Lord Hoffmann was absolutely right, in Sunningwell [2000] 1 AC 335, to say that the English theory of prescription is concerned with 'how the matter would have*

appeared to the owner of the land' (or if there was an absentee owner, to a reasonable owner who was on the spot)."

27. The Owner has not given anybody express permission to use the Land.

28. However it is contended that, aside from the occasional child playing on the Land, the Owner has not seen or been made aware of any social use of the Land e.g. social gatherings, firework displays or other activities which it is claimed have taken place, despite him passing it regularly by car (he lives only a few miles away) and mowing it regularly.

29. Whilst the inhabitants may not have intended their use to be secretive or by stealth, the use has not been sufficient to bring home to the Owner that a right is being asserted against him, and as such he has not had the choice of warning them off the Land as is required (per Lord Walker in the 2010 Supreme Court case of Redcar, referred to above).

"Lawful sports and pastimes"

30. In the Sunningwell case Lord Hoffmann said:

> "*As a matter of language, I think that "sports and pastimes" is not two classes of activities but a single composite class which uses two words in order to avoid arguments over whether an activity is a sport or a pastime. The law constantly uses pairs of words in this way. As long as the activity can properly be called a sport or a pastime, it falls within the composite class*".

31. The Application suggests that activities on the Land have included children playing, barbecues, social gatherings, meetings, firework displays and snowmen building. It is accepted that, aside from the meetings, barbecues and social gatherings, these activities meet the definition of 'lawful pastimes and sports' for the purposes of s15 Commons Act 2006.

32. Several of the letters submitted with the Application refer to meetings taking place on the Land. The Applicant says that residents' association meetings have taken place. It is submitted that such a meeting cannot possibly be defined as a sport or a pastime.

33. The Court explained in Sunningwell that the context of sports and pastimes in the Commons Act 2006 suggests that barbeques or social gatherings should not be seen as falling into this category either.

34. The Owner has occasionally seen people walking across the Land. That is not a lawful sport or pastime if it is walking directly from A to B; in this case the land area is so small that those walking across it would not have been doing so as a sport or pastime.

"For a period of at least 20 years"

35. Subject to the exceptions below, the Land must have been used as of right for at least 20 years prior to the date of the Application. In Oxfordshire County Council v Oxford City Council [2006] UKHL 25 the Court confirmed that the 20 year period must be continuous.

36. The requirement that the use must continue up to the date of the application is qualified in s15 as follows:

    a) S15(3) says that where the use has ceased before the application is made, but after s15 has come into force (6 September 2007 in Wales), then provided the period between the cessation of the user and the making of the application is not more than 2 years, the user is deemed to have continued until the date of the application.

    b) Section 15(4) says that where the use has ceased before s15 came into force, an application must be made within 5 years. Under s15(5) the right to apply within this 5 year period does not arise where, before 23 June 2006, construction works have been carried out with planning permission and the land has become permanently unusable.

37. The documents submitted with the Application contend that the use of the Land was ongoing as at the date of the Application, and therefore the relevant period is 1996 to 2016.

38. The Owner's case is that the Land was inaccessible to anyone from 1996 (and prior to this from at least the mid 1980s) up until 2003 because it was overgrown with

grass and thistles. The grass and thistles were cut once a year following which it remained inaccessible because the cut grass and thistles were left on the Land.

39. Even if the use of the Land met the requirements of the legislation from 2003 to 2016, that would only give 13 years and the Application would fail. The required 20 years use could not have been achieved prior to the 1980s because the Applicant says that the contended use commenced in 1988.

40. On this basis, the claim should not succeed.

41. If, however, for whatever reason the Owner's case on this is not accepted, the Owner contends that the use of the Land has not continued for any 20 year period (whether from 1996 to 2016), or even between 1994 to 2014 if s15(3) were relied on by the Applicant, which is has not been.

42. The Applicant contends that, even if the other requirements of s15(2) are met (and it is denied that they are), the use has not continued for in excess of 20 years, and that the use ceased in or around 2010/11. This is corroborated by some of the letters submitted with the Application, including those of Eluned Jones, Elizabeth Davies and Mrs P Bound (referred to above). In addition, the closure of the local school in 2011 supports the Owner's contention that the number of children resident on the Estate had dramatically decreased by that point. D.R Jones' letter says that the whole community use the Land to have a neighbourhood get together; however, the letter also confirms that they had only lived on the Estate for 6 years, and cannot therefore attest to any get togethers taking place prior to this.

43. Whilst the Applicant does not need to show that the Land has been permanently in use for lawful sports and pastimes for the full 20 year period, the Sunningwell case confirmed that if the use is "so trivial and sporadic as not to carry the outward appearance of user as of right" then the Application should not be validated.

44. This echoed what was said by Buckley J in White v Taylor (No. 2) (1969) 1 Ch 160 who said: "...the user must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed."

Conclusion

45. Several aspects of the test set out in s15 are simply not made out:

i) ‘significant number of the inhabitants’: the Application does not show that the Land has been used by a significant number of inhabitants of the Estate, and suggests that the numbers of people using the Land has been so insignificant that it signifies that it has been in general use rather than occasional use;

ii) “As of right”: the use of the Land has not been sufficient or significant enough so as to bring home to the Owner that a prescriptive right was being asserted against him; the owner did not, therefore, have the choice of warning the users off or finding that the rights have been established;

iii) “For a period of at least 20 years”: the Land was inaccessible from the mid 1980s to 2003, such that it is impossible for the 20 year period to be made out. Even if the Land had been accessible during that period (and even if the other requirements of s15 were met, which they were not), it is contended that the use stopped prior to the submission of the Application.

46. It is clear that, on the balance of probabilities, each component part of the legal test in s15 of the Commons Act 2006 has not been satisfied. For these reasons, the Application is not valid.