

APPLICATION FOR REGISTRATION OF LAND AT HODGE CLOUGH ROAD,
LOWER SHOLVER, MOORSIDE, OLDHAM AS A TOWN OR VILLAGE GREEN
APPLICATION NUMBER: RTG/6

REPORT

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RECOMMENDATION

The Application should be rejected

1. INTRODUCTION

- 1.1 I am instructed in this case by Oldham Metropolitan Borough Council in its capacity as the registration authority for town or village greens within its administrative area and I will refer to the Council in this capacity as “the Registration Authority”. I will use the expression “the Council” when referring to it in any other capacity.
- 1.2 My instructions are to consider an application, reference number RTG/6, to register land at Hodge Clough Road, Lower Sholver, Moorside, Oldham as a town or village green (“the Application”) and to provide a report for the Registration Authority’s Commons Registration Committee containing my recommendation on how the Application should be determined.
- 1.3 If I consider that I cannot report on the Application, and, consequently, that it cannot be determined, without the holding of a non-statutory inquiry, I am instructed to liaise with my Instructing Solicitor so that arrangements can be made for such an inquiry.
- 1.4 In the event, I consider that I can properly report (with a recommendation) on the Application, as it stands on paper, without the necessity for an inquiry and that it can be determined without one. Hence I report at this stage on the basis of the written material before me.

2. THE APPLICATION

- 2.1 The Application was made by Mr Fred Williamson of 40 Hodge Clough Road, Lower Sholver, Moorside, Oldham (“the Applicant”). It was stamped as received by the Registration Authority on 27th June 2018.
- 2.2 The Application seeks to have registered as a town or village green a plot of land at Hodge Clough Road (“the Application Land”). I will describe the Application Land in section 3 below.

2.3 The Application was made on the basis that section 15(2) of the Commons Act 2006 (“the 2006 Act”) applies. Section 15(2) “*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.”

2.4 The locality, or neighbourhood within a locality, in respect of which the Application was made was said to be “*Saint James Ward, Lower Sholver, Moorside, Oldham. OL1 4PW. Hodge Clough Road.*”

2.5 The justification for the Application was expressed in the following terms:

“(1) The land has been used for more than twenty years by the residents of Lower Sholver and Moorside for recreational activities: dog walking, football, rugby, cricket, kite flying, drone flying, bonfires (5th November), snowman building, carol singing (Christmas).

(2) The ‘Green’ is a focal point for our community and a safe place where children can play, close to their homes, and away from traffic.

(3) In January 1996 ‘Barratt Homes Limited’ paid ‘Oldham Borough Council’ the sum of thirty thousand pounds ‘as a contribution towards the cost of providing an area of public open space.’ ‘Hodge Clough Road’.

(4) The land is used by wildlife: deer, fox, bats.”

2.6 The Application was supported by the following material apart from the standard statutory declaration by the Applicant. First, documentary evidence, in the form of a copy of a section 106 agreement of 11th January 1996 between the Council and Barratt Homes Limited, was submitted to substantiate the payment referred to in the previous paragraph. I will call this section 106 agreement “the 1996 Agreement”. It related to land at Hodge Clough Road, Oldham and was made in connection with the development of the same. Secondly, two photographs of the Application Land were submitted. These showed a deer on the Application Land. Thirdly, 11 letters/statements from local residents setting out the use of the Application Land were submitted. These spoke of the sort of recreational activities on the Application Land mentioned in the justification for the Application. Fourthly, a petition, containing over 100 signatures, was submitted in support of the grant of village green status for the Application Land. The heading to the petition stated: “*I agree that the field on*

Hodge Clough Rd should be granted village green status for the reasons stated below” and the reasons were then set out. The stated reasons were that “The green has been used for over 20 years by residents for the following activities: dog walking, bonfire on November 5th, snowman building, drone flying, kite flying, cycling, football, rugby, cricket, golf, frisbe [sic], rounders and children’s party activities including bouncy castles. The green is also a communal place where chance meetings of participants of the above activities have forged and developed close neighbourhood ties and friendships. It is the heart, focal point of our community and a safe place where children can play close enough to their homes and away from traffic.”

3. THE APPLICATION LAND

- 3.1 The Application Land is an open area, broadly rectangular in shape, which lies immediately to the west of that section of Hodge Clough Road which runs in a north-south direction. The rectangle is much longer in a north-south direction than it is wide in a west-east direction. The map of the Application Land accompanying the Application records it as having an area of 9,915m² (which equates to 2.45 acres).
- 3.2 The eastern boundary of the Application Land is formed by the western kerb line of Hodge Clough Road. There is housing development opposite the Application Land on the eastern side of Hodge Clough Road. Housing development on Hodge Clough Road and Dalesman Drive marks the northern boundary of the Application Land. There are no physical boundaries to the southern and western sides of the Application Land where it merges into a further area of open land. Save for the boundary features of the properties to its north, the Application Land is not enclosed in any way and access to it is easy and unobstructed.
- 3.3 The Application Land is relatively flat, grassed and generally featureless. It is evident that a large part of the Application Land (extending from its northern boundary southwards to a point level with a right angled bend in Hodge Clough Road) is regularly maintained by mowing the grass. However, there are also unmaintained areas in the south of the Application Land and along its western boundary. These areas are indistinguishable from the adjoining open land.
- 3.4 The Application Land is owned by the Council. It forms part of two registered title numbers, LA43936 and LA88157, each registered title relating not just to the Application

Land but also to a wider area of land. The different title numbers reflect the fact that the two land acquisitions which include what is now the Application Land occurred at different points in time. The area of land with title number LA43936 was acquired by the Council's statutory predecessor on 19th May 1964 and the area of land with title number LA88157 was acquired by the Council's statutory predecessor on 29th June 1966.

4. THE OBJECTIONS TO THE APPLICATION

4.1 The Application produced two objections following its notification and publication by the Registration Authority. The first, submitted to the Registration Authority under cover of a letter dated 14th September 2018, was from First Choice Homes Oldham Limited ("First Choice"). The second, submitted to the Registration Authority under cover of a letter dated 21st September 2018, was from the Council in its capacity as the owner of the Application Land.

4.2 First Choice is a provider of social housing and, according to the Application, is considering the Application Land for housing development. First Choice objected to the Application on several grounds which may be summarised as follows:

- The Application had not made clear what qualifying area was being relied on; Lower Sholver or Moorside were not localities and it had not been shown that they were neighbourhoods; the same applied to Hodge Clough Road.
- If the qualifying locality was St James' Ward, it had not been demonstrated that use of the Application Land had been by a significant number of the inhabitants of the ward.
- Use of the Application Land had not been "*as of right*" but "*by right*" by the licence of the Council and/or the Application Land was public open space.
- It had not been demonstrated that there had been use of the Application Land for the whole of the necessary 20 year qualifying period.

4.3 First Choice's objection was accompanied by a witness statement exhibiting the relevant official copies of the Land Registry's register of title, various photographs of the Application Land and a plan of it.

4.4 The Council also objected to the Application on a number of grounds. Before turning to these, there are a number of evidential matters which arise from the Council's objection and the evidence it has submitted.

4.5 The first matter relates to general background evidence in relation to Lower Sholver. The Council explained in its objection that Lower (or Bottom) Sholver was part of an edge-of-town estate development which was begun in the 1960s to re-house the population of large areas of more central locations in Oldham which had been subject to clearance programmes. The rental stock making up the estate was, however, itself subject to large scale demolition in the mid-1980s following which Lower Sholver was re-developed with modern housing in the 1990s.

4.6 The second matter relates to the Application Land itself. In this regard, the Council has supplied (subsequent to its objection¹) a sequence of historical maps. These show that the Application Land was undeveloped in the 1950s but was occupied by housing in the 1970s and 1980s whereas, in the period from 1992-1994, the Application Land is shown again as undeveloped. I should add at this point that, consistent with the last piece of map evidence, the evidence in support of the Application tends to suggest that new housing in the area of Hodge Clough Road was completed in approximately the late 1990s.

4.7 The third matter concerns the statutory purpose for which the areas of land in Lower Sholver, within which the Application Land is situated, were originally acquired by the Council in the 1960s. The Council's objection exhibits a copy of an original conveyance of 19th May 1964 ("the 1964 Conveyance") to (what was then) the County Borough of Oldham of a large area of land at Sholver which is now registered to the Council under title number LA43936. The conveyance recorded that the purchase was pursuant to Part V of the Housing Act 1957. The Council does not have any corresponding conveyance for the land within title number LA88157. However, the Council does produce deed record cards in respect of title numbers LA43936 and LA88157. These confirm that the relevant purchases were made on 19th May 1964 and 29th June 1966 respectively and that, in each case, the relevant committee of the Council in respect of whose portfolio the land was acquired was the Housing Committee. Moreover, the Council also provides a witness statement confirming that the deed packet covers (exhibited to the statement) for the parcels of land registered under title numbers LA43936 and LA88157 each bore a distinctive red, rectangular mark to indicate that the land fell within the portfolio of the Housing Committee

¹ Subsequent to its objection the Council submitted not just the historical maps referred to in the paragraph of the text above but also a copy of a 1995 section 106 agreement (see paragraph 4.9 below) which had been referred to in its objection and a short witness statement (see paragraph 4.13 below) evidencing the maintenance of the Application Land which had been referred to in its objection. The Applicant was given the opportunity to comment on this additional material but did not offer any such comments.

or was land which was specified for housing. The deed packet cover in respect of LA88157 also bears the word “housing”. It was therefore submitted on behalf of the Council that there was sufficient evidence to show, on the balance of probabilities, that the Application Land was acquired under Housing Act powers.

4.8 The fourth matter relates to the 1996 Agreement produced in support of the Application and to another section 106 agreement on which the Council particularly relies. As for the 1966 Agreement, the Council’s objection explains that the particular area of land to which it applied lay to the immediate north, north east and east of the Application Land but that it did not include the Application Land itself. The contribution in the 1996 Agreement was towards the provision by the Council of an area of public open space in the area of the land subject to the agreement but the Council did not have any plan or other information in its possession to show how the sum paid had been applied. The Council was therefore not able to confirm that the Application Land had been provided and laid out as public open space as a result of the 1996 Agreement.

4.9 However, on 6th June 1995 the Council had entered into another section 106 agreement (“the 1995 Agreement”) with Lovell Partnerships (Northern) Limited (a copy of which was supplied by the Council subsequent to the submission of its objection). The 1995 Agreement relates to the development of land for housing within land defined by reference to title numbers GM619490 and GM216307. These title numbers are referred to in the official copies of the Land Registry’s register of title for both title numbers LA43936 and LA88157.

4.10 Clause 8 of the 1995 Agreement provided that *“In consideration of the sum of £29,965.65 paid by the Developer to the Council on the date hereof (the receipt of which the Council hereby acknowledges) the Council will within a reasonable period provide and layout the area of public open space shown edged blue on the plan marked ‘Public Open Space’ annexed hereto.”*

4.11 The Council’s copy of the 1995 Agreement does not have the annexed “Public Open Space” plan. Nevertheless, the official copies of the Land Registry’s register of title for both title LA43936 and LA88157 make specific reference to the 1995 Agreement. The first contains the reference *“An Agreement dated 6 June 1995 affecting the land edged blue on the title plan and other land made between (1) Oldham Borough Council and (2) Lovell*

Partnerships (Northern) Limited relates to planning obligations pursuant to Section 106 of the Town and Country Planning Act 1990.” The second contains the reference “*An Agreement dated 6 June 1995 affecting the land tinted blue on the title plan and other land made between (1) Oldham Borough Council and (2) Lovell Partnerships (Northern) Limited relates to planning obligations pursuant to Section 106 of the Town and Country Planning Act 1990.*” On the title plan for LA43936 the Application Land was outlined in blue and, on the title plan for LA88157, the Application Land was coloured blue. It was therefore submitted on behalf of the Council that, on the balance of probabilities, the Application Land had been provided and laid out as public open space under the 1995 Agreement.

4.12 Before leaving this topic I would add that the 1995 Agreement and the 1996 Agreement both indicate that associated planning permissions for development in the Hodge Clough Road area were being granted in the mid-1990s. This in turn is consistent again with the picture which emerges from the evidence in support of the Application of new housing being completed round about the late 1990s.

4.13 The fifth matter concerns the maintenance of the Application Land. The Council’s objection stated that the Application Land was maintained and mowed by the Council. Subsequent to the objection the Council submitted a witness statement confirming that this has taken place for in excess of ten years.

4.14 Against that background, the main grounds of the Council’s objection may be summarised as follows.

- While St James’ Ward was a locality, the Application had not demonstrated use of the Application Land by a significant number of the inhabitants of this ward.
- No neighbourhood had been put forward in the Application but, if any were to be relied upon (such as Sholver or Lower Sholver), the significant number test would still not be satisfied.
- Use of the Application Land had not been “*as of right*” but with the licence of the Council because the Application Land had been held by the Council for the whole of the claimed qualifying period for recreational purposes stemming from its powers to acquire land under the Housing Acts. Further, the Council had laid out the Application Land for use as public open space under the 1995 Agreement. These points were fatal

to the Application. Reliance was placed on the Supreme Court decision in *Barkas v North Yorkshire County Council*².

- The evidence of the period of use was very limited and, untested, not sufficient to justify registration of a new green.

5. THE APPLICANT'S RESPONSE TO THE OBJECTIONS

5.1 In due course the Applicant responded to the objections (under cover of a letter to the Registration Authority dated 7th November 2018). The response was accompanied by photographs of the Application Land showing, in the main, children playing on it.

5.2 The Applicant's response adds little to the original Application material. I note in particular that it does not engage in any detail with the objections made on the basis that use of the Application Land was not "*as of right*" and provides no substantive response to the case made against the Application in this respect.

5.3 A still of a YouTube video was also submitted to the Registration Authority on behalf of the Applicant by way of an email dated 4th November 2018. The email also contained a link to the video itself (which I have watched).

6. ANALYSIS

Introduction

6.1 It is a fundamental requirement of section 15(2) of the 2006 Act that use relied upon to support an application for registration of a new green must be "*as of right*". In the Supreme Court decision in *Barkas*³, Lord Neuberger said (at paragraph 14) that it was "*helpful to explain that the legal meaning of the expression 'as of right' is, somewhat counterintuitively, almost the converse of 'of right' or 'by right'. Thus, if a person uses privately owned land 'of right' or 'by right', the use will have been permitted by the landowner—hence the use is rightful. However, if the use of such land is 'as of right', it is without the permission of the landowner, and therefore is not 'of right' or 'by right', but is actually carried on as if it were by right—hence 'as of right'. The significance of the little*

² [2014] UKSC 31.

³ See footnote 2 above for the case reference.

word ‘as’ is therefore crucial, and renders the expression ‘as of right’ effectively the antithesis of ‘of right’ or ‘by right’”.

6.2 Lord Neuberger also explained (at paragraph 27) that “[as] against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser”.

6.3 In the present case I am left in no doubt from the objections which have been submitted, particularly that of the Council, that the Application cannot succeed and that it must fail on the issue of whether use of the Application Land has been “as of right”. It is clear to me from the documentary material which the Council has produced that, when considered in the context of the relevant legal framework, use of the Application Land for informal recreation by local residents (which plainly has occurred) has been “by right” and not “as of right”. I do not consider that there can be any serious dispute about this matter and that there is, accordingly, no need for any non-statutory inquiry to be held⁴. Indeed, it would be a waste of public money to hold an inquiry to explore such issues as the extent of the use of the Application Land over time or whether its use has been by a significant number of the inhabitants of any locality or any neighbourhood within a locality, given that any use must inevitably fail to satisfy the requirement that it be “as of right”.

6.4 In the rest of this section of my report I expand on my reasoning in relation to the issue of use “as of right”.

The statutory purpose of the acquisition of the land within which the Application Land lies

6.5 I turn first to the question of the statutory purpose for which the land within which the Application Land lies was originally acquired by the Council. This question is relevant to the issue of the powers available to the Council, which, in turn, is relevant to the issue of whether use was “as of right”. I will turn to analysis of the relevant statutory powers in due course but consider at this point the factual question of the statutory purpose of the

⁴ See *Whitney v Commons Commissioners* [2004] EWCA Civ 951.

acquisition as shown by the documentary evidence. My conclusion is that the documentary evidence clearly establishes that the land in question was acquired for housing purposes.

6.6 The 1964 Conveyance in respect of the land registered under title number LA43936 states expressly that that land was acquired pursuant to Part V of the Housing Act 1957⁵. Moreover, the deed record card for the land registered under title number LA43936 shows that it fell within the portfolio of the Council's Housing Committee and the mark on the deed packet cover confirms this position.

6.7 While there is no conveyance available in respect of the land registered under title number LA88157, I consider that it is clear that this land too was acquired for housing purposes. The relevant deed record card shows that the land fell within the portfolio of the Council's Housing Committee and the deed packet cover contains the appropriate mark to confirm this as well as bearing the word "*housing*". The conclusion that the land registered under title number LA88157 was acquired for housing purposes is also entirely consistent with both the fact that the neighbouring land registered under title LA43936 was so acquired and the general context of the estate construction programme in the area which began in the 1960s. The official copy of the Land Registry's register of title for LA88157 also refers to transfers out of this title having been made pursuant to Part V of the Housing Act 1985⁶.

Did the Council provide and lay out the Application Land as public open space?

6.8 Next, I consider the factual question of whether the Application Land was provided and laid out as public open space by the Council, again another factor relevant to the issue of whether use of the Application Land was "*as of right*". I conclude, on the basis of the documentary material produced by the Council, that it clearly was. Of particular significance here is the 1995 Agreement. This provided that the Council would, within a reasonable period, provide and layout an area of public open space as shown on an annexed plan. The plan in question is not available. However, the official copies of the Land Registry's register of title for both title LA43936 and LA88157 each make specific reference to the 1995 Agreement. The first contains the reference "*An Agreement dated 6 June 1995 affecting the land edged blue on the title plan and other land made between (1) Oldham Borough Council and (2) Lovell Partnerships (Northern) Limited relates to*

⁵ This concerns the provision of housing accommodation.

⁶ This concerns the right to buy.

planning obligations pursuant to Section 106 of the Town and Country Planning Act 1990.”

The second contains the reference *“An Agreement dated 6 June 1995 affecting the land tinted blue on the title plan and other land made between (1) Oldham Borough Council and (2) Lovell Partnerships (Northern) Limited relates to planning obligations pursuant to Section 106 of the Town and Country Planning Act 1990.”*

6.9 Turning first to the title plan for the latter title, LA88157, those parts of the Application Land which fall within this title number are clearly tinted blue while no other areas on the plan are similarly tinted. This ties the statement in the 1995 Agreement about the provision and laying out by the Council of public open space specifically to the Application Land. The title plan for LA43936 also shows that the other parts of the Application Land fall within an area of land edged blue on that plan. The Council’s long-standing maintenance and mowing of the Application Land is all of a piece with the conclusion that it was provided and laid out as public open space by the Council.

6.10 I also think that, while the Council has not sought to rely on the 1996 Agreement as such, the public open space referred to therein was probably the Application Land. It is correct that the land subject to the 1996 Agreement (in the sense of the land bound by it) does not include the Application Land and that the plan annexed to the 1996 Agreement does not identify the land on which the public open space was to be provided and laid out. Nevertheless, the area of public open space which the Council was to provide and lay out was not to be *“on”* the land subject to the 1996 Agreement but *“in the area of it”*. The obvious area where that was to be was the Application Land immediately next to the land subject to the 1996 Agreement.

6.11 As to the date at which the Application Land was provided and laid out by the Council as public open space, the clear inference that is to be drawn is that this would have been in approximately the late 1990s when the new housing in the immediate area was completed.

The power of the Council to do what it did

6.12 The next question to be considered is that of the power of the Council to lay out and provide public open space under the Housing Acts. I focus on the Housing Acts because there is nothing to suggest that so much of the land falling within title numbers LA43936 and LA88157 as comprises the Application Land has ever been appropriated by the Council

to anything other than the housing purposes for which it was first acquired. The power to provide public open space is therefore to be sourced from the Housing Acts.

6.13 At the time of the acquisition of the land within title numbers LA43936 and LA88157 the relevant Housing Act under which the acquisition took place was the Housing Act 1957 (“the 1957 Act”). By the time of the new development in the area of Hodge Clough Road and the provision and laying out of the Application Land as public open space in approximately the late 1990s the relevant statute was the Housing Act 1985 (“the 1985 Act”).

6.14 There are two candidate powers under the 1985 Act. Each power applies to a local housing authority which the Council is and was⁷. The first candidate power is found in section 12(1) of the 1985 Act which provides that a *“local housing authority may, with the consent of the Secretary of State, provide and maintain in connection with housing accommodation provided by them under this Part—*

(a) ...

(b) recreation grounds, and

(c) other buildings or land which, in the opinion of the Secretary of State, will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.”

6.15 The second candidate power is found in section 13(1) of the 1985 Act which provides that a *“local housing authority may lay out and construct public streets or roads and open spaces on land acquired by them for the purposes of this Part.”*

6.16 As to the second candidate power under section 13(1) of the 1985 Act, I consider that the reference to *“open space”* which is contained in it should be construed to be a reference to *“public open space”*. While there is no definition of *“open space”* in the 1985 Act, I see no good reason of principle why the word *“public”* which appears before the word *“streets”* should not be read across to the later words *“or roads and open spaces”*. The natural reading of section 13(1) is that the word *“public”* governs not just the word *“streets”* but also the words *“roads”* and *“open spaces”*. And, in terms of statutory

⁷See section 1 of the 1985 Act.

purpose, it is difficult to see what would justify limiting the meaning of “*open spaces*” to those which were not public or not for public use⁸.

6.17 Moreover, the view of the inspector who reported in the decision which became the subject of the *Barkas* litigation was that the words “*open spaces*” in the corresponding power of an earlier Housing Act⁹ enabled the laying out of public open space¹⁰. This view was endorsed in the first instance decision in the case¹¹. The judge also took the view that the emphasis in the corresponding provisions of the earlier statute was on public provision¹². There is no reason why these views (which were not affected by the subsequent proceedings in the Court of Appeal and Supreme Court) should not hold good for the current power in section 13(1) of the 1985 Act.

6.18 For the sake of completeness, I should also add that the words – “*land acquired by them for the purposes of this Part*” – found in section 13(1) of the 1985 Act are satisfied in this case. Section 13 is found in Part II of the 1985 Act which is concerned with the purpose of the provision of housing accommodation. The land in title numbers LA43936 and LA88157 was acquired for such purpose under the 1957 Act¹³. The continuity of the law as between the 1957 Act and the 1985 Act and the treatment under the 1985 Act of references to its provisions to include reference to corresponding earlier provisions is expressly provided for in section 2 of the Housing (Consequential Provisions) Act 1985.

6.19 I have focused above on section 13(1) of the 1985 Act rather than section 12(1)(b) because it seems to me that, of these two candidate powers, it is the former which is the more appropriate one in the present case. I say that for three reasons. First, in circumstances where alternative powers might have applied but one power did not require ministerial consent for its exercise whereas the other did, and there is no evidence of such consent, the inference to be drawn as to which power was used should be that it was the former power.

⁸ I do not regard the fact that ministerial consent was required in order for a recreation ground to be provided under section 12(1)(b) should in some way be regarded as a factor which should be taken to narrow the meaning of what could be done under the alternative power to do something different (albeit potentially similar) – lay out open spaces – under section 13(1).

⁹ Section 79(1)(a) of the Housing Act 1936.

¹⁰ See paragraph 122 of the inspector’s report as quoted in the first instance decision in *Barkas* [2011] EWHC 3653 (Admin) at paragraph 7. The terms of section 79(1)(a) are set out at paragraph 9 of the first instance judgment.

¹¹ [2011] EWHC 3653 (Admin) at paragraph 27.

¹² *Ibid* at paragraph 31.

¹³ Part V of the 1957 Act which is referred to in the 1964 Conveyance dealt with the provision of housing accommodation. See footnote 5 above.

That favours section 13(1) in this case as there is no evidence of ministerial consent. Secondly, the 1995 Agreement and the 1996 Agreement each referred to the Council providing and laying out public open space. The description given in these agreements of what the Council considered it was doing matches more closely the power in section 13(1) rather than the power to provide a recreation ground in section 12(1)(b). Thirdly, the power under section 13(1) is untrammelled by any requirement that the open space must be provided “*in connection with housing accommodation provided by them*” (that is, the local housing authority) [underlining added]. While the Application Land was no doubt provided for the benefit of the new housing built in about the late 1990s, it may be open to question whether this housing was provided by the Council. I do not express any more definitive view than that on this last matter. I simply make the point that the question does not arise under section 13(1) of the 1985 Act.

6.20 The power to maintain land laid out as open space under section 13(1) of the 1985 Act is either necessarily implicit in that provision or may be seen as a subsidiary power authorised under section 111 of the Local Government Act 1972.

Was use of the Application Land as of right?

6.21 Summarising my analysis at this point, I have concluded that the Application Land was acquired by the Council (as part of the acquisition of wider areas of land) for housing purposes, that it was provided and laid out by the Council as public open space in approximately the late 1990s and that there was appropriate power to do so under housing legislation in the 1985 Act.

6.22 In these circumstances the decision of the Supreme Court in *Barkas* leaves no room for any doubt that the use of the Application Land cannot have been “*as of right*”. Use of the Application Land by local inhabitants for informal recreation was use of public open space provided and laid out by the Council for that purpose. Users of the Application Land could not have been trespassers on it. Their use of it was pursuant to a public right or a publicly based licence and thus use “*by right*” and not “*as of right*”. I refer, in particular, to paragraphs 20-24 of the speech of Lord Neuberger (with whom Baroness Hale, Lord Reed and Lord Hughes agreed).

6.23 *Barkas* concerned a recreation ground provided under an earlier statutory power corresponding to that now found in section 12(1)(b) of the 1985 Act rather than the power relating to open space now found in section 13 of the 1985 Act. This makes no difference; the principle is the same. This emerges with particular clarity from paragraph 24 of Lord Neuberger’s speech where he said: *“I agree with Lord Carnwath JSC that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land ‘as of right, simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights.”*

6.24 The principle enunciated in this passage is fatal to the Application.

6.25 To similar effect in *Barkas*, Lord Carnwath (who agreed with Lord Neuberger and with whom Baroness Hale, Lord Reed and Lord Hughes agreed) observed that where *“land is owned by a public authority with power to dedicate it for public recreation, and is laid out as such, there may be no reason to attribute subsequent public use to the assertion of a distinct village green right”* (at paragraph 64) and that *“where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to ‘warn off’ the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights.”* (Paragraph 65).

7. OVERALL CONCLUSIONS AND RECOMMENDATION

7.1 Use of the Application Land by local inhabitants in this case cannot have been *“as of right”* but was *“by right”*. As such, a fundamental requirement for the registration of a new green

on the basis of section 15(2) of the 2006 Act is not met. The Application must therefore fail.

7.2 These conclusions follow inevitably from the documentary material in this case when considered against the applicable law. In these circumstances there is no need for a public inquiry to be held in order to determine the Application and it would be a waste of public money to do so.

7.3 I recommend that the Application should be rejected.

Kings Chambers
36 Young Street
Manchester M3 3FT

Alan Evans
13th December 2018