RE: LAND AT HARLEY SHUTE ROAD, ST LEONARDS ON SEA

ADVICE

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1. I am asked to advise East Sussex County Council ("the Council") in its capacity as Registration Authority for the purposes of the Commons Act 2006 ("the 2006 Act") upon an application dated 09 March 2012 ("the Application") made by Mr Peter Jones ("the Applicant") pursuant to section 15(2) of the 2006 Act to register land known as "The Swings" or "The Green" at the corner of Harley Shute Road and Edinburgh Road, St Leonards on Sea ("the Land") as a town or village green.

BACKGROUND

2. An Objection was received to the Application from Amicus Horizon Limited, the current owner of the Land, to which the Applicant responded. The Application was then placed before the Council's Commons and Village Green Registration Panel on 29 October 2013 with an Officer Report recommending that the Application be rejected. At that meeting, the Panel resolved to adjourn the determination of the Application to enable specialist advice to be sought, particularly in relation to the effect of a particular covenant contained in a Conveyance of the Land dated 02 June 1950 between the Kites and the County Borough of Hastings ("the Conveyance").

3. By that Conveyance, the Land was conveyed to The Mayor Alderman and Burgesses of the County Borough of Hastings on 02 June 1950. It was subject to a covenant on behalf of the County Borough of Hastings, which became Hastings Borough Council, that was binding on its successors in title, that:-

> "*they will at all times hereafter keep and maintain the said land hereby conveyed as an open space and free from any buildings or erections except such structures as may be incidental to the use of the land as a public open space or park…*"

Hastings Borough Council continued to own the Land until 1996. It was then transferred to 1066 Housing Association Limited, which owned the Land until 2010 when it was transferred to the current owner, Amicus Horizon Limited.

4. I shall consider each of the issues raised in my Instructions in turn on the basis of the documentation and information provided.

EFFECT OF CONVEYANCE BETWEEN 1950 AND 1996

5. The first matter concerns the effect of the 1950 Conveyance during the period of Hastings Borough Council's ownership of the Land between 1950 and 1996 in the context of the determination of the Application.

Legal Framework

6. The starting point is section 15(2) of the 2006 Act on which basis the Application has been made. That provision contains the relevant statutory criteria which must each be established by the Applicant on the balance of probabilities in order for the Land to be registered. It provides:-

"*This subsection 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."

Thus, one of the fundamental elements of the statutory criteria is that the qualifying use of the Land must have been "*as of right*". Use of land "*as of right*" is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*.

7. However, in addition, recent caselaw has established that land that is used "by right" is not being used "as of right" and so such use cannot be relied upon in support of registration. The leading case on that issue is currently the Court of Appeal's decision in ***Barkas v. North Yorkshire County Council***.[1] In his Judgment, with which the other two Lord Justices agreed, Sullivan LJ made it clear that the earlier House of Lords decision in ***R. v. Sunderland City Council ex parte Beresford***[2] is authority for the following propositions:-

(i) that there is a distinction between a use of land "by right" and a use of land "as of right";

(ii) that, if a statute, properly construed, confers a right on the public to use land for recreational purposes, their use of that land will be "by right" and not "as of right"; and

[1] [2013] 1 WLR 1521.
[2] [2004] 1 AC 889.

(iii) that section 10 of the Open Spaces Act 1906 is an example of land which is provided by a local authority as open space which the public use for recreational purposes "by right".[3]

8. Further, Lord Justice Sullivan went on to state:-

> "*I can see no sensible reason for drawing a distinction between land held under section 10 and land which has been appropriated for recreational purposes under some other enactment*".[4]

Significantly, he explained that "appropriation" in that context was not to be understood in the narrow sense of appropriated for the purpose of public recreation under section 122 of the Local Government Act 1972. Instead, **land is "appropriated for recreational purposes" in the *Barkas* sense if it is provided or made available by a local authority for the purpose of public recreation in exercise of statutory powers to do so**. In such circumstances, the land is then used by the public "by right" and not "as of right".

9. I should add that the ***Barkas*** decision is being appealed to the Supreme Court and such appeal is listed to be heard on 02 April 2014. However, the Court of Appeal decision represents the current state of the law on the "by right" and "as of right" issue.

Application of Law to Facts

10. Applying the present legal position to the Application Land and the 1950 Conveyance in relation to the period up until 1996, the fundamental question

[3] At paragraph 26 of his Judgment.
[4] At paragraph 34.

is whether during that period the Land was provided or made available by a local authority for the purpose of public recreation in exercise of statutory powers to do so. If it was, the Land was used "by right" during that period and not "as of right".

11. According to the information I have seen, the Land was, as a matter of fact, made available by The County Borough of Hastings, which became Hastings Borough Council, as a public recreation ground throughout its period of ownership between 1950 and 1996 and was so used by the public. That is so stated in Appendix 1 to the Application,[5] in paragraphs 7.16 and 7.34 of the Panel Report, and in the Objection. Thus, the issue is then whether the Land was made so available for that purpose during that period pursuant to a statutory power to do so.

12. The Conveyance is silent as to the statutory power under which the Land was acquired in 1950. Further, the purpose for its acquisition is not expressly stated in the Conveyance. Nonetheless, the covenant it contains as set out in paragraph 3 above is cogent evidence that the Land was conveyed for the purpose of its use as public open space. Indeed, that covenant specifically requires the Land to be kept and maintained for that purpose and restricts any structures on the Land to those incidental to its use as a public open space or park. It does not seem to me that the acquisition of the Land could reasonably have been for any other purpose given the wording of that covenant together with the lack of any reference in the Conveyance to any other purpose.

[5] I assume that is supported by the user evidence which I have not seen.

Moreover, that purpose for its acquisition is supported by the fact that the Land was thereafter laid out, maintained and used as a public recreation ground throughout its ownership by the Borough Council. In those circumstances, it is my view that the evidence establishes on the balance of probabilities that the Land was acquired by the public body for the purpose of it being used as a public recreational ground.

13. That being so, it is then necessary to turn to the statutory power under which it was so provided. In its letter of Objection dated 11 May 2012, the Objector states on the fourth page that Hastings Borough Council "*maintained the Land and continued to hold it, with the rest of the estate, pursuant to the Council's powers under various Housing Acts until it was transferred with many other properties to 1066 Housing Association*". That is not disputed by the Applicant in his response of 29 June 2012 and I have seen no evidence nor any suggestion to the contrary. Moreover, given the location of the Land within a residential area and that, according to the Objector in the above paragraph of its Objection, it was transferred by the Borough Council in 1996 to a Housing Association together with many other properties, such evidence gives further support to the Land having been held by the Borough Council pursuant to housing legislation. Indeed, that conclusion is given added force by the fact that the relevant register of title I have seen makes reference to the Land having the benefit of and being subject to "*the easements and other rights prescribed by Paragraph 2 of Schedule 2 of the Housing Act 1980 or Paragraph 2 of Schedule 6 of the Housing Act 1985*".

14. Housing legislation contains, and previously contained, various powers conferred on a housing authority to lay out open space, namely section 79(1)(a) of the Housing Act 1936, section 107 of the Housing Act 1957 and subsequently section 13(1) of the Housing Act 1985. A housing authority also has the power, with ministerial consent, to provide a recreation ground, namely in section 80(1) of the Housing Act 1936, section 93(1) of the Housing Act 1957 and section 12(1) of the Housing Act 1985. From the factual circumstances and the available evidence, it seems to me that the Land was made available by the Borough Council for the purpose of public recreation pursuant to one of such statutory powers. All such powers engage the ***Barkas*** principle, namely there has thereby been an appropriation of the Land for the purpose of public recreation throughout the Borough Council's ownership of the Land, with the consequence that its use for that purpose during that period was "by right" and not "as of right".

Conclusion

15. Therefore, on the basis of the available evidence and applying the law as it currently stands, it is my opinion that the Land was used for recreational purposes "by right" during the Borough Council's period of ownership until 1996 and so such use was accordingly not "as of right" during that period as concluded in the Officer Report. Given that the relevant 20 year period is March 1992 until March 2012, it follows that the Land has not been used "as of right" throughout the relevant 20 year period and is consequently bound to be rejected on that particular ground.

EFFECT OF CONVEYANCE POST 1996

16. The next issue raised is whether the covenant in the 1950 Conveyance is of any significance post 1996 when the Land was transferred to 1066 Housing Association Limited. I have not seen a copy of that Transfer nor am I aware whether it remained subject to the covenant. I note, for example, that there does not appear to be a reference to that covenant nor to the 1950 Conveyance at all in the register of title.

17. However, in any event, the ***Barkas*** principle applies only to land owned and held by a local authority rather than by a private landowner. As I understand the position, 1066 Housing Association Limited was a private limited company, as is the current landowner, and not a local authority. Although it had public related objectives, ***Barkas*** would not be engaged and the Housing Association would be subject to the same principles as any other private landowner. Thus, in my view, the Land would not have been used "by right" post the 1996 Transfer.

18. Nonetheless, it does not automatically follow that the Land was consequently used "as of right". On the contrary, as noted above, for land to be used "as of right", it must be used without force, stealth or permission. Land will not be used "as of right" if it is used with force, with stealth or with permission, **or** if it is used "by right".

19. In that regard, the Objector contends that the Land has been used with implied permission and thus not "as of right" post 1996. The question thus arising for

the Panel to consider in relation to the period post 1996 is whether the use was then *precario*, applying the principles laid down by the House of Lords in ***Beresford***. It was found in that case that an implied permission could arise where a landowner's conduct was such that it made it clear to local inhabitants that the use of his land was pursuant to his permission. However, permission cannot be implied from the mere inaction of the landowner with knowledge of the use to which his land was being put. Instead, the landowner has to do something positive and overt to make the public aware that their use of his land is by his licence so that they ought to know that the land is being used by them only with his permission and not as of right. Conduct amounting to positive encouragement to use the land is not in itself sufficient to amount to an implied permission. Instead, examples given in that case of circumstances where an implied consent may well arise on the facts included where the landowner made a charge for entry to the land or where the owner occasionally closed the land to the general public or where appropriate signs were erected. Each of those examples would amount to an overt act communicating to the public that their use of the land was subject to the landowner's permission and was not as of right.

20. That matter is ultimately a determination of fact for the Panel on the basis of all the evidence applying the above legal principles. Consideration will need to be given to whether acts such as the erection of signs prohibiting dog fouling and having dog patrollers on the Land were sufficient to clearly indicate to local inhabitants of the relevant locality or neighbourhood within a locality

that they were using the Land only with the Landowner's permission which could be revoked at any time.

21. As indicated above, it is my firm view that the Application is bound to be rejected on the basis of the current law on the ground that the use was "by right" and consequently not "as of right" between March 1992 and the Transfer in 1996. However, if the law is changed by the Supreme Court in ***Barkas***, or if the Council wishes to also consider whether the use was "as of right" post 1996 in any event, then the fundamental issues to address are those raised in paragraphs 19 and 20 above to which I refer.

EFFECT OF CONTROL OF LAND BY HOUSING ASSOCIATION

22. As to whether the Objector's submissions concerning control of the Land by the Housing Association pursuant to the Housing Acts would be sufficient to defeat the Application, those submissions are to be considered in the context of whether the Land has been used with permission post 1996 applying the principles in ***Barkas*** set out above.

23. Ultimately, it is a question of fact for the Panel whether the control of the Land by the Housing Association was sufficient to amount to overt conduct making it clear to local inhabitants of the claimed locality or neighbourhood within a locality that their use of the Land was with the Landowner's permission which could be revoked by the Landowner at any time. However, the following are of note. The conduct must be overt and clear to the users. Hence, terms indicating the Landowner's control of the Land contained in

individual tenancy agreements would only be known to those individual tenants. I assume that the residents of the claimed neighbourhood within a locality, which area I have not had sight of, were not all tenants of the Housing Association. Insofar as they were tenants and/or are tenants of the current Landowner, then the terms of the tenancy agreements that have been referred to by the Objector may well be regarded as sufficient to indicate the Landowner's control to the extent that the Landowner was merely permitting usage to those tenants if they abided by such conditions. If so, their use would consequently be *precario* and would need to be discounted from the qualifying use. However, the contents of the tenancy agreements would not result in the use of the Land by other local people being *precario*. Without being aware of the extent of the users that were tenants and those that were not, I am unable to provide any view as to the overall implications of that matter in the context of the Application.

24. In contrast, the signage and dog patrollers would have been evident to the wider public. However, the fundamental question of fact is whether they were sufficient to indicate to users that their use was subject to the Landowner's permission which could be revoked at any time. A sign with clear wording to that effect which was visible and was in situ for a material part of the relevant 20 year period would cause the use to be *precario*. Similarly, such a sign which sought to control recreational uses of the Land may be regarded as causing the use to be *precario*. Nonetheless, a sign that merely says "no dog fouling" would not seem to me to be sufficient to have that effect. Such a sign is effectively an attempt to enforce the law over dog fouling which applies

irrespective of whether or not the use is "as of right". Similarly, the position would be the same in relation to dog patrols if their primary purpose was to ensure that dog walkers obeyed the law. In my view, such would not be reasonably interpreted by a member of the public that they were only able to use the Land with the Landowner's permission, and so would not cause the use of the Land to be *precario* and thus not "as of right".

DISCRETION TO APPLY OBITER STATEMENTS

25. The next matter I am asked to consider is whether there is any discretion available to Members of the Panel not to follow the *obiter* comments made by the House of Lords in ***Beresford*** and elsewhere in relation to the "as of right" and "by right" issue. It is of course the position that *obiter* observations by a Court do not amount to binding precedent. Thus, Members are not in principle bound by such observations. Nonetheless, they ought to be taken into account as being of persuasive authority, and the weight to be given to them is particularly significant when they are observations made by the House of Lords. Indeed, it is uncommon even for the Court of Appeal not to follow *obiter* observations by the House of Lords and they would only do so after careful consideration and for good reasons. Thus, the Panel would need to provide express and cogent reasons for disagreeing with such *obiter* comments. Further, a failure to follow such observations would also in itself give the unsuccessful party to an application a ground to challenge the Members' decision in principle.

26. However, in my view, that issue no longer arises given the Court of Appeal's more recent decision in ***Barkas***. The legal position set out by Sullivan LJ which I refer to above was not *obiter* but part of the *ratio* and so IS binding on the Panel unless and until it is overturned by the Supreme Court. Applying that decision to the present circumstances, for the reasons given above, it is my firm view that the Land was used "by right" between 1992 and the Transfer in 1996. It is open to the Panel to apply the law in ***Barkas*** to the circumstances and conclude otherwise if they have good reason for doing so. It is not, though, open to the Panel to determine not to apply the law as stated in ***Barkas***, unless and until it is overturned.

SUSPENSION OF RIGHTS

27. The remaining issue raised concerns whether it is open to the Panel to determine that town or village green rights were "suspended" whilst the Land was owned by Hastings Borough Council and then "re-established" once transferred out of public authority ownership. In my view, the short answer is "no" for the following reasons.

28. The Application has been made pursuant to section 15(2) of the 2006 Act which I have set out in full in paragraph 6 above. That requires the qualifying "as of right" use to have taken place "*for a period of at least 20 years*" AND to be continuing "*at the time of the application*". The effect of that statutory wording as interpreted by caselaw is that the use can have taken place for merely 20 years, or for any longer period whatsoever, but in any case, that use

must be a **continuous** one over at least 20 years[6] AND that continuous 20 year use must still be taking place as at the date of an application. In other words, at the very least, it must be taking place at the date of the application and have done so continuously for 20 years immediately prior thereto, namely throughout "the relevant 20 year period". That is further confirmed by the wording of section 15(6) which provides that for the purposes of determining the relevant 20 year period, "*there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment*". That has been used in practice where access was prohibited during the foot and mouth outbreaks. The cessation of use of land on that very specific ground does not prevent the use from otherwise being continuous because of that statutory provision, and the accrual of any town or village green rights is thereby effectively "suspended" during that time and then resumed. Notably, though, there is no other provision preventing the use from otherwise needing to be continuous throughout the entirety of the relevant 20 year period that could be relied upon in this instance.

29. Instead, the Application is dated 9 March 2012 and was received by the Council on 16 March 2012. Thus, in order to be registered, the Land must be found by the Panel to have been used for the qualifying use as of right continually from at least March 1992 until March 2012. That includes the period from March 1992 until the Transfer in 1996.

[6] See ***Hollins v. Verney*** (1884) 13 QBD 304.

30. It follows that even if the Land was used "as of right" for lawful sports and pastimes by a significant number of the local inhabitants of the claimed neighbourhood within a locality prior to the 1950 Conveyance, for however long a period, that subsequent period of "by right" use would prevent the requisite use been established throughout the relevant 20 year period, which is the relevant statutory test that the Council must apply. It is the continuous use of the Land for that relevant 20 year period and no other which section 15(2) requires to be established, irrespective of the extent of the use prior to and subsequent to those dates.

CONCLUSION

31. In conclusion, it is my view in relation to the "as of right" issue that the Land was used "by right" and so not "as of right" for a material part of the relevant 20 year period, namely from March 1992 until the date of the Transfer in 1996. On that ground, and on the basis of the law as it presently stands, it is my opinion that the Application should be rejected. However, given that that very issue is to be considered by the Supreme Court in April 2014, albeit that the ultimate decision may be some weeks later, the Council may wish to give consideration to deferring its decision, subject to the views of the Applicant and the Objector. As I am appearing in that case on behalf of the Registration Authority, North Yorkshire County Council, I can provide any updates if required in due course.

32. I advise accordingly, and if I can be of any further assistance, please do not hesitate to contact me.

RUTH A. STOCKLEY

03 February 2014

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RE: LAND AT HARLEY

SHUTE ROAD, ST

LEONARDS ON SEA

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