WORCESTERSHIRE COUNTY COUNCIL: COMMONS ACT 2006

REPORT FOR DECISION BY HEAD OF LEGAL AND DEMOCRATIC SERVICES

APPLICATION FOR A TOWN GREEN: LAND AT WYCHBOLD BOTTOM GREEN WYCHBOLD WORCESTERSHIRE
S15 COMMONS ACT 2006

1. The Application

1.1 An application under s15 (1) Commons Act 2006 dated 06 August 2012 was made by Mr Peter Evans on behalf of the Wychbold Residents Association ("the Applicant") to Worcestershire County Council as the Commons Registration Authority to register a village green at Wychbold Bottom Green Wychbold Worcestershire.

1.2 The application claimed that the land ("the Land") shown on the plan annexed ("the Plan") became a Town Green on 06 August 2012.

1.3 The application maintained that the Land had been used by a significant number of local inhabitants for lawful sports and pastimes for upwards of 20 years.

1.4 The freehold owners of the land are Festival Housing Association.

2 Objectors

Festival Housing Association (the Objector) objected to the Application by letter dated 16 October 2012.

3. Background

The Land comprises flat area of open grassland located within a built up residential area and bounded by residential roads on all sides. There is open access to it from all sides.

4. Evidence

4.1 Evidence was supplied in written form with the application as to the use of the land the evidence and other supporting information was provided with the Application, together with subsequent further statements and representations made by the Applicant.

4.2 The Commons Registration Authority decided to refer the application and evidence to which Miss Ruth Stockley of Kings Chambers, Manchester for advice on the merits of the application. The Inspector's report was received on 18th February 2015 and the applicant and the Objector were given an opportunity to make further observations. The applicant declined to make any further representation concerning the advice.

4.3 I attach a copy of the Inspector's report which summarises the evidence and the law and reaches the following conclusion :-

4.3.1 that the Land has not been used "as of right" throughout the relevant 20 year period;

4.3.2 that failure to satisfy this ground was sufficient to preclude consideration of the rest of the evidence adduced;

4.3.3 to advise the Authority to determine not to add the Application Land to its register of town and village greens.

5. The Law

The law requires that the Land should have been used 'as of right' for the qualifying period. On the testing of the evidence in this respect by expert counsel,

she was of the opinion that the Applicant did not satisfy this relevant statutory requirement and that the application should be rejected on the following ground:

5.1 The Applicant has failed to establish that the Land has been used "as of right" throughout the relevant 20 year period to have created a town or village green.

Recommendation

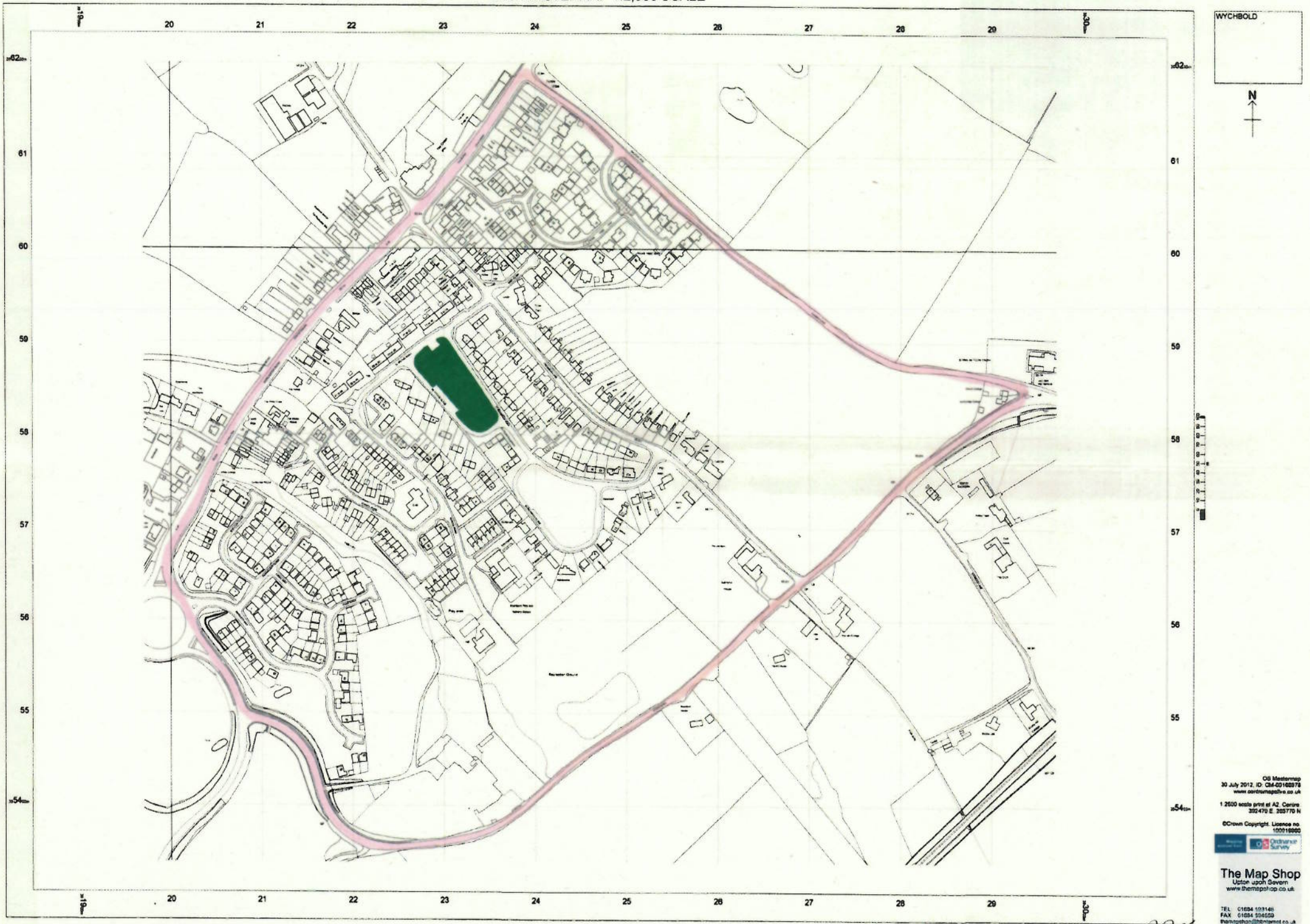
Accordingly having considered Miss Stockley's report and adopting her reasoning I recommend that the application to register the Land as a Village Green be refused.

Fiona Morgan.
Principal Conveyancer.
Dated: 10th March 2015

I agree/~~do not agree~~ the recommendation made in the report above.
I accept the reasoning set out in Miss Stockley's report. (Small typo in para 5.9 - vesting in WDC would have been 1974 - but no material impact on the reasoning or conclusion).

Simon Mallinson
Head of Legal and Democratic Services
Date: 16/3/15.

O.S. MASTERMAP 1:2,500 SCALE



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P.R. Law.

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS WYCHBOLD BOTTOM GREEN AT ST RICHARDS ROAD, WYCHBOLD, DROITWICH SPA, WORCESTERSHIRE AS A TOWN OR VILLAGE GREEN

ADVICE

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1. I am asked to advise Worcestershire County Council ("the Council") in its capacity as the Registration Authority for the purposes of the Commons Act 2006 ("the 2006 Act") upon the merits of an application to register land known as Wychbold Bottom Green at St Richards Road, Wychbold, Droitwich Spa, Worcestershire ("the Land") as a town or village green.

2. THE APPLICATION

2.1 The Application was made by Mr Peter Evans on behalf of the Wychbold Residents Association ("the Applicant") and is dated 06 August 2012. It was received by the Registration Authority on 07 August 2012. Part 5 of the Application Form states that the Land sought to be registered is usually known as "*Wychbold Bottom Green*", and its location is described as follows: "*The area of land is shown in "Green" and bounded by; St Richards Road, DeWyche Road, DeWyche Close, and DeWyche Bungalows*". A map, marked "Map "A"", was submitted with the Application which shows the Land shaded in green. In part 6 of the Application Form, in relation to the relevant "locality

or neighbourhood within a locality" to which the claimed green relates, it is stated: "*The neighbourhood is shown on attached Map and is bounded by the "Pink" line. To the North bounded by Worcester Rd A38. To the East bounded by Church Lane. To the South bounded by Stoke Road. To the West bounded by Stoke Road and M5 South Junction 5 Slip Road*".

2.2 The Application is made on the basis that section 15(3) of the 2006 Act applies, which provision contains the relevant qualifying statutory criteria. The date on which the use as of right ended is identified in Part 4 of the Application Form as 9 September 2012 on the ground that the following day, a fence and temporary compound were erected on a small section of the Land as identified on the plan marked "Map "C"" submitted with the Application. The justification for the registration of the Land is set out in Part 7 of the Form together with an "Opening Statement" submitted by the Applicant. The Application is verified by a statutory declaration in support made on 6 August 2012. As to supporting documentation, an Opening Statement, 77 completed evidence forms, 3 maps, a register and analysis of all the evidence forms submitted in terms of timescales of use, observations of use and activities of use and photographs were submitted with the Application.

2.3 The Application was duly advertised by the Registration Authority and was also served on the Landowner, Festival Housing Association ("the Objector"), who duly objected to the Application by letter dated 16 October 2012. Further correspondence was submitted by the Applicant and the Objector, including the Applicant's Rebuttal Statement dated 23 January 2013, the Objector's

response by e-mail of 11 February 2013 and the Applicant's letter of 27 February 2013. Subsequently, as the principal issue raised by the Objector concerned matters of relevance in ***Barkas v. North Yorkshire County Council***, the Court of Appeal's decision[1] in which was subject to an appeal to the Supreme Court, the matter was deferred pending the decision of the Supreme Court. Both the Applicant and the Objector have provided further representations in the light of that decision, namely the Applicant by letter dated 8 July 2014, the Objector by letter dated 23 July 2014, and the Applicant by further letter dated 4 August 2014.

2.4 The Land is identified on the map marked "Map "A"" on which it is shaded in green. It appears from the photographs produced to be a flat area of open grassland located within a built up residential area and bounded by residential roads on all sides. There is open access to it from all sides.

2.5 I have taken into account all the evidence and other supporting information provided with the Application, all the subsequent further statements and representations made by the Applicant and all the representations and documentation submitted by the Objector in reaching my conclusions set out below.

3. NATURE OF OBJECTION

3.1 The Objection is made on one principal basis, namely that the Land has not been used "as of right" throughout the requisite 20 year period and cannot

[1] [2012] EWCA Civ 1373.

accordingly be registered. Instead, it is contended that up until 1994, the Land was used "by right" rather than "as of right" applying the principles laid down by the Supreme Court decision in ***R. (on the application of Barkas) v. North Yorkshire County Council***.[2]

3.2 I am asked to consider the merits of that Objection and whether the Application should be refused on that basis. If not, I am asked to advise upon the merits of the Application generally.

4. RELEVANT LEGAL FRAMEWORK

4.1 The Application seeks the registration of the Land by virtue of the operation of section 15(3) of the 2006 Act. Under that provision, land is to be registered as a town or village green where:-

> "*(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
>
> *(b) they ceased to do so before the time of the application but after the commencement of this section; and*
>
> *(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).*"

Therefore, for the Application to succeed, it must be established that:-

(i) the Land comprises "land" within the meaning of the 2006 Act;

(ii) the Land has been used for lawful sports and pastimes;

(iii) such use has been for a period of not less than 20 years;

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[2] [2014] 3 All ER 178.

(iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;

(v) such use has been as of right;

(vi) such use ceased before the time of the Application but after 6 April 2007; and

(vii) the Application is made within 2 years of the cessation of the use.

4.2 Use of land "*as of right*" is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[3] that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

4.3 In ***Barkas***, the Supreme Court held that where land has been provided and maintained by a local authority pursuant to section 12(1) of the Housing Act 1985 or its statutory predecessors, its use by the public for recreational purposes is a use "by right" and not "as of right" within the meaning of the 2006 Act. In such circumstances, the public have a statutory right to use that land for recreational purposes, which public right is enforceable in public law, and they cannot be prevented from so using that land as they are entitled to use it provided they use it for recreational purposes and in a lawful manner. The public are therefore not then using the land "as of right" as trespassers, tolerated or otherwise, but are using it "by right".

[3] [2000] 1 AC 335.

4.4 In that case, the land in question had been acquired by the local authority as part of a larger area of land pursuant to section 73 of the Housing Act 1936 as a site for the erection of houses for the working classes. The application land had been laid out and maintained by the authority as a recreation ground under section 80(1) of the 1936 Act in connection with such housing. The Court determined that such recreational land had thus been provided and maintained by the local authority for the purpose of public recreation under an express statutory power to provide and thereafter maintain it as a recreation ground. Consequently, throughout the relevant 20 year period, the local inhabitants had indulged in lawful sports and pastimes on that land "by right" and not "as of right".

4.5 The Supreme Court went on to hold that where any land that is owned by a public authority which has the statutory power to provide it for public recreation is so laid out by that authority pursuant to the statutory power, the public's use of that land will be pursuant to a statutory right to do so and thus "by right" and not "as of right". Indeed, they accordingly held that the decision and reasoning of the House of Lords in ***R. v. Sunderland City Council ex parte Beresford***[4] should no longer be relied upon as in that case, the land in question had been laid out and maintained as a public recreation ground by a new town corporation pursuant to its statutory powers to do so contained in section 3 of the New Towns Act 1965. Accordingly, it ought to

[4] [2004] 1 AC 889.

have been found that its use was "by right" and not registered as a village green.

5. APPLICATION OF THE LAW TO THE EVIDENCE

5.1 Turning to whether the Land subject to the present Application has been used "as of right" throughout the relevant 20 year period, the starting point is to identify that period.

5.2 For the purposes of section 15(3) of the 2006 Act, the qualifying use must have ceased before the date of the Application, but after 6 April 2007. The Applicant contends that the qualifying use ceased on 9 September 2012 due to the erection of fencing and a temporary compound on the Land the following day. On that basis, the relevant 20 year period is September 1992 until September 2012. Indeed, if section 15(2) was relied upon in the alternative, as the use would then have to continue up until the Application in August 2012, the relevant 20 year period would instead be August 1992 until August 2012.

5.3 Turning next to the factual position, the Land was acquired as part of a larger area of land by the Rural District Council of Droitwich in 1947. I have seen a copy of the relevant Conveyance provided by the Objector which is dated 27 January 1947 and made between one John Wilson and the Rural District Council. It appears from the plan attached to the Conveyance on which the land thereby conveyed is edged in pink that such land includes the Application Land. Moreover, I note there is no suggestion to the contrary by the Applicant.

5.4 It is significant that the land acquired by the Rural District Council under the 1947 Conveyance was expressly stated to be acquired under the Housing Act 1936. It was accordingly acquired and held by that Council at that time for housing purposes.

5.5 Chronologically, the next relevant factual matter is, as also agreed by the Applicant and the Objector and confirmed by the available evidence, that the Land was physically laid out by the Rural District Council as a public recreation ground during the 1950's. The Objector states in its letter of Objection dated 16 October 2012 that "*the RDC laid out the Application Land as open space for the benefit of those persons for whom the RDC provided housing accommodation*". That is consistent with the Applicant's Opening Statement which states that during the 1950's, a large parcel of land was developed which includes the current core of the village and that such development "*incorporated two large recreation areas traditionally laid out with each area of land surrounded by residential homes*", and that the Application Land has been used by local inhabitants for recreational purposes since 1954. The letter provided by the Applicant from Wychavon District Council to Ms J Harrigan, the Chair of Dodderhill Parish Council, dated 1 April 2009 states that despite the lack of written records, it "*seems likely that this particular area was provided as public open space as part of the residential development that subsequently took place...which will have taken place approximately sixty years ago*". Thus, all the available evidence suggests that the Land was laid out as a public recreational area by the Rural District Council during the 1950's as part of its wider development to provide

housing accommodation for its tenants, and in my view it is appropriate to so find on the balance of probabilities.

5.6 That being so, the question then arising is whether the Land was so laid out by the Rural District Council pursuant to its statutory powers. As the Land had been acquired for housing purposes as part of a wider area of land that was used to provide council housing accommodation, that authority's relevant statutory powers at that time would have been contained in the Housing Act 1936. Section 80(1) of that Act provides:-

> "*The powers of a local authority under this Part of this Act to provide Housing accommodation,* ***shall include a power to provide and maintain, with the consent of the Minister*** *and if desired jointly with any other person, in connection with any such housing accommodation, any building adapted for use as a shop,* ***any recreation grounds*** *or other buildings or land, which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.*" (my emphasis).

Thus, the Council had an express statutory power to provide recreation grounds in connection with the housing accommodation.

5.7 As the Applicant points out, Ministerial Consent is required to provide such recreation grounds and there is no available evidence of such consent having been applied for or obtained by the Rural District Council in relation to the Land. Nonetheless, it seems to me that in the circumstances, it can reasonably

be inferred that such Ministerial Consent was, in the event, obtained for the following reasons. It appears from the investigations that have taken place that there is unfortunately a distinct lack of available Rural District Council written records. It is thus unsurprising that any records surrounding the provision of the Land in the 1950's are unavailable. Further, there is no evidence that Ministerial Consent was not applied for or not obtained. Moreover, it is my view that it is appropriate to apply the presumption of regularity in such circumstances, namely it can be reasonably inferred that the requisite Consent was obtained in the absence of any contrary evidence. In any event, it is notable that under section 79(1) of the 1936 Act, a local authority had power to lay out public open spaces on council estates without ministerial consent.

5.8 Consequently, it is my opinion that, on the balance of probabilities, the Land was provided as recreational open space by the Rural District Council during the 1950's as part of its wider provision of housing accommodation pursuant to its statutory power contained in section 80(1) or, alternatively, in section 79(1) of the Housing Act 1936.

5.9 Thereafter, there is no dispute that the Land subsequently vested in Wychavon District Council in 1972 as part of local government reorganisation under the Local Government Act 1972. The District Council thereby became the successor to the Rural District Council.

5.10 It also seems to me to be undisputed from the evidence that the Land continued to be maintained by Wychavon District Council as a recreational

area for local residents. That is so stated by the Objector in its Objection letter of 16 October 2012 and in its email dated 11 February 2013. It is also stated by the Applicant on the second page of his letter of 27 February 2013 that "*The Application Land has been maintained by Wychavon DC since 1974*".

5.11 A statutory power to maintain such a recreation ground was contained in section 80(1) of the 1936 Housing Act, which is currently provided in the similar provision in section 12(1) of the Housing Act 1985. In my view, it is a reasonable inference that the Land was thereby maintained as a recreation ground by the Rural District Council and subsequently by Wychavon District Council pursuant to such statutory powers.

5.12 In addition, it is agreed that the Land was transferred by Wychavon District Council to the Droitwich Spa and Rural Housing Association Limited in 1994, together with the remaining Council housing surrounding the Land.

5.13 Applying the law as set out in ***Barkas*** to such facts, the Rural District Council had the statutory powers contained in the Housing Act 1936 to provide the Land as a recreational area for its tenants and to maintain it as such thereafter. For the reasons set out above, it is my view that it can reasonably be inferred that the Land was so provided and thereafter maintained by that authority pursuant to such statutory powers. Further, it seems to me that Wychavon District Council thereafter continued to maintain the Land as a recreational area until 1994 pursuant to its similar statutory powers which were subsequently contained in section 12(1) of the Housing Act 1985.

5.14 There is nothing to suggest that the Land was appropriated by either Authority to any other purpose at any time between 1947 and 1994. Moreover, as a matter of fact, the Land continued to be used as recreational land by local inhabitants for whom it had been provided and there was no reason for it to cease being held for the housing purposes for which it was initially acquired. In those circumstances, it is my opinion that until 1994, the Land continued to be held for the purposes for which it was acquired in 1947, namely for housing purposes. The Rural District Council and subsequently Wychavon District Council consequently had the requisite statutory powers contained in the relevant housing legislation to maintain the Land for recreational purposes.

5.15 As the Land was provided and maintained as a public recreation ground by a local authority between 1947 and 1994 pursuant to its statutory powers to do so, applying the law as contained in ***Barkas***, the public thereby had a statutory right to use the Land for recreational purposes during that period. They were entitled to use the Land throughout the period for such purposes rather than being trespassers, tolerated or otherwise. Neither the Rural District Council nor Wychavon District Council would have been entitled to challenge a member of the public using the Land for such purposes in a lawful manner as the public had a statutory right to so use it. As pointed out by Lord Neuberger at paragraph 23 of ***Barkas***:-

> *"Section 12(1) of the 1985 Act and its statutory predecessors bestow a power on a local (housing) authority to devote land such as the Field for public recreational use (albeit subject to the consent of the minister*

or Secretary of State), at any rate until the land is removed from the ambit of that section. Where land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so."

Applying the principles set out in ***Barkas***, the Land was accordingly used by the public throughout that period until 1994 "by right" and not "as of right".

5.16 Turning to the Applicant's specific contentions that ***Barkas*** does not apply to the present circumstances, the primary point raised is that neither the Rural District Council nor Wychavon District Council held the Land as public open space and there is no evidence that either of those bodies did so. However, it does not appear to me from the Supreme Court's decision that there is any requirement for land to be specifically held as public open space in order for the principles in ***Barkas*** to be engaged. Instead, it is merely necessary for land in the ownership of a public authority to have been provided and maintained as a public recreational area pursuant to that authority's statutory powers. When such occurs, the public have a statutory right to use that land for recreational purposes, and such use is accordingly "by right" rather than "as of right". That applies irrespective of whether the land is formally held as public open space. Indeed, in ***Barkas*** itself, the land in question had, similarly to the present circumstances, been acquired and held for housing purposes rather than specifically as public open space, but had been provided as a recreational ground pursuant to statutory powers contained in the housing legislation. As pointed out by Lord Neuberger at paragraph 21:-

> *"So long as land is held under a provision such as s 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land 'by right' and not as trespassers, so that no question of user 'as of right' can arise."*

Therefore, I do not concur with the Applicant's fundamental premise that land must be specifically held as public open space in order for its use to be "by right" and that only such land engages the ***Barkas*** principles.

5.17 Similarly, it is pointed out by the Applicant, quite correctly, that there is a distinct lack of documentary support for a finding that Wychavon District Council regarded the Land as public open space or that it held the Land as such. However, it does not seem to me that such evidence is necessary. Instead, it is sufficient for the Land to have been provided and maintained by the public authorities as a public recreational area pursuant to statutory powers, which the evidence suggests it was. The exercise of those particular statutory powers in the housing legislation did not require the Land to be formally appropriated for public open space purposes or to be otherwise held as such. It was sufficient that the Land was acquired for housing purposes and remained held for such purposes in order for the relevant powers in the housing legislation to be employed.

5.18 In his representations post the Supreme Court's decision in ***Barkas***, the Applicant refers at the top of the second page of his letter dated 8 July 2014 to paragraphs 78 and 79 of the speech of Lord Carnwath. They relate to the

circumstances of ***Beresford***. There is no support in those paragraphs to there being a requirement for specific evidence that the requisite Ministerial Consent had been granted in order for recreational land provided under the housing legislation to be capable of being used "by right" in principle. Indeed, in paragraph 79, in relation to section 6 of the New Towns Act 1965, Lord Carnwath referred to an assumption that the requisite ministerial approval in that instance had been given "*in the absence of any indication to the contrary*", which in my view is the same approach that should be taken in this instance.

5.19 The Applicant also raises the issue that no formal process under sections 122 and 123 of the Local Government Act 1972 was undertaken by Wychavon District when it transferred the Land to the Droitwich Spa and Rural Housing Association Limited in 1994 as is required where a local authority disposes of public open space, suggesting that the Land was not public open space at that time nor regarded as such. However, it does not appear to me that such circumstances affect the established facts that the Land was provided and maintained as a public recreational area by a local authority pursuant to statutory powers until 1994, and was used by the public as such, which are sufficient for the Land to be used "by right" rather than "as of right" according to ***Barkas***. Whether the Land comprised "public open space" and whether its transfer to the Housing Association in 1994 amounted to a "disposal" within the meaning of the Local Government Act 1972 does not affect those established facts.

6. CONCLUSIONS

6.1 In conclusion, for the above reasons, it is my view that Land was used by the public "by right" from 1947 until 1994 during which it was in public ownership. It follows that its use throughout that period was not "as of right".

6.2 In contrast, since 1994, the Land has not been in the ownership of a public authority and thus would have been capable of being used thereafter "as of right" in principle.

6.3 Nonetheless, in order to satisfy the relevant statutory criteria for registration, the Land must have been used "as of right" throughout the relevant 20 year period, namely from September 1992 until September 2012. I am unaware of the precise date of the Land's transfer to the Droitwich Spa and Rural Housing Association Limited, although I note that the Applicant's letter of 4 August 2014 suggests that it occurred in March 1994. Thus, from September 1992 until around March 1994, the Land was not used "as of right", namely for approximately 1½ years of the relevant 20 year period. Such a period of time cannot be regarded as de minimis. Consequently, it is my opinion that the Land has not been used "as of right" throughout the relevant 20 year period, and accordingly that vital element of the statutory criteria has not been met.

6.4 In those circumstances, it is my advice that the Application is bound to be rejected on that basis.

6.5 Given that conclusion, as requested, I shall not proceed to consider the other elements of the statutory criteria in relation to which I note the Objector raises no objection nor any evidence to counter that provided by the Applicant.

6.6 Instead, I advise the Council to reject the Application on the ground that the Application Land has not been used "as of right" throughout the relevant 20 year period, and to determine not to add the Application Land to its register of town and village greens.

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

RUTH A. STOCKLEY

17 February 2015

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IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS WYCHBOLD BOTTOM GREEN AT ST RICHARDS ROAD, WYCHBOLD, DROITWICH SPA, WORCESTERSHIRE AS A TOWN OR VILLAGE GREEN

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Our Ref: RS 337192