IN RE: AN APPLICATION TO REGISTER LAND KNOWN AS THE LANE, RUDMORE PARK, NEWBRIDGE, BATH AS A NEW TOWN OR VILLAGE GREEN

REPORT TO BATH AND NORTH EAST SOMERSET COUNCIL

Introduction

1. I have been asked to advise Bath and North East Somerset Council ('BANES') as to whether it should accede to an application to register land at Rudmore Park, Bath as a Town or Village Green pursuant to the provisions of section 15 of the Commons Act 2006 ('the Act').

2. BANES is a Registration Authority for the purposes of the Act. By application number TVG10/2 made by Joanne McCarron, Peter Burns, and Jose Ash and received by BANES on 1st. April 2010, the Applicants sought the registration of a plot of land referred to as The Lane, Rudmore Park, as a Town or Village Green on the basis that local inhabitants had indulged in usage that qualified for registration pursuant to Section 15(3) of the Act. The relevant neighbourhood from which the inhabitants came was said to be 'Lower Weston and Newbridge', in the electoral wards of Newbridge and Kingsmead

within BANES. It was said that qualifying usage ceased on 5th. April 2008.

3. BANES advertised the making of the application by published public notice pursuant to the Commons (Registration of Town or Village Green)(Interim Arrangements) (England) Regulations 2007 on 20th. May 2010.

4. The only objection to the application in response to the advertisement was itself provided by BANES. BANES is the freehold owner of the land, and therefore both has a practical interest in the future use of the land, and a statutory duty as registration authority under the Act to consider the application properly and fairly. As I understand it, it is for this reason, and to remove the possibility, so far as is possible, that the decision reached might be perceived to be affected by any conflict of interest, that BANES has sought my advice as an independent barrister, on the merits of the application. I would stress however that this document is my considered advice to BANES. The statutory duty to make the decision belongs to BANES.

5. Where I refer below to 'the Authority' I am referring to BANES in its capacity as registration authority under the Act. Where I refer to 'the

Objector' I am referring to BANES in its capacity as landowner and objector to the application. Where the context is indiscriminate, I have simply referred to 'BANES'.

6. In its written objection, the Objector put forward a number of specific reasons why the application should not be granted. These were:

(1) that the land was acquired by the Objector under the statutory purposes of the Open Spaces Act 1906. The consequence of this, says the objector, is that use of the land for lawful sports and pastimes by local inhabitants is not 'as of right' as required by the Commons Act 2006; instead it is 'by right';

(2) Secondly, it does not admit that the land specified in the application as a 'neighbourhood' is in fact a neighbourhood;

(3) Thirdly, the land is used as a right of way, and not as a Town or Village Green. If that is right, say the objectors then whether or not the usage is sufficient to lead to the creation of a footpath over the land, it is not sufficient to register a Town or Village Green over it;

(4) Fourthly, part of land shown on map is in the ownership of Oakhill Group Ltd. has been fenced off at all material times, and has not been used for recreational purposes.

7. The Applicants filed a Response on the 27th. August 2010 which accepted that the land shown on the application plan as subject to the application included a parcel of land owned by Oakhill Group Limited that was fenced-off as part of its business; and that this small parcel of land should be excluded from the application. Otherwise it did not accept the points made by the Objector.

8. I was instructed by the Authority to hold a public inquiry into the application; to receive and consider any relevant evidence; and to advise the authority as to whether it should acceded to the application. A public inquiry was held at the Guildhall, Bath on 23rd & 24th. May 2011. The Applicants were represented by Mr. Christopher Maile, a lay representative from the organisation 'Planning Sanity', whilst the Objector was represented by Mr. Vivian Chapman QC. As part of that inquiry I have viewed the site accompanied by the parties' representatives.

9. At the outset of the inquiry Mr. Maile applied to amend the application to change the neighbourhood on which reliance was being placed. He sought to rely on a neighbourhood described as 'Lower Weston' in the locality of Newbridge, which is an electoral ward within the ambit of BANES. It is bounded to the South by the

River Avon; to the North by Newbridge Road; as far West as the New Bridge over the Avon, and as far East as Chelsea Road. Mr. Chapman did not oppose this application, and I advise the Authority that it should consider the application as if it had been made in respect of the inhabitants of Lower Weston as so defined.

10. Mr. Chapman made the point that the application appeared to have been made under the wrong sub-section of the Commons Act 2006. It was made under section 15(3), which is apt where use has come to an end or been interrupted within two years prior the date of the application (see section 15(3)(b) *ibid.*); whereas the usage appears to have been continuing up to the date of the application. Mr. Maile applied to amend the application, so as to assert that usage continued up to the date of the application. There was no opposition to this, and it seems to me to be appropriate for the Authority to treat the application as being made under section 15(2), which relates to applications made where usage is so continuing.

11. The land that is the subject of the application is part of the former track bed of a long-disused railway line of the former Midland Railway between Bath and Bristol which led to Green Park Station in Bath. The line closed at the end of the 1960s. The application land, as

amended, runs at its Western end along an elevated embankment from Brassmills Road. The adjacent land to the Northern boundary rises as one passes further Eastwards along the application land. The land also widens out as it extends Eastward. The application land (as amended) ends at a mesh-link fence separating BANES' land from that occupied by Hartwell's Garage. The land is bounded to the North by the embankment, fencing, hedging, and the rear gardens of dwellings at Rudmore Park. To the South of the land is the housing of Avon Park, with an area of allotments at the Eastern end. Access to the land from the West lies from the Southern boundary, up some steps at the Western end of the land, and up a made access at roughly the mid-point of the land. At the Eastern end access is gained by the North-Eastern corner of the land, by which the public footpath running through the land exits it, leading on to Newbridge Road. The land is roughly grassed.

Evidence

12. What follows is not intended to be a complete summary of the oral evidence that I heard, but rather an indication of the evidence that makes the conclusions that I have drawn easier to follow.

13. I heard evidence from the Applicant Joanne McCarron, who lives at Rudmore Park. Her garden backs on to the land. She has used the land from 2004 for picnics, during community events such as picnics and parties, as a children's play area, as a location for children's dens, and for fruit picking. She has played badminton there. She hears children playing there, and she regards the area as a safe place for children to play. Ms. McCarron had organised a party on the land on one occasion, and about 20 or 30 people turned up. It was more than a street party. Her evidence was that the land was frequently used for general recreational purposes by young and old alike; it was convenient for people to walk their dogs, and for children to play. She accepted that there had been some dumping of rubbish on the land, but maintained it was still an enjoyable and attractive plot of land. Indeed, that was my impression of it during the site visit. She said that she regarded herself as living in the neighbourhood of Lower Weston. Ms. McCarron told me that Rudmore Park is part of Lower Weston, but she could not say where the boundaries of Lower Weston were. Residents considered it to be below (to the South of) Newbridge Road, and she thought that the residents would consider Lower Weston to extend into Kingsmead Ward. There is an Upper Weston which is above Newbridge Road. Whilst she accepted that the application had been prompted by

BANES' proposal to create a bus rapid transit route along the land, she denied that her evidence was exaggerated as a result. I found Ms. McCarron to be a straightforward witness whose evidence was presented reasonably.

14. Mr. Peter Burns lives at Avon Park. The area all around the land was all one parish called Weston. The border between Weston and Twerton was the river. When the area became so big with the construction of the gas works, it was split into two parishes – Weston and Lower Weston. St. John's Church is the parish church of Lower Weston. The gas works is to the South of the river, just above Twerton Cemetery. St. John's Church is by Cork Place. He has used the land since 1966, for walking and for picking blackberries. He had seen people use the land since trains stopped running over the tracks. Children do 'general adventure stuff'. Their numbers have varied, depending on the generations. He had seen children camping there. Recently two friends of his had seen children from Newbridge School doing nature trails there. He visits the land several times a day. Sometimes it is a short cut across the road. I had no reason to doubt Mr. Burns' evidence.

15. Ms. Jose Ash lives at Brassmill Lane, and has done so since 1977. She described the use that she and her family and other children made of the land since 1983. There is wildlife there, and blackberries for picking. Local people picnic there. There has been a community clear-up of litter on the land. She sees up to half a dozen children on the land at any one time, although it depends on the weather. Ms. Ash has an allotment nearby, and could see children on the land from her allotment. One would get more children there in the school holidays. Some residences nearby have little if anything in the way of gardens, and so the land is valuable for those children in particular. The people she sees walking around appear to be doing so for exercise, rather than to get to any particular place. She had always known the surrounding land as 'Lower Weston', running between Newbridge Road and the River and as far East as Locksbrook Road. People refer to Lower Weston in conversation. Ms. Ash would put it on her addresses. She had always known the claimed neighbourhood as such. The local Post Office (which is a stationers' shop and a sub post office) refers to itself as in Lower Weston.

16. Cllr. Loraine Brinkhurst MBE lives on Newbridge Road, near the land, having previously until 1977 lived at Widcombe Hill. She has been a ward councillor for sixteen years. Her family has used the land for

recreation since 1977, her children playing on the land, as had other families and children. The site in question has houses on either side of it, and in the councillor's view, the land serves the community well. She referred me to the fact that play equipment for children had been put on the land in 1996, the funding being received from the developers who constructed the housing at Kaynton Mead to the South. Planting schemes for shrubs and trees were carried out in 1997, and again in 2006 (following the disturbance of the ground by the installation of a water pipe). Fun days and picnics have been held there. Children appreciate it as part of their environment.

17. Councillor Brinkhurst had always known the area as Lower Weston. As such it was part of her address. She had understood the area to be a part of Weston, which is a prominent village at the other side of the Royal United Hospital. Newbridge and Lower Weston are regarded as the same area. The councillor had a clear interest in her local environment, and was a measured and reliable witness.

18. Mr. Colin Harding lives on Brassmill Lane, and has used the land for various purposes, such as walking, dog walking, bird watching, and picking blackberries, as has his wife. The land has been so used by him and others since 1992. The land has always been well-used by

children. He has seen a dozen or more children there at various times. They tend to be running around, hiding in bushes and making dens. There is also a fair amount of dog-walking on the land. Those people who do go there with their dogs usually take dogs up there and let them off the lead. This is a safe practice, and there is no risk of the dogs running on to a main road. People go there specifically to walk and exercise their animals.

19. Mr. Norman Rosser lives on Rudmore Park. He and his family have used the land for over thirty years for recreation. It is a much-used area of land. It is not just used for walking; people sit on the grass. His garden backs on to the land, and in consequence he sees a lot of people going on to the land with their children. Many people go up and down with their dogs enjoying themselves; children play ball games. It is mainly children, but there are sometimes grown-ups. He would do the same sort of thing with his grand children at weekends. In effect it is a playground to the local children.

20. Karen Hill lives on the Newbridge Road. She has used the land for recreational walking, blackberrying and playing with her children since 1987. More recently she went on a May Day picnic and barbeque about three years ago. A gazebo was put up by the local

residents. Most people were from the gardens backing on Rudmore Park and Avon Park and a few from Newbridge Road. People brought items of food, and there were some informal games as well. In her view, local residents have used this land for at least two generations.

21. I then heard oral evidence in opposition to the application. Mr. Robert Scott FRICS is employed as a Client Services Manager by BANES, working in Property Services. Much of Mr. Scott's evidence comprised of helpfully giving background information, and uncontentious description. I deal with the paper material relating to the acquisition separately below. Mr. Scott also produced some statistical analysis of the inhabitants of Lower Weston and Newbridge, and I will deal with that when I consider the issue of 'neighbourhood' below. In part, that analysis was superceded by the amendment obtained by Mr. Maile, but it remains relevant.

22. Mr. Scott produced a plan of the public footpaths in the area. A footpath runs from Newbridge Road Southwards. It enters the land at its Eastern end, and then runs westwards until it reaches a point adjacent to 35 Rudmore Park. At that stage it leaves the land to the South, and joins a network of footpaths which run variously alongside

the allotments to the East; alongside the land to Brassmill Lane; and to Avon Park. He pointed out that there is open land in the near vicinity, being a triangular open green area at Rudmore Park. He could not tell me whether this was publicly accessible open space, although on my inspection I saw nothing to indicate that it was private, and my inference would be that it was open to the public, or at least treated as such.

23. Mr. Scott was also re-called to give evidence as to the extent of the neighbourhood of 'Lower Weston'. He told me he had heard of such an area. In his view it was centred around the around the Royal United Hospital. To the North stood Upper Weston and Weston Village and below that Lower Weston, which was sometimes described as Newbridge. In his experience it extended as far East as the Royal Victoria Park, as far North as the Hospital, as far South as the River as far West as the end of town, although some people call the area around Newbridge Park Newbridge. I thought Mr. Scott was doing his best to assist the Inquiry in giving this evidence, and I accept it as his perception of the extent of 'neighbourhoods' in Bath.

24. I next heard from Mr. Andrew Reed, who is a Property Law Manager employed by the Council. Has prepared a helpful document that

itemised BANES' acquisition of the land, showing how the decision was taken. He was asked by Mr. Maile whether he knew or could assist as to the precise purpose for which the land was acquired, within the overall description 'open space', but he could not.

25. Lastly, I heard from Mr. Simon Memory, who is a Parks and Green Space officer with BANES. He produced documentation that indicated that the Council had regularly collected litter, cut the grass and maintained the hedgerows on the land. In summary, he said that the Council had maintained the land as an informal open space for the benefit of the public.

26. I turn next to the relevant documentation presented to the Inquiry. On behalf of the Applicant, this comprised a number of witness statements in substantially *pro forma* format, which gave fairly basic information as to the use that was made of the land – name, address, period of usage and type of usage. Mr. Chapman cautions me against giving much weight to this evidence given that such samples tend to be self-selecting; the evidence is not tested by cross-examination; and it is on occasion unclear whether the person in question is referring to usage of this land, or to the usage of open land nearby which is also subject to the proposed Bus Rapid Transit

development. These are reasonable and appropriate comments. However, such documentation may be useful both in corroborating or disputing contested oral evidence, and in buttressing or fleshing out or contradicting relatively limited oral evidence. I do not think it can be disregarded.

Acquisition of the Land

27. The application land formed one part of two parcels of land at Lower Weston, Bath, conveyed by the British Railways Board to Bath City Council on 21st. September 1987. The habendum states that the land was conveyed to the Council:

> "TO HOLD unto the Council in fee simple as to the property first hereinbefore described for the purpose of the Open Spaces Act 1906 and as to the property secondly hereinbefore described for the purposes of section 120(2) of the Local Government Act 1972."

Although the copies supplied are poorly coloured, the original conveyance plan was produced at the Inquiry. The application land formed part of the 'property first hereinbefore described', being land coloured blue and blue hatched yellow.

Subsequent Dealings with the Land

28. Part of the land has been advertised by BANES as land that it intends to use for purposes of a Bus Rapid Transport System. As I have said before, BANES' intention to use the land for this purpose is not relevant to the merits of the application. Equally the consequences of registration are not material to the application.

Burden and Standard of Proof

29. The practical consequences of registration are substantial, and restrictive of the possibilities of future use. It is not to be regarded as a trivial matter to have a TVG registered over land. It is necessary for the Applicant to strictly and properly prove his claim. To do so he must establish his claim by the production of evidence leading to the conclusion on the balance of probability that each element of the statutory test set out in section 15(2) of the Commons Act 2006 has been established. Section 15(2) states:

> "(2) 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"

Although the issues set out in the notice of objection were restricted to four specific heads of objection (see para. 6 above) Mr. Chapman indicated that the Objector put the Applicant to proof of all matters necessary to establish the right claimed.

Issues - Use of the land for lawful sports and pastimes

30. The sort of activity relied on to establish the TVG is informal recreation, such as walking or dog walking or playing with one's children. With a caution that certain types of walking in certain circumstances may not have the effect of producing a TVG because it may instead be referable to the existence of a public highway (which I deal with below), such use falls within the statutory definition – see R v. Oxfordshire County Council ex. p. Sunningwell P. C. [2000] 1 AC 335 at 357 per Lord Hoffmann. Litter picking or tree planting is not of itself a sport or pastime, although it may be evidence that indicates that the local community viewed the land as a community resource, from which one might infer that it was used by local residents. I am of the view that picking blackberries may, in the correct context, amount to recreation or part of recreational use;

although it may also amount to the exercise of a *profit a prendre*[1] in law.

Use of the land as if it were a public footpath

31. As I have set out above, the land is broadly linear in shape (although it widens to the West). The Western end has a public footpath running through it. The Objector argues that use of the land is referable to (or 'proves') the use of the land as a public footpath only, and not as a TVG. It also argues (relying on the decision of the House of Lords in DPP v. Jones [1999] 2 AC 240) that once a footpath is in existence, then any usage by the public of that land that does not amount to a nuisance, either to the landowner or to the other users of the footpath, is lawful and permitted. If such activity was lawful, it followed that such user was not 'as of right' but 'by right', and not within the scope of section 15(2) Commons Act 2006. It would I think follow that the practical effect was that a public highway could not be registered as a TVG, and possibly that all public highways could be used as TVGs (although they would not have the legal status of such) so long as they did not cause a nuisance by obstructing the highway. As far as the part of the land not covered by the highway was concerned Mr. Chapman's argument was again that the use by

[1] A right to take produce of the soil from the land of another.

the inhabitants looked like the sort of use that one would see giving rise to the deemed creation of a footpath, and not a TVG.

32. Mr. Maile's submissions on the point were broadly to the effect that even if Mr. Chapman's submissions were well founded (which I do not think he admitted) the footpath only extended for half of the length of the application land, and that it would not affect the remainder.

33. I agree with Mr. Chapman that the law of the topic is set out in the judgment of Lightman J in Oxfordshire County Council v. Oxford City Council [2004] EWHC 12 (Ch) in terms which were not disapproved when the case was appealed:

> "[102] The issue raised is whether user of a track or tracks situated on or traversing the land claimed as a Green for pedestrian recreational purposes will qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a Green. If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a Green. The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a

presumption. The answer must depend how the matter would have appeared to the owner of the land: see Lord Hoffmann in Sunningwell at pp 352H-353A and 354F-G, cited by Sullivan J in Laing at paras 78-81. Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. *Use of a track merely as an access to a potential Green will ordinarily be referable only to exercise of a public right of way to the Green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential Green may be recreational use of land as a Green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land.* (my emphasis). If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a Green).

[103] Three different scenarios require separate consideration. The first scenario is where the user may be a qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a Green or for both. The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational

activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to (e.g.) an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track e.g. fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a Green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights.

[104] The second scenario is where the track is already a public highway and the question arises whether the user of the track counts towards acquisition of a Green. In this situation, the starting point must be to view the user as referable to the exercise (and occasional excessive exercise) of the established right of way, and only as referable to exercise as of right of the rights incident to a Green if clearly referable to such a claim and not reasonably explicable as referable to the existence of the public right of way.

[105] The third scenario is where there has been a longer period of user of tracks referable to the existence of a public right of way and a shorter period of user referable to the existence of a Green. The question which arises is the effect of the expiration of the 20-year period required to

trigger the presumption of dedication of a public highway on the potential existence after the full 20 years qualifying user of a Green. During the balance of the latter 20-year period the user of the path will prima facie be regarded as referable to the exercise of the public right of way (cf. para 104 above). The question raised is whether the user during the previous period should likewise be so regarded because the presumed dedication as a public highway dates back to the commencement of the 20 year period of user of the way. In a word, does the retrospective operation of the dedication as a public highway require that the user of the path throughout the 20 year period giving rise to the dedication should be viewed retrospectively as taking place against the background of the existence throughout that period of a public footpath? In my judgment the answer is in the negative. Over the period in question the user of the path was in fact "as of right" and not "of right". It is totally unreal to view user as taking place against the background of the existence of a public right of way at a time before that right of way came into existence. Where a public right of way comes into existence during the period of potentially qualifying user for the existence of a Green, in determining whether the qualifying user is established it is necessary to have in mind that at least some of the user must have been referable to the potential (and later actual) public right of way. But that does not mean that acts of user may not also or exclusively be referable to qualifying user as a Green. I do not think that anything said by, let alone the decision of, Sullivan J in Laing should be read as to the contrary effect. The

question must in all cases be how a reasonable landowner would have interpreted the user made of his land.

In the present case user relates (as to broadly the Eastern part of the land) to land over which a public footpath runs, and hence the principle set out by Lightman J. at para. [104] applies. Although the footpath was only created in 2006, the issue relates to the appearance of usage throughout the relevant period of twenty years. I remind myself that there is land at the Western end that has been used together with the land at the East, and which does not appear to me to fall within the extent of the footpath dedicated to public use; also that in assessing the appearance of usage to a landowner, one must bear in mind that there was a substantial period of time before the dedication of the footpath where no footpath was in existence. To that extent the position is not as neat as Lightman J.'s categorisation might make it. To that part of the land over which no footpath runs, the principle set out at paras. [102-3] applies. Before considering those principles I need to make two preparatory comments. First, at the Inquiry I asked if I could be supplied with information of the width of the public highway over the application land. The footpath was created by the Bath and North East Somerset Council (City of Bath Definitive Map and Statement Modification Order)(No.5 – Newbridge) 2006 Order on 15th.

November 2006. That document specifies the width of the way as it traverses the application land as 1.8 metres. The application land is substantially wider than that throughout (I would estimate 10m at its narrowest). The way is not fenced of marked where it runs through the application land. Secondly, although different tests apply to different parts of the application land, in truth the appearance of usage to the landowner would relate to usage of the land as a whole.

Findings as to Usage - Footpath or Recreation

34. I have no doubt that some of the usage of land that has been described would be 'to and fro' walking, either actually for the purpose of access, or giving the impression that it was the sort of usage that one might typically see on a footpath. However I am satisfied that the majority of the usage, by a fair margin, would be recreational in nature. The evidence of dogs being let off of the leash; playing with children (which in my view is a significant part of the usage of this land); the use of ball games on the land; playing on the wider area at the western end of the land, and playing in dens in the undergrowth, indicates that a landowner would have been well aware that the recreational usage of the land went outside and differed from what one might typically expect to see on a mere

footpath. I would add first that from my site view it seemed to me that the public footpath leading from Newbridge Road to the Western end of the application land was not easy to traverse adjacent to Newbridge Road, and singularly unattractive. As a matter of fact it is unlikely that the footpath would be used as a through route save in the relatively limited circumstances of someone needing to pass from the housing to the South to that part of Newbridge Road or vice versa. It is (in my view) more likely that the network of footpaths would be used to get to the application land. Secondly I note that the housing to the South of the land does not appear to be well served in terms of garden space. There is the River to the South, but in the vicinity it has been built up to; and there is Rudmore Park to the North. But especially where children are concerned it is likely that they will head to the closest available open space, and for that housing this would be the application land. Thirdly, the construction of facilities for play in about 1996, at the time of the construction of Kaynton Mead, was some recognition that this land was at the least suitable for play by children, and recreation by local residents. I found Cllr. Brinkhurst's evidence on this point helpful.

35. Applying the test set out by Lightman J at paragraphs [102-3] of his judgment set out above to the land at the Eastern half of the land

subject to the application, I am satisfied that a reasonable landowner would have concluded that this land was being used for sports and pastimes. Applying the test set out at paragraph [104] to the Western half, the usage of this part of the land, and in particular the wide area at the Western end, would clearly be referable to an apparent belief in the existence of TVG rights, and not to the mere usage of a footpath over part of the land. I have carefully considered Mr. Chapman's submission based on DPP v. Jones. That argument was considered by Lightman J. in Oxfordshire at [101], and his Lordship considered that the wide view relied on by Mr. Chapman was that of Lord Irvine LC alone. Given that Lightman J gave a considered view as to the effect of the existence of a right of way, and the view expressed by Lord Irvine in DPP v. Jones, it is my advice to the Authority that it should be guided by the advice given by Lightman J. I would repeat that on the evidence I have considered the usage made of the land as a whole went substantially beyond that referable to mere usage of land as a footpath, and would clearly have indicated to the landowner that the land was being used for general recreational purposes.

Usage by a significant number of the inhabitants of the neighbourhood of Lower Weston

36. The next issue is whether the Applicant has succeeded in proving that the neighbourhood that has been asserted exists. The objector does not contend that Lower Weston is not a neighbourhood. Its point is that it is a larger neighbourhood than that which the Applicant contends for. The point is that the larger the neighbourhood (in terms of the number of inhabitants), the smaller a proportion of it will the proven users be. But the first point that Mr. Chapman makes is that if the neighbourhood is as a matter of fact larger that the area alleged by the Applicant in the Amended Application, then the application must fail.

37. A neighbourhood has to be a cohesive area, which people would or could identify, although it need not be definable with absolute precision – see the comments of HHJ Behrens in Leeds Group plc v. Leeds City Council [2010] EWHC 810 (approved in the Court of Appeal at [2010] EWCA Civ. 1438), and the comment of Lord Hoffman in Oxfordshire County Council v. Oxford City Council [2006] 2 AC 674 at [27] that the phrase:

> '"Any neighbourhood within a locality" is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries'

The argument put forward by Mr. Chapman is that the finding of a TVG results in all of the inhabitants having a right to exercise the rights of lawful sports and pastimes. Therefore it is necessary to find exactly where the boundary of the neighbourhood lies. If the neighbourhood put forward by the applicant is not accurate, then the application must fail.

38. In my view the correct question here is whether the area designated by the applicant can be fairly said to be a neighbourhood. It does not matter that others may come to a different view as to where the boundaries of that neighbourhood may be, so long as the attribution put forward by the Applicant is a reasonable one. Otherwise one may have the position, as is argued here, that on an objective view of the evidence the 'true' neighbourhood is of a slightly different size and shape than that set out on the application map. Unless the applicant was 'spot on' with his application, or his amendment (if allowed) as the hearing progressed, the application would be defeated. That seems to me to be an inefficient and unfair way of formulating the issues, which harks back to the rigid formalism that applied when the only available area was the locality, and which the definition of 'neighbourhood' was intended to avoid.

39. Lower Weston, as is plain from the evidence of Mr. Scott and the map evidence submitted to the Inquiry, does exist as a recognised area in West Bath. However, there is little agreement as to precisely what it comprises. In part, it seems to me that problems have arisen because the Applicant has both described his neighbourhood (as 'Lower Weston') and defined it by reference to a plan. The Objector has argued that the area of 'Lower Weston' is different from that described by the Applicant. If so, that may render the issue of proof more difficult, but it does not mean the application fails. It would instead mean that, to most people, 'Lower Weston' was not the area identified by the Applicant as a neighbourhood. It would not necessarily mean that the area defined by the Applicant was not a neighbourhood, although it may make it more unlikely to be true as a matter of fact.

40. The description 'Lower Weston' appears on the plan provided by the Objector to plot the dwellings of those giving evidence in support of the application[2]. It is referred to as part of the postal address in a number of application forms. After the Inquiry closed I received (with the consent of the Objector) a letter from Mr. Peter Burns which contained a map showing the parish boundaries from the history of St. John's Church, Lower Weston. The Southern boundary follows the

[2] Although it is placed to the East of Chelsea Road.

River Avon, as far West as Cleeve Hill and as far East as Royal Victoria Park. The Northern boundary runs along Kelston Road, and then to the South of the Royal United Hospital. The parish is therefore significantly larger than the claimed neighbourhood; in particular it includes the land to the North of Newbridge [Road] Hill about Locksbrook Cemetery; and land to the West of New Bridge, although that land is not urban.

41. Whether the area claimed as a neighbourhood qualifies as such depends upon whether it is sufficiently cohesive. It is also important that it is perceived as a neighbourhood by those who live within it. The land to the South of the claimed neighbourhood is to a large extent industrial; the Brassmill Trading estate and the Locksbrook Trading estate comprise light industrial units. To the North are streets of what might be termed artisans' dwellings, with larger housing to the North of the former railway line. There are shops along Newbridge Road, although they tend to be on the Northern side. There are also what appears to be a few former general stores in the neighbourhood. One is closed; another has become a dog-grooming centre. There are public houses on Newbridge Road, and on the Avon. Although the housing stock is generally Victorian, there are more recent enclaves, notably the development at Kaynton Mead.

42. The boundaries of a claimed neighbourhood need not be distinct. On the evidence I have heard, I conclude that Lower Weston is a cohesive area that is broadly recognised locally; is bounded by the River Avon to the South; and extends as far West as the New Bridge. I doubt that it is clearly bounded by Newbridge Road; although Newbridge Road is a busy road and a clear boundary, I think it likely that some residents to the North side of that road would regard themselves as living in Lower Weston. Equally I think it likely that it extends a little further to the East than that. The fact that the parish of Lower Weston may be an historic locality does not necessarily mean that the perceived neighbourhood is of the same bounds. However, making allowances for the undoubtedly fuzzy and indistinct boundaries of Lower Weston as it is popularly perceived, I am of the view that the area set out in the application is a neighbourhood within the meaning of the Commons Act 2006.

43. The next issue is whether the usage of the land is by a significant number of the inhabitants of the neighbourhood. According to Sullivan J. in R. v. Staffordshire County Council ex p. Alfred McAlpine Homes Ltd. [2002] EWHC 76 considering what usage by 'a significant number' of inhabitants meant:

"…what matters is that the number of people using the land in question has to be significant to indicate that their use of the land signifies that it is in general use by the local community for informal recreation".

It is a question of impression from the evidence available to the Inquiry as to whether this test is satisfied; it is not necessary that the number of users from the neighbourhood be considerable or substantial. In coming to my conclusion I am not limited to the evidence of the users themselves; I can draw inferences from the character and location of the land as to likely use. Nor am I limited to their evidence of their own use. Indeed it is noteworthy that many of those who gave evidence themselves stated that the land was used by others.

44. I have no doubt from the evidence that I have heard and read that that the land has been subject to substantial and regular recreational usage by local residents. In the main this usage has comprised recreational walking and dog walking by adults, and ball and other games by children. Although there is other open land available for recreation nearby at Rudmore Park itself, that land is quite open. The application land is more interesting land, and I can

fully understand why for some recreational activities it should be preferred to the open land at Rudmore Park.

45. I have born in mind the statistical analysis carried out by the Objector which analyses the witness evidence (both oral and written) against the extent and population of the claimed neighbourhood. I note that the analysis does not take account of the extent of family usage referred to in the witness evidence (where witnesses refer to the usage by spouses or children) nor third party usage. I note the lack of land available nearby for recreation save for Rudmore Park; and the two parcels of land that are also subject to applications for TVG registration at Newbridge and Kaynton Mead. This land has been available for recreation use at least since it was acquired by BANES, and probably for significantly longer than that. I do not consider that the Objector's analysis, although intended to be helpful, is properly representative of the use that I find to have taken place on the land. This usage was plainly more than intermittent acts of trespass by local residents; it was regular usage for recreation by a relatively large number of residents. It is not surprising that the users are more strongly clustered around the land; that is what one would expect. Access from the claimed neighbourhood is reasonably straightforward. I am

of the view that the usage by local residents has been by a significant number of the inhabitants of the claimed neighbourhood.

User 'as of right'

46. Mr. Chapman argues that user is only 'as of right' if there was at the time no legal right to do the lawful sport or pastime relied upon. He says that 'as of right' should be thought of as meaning 'as if of right'. He then argues that as BANES held the land at all material times since 1987 pursuant to the provisions of the Open Spaces Act 1906, section 10, it was obliged to allow the local inhabitants to carry out their informal sports and pastimes on it; to put it another way, they had a right to do so. In those circumstances says Mr. Chapman their usage was not 'as of right'. He relies on comments made by various members of the House of Lords in R v. Sunderland City Council ex p. Beresford to establish these propositions, although he accepts that these comments were not strictly necessary for the decision in the case.

47. Mr. Maile contends that it does not matter what power the land was acquired under; what matters is the power for which the local authority use the land. In the present case the only use that the local authority have made of the land has been for footpath or highway

use. Such use does not permit usage as sports and pastimes; therefore local inhabitants' use for such purposes is 'as of right'.

48. Usage is traditionally regarded as 'as of right' if it is without force, secrecy or stealth. It has been judicially commented that it is really use that is 'as if of right' – with the appearance of being entitled to carry out the usage. Relatively recently, and particularly in the context of TVGs, Courts and Registration Authorities have considered that there is a further requirement to add to that definition, that the usage must not be 'by right'. To put it another way, the whole doctrine of usage 'as of right' exists to create a legal right or status where none existed before. It explains why people did what they would otherwise have no right to do. So, in the case of a right of way that is claimed to exist by long usage, if it is the case that the owner already had been granted a formal right of way, even one which will expire at some short time in the future, there will be no need for him to rely on his alleged right by long usage. In the same way, if the public in this case had a right to use the land for recreation, then their usage would be by reference to that right, and not 'as [if] of right'. The proposition underlay the comments of Lords Bingham, Scott and Walker in Beresford.

49. In my view all local authorities can only use land in the long term for the purpose for which they hold it. They can use land for a temporary purpose if their intended long-term use is not one that can presently be realised; but unless that is the case, they must use it if at all for the purpose for which they hold the land – see the comments of Sir Thomas Bingham in R v. Somerset County Council ex p. Fewings [1995] 1 WLR 1037 at 1042 and decision of the Court of Appeal in Attorney-General v. Poole Corporation [1938] 1 Ch 23. I do not think that it is inconsistent with a decision to hold land for the purposes of public open space that a local authority should decide to dedicate a public highway through the land. Such a usage in ancillary to the use of the land as public open space, as it assists in the passage of the public to and through the land. I would also add that from the evidence before me there is no case that BANES either decided to, or did, hold the land temporarily for any other purpose pending its eventual use as public open space. I am of the view that it has been held as, and used by BANES as, public open space since 1987.

50. The next question is, if land is held for the purpose of section 10 Open Spaces Act 1906, what rights to use the land are conferred on the public? I agree with Mr. Chapman's submissions that where a local authority so holds land, the consequence is that it holds it on trust to

permit the local residents to use that land for recreational purposes. Although the comments of law lords in Beresford on this point amount to *obiter dicta*, they are the considered views of a number of senior law lords. They are consistent with earlier authority (see Poole Corporation *supra* and Hall v. Beckenham Corpn. [1949] 1 KB 716) and the view of Parliament (see section 122 Local Government Act 1972 as amended, which refers to the discharge of trust arising under section 10 of the Open Spaces Act 1906 and section 164 Public Health Act 1875 on appropriation of land to another use) and in my view are correct as a matter of principle.

51. I therefore conclude that the land has, at all material times, been held by BANES as public open space, and that usage of the land by local residents has not been 'as of right' for the purposes of the Commons Act 2006.

Conclusion

52. I therefore advise the Authority that they should dismiss the application, because the recreational use of the land by local inhabitants has not been 'as of right', the land being held by BANES at all material times pursuant to the provisions of the Open Spaces Act 1906, section 10.

53. As a postscript I should note that Mr. Chapman had a further argument in his locker. Although the Applicants apply under the Commons Act 2006, that Act superceded in different terms the provisions of the Commons Registration Act 1965, which had itself been amended by the Countryside and Rights of Way Act 2000. That amending Act allowed applicants to rely on usage by the inhabitants of a neighbourhood to establish a TVG, whereas they had previously been limited to relying on the usage of inhabitants of a locality. The argument is that the present Commons Act does not allow an applicant to rely on usage by inhabitants of a neighbourhood where the usage, as here, predates the coming into force of the 2006 Act. I did not think Mr. Chapman thought much of this argument, and he put it forward because in the recent Leeds case the Court of Appeal indicated that they would deal with it in a subsequent hearing. Had the applicants' case otherwise succeeded, I would have made further enquiries as to whether and when the Court of Appeal might have heard the argument, and I would have considered advising the Authority to defer its decision until judgement was given. But in the circumstances it is pointless to delay matters further.

54. Lastly, can I extend my thanks to Mr. Simon Elias and Mr. Graeme Stark who facilitated the hearing and took care of all of the parties at it. I am very grateful also to Mr. Chapman and Mr. Maile for their helpful, thoughtful and measured submissions throughout.

21st. September 2011

Leslie Blohm Q.C.

St. John's Chambers,
101 Victoria Street,
Bristol,
BS1 6PU