Neutral Citation Number: [2014] EWHC 2560 (Admin)

Case No: CO/6606/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

28/07/2014

B e f o r e :

JOHN HOWELL QC
Sitting as a Deputy High Court Judge

Between:

Richard Naylor	**Claimant**
- and -	
Essex County Council	**Defendant**
- and -	
(1) Silverbrook Estates Ltd **(2) Diana Humphreys** **(3) Tendring District Council**	**Interested Parties**

Dr Ashley Bowes (instructed by KSN Solicitors) for the Claimant
Alan Evans (instructed by Essex Legal Services) for the Defendant
Hearing dates: 3 July 2014

JOHN HOWELL QC :

1. This claim for judicial review impugns the decision of the Development and Regulation Committee of Essex County Council, taken on February 22nd 2013, not to register an area of land in Walton on the Naze as a Town or Village Green pursuant to section 15(2)(a) of the Commons Act 2006 (the 2006 Act). The County Council is the relevant registration authority for its area for that purpose under the 2006 Act.

2. The Claimant, Mr Richard Naylor, lives near the relevant land and he has used it for recreational purposes. He was given permission to bring this claim by His Honour Judge Anthony Thornton QC, sitting as a Deputy High Court Judge, in a reserved judgement handed down in this Court on March 7th 2014: see *R (Naylor) v Essex County Council and others* [2014] EWHC 90 (Admin).

3. The Claimant seeks to impugn the decision not to register the relevant land on the basis (i) that the Committee erred in concluding, on the basis of the information it had, that the public's use of it for lawful sports and pastimes had been "by right" during the 20 year period before the application for its registration was made, rather than being "as of right" throughout that period (as section 15(2)(a) of the 2006 Act requires); (ii) that, in any event, it failed in the duty, which it had in the circumstances, to investigate before taking the decision impugned the basis upon which Tendring District Council, the Third Interested Party, ("the District Council") had been maintaining and managing the relevant land during that period; and (iii) that it further erred in concluding that the relevant land had not been continuously used without interruption for lawful sports and pastimes in that period.

4. Since this is a claim for judicial review of a decision vested by Parliament in the registration authority, subject to issues of law or of rationality, the factual issues were for the registration authority to resolve: see eg *R (Barkas) v North Yorkshire County Council and another* [2014] UKSC 31, [2014] 2 WLR 1360, (Barkas) per Lord Carnwath JSC at [70].

Background

5. The application to register the relevant land as a Town or Village Green was made to the County Council by Ms Diana Humphreys, the Second Interested Party, on April 11th 2011. The owner of the relevant land, Silverbrook Estates Limited, the First Interested Party, objected to its registration.

6. The County Council accordingly arranged for Mr Alun Alesbury, MA, Barrister at Law, ("the Inspector") to hold a non-statutory public inquiry into the application. This he did on November 6th, 7th and 8th 2012. The Inspector produced a report, dated January 11th 2013,[1] that summarises and discusses the evidence and submissions to him and that contains his findings. He recommended that the application for registration should be rejected.

7. The County Council then gave Ms Humphreys and Silverbrook Estates Limited an opportunity to comment on the Inspector's conclusions. Ms Humphreys took advantage of that opportunity to make further representations. The Inspector commented on them on February 1st 2013.[2]

8. The Inspector's Report, Ms Humphrey's further representations and his comments in response to them them were all attached to a report (which also summarised those documents) which the County Solicitor made to the Development and Regulation Committee. The County Solicitor recommended the Committee to accept the Inspector's analysis and recommendation to reject the application for registration of the relevant land as a town or village green for the reasons that the Inspector had given. The Committee did so in the decision which the Claimant impugns.

9. Section 15 of the 2006 Act provides (so far as relevant) that

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2)...applies.
>
> (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.
>
> ...

(6) In determining the period of 20 years referred to in subsections (2)(a)..., 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.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right".

10. In her application for its registration Ms Humphreys described the relevant land as "the triangle of grass at the town end of Mill Lane, and the adjoining sea wall to the east of Mill Lane from the drainage ditch (south) to the flood gate (north)". The main, southern (triangular-shaped) part of the site is a grassy, relatively flat area open to the carriageway of Mill Lane on its west side, with a small drop to the level of Mill Lane for some of its length. The other part of the site, on the north-east side of the triangular area, and then running for some distance further northwards, is a relatively steep-sided sea defence bank with a pedestrian path running along its top, although the path is not one which is officially recorded or recognised as such. Beyond the bank, outside the relevant land, is Walton Mere. It appears that a sea wall or bank was first constructed on the relevant land in 1954 following flooding in 1953.

11. The Inspector found that, with the exception of one period, during the relevant period of 20 years before the application for its registration was made, the relevant land had been clearly open and generally unfenced and that it had been well maintained and tended by the District Council as some sort of publicly available open space or recreation area.[3] The exception was that, for a considerable period during the summer of 1993, there were substantial civil engineering works, relating to the construction of a new higher sea wall or bank, which had effectively created that part of the land in the form that it now has. These works had affected the whole of that part of the relevant land and at least a substantial part of the larger, flatter triangular area in the southern part of the site.[4]

12. The Inspector found that there was an important distinction between two parts of the relevant land in terms of their use. In his view there was no substantial evidence that the sea wall or bank running along (but within) the entire eastern boundary of the site had ever been used to a material extent for lawful sports and pastimes in a way that would warrant registration.[5] By contrast, he found that, for nearly all of the relevant 20 year period, there had been a sufficiently continuous use of the relatively flat grassy triangle in the south for lawful sports and pastimes by a significant number of the inhabitants of the neighbourhood to support its registration.[6]

13. The Inspector found, however, that the relevant land did not qualify for registration for two reasons.[7]

14. First he found that the use made by local inhabitants had been "by right" during the relevant 20 year period rather than being "as of right" as required by section 15(2)(a) of the 2006 Act.

15. The Inspector found that the relevant land had been owned by Mr Ted Carter for a long time (apparently from 1945) until his death in 2004 and then by his executors and heirs until May 2009 when it was sold by them to Silverbrook Estates Limited.[8] But, except for the period of the works in 1993, the land had been managed and maintained by the District Council, at least

from 1989-90 (when it appears to have been included in a grounds maintenance contract let by the District Council), as if it were an area of public open space or parkland available and open for all to use.[9] The Inspector found that it was probable that there had been a much longer term arrangement for its management and maintenance going back to before 1974 (when, on local government reorganisation under the Local Government Act 1972, the District Council replaced Frinton and Walton Urban District Council).[10]

16. In the Inspector's view it had to be assumed, unless there was clear evidence to the contrary, that, what the District Council had done, it had done lawfully and that it could not have done so lawfully other than in discharge of some statutory function.[11] He had previously stated that it was "highly probable" that the relevant land was maintained (as it was) by the Council "precisely for the purpose of encouraging members of the public, including local people as well as visitors to the town, to use it for things which would fall into the category of 'lawful sports and pastimes'".[12] In his view it seemed clear that this was not the result of some mistaken belief on the District Council's part that it owned the relevant land.[13] He found that the most probable explanation was that the District Council had managed and controlled the land under sections 9 and 10 of the Open Spaces Act 1906 ("the 1906 Act") or section 164 of the Public Health Act 1875 ("the 1875 Act") and that, when a local authority does so, the public have a right to use such land as they had done in this case.[14] They were thus using the relevant land "by right" rather than "as of right".

17. These sections of the 1906 Act provide as follows:

> "9. A local authority may, subject to the provisions of this Act,–
>
> (a) acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or burial ground, whether situate within the district of the local authority or not; and
>
> (b) undertake the entire or partial care, management, and control of any such open space or burial ground, whether any interest in the soil is transferred to the local authority or not; and
>
> (c) for the purposes aforesaid, make any agreement with any person authorised by this Act or otherwise to convey or to agree with reference to any open space or burial ground, or with any other persons interested therein.
>
> 10. A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired –
>
> (a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose: and
>
> (b) maintain and keep the open space or burial ground in a good and decent state
>
> and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them."

18. Section 164 of the 1875 Act provides that:

"Any local authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.

Any local authority may make byelaws for the regulation of any such public walk or pleasure ground, and may by such byelaws provide for the removal from such public walk or pleasure ground of any person infringing any such byelaw by any officer of the [local authority] or constable."

19. Secondly, the Inspector found that the use of the relevant land for lawful sports and pastimes had not continued throughout the period of 20 years before the date of the application. He found that there had been a period of interruption of over some 3 months in the summer of 1993 when the major works took place for the replacement and heightening of the sea wall or bank. Although some part of the grassy area may not have been affected, it was unclear in his view how much might not have been.[15] The Inspector found that, when the works were not being actively carried out, members of the public interested in that sort of thing could probably have wandered onto the site of the works to look at them. But he did not accept that, during the period of these works, the site was available for local people to use for lawful sports and pastimes and he found that this was a substantial interruption that could not reasonably be regarded as *de minimis* or so temporary as to be of no significance.[16] Accordingly the Inspector found that the evidence did not show that there had been a continuous uninterrupted use of the application site for lawful sports and pastimes for the period of 20 years as required by section 15(2)(a) of the 2006 Act.[17]

Whether the use of the relevant land was made "as of right"

20. On behalf of the Claimant, Dr Ashley Bowes contended that the Inspector had misdirected himself in law when considering whether the use by the public of the relevant land was "by right" and that the Committee, which adopted his reasoning, likewise did so. Dr Bowes supported this contention broadly on two main grounds. The first was that the Inspector had misdirected himself in law when use is "by right". The second was that the Inspector had misdirected himself in various respects in concluding that the District Council had been acting under the 1906 Act or the 1875 Act.

(a) when a use made of land is "as of right"

21. Registration of a town of village green under section 15(2)(a) of the 2006 Act depends on the acquiescence or toleration by the landowner of a significant number of inhabitants of any locality or neighbourhood within in it indulging in lawful sports and pastimes on his land over a 20 year period without having any right to do so but as if they had. The legal meaning of the expression "as of right" in that provision is thus effectively the antithesis of "by right". For example, in an ordinary case, if a person uses privately owned land as if he has a right to do so but his use is not permitted by its owner, his use is "as of right". But, if his use has been permitted by the landowner, his use is rightful: it is "by right": see eg *Barkas supra* per Lord Neuberger of Abbotsbury PSC at [14].

22. It is sometimes said that use "as of right" means "*nec vi, nec clam, nec precario*" (not by force, nor stealth nor permission). Dr Bowes and Mr Alan Evans, who appeared on behalf of the County Council, were not agreed whether a use "by right" was the same as one "*precario*" and whether the Inspector was drawing any distinction between them. Plainly a use "*precario*" is a use "by right": see eg *Barkas supra* per Lord Neuberger at [29]. But a use "by right" need not necessarily be one "*precario*", however, **if** that is taken to refer only to a permission granted by the landowner which is communicated to the person having it and not one arising in any other way, for example by virtue of an enactment, as Richards LJ assumed in *R (Newhaven Port &*

Properties Ltd) v East Sussex County Council [2013] EWCA Civ 276, [2014] QB 186 at [7], [14], [79] and [82]; cf also *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11, [2010] 2 AC 70, ("*Lewis*") per Lord Rodger at [87]. There appears no good reason, however, to say that a person's use of the land is not by permission when that permission is derived from an enactment, such as section 2 of the Countryside and Rights of Way Act 2000 which gives anyone a right to enter and remain on "any access land" (such as mountain, moor or heath) for the purpose of open-air recreation. As Lord Neuberger said in *Barkas* at [27], "as against the owner (or more accurately, the person entitled to possession), third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are **permitted** to be there, and if they have no right to be there, then they are trespassers" (emphasis added). Less easy to reconcile with the formula, "*nec vi, nec clam, nec precario*", however, are cases in which there may be a constraint on the landowner's capacity to do something to stop the use of that owner's land by others when it occurs. Nonetheless, in *Barkas supra* at [51], Lord Carnwath treated the public's use of the land as being one ""by licence" (or "precario")" given the public law constraints on the local authority's ability to cease using the land for public recreation. In my judgement, however, for the reasons I shall give below, there is no need to resolve such terminological questions for the purpose of determining this case.

23. In all cases, however, what is crucial if continuous uninterrupted use over the relevant 20 year period is not to give rise to a town or village green is that there is a reason why it would not have been reasonable to expect the owner to resist the exercise by the members of the public of any right to use the land for the purpose of lawful sports and pastimes which they were apparently asserting, since the prescription of such public rights depends on acquiescence by a person in a position to resist them: see *R v Oxfordshire County Council ex p Sunningwell CC* [2000] 1 AC 335 per Lord Hoffmann at pp 350h-351c, 353h-354b.

24. In this case the Inspector had available to him the decision of the Court of Appeal, but not that of the Supreme Court, in *Barkas*. He considered that it was clear from that decision "that where a local authority provides land for public [recreational] use under either of the 1906 or 1875 Acts..., use of that land by the (local) public will be 'by right' not 'as of right'...the same principle must apply to land belonging to someone else, which is managed or controlled by a Council" under those Acts.[18]

25. Dr Bowes submitted that the Inspector had been wrong in law to "extend" this "by right" principle to land in which a local authority does not hold a legal estate. He submitted that, when a local authority makes its own land available for the purpose of public recreation, it is not free, unlike a private landowner, to cease making it available for, or to prevent members of the public using it for, that purpose lawfully on a whim, as Sullivan LJ pointed out in *Barkas* in the Court of Appeal: see [2012] EWCA Civ 1373, [2013] 1 WLR 1521, at [43]. As Lord Neuberger put it in *Barkas* at [24]:

"where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land.... It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."

26. Dr Bowes submitted that, when a local authority does not itself hold an estate in land, it has no power to grant local inhabitants a right to use the land or an ability to exclude them from it. In

this case the District Council may itself have had, at most, a licence from the landowner. It was thus the landowner who retained the exclusive ability to permit, or to prevent, others using the relevant land. No claim in public law could have been sustained against the District Council had the landowner prevented members of the public from using it. Thus, in the absence of a deed of trust in writing from the landowner declaring the relevant land to be held in trust for public recreation, there was no basis for the Inspector to conclude that its use by local inhabitants was "by right". Dr Bowes submitted, therefore, that the Inspector had failed to ask himself the relevant question, namely whether the landowner's discretion to put a stop to the use of the relevant land for lawful sports and pastimes was constrained like that of a local authority which owns public open space.

27. In my judgement Dr Bowes' submissions fail to engage with the nature of the arrangement that the landowner must be taken to have had with the District Council in this case. As the Inspector correctly pointed out, it must be assumed, unless there is evidence to the contrary, that the District Council did what it did properly and lawfully in pursuance of some statutory power enabling it to do so: see eg on 'the presumption of regularity' *Calder Gravel Ltd v Kirklees MBC* (1989) 60 P&CR 322 per Sir Nicholas Browne-Wilkinson VC at pp338-339. That will have involved the District Council having an arrangement with the landowner that the authority should maintain and manage the relevant land (as it did) for the public to enjoy as an open space, something the Inspector thought that the District Council had the power to do under the 1906 and 1875 Acts. That arrangement may have been one terminable on notice, or on reasonable notice, or at some other time, by the landowner or by the District Council. But, for present purposes that it is irrelevant. While such an arrangement subsisted, the landowner had plainly permitted, or had at least authorised the District Council to permit, the public to use the relevant land for recreational purposes.

28. Dr Bowes submitted, however, that, when it is said that the landowner has permitted the use of his land by local inhabitants, such permission needs to be communicated to them. He referred in support of that proposition to *R (Newhaven Port & Properties Ltd) v East Sussex County Council supra*. In his judgement in that case Richards LJ distinguished a case when a use may be "by right" by virtue (for example) of an express enactment, when the right need not be communicated during the relevant twenty year period to local inhabitants who have it, from a "use precario", that is by permission of the landowner. In the latter type of case Richards LJ (with whom MacFarlane LJ agreed) considered that there must be some overt act communicating permission in that period: see [69]-[87]. Accordingly, he and MacFarlane LJ found that an implied permission contained in byelaws governing the relevant land in that case (which had been made by the landowner) had not made the public's use of it "by right", as the byelaws had not been communicated to the local inhabitants using it during the 20 year period before the date of the application for registration (although the byelaws had been properly publicised when promulgated). Lewison LJ (dissenting) regarded the public's use of the land as one "by right" precisely because it was permitted (by implication) in a valid local law.

29. There is no doubt that permission to use land may be communicated by conduct. As Lord Bingham stated in *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889, at [5], "a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission." In that case the registration authority considered that the use had been "by right", by virtue of an implied licence, as the Development Corporation, the Commission for New Towns and then the City Council had maintained the land in question by keeping the grass cut and maintaining perimeter seating and it would have been perceived as a recreational area provided for the use by the public for recreation. This reasoning was regarded by the Supreme Court in *Barkas supra* as "unimpeachable in common sense and in law" (when finding that the decision in that case by the Appellate Committee was wrong): see per Lord Carnwath, with whom the other members of the Supreme Court agreed, at [73]-[74]; cf also at [85].

30. In this case the District Council did at least as much by way of management and maintenance as the public authorities did in *Beresford*. Not only (as the Inspector found) did it mow the grass regularly, it also regularly picked up litter from the relevant land and it erected and replaced a "dog poo bin" attached to a post it had erected there.[19] The Inspector found that the relevant land had been maintained by the District Council "as something which looked like, and was de facto available as, a piece of public open space or park land, or indeed a town or village green" and that "it was unsurprising….that several witnesses for the Applicant said that (until recent times) they had believed that the land was in fact owned by the District Council, as some kind of common or public amenity land".[20]

31. In this case, therefore, it would appear to follow from the Inspector's findings of fact that permission to use the relevant land, whether granted by the landowner or by the District Council pursuant to the arrangement which it is to be taken it had with the landowner, was communicated in the relevant period to the public using the land by such conduct.

32. Does the fact that in *Beresford* the land was always owned by a public authority, whereas in this case the relevant land was managed and maintained by the District Council pursuant to an arrangement with the landowner, make any difference? As I have indicated, Dr Bowes submitted that it does.

33. In analysing the decision in *Beresford* in *Barkas* Lord Carnwath stated that the judge at first instance in that case had, correctly, attached importance to the fact of public ownership as plainly being a relevant consideration: see at [74]. Similarly Lord Neuberger thought that, in *Barkas* itself, the public had "a public right, or a publicly based licence" (which the local authority could have withdrawn), which would be enforceable in public (rather than by private) law proceedings, to use the land in that case for recreational purposes (which the authority held for housing purposes) so long as it was allocated or devoted to use as a recreation ground by the authority. The local authority could not lawfully object to that use consistently with its allocation decision: see at [20]-[24]. Nor, as Sullivan LJ had pointed out in the Court of Appeal in that case, as Dr Bowes emphasised, could the authority have altered its use or withdrawn any such licence "on a whim", unlike a private landowner. It was constrained in what it could lawfully do.

34. Neither of those two cases, however, dealt with a situation (as in this case) in which a public authority was maintaining and managing land vested in a private landowner for public recreational use under an arrangement with that landowner.

35. Parliament has explicitly provided, for example, in the 1906 Act, that a local authority may manage and maintain land vested in others as a public open space by agreement (including land vested in, or held for the benefit of, private landowners). Under section 2(1)(c) of that Act, those in whom the care and management of an open space has been vested by enactment with a view to its preservation and regulation as a garden or open space may (with the consent of the owner or occupiers of any houses fronting it or liable to be rated for its maintenance) "make any agreement with any local authority for the opening to the public of the open space and the care thereof by the local authority, either at all times or at any specified time or times". Similarly, under section 5(1)(c) of the 1906 Act, when any open space is subject to rights of user for exercise and recreation in owners or occupiers, or both, of any houses round or near it, its owner (with their consent) may "make an agreement with any local authority for the opening to the public of the open space and the care and management thereof by the local authority either at all times or at any specified times". Likewise, under section 6 of that Act, the owner of any disused burial ground may "make any agreement with any local authority for the purpose of giving the public access to the burial ground, and preserving the same as an open space accessible to the public and under the control of the local authority, and for the purpose of improving and laying out the same". Section 9(1)(c) of the 1906 Act (quoted in paragraph [17] above) authorises the local authority to make any agreement with persons authorised to do so

under those provisions, and indeed also with any persons who may otherwise be able to make such agreements with respect to any open space or burial ground, under which the local authority may undertake the entire or partial care, management and control of such open space or burial ground, whether or not any interest in the soil is transferred to the local authority.

36. When a local authority has acquired any control over an open space or burial ground under the 1906 Act, even if they have not acquired any estate or interest in it, then, subject to any conditions under which such control was acquired, in accordance with section 10 of that Act (quoted in paragraph [17] above), it must hold and administer the land in trust "to allow, and with a view to, the enjoyment thereof by the public as an open space...and for no other purpose". But in my judgement, when a local authority has acquired a right to manage or control land for the purpose of allowing the public to use it for recreational purposes (whether under the 1906 Act or some other enactment), it could not lawfully object to the public so using it (other than in the proper management of the land for that purpose) whilst its rights subsist. It matters not whether section 10 of the 1906 Act or anything similar is applicable. Such rights as it has acquired are only held for the purpose of, and are limited to, allowing the public to use such land for recreational purposes and it has no power or rights to exercise for any other purpose.

37. In this respect such a case is stronger than was the case in *Barkas*. There the land was originally acquired as a site for the erection of houses and it was accordingly held under Part II of the Housing Act 1985 for the provision of housing accommodation. Such land could be used in addition for a number of ancillary purposes (without the need for any appropriation) including the provision and maintenance of "recreation grounds": see at [4] and [5]. Public recreation was not the only purpose, therefore, for to which the land could have been lawfully put. In that case the Supreme Court regarded the "public right or publicly based licence" as continuing so long as the Council continued to devote the land to that purpose.

38. In that case, there was also no statutory trust such as section 10 of the 1906 Act imposes. As Lord Neuberger said in *Barkas* (at [45]), "once land is statutorily held by a council for the purpose of public recreation, it is hard to see why members of the public only have the right to use the land for that purpose if there is a super-added trust to that effect." Indeed there is no such explicit statutorily super-added trust where land is held for the purpose of section 164 of the 1875 Act in respect of which the public have been recognised to have similar rights of access for recreational purposes: see eg per Sullivan LJ in the Court of Appeal in *Barkas supra* at [27]-[34]. It is equally hard to see, particularly given the development of public law since 1906, why members of the public should only have a right to use land maintained and managed by a local authority for recreational purposes under an arrangement with the landowner for that purpose if there is a super-added statutory trust.

39. In my judgement, therefore, it makes no difference to the right which the public has to use the land that it is made available for public recreational use by a local authority by virtue of an arrangement it has with the landowner which does not give the authority itself any estate or legal interest in that land. While such an arrangement subsists, the landowner has permitted (or has at least authorised the local authority to permit) the public to use the relevant land for recreational purposes. The local authority is empowered to permit such use by virtue of the enactment under which it acquires its rights for that purpose (as being consequential thereto). Permission to use the land for recreational purposes is communicated to the public (if that is required) by the local authority making the land available for use for such recreational purposes. While such an arrangement subsists and the land is made available for use by the public for recreational purposes by the local authority pursuant to it, neither the landowner nor the authority could assert that a member of the public using it for such purposes was a trespasser. Members of the public would not be using it "as of right"; they would be using it "by right" for a purpose for which they had been lawfully invited to use it. Use by members of the public would be "*precario*" in the narrower sense of permission from the landowner (or

from a person the landowner had authorised to give it) and "by right" to the extent that that term may be wider.

40. In terms of acquiescence, given an arrangement between a landowner and a local authority that the authority will maintain and manage land for public recreation, it would not have been reasonable to expect the owner to resist the exercise by the members of the public of any right to use the land for the purpose of lawful sports and pastimes when the authority made that land available for such use while that arrangement subsisted. Nor could the authority have done so in that period (other than in the proper management of the land for that purpose) when its rights in respect of that land were held for purpose of making it available for public recreation.

41. In my judgement any other conclusion would be contrary to the public interest in the provision of recreational facilities for the benefit of the public. The provisions of the 1906 Act, to which I have referred, plainly indicate that Parliament thought that it was in the public interest that public enjoyment of open spaces should be facilitated by agreements under which local authorities maintained and managed them even if the local authority acquired no estate or interest in them. Those persons who may otherwise be prepared to enter into such agreements with local authorities may be deterred from doing so, however, if the public may obtain indefeasible rights precluding any subsequent beneficial or alternative use by such persons (or by any heir such persons may have) after 20 years.

42. I do not accept Dr Bowes' submission, therefore, that the Inspector unlawfully failed to ask himself the question whether the landowner's discretion to put a stop to the use of the relevant land for lawful sports and pastimes was constrained. The relevant question was not whether the landowner could have brought any arrangements with the District Council to an end. The landowner may have been able to do so (on notice or on reasonable notice) without constraint. The relevant question was whether, whenever members of the public used the relevant land for lawful sports and pastimes in the 20 year period before the date of the application for registration, they did so as trespassers. While the arrangement with the District Council subsisted, the landowner could not have contended that any member of the public using the land was a trespasser, any more than any landowner could do in respect of any person to whom he had given a revocable permission to use it for that purpose. Members of the public could use for it for recreational purposes "by right".

(b) under what powers (if any) was the District Council acting

43. Dr Bowes contended that the Inspector erred in finding that the District Council had been acting under the 1906 Act or the 1875 Act. If that authority was acting under any power, he submitted that it would have been section 111 of the Local Government Act 1972 and, after 2000, possibly section 2 of the Local Government Act 2000 as well.

i. the 1906 Act

44. I have set out sections 9 and 10 of the 1906 Act in paragraph [17] above. Dr Bowes submitted that a local authority may only act under section 9(b) of that Act if it has first acquired an interest in an open space under section 9(a), which it had not done in this case. In any event, so he submitted, the Inspector had wrongly conflated mere management of the relevant land with its "control" and that the Inspector would have been irrational to have regarded what the District Council did as manifesting "control" of the relevant land. Without "control", which, so he submitted, requires the authority to hold an estate in land (since, without it, the authority cannot exclude the world from the land), the statutory trust under section 10 was inapplicable.

45. In my judgement a local authority may act under section 9(b) of the 1906 Act even if it has not acquired any interest in an open space under section 9(a) of it. The open spaces and burial grounds in respect of which a local authority may acquire an estate, interest, right or easement

under section 9(a) of the 1906 Act are ones which are situate not only within its district but also beyond. A local authority may undertake the entire or partial care, management and control of any such open space or burial ground under section 9(b) of that Act, whether or not it has acquired any interest in it. The authority is not required to acquire any estate, interest, right or easement in it before it may undertake such things. It may make an agreement for those purposes under section 9(c) with any persons who may themselves be authorised to reach such an agreement with the authority under the earlier provisions of the 1906 Act (to which I have referred in paragraph [35] above) or who are otherwise able to make such agreements with it.[21] Were it otherwise, the 1906 Act would have earlier authorised others (who may have needed such statutory authority) to enter into agreements with a local authority for the management or control of land in order for it to be opened up to the public for its enjoyment of it without conferring the necessary power on the local authority to enter into such agreements with them.

46. The Inspector found that the District Council "managed and controlled" the relevant land under sections 9 and 10 of the 1906 Act.[22] Dr Bowes contends that the Inspector conflated "management" with "control" and that it was irrational for him to regard the District Council as having "control" of the relevant land given that he had only found that they regularly mowed the grass, picked up litter and provided "dog poo" bins. "Control", so he submitted, requires the local authority to have an interest in the land.

47. It does not appear that any argument was addressed to the Inspector that the District Council exercised powers only of "management", not also of "control". Had it been, the Inspector might have considered, for example, whether any significance should have been attached to the evidence (that he had[23]) that, since 1988, a local security firm had been asked by the District Council to check whether the relevant land was being used by travellers and what else a local authority having control of such a small area of land might have been expected to do given its nature.

48. I do not accept that, as Dr Bowes submitted, "control" for the purpose of the 1906 Act requires the authority to have acquired any estate or interest in the land. It is plain from section 10 of the 1906 Act itself that a local authority may have obtained "control" over an open space or burial ground, even if it has not acquired any estate or in it. They are potential alternatives. Moreover the authority is empowered under section 9(b) of that Act to undertake the entire or partial care, management and control over an open space or burial ground "whether any interest in the soil is transferred to the local authority or not".

49. A more difficult question in my judgement, however, is whether or not there is in fact any difference between "management" of land and its "control" under the 1906 Act and, if there is, in what it consists. As I explained in paragraph [35] above, others are empowered by the 1906 Act to make agreements with a local authority for the "care and management" by it of an open space or burial ground (under sections 2(1)(c) and 5(1)(c) of the Act), and for such land to be "under the control of the local authority" (under section 6 of the Act), without transferring any estate or interest to the authority. It may appear, therefore, that a distinction is thus drawn elsewhere in the Act between "care and management" and "control" over land: see also section 15(1) and (2). That may appear to be reinforced by the power which the authority has (by virtue of section 9(b) and (c) of the Act) to undertake the entire or partial care, management and control of an open space or burial ground pursuant to agreements that others are empowered to make with it under those provisions. On the other hand, if there is such a distinction to be drawn on some basis, what would distinguish management from "entire or partial….control" of any land for the purpose of section 9(b) is by no means self-evident. Moreover the obligations imposed on a local authority by section 10 will not apply to land in respect of which an agreement which has been made with the local authority for its care and management (for example under section 5(1)(c) of the 1906 Act).

50. For present purposes, however, it is not necessary to resolve this issue. In my judgement it is sufficient that any agreement which the District Council had was one for the care and management of the relevant land under section 9(b), even if it did not give the District Council "control" of it. In my judgement section 9(b) permits a local authority to make such agreement with (for example) those authorised to make such an agreement with the authority under sections 2(1)(c) and 5(1)(c) of the Act. The reason why such an agreement is sufficient (if any agreement was made under section 9 and the relevant land was made available to the public pursuant to it) is that the applicability of a "super-added" trust (such as that which arises under section 10 if the authority has acquired control) is unnecessary: see paragraph [38] above. In this case the Inspector himself thought, in my judgement correctly, that the principle that the public's use will be "by right" when a local authority provides land for public use under the 1906 Act applied to "land belonging to someone else which is managed **or** controlled by a Council under **section 9** of the 1906 Act"[24] (emphasis added). Dr Bowes did not submit that the Inspector was not entitled to find that the land had been managed as an open space by the District Council for the enjoyment of the public. Accordingly Dr Bowes' submissions that the Inspector conflated "management" with "control" and that he could not rationally have found that the relevant land was under the "control" of the Council, even if well founded, do not undermine the Inspector's basic conclusion that the District Council had managed the land under the 1906 Act and that, while that was so, the public's use had been "by right".

ii. section 164 of the 1875 Act

51. I have set out section 164 of the 1875 Act in paragraph [18] above. The Inspector thought that the powers conferred by this section were arguably relevant as an alternative explanation and justification for the actions of the District Council over a prolonged period in relation to the management and maintenance of the relevant land[25] and, although he thought the "most probable explanation" of its actions was that the District Council managed the land under the 1906 Act, he was "fortified by [its ability] to do much the same thing under section 164 of the Public Health Act 1875".[26] Unsurprisingly Mr Evans submitted that, even if (for some reason) the District Council could not lawfully have done what it did under the 1906 Act, it could have done so under this section.

52. Dr Bowes submitted that the power to maintain land for the purpose of being used for public walks and pleasure grounds only arises under section 164 of the 1875 Act if the authority has purchased or taken the land in question on lease.

53. In my judgement that may well be too narrow a construction of this section. Such a construction would not enable the powers to lay out, plant improve and maintain land for the purpose of being used as public walks and pleasure grounds (which a local authority would otherwise have) to be used in respect of land not so purchased or leased under this section but which were, for example, previously acquired under other powers for a purpose for which it is no longer required. I can see no reason why such powers should be not be available if the authority appropriates such land to be held for the purpose of being used as public walks and pleasure grounds under section 164 of the 1875 Act. Nor is there any ostensible reason why such powers should not be exercised in respect of land that an authority may be able to manage and maintain by virtue of an agreement with its owner which does not give it an estate or interest in the land.

54. Given that I did not receive full argument on this point and that the Inspector was entitled to explain the District Council's actions by virtue of its exercise of the powers it had under the 1906 Act, however, I do not need, nor do I propose, to reach any conclusion on this point.

iii. other powers that the District Council may have had and used

55. It does not appear that the Inspector was invited to find that the District Council's actions may have been explicable on some legal basis other than the powers it had under the 1906 and 1875 Acts.[27] Dr Bowes submitted, however, that, if that authority was acting under any power, it would have been section 111 of the Local Government Act 1972 and, after 2000, possibly section 2 of the Local Government Act 2000 as well.

56. In my judgement this submission lacked any basis. District councils only have such "functions" as are "vested in them" by enactment: see section 2 of the Local Government Act 1972. By virtue of section 111(1) of the 1972 Act,

"Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

As Lord Templeman stated in *Hazell v Hammersmith LBC* [1992] 1 AC 1 at p29, "in section 111 the word "functions" embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it." Thus, as Woolf LJ put it in the Divisional Court in that case ([1990] 2 QB 697 at p723), in a passage subsequently endorsed by the Appellate Committee in *McCarthy & Stone (Developments) Ltd v Richmond upon Thames LBC* [1992] 2 AC 48 at p69,

"the subsection does not of itself, independently of any other provision, authorise the performance of any activity. It only confers, as the sidenote to the section indicates, a subsidiary power. A subsidiary power which authorises an activity where some other statutory provision has vested a specific function or functions in the council and the performance of the activity will assist in some way in the discharge of that function or those functions."

57. Accordingly it is not sufficient to refer to section 111(1) of the 1972 Act alone to identify the *vires* that a local authority may have for any activity. It is also necessary to refer to some other statutory provision or provisions in conjunction with which section 111(1) is said to authorise that activity. Dr Bowes identified none in the relevant 20 year period prior to the application for registration of the relevant land before the enactment of the power that local authorities were given in section 2 of the Local Government Act 2000 to do anything for the economic, social or environmental well-being of their areas. Thus he failed to identify any alternative explanation for the legal basis of the District Council's activities in the relevant period before section 2 of the Local Government Act 2000 came into force.

58. Even if Dr Bowes' submission had had a better basis, however, it is by no means clear that it would have assisted the Claimant's case. *Barkas* indicates that the question whether a use is "by right" is concerned simply with the purpose for which in fact the land is being made lawfully available for the time being by a public authority rather than with the statutory function for which it is held: see paragraphs [33] and [37]-[38] above. In the circumstances, however, I need not consider whether the use made of the relevant land for lawful sports and pastimes would still have been "by right" if the District Council had made the land available for such use with the agreement of the landowner under statutory powers other those in the 1906 and 1875 Acts.

(c) conclusion on whether the use made of the relevant land was "as of right"

59. In my judgement, therefore, the Inspector was entitled to conclude on the basis of the evidence which he had that the use made of the relevant land for lawful sports and pastimes had been "by right" (not "as of right") during part of the 20 year period before the application for its

registration was made given that the relevant land had been made available by the District Council for such use by the public during part of that period (in accordance with the presumption of regularity) with the agreement of the landowner under the powers which that authority had vested in it by section 9 of the Open Spaces Act 1906.

The Registration Authority's alleged investigative duty

60. Dr Bowes contended, however, that the County Council was obliged to appraise itself of the relevant facts before making a decision which in this case included the powers under which the District Council managed and maintained the land. The question for the court was, he submitted, as Lord Diplock had put it in *Secretary of State for Education and Science v Tameside Metropolitan Council* [1977] AC 1014 at p1065b-c, "did [the County Council] ask [itself] the right question and take reasonable steps to acquaint [itself] with the relevant information to enable [it] to answer it correctly?". He submitted that the County Council should have written to the District Council to obtain that information.

61. Mr Evans submitted that the County Council was under no such duty. The regulations governing the determination of the application made under section 24 of the 2006 Act which were applicable in this case, the Commons (Registration of Town and Village Greens) (Interim Arrangements) (England) Regulations 2007, did not require the County Council to make such investigations. When considering the position under earlier, similar regulations, Lord Hoffmann stated, albeit *obiter* but "in case there should be any doubt", and, so Mr Evans submitted, correctly, that "the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties": see *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674, at [61].

62. Regulations made under section 24 of the 2006 Act may make provision as to the evidence to be taken into account in making a determination: see section 24(2)(j). Accordingly they may require a registration authority to obtain, or preclude it from relying on, any evidence that such regulations may specify. In my judgement the fact that there is no requirement in the relevant regulations for a registration authority to obtain information other than from the applicant or to consider any information not provided by the applicant or in any written statement of objection does not necessarily mean that it has no power to do so. For example, under the regulations applicable in this case, an authority can rely to reject an application on matters, however obtained, not contained in written statements from objectors received following notification of it to the public and to those interested in (or occupying) the land to which it relates: see regulations 5 and 6 of the 2007 Regulations. Moreover, as Lord Hoffmann recognised, in the context of such regulations, a number of judicial decisions have sanctioned the practice of holding non-statutory inquiries and in one case, *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975, Sullivan J decided that the holding of one in some circumstances would be necessary as a matter of fairness: see *Oxfordshire County Council v Oxford City Council supra* at [29]. Absent some applicable restriction, a registration authority may do anything which is calculated to facilitate the discharge of its functions as such under section 111(1) of the 1972 Act (quoted in paragraph [56] above). A public inquiry is one means by which, if it decides to do so, a registration authority may obtain evidence other than from the applicant and any objector or by which it may test or supplement that which it has received from them in written form. There is nothing in the relevant regulations which precludes it from doing so, or which precludes it from otherwise obtaining evidence, if it decides to do so, provided always that it acts fairly. Subject to any restriction in relevant regulations, it has a discretion whether or not to do so that it may not exercise, or fail to exercise, unreasonably.

63. In my judgement, however, a registration authority is entitled to assume that normally the evidence it obtains from the applicant and any objectors in accordance with any relevant

regulations will be sufficient to provide it with sufficient information upon which it may reasonably determine the application made to it, particularly if it has held a public inquiry (as the County Council did in this case), given the nature of the issues to which an application for registration is likely to give rise. That even the holding of a public inquiry will not necessarily be sufficient in all cases, however, if the decision maker is to satisfy his obligation to "call his own attention to the matters which he is bound to consider" (to put it as Lord Greene MR did in *Associated Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 at p229) is illustrated by the decision of the Court of Appeal in *Prest v Secretary of State for Wales* (1983) 81 LGR 193. But, in any case, what a claimant who contends that an authority should have made further investigations has to show is that the authority failed to take steps which any reasonable authority would have done in order to obtain the information or evidence without which no reasonable authority could have made the decision it did in the circumstances: see eg *R v Westminster City Council ex p Monahan* [1990] 1 QB 87 CA at pp 92e-f, 117f-118c, 121f, 122g; *R (Katun) v Newham Borough Council* [2004] EWCA Civ 55, [2005] QB 37 per Laws LJ at [35]; *R (Badger Trust) v Secretary of State for the Environment Food and Rural Affairs* [2012] EWHC 1904 (Admin) per Ouseley J at [45] and [67] (permission to appeal on this ground was refused by the Court of Appeal: [2012] EWCA Civ 1286 at [6]-[7]); *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at [99]-[100].

64. In this case the Inspector noted that there had been no want of trying by the parties to obtain relevant information from the District Council; that the information they had each obtained was consistent and not disputed; but that their efforts had met with only limited success.[28] In those circumstances, in my judgement, as Mr Evans submitted, the County Council was under no obligation to replicate what the parties to the Inquiry had already done. The Claimant has not shown that any reasonable authority would have done so. Dr Bowes did not submit, for example, that there was anything which would have indicated to the County Council that, if it had itself made further enquiries, it was likely that it would (or even might) have obtained any further information from the District Council, much less any that would (or even might) have made any material difference to its determination.

65. Dr Bowes also submitted that the County Council should have made further inquiries about the powers under which the National Rivers Authority carried out the engineering works it did in 1993. For the reasons I shall give below, he has likewise failed to show that the County Council acted unlawfully in failing to do so.

66. In my judgement, therefore, this ground of complaint fails. Accordingly this claim for judicial review must be dismissed in any event regardless of the final ground on which it is pursued that concerns the break in the public's use of the land in 1993.

Interruption to the use made of the land

67. The final ground on which Dr Bowes contends that the decision impugned is flawed concerns the Inspector's conclusion that there had been an interruption of the use of the relevant land for lawful sports and pastimes during the 3 months in 1993 during which the engineering works to refashion the sea wall or bank were carried out. Even if my conclusions are wrong in respect of the challenge to the finding that the use made of the relevant land was not "as of right", the decision to refuse its registration would not be affected unless the Claimant can also show that the Inspector's conclusion on the present issue was flawed.

68. Dr Bowes submitted that the Inspector's conclusion was flawed for three reasons: (i) that, to constitute a relevant interruption by a third party, there must be a physical ouster of local inhabitants from the land but that here there was not; (ii) that the use made of land for lawful sports and pastimes need not be continuous throughout the 20 year period and a three month interruption need not defeat a claim to registration; and (iii) that, in any event, that period fell to be disregarded under section 15(6) of the 2006 Act.

(i) the alleged need for a physical ouster of local inhabitants from the land

69. Dr Bowes relied on the statement by Patten LJ in *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2012] EWCA Civ 250, [2012] 2 P & CR 3 ("*Betterment*") at [71], that "for the actions of a third party to be taken into account there must be a physical ouster of local inhabitants from the land and the disruption must be inconsistent with the continued use of the land as a village green." On that basis he submitted that, for the flood defence works carried out by the National Rivers Authority on the relevant land in 1993 to have constituted an interruption, it was necessary for there to have been both (a) a physical ouster of local inhabitants from the relevant land and (b) a disruption inconsistent with continued use of the land for lawful sports and pastimes. He submitted that in this case the Inspector had failed to address the need for the first of these two necessary elements and that it was clear from his findings that there had been no such physical ouster of local inhabitants during the works, for example by a fence such as had occurred in *Betterment*.

70. In my judgement Dr Bowes' submission that there are two necessary elements for there to be any interruption is misconceived. Physical exclusion of local inhabitants from the land and carrying on an incompatible use of it (in each case whether by the landowner or others) are two different ways in which its use for lawful sports and pastimes by local inhabitants may be interrupted: see eg *Gadsden on Commons and Greens* 2nd ed at 14.17-14.19.

71. The relevant question is whether the use of any land for lawful sports and pastimes has continued uninterrupted during the relevant 20 year period. An interruption may occur if the public are physically excluded from the land, however the land may be used when that occurs. But, if there are works carried out that mean that the use of the land for lawful sports and pastimes cannot continue, in my judgement there is no reason why such a use should be treated as continuing, even if members of the public are not physically excluded from the area of the works, for example, by a fence. The mere fact that it is physically possible for a local inhabitant to gain access to the area of the works to inspect them (if they are sufficiently interested) when the works are not actually in progress (as the Inspector found was possible in this case), for example, does not necessarily mean that the land can continue to be used for lawful sports and pastimes. Thus the Inspector did not accept in this case that, during the period of the works, the site was available for local people to use for lawful sports and pastimes. That finding Dr Bowes did not seek to impugn.

72. The question that the Court of Appeal had to address in *Betterment supra* was "whether the physical disruption to public use caused by the fencing off of the site for about four months was sufficient to interrupt user of that land": see per Patten LJ at [70]. It did not have to address a case in which the land could not be used for lawful sports and pastimes because of works being carried on on it but where the land had not been fenced off so as to exclude local inhabitants from it completely. Patten LJ's statement on which Dr Bowes relies must be read in the context of the issue in that case which he was addressing.

(ii) whether the use of the relevant land for lawful sports and pastimes continued notwithstanding the three month period of interruption in 1993

73. Dr Bowes submitted that, even if there had been a break in the use of the relevant land by local inhabitants for lawful sports and pastimes for three months in 1993, that was an insufficient basis for finding that their use of it had not continued without interruption during the relevant 20 year period. He submitted that the public's recreational use need not be without any break at all. For example a beach can be used by the public for recreational purposes even if it is covered by water for very substantial periods. Nor, so Dr Bowes submitted, need the public's use be the sole use made of the land. He pointed, for example, to the discussion in *Lewis supra* of the compatibility of low level agricultural activities and the recreational use of the same land by local inhabitants. In that case Lord Walker of Gestingthorpe JSC thought that taking a single

hay crop from a meadow (which might mean local inhabitants keeping off the field for three months) was compatible with the recreational use of the land in the late summer and from then until the next spring: see at [21]-[28]; cf also per Lord Hope of Craighead DPSC at [74].

74. In my judgement the question whether any break in the use made by local inhabitants of land for lawful sports and pastimes is sufficient to interrupt their continuous use of it for that purpose in the relevant 20 year period is a matter of judgement for the registration authority which, absent any misdirection, can be impugned only on well known *Wednesbury* grounds. Thus no one would reasonably suggest, for example, that the fact that the public may not use land for lawful sports and pastimes during the night would mean that their use of the land had not been continuous for the purpose of this legislation.

75. In my judgement Dr Bowes has not shown that in this case the Inspector misdirected himself in law. He was not required to compare the flood defence work in this case, whose nature and extent necessarily obstructed local inhabitants from using the relevant land for lawful sports and pastimes, with recurrent use of land by a landowner (for example, for low level agricultural activities or golf) which the public may choose to respect while continuing to use the land for such recreational purposes as of right. Moreover Dr Bowes did not submit that the conclusion that the Inspector came to was one no reasonable person could have reached in this case. Such a submission would have been difficult to advance given that the Court of Appeal had found no error in the conclusion that a four month break associated with the execution of works was sufficient to constitute an interruption in the continuity of the public's use of land in *Betterment supra*.

(iii) whether any interruption fell to disregarded given section 15(6) of the 2006 Act

76. As I have mentioned above, Dr Bowes submitted that the County Council should have made further inquiries about the powers under which the National Rivers Authority carried out the flood defence works on the relevant land that it did in 1993. The significance of the powers which the National Rivers Authority relied on is that they may be relevant to the question whether any interruption to the use of the relevant land by the public for lawful sports and pastimes falls to be disregarded by virtue of section 15(6) of the 2006 Act.

77. I have quoted section 15 of the 2006 Act and subsection (6) in particular in paragraph [9] above.

78. In my judgement this complaint is without merit. No party placed reliance on section 15(6) of the 2006 Act until after the determination of the relevant committee which the Claimant now impugns. Accordingly it was not unreasonable for the County Council not to have investigated the powers which the National Rivers Authority were relying upon. Moreover, and in any event, it appears, as Mr Evans submitted, that the flood defence works were in fact carried out by the National Rivers Authority under powers which that Authority then had vested in it by section 165(2) of the Water Resources Act 1991. No other power which that Authority had to do the works has been suggested by the Claimant. Thus the Claimant has not shown that it has suffered any prejudice in advancing the contention (which it now does) that the interruption of the use of this land for lawful sports and pastimes is to be disregarded given section 15(6) of the 2006 Act.

79. The question under section 15(6) of the 2006 Act is whether "access to the land was prohibited to members of the public by reason of an enactment".

80. Mr Evans submitted that there is no evidence that access to the relevant land was prohibited in 1993 by reason of any enactment. It is not sufficient merely that access is in fact prevented: it must be prohibited by reason of an enactment. Dr Bowes submitted that access is prohibited by

reason of an enactment when access for lawful sports and pastimes is in fact prevented by reason of works under statutory powers (as it was here in 1993).

81. In my judgement section 15(6) of the 2006 Act is concerned with a case in which a statutory prohibition on access to the land is imposed on members of the public. The case of an area closed to the public by order under an enactment during an outbreak of foot-and-mouth disease (given in DEFRA's Guidance on Part 1 of the Commons Act 2006 published in January 2014 at [8.10.70]) provides an example of such a statutory prohibition. No doubt such a prohibition has the consequence that the public may not use the land lawfully for lawful sports and pastimes. But the relevant prohibition is one on access to the land by members of the public. Section 15(6) would not require any period in which the land could not lawfully be used for such purposes (for example by bye-laws or an order made under any enactment) to be disregarded.

82. Equally it follows in my judgement that section 15(6) of the 2006 Act is not concerned with cases in which works are carried out on land which in fact prevent any use of it by the public for lawful sports and pastimes. Indeed, were it otherwise, it would create an inexplicable distinction between (a) the legal effect of works carried out by a private landowner and (b) the legal effect of works carried out by a public authority on its own land (or on the land of others with their agreement or under compulsory powers) which it can only do in the exercise of some statutory function. In each case the interruption may be the same but the legal result would be different for no apparent reason.

Conclusion

83. For the reasons I have given, the County Council's Development and Regulation Committee were entitled to conclude that the public's use of the relevant land for lawful sports and pastimes had been "by right", rather than being "as of right" (as section 15(2)(a) of the 2006 Act requires), during the 20 year period before the application for its registration was made. In addition, and in any event, they were also entitled to conclude that the public's use for that purpose had not continued throughout that period but had been interrupted in 1993. This claim for judicial review must accordingly be dismissed.

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[1] The report is referred to as IR in the footnotes to this judgement

[2] The Inspector's additional comments are referred to in these footnotes as IC

[3] see [IR 11.3], [IC3, IC4]

[4] see [IR11.4 and IR11.5]

[5] see [IR11.20-IR11.24]

[6] see [IR 11.25-IR 11.33] and [IR 11.34-IR 11.42]

[7] see [IR11.73]

[8] see [IR 11.48]

[9] see [IR 11.47], [IR 7.118], [IR 9.108]

[10] see [IR 11.51], [IR 11.47], [IR 2.11]

[11] see [IR 11.52]

[12] see [IR 11.26]

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[13] see [IR 11.52]

[14] see [IR 11.53-11.58]

[15] see [IR 11.62-11.64]

[16] see [IR.11.65-11.66]

[17] see [IR 11.66 and 11.68]

[18] see [IR 11.55-11.56]

[19] see [IR 11.51], [IR 11.47]

[20] see [IR 11.48] and [11.49]

[21] This construction is consistent with the terms of section 5 of the Metropolitan Open Spaces Act 1881, as extended by section 5 of the Open Spaces Act 1887 and section 6 of the Open Spaces Act 1890, which section 9 of the 1906 Act consolidated

[22] See [IR 11.53] and [IR 11.58]

[23] see IR[9.39], [[9.41], [9.42], [9.46], [9.49] and [9.50]

[24] see [IR 11.56]

[25] see [IR 11.54]

[26] see [IR 11.58]

[27] see [IR 11.58] and the Further Representations by the Applicant

[28] see [IR 11.50] and [11.51]