IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS 'WATERBARN RECREATION GROUND', WATERBARN LANE, STACKSTEADS, BACUP (APPLICATION VG107) AS A TOWN OR VILLAGE GREEN

REPORT

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INTRODUCTION

1. This Report relates to an application ("the Application") made under section 15(1) of the Commons Act 2006 ("the 2006 Act") to register land known as 'Waterbarn Recreation Ground', Waterbarn Lane, Stacksteads, Bacup ("the Land", "the Site") as a town or village green. Under the 2006 Act, Lancashire County Council, as the Registration Authority ("the Registration Authority"), is required to register land as a town or village green where the relevant statutory requirements have been met.

2. The Registration Authority instructed me to hold a non-statutory public inquiry into the Application, to consider all the evidence, and then to prepare a Report containing my findings and recommendations as to how to determine the Application for consideration by the Authority.

3. I held such an Inquiry over 3 days, namely on 23rd November, 25th November, and 26th November 2021. At the Inquiry the Applicant was represented by Mr Keith Loughlin. The Objector (TMJ Contractors Ltd) was represented by Mr Andrew Piatt, Solicitor. I thank both advocates for their assistance at the Inquiry. I also thank the Registration Authority for arranging the Inquiry and providing all necessary administrative support.

4. I undertook an accompanied site visit on 25th November 2021. On the accompanied site visit I walked around the Site, across the Site, identified the location of the access points claimed by the Applicant and identified the various physical landmarks surrounding the Site (including the Church, the old Cricket Club pavilion, the river). I thank Mrs Wright and

Mr Loughlin for their helpful assistance on the site visit. I undertook unaccompanied site visits on 22nd November 2021 and 24th November 2021.

5. Prior to the Inquiry, I was invited to make directions as to the exchange of evidence and of other documents. Those documents were duly provided to me by both Parties in accordance with my directions which significantly assisted my preparation for the Inquiry.

6. The Applicants produced a bundle of documents containing their supporting witness statements, evidence questionnaires and other documentary evidence in support of the Application and upon which they wished to rely, which I shall refer to in this Report as "AB".

7. The Objector produced two bundles of documents containing the written evidence in support of its Objection, which comprised of witness evidence and other documentary evidence upon which it wished to rely, which I shall refer to as "OB1" and "OB2".

8. At the inquiry, I accepted several further documents into evidence. These documents were numbered sequentially (ID1, ID2 etc). A list of these documents and their references is 'Appendix 1' to this report.

9. I have read all the documents contained in the bundles and provided to me at the Inquiry and have taken their contents into account in this Report.

10. I am aware of the strength of feeling concerning this case. My role is to consider whether the Applicant can demonstrate on the balance of probabilities that the statutory criteria within section 15 of the Commons Act 2006 are met. The relative merits of the claimed use relied upon and the possible development of the Site are not relevant to whether section 15 is complied with, and I have not taken such matters into account.

11. This Report can only be a set of recommendations to the Registration Authority as I have no power to determine the Application. Therefore, provided that it acted lawfully, the Registration Authority would be free to accept or reject any of my recommendations contained in this Report.

THE APPLICATION

12. In this section I provide an overview of the Application and the application process leading up to the inquiry.

13. In 2007 an application for village green status in relation to the Land was commenced but ultimately not pursued. I have been provided with some of the evidence gathered in support of that application.

14. The Application itself is dated 16th September 2013. The official stamp on the Application Form to register the town or village green records the date of 10th December 2014.

15. The Registration Authority's Notice of Application dated 12th of April 2018, confirms that an application was made to register the Land as a Town or Village Green by Mr Duncan Kerron ('the Original Applicant') under section 15(1) and section 15(2) of the Commons Act 2006 and in accordance with The Commons Registration (England) Regulations 2014 ('the Regulations').

16. Section 15(1) of the Commons Act 2006 provides (as applicable to this Application) that:

    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), (3) or (4) applies.

17. Subsection (2) (in the form that applies to this Application) applies where:

    (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

    (b) they continue to do so at the time of the application.

18. The Notice of Application records that the application seeks the inclusion in the Register of Town and Village Greens of the land described in the application as "Waterbarn Recreation Ground" which is situated at Waterbarn Lane, Stacksteads, Bacup OL13 0NR. The approximate centre of this land is at grid reference easting SD384660 and northing SD421628.

19. Subsequently, further applicants were added to the Application, with the permission of the Registration Authority. The first named Applicant remained Mr Kerron. Mr Loughlin, Mr Kirkbright and Mr Turner were all added as applicants (see letter from the Registration Authority dated 25 June 2014 at AB/Tab C/ 1/App/3).

20. The Application was supported by a document titled 'Justification' setting out the case for registration (AB/Tab A/2/8 – 2/12), various photographs (AB/Tab A/2/13 – 2/26), plans (AB/Tab A/2/27 – 2/28) and 51 evidence questionnaires (AB/Tab A/2/2014 1/1 – 2/2014 51/6).

21. The evidence questionnaires for the (aborted) 2007 and 2014 applications are helpfully summarised in the AB (at AB/Tab C/1APP5 and AB/Tab C/1APP6-7, respectively).

22. The information contained in the evidence questionnaires (both from 2007 and 2014) regarding people's use of the land is summarised in the AB (AB/Tab C/1APP13-14). The activities include: cycling, cricket, walking and dog walking, rounders, sledging, kite flying and socialising.

THE APPLICATION LAND

23. The Application land is described in the application as "Waterbarn Recreation Ground" which is situated at Waterbarn Lane, Stacksteads, Bacup OL13 0NR. The Application land is located in Stacksteads in the Borough of Rossendale and is a rough square shape. Next to the southern boundary is a public right of way which forms part of the Pennine

Bridleway, formerly the route of an old railway line. To the east of the Site is the river Irwell and to the west is the Waterbarn Chapel, a Grade II listed Baptist Chapel which is now derelict. It has been vacant for some years. The Waterbarn Chapel's burial ground adjoins the church. In the southwest of the Application land is a former cricket pavilion which is now boarded up. To the north of the Application land is Brandwood Road, a street of terraced houses. A path runs between the large hedge at the northern edge of the land and the rear gardens of the terraced houses.

24. On my site visits it was apparent that the Application land is currently overgrown. However, it was possible to discern the route of a path through the site and to walk across the site to observe its physical features.

25. The place name 'Waterbarn' appears in several documents (for example, ID7 and the plan at AB/TabA/2/7 and 2/27) but no document defining the precise extent and boundaries of the area known as 'Waterbarn' was identified before the Inquiry.

26. The Lancashire County Council PROW map identifies no public rights of way across the Application land.

27. Historically, there have been several points of entry to the Application land. The Applicant has identified the six accesses to the site, labelled 1-6 on an aerial photograph (AB/Tab C/ 1/App1). I adopt the numbering shown on that photograph in this report. Accesses 1 -3 are along the northern boundary of the Application land. Accesses 5-6 are on the southern

boundary. Access 4 is to the west in the grounds of the Waterbarn Baptist Church. On the accompanied site visit I noted the locations of the various claimed access points.

28. In terms of the broad history of the ownership of the land it appears that the land was originally owned by a family who designated it as recreational space for their workers living in nearby terrace houses. The land then passed into the ownership of the Baptist Church. The Trustees of the Church then sold the land to Mr Fielding- Bell. When Mr Fielding- Bell died the Site was sold at auction in 2014. The Site then changed hands several times, on occasion being sold at auction. TMJ Contractors Limited purchased the Site in October 2017 (OB1/TabA/4). TMJ Contractors then transferred ownership of the Church to Gateside Ltd on 18 May 2020 and the Land to Freeform Services Ltd on 3 November 2020 (ID16). The current owner of the Land endorses the Objector's (TMJ Contractors Ltd) submission; the two companies share the same Director and same registered office address (ID16).

THE MAIN ISSUES

29. The Land is claimed to have qualified for registration as a town or village green. To be so registered the Registration Authority will need to be satisfied that a significant number of the inhabitants of the locality, or of a neighbourhood within the locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years, and continued to do so at the time of the application.

30. As identified in my opening statement to the Inquiry, the main issues are:

I. whether a locality or neighbourhood within a locality has been identified,

II. whether use has been by a significant number of inhabitants of the identified locality or neighbourhood,

III. whether use has been by right or as of right,

IV. the extent of the use, and whether there has been use for at least 20 years.

31. Under main issue iii falls the related question of whether it would be possible for me to recommend registration if some of the identified use is permissive but some of the identified use is not permissive.

32. The relevant 20-year period is the 16th September 1993 to 16th September 2013.

PROCEDURAL MATTERS AT THE PUBLIC INQUIRY

33. The Objector submitted an email to the Inquiry (ID16) to clarify the Objector's position in relation to their interest in these proceedings and their legal interest in the Application land. The email explains that TMJ Contractors transferred ownership of the Land to Freeform Services Ltd on 3 November 2020 (ID16). Freeform Services Ltd, as the current owner of the Land, endorses the Objector's (TMJ Contractors Ltd) submissions as the two companies share the same Director and same registered office address (ID16).

34. The Applicant queried whether the Objector did in fact have standing to address the Inquiry and object to the Application.

35. When the Objector wrote its first and second letters of objection, it was the landowner of the Site (OB1/TabA/4-12; (OB1/TabA/30-34). At the time of the Inquiry, Freeform Services Ltd was the current landowner.

36. The Commons Registration (England) Regulations 2014 grant a broad right to make representations to the registration authority about a TVG application. Regulation 25(1) provides that "Any person may, by the date specified in the notice of an application or proposal, make written representations to the registration authority about the application or proposal".

37. In terms of participation in a public inquiry, the Commons Registration (England) Regulations 2014 grant a right to appear at a public inquiry, pursuant to regulation 29(4) in the following terms "Any person interested in the subject-matter of an inquiry may appear at the inquiry in person or by a representative".

38. In my judgment the rights granted to make representations and to appear at a public inquiry are broad. I am satisfied that the Objector is a person "interested in the subject matter" of the inquiry by virtue of having previously made representations to the Registration Authority and previously been a landowner at the time of the Application. Further and in any event, Freeform Services Ltd, as the current owner of the Land, endorses the Objector's (TMJ Contractors Ltd) submissions.

39. I am satisfied that the Objector was entitled to address the Inquiry and participate in proceedings.

THE EVIDENCE

40. As noted above, the Inquiry was assisted by three bundles of documents supplied by the Applicant and Objector in accordance with the directions and the various documents submitted during the Inquiry (set out in Appendix 1).

41. The Inquiry heard live evidence from Mrs Sheila Wright MRTPI, Mrs Wendy Priscilla Walmsley and Mr Christopher Shufflebottom. I record at the outset that every witness from both Parties presented their evidence in an open, straightforward and helpful way. Further, I have no reason to doubt any of the evidence given by any witness save as indicated below, and I regard each witness as having given credible evidence to the best of their individual recollections.

42. The following is not an exhaustive summary of the evidence given by every witness to the Inquiry and contained in all the documents to which reference has been made. However, it purports to set out the main points of the key parts of the evidence before the Inquiry.

CASE FOR THE APPLICANT

43. The Applicant called two witnesses, Mrs Wendy Priscilla Walmsley, and Mr Christopher Shufflebottom. The Applicant's bundle contained a wealth of documents. Further documents were presented during the Inquiry (ID1-11).

44. Mrs Patricia Walmsley distinguished in her evidence between the rough section of the Land, the cricket pitch, bowling green and tennis court. She said that those who had no association with the Church were able to use the Land. She recalled varying use of the Land over the years from her time as a Brownie and Girl Guide to dog walking and walking in alter years. She remembers Church and Cricket Club members chasing people off the cricket pitch. In terms of the Brownies and Guides use, she recalled that those clubs were based in the Church.

45. Mr Christopher Shufflebottom is Trustee and Groundman for the Rossendale United Junior Football Club. He cut the grass on the Site following a request by a resident of Brandwood Road unconnected with the Church or Cricket Club. He cut the grass over a number of years from 2007 to 2015 when asked to do so by the same resident (Mr Edmondson) or his partner. From 2011- 2015, after the Cricket Club left, he cut the grass more regularly, every 3 weeks or so. He used a tractor with a rear cutting machine and accessed the Site through access point 1 which he recalls having metal gates he sometimes had to open. He was not granted permission by a landowner or the Cricket Club to cut the grass. Mr Shufflebottom's wife is the author of the letter from the Rossendale United Junior Football Club (AB/Tab C/ 2/ APP13). Mr Shufflebottom said that the RUJFC would not use the Land without permission for insurance reasons.

46. Mr Loughlin's helpful case summary (AB/Tab D/6/1-6/6), opening statement, and closing statement (ID12 and ID18 respectively) set out the case for the Applicant.

47. The Applicant's case was that all elements of the statutory test were made out in the evidence and that registration should be recommended. In particular, the Applicant considered that there was evidence of a significant number of users, noting that the caselaw established that the use had to be "more than trivial or sporadic". Further the Applicant submitted that the alleged neighbourhood was connected enough and is clearly identifiable as "a co-terminus with streets and other landmarks" on the ground with an obvious social/ geographic characteristic.

48. In terms of use "as of right", the Applicant submitted that the residents deferred to the Cricket Club use but use was "as of right" not by right and the sorts of activities identified in the evidence were the sorts of activities that had been endorsed as constituting lawful sports and recreation in the case law. In terms of the relevant period, the Applicant submitted that the user evidence forms, as summarised in the spreadsheets prepared for the inquiry, demonstrated the full 20-year period of use.

CASE FOR THE OBJECTOR

49. The Objector called one witness, a professional witness (a planning consultant) Mrs Sheila Wright MRTPI. Mrs Wright's evidence addressed the claimed neighbourhood, lawful sports and pastimes, the nature of the use and the extent of the use across the 20-year period.

50. Mrs Wright gave evidence addressing whether a neighbourhood had been demonstrated and the adequacy of the boundaries of that neighbourhood, whether use took place continuously, whether use was as of right and the extent and duration of the claimed use. Mrs Wright had no direct knowledge of the Site (she did not give evidence as a user) but rather reviewed the evidence presented in the Application from the perspective of a planning consultant and applied the relevant statutory tests.

51. Mrs Wright was cross-examined on her evidence by Mr Loughlin.

52. The Objector's case was that the Applicant had failed to prove their case by failing to demonstrate all the elements of the statutory test to the relevant standard. In particular, the Objector submitted that the Application fails to prove to the relevant standard that there is a neighbourhood within a locality; fails to demonstrate a significant number of inhabitants; that use is as of right; and that the use has been continuous across all of the Land for twenty years.

53. Mr Piatt's helpful case summary (OB1/Tab D/124-127) opening and closing statement (ID13 and ID17 respectively) set out the case for the Objector.

FACT FINDING AND ANALYSIS

54. It will assist to briefly set out the relevant statutory framework.

55. As noted above in the section of this report titled 'The Application', section 15(1) of the Commons Act 2006 provides (as applicable to this Application) that:

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), (3) or (4) applies.

56. Subsection (2) (in the form that applies to this Application) applies where:

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they continue to do so at the time of the application.

57. The burden of proof lies on the Applicant to demonstrate that the statutory criteria are satisfied. The standard of proof is the civil one – that is "on the balance of probabilities" or, put simply, that it is more likely than not. The approach of Pill LJ in *R v Suffolk County Council, ex parte Steed* [1996] 75 P&CR 102, 111[1] is relevant:

"However, I approach the issue on the basis that it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green and that the evidential safeguards present in the authorities already cited dealing with the establishment of a customary right (class B) should be imported into a class C case.

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[1] This approach was endorsed by Lord Bingham in *R v Sunderland City Council, ex parte Beresford [2004] 1 AC 889 at [2]*. I note of course that *Beresford* has been both distinguished and not followed or to be relied upon in *R (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31 however these observations remain good law.

Use, as of right, and as inhabitants of Sudbury, for sports and pastimes must be "properly and strictly proved"".

58. From section 15(1) and (2) of the Act and the relevant case law it is clear that the Application must demonstrate the following:

    I. The application land has to have been used for lawful sports and pastimes
    II. The use has to have been by a significant number of people who come from:
    III. A locality; or

        Any neighbourhood within a locality.
    IV. The use has to have been carried out for at least 20 years up to when the application to register has been made.
    V. The use has to have been "as of right" throughout that period.

59. The expression "*lawful sports and pastimes*" was considered in ***R v Oxfordshire County Council, ex parte Sunningwell Parish Council*** [2000] 1 A.C. 335. It was held that "sports and pastimes" is a single composite class of activities. It was further held that dog walking and playing with children are, in modern life, the kind of informal recreation, which may be the main function of a village green (at 357A-D).

60. A "locality" must be a division of the County known to the law, such as a borough, parish, or manor: ***MoD v Wiltshire CC*** [1995] 4 All ER 931 at [937b-e]; ***R (Cheltenham Builders Ltd) v South Gloucestershire DC*** [2003] EWHC 2803 (Admin); and ***R. (Laing Homes Limited) v.***

Buckinghamshire CC DC [2003] EWHC 1578 (Admin). A locality cannot be created simply by drawing a line on a plan (Sullivan J at [41-48] in *Cheltenham Builders*).

61. A "neighbourhood" need not be a recognised administrative unit. In *Oxfordshire County Council v. Oxford City Council* [2006] 2 AC 674 at [27] Lord Hoffman observed that the statutory criteria of "*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*". Hence, a housing estate can be a neighbourhood: *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council* [2002] EWHC 76. Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must be an area which has a sufficient degree of cohesiveness, and it must be capable of a meaningful description (*Cheltenham Builders*).

62. HHJ Waksman QC stated in *R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council [2010] EWHC 530 (Admin)* at [79]:

    "While Lord Hoffmann said that the expression was drafted with "deliberate imprecision", that was to be contrasted with the locality whose boundaries had to be "legally significant". See paragraph 27 of his judgment in Oxfordshire (supra). He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality… but, as Sullivan J stated in R (Cheltenham Builders) Ltd v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing)

cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application."

63. Section 15(2)(a) refers to *"a significant number of the inhabitants of any locality, or of any neighbourhood within a locality".*

64. In *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council* [2002] EWHC 76 at para. 71 Sullivan J held that a "significant number" need not be considerable or substantial. It was held that it was a matter for the decision maker, an impression formed from the evidence. The number of people using the land in question had to be sufficient to indicate that their use of the land signifies that it is a general use by the local community for an informal recreational use, rather than occasional use by individuals as trespassers.

65. In *Sunningwell* Lord Hoffman observed that the question is "*how the matter would have appeared to the owner of the land (or if there was an absentee owner, to a reasonable owner who was on the spot)*".

66. Lord Walker JSC observed in *R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70* (at [30]), "*if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the*

trespassers, or eventually finding that they have established the asserted right against him".

67. In <u>*Lewis*</u>, Lord Walker observed that *"… a reasonable owner would [not] have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility or, in the inspector's word, deference towards members of the golf club who were out playing golf*" (at [36]). Lord Walker went on to observe that although the residents were courteous and civil, with occasional exceptions, the fact remained that they were regularly, in large numbers, crossing the fairways as well as walking on the rough. As such, "*a reasonably alert owner of the land could not have failed to recognise that that user was the assertion of a right and would mature into an established right unless the owner took action to stop it*".

68. In <u>*Lewis*</u>, Lord Hope observed (at [75]): "*The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice coexist*". Lord Hope continued (at [76]): "*Of course, the position may be that the two uses cannot sensibly coexist at all. But it would be wrong to assume, as the inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use of the land as of right for lawful sports and pastimes. It is simply attributable to an acceptance that where two or more rights coexist over the same land there may be occasions when they cannot practically be enjoyed simultaneously*".

69. In *Lewis* the Court held that the inspector's assessment amounted to an error of law. He misdirected himself as to the significance of perfectly natural behaviour by the local residents. The local authority should register the land as a town green under the 2006 Act.

70. The use must also be of a sufficient extent and "*of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed*" (*White v Taylor (No.2)(1969) 1 Ch 160* at [192]). The use must not be trivial and sporadic (*Sunningwell* at [357D-E]).

71. To be "*as of right*" the use must have been carried out: without force (*nec vi*); without secrecy (*nec clam*); and without permission (*nec precario*). The phrase *"as of right"* is based upon the acquisition of rights by prescription (see observations by Lord Hoffman in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 at 351B-C).

72. In *R (oao Barkas) v North Yorkshire County Council and another [2014] UKSC 31*, Lord Neuberger's speech sets out in some detail the meaning of "as of right" "*it is, I think, helpful to explain that the legal meaning of the expression "as of right" is, somewhat counterintuitively, almost the converse of "of right" or "by right". Thus, if a person uses privately owned land "of right" or "by right", the use will have been permitted by the landowner—hence the use is rightful. However, if the use of such land is "as of right", it is without the permission of the landowner, and therefore is not "of right" or "by right", but is actually carried on as if it were by right—hence "as of right". The significance of the little*

word "as" is therefore crucial, and renders the expression "as of right" effectively the antithesis of "of right" or "by right"" (at [14]).

73. Further, Lord Neuberger rejected the submission that non-trespassers could be using the land is in question "as of right" (at [27]): "*It was suggested by Mr Edwards QC in his argument for Ms Barkas that, even if members of the public were not trespassers, they were none the less not licensees or otherwise lawfully present when they were on the field. I have considerable difficulty with that submission. As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a "tolerated trespasser" is still a trespasser".* In a later passage, criticising Lord Scott's conclusion in Beresford (which the Supreme Court said was wrongly decided), Lord Neuberger said "*Lord Scott's conclusion in para. 48 that, when using the land for recreation, members of the public were 'certainly not trespassers' should ineluctably have led him to decide that the public's use of the land had been 'by right' and not, as he did decide, 'as of right'*" (at [37]).

74. Lord Neuberger continued, (at [28-29]):

"28. Furthermore, the fact that the landowner knows that a trespasser is on the land and does nothing about it does not alter the legal status of the trespasser As Fry J explained,

acquiescence in the trespass, which in this area of law simply means passive toleration as is explained in Gale on Easements (or, in the language of land covenants, suffering), does not stop it being trespass. This point was well made by Dillon LJ in Mills v Silver [1991] Ch 271, 279–280, where he pointed out that "there cannot be [a] principle of law" that "no prescriptive right can be acquired if the user … has been tolerated without objection by the servient owner" as it would be "fundamentally inconsistent with the whole notion of acquisition of rights by prescription." Accordingly, as he added at p 281, "mere acquiescence in or tolerance of the user … cannot prevent the user being user as of right for purposes of prescription."

29. Thus, if a trespass has continued for a number of years, then the fact that it has been acquiesced in (or passively tolerated or suffered) by the landowner will not prevent the landowner claiming that it has been and is unlawful, and seeking damages in respect of it (subject to the constraints of the Limitation Act 1980). For the same reason, if such a trespass has continued for 20 years and was otherwise as of right, it will be capable of giving rise to a prescriptive right. On the other hand, if the landowner has in some way actually communicated agreement to what would otherwise be a trespass, whether or not gratuitously, then he cannot claim it has been or is unlawful—at least until he lawfully withdraws his agreement to it. For the same reason, even if such an agreed arrangement had continued for 20 years, there can be no question of it giving rise to a prescriptive right because it would clearly have been precario, and therefore "by right"."

75. Lord Neuberger observed that in terms of the meaning of 'by right' "*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" (at [27]). The exact nature of the right granting permission was not deemed material. Lord Carnwath (at [51]), held that 'by right' was equivalent in meaning to 'by licence': "*the sole issue is whether the use of the recreation ground by local inhabitants has been "as of right" or "by right", the latter expression being treated as equivalent to "by licence" (or "precario") in the classic tripartite formulation (nec vi, nec clam, nec precario) as endorsed by Lord Hoffmann in the R v Oxfordshire County Council, Ex p Sunningwell Parish Council case [2000] 1 AC 335*."

76. Before turning to the main issues, I note that there is no difficulty in identifying the relevant land sought to be registered. The Land has defined and has fixed boundaries, and there was no dispute at the Inquiry nor in any of the evidence adduced that that area of land comprises "land" within the meaning of section 15 of the 2006 Act and is capable of registration as a town or village green in principle.

77. I now address each of the main issues in turn.

i. whether a locality or neighbourhood within a locality has been identified

78. The claimed neighbourhood must be an area which is cohesive, identifiable, and recognisable as a community in its own right. There must be something about the claimed neighbourhood (or at least its core area) which distinguishes it from the surrounding areas. Only the inhabitants of the relevant neighbourhood have recreational rights over the land.

79. The area chosen by the Applicant is fairly large. Whilst the area has been referred to as ‘Waterbarn’ and there are plans which have ‘Waterbarn’ inscribed on them in the broad area of the claimed neighbourhood, I have not been taken to any document or plan which definitively demonstrates the boundaries of the ‘Waterbarn’ area.

80. I asked Mr Loughlin to explain the location of the boundaries and to set out why the particular boundaries were chosen. Mr Loughlin was very honest in his response and explained that he had not been able to establish how the boundary for the 2007 (withdrawn) application was chosen. He worked from this boundary for the 2014 application.

81. Mrs Wright in her evidence explained that the boundary lines lead to some anomalies like the exclusion of houses to the north of the road and the inclusion of those in the southern edge (in relation to the eastern part of the northern boundary). The eastern boundary, Mrs Wright explained, cuts through an area of housing excluding houses on the east side of School Street but including those on the west side of the street. I note that Mrs Wright was challenged in cross- examination on the issue of the boundary alignment, particularly in relation to whether the boundary line cut through neighbouring houses and individual properties.

82. I attempted to walk the boundary line on my unaccompanied Site visit. I did not find that the boundary had an obvious social or geographical character and found the line difficult to follow in practice.

83. I find that the boundary line incorporates industrial properties and excludes parts of residential estates (including some houses but not others on the same road, for example) without explanation for so doing.

84. In closing Mr Loughlin submitted that the boundary encompasses those who could comfortably walk or even drive to the land (at [46]). Further, he submitted that there was evidence of supporting infrastructure and facilities within the neighbourhood (at [45]). I did not hear detailed evidence on these points. From the documentary evidence available, I am not persuaded that the claimed neighbourhood is identifiable from travel distance to the Site or the presence of infrastructure or community facilities.

85. Overall, there was no evidence before the Inquiry to demonstrate that the area had any cohesiveness or to show that its inhabitants considered themselves part of a community group in a wider urban context. On this basis the Application must fail as the existence of a neighbourhood within a locality has not been established on the evidence.

86. In light of my finding on this point it is not strictly necessary for me to go any further. However, in view of the great efforts expended by both sides it is right that I consider the other issues in the case.

ii. whether use has been by a significant number of inhabitants of the identified locality or neighbourhood

87. In light of my finding regarding the purported neighbourhood it is very difficult for me to assess whether the use has been by a significant number of people within the neighbourhood. The Applicant has the burden in this regard.

88. I accept that there were challenges in securing attendance at the Inquiry by live witnesses given concerns about the pandemic and the amount of time which has passed since the application was made. However, I cannot give full weight to evidence which has not been tested (i.e., evidence which a live witness has given evidence and been cross examined on).

89. I also note and am grateful for the efforts the Applicant has gone to capture and display the evidence. As noted above, the evidence questionnaires for the (aborted) 2007 and 2014 applications are helpfully summarised in the AB (at AB/Tab C/1APP5 and AB/Tab C/1APP6-7, respectively). People's use of the land for activities, derived from information contained in the evidence questionnaires (both from 2007 and 2014), is summarised in the AB (AB/Tab C/1APP13-14). The activities include: cycling, cricket, walking and dog walking, rounders, sledging, kite flying and socialising. Photographic evidence of such activities is found at AB/Tab C/2APP1-9.

90. Mrs Wright's Appendix 11, a schedule of the questionnaires, was also most helpful in summarising the available evidence.

91. There 82 questionnaires before me in total, 31 from 2007 and 51 from 2014. There is some duplication in that some of the statements are from people who submitted a statement in 2007 and 2014. The questionnaires are a standard template from the Open Spaces Society. The form asks the person completing it to confirm that they authorise the

use of the from at a public inquiry and authorise its disclosure in relation to the TVG application but does not contain a statement of truth. This necessarily effects the weight I can give to the questionnaire evidence.

92. However, taking the Applicant's evidence at its highest, I note that there are only user evidence forms relating to certain parts of the claimed neighbourhood area. There are whole areas of the claimed neighbourhood area which have no claimed user. Taking an overall view, I do not have the impression that the Land is in a general informal recreational use by the local community, rather than occasional use by individuals as trespassers.

iii. whether use has been by right or as of right

93. In view of ID1, (the licence between the Trustees of Waterbarn Baptist Church and the Trustees of Stacksteads Cricket Club relating to Recreation Ground Waterbarn, dated 01 November 1990), there can be no doubt that there was at least for the period of time to which the licence pertains a licence granted from the Church to the Cricket Club. In other words, the Church drew up a legal document granting the Cricket Club permission to use the Land.

94. In my view it does not matter whether the means of granting the permission was by way of lease or licence. The fundamental point is that permission was granted, and use cannot therefore be "as of right". This was the conclusion of the Supreme Court in *Barkas*, in which the Court considered that if persons on the Land "*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"* (at [27]). The exact nature of the right

granting permission was not deemed material. Indeed, Lord Carnwath (at [51]), held that 'by right' was equivalent in meaning to 'by licence': "*the sole issue is whether the use of the recreation ground by local inhabitants has been "as of right" or "by right", the latter expression being treated as equivalent to "by licence" (or "precario")…"*

95. Mr Loughlin submitted that it was material that the document granting permission was a lease and not a licence. I do not agree that anything turns on this distinction. In my view, applying relevant authorities, the significant point is that permission was granted, and I find that permission to use the Land for cricket was granted by the Church.

96. It follows that the Cricket Club use was with permission and so the use of the Land for cricket cannot be relied upon to meet the statutory criteria in this case.

97. The letter from the Lancashire Football Association (AB/Tab C/ 2/ APP15) of 2015 refers to the owner withdrawing permission for football training and expresses the hope that permission will be granted again. This letter corroborates the position that football activities held on the Land by the Lancashire Football Association took place with permission.

98. The letter from the Rossendale United Junior Football Club (AB/Tab C/ 2/ APP13) is a letter to the then landowner, when read as a whole it appears to be a request for permission to use the Land. It is not clear from the letter whether historically permission has been granted.

99. The documentary evidence tends to support the position that use was with the permission of the landowner.

100. Whilst the land was in the ownership of the Church, permission was granted to the Cricket Club. There is no direct evidence from the Church addressing the circumstances in which the Land was held or made available for use.

101. I asked the parties to address the question of whether it would be possible for me to recommend registration if I found that the Cricket Club use was with permission. Mr Piatt in closing submitted that a finding that there were periods of permission for sports and pastimes over all or parts of the Site would be fatal to the claim. He submitted that a period of permission would break the continuity of use as of right for the requisite 20-year period whether that permission effects the part or all of the Site.

102. Mr Loughlin drew to my attention the authority of _R (oao Lewis) v Redcar and Cleveland Borough Council and another_ *[2010] UKSC 11*. In _Lewis_ the Supreme Court noted that deference to organised sport on the land in question would not necessarily prelude recreation "as of right". Deference, even overwhelming deference, would not preclude co-existence of two uses on the land. The issue was one of fact and degree and turned on whether the two uses could and did in fact sensibly co-exist. In _Lewis_, the Court was concerned with land used as a golf course but also used for other recreational activities.

103. Mrs Wright drew my attention in evidence to the way in which the cricket pitch was maintained and suggested that it would be unlikely that the club would allow other

recreational users during the period of its tenure because they would want to preserve the quality of the pitch. Mrs Walmsley remembered Church and Cricket Club members chasing people off the cricket pitch. I consider that it is more likely than not that the Cricket Club would exercise a degree of control over the Land in order to prevent damage to the pitch. If, however, I am wrong about that, I consider that in the present case I simply do not have the evidence upon which to conclude that there were two uses each co-existing with the informal as of right use showing deference to formal by right use. I do not know how the Cricket Club's use interacted with any other uses there may have been over the relevant period. The most concrete evidence of use before me is permissive use by (for example) brownies, guides, the Cricket Club. I have no clear evidence of informal as of right recreational use deferring to that use. I therefore cannot find that this is a case of deference as in the case of *Lewis*.

104. In my view the main uses which occurred on the Land over the relevant period were likely with permission granted by the Church: Guides, Brownies, football, and cricket. Activities like car boot sales and sports days require a degree of organisation. In my view those sorts of activities were likely done with permission and with the approval of the landowner.

iv. the extent of the use, and whether there has been use for at least 20 years.

105. There is no doubt that use has been made of the Land at various points over the relevant 20 years for different sports and pastimes. The issue which arises is whether the evidence is sufficient to demonstrate continuity of use across the Land.

106. In my view, the evidence is not sufficient.

107. In order to evidence general use by the community across the entire land I would have expected the Applicant to produce more witnesses to give evidence on oath or at least to have produced witness statements with statements of truth. This is particularly important in a case such as this where, as noted above, the Applicant is arguing that use as of right was not interrupted by use by right but instead the various uses co-existed with one use showing deference to another.

108. I do not doubt the challenges inherent in assembling an Application or in preparing a case for inquiry nor do I doubt that some people who completed witness statements may not wish to give evidence or prepare a witness statement for various reasons. However, I must apply the statutory tests.

CONCLUSIONS AND RECOMMENDATION

109. It is incumbent on the Applicant to prove every qualifying requirement. In my view, the qualifying requirements have not been proved in this case.

110. The Application must fail on the basis that the Applicant has failed to prove that it is more likely than not that there have been lawful sports and pastimes in such quality and quantity for the 20-year period spanning 1993- 2013 by a significant number of inhabitants of a neighbourhood within a locality.

111. I therefore recommend to the Registration Authority that the Application should be rejected.

Constanze Bell

Kings Chambers

Leeds Manchester Birmingham

17th March 2022

APPENDIX ONE: LIST OF INQUIRY DOCUMENTS

ID1 Licence between Trustees of Waterbarn Baptist Church and Trustees for the time being of Stacksteads Cricket Club relating to Recreation Ground Waterbarn, dated 01 November 1990

ID2 Letter from Maxwell Entwistle & Byrne Solicitors, dated 17 May 1988

ID3 Letter from Maxwell Entwistle & Byrne Solicitors to Mr Grimshaw, dated 15 July 1988

ID4 Letter from Maxwell Entwistle & Byrne Solicitors, dated 22nd August 1990

ID5 Handwritten Letter from the Trustees of Waterbarn Baptist Church to the Trustees of Stacksteads Cricket Club, dated 20 April 2007

ID6 Bacup, Britannia, Weir and Stacksteads policies map 2017 (Regulation 18)

ID7 Bacup map showing 'Waterbarn' written in pale green writing

ID8 Development Advice Control Note 15, 2nd Edition, The Planning Service, Vehicular Access Standards, dated August 1999

ID9 Letter to the Inspector c/o the RA from The Rt. Hon. Jake Berry MP, dated 02 November 2021

ID10 Statement of Wendy Priscilla Walmsley, dated 19th November 2021

ID11 Statement of Christopher Shufflebottom, dated 19th November 2021

ID12 Skeleton Opening Argument on behalf of the Applicant

ID13 Opening Statement on behalf of TMJ Contractors Limited

ID14 DEFRA Guidance Commons Registration Authorities: Process New Event Applications, updated 18 November 2015

ID15 The Commons Registration (England) Regulations 2014

ID16 Email from Ms Susan Ehlinger of Gateley Legal to Ms Lindsay Campy of the Registration Authority regarding TMJ Contractors Ltd’s position as Objector, dated 25 November 2021

ID17 Closing Submissions on behalf of TMJ Contractors Limited

ID18 Closing Submissions on behalf of the Applicant