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Humpty Hill, Faringdon case

Full name

R (on the application of Allaway and Pollock) v Oxfordshire County Council and Stewart
27 October 2016

Neutral citation number

[2016] EWHC 2677 (Admin)

Link to judgment

www.bailii.org/ew/cases/EWHC/Admin/2016/2677.html

For details of other cases cited in this note (where there is no hyperlink), please see the Society's useful cases.

Summary

The High Court upholds the registration of land in Faringdon, Oxfordshire, as a town green, dismissing a challenge that the inspector had wrongly assessed use of paths around the edge of the land as nevertheless contributing to overall use of the land as a green, and rejecting, once again, the argument that the origin of users must be spread across the whole of the locality.

Background

An application was made in 2013 by Robert Stewart, the interested party, to register 5.6 hectares of meadowland at Humpty Hill (photograph here in the foreground) in Faringdon as a town or village green, under section 15(2) of the Commons Act 2006 (*i.e.* on the basis of continuing use). The claimants, Charles Allaway and Rosemary Pollock, objected as landowners, as did Gladman Developments Ltd, who had an interest in the land, and are self-described as 'one of the largest developers in the UK'.

In due course, an inspector, Charles Mynors of counsel, was appointed to inquire into and recommend on the disposal of the application. He duly recommended registration of the land. The council resolved late in 2015 to grant the application. The claimants sought judicial review of the council's decision: permission was initially refused, and this was a

'rolled-up' hearing, involving both an oral presentation of the case for permission, and a substantive discussion of the case.

Discussion

The claimants challenged the council's decision to grant the application on two grounds:

- that the inspector (and so in turn, the council) failed, in assessing use of the application land as a green, to discount the use made of the perimetral path (there was a public footpath along the east headland, and some users simply walked around the meadow along the other headlands);
- that the inspector failed properly to assess whether there was use by 'a significant number of the inhabitants of any locality' (section 15(2) of the 2006 Act).

The inspector was required to consider the extent of the use of the application land. In his report to the council, the inspector found, 'abundant use of the [application] Land throughout the period for informal recreation'. He noted that 'the walking was predominantly on the public footpath and the circular path, but by no means exclusively so.' The inspector recognised that those walking round the field might be establishing a right of way (apart from the existing public footpath along the east headland), but said: 'that applies only in the case of those entering at one gate and leaving at the other, in the course of a longer walk (or jog) from A to B.'

The inspector also briskly concluded that the users came largely from the parish of Great Faringdon, adding that the use 'was predominantly from the parts of Faringdon nearest to the Land', as might be expected.

It seems that the inspector was asked by the council in due course to prepare a supplementary report, to respond to objections pressed by the landowners. The landowners had pointed out that the evidence of use (written evidence from 111 users) did not represent a significant number of the inhabitants of the parish (population 7,121), that the inspector had failed to discount use of merely the perimetral path, and that in any case, the users were not drawn from across the town of Faringdon, but clustered in nearby streets.

The inspector responded that, as an experienced inspector, the application was 'one of the more convincing I have come across'. He decided that, although many users stuck to the perimetral path, 'the bulk of walkers…were using the Land for what, to adopt the analysis of Lord Carnwath in *Barkas*, was the assertion of a village green right'. And he said that 'it cannot be the case that land has to be used equally by people from all parts of the town or village in question.'

The council therefore agreed with the inspector's recommendation to grant the application, leading to this judicial review.

Use of perimetral footpath

In her judgment, the judge, Patterson J, first considered the inspector's assessment of the use of the perimetral path, and the extent to which the inspector discounted such use. The claimants said that the inspector had discounted only that use which was part of a journey from A to B — where the user had entered through one entrance and left through another. He had assessed use of the perimetral path (typically, a pan-handle visit returning through the same entrance) as contributing to the applicant's case.

The claimants deprecated the first instance judgment in the *Trap Grounds*, where Lightman J said: 'But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential Green may be recreational use of land as a Green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land.' However, in that case, the judge went on to say that 'If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a Green).'

The inspector had observed that users with dogs allowed their dogs to range freely. The claimants said that the court in the *Laing Homes* case had ruled against allowing anything for the additional canine user: 'I do not consider that the dog's wanderings or the owner's attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.'

The judge said that Lightman J, in the *Trap Grounds*, had got it right. User of the perimetral path 'may be recreational use of land as a green and part of the total such recreational use if, in all the circumstances, it is such as to suggest to the reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land.' She added 'The majority of the recreational use that [the inspector] found was of walking one or other of the paths which was distinct from some people using the land to assert a public right of way.' It was a matter for the inspector's judgement whether user was one or the other. The judge declined to rule that use of the perimetral path should be discounted altogether. She distinguished the *Laing Homes* case, where the perimetral use had actually given rise to the recording of public footpaths on the definitive map of public rights of way. The judge concluded: '[T]he owners of the land must have been aware…that…informal recreational activities…were taking place and that they took only cursory steps to prevent or restrict it.'

Significant number of inhabitants

The claimants revived the 'spread' argument, which had been dismissed by the High Court in both *Paddico (267) Limited v Kirklees Metropolitan Council* and the *Moorside Fields* case. The claimants said that user must be by a significant number of inhabitants drawn from across the locality, and not just part of it. Given that registration as a green would confer

rights on all the inhabitants, it could not be right that such rights could be established by users from only part of the locality.

The judge decided that the spread argument had no foundation. Parliament could have expressed section 15(2) of the 2006 Act to require user across the locality, but did not. The reasoning of the court in *Moorside Fields* was 'highly persuasive'. As to whether the use was by a 'significant number' of local inhabitants, the judge endorsed the long-standing words of the court in the *McAlpine* case, saying that the evidence 'signified that [the application land] was in general use by the local community for informal recreation that was sufficient', adding that this was a matter of judgment for the decision maker.

Comment

The court's affirmation of the inspector's careful distinction of use of the perimetral path is of considerable value. The inspector had excluded consideration of use by those making journey from A to B (whether or not they passed through Humpty Hill for its recreational possibilities). But the inspector had taken account of use of the path by those (seemingly the majority) who went to Humpty Hill purposely for recreation, and went in and then out by the same route, after taking a tour of the field. The court distinguished the *Laing Homes* case, where the court deprecated the inspector's advice which had taken into the reckoning use made of paths round the edge of the fields, because in that case, the use of the paths was such that they had become recorded as public footpaths. However, the court endorsed, as 'a persuasive starting point', that an 'inference should generally be drawn of exercise of the less onerous right (the public right of way)'.

The judgment cannot be said to leave the position entirely clear. Use of the perimetral paths, even on an out-and-back basis for recreation, is capable of contributing to the establishment of a right of way, and it remains unclear how the use should be assigned to one outcome or the other— or indeed both. If the landowner claimants in the present case had themselves successfully applied to show that the perimetral paths had become dedicated through long use, before the inspector prepared his advice on the town green application, would this have changed the outcome?

The challenge on grounds of disproportionate user from one part of the locality was recently rehearsed again in *Moorside Fields* and dismissed, and it was unlikely to gain more traction on this, the third such occasion at first instance. The judgment does not directly address the claimants' point that, if it is sufficient to show user from only part of the locality, then the amendment made by section 98 of the Countryside and Rights of Way Act 2000, to allow for user from among the inhabitants of a neighbourhood within a locality, might seem redundant. However, it is not clear that was the purpose of the amendment. In introducing it in Parliament, the Minister said[1] that the amendment would, in effect, allow user from

[1] HL Deb 16 November 2000 vol 619 c514.

outside the locality (or now neighbourhood) to be ignored, but also: 'the amendment addresses the problem of applications being accepted only where it can be demonstrated that users come from a discrete area, such as a village or parish. That is not easy in large built-up areas.' The amendment appears to have been targeted at urban areas where the locality is so large and disconnected from the community which uses a claimed green, that it makes more sense to focus on an identifiable neighbourhood (which may straddle two or more technical localities). Whereas, in relation to Faringdon, it was sufficient to show evidence of use from about 1½% of the population of the town, most of whom lived near the green, in an urban area, the locality may be much larger, and even 1% may be unattainable. Nevertheless, the spread argument, having been slapped down in three successive High Court actions, has not yet received the attention of the Court of Appeal, and it is perhaps too early to dismiss it as irrelevant.

Having failed to establish that there needed to be a spread of users across the locality, the claimants' argument that there was not a sufficient number of users amounted to a merits challenge, and seemed doomed to fail: the court was most unlikely to agree that the inspector had so grossly erred on the scale of user that he was wrong to conclude that there was not a 'significant number'.

Although the judgment is a welcome affirmation of two issues which are often in play in town or village green applications, it cannot be said wholly to close the door on either issue, and the interest of a major developer in the application land means an appeal is entirely possible.