COMMONS REGISTRATION ACT 1965

Reference No. 16/D/2

In the Matter of Sleapshyde Green,
Colney Heath, St. Albans R.D.,
Hertfordshire

DECISION

This dispute relates to the registration at Entry No. 1 in the Land section of Register Unit No. V.G.26 in the Register of Town or Village Greens maintained by the Hertfordshire County Council and is occasioned by Objection No. 94 made by Redland Inns Gravel Ltd. and noted in the Register on 8 October 1970.

I held a hearing for the purpose of inquiring into the dispute at Hertford on 27 October 1972. The hearing was attended by (i) Colney Heath Parish Council ("the Council") who were represented by their clerk Mr. H.D. Wood, (ii) Redland Gravel Limited ("the Objectors": their former name was Redland Inns Gravel Limited) who were represented by Mr. D.J. Clare solicitor of Messrs. Longmores solicitors of Hertford, and (iii) Mr. Malcolm Tomkins in person.

The land was registered pursuant to an application made on 21 March 1968 by the Council. The grounds stated in the said Objection were:- "This land is the freehold of this Company (the Objectors) and forms part of our worked out London Colney gravel pit. The title deeds can be inspected at the address above (the address of the Objectors)".

This Unit consists of (i) a triangular piece of land ("the Triangle") situated at a point where three roads meet and bounded on all three sides by metalled carriage ways and (ii) a piece of land ("the Disputed piece") separated from the Triangle by one of the metalled carriage ways and a fence (of which more below).

At the beginning of the hearing (before any evidence was given) it was agreed that the Objection relates only to the Disputed Piece, that the Objectors are now the owners of the Disputed Piece and that the Disputed Piece does not form part of their worked out London Colney gravel pit.

Mr. Wood submitted that the Objectors did not raise a case which the Council could be required to answer and he proposed therefore to prove that the land was within the definition of "town or village green" in section 22 of the Act.

On behalf of the Council, oral evidence was given by Mr. R.W. Page who now lives and has since 1924 (when he was 7 years of age) lived at the "Old House" (about 50 yeards from the land) and who is and for the last 21 years has been a member of the Parish Council, and written evidence was given by Mr. H. Windmill (his evidence being a letter dated 25 October 1972 and signed by him). Mr. M.R. Tomkins who wished to support the Council's case, gave oral evidence: he first came to live in the Village in 1958; he produced a letter dated 26 October 1972 written by Mr. A. Jenkins who lives in the Village and he described to me a conversation which he had on the previous day with an elderly lady who has lived for 60 years in the Village. Mr. Clare objected to the evidence of Mr. Windmill and Mr. Tomkins. On behalf of the Objectors, evidence was given by Mr. B. McK. Brown now employed by them as transport

manager; from 1947 he has worked for Mr. Marriott, who occupied a farm adjoining the Disputed Piece; Mr. Brown had not seen the land since 1955.

Recently the carriage ways surrounding the grass on the Triangle have been widened, so that the grass now covers only the central part of the triangular piece of land coloured green on the Register Map. In the middle of this grass land, there is an iron water pump which is now disused but which has been there as long as any one can remember. Considered in isolation the Triangle is so small that no one would now want on it to "indulge in sports and pastimes" as these words are ordinarily understood. Nevertheless notwithstanding its small size, it has some of the attributes of a village green and may be of some value to the Village as an amenity. There being no objection to this, I can I think properly confirm this registration at least so far as it relates to the Triangle.

The Disputed Piece is very approximately rectangular in shape (two of its sides curve inwards, one side curves outwards, and the remaining side is nearly straight). The Disputed Piece is separated from the adjoining land on the north-west, north-east and south-east sides (apart from the gate below mentioned) by a bank on and near which there are trees and bushes and rough vegetation which together make an impenetrable barrier; on the north-east side, there is a small gate leading into the grounds of a nearby cottage ("the Cottage"); on the south-west side of the Disputed Piece (separating it from the carriage way which is here more or less on the same level) is a high open boarded fence; in this fence there is a gate through which passes the path to the Cottage. The path crosses the south-eastern part of the Disputed Piece; on the north western part there is now a small pond (sometimes dried up) fed from the ditches leading from the adjoining land; the rest of the Disputed Piece is rough vegetation (including trees, shrubs, docks and nettles, and a little grass), which makes it either impossible or difficult or unattractive to go upon.

Mr. Page (whose evidence I accept) said that the fence was erected in or about 1948. Before then as far back as he can remember: the Disputed Piece was not fenced from the road in any way and was quite open; the pond was much larger (as shown on the Register Map); the path to the Cottage was there as now; the Disputed Piece, although not so over grown as now, was always rough open space; he as a child with other children of the Village played there and children continued to play there until the fence was erected: the games were not organised (the available space was not large enough) but they played ordinary childrens games such as hide and seek and so forth; when the pond froze in winter the children and younger parents amused themselves by sliding on the ice. After the 1939-45 war, persons started to tip rubbish into or near the pond; he always understood that the fence was put up by Mr. Marriott to prevent the land becoming a rubbish dump. He thought there were only about 21 houses in the Village when he was a boy (since the 1939-45 war the Village has been much enlarged by the erection of numerous houses, situate west of this Unit as marked on the Register Map). When speaking of the Village he was referring to Sleapshyde only; having regard to its small size, the number of children living there before 1948 could never have been large. After 1948, children ceased to play on the Disputed Piece, being disinclined (so Mr. Page thought) to enter upon enclosed premises.

Mr. Windmill in his letter stated: he resided in a cottage attached to Sleapshyde Farm from 1922 until 1937; the water pump then operated by hand provided drinking water for the villagers; "the surrounding banks of the pond were a favourite spot to play with friends when we were children"; it was a picturesque

sight in Spring when the pond was well filled and the ducks and moorhens built their nests; during the winter when frozen the pond provided a skating rink for the local residents. I reject the submission made by Mr. Clare that I should not look at this letter because Regulation 22 of the Commons Commissioners Regulations of 1971 provides that evidence may be given orally or by affidavit; it seems to me that this Regulation does not preclude me accepting evidence which would be admissible under the Civil Evidence Act 1968 in any civil proceedings mentioned in such Act; regulation 25 contemplates that "documentary evidence" may be given. In substance the letter appears to me to make two additions to the evidence of Mr. Page: first the playing by children went back to 1922 (and not merely to 1924 as stated by Mr. Page) and secondly the pond when frozen was used for skating as well as for sliding. Having regard to the above quoted grounds stated in the Objection and to the circumstances that the statement is entirely consistent with and adds nothing essentially new to the oral evidence of Mr. Page, I think the failure of the Council to procure the personal attendance of Mr. Windmill at the hearing and to give to the Objectors in advance a copy of the letter, should be excused; I therefore accept the letter as evidence of the additional matters above mentioned.

I need not I think consider whether the statements sought to be put in by Mr. Tomkins were properly admissible, because by reason of their vagueness, in reaching my decision in this case I have disregarded them.

Mr. Brown supplemented the evidence of Mr. Page by saying that Mr. Marriott in addition to putting up the fence did some leveling up of the surface in or around the pond. Generally the evidence of Mr. Brown seemed to me to confirm that of Mr. Page; although they may have described the state of the land when they knew it in slightly different words, there was I think no real conflict between them.

Mr. Woods submitted that the evidence on behalf of the Council showed that from 1924 to 1948 the inhabitants of the Village had indulged in sliding and skating which were sports and the youngsters of the Village had indulged in games which were pastimes and that therefore the definition of a "town or village green" in section 22 of the Act was satisfied.

After the hearing I inspected the land in the presence of Mr. Wood and Mr. Clare. The fence is now dilapidated and in places it would not be difficult to get through it; although when new it must have appeared to be a formidable obstacle, by reason of the gate (leading to the path to the Cottage), an inhabitant of the Village wanting to walk on the Disputed Piece would have had no difficulty in going there. Cleared it might be of some value as an amenity, but I cannot imagine how it could or would be used now for sports and pastimes. It is derelict, uncultivated and uncared for; it is not incorporated in any way in the surrounding land and I infer that who ever put up the fence, could not have had this in mind; indeed the doing of this might by reason of the banks be a difficult and expensive operation. Before 1948 (when the fence was put up) back to 1924 and possibly earlier, the Triangle on the Disputed Land would have appeared as one piece of public open land situate at the most important road junction in the Village and having on it the Village pump and the Village pond.

I accept the submission of Mr. Wood that the 20 year period mentioned in the definition in section 22 could in this case properly be between 1924 and 1948.

But with regard to the words "as of right" in the definition, I am bound by the observations made in the Court of Appeal in Beckett v Lyons 1967 1 Ch. 449: which were to the effect that to show that permission had never been asked or refused, "is very far from showing that the exercise of the privilege was under claim of right,.... that when the law talks of something being done as of right it means that the person doing it believes himself to be exercising a public right"; that the question is whether the Act was done by a person who "believes himself to be exercising a right or was merely doing something which he felt confident that the owner would not stop but would tolerate because it did no harm" (per Harman L.J.(at pages 468 and 469); and see also observations of Russell L.J. (at page 475).

In favour of the use of the Disputed Piece for sliding and skating and for games by children as described by Mr. Page and Mr. Windmill being "as of right" within the meaning of the definition:- Mr. Page had never heard of any permission being given or asked for; the land was never used in a manner wholly inconsistent with the public having rights over it. But against this:- After the erection of the fence and the levelling of part of the pond, sports and pastimes ceased; although when the fence was put up there was quite a bit of backchat in the Village about it, Mr. Page had no knowledge of anybody ever complaining to Mr. Marriott. No evidence was given as to who had been the owner of the Disputed Piece from time to time; but I must I think infer from the agreed present ownership of the Objectors that the Disputed Piece has at all material times been privately owned land.

Even assuming in favour of the Council that in legal proceedings before 1948 the Court would have found that the inhabitants of the Village had a right to go on the Disputed Piece for the purpose of getting water (and indeed may still have this right, although it is now useless because of the piped water supply) or that the public had a right to pass over it because being open to the highway, it ought to be regarded as part of the highway, I cannot I think on these assumptions infer that the inhabitants were "as of right" indulging in sports and pastimes on it. Balancing the conflicting considerations outlined above I conclude that the sports and pastimes on the Disputed Piece for any period before 1948 (when the fence was erected) amounted to no more than what an ordinary owner would tolerate because it did no harm, and cannot therefore be regarded as being "as of right"; accordingly the Disputed Piece is not properly registerable under the Act.

For the above reasons I confirm the registration with the modification that of the two pieces of land which are comprised in this Register Unit and which are separated by a metalled carriage way and a fence (now somewhat dilapidated) that which is situated on the north-east side of the said carriage way be removed from the Register.

I reject the submission made by the Objectors that I should order the Council to pay their costs of these preceedings. A person who applies for registration under the Act of any land is not I think merely by reason of having made such application, at least if it be made in good faith and upon reasonable grounds, at risk as to costs. Whether such a person should be ordered to pay costs, must I think depend on events subsequent to the application. The grounds stated in the Objection as quoted above are all irrelevant to this decision. I consider that the Council acted reasonably when they applied for registration and when they took no steps to prevent this public inquiry being held.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous <u>in point of law</u> may, within 6 weeks from the date on which the notice of the decision is sent to him, require me to state a case for the decision of the High Court.

Dated this 4th day of January 1973

a. a. Baden Fuller

Commons Commissioner