

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS ERW
GOCH FIELD ADJOINING HAFAN Y WAUN, WAUNFAWR, ABERYSTWYTH
SY23 3AY AS A TOWN OR VILLAGE GREEN UNDER SECTION 15(2) COMMONS
ACT 2006**

**INITIAL REPORT OF INDEPENDENT BARRISTER
ASSESSOR TO COMMONS REGISTRATION AUTHORITY**

INTRODUCTION

1. On 24 February 2021 Ceredigion County Council, in its capacity as commons registration authority under the Commons Registration Act 1965 and the Commons Act 2006 (“the Registration Authority”), received an application (“the Application”) to register land known as Erw Goch Field adjoining Hafan Y Waun, Waunfawr, Aberystwyth SY23 3AY (“the Land”) as a Town or Village Green (“TVG”) under section 15(2) of the Commons Act 2006.
2. The Registration Authority considered that the Application did not comply in full with the relevant statutory requirements with the result that further details were requested from the applicant. On 20 May 2021, following the submission of those further details, the Application was accepted. It follows that the formal date of the Application is 20 May 2021.
3. I understand that the Registration Authority subsequently advertised the Application and gathered representations in accordance with the procedure set out in The Commons (Registration of Town or Village Greens) (Interim Arrangements) (Wales) Regulations 2007. Representations for and against the Application have been received, including representations objecting to the Application from Ceredigion County Council as landowner (“the Landowner”).
4. Following the above, on 8 July 2022 the Registration Authority (as Full Council) considered the Application alongside an officer’s report (“the OR”). The OR advised the Registration Authority that there are no formal procedures in place for determining applications for the registration of TVGs but referred to paragraph 42 of a guidance document from the Welsh Government entitled “Guidance notes for the completion of

an application for the registration of land as a Town or Village Green” (“the Guidance”). The relevant extract provides:

“42. The registration authority may decide to inquire into the application. This may take the form of a hearing before an officer of the authority or of a neighbouring authority, or the case may be heard before a committee of the authority. Alternatively, an independent inspector may be asked to conduct a public inquiry. A hearing or inquiry is particularly likely if the registration authority or another local authority owns the land so that the evidence may be tested impartially. The Court of Appeal has ruled that in determining applications where there is a dispute the registration authority should consider convening such a hearing or inquiry.”

5. On 8 July 2022 the Registration Authority, in accordance with the recommendation in the OR, went on to resolve as follows:

*“a) authorise the appointment of a Barrister to act as an independent assessor;
b) that the Barrister advises on the merits of the application for registration of the Land as Town or Village Green;
c) subject to the advice provided in (b), that the Barrister hold a Public Inquiry or such other hearing as advised by the Barrister, the findings of which and recommendation will be reported back to the Council for decision on the application to register the Town or Village Green.”*

6. The Registration Authority’s legal department has accordingly instructed me, a barrister, to act as an independent assessor.

RECOMMENDED NEXT STEPS

7. As I understand the resolution above, (c) requires me hold a public inquiry (or such other hearing as I advise) into the Application but this is subject to the advice on the merits I am first required to give under (b). This note therefore contains my advice under (b) so that, in light of this, the Registration Authority can consider whether it wishes to proceed to (c), or some alternative course of action such as that recommended below.
8. I have reviewed the Application and the representations made for and against the Application. In light of this:
 - (a) I confirm that I have not identified any reason why the Application has not been validly made and why it should not – therefore – be determined on its merits.

(b) With the exception of the point addressed at (c) immediately below, my recommendation to the Registration Authority as to how it should determine the Application will depend how I consider various disputes of fact should be resolved. This means that it is appropriate for the evidence to be tested through cross-examination at a public inquiry. Indeed, as per the Guidance above, the robust testing of the evidence is particularly important in this case given that Ceredigion County Council is both decision-maker (in its capacity as Registration Authority) and landowner. As such, I do not consider it would be helpful, or fair, for me to comment further at this early stage on the apparent strength of the evidence in support of and/or against the Application.

(c) One of the Landowner's objections to registration is based on the "statutory incompatibility" doctrine developed by the courts in a series of relatively recent cases. This is essentially a question of law (as confirmed by the Supreme Court in *Lancashire County Council v Secretary of State for the Environment, Food and Rural Affairs* [2019] UKSC 58) and so will not benefit from cross-examination. Rather, as a point of law it is best addressed through legal submissions. Further, if the Landowner's objection in this regard succeeds, the law requires that the Registration Authority reject the Application. Accordingly, it seems to me that the Landowner's proposal of dealing with the question of statutory incompatibility as a preliminary issue is sensible. Furthermore, I see no reason why the issue cannot adequately and fairly be dealt with in writing.¹ This will benefit all parties, as well as the Registration Authority, since if my advice is that the statutory incompatibility defence succeeds (and the Registration Authority goes on to accept my advice in this regard), the time and expense of a public inquiry can be avoided.

9. Accordingly, I recommend that the Registration Authority authorises the following way forward in respect of determining the Application:

(a) The independent barrister assessor to consider as a preliminary issue, and by way of written representations (unless the barrister subsequently considers that a hearing

¹ I add for completeness that in so far as any question of fact arises, based on the representations and materials I have seen so far, I consider it could be adequately and fairly addressed in written submissions.

or inquiry would be more appropriate), whether the doctrine of statutory incompatibility prevents registration of the Land as a TVG;

- (b) The independent barrister assessor to write a report setting out her recommendation as to whether the Landowner's statutory incompatibility defence succeeds. The report is to be shared with the parties, and made publicly available;
- (c) If the independent barrister assessor's report referred to at (b) advises that the statutory incompatibility defence succeeds, such that recommendation made to the Registration Authority is that it should not register the Land as a TVG, the Application shall at that stage be considered by the Registration Authority for decision;
- (d) If the independent barrister assessor's report referred to at (b) advises that the statutory incompatibility defence fails, she shall go on the hold a public inquiry to examine the remaining issues. Following the public inquiry, the independent barrister assessor shall provide the Registration Authority with a report which sets out her analysis of the evidence and recommendation as to whether the Land should be registered as a TVG. The Application shall then be considered by the Registration Authority for decision.

10. I would add that I am mindful that the statutory incompatibility doctrine is a highly specialist and technical area of law. As such, assuming the Registration Authority approves the course of action I advise in this document, I intend to give both parties a further opportunity make any additional written submissions on the issue, with the applicant given sufficient time to seek professional legal assistance in this regard should she wish.

11. Finally, and for the avoidance of doubt, I note that as an independent assessor it is my role to consider the Application, and the evidence for and against it, and make a recommendation to the Registration Authority as to how it should determine the Application. It follows that I am not the decision-maker but an advisor – it is ultimately for the Registration Authority to determine the Application as it sees fit, having taken account my recommendation and the reasons for it.

KATHERINE BARNES

2 September 2022

39 Essex Chambers