

Second Interim report of Burnham Overy Parish Council (BOPC) Advisory Committee on 77 Acres

Since the first report the Advisory Committee have received further legal advice and met to assimilate and review information and advice relating to the 77 Acres and ½ Island ('The Land'). They have also met with Peter Mitchell of Holkham. Some of the members of the group have attended SHADRA meetings.

The purpose of this report is to brief BOPC on what has come out of this research to assist them in deciding next steps regarding The Land.

N.B. The Land does not include the creeks

BOPC have been informed by Scolt Head and District Common Rights Holders Association (SHADRA) that SHADRA believe BOPC own The Land and should take steps to register it in their name

A summary of the main reasons given by SHADRA (at meetings and in various emails and documents) for BOPC to own The Land are

1. SHADRA have presented documents which they believe prove that BOPC is the rightful owner of the Land*
2. SHADRA have suggested that BOPC would be misappropriating parish assets if they did not take on ownership
3. BOPC ownership would protect it for future generations in a way that Holkham owning it does not
4. The suggestion that Holkham could give The Land to BOPC
5. The belief that Holkham are not managing The Land well

BOPC need to decide if it is in the best interests of our community own The Land

Is BOPC the rightful owner of The Land?

Evidence has been presented to BOPC by SHADRA which SHADRA believes proves that BOPC is the rightful owner of The Land. BOPC advice is that the evidence presented is not sufficient to prove ownership. The cost of further investigation would be '*at least £1500*'. Holkham state that '*the legal advice received by the Estate has consistently been that any challenge made by BOPC to Holkham's recent registration of the land would not be successful*'.

BOPC have been advised that '*the basis of ownership of this land is complex*' and that there is '*no basis to suggest any wrongdoing on behalf of the Estate*'. BOPC is told that '*one of the risks of taking on the land would be significant legal expenses*' and could '*cost as much as £5,000 plus land registry and other fees*'. SHADRA has suggested that the only cost would be £40 to fill in a form to challenge Holkham's first registration. However, BOPC's advice is that '*the costs involved are primarily in drafting the documentation and in taking the challenge to the Land Tribunal; the direct Land Registry fee is almost incidental*'. However, it would be '*considerably less costly*' if there was no need for a challenge, but would not be only £40.

In conclusion: Holkham are firmly advised that their registration in 2016 of the land was lawful and valid. Holkham has found no evidence that would overturn the validity of its registration of the Land but continues to be willing to work with BOPC if BOPC wants to step forward with a clear claim and a

clear plan for managing the Land. BOPC is advised that it would be costly to find out if they are the lawful owner and the evidence presented so far is not sufficient to prove either way.

Would BOPC be misappropriating parish assets by not owning land

Legal advice is that BOPC *'do not have a duty to...hold this land'*.

The Parish Council would not be misappropriating parish assets by not owning the Land – *'There is no logical legal path between the Parish Council making the decisions set out above (to take on the Land) and any suggestion of misappropriation'*. Misappropriation involves a councillor *'using parish assets or funds as his or her own'* which is not the case here.

In conclusion: Not taking on The Land does not amount to misappropriation.

Would becoming legal owners of the Land protect it for future generations any more than it is already protected by virtue of being Common Land?

The strongest argument, cited in our first report, for BOPC taking legal ownership of the Land is that by doing so we would be able to 'protect it for future generations' and by not doing so we put its future at risk. BOPC understands that:

1. The very fact that the Land is registered Common Land is what protects it and keeps it accessible to all in perpetuity
2. Common Land is held in charitable trust for its beneficial owners. The beneficial owners are the Common Rights Holders and their rights are protected by virtue of the land being registered Common Land
3. The Legal owners hold common land for the benefit of the Common Rights Holders
4. Neither the legal owners (whoever they may be) nor the common rights holders can prevent Natural England from exercising their extensive statutory powers. The key powers effectively remove all rights of owners of the Land, subject to compensation. It is very rare for these powers to be exercised

Thus, there is virtually nothing that could stop the common rights holders from accessing The Land. In that respect, it is immaterial who owns it and whether it be Holkham or BOPC, the common rights holders retain access.

HOWEVER

There is a legitimate concern that access to The Land could be stopped for non common rights holders. It could be designated 'restricted access' by Natural England. The decision on this is presently with the Secretary of State.

'Restricted access' is not as bad as it sounds. Whilst this would prevent The Land opening up for all walkers, day trippers etc, Holkham as owner could maintain the status quo of informal consent for those other than common rights holders to access the land. (Common rights holders do not need the landowner's consent as they have beneficial rights).

The fear is that, in the future, political or countryside management or other changes could prompt Holkham to withdraw this informal consent denying parishioners other than common rights holders' access to The Land. This would be very unwelcome locally. Though it is unclear how this could practically happen or how anyone could prevent access to The Land.

Holkham are willing to send BOPC a letter signed by Lord Leicester guaranteeing that they will not remove informal consent for access to The Land.

In conclusion: The risk for future generations of non common rights holders losing access to the land comes from the risk that at some time in the future Holkham could withdraw their informal consent to access The Land. They have no intention to withdraw this and are willing to write a letter signed by Lord Leicester confirming this.

What if Holkham surrendered the land to the Parish Council?

It is the case that a letter alone might not have legal standing. If BOPC owned the land they could ensure that informal consent was always in place protecting parishioners' rights of access for ever.

Holkham have previously offered to *'explore whether the Estate could or should step back from the registration of the land'* but they point out that the legal owner would need to instruct a qualifying organisation to manage the National Nature Reserve, deal with the ongoing Coastal Access Proposals and think through carefully boundary matters as well as manage the land with the common rights holders. The door is open for BOPC to take ownership, but it is not straightforward or cost free.

If BOPC owned The Land, as legal owner they would then be responsible for managing it together with the common rights holders. There are many duties and liabilities that come with this relating to the fact that it is an Area of Outstanding Natural Beauty and a Site of Special Scientific Interest and a National Nature Reserve. To do this, BOPC would need to set up and run a charitable trust. We would need to agree with the common rights holders how the land should be managed and by whom. We would also have to manage conflicts of interest.

By Holkham remaining landowner all these difficulties are obviated. If BOPC took on The Land, one way to ensure it was managed in accordance with requirements would be to lease it straight back to Holkham but we have been advised against the course on the grounds that it would be expensive and somewhat pointless.

BOPC is advised that they should not take ownership of the Land because it will expose us to liability, cost and complexity and divert time and financial resources away from the parish whilst making no difference to the accessibility and protection of The Land. The strong advice is that BOPC should not take on an asset without being sure they have sufficient resources to continue with the management and maintenance of the asset. The concern is that, should we take on the land, it will not in fact benefit the poor. Our advice is that the opposite could take place as so much time and resource will need to be put into it, we will not be free or resourced to act in the best interests of our community on other matters.

In conclusion: It would be possible to ask Holkham to explore surrendering The Land to BOPC and they have indicated that they might agree but it would entail further significant time and financial costs detracting from the community. BOPC is advised against pursuing this route.

Management of the Common Land

Management of the creeks and moorings remains an issue and is concern for many villagers and common rights holders Holkham advise that they own the creeks and plan to register them. As BOPC do not own the creeks they can only have influence as a stakeholder here, not control.

At the time of writing BOPC has not received a response from SHADRA to our letter agreeing to meet to discuss management as proposed in our first report. This letter was read out at the August SHADRA meeting.

Summary

It is the responsibility of BOPC to act in the best interests of our community as a whole.

There are some very strong and genuinely held feelings amongst people within and outside our community that Holkham is not the legal owner of The Land and that BOPC is the rightful owner. Holkham are registered as owners of The Land and advised that they are the rightful owners. There is a desire amongst some people for BOPC to accept Holkham's offer to explore the possibility of surrendering The Land to them.

The strongest argument for this is that such ownership would afford cast iron protection for access for future generations. However there are also very persuasive arguments against taking on The Land. There is a clear commitment from Holkham that they have no intention of ever limiting access and they will confirm this in a letter.

BOPC take their responsibility to future generations seriously but have been advised not to own The Land.

Next steps

The main perceived risk relating to future generations is if Holkham (for unforeseeable reasons) remove the informal consent for non common rights holders to access The Land. There is no suggestion whatsoever that Holkham have any intention of doing this. BOPC need to decide if they consider this a genuine risk, if the letter from Holkham is sufficient reassurance and if in any event they consider there is any practical way access to local people could be restricted whilst allowing it for common rights holders.

If BOPC consider a letter alone from Holkham is not sufficient, it would seem a sensible next step to explore through further meeting with Holkham and further legal advice if there are ways the informal consent to access The Land can be legally and permanently guaranteed without BOPC taking on the costs and complexity of owning The Land. This way we could protect The Land for future generations but avoid taking on ownership of The Land against our legal advice.

12.09.2019

* CORRECTION : It has been brought to the notice of the committee that in fact a member of the public presented the documents to BOPC not Scolt Head & District Common Right Holders Association. 18.09.2019