

Recommendation report of Burnham Overy Parish Council (BOPC) Advisory Group on 77 Acres and half island

1. Introduction

- 1.1. The purpose of this report is to review all advice and information and research on the 77 acres and half the small island known as Rabbit Island opposite Quayside (shown on the attached map) and registered to Lord Leicester of Holkham Estate and to make a recommendation to Burnham Overy Parish Council as to whether or not to challenge the registration.
- 1.2. For ease of reference the area shown on the map will be referred to as 'The Land' and Lord Leicester of the Holkham Estate will be referred to as 'Holkham'. Burnham Overy Parish Council will be referred to as 'BOPC'.
- 1.3. The Advisory Group who prepared this report and have met on a number of occasions and prepared two interim reports is made up of three Parish Councillors, one ex Parish Councillor with extensive knowledge of the history of the matter and the clerk. Two of the members of the Advisory Group are Common Rights Holders.

2. Background

- 2.1. The Land is part of CL65 which is an area of Common Land extending across the whole of Overy Marsh and includes Scolt Head. The area in question is the marsh (but not the creeks) to the West of (and not including) The Cockle Path and half the island shown shaded on the map attached.
- 2.2. Common land is land that, legal ownership notwithstanding, is available for the use and enjoyment of all. The public have rights to air and exercise over common land. In the case of CL65, common rights holders have the additional rights including the right to take wildfowl, fish, samphire etc. BOPC's lawyer explains '*Transferring the shares of legal ownership from Holkham to the Parish Council cannot change who benefits from the Common*'.
- 2.3. On 11 November 2016 a member of the public raised the question as to whether Holkham were the legitimate legal owner of The Land. The member of the public believed that BOPC should own it in its entirety for the benefit of the poor of the parish.
- 2.4. The Advisory Group have taken legal advice, had discussions with local common rights holders, met with Holkham representatives and taken advice from the Open Spaces Society and given the matter thorough and detailed and time consuming consideration in keeping with the obligation to act in the best interests of the community. They have given very careful thought as to whether it would be to the benefit of the community to challenge the registration of The Land.

3. Ownership of The Land

- 3.1. Holkham are the current Registered Legal Owner
 - 3.1.1. Holkham are the registered owners of The Land. The Advisory Group have been advised by their lawyer that '*there is no basis to suggest any wrongdoing on behalf of the Estate (Holkham)*' (22 Jan 2019). In a letter from Holkham dated 8th November

2018 they indicated that they had *'found nothing which demonstrates the 1922 Conveyance from Lord Orford to the 3rd Earl of Leicester was invalid'*.

3.1.2. Holkham have however noted (8 November 2018 letter) that the 7th Earl did treat The Land a bit differently and suggested that they could *'step back from the registration'* but that for reasons of management of the land by virtue of it being a National Nature Reserve, SSSI, Ramsar Site and AONB this would have to be thought through very carefully and they would want to understand BOPC's appetite for the consequences of such a change in legal ownership.

3.1.3. The legal situation is that Holkham are the legal owners of The Land as they have it registered at the Land Registry and provided a root of title to gain registration.

3.2. Complexities of Ownership

BOPC lawyer has explained in a letter dated 26 Feb 2021 that the situation regarding ownership of The Land is highly complex and very unusual. He explained that because of the history and designation of The Land, any owner of it has a complex web of duties:

- The Land is held in trust and the owner has duties under the Inclosure Act 1845;
- It is subject to rights of common in common law which creates legal duties, which are separate, and in addition to the duties that the owner has as trustee under the Inclosure Act.
- Owners of The Land are subject to the supervision of Natural England.
- Finally, the specific regulations for the protection of the land are separate again and also create further duties that the owner *'must'* undertake.

Over and above these duties, as a Parish Council, BOPC would have additional duties. It is a complex matter to attempt to meet all the duties, some of which conflict with each other.

3.3. There is a question over whether BOPC should be the Registered Legal Owner

The member of the public who raised this, presented documents which he believed suggested that BOPC should hold The Land for the benefit of the poor. Others consulted suggested that if Holkham did not own it, it was owned three or four ways. The matter is clearly not straightforward, and time would need to be spent by lawyers to unravel it. BOPC lawyer states that the evidence provided by the member of the public is not sufficient to prove things either way. He also explained that some of the statements by the member of public as to the law are incorrect e.g. The Land did not pass to BOPC under the Local Government Act of 1894. A full investigation would cost at least £1500 plus VAT (21 Jan 2019). Whilst the BOPC lawyer states that he has sympathy for the correspondent, he points out that in his experience the necessary work to prove ownership can be *'painstaking, time consuming and fruitless'* (22 Jan 2019) and that nothing in the papers available is sufficient to prove the claims made about the land.

The Advisory Group considered in detail whether this would be a worthwhile expense for the Parish Council.

3.4. BOPC are advised against challenging the registration

3.4.1. The BOPC lawyer has made it clear that BOPC have no obligation to challenge the registration of The Land, and it is not a core object for them to have legal ownership. He has also explained that as The Land is part of common land and covered by the Inclosure Act it has to be held in trust and *'the legal shares in an asset held in trust are less important than they intuitively look,'* and that *'Transferring the legal shares from Holkham to the Parish Council cannot change who benefits from the Common.'* (12 July 2019).

3.4.2. In Feb 2021 he advised *'the reason that I have so strongly advised against the Parish Council's involvement is that taking on the Common land creates multifaceted duties with their related expense despite not creating a particular benefit to anyone.'* He concludes *'I have also taken the time to confer with other lawyers and discussed the Parish Council's options with them. They concur that there does not appear to be sufficient public benefit available to justify the Parish Council taking this decision...'*

3.4.3. The Open Spaces Society advise that *'the more the detail of the proposal emerges, the more difficulties begin to loom'* (19 June 2020).

3.4.4. BOPC have to act in the best interests of the whole community and in the public benefit and the Advisory Group have been unable to identify any meaningful benefits.

4. The Consequences of BOPC taking on Legal Ownership

If BOPC were to take on legal ownership, nothing would change regarding access to The Land as far as the public and common rights holders are concerned.

4.1. Negative Consequences of having legal title

There would be significant financial and time resource consequences for BOPC.

4.1.1. The legal owner is responsible for management of The Land with the common rights holders- BOPC are not equipped either financially or with the skills, expertise and time resources to manage 77 acres of land. BOPC, as part legal owners of CL65, would have to manage The Land alongside the common rights holders and other landowners resulting in conflicts of interest and unnecessary extra complexity.

4.1.2. The legal owner has multifaceted duties (with related expenses) towards the Common Rights Holders, under the Inclosure Act and towards Natural England

4.1.3. BOPC are not approved to manage a Nature Reserve -The Land is part of a National Nature Reserve, SSSI, Ramsar and ANOB. For this reason, if BOPC were legal owners, they would have to appoint an approved body to manage the land under s.35 of the Wildlife and Countryside Act. Holkham Nature Reserve Limited (HNR) is such an approved body so BOPC would have to lease The Land back to HNR or set up a management agreement with them (or another approved body) because BOPC are not an approved body under s.35 of the Wildlife and Countryside Act.

4.1.4. A separate charity to hold The Land would need to be set up and run indefinitely -To avoid conflicts of interest, and for legal reasons, BOPC would have to set up a separate charity to own The Land which would need its own trustees, accounts, meetings etc. At least six local volunteers would be required to act as Trustees of the charity (NP Law 8 September 2020 and elsewhere).

4.1.5. The costs would be more than BOPC annual budget- The legal fees to challenge the registration, set up the charity and arrange the lease back to Holkham would be in the region of £9,000 (including VAT) and could be more, with ongoing costs - time and financial- of managing the charity. For reference, the precept (annual amount BOPC gets from the Borough Council) was £7,243 in 2019/2020.

4.1.6. It would cost parishioners money -These costs would have to be added to the precept which is recouped through council tax so each parishioner would have to pay extra for something they already have for free.

4.1.7. It would use up valuable time resources –setting up, running a charity, dealing with lawyers, leases, regulatory bodies etc. would use up considerable time of our Parish Clerk and our volunteer councillors. The Parish Clerk’s time is charged to the parish, and ultimately the parishioners, and we cannot be sure in our very small parish to have volunteers willing to give up the time required either initially or on an ongoing basis.

4.1.8. There are other risks - BOPC is advised that it would be taking regulatory, reputational, financial, and potentially democratic risks in taking legal ownership of The Land and strongly advised against doing so by both their lawyer (14 June 2019, 21 Feb 2021) and the Open Spaces Society advisor (19 June 2020)

4.1.9. Neither Holkham nor BOPC have power over Natural England Regardless of who the legal owner is, Natural England could use statutory powers to prevent access to The Land. This is a rare occurrence and they would have to pay compensation to CL65 Common Rights Holders should they do this.

In summary: there is no clarity of ownership (other than the registration to Holkham); it would be expensive and complex and time-consuming for BOPC to challenge and take on the legal ownership of The Land. In addition, BOPC’s very strong legal advice is not to do it. Parishioners would have to pay for it through increased precept and there would be ongoing costs and risks. The Land would have to be leased back to Holkham for regulatory reasons so the costs and time would be expended for no change in the management or public access to The Land.

5. Are there any benefits to taking legal ownership?

The Advisory Group considered very carefully whether there are any benefits to BOPC taking on legal ownership. Some benefits have been put forward by those believing BOPC have ownership of The Land. These are set out below but the Advisory Group did not find any of them convincing.

5.1.1. ‘It would protect the land for generations to come’ but this has been achieved through the land being designated Common Land and the Advisory Group were advised by NPLaw that BOPC having legal ownership of The Land would not *‘protect it for generations to come for ‘the poor of the parish’ because the very fact that it is Common Land held in a charitable trust achieves that’* (2 Aug 2019).

5.1.2. It would prevent Holkham ever denying access -In very limited circumstances the legal owner could, in theory, deny the current informal access to the public (not Common Rights Holders) to The Land. One suggestion was that if BOPC were the legal owner they would never do this, whilst it is conceivable that Holkham would. The Advisory Group recognise this as a very minimal risk but consider it not sufficiently significant to overcome the other negative consequences listed above and for all practical purposes it would be almost impossible to police or prevent those who wanted to access The Land.

5.1.3. It would give BOPC a ‘seat at the table’ when it comes to other matters concerning The Land. This is perhaps the strongest argument however Parish Councils are

recognised both in 'A Common Purpose' (the proposed protocol for arriving at a sensible management approach to common land) and in Harris and Ryan (a reference book on Common Land) as stakeholders who should be consulted so BOPC have a 'seat at the table' as an active stakeholder.

It is the view of the Advisory Committee that there is no meaningful advantage to taking legal ownership of The Land.

6. Conclusion

The Advisory Group have found no convincing evidence that BOPC are the rightful owners of The Land. BOPC conclude that the time and financial costs of investigating it further and then acting on it are unwarranted because BOPC having legal ownership would make no difference to the rights of the public and common rights owners over The Land, nor to the management of it. The many negative consequences of having legal ownership cannot be justified.

It is the conclusion of the Advisory Group that BOPC should not challenge the registration of The Land (or otherwise take on legal ownership) because it is not in the public benefit to do so. There would be no practical difference to the accessibility of The Land and yet the considerable costs would have to be passed on to the parish. Paradoxically, taking legal ownership would incur a cost to 'the poor of the parish' who already have rights over The Land.

In short, it is not in the interests of the community of Burnham Overy Parish or in the public benefit for BOPC to have legal ownership of The Land. BOPC have no obligation to challenge the registration and have been strongly advised against it by their legal advisors.

7. Recommendations

The Advisory Group recommend to BOPC that they debate the following proposal.

'BOPC thank the member of the public for raising the question of the ownership of Overy Marsh NK419143 and half the island NK458567. After very careful consideration BOPC will not challenge the registration because it is not in the best interests of our community or in the public benefit.'

In the light of there being incorrect and incomplete information on this matter in the public domain, the Advisory Group suggest providing the attached letter to all parishioners.

77 Acres Advisory Group March 2021

