APPLICATION TO REGISTER LAND KNOWN AS SOUTHWICK COURT FIELDS AS A TOWN OR VILLAGE GREEN.

ADVICE

1. I am asked to advise Wilshire Council ("the Council") in its capacity as commons registration authority ("the CRA").
2. I have been asked to advise the CRA in respect of its determination of an application to register as a town/village green land at Southwick Court Fields, located in the parishes of Southwick and North Bradley, Trowbridge.
3. That application has been given a reference 2020/02TVG by the CRA.
4. There is a lengthy procedural history to this application which is relevant to the matters I am asked to advise upon. It is necessary for me to set out a summary of that procedural history in this advice.

Application made on 13 January 2020

5. On 13 January 2020, an application was made to the CRA under s.15(2) of the Commons Act 2006 to register as a town/village green, land at Southwick Court Fields, Trowbridge. The application was made by Mr Norman Swanney and was dated 13 January 2020.
6. The application was acknowledged as having been received by the Council by letter of 13 January 2020. No identification number was given in respect of that application, at that stage.
7. The Council thereafter made enquiries of planning officers within the Council and of the Planning Inspectorate ("PINS") concerning whether any trigger event had occurred in respect of the land sought to be registered as a town/village green. On 19 February 2020 both PINS and Mr. Geoff Winslow, of the Council's Spatial Planning Team, responded to the enquiry made of them. Both stated that a trigger event had occurred, but no corresponding terminating event had occurred, in respect of the relevant land. The trigger event identified by both the Spatial

Planning Team and PINS was the trigger event set out in para.3 of the Schedule 1A of the Commons Act 2006 and it concerned the allocation of land for development in the emerging Wiltshire Housing Site Allocations Plan.

8. That there was a trigger event, and no corresponding terminating event, was accepted by the CRA. On 24 January 2020, the CRA wrote to Mr. Swanney to inform him that a trigger event was in place when he made his application on 13 January 2020. In that letter, the Council said as follows:

> "The land at Southwick and North Bradley subject to the Town/Village Green application, forms part of an allocation for development (Site H2.6), as set out in the draft Wiltshire Housing Site Allocations Plan (WHSAP). The WHSAP has been through a public consultation and extensive preparation process resulting in an independent examination process conducted by a Planning Inspector appointed by the Secretary of State. The Inspector's report concluded that subject to a series of recommended main modifications being made, the WHSAP (including the allocation of Site H2.6) is sound and legally compliant. The Inspector's Report was considered by Cabinet on 4 February and a report with a recommendation to formally adopt the WHSAP, will be presented to the Council at a Full Council meeting on 25 February.
>
> Therefore, planning trigger event 3, as defined in Schedule 1A of the Commons Act 2006 has been engaged and where there has been no terminating event, the application **cannot** be accepted and progressed to determination.
>
> I therefore return your application. A copy of the application form and plan is attached to the emailed copy of this letter and your original application in full will be returned to you by post. I understand that this will be very disappointing for you, however, until this trigger event is terminated it will not be possible to apply to register the land under section 15 of the 2006 Act." (emphasis as original)

9. The 13 January 2020 application was returned.

Application made on 11 June 2020

10. By letter of 11 June 2020, Mr. Swanney submitted a further application form for the registration of Southwick Court Fields as a town/village green. The application was made under s.15(2) CA 2006.
11. Mr. Swanney, in his letter of 11 June 2020, states that he was "re-submitting" his application. The application form sent to and received by the CRA on 11 June 2020 was dated 13 January 2020.

12. Confirmation of the receipt of the application sent on 11 June 2020, in electronic form, was given by the CRA to Mr. Swanney on 12 June 2020. Confirmation of the receipt of the paper copy was given by the CRA to Mr. Swanney on 22 June 2020.
13. No identification number was given at this stage in respect of the application.
14. As before, the CRA undertook checks with PINS and with its planning officers concerning trigger and terminating events.
15. The response from the Council's development control team (email of 23 June 2020) confirmed that "... an outline planning application for residential development on a large part of the site was received on January 15th 2020. ... So if the application to register the land as a VG was received after January 15th, it would be my view that a trigger event has occurred." It appears that the application for outline planning permission was first publicised in accordance with the relevant statutory procedures on 17 January 2020 (see Inspector's report para.16). The Council's Spatial Planning Manager, Geoff Winslow, responded to the CRA by letter of 1 July 2020. In that letter, Mr. Winslow stated as follows:

"Having considered the application I am writing to confirm that trigger point 4, as defined in Schedule 1A to the Commons Act 2006 has been engaged.

The land, the subject of the above application, forms part of an allocation for development (Site H2.6) set out in the Wiltshire Housing Site Allocation Plan (the WHSAP) which was formally adopted by the Council on 25 February 2020.

..."

16. On 7 October 2020 the CRA wrote to Mr. Swanney. In the CRA's letter, it was stated as follows:

"The land at Southwick and North Bradley subject to the Town/Village Green application has been allocated for development within the Wiltshire Housing Site Allocations Plan (WHSAP) The WHSAP was formally adopted by Wiltshire Council on 25th February 2020. The adoption of the WHSAP was not challenged through the courts and hence the document is recognised as forming part of the development plan for Wiltshire. It is therefore concluded that trigger point 4 as set out at Schedule 1A of the Commons Act 2006 has been engaged.

Additionally, planning application no.20/00379/OUT, an outline planning application for residential development, received on 15th January 2020, affects a

large part of the site. The planning application pre-dates the town/village green application and is not yet determined, therefore trigger event point 1 as set out at Schedule 1A of the Commons Act 2006 is also engaged over that part of the land.

I am therefore returning your application. I do of course understand that this decision will be very disappointing to you, however, until these trigger events are terminated by a corresponding terminating event, (please see Schedule 1A of the Commons Act 2006), it will not be possible to apply to register the land as a town/village green under Section 15(1) of the 2006 Act."

Application received on 30 November 2020

17. By a letter of 29 November 2020, Mr. Swanney sent to the CRA further application.
18. The completed application form appears to have been identical to the form sent to the CRA by Mr. Swanney on 13 January 2020 and again 11 June 2020, save that the date, included in section 11 of the form of 13/1/2020 is struck through in manuscript and a further date of 23 January 2020 has been added.
19. The CRA corresponded with the Council's planning department and with PINS, as before. On 14 December 2020, Mr. Wilmott, Head of Development Management at the Council, wrote to the CRA by email to confirm that the application for outline planning permission submitted in January remained before the Council. In the same email Mr. Wilmott referred to the adoption of the WHSAP in February 2020, for which there had been no corresponding terminating event. Mr. Winslow, on behalf of the Council's Spatial Planning department, replied on 11 March 2021 confirming that a trigger event had occurred with no corresponding terminating event. The trigger event referred to by Mr. Winslow appears to be the allocation of land by the Wiltshire Housing Site Allocations Plan (WHSAP).

20. On 6 May 2021 the CRA wrote to Mr. Swanney as follows:

"Further to the resubmission of your application to register land known as Southwick Court Fields (Southwick and North Bradley Parishes), as a Town or Village Green (TVG), Wiltshire Council, as the Commons Registration Authority (CRA), has now received replies from the relevant Planning Authorities following consultation regarding planning "trigger" and "terminating" events in relation to the land. It appears that there are planning trigger events in place over part, but not all of the application land, which have the effect of extinguishing the right to apply to register part of the land as a TVG without relevant terminating events which would revive the right to apply.

DEFRA Guidance .... advises that where the exclusion applies to only part of the land, for the portion of the land not subject to the exclusion, the application should proceed as usual. Therefore, the application has been accepted in part and has been allotted application no. 2020/02TVG, received by Wiltshire Council on 29 November 2020. Please find enclosed notice of this in the form of "Form 6", with attached map showing the extent of land over which the application is accepted. ...

I note the representations in your email dated 29th November 2020 and I have attached a full reply regarding the issues raised as an additional document appended here.

...".

21. The application was thereafter allotted an identification number and was publicised in accordance with the legislative requirements. The landowner objected to the application. A non-statutory public inquiry was then held before an Inspector, William Webster, of counsel. Mr. Webster's report ('the Report") is dated 9 February 2024. He recommended that the land should not be registered as a town/village for reasons summarised in para.193 of the report, namely that it had not been shown that the land had been used for lawful sports and pastimes or for a sufficiency of lawful sports and pastimes so as to justify its registration in pursuance of Mr. Swanney's application.
22. The CRA has not yet reached a decision on the application.
23. I have been asked to consider various procedural matters arising from Mr. Swanney's application and the Inspector's consideration of these matters. However, before doing so, it is necessary for me to set out some of the legislation concerning the making and the determination of applications to register land as a town/village green.

Commons Act 2006 and the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007/457

24. By s.15(1) of the Commons Act 2006, "Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green ...". The two bases on which an application may now be made pursuant to s.15(1) are then set out within s.15(2)-(3).

25. Mr. Swanney's applications were each made under s.15(2) CA 2006. S.15(2) provides as follows:

"(2) This subsection applies where–
(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
(b) they continue to do so at the time of the application."

26. By s.15C(1) CA 2006, " The right under section 15(1) to apply to register land as a town or village green ceases to apply if an event specified in the first column of the Table set out in the relevant Schedule has occurred in relation to the land ("a trigger event")." The "relevant Schedule" is Schedule 1A of the CA 2006. By s.15C(2), the right to apply to register land as a town/village green becomes exercisable again when a terminating event, corresponding to a trigger event, occurs, as set out in second column in the table in Schedule 1A.

27. The procedure for the "making" of an application under s.15 CA 2006 and the procedure to be followed by a commons registration authority when an application is made is set out in the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007/457 ("the 2007 Regulations"). The 2007 Regulations are made pursuant to s.24 CA 2006. A different procedure applies in "pioneer authorities', which the Council is not.

28. Regs.4 and 5 of the 2007 Regulations provide as follows:

"**Procedure on receipt of applications**
4.—(1) On receiving an application, the registration authority must—
(a) allot a distinguishing number to the application and mark it with that number; and (b) stamp the application form indicating the date when it was received.
(2) The registration authority must send the applicant a receipt for his application containing a statement of the number allotted to it, and Form 6, if used for that purpose, shall be sufficient.
(3) In this regulation, *"Form 6"* means the form so numbered in the General Regulations.

Procedure in relation to applications to which section 15(1) of the 2006 Act applies

5.—(1) Where an application is made under section 15(1) of the 2006 Act to register land as a town or village green, the registration authority must, subject to paragraph (4), on receipt of an application—

(a) send by post a notice in form 45 to every person (other than the applicant) whom the registration authority has reason to believe (whether from information supplied by the applicant or otherwise) to be an owner, lessee, tenant or occupier of any part of the land affected by the application, or to be likely to wish to object to the application;

(b) publish in the concerned area, and display, the notice described in sub-paragraph (a), and send the notice and a copy of the application to every concerned authority; and

(c) affix the notice to some conspicuous object on any part of the land which is open, unenclosed and unoccupied, unless it appears to the registration authority that such a course would not be reasonably practicable.

(2) The date to be inserted in a notice under paragraph (1)(a) by which statements in objection to an application must be submitted to the registration authority must be such as to allow an interval of not less than six weeks from the latest of the following—

(a) the date on which the notice may reasonably be expected to be delivered in the ordinary course of post to the persons to whom it is sent under paragraph (1)(a); or

(b) the date on which the notice is published and displayed by the registration authority.

(3) Every concerned authority receiving under this regulation a notice and a copy of an application must—

(a) immediately display copies of the notice; and

(b) keep the copy of the application available for public inspection at all reasonable times until informed by the registration authority of the disposal of the application.

(4) Where an application appears to the registration authority after preliminary consideration not to be duly made, the authority may reject it without complying with paragraph (1), but where it appears to the authority that any action by the applicant might put the application in order, the authority must not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action.

..."

29. I observe at this point, that the registration of land as a town/village green under s.15 CA 2006 is in response to an application made by a person. The obligation on a commons registration authority to process and to determine the application (as necessary) arises when an application is "made" (reg.5) and "received" (reg.4).

30. Neither the CA 2006 nor the 2007 Regulations set out any express procedure to be followed by a commons registration authority either to investigate whether a trigger or corresponding terminating event has occurred in relation to land which

is the subject of an application made and received in pursuance to s.15 CA 2006 nor what the commons registration authority should do if it concludes that a trigger event has occurred and thus the right to make an application has ceased to apply by reason of s.15C(1). Moreover, the legislation does not include any express provision as to the status of an application which has been made under s.15 and received by a commons registration authority, but it is subsequently determined that a trigger event has occurred in respect of all or some of the land which is the subject of the application.

31. It is clear enough however that the legislation requires a commons registration authority to reach a determination as to whether a trigger or corresponding terminating event has occurred; indeed, the DEFRA Guidance of December 2016 (para.73) confirms this.

32. It must follow from the legislative provisions that where an application under s.15 CA 2006 is made and received by a commons registration authority which the authority, following receipt, determines to be the subject of a trigger event (with no corresponding terminating event) in respect of *all* of the land the subject of the application, that application is not validly or lawfully made, since the right to make the application has "ceased to apply" by reason of the operation of s.15C(1). Thus, where a commons registration authority determines that such a trigger event has occurred affecting *all* of the land which is the subject of the application (and there has been no corresponding terminating event), it cannot lawfully proceed with the application or determine it. In such circumstance, and in practical terms, the commons registration authority should communicate this to the applicant (and others, as necessary or appropriate) and take no further action in respect of the application. In effect, once a commons registration authority has reached a determination that a trigger event has occurred and that an application is not valid, that brings that application to an end. The DEFRA Guidance (referred to above) generally accords with this approach in that, at para.75, it is advised that "if the right has been excluded for that land then the commons registration authority must refuse to consider the application". The Guidance continues at para.87 to advise that where there is a trigger event which affects all of the land

the subject of the s.15 application, "the application should not be accepted ..." (see also the Guidance at para.60).

33. Where a commons registration authority determines that a trigger event has occurred in respect of part only of the land which is the subject of an application made under s.15 and received by a commons registration authority (and where there has been no corresponding terminating event), then, in my view, the authority may proceed with and determine the application but excluding the area of land which is subject to the trigger event. That this is the case accords with the advice given by DEFRA at para.96 of the 2016 Guidance.

Procedure when an application made under s.15 CA 2006 is received

34. The first point I am asked to address is the procedure required to be followed by a commons registration authority when an application is made by an individual under s.15 CA 2006 and is received by the authority.

35. In non-pioneer areas, the procedure is set out in reg.4 of the 2007 Regulations. Regulation 4, which is headed "procedure on receipt of applications" provides that "on receiving an application" the registration authority "must":

    a. "allot a distinguishing number to the application and mark it with a number; and

    b. stamp the application form indicating the date when it was received".

36. By regulation 4(2), the commons registration authority "must" then send to the applicant a receipt containing the number allotted to the application (whether in the form of Form 6 or otherwise).

37. Regulation 4 is clear; a commons registration authority is required to take the steps set out in regulation 4 upon receipt of an application whether or not the authority takes the view that the application has been duly made (about which, see below) and no exception to this obligation is made to allow for the authority to complete checks required to determine whether a trigger event and terminating event has occurred. CRA here adopted a different approach in respect of the January 2020 and June 2020 applications and did not allot a number to those

applications upon receipt, pending completion of the trigger event check; it was wrong not to have done so.

38. To the extent that the DEFRA Guidance of 2016 at para.87 advises that a commons registration authority should not "formally accept or acknowledge receipt of an application" until it has confirmed whether the right to make the application has been excluded under s.15C by reason of the occurrence of a trigger event, that advice is wrong, in my view.

39. Regulation 5 of the 2007 Regulations provides further steps which a commons registration authority is required to follow upon receipt of an application. These include giving formal notice of the application to the landowner, etc. (reg.5(1)(a)). By regulation 5(4) these steps are not required to be followed (or may be deferred) if an application is considered not to have been duly made. If a commons registration authority either rejects an application as not having been duly made before complying with reg.5(1) or defers compliance with reg.5(1) to give the applicant a reasonable opportunity to put his/her application in order such that it becomes "duly made", I suggest that a precautionary notice, in the form of a letter, is sent to those who would receive formal notice under reg.5(1)(a) and to "every concerned authority" (see reg.5(1)(b)) informing them that an application has been received and giving them an opportunity to review the application (in this respect, see *R (Church Commissioners for England) v Hampshire County Council* [2014] 1 WLT 4555 per Arden LJ. at para.43).

40. Where after receiving an application and complying with reg.4 and possibly reg.5 of the 2007 Regulations, a commons registration authority determines that a trigger event has occurred in respect of the whole of the land sought to be registered as a green with no corresponding terminating event, such that the right to make the application ceases to apply, the application received is in substance invalid and the commons registration authority, having reached such a determination, can take no further substantive action in respect of it (see para. 32, above). The correct course would be to inform the applicant and the landowner, etc. of the decision and confirm that the application will not be proceeded with or determined.

41. As advised, above, if a trigger event has occurred which affects only part of the application land (and there has been no corresponding terminating event) the application can proceed but only in respect of the unaffected part. A commons registration authority should confirm its determination and the reasons for it in this respect to the applicant, the landowner and other affected persons. It is not necessary, in my view, for an application formally to be amended to reflect any such determination (although it would be open to an applicant, in response, to do so) nor is it necessary for the statutory declaration which accompanied the application to be replaced. As was confirmed in *Oxford City Council v Oxfordshire County Council and Robinson* [2006] UKHL 25, a registration authority is entitled to determine an application in respect of an area of land which differs from that applied for, so long as no unfairness arises.

The Application made on 13 January 2020 and potential trigger events

42. As I have recited above, the application received by the CRA on 13 January 2020 was determined by the CRA to be the subject of a trigger event which affected the entirety of the land sought to be registered with no terminating event. The CRA determined, following advice given by its spatial planning team and PINS, that a trigger event according with para.3 in Schedule 1A had occurred, namely a draft of a development plan document which identifies the land for potential development is published in accordance with regulations made under s.17(7) of the Planning and Compulsory Purchase Act 2004. Mr. Swanney, the applicant, was informed of this by letter of 24 February 2020. As I have recorded above, the application received on 13 January 2020 was not allotted a reference number before this determination was made.
43. I am instructed that the relevant draft development plan document – the Wiltshire Housing Site Allocations Plan (WHSAP) – was published for consultation pursuant to regulation 19 of the Town and Country Planning (Local Planning) Regulations on 14 July 2017. Therefore, for the purposes of Schedule 1A para.3, on 14 July 2019, a corresponding terminating event as set out in para.3, column 2 para.c had occurred by 13 January 2020, namely that "The period of two years beginning with the day on which the document is published for consultation expires". It follows,

on this basis, that the right to make an application under s.15(1) CA 2006 had not been excluded by operation of s.15C(1) on the date on which it was received by the Commons Registration Authority on 13 January 2020. Therefore, the CRA was wrong to have determined to the contrary and to have in substance found the application to be invalid, to have decided not to "accept it" and to return the application to the applicant, as it did on 24 February 2020.

44. However, and be that as it may, the CRA did so by its letter of 24 February 2020 and there was no claim for judicial review of its decision to find that s.15C(1) was engaged. The CRA cannot now unilaterally reverse the decision that it took on 24 February 2020; it is well established in law that "however wrong public law decisions may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction" (per Lord Donaldson MR in *R v Panel on Takeovers and Mergers ex parte Datafin plc* [1987] QB 815 at p.840). Given the passage of time, extending to well in excess of four years since the decision was taken by the CRA that the January 2020 application was invalid, any claim for judicial review brought now would be well out of time.

45. I should add for completeness that if there had in fact been a trigger event operating as a result of the WHSAP on 13 January 2020, the relevant allocation contained in that emerging plan affected only part of the land sought to be registered as a green. As such, the CRA would have been entitled even on this basis to accept and to proceed to determine the application in so far as it concerned the part of the land unaffected by the allocation. However, that was not the decision of the CRA taken on 24 February 2020 nor would that decision have been correct even if the CRA proceeded to consider only part of the application land. However, for reasons I have given above, it is now too late to reverse the decision taken and communicated by the CRA's letter of 24 February 2020.

Application made on 11 June 2020

46. The CRA determined that the application made under s.15(2) CA 2006 and received on 11 June 2020 was the subject of a trigger event and was thus in substance invalid and could not be accepted. It was returned to the applicant on

7 October 2020. There was no claim for judicial review in respect of the decision of 7 October 2020. It was correct that by 11 June 2020 two separate trigger events had arisen, as set out in the CRA's letter of 7 October 2020, namely the adoption of the WHSAP on 25 February 2020, which included an allocation for development of part of the land sought to be registered and, separately, an application for outline planning permission had been made on 15 January 2020 and the application was first publicised on 17 January 2020. This application for outline planning permission affected part but not the whole of the application land. However, each of these trigger events affected only part of the application land and not the whole (as is explained by Mr. Webster in his report). The CRA was therefore wrong to have rejected the application made and received on 11 June 2020 in its entirety. However, as with the application made on 13 January 2020, it is now too late for the decision taken on 7 October 2020 to be set aside.

Application received on 30 November 2020 and the Inspector's report

47. Before addressing the Inspector's report of 9 February 2024, it is important to understand what application made under s.15 CA 2006 was in fact before the Inspector and before the CRA for determination.
48. For reasons I have set out above, the applications made on 13 January 2020 and on 11 June 2020 were determined by the CRA to engage trigger events and therefore both were determined not to be valid and, as a result, were not accepted and were returned to the applicant.
49. Then application received on 30 November 2020 was not rejected but, given the conclusion that trigger events affected part but not the whole of the land sought to be registered as a town/village green, the CRA determined that the application could be accepted and should proceed in respect of part only of the land. This was communicated to the applicant on 6 May 2021. Therefore, the application before the CRA and before the Inspector was the application received on 30 November 2020. It is 30 November 2020 which is "time" of the application for the purposes of s.15(2)(b). It is also the relevant date for the purpose of determining whether the

right to make an application ceases to apply for the purposes of s.15C CA 2006. The fact that the applicant may have dated the application on an earlier date is nothing to the point nor is the fact that the applicant refers to "resubmission" of his application relevant.

50. The Inspector in his report treated the application he was considering as having been made, for the purposes of s.15(2) and s.15C(1) CA 2006, on 13 January 2020. In my view, it was not open to the Inspector to do this as a matter of law. The application before him was made and received by the CRA on 30 November 2020 and he was not entitled to treat it as having been made on an earlier date. Indeed, the Inspector's approach does not accord with the position of the CRA as set out in its letter of 6 May 2021 and accompanying note, both of which were sent to the applicant. To the extent that the Inspector was in effect treating the application before him as that made on 13 January 2020, he was wrong to do so; the application made and received by the CRA on 13 January 2020 had been determined to be the subject to a trigger event and had not been accepted by the CRA. It had been returned to the applicant as being substantively invalidly made. I do not consider that the principle addressed by *Church Commissioners* allows a commons registration authority to reverse subsequently a decision to reject an application as invalid on the basis of a determination that a trigger event has occurred, as the CRA did in respect of the 13 January 2020 application. Moreover, the Court of Appeal in the *Church Commissioners* case was not considering the operation of s.15C CA 2006. Although the CRA's determinations in respect of the 13 January 2020 and 11 June 2020 applications were wrong, substantively and procedurally, for the reasons I have given, neither determination can now be reversed by the CRA.

51. However, it follows from the Inspector's conclusions as to the merits of the application during the 20-year period ending on 13 January 2020, that, when a 20-year period ending on 30 November 2020 is considered (as it should have been), the outcome must be the same. If there had not been shown to be insufficient use of the land for lawful sports and pastimes for a 20-year period ending on 13 January 2020 the same must be the case for the overwhelming majority of the period ending on 30 November 2020. The Inspector's recommendation can

therefore be relied on by the CRA in determining the application received on 30 November 2020.

52. I advise accordingly.

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16 October 2024.