Wiltshire Council

AGENDA SUPPLEMENT (2)

Meeting: **Western Area Planning Committee**

Place: **Council Chamber - County Hall, Bythesea Road, Trowbridge, BA14 8JN**

Date: **Wednesday 6 November 2024**

Time: **3.00 pm**

The Agenda for the above meeting was published on *Tuesday 29 October 2024*. Additional documents are now available and are attached to this Agenda Supplement.

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7 **Southwick Court Fields: Southwick and North Bradley - Application No. 2020/02TVG** *(Pages 3 - 14)*

DATE OF PUBLICATION: Wednesday 6 November 2024

Comments Provided to Case Officer

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Town and Village Green application no.2020/02TVG – Questions from Councillor David Vigar in advance of Western Area Planning Committee, 6 November 2024 and responses from Douglas Edwards KC.

1. Does the Council agree with Douglas Edwards KC that Wiltshire Council as the Commons Registration Authority (CRA) was wrong not to have stamped the TVG application and given it a number as stated paragraph 37 of his advice?

The Committee's function is to determine the current application not to review past procedures.

2. Does the Council agree that, as counsel states in paragraph 43 of his judgement, the CRA was also wrong to find the application invalid because the trigger event of inclusion in the Wiltshire Housing Site Allocations Plan (WHSAP) had terminated in 2019?

That is my Advice.

3. Does the Council agree that Douglas Edwards KC notes that the publication of the draft WHSAP on 14 July 2017 constituted a trigger event and that a corresponding terminating event occurred with the passage of two years from that date on 14 July 2019?

That is my Advice.

4. Does the Council agree that counsel does not identify any other trigger event prevailing on 13 January 2020 - such as a subsequent draft of the WHSAP as earlier argued by the CRA – and therefore that there was no trigger event in force and the application should have been processed?

That is my Advice.

5. Had the CRA not made these mistakes but had accepted the application and determined no trigger was in force, what process would then have ensued with regard to the application?

Presumably the application would not have been considered to be invalid and it would have proceeded to an Inquiry.

6. Had the CRA not made these mistakes but had accepted the application and determined no trigger was in force, what would have been the implication for the planning application for up to 180 dwellings, access and other services made on 15 January and referenced as application 20/00379/OUT?

In principle, a TVG application does not affect the decision to seek planning permission. What the outcome of the planning application would have been if the land had been registered as a TVG beforehand is speculative and now irrelevant.

7. Does the Council agree with Inspector William Webster's statement in paragraph 178 of his report that those intending to use the Southwick Court Fields for kite flying, ball games and the like were more likely to use the upper part of the field, that was wrongly deemed subject to a trigger event, than the lower part, which was the focus of the subsequent application – and that therefore an application to register the upper part of the field as a village green would have had a greater chance of being approved than the one that was proceeded with for the lower part?

That was the Inspector's view. It is not directly relevant to the determination of the application. The outcome of an application concerning land which is not before the Committee is irrelevant. In any event, the Inspector did not make any findings about whether the excluded land met the tests required by section 15 of the Commons Act 2006; he did not need to do so.

8. Had the TVG application been accepted, processed and approved, would a planning application for 180 dwellings also have been accepted in respect of the same land?

Please see reply to question 6 above.

9. Do you agree that had Wiltshire Council as the CRA not made the mistakes identified by Douglas Edwards KC, the village green application would have

been considered and had it been approved, planning permission for a development of up to 180 dwellings might not have been granted?

Please see reply to question 6 above.

10. Douglas Edwards KC says that "…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'". In this he relies on *R v Panel on Takeovers and Mergers ex parte Datafin plc (1987)*[1]. The key factor in that case was whether that Panel could be subject to judicial review. Lord Donaldson, then Master of the Rolls, described the Panel "as an unincorporated association without legal personality" with "no statutory, prerogative or common law powers." Does the Council agree that Wiltshire Council has a legal personality and statutory powers and is therefore a very different type of entity to the that as such a ruling made in respect of the Takeover Panel which had neither?

The legal status of the Panel is not relevant to the conclusion reached.

11. In the *R v Panel on Takeovers and Mergers ex parte Datafin plc (1987)*[2] judgement Lord Donaldson states: "The principal issue in this appeal, and only issue which may matter in the longer term, is whether this remarkable body is above the law." He later says, on this issue,: "it is really unthinkable that, in the absence of legislation such as affects trade unions, the Panel should go on its way cocooned from the attention of the courts in defence of the citizenry" and concludes that: "the court has jurisdiction to entertain applications for the judicial review of decisions of the Panel." In addition to this, which is the primary finding of the judgement in respect of the Takeover Panel being subject to judicial review, Lord Donaldson also notes as a subsidiary point, that the Panel's decisions remain effective unless and until they are overturned. This is where he uses the words cited by Douglas Edwards KC in saying: "I think that it is important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the Panel, namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain

[1] https://www.nadr.co.uk/articles/published/ArbitrationOlderReports/Data%20Fin%201986.pdf
[2] https://www.nadr.co.uk/articles/published/ArbitrationOlderReports/Data%20Fin%201986.pdf

fully effective unless and until they are set aside by a court of competent jurisdiction." Does the Council agree that the context for these words is a case where the primary issue was whether a body is subject to judicial review and that the words cited act to clarify a subsidiary point, namely that the decisions remain effective if not so set aside?

The general observations of the Judge are of general application.

12. Has *R v Panel on Takeovers and Mergers ex parte Datafin plc (1987)* previously been relied upon in respect of a decision of a local authority?

Yes, the general observations of the Judge in the *Datafin* case are frequently cited in subsequent judgements.

13. Does the Council agree that words from a case in 1987 which found that a national Takeover Panel was subject to judicial review can be used to justify Wiltshire Council in 2024 being unable to reverse a decision made in 2020 in respect of a village green application?

My advice is that principle in *Datafin* applies.

14. Does the Council agree that *R v Panel on Takeovers and Mergers ex parte Datafin plc (1987)* cannot be relied upon for such an important finding as that which holds that the CRA's decision of January 2020 to rule the TVG application invalid cannot be reversed?

It is a point of general application.

15. Is the Council aware of any recourse that residents of Trowbridge Grove may have to reverse the incorrect decisions that led to the TVG application being deemed invalid in January 2020?

They could try to bring a judicial review claim, however, the time limit for bringing a claim has now expired.

16. The Inspector who conducted the inquiry into this application no.2020/02TVG, Mr William Webster of 3 Paper Buildings, treated the

application as having been duly made on 13 January 2020. In paragraph 19 of his report he says: "the TVG application had, in my view, been duly made before the planning application had been publicised". Does the Council agree?

No, the application was never accepted.

17. In the matter of the dating of the application, Mr Webster relied on *R (Church Commissioners for England) v Hampshire County Council [2014] 1 WLR 4555*[3], which states that where deficiencies in an application can be remedied under reg.5(4) … such that, in the view of the CRA, the application was duly made within the meaning of the regulations, the application would be treated as having been duly made on the date on which the original defective application had been lodged, which in this case would be 13 January 2020. That regulation says: "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." Douglas Edwards KC says in his advice that he does not consider that the principle addressed by the Church Commissioners case allows a commons registration authority to reverse a decision to "reject" an application as invalid on the basis of a determination that a trigger event has occurred as the CRA. In the case of Application no.2020/02TVG, Wiltshire Council as the Commons Registration Authority returned the application to the applicant on 24 January 2020 following it being lodged on 13 January 2020. It stated incorrectly that a trigger event existed in the form of the site's allocation in the Wiltshire Housing Site Allocations Plan (WHSAP). It did not say it was "rejecting" the application but stated that "until this trigger event is terminated", it would not be possible to apply to register the land as a village green, holding out the possibility of the application going ahead. Given that the trigger event has now been found not to have applied, as the TVG application predated adoption of the WHSAP, and that the council said it was "returning" the application and did not use the word 'reject', can its action on 24 January 2020 be held to be a rejection?

[3] https://www.casemine.com/judgement/uk/63fa5afaafc23314151e10e3

That is not correct. The decision was taken to reject the January 2020 application due to there being a trigger event. It is plain that this is what the CRA decided and communicated to the applicant. The CRA then returned the application.

18. The minutes of the Western Area Planning Committee of 10 April 2024 record that "The Committee DEFERRED determination of the application to register land at Southwick Court Fields, in the parishes of Southwick and North Bradley, as a Town or Village Green, to seek Counsel's Opinion on the question of whether the Draft Wiltshire Housing Sites Allocation Plan forms a valid trigger event at the time of application, which would extinguish the right to apply to register part of the land as a Town or Village Green." Does the Council agree that Douglas Edwards KC states in paragraph 43 of his advice that the draft WHSAP did not form a valid trigger event because it was subject to a terminating event on 14 July 2019 with the expiration of a two-year period from its publication?

That is my Advice.

19. Does the Council agree that the right to make an application had not been excluded by a trigger event and the CRA was wrong to have determined to the contrary and found the application to be invalid?

That is my Advice.

20. Does the Council agree that had the committee did not ask Douglas Edwards KC to rule on the date that the TVG application was made?

I don't understand this. To advise on when the valid application was made is plainly within the scope of what I was asked to advise on.

21. Does the Council agree that if it were not for the unrequested advice provided by counsel on the date that the TVG application was made, the application could still be accepted and considered?

Please see the answer to question 20. In any event, it would be unlawful for the Council to proceed as envisaged by this question.

22. Does the Council agree that it is not bound to accept counsel's advice on the question of the date the application, particularly as the advice contradicts the finding of Inspector William Webster and is open to the challenge that the application was not formally rejected in January 2020?

The Council has a discretion on whether or not to accept my Advice but by not doing so the consequences could be that the Council would be open to an application for a Judicial Review by the objector, on the basis that the Council had acted unlawfully.

23. What does the Council propose to do to make amends to the applicant and the many residents who have supported this application now that it has been found that it should have been accepted and this might have prevented the subsequent planning application being considered and, after rejection by councillors, approved by an Inspector?

There is no statutory basis for the Council "making amends" in the circumstances described.

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Representations from Mr. Morland and responses from Commons Registration Authority

Mr. Morland's representations

I am very doubtful that the conclusions/advice in the Counsel's Advice 16 October 2024 (Douglas Edwards KC) at Appendix 5 to the Officer's Report on Agenda Item 7 (Southwick Court Fields Village Green Application 2020/02TVG) are entirely sound. However, I have not had sight of the Instructions to Counsel which might throw further light on the particular points in the Advice that are troubling me.

The crucial point where I believe he has gone wrong is in his assertion that Wiltshire Council could not/cannot review/change/reverse the decisions taken by its officers on 24 February 2020 * (in respect of the 13 January 2020 application) and on 7 October 2020 (in respect of the alleged 11 June 2020 application - but still dated 13 January 2020 - see [11]), even though he concludes that in both cases, those decisions were "wrong, substantively and procedurally" (see [37], [43], [46] and [50]).

His suggestion that those decisions could nevertheless only have been corrected by Mr Norman Swanney commencing Judicial Review proceedings to challenge them (see [44] and [46]) is frankly absurd. Even the Pre-Action Protocol for Judicial Review would become pointless if decisions by public bodies could only be changed by a court order. Equally, the entire complaints system operated by Wiltshire Council would also become worthless, and every case of alleged maladministration would have to be determined by the courts too.

The legal authority stated for this outcome (see [44]) is R (Datafin plc) v Panel on Takeovers and Mergers [1987] QB 815 (CA), the substance of which has no connection whatever with Village Greens. Although I have been unable to find a transcript of the judgment of that Court of Appeal case anywhere on-line (even though it does have a Wikipedia article, I do not think the passage quoted per Lord Donaldson MR (at p.840) "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" is as wide and general in its scope as is suggested in the Counsel's Advice. That is clear from the more recent case of Cerelia Group Holdings v Competition and Markets Authority

in which the same passage was cited (see [123]).

By Regulation 5(4) of The Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) Regulations 2007/457 (see at [28]), "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". The effect of this provision was considered by the Court of Appeal in the case of

R (Church Commissioners for England) v Hampshire County Council

Arden LJ, who gave the leading judgment, said (at [44]) "Regulation 5(4) provides a means for curing deficiencies in an application which does not provide all the statutory particulars, and, once an application is so cured, it is treated as duly made on the date on which the original defective application was lodged".

I do not agree with the Counsel's Advice (see [50]) that the Arden LJ's conclusion in the Church Commissioners case is in effect overridden by the comments of Sir John Donaldson MR made 27 years earlier in the Datafin case, because she was not considering the operation of s.15C CA 2006 (Registration of greens: exclusions) in respect of trigger events and terminating events (which came into effect on 25.4.2013 by virtue of the Growth and Infrastructure Act 2013).

It follows that I also do not agree with the Counsel's Advice that "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" or the comment that "In my view, it was not open to the Inspector to do this as a matter of law".

However, I agree with the Counsel's Advice (at [43]) that there was a terminating event on 14 July 2019 in respect of the draft development plan document - the Wiltshire Housing Site Allocations Plan, and therefore that there were no trigger events in force on 13 January 2020. I also agree that "by 11 June 2020 two separate trigger events had arisen" (see [46]), so any change to the "wrong" decision taken by officers on 7 October 2020 (see [16]) would not affect the outcome of Mr Swanney's application.

Nevertheless, that is not the case in respect of a change to the "wrong" decision taken by officers on 24 February 2020 (see [8]), which would enable Mr Swanney's application to be considered for its whole application area on 13 January 2020, and on its merits might well reach a different conclusion from that recommended by the Inspector's Advisory Report of 9 February 2024 (see Agenda Report [4] and Appendix 4).

In my view, it remains open to Wiltshire Council, either by a resolution of its Western Area Planning Committee or otherwise, to review/change/reverse the decision taken by its officers on 24 February 2020, notwithstanding the Datafin case referred to in the Counsel's Advice. If it does not do so, it seems to me that a claim for maladministration against Wiltshire Council by or on behalf of Mr Swanney/Cllr David Vigar, and relying on the findings of the Counsel's Advice, is bound to be successful, and with a substantial financial damages and costs award attached.

Commons Registration Authority's response

Mr Morland questions the reliance on the case of *R(Datafin plc*) *v Panel on Takeovers and Mergers 1987* as authority for the decision that the Council, as the Commons Registration Authority, cannot unilaterally reverse a decision once made.

Douglas Edwards KC has advised that it is a well-established principle of law that decisions of public authorities are valid unless and until quashed. He has referred us to decided cases in which that principle has been followed.

When dealing with a Town or Village Green application, the Council, is acting in a quasi-judicial capacity, which should, of course, be borne in mind.

With regard to the *Church Commissioners for England v Hampshire County Council 2014,* Mr Edwards in his written Advice to the Council distinguishes the circumstances of that case from those the Committee is now asked to consider and concludes that the case is not authority for the proposition that the Council could reverse its decision to reject the application.

With regard to the penultimate paragraph, the outcome of an application concerning land which is not now before the Committee is not a relevant matter for consideration by the Committee.

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