

Commons Act 2006 – Sections 15(1) and (2)
Application to Register Land as Town or Village Green – Southwick Court
Fields, Southwick and North Bradley – Application no.2020/02TVG

Purpose of Report

1. To consider legal advice requested by the Western Area Planning Committee (WAPC) 10th April 2024, to assist in its determination of an application made under s.15(1) and (2) of the Commons Act 2006 to register land as a Town or Village Green (TVG), Southwick Court Fields, in the parishes of Southwick and North Bradley and recommend that the Inspector's Advisory Report be accepted in part, and that the application be rejected on the ground that all the criteria for registration laid down in s.15(2) of the Commons Act 2006 have not been satisfied, for the reasons set out in the Inspector's Advisory Report dated 9 February 2024.

Relevance to the Council's Business Plan

2. Working with the local community to provide an accurate register of TVGs and Common Land, making Wiltshire an even better place to live, work and visit.

Background

3. Wiltshire Council as the Commons Registration Authority (CRA) are in receipt of an application to register land known as Southwick Court Fields, in the parishes of Southwick and North Bradley as a TVG, as yet undetermined, (see Location Plan at **Appendix 1**; Application Plans at **Appendix 2** and Application Plan (Accepted Land) Application dated 30 November 2020 at **Appendix 3**).
4. The WAPC previously considered this application at their meeting dated 10 April 2024, specifically the Advisory Report of the Inspector Mr William Webster, dated 9 February 2024, appointed by Wiltshire Council as the CRA to:
 - i) preside over a non-statutory public inquiry, held on 21-22 November 2023 at St Johns Parish Centre, Studley Green, Trowbridge, to consider the evidence in relation to the application, and
 - ii) produce an advisory report to include a recommendation to the CRA to assist in its determination of the application.

Please see Inspector's Advisory Report at **Appendix 4** and WAPC report dated 10 April 2024:

[Agenda and minutes - Democratic Services - Wiltshire Council](#)

5. On consideration of the Inspector's Advisory Report, WAPC made the following resolution:

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 [WHSAP] 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.

6. On 1 May 2024, Wiltshire Council appointed Douglas Edwards KC of Francis Taylor Building to provide advice on:
 - i) the procedure for determining applications received by Wiltshire Council as the CRA, (although this was not advice requested by WAPC it was the intention of the CRA to seek advice on this point), and
 - ii) the specific point raised by the WAPC regarding the draft WHSAP as a valid planning trigger event.
7. Mr Edwards KC provided advice dated 16 October 2024 as attached at **Appendix 5**.

Main Considerations for the Council

8. The application to register land known as Southwick Court Fields is made under s.15(1) and (2) of the Commons Act 2006 – the legal test to be applied being whether or not:

'A significant number of 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 they continue to do so at the time of application.'

9. The Growth and Infrastructure Act 2013 at s.16, inserted into the Commons Act 2006, s.15C "Registration of greens: exclusions", i.e. the removal of the "right to apply" to register land as a TVG where specific planning trigger events have occurred in relation to the land, e.g. where the land is subject to an application for planning permission, or the land is included in a draft or adopted development plan which identifies the land for development. The right to apply is revived where a corresponding "terminating event" has taken place.

10. DEFRA guidance recommends that on receipt of an application the CRA should write to the local planning authorities and the Planning Inspectorate (PINS) to seek confirmation on whether or not there are planning trigger/terminating events in place on all or part of the application land. The date of the application is therefore important as it is the trigger and terminating events in place at that date which determine whether the right to apply is extinguished, (where the right to apply is extinguished over only part of the land, the application over the unaffected land may continue to be determined in the usual way).
11. In this case the Inspector's Advisory Report considered the application submitted to the CRA on 13 January 2020. The advice received by the CRA at that date from Spatial Planning and PINS was that the draft WHSAP, (as a development plan which identified the land for development), was a valid trigger event, i.e. planning trigger event as listed at Schedule 1A of the Commons Act 2006, para 3 *"A draft development plan document which identifies the land for potential development is published for consultation in accordance with regulations under section 17(7) of the 2004 Act"* (Planning and Compulsory Purchase Act 2004). However, the Applicant considers that this was not a valid trigger event at that time where a corresponding terminating event in respect of the draft WHSAP had occurred, i.e. Schedule 1A 3(c) *"The period of two years beginning with the day on which the document is published for consultation expires."*
12. WAPC sought legal advice on inclusion of the land in the draft WHSAP as a valid trigger event at the time of application. Counsel's Advice received on 16 October sets out the following (see Advice in full at **Appendix 5**):
 - Para 22 - *"The CRA has not yet reached a decision on the application"*.
 - Para 43 - *"...the Wiltshire Housing Site Allocation 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"*.
 - Para 43 – *"It follows, on this basis, that the right to make an application under s.15(1) CA [Commons Act] 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.”

- Para 44 – [in relation to the CRA decision on 24 February 2020 to return the application dated 13 January 2020] *“However, and be that as it may, the CRA did so by letter of 24th 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...”*
- Para 46 – [in relation to the application dated 11 June 2020 and the trigger events at that time, i.e. the adopted WHSAP and planning application no.20/00379/OUT (residential development of up to 180 dwellings)] *“...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). [Paras 15 and 23 of the Inspector’s Advisory Report dated 9 February 2024 **Appendix 4**] 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.”*
- Para 46 - *“There was no claim for judicial review in respect of the decision of 7th October 2020.”*
- Para 49 - *“...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.”*
- Para 49 – *“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.”*
- Para 50 – *“The Inspector in his report treated the application he was considering as having been made, for the purposes of c.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...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.”

- *Para 50 – “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.”*
- *Para 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.”*

13. Therefore, where the application before the Inspector was that dated 30 November 2020, reference to the 13 January 2020 application within the Inspector’s Advisory Report should be discounted as it was not open to him to consider the submitted and returned application. It was open to the Inspector only to consider the position regarding trigger and terminating events as they were on the date of the application received on 30 November 2020, and it was therefore correct, at the public inquiry, for the Inspector to address those giving evidence to the southern section of the land only, as he did, where the northern section of the land was, by 30 November 2020, excluded from consideration as a result of the planning trigger events in place at that time which had extinguished the right to apply to register that section of the land as a TVG, i.e. planning application no.20/00379/OUT and the adopted WHSAP. The evidential conclusions of the Inspector’s Advisory Report are correct and the application should be rejected.
14. Evidence is key and is the only consideration for the CRA in determining applications to register land as a TVG.
15. There is no obligation placed upon the determining authority to follow the Inspector’s recommendation, however, if the Committee determines not to follow the Inspector’s recommendation which is supported by a very detailed and thorough consideration of the evidence in the Inspector’s Advisory Report and Counsel’s advice, the Committee must provide sound evidential reasons for departing from the recommendation before it.
16. If it is determined to reject the application, as recommended by the Inspector and Counsel’s Advice, the Regulations set out the process for concluding the

application. The CRA will send written notice of the decision to every concerned Authority; the Applicant and every person who objected to the application including the reasons for the rejection. The application form and all accompanying documents will be returned to the Applicant.

Safeguarding Implications

17. Considerations relating to the safeguarding implications of the recommendation are not permitted under s.15 of the Commons Act 2006. Determination of the application must be based only upon the relevant evidence before the CRA.

Public Health Implications

18. Considerations relating to the public health implications of the recommendation are not permitted under s.15 of the Commons Act 2006. Determination of the application must be based only upon the relevant evidence before the CRA.

Environmental and Climate Change Considerations

19. Considerations relating to the environmental and climate change impact of the recommendation are not permitted under s.15 of the Commons Act 2006. Determination of the application must be based only upon the relevant evidence before the CRA.

Equalities Impact of the Recommendation

20. Considerations relating to the equalities impact of the recommendation are not permitted under s.15 of the Commons Act 2006. Determination of the application must be based only upon the relevant evidence before the CRA.

Risk Assessment

21. The holding of a non-statutory public inquiry; the Advisory Report and recommendation to the CRA by an independent Inspector dated 9 February 2024 and the Advice of Counsel dated 16 October 2024, have reduced the risk to the Council of a potential legal challenge, where the evidence of witnesses has been heard, tested and considered.

Financial Implications

22. There is no mechanism by which the CRA may charge the Applicant for processing an application to register land as a TVG and all costs are borne by the Council.

23. Where the Council makes a decision to register / not register the land as a TVG, it must give clear evidential reasons for its determination as this decision is potentially subject to legal challenge where any decision of the Council is open to judicial review (within 3 months of the date of decision). The legal costs of a successful challenge against the Council could be in the region of £40,000 - £100,000.
24. If the land is registered as a TVG, there is no ongoing duty of maintenance placed upon Wiltshire Council as the CRA, or the landowner.

Legal Implications

25. If the CRA determines not to register the land as a TVG, the only appeal open to the Applicant is through judicial review proceedings and challenging the lawfulness of the decision in the High Court. The Court's permission to bring proceedings is required and the application must be made within 3 months of the date of the determination.
26. Landowners can also use judicial review proceedings to challenge the Council's decision if the land is successfully registered as a TVG. Additionally it is open to landowners to challenge the CRA decision to register land by appeal to the High Court under s.14(1)(b) of the Commons Registration Act 1965, which allows the High Court to amend the register only if it can be shown that the registration ought not to have been made and that it is just to rectify the register. There is no time limit on application.
27. There is a cost to the Council as the CRA in judicial review proceedings not successfully defended. The Aarhus Convention does limit the costs liability of the Council to £35,000 if the case is lost, however, the CRA would also be required to meet its own legal costs to defend the case, (a broadly similar sum), in addition to the Applicant's costs. The Applicant's potential maximum cost liability, if their case is unsuccessful, is £5,000.
28. As set out in Counsel's Advice, it is now out of time for challenge to the CRA decisions to return the applications dated 13 January 2020 and 11 June 2020 in their entirety and there is no remedy.

Options Considered

29. The options available to the Committee in the determination of the application, are as follows:
 - (i) Accept the Inspector's recommendation that the application made by Mr Swanney, to register land at Southwick Court Fields as a TVG, under s.15(1) and (2) of the Commons Act 2006, be rejected following detailed consideration of the evidence, for the reasons set out in the Inspector's

Advisory Report dated 9 February 2024 and as recommended in Counsel's Advice.

- (ii) Not accept the Inspector's recommendation that the application made by Mr N Swanney, to register land at Southwick Court Fields as a TVG under s.15(1) and (2) of the Commons Act 2006, be rejected and resolve to register all or part of the land subject to application and capable of registration as a TVG, if the Committee considers that there are sound evidential reasons for departing from the recommendation and Counsel's Advice.
30. Where Members of the Committee do not resolve to accept the Inspector's recommendation and Counsel's Advice and make an alternative determination, clear evidential reasons for this decision must be given where the decision of the CRA regarding the registration is open to legal challenge by both the Applicant and the Landowner.

Reasons for Recommendation

31. In the Southwick Court Fields case, the evidence of whether a significant number of 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, with use continuing at the time of application, is in dispute. It is the duty of the determining Authority to determine the application in a fair and reasonable manner. Due to the substantial dispute of fact in this case, Wiltshire Council determined to hold a non-statutory public inquiry where the facts of the case would be likely to be resolved by the inquiry process through witnesses giving oral evidence in chief and through cross-examination and re-examination, including consideration of documentary evidence by the Inspector.
32. Following the close of the inquiry, the Inspector presented a well written and thorough consideration of the evidence in a 60-page Advisory Report, dated 9 February 2020 (see **Appendix 4**) and containing a recommendation to Wiltshire Council, as the CRA, that the application be rejected for the reasons set out in the Inspector's Advisory Report. The Advice of Counsel is that whilst it was not open to the Inspector to consider the date of the application as 13 January 2020, his findings regarding the evidence are sound and would have equally applied to the period ending on 30 November 2020, as they did to the period ending 13 January 2020 (first application received), (see para 51 of Counsel's Advice **Appendix 5**).

Recommendation

33. That Wiltshire Council as the CRA, accepts Counsel's Advice that whilst it was not open to the Inspector to consider the application dated 13 January 2020 in

his Advisory Report, the Inspector's conclusions as to the merits of the application would be the same for the period ending 30 November 2020 and the Inspector's recommendation can therefore be relied upon by the CRA in determining the application received on 30 November 2020, and the application to register land at Southwick Court Fields, in the parishes of Southwick and North Bradley, (proceeding under Application number 2020/02TVG), should be rejected on the ground that all the criteria for registration laid down in section 15(2) of the Commons Act 2006 have not been satisfied, for the reasons set out in the Inspector's Advisory Report dated 9 February 2024.

Samantha Howell

Director Highways and Transport

Report Author:

Janice Green

Senior Definitive Map Officer

The following unpublished documents have been relied on in the preparation of this Report:

None.

Appendices:

Appendix 1 – Location Plan

Appendix 2 – Application Plans

Appendix 3 – Application Plan (Accepted Land) Application 30 November 2020

Appendix 4 – Inspector's Advisory Report 9 February 2024

Appendix 5 – Counsel's Advice 16 October 2024

Appendix 6 – Form 6 (6 May 2021) - Acceptance of Application 30 November 2020 in Part, as referred to at para 20 of Counsel's Advice