

WILTSHIRE COUNCIL

WESTERN AREA PLANNING COMMITTEE

10 April 2024

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:
 - (i) Consider the Advisory Report, dated 9 February 2024, submitted by Mr William Webster of 3 Paper Buildings, appointed by Wiltshire Council as the Commons Registration Authority (CRA), to act as an independent Inspector to:
 - preside over a non-statutory public inquiry, held on 21-22 November 2023 at St Johns Parish Centre, Studley Green, Trowbridge, to consider an application made under Sections 15(1) and (2) of the Commons Act 2006, to register land at Southwick Court Fields, in the parishes of Southwick and North Bradley, as a Town or Village Green (TVG), and
 - produce an advisory report to include a recommendation to the CRA to assist in its determination of the application.
 - (ii) Recommend that Wiltshire Council accepts the Inspector's recommendation that the application 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.

Relevance to the Council's Business Plan

2. Working with the local community to provide an accurate register of TVG's, making Wiltshire an even better place to live, work and visit.

Background

3. This report relates to an application made by Mr N Swanney of Trowbridge, under Sections 15(1) and (2) of the Commons Act 2006 to register land as a TVG in the parishes of Southwick and North Bradley. The relevant regulations/guidance for the processing of applications under Sections 15(1)

and (2) of the Commons Act 2006, are “The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007” and DEFRA “Guidance to Commons Registration Authorities in England on Sections 15A to 15C of the Commons Act 2006” – December 2016.

4. The application land is located at Southwick Court, which lies to the south-west of Trowbridge, in the parishes of Southwick and North Bradley, (please see Location Plan at **Appendix A** and Application Plan at **Appendix B**). Southwick Court itself is a Grade II listed moated medieval manor house which dates from the 16th century, lying at the centre of a system of fields and water meadows between Trowbridge Town and Southwick village, of which the application land forms part. The Lambrok stream which originates in Beckington (Somerset), feeds the moat and then continues into the surrounding water meadows and then into Trowbridge where it joins the River Biss. The application land is agricultural, laid to grass with recorded public rights of way, Southwick Footpath no’s 1, 2 and 3 and North Bradley Footpath no.4, leading into it and across it. The land is also accessed from Axe and Cleaver Lane, (Bridleway no.3 North Bradley), which leads from Woodmarsh, North Bradley, alongside the application land at the south-east edge.
5. Wiltshire Council, as the CRA, must determine the application in a manner which is fair and reasonable to all parties. All the elements of the legal test laid down at Section 15(2) of the Commons Act 2006 must be demonstrated if the land is to be registered, the standard of proof being the civil standard of proof on the balance of probabilities that:

‘a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged as of right in lawful sports and pastime on the land for a period of at least 20 years and they continue to do so at the time of application’.

6. The burden of proof lies with the Applicant and the Council, as the CRA, has no investigative duty in relation to TVG applications which would require it to find evidence or to reformulate the Applicant’s case. The Council considered the evidence and the objections received, as set out below, within a report to the Southern Area Planning Committee dated 7 June 2023, a copy of the Committee Report and its Appendices (referenced below) may be viewed on the Wiltshire Council website using the following link: [Agenda for Western Area Planning Committee on Wednesday 7 June 2023, 3.00 pm | Wiltshire Council](#)

Evidence considered in Western Area Planning Committee Report (7 June 2023):

- (i) Application no.2020/02TVG dated 13 January 2020 and received by Wiltshire Council on 13 January 2020 in the form of “Form 44” and statutory declaration.
- (ii) Trigger/terminating event consultation replies (**Appendix 11**).
- (iii) Objections and representations received during formal notice period for application 2020/02TVG (**Appendices 7 and 8**).
- (iv) Applicant’s and Cllr G Hill’s comments on Objections (5 April 2022) (**Appendix 9**).
- (v) Objector’s comments on Representations (23 May 2022) (**Appendix 10**).

7. Within the report at paragraph 47, Officers highlighted some areas of concern when interpreting the evidence adduced:

“47. ...Matters of particular conflict within the evidence include the main use of the land identified as walking, with or without dogs, and fruit/produce picking at the perimeter of the application land, taking place on the recorded public footpaths over the land and unrecorded tracks and pathways which raises a number of issues:

- (i) *Whether the use would appear to a reasonable landowner to be attributable to the exercise of a right of way along a defined route, or wider use of the land for lawful sports and pastimes.*
- (ii) *Qualifying user “as of right”;*
 - *the use of recorded public rights of way “by right” rather than “as of right”;*
 - *was use of the land for lawful sports and pastimes sufficient to bring such use to the attention of the landowner to challenge that use if they so wished.*
- (iii) *If the use of recorded/unrecorded public rights of way is removed as qualifying user, is the remainder of the use for lawful sports and pastimes sufficient to support registration.*

Additionally, there is a lack of evidence of regular/organised community events taking place on the land.”

8. Officers recommended that given the substantial dispute of the evidence in this case and the difficulties inherent in interpreting the written evidence, it would be open to the CRA to hold a non-statutory public inquiry at which the evidence of all parties would be heard and tested through cross examination, appointing an independent Inspector to preside over the inquiry and to provide an advisory report and recommendation to the determining authority. It was resolved by the Western Area Planning Committee on 7 June 2023:

“Resolved:

To appoint an independent Inspector on behalf of the Commons Registration Authority (CRA) to preside over a non-statutory public inquiry at which the evidence of all parties will be heard and tested through cross-examination, and to produce an advisory report and recommendation regarding the application to the Western Area Planning Committee, to assist the CRA in its determination of the application to register land as a Town or Village Green at Southwick Court Fields, in the parishes of Southwick and North Bradley, as soon as is reasonably practicable.”

9. Wiltshire Council appointed Mr William Webster of 3 Paper Buildings, as an independent Inspector to preside over a non-statutory public inquiry and to produce an advisory report containing a recommendation to Wiltshire Council as the determining authority. The inquiry was held at St Johns Parish Centre, Upper Studley, located not far from the application land, on 21-22 November 2023 inclusive, with closing submissions from both parties sequentially (Applicant one week before Objector), following the close of the inquiry. Mr Webster submitted his advisory report with recommendation to Wiltshire Council as the CRA on 9 February 2024, (please see advisory report attached at **Appendix D**).

Main Considerations for the Council

10. Under the Commons Registration Act 1965, Wiltshire Council is charged with maintaining the register of TVG's and determining applications to register new greens. The application to register land at Southwick Court Fields, Southwick and North Bradley has been made under Sections 15(1) and (2) of the Commons Act 2006, which amended the criteria for the registration of greens. Sections 15(1) and (2) of the Act, state:

“15 Registration of greens

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(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.”

11. In the Southwick Court Fields case, the Inspector considers the difficulty of interpreting written evidence, and that additional weight may be applied to evidence given in person:

“162. As a general rule considerably less weight should be attached to the evidence of witnesses who do not give oral evidence. This is principally because the objector will not have had an opportunity to test this evidence by cross examination.”

12. The Inspector sets out the legal tests to be applied and the determination of the application on evidential grounds only:

“59. The only question for the CRA is whether the statutory conditions for registration are satisfied and the onus is on the applicant to establish this on the balance of probabilities. There is no scope for the application of an administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the land as it is a convenient open space for use by local inhabitants or that it is a necessary step to prevent its development in the future...”

61. It has been said that it is no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be ‘properly and strictly proved’ (R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p.111 (Pill L.J) and approved in R (Beresford) v Sunderland City Council [2003] UKHL 60 at [2] (Lord Bingham)).”

13. Following consideration of the available documents and the hearing of evidence given in chief; in cross-examination and in re-examination at the public inquiry, the Inspector presented an advisory report to Wiltshire Council, dated 9 February 2024, (please see report attached at **Appendix D**), in which he considers the evidence and reaches the following conclusions and makes a recommendation to the CRA regarding the determination of the application:

“191. My conclusions on the user evidence are these:

- (i) Use of the TVGAL by qualifying inhabitants has mainly been confined to the use of paths for walking, with or without dogs, which would not have been qualifying use as it would have appeared to a reasonable landowner as referable to the exercise of a right (or rights) of way along a defined route (or routes).*
- (ii) Any use of the PROWs located within the TVGAL will not count as a qualifying use as it would involve use by right and not as of right.*
- (iii) The applicant has also failed to prove that other claimed recreational uses were sufficient, in terms of their quality and quantity, to justify*

registration, nor would it have appeared to a reasonable landowner that users were asserting a right to use the TVGAL for recreation.

- (iv) The applicant has been unable to demonstrate that, for all practical purposes, it could sensibly be said that the whole of the TVGAL had been used for LSP for the relevant period.*
- (v) The applicant has also failed to prove that the areas outside the paths on the TVGAL were, throughout the whole of the qualifying period, even suitable for informal recreation owing to (i) the wet ground conditions; (ii) the presence of cattle grazing; (iii) the condition of the ground (which is uneven and deeply pitted) by reason of the presence of grazing cattle for prolonged periods over many years; and (iv) the growing grass crop in the period March-June each year and the limitations to which this is bound to have given rise in walking outside the paths (if the grass crop was to be respected).*

Recommendation

*192. In light of the above discussion, I recommend that the application to register the TVGAL (proceeding under application number 2020/02 TVG) should be **rejected** on the ground that all the criteria for registration laid down in section 15(2) of the CA 2006 have not been satisfied.*

193. The CRA must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be “the reasons set out in the Inspector’s report dated 9 February 2024”.

- 14. **Evidence is key and is the only consideration for the CRA in determining applications to register land as a TVG.** It is not possible to take into account other matters such as need; health and safety; environment and the general desirability of the registration of the land.
- 15. There is no obligation placed upon the determining authority to follow the Inspector’s recommendation, however, **if the Committee decides not to follow the Inspector's recommendation which is supported by the very detailed and thorough consideration of the evidence in the Inspector's Advisory Report (Appendix D), the Committee must provide sound evidential reasons for departing from the recommendation before it.** Members of the Committee are requested to consider the Inspector’s Advisory Report and the available evidence in order to determine whether or not the application land should be registered as a TVG.
- 16. If it is determined to reject the application, as recommended by the Inspector, 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 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 proposal are not permitted within Section 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 proposal are not permitted within Section 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 proposal are not permitted within Section 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 Proposal

20. Considerations relating to the equalities impact of the proposal are not permitted within Section 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 and the production of the subsequent advisory report and recommendation to Wiltshire Council as the CRA, by an independent Inspector, 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 to register the land as a TVG, it must give clear evidential reasons for its determination as this decision is potentially open to legal challenge where any decision of the Council is open to judicial review. The legal costs of a successful challenge against the Council could be in the region of £40,000 - £100,000.
24. If land is registered as a TVG, there is no ongoing duty of maintenance placed upon the CRA.

Legal Implications

25. If the CRA determines not to register the land as a TVG, the only right of 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 decision to determine the TVG application. A landowner could also use judicial review proceedings to challenge the Council's decision if the land is registered as a TVG.
26. If the land is successfully registered as a TVG, the landowner could potentially challenge the CRA's decision by appeal to the High Court under Section 14(1)(b) of the Commons Registration Act 1965 ('the 1965 Act'), 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. The overall effect is that the registration of the land is deemed to have been made under Section 13 of the 1965 Act and there is a preserved right under Section 14 to apply to the court to rectify the registration of the TVG without limit of time. The application, which could be made many years after the decision and potentially enable the Court to hold a re-hearing of the application and consideration of the facts and law, could lead to the de-registration of the land.
27. Judicial review proceedings are a complex area of administrative law where every aspect of the law and facts relevant to the decision and the CRA's decision making process would be subject to detailed analysis by the Court. Due to the complexity of such cases the legal costs can quickly escalate. If the judicial review proceedings are not successfully defended, the Aarhus Convention (concerning the legal costs for environmental cases), does limit the costs liability so far as the Council as the CRA is concerned (if the case is lost) to £35,000; however, the CRA would also be required to meet its own legal costs to defend the case (which would be a broadly similar sum if not more depending on the issues that may arise during the proceedings), in addition to the Applicant's costs. The Applicant's potential maximum costs liability, if their case is unsuccessful, is £5,000.

28. The issue of ‘pre-determination’ or approaching the decision with a ‘closed mind’, (for example a decision maker having already made up their mind on the application before considering the evidence and/or the Inspector’s recommendation and making the decision), is a serious allegation and one that a CRA must avoid. There is a potential reputational issue for a CRA if a Court was to make a determination that ‘pre-determination’ took place before a committee made a formal decision to determine an application to register land as a TVG. The Court may order that the decision be quashed, and the decision sent back the CRA to be re-made.

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

Reason for Proposal

31. In the Southwick Court Field 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 2024 (**Appendix D**), and containing a recommendation to Wiltshire Council, as the CRA, that the application be **rejected** for the reasons set out in the Inspector's report.
33. Officers are satisfied that over the course of the two days of the public inquiry, the Inspector carried out a thorough and detailed examination of the evidence, all parties being given full opportunity to make their representations and to cross-examine other parties on their evidence. Officers consider that the Advisory Report (**Appendix D**), is a correct and accurate reflection of the witness and documentary evidence and that the Inspector's recommendation should be accepted.

Proposal

34. That Wiltshire Council, as the CRA, accepts the Inspector's recommendation that 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.

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Senior Definitive Map Officer

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

None

Appendices:

Appendix A – Location Plan

Appendix B – Application Plan (Accepted)

Appendix C – Photographs of Application Land

Appendix D – Inspector's Advisory Report – Mr William Webster, 3 Paper Buildings
9 February 2024