

**Commons Act 2006 – Section 15(1) And (3)
Application To Register Land As A Town Or Village Green – The
Common / Browns Copse Field / Bluebell Wood Field / Village Hall
Field / The Field, Winterslow**

Purpose of Report

1. To:
 - a. Consider evidence in the form of an Inspector's recommendation, dated 10 March 2015, made by Mr Stephen Morgan of Landmark Chambers, appointed by Wiltshire Council as an independent Inspector to preside over a non-statutory public inquiry, held in November/December 2014 and a Court Order dated 31 March 2016 and to consider an application made under Sections 15(1) and (3) of the Commons Act 2006, to register land owned by Mr and Mrs Sheppard and known as Browns Copse/Bluebell Wood ('Browns Copse'), in the parish of Winterslow, as a town or village green.
 - b. Recommend that Wiltshire Council accepts the Inspector's recommendation to register land known as Brown's Copse as a town or village green.

Relevance to the Council's Business Plan

2. Working with the local community to provide an accurate register of town and village greens, making Wiltshire an even better place to live, work and visit.

Legal Background

3. Please see previous reports attached at;
 - (1) **Appendix 1** - considered by Members of the Southern Area Planning Committee at its meeting dated 30 April 2015
 - (2) **Appendix 2** - considered by Members of the Southern Area Planning Committee at its meeting dated 24 September 2015
 - (3) **Appendix 3** - considered by the Southern Area Planning Committee at its meeting dated 17 December 2015.
4. Members may recall that this application was considered by this Committee at their meeting on 24 September 2015. However after a challenge by a third party a consent order quashing the Council's decision only so far as Brown's Copse was concerned was sealed by the Court on 31 March 2015.

5. Once a decision has been quashed in this manner the application to register Brown's Copse as a village green under the Commons Act 2006 is reinstated as undetermined and has to be determined once more by the Council as Commons Registration Authority.

General Background

6. Under the Commons Registration Act 1965, Wiltshire Council is charged with maintaining the register of town and village greens and determining applications to register new greens. The application to register land off Middleton Road, Winterslow as a town or village green, has been made under Sections 15(1) and (3) of the Commons Act 2006.

Sections 15(1) and (3) of the Commons Act 2006 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.

(3) This subsection applies where-

(a) A significant number of inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b)."

7. Wiltshire Council as the Commons Registration Authority received an application, dated 3 February 2012, made under Section 15(1) and Section 15 (3) of the Commons Act 2006, to register land off Middleton Road, Winterslow known as The Common / Browns Copse Field / Bluebell Wood Field / Village Hall Field / The Field, as a town or village green. The application concerned three parcels of land which are referred to as 'The Field', Brown's Copse (owned by Mr and Mrs Sheppard) and the northwest corner of Brown's Copse (owned by Wiltshire Council). The application was made by Mr T Crossland on behalf of the group "Winterslow Opposed to Over Development" ('WOOD').
8. In Part 7 of the application form the applicant provided a summary of the case for registration and included the following comments below;

"Indulgence by a significant number of inhabitants of Winterslow as of right in lawful sports and pastimes for a period of at least 20 years and 5 months under Section 15(3) of the Commons Act 2006, as witnessed by the 63 enclosed signed statements showing use for activities including dog walking, picking blackberries, kite flying and bicycle riding by a total of 63 people over a period extending from December 1990 to April 2011."
9. The claimed land is located to the south-west of Middleton Road, Winterslow and occupies an area of approximately 18 acres.

10. The Council received objections to the registration of the land as a town or village green which could not be resolved. A non- statutory inquiry was therefore considered necessary in this case because the factual evidence was strongly disputed by both the applicant and the objector. An Independent Inspector (a barrister from London chambers who specialised in the area of village green law) was appointed and a non-statutory public inquiry was arranged to take place in Winterslow in November and December 2014. The Inspector also undertook a site visit. At the inquiry, evidence was given orally by witnesses both in support and in objection to the application. This evidence was then tested through cross-examination and re-examination of the witnesses. Officers were in attendance for the duration of the Public Inquiry.

11. Following the inquiry and having also considered the written evidence the Inspector produced a report of his findings (**Appendix 4**) and on 10 March 2015 made the following recommendation to Wiltshire Council:

“The Application by Winterslow Opposed to Over Development (WOOD) under Section 15(3) of the Commons Act 2006 be approved but only to the extent that Brown’s Copse is registered as a town or village green in its entirety, other than the north-west corner of the Copse that is owned by Wiltshire Council.”

12. Members of the Committee first considered this matter on 30 April 2015. The application was brought back to the Committee on 24 September 2015 in order to formalise and agree the reasons for the Committee’s in principle refusal of the Inspector’s recommendation in relation to Brown’s Copse and to reach a decision on the application as a whole. At the 24 September Committee meeting Members of the Committee made the following resolutions;

- i. ‘To approve the Inspector’s recommendation that the **Field** not be registered as a town or village green;*
- ii. To approve the Inspector’s recommendation that the **section of Brown’s Copse owned by Wiltshire Council** not be registered as a town or village green;*
- iii. To refuse the Inspector’s recommendation to register that part of **Brown’s Copse owned by Mr and Mrs Sheppard** as a town or village green.’*

13. As a result of the Court Order dated 31 March 2016 the resolution set out in 12 (i) & (ii) above remain but the part of the resolution set out in 12 (iii) above has been quashed. **A copy of the Court order is attached at Appendix 6.**

14. The application only so far as Brown’s Copse is concerned now remains undetermined and has to be determined once more by the Council under Section 15(3) of the Commons Act 2006.

Main and Legal Considerations for the Council

15. Members are now requested to re-consider the application but only insofar as it relates to Brown's Copse.
16. The Committee's decision made 24 September 2015 was successfully challenged by the Applicant because the Committee did not accept the Inspector's recommendation that the land known as Brown's Copse should be registered as a village green, although the Committee did accept the Inspector's recommendations concerning the Field and the section of Brown's Copse owned by Wiltshire Council.
17. Although it is open to the Council to reject the Inspector's report and recommendation it can only do so if the Council finds that the Inspector made a significant error of fact or law. If the Inspector's recommendation is rejected the Council must give legally valid reasons supported by evidence of the error of fact and law otherwise the Council's decision would again be open to legal challenge.
18. Members will recall that due to the Court proceedings a meeting took place with Counsel. A copy of a note containing legal advice for this meeting is available to the Committee under a separate Part 2 report (**Appendix 7**).
19. A copy of the Power Point presentation which also includes plans is attached at **Appendix 5**.
20. The key criteria (or 'legal test') for registration of land as a town or village green is set out in section 15 (2) of the Commons Act 2006 namely;

'where a significant number of inhabitants of any locality or of any neighbourhood within a locality, have indulged as of right in lawful sports or pastimes on the land for a period of at least 20 years'.
21. In the Beresford case (R (Beresford) v Sunderland City Council (2004) Lord Bingham observed that it was necessary for *all* the ingredients of the legal test to be met before the land is registered.
22. Therefore under Section 15(3) of the Commons Act 2006, the only consideration which the Committee Members may take into account in making their decision is the **evidence that a significant number of inhabitants of the locality (i.e. the Parish) have indulged as of right (i.e. not by force, not by stealth and without the landowner's permission) in lawful sports and pastimes (such as children's games, blackberry picking, dog walking, walking to the copse to see the Bluebells, playing in the copse) over the land for a period of 20 years or more.**
23. Members should note that issues such as the future maintenance of the land if it is successfully registered as a town or village green; planning and future development of the land; moral issues of land ownership and the availability of alternative recreational facilities locally, for example, are **not** legally valid

reasons for the purposes of making a decision on whether or not to register land as a green under the Commons Act 2006.

24. The reasons given for the Committee's decision can therefore only be based on the evidence before the Registration Authority, given that the decision of the Council is potentially open to be legally challenged by way of judicial review. Members are therefore referred to the Inspector's Recommendation to the Commons Registration Authority dated 10 March 2015
25. There is currently no statutory or non-statutory guidance available to authorities regarding when it would be considered to be appropriate for a Registration Authority to hold a non-statutory public inquiry. However the Courts have confirmed that it is the authority's duty to determine an application in a fair and reasonable manner and in the case of R (Cheltenham Builders Ltd v South Gloucester District Council) it was decided by the court that the holding of a non-statutory public inquiry in some circumstances would be necessary as a matter of fairness.
26. The land proposed to be registered and outlined in red did not show a small triangular area of land in the south-east corner of Brown's Copse which was included in the application plan and was shown to be wooded and part of Brown's Copse from the aerial photographs. This area of land is in the ownership of Mr and Mrs Shepherd. The Inspectors report does not include a map of the area of land which he proposes should be registered, however Officers have concluded that this wooded area of land is part of Brown's Copse and should be included within the area of land to be registered because the Inspector in his report does make a distinction between the application land which forms part of the Field and that which forms part of Brown's Copse, i.e. the Inspector does not consider that the statutory tests have been met over the field. So far as the Field was concerned, the Inspector found that:
 - i. A significant number of those using the field were using linear routes to cross from one side of the village to the other, i.e. the exercise of public rights of way rather than lawful sports and past-times.
 - ii. There was insufficient evidence to demonstrate significant use of the field throughout the whole of the relevant period.
27. In his recommendation the Inspector sets out why the copse is an exception to this, regarding the nature of the use of Brown's Copse, he found that the Copse was "a destination in its own right" and an "entity in itself" and that the Copse as a whole was a place of recreational resort rather than a means of transit. He records evidence of uses of the Copse which are different to that of the field, i.e. building dens; playing hide and seek; exploring the woodland; bird watching; use of swings; adventure playground; a public amenity; collecting acorns and walking on minor and diverging paths.
28. The Inspector did not investigate whether this small triangle area of the land was fenced off but Officers consider that this area of woodland, which has not been specifically excluded by the Inspector would be subject to the Inspectors findings for the Copse because the nature of the triangle area is similarly wooded as is the Copse and as such should be registered.

29. If the land is successfully registered as a town or village green, the landowner could potentially challenge the Registration Authority's decision by an appeal to the High Court under Section 14(1)(b) of the Commons Registration Act 1965. Where the Registration Authority decides not to register the land as a town or village green, there is no right of appeal for the applicant, although the decision of the Council can be challenged through judicial review.

Financial implications

30. Presently there is no mechanism by which a Registration Authority may charge the applicant for processing an application to register land as a town or village green and all costs (including the public inquiry costs) are borne by the Council.

31. Where the Council makes a decision to register land or not to register land as a town or village green it must give reasons for its determination as the decision is open to legal challenge. The legal costs of a contested (and successful) legal challenge against the Council could be in the region of £35,000 - £80,000, for which there is no budgetary provision.

32. There is no duty placed upon the Registration Authority to maintain land registered as a town or village green.

Risk Assessment

33. The Council's decision so far as Brown's Copse is concerned was quashed by the Court on 31 March 2016. If the Council made a decision not to follow the Inspector's Recommendation to the Council and to refuse to register Brown's Copse, it is very likely that decision would again be challenged in the High Court and be quashed and the Council being ordered to pay the Applicant's costs and having to re-determine the application.

34. Although it is open to the Council to reject the Inspector's report and recommendation; where the Council does so, it must give legally valid and supported reasons showing that the Inspector had significantly erred in law and in fact otherwise the decision is open to legal challenge. The Committee must therefore only consider the evidence before it (including the witness statements and Inspector's recommendation) and the legal criteria for registration of town and village greens as set out in section 15 (3) of the Commons Act 2006.

Safeguarding Considerations

35. Considerations relating to safeguarding impacts of the proposal are not permitted under Section 15(3) of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Public Health Implications

36. Considerations relating to the public health implications of the proposal are not permitted under Section 15(3) of the Commons Act 2006. Any determination

must be based on the relevant evidence before the Registration Authority.

Environmental Impact of the Proposal

37. Considerations relating to the environmental impact of the proposal are not permitted under Section 15(3) of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Equalities Impact of the Proposal

38. Considerations relating to the equalities impact of the proposal are not permitted under Section 15(3) of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Options Considered

39. Members are now requested to re-determine the application only insofar as it concerns Browns Copse (owned by Mr and Mrs Sheppard).

40. Officers consider that the full and detailed report is a correct and accurate reflection of the documentary evidence and evidence given by witnesses at the public inquiry and that the Inspector's recommendation should be accepted.

41. The decisions open to the Committee are as follows:

- i. Having considered the legal tests and the evidence to agree the Inspector's recommendation insofar as it concerns Brown's Copse its entirety and register only the Copse, other than the north-west corner owned by Wiltshire Council.
- ii. Based only the legal test and on the available evidence to reject the Inspector's recommendations/findings in part and refuse to register the land known as Brown's Copse as a town or village green and in their given reasons for rejection of the Inspector's recommendation to evidence where the Inspector made a significant error in law or in fact.

Proposal

42. That Wiltshire Council accept the Inspector's recommendation and the application by Winterslow Opposed to Over Development (WOOD) under Section 15(3) of the Commons Act 2006 be approved but only to the extent that Browns Copse is registered as a town or village green in its entirety, other than the north-west corner of the Copse that is owned by Wiltshire Council.

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

None

Appendices:

Appendix 1 – Southern Area Planning Committee Report dated 30 April 2015

Appendix 2 - Southern Area Planning Committee Report dated 24 September 2015

Appendix 3 - Southern Area Planning Committee Report dated 17 December 2015

Appendix 4 – Inspector’s Recommendation

Appendix 5 – PowerPoint Presentation (including plans)

Appendix 6 – Court Order

Part II

Appendix 7 – Counsel’s Legal Advice Note for Southern Area Planning Committee Meeting