

WILTSHIRE COUNCIL

WESTERN AREA PLANNING COMMITTEE

17 JUNE 2020

COMMONS ACT 2006 – SECTIONS 15(1) AND (3)
APPLICATION TO REGISTER LAND KNOWN AS ‘GREAT LEES FIELD’ OFF
POUND LANE, SEMINGTON, AS A TOWN OR VILLAGE GREEN

Purpose of Report

1. To:
 - (i) Consider a report and recommendation, dated 7 February 2020, made by Mr William Webster of 3 Paper Buildings, appointed by Wiltshire Council as an independent Inspector to reside over a non-statutory public inquiry, held in October/December 2019, to consider an application made under Sections 15(1) and (3) of the Commons Act 2006, to register land known as ‘Great Lees Field’, in the parish of Semington, near Trowbridge, as a town or village green.
 - (ii) Recommend that Wiltshire Council accepts the Inspector’s recommendation.

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.

Background

3. Wiltshire Council received an application, dated 24 June 2016, made under Section 15(1) of the Commons Act 2006, to register land off Pound Lane, Semington, known as ‘Great Lees Field’ as a town or village green. The application was also made under Section 15(3) of the Act, i.e. where use of the land for recreational purposes had ceased and the application made within one year of the cessation of use. The application was made by Dr William Scott, Mr Steven Hall and Mr Jon Jonik on behalf of ‘The Friends of Great Lees Field’.
4. Part 7 of the application form requires the applicant to provide a summary of the case for registration. The applicant included the following information:

“Great Lees Field in the village of Semington has been extensively used by villagers in the post-war period ‘as of right’ for a wide range of recreational, sporting and other activities. This use came to an end on April 27, 2016, when the field was ploughed -as a prelude to maize being planted. This event, which

came without warning, was a shock to villagers who lost, overnight a prized village amenity; that is about 4Ha of green space which could be used for a wide range of activities in and around its normal agricultural usage. The ploughing of the field has prompted this application to establish village green status for the field with the aim of enabling villagers to continue to carry out the activities that they have freely enjoyed for so long.

Up to that point there had been no attempt by the field's joint owners (who do not live in the village) to prevent use by village families; nor had any attempt been made to deny complete access to the field by villagers by notices or physical barriers. In the same vein, permission had never been sought from the owners, by individuals or families, to use the field for any purpose.

Data on residents' use of Great Lees Field, and access to it, were gathered by questionnaire. There was a 16% return, which represents a significant level of sampling of village opinion. All respondents said that they had used the field during the past 20 years, and many said that it was for much longer than that. All were supportive of this application. The data show that there are at least six ways that people on foot have used to get into Great Lees Field over the years, and there is good evidence both through photographs and on Google maps of this usage.

The data show that the use of Great Lees Field was both regular and frequent. 26% of respondents said they used it every day, 47% every week, and 12% every month. Over 30 different activities were identified. The most frequently cited were: walking (with and without dogs), children playing, picking blackberries, and kite flying. This use of Great Lees Field by the village is in tune with agricultural practice and the rhythm of the seasons, as there are both seasonal activities, for example, which fit in around grass cutting for silage, and the more frequent activities that people undertake with their families (or on their own) more or less all the time."

5. The application was accepted as a complete and correct application on 9 September 2016. The application was accompanied by a plan on which the land is shown edged red at **Appendix B** and 66 completed witness evidence questionnaires. The witness evidence questionnaires were available to be viewed by the public at the Offices of Wiltshire Council - Rights of Way and Countryside, Unit 9, Ascot Court, White Horse Business Park, Trowbridge, Wiltshire, BA14 0XA and continue to be available to the public at the Council offices (Rights of Way) County Hall, Bythesea Road, Trowbridge. The Council, as the Commons Registration Authority ('CRA'), has a statutory duty to determine the application. The evidential burden of proof lies on the applicant for the registration of a new green. Following the service of formal notice of the application, posting of notice of the application on site and in one local newspaper and placing the application on public deposit, objections and representations were received, as follows:

Objections were received from:

- 1) Gateley Plc who put in a Submission on behalf of the landowners – 21 November 2016

Representations of support were received from:

- 2) Mr Steven Hall – E-mail correspondence dated 16 November 2016
- 3) Semington Parish Council (Mr Roger Coleman Clerk to Semington Parish Council) – E-mail correspondence dated 14 October 2016

*(Please note all responses are included in Wiltshire Council's decision report dated 1 December at Appendix C of the Western Area Committee report dated 13 December 2017 at **Appendix C** to this report).*

6. As part of the statutory procedure for determining town and village green applications, where objections are received, they must be forwarded to the applicant allowing the applicant a reasonable opportunity for dealing with the matters raised. Comments on the objections from 'The Friends of Great Lees Field' were received on 22 January 2017. The objectors were then given further opportunity to respond and their representations were received on 10 March 2017.

*(Please note all responses are included in Wiltshire Council's decision report dated 1 December at Appendix C of the Western Area Committee report dated 13 December 2017 at **Appendix C** to this report).*

7. The claimed land is located to the north of Pound Lane, Semington on the western side of the parish, just outside the settlement boundary identified within the Wiltshire Core Strategy document, between Pound Lane to the south and the Kennet and Avon Canal to the north, occupying an area of approximately 3.86 hectares (please see location plan at **Appendix A** and application plan attached at **Appendix B**).
8. Access to the site is possible from the following points:
 - (i) Public footpath no.1 Semington which leads from the Semington/Hilperton parish boundary, north-west of the swing bridge over the Kennet and Avon Canal to the west of 'Great Lees Field', through 'Great Lees Field' to Semington High Street, adjacent to the Somerset Arms pub. The route enters the field via a stile at the north-west corner of the field and a stone stile in the north-east corner of the field.
 - (ii) Gate in the southern field boundary alongside Pound Lane, (the Pound Lane gate).

- (iii) A former gap/Wiltshire gate (now fenced) in the western field boundary leading into the field to the west which has recorded public rights of way.
 - (iv) Garden gates leading from private properties on the eastern side of the field which are now fenced out of the field.
9. The whole of the application land is jointly owned by Mr William Stuart-Bruges and Mr Arthur Haythornthwaite. The land to the west is owned by Mr Thomas Masters and his sister, Ms Julia Masters.
10. Wiltshire Council, as the CRA, must determine the application in a manner that is fair and reasonable to all parties. All the elements of the application must be demonstrated. The standard of proof is 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 pastimes over the land for a period of at least 20 years and that use has ceased’. The Council, as CRA, has no investigative duty in relation to village green applications which would require it to find evidence or reformulate the applicant’s case. The Council considered the evidence and the objections received within a report to the Western Area Planning Committee dated 13 December 2017, (A copy of the Committee’s report is attached at **Appendix C**). Of particular concern to officers in the determination of this application were:
- (i) Was there sufficient evidence of the exercise of lawful sports and pastimes over the whole of the application land, where the majority of use undertaken on the land had been walking and dog walking?
 - (ii) The alleged ploughing of the land in 2000, which would lead to a cessation of use at that time, where 20 years use after 2000 could not be shown and the application would no longer be valid under Section 15(3) of the Commons Act 2006.
11. Officers recommended that given the substantial dispute of fact in this case it would be open to Wiltshire Council, as the Registration Authority, to hold a non-statutory public inquiry into the evidence, appointing an independent Inspector to preside over the inquiry and to provide a report and recommendation to the determining authority. It was resolved by the Western Area Planning Committee on 13 December 2017:

“That Wiltshire Council, as the Commons Registration Authority, appoints an independent Inspector to preside over a non-statutory public inquiry, in order that a recommendation can be made to the Council as the Registration Authority, to assist in its determination of the application to register land off Pound Lane, Semington, known as Great Lees Field, as a town or village green, as soon as is reasonably practicable.”

12. Wiltshire Council appointed Mr William Webster, of 3 Paper Buildings, as an independent Inspector to preside over a non-statutory public inquiry and to write a report containing a recommendation to Wiltshire Council as the determining authority. The inquiry was held at Semington Village Hall, located not far from the application land, on 15 – 17 October 2019 inclusive and 4 – 5 December 2019 inclusive, with an accompanied site visit held on 17 October 2019 and closing submissions in written form following the close of the inquiry.

Main Considerations for the Council

13. It should be noted that prior to the resumed inquiry on 4 December 2019, the CRA received a joint request from Counsel acting for both the applicants and the objectors, to adjourn the inquiry to a date not before the beginning of March 2020, in order to allow the parties time to continue ongoing discussions and complete the details of an agreement where the parties had, in principle, agreed that the town/village green application would be withdrawn in exchange for the dedication of a footpath around the perimeter of the site. The DEFRA advice - *“Section 15 of the Commons Act 2006 – Guidance notes for the completion of an application for the registration of land as a town or village green outside the pioneer implementation areas”* October 2013, states:

“61. ...If you decide at any stage not to proceed with your application, the registration authority has discretion either to take no further action on your application, or to go ahead and determine the application you made, based on the available evidence.”

14. This request was considered by both the CRA on receipt and by the Inspector at the inquiry and commented upon within the Inspector’s report (**Appendix D**). Where it is at the discretion of the Registration Authority, it was concluded that the inquiry should continue and the application be determined where there was a wider public interest and due to the difficulties that a six month adjournment would cause to the Inspector being obliged to make findings on the earlier evidence.
15. 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 Pound Lane, Semington, (‘Great Lees Field’), as a town or village green, has been made under Sections 15(1) and (3) of the Commons Act 2006, which amended the criteria for the registration of greens. Section 15 of the Commons Act is set out in full at part 9 of the Wiltshire Council decision report dated 1 December 2017 at Appendix C of the Western Area Planning Committee report dated 13 December 2017 and included at **Appendix C** to this report.
16. Sections 15(1) and (3) 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...

...(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 relevant period.

(3A) In subsection (3), “the relevant period” means-

(a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b)...”

17. There is currently no statutory or non-statutory guidance available to authorities regarding when it would be considered appropriate for a Registration Authority to hold a non-statutory public inquiry. However, judicial cases have confirmed that it is the authority’s duty to determine an application in a fair and reasonable manner and judicial decisions have also sanctioned the practice of holding non-statutory inquiries. In *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* Admn 10 Nov 2003 the Court decided that the holding of a non-statutory public inquiry in some circumstances would be necessary as a matter of fairness. In *R (on the application on Naylor) v Essex County Council* [2014] EWHC 2560 (Admin) the Court confirmed that a public inquiry was one means by which a registration authority may obtain evidence other than from the applicant and any objector or by which it may test or supplement that which it has received in written form.

18. 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 a report to Wiltshire Council, dated 7 February 2020 (please see report attached at **Appendix D**), in which he made the following recommendation:

“Findings of Fact

259. The core findings I make are these:

(a) A significant number of the local inhabitants of Semington used the land, but not the whole of the land, for LSP (lawful sports and pastimes) throughout the qualifying period.

- (b) *The land was mainly used as a place of transit for walking to destinations outside the land rather than as a destination in its own rights for LSP over the whole of the land. Any remaining use of the land itself would have been confined largely to walking, with or without dogs, around the perimeter of the field.*
- (c) *It follows that the land would have been mainly used for the exercise of putative or supposed rights of way along a defined route or routes. Such use would not justify registration. It follows that the whole of the land has not been used for qualifying LSP.*
- (d) *Any use not falling within category (b) (i.e. once the footpath use has been discounted) would not justify registration as it was too limited and infrequent.*
- (e) *The As (the Applicant's) are precluded from relying on use through the Pound Lane gate as it involved use which was forcible in law and therefore not as of right and would not justify registration as a matter of law. The use of the land by others who had entered it through different entry points was insufficient to justify registration.*
- (f) *WS-B (William Stuart-Bruges) threaded barbed wire on the top bar of the three Pound Lane gates after 1987. In doing so his intention had been to discourage local inhabitants from using this gate as a means of entry into the land. Reasonable users of the Pound Lane gate should have known that the presence of barbed wire in these circumstances meant that the land was private and off limits to the public.*
- (g) *Throughout the whole of the qualifying period the Pound Lane gates would have been continuously locked for months, if not for years, at a time except on those occasions when the Masters wished to go onto the land for their own purposes. Reasonable users who were regularly using these gates as a means of entry into the land should have been aware of the existence of the lock and chain around the latch post and should have appreciated that the land was private and off limits to the public.*
- (h) *If the Pound Lane gate had been left open at any time it was either because it had been inadvertently left open for short periods by the Masters or, prior to at least 2003, because the gate had been wrongfully lifted off its hinges on the hanging post by persons unknown allowing local inhabitants to enter the land.*
- (i) *Prohibitory signs were erected by WS-B on the Pound Lane and Wiltshire gates in 1987, 1989, 1998, 2003 and in 2004. By 2010 there was no further prohibitory signage on the Pound Lane gate. Such signs are likely to have been removed within a relatively short period by persons unknown and Os (the Objectors) were justified in the circumstances in not re-erecting replacement signage on a continual basis as it was likely to be torn down within a short period.*

- (j) *The foregoing signs would have said 'Private – No Right of Way' or similar. They were located where they would be seen by reasonable users and would have conveyed the clear message that the land was private and off limits to the public.*
- (k) *If any one or more of the three gates had been secured to the angle iron and had not been locked to the latch post it would have occurred on only a few occasions when contractors were working in the field. Any entry into the field by local inhabitants on these occasions would have been very limited and would not justify registration.*
- (l) *Any damage done to any of the Pound Lane gates will have been caused by persons unknown using the gate as a means of improper entry into the land and was not as a result of the ordinary passage of agricultural vehicles through the gateway.*
- (m) *The Wiltshire gate was usually open during the qualifying period as were the stiles at the northern end of the land.*
- (n) *The land was ploughed in 2000.*
- (o) *The grass on the land was cut twice each year (late spring and early autumn) during the qualifying period and prior to cutting would have been in the region of 2-3 feet long.*
- (p) *The cases of Os on permissive use and interpretation are rejected for the reasons given.*

Recommendation

260. *In the light of the above discussion, I recommend that the application to register the land as a TVG (being application number 2016/02) should be **rejected** on the ground that the applicable statutory criteria laid down in section 15(3) of the CA (Commons Act) 2006 have not been satisfied.*
261. *Put shortly, in order to justify registration As had to show that a significant number of inhabitants of Semington indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years before the application was made and, in my view, they failed to do this for the reasons explained.*
262. *Under reg 9(2) of the 2007 Regulations, 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 7 February 2020'."*

19. There is no obligation placed upon the determining authority to follow the Inspector's recommendation, although if the Committee decide not to follow the Inspector's recommendation which is supported by the very detailed and thorough consideration of the evidence in the Inspector's 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 report and the available evidence in order to determine whether or not the application land should be registered as a town or village green.
20. Under the Council's constitution one of the functions of the Area Planning Committee is that where an objection has been received and has not been resolved, to consider matters of local importance within the area such as the registration of town and village greens.
21. On 4th June 2020, Dr William Scott, a joint applicant in the Town/Village Green application, made representations regarding the Inspector's perception of his role in the application process, as contained within the report. It is not for the Registration Authority to alter the Inspector's findings in his report and it should be noted that the Inspector states that it was "*my impression*". An extract from Dr Scott's email is set out below for the Committee's information:

"I have been mulling over one aspect of Mr Webster's report for some time, and thought I had better raise it with you. It is the second sentence of para 78 on page 32. It says:

"It is my impression that he is the driving force behind the application to register."

The "he" is a reference to me. I am wondering how concerned I ought to be with this sentence appearing in a document which is about to be published. I say this because I do not regard the statement as true. I would readily concede that I was a driving force, but there were 5 of us involved and each was as committed as I was to the case we were arguing – as were a lot of other people in the village outwith the Friends group.

Its true that it is only Mr Webster's "impression", but I do not know why he wrote this. It seems gratuitous, and hardly germane to the inquiry or his recommendation. What was his point? Was it, perhaps, that this was something that one person was driving and not the collective endeavour that our case argued it was? I must say that this is how I read it – as might a reasonable uninvolved reader, I think. If so then this is more problematic than putting "the" instead of "a" (as noted above).

My concern is that when this goes to committee and is accepted (as we both know it will be), then this "impression" of my actions will be formally endorsed by Wiltshire Council. In effect the Council will be endorsing an opinion about me which I refute."

Safeguarding Implications

22. There are no safeguarding implications as those relating to safeguarding are not permitted with Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Public Health Implications

23. There are no public health implications as considerations relating to public health are not permitted within Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Environmental and Climate Change Considerations

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

Equalities Impact of the Proposal

25. Considerations relating to the equalities impact of registering land as a town or village green are not permitted within Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Risk Assessment

26. The holding of a non-statutory public inquiry and the production of the subsequent report and recommendation to Wiltshire Council from an independent Inspector, have reduced the risk to the Council of a potential legal challenge as the evidence of witnesses has been heard, tested and considered.

Financial Implications

27. Presently, there is no mechanism by which the Registration Authority may charge the applicant for processing an application to register land as a town or village green and all costs are borne by the Council.
28. Where the Council makes a decision to register / not to register the land as a town or village green it must give clear reasons for its determination as this decision is potentially open to legal challenge as 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.
29. There is no duty for Registration Authorities to maintain land registered as town or village green.

Legal Implications

30. If the CRA decides not to register the land as a town or village green, 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 three months of the date of the decision to determine the village green application. A landowner could also use judicial review proceedings to challenge the Council's decision if the land were to be registered as a town or village green.

31. 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 ('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 town or village green without limit of time. The application, which could be made many years after the decision and potentially enables the Court to hold a re-hearing of the application and consideration of the facts and law, could lead to de-registration of the land.
32. 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 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.
33. The issue of 'pre-determination' or approaching 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 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 Commons Registration Authority if a court was to make a finding that 'pre-determination' took place before a committee made a formal decision to determine an application to register land as a town or village green. The court may order that the decision be quashed and the decision sent back to the CRA to be re-made.

Options Considered

34. Members of the Committee need to consider whether to:
 - (i) Accept the Inspector's recommendation that the application by 'The Friends of Great Lees Field' made under Section 15(3) of the Commons

Act 2006 be rejected for the reasons set out in the Inspector's report dated 7 February 2020.

- (ii) Accept the Inspector's recommendation, but with modification supported by the available evidence, e.g. registering only part of the application land.
 - (iii) Not accept the Inspector's recommendation and resolve to register all of the land as described in the application made under Section 15(1) of the Commons Act 2006 and described as 'Great Lees Field', as a town or village green.
35. Where Members of the Committee do not resolve to accept the Inspector's recommendation in full and make an alternative decision, clear reasons for this decision, based on evidence, must be given as the decision of the Registration Authority is open to legal challenge by both the applicants and the landowners.

Reasons for Proposal

36. In the Semington case, the evidence of whether a significant number of inhabitants of any locality, or 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 was 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.
37. Following the close of the inquiry, the Inspector presented a well written and extremely thorough consideration of the evidence in a 97 page report with recommendation to Wiltshire Council, as the Registration Authority, dated 7 February 2020 (**Appendix D**):
- "...I recommend that the application to register land as a TVG (being application number 2016/02) should be **rejected** on the ground that the applicable statutory criteria laid down in section 15(3) of the CA 2006 have not been satisfied."*
38. Officers are satisfied that over the course of the five 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 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

39. That Wiltshire Council, as the Registration Authority, accepts the Inspector's recommendation and that the application by 'The Friends of Great Lees Field', under Sections 15(1) and (3) of the Commons Act 2006, to register land off Pound Lane, Semington, known as 'Great Lees Field', be rejected for the reasons set out in the Inspector's report dated 7 February 2020 (**Appendix D**).

Jessica Gibbons
Director – Communities and Neighbourhood Services

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

None

Appendices:

- Appendix A – Location Plan
Appendix B – Application Plan
Appendix C Wiltshire Council Western Area Planning Committee Report on recommendation to hold a non-statutory public inquiry (13 December 2017)
Appendix D Inspector's Report – Mr William Webster, 3 Paper Buildings – 7 February 2020