APPENDIX D

In the Matter of Two Applications

to Register Land at West Dean

partly in Wiltshire and partly in Hampshire

as a Village Green

FURTHER REPORT

of Mr VIVIAN CHAPMAN

1st July 2003

Wiltshire and Hampshire County Councils

c/o Corporate/Legal Services

County Hall,

Trowbridge,

Wiltshire BA14 8JN

Ref TSS/04463/GOO-11

49838/VRC/03/163/wp/179/West Dean Report 2

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FURTHER REPORT

1. Introductory

After a preliminary hearing on 24th April 2003, I made a Report dated 25th April 2003. I am asked to reconsider my Report in the light of:

1.1. a new application by the applicant for deferment of the decision of the registration authorities, and

1.2. correspondence from Mr Francis Morland.

2. The New Deferment Application

At the preliminary hearing, the applicant's solicitor (Mr Willis of Messrs Whitehead Vizard) expressly (a) conceded that, in relation to the objectors' land, the applications could not succeed in the absence of regulations under Commons Registration Act 1965 s 98 s 22(1A)(b) because recreational user was not continuing, and (b) disclaimed reliance upon an argument ("the Trap Grounds Argument") that the land was registerable because it had become a green under the old definition of

town or village green before the definition was amended by the Countryside and Rights of Way Act 2000 s 98. The only issue was therefore whether a decision should be deferred pending the introduction of regulations. I advised against such a deferment since the making of the regulations had already been long delayed and it was uncertain when the regulations would be made.

The substance of Messrs Whitehead Vizard's letter of 5th June 2003 is that the applicant wishes to withdraw the express concession and disclaimer made at the preliminary hearing and to request a deferment of any decision on the application until after the court ruling in the Trap Grounds case, in which the disclaimed argument will be considered by the court. The letter also submits some written evidence which appears to me to be irrelevant to the application.

Messrs Whitehead Vizard's letter of 11th June 2003 refers to the view expressed on the DEFRA website that, notwithstanding the absence of regulations, registration authorities should allow a reasonable time after recreational user is prevented for the lodging of an application to register a green. In my opinion, the DEFRA view is inconsistent with the wording of the legislation. However, whether the DEFRA view is right or wrong, it cannot apply in the present case, where the applications were made several years after user of the Morgans' land was prevented. There is nothing in this letter to affect my Report.

Thus, the central issue is whether the applicant should be permitted to withdraw the concession and disclaimer made at the preliminary hearing.

Since the registration authorities have not yet made their decisions whether to accept or reject the application, it seems to me that justice requires that the applicant should be allowed to withdraw the concession and disclaimer if they are now thought to have been wrongly made, unless withdrawal would cause unreasonable prejudice to

the objectors. It is therefore necessary carefully to consider the arguments put forward by Messrs Birketts.

First, Messrs Birketts argue that it would be a waste of public funds if the applicant were allowed to render the preliminary hearing a nullity by withdrawing the concession and disclaimer. However, I am not convinced by this argument. It was the objectors who asked for the preliminary hearing in order to put forward three legal arguments (on which they were successful on only one and then only because of the concession and disclaimer). It appears to me that there would have been a preliminary hearing even if the applicant had not made the concession and disclaimer.

Second, Messrs Birketts point out that Messrs Whitehead Vizard did not ask for an adjournment of the preliminary hearing to consider the Trap Grounds Argument (which I raised at the preliminary hearing). I agree that it would have been better for the applicant to have asked for an adjournment rather than to make the concession and disclaimer and then seek to withdraw them, but I do not think that the applicants should be punished because of a procedural mistake by their lawyer made on the spur of the moment in the face of a point which he was not expecting and for which he was not prepared. The task of the registration authority is to arrive at the right result and not to discipline the parties.

Third, Messrs Birketts argue that if the concession and disclaimer had not been made, they would have deployed legal arguments at the preliminary hearing to counter the Trap Grounds Arguments. I am sure that they are right that, in the absence of the concession and disclaimer, the Trap Grounds Argument would have been more fully debated at the preliminary hearing. However, since leading counsel has advised in favour of the Trap Grounds Argument and there is likely to be an imminent High Court ruling on the Trap Grounds Argument, I consider it inconceivable (in the

absence of the concession and disclaimer) that I would have recommended that the application be rejected on preliminary hearing on the basis that the Trap Grounds Argument was bound to fail.

Fourth, Messrs Birketts point to the delay between my Report of 25th April 2003 and Messrs Whitehead Vizard's letter of 5th June 2003 in which they first sought to withdraw the concession and disclaimer. I do not regard this delay as decisive. I bear in mind that the applicant was unaware of the Trap Grounds Argument before I raised it at the preliminary hearing and that it is a complex point on which the applicant doubtless required time to reflect and to take advice.

Fifth, Messrs Birketts argue that, in the light of the officer's recommendation that the application should be dismissed in relation to Mr and Mrs Morgan's land, legal fees were settled by the Morgans' insurers. However, they do not say that the insurers will not cover any further fees. In any event, it seems to me that the objectors act at their own risk if they act in reliance on officer's recommendation rather than the decision of the registration authorities, since the registration authorities are in no way bound by their officers' recommendations.

Having carefully considered Messrs Birketts' arguments, I consider that any prejudice to the objectors is outweighed by the injustice that would be caused to the applicant if the applicant were prevented from withdrawing its concession and disclaimer. I therefore recommend that the applicant be allowed to withdraw its concession and disclaimer and to rely on the Trap Grounds Argument.

If the applicant had not made the concession and disclaimer at the preliminary hearing but had relied on the Trap Grounds Argument, I have no doubt that I would have advised the registration authorities (a) to cancel the public inquiry and (b) to defer their decisions until after judgment in the Trap Grounds case. The question of

part registration may also be debated in the Trap Grounds case and I recommend, in the circumstances, that the decision on the application relating to land not owned by the Morgans also be deferred. I bear in mind that Mr and Mrs Morgan wish to sell their property and that the property is probably unsaleable until the village green application is determined. However, I do not regard this as decisive bearing in mind that (a) the Trap Grounds case is likely to be heard in the next few months, and (b) any prospective purchaser is likely to be advised that the legal position is doubtful until judgment in the Trap Grounds case.

Accordingly, I recommend that the registration authorities (a) defer their decisions until after judgment in the Trap Grounds case and (b) invite further written submissions from the parties after judgment in the Trap Grounds case.

3. Mr Morland

In his letters of 3rd March and 12th June 2003, Mr Morland puts forward two arguments. First, he argues that, on the true construction of CRA 1965 s 22(1A) (as amended by s 98 of CRoW 2000), there is no time limit on the making of an application to register a green after user has ceased to continue. Second, he argues that the part of the green which is not owned by the Morgans and is not the subject matter of any objection should be registered in any event.

On the first point, I cannot agree with Mr Morland. It appears to me that the scheme of the new definition is that a green can only be registered under the new definition if user is continuing or if user has ceased for no longer than a period to be prescribed by regulations. In the absence of regulations, user must be continuing. The rationale for the requirement of continuing user is unclear and, indeed, the new definition betrays some confusion in the draftsman's mind about the effect of

registration. However, it seems to me that the words are clear. I note the (somewhat enigmatic) comments in para 274 of the Explanatory Notes to s 98 of CRoW 2000, but the Explanatory Notes cannot affect the meaning of the statute.

On the second point, it seems to me that if, as I recommend, the decisions in relation to the Morgans' land are deferred pending judgment in the Trap Grounds case, it would be sensible also to defer decisions on the rest of the application land, in case the Trap Grounds judgment throws further light on the issue of part registration. Local people are not prejudiced because recreational user of the non Morgan land is continuing.

Accordingly, Mr Morland's letters do not affect my current recommendations.

4. Recommendations

In place of the recommendations in my Report of 25th April 2003, I now recommend that the registration authorities (a) defer their decisions until after judgment in the Trap Grounds case and (b) invite further written submissions from the parties after judgment in the Trap Grounds case.

Vivian Chapman

1st July 2003

Lincoln's Inn