WILTSHIRE COUNTY COUNCIL **AGENDA ITEM NO**

REGULATORY COMMITTEE

11 JUNE 2003

COMMONS REGISTRATION ACT 1965 (AS AMENDED) APPLICATION FOR THE REGISTRATION OF A TOWN OR VILLAGE GREEN: WEST DEAN VILLAGE GREEN, WEST DEAN

Purpose Of Report

1. To inform the Committee of the outcome of a Pre-Enquiry Hearing and the recommendations of the Inspector

Background

2. At its meeting on 5 March, 2003, the Committee considered objections to register land at West Dean as a Village Green. A copy of the Report to that meeting of the Committee is attached to this Report as Appendix A.

3. The Committee Resolved:

"To refer the Application to a Public Inquiry to be held jointly with Hampshire County Council because of the conflicting evidence and to request the Solicitor to the Council to negotiate with colleagues at Hampshire on the apportionment of costs".

4. Mr Vivian Chapman, Barrister of 9 Stone Buildings, Lincoln's Inn, was appointed to act as Inspector.

5. Messrs Birketts, Solicitors for Mr & Mrs Morgan, the objectors (being the owners of Red Lion House and of that part of the application site shown shaded and hatched black on the plan attached to this Report as Appendix B) requested a Pre-Inquiry Hearing to raise legal issues, because they maintained that the Applications were bound to fail on points of law.

6. The Pre-Inquiry Hearing was held on 24 April, 2003, the Inspector having carried out an unaccompanied site visit beforehand. The Solicitor to Hampshire County Council had agreed to be represented at the Hearing by Wiltshire County Council. The Solicitors for the Parish Council (the Applicant) and for Mr & Mrs Morgan

(the Objectors) attended and made legal submissions. The Inspector advised that he would provide the parties with a written Decision.

Legal Position

7. The three points of law disputed as a preliminary issue are set out in paragraph 7 of the Inspector's Report, a copy of which is attached as Appendix C. The Inspector dismissed the first two points of challenge but accepted the third based on the absence of continuity of user.

8. Section 22 of the Commons Registration Act 1965 (as amended by Section 98 of the Countryside and Rights of Way Act 2000) contains the definition of a Village Green. One of the requirements is that there must be continuing use of the land for recreational purposes. Messrs Birketts argued that after purchasing the property in 1995, Mr & Mrs Morgan had prevented the use of that part of the land which belongs to them. The Parish Council's Solicitor conceded that there is no continuing recreational user of the land in Mr & Mrs Morgan's ownership and, therefore, in the absence of further regulations covering the position the application was unsustainable in relation to Mr. & Mrs. Morgan's land for lack of continuing user.

9. However, the Parish Council's Solicitor asked that determination of the Application be deferred until such time as Regulations are made under Section 22 (as amended) of the Commons Registration Act 1965. It is expected that the Regulations will specify a period of time during which user may have ceased but which would allow the Application to be valid. Mr & Mrs Morgan's Solicitor argued that the uncertainty created would leave a blot on their title which would inhibit any sale of the property. This argument was accepted by the Inspector.

Conclusion

10. The Inspector concluded and recommended that:

(i) the Registration Authorities should reject the Applicant's Application for a deferment until the Regulations are made;

(ii) the Registration Authorities should reject the Application in relation to such part of the Application Land as lies within the boundaries of Mr & Mrs Morgan's registered title;

(iii) the Registration Authorities should accede to the Application in relation to such part of the Application Land as lies outside the boundaries of Mr & Mrs Morgan's registered title;

(iv) the Registration Authorities should cancel the proposed Public Inquiry as being unnecessary;

(v) the Registration Authorities should, as required, give reasons for part rejection of the Application and those reasons should be "for the reasons set out in the Inspector's Report dated 25 April 2003".

Recommendation

11. It is recommended that the Recommendations at paragraph 10 above are adopted by the Committee.

12. A similar Recommendation will be made to Hampshire County Council's Regulatory Committee on 16 July 2003.

PETER SMITH
DIRECTOR OF CORPORATE SERVICES

Published documents relied upon in the production of this Report:-

The Application for Registration and the Representations received

Environmental impact of the Recommendations contained in this report:-

Approval of the Application for Registration would result in part of the land known as West Dean Village Green being registered as a Village Green under the Commons Registration Act 1965 (as amended).

APPENDIX A

WILTSHIRE COUNTY COUNCIL **AGENDA ITEM NO:**

REGULATORY COMMITTEE

5"' March 2003

COMMONS REGISTRATION ACT 1965 (as amended)
APPLICATION FOR THE REGISTRATION OF A TOWN OR VILLAGE GREEN: WEST DEAN VILLAGE GREEN, WEST DEAN

Purpose of Report

1. To inform the Committee of an application which has been received to register land at West Dean Village Green, West Dean, Wiltshire as a Village Green under the Commons Registration Act 1965 and to seek a decision on the application.

Background

2. The Commons Registration Act 1965, required all common land and town or village greens to be formally registered. County Councils were charged with compiling the register of such land.

Failure to register any land within the prescribed period, which expired in 1970, resulted in that land ceasing to be common land or town or village green.

3. Further registrations may be made in certain very specific circumstances.

Under Section 22(1A) of the Commons Registration Act 1965 (inserted with effect from 30th January 2001 by Sections 98 and 103(2) of the Countryside and Rights of Way Act 2000) land will be a town or village green-

> "... if it is land on which for not less than twenty years a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged in lawful sports and pastimes as of right and either:-
>
> (a) continue to do so, or
>
> (b) have ceased to do so for not more than such period as may be prescribed or determined in accordance with prescribed provisions."

No regulations have yet been made under paragraph (b).

If an application to register land as common land or as a town or village green is made, the County Council as Registration Authority is required to advertise the application in the local press and on the site, inform the other local authorities in the area and the owner, lessee, tenant or occupier of the land concerned. A period of not less than six weeks is allowed for objections to the application to be lodged.

The application and objections must then be considered by the Registration Authority and a decision made as to whether the land is to be registered or not. Whilst there is no formal right of appeal against a rejected application, it is open to the applicant to seek a judicial review of the Authority's conduct, if he believes it to constitute an abuse of power or to be wrong in law, unreasonable, procedurally improper, biased or contrary to legitimate expectations.

Detail

4. The application site is shown shaded on the plan attached as Appendix I. Mr R. H. and Mrs C. A. M. Morgan are the owners of part of the site shown hatched on the plan.

5. The application dated 13th November 2002 was made by Mr Alan Willis of Messrs Whitehead Vizard, Solicitors, on behalf of West Dean Parish Council. The Parish Council's case is that the land became a Village Green in 1990 by user for more than 20 years. The application replaces a previous application, giving an earlier date, which was withdrawn after legal discussions between the applicant's solicitors, the owners' solicitors and the County Council as registration authority.

6. The application is supported by 31 letters or statements from local residents and former residents and details of these (including the claimed uses) are given in Appendix II to this report, (these are the same letters or statements which were used in connection with the earlier application).

7. Following notice to the owners of the application, an objection has been received from Messrs Birketts, Solicitors, on behalf of Mr and Mrs Morgan in relation to the land in their ownership. They have asked that Mr Morgan's letter of 4th March 2002 (submitted in connection with the earlier application) be used as an objection (Appendix III to this report). The enclosures referred to in Mr Morgan's letter are available for inspection in the Members' Room.

8. Messrs Birketts have also made the following point:

The use ceased before the date of the application and therefore does not comply with Section 98 of the CROW Act 2000 which requires continuous use. No regulations have yet been made under the Act to allow a gap between the user and the application.

9. As required by the Regulations, the objection has been forwarded to the applicant for comments and the response on behalf of the Parish Council is attached to this report as Appendix IV.

Issues for Consideration

10. In order to meet the requirements of the Commons Registration Act 1965 (as amended), the applicant must demonstrate that the land has been used by a significant number of local inhabitants for lawful sports and pastimes, as of right for not less than 20 years and continues to be so used. To qualify 'as of right' the use must have been open. It must have been achieved without the use of force. Finally, it must not have been use under licence from the owner. Each of these requirements is examined below.

Actual Use for Lawful Sports and Pastimes

11. The statements in support of the application for registration, assert that the land has been used for a wide range of village activities as shown in Appendix II. On behalf of the owner, it is stated that the use has not been continuous and that before the closure of the Red Lion public house (now a private house owned by Mr and Mrs Morgan), many of the events held on the land (eg. The Tug-o-War) were organised by the public house to generate sales and that no sports and pastimes have taken place there since they purchased the property in 1995.

Local Inhabitants

12. The use must be mainly, but need not be solely, by a significant number of inhabitants of any locality or of any neighbourhood within a locality. Most of the letters in support of the application are from local residents.

As of Right for Not Less than 20 years

13. The applicant claims that the land became a village green in 1990 by user for more than 20 years.

In order to qualify for use 'as of right' the users need not necessarily believe that they have any right to go on the land. It is, however, necessary to provide evidence to satisfy the tests of the use without force, without secrecy and without permission. There is a significant conflict between the letters of support and the objection as to whether the land was used with the permission of the proprietors of the then Red Lion public house.

14. Members are informed that an application has been made to Hampshire County Council for adjoining land in that county to be registered as a Village Green.

Hampshire has indicated that it would agree to hold a non-statutory Public Inquiry to deal jointly with the application which it is obliged to determine and the application which is the subject of this report.

Conclusion

15. It is recommended because of the conflicting evidence that the application to Wiltshire be referred to a Public Inquiry to be held jointly with Hampshire, on the basis of each Council sharing the cost equally.

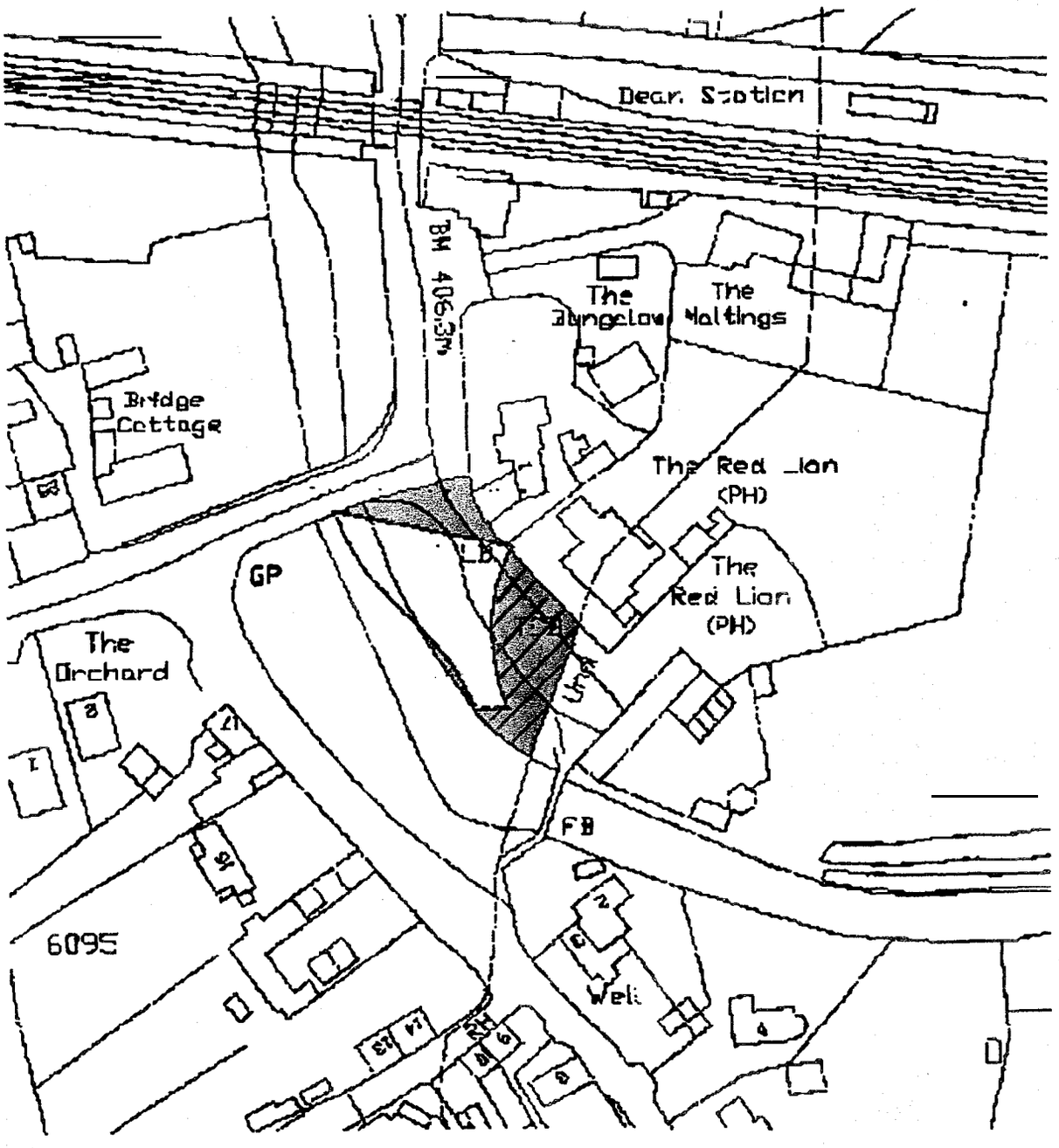
16. The total cost of a Public Inquiry (to include the Inspector's fee and the cost of the accommodation and advertising), is estimated to be in the region of £5,000 to £7,000. The cost to Wiltshire County Council would, therefore, be in the region of £2,500 to £3,500.

PETER SMITH
Director of Corporate Services

Unpublished documents relied upon in the production of this report:- The application for registration and representations received.

Environmental impact of the recommendations contained in this report:- Approval of the application for registration would result in The West Dean Village Green being registered as a Village Green under the Commons Registration Act 1965.

APPENDIX I AEW 1



APPENDIX II

NAME	ADDRESS	YEARS OF PERSONAL KNOWLEDGE	ACTIVITIES
P Parsons	Church Farm, West Dean	1931→	Maypole, Morris Dancing, Tug-o-War, Picnics, Coronation Jubilee & Millennium celebrations
S Snell	Netherfield, West Grimstead	1931→	Fishing, Football, Tug-o-War
M Thomas	Burdon Grane, Highampton Beaworthy, Devon	1940-1957	Communal open space
G Snelling	Manston, Tytherley Road, Winterslow, Salisbury	1940-r	Cricket, Football, Cycling
C Warry	Cobwebs, 14 West Dean	1939-J	Cattle watering, Picnics, Paddling, Tug-o-War, Silver Jubilee, Car Boot Sale
C H Poolman	4 Rectory Hill, West Dean (including Env. Sub-committee statement)	19434	Fishing, Picnics
R Parsons	27 West Dean	1950→	
J S Gledhill	Tanglewood, West Dean	1958→	Maypole, Nature walks, Picnics
P Noyce	The Feller's Lodge, West Tytherle y	1963→	Tug-o-War, Fete, Hunt Meet, Feeding ducks
L & M Palmer	4 Railway Cottage, West Dean	1961→	Picnics, Paddling, Pony Riding, Charity events
M E L Blair	6 Moody's Hill, West Dean	1958→	Playing, Bicycling, Paddling, Sailing boats
M Wootten	not given	1963-1999	Tug-o-War, Greasy pole, Maypole, Dancing, Fetes
S Gruzelier	Pilgrim's Croft, West Dean	1969→	Duck feeding, Playing, Fund raising
M Lancaster	Rectory Hill House, West Dean	1970→	Playing, Pony Riding, Dog walking
J L Fletcher	10 Whetlands, Southwell Portland, Dorset	1971-1993	Tug-o-War, Maypole, Celebrations

NAME	ADDRESS	YEARS OF PERSONAL KNOWLEDGE	ACTIVITIES
J A Holland	Bridge Cottage, West Dean	1979-T	Playing, Sailing boats, Rowing Dinghies
Brig. Hargrave	5 West Dean	1982 →	Sailing boats, Feeding ducks, Tug-o-War, Village Festival
A M Hand	Well Cottage, West Dean	1981 →	Picnics, Pony Riding, Treasure Hunt, Barbeques
R Glassock	2 Moody's Hill, West Dean	1983 →	Fishing, Sailing boats, Bicycling, Rollerblading, Picnics
Q R Nicholson	13 The Mead, Hythe, Southampton	17 years	
D T & D L Tucker	Orchard Farm, 15 West Dean	1988 →	Tug-o-War, Duck Derbys, Pig Roasts, Millennium & New Year's Eve parties, 'Volewatch' Naturewatch Club
D & I McKenna	Chantry House, West Dean	1989 →	Walking, Picnics, Duck feeding, Cricket, Musical Evenings, Fetes
J Johns	The Crown House, Clifton-Upon-Teme, Worcestershire	1959-1973	Car parking
S Hunter	3 Strangway, Larkhill	1949-1998	Picking-up and dropping-off point, Car parking
Dr K S Mann	Algars, Sarum Road, Winchester	1995-1996	Bicycling, Duck feeding
L Hughes	14 Clarendon Close, Romsey	not specified	Fishing, Playing
C Howard	4 Prospect Cottages, Great Bourton, Banbury	"	Pony Riding, Picnics, Tug-o-War, Pillow fights
J Moxham	Idlewild, West Tytherley Salisbury	"	Playing, Paddling, Picnics, Tug-o-War, Fetes
S Hilliard	3 1 The Rookery, West Dean	"	Duck racing, Tug-o-War, Community gathering
J Cole	6 Hillside Close, West Dean	"	Paddling, Fishing, Swimming

APPENDIX III

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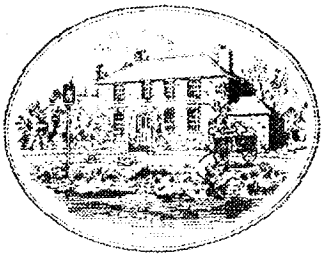
From: Huw & Caroline Morgan



Red Lion House
West Dean
Wiltshire
SP5 1JF

Home: (0 1794) 340469
Work: (0 1962) 888224
Fax: (01962) 888210
E-mail: huwmorgan 1 @compassmag.co.uk

Mr Trevor Slack
Wiltshire County Council
County Hall
Trowbridge
Wiltshire BA14 8JD

4 March 2002

Dear Trevor,

Thank you for your letter of 1 March 2002 concerning the additional time that you have granted to West Dean Parish Council (WDPC). We understand your reasons but believe that you have been overgenerous.

As discussed, I enclose copies of letter received by the planning departments of Salisbury District Council and Test Valley Borough Council in 1996 and 1997. At this time the correspondents were arguing that Change of Use should not be granted for the property as the Red Lion was the hub of village activity. They state that the pub ran the Tug of War, the Duck Derby and many other social and charitable events. Four years on, the same correspondents claimed that the pub had no role in these events. Time plays strange tricks upon the memory! You will see from the attached press cutting that most of those contributing the new evidence in order to support the Village Green application, were strongly opposed to the Change of Use. We see this current application as a continuation of this campaign.

I also enclose relevant extracts from the statements secured by Barbara Burke when (in 1999) WPDC were lobbying for the area to be designated as Highway. It is quite clear that some of the area now being assessed as Village Green was enclosed by sheep pens, used for the grazing and watering of animals and used as car parking. Further, the Whitbread paid for the tarmac surface, the landlord maintained the grassed areas and picnic benches, owned by the pub, for the use of pub customers were present on the grassed areas to the East of the River Dun. Signs concerning car parking (liability and access) on the forecourt were also erected by the brewery who owned the land since the division of the Norman Court Estate in 1945.

I attach minutes frotn WDPC dating back to the 1960s which discuss the area in front of the Red Lion. You will determine that the Common Land was registered in the early 1970s but usually referred to as the Village Green. This mistaken use of the term Village Green lies at the heart of WDPC's error. Having registered part of the area as Common Land, there is no route back to transfer the land to another register which lists Village Greens.

You will note that in the 1980s all parties were trying hard to disown the approach to the car park as they did not want to pay for its maintenance. It was eventually resurfaced by the brewery and the bill passed onto the Highways Department. The pub landlord paid for the groundworks and seeding of the grassed areas.

We have continued to maintain the land which we own in front of our home. We have cut the grass, built up and seeded the riverbank, planted flowers and maintained the flowerbeds. We have planted shrubs and pruned the trees. Visiting friends park their cars in our car park.

In 1996 we gave permission to Mrs Wooton to use the car park and barn for a plant sale and allowed Mr Wilmot to hold a steam railway rally the same year. We even allowed Mr Hargrave to park his removals van on the car park overnight when he moved to the village. He kindly gave us a bottle of red wine to thank us. Other villagers have asked us whether their friends can park there when attending parties, funerals and sponsored walks and we have again given permission. The organisers of the Vole Watch from Tytherley wrote to ask permission to come onto our land and also wrote to thanks us afterwards. Mr Holland claims that he dammed the river, but contemporaneous minutes from the Parish Council show the landlord did it.

In 1998 we have given permission to the fete committee to hold a tug of war using our side of the River Dun. We regretted this decision as we found vomit on our doorstep and damage to the kerbstones as a result. The tug of war has not been held on our land since – mainly because of the robust stance of Wiltshire Constabulary. 1 attach a letter from Superintendent Hollingshead.

There is no evidence to show that of 'sports and pastimes' have been organised on the car park over a period of 20 years – before or after 1970. Many of the activities quotes took place in the River Dun or upon the Common Land. Regular events, such as the tug of war, were run by the pub and it is clear that charitable and community events were welcomed by the landlords as they generated bar sales. Most of your recent correspondents recognise the involvement of the Red Lion in these activities. It was in the brewery's interest to attract people to the area; the land has always been in private ownership, but attached to a public house. No 'sports and pastimes' have taken place on our land without permission since we purchased the property in 1995.

I enclose a letter from Mr and Mrs Chandler which confirms that we maintain the land and that the pub ran community events. Finally, the records from the Parish Meeting in 1967 show that they accepted that the brewery owned the land as they had seen the deeds. Further, they knew that they could not register the land as Village Green as the historic green was already recorded – in a different location. We have all the evidence to show where this village green was.

Finally, I enclose the Save Our Pub Committee Bulletin from 8 October 1995 which lists several of your correspondents as part of the committee. I believe that they should have declared an interest when writing to you as they tried to purchase the Red Lion in 1995. You will also detect that they. maintained that the pub was the hub of the village in 1996/7 when dealing with the Change of Use application, and now deny that it had any role to play.

We believe that there has been cynical manipulation of WCC by WDPC who have misled the villagers and now seek to deceive the comtnittee They first claimed the right to park, then that the land was highway and finally, when they realised that highway would impede, not help, their plans they claimed a Village Green. Please bring these matters to the attention of the Regulatory Committee in your report – I am sure that they will see through the application.

Yours sincerely,

APPENDIX IV

RESPONSE OF THE WEST DEAN PARISH COUNCIL 17TH FEBRUARY 2003

Re WEST DEAN VILLAGE GREEN WILTSHIRE
REPLY TO BIRKETTS' COMMENTS.

1. USER

The Applicants have put forward a substantial body of witnesses to support use of the type required to be established for registration of a village green. The Morgans seek to argue that this use has been exercised not as of right but with either their or their predecessors' consent.

This is a pure matter of fact and can be determined only by an enquiry, either statutory, or non-statutory.

2. CROW ACT 2002, SECTION 98

The Applicants say that this Section effectively adds a set of circumstances under which land may become a village green.

They concede that the land is not being used in the way set out in the Commons Registration Act 1965, Section 21(1 A) because the Morgans have stopped that use.

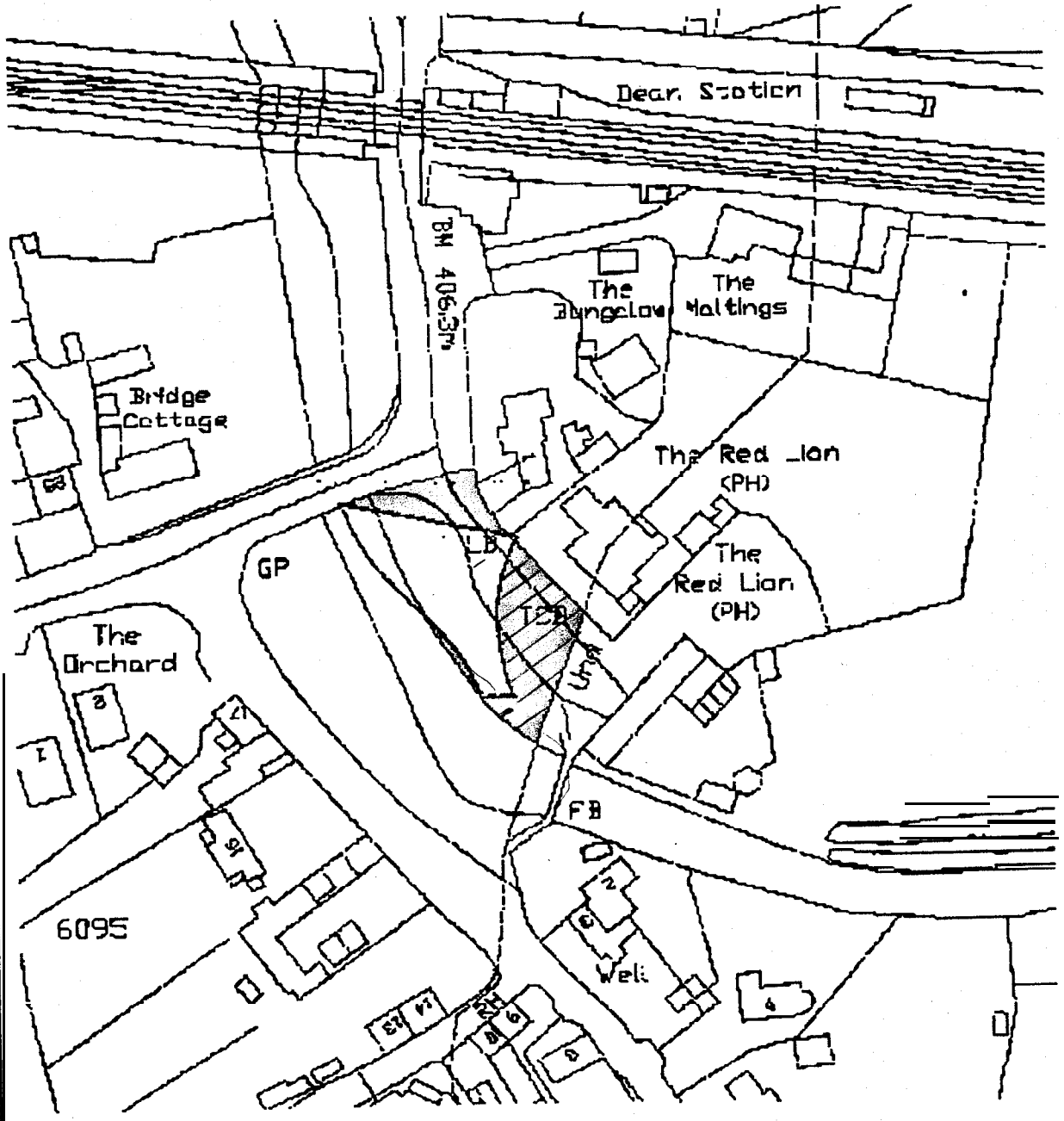
They concede further that there are at present no Regulations made pursuant to Section 2 1(1A)(b).

However, they say that the definition of "*town* or village green" contained in Section 21(1) enables the Applicants to seek registration of the land as a village green either because " the inhabitants of any *locality* have a customary right to *indulge* in *lawful* sports or pastimes, or on which the inhabitants of a locality *have* indulged in such sports or pastimes".

3. REGISTRATION AS A VILLAGE GREEN OF LAND ALREADY REGISTERED

This is conceded. The present application is clearly, and on its face, restricted to land not already so registered.

APPENDIX 13 AEW



APPENDIX C

In the Matter of Two Applications to Register

Land at West Dean,

partly in Wiltshire and partly in Hampshire

as a Village Green

REPORT

of Mr VIVIAN CHAPMAN

25th April 2003

Wiltshire and Hampshire County Councils

C/o Corporate/Legal Services

County Hall,

Trowbridge,

Wiltshire BA14 8JN

Ref TSS/04463/GOO- 11

4983 8/VRC/03/89/wp/174/West Dean Report 2

In the Matter of Two Applications to Register Land at West Dean, partly in Wiltshire and partly in Hampshire as a Village Green

REPORT

of Mr VIVIAN CHAPMAN

25th April 2003

1. West Dean

The village of West Dean lies on the Wiltshire/Hampshire border. The River Dunn runs through the village. At the heart of the village is a former public house, the Red Lion. Between the Red Lion and the river there is an expanse of open land, part of which is the tarmac former public house car park and part of which is mowed grass. The county boundary runs across this open land and through the Red Lion. Part of the car park and grassed area is registered under the Commons Registration Act 1965 as common land. Some, but not all, of the open land is comprised within the registered title of the Red Lion.

A dispute has arisen between Mr and Mrs Morgan (who bought the Red Lion in 1995) and West Dean Parish Council about the status of that part of the open land owned by Mr and Mrs Morgan in front of the Red Lion which is not already registered as common land. The parish council assert, and Mr and Mrs Morgan deny, that the land is subject to the recreational rights of villagers.

2. The Two Applications

In order to resolve this dispute, the parish council made two applications under s 13 of the Commons Registration Act 1965.

2.1. Hampshire County Council Application

On 10th October 2001 the parish council applied to Hampshire County Council for the registration as village green of the land shown coloured purple on an attached plan. The colouring of the plan is somewhat confusing, but the county boundary is shown as a series of dashes with Hampshire on the eastern side of the boundary. The land sought to be registered mostly lies on the north side of the River Dunn but includes the footbridge over the river and a small area on the south bank. It includes some land not owned by the Morgans.

Part 4 of the application form says that the land became a village green "In at least 1970, possibly earlier". Part 5 of the application form says that the land became a village green "by user for more than 20 years in the circumstances mentioned in s 22(1) (a) of the Commons Registration Act 1965 (as amended).

2.2. Wiltshire County Council Application

On 13th November 2002, the parish council applied to Wiltshire County Council for registration as a village green of the land coloured green on an attached plan. This land comprised part of the former public house car park and part of the grassy areas around the car park on the north side of the River Dunn. Again, not all the application land was owned by the Morgans.

Part 4 of the application form stated that the application land became a village green in 1970. Part 5 said that the land became a village green by user for more than 20 years.

3. Objections

The only objectors to the applications were Mr and Mrs Morgan.

4. Evidence

4.1. In **Support** of Applications

In support of the applications, the parish council submitted a bundle of letters from local people saying, in effect, that the application land has been used peaceably openly and without permission for recreation by village people for as long as anyone can remember. The application was also supported by the required statutory declarations confirming the truth of the matters stated in the applications.

4.2. In Opposition to Application

The objectors have, as yet, submitted no clear statement of the facts alleged by the objectors, but rather bundles of miscellaneous documents apparently designed to cast doubt on the good faith of application.

5. Non **Statutory** Public Inquiry

I was instructed by Hampshire and Wiltshire County Councils to hold a non statutory public inquiry into the applications and to report with my findings and recommendations. The public inquiry was fixed to start on 21st May 2003 and I issued Directions on 26th March 2003.

6. The Current Application

By letter dated 8th April 2003, the objectors' solicitors applied for a preliminary hearing on the ground that the applications were bound to fail on points of law. There was no objection from the applicant to such a preliminary hearing and so I fixed a preliminary hearing for 24th April 2003 and gave Further Directions on 15th April 2003 requiring the objectors to summarise their points of law in writing so that the applicants would have an opportunity to consider them before the hearing.

I held the preliminary hearing in Wilton on 24th April 2003. On the way to Wilton I held an unaccompanied site view to familiarise myself with the application land. Mrs Sydenham appeared for the objectors and Mr Willis for the applicants. I am indebted to them both for their helpful written and oral submissions. I would also like to thank Mr Trevor Slack of Wiltshire County Council for making all the administrative arrangements with great efficiency.

7. Points of Law

Mrs Sydenham put forward three points of law

7.1. First, she argued that the applicant's evidence showed immemorial user. Accordingly, she argued, the application land was registerable on first registration as a customary green and therefore is not registerable by way of amendment as a prescriptive green under s 13.

7.2. Second, she argued that Part 4 of the Hampshire County Council application says that land became a green in at least 1970 and possibly earlier. Mrs Sydenham argued that land that became a green in or before 1970 is registerable only on first registration and not under s 13

7.3. Third, she argued that the applicant had conceded in a Response dated 17th February 2003 that the application land was no longer used for recreation because

the Morgans had stopped such use. She submitted that since the applicant has admitted that user is not continuing, the land cannot be a new green under s 13 in view of the new definition of town or village green introduced by s 98 of the Countryside and Rights of Way Act 2000 which requires user to be continuing save as provided by regulations under s 22(1A) (b) of the amended Commons Registration Act 1965, which regulations have not yet been made..

8. Point 1

In my view, Mrs Sydenham's first submission is inconsistent with the views expressed by the Court of Appeal in ***R v Suffolk CC ex p Steed (1996) 7.5 P&CR 102.*** The Court of Appeal considered that an unregistered customary green could be registered on the basis of 20 years' post 1970 user under s 13 : see p 113. I do not think that the applications necessarily fail on this ground.

9. Point

Point 2 depends on whether the applicants are bound by the date of 1970 given in part 4 of the application form. Mr Willis argued that he should be allowed to amend the date given in Part 4 to 1990. He referred to the Commons Registration (New Land) Regulations 1969 regs 5(7) and 6(3). Whilst reg 5(7) only applies to preliminary consideration before publicity and thus does not apply in the present case where publicity has already taken place, I consider that his reference to reg 6(3) is apposite. To my mind, it shows that the application is not to be defeated by technical defects in the application form. I think that it would be absurd if the application had to be rejected on the ground that the land had not become a registerable green by 1970 notwithstanding that it had become a registerable green before the date of the

application. I cannot accept Mrs Sydenham's argument that a potential objector might be prejudiced by the error. It appears to me that the issue in a s 13 application is whether the application land has become a registerable green, and that the precise date on which it became such a green is not crucial. I cannot conceive of any person who might have objected if Part 4 had specified 1990 who did not object because Part 4 specified 1970. It has to be borne in mind that 1970 is not an impossible date for the creation of a new prescriptive green, if based on user which started immediately after 3 1st July 1950. Indeed, form 30 itself is headed "Application for the Registration of Land Which Became a Town or Village Green after 2nd January 1970".

In the case of the Trap Grounds, North Oxford, I was appointed inspector to hold a non statutory public inquiry and advised Oxfordshire County Council that an applicant was not strictly bound by the date specified in Part 4 of her application form. Mr G Laurence QC subsequently advised the opposite. Oxfordshire County Council is applying to High Court for directions. In the circumstances, I cannot advise that the present Hampshire application is bound to fail on the basis of a point that I consider is bad and which is, in any event, going to High Court for decision.

10. Point 3

Mr Willis expressly conceded that there was no continuing recreational user of the part of the application land owned by the Morgans although he maintained that user was continuing in relation to the rest of the application land. Mr Willis further expressly conceded that the application was unsustainable in relation to the Morgans' land unless and until regulations were made under s 22(1A) (b) which prescribed a period of cessation longer than that of the actual cessation .There is no clear evidence of the date on which recreational use of the Morgans' land ceased, and Mr Willis

made no concession about that date. It may date back as far as the Morgans' acquisition of the Red Lion in 1995.

Mr Willis expressly disclaimed reliance on the argument put forward in the Trap Grounds case by Mr Laurence QC, who advised that if the application land became a green under old definition before CRoW came into force, it should still be registered on a s 13 application made after introduction of the new definition, whether or not it complied with the new definition. Mr Willis also expressly disclaimed reliance upon an argument that if the application land was a green before user was obstructed, the obstruction was unlawful under s 12 Inclosure Act 1857 & s 29 Commons Act 1876 and cannot be relied upon to defeat a s 13 application.

However, Mr Willis argued that the registration authorities should defer consideration of the applications until after regulations are made under s 22(1A) (b). He pointed out that, when the regulations are made, it may prove that the applications are well founded in relation to the Morgans' land. He further pointed out that if the applications were rejected in relation to the Morgans' land without waiting for the promulgation of the regulations, the applicant might be prejudiced because the period specified under the regulations might well be a specified period before the date of the application, with the result that a fresh application would be unsuccessful even though the present application would have been successful

Mrs Sydenham argued that her clients wished to sell their property and that an indefinite deferment of the public inquiry would leave a blot on their title which would inhibit any sale. She pointed out that the regulations were already much delayed and that the date when they would be promulgated was still uncertain.

I think that the arguments of Mrs Sydenham on this point are to be preferred. It is now conceded on behalf of the applicant that it made an application which was

bound to fail in relation to the Morgans' land unless saved by regulations under s 22(1 A)(b). A number of years have passed since CRoW was enacted and there is still no certain date when those regulations will be published. It is even uncertain whether those regulations will in fact save the application. It seems to me that any prospective purchaser of the Red Lion is bound to be seriously concerned at the prospect of a future public inquiry hanging over the land, and that an indefinite deferment would gravely prejudice attempts to sell the Red Lion. If the applicant is right and the application land is an unregistered customary green, it appears, on the views expressed by the Court of Appeal in *Steed* that the recreational rights of local inhabitants will not be affected by non registration. In all the circumstances, it does not seem to me that it would be right to have an indefinite postponement of the determination of the applications. I recommend the registration authorities to refuse the application to defer determination until the s 22(1A) (b) regulations are in force.

11. Part Registration

Ifdeferment is rejected, then Mr Willis concedes that the applications must fail in relation to the Morgans' land for lack of continuing user. However, it appears to me that the applicant has established its case in relation to the rest of the application land. Mrs Sydenham expressly told me that her clients had no objection to the registration of that part of the application land which they did not own, and she produced her clients' registered title to show the boundaries. There was no objection to the applications other than that of Mr and Mrs Morgan. The applications were supported by the required statutory declarations verifying the facts stated in the application forms, and the applicant has produced a substantial body of written evidence to prove that the land has been used as of right since time immemorial and is

still used for recreation by local people. The only reason why there was no continuing user of the Morgans' land was because the Morgans objected to and prevented recreational use of their land by local people, It is not suggested that they stopped recreational use of any land which they did not own.

In my view, the correct action is to refuse to register the Morgans' land but to register the rest of the application land as a village green. It is however necessary to take account of the decision of Sullivan J in ***R (MacAlpine) v Staffordshire CC (unreported)*** which considered the question of part registration. As I read the judgment, there were two alternative ***rationes decidendi***, one that it is generally permissible to register part of the application land, and the other that it is permissible to register part of the application land at least where the part registered is substantially the same as the whole of the application land. This point also arose in the Trap Grounds case, where I advised registration of part of the application land which was not substantially the same as the whole of the application land, and Mr G Laurence QC advised that in his opinion, the ***true ratio decidendi*** of Sullivan J's decision was that part of the application land can only be registered if it not substantially different from the whole. Oxfordshire County Council is seeking the directions of the High Court on this point also.

To my mind, it would be absurd if a registration authority had to reject the whole of an application in a case where the applicant failed to prove its case in relation to the whole or substantially the whole of the land but proved its case in relation to part of the land. The result would be the unnecessary cost and delay of a second and more limited application. In my view, the registration authorities in the present case can properly register the non Morgan land and refuse to register the Morgan land.

12. Conclusion and Recommendation

I conclude and recommend as follows:

12.1. The registration authorities should reject the applicant's application for deferment of the determination until regulations are made under s 22(1A) (b)

12.2. The registration authorities should reject the application in relation to such part of the application land as lies within the boundaries of Mr and Mrs Morgan's registered title,

12.3. The registration authority should accede to the application in relation to such part of the application land as lies outside the boundaries of Mr and Mrs Morgan's registered title

12.4. The registration authorities should cancel the proposed public inquiry as being unnecessary, and

12.5. The registration authority should (as required by the Commons Registration (New Land) Regulations 1969) give reasons for part rejection of the application and those reasons should be "for the reasons set out in the Inspector's Report dated 25th April 2003.

Vivian Chapman

25th April 2003

Lincoln's Inn