APPENDIX 4

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Solicitor to the Council
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County Hall
Trowbridge BA14 8JN

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Your Ref.: TSS/AW/05775

19 November 2004

Dear Sir,

Re: Commons Registration Act 1965
Applications to register land as Town Greens at Penleigh Park, Westbury

I refer to your letters of 5, 11 and 12 October and 5 November 2004. Thank you for advising the Applicants of 163 letters received by the Registration Authority in support of the Applications.

The following comments on the Objections are made on behalf of all the Applicants.

With respect to the letter from West Wiltshire District Council ("WWDC") dated 20 July 2004, it does not in terms state any objection to any of the four Applications. Even if the Registration Authority were to interpret it as such, it contains no argument or reasoning relevant to the determination of the status of the land in question and has no substance.

I do not agree with WWDC that determination of the Applications should be deferred for its convenience, nor that WWDC should have any special preferential treatment in seeing your draft report before submitting comments outside the stated consultation period. As you will recall, it was as a direct result of such a practice that the Registration Authority found itself in breach of Regulation 6 (3) (Consideration of Objections) of the Commons Registration (New Land) Regulations 1969, in respect of the previous Town Green Application submitted by Mr Patrick Taylor (your reference 2001/02), by considering WWDC's letter dated 1 October 2001 at the meeting of its Environmental Services Sub-Committee on 3 October 2001 without having first supplied Mr Taylor with a copy and without having given him a reasonable opportunity of responding to it (see Minute 123 of the Sub-Committee and Mr Taylor's letter to the Solicitor to the Council dated 9 March 2002).

I hardly need remind you that the four Applications now being considered were received by the Registration Authority on 6 August 2001 (your references 2001/12, 2001/16, 2001/18 and 2001/22), and that they long pre-date the assessment exercise which WWDC states that it is now contemplating. In accordance with the judgment of Lightman J. in Oxfordshire County Council – v. – Oxford City Council [2004] EWHC 12 (Ch), particularly at paragraph 32, the basis of all these Applications is that the current status of the application sites is already Town Green by reason of past usage.

Moreover, from that judgment (at paragraph 14) it is clear that at common law the principle "once a Green, always a Green" applies to Town Greens. As a result, such land cannot cease to be a Green by discontinuance of user or abandonment, and this would need to be taken into account by WWDC in its current studies in any event, whether or not these Applications had already been made.

I shall need to deal with the letter from Davies and Partners dated 23 August 2004 (with an attached plan) on two bases. Firstly, to respond to their narrow Objections, which relate only to a strip of land comprising a length of paved footway and roadside verge, and secondly, to deal with general points which may follow from what they say.

In the first paragraph of the Davies and Partners' letter, the "application site" is defined as the land "shown edged green on the plan in the application", but they do not say which one. I assume from the argument which follows that they are referring only to the plan in Mrs Sylvia Taylor's Application (your reference 2001/16). As you know, the Schedule to the Public Notices dated 10 June 2004 and 8 July 2004 gave particulars of three other Town Green Applications, of which Mrs Susan Illsley's Application (your reference 2001/12) relates to a quite different area of land.

With respect to the definition given for "Persimmon's land", the interest of Persimmon in the strip of land identified on Davies and Partners' attached plan is subject to the dedication of that land as highway on 24 October 2002 (when the link road was opened for use), pursuant to paragraph 22 of Schedule 11 of the relevant Section 106 Agreement dated 16 March 1998. Accordingly, from that date the surface of that land became vested in the Highway Authority, pursuant to Section 263 of the Highways Act 1980. The remaining interest of Persimmon in that land is therefore now limited to rights in the subsoil. It should also be noted that the attached plan is taken from the Land Registry Index Map and is not therefore authoritative on the exact line of the boundary between Persimmon's land and the land retained by WWDC.

As far as possible, I shall address my comments on the Objections stated in Davies and Partners' letter under the paragraph numbers in that letter.

Paragraph 1

Mrs S. Taylor's Application refers exclusively to land remaining in the ownership of WWDC (see Part 6 of the form) and specifically excludes the land transferred to Persimmon (as stated in Part 9). The western boundary of the land edged green on Mrs Taylor's plan (at Appendix A) was drawn from a plan provided by the Solicitor to WWDC in its Objection dated 11 May 2001 (Appendix 2) to Mr P. Taylor's Town Green Application (your reference 2001/02). It was therefore based on the best information then available.

The four Town Green Applications now under consideration were part of a larger number (thirty-three in all, your references 2001/10 to 2001/42), which together comprised a comprehensive response to certain objections raised in respect of Mr P. Taylor's original Application. Applications 2001/16, 2001/18 and 2001/22 all relate to WWDC's retained land east of the link road, whilst Application 2001/12 relates to Persimmon's land west of the link road, which is defined as the "Public Open Space Land" in clause 1.1.13 of a Sale Agreement dated 17 March 1998. By clause 12.1.5

(Accommodation Works) of that Agreement, Persimmon is required to lay out the Public Open Space Land, and thereafter, by clause 16, it is required to transfer that land back to WWDC at nil consideration and free from incumbrances. Between these two areas lies the land, also transferred by WWDC to Persimmon on 24 July 1998, over which the link road has been constructed and which was the subject of Town Green Applications 2001/38, 2001/39, 2001/40, 2001/41 and 2001/42, none of which has yet been advertised for objections and which remain in abeyance pending the outcome of the four Applications advertised in June and July 2004.

When Persimmon has performed all its obligations under the Sale Agreement, it will have no further interest in any of the land transferred to it on 24 July 1998 except in respect of the subsoil under the highway (see above).

Paragraph 2

In respect of the extent of this application site, the written terms of Application 2001/16 are precise and unambiguous, and the plan appended to it (Appendix A) was based on the best information available at the time the Application was made to the Registration Authority (see above). The plan attached to Davies and Partners' letter is based on the Land Registry Index Map and may not show the boundary in question any more accurately (see above).

In R (Alfred McAlpine Homes Ltd) – v. – Staffordshire County Council [2002] EHWC 76 (Admin), decided on 17 January 2002, Sullivan J. refused to quash a registration authority's decision to register a lesser area than that applied for, saying "it has to be recognised that those who make applications for registration are not necessarily expert cartographers" (Paragraph 79). After a careful analysis of this and a number of other authorities, Lightman J. reached the same conclusion in Oxfordshire County Council – v. – Oxford City Council [2004] EWHC 12 (Ch), decided on 22 January 2004 (see paragraphs 82-91).

Paragraph 3

The thirty-one Supporting Statements appended to Mrs S. Taylor's Application (at Appendix C), with the other evidence submitted, demonstrate that the number of inhabitants who have indulged in lawful sports and pastimes as of right on the application site is significant and that such enjoyment took place for not less than twenty years and continued up to the date of the Application.

Paragraph 3.1

It is the cumulative effect of the Supporting Statements, with other evidence, that must be evaluated, rather than the extent of each individual use. In any event, the thirty-one Supporting Statements for this Application include twenty-six which show a period of use for not less than twenty years.

Paragraph 3.2

Although construction of the link road commenced in 2000, this did not affect the land claimed to be a Town Green in Mrs S. Taylor's Application, which relates exclusively to WWDC's retained land. That land remained available for use for lawful sports and pastimes throughout, and no one was excluded from it by fencing.

Apart from Mrs S. Taylor's Application, the other three Applications scheduled in the Public Notices dated 10 June 2004 and 8 July 2004 are all based on periods of usage as of right for not less than twenty years up to "on or about 31 July 2000" (see part 4 of each). Part 9 of Mrs Illsley's Application (your reference 2001/12) states that construction of the link road commenced about September 2000. Confirmation of that is in paragraph 7 of Persimmon's Objection dated 11 May 2001 to Mr P. Taylor's Application (your reference 2001/02) and in Peter Finlayson Associates' letter of the same date, attached as Appendix 1 to that Objection, stating work commenced on site on 29 August 2000. Accordingly, the qualifying period of not less than twenty years had already elapsed before construction of the link road began, and the legal maxim "Once a Green, always a Green" shows that this objection is without substance (see above; paragraphs 56 and 61 of *Getting Greens Registered*; and Oxfordshire County Council – v. – Oxford City Council [2004] EWHC 12 (Ch), paragraphs 32-71).

More generally, and in any event, temporary inaccessibility of part of the areas claimed (e.g. for carrying out drainage works) during the twenty year period does not in itself affect the registrability of Town Greens (see paragraph 18 of *Getting Greens Registered*).

Paragraph 3.3

It appears that one of the Supporting Statements to Mrs S. Taylor's Application copied to Davies and Partners was duplicated. Of the thirty-one Supporting Statements submitted with that Application, twenty-six record qualifying usage for not less than twenty years up to on or about 2 August 2001 (see above), and there was no interruption of such use in 2000 on that land (see above).

Forty-one Supporting Statements were submitted with each of the other three Town Green Applications advertised in June and July 2004 (at Appendix C), of which thirty-one record qualifying usage for not less than twenty years up to on or about 31 July 2000.

Paragraph 3.4

As stated above, Mrs S. Taylor's Application (your reference 2001/16) does not include any of Persimmon's land, whether highway or not.

More generally, none of the four Town Green Applications advertised in June and July 2004 is amongst those submitted in August 2001 which apply specifically and solely to the land over which the link road has been constructed (see above). It is not accepted that any changes are needed to any of the four Applications now in question to remove ambiguity or uncertainty in them.

In the judgment of the Court of Appeal in R (Whitmey) – v. – Commons Commissioners [2004] EWCA Civ 951, decided on 21 July 2004, Arden LJ said at paragraph 29

> "If the dispute is serious in nature, I agree with Waller LJ that if the registration authority has itself to make a decision on the application (c.f. paragraphs 30 and 31 below), it should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry".

and at paragraph 30

> "The authority may indeed consider that it owes an obligation to have an inquiry if the matter is of great local interest".

Waller LJ said at paragraph 62

> "Where there is a serious dispute that will normally under present procedures be by conducting a non-statutory public inquiry through an independent expert, and having regard to what I say below should I suggest almost invariably be so".

and at paragraph 66

> "It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration".

The earlier cases on this point are :- R – v. – Suffolk County Council *ex parte* Steed (1995) 70 P&CR 487, 500-501 (Carnwath J.); R (Cheltenham Builders Ltd) – v. – South Gloucestershire District Council [2003] EWHC 2803 (Admin), paragraphs 34-40 (Sullivan J., decided on 10 November 2003); and Oxfordshire County Council – v. – Oxford City Council [2004] EWHC 12 (Ch), paragraph 15, ix and x (Lightman J., decided on 22 January 2004).

Yours faithfully,

E. Manasseh

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