

REGULATORY COMMITTEE
2nd March 2005

COMMONS REGISTRATION ACT 1965 (as amended)
APPLICATION BY MRS. SUSAN ILLSLEY FOR THE REGISTRATION
OF A TOWN GREEN: LAND AT PENLEIGH PARK,
WESTBURY

Purpose of Report

1. To ask the Committee to consider the application of Mrs. Susan Illsley to register land at Penleigh Park, Westbury, as a town green under the Commons Registration Act 1965 (as amended) and to seek a decision on the application.

Background

2. A report relating to four applications to register land at Penleigh Park, Westbury as a town green under the Commons Registration Act 1965 was considered by the Committee at its meeting on 15th December 2004 (**Appendix 1**). One of those applications was from Mrs. Susan Illsley.
3. The Committee resolved "To register the land at Penleigh Park, Westbury as a town green but not to include land that is in the ownership of Persimmon Homes". As a result of this Resolution, the land which was the subject of the applications by Mrs. Carole Taylor, Mr. Charlie Taylor, deceased and Mrs. Sylvia Taylor was registered as a town green, as this land was owned by West Wiltshire District Council. However officers believed that the land which was the subject of Mrs. Susan Illsley's application was owned by Persimmon Homes, although the solicitors acting for Persimmon Homes had not been able to clarify the position. This land was therefore not registered.
4. The Committee by its Resolution had intended that any application which could not be registered would be referred back to a later meeting of the Committee for consideration once Persimmon's ownership had been clarified, to enable the Committee to have a clearer understanding of the basis of Persimmon's objection. However the December Resolution did not make the position clear. At the meeting of the Committee on 2nd February 2005, the Chairman therefore moved an amendment to the Resolution, which was confirmed as follows:
"To register the land at Penleigh Park Westbury as a Town Green but not to include land that is in the ownership of Persimmon Homes and to defer consideration of any application which may relate to land owned by Persimmon Homes in order to have a clearer understanding of the basis of Persimmon's objection."
5. Persimmon's solicitors were asked to clarify their client's position following the meeting in December, but no response has been received to date. Officers have conducted a Land Registry search, which confirms ownership as stated in Mrs. Illsley's application (Appendix Three to the report of 15th December 2004). It appears that the land which is the subject of Mrs. Illsley's application is owned by Persimmon Homes.

6. It must be stressed however that land ownership cannot be taken into account when determining an application for town green status. In reaching a decision on the status of this land, it is essential that Members take into account all relevant factors but do not take into account any irrelevant factors. **Land ownership is not a relevant factor** and if it were to be considered, the County Council would lay itself open to challenge by way of judicial review in the High Court.

Main Considerations for the Council

7. The application site, being land at Penleigh Park, Westbury, is shown hatched black on the plan attached to Mrs. Illsley's application dated 3rd August, 2001. (**Appendix 3 of Appendix 1 to this report**). The applicant states that the land became a town green on or about 31st July 2000. The four applications originally received were advertised together and only one letter of objection was received, from Davies and Partners, solicitors for Persimmon Homes (**Appendix 2**). A representation was also received from West Wiltshire District Council asking that consideration of the applications be deferred until April 2005. There is however no valid legal reason for such a deferral.
8. A number of letters in support of the application and a letter from Mr Manasseh commenting on the objection have been received. A letter has also been received from Mr Horace Prickett, the Mayor of Westbury. His letter expresses support for sport and recreational facilities in Westbury but does not address the legal issues that must be considered in deciding whether the land is a town green. Copies of the statements accompanying Mrs. Illsley's application, the letters in support, and the letter from the Mayor of Westbury are available for inspection in the Members' Room.
9. 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 that such use has continued to the date claimed in the application. Each of these requirements is examined below.

Local Inhabitants

10. 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. The statements in support of Mrs. Illsley's application are from residents of Westbury.

Actual Use for Lawful Sports and Pastimes

11. The application asserts that the land has been used for lawful sport and pastimes. The statements accompanying the application contain details of the use of the land, all of which are qualifying uses as summarised in **Appendix 3**.

Continuing use as of right for not less than 20 years

12. 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 used under licence from the owner. The users need not necessarily believe that they have any right to go on the land. It is, however, necessary for the applicants to provide evidence to satisfy the tests of use without force, without secrecy and without permission.
13. The statements in support of the application says that the users of the land did not believe they needed permission from the owners. The applicant also relies on the

decision in the Beresford case that any acts undertaken by the owner, such as cutting the grass, were not sufficient to demonstrate use by implied licence. The details of the Beresford case are set out at paragraphs 7 to 9 of Appendix 1.

14. The applicant claims that the application sites became a town green by actual use of the land by local inhabitants for lawful sports and pastimes as of right for not less than 20 years. Out of the 41 statements made in support of the application by Mrs. Illsley, more than 30 refer to continuous use for more than 20 years and 23 of these specifically refer to continuous use as at the date claimed in the application.

Objection

15. Mr Manasseh, agent for the applicants, has submitted a detailed response to the objection submitted on behalf of Persimmon Homes. A copy is attached at Appendix 4.

The following observations are made in relation to the grounds of objection set out in the letter at Appendix 2:

- (a) Paragraphs 1 and 2 do not appear to relate to this application. As already stated land ownership is not in any event a relevant consideration for these purposes.
 - (b) It is not necessary for each and every statement to support a period of 20 years continuing user. It is sufficient to meet the test that there is evidence of such use by a significant number of local inhabitants. On our analysis of the supporting evidence this requirement is satisfied.
 - (c) It would appear from Mr Manasseh's submission that the construction of the link road commenced in about September 2000. If this is correct then the point made on behalf of Persimmon in paragraph 3.2 has no bearing on the matter as the applicant seeks to establish that the land became a town green on or about 31st July 2000. Temporary interruption of this kind would not in any case defeat continuing use otherwise established.
 - (d) No part of the land which is the subject of this application is highway. Paragraph 3.4 does not, therefore, apply.
 - (e) The point made in the final paragraph (3.4) has no substance in the light of the decision of the House of Lords in the Beresford case (see earlier at paragraph 13 of this report).
16. In conclusion, therefore, it is considered that the grounds of objection raised by Persimmon do not raise any points of substance which would seriously challenge the weight of user evidence submitted in support of this application.

Environmental Impact of the Recommendation

17. Approval of the application for registration would result in the area of land being registered as a town green under the Commons Registration Act 1965.

Risk Assessment

18. The Council could be challenged in the High Court by either the applicant or the objector on the grounds that the Council has reached a decision that no reasonable Council could reach. If Members are minded to grant the application, they must

therefore be fully satisfied on the balance of probabilities that the legal tests have been met.

It should be borne in mind that town green applications can cause considerable controversy in the locality concerned and this application is of considerable local importance.

Financial Implications

19. In the event of a non-statutory local inquiry being held to determine the application, the costs of the inquiry would be borne by the County Council as registration authority. The cost of a non-statutory local inquiry, based on a one day hearing, is estimated to be in the region of £5,000, which comprises advertising, hire of accommodation and the Inspector's fees and expenses.

There could also be substantial costs implications in the event of a successful legal challenge in the High Court.

Options Considered

20. Members may:
- (i) approve the application;
 - (ii) reject the application; if so, Members must give reasons for the rejection;
 - (iii) decide that a barrister, experienced in this area of the law, be appointed as an Inspector to hold a non-statutory local inquiry and to make a recommendation to the Committee on the application.

Reason for Recommendation

21. The evidence submitted by the applicant is persuasive and appears to meet the legal tests on the balance of probabilities. The grounds of objection are weak in substance and do not sufficiently challenge the evidence to warrant a non-statutory public inquiry.

Recommendation

22. Members are recommended to register the land at Penleigh Park, Westbury edged green on the plan attached to the application of Mrs. Susan Illsley dated 3 August 2001 as a town green under the Commons Registration Act 1965.

IAN GIBBONS

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

Statements in support of the application, and the letter from the Mayor of Westbury.