WILTSHIRE COUNTY COUNCIL **AGENDA ITEM NO. 12**

REGULATORY COMMITTEE
8th February 2006

COMMONS REGISTRATION ACT 1965 (as amended) APPLICATION FOR THE REGISTRATION OF A TOWN OR VILLAGE GREEN: LAND KNOWN AS THE GREEN, TIDWORTH

Purpose of Report

1. To ask the Committee to consider an application to register land known as The Green Tidworth as a town or village green under the Commons Registration Act 1965 (as amended) ("the 1965 Act") and to seek a decision on the application.

Background

2. The 1965 Act 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 1965 Act (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).

4. If any application to register land as common land or town or village green is submitted, the County Council as registration authority is required to advertise the application in the local press and on 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.

5. 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. Where there is conflicting evidence which needs to be tested in cross examination, the authority may decide to defer the decision and appoint an inspector to hold a non-statutory public inquiry. Whilst there is no formal right of appeal against a rejected application, it is open to the applicant to seek judicial review of the authority's decision if he/she believes it to constitute an abuse of power or to be wrong in law, unreasonable, procedurally improper or biased.

Main considerations for the Council

6. The application site is known as The Green, Tidworth and is shown hatched on the plan attached as **Appendix 1**. Tesco Stores Limited is the owner of the land, having acquired the site in March 2005. Before then, the site had been in the ownership of the Ministry of Defence for more than 100 years.

7. The application dated 29th July 2005 **(Appendix 2)** was made by Anne Elizabeth Thornton of 10 Hampshire Cross, Tidworth. Mrs. Thornton's case is that the land has been used by inhabitants of the locality for lawful sports and pastimes as of right for 35 years, since August 1970. Her claim is that it became a village green on 1st August 1990 and that use has been continuing since then. The application was accompanied by a location map, a map to show inhabitants of the locality **(Appendix 3)**, a print-out of the Ordinance Survey map to show the right of way which crosses the land **(Appendix 4)** and evidence in support, which includes 46 witness statements and 2 letters. The content of the supporting evidence has been summarised in **Appendix 5.** A full copy of the application together with all supporting evidence is available in the Members' Room.

8. Following public notice of the application, objections were received from the owner of the land, Tesco Stores Limited and from 4 residents of Tidworth. A summary of the objections and copies of the objection letters are at **Appendix 6.** The Applicant has responded to the objectors' comments and this is summarised at **Appendix 7,** together with a copy of the applicant's letter of 12th December 2005 **Appendix 8**. A copy of the objection letters, the applicant's response and all appendices are available in the Members' Room.

9. The village green application must satisfy the legal tests set out at paragraph 3 above. However a recent Court of Appeal decision has clarified a number of points which has changed the way in which the definition in section 22(1A) of the 1965 Act should be interpreted. On 24th February 2005, the Court of Appeal issued its judgement in the case of *Oxfordshire County Council and (1)Oxford City Council and (2)*

Robinson. The judgement, which was unanimous, establishes some key principles which registration authorities are now required to apply in the determination of an application for registration of land as a town or village green under the 1965 Act.

Legal Requirements

10. In order to meet the requirements of the 1965 Act, the applicant must demonstrate that the land has been used by a **significant** number of inhabitants of any locality or of any neighbourhood within a locality for lawful sports and pastimes as of right for not less than 20 years and that **such use is continuing**. Prior to the amendment to the 1965 Act in January 2001, there was no requirement for continuing use. However from 30th January 2001, this requirement was interpreted as "continuing until the date of the application".

11. The relevant issues decided by the Court of Appeal in the Oxfordshire case were:

    - The recreational use must continue to the date of registration;

    - Any application for registration made after 30th January 2001 must be considered in accordance with the amended definition set out above;

    - An application cannot succeed on the basis that the land "became" a village green at some earlier date claimed in the application. The Court held that "*there is no legal basis for treating the land as having acquired village green status by virtue of an earlier period of qualifying use. The mere fact that it would at some earlier time have come within the statutory definition is irrelevant, if it was not registered as such*".

12. The Court recognised the impact that this interpretation of the law is likely to have on the opportunities for registration of new greens under this particular class. In his judgement Lord Justice Carnwarth stated:

    "I agree that a consequence of my interpretation is that the owner may be able to take action to bring the qualifying use to an end, and that this is likely to limit substantially the opportunities for registration of new class "c" greens. However, I do not accept that this reading is so obviously unreasonable, or contrary to the legislative intention, that it must be rejected. It means simply that the landowner, who otherwise will be deprived by operation of law of the effective use of his land, is given the final opportunity to assert his rights. As I have said, the history of the 1965 Act gives no support for a broad interpretation of the provisions for new greens. Indeed, a restrictive view can help to provide an answer to possible human rights objections. If the landowner fails to assert his rights, even at this late stage, then it may be legitimate to infer that the land has been dedicated or abandoned to recreational use, and to recall that fact by

registration as a class "c" green. Parliament gave the Secretary of State the power to limit the landowner's options by describing a different time limit. That power not having been used, I see no reason for the Court to take over that task, and no proper basis on which it could do so".

13. In the light of the above, the evidence submitted by the applicant has been assessed against the law as it currently stands. The applicant in the *Oxfordshire case* has been granted leave to appeal and it is expected that the appeal will be heard by the House of Lords during the week beginning 27th March 2006. However the County Council as registration authority is required by The Commons Registration (New Land) Regulations 1969 to determine applications as soon as possible and must make its decision according to the law as it stands at the date of determination. Furthermore, for the reasons set out below, it is unlikely that the recommendation would alter if the House of Lords were to overturn the Court of Appeal decision.

Significant number of inhabitants of any locality or of any neighbourhood within a locality

14. The use must be mainly, but need not be solely, by the inhabitants of any locality or of any neighbourhood within a locality. Case law has defined "locality" as an area recognised by law, whether civil or ecclesiastical and a "neighbourhood" must be an area with a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning. What has been made clear in case law is that the locality or neighbourhood must be more than just an arbitrary line on a map around an area which includes the addresses of all known users of the land. It is therefore questionable whether the application satisfies this requirement. Whilst Mrs. Thornton, on page 5 of her letter of 12th December 2005 (**Appendix 8**), refers to the Green as being in the Parish of South Tidworth (as it was formerly known) and the inhabitants as living in the same Parish, the application itself states that the locality is "the Green in Tidworth bounded by the roads of Hampshire Cross, Station Road and Ashdown Terrace. It also appears from the map at **Appendix 3** that the witness evidence comes from those who live close to the land in question rather than from inhabitants of the Parish of South Tidworth.

15. It is also questionable whether there has been use by a "significant" number of inhabitants. Use is claimed from August 1970 yet of the 48 letters/statements in support of the application, only 3 witnesses claim to have used it in 1970 for lawful sports and pastimes plus one letter which referred to use in general by local residents. Whilst it is not necessary for each witness to have used the land for the full 20 year period, there must be significant use over the full period to satisfy the definition. Many of the witnesses have only claimed use for short periods, the majority being in the 1990's or later.

Actual Use for Lawful Sports and Pastimes

16. The application for registration 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 5**.

Use As of Right for Not Less than 20 years

17. Use as of right means that it must be open; it must be without the use of force and must not be by the licence of the owner. The users need not necessarily believe that they have a right to go on the land but the applicant must provide evidence to satisfy the legal test of use as of right for the full 20 year period.

18. The applicant claims that the application site became a village green on 1st August 1990 as a result of use as of right since August 1970. However the application site was within the area covered by the Salisbury Plain Military Lands Byelaws 1981, made under the Military Lands Act 1892 **(Appendix 9)**. The Schedule to the Byelaws setting out the lands affected includes "parts of the parishes of Shipton Bellinger and South Tidworth" and the Ministry of Defence has confirmed that "Station Road Green was included in the Byelaws, being in the former parish of South Tidworth, which was then in the County of Hampshire".

19. Byelaw 8 states that "…. when the Military Lands are not being used for the military purposes for which they are appropriated, the public may use the Military Lands for recreational purposes". Byelaw 8 therefore gave permission to the inhabitants of the locality to use the land so that use could not have been as of right. The applicant points out that no signs have been erected in Tidworth referring to the Military Lands Byelaws; however there is no legal requirement to erect signs on sites covered by byelaws. There is a requirement to advertise in the local newspapers prior to byelaws being made but once they are in force, they would defeat any claim for use of the land as of right. Whether users knew of the Byelaws is immaterial. In the circumstances, the applicant cannot prove 20 years' use of the application land as of right since the Byelaws came into operation in April 1982.

Use continuing to the date of registration

20. This is interpreted as meaning up until the date of determination of the application. A number of the statements in support refer to continuing use; Tesco however fenced the site off on the 5th August 2005, leaving 3 access gates. The applicant has confirmed this but states that she was advised that the fence around The Green was erected while an archaeological dig was being carried out and that it would be taken down. She was then told that it would remain to prevent it having to be put back up again when construction started. The applicant concludes that the fence was not put up to stop people using The Green and that

the gates allow people to continue to enter The Green to carry out lawful sports and pastimes.

21. A right of way (footpath 11) crosses The Green **(Appendix 10)** so the landowner would be required to provide access to the footpath at each end. However by fencing the land and leaving the fence in position it could be argued that the owner has asserted its rights by preventing open access to the land.

22. When the land was sold to Tesco in March 2005, the Military Byelaws would have ceased to have effect over the application land. However notices were erected at the site in May 2005 stating that the public had permission to enter for recreation but that such permission may be withdrawn at any time. The owner, Tesco, contends that even if the 1981 Byelaws did not prevent the use being as of right, the notices put up at the site in May 2005 did. The applicant has evidence that the notices were erected and paid for by the MOD and remain the property of the MOD **(Appendix 11)**. The applicant argues that Tesco has therefore not given permission to use the land and that the local inhabitants still continue to do so 'as of right'.

23. The Court of Appeal decision in the Oxfordshire case supports the applicant's view in respect of the notices. As Lord Justice Carnwath stated in his judgement: *"I agree that a consequence of my interpretation is that the owner may be able to take action to bring the qualifying use to an end, and that this is likely to limit substantially the opportunities for registration of new class c greens. However, I do not accept that this reading is so obviously unreasonable, or contrary to the legislative intention, that it must be rejected. It means simply that the landowner, who otherwise will be deprived by operation of law of the effective use of his land, is given a final opportunity to assert his rights."* This makes it clear that it is the owner of the land who must take action to protect his position and it is unlikely therefore that the notices put up in May 2005 by the MOD can be relied upon by Tesco.

24. This is an extremely contentious matter. If the application succeeds, the land will be registered as village green and will be of no use to its owner, Tesco Stores Limited. If the application is rejected, the land may be developed. An application for Planning Permission has been submitted by Tesco to Kennet District Council and is due to go to Committee on the 26th January 2006.

Environmental Impact of the Recommendation

25. Approval of the application for registration would result in the area of land being registered as Village Green under the 1965 Act. Should the application to register fail, it is the intention that the land be developed.

Risk Assessment

26. The risk to the County Council is that either the applicant or the objectors could challenge the decision in the High Court on the grounds that the Council has reached a decision that could not have been taken by an authority properly directing itself on the law and acting reasonably. If members are minded to approve the application, they must be satisfied on the balance of probabilities that the legal tests have been met. It should be borne in mind that village green applications can cause considerable controversy in the locality concerned.

Financial Implications

27. If the land were to become registered it would not place any obligation on the County Council to maintain the land. The only financial implication is the administration cost of dealing with the application, report and registration. In the event of a non-statutory Local Inquiry being held, the costs of the Inquiry would be borne by the County Council as registration authority. The cost to the County Council of holding an inquiry, based on a one day hearing, is estimated to be in the region of £2,500 which comprises advertising, hire of accommodation and Inspector's fees and expenses. There would also be costs implications if there were a legal challenge to any decision made.

Options Considered

28. Members may:-

    (i) approve the application

    (ii) reject the application

    (iii) decide that a barrister experienced in this area of law be appointed as an Inspector to hold a non-statutory local inquiry and to make a recommendation to the Committee on the application.

Reasons for Recommendation

29. The user evidence in this case appears to satisfy the 'lawful sports and pastimes' test. However it is questionable whether use has been by a significant number of local inhabitants. The main factor which defeats this application is that use has not been as of right since April 1982, when the Salisbury Plain Military Lands Byelaws came into operation. From April 1982 until the land was sold at the end of March 2005, any use of the land has been by express permission granted by Byelaw 8. Therefore the applicant is unable to satisfy the test of 20 years' use as of right.

30. Members should be aware that if they resolve to reject the application, they are required by the Commons Registration (New Land) Regulations 1969 to record the reasons for the rejection.

Recommendation

31. Members are recommended to reject the application to register land known as The Green Tidworth shown hatched on the plan attached to the application of Mrs. Thornton dated 29th July 2005 and to give their reasons for the rejection.

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Unpublished documents relied upon in the production of this report:
Correspondence with applicant and objectors.