

REGULATORY COMMITTEE

23 April 2008

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**COMMONS REGISTRATION ACT 1965**  
**APPLICATION FOR THE REGISTRATION OF A**  
**TOWN OR VILLAGE GREEN: LAND AT THE GREEN AT BLENHEIM PARK,**  
**BOWERHILL, MELKSHAM**

**Purpose of Report**

1. To ask the Committee to consider the application of Melksham Without Parish Council (MWPC) to register land known as The Green at Blenheim Park, Bowerhill, Melksham as a town green under the Commons Registration Act 1965 (as amended) and to seek a decision on the application.

**Background**

2. Under the Commons Registration Act 1965, all common land and town or village greens were required to be formally registered. County Councils as registration authorities were charged with compiling a register and failure to register land within the prescribed period, which expired in 1970, resulted in that land ceasing to be common land or town or village green.
3. However, under Section 22(1A) of the Commons Registration Act 1965 (inserted with effect from 30<sup>th</sup> January 2001 by the Countryside and Rights of Way Act 2000), land can continue to be registered provided the registration authority is satisfied that it meets the statutory criteria.
4. If an application to register land as common land or as a town or village green is submitted and is validly made, the 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 must be 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. Whilst there is no formal right of appeal against a rejected application, the applicant or an objector may seek permission from the High Court to judicially review the authority's decision if he/she believes it to constitute an abuse of power or to be wrong in law, unreasonable, procedurally improper, biased, or contrary to legitimate expectations.
6. The Commons Act 2006 has made changes to the law on the registration of town or village greens but it does not have retrospective effect. This

application was submitted before the 2006 Act came into force and must therefore be considered under the Commons Registration Act 1965 (as amended).

### **Main Considerations for the Council**

7. The application site is known as The Green at Blenheim Park, Bowerhill, Melksham. It is shown circled on plan 1-A and cross-hatched on plans B-1 and B-2 attached to the application (**Appendix 1**). A further plan C is at **Appendix 2** where the site is cross-hatched.
8. The Bowerhill area of Melksham is a relatively new community to the southeast of Melksham which has its origins in the former Melksham RAF station. In 1970, the RAF sold 140 acres of its land to the Bradford and Melksham Rural District Council. The land was subsequently redeveloped. It was officially opened in June 1973 with new residential and industrial units. An open area of green space of 0.5 acres (0.22 hectares) known as The Green was preserved as part of the development. The land has continued to be maintained as a green space since 1973 by the RDC/West Wiltshire District Council (WWDC).
9. In 2001 WWDC sold part of The Green to property developers, J S Bloor (Swindon) Ltd and Westbury Homes (Holdings) Ltd as part of a large development site in the area.
10. On 12 September 2006, Melksham Without Parish Council (MWPC) applied to the County Council to register The Green as a town or village green (**Appendix 1**). MWPC's application is accompanied by a statutory declaration from its Clerk and Financial Officer and 50 supporting statements.
11. The application was advertised in November 2006 and on 20 November 2006 an objection was received from Persimmon Homes Wessex (**Appendix 3**). Persimmon Homes is the successor in title to Westbury Homes (Holdings) Ltd. The other landowners have not objected to the application.
12. The objector does not challenge the user evidence nor MWPC's ability to satisfy the requirements for registration. Instead, Persimmon Homes objects to the land's registration on the basis that if the land is registered as a town/village green, it believes it will not be able to fulfil its obligations to WWDC to carry out "strategic landscaping" on the land, which is a planning requirement<sup>1</sup>. Under the terms of the section 106 agreement, when the strategic landscaping has been completed, it will be adopted by WWDC as Public Open Space. However, planning issues are not relevant to town green applications under the Commons Registration Act 1965. The sole issue is whether the evidence satisfies the statutory requirements. The fact that part of the land is subject to planning permission and an agreement under s106 of the Town and Country Planning Act 1990 is irrelevant.

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<sup>1</sup> These obligations are contained in an agreement between the developers, WWDC and others pursuant to section 106 of the Town and Country Planning Act 1990.

13. MWPC has submitted a response to the objection dated 24 January 2007 (**Appendix 4**). It does not believe there is any conflict between its application and Persimmon Homes' obligations.
14. Copies of all the documents are available in the Members' Room and are also available for inspection through either of the report authors.
15. In order to meet the requirements for registration under the Commons Registration Act 1965 (as amended), MWPC 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 has continued to the date of the application. Moreover, the registration of a green does not affect ownership of the land. If the application site is registered as a green, Persimmon Homes will retain legal ownership of its land and will still be able to transfer ownership to WWDC.
16. The standard of proof is the usual civil standard of the balance of probabilities. Each of the requirements is examined in turn below.

#### A significant number

17. "Significant" does not mean considerable or substantial. In this context, what matters is that the use is sufficient to indicate that the land is, in general, used by a large number of the local community rather than occasional use by individuals as trespassers (see *R (McAlpine) v Staffordshire CC* (2002)).
18. In this case, 50 witnesses have signed questionnaires confirming their use of the land.
19. Officers believe that, on the balance of probabilities, the applicant has established a prima facie case that there has been general use of the site by a significant number of the local community.

#### Inhabitants of any locality or neighbourhood within a locality

20. A locality must be a distinct and identifiable community such as a division of the county known to law, like a borough, parish or manor. An ecclesiastical parish can be a locality. Moreover, the word "locality" in the definition of village green should be interpreted with regard to its context (*R v Suffolk County Council ex p Steed and Steed* (1995)).
21. The applicant defines the locality as Bowerhill which is shown outlined in black on Plan 1-A attached to its application at **Appendix 1**. An analysis of the addresses of the applicant's witnesses shows that 46 of the 50 witnesses live in the Bowerhill area of Melksham.
22. Bowerhill is in the Beanacre and Bowerhill ward of Melksham. It has a school and village hall, two shops, one combined with a post office, and a play area. It is located in the civil parish of Melksham Without. According to the WWDC

District Plan - Adopted Plan - March 1996 *"the settlement of Bowerhill lies to the southeast of Melksham and includes a major employment area. The history of residential development at Bowerhill has led WWDC to regard it as a unique development. While its built form resembles a more modern urban environment it has a strong sense of local identity, similar to that of a village community. There is a local perception that Bowerhill is very much a separate settlement"*.

23. Officers consider that in light of the above, Bowerhill is a locality and thus a distinct and identifiable community which meets the statutory definition.

#### Actual use for lawful sports and pastimes

24. The applicant states that the land has been and continues to be used for lawful sports and pastimes. The statements which accompany the application contain details of the use of the land including informal recreation such as walking, sports and games, children's play, kite flying and picnics. A summary of the user evidence is at **Appendix 5**.
25. Officers consider that the activities described satisfy the statutory criteria.

#### Use as of right

26. In order to demonstrate that the use of the land has been as of right, the use must have been open, that is, without force, stealth or permission and does not turn on the subjective beliefs of the users: *R v Oxfordshire CC ex p Sunningwell PC* (2000).
27. 50 individuals have signed statements confirming that the application site has never been fenced nor has any barrier been placed on it to prevent users accessing it. No notices have been displayed to discourage public use. No officials have denied access or issued verbal orders to leave the area.
28. Officers consider that, on the balance of probabilities, the applicant has demonstrated that the land was used as of right by the community.

#### The land

29. It is necessary to consider whether the whole of the land subject to the application has been used for informal recreation by local people. There is no evidence that it has not.

#### Use for a period of at least 20 years

30. The applicant claims that the application land became a town/village green on 1<sup>st</sup> August 1990. MWPC also says that the qualifying use continued up to the date of the application, 12 September 2006. The relevant period, as clarified by the House of Lords in 2006, is the 20 year period immediately before the date of the application. The qualifying period in this case therefore runs from 1986 to 2006.

31. It is not necessary for each witness to have used the claimed land for 20 years; it is the body of evidence taken as a whole which must demonstrate use continuously throughout the 20 year period. The summary of evidence at **Appendix 5** sets out the dates when each witness used the claimed land and from the evidence presented, the land has been used for more than 30 years.
32. Officers therefore consider that, on the basis of the user evidence, the application meets the evidential threshold.

### **Environmental Impact of the Recommendation**

33. Approval of the application for registration would result in the site being registered as a town green under the Commons Registration Act 1965. This would mean that the inhabitants of Bowerhill would have the legal right to indulge in sports and pastimes over the land.
34. Should the application to register fail, it may be developed.

### **Risk Assessment**

35. If the application is approved, the land would be entered in the register as a town green. Any person aggrieved by the inclusion of the land in the register may appeal to the High Court.
36. If the application is rejected, particularly on the basis of the papers alone, there is a risk that the applicant may seek a judicial review if it believes the decision to be wrong in law or procedurally improper. Moreover, the applicant may have grounds for challenge on the basis that there is a conflict of interest between the County Council's role as registration authority and its position as future owner of part of the land as unitary authority for Wiltshire. This could, potentially, generate significant public and political interest. The cost implications are dealt with in paragraph 39 below.

### **Financial Implications**

37. If the application is approved and the land entered in the register as a town green, the only direct cost to the County Council is the administrative cost of dealing with the application, report and registration. There would not be any obligation on the County Council to maintain the land.
38. If Members were minded to refer the application to a non-statutory public inquiry, the costs of such an inquiry would be borne by the County Council. 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 to £5,000 which comprises advertising, hire of accommodation and Inspector's fees and expenses.
39. There would also be financial implications if there were a High Court challenge to any decision made. High Court proceedings are invariably expensive and frequently generate a significant costs liability, which could be in excess of £50,000.

### **Options Considered**

40. Members may:-

- a) approve the application;
- b) reject the application. If so, Members must give reasons for the rejection in accordance with regulation 8(1) of the Commons Registration (New Land) Regulations 1969;
- c) decide that a barrister experienced in this area of law be appointed as an Inspector to hold a non-statutory local inquiry and make a recommendation to the Committee on the application or to advise on the merits of the application.

### **Reasons for Recommendation**

- 41. Officers consider that, on the basis of the evidence submitted, the application satisfies the qualifying criteria on the balance of probabilities. The objector has not challenged the evidence submitted nor whether the statutory criteria have been met. The objection is based solely on Persimmon Homes' obligations under the s106 agreement with WWDC, which have no bearing on the town green application. It follows that if Members are satisfied that the legal tests have been met, then the application should be approved.
- 42. Alternatively, Members may prefer to refer the matter to a non-statutory public inquiry so that the evidence can be tested before an Inspector.

### **Recommendation**

- 43. It is recommended that Members approve the application for the reasons set out above.

IAN GIBBONS  
Head of Legal & Democratic Services

Report Authors  
BARBARA MILLS  
Deputy Head of Legal Services

DEIRDRE FENTON  
Legal Officer

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Unpublished documents relied upon in the production of this report: None.