

WILTSHIRE COUNCIL

WESTERN AREA PLANNING COMMITTEE

20 January 2021

COMMONS ACT 2006 – SECTIONS 15(1) AND (3)
APPLICATION TO REGISTER LAND KNOWN AS ‘CHURCH FIELD’, HILPERTON
AS A TOWN OR VILLAGE GREEN

Purpose of Report

1. To:
 - (i) Consider a report and recommendation, dated 19 November 2020, made by Mr William Webster of 3 Paper Buildings, appointed by Wiltshire Council as an independent Inspector to reside over a non-statutory public inquiry. This was held virtually using “Zoom” on 29 and 30 September 2020, to consider an application made under Sections 15(1) and (2) of the Commons Act 2006, to register land known as ‘Church Field’, in the parish of Hilpertont, near Trowbridge, as a town or village green.
 - (ii) Recommend that Wiltshire Council accepts the Inspector’s recommendation.

Relevance to the Council’s Business Plan

2. Working with the local community to provide an accurate register of town and village greens, making Wiltshire an even better place to live, work and visit.

Background

3. Wiltshire Council received an application, dated 24 April 2017, made under Section 15(1) of the Commons Act 2006, to register land at Hilpertont known as ‘Church Field’ as a town or village green. The application was also made under Section 15(2)(a)(b) of the Act, i.e. where a significant number of the inhabitants of any locality, or neighbourhood within a locality, have indulged in lawful sports and pastimes on the land for a period of at least 20 years and they continue to do so at the time of the application. The application was made by the “Church Field Friends”.
4. Part 7 of the application form requires the applicant to provide a summary of the case for registration. The applicant included the following information:

“A significant number of inhabitants of Hilpertont have used the land (marked on the map exhibit A) for a period of 20 years, as of right, and continue to do so. This is supported by statements - in the form of letters from parishioners (Exhibit D) and supporting photographic evidence (Exhibit C). A supporting statement is enclosed marked Exhibit B”.

5. The application was accepted as a complete and correct application on 19 June 2017. The plan submitted, showing the extent of the applicant land edged in red, is appended at **APPENDIX 1**. The application was advertised on site and in The Wiltshire Times on 21 July 2020 with a deadline for receipt of objections or representations of 4 September 2020. Notices were also placed on site and served on the owners of the land, the occupier of the land, the applicant, Hilperton Parish Council and Wiltshire Council as planning authority. Three objections and one representation in support were received. Additionally, after the advertised deadline, in January 2018, Hilperton Parish Council wrote to the Council expressing its support for the application.
6. As part of the statutory procedure for determining town and village green applications, where objections are received, they must be forwarded to the applicant allowing the applicant a reasonable opportunity for dealing with the matters which are raised. A right to reply was also extended to the objectors. Exchanges of comments on the objections occurred between October 2017 and April 2018.
7. Wiltshire Council, as the Commons Registration Authority (CRA), must determine the application in a manner that is fair and reasonable to all parties. All the elements of the application must be demonstrated. The standard of proof is the civil standard of proof on the balance of probabilities that 'a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged as of right in lawful sports and pastimes over the land for a period of at least 20 years and that use has ceased'.

The Council, as CRA, has no investigative duty in relation to village green applications which would require it to find evidence or reformulate the applicant's case. The Council considered the evidence and the objections received within a report to the Western Area Planning Committee dated 6 March 2019, (a copy of the officers' report to committee is attached at **Appendix 2**). At paragraph 16.3 officers highlighted some areas of concern when interpreting the evidence adduced:

"Officers have considered the evidence and the objections and consider that the opinion of an expert in this area of law would greatly assist the Council in coming to a decision on the application. In particular a non-statutory public inquiry where witnesses could give their evidence verbally and possibly under cross examination would expand and elucidate the following points especially:

- a) *Is there sufficient evidence from a significant number of inhabitants?*
- b) *Has use been by permission?*
- c) *Have the agricultural activities prevented registration?*
- d) *Is the evidence sufficient to demonstrate use of the whole field and not just the public rights of way?"*

8. Officers recommended that given the dispute of facts in this case and the difficulties inherent in interpreting the written evidence it would be open to Wiltshire Council, as the Registration Authority, to hold a non-statutory public inquiry into the evidence, appointing an independent Inspector to preside over

the inquiry and to provide a report and recommendation to the determining authority. It was resolved by the Western Area Planning Committee on 6 March 2019:

“The Committee agreed for Wiltshire Council to appoint an independent Inspector to hold a non-statutory Public Inquiry and provide an advisory report for the Western Area Planning Committee on the application to register land as a town or village green at Church Field, Hilperton.”

9. Wiltshire Council appointed Mr William Webster, of 3 Paper Buildings, as an independent Inspector to preside over a non-statutory public inquiry and to write a report containing a recommendation to Wiltshire Council as the determining authority. Owing to constraints on movements and meetings imposed by the Covid-19 pandemic the Inspector held an unaccompanied site visit in August and a two day virtual public inquiry using Zoom software. Interested parties could either participate or observe the inquiry. Closing statements were invited after the inquiry and were considered by the Inspector as part of his report to the Council.

Main Considerations for the Council

10. Under the Commons Registration Act 1965, Wiltshire Council is charged with maintaining the register of town and village greens and determining applications to register new greens. The application to register land at Church Field, Hilperton, as a town or village green, has been made under Sections 15(1) and (2) of the Commons Act 2006, which amended the criteria for the registration of greens. Section 15 of the Commons Act is set out in full at part 9 of the Wiltshire Council decision report dated 5 February 2019 at Appendix 2 of the Western Area Planning Committee report dated 6 March 2019.
11. Sections 15(1) and (3) of the Act, state:

“15 Registration of greens

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies...

...(2) This subsection applies where-

(a) A significant number of inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they continue to do so at the time of the application.

12. There is currently no statutory or non-statutory guidance available to authorities regarding when it would be considered appropriate for a Registration Authority to hold a non-statutory public inquiry. However, judicial cases have confirmed that it is the authority's duty to determine an application in a fair and reasonable manner and judicial decisions have also sanctioned the practice of holding non-statutory inquiries. In *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* Admin 10 Nov 2003 the Court decided that the holding of a non-statutory public inquiry in some circumstances would be necessary as a matter of fairness. In *R (on the application on Naylor) v Essex County Council* [2014] EWHC 2560 (Admin) the Court confirmed that a public inquiry was one means by which a registration authority may obtain evidence other than from the applicant and any objector or by which it may test or supplement that which it has received in written form.
13. Following consideration of the available documents and the hearing of evidence given in chief; in cross-examination and in re-examination at the public inquiry, the Inspector presented a report to Wiltshire Council, dated 19 November 2020 (please see report attached at **APPENDIX 3**), in which he discussed and recommended as follows:

NB: The applicants and the objectors each appointed counsel to represent them. The applicants were represented by Mr Horatio Waller and the objectors by Mr James Marwick.

“Discussion

130. The application must be tested against the criteria for registration contained in section 15(2) of the CA 2006, namely whether a significant number of the inhabitants of (in this instance) any locality had indulged as of right in LSP on the application land during the relevant 20 year period ending in April 2017.

131. In the first instance, it is plain that the civil parish of Hilperton is a qualifying locality. For reasons already explained, this is not a case where the applicants rely on one or more neighbourhoods straddling more than one locality. The case advanced is based solely on the qualifying use of those living in the civil parish of Hilperton. In the result, the applicants are unable to rely on the use of the land by others living outside the boundaries of the village. The point is academic anyway as the applicants are relying only on the written and oral evidence of those who actually live, or have lived, in the village.

132. The core issue on this application is, as it seems to me, whether, without more, the use of the land for walking, with or without dogs, children's play and general informal recreation suffices to justify registration? This is not, however, a straight-forward application involving a small parcel of land being used for qualifying purposes. On the contrary, it is a very large grass meadow subject to low-level agricultural uses which happens to be criss-crossed by four PROW (with gated access points and directional signs) and a circular path running around the outside of the field which, in my view, in the case of the latter, is likely

to fall within the category of an emergent right of way. I cannot see how it would have appeared other than this from the perspective of the landowner in a case where walkers mainly use the path to walk around the field and only incidentally walk outside it, perhaps to stand around chatting with other dog walkers or to follow their dog or else cut a corner if they are pressed for time or even to bypass other walkers ahead of them.

133. *It seems to me that the main issues which need to be addressed by the CRA on this application are these:*

- (a) Where do people mainly walk when they use the land?*
- (b) Was that main use sufficient to justify registration – for instance was it non-qualifying as a matter of law because it was not enough to suggest to a reasonable landowner that the whole of the land was being used for informal recreation during the relevant period?*
- (c) Were other incidental uses outside the trodden paths, when looked at in the round, sufficient to justify registration?*

134. *I shall start by dealing with the general pattern of use of the land and its context.*

135. *The land is a grass meadow of long-standing within the Hilperton Gap. The agricultural use within the relevant period has been limited to an annual hay or silage crop although prior to the coming of Elizabeth Way in 2015 it had also been used for the occasional grazing of a small number of cattle (the evidence is too vague to put a number on it but the grazing herd would have been small and non-threatening to walkers) none of which activities in practice, as I find, would have been inconsistent with the use of the land for TVG purposes. It was not as if the land was ploughed or used extensively for grazing. In general, the whole of the land was available for informal recreation during the relevant period although it is important to note that before the grass was cut in June/July each year there would have been a number of weeks when the grass was longer and more difficult to walk upon.*

136. *The alignment of the PROW and the main circular path have remained more or less consistent over the years. The Google earth images after 2002 demonstrate that this has been the case. The landscape changed in around 2015 with the construction of Elizabeth Way which ran through Hilperton Gap and cut off the land from the two fields which used to adjoin it on its south-west side. One can, for instance, see how cattle would have been moved between these fields with ease and how HILP3 ran across these fields right into the outskirts of Trowbridge. It is also apparent from the rights of way plan at App/2 that before the new road was built walkers could have traversed Hilperton Gap unhindered via a network of paths whereas the new road places limits on the practicalities of this (compare the plans on App/1 and App/2) despite the new Middle Lane crossing.*

137. *I think Mr Marwick is right when he says that the trodden paths crossing and running around the land represent the principal way in which it has been used by walkers, with or without dogs, during the relevant period. A number of oral witnesses on both sides gave evidence to this effect. It seems to me that whereas, before 2015, there is certain to have been greater use of the land as a place of transit into the adjoining fields, the position after the advent of the new road is that most people now stick to the field as a destination in its own right and use it, as one might expect, by walking mainly on the worn paths or at least as close to these paths as makes no difference. I also consider that any use outside the paths should be treated as being incidental to the primary use of the paths and not referable to LSP.*

138. *I think Mr Marwick is right when he says that the use of the trodden paths would have indicated to a reasonable landowner the assertion of an emergent right of way, in the case of the main circular path and its offshoots, or the use of actual rights of way when it comes to the use of the four PROW and that, as a matter of law, such use should be discounted for TVG purposes. I also accept his submission (i) that any use by those straying off the paths (including by those retrieving their dogs), and (ii) that any use in excess of the width of the paths identified in the DMS would also have been such as to indicate the exercise of emergent or actual rights of way.*

139. *While I accept that, from time to time, people used the field for other recreational activities such as ball games, flying kites and model aeroplanes, jogging, camping and generally enjoying the land, I do not accept that these uses were, either by themselves or collectively, substantial enough or occurred with sufficient frequency to justify registration. I find that these other non-dog walking uses were very probably trivial uses and, as Mr Marwick rightly says, did not involve user of such a duration, nature or quality as would support registration. In my view, such uses are likely to have occurred mainly in the summer months after the grass had been cut when, for a while, the land is bound to have been much easier to walk on.*

140. *The CRA needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the application land had been used for informal recreation always bearing in mind that qualifying use will be heavier in some areas than in others. I have already indicated that, in my view, the land is mainly used by people walking on the trodden paths which, as I find and as I saw for myself on my inspection in August, soon reappear after the grass has been cut. However, this still leaves the rest of the field which, as I find, is largely unused apart from only trivial or occasional uses when the length of the grass and the condition of the weather is such as to accommodate with far greater ease other non-dog walking uses.*

141. *It is not an uncommon difficulty in what I might call a 'big field' case for a CRA to have to decide whether the whole or part of the land is still registerable even though large parts of it are unused. In such a case, even if the CRA were (a) required to discount the use of the trodden paths, yet (b) considered that*

other uses taking place outside these paths were still sufficient to justify registration, an applicant would, in these circumstances, (c) still need to identify with precision where these other qualifying uses took place on the land in order that the CRA might then consider whether to exercise its power to sever from the application those parts of the land where qualifying use may not have taken place. As Mr Marwick succinctly puts it at OBJ/33 at para 6, the claimed use in this instance (outside the trodden paths) 'is imprecise and unclear both temporally and spatially'. I agree. This is not a severance case even if it was arguable that other uses outside the use of the trodden paths would have supported registration which, I hasten to add, is not the case on the basis of evidence laid before the CRA. The applicants' case might have been a good deal more arguable when it came to uses outside the paths if it had showed with much greater precision what was happening on the land, where it was taking place and when but their case under this head had not been properly or strictly proved.

142. I am not going to reiterate my findings on the oral evidence (where, it will be recalled, I expressed concerns about the quality of the evidence of Ms Katevska, Ernest Clark and Mrs Hart) but there is another matter which I should address and it concerns the Paxcroft Mead development.

143. Whilst I accept that this estate resulted in some people who lived outside the village boundary using the land (and so may have numbered amongst others observed to be using the land by qualifying local residents), it is, as I find, unlikely to have been a major component in the overall use of the land although I accept that some discounting would be necessary to allow for the use of those living outside the village. However, it still needs to be recognised that crossing the A361 is likely to have been a major hindrance to those living outside the village boundary who wished to recreate on the field, especially in the case of adults with young children in tow. The field was very probably also too away for unsupervised play in the case of younger children. I am also told that there are suitable amenity spaces within the new estate although I doubt whether they are likely to be as desirable for dog walking as the application land. This issue arose late in the day and in the absence of a proper audit as to how many people accessed the land for recreation via points 11-13 on App/3 one can only but speculate on the number of people using the land who lived outside the village boundary, whether they came from the Paxcroft Mead estate or elsewhere. At the end of the day, however, there were, in my view, enough qualifying witnesses who gave oral and written evidence to signify that the land was likely to have been in general use by the local community for informal recreation. It is just that the user relied on was, for the reasons explained, not qualifying use for the purposes of section 15 of the CA 2006.

Recommendation

144. In light of the above discussion, I recommend that the application to register the application land (proceeding under application number 2017/01)

should be rejected on the ground that the criteria for registration laid down in section 15(2) of the CA 2006 have not been satisfied.

145. Put shortly, the predominant use of the application land during the relevant period was for walking, with or without dogs, on four PROW and a circular path (and its offshoots) running around the outside of the application land which would not have justified registration as a matter of law as it would not have suggested to a reasonable landowner the exercise of a right to indulge in LSP across the whole of the application land. Other claimed uses taking place outside these paths were either incidental to the primary use of the paths or else were too trivial or occurred only sporadically and, either alone or collectively, would not have been sufficient in terms of duration, nature or quality to support registration.

146. The CRA must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be “the reasons set out in the Inspector’s report dated 19 November 2020”.

14. There is no obligation placed upon the determining authority to follow the Inspector’s recommendation, although if the Committee decide not to follow the Inspector’s recommendation, which is supported by the very detailed and thorough consideration of the evidence in the Inspector’s report (**APPENDIX 3**), the Committee must provide sound evidential reasons for departing from the recommendation before it. Members of the Committee are requested to consider the Inspector’s report and the available evidence in order to determine whether or not the application land should be registered as a town or village green.
15. Under the Council’s constitution one of the functions of the Area Planning Committee is that where an objection has been received and has not been resolved, it can consider matters of local importance within the area such as the registration of town and village greens.

Safeguarding Implications

16. There are no safeguarding implications as those relating to safeguarding are not permitted with Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Public Health Implications

17. There are no public health implications as considerations relating to public health are not permitted within Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Environmental and Climate Change Considerations

18. Considerations relating to the environmental impact of the proposal are not permitted within Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Equalities Impact of the Proposal

19. Considerations relating to the equalities impact of registering land as a town or village green are not permitted within Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

Risk Assessment

20. The holding of a non-statutory public inquiry and the production of the subsequent report and recommendation to Wiltshire Council from an independent Inspector, have reduced the risk to the Council of a potential legal challenge as the evidence of witnesses has been heard, tested and considered.

Financial Implications

21. Presently, there is no mechanism by which the Registration Authority may charge the applicant for processing an application to register land as a town or village green and all costs are borne by the Council.
22. Where the Council makes a decision to register / not to register the land as a town or village green it must give clear reasons for its determination as this decision is potentially open to legal challenge as any decision of the Council is open to judicial review. The legal costs of a successful challenge against the Council could be in the region of £40,000 - £100,000.
23. There is no duty for Registration Authorities to maintain land registered as town or village green.

Legal Implications

24. If the CRA decides not to register the land as a town or village green, the only right of appeal open to the applicant is through judicial review proceedings and challenging the lawfulness of the decision in the High Court. The court's permission to bring proceedings is required and the application must be made within three months of the date of the decision to determine the village green application. A landowner could also use judicial review proceedings to challenge the Council's decision if the land were to be registered as a town or village green.
25. If the land is successfully registered as a town or village green, the landowner could potentially challenge the Registration Authority's decision by an appeal to the High Court under Section 14(1)(b) of the Commons Registration Act 1965 ('the 1965 Act'), which allows the High Court to amend the register only if it can be shown that the registration ought not to have been made and that it is just to rectify the register. The overall effect is that the registration of the land is

deemed to have been made under Section 13 of the 1965 Act and there is a preserved right under Section 14 to apply to the court to rectify the registration of the town or village green without limit of time. The application, which could be made many years after the decision and potentially enables the Court to hold a re-hearing of the application and consideration of the facts and law, could lead to de-registration of the land.

26. Judicial review proceedings are a complex area of administrative law where every aspect of the law and facts relevant to the decision and the CRA's decision making process would be subject to detailed analysis by the Court. Due to the complexity of such cases the legal costs can quickly escalate. If the judicial review proceedings are not successfully defended, the Aarhus convention (concerning the legal costs for environmental cases) does limit the costs liability so far as the Council, as CRA, is concerned (if the case is lost) to £35,000; however, the CRA would also be required to meet its own legal costs to defend the case (which would be a broadly similar sum if not more depending on the issues that may arise during the proceedings) in addition to the applicant's costs. The applicant's potential maximum costs liability if their case is unsuccessful is £5,000.
27. The issue of 'pre-determination' or approaching a decision with a 'closed mind' (for example a decision maker having already made up their mind on the application before considering the evidence and/or Inspector's recommendation and making the decision) is a serious allegation and one that a CRA must avoid. There is a potential reputational issue for a Commons Registration Authority if a court was to make a finding that 'pre-determination' took place before a committee made a formal decision to determine an application to register land as a town or village green. The court may order that the decision be quashed, make an order for costs and for the decision sent back to the CRA to be re-made.

Options Considered

28. Members of the Committee need to consider whether to:
 - (i) Accept the Inspector's recommendation that the application by 'Church Field Friends' made under Section 15(2) of the Commons Act 2006 be rejected for the reasons set out in the Inspector's report dated 19 November 2020.
 - (ii) Accept the Inspector's recommendation, but with modification supported by the available evidence, e.g. registering only part of the application land.
 - (iii) Not accept the Inspector's recommendation and resolve to register all of the land as described in the application made under Section 15(1) of the Commons Act 2006 and described as 'Church Field', as a town or village green.

29. Where Members of the Committee do not resolve to accept the Inspector's recommendation in full and make an alternative decision, clear reasons for this decision, based on evidence, must be given as the decision of the Registration Authority is open to legal challenge by both the applicants and the landowners.

Reasons for Proposal

30. In the Hilperton case, the evidence of whether a significant number of inhabitants of any locality, or any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years was in dispute. It is the duty of the determining authority to determine the application in a fair and reasonable manner. Due to the substantial dispute of fact in this case, Wiltshire Council determined to hold a non-statutory public inquiry where the facts of the case would be likely to be resolved by the inquiry process through witnesses giving oral evidence in chief and through cross-examination and re-examination, including consideration of documentary evidence by the Inspector.
31. Following the close of the inquiry, the Inspector presented a well written and extremely thorough consideration of the evidence in a 52 page report with recommendation to Wiltshire Council, as the Registration Authority, dated 19 November 2020 (**APPENDIX 3**):

"..., I recommend that the application to register the application land (proceeding under application number 2017/01) should be rejected on the ground that the criteria for registration laid down in section 15(2) of the CA 2006 have not been satisfied."

32. Officers are satisfied that over the course of the two days of the public inquiry, the Inspector carried out a thorough and detailed examination of the evidence, all parties being given full opportunity to make their representations and to cross-examine other parties on their evidence. Officers consider that the Inspector's report is a correct and accurate reflection of the witness and documentary evidence and that the Inspector's recommendation should be accepted.

Proposal

33. That Wiltshire Council, as the Registration Authority, accepts the Inspector's recommendation and that the application by 'Church Field Friends', under Sections 15(1) and (2) of the Commons Act 2006, to register land at Church Field, Hilperton, be rejected for the reasons set out in the Inspector's report dated 19 November 2020.

Jessica Gibbons
Director – Communities and Neighbourhood Services

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

None

Appendices:

Appendix 1 – Plan showing applicant land

Appendix 2 – Report to the Western Area Planning Committee 6 March 2019

Appendix 2A to 6 March 2019 report

Appendix 2A.1 to 6 March 2019 report

Appendix 2A.2 to 6 March 2019 report

Appendix 2A.3 to 6 March 2019 report

Appendix 2A.4 to 6 March 2019 report

Appendix 3 - Inspector's report dated 19 November 2020

Appendix 3.1 to Inspector's report 19 November 2020