

Commons Act 2006 – Sections 15(1) and (2)
Application to Register Land as Town or Village Green – Southwick Court
Fields, Southwick and North Bradley – Application no.2020/02TVG

Purpose of Report

- A. To consider Legal Advice requested by the Western Area Planning Committee (WAPC) at its meeting dated 6 November 2024, to assist in its determination of an application made under s.15(1) and (2) of the Commons Act 2006 to register land as a Town or Village Green (TVG), Southwick Court Fields, in the parishes of Southwick and North Bradley.

Relevance to the Council's Business Plan

- B. Working with the local community to provide an accurate register of TVGs and Common Land, making Wiltshire an even better place to live, work and visit.

Background

- C. Wiltshire Council as the Commons Registration Authority (CRA) are in receipt of an application to register land known as Southwick Court Fields, in the parishes of Southwick and North Bradley as a TVG, as yet undetermined. The WAPC considered Counsel's Advice in this matter at their meeting dated 6 November 2024 and made the following resolution:

The Committee DEFERRED determination of the application to register land at Southwick Court Fields, in the parishes of Southwick and North Bradley, as a Town or Village Green, to seek a further report on whether the application of January 2020 could be processed with the wider application area examined.

Please see WAPC Report and Appendices dated 6 November 2024, which may be viewed using the following link:

[Agenda - Democratic Services - Wiltshire Council](#)

- D. Representations and Questions received further to the Committee meeting dated 6 November 2024 are attached at **Appendix A**:
- i) Cllr D Vigar – Address to Committee 6 November 2024
 - ii) Cllr D Vigar – Questions 12 November 2024
 - iii) Mr F Morland – Representations 18 November 2024

- E. At **Appendix B** please see Legal Opinion from Lord Banner KC dated 20 November 2024, submitted by Mr D Richardson (Ashfords LLP) on behalf of Waddeton Park Ltd, with covering e-mail dated 22 November 2024.

Main Considerations for the Council

- F. Mr Frank Cain, Consultant (Employed Barrister), Wiltshire Council has provided the following advice:

In respect of the question that the Committee has raised, my advice is as follows: -

1. There have been three separate applications for registration of land in Southwick as a Village Green under section 15 of the Commons Act 2006 (the 2006 Act).
 - a) The Application lodged with the Council as Commons Registration Authority (CRA) on 13 January 2020.
 - b) The Application lodged with the Council as CRA on 11 June 2020.
 - c) The Application lodged with the Council as CRA on 30 November 2020.
2. In respect of the first two applications, the Council as CRA determined, on 24 February 2020 and 7 October 2020 respectively, that there were triggering events with no corresponding terminating events and therefore under section 15C(1) of the 2006 Act the applications could not be accepted and progressed to determination and the applications were returned to the applicant.
3. As a result of those determinations the Council as CRA did not have to meet the requirements of Regulation 5(1) of the 2007 Regulations i.e. provide notice to owners, tenants or occupiers, and publication of a notice and the application for consultation purposes.
4. The Applicant's remedy, if he disagreed with those determinations was to seek Judicial Review of the decisions. This would have allowed a Court of Competent jurisdiction to rule on any such argument. The Applicant (who was the same for both applications) did not exercise these rights and in fact appeared to accept those determinations as, in each case, he has filed a new application (which was his right to do).
5. As has already been identified in earlier KC advice there is a long-standing legal principle in public law that however wrong they may be, however lacking in jurisdiction they may be, decisions by public bodies subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction (R v Panel on Takeovers and mergers,

Ex parte Datafin Plc [1987] Q.B. 815 and endorsed in Cerelia Group Holdings SAS v Competition and Markets Authority [2023] CAT 54).

6. I note that the learned authors in De Smith's Judicial Review (9th Ed. 2023) at paragraph [4-066] explains why this legal principle is in the public interest when they said *The public must be able to rely upon their validity so a decision that is not challenged within the relevant (limited) time period for judicial review retains legal effect, regardless of whether it would have been declared unlawful had it been challenged.* The need for legal certainty in public affairs and administrative decisions made by public bodies has been recognised regularly by the Courts in many different areas of the law.
7. Therefore, in respect of the applications lodged with the Council on 13 January 2020 and 11 June 2020 those applications had come to an end and can't be resurrected. The Council, as CRA on each of those applications has become in the position of *Functus Officio* (i.e. a person who has discharged its duty and whose office or authority (in respect of those applications) is at an end.
8. On 30 November 2020 the third application was lodged and accepted by the Council as CRA. It related to an application for village green status for the lower field only. This was the land in which the Requirements of Regulation 5(1) were notified and published for consultation purposes. The non-Statutory public Inquiry was charged with considering this land and this land only. The valid evidence that was presented by the Applicant and the objector could only relate to this land and this is the land in which the Inspector could only make his findings and recommendations on. It is on these facts and these facts alone on which the Committee must make a determination.
9. The legal certainty for all parties has been based on the validity of the two earlier decisions and the WAPC can not go behind that validity. The Committee has no power to do so. If the Committee were considering overturning the decisions in the earlier applications, then any decision taken would be liable to successful challenge due to: -
 - The earlier applications have been determined based on the facts as the Council believed them to be and the Council as CRA decision maker is now *Functus Officio* (refer paragraph 7 above),
 - Being outside the power of the committee (see paragraph 8 above),
 - The passage of time (over four years),
 - Any such decision is likely to adversely affect other interested parties who have relied upon those decisions and the general public interest in legal certainty.

10. Mr Morland in his representations has suggested that use of the second leg of Regulation 5(4) of the 2007 Regulations to amend the 30 November application and refers to the case of R (Church Commissioners of England) v Hampshire County Council [2014] 1 WLR 4555. With all due respect this is a misunderstanding of the law. Regulation 5(4) of the 2007 Regulations relates to the time of receipt of the application. It is designed to allow a CRA to allow correction of minor errors, which are capable of remedy, to be remedied to allow the application to be progressed without a strict adherence to rejection criteria.
11. I note that in the Church Commissioners case The Court of Appeal determined that when an application is received a Council could seek corrections of minor aspects of the application but having regard to the facts the time afforded (13 months) was unreasonable.
12. In this case, the 30 November application was received and accepted by the Council as CRA as sufficient in its current form. It is this application which the submitters and landowner commented on, what the Inspector was charged with when carrying out the non-statutory public Inquiry and what the WAPC has to determine. Regulation 5(4) is not worded in such a way that it would allow a Committee charged with making a determination on the Application, as accepted, to resurrect an earlier application which has come to an end. Further the Church Commissioners decision can't be read as extending the requirements of Regulation 5(4) to remedying a defect in an earlier separate application which has been determined to have come to an end and has in law been concluded. Any Committee's attempt to extend Regulation 5 (4) would be stepping outside the powers that it has been given to determine the application before it.
13. I note that subsequent to the Committee meeting Mr Morland has referred to three cases in which a decision maker has revisited an earlier decision. Whilst I accept that in certain very limited circumstances, which do not apply in this case, a decision maker may be able correct errors in their decision making, however there needs to be:
 - A. A Temporal and causal connection between the original decision and the subsequent correcting decision
 - B. No adverse effect on a specific interested party (e.g the landowner)
 - C. No adverse effect on the principle of legal certainty for any person who may be affected by an administrative decision.
14. I am of the opinion that there is no causal connection (separate applications of 13 January 2020 of 30 November 2020), no temporal

connection (a period of four years and intervening events of adoption of WHSAP and application for and grant (on appeal) of planning permission 20/00379/OUT). Further there is an adverse effect on an interested party (the Landowner) and it would undermine the public interest principle of legal certainty for administrative decisions.

Safeguarding Implications

- G. Considerations relating to the safeguarding implications of the recommendation are not permitted under s.15 of the Commons Act 2006. Determination of the application must be based only upon the relevant evidence before the CRA.

Public Health Implications

- H. Considerations relating to the public health implications of the recommendation are not permitted under s.15 of the Commons Act 2006. Determination of the application must be based only upon the relevant evidence before the CRA.

Environmental and Climate Change Considerations

- I. Considerations relating to the environmental and climate change impact of the recommendation are not permitted under s.15 of the Commons Act 2006. Determination of the application must be based only upon the relevant evidence before the CRA.

Equalities Impact of the Recommendation

- J. Considerations relating to the equalities impact of the recommendation are not permitted under s.15 of the Commons Act 2006. Determination of the application must be based only upon the relevant evidence before the CRA.

Risk Assessment

- K. The holding of a non-statutory public inquiry; the Advisory Report and recommendation to the CRA by an independent Inspector dated 9 February 2024; the Advice of Counsel dated 16 October 2024 and internal review by Wiltshire Council Legal Team, have reduced the risk to the Council of a potential legal challenge.

Financial Implications

- L. There is no mechanism by which the CRA may charge the Applicant for processing an application to register land as a TVG and all costs are borne by the Council.

- M. Where the Council makes a decision to register / not register the land as a TVG, it must give clear evidential reasons for its determination as this decision is potentially subject to legal challenge where any decision of the Council is open to judicial review (within 3 months of the date of decision). The legal costs of a successful challenge against the Council could be in the region of £40,000 - £100,000.

Legal Implications

- N. If the CRA determines not to register the land as a TVG, the only 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 3 months of the date of the determination.
- O. Landowners can also use judicial review proceedings to challenge the Council's decision if the land is registered as a TVG. Additionally it is open to landowners to challenge the CRA decision to register land by appeal to the High Court under s.14(1)(b) of the Commons Registration Act 1965, 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. There is no time limit on application.
- P. There is a cost to the Council as the CRA in judicial review proceedings not successfully defended. The Aarhus Convention does limit the costs liability of the Council to £35,000 if the case is lost, however, the CRA would also be required to meet its own legal costs to defend the case, (a broadly similar sum), in addition to the Applicant's costs. The Applicant's potential maximum cost liability, if their case is unsuccessful, is £5,000.

Options Considered

- Q. The options available to the Committee in the determination of the application, are as follows:
- (i) Accept the Inspector's recommendation that the application made to register land at Southwick Court Fields as a TVG, under s.15(1) and (2) of the Commons Act 2006, be rejected following detailed consideration of the evidence, for the reasons set out in the Inspector's Advisory Report dated 9 February 2024 and as recommended in Counsel's Advice provided by Douglas Edwards KC dated 16 October 2024 .
 - (ii) Not accept the Inspector's recommendation that the application made to register land at Southwick Court Fields as a TVG under s.15(1) and (2) of the Commons Act 2006, be rejected and resolve to register all or part

of the land subject to application and capable of registration as a TVG, if the Committee considers that there are sound evidential reasons for departing from the Inspector's recommendation and Counsel's Advice provided by Douglas Edwards KC dated 16 October 2024.

- R. Where Members of the Committee do not resolve to accept the Inspector's recommendation; Counsel's Advice and Wiltshire Council Legal Advice and make an alternative determination, clear evidential reasons for this decision must be given where the decision of the CRA regarding registration is open to legal challenge by both the Applicant and the Landowner.

Reasons for Recommendation

- S. In the Southwick Court Fields case, the date of the application is significant as the trigger and terminating events in place at that time determine whether the right to apply to register the land is extinguished over all; part or none of the application land. Whilst the Inspector in his Advisory Report considered the "time" of the application to be 13 January 2020, Counsel's Advice states that it was not open to him to consider that application, the application before him was that received on 30 November 2020 and the trigger and terminating events in place at that time, i.e. both the adopted WHSAP and the planning application no.20/00379/OUT (residential development of up to 180 dwellings). Counsel's Advice at para 44 states that it is not open to Wiltshire Council as the CRA to reverse its decision to reject the application dated 13 January 2020 and this is supported by the Wiltshire Council Legal Advice requested by the Committee at its meeting dated 6 November 2024.
- T. Counsel's Advice sets out that whilst it was not open to the Inspector to consider the application dated 13 January 2020, it follows from his conclusions as to the merits of the application during the period ending on 13 January 2020, that the outcome must be the same if the 20 year period ending on 30 November 2020 is considered. Therefore the Inspector's recommendation can be relied upon by the CRA in determining the application received on 30 November 2020.

Recommendation

- U. That Wiltshire Council as the CRA, accepts Counsel's Advice supported by Wiltshire Council Legal Advice, that it was not open to the Inspector to consider the application dated 13 January 2020 and that the decision of the CRA to reject the application dated 13 January 2020 cannot be reversed. The Inspector's recommendation can be relied upon by the CRA in determining the application received on 30 November 2020 and the application to register land at Southwick Court Fields, in the parishes of Southwick and North Bradley, (proceeding under Application number 2020/02TVG) should be rejected on the ground that all the criteria for registration laid down in s.15(2)

of the Commons Act 2006 have not been satisfied, for the reasons set out in the Inspector's Advisory Report dated 9 February 2024.

Samantha Howell

Director of Highways and Transport

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Senior Definitive Map Officer

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

None.

Please see Wiltshire Council Western Area Planning Committee Report (with Appendices) - 6 November 2024

Appendix 1 – Location Plan

Appendix 2 – Application Plans

Appendix 3 – Application Plan (Accepted Land) Application 30 November 2020

Appendix 4 – Inspector's Advisory Report 9 February 2024

Appendix 5 – Counsel's Advice 16 October 2024

Appendix 6 – Form 6 (6 May 2021) – Acceptance of Application 30 November 2020 in Part, as referred to at para 20 of Counsel's Advice

Report may be viewed using the following link:

[Agenda - Democratic Services - Wiltshire Council](#)

APPENDICES:

APPENDIX A - Representations and Questions received further to the Committee meeting dated 6 November 2024:

- i) Cllr D Vigar – Address to Committee 6 November 2024 (*p.1*)
- ii) Cllr D Vigar – Questions 12 November 2024 (*p.10*)
- iii) Mr F Morland – Representations 18 November 2024 (*p.13*)

APPENDIX B - Legal Opinion from Lord Banner KC dated 20 November 2024, submitted by Mr D Richardson (Ashfords LLP) on behalf of Waddeton Park Ltd, with covering e-mail dated 22 November 2024