TVG remarks – 6 November 2024

Thank you Chair for allowing me to speak as the local member for Trowbridge Grove. Trowbridge Grove is identified as the locality in this application.

I want to recap the facts of the case as the people of Trowbridge Grove would see them and I am open to correction by officers if I get any of those facts wrong.

The decision you are about to make has huge consequences for those residents. Since 2017 they have lived with one big question. Will the land that they know as Southwick Court Fields remain the open green space that many have enjoyed since childhood or will it be built on?

This is a big decision for these people and it needs to be based on firm foundations.

The salient facts are these.

In 2017 the land was allocated for housing in a draft of the Wiltshire Housing Site Allocation Plan or WHSAP.

On 13 January 2020, a resident of Trowbridge Grove, Mr Norman Swanney, applied to this Council as the Commons Registration Authority or CRA to have Southwick Court Fields registered as a village green.

On 15 January 2020, a planning application was lodged with Wiltshire Council by Waddeton Park for 180 dwellings and an access road covering the upper part of that land.

On February 24 2020, Mr Swanney's application was returned to him, saying the land was subject to a so-called trigger event, namely its inclusion in the WHSAP and therefore could not be considered for registration as a village green.

On 25 February 2020, the WHSAP was approved and adopted by Wiltshire Council.

As you can tell by this sequence of events, the WHSAP could not have been a trigger event as was approved over one month after the village green application was made. The mistake that identified it as a trigger and deemed the application invalid is at the centre of this case.

On 30 November 2020, Mr Swanney submitted a repeated application and this one was accepted because it covered the lower part of the land that was not subject to the allocation.

On 22 February 2023, the application for 180 dwellings was rejected by the Strategic Planning Committee.

On 7 June 2023, this committee voted to refer the village green application to a non-statutory inquiry.

In October 2023, an appeal inquiry was held into the planning application under Inspector John Longmuir.

And in November 2023, the non-statutory inquiry into the village green application took place under Inspector William Webster.

In February 2024 William Webster submitted his report recommending the village green application be rejected as there was insufficient evidence of lawful sports and pastimes occurring on the lower field for the 20 years preceding the application.

However he did also say that the effective date of the application should have been 13 January 2020, citing the judgement in a 2014 case of Church Commissioners for England v Hampshire County Council which held that that where deficiencies in an application can be remedied such that, if it was duly made in the view of the CRA, the application would be treated as having been duly made on the date on which the original defective application had been lodged.

On 20 March 2024, the Inspector for the planning application allowed the appeal and granted outline planning permission for the 180 dwellings and access road – although all matters were reserved other than the access.

On April 2024, William Webster's report was presented to this committee and I argued that while I accepted his finding that the lower part of the land did not qualify as a village green, I did not think that the Council should have found the application for the upper part invalid in January 2020 as I did not believe the WHSAP constituted a trigger event – as it wasn't approved until the month after the application.

My argument was that the land was first identified for housing in the draft WHSAP in June 2017. And that type of trigger event expires after two years – ie in June 2019. I questioned whether subsequent drafts had the same force.

At that meeting, as the minutes record, the Committee deferred determination of the application to register the land … to seek Counsel's Opinion on the question of whether the Draft WHSAP forms a valid trigger event.

I was very grateful to you for voting for that deferral. You had listened and decided that the case had to be properly examined.

I can understand why today you may be thinking that now we have the counsel's opinion, it should be followed and a line drawn under this long running saga. I totally get that and I feel a little of it myself. But that feeling has to be trumped by the imperative of any public servant to make the right decision, even if it is difficult and tedious to reach.

But now we have the advice of Douglas Edwards KC before us and you have to consider whether it is so unequivocal that it must be followed and the application rejected without being heard.

Let's recall that our main question to counsel was whether the 2017 draft of the WHSAP was a valid trigger event.

And the report from Douglas Edwards KC is clear on that. He agrees with what I said. The trigger expired in 2019. There was no trigger as of 13 January 2020. The red hatching we saw earlier should not have been there.

And he is clear that the Council should not have found the application invalid. He says the Council was wrong not to allot a number to the application and, much more importantly, wrong to have found the application to be invalid – because the trigger event had expired.

I do not blame the Council for this error. We all make mistakes. In early 2020 emails were sent and replied to and it was understandable that precise dates were overlooked. So I blame no-one. It was a mistake made in good faith.

But the mistake has had massive consequences for the residents of Trowbridge Grove. They were denied the chance to support an application to register the land as a village green by attesting to their use of it over 20 years for lawful sports and pastimes.

William Webster acknowledged that an application for the upper field might have had more chance of success when he said that those intending to use the Southwick Court Fields for kite flying, ball games and the like were more likely to use the upper part of the field.

And had Douglas Edwards KC confined himself to the question you asked him to answer in April, the answer would be clear. The application should stand and be considered.

But Mr Edwards has not confined himself to that question. He has posed and answered two other questions which could effectively enable the council's decisions to stand, wrong though they were.

First, he explores the question of the date on which the village green application was duly made.

He argues that Inspector William Webster was wrong to say the application was made on 13 January 2020 because the Council rejected the application. Webster relied upon Church Commissioners case and Edwards says that only applies where a council gives an applicant the chance to remedy a defective application, not where it rejects it. So, says Douglas Edwards KC, the effective date was 30 November when the revised application was made.

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I am not sure that a court would agree that the 13 January application was rejected. The Council did not use that word. It said it was returning the application and even stated that "until this trigger event is terminated", it would not be possible to apply to register the land as a village green, holding out the possibility of an application going ahead. Is that a rejection?

But if you accept that the application was rejected, then you have to consider the second question that the KC answered without being asked – namely whether a wrong decision made four years ago can be challenged.

Douglas Edwards KC invites you to agree that while Wiltshire Council made a mistake in 2020, it cannot be challenged.

He says that: "…it is well established in law that 'however wrong public law decisions may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction'".

So how is this well-established? Mr Edwards relies on *R v Panel on Takeovers and Mergers ex parte Datafin plc (1987)*. And to my mind this goes beyond bizarre. It's a 26 year old case where a company challenged a decision made by the national panel on takeovers and mergers. You'd be hard pressed to find something further removed from a planning decision by a local authority about a village green in 2020.

But I have read it just to see if there is a clear precedent. And what I see is that the key factor in that case was not whether a wrong decision should stand, but the wider one of whether the Panel could be subject to judicial review. And Lord Donaldson, then Master of the Rolls, found that it could be challenged.

And then almost as an aside, he noted that the decisions of the panel should stand until set aside by a higher court. The full quote from Lord Donaldson is: this "I think that it is important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the Panel, namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction."

Douglas Edwards quotes selectively from this judgement in para 44 on page 106 and does not provide the context which shows the matter related specifically to takeover bids.

I have asked if that Takeover Panel / Datafin case has ever been relied upon in a matter concerning a local council and in answers provided by Mr Edwards he says the observations are frequently cited in subsequent judgements.

We are also asked in this report to accept that a judicial review is impossible because it has to be applied for within three months of a decision. My reading of the Civil Procedure Rules is that at 54.5(5) they do say that an application for judicial review relating to a decision of a planning authority must be made no later than six weeks after the grounds to make the claim first arose. But at 3.1(2)(a) they say the court has power to extend or shorten the time for compliance with any rule, practice direction or court order (even if an application is made after the time for compliance has expired).

And in practice, there have been exceptions to this rule.[1] There was a 2021 case where the Croyde Area Residents Association in Devon successfully sought a judicial review of the decision of North Devon District Council in 2014 to grant permission to Parkdean Holiday Parks Limited for the use of lodges, static caravans and touring caravans at Ruda Holiday Park.[2]

And in 2019, the Court of Appeal upheld the quashing of a permission given in 2011 for the erection of 3 marquees to be used for events on the Wirral - when the challenge had been lodged in 2017 and permission to appeal granted in 2018. In that case the judges said that "..the council's mistake in issuing a decision notice that did not reflect its own lawful decision was and remains – as it concedes – an indisputable error. …. If the planning permission were not quashed, this manifest unlawfulness would persist."[3]

Manifest unlawfulness – strong language. And there the error was sending out a decision notice without the conditions attached. So perhaps an error of similar

[1] https://www.planoraks.com/posts-1/judicial-reviews-after-6-years
[2] https://www.bailii.org/ew/cases/EWHC/Admin/2021/646.html
[3] https://www.bailii.org/ew/cases/EWCA/Civ/2019/737.html

proportions to the one made by this Council in January 2020. So I contend that there is no clear precedent that says the mistake of 2020 must be accepted.

This is a complex legal matter. And you have had little time to consider it. Douglas Edwards KC was appointed to look at this in May. He has had six months to provide advice. You have had six working days in which to consider these issues. And we were given four working days in which to submit questions on it. I submitted 23 questions covering the issues I have just raised on Monday morning and have only had a few hours / minutes to digest the answers. This is no way to make a decision that will affect this land way beyond any of our lifetimes.

And that is particularly true when you are being asked to choose between two outcomes, neither of which address the injustice to residents and both of which in my view carry significant legal risk.

The first choice is to accept the counsel's advice – on issues he was not asked to consider – and to reject the application. This might prompt a judicial review. First, based on the precedents I have cited, it could be a review of the mistaken January 2020 decision. Or it could be a review of today's decision.

So that decision could be challenged in the courts. Or it could go to the Local Government Ombudsman which can investigate planning cases where the issue is, and I quote: "whether the council has done something wrong in the way it went about dealing with certain aspects of the situation" and that includes: "inaccurate information about procedures or planning law."

The second option you are presented with in the report is to go all the way across the spectrum of options and register the land as a village green right here and now without taking evidence from residents or the likely Objector. That would of course invite a judicial challenge by the applicant who has been granted planning permission or the landowner.

And you are warned that if you take that course you need to adduce "clear evidential reasons". Of course you can't summon those up on the fly.

So the pressure is on to go with option 1.

You're being asked to rubber stamp an understandable but far reaching mistake that has consequences for hundreds of people in perpetuity and the only alternative is to invite a legal nightmare.

I submit that you are being faced with what is known as a false binary – a fallacy that presents two options as if they are the only possibilities, when in fact there are others.

In this case if you follow logic and natural justice, the fair outcome would be to recognise that the original application for a village green was valid, to agree with counsel that the CRA was wrong to deem it invalid, and to process it as should have been processed four years ago.

If the same approach were taken as with the lower field, the process would be to hold a non-statutory inquiry into the application as originally submitted. Probably the application would be denied in respect of the lower part of the field as that part has been thoroughly investigated in the November 2023 Inquiry. But the upper part is different. That is where children play, joggers jog, families play ball games and so on – as they have done for decades. That case has never been heard and the reason it has never been heard is because, as the KC says here, the Council got it wrong. That that's simply unfair.

I also believe the recommendation is misleading when it says that "…whilst it was not open to the Inspector to consider the application dated 13 January 2020 in his Advisory Report, the Inspector's conclusions as to the merits of the application would be the same for the period ending 30 November 2020 and the Inspector's recommendation can therefore be relied upon by the CRA." This is because had the application of 13 January been considered as it should have been, with no trigger in force, then it would have covered a different area, namely the upper field as well as the lower one.

So although it pains me to ask, I ask you to defer a decision once again. My request is that someone propose to defer this to January and to ask for a further report that examines the option of processing the application as it should have been processed originally. And I also suggest that this consideration should be in-house rather than handed to an external lawyer.

Deferral will also guard against the risk of a judicial review and provide a space for the parties to discuss matters informally. In simple terms it offers some thinking space to resolve a very tricky conundrum.

I hope you agree and ask that you consider this course of action.

ii) Cllr D Vigar - Questions 12 November 2024

QUESTIONS ON APPLICATION TO REGISTER LAND AS A VILLAGE GREEN AT:
Southwick Court Fields: Southwick and North Bradley
Application No. 2020/02TVG
Councillor David Vigar, November 2024

Questions marked in bold

Douglas Edwards KC said that although he found the CRA was wrong not to have accepted the village green application dated 13 January 2020, it could not reverse that decision. He bases this statement on Lord Donaldson's remarks in R. v Panel on Takeovers and Mergers Ex p. Datafin Plc [1987] Q.B. 815 (05 December 1986)[1]. Lord Donaldson: "36. I think that it is important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the Panel, namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction."

He has subsequently also cited other cases including Noble v Thanet DC [2006] 1 P&CR 13, [42]-[44], [61] (Auld LJ)[2], in which Auld LJ said "42 … the domestic law principle is clear, and was correctly applied by the Judge, namely that administrative acts are valid unless and until quashed by a court."

Can the CRA how accept and consider the 13 January 2020 application on the basis that it would be a separate action to reversing the decision to reject it.

Do these precedents make it unlawful for the CRA to consider the 13 January 2020 application?

Do the precedents mean that the rejection of the application had legal force but could have been overturned by a court, had an application for judicial review been made?

[1] https://www.nadr.co.uk/articles/published/ArbitrationOlderReports/Data%20Fin%201986.pdf
[2] https://www.bailii.org/cgi-bin/markup.cgi?doc=%2Few%2Fcases%2FEWCA%2FCiv%2F2005%2F782.html&query=thanet%202005&method=all

On the possibility of the case being subject to legal challenge, Douglas Edwards said that any claim for judicial review would be well out of time.

Civil court procedure rules state at 54.5(5) that “Where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose.”[3]

However, they also state at 3.1(2) “(2) Except where these Rules provide otherwise, the court may – (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)”.[4]

There are cases where the Court has accepted and heard a judicial review in respect of a planning matter several years after the decision being challenged. Examples are: R. (Croyde Area Residents Association) v North Devon District Council and Parkdean Holiday Parks Ltd [2021][5] and R (Thornton Hall Hotel Ltd) v Wirral MBC and Thornton Holdings Ltd [2019].[6]

In the former, Mrs Justice Lieven said: 86 “It would be very hard to explain to a member of the public why a permission which was granted in complete error … should not be quashed.”

Might an application for judicial review be granted in this case despite the passage of time – taking these precedents into account?

The Local Government Ombudsman will investigate some planning cases. Its website says:

“…sometimes something happens which cannot be remedied by an appeal to the Planning Inspectorate and it would not be reasonable for you to be expected to pursue an appeal. In such cases we have discretion to consider whether to investigate your complaint.

[3] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.5
[4] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03

[5] https://www.bailii.org/ew/cases/EWHC/Admin/2021/646.html
[6] https://www.bailii.org/ew/cases/EWCA/Civ/2019/737.html

“In those complaints by people who have made planning applications which we can investigate we would consider whether the council has done something wrong in the way it went about dealing with certain aspects of the situation which have caused you problems. Some of the issues we can look at might include whether you have been given:

- inaccurate information about procedures or planning law
- misleading advice in advance of making an application, or
- no or an inadequate response to correspondence about your development proposals before an application is made or determined.” [7]

Could this case be the subject of a complaint to the Ombudsman?

[7] https://www.lgo.org.uk/make-a-complaint/fact-sheets/planning-and-building-control/how-your-application-for-planning-permission-is-dealt-with

iii) Mr F Morland - Representations 18 November 2024

From:	[redacted]
To:	[redacted]
Cc:	[redacted]
Subject:	Application to Register Land as Town or Village Green - Southwick Court Fields
Sent:	18/11/2024 15:16:13

Dear Senior Definitive Map Officer,

Thank you for the list of cases, all of which appear to me to be further examples of the general caselaw on the so-called Presumption of Regularity, as is the passage per Lord Donaldson MR in R v Panel on Takeovers and Mergers ex parte Datafin plc [1987] QB 815 at p. 840 cited in [44] of the Counsel's Advice. However, they all relate to challenges by other parties to the decisions in question and are not authority for Counsel's extension of that presumption to bind the decision taker too (viz., "The CRA cannot now unilaterally reverse the decision that it took on 24 February 2020". See also [50] :- "Although the CRA's determinations in respect of the 13 January 2020 and 11 June 2020 applications were wrong, substantively and procedurally, for the reasons I have given, neither determination can now be reversed by the CRA.").

In fact, the relevant caselaw demonstrates that that presumption does not prevent the decision taker from reviewing/changing/reversing "wrong" decisions, if it sees fit to do so and uses fair procedures for that purpose.

The earliest case addressing this issue was that of the Privy Council in De Verteuil v Knaggs [1918] UKPC 29, when Lord Parmoor said "there is no reason why the acting Governor may not at any time review or alter a decision previously given, and it may be his duty to do so, in the prudent exercise of his discretion, on a further consideration of all the relevant factors after full enquiry".

Lord Reid cited that precedent in Ridge v Baldwin (No 1) [1963] UKHL 2, when he said "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh after affording to the person affected a proper opportunity to present his case then its later decision will be valid".

That passage was cited by Lord Carswell in Grant v The Teacher's Appeals Tribunal [2006] UKPC 59, when he said "their Lordships do not consider that a hearing will necessarily be unfair if a committee or other body has heard a complaint before and proceeds to rehear it before reaching a final decision. The rehearing may still be fair and valid even if the committee has earlier reached a conclusion on the subject matter, provided it gives genuine and fair consideration to the case and any further facts or arguments put before it on the second occasion".

Unfortunately, judicial comment on the Presumption of Regularity (including that in the Datafin case) is usually articulated in contexts in which the relevant decision-maker has not agreed to reconsider his own initial decision. However, a review of the

authorities cited above makes it readily apparent that although in practice administrative decisions are ordinarily only set aside by way of court order, the true legal position is that administrative bodies can generally reconsider their decisions should they wish to do so.

In the light of Regulation 5(4) of The Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) Regulations 2007 (SI No. 457) and [44] of the judgment of Arden LJ in R (Church Commissioners for England) v Hampshire County Council [2014] EWCA Civ 634, it also seems to me that the finding in the Inspector's Advisory Report of 9 February 2024 that Mr Swanney in substance made only a single TVG application (dated 13 January 2020 and given the reference number 2020/02TVG by the CRA), which has not yet been determined, is much to be preferred to that in the Counsel's Advice of 16 October 2024 that the position should be construed as him having made a series of such applications (all bearing the same date of 13 January 2020!), the first and second of which were determined, wrongly rejected as invalid and returned to Mr Swanney by the decisions of officers on 24 February 2020 and 7 October 2020 respectively, and only the third of which remains undetermined.

Counsel's Advice is that the decisions on 24 February 2020 and 7 October 2020 are now long out-of-time for challenge by Judicial Review. However, I am doubtful that that would be the position if the Inspector's approach/finding of there having been only a single application not yet determined is the correct one.

The House of Lords considered the issue in R v London Borough of Hammersmith and Fulham ex parte Burkett [2002] UKHL 23 and held that in cases involving planning law, the time limit for Judicial Review challenges did not start to run until the date on which the planning permission was actually granted (being the date on which the decision notice was issued).

In the leading judgment, Lord Steyn said:-
[37] ... "These provisions [RSC Ord 53, r 4(1) and CPR r 54.5(1)] apply across the spectrum of judicial review applications. Making due allowance for the special features of town planning applications, an interpretation is to be preferred which is capable of applying to the generality of cases. ... [43] ... "the rule of court applies across the board to judicial review applications. ... In my view the time limit under the rules of court would not run from the date of such preliminary decisions in respect of a challenge of the actual decision. If that is so, one is entitled to ask: what is the qualitative difference in town planning? There is, after all, nothing to indicate that, in regard to RSC Ord 53, r 4(1), town planning is an island on its own. ... [45]. First, the context is a rule of court which by operation of a time limit may deprive a citizen of the right to challenge an undoubted abuse of power. And such a challenge may involve not only individual rights but also community interests, as in environmental cases. This is a contextual matter relevant to the interpretation of the rule of court. It weighs in favour of a clear and straightforward interpretation which will yield a readily ascertainable starting date. ... [46]. Secondly, legal policy favours simplicity and certainty rather than complexity and uncertainty. ... In procedural legislation, primary or subordinate, it must be a primary factor in the interpretative process, notably where the application of the procedural regime may result in the loss of

fundamental rights to challenge an unlawful exercise of power. The citizen must know where he stands. And so must the local authority and the developer. ... [50]. Thirdly, the preparation of a judicial review application, particularly in a town planning matter, is a burdensome task. ... An applicant is at risk of having to pay substantial costs which may, for example, result in the loss of his home. ... They further reinforce the view that it is unfair to subject a judicial review applicant to the uncertainty of a retrospective decision by a judge as to the date of the triggering of the time limit under the rules of court".

Under the heading "Challenging Multi-step Administrative Action", the Supreme Court considered the position further in R(Fylde Coast Farms) v Fylde Borough Council [2021] UKSC 18 as it affected challenges to neighbourhood plans (Section 61N of the Town and Country Planning Act 1990); (viz. "where a public law measure is taken at the end of and on the basis of a series of steps and its lawfulness is contingent on the lawfulness of each of the steps leading up to it" [36]); and said (at [38]) "requiring a claimant to take action in relation to the step along the way could be perceived to be premature and potentially wasteful (in that, if one waited, it could transpire that for various reasons the final decision might not be taken, so that there would in fact have been no need for any challenge); it could also be perceived as placing the claimant under a heavy burden of trying to assess the future impact of an administrative process on him and then taking prompt action at a stage when the outcome of that process is not clear. ... Particularly where the applicable law is complex, it may be relatively easy to find that a public authority has innocently slipped into some unlawfulness along the way to taking a final decision". It noted (at [40]) that in the Burkett case the House of Lords had held "that it was open to the claimant to wait until the end of the decision-making process to see if they needed to take any action" and concluded (at [41]) that "There is no clear presumption how the balance should be struck in the context of the statutory regime under consideration here which could offer any guidance regarding the interpretation of Section 61N. Parliament was entitled to strike the balance in this particular context as it thought fit and the words of the provision itself provide a clear answer as to how it intended that should be achieved".

For these reasons, I do not agree that a Judicial Review of the final decision on the Southwick Court Fields application 2020//02TVG could not remedy the "wrong" decisions of officers on 24 February 2020 and 07 October 2020; so there are compelling reasons why Wiltshire Council (either by its Western Area Planning Committee or otherwise) should now re-take and correct those decisions (and in consequence instruct the Inspector, or another experienced barrister, to conduct another non-statutory public inquiry and submit another Advisory Report on Mr Swanney's TVG application for the whole of the application area on 13 January 2020, there having been <u>no</u> trigger events in force on that date).

Yours sincerely,

Francis Morland

E&OE: Disclaimer

From: Green, Janice <janice.green@wiltshire.gov.uk>
Sent: 11 November 2024 09:33
To:
Cc:
Subject: Application to Register Land as Town or Village Green - Southwick Court Fields

Dear Mr Morland,

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

Following the meeting of the Western Area Planning Committee dated 6th November, please find attached below list of cases referred to in the discussion:

Smith v East Elloe RDC [1956] AC 736, 769-70 (Lord Radcliffe)
Noble v Thanet DC [2006] 1 P&CR 13, [42]-[44], [61] (Auld LJ);
R(oao Wingfield) v Canterbury CC [2019] EWHC 1974 (Admin), [63] (Lang J)

Kind regards,

Janice Green
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Information relating to the way Wiltshire Council will manage your data can be found at:
http://www.wiltshire.gov.uk/recreation-rights-of-way
Report a problem: https://my.wiltshire.gov.uk/ Web: www.wiltshire.gov.uk