Evidence item 24

Appendix XX

This section includes;-

a) An extract from the inspectors Report from the registration as a Town or Village Green of Land at Ashton Vale Fields, Bristol. We used this as a guide to understand the legislative framework.

IN THE MATTER OF TWO APPLICATIONS

BY [redacted] AND [redacted]

FOR THE REGISTRATION AS A TOWN OR VILLAGE GREEN

OF LAND AT ASHTON VALE FIELDS, BRISTOL

INSPECTOR'S REPORT

A. The legislative framework

1. The Commons Registration Act 1965 ("the 1965 Act") made provision for the establishment and maintenance of registers of common land and town or village greens, including (by section 13) provision for the amendment of those registers "*where ... (b) any land becomes common land or a town or village green*". Procedural provisions for the addition of land to the registers by the local authorities responsible for their maintenance were enacted in the Commons Registration (New Land) Regulations 1969 ("the 1969 Regulations"). Any person could apply for the addition of land as a new town or village green: regulation 3(4).

2. The original definition of "town or village green" in section 22(1) of the 1965 Act was as follows:[1]

> "*land* [a] *which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or* [b] *on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or* [c] *on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.*"

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[1] The letters [a], [b], and [c] did not appear in the statute itself, but have been interpolated by me to reflect the common practice of referring to the three distinct categories of land registered under the 1965 Act as, respectively, "class a", "class b" and "class c" greens.

3. The definition was amended by section 98 of the Countryside and Rights of Way Act 2000 with effect from 30 January 2001. As amended, it read:

> *"land* [a] *which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or* [b] *on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or* [c] *which falls within subsection (1A) of this section".*

Land fell within section 22(1A) if it was

> *"land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either*
>
> *(a) continue to do so, or*
>
> *(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."*

No regulations were ever made for the purposes of the subsection.

4. Applications for the registration of land as a town or village green made before 6 April 2007 continue to be governed by the 1965 Act and 1969 Regulations. However, all subsequently made applications are governed instead by section 15 of the Commons Act 2006 ("the 2006 Act").[2] Section 15[3] lays down criteria for the

[2] See the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007 for the relevant commencement and saving provisions.

registration of new greens which are similar, although not identical, to those in section 22(1A) of the 1965 Act. It follows that familiarity with the terms of the section 22(1) definition of "town or village green", both as originally enacted and as amended in 2001, is essential, because much of the case law relating to those provisions applies or may apply by analogy to section 15.

5. Insofar as presently material, section 15 provides that:

> "(1) *Any person may apply to the commons registration authority to register land to which this Part applies*[4] *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 the inhabitants of any locality, or of 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; and*
> >
> > (b) *they continue to do so at the time of the application.*
>
> (3) *This subsection applies where –*
>
> > (a) *a significant number of the 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 ceased to do so before the time of the application but after the commencement of this section; and*

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[3] In the remainder of this Report I shall refer to section 15 of the 2006 Act simply as "section 15".

[4] Part 1 of the 2006 Act applies to all land in England and Wales except the New Forest, Epping Forest, and the Forest of Dean: section 5.

> (c) *the application is made within the period of two years beginning with the cessation referred to in paragraph (b).*
>
> (4) *This subsection applies (subject to subsection (5))*[5] *where –*
>
> (a) *a significant number of the 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 ceased to do so before the commencement of this section; and*
>
> (c) *the application is made within the period of five years beginning with the cessation referred to in paragraph (b)."*

6. "Land" is defined in section 61 of the 2006 Act as follows:

> *" 'Land' includes land covered by water".*

7. Applications made under section 15 in respect of land in England are currently governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 ("the 2007 Regulations").[6] Their provisions are similar, but not identical, to those of the 1969 Regulations. In each case, the application has to be in the prescribed form and supported by a statutory declaration made by the applicant.[7] A registration authority receiving such an application is required (if satisfied that it is duly made) to notify the affected landowners and other potential objectors and take other steps to publicise the

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[5] The section 15(5) exception only applies where planning permission had been granted in respect of the land, and its implementation had begun, before 23 June 2006 (not the case here).
[6] Save in the seven "pilot areas" specified in Schedule 1 to the Commons Registration (England) Regulations 2008, which do not include Bristol.
[7] 1969 Regulations, regulation 3(7); 2007 Regulations, regulation 3(2)-(3).

application.[8] The authority is then to proceed to further consideration of the application and any statements in objection.[9] Anyone can object to the application, whether or not interested in the relevant land.

8. Neither set of Regulations contains any provision for an oral hearing to be held before the authority "disposes" of an application by "accepting" ("granting", in the 2007 Regulations) or "rejecting" it.[10] However, determining applications on paper would in many cases be unsatisfactory, especially where there are material disputes of fact which can only fairly be resolved by hearing oral evidence which is tested in cross-examination. A practice has accordingly developed among registration authorities of appointing an independent inspector to conduct a non-statutory[11] inquiry and report back to the authority on the evidence and the law, with a recommendation as to how it should determine the application. That practice has received express judicial endorsement in several cases,[12] and been impliedly approved by the House of Lords in *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335 ("*Sunningwell*") and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (*"Oxfordshire"*). The decision, however, remains the registration authority's to make. The duty to determine the application is not delegable to anyone outside the authority and it is the duty of the authority to assess the submitted evidence and consider the arguments on both sides for itself when performing the duty to determine the application.[13] It is not, however, under any "*investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties*": per Lord Hoffmann in *Oxfordshire* at paragraph 61.

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[8] 1969 Regulations, regulation 5(4); 2007 Regulations, regulation 5(1).
[9] 1969 Regulations, regulation 6; 2007 Regulations, regulation 6.
[10] 1969 Regulations, regulations 7, 8; 2007 Regulations, regulations 8, 9.
[11] The inquiry is "non-statutory" not in the sense that the authority has no power to hold it (for section 111 of the Local Government Act 1972 confers power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions, including determining a section 15 application), but in the sense that there is no provision for it in the particular legislation specifically governing such applications.
[12] *R v Suffolk County Council ex p Steed* ("*ex p Steed*") (1995) 70 P&CR 487, pp 500-501; *R (Cheltenham Builders Ltd) v South Gloucestershire Council* [2004] JPL 975 ("*Cheltenham Builders*"), paragraphs 34-40; *R(Whitmey) v Commons Commissioners* [2005] QB 282, paragraphs 28-30, 62.
[13] *ex p Steed* in the Court of Appeal (1996) 75 P&CR 102, pp.115-116.

9. The House of Lords held in *Oxfordshire* that in response to an application for registration of land as a green made under the 1965 Act and 1969 Regulations, the registration authority was entitled, without any amendment of the application, to register only that part of the land the subject of the application which the applicant had proved to have been used in the requisite manner for the necessary period. There was no rule that the lesser area should be substantially the same as, or bear any particular relationship to, the whole area originally claimed. See in particular Lord Hoffmann's speech, at paragraph 62. At first instance, Lightman J had declared the jurisdiction to exist subject to the qualification that its exercise would "*occasion no irremediable prejudice*" to anyone. The appeal against that declaration was dismissed by the Court of Appeal and the House of Lords, so that the "irremediable prejudice" test stood. However, Lord Hoffmann said that "*it is hard to see how [registration of part] could cause prejudice to anyone*". I can think of no reason why the courts would adopt a different approach to applications under the 2006 Act and 2007 Regulations, and at the inquiry conducted by me in relation to the applications with which this Report is concerned, counsel for the parties concurred with my view.

10. Other procedural questions which arose in *Oxfordshire* were whether registration authorities had power to allow amendments to 1965 Act applications, and whether they had power (without any amendment) to treat such applications as if a different date had been specified in Part 4 of the application form as the date on which the land became a town or village green. Both questions were answered in the affirmative. The context in which the questions arose was this. The applicant, Miss Robinson, had specified 1 August 1990. The inspector took the view that she had made a mistake, because the "continuance" requirement under the 1965 Act as amended in 2001[14] precluded land's satisfying the definition of "town or village green" on a date preceding the application, and the date of the application was the only correct answer to the Part 4 question. However, he also took the view that the registration authority could treat the application as if that was the answer Miss Robinson had given. The inspector's approach was upheld by Lightman J, the Court of Appeal, and the House of Lords, and Lightman J made a declaration accordingly which was left undisturbed on appeal.

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[14] See paragraph 3 above.

11. At paragraph 61 Lord Hoffmann made the general observations that

> *"It is clear from the [1969] Regulations that the procedure for registration was intended to be relatively simple and informal. The persons interested in the land and the inhabitants at large had to be given notice of the application and the applicant had to be given fair notice of any objections (whether from the land owner, third parties or the registration authority itself) and the opportunity to deal with them. Against this background, it seems to me that the registration authority should be guided by the general principle of being fair to the parties."*

Baroness Hale said[15]

> *"I... entirely agree [with Lord Hoffmann] that the registration authority may allow amendments or deal with an application in accordance with the evidence before them, provided always that they have given every person who might wish to object (or who otherwise has a legitimate interest in the process) a fair opportunity to consider what is proposed and make representations about it."*

12. I can think of no reason why the courts would adopt a different approach to the issue of allowing amendments to applications made under the 2006 Act and the 2007 Regulations. Different considerations might apply to - in Baroness Hale's words - dealing with applications in accordance with the evidence before them, without any formal amendments being made. As to that, counsel for the parties disagreed, and I shall return to the matter below.[16]

13. The burden of proof that the applicable criteria are satisfied rests on the applicant for registration. It has been said that it is "no trivial matter"[17] for a landowner to have land registered as a green, having regard to the consequences. As confirmed in

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[15] *Oxfordshire*, paragraph 144.
[16] At paragraph 551.
[17] *ex p. Steed* (1996) 75 P&CR 102, at p.111 per Pill LJ, approved by Lord Bingham in *R (Beresford) v. Sunderland City Council (Beresford)* [2004] 1 AC 889 at paragraph 2.

Oxfordshire by the House of Lords, registration gives rise to rights for the relevant local inhabitants to indulge in lawful sports and pastimes on the land, and attracts the protection of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 ("the 19th century legislation") which make it a criminal offence to build or do anything on the land which interferes with local inhabitants' enjoyment of their rights.[18] It was also said that all the ingredients of the 1965 Act definition had to be "properly and strictly proved", and careful consideration had to be given by the decision-maker to whether that was the case.[19] However, there was no suggestion that the standard of proof was anything other than the usual civil standard, ie. the balance of probabilities.

14. There is an already considerable, and growing, body of case law bearing on the interpretation and application of the provisions in the 1965 and 2006 Acts for registration of land as a town or village green. I shall refer to authorities which address the substantive (as opposed to procedural) legal issues arising in Section H of this Report (paragraphs 410-461 below).

15. It is important to note that a section 15 application can only succeed if (or to the extent that) the land the subject of the application is proved to satisfy the criteria set out in section 15(2), 15(3) or 15(4). Conversely, if those criteria are met, the application must be granted. No regard can be had to considerations of the desirability of the land's being registered as a green on the one hand, or of its being developed or put to other uses on the other hand. All such considerations are wholly irrelevant to the statutory question which the registration authority has to decide, namely whether the land (or any part of it) is land which satisfies the specified criteria for registrability.

16. The only context in which it is legitimate to have regard to a subsisting planning permission or proposal for development of the land the subject of an application is in assessing the credibility of witness evidence. That is because of the possibility that

[18] Those rights may, however. be qualified so as to permit the landowner to continue activities carried on by him before registration: *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 WLR 653 ("*Lewis*"). See further paragraphs 429-430 below.

[19] See the references at footnote 17 above, and also *Beresford* paragraph 92 per Lord Walker.

witnesses might be motivated to exaggerate or even fabricate evidence, or their recollections might be subconsciously coloured, by their support for, or opposition to, the proposed development.

B. ~~The Applications~~

17. The two applications with which this Report is concerned ("the Applications") were both made under section 15 and fall to be determined in accordance with its provisions. They were made by [redacted] and [redacted] ("the Applicants") and dated respectively 26 October 2009 and 22 October 2009. Each of the Applications[20] was made in the form prescribed by the 2007 Regulations, Form 44, and accompanied by the requisite statutory declaration.[21] They were submitted to Bristol City Council in its capacity as registration authority for the purposes of the 2006 Act ("the Registration Authority").

18. Both Applications were for registration as a new town or village green of one and the same area of land, described in part 5 of the forms as being "*Ashton Vale Fields/The Fields*" (with the addition in [redacted] case of the words "*Ashton Marsh*") and located "*adjoining North Somerset boundary between Ashton Drive cul-de-sac and the Park and Ride*". The land ("the Application Land") comprises six intercommunicating fields, totalling approximately 24.7 hectares (42.2 acres) in area, which are described in more detail in Section C of this Report (paragraphs 25-40 below). Both Applications were expressed to be made under section 15(2), that is on the basis that qualifying use was continuing at the time of the application.[22] The justification for the Applications was stated in part 7 of the two forms in more or less identical terms:

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[20] There is a copy of [redacted]'s application at pp 3-18 of the Applicants' Inquiry Bundle and a copy of [redacted] application at pp 19-34. Throughout the remainder of this Report, references in the form "A [no]" are references to pages in the Applicants' Inquiry Bundle. References in the form "O [no]" are references to pages in the Objectors' Inquiry Bundle.

[21] As initially submitted, they did not fully comply with the 2007 Regulations in that they were not accompanied by an ordnance map on a scale of not less than 1:2,500 identifying the Application Land (regulation 10). That was put right in December 2009.

[22] See paragraph 5 above.