WORCESTERSHIRE COUNTY COUNCIL: COMMONS ACT 2006

REPORT FOR DECISION BY HEAD OF LEGAL AND DEMOCRATIC SERVICES

APPLICATION FOR A TOWN GREEN: LAND AT POWER STATION ROAD STOURPORT ON SEVERN WORCESTERSHIRE
S15 COMMONS ACT 2006

1. The Application

1.1 An application under s15 (1) Commons Act 2006 was made by JOSEPH COLIN HAWKINS and PETER MICHAEL PRIESTLEY ("the Applicant") dated 10th May 2012 to Worcestershire County Council as the Commons Registration Authority to register a village green at Power Station Road Stourport on Severn Worcestershire.

1.2 The application claimed that the land ("the Land") shown on the plan annexed ("the Plan") became a Town Green on 10th May 2012.

1.3 The application maintained that the Land had been used by a significant number of local inhabitants for lawful sports and pastimes for upwards of 20 years.

1.4 The freehold owners of the land are Tarmac Homes Midlands Limited now Taylor Wimpey North Midlands.

2 Objectors

No objections were received following the advertising of the application.

3. Background

The Land comprises a flat area of open mown grassland with tress and hedges in a primarily residential area. To the north east is registered common land, Hartlebury Common.

4. Evidence

4.1 Evidence was supplied in written form with the application as to the use of the land.

4.2 The Commons Registration Authority decided to refer the application and evidence to which Miss Ruth Stockley of Kings Chambers, Manchester for advice on the merits of the application. The Inspector's report was received on 16th February 2015 and the applicant was given an opportunity to make further observations. The applicant declined to make any further comments or representations

4.3 I attach a copy of the Inspector's report which summarises the evidence and the law and reaches the following conclusions :-

4.3.1 That the Land comprises land that is capable of registration as a town or village green in principle;

4.3.2 That the relevant 20 year period is May 1992 until May 2012;

4.3.3 That the Land has been used for some lawful sports and pastimes during the relevant 20 year period;

4.3.4 That the Mitton Ward is a qualifying locality;

4.3.5 That no other qualifying locality or neighbourhood has been identified;

4.3.6 That the Land has not been used for lawful sports and pastimes throughout the relevant 20 year period by a significant number of the inhabitants of the Mitton Ward or of any other identified qualifying locality or neighbourhood within a locality;

4.3.7 That the Land has not been used for lawful sports and pastimes throughout the relevant 20 year period to a sufficient extent and continuity to have created a town or village green;

4.3.8 That the use of the Land for lawful sports and pastimes has been as of right throughout the relevant 20 year period; and

4.3.9 That the use of the Land has continued up until the date of the Application.

5. The Law

The law requires there to be more than 20 years' continuous use of the Land for lawful sports and pastimes as of right enjoyed by a significant number of the inhabitants of a neighbourhood or a locality. On testing of the evidence by expert counsel she was of the opinion that the applicants did not satisfy each and every relevant statutory requirement and that the application should be rejected on the following grounds:

5.1 The Applicant has failed to establish that the Application Land has been used for lawful sports and pastimes to a sufficient extent and continuity throughout the relevant 20 year period to have created a town or village green ; and

5.2 The Applicant has failed to establish that the use of the Application Land has been by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period.

Recommendation

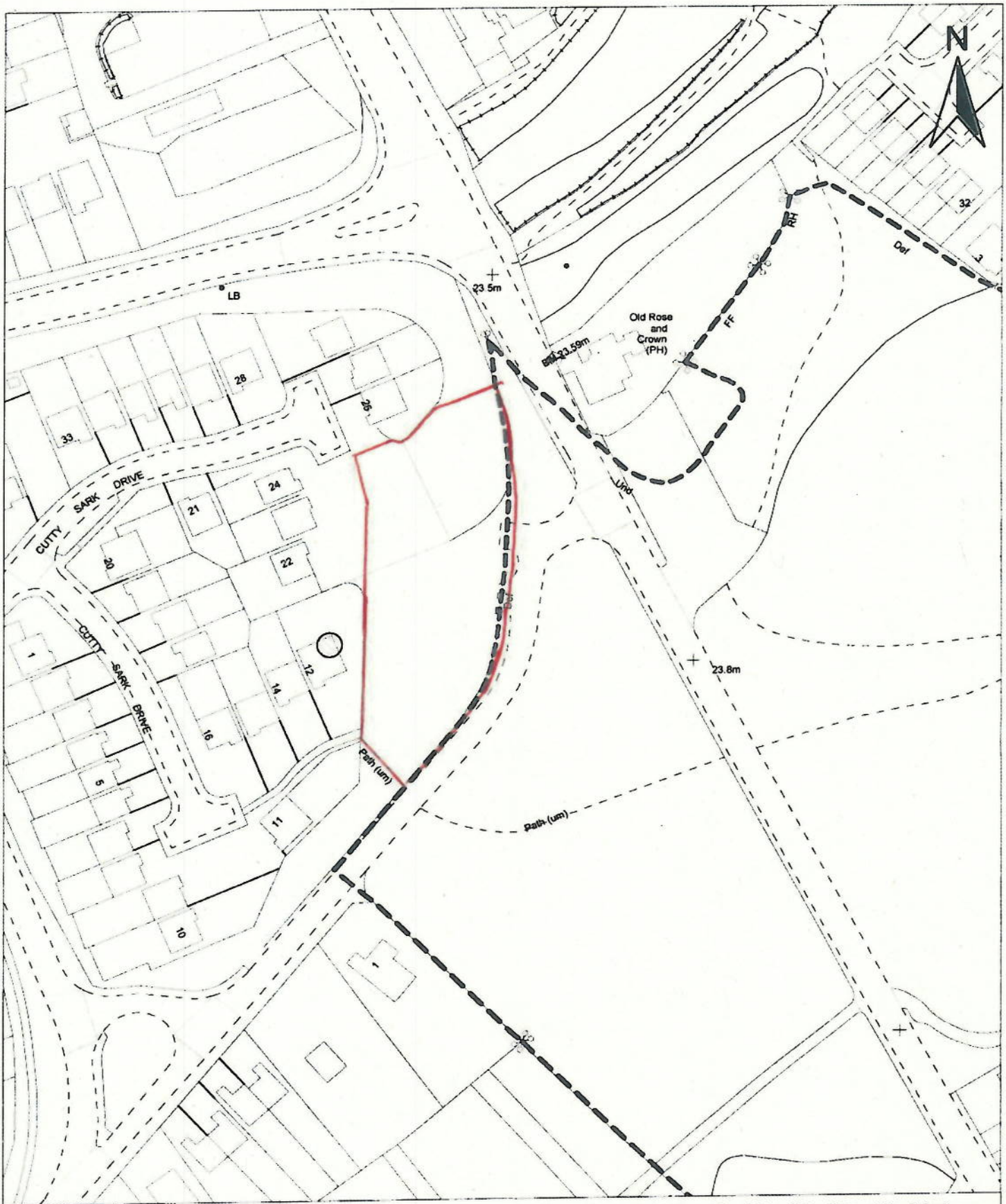
Accordingly having considered Miss Stockley's report and adopting her reasoning I recommend that the application to register the Land as a Village Green be refused.

Fiona Morgan.
Principal Conveyancer.
Dated: 10th March 2015

I agree/~~do not agree~~ the recommendation made in the report above.

on the basis of Miss Stockley's report and her reasoning.

Simon Mallinson
Head of Legal and Democratic Services
Date: 16/3/15.



worcestershire county council
County Hall,
Spetchley Road,
Worcester
WR5 2NP

Scale: 1:1,250

10 0 10 20 30 40 50 60 70 80 Meters

Land at Cutty Sark Drive
Stourport on Severn
Worcs.

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT POWER STATION ROAD/WORCESTER ROAD, STOURPORT ON SEVERN, WORCESTERSHIRE AS A TOWN OR VILLAGE GREEN

ADVICE

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1. I am asked to advise Worcestershire County Council ("the Council") in its capacity as the Registration Authority for the purposes of the Commons Act 2006 ("the 2006 Act") upon the merits of an application to register land at Power Station Road/Worcester Road, Stourport On Severn, Worcestershire ("the Land") as a town or village green.

2. THE APPLICATION

2.1 The Application was made by Joseph Colin Hawkins and Peter Michael Priestley of 12, Cutty Sark Drive and 11, Cutty Sark Drive respectively, Stourport on Severn, Worcestershire DY13 9RP ("the Applicants") and is dated 10 May 2012. It was received by the Registration Authority on 24 May 2012. Part 5 of the Application Form states that the Land sought to be registered is usually known as "*Open Space Land adjacent to Power Station Rd and Worcester Rd*", and its location is stated as being "*Stourport On Severn Worcestershire DY13 9RP*". A map, marked "Map "A"", was submitted with the Application attached to the Statutory Declaration which shows the Land subject to the Application shaded in green. In part 6 of the

Application Form, in relation to the relevant "locality or neighbourhood within a locality" to which the claimed green relates, it is stated: "*Mitton Ward, Stourport On Severn Worcestershire, Off Power Station Rd and Worcester Rd, DY13 9RP*".

2.2 The Application is made on the basis that section 15(2) of the 2006 Act applies, which provision contains the relevant qualifying statutory criteria. The justification for the registration of the Land is set out in Part 7 of the Form. The Application is verified by a statutory declaration in support made on 10 May 2012. As to supporting documentation, three Google earth images of the Land are attached to the Application together with witness statements in support and community giving support forms. In addition, having commenced to review the Application, my Instructing Solicitor gave the Applicants an opportunity to improve the quality of the evidence adduced in support which they took and submitted a number of evidence questionnaires.

2.3 The Application was duly advertised by the Registration Authority and was also served on the Landowner, Tarmac Homes Midlands Limited, at the address shown on the registered title. However, it transpired that the Land is currently owned by Taylor Wimpey North Midlands, the former's successor, and the Application was accordingly subsequently served on the latter. In the event, no objections were received.

2.4 The Land is identified on the map marked "Map "A"" on which it is shaded in green. It appears from the photographs produced to be a flat area of open

mown grassland with trees and hedges planted on it and it is located within a primarily residential area. To the north east of the Land is registered common land known as Hartlebury Common which belongs to Worcestershire County Council.

2.5 I have taken into account all the evidence and other supporting information provided in reaching my conclusions set out below.

3. RELEVANT LEGAL FRAMEWORK

3.1 The Application seeks the registration of the Land by virtue of the operation of section 15(2) of the 2006 Act. Under that provision, land is to be registered as a town or village green 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.*"

Therefore, for the Application to succeed, it must be established that:-

(i) the Land comprises "land" within the meaning of the 2006 Act;

(ii) the Land has been used for lawful sports and pastimes;

(iii) such use has been for a period of not less than 20 years;

(iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;

(v) such use has been as of right; and

(vi) such use continued at the time of the Application.

Burden of Proof

3.2 The burden of proving that the Land has become a village green rests with the Applicant for registration. The standard of proof is the balance of probabilities. Further, when considering whether or not the Applicants have discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in ***R. v Sunderland City Council ex parte Beresford***[1] that all the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant.

Land

3.3 Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration. However, it was stated by way of *obiter dictum* by the majority of the House of Lords in ***Oxfordshire County Council v. Oxford City Council***[2] that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered.

Lawful Sports and Pastimes

3.4 It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[3] that "*lawful sports and pastimes*" is a composite expression

[1] [2004] 1 AC 889 at paragraph 2.
[2] [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.
[3] [2000] 1 AC 335 at 356F to 357E.

and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children's play.

3.5 However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way. Lightman J. stated at first instance in ***Oxfordshire County Council v. Oxford City Council***[4] at paragraph 102:-

> "*Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).*"

[4] [2004] Ch. 253.

He went on at paragraph 103 to state:-

> *"The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e g, fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights."*

The Court of Appeal and the House of Lords declined to rule on the issue since it was so much a matter of fact in applying the statutory test. However, neither the Court of Appeal nor the House of Lords expressed any disagreement with the above views advanced by Lightman J.

Continuity and Sufficiency of Use over 20 Year Period

3.6 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: ***Hollins v. Verney***.[5] Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: ***R. (on the application of Lewis) v. Redcar and Cleveland Borough Council***.[6]

Locality or Neighbourhood within a Locality

3.7 A "*locality*" must be a division of the County known to the law, such as a borough, parish or manor: ***MoD v Wiltshire CC***;[7] ***R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC***;[8] and ***R. (Laing Homes Limited) v. Buckinghamshire CC***.[9] A locality cannot be created simply by drawing a line on a plan: ***Cheltenham Builders*** case.[10]

3.8 In contrast, a "*neighbourhood*" need not be a recognised administrative unit. Lord Hoffmann pointed out in ***Oxfordshire County Council v. Oxford City Council***[11] that the statutory criteria of "*any neighbourhood within a locality*" is "*obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries*". Hence, a housing estate can be a neighbourhood: ***R. (McAlpine)***

[5] (1884) 13 QBD 304.
[6] [2010] UKSC 11 at paragraph 36.
[7] [1995] 4 All ER 931 at page 937b-e.
[8] [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.
[9] [2003] EWHC 1578 (Admin) at paragraph 133.
[10] At paragraphs 41 to 48.
[11] [2006] 2 AC 674 at paragraph 27.

v. Staffordshire County Council.[12] Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must be an area which has a sufficient degree of cohesiveness: ***Cheltenham Builders*** case.[13]

3.9 Further clarity was provided on that element by HHJ Waksman QC in ***R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council***[14] who stated:-

> *"the area from which users must come now includes a neighbourhood as well as a locality. On any view that makes qualification much easier because it was accepted that a locality had to be some form of administrative unit, like a town or parish or ward. Neighbourhood is on any view a more fluid concept and connotes an area that may be much smaller than a locality."*[15]

He went on to state:-

> *"while Lord Hoffman said that the expression [sc., neighbourhood within a locality] was drafted with deliberate imprecision, that was to be contrasted with the locality whose boundaries had to be legally significant – see paragraph 27 of his judgment in Oxfordshire (supra). He was not saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality ... but, as Sullivan J stated in R*

[12] [2002] EWHC 76 (Admin).
[13] At paragraph 85.
[14] [2010] EWHC 530 (Admin).
[15] At paragraph 69.

(Cheltenham Builders Ltd) v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application."[16]

3.10 Subsequently, in ***Leeds Group plc v. Leeds City Council***,[17] HHJ Behrens stated, and the Court of Appeal upheld his view on the point:-

"I shall not myself attempt a definition of the word 'neighbourhood'. It is, as the inspector said an ordinary English word and I have set out part of the Oxford English Dictionary definition. [Sc., "A district or portion of a town; a small but relatively self-contained sector of a larger urban area; the nearby or surrounding area, the vicinity"]. I take into account the guidance given by Lord Hoffman in paragraph 27 of the judgment in the Oxfordshire case. The word neighbourhood is deliberately imprecise. As a number of judges have said it was the clear intention of Parliament to make easier the registration of Class C TVGs. In my view Sullivan J's references to cohesiveness have to be read in the light of these considerations."[18]

Significant Number

[16] At paragraph 79.
[17] [2010] EWHC 810 (Ch).
[18] At paragraph 103.

3.10 "*Significant*" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers: ***R. (McAlpine) v. Staffordshire County Council***.[19]

As of Right

3.11 Use of land "*as of right*" is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[20] that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

3.12 "Force" does not merely refer to physical force. User is *vi* and so not "*as of right*" if it involves climbing or breaking down fences or gates or if it is under protest from the landowner: ***Newnham v. Willison***.[21] Further, Lord Rodger in ***Lewis v. Redcar*** stated that "*If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being vi...user is only peaceable (nec vi) if it is neither violent nor contentious*".[22]

3.13 "Permission" can be expressly given or be implied from the landowner's conduct, but it cannot be implied from the mere inaction or acts of

[19] [2002] EWHC 76 (Admin) at paragraph 71.
[20] [2000] 1 AC 335.
[21] (1988) 56 P. & C.R. 8.
[22] At paragraphs 88-90.

encouragement of the landowner: ***R. v. Sunderland City Council ex parte Beresford.***[23]

4. APPLICATION OF THE LAW TO THE SUBMITTED EVIDENCE

Approach to the Evidence

4.1 I have considered all the written evidence submitted by the Applicants in support of the Application. In doing so, I have borne in mind that in determining whether the Land should be registered as a town or village green, the crucial issue is whether each of the relevant statutory criteria have been satisfied by the Applicants on the balance of probabilities on the basis of all the evidence adduced. In so determining, it is inappropriate to take into account the merits of the Land being registered as a town or village green or of it not being so registered.

4.2 I shall consider below each of the elements of the relevant statutory criteria in turn as set out in paragraph 3.1 above, and determine whether they have been established on the basis of all the evidence, applying the facts as contained in the evidence to the legal framework set out above.

The Land

4.3 The relevant land sought to be registered is clear. A map marked "Map "A"" was submitted with the Application which shows the Land subject to the Application shaded in green, and that is the definitive document on which the Land that is the subject of the Application is marked. The Land has defined

[23] [2004] 1 AC 889.

and fixed boundaries, and it specifically excludes the registered common land known as Hartlebury Common. In my view, that marked area of land comprises "land" within the meaning of section 15(2) of the 2006 Act and is capable of registration as a town or village green in principle.

Relevant 20 Year Period

4.4 As to the identification of the relevant 20 year period for the purposes of section 15(2) of the 2006 Act, the qualifying use must continue up until the date of the Application. Hence, the relevant 20 year period is the period of 20 years which ends at the date of the Application. The Application Form is dated 10 May 2012 and was received by the Registration Authority on 24 May 2012. It follows that the relevant 20 year period for the purposes of section 15(2) is May 1992 until May 2012.

Use of Land for Lawful Sports and Pastimes

4.5 Turning next to whether the Land has been used for lawful sports and pastimes in principle during the relevant 20 year period, references are made in the written evidence, namely in the witness statements, community giving support forms and evidence questionnaires, to various recreational activities having been carried out on the Land by the witnesses and compilers of the evidence questionnaires themselves and by others they saw on the Land. The primary activities referred to are dog walking, general walking, children's play, and informal games of football and cricket. It is apparent from the evidence that the Land has been used for recreational purposes.

4.6 Moreover, from the photographs I have seen of the Land, I regard it as unsurprising that the Land has been used for some recreational activities given its nature and location. It appears to be a pleasant, open, grassed area which is located within a built up residential area and would be attractive to local residents as an area on which to recreate, especially for walking, dog walking and children's play.

4.7 Further, the activities referred to in the written evidence are lawful, and they are all capable of being recreational pursuits in principle. Therefore, it seems to me that lawful sports and pastimes have been carried out on the Land during the relevant 20 year period as a matter of fact. I shall address below the extent and degree to which they have been carried out as of right throughout the entirety of the relevant period by the inhabitants of the claimed locality or neighbourhood within a locality.

Locality or Neighbourhood within a Locality

4.8 The next issue is the identification of the relevant locality or neighbourhood within a locality for the purposes of section 15(2) of the 2006 Act. In the Application, it is not stated whether a locality or neighbourhood within a locality is relied upon. It is merely stated in Box 6 in relation to the locality or neighbourhood within a locality relied upon: "*Mitton Ward, Stourport On Severn Worcestershire, Off Power Station Rd and Worcester Rd, DY13 9RP.*" Further clarification and information was sought from the Applicants on that issue by the Council. However, regrettably, the Applicants indicated that they did not wish to provide any further information or clarification and instead,

specifically requested that the Application be determined on the basis of the information already provided.

4.9 That being so, the Applicants have specifically referred to Mitton Ward in the Application. In my view, that is a qualifying locality. It is a recognised and established administrative area with fixed and identifiable boundaries and is an area known to the law. Consequently, it is a qualifying locality for the purposes of section 15(2) of the 2006 Act.

4.10 In contrast, no neighbourhood or purported neighbourhood has been identified by the Applicants, despite the opportunity given by the Council to them to do so. The only other reference in Box 6 of the Application is to the postal location of the Land itself off Power Station Road and Worcester Road. No other area whatsoever is identified. It is not for the Council to seek to identify an appropriate neighbourhood. Instead, the burden of proof is on the Applicants to establish each and every element of the statutory criteria. Moreover, and inevitably, no evidence has been forthcoming as to the extent or cohesiveness of any such area in order to ascertain whether it is capable of amounting to a qualifying neighbourhood within the meaning of section 15(2). In those circumstances, I am bound to advise that no potential neighbourhood has even been identified, let alone demonstrated to be a qualifying neighbourhood.

4.11 In those circumstances, the Application is necessarily pursued on the basis of a limb 1 case only, namely in reliance upon a locality rather than a

neighbourhood within a locality. The only such locality identified and relied upon is the Mitton Ward, a qualifying locality as referred to in paragraph 4.9 above.

Use by a Significant Number of Inhabitants of Locality

4.12 The fundamental issue then arising is whether the Land has been used by a significant number of the inhabitants of the Mitton Ward for lawful sports and pastimes throughout the relevant 20 year period, which includes consideration of whether that such use has been of a sufficient nature and extent throughout that period in order to establish village green rights over the Land.

4.13 In order to ascertain the sufficiency of the use, it is necessary to identify the relevant qualifying use. As indicated above, the question for determination is whether the qualifying use of the Land for lawful sports and pastimes has been of such a nature and frequency by the inhabitants of the Mitton Ward throughout the relevant 20 year period to demonstrate to the Landowner that recreational rights were being asserted over the Land by that local community.

4.14 Having considered all the written evidence, it is apparent that all the use of the Land relied upon is from inhabitants of Cutty Sark Drive in Stourport on Severn save for four households on Endeavour Place who have provided community giving support forms. Despite a request to the Applicants, no plan has been provided identifying the location of the various users on a plan. I am also unaware from the evidence supplied of the extent of the Mitton Ward given the failure of the Applicants to provide any plan of its boundaries, again

despite a specific request to do so. The Council will no doubt be in a position to ascertain those boundaries in detail. Nonetheless, it is abundantly clear that the users who have provided evidence of their use of the Land live in the immediate vicinity of the Land, namely on the two streets identified.

4.15 It is also evident that the Mitton Ward comprises a very significantly larger area than those two particular streets. Although the number of inhabitants of that Ward who use the Land need not be a specific percentage nor even the majority in order to satisfy the statutory criteria, it is my opinion that its use by the inhabitants of merely two streets in that Ward is wholly insufficient to demonstrate that a significant number of the inhabitants of the Ward itself use the Land. It must be borne in mind that if the Land is registered, it is the inhabitants of the locality or neighbourhood relied upon, namely Mitton Ward in this case, who would have registered recreational rights over the Land. It is the community of that identified Ward which the Landowner should have been aware were asserting rights over the Land. There must accordingly be a sufficient geographical spread of users throughout the locality in order to satisfy the statutory criteria. In my view, that has not been established by the submitted evidence.

4.16 I take into account that the written evidence refers to others using the Land. However, insofar as any indication is given as to the location of the residences of those other users, the evidence suggests that they too are from the same immediate vicinity rather than from throughout the wider area of the Ward. In that regard, the evidence questionnaires themselves are fundamentally flawed

in that no plan of the locality or neighbourhood relied upon is attached. It appears that the compilers who answered "Yes" to question 2 that such a map was attached were under the impression that the map attached showing the Land and the immediate area represented the "locality or neighbourhood" in question. Indeed, there is no reference to the locality being the Ward and nothing to indicate that compilers of those forms were aware that the Ward was being regarded as the locality rather than any other area or any neighbourhood. Further, in response to question 7 as to where people come from who use the Land, no one has referred to streets or elsewhere in the wider Ward. Instead, references are made to them coming from the "*local area*", "*mainly from Cutty Stark Drive*", and from that particular estate. Similarly, in the community giving support forms, the relevant neighbourhood appears to have been regarded as the Power Station Estate rather than the locality of the Mitton Ward. There is no suggestion in those forms nor in the witness statements that users came from the wider Ward.

4.17 Thus, on that basis alone, it is my view that the Application should be rejected as the evidence fails to establish that the Land has been used by a significant number of the inhabitants of the locality of Mitton Ward throughout the relevant 20 year period.

4.18 It may be that the position would have been different had a smaller area such as the Power Station Estate been relied upon as the relevant neighbourhood. However, the Applicants failed to take the opportunity to present information to support such a contention, and from the submitted evidence there is no

information from which I am able to find that any such claimed neighbourhood satisfies the test of sufficient cohesiveness or even to ascertain the particular boundaries of any such area and whether it is more than merely a line drawn on a plan. Indeed, the users may still have been only from a small part of that Estate and insufficient to establish the statutory test on that same basis. The burden is on the Applicants to establish each of the statutory criteria and has not done so in relation to that element.

4.19 In addition, it is necessary to discount from the qualifying use any use by those using the Land in a manner more akin to the exercise of a public right of way rather than to the exercise of recreational rights over the Land generally. In that regard, I note the number of references in the evidence to the Land being used for walking, and that a significant number of compliers of the evidence questionnaires stated in response to question 8 that there are public rights of way crossing the Land. Further, in response to question 18, references were made to the Land being used for the purposes of "*walking across it to the main road*", "*as a thoroughfare*", as a "*means of access*", as "*a pathway*", as "*a through route*" and as "*a short cut*". Such evidence suggests that a material amount of the Land's use involved walking along such defined routes on the ground which would be more akin to the exercise of a public right of way rather than recreating over the Land generally and all such use would need to be discounted from the qualifying use.

4.20 Furthermore, only limited weight can properly be attributed to the community giving support forms. They are effectively templates with only very limited

information provided by the individual signatories. Indeed, in a number, the nature of the use of the Land by individuals has not been identified at all.

4.21 Taking the evidence as a whole, it is my view that the Applicants have failed to establish on the balance of probabilities that the Land has been used by a significant number of the inhabitants of the Ward of Mitton, or of any other identified locality or neighbourhood within a locality, for lawful sports and pastimes throughout the relevant 20 year period. From the evidence, it has not been demonstrated that there has been sufficient use in terms of the number of inhabitants of any such wider area, and it has also not been demonstrated that the use has been sufficient in terms of its nature, extent and frequency once the non-qualifying use is discounted. It would not have been apparent to the Landowner from such identified use that the Land was in general use by the inhabitants of the Ward and that such inhabitants were asserting recreational rights over the Land.

Use as of Right

4.22 Turning to whether the use of the Land was "*as of right*", there iss no suggestion that any of the use was by stealth, such as under cover of darkness or otherwise. Therefore, the evidence suggests that the use was *nec clam*.

4.23 Similarly, there is no evidence to indicate that any of the use of the Land was with force. There appears to have been open access to it throughout the relevant 20 year period without it being fenced off at any time or otherwise restricted. Moreover, in response to questions 13 and 14 of the questionnaires,

the consistent reply was that use of the Land had not been restricted in any way, and in response to question 15 that no notices were erected until 2012. In those circumstances, it seems to me that the use was *nec vi*.

4.24 As to whether the Land had been used with permission, there is also no evidence to that effect. In response to questions 11 and 12, the general reply in the questionnaires was that permission had never been sought nor given to use the Land. Further, there is no evidence of any signs having been erected during the relevant period nor any other indication having been given to users that their use of the Land was subject to the Landowner's permission. Consequently, it appears that the use of the Land was *nec precario*.

4.25 Hence, it is my view from the available evidence that it has been established on the balance of probabilities that the use of the Land was "as of right" throughout the relevant 20 year period.

Continuation of Use

4.26 The final issue is whether the qualifying use continued up until the date of the Application in May 2012. The Land remains in use, although it seems from a minority of the questionnaires that a sign stating that the Land was "private property" was erected in 2012. I am unaware of any of the details of that sign and its location. However, such would have been likely to preclude any use being "as of right" thereafter. I am also unaware whether that sign was erected prior to our post the making of the Application in May 2012.

4.27 Given that such sign is only referred to in a small minority of the questionnaires, and in the absence of any other evidence relating to it, I shall assume that it was erected relatively shortly before the questionnaires were compiled, which was in February 2013, and thus post the making of the Application. On that basis, it seems on balance that the qualifying use was continuing as at the date of the Application.

5. CONCLUSIONS

5.1 For the above reasons, my conclusions are as follows on the basis of all the evidence adduced:-

5.1.1 That the Land comprises land that is capable of registration as a town or village green in principle;

5.1.2 That the relevant 20 year period is May 1992 until May 2012;

5.1.3 That the Land has been used for some lawful sports and pastimes during the relevant 20 year period;

5.1.4 That the Mitton Ward is a qualifying locality;

5.1.5 That no other qualifying locality or neighbourhood has been identified;

5.1.6 That the Land has not been used for lawful sports and pastimes throughout the relevant 20 year period by a significant number of the inhabitants of the Mitton Ward or of any other identified qualifying locality or neighbourhood within a locality;

5.1.7 That the Land has not been used for lawful sports and pastimes throughout the relevant 20 year period to a sufficient extent and continuity to have created a town or village green;

5.1.8 That the use of the Land for lawful sports and pastimes has been as of right throughout the relevant 20 year period; and

5.1.9 That the use of the Land has continued up until the date of the Application.

5.2 In view of those conclusions, it is my view that the Registration Authority should reject the Application and should not add the Application Land to its register of town and village greens for the reasons contained in this Advice and on the specific grounds that:-

5.2.1 The Applicants have failed to establish that the Land has been used for lawful sports and pastimes as of right throughout the relevant 20 year period; and

5.2.2 The Applicants have failed to establish that the use of the Land has been by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period.

5.3 I advise accordingly, and if I can be of any further assistance, please do not hesitate to contact me.

RUTH A. STOCKLEY

16 February 2015

Kings Chambers
36 Young Street Manchester M3 3FT
5 Park Square East Leeds LS1 2NE
and
Embassy House, 60 Church Street, Birmingham B3 2DJ

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT POWER STATION ROAD/WORCESTER ROAD, STOURPORT ON SEVERN, WORCESTERSHIRE AS A TOWN OR VILLAGE GREEN

ADVICE

Simon Mallinson
Head of Legal and Democratic Services
Worcestershire County Council
County Hall
Spetchley Road
Worcester
WR5 2NP

Your Ref: FM/273/2012/03/JM
Our Ref: RS 340400