Neutral Citation Number: [2018] EWHC 1704 (Admin)

CO/5886/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL
Thursday. 5 July 2018

B e f o r e:

DAVID ELVIN QC

(Sitting as a Deputy High Court Judge)

BETWEEN:

THE QUEEN

on the application of

COOPER ESTATES STRATEGIC LAND LIMITED

Claimant

v

WILTSHIRE COUNCIL

Defendant

and

(1) RICHARD GOSNELL
(2) ROYAL WOOTON BASSETT TOWN COUNCIL

Interested Parties

Gregory Jones QC and **Philip Petchey** (instructed by Blake Morgan) appeared on behalf of the Claimant

Stephen Morgan (instructed by Wiltshire Council Legal Services) appeared on behalf of the Defendant

- -

Hearing date: 3 July 2018

- -

Judgment Approved by the court for handing down

(subject to editorial corrections)

DAVID ELVIN QC (Sitting as a Deputy Judge of the High Court)

Introduction

1. This is an application for judicial review, brought with permission granted by Dove J. on 8 February 2018, of the decision made on 4 October 2017 by Wiltshire Council ("the Council") as the commons registration authority ("CRA") under the Commons Act 2006 (as amended) ("the 2006 Act") to register land at Royal Wootton Bassett as a town or village green and its subsequent registration of that land.

2. The subject land is an irregularly, triangular shaped area of some 380 sqm adjacent to Vowley View and Highfold, Royal Wootton Bassett ('the Land") and appears to be an amenity space in an establishing area of housing, or at least was so until the fencing and gate, which had been installed by the Claimant in 2006, was locked in 2015.

3. The Claimant is the owner of the Land which, having unsuccessfully objected to the application, seeks an order quashing the decision to register and the consequential registration.

Facts

4. The application to register the Land was made pursuant to s. 15(1) and (3) of the 2006 Act by Mr Richard Gosnell, the First Interested Party. It was received by the Council as CRA on 12 April 2016. It was accompanied by 27 witness evidence questionnaires (including plans and photographs) relating to the claimed recreational use of the land and supporting the application. It was stated that the Land had been used by the inhabitants of the locality for the purposes of lawful sports and pastimes for a period of 20 years, as of right, with the use of the land ending in May 2015 when a gate installed by the Claimant was locked. Prior to 2006 the Land had mistakenly been thought to be owned by the local authority and had been regularly maintained by it but the Claimant fenced the land in 2006 and installed a gate which was left unlocked. While it was effective to end local authority mowing, it did not prevent access by local inhabitants. See e.g. the answers in the questionnaires by Mr and Mrs Pope (Bundle pp. 496, 503, 510 and 517) and the Decision Report (below) at paras. 13.32-13.36 (under the heading "Have indulged as of right").

5. Before accepting and date stamping the application as valid, the CRA (through Miss Janice Green) investigated first whether the right to apply for registration had not been suspended by a "trigger event" within s. 15C and Schedule 1A of the 2006 Act. If there had been found to be a trigger event, the application could not have been accepted: s. 15C(1) of the 2006 Act. Following Defra *Guidance to Commons Registration Authorities*

in England on Sections 15A to 15C of the Commons Act 2006 (December 2014 at the time the application was made, current version December 2016) the Council wrote to its own planning services (spatial planning and development management) and to the Planning Inspectorate all of whom returned confirmation that there was no trigger event. The CRA appears to have treated those responses as virtually conclusive (to judge by later statements in reports to Committee) and the Application was then accepted with the relevant date of receipt given as 12 April 2016 in accordance with ***R (Church Commissioners for England) v. Hampshire CC*** [2014] EWCA Civ 634. However, it is common ground between Mr Jones QC for the Claimant and Mr Morgan for the Defendant that this issue is a matter of law for the Court.

6. Since the application was not in proper order, Mr Gosnell was then given the opportunity to put it in order in accordance with regulation 5(4) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 ("the 2007 Regulations"). Following correspondence on that issue, and the amendment of the application, it was then found by the Defendant to be duly made on 15 September 2016 and given the application number 2016/01. A number of parties, including the Claimant and its solicitors were accordingly notified of the application by letter dated 30 September 2016 which stated:

> "Wiltshire Council are in receipt of an application to register land adjacent to Vowley View and Highfold, Royal Wootton Bassett, as a town or village green, as shown on the enclosed plan. It is claimed that the land has qualified for registration as a town or village green by virtue of "The Green" being often used by local residents since 1975 and possibly since 1969, without let or hindrance, as of right, for lawful sports and pastimes, with use ending in May 2015.
>
> As the affected landowner, please find enclosed notice of the application for your attention. Notice will also be placed in the Wilts Gazette and Herald on Thursday 6th October 2016 and posted on site. The application in full will be made available for public inspection at the offices of Royal Wootton Bassett Town Council and Wiltshire Council offices at Ascot Court, White Horse Business Park, Trowbridge, Wiltshire, BA 14 OXA.
>
> If you would like to make any representations or objections regarding the proposals, I would be very grateful if you could forward them to me, in writing, at the above address, not later than 5:00pm on Friday 18th November 2016."

7. The press notice was in Form 45 and stated:

"**COMMONS ACT 2006 - SECTION 15(1)**

Notice of an application for the registration of land as a Town or Village Green

To every reputed owner, lessee, tenant or occupier of any part of the land described below, and to all others whom it may concern.

Application has been made to the Wiltshire Council of County Hall, Bythesea Road, Trowbridge, Wiltshire, BA 14 8JN by Mr Richard Gosnell, of Royal Wootton Bassett, Wiltshire, under section 15(1) of the Commons Act 2006 and in accordance with the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The application seeks the inclusion in the register of town and village greens of the land described in the Schedule below which is claimed to have qualified for registration as a town or village green. In May 2015 by virtue that "The Green" has been often used by local residents since 1975 and possibly since 1969, without let or hindrance as of right for lawful sports and pastimes, with use ending in May 2015.

The application, which includes a plan of the land proposed for registration may be inspected at the following offices: Wiltshire Council, Rights of Way and Countryside Team, Waste and Environment, Unit 9, Ascot Court, White Horse Business Park, Trowbridge, Wiltshire, BA14 OXA between the hours of 9:00am and 5:00pm on Monday to Friday. Copies of the documents may also be inspected at the following location: Royal Wootton Bassett Town Council, Council Offices, 117 High Street, Royal Wootton Bassett, Wiltshire, SN4 7AU, between the hours of 8:30am and 5:00pm on Monday to Thursday and 8:30am and 4:00pm on Friday.

If the registration authority is satisfied that the land described below qualifies for registration as a town or village green, it will so register the land.

Any person wishing to object to the registration of the land as a town or village green should send a statement of the facts on which the objection is based to Miss J Green, Rights of Way Officer, Waste and Environment, Wiltshire Council, Bythesea Road, Trowbridge, Wiltshire, BA14 8JN on or before Friday 18th November 2016. Any representations that are to be taken into account by the Authority in reaching a decision on the application cannot be treated as confidential and will be copied to the applicant for comment and may be disclosed to other interested parties.

Dated 6th October 2016

Wiltshire Council

Schedule

Description of the land claimed to have qualified for registration as a town or village green.

Land adjacent to Vowley View and Highfold, Royal Wootton Bassett. Ordnance Survey Grid Reference SU 075-821."

8. The Claimant's solicitor sent an email to the Council on 18 November 2016 enclosing an opinion from Mr Jones QC which supported their contention that the trigger event under

paragraph 4 applied to bar the application. I will not set this out in detail, since it covers the same territory as Mr Jones' submissions to the Court, other than to note that the critical aspect of his opinion comprised the proposition that Policies CP1 and CP2 of the Wiltshire Core Strategy 2015 acted as a "trigger event" for the purposes of s. 15C of the 2006 Act and the Core Strategy "identifies the land for potential development" within paragraph 4 of Schedule 1A. (I set out the relevant parts of the Core Strategy later in this judgment).

9. The email noted, raising the validity issue and also reserving the Claimant's position with respect to the merits:

> "In leading counsel's opinion, the application is not valid and should be rejected without further steps and costs being incurred. This is without prejudice to any further submissions our clients might have on the merits of the application."

10. The opinion was sent to Mr Gosnell in accordance with the 2007 Regulations and he pointed out in written comments on 9 December 2016 that the CRA had "made due checks and ascertained that there were not events hindering the Application under this heading". He also took issue with the relevance of the Core Strategy, though wrongly considering that the issue of trigger events was only with existing developments. The Council wrote again to the Claimant on 10 February 2017 inviting representations on Mr Gosnell's comments by 10 March 2017 though not itself making any reference to having investigated whether there had been any trigger events. However, it was reasonably clear from this that Mr Gosnell knew that the CRA had considered trigger events and that this should have put the Claimant on notice, though it was not followed up by the Claimant in subsequent correspondence.

11. On 2 March 2017, the Claimant's solicitor sent a further opinion from Mr Jones QC re-affirming his view with respect to the existence of a trigger event and the covering letter requested the CRA's confirmation that the application would be rejected. Mr Jones' further opinion noted:

> "I do not know whether the Council purported to check whether any trigger events had occurred. It does not matter whether or not it did. The key question is whether a trigger event has in fact occurred prior to the application having been made"

12. In the light of the opinions from leading counsel, Ms Green sought confirmation of the views of the planning authority. Mr Winslow (the Council's Senior Planning Officer, Spatial Planning) having initially expressed the view on 7 March 2017 that he thought Mr Jones was "overplaying what would possibly be described as an unfortunate consequence

of the literal interpretation of CP1/CP2" then emailed on 21 March:

> "If we simply accede to the view presented by Mr Jones in his Opinions, we would effectively find ourselves in a position of being unable to implement the policies of the Wiltshire Core Strategy in a meaningful manner. Bearing in mind the planning policy implications that evolve out of this circumstance, Georgina [Clampitt-Dix] is of the view that we should seek our own legal opinion on this matter"

13. Legal advice was then taken from Mrs Marshall (Senior Solicitor) which was relayed by Ms Green to Ms Clampitt-Dix (Head of Service, Place Shaping, Economy and Planning) on 17 May 2017 as follows:

> "The Council in its role as the CRA has now been advised that on the subject of whether or not a trigger event has taken place, there is no reason why the CRA cannot now rely on the responses received from the Planning Inspectorate and the Council as Planning Authority (including the Spatial Planning Department and Development Control) as set out in 1) to 3) below:
>
> 1) 27 April 2016 – Wiltshire Council Spatial Planning – I confirm that no trigger or terminating event has occurred on the land …
>
> I note that in the formal response from Spatial Planning dated 27 April 2016, the adopted Wiltshire Core Strategy (January 2015) was considered in making the response that there were no trigger or terminating events present over the land and we have received no information from the Planners to contradict this, in the light of objections to the application regarding trigger/terminating events.
>
> I am therefore writing to advise you that the Council as CRA are now satisfied that no trigger or terminating event has occurred over the land and this is based on the information supplied by the Council as Planning Authority and the Planning Inspectorate. The CRA will now be following the usual processes in order to determine this application under sections 15 (1) and (3) of the Commons Act 2006.
>
> If the Council as Planning Authority requires legal advice on the trigger events and/or the legal opinion supplied by the landowner's agents, Spatial Planning will need to obtain their own independent legal advice as there is a potential conflict of interests between the Council as CRA and the council as Planning Authority dealing with matters concerning sustainable development … Please also note that any information sent to the CRA between now and determination of the application may need to be sent to the applicant and landowner for comment"

14. All parties were informed by the CRA on 11 September 2017 that the application would be considered by the Committee on 4 October 2017 and the Report would be available about 7 days before the meeting. In response to a request from the Claimant's solicitors on 15 September 2017 that the report would advise members that the application was invalid, Ms Green replied:

> "… I'm afraid I am unable to release further details of the content of the Committee Report at this time as the report is still in draft form within the authorisation process. The report will consider all of the evidence submitted both in support of and in objection to the application, in order to make a recommendation to the Committee and all interested parties at the same time"

15. I note that Miss Green's "Decision Report", Annex C to the Report to the Northern Area Planning Committee of 4 October, was dated 28 June 2017 and included detailed advice, including the issue of the trigger event. That date is slightly misleading since, although it was drafted by Miss Green on that date, it was submitted to senior officers for their comments and not finalised until shortly before it was publicised. It is not clear why Miss Green could not at least have informed the Claimant that the CRA did not accept the Claimant's representations made on the trigger event since that appears to have been the CRA's position since May 2016, confirmed in May 2017. Whilst some mention was made of the Council remaining neutral on the topic, pending members' decision, I see no reason why the fact of the consideration of the trigger event could not have been communicated to the Claimant as landowner. Indeed, the Council was not wholly neutral since it had satisfied itself sufficiently following Defra Guidance to consider the application valid and could have made it clear that the view was provisional and was subject to members' consideration of the Claimant's representations. A good deal of misunderstanding in this case could have been avoided had this point been communicated.

16. Nonetheless, further formal confirmation was sought from Ms Clampitt-Dix on 18 September 2018 for inclusion in the report and who, on 20 September, reiterated the view that there was no trigger event. That also was not communicated to the Claimant.

17. On 26 September 2017 the CRA published the Report for 4 October Northern Area Committee Meeting which annexed the 28 June Report, which set out in detail the CRA's consideration of the evidence, the requirements of the 2006 Act and the authorities.

18. On 3 October 2017, the Claimant's solicitors emailed the CRA (just after 5.30pm, after Council office hours) to express its disappointment that the report had been produced without any further communication and that its advice was "deeply flawed". It added:

> "**The Evidence**
>
> Without prejudice to the foregoing, the objectors do not accept the applicant's evidence satisfies the required statutory test. There is no objective evidence demonstrating a continuous use as of right for the required 20 years. The objectors would, therefore, wish that they have the opportunity to test the evidence at a

non-statutory inquiry. Moreover, it is the objector's position that any access to the site has been by implied permission. This is evidenced, for example, but not only, by the fact that when the gate was first installed it was left open (see R (Newhaven Port and properties Limited v East Sussex County Council [2015] UKSC 7).

….

The Registration Authority must reject this application as invalid. My clients reserve the right to seek judicial review of any decision to declare the application valid.

Without prejudice to the foregoing, the evidence produced does not support the view that the test of continuous and open use without implied licence has been satisfied and my clients would wish to have the opportunity to test the applicant's case before a non-statutory hearing."

The Decision Report

19. Paragraph 6 of the Decision Report stated:

> "6. In a town/village green application the Council, as the Registration Authority, has no investigative powers and it is for the applicant to discharge the burden of proof in this case. The standard of proof is the balance of probabilities and each component part of the legal test, as set out under Sections 15(1) and (3) of the Commons Act 2006, must be satisfied in order for the application to succeed. The Council as Registration Authority must deal with the application in a fair and reasonable manner. Officers of the Council have carefully considered the evidence submitted in this case and are satisfied that the applicant has successfully discharged the burden of proof, (please see paragraphs 13.1–13.95 of the decision report attached at Appendix C, where the evidence is considered in detail). Furthermore, the objectors do not challenge the evidence submitted in support of the application, (please see correspondence attached at Appendices 2 and 6 of the Decision Report attached at Appendix C)."

20. On the Claimant's objections, the Decision Report stated in respect of the issue which forms Ground 1 of this challenge:

> "19. The landowners also object on the ground that there is a planning "trigger event" in place over the land, which would effectively extinguish the right to apply to register land as a town or village green, where "*the site in question is subject to the adopted Core Strategy*" and "*The current site is within limits for development of Royal Wootton Bassett. Wiltshire Council having considered these policies has previously accepted that the "location of the site is therefore considered appropriate for development in principle…*"
>
> > "*It is clear from the wording of the policy that the site in question was identified as land for "potential development" before the application to register the site as a village green was made. The trigger event had thus been triggered before the application was made. Accordingly, the application is*

invalid and must be rejected."

20. The question of planning trigger and terminating events over the land arises from the Growth and Infrastructure Act 2013, which introduced a series of provisions to make it more difficult to register land as a town or village green, this included at Section 16 the removal of the "right to apply" where specified planning events have occurred, (please see part 10 of the decision report attached at Appendix C to this report).

21. Accordingly, upon receipt of the application, Wiltshire Council, in its capacity as the Registration Authority, wrote to the planning authorities on 15 April 2016, including a list of trigger and terminating events, requesting details of any trigger/terminating events in place over the land at this time. Correspondence was addressed to Spatial Planning – Wiltshire Council; Development Control – Wiltshire Council and the Planning Inspectorate, all of whom identified that there were no "trigger events" in place over the land at that time, (without corresponding terminating events), which would extinguish the right to apply.

22. Wiltshire Council, as the Registration Authority, must rely upon the responses given by the planning authorities. In this case the objectors' representations, regarding trigger events in place over the land, were forwarded to Spatial Planning at Wiltshire Council for further comment. The Head of Spatial Planning has given the following advice:

"I have considered the objector's assertions that there is a trigger event in place. However, I can confirm that in our opinion no trigger event has occurred in relation to the land in question, as the land/site (subject of the application) is not specifically identified for potential development, although strategic policy for the area exists as set out in the Wiltshire Core Strategy (adopted January 2015)."

23. Therefore, the right to apply has not been extinguished and the Registration Authority must continue to determine the town/village green application, based upon the available evidence, which is not disputed by the objectors."

21. Although the Decision Report was produced before receipt of the Claimant's letter of 3 October, it nonetheless considered whether it should hold a public inquiry under the heading "Financial implications":

"33. It is possible for the registration authority to hold a non-statutory public inquiry into the evidence, appointing an independent Inspector to produce a report and recommendation to the determining authority. There is no clear guidance available to authorities regarding when it is appropriate to hold an inquiry; however, it is the authority's duty to determine an application in a fair and reasonable manner and its decision is open to legal challenge, therefore a public inquiry should be held in cases where there is serious dispute, or the matter is of great local interest. Even where a non-statutory public inquiry is held, there is no obligation on the authority to follow the recommendation made.

34. The cost of a three day non-statutory public inquiry is estimated to be in the region of £8,000, (based on figures obtained in March 2017 from 3 Paper Buildings Barristers Chambers, of £1,000 per day to include three day inquiry, two days preparation and three days report writing). In the Royal Wootton Bassett case it is not considered that a non-statutory public inquiry is necessary, where there is sufficient evidence provided to enable the Registration Authority to determine the application; the objectors do not dispute the evidence and the main point of objection relating to trigger events in place over the land, is unlikely to be resolved by hearing the witnesses give evidence in chief and through the process of cross-examination of the witnesses at a public inquiry."

22. It is unnecessary to rehearse further the terms of the Decision Report which analysed in detail the evidence which had been presented to support the application and concluded that the application for registration should succeed. I note that Section 13 dealt with the evidence of user and satisfaction of the legal requirements in a detailed, logical and comprehensive manner (other than the points made afterwards on 3 October).

23. Following receipt of the representations of 3 October, a supplemental report headed "Additional Information" was produced as part of the Agenda for 4 October meeting, which also annexed the letter:

"**Comments on Representation from Blake Morgan LLP**

The CRA has followed the statutory process and has given each party the reasonable opportunity to comment on the application and the objections / representations of support. On the implied permission, what the landowner needs to do is to make clear their ability to regulate or exclude access through a revocable permission, perhaps by occasional closure of the land to all concerned. By excluding people when the landowner wishes to use the land for their own purposes or on occasional days, they make plain that use on other occasions occurs because they do not choose to exercise their right to exclude and so permit such use. In the RWB case, there is no evidence that the gate was locked on any occasion and therefore it was not demonstrated to the local inhabitants that their use of the land was by a revocable permission.

Trigger Events

The Officers report is not deeply flawed in its advice to Committee. The Planning Authorities have been consulted and advised that there are no planning trigger events in place over the land or any part of it. DEFRA guidance advises that the Registration Authority should consult on this matter with the two Planning Authorities – in this case Wiltshire Council as Planning Authority and the Planning Inspectorate, which was done in this case. The CRA also requested further advice from Wiltshire Council Planning Officers regarding the objector's specific point regarding trigger events and the Core Strategy Document. The Planning Officers are believed to have sought their own legal advice on this point. The purpose of the Settlement strategy is to provide a framework and identify areas of grown where development will be focused in order to provide the basis for future decision on potential development in identified

settlements which include Market Towns and Community Areas.

Without more the settlement hierarchy cannot be considered to undertake the specific task to 'identify land for development'. The Core Strategy is therefore not aimed at specific sites without a neighbourhood plan or development plan, both of which would be site specific.

The land the subject of the town/village green application has already been subject to 4 planning applications – 1 withdrawn and 3 dismissed at appeal. Those four planning applications were trigger events but they were all followed by termination events. The latest appeal decision includes within the reasons: "The proposal would be contrary to that part of Wiltshire Core Strategy Policy CS57 which requires development to have regard to the compatibility of adjoining buildings and uses including the impact upon the amenities of existing occupants. It would also be contrary to one of the core planning principles set out in the National Planning Policy Framework which requires a good standard of amenity for all existing and future occupants of land and buildings."

The Core Strategy does not itself "identify" the land and therefore cannot be a valid trigger event under the trigger event identified by the landowner being 'A development plan document which identifies the land for potential development is adopted under s.23(2) or (3) of the Planning and Compulsory Purchase Act 2004'.

…

User Evidence

The objectors were given the opportunity but have not previously challenged the user evidence presented in support of the application. It is considered that evidentially sufficient evidence has now been provided to the CRA [to] enable the CRA to reach a decision on the application and a non-statutory public inquiry is not considered to be necessary in this case where the objectors have presented no evidence in order to challenge the user evidence submitted by the applicant. Hearing from the witnesses at a public inquiry is unlikely to assist the CRA in its consideration of the two legal points of objection, i.e. the timescales and validity of the application and whether or not a trigger event is in place over the land by reference to the Wiltshire Core Strategy document.

There is evidence that after the fence was erected, local inhabitants continued to use the land for the purposes of lawful sports and pastimes, accessing the land via an unlocked gate. If the landowners had wished to prevent access or provide access only on a permissive basis, why was the gate not locked at that time. There is no evidence of signage placed on the land to communicate to the public that the land was private and that access was prohibited / permissive only. On the matter of implied permission, what the landowner needs to do is to make clear their ability to regulate or exclude access through a revocable permission, perhaps by occasional closure of the land to all concerned. By excluding people when the landowner wishes to use the land for their own purposes or on occasional days, they make plain to users that use on other occasions occurs because they do not choose to exercise their right to exclude and so permit such use. In this case there is no evidence that the gate was locked on

any occasion before May 2015 and therefore it was not demonstrated to the local inhabitants that their use of the land was by a revocable permission.

The case R (on the application of Newhaven Port and Properties Ltd) (Appellant) v East Sussex County Council and another 2015) is concerned with use of a beach (West Beach) which was wholly uncovered by water for only a few minutes each day. The question (amongst others) considered by the court was whether byelaws gave members of the public permission to use the beach for lawful recreational pursuits. The court held on that point that the user was by permission in the light of the Byelaws. …"

24. At 4 October 2017 meeting members agreed with the officer's advice and determined that the application was valid and should succeed. The land was then registered pursuant to that decision under Register Entry VG 65.

25. Following pre-action correspondence, including a letter before claim dated 2 November 2017 and a response from the CRA dated 16 November, these proceedings were commenced on 20 December 2017.

Relevant law

26. S. 15 of the 2006 Act provides for the making of an application to register land as a town or village green and states (in part):

"**15. Registration of greens**

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

(2) This subsection applies where–

(a) a significant number of 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

(c) the application is made within the relevant period

(3A) In subsection (3), "the relevant period" means—

(a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b);

(b) in the case of an application relating to land in Wales, the period of two years beginning with that cessation."

27. S. 15C and Schedule 1A of the 2006 Act remove the right to apply under s. 15 on the occurrence of a "trigger event" (provided it has not been ended by a "terminating event") as follows (to the extent relevant):

> "**15C Registration of greens: exclusions**
>
> (1) The right under section 15(1) to apply to register land as a town or village green ceases to apply if an event specified in the first column of the Table set out in the relevant Schedule has occurred in relation to the land ("a trigger event").
>
> (2) Where the right under section 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again only if an event specified in the corresponding entry in the second column of the Table set out in the relevant Schedule occurs in relation to the land ("a terminating event")."

28. S. 15C(3)-(7) allow for the modification of the trigger events set out in the relevant Schedule by Order providing –

> "(6) A trigger or terminating event specified by order under subsection (5)(a) must be an event related to the development (whether past, present or future) of the land."

29. This provision highlights the purpose behind the introduction of s. 15C by s. 16 of the Growth and Infrastructure Act 2013 which was to implement the Government's response to the recommendations of the Penfold *Review of non-planning consents* (June 2010) which made recommendations to remove barriers to development and investment, caused by non-planning consents including the registration of town and village greens (Recommendation H, paragraph 4.37). See paragraph 3 of the Defra Guidance (2016 version):

> "3. In July 2011 the Government published a consultation on the registration of new town and village greens ("greens") due to increasing concerns about the impact of such applications on the planning system. The Government places great importance on the planning system to support efficiency, effectiveness and growth. This is partly why the Government committed to delivering the *Penfold review* recommendation to reduce the impact of the greens registration system on the planning system. The Penfold review looked into whether non-planning consents discourage or delay investment in development projects."

30. This purpose can also be seen from the current list of 13 "trigger events" in Schedule 1A to the 2006 Act which include -

(1) More specific triggers such as applications for planning permission, or permissions in principle, or application or proposed application for a development consent order (under the Planning Act 2008) "in relation to the land" (Sched. 1A paras. 1, 2, 8 and 9), draft local development orders which would grant permission "for operational development of the land" (paragraph 7A) and a notice of application under the Transport and Works Act 1992 that application is being made for a deemed permission "in respect of the land" (paragraph 10); and

(2) broader triggers such as a draft development plan document ("DPD"), or adopted DPD, which "identifies the land for potential development" (paras. 3 and 4), the publication of brownfield land registers (paras. 4A and 4B), a neighbourhood plan, or proposal for a neighbourhood plan, or "saved plan" which "identities the land for potential development" (paras. 5, 6 and 7).

31. The form of the trigger events are varied according to the nature of the trigger, for example in the case of planning applications (or permission in principle) they must self-evidently be "in relation to the land" since a proposal on land not subject to a registration application would not fall within the statutory mischief of registration which would inhibit development. Equally, the terminating event for an application (refusal, withdrawal etc) is tailored to the mischief of an application for registration inhibiting future development and may mean that the exclusion of the right under s. 15 is short-lived if the application is refused.

32. On the other hand, in the case of development plans these will generally be wider in their effects than a planning application and to be longer-lived since development plans are intended to apply for many years. The issue there is whether the plan identifies the land for potential development since in the case of a plan policies may be more or less specific and still be relevant in terms of the statutory mischief even if they are not specific to the land itself but are sufficiently directed to an area, or circumstances, which include the land that a registration application would fall within the statutory mischief of inhibiting future development. A terminating event includes the superseding of the relevant part of the plan by a more recent policy in accordance with s. 38(5) of the Planning and Compensation Act 2004.

33. In my judgment, the purpose of the requirement to identify the land for future development is to create a sufficient nexus between the plan and the land so that it does not fall within paragraph 4 simply because there are plan policies that generally encourage certain categories of development, or in certain circumstances. To do so would

unduly restrict the s. 15 right since many, if not most, development plans contain policies that may be regarded as positive in nature without specifically identifying the land development of which would be inhibited. Parliament has required in paragraph 4 (and the other development plan trigger events) a more specific nexus than a plan which simply creates a potential for future development and aligns more closely with the statutory purpose by requiring that the plan identify the land (by one means or another) for potential development which would be inhibited by a s. 15 application.

34. The term "identifies" is not a defined term nor one with particular meaning in planning (such as "allocate") although it appears in at least one other context, very different from the present, discussed by Lindblom J. (as he then was) in ***West Kensington Estate Tenants and Residents Association v Hammersmith and Fulham LBC*** [2013] EWHC 2013 (Admin) at [56] where in the context of the regulation 6 of the Town and Country Planning (Local Development) (England) Regulations 2004, he had regard to the meaning of "identifies" in the Shorter Oxford English Dictionary:

> "The sense of the word "identifies" in regulation 6(2)(a)(ii) is **plainly the ordinary English meaning of the transitive verb "to identify**", namely to "[e]stablish the identity of; establish who or what a given person or thing is; recognize" (The New Shorter Oxford English Dictionary (1993)(emphasis supplied)".

35. In my judgment, the same is true of paragraph 4 having regard to the language used and the purpose of s. 15C and Schedule 1A.

36. The specific trigger event relied upon by the Claimant here is that found in paragraph 4:

> "4. A development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the 2004 Act"

37. Its corresponding terminating events (which has not occurred) are:

> "(a) The document is revoked under section 25 of the 2004 Act.
>
> (b) A policy contained in the document which relates to the development of the land in question is superseded by another policy by virtue of section 38(5) of that Act."

The Wiltshire Core Strategy 2015.

38. This Core Strategy, adopted in 2015, and which was in force prior to Mr Gosnell's s. 15 application, is capable of giving rise to a "trigger event" if it otherwise fulfils the requirements of paragraph 4 of Schedule 1A.

39. There is introductory text in Chapter 1 which helps place in context the two policies in

issue, CP1 and CP2:

> "1.6 Planning for job growth and meeting the needs of business are central to this strategy. This plan puts in place policies which will help both attract new inward investment and help existing business meet their aspirations in Wiltshire, as well as providing the right environment for business start-ups. This will be achieved by ensuring new land is identified for job growth, allowing for redevelopment of outdated premises, safeguarding a range of employment sites to allow for choice and making sure that potential barriers to investment, such as inadequate infrastructure, are overcome. In addition, specific policies have been put in place to support the regeneration of Salisbury, Trowbridge and Chippenham through town centre regeneration, as well as recognition being given to the importance of the market towns and rural communities. Specific policies have been framed to support the changing role of the military in Wiltshire.
>
> 1.7 Underpinning this strategy is the delivery of resilient communities to be achieved through enhancing the economy in order to help secure a greater level of self containment in settlements and provide the jobs locally that Wiltshire's communities need. This is an economic led strategy.
>
> ….
>
> 1.10 The Core Strategy provides a spatial expression of the Wiltshire Community Plan 2011-2026: People, places and promises, and will be focused on delivering the three overarching priorities and the 17 key objectives of the Community Plan. The overarching priorities are to help build and protect resilient communities, through:
>
> • creating an economy that is fit for the future
>
> • reducing disadvantage and inequalities
>
> • tackling the causes and effects of climate change.
>
> 1.11 This Core Strategy sets out policies and proposals that will make an important contribution in delivering these priorities."

The role of supporting text was considered by Richards LJ in ***R. (Cherkley Campaign Ltd) v Mole Valley DC*** [2014] 2 E.G.L.R. 98 at [16]-[24].

40. More specifically Chapter 4, which contains the relevant policies, is headed "Delivering the Vision - the Spatial Strategy for Wiltshire". This begins:

> "4.1 Setting out a clear spatial strategy is fundamental to the delivery of the vision and objectives. New development must deliver overall benefits to, and take account of, local distinctiveness and the character of Wiltshire. It should also be delivered in tandem with good quality infrastructure and services.
>
> 4.2 The challenge is to plan for growth whilst maintaining people's quality of life and protecting Wiltshire's high value environment.
>
> 4.3 The Spatial Strategy for Wiltshire consists of three key elements, namely:

> • Settlement Strategy - classifies Wiltshire's settlements based upon an understanding of their role and function.
>
> • Delivery Strategy - identifies the level of growth and how Wiltshire's settlements will develop in the most sustainable fashion.
>
> • Infrastructure Requirements – describes how infrastructure will be provided to support future development."

41. Paragraph 4.3 is explains that CP1 falls into the broader, strategic category of the settlement strategy, CP2 is the delivery strategy i.e. the strategy to deliver development.

42. CP1 provides for a hierarchy of settlements and identifies broadly what is expected of each:

> "**Core Policy 1**
>
> **Settlement Strategy**
>
> The Settlement Strategy identifies the settlements where sustainable development will take place to improve the lives of all those who live and work in Wiltshire.
>
> The area strategies in Chapter 5 list the specific settlements which fall within each category.
>
> **Principal Settlements**
>
> ….
>
> **Market Towns**
>
> Outside the Principal Settlements, Market Towns are defined as settlements that have the ability to support sustainable patterns of living in Wiltshire through their current levels of facilities, services and employment opportunities.
>
> Market Towns have the potential for significant development that will increase the jobs and homes in each town in order to help sustain and where necessary enhance their services and facilities and promote better levels of self containment and viable sustainable communities.
>
> The Market Towns are: Amesbury, Bradford on Avon, Calne, Corsham, Devizes, Malmesbury, Marlborough, Melksham, Tidworth and Ludgershall, Warminster, Westbury, and Royal Wootton Bassett."

43. CP2 provides the delivery strategy whilst setting out a series of strategically important sites for development:

> "**Core Policy 2**
>
> **Delivery Strategy**
>
> In line with Core Policy 1, the delivery strategy seeks to deliver development in Wiltshire between 2006 and 2026 in the most sustainable manner by making

> provision for at least 178ha of new employment land and at least 42,000 homes distributed as follows ….
>
> ….
>
> **Within the defined limits of development**
>
> Within the limits of development, as defined on the policies map, there is a presumption in favour of sustainable development at the Principal Settlements, Market Towns, Local Service Centres and Large Villages.
>
> **Outside the defined limits of development**
>
> Other than in circumstances as permitted by other policies within this plan, identified in paragraph 4.25, development will not be permitted outside the limits of development, as defined on the policies map. The limits of development may only be altered through the identification of sites for development through subsequent Site Allocations Development Plan Documents and neighbourhood plans."

44. CP2 also identifies a series of strategically important sites, excluding Chippenham. This makes it clear, which is not disputed by the Council in any event, that CP2 is not intended only to set a strategic framework for other plans but to manage development. It is a policy, as Mr Morgan acknowledged, that would be used to judge the acceptability of a development proposal and would be cited in support of a reason for refusal e.g. for a proposal to develop outside a settlement boundary which did not fall within the exceptions permitted by other policies (listed at paragraph 4.25). This is relevant to the issue of "potential for development" in paragraph 4, to which I will return.

45. My attention was drawn to a number of paragraphs of the supporting text of Chapter 4 of the plan but will not rehearse them all here but note that they support the view that CP2 is not directed simply to setting the spatial context in which other plans are to be produced but is also directed to regulating developmen

46. Paragraph 4.27 of the supporting text notes:

> "4.27 The Core Strategy allocates sites and broad locations for growth that are strategically important for the delivery of the Plan for Wiltshire. Additional sites will also be identified through the Chippenham and Housing Site Allocations DPDs to ensure the delivery of housing land across the plan period in order to maintain a five year land supply at each HMA."

47. The reference to paragraph 4.25 in CP2 is to additional sources of development outside the identified settlements:

> "The Core Strategy also includes 'exception policies' which seek to respond to local circumstance and national policy. In doing so these represent additional sources of

supply to those detailed at paragraphs 4.22 and 4.24."

These include rural exception sites, additional employment land and military establishments.

48. Whilst some of the sites are specifically named in CP2 it is also necessary to look at the explanation of the sources of development land generally in paras. 4.22 and 4.24:

> "4.22 The 178ha of new strategic employment land will be provided by a combination of the following types of sites:
>
> • New strategic employment allocations
>
> • Provision of employment land as part of mixed use urban extensions
>
> • Retained Local/District Plan allocations for employment land."

> "4.24 In planning for new homes, a number of sources have been identified to ensure a continuous supply of housing across the plan period. These sources of supply are detailed within Appendix C and include:
>
> • strategic allocations made within this plan
>
> • retained Local Plan allocations
>
> • existing commitments
>
> • regeneration projects, for example, those in Chippenham, Trowbridge and Salisbury
>
> • business expansion plans
>
> • sites identified through DPDs and neighbourhood plans
>
> • windfall sites in accordance with the delivery strategy."

49. At 4.27 it is said

> "4.27 The Core Strategy allocates sites and broad locations for growth that are strategically important for the delivery of the Plan for Wiltshire…"

50. The plan also sets indicative housing targets for community areas and notes at paras. 4.30 and 4.33 the need for flexibility (emphases added):

> "4.30 The disaggregation to Community Areas set out above is not intended to be so prescriptive as to be inflexible and potentially ineffective in delivering the identified level of housing for each market area. It clarifies the council's intentions in the knowledge of likely constraints in terms of market realism, infrastructure and environmental capacity. They provide a strategic context for the preparation of the Housing Sites Allocation DPD and in order to plan for appropriate infrastructure provision."

> "4.33 … These more localised indicative requirements, as set out within the Area

> Strategy Core Policies, are intended to prevent settlements receiving an unbalanced level of growth justified by under or over delivery elsewhere. They also address the ability of each Community Area to accommodate housing because of the constraints and opportunities present in each. The indicative figures also allow a flexible approach which will allow the council, including through the preparation of the Sites Allocation DPD and local communities preparing neighbourhood plans, to respond positively to opportunities without being inhibited by an overly prescriptive, rigid approach which might otherwise prevent sustainable development proposals that can contribute to maintaining a deliverable five year housing land supply and delivering the strategic objectives of the plan. Neighbourhood Plans should not be constrained by the specific housing requirements within the Core Strategy and additional growth may be appropriate and consistent with the Settlement Strategy (Core Policies 1 and 2). In addition sustainable development within the limits of development or at Small Villages should not be constrained just because requirements have been reached. For these reasons the overall housing requirement is shown as "at least", while the area strategy figures are "indicative"."

51. It is notable that, notwithstanding the above sources and the strategically important sites in CP2, the delivery strategy in CP2 does not limit development to sites so identified, or those allocated elsewhere in the plan or in other plans and draws a distinction between development within and outside settlement boundaries. A number of the categories of housing land supply described in 4.24 above appear to be ones which might fall within the scope of the general within/outside settlement aspects of CP2 including windfall sites, business expansion plans and regeneration projects, as well as accommodating the need for flexibility referred to at paragraph 4.33.

52. Even in the case of the strategically important sites in CP2, which on any view are "identified" and appear to me plainly to fall within paragraph 4, the support for development is not unconditional –

> "Development will be supported at the following sites in accordance with the Area Strategies and requirements in the development templates at Appendix A."

Appendix A considers each of the sites in CP2 and sets out constraints on development in relation to that particular site. See, for example as was raised in argument, the site at Fugglestone Red, Salisbury, which is said in Annex A to be subject to a number of objectives to be met and constraints at pp. 376-381 of the Plan. Even sites that are plainly identified for development may be subject to constraints on that development. Merely identifying or allocating a site for development does not mean that permission will be granted for any proposal. This is relevant to a point made by Mr Morgan, which I will return to later.

53. The Land lies within the settlement boundary of Royal Wootton Bassett for the purposes of CP2.

The grounds of challenge

54. Two grounds of challenge are advanced by the Claimant:

    (1) The application by Mr Gosnell under s. 15 was not validly made since Policies CP1 and CP2 provide a trigger event within s. 15C which precludes the making of such an application. The CRA therefore erred in law in determining that the application was valid, in approving it and in registering the Land; and

    (2) The Council acted unfairly in failing to arrange for a public inquiry to investigate the issues prior to deciding whether or not to accept the application for registration. In this context it is said by the Claimant that the CRA did not properly consider the issue of implied permission and therefore ought to have allowed it to be more fully investigated at inquiry.

55. Mr Morgan did not pursue a submission of alternative remedy which would have not succeeded in any event since the opportunity to apply to rectify the register in future is not properly an alternative to dealing with defects which are said to invalidate the decision to register in the first place. Judicial review would undo the consequences of the invalid decision whereas an application to rectify would leave it in place as valid without any certainty as to whether such an application would be likely to succeed. Such an argument ought more properly to be considered as seeking the exercise of the discretion not to quash but it would not qualify on normal principles as a reason for not quashing a defective decision.

56. I am grateful to all counsel for their helpful written and oral submissions.

Ground 1

57. Mr Jones QC puts the Claimant's case simply:

    (1) CP1 and CP2, CP2 in particular, direct development to specific categories of settlement including Market Towns, which includes Royal Wootton Bassett.

    (2) CP2 specifically creates "a presumption in favour of sustainable development" within the boundaries of a number of types of settlement, including Market Towns though excluding Small Villages, which goes a stage further than merely identifying such

locations as having development potential. The presumption applies within the defined boundaries of the settlement and can be contrasted with development "Outside the defined limits of development" which will normally not be permitted (except in the paragraph 4.25 categories).

(3) Since the Land lies within the defined limits of Royal Wootton Bassett shown on the Plan's Inset Map 3, it is identified because it falls within the classic means of defining areas to which policies apply, namely within a line shown on a plan – in this case, a black line with the legend "CP1 Settlement Framework'.

58. In my judgment there is force in these submissions.

59. I agree with Mr Jones' further point that the land does not have to be identified by the use of a line on a plan, but the fact that it is so identified is sufficient to bring it within paragraph 4. That line is used here to define the boundary of this market town within which there is a presumption in favour of sustainable development which is sufficient to identify the land for potential development. The fact that the Land is only part of the land so identified is not a bar to the application of paragraph 4 since the Land is nonetheless identified though it forms part of a larger area and the statutory purpose would be significantly undermined if only applied if the plan identified the area actually the subject of the registration application (and would create an easy means to avoid s. 15C by encouraging applicants to ensure that the land applied for did not coincide with the policy land).

60. There is no reason in principle why identification could not be through the means of a variety of planning methods. Allocation would, perhaps, be the paradigm example but identification could be through preferred areas for development, opportunity areas, reserved areas etc. The fact that that identified area might contain constraints would be no surprise and was no reason for not regarding that area as identified for potential development. It did not need to allow any development in any location within the area of the application of the policy in order to identify it for potential development. If that were the case, the statutory purpose would be seriously undermined since many if not most sites are subject to some constraints, even if they are of the more mundane varieties such as design and highway capacity.

61. Mr Morgan accepts that "the land" (meaning the land which is the subject of the s. 15 application, which must be correct) does not have to be identified by a specific policy the area of which coincides with that land but may form part of a wider areas. However, he submitted:

(1) Settlement boundaries should not be regarded as boundaries that identify etc. for the purposes of paragraph 4 since they encompass such a wide range of features such as existing development, listed buildings, conservation areas and other features which provide a constraint on the areas that might be developed.

(2) A balance needed to be struck between meeting the purpose of s. 15C and Schedule 1A and the rights to apply under s. 15 and to include settlement boundaries would be to strike the balance too much in favour of excluding s. 15 applications.

(3) S. 15 applications were in any event hedged with considerable complexity and its requirements were not easily met. I took this as a submission related to the previous one, namely that the Claimant's approach was one which unduly favoured exclusion of the right under s. 15.

(4) It would be difficult for an application to discover whether a s. 15 application could be made if settlement boundaries could identify for the purposes of paragraph 4.

62. In approaching the question of whether policies CP1 and CP2 mean that the Core Strategy "identifies the land for potential development" it is necessary to consider the language Parliament has used and to do so in the context of the mischief which s. 15C and Schedule 1A were intended to meet, which I have referred to above. It is also necessary to consider the application of those words by reference to the specific plan and plan policies and not to rely on generalisations which may or may not hold good for specific plans.

63. On the face of it, as Mr Jones submits, the Core Strategy through CP1 and CP2 identifies an area of land which includes the Land (i.e. the boundary of Royal Wootton Bassett) and identifies it for potential development by creating a presumption in favour of development within the settlement boundary. It appears to me that this falls within the normal meaning of "identifies" as referred to by Lindblom J. in ***West Kensington***. Indeed, the point is underlined by the fact that CP2 creates a presumption within the settlement boundary and provides for the refusal of applications that fall outside that boundary. This, and the fact that CP2 is a development management tool which will guide the determination of a planning application, supports my view that the plan identifies the Land for potential development.

64. That boundary identifies an area which is much greater than the Land itself but it is not disputed by the Council that this itself is not a bar to treating a plan as falling within paragraph 4. Mr Morgan was unable, however, to formulate an approach in terms of scale which would necessarily preclude identification through a settlement boundary - which

drove him to argue the "balance" and complexity of s. 15 points. I found neither of those points to amount to good reason to rule out identification through a settlement boundary either here specifically or in general. The contention is his skeleton argument at [27] that the plan did not identify the Land as opposed to the settlement is inconsistent with his acceptance that "the land" for the purposes of paragraph 4 may be within a larger identified area. In any event, for reasons I have given, I consider the plan does identify the Land.

65. The existence of a potentially significant number of constraints within a settlement boundary does not in my view take the plan or policy outside paragraph 4. As Mr Jones submitted, many sites have constraints in any event and "identified for potential development" does not mean that any application on any part of the site has to be one likely to succeed. "Potential" is a very broad concept, is not qualified, and is not to be equated with likelihood or probability. Moreover, as I have already noted, even the sites identified as strategically important (which I did not understand Mr Morgan to contend fell outside paragraph 4) are subject to constraints set out in Annex A. There is no basis in principle to distinguish the constraints applicable to them and to those applicable within the settlement - whether or not they are spelled out or applicable due to the need to apply the plan as a whole. Indeed, for the reasons given, the existence of constraints does not appear to me of itself to take a plan (or the area in a plan) outside the terms of paragraph 4. There might be specific cases where the plan constraints do bear directly on the land and might on the facts preclude potential development, but this is not such a case. Mr Morgan accepted that there were no constraints that applied to the Land. Indeed, it is clear from a s. 78 appeal decision dated 6 June 2017 on an appeal by the Claimant (appeal ref: APP/Y3940/W/17/3169482) that the Council had not disputed that the Land was suitable in principle for development.

66. At several points in his skeleton and in argument Mr Morgan suggested, by reference to Mr Jones' skeleton argument, that the Land was not "sufficiently" identified but I consider that the issue under paragraph 4 is simply whether it is identified for potential development and it is unnecessary to gloss the statutory language to include a requirement of sufficiency.

67. I do not consider that there is a concept of "balance" to be implied into paragraph 4 or s. 15C. These provisions have been overlaid on the scheme of the 2006 Act by the amendments made by the 2013 Act. Parliament undoubtedly intended to make a change in the law. The only balance, if such it is, is the one struck by Parliament through the provisions and seeking to protect future development opportunities against the effect of s.

15 applications. If those provisions apply, according to their language and purpose, then the right to apply is excluded. Their extent is defined primarily by the language used, supported by the mischief they sought to address. As a matter of language paragraph 4 applies and in my judgment this is reinforced by the purpose, namely to prevent a s. 15 application from hindering potential development of the land. I have found this to be so in the case of these specific policies and the 2006 Act does not allow that conclusion to be displaced because of a view I might reach as to whether it should strike some other balance.

68. The complexity of s. 15 applications in my view does not assist. Their complexity is well-known and can be taken to be well-known to Parliament. Indeed, they were built into s. 15 by the 2006 Act and Parliament has chosen to add to them additional requirements through the 2013 Act, including s. 15C and Schedule 1A. I was equally unconvinced by the argument that the use of settlement boundaries might be difficult for potential s. 15 applicants to follow. On the contrary, the use of the boundaries in the context of these specific policies seemed to me to be easy to understand since they are reflected in a clear line on well-drawn inset plans. They appear to me to be a lot simpler to understand than a case where a policy might identify the land by written description rather than a line on a plan and where a greater degree of interpretation might be necessary.

69. For these reasons, I consider that the application under s. 15 was not validly made and that Ground 1 of the challenge succeeds.

Ground 2

70. It is not necessary for me to examine the fairness challenge in detail since I have already determined that the application was not validly made since it was precluded by a trigger event within s. 15C of the 2006 Act.

71. However, taking the matter shortly in that context, first, I consider that the Claimant cannot complain that it was not given a further opportunity to address the merits of the application since it was given ample notice of the application on 30 September 2016 and further opportunities to comment in early 2017.

72. The Claimant chose not to present its full case on the law and merits which would have been the prudent, and normal course of action, presenting its legal arguments on validity together with any points on the substance of the application as well. True it was that the CRA did not indicate its view, provisional or otherwise, to the Claimant but this was in

the context that it on no occasion did the CRA state that it was dealing only with the issue of validity, or in some other way create a legitimate expectation that it would deal first with validity and only later address the substance of the evidence. In any event Mr Gosnell's response in December 2016 made it clear that he thought the CRA had carried out validity investigations on trigger events, which at least put the Claimant on notice though it did not follow up the point.

73. I did not find the Defra Guidance that an authority should first check validity before embarking on the costly and time-consuming exercise of processing the application of assistance to the Claimant. If anything, it suggested that the Council would have done this first before sending out notifications on 30 September 2016.

74. Secondly, with respect to the failure to address the late representations sent after office hours on 3 October 2017, the evening before the committee meeting, and the complaint that the Additional Note provided by officers on 4 October, effectively reversed the burden of proof, confused the request for a hearing with the trigger issue when in fact it was related to the issue of implied permission and the unlocked gate, and the wish to test the evidence which had been presented, and wrongly suggested that the representations were too late, I am inclined to approach that Additional Note generously. Until the officers arrived at work on the day of the meeting, they had no idea that the Claimant had raised additional points relating to the evidence and had to hurriedly compile a response to put in front of members. The normal leeway afforded to interpreting officer advice and administrative decisions applies here with additional force given the lateness of the representations.

75. Whilst it is true that the Claimant reserved its position as to the merits a year earlier, it had done nothing before 3 October to suggest that it had any specific reservations other than on the question of validity. The CRA did not, as it was entitled to do in the exercise of its discretion under reg. 6(2)(a) of the 2007 Regulations, decide not to entertain the late representations, but sought to address them.

76. With regard to the allegation of the reversal of the normal burden of proof, which lies on the party seeking registration, the Additional Note said:

> "It is considered that evidentially sufficient evidence has now been provided to the CRA enable the CRA to reach a decision on the application and a non-statutory public inquiry is not considered to be necessary in this case where the objectors have presented no evidence in order to challenge the user evidence submitted by the applicant."

77. Approaching the matter with the appropriate degree of benevolence, I do not read that as a reversal of the burden of proof but merely a statement that no evidence had been presented. It is true that the Claimant's solicitors had (just) raised the issue of implied permission, but I prefer to treat that as a submission as to the interpretation of the facts presented rather than evidence. There is no doubt that in the Decision Report officers had very carefully analysed and considered the evidence presented to them which included the undisputed fact that the fence was installed in 2006 with a gate that was kept unlocked until 2015. It is not suggested that there was any evidence other than that to present and Mr Jones submitted that the issue of implied permission did not require the landowner to communicate the implied permission in any way. The question was whether, as a matter of fact, permission had been given: see Lord Neuberger in ***R. (Barkas) v North Yorkshire County Council*** [2015] AC 195 at [14]-[19] and [35]-[38], which also summarises the law on the relationship between permission and mere acquiescence.

78. Even if, as was submitted, the issue of permission did not need to be communicated (see ***R (Newhaven Port & Properties Ltd.) v East Sussex County Council*** [2015] AC 1547 at [67]-[73], noting that this was a case of public bye-laws rather than private land, as to which see [68]), and the gate being kept unlocked was an undisputed fact, it is a matter on which the Council could fairly conclude in any event that a hearing was not necessary. It may go to the legality or otherwise of their decision (as to which I express no view) but that is a matter to be drawn from the facts, not the investigation of disputed facts themselves. The Claimants did not contend that there was any communication of their consent to the use of the Land to the local inhabitants.

79. I accept that applications to register are often, though not invariably, dealt with through a non-statutory hearing and that the need for this may be greater in town and village green cases than in some areas of decision-making. See, for example, Sullivan J. (as he then was) in ***R (Cheltenham Builders Ltd.) v South Gloucestershire DC*** [2003] 4 P.L.R. 95 at [34]-[40] and Carnwath J. (as he then was) in ***R v Suffolk County Council ex p. Steed*** (1995) 70 P&CR 487 at 475-6. As Sullivan J. held at [36]:

> "I accept that registration authorities have a discretion as to the procedure to be adopted (assuming that the limited requirements in the regulations have been complied with), but that discretion is not unfettered. It must be exercised in a manner which is fair to applicants and objectors. What fairness requires by way of procedure will depend upon the circumstances of the particular application. Coupled with the obligation to act fairly, the registration authority is also under an obligation not merely to ask the correct question under the Act, but to "take reasonable steps to acquaint [itself] with the relevant information" to enable it to correctly answer the question: see the Tameside case cited by Carnwath J above."

80. He noted at [40]:

> "It is important from the point of view of applicants for registration, as well as objectors, that the registration authority should do its best to resolve disputed questions of fact when deciding whether to accept or reject an application. The registration authority will be able to resolve factual disputes locally in a forum (inquiry or hearing) that will be more convenient for local residents who may support or oppose the application and will not expose them to the additional expense and the risk of costs that are inherent in High Court proceedings."

81. Nonetheless, the issue of the need for a hearing has to be considered on the facts. Although Mr Jones placed considerable reliance on Sullivan J.'s judgment at [37]-[38], the facts here are very far removed from ***Cheltenham*** itself where, as Sullivan J made clear at [38], the conclusions on user there could not be accepted without a hearing since as he found at [30] it could not reasonably have concluded on the officer's assessment of the evidence that the user requirement was met. In contrast, as Mr Morgan submitted, the sufficiency of the evidence here to found a conclusion that the required quality of user was made out, set out at length in Section 13 of the Decision Report, was not disputed.

82. I do not consider that the unfulfilled wish of a landowner to be able to cross-examine is, without more, a reason to find that a refusal to hold a hearing is unfair. It has to be coupled with a specific reason why it would be unfair to proceed without it. Fairness is a matter for the Court to judge, and even given the possible confusion of the issue of revocable permissions following ***Barkas***, which it is unnecessary for me to resolve, I am satisfied that it was not unfair for the Council to decline to allow a hearing. Whilst that issue may have meant that the decision was flawed as a matter of law (which is academic given my finding on Ground 1) that would not itself justify the holding of a hearing (though it might have justified a different ground of challenge). I make it clear that I have not thought it necessary to determine the issue of permission, implied or otherwise.

83. I therefore reject Ground 2 but this makes no difference to the disposition of the case since I have already found for the Claimant on Ground 1.

Conclusion

84. The claim succeeds on Ground 1 and I hereby quash the Council's decision on 4 October 2017 to accept the application to register under s. 15 of the Commons Act 2006 and order that the register be rectified by the deletion of the entry relating to the Land, namely Register Entry VG 65.

85. I will hear counsel on costs and any consequential orders.