RE: LAND KNOWN AS COLLINGWOOD ROAD GREEN, HORSHAM

OPINION

INTRODUCTION

1. I am asked to advise West Sussex County Council as commons registration authority ('the CRA' or 'the Council') in relation to an application to register land known as Collingwood Green as a town or village green ('TVG') (Ref: 30/53). My advice is sought in relation to whether the application can be determined on the papers or whether it is necessary to hold a non-statutory public inquiry.

CONTEXT

2. The application was submitted by Felicity Harrington on behalf of Collingwood Green Association on 14 September 2022. It has been through all necessary consultation procedures and is now ready to be considered by the CRA's Planning and Rights of Way Committee to decide the most appropriate disposal. I have considered the strength of the application and the procedural options available.

3. It is open to the registration authority to effect a registration without a non-statutory local inquiry, even if there is a dispute as to the factual basis for registration, but the registration authority must act *reasonably* (R (Whitmey) v, Commons Commissioners [2005] QB 282 at [25] – [26] and [28]). In Whitmey, Arden LJ gave the following guidance to registration authorities in deciding whether or not to hold a local inquiry:

> "In order to act reasonably, the registration authority must bear in mind that its decision carries legal consequences. If it accepts the application, amendment of the register may have a significant effect on the owner of the land or indeed on any person who might be held to have caused damage to a green and thus to have incurred a penalty under section 12 of the Inclosure Act 1857 … In cases where it is clear to the registration authority that the application or any objection to it has no substance, the course it should take will be plain. If, however, that is not the case, the authority may well properly decide, pursuant to its powers under section 111 of the 1972 Act [Local Government Act 1972], to hold an inquiry.

> We are told that it is the practice for local authorities so to do, either by appointing an independent inspector or by holding a hearing in front of a committee. If the dispute is serious in nature, I agree with Waller LJ that if the registration authority has itself to make a decision on the application … it should proceed only after receiving the report of an independent expert ... (at [29]).
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> … The authority may indeed consider that it owes an obligation to have an inquiry if the matter is of great local interest" (at [30]). [emphases added]

4. Waller LJ added:

> "the registration authority has to consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration" (at [66]).

5. The circumstances when an inquiry is appropriate are therefore wide, and include where the matter is of great local interest as well as if there are disputes of fact. Arden LJ stresses that a registration authority, if it is not the case that an application or objection has no substance, may well properly decide to hold an inquiry. However, in cases where the registration authority is able to identify a clear 'knock out blow' to the application from the papers alone, then no purpose would be served in holding a public inquiry.

ANALYSIS

6. In light of the above, I have considered whether there is any clear 'knock out blow' to the application to register the land as a TVG which would mean that the application is bound to fail and no purpose would be served by testing the evidence. The obvious issue which stands out to be considered in this context is whether the land is adopted highway and, if so, the effect of this on the application.

7. I have been instructed that the whole of the land has the status of publicly maintainable highway and the grass is mown by the Council periodically. I have seen an adoption agreement dated 10 November 1966 between the Horsham Urban District Council and Federated Homes Ltd. which is in the form of a modern day agreement under s. 38 of

the Highways Act 1980 indicating an intention to construct Collingwood Road including the marked 'amenity area' which accords with the area applied to be registered as highway to be maintainable at public expense. The agreement required the developer to construct the cul de sac including the 'amenity area'. Once the street had been completed to the satisfaction of the Council's Engineer and Surveyor he was to issue a certificate and from the date of that certificate the Council shall undertake the maintenance of the street and the date shall be the specified date under s. 42(2) of the Highways Act 1959 on which the street shall become a highway maintainable at the public expense.

8. I have not seen any actual evidence that adoption took place. However, in the circumstances, I would assume that it did given that the Council (and presumably their predecessors) have always maintained the land at the public expense. The area is also included shaded pink on the Council's maps of highway land. I therefore am of the view that it is clear, on the balance of probabilities, that the CRA should consider the whole of the application land as highway land.

9. I turn then to the legal consequences of that in terms of TVG registration.

10. I start, first, with the relevant statutory provisions. Section 15(1) of the Commons Act 2006 provides that 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. The relevant subsection in the context of this application is (2).

11. Section 15(2) applies where:

    (a) a significant number of inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes ont eh land for a period of at least twenty years; and
    (b) they continued to do so at the time of the application.

12. The burden of proof is on the applicant to demonstrate that the requirements of the statutory definition are satisfied and all the ingredients of the definition must be met. It

is not lawful to assume any element of the applicant's case where it is not substantiated by sufficient evidence.

13. In relation to highway land, there is nothing expressly within the statutory definition which precludes highway land from being registerable as a town or village green. I also note two Commons Commissioner decisions from 1979 which are cited in Gadsden on Commons and Greens (Sweet & Maxwell, 2020) at footnote 104 to paragraph 15-25 (Re The Green, Hargrave, Suffolk (1979) 234/D/79 and Medstead Village Green, Medstead, Hants (1979) 214/D/1 13) which appear to suggest land which is dedicated as public highway can also be subject to the grant of rights of common.

14. In the Medstead case, it was said as follows: "The definition of a "town or village green" in Section 22 of the 1965 Act (unlike that of "common land") does not expressly exclude highway. Land may be both highway and subject to a right to hold a market, see Pratt and Mackenzie on Highway (21st Edition 1967) page 19; upon similar considerations to those set out in the case there cited land may be both highway and subject to a local customary recreational right. This is in accordance with common experience; for many village greens are cross by footpaths (in law highways) which are for recreational purposes temporarily obstructed without anyone objecting to the inconvenience (often very little) thereby caused."

15. I accept that these Commons Commissioners' decisions would not bind the registration authority (although they are persuasive) and they are now of some age. However, I also note that, since then, Parliament had, at the time of considering the Bill that would lead to the enactment of the 2006 Act, the opportunity to narrow the definition of a green should they so choose (see the comments of Lord Rogers in Oxfordshire County Council v Oxford City Council [2006] 2 AC 674 at [115]) and could have decided expressly to exclude highway land from the definition, but did not.

16. Nevertheless, the common law does appear to have moved on since then with regard to the definition of 'as of right', especially in view of the House of Lords decision in R (Barkas) v North Yorkshire County Council [2014] UKSC 31. There, Lord Neuberger stated as follows: "the legal meaning of the expression "as of right" is, somewhat counterintuitively, almost the converse of "of right" or "by right". Thus, if a person

uses privately owned land "of right" or "by right", the use will have been permitted by the landowner – hence the use is rightful" (see [14]).

17. In relation to highway land in particular, there are two relevant Court decisions now in play: the House of Lords decision in DPP v Jones [1999] 2 AC 240 and the High Court decision in Somerford Parish Council v Cheshire East Borough Council [2016] EWHC 619 (Admin) (Stewart J). Somerford is of relatively little assistance because the main argument in that case was whether there had been a procedural impropriety resulting in the registration authority not having held a public inquiry. It was simply accepted without debate that: "if [the land were a highway] … then in the circumstances of this case he [the registration authority] was entitled to find that it cannot be registerable as a TVG. This is because the use could properly then be found as a use by right, not a use as of right".

18. I have considered the Inspector's report for the inquiry which then did take place, following the quashing of the original decision (the Inspector was barrister, Tim Jones)[1]. The reasoning on the 'lawful use of the highway' point is brief (see [72]). The Inspector, having found the land to be highway land stated: "The Highway Authority submits that all of the activities are lawful uses of the highway. Apart from the selling of cars on the verge (about which I have considerable doubts, but which is not lawful sport or pastime), I agree. This accords with the high authority of DPP v Jones mentioned in Stewart J's judgment which binds me and the Council. It also accords with my view of common sense. None of the activities are of a sort that are unexpected on a highway verge, a nuisance, an impediment to normal use of the highway or otherwise unreasonable. It would be regrettable if highway authorities had to stop such activities in order to prevent verges becoming a village green." Inspectors' reports are of course not binding on the registration authority but they are helpful in seeing how other Inspectors have viewed the issue.

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1 https://moderngov.cheshireeast.gov.uk/ecMinutes/documents/g6626/Public%20reports%20pack%2011th-Sep-2017%2014.00%20Public%20Rights%20of%20Way%20Committee.pdf?T=10

19. I turn then to the DPP v Jones House of Lords authority which formed the basis for Mr Jones' finding that the vast majority of recreational activities on a highway verge will be pursuant to a lawful highway right.

20. The case is not to do with registration of land as a town or village green. The issue was, rather, whether the public were trespassing on highway land by holding a peaceful, non-obstructive assembly. It was held that they were not trespassing. The public highway is a public place that the public might enjoy for any reasonable purpose, provided that the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the public's primary right to pass and repass, and within those qualifications there was a public right of peaceful assembly on the highway.

21. DPP v Jones is thus authority (of the highest level) that the extent of activities that may lawfully carried out on the public highway is far greater than simply using the highway to pass and re-pass. Anything reasonable can be done provided it does not obstruct the right of passage or cause a nuisance.

22. Applying that then to the wide ambit of lawful sports and pastimes which may be carried out on town or village greens means that a vast number (if not all) activities that are normally carried out on a town or village green may also lawfully be carried out on a highway verge. That being so, such activities would be lawful in any event on highway land and thus not capable of founding the acquisition of a prescriptive right by user 'as if of right'. Another way of putting it is that the public are not trespassing on the highway verge when they carry out these sorts of activities. Examples given by Lord Irvine (giving the leading majority judgment in DPP v. Jones) of 'such ordinary and usual activities' are making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic, or reading a book (at 255).

23. Lord Irvine also noted that what is ordinary and usual may depend on the particular characteristics of the highway. He said that the test of reasonableness would be strictly applied where narrow highways across private land are concerned, for example, narrow

footpaths or bridle-paths, where even a small gathering would be likely to create an obstruction or a nuisance (at 256).

24. Accordingly, in practice it would be relatively unusual, albeit not impossible, for land to be registered as a village green that is entirely highway and I am not personally aware of any examples where such land has been registered. If the entire land in issue is highway, then all the public's use of that land pursuant to their rights to use it as a highway must be discounted from the consideration as to whether it has become a village green. Indeed, as the public can lawfully do anything reasonable on highway land which does not interfere with the right to pass and re-pass, it follows that other activities will by definition interfere with that primary right. If so, an obstruction of the highway and / or a nuisance is then likely to occur which in turn would be likely to result in the local highway authority taking appropriate steps to prevent such activities, given the authority's statutory duty in s. 130 of the Highways Act 1980 to assert and protect the rights of the public to the use and enjoyment of any highway, especially if those activities are taking place to the extent that would be necessary to justify registration as a village green.

25. I note some parallels with the position with regard to the use of footpaths (which are, as the Commons Commissioner noted, also highways). Recreational walking / running etc. is a lawful sport or pastime on a village green but where that use has been carried out on a public right of way then it does not count towards qualifying use for the purposes of meeting the s. 15(2) test (because it is permitted in any event).

26. I will come on to consider which activities would fall within 'lawful highway use' and which (if any) would not and could therefore be considered to be 'lawful sports and pastimes' for the purposes of acquisition of a town or village green right in relation to this application. However, for present purposes, my conclusions on whether highway land is capable of being registered as a town or village green are as follows:

    (a) There is nothing *per se* which precludes highway land from being registered as a town or village green;

(b) Indeed there may be in existence a number of pieces of land which are highway land which are registered, in particular there are a number of footpaths which cross town or village greens;

(c) However, qualifying user has to be 'as of right' rather than by virtue of an existing right which the public already have to use the land;

(d) The range of activities which the public may carry out on highway land is wide following DPP v Jones. The right extends to anything reasonable which does not interfere with the public's right of passage or cause a nuisance. None of these activities can count towards the acquisition of a prescriptive 'town or village green' right.

(e) If an activity were such as to cause a public or private nuisance, then it may not be a 'lawful' sport or pastime in any event.

27. I note an additional reason why it is suggested that highway land may not be registerable set out by the authors of Gadsden, namely that there is a fundamental incompatibility between land being both highway and a green (see 15-25). That may be so in cases where vehicular rights are involved, but I am not sure there is necessarily an incompatibility with registration of a highway verge and use of the land as a village green. In any event, there is no authority supporting this line of reasoning to prohibit highway land from being registered and I prefer to look at it in accordance with the above 'by right' / 'as if of right' analysis.

28. I turn then to the activities which are asserted by the applicant to have been carried out on 'Collingwood Road Green'. At the outset, there does not seem to be any dispute by the landowner that the 'Green' has been well-used by local residents for recreational activities throughout the 20 year relevant period. The essential question, however, in my view, is whether any of the wide range of activities which local inhabitants have clearly and undisputedly carried out throughout the relevant period would not have been permitted, lawful activities for them to have carried out on this land in any event.

29. In considering what is a reasonable activity to carry out on a highway, which does not interfere with the primary rights of passing and re-passing, it is, in my view, necessary to consider the nature of the highway land. What would be reasonable on a motorway verge is very different to what is reasonable on a narrow private footpath or what is

reasonable on a relatively large, open grassy amenity area in a quiet cul-de-sac, such as Collingwood Road.

30. I have no doubt that many of the activities carried out, such as golf putting practice, kite flying, football and rounders etc. would be wholly inappropriate – and in fact dangerous – if sought to be undertaken on highway land of a different character. However, on a piece of grass within a cul-de-sac which is not used as a route between A-B, they would not (and did not in fact) obstruct anyone or cause a nuisance.

31. The public had a right to use the application land at all times and their right was only limited in extent by the stipulation that they must not obstruct anyone or cause a nuisance. In my view, none of activities carried out as set out in the user evidence questionnaires and accompanying photographs, would have had that effect and thus they were all perfectly lawful uses of highway verge.

32. The only activity which might conceivably have caused an obstruction to someone attempting to use the highway verge to pass and re-pass (or indeed attempting to use the cul de sac of Collingwood Road itself) is the large street parties e.g. the Jubilee party referred to in evidence. However, these events were not only relatively infrequent but also appear to have been pretty fluid in terms of where they took place – photographs show some of the activities taking place on residents' drives (see the St Catherine's Hospice raffle table and carol singing tent). They are also not in fact an uncommon lawful use of a highway, as indicated by the fact that they are called 'street' parties. I note that in DPP v Jones a large public assembly was accepted as a highway use, in the context of the particular highway concerned and Lord Irving expressly referred to carol singing as being a normal use of a highway. I consider that the street parties and carol singing in the context of Collingwood Road should be considered similarly lawful.

33. Thus, in my opinion, the application is bound to fail on account of there being no use of the application land which can qualify as a 'lawful sports and pastime' for the purposes of acquiring a village green prescriptive right. This is because all of the activities which local residents have carried out on the land have been lawful uses of

the highway verge and thus they undertook those activities by virtue of a pre-existing right they had. They were not trespassers.

34. Even if I am wrong and there were some activities which were not lawful uses of highway verge, then in my view they would either amount to an obstruction or nuisance - in which case they would not qualify as lawful sport or pastimes in any event - or they would be too trivial or sporadic to amount to the assertion of a TVG right.

CONCLUSIONS AND NEXT STEPS

35. I consider that the fact that the entirely of the application land is adopted highway is sufficient to reject the application. Given that my conclusions do not turn on any element of fact which is capable of dispute I do not consider that any useful purpose would be served in holding a public inquiry into the application. It is thus recommended that the registration authority reject the application on the papers for the reasons I have given in this opinion. However, in the interests of fairness, I would advise that my opinion is shared with the parties to enable them to make any further written representations on the points before the matter goes to Committee.

36. If any questions arise as a result of this opinion, or if I can be of further assistance, then please do not hesitate to be in touch.

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