

## **Planning and Rights of Way Committee**

**19 March 2024**

### **Application under S.15 of the Commons Act 2006 for the registration of land claimed to have become a town or village green**

**Land known as Collingwood Road Green, Horsham**

**Report by Director of Law and Assurance**

**Electoral division: Horsham Hurst**

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## **Summary**

This is an application made under the provisions of s.15 (1) and (2) of the Commons Act 2006 to register land known as Collingwood Road Green, Horsham as a town or village green. The land consists of an open space comprising a grassy area at the end of a cul-de-sac.

The application is supported by 31 evidence forms and 1 statement. The evidence is from local inhabitants of a neighbourhood within a locality referred to as "Collingwood Road". The land is privately owned by Ms Singh, who purchased the land in May 2023 after the application was made in September 2022, and who submitted a letter of objection to the application on the basis that she intended the land for development, though submitted no evidence to rebut the claims of the applicant.

The land claimed as village green is adopted highway, which brings into question whether (a) it can be registered as village green and (b) whether its use by residents is 'by right' or 'as of right'.

Counsel was instructed to act as independent inspector to hold a non-statutory public inquiry with a preliminary phase to assess the evidence to determine if the application land being highway was a knock-out blow to the application. The opinion of Counsel, included in the appendices, was that the vast majority of user should be considered as 'by right'. If there were some uses of the highway verge which were not lawful then they would either amount to a nuisance or obstruction and so would not qualify as lawful sports or pastimes in any event or they were too trivial or sporadic to amount to the assertion of a town or village green right.

The legal tests for the registration of land as a town or village green require that the application must show on the balance of probabilities that all the elements have been met. Having evaluated all the evidence submitted it is apparent that

the application fails on account of the land being highway and use of the land 'as of right' for lawful sports and pastimes has not been proven.

## **Recommendation**

That the land known as Collingwood Road Green, Horsham and as shown cross-hatched black on the application plan attached be not registered as a town or village green.

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### **1. Background**

- 1.1 This report concerns an application received on 16 September 2022 from Felicity Harrington (on behalf of Collingwood Green Association), of 39 Collingwood Road, Horsham, West Sussex, RH12 2QN, for the registration of land described as 'Collingwood Road Green' at Horsham as a village green.
- 1.2 The application is made under Section 15(2) as no restriction on use of the land has occurred and the twenty-year period of use 'as of right' runs from September 2002 – September 2022.
- 1.3 The application land is comprised of an area of open grassland forming a highway verge at the end of the Collingwood Road cul-de-sac, with a size of approximately 0.19 acres (0.08 hectares).
- 1.4 The area currently carries highway status and is maintained by WSCC as highway verge.
- 1.5 When the application was made, the land was owned by Danshe Ltd, however it was sold at auction on 24 May 2023 to Ms Claire Singh, of Dagenham, Essex.
- 1.6 The application is supported by 31 evidence forms. These are from 31 different postal addresses and in a locality or neighbourhood within a locality described in the application as being 'Collingwood Road'. A summary of these statements is included in the table at appendix 2 to this report.
- 1.7 Attached to this report are a location plan (appendix 1a) and a report plan (appendix 1b), which shows the application land cross-hatched black.

### **2. The handling of the application**

- 2.1 The Growth and Infrastructure Act 2013 inserted new Section 15C and Schedule 1A into the Commons Act 2006, which exclude the right to apply for the registration of land in England as a town or village green where a trigger event has occurred in relation to the land. The right to apply for registration of the land as a green remains excluded unless and until a terminating event occurs in relation to the land. Trigger and terminating events are set out in Schedule 1A to the 2006 Act and broadly relate to

whether land is identified for potential development in the planning system.

- 2.2 In accordance, letters were sent to Horsham District Council (HDC) and the Planning Inspectorate (PINS) as relevant local planning authorities on 11 November 2022 requesting identification of any trigger and terminating events affecting the land claimed as village green at Collingwood Road. Responses were received from HDC (on 20 December 2022) stating that a trigger event and a corresponding terminating event had both occurred, and PINS (on 28 February 2023) stating that no trigger events had occurred. Copies of these responses can be read in the background papers, which are available on request or can be found in the Members' Room prior to the Committee Meeting.
- 2.3 Following the receipt of confirmation that no trigger events were affecting the land, the application was formally accepted. However, according to Regulation 10(2) of The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, applications must be accompanied by an Ordnance map, which must also (according to 10(3)) (a) be on a scale of not less than 1:2,500, (b) show the land to be described by means of distinctive colouring; and (c) be marked as an exhibit to the statutory declaration in support of the application.
  - 2.3.1 On inspection of the application, it was clear that the application was not duly made, owing to the lack of a map as described above. Rather than reject the application on this basis, according to Regulation 5(4) the investigating officer wrote to the applicant on 17 March 2023 to accept the application and request an Ordnance map in accordance with Regulation 10, as described in paragraph 2.3 above.
  - 2.3.2 The applicant submitted the requisite map on 23 March 2023, however it had not been marked as an exhibit to the Statutory Declaration made as part of the application. This fact was not observed until 15 September 2023. A further letter was written to the applicant on that date requesting this amendment was made. The map was returned on 21 September 2023 having been marked as an exhibit and witnessed by the same solicitor. The two application plans can be seen at appendix 3a and 3b. Further discussion of these plans will occur in paragraphs 2.10 and 5.1.
- 2.4 The application was advertised in the West Sussex County Times on 30 March 2023 and the closing date for representations was therefore given as 11 May 2023. Notices were sent to the landowner, at the time Danshe Ltd, of London, and also displayed on the site as required. The relevant 'concerned local authorities', as defined in the regulations are Horsham District Council and Horsham Trafalgar Neighbourhood Council. They were also contacted and asked to put a copy of the application on deposit for public inspection.
- 2.5 The applicant, knowing as she did that the land was due to be sold, was helpful throughout the processing of the application in keeping the investigating officer informed of any potential ownership changes. The land was eventually sold at auction on 24 May 2023. Prior to the auction, the auctioneer was informed by officers of WSCC that the land carried

highway status (sent 2 March 2022) and was subject to a village green application (sent 13 April 2023). They were asked to ensure any potential purchaser was made aware of this information. Copies of these emails can be read in the background papers.

- 2.6 The new owner, having purchased the property on 24 May 2023, had not had the benefit of the original notice period which ended on 11 May, so a decision was taken by the relevant legal officers of WSCC that it would be reasonable to allow the new landowner to make representations regarding the village green application on their land. After learning their identity, a new notice was served on them on 7 July 2023, with this period ending 18 August. An objection was received from the new landowner on 12 August. Discussion of this objection will occur in paragraph 2.13.
- 2.7 The applicant, and other members of Collingwood Green Association, on whose behalf she is making this application, complained about the additional notice afforded to the new owner, on the basis that the auction house was made aware both of the highway status and the existence of the village green application. Their argument was that the auction house should have made these known to any purchaser and therefore any new landowner should have been aware of these factors when they bought the land. No additional notice period should have been given to the new landowner, and in their opinion, this delayed the progress of their application and had a deleterious effect on its chances of success.
- 2.7.1 Although best efforts were made to ensure this information was conveyed before the land purchase, WSCC as Commons Registration Authority cannot rely on a third party to conduct its statutory duties, namely the notification of a landowner of a village green application affecting their land. Further, as there is no right of appeal to the registration of land as village green, it was reasonable to allow the landowner, Ms Singh an opportunity to make any representations.
- 2.8 The Applicant states that the application land is used regularly by the local inhabitants for exercise, walking and training dogs, sporting activities, social occasions such as birthday parties, community events such as 'clap for carers' during the first Covid-19 lockdown, community celebrations for VE Day and the late Queen's jubilees, and seasonal activities such as carol singing and many other activities. She says it has been used 'as of right' for about 60 years. She states that "the open nature of the site encourages community interaction and support," and also "as the green is located at the end of a cul-de-sac it serves as a very safe area for outdoor play." She further contends that the space allows "a gradual increase in independence for children while still being visible, until they are of an age to play completely independently."
- 2.9 The evidence in support of the application can be summarised as follows:-
- The earliest claimed use among witnesses is in 1975. The majority of users have used the land within the relevant 20-year period (September 2002 – September 2022) with the nature of use ranging from 'a few times a year' to 'daily'.

- 12 users out of the 31 who submitted evidence forms claim to have used the land throughout the whole 20-year period.
- There is significant reference to the land being used for exercise purposes, particularly walking with dogs. Other uses include ball games, family activities, playing with children, independent play by children, football, picnics, fetes, seasonal carol singing, bike riding and birthday parties. Witnesses also refer to community events and celebrations organised by the Collingwood Residents' Association and Collingwood Green Association, such as VE Day celebrations, Jubilee celebrations, and socially-distanced picnics during Covid-19 lockdowns.
- All users refer to seeing others using the land.
- Nobody refers to discussions with landowners about the status of the land, ever having been stopped or turned back, having obtained permission to use the land or seen any notices on the land. Some claim that until March 2022 it was believed that the land was owned by "the council" and were surprised when a 'for sale' sign was erected.
- One user in a letter of support refers to the benefit of having space to "spread out and relax" and that the green "gives a wealth of benefits to so many, young and old."
- All users say they access the land simply by walking onto it; it is open on all sides and can be accessed within a few metres of many of their front doors.
- 3 colour photographs provided in the letter of support mentioned above show a Jubilee party in 2022 with at least 9 people in attendance.

A more detailed summary of the evidence is included in the table which is in appendix 2 to this report.

- 2.10 All users have signed the plan marked Map A (appendix 3a) showing the land which is the subject of the application. However the land shown in Map A (taken from Google Maps), although the same land, is marginally greater in extent than the land exhibited in the OS plan (appendix 3b), which has been signed by the applicant, not the other users. The formal OS plan for the application also carries the exhibitory statement "this map shows the precise area to be registered as village green." Further discussion of these plans will occur in paragraph 5.1.
- 2.11 A site visit was carried out on 5 October 2023, during which the case officer observed the claimed land to be a well-maintained green space with even grass growth over the whole area claimed and no worn areas. The area slopes down by approximately 1-2 metres from south-east to north-west. It is surrounded by houses of both one and two storeys, all of which are claimed by the applicant to have been built in the 1960s.
- 2.12 During the initial period for representations no objections or letters of support were received. The single objection received was made by the new landowner, Ms Claire Singh (also known as Sunita) in the additional representation period afforded to her. Her objections can be summarised as follows:

- the land should not have been sold if it is an 'asset of community value' and the residents wish to keep it as a green;
- that the land was now private and the local residents should go elsewhere to undertake the activities previously enjoyed on the land;
- that she intended to erect fencing to prevent residents from accessing the land;
- she had bought the land as an investment opportunity and intended to develop it;
- that she would offer local residents first refusal on purchase of the land so they could use it for these activities;
- if the residents wish for it to be registered as a green, they must first come to an agreement with her.

2.13 These points in objection are not of legal relevance to the determination of a village green application. Having only recently acquired the land, the landowner does not appear to possess any evidence which rebuts the claims of the applicant or other users. As they were the known owners during the notice period, Notice and other communications were sent to the previous owner, Danshe Ltd, however they did not respond to any communications, and so landowner evidence is essentially unavailable in this case. A copy of Ms Singh's full letter of objection can be read in the background papers.

2.14 As required under the Regulations, copies of the letter of objection were sent to the applicant on 22 August 2023 by email. The comments made by the applicants in response to Ms Singh's objections can be summarised as follows:

- They point out that Ms Singh acknowledges that the land has been used as a green;
- That any complaints she has about having bought land that is subject to a village green application are not their responsibility to resolve, either through purchase of the land from her or agreeing to any terms she might have; and
- That she should be immediately informed of the statutes in force preventing her from erecting fencing on land with highway status.

2.15 As previously mentioned in paragraph 2.7, the applicant and her associates at Collingwood Green Association were already dissatisfied at WSCC's decision to allow Ms Singh a further notice period, and on 22 January 2024 Paul Dugate, the Chair of Trustees of the Collingwood Green Association, renewed enquiries as to the legitimacy of the decision on behalf of WSCC to serve a second notice on the new landowner. He was not satisfied with the responses given by WSCC so, as Counsel had already been instructed as Independent Inspector (see details starting in paragraph 4.5), this question was also referred for independent consideration.

- 2.15.1 Counsel opined that, (1) the decision to extend the notice period for the benefit of the new landowner did not breach the Regulations, and (2) as the landowner had not been able to produce any evidence which materially affects the outcome of the case, the extended notice period was rendered of no consequence. Copies of all communications on this matter can be found in the background papers, and Counsel's full response can be read in the Supplementary Note, at Appendix 8.
- 2.16 A letter was written to Ms Singh on 5 September 2023 to remind her of the fact that the application land carries highway status and that no fences or other obstacles to access may be erected on it. This letter can also be found in the background papers.

### **3. The Law**

- 3.1 Any person may apply to register land as town or village green. The burden of proof falls on the applicant who must properly and strictly satisfy all of the tests in order for registration to be made and the standard of proof is the civil one, that is, on the balance of probabilities. This application has been made under s.15 (2) of the Commons Act 2006 which was enacted on 6<sup>th</sup> April 2007. 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 twenty years; and*
  - (b) *they continue to do so at the time of the application".*

The definition can be broken down into the following elements:

- 3.2 **"... a significant number ..."** "Significant" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.
- 3.3 **"... of the inhabitants of any locality..."** A "locality" cannot be created by drawing a line on a map. It has been decided that "locality" means an administrative district or an area within legally significant boundaries, such as a borough or parish.
- 3.4 **"... or of any neighbourhood within a locality..."** A neighbourhood need not be a recognised administrative unit. A housing estate can be a neighbourhood. However, a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness. The neighbourhood must fall within a "locality", although the House of Lords has held that it can fall into more than one locality (for which see above).
- 3.5 **"...have indulged as of right..."** Use of land "as of right" means use without force, secrecy or permission and does not turn on the subjective beliefs of the users. Force does not mean just physical force – it can be when use is contentious, that is that the landowner takes steps which

signify to the reasonable user that he does not acquiesce in the use. Permission can be express or implied, but permission cannot be implied from the inaction or acts of encouragement by the landowner. Toleration, as distinct from permission, will not defeat a claim that use has been 'as of right'.

The Supreme Court in the case of *R (Lewis) v Redcar and Cleveland Borough Council & Persimmon Homes (Teeside)* confirmed in 2010 that use of land as a village green can co-exist with a landowner's activities. In the Redcar case the landowner's activity was primarily that of running a golf course although there were 3 fields where hay was cropped annually. If there is a conflict between the landowner's use and recreational use by local inhabitants and the use of the local people materially defers to the use by the landowner, the recreational use will not have the appearance to the landowner of use as of right. This is a question of fact and degree. If the activities of the landowner make no difference to the activities of local people then provided the use is without force, secrecy or permission, it is likely it will be held that the activities of the local people have the necessary appearance of asserting a right against the owner. The Supreme Court therefore decided that use by the public, despite the public giving way to the co-existing use, satisfied the 'as of right' test.

- 3.6 **"...in lawful sports and pastimes..."** The words "lawful sports and pastimes" form a composite expression, which includes informal recreation such as walking with or without dogs, and children's play so long as there is an established pattern of use. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way (for example simply walking along the line of a path or undertaking activities that are associated with the use of such a path).
- 3.7 **"...on the land ..."** Any land will do. It is not necessary for the land to have the characteristics of a "traditional village green". The Registration Authority must be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land has been used for lawful sports and pastimes.
- 3.8 **"...for a period of at least 20 years..."**
- 3.9 **"... and continued to do so at the time of the application."**

#### **4. Application of the law to the facts**

- 4.1 The application is supported by 31 evidence forms from 31 postal addresses. A summary of the evidence contained in the evidence forms is set out in Appendix 2 to this report.
- 4.2 The elements of the definition of "village green" can be analysed as follows:
- 4.3 **"a significant number"**. The 31 evidence forms submitted by 31 addresses demonstrate that the application is well supported, and 12 users have regularly used the application land throughout the whole twenty-year period of claimed use. Collingwood Road contains 64 unique

addresses, and the addresses given in the evidence correspond to nearly every house which fronts or overlooks the land in question, and a few others close by. Only 4 of the 22 houses which overlook the green have not had an inhabitant submit a witness form. 31 households of 64 in the neighbourhood is a little over 48%, nearly half, which is "sufficient to indicate that ... the land is in general use by the local community for informal recreation", as mentioned in paragraph 3.2.

- 4.4 **"of the inhabitants of any locality or any neighbourhood within a locality"**. The neighbourhood within a locality claimed in the application is described as being 'Collingwood Road'. Plans at varying scales, and including a development plan of the neighbourhood, were submitted with the application, however none specifically identified the area. Given that all the addresses on the witness forms are located on Collingwood Road, the case officer was able to identify the area and inspect its attributes. Appendix 4 shows a plan and aerial photo (taken 2018) of the locality produced from WSCC's mapping systems.
- 4.4.1 As can be seen from the plan and photo, Collingwood Road is a cul-de-sac with its entry point on Trafalgar Road. Collingwood Close (another cul-de-sac) leads off it. There is no other road or footpath with entry onto Collingwood Road, so as such it is a self-contained estate. Historical mapping from the period 1843-1943 indicates the estate was built on what was once Spencer's Farm.
- 4.4.2 The fact several witnesses claim there is a Residents' Association indicates a sense of neighbourhood cohesion and identity, which would strongly support the area being consistent with a "neighbourhood within a locality".
- 4.4.3 There is case law (*R (Cheltenham Builders Ltd) v South Glos DC [2003] EWHC 2803 para 85*), which dictates there must be some degree of cohesiveness (i.e. contain similar types of housing with the same demographic qualities) within the identified area. Collingwood Road contains three different types of house: detached two storey houses (odd numbers 1-37 and even numbers 2-24) from the entrance of the road to just before the green starts, and semi-detached houses (odd numbers 39-61 and even numbers 26-48) and bungalows (even numbers 50-68) around the green and spurs. 2021 census data indicates that the inhabitants share strong demographic similarities in terms of ethnicity, nationality, religion and language spoken. There is a variety of ages represented, but that may be as expected in a residential street of this kind, where families inhabit.
- 4.5 **"have indulged as of right"**. The applicant's case is that there has been use of the land 'as of right'. All users refer to seeing other people using the land and none of the user evidence refers to any discussions with the landowner about the status of the land. Nobody refers to having obtained permission to use the land.
- 4.5.1 The obvious issue which has to be considered is the legal consequences for the application of the application land being adopted highway. Does the application fall to be rejected for registration on the basis that user

has been 'by right' and not 'as of right' by virtue of the land being highway land?

- 4.5.2 'By right' is taken to mean that use is granted by permission, statute or other means. 'As of right' is taken to mean use without permission, force or secrecy. Although in 2018 the Supreme Court ruled that the word 'highway ha[s] no single meaning in the law'<sup>1</sup>, a generally accepted common law understanding of highway is "a way over which there exists a public right of passage, that is to say a right for all [His] Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance"<sup>2</sup>.
- 4.5.3 There is nothing expressly within the statutory definition for town or village greens which expressly precludes highway land from being registerable. 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. The definition of 'as of right' has evolved since the passing of the Commons Act 2006, in particular following the House of Lords decision in *R v (Barkas) v North Yorkshire County Council [2014] UKSC 31*, in which it was stated: "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".
- 4.5.4 The House of Lords decision in *DPP v Jones [1999] 2 AC 240*, is authority that the extent of activities that may lawfully be carried out on the public highway is far greater than simply using the highway to pass and repass. Anything reasonable can be done provided it does not obstruct the right of passage or cause a nuisance.
- 4.5.6 The question is whether any of the wide range of activities which local inhabitants have undisputedly carried out on the application land would not have been permitted, lawful activities for them to have carried out on this land in any event. When considering what is a reasonable activity, it is necessary to consider the nature of the highway land. What would be reasonable on a motorway verge is quite different to what is reasonable on an open amenity area in a quiet cul-de-sac such as the application land. Activities such as golf putting practice, kite flying, football and rounders would be wholly inappropriate if carried out on highway land of a different character. However, on a piece of grass within a cul-de-sac not used as a route from A - B, they would not (and did not) obstruct anyone or cause a nuisance. As none of the activities carried out on the application land would have had the effect of obstructing or causing a nuisance they were lawful uses of the highway.
- 4.5.7 The only activity which might conceivably have caused an obstruction to someone using the highway verge to pass and re-pass is the large street parties referred to in evidence. However, these were relatively infrequent but appear to have been fluid in terms of where they took place – photographs show some of the activities taking place on residents' drives.

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<sup>1</sup> Southwark LBC v Transport for London (SC(E)) [2020] AC 914, p915 para A

<sup>2</sup> (Halsbury's Laws 21[1])

In *DPP v Jones* a large public assembly was accepted as a highway use, in the context of the particular highway and Lord Irving expressly referred to carol singing as being a normal use of a highway. Street parties and carol singing in the context of Collingwood Road are considered similarly lawful. The conclusion is that the considerable majority of user evidence would be categorised as use 'by right', not 'as of right'.

4.5.8 It is open to the County Council to hold a non-statutory public inquiry to test these findings fully, though the County Council can determine without one, acting reasonably. The County Council may consider that it owes an obligation to have an inquiry if the matter is of great local interest.

4.5.9 Ms Annabel Graham Paul of Francis Taylor Buildings was instructed to act as independent inspector to hold a non-statutory public inquiry, to include a preliminary phase to assess the evidence to determine if the application land being highway was a knock-out blow to the application, in which case it would not be necessary to proceed to a full non-statutory public inquiry as no purpose would be served by it.

4.5.10 Ms Graham Paul's opinion (in summary, and which can be read in full at Appendix 5) was that: "*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*" (paragraph 33 of the opinion).

4.5.11 Ms Graham Paul concluded that the fact that the entirety of the application land is adopted highway is sufficient to reject the application. As these conclusions do not turn on any element of fact capable of dispute, no useful purpose would be served in holding a public inquiry into the application and the County Council were recommended to reject the application on the papers. It was recommended that the opinion be shared with the parties to enable them to make any further written representations on the points raised before determination by Committee.

4.5.12 The opinion was shared with both the applicant and the landowner to ensure fairness. The landowner responded via telephone to say she was pleased that this was Counsel's conclusion. The applicant wrote in via email with various comments and questions; this communication can be read at Appendix 6. The general thrust of these comments was that the applicant felt that a non-statutory public inquiry should be held given the matter is of great local interest.

4.5.13 The applicant's comments were forwarded to Ms Graham Paul, who addressed them in a Supplementary Note (at Appendix 7). While appreciating the applicant's concerns and reasons for desiring a non-statutory public inquiry, Ms Graham Paul confirmed she had considered with an open mind the most appropriate disposal of the application. This is a matter of judgment for the County Council as registration authority, acting reasonably. Given the conclusion that the application fails on the basis that the land is highway land, she remained firm in her conclusion

that no useful purpose would be served in holding an inquiry to hear all the evidence of use. The application is bound to fail on account of the whole of the application land being highway. This constitutes a knock-out blow to the application and no purpose would be served in holding a non-statutory public inquiry to investigate the issues any further.

- 4.6 **“in lawful sports or pastimes”**. To satisfy this element of the test, use needs to fall within the legal definition of ‘lawful sports and pastimes’. The 31 witness statements refer to a wide variety of uses. These include children playing, football, rounders, cricket, walking dogs, walking, picnicking, kite flying, team games, community celebrations, bike riding, fetes events linked to snowfall such as sledging and building snowmen etc.
- 4.6.1 All of these could reasonably be said to fall within the phrase “lawful sports or pastimes”. A few photographs have been submitted of a few different events, including a jubilee party and carol singing in December 2020, and a few which show an event attended by around nine individuals. However, in view of the conclusion of Ms Graham Paul that the use of the application land was a lawful use of the highway and so has been in the exercise of a pre-existing right, the use of the land cannot qualify as use of the land for ‘lawful sports and pastimes’. Users of the application land were not trespassers. Even if there were some activities which were not lawful uses of the highway verge, they would amount to an obstruction or nuisance and so would not qualify as ‘lawful sport or pastimes’ or would be too trivial or sporadic to amount to the assertion of a town and village green right.
- 4.7 **“for a period of at least twenty years”**. The application is made under Section 15(2). The 20-year period of use ‘as of right’ therefore runs from September 2002 –September 2022. The evidence submitted in the witness statements covers varying periods from 1975 to 2022 and therefore covers the period of use. 12 users state that they have used the land for the whole of the 20-year period. Owing to the change in land ownership since the application was made, there is no available evidence to confirm or contradict these claims; they must be taken at face value.
- 4.8 **“and they continue to do so at the time of the application”**. The application is made under Section 15(2) and was received on 16 September 2022. The claim by the applicant, which the user evidence supports, is that the majority of the users were still using the land at the time of the application.

## 5. Other Matters

### 5.1 *Issues regarding the evidence forms*

As discussed in paragraphs 2.3 and 2.10 above, the application was submitted with a number of maps and plans, of which the most significant are labelled Map A and the OS Plan (which can both be seen in appendix 3). Map A identifies a larger area claimed as village green than the OS Plan and has been identified and signed by those submitting user evidence

forms. However, its format is not that prescribed in Regulation 10(2) and (3), Regulation 10(2) of The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, and could therefore be argued to be non-compliant. The OS Plan is compliant with the above regulations, and has no witness signatures, but bears the statement “[t]his map shows the precise area to be registered as a village green”.

- 5.1.1 The statutes pertaining to the registration of new town or village greens require applications to be accompanied by a plan in compliance with Regulation 10 as described above, however they do not require a map which is signed by every witness completing a user evidence form. It is reasonable therefore to give precedence to the OS Plan and assign it as the application plan, rather than Map A.
- 5.1.2 Of the submitted user evidence forms, 12 out of 31 used the same near-identical text to respond to several of the questions. This text primarily concerned the uses which that witness had ostensibly made of the green and seen others making, but one question asking the witness to indicate the personal frequency of their use was found to have the same identical answer repeated on seven forms. This phrase stated “[f]amilies who live round the green have used it on a daily basis for play, exercise, dog walking, with larger events such as birthday parties, picnics, VE and Jubilee celebrations as appropriate.” Where forms submitted this statement, no personal claim was made as to the frequency of their own use of the land.
- 5.1.3 This omission is problematic both in terms of making it difficult for WSCC as Commons Registration Authority to build an accurate picture of the frequency of use among all those who claim usage of the land, and in terms of calling into question the credibility of the evidence. If many of the forms have been completed by a single individual and then given out to others to add personal details and sign, then a claim could be made that the evidence is in fact concocted to meet the aim of achieving the registration of the land as town or village green, rather than portraying an accurate picture of usage which may not meet that aim.
- 5.1.4 However an alternative interpretation is that in filling in the form, the witnesses had the opportunity to amend any pre-filled statements – and indeed many did so – before signing, therefore personalising the information therein, and by signing demonstrating their agreement with the pre-filled statements. This interpretation acknowledges these are laypeople with no particular knowledge or understanding of the law governing such applications, and who may not realise the impact that such a course of action may have on the overall application.
- 5.1.5 Even under the interpretation in the above paragraph, a problem still arises from the absence of information regarding the frequency of use by those witnesses making non-personal claims. However among the witnesses who do make personal claims, the frequency varies between ‘very few’ i.e. 4-5 times per year to six people claiming ‘regularly’ and four claiming ‘every day’. This gives a significant number of the witnesses claiming frequent use.

## 5.2 *Queries regarding consistency of decision-making*

After advice from Counsel was sought in October 2023, it was drawn to the case officer's attention that two village greens had been registered by WSCC where the land also carried highway status; at what is now Cootes Green, Merryfield Drive, Horsham (VG90) in 2008 and at Birch Drive, Billingshurst (VG88) in 2006. The applicant asked through a Freedom of Information request why these applications for village green registration were successful whereas this application is being recommended for refusal, and what the distinguishing factors were, including whether Counsel had been asked for advice in the earlier cases. A transcript of the questions raised and the responses given can be seen at Appendix 8, and are summarised below.

5.2.1 The case officer has been able to examine the committee reports for both applications and the investigation papers for the Cootes Green registration. The papers for the Birch Drive application are located in the flooded area of Durban House and are therefore inaccessible.

5.2.2 The essential distinction between the current application and those for Cootes Green and Birch Drive can be summarised as follows:

*"The incompatibility between use 'by right' and use 'as of right' has been questioned and acted upon in the current case, whereas it was not in the earlier cases. In the context of the undetermined Collingwood Road application however, it cannot be the case that because an error may have been made in relation to Birch Drive and Cootes Green, that those decisions should be followed."* (response to final FOI question).

5.2.3 *In conclusion*, WSCC as registration authority must consider this application strictly in accordance with the relevant legal tests set out in detail above.

## **6. Conclusion**

6.1 The application does not succeed on the basis that the application land is highway and the use by the local inhabitants has not been 'as of right' and cannot qualify as 'lawful sports and pastimes' for the purposes of acquiring a village green prescriptive right. The vast majority of the activities which local residents have carried out on the land have been lawful uses of the highway and thus were undertaken by virtue of a pre-existing right. If there were some uses of the highway verge which were not lawful then they would either amount to a nuisance or obstruction and so would not qualify as lawful sports or pastimes in any event or they were too trivial or sporadic to amount to the assertion of a town or village green right.

6.2 The legal tests for the registration of land as a town or village green require that the application must show on the balance of probabilities that all the elements have been met. Having evaluated all the evidence submitted it is apparent that the application fails on account of the land being highway and use of the land 'as of right' for lawful sports and pastimes has not been proven. As these conclusions do not turn on any

element of fact capable of dispute no useful purpose would be served in holding a public inquiry. The recommendation is therefore that the application to register Collingwood Road Green as a village green should be refused.

## **7. Resource Implications and Value for Money**

- 7.1 The County Council is under a duty to investigate applications. The consideration of the application by officers falls within existing budgets.
- 7.2 Cost implications arise should the decision of the committee be challenged by way of Judicial Review.
- 7.3 The decision taken by the investigating officer and the Rights of Way Committee is a decision based on legal tests and the above costs cannot be a consideration in the determination of the application.

## **8. Risk Management Implications**

- 8.1 The decision is one that must be taken on strict legal tests. If the application is not determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.
- 8.2 In reaching a recommendation the investigating officer has considered the evidence in accordance with the law.

## **9. Crime and Disorder Act Implications**

- 9.1 The application process involves the application of legal tests, which mean that it is not possible to give weight to any effect on crime and disorder.

## **10. Human Rights Act 1998 Implications**

- 10.1 It is unlawful for a public authority to act in any way, which is incompatible with a convention right. The rights, which should be considered, are rights pursuant to Article 8, Article 1 and Protocol 1 and Article 6.
- 10.2 Article 8 protects the right to respect for private and family life including an individual's home. This is a qualified right and there may be interference by a public authority if that authority does so with an intention of protecting the right and freedom of others.
- 10.3 Article 1, Protocol 1 deals with the protection of property. Again, this is a qualified right and interference with it may take place where it is in the public's interest to do so subject to the conditions provided by law. Any interference, however, must be proportionate. The main body of the report identifies the extent to which there is interference with these rights and whether the interference is proportionate.
- 10.4 The Committee should be aware of Article 6, the focus of which (for the purpose of this Committee) is the determination of an individual's civil

rights and obligations. Article 6 provides that in the determination of these rights, an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a great deal of case law and the decision making process as a whole complies with Article 6.

## **11. Equality Act 2010 – Equality Impact Report**

11.1 The Committee should be aware that the Equality Act 2010 bans unfair treatment, and seeks equal opportunities in the workplace and in wider society. It also introduced a Public Sector Equality Duty (PSED). The PSED requires us to have due regard in all decision-making processes to the need to:

- a) Eliminate discrimination, harassment, victimisation or other prohibited conduct;
- b) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and
- c) Foster good relations between those who share a relevant characteristic and those that do not share it.

11.2 The relevant protected characteristics are age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

11.3 An Equality Impact Report has been undertaken.

11.4 No relevant impact upon any of the protected characteristics in the Equality Act 2010 emerged during the consideration of this application.

### **Tony Kershaw**

Director Law and Assurance

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### **Appendices**

1. (a) Report Plan  
(b) Location Plan
2. Summary table of Witness Forms
3. (a) Application Plan 'Map A'  
(b) Ordnance Survey Application Plan
4. (a) Plan of Collingwood Road  
(b) Aerial photo of Collingwood Road
5. Opinion of Annabel Graham Paul, dated 29 December 2023
6. Response from Applicant in response to Ms Graham Paul's Opinion, dated 15 January 2024

7. Supplementary Note to Opinion of Ms Graham Paul, dated 24 January 2024
8. Transcript of applicant's FOI Request

**Background papers**

- Application form and additional plans submitted with the application
- Responses from HDC and the Planning Inspectorate regarding trigger and terminating events
- Objection received to the application from Ms Singh, landowner
- Response from Ms Harrington's association to Ms Singh's objection
- Response from WSCC case officer to Ms Harrington's association
- Letter from WSCC to Ms Singh regarding highway status of her land
- Email correspondence between Mr Dungate and WSCC regarding procedural propriety of second notice period
- Email to Ms Harrington and Mr Dungate forwarding Counsel's supplementary note.