IN THE MATTER OF:

AN APPLICATION TO REGISTER

LAND AT SIXTH AVENUE, GREYTREE, ROSS-ON-WYE, HR9 7JS

AS A NEW TOWN OR VILLAGE GREEN

REPORT

OF PETER ENDALL (INSPECTOR)

Date: 10 March 2016

Solicitor to the Council
(Property & Commercial)
Herefordshire Council
Shire Hall
Union Street Hereford
HR1 2HX

A. INTRODUCTION

1. This report relates an application to register land at Sixth Avenue, Greytree, Ross-on-Wye, HR9 7 JS (described in the application as 'Willowbrook Play Area') as a new town or village green ("the Application Land").

2. I was appointed by Herefordshire Council ("the Council"), a Registration Authority under the Commons Act 2006 ("the 2006 Act"), as an independent inspector to prepare a report recommending whether it should register the Application Land as a Town or Village Green pursuant to the 2006 Act.

3. A Determination Hearing was held on Wednesday 24th February at the Town Hall, Hereford to allow the Applicants and the Objectors to make submissions regarding the Application. Proceedings were conducted in accordance with Directions which I issued on 18 February 2016.

4. At the Determination Hearing Mr. P.N. Davies appeared in person on behalf of the four Applicants named in the application. The Objector was represented by Mr. John Hunter of Counsel. Both Applicant and Objector presented me with written Submissions. A list of the documentary evidence I have considered is attached as a Schedule to this Report.

5. I have not conducted a site visit. As explained at the opening of the Determination Hearing I concluded that the abundance of photographic evidence submitted by the parties, and the nature of the issues at stake, rendered a site visit unnecessary.

B. THE APPLICATION LAND

6. The Application Land is an irregularly shaped piece of grassland, approximately 1000 square metres in area, lying at the end of a cul-de-sac. It adjoins a stream running southwards towards the River Wye nearby. Beyond the brook to the north-west is open farm land.

C. THE APPLICATION TO REGISTER AS A NEW TVG

7. An application to register the Application Land pursuant to section 15(2) of the Commons Act 2006 was received by the Council on 6 May 2015 ("the Application"). Four Applicants were identified – Mr. P.N. Davies, Ms. J. Yeomans, Ms. S. Davies and Mrs. H. Fursdon.

8. Paragraph 7 of the Application claims that the Application land has been used by residents of Willowbrook and Greytree from 1982 to the date of the Application, and that such use was continuing. The use is claimed to be as a Play Area, for social pastimes and community uses. Appendix E to the Application "Any other information" indicates that until 2015 the general assumption among local residents had been that the Application Land was owned by the Council. This assumption was founded on the fact that the Council had maintained the area including: cutting the grass, installing a bench, replacing fencing etc. Also a sign had long been located on the Application Land reading "PLAY AREA DOGS MUST NOT BE ALLOWED TO FOUL THIS AREA" (visible in the photographs attached as Appendix B). The Applicant also attached at Appendix D a planning permission dated 25 June 1980 for the construction of houses adjoining the Application Land. The plan attached to that planning permission shows the Application Land, which is described as "PLAY AREA To be dedicated to SHDC" [SHDC being South Herefordshire District Council, a statutory predecessor of the Council].

9. The Application was considered by the Council to have been "duly made" and stamped as such on 3 June 2015. The Application was then published in accordance with the Commons Registration (England) Regulations 2014. A number of objections were received, including a substantial one from the owner of the land, Mr. C.M. Burford.

10. During the Determination Day Counsel for the Objector submitted that the Application was not in fact duly made, for reasons I return to below. I was invited to determine that matter as a preliminary issue and to declare that there need be no consideration of the evidence in the matter, and that the Council should not proceed further with the Application. I declined to make any such declaration for reasons I set out below.

D. THE LEGAL TEST

11. The Application is made under Section 15(2) of the 2006 Act which provides that land is to be registered where it is proven that:

> (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.

12. I explained at the opening of the Determination Day that Section 15(2) allows no scope for consideration of 'merit'/ whether registration would be a good or bad thing from the perspective of e.g. benefit to the community. I must focus solely on the elements of the test set out in Section 15(2). I will make general comments on each of the elements in turn and then apply them to the facts of this Application.

…a significant number…

13. This does not necessarily require a large number of people. Rather it must be a number of people using the land sufficient to indicate to the landowner that more than casual trespassing was underway, and that a right might be in the course of acquisition.[1]

[1] R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council v Paul Deluce, Christopher Whitmey, Rosie Booth [2010] EWHC 530 (Admin) HHJ Waksman at paragraphs 64-79;
The Queen on the Application of Alfred McAlpine Homes Limited v Staffordshire County Council [2002] EWHC 76 (Admin) Sullivan J, paragraph 77.

…of the inhabitants of any locality…

14. Only a community unit formally recognised by law will suffice[2].

…or of any neighbourhood within a locality…

15. This is a less formal concept. A neighbourhood must have some degree of cohesiveness and its boundaries must be clear. A single street has been held to be capable of being a neighbourhood[3].

…have indulged as of right…

16. Use "as of right" is a concept widely known to the law, not only in village green contexts. For use to be as of right it must be without force, openly, and not by permission of the landowner ("nec vi, nec clam, nec precario" as it is described in the traditional latin phrase)[4].

17. For the purposes of the present Application is it important to recall what was said in the ***Redcar*** case regarding use of right. The issue is not whether users of the land believed they had a right. Rather, the land must have been used in a way which would have put a landowner on notice that rights were potentially in the course of being acquired, and thus prompt the landowner to take action if they wished to avoid such rights being acquired. [5] I will also

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[2] The Queen on the Application of Cheltenham Builders Limited v South Gloucestershire Distrcict Council [2003] EWHC 2803 (Admin) Sullivan J, paragraph 41-48..

[3] R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council v Paul Deluce, Christopher Whitmey, Rosie Booth [2010] EWHC 530 (Admin) HHJ Waksman at paragraphs 8 & 79.

[4] R (on the application of Lewis) (Appellant) *v* Redcar and Cleveland Borough Council and another (Respondents) [2010] UKSC 11, Lord Walker at paragraphs 17-19.

[5] R (on the application of Lewis) (Appellant) *v* Redcar and Cleveland Borough Council and another (Respondents) [2010] UKSC 11, Lord Kerr at paragraph 116.

review below the extent to which the particular facts of this Application require consideration as to how "as of right" was interpreted in the ***Naylor*** case[6].

…in lawful sports and pastimes…

18. It has long been established that relatively informal pastimes will be sufficient to satisfy the legal test. The ***Sunningwell*** and ***Oxford*** cases established that children playing or dog walking were capable of being informal pastimes. However, simply walking from one point to another would not in itself constitute a sport or pastime (although it might give grounds for establishing a public right of way by virtue of long use)[7].

… for a period of at least twenty years ……they continue to do so at the time of the application…

19. The relevant period for the purposes of an application such as this, under Section 15(2) of the Act is twenty years immediately preceding the date of the application.

E. PRELIMINARY ISSUES

20. The consequences for the land owner of registration as a town or village green can be significant. There is accordingly a duty on the part of the Council as Registration Authority to ensure that the Application is formally correct, as well as establishing whether the legal tests in Section 15(2) of the Act have been met[8].

[6] Naylor v Essex CC [2014] EWHC 2560 (Admin).

[7] R v Oxfordshire County Council and Others [2000] 1 A.C. 335 Lord Hoffman at paragraphs 356H-357D; R v Suffolk County Council (1996) 71 P. & C.R. 463, Carnwath J, paragraph 477.

[8] R v Sunderland [2003] UKHL 60, Lord Bingham, paragraph 3.

21. As mentioned at paragraph 9 above Counsel for the Objector submitted that the Application suffered from a number of (fatal) procedural and substantive irregularities [paragraph 11(1)-4 of Counsel's Submissions].

22. Counsel suggested that two of these perceived flaws justified consideration as preliminary issues – 11(1) and 11(3) in his Submissions, which if found proven, would justify summary dismissal of the Application:

(a) Submission 11(1) – Whether previous management of the Application Land by the Council and its predecessors was sufficient to prove definitively that use was not as of right?

(b) Submission 11(3) – Failure by the Applicants to properly define a locality or neighbourhood in it/ to include a sufficient plan. Further, that omitting such a plan caused the Objector "huge and irremediable prejudice" [Counsel's Submissions paragraph 15(iv)] in preparing his objection.

Submission 11(1)

23. This point did not appear to me to be capable of being resolved without dispute of evidence (the criteria mentioned by Counsel at paragraph 12 of his Submissions). Accordingly I did not consider it suitable for resolution as a Preliminary Issue.

Submission 11(3)

24. I gave close consideration to Counsel's Submissions and to the case of R (Trail Riders) Fellowship v Dorset CC [2015] 1WLR 1406, and paragraph 9 of Schedule 4 to the Regulations, to which Counsel referred. The following points appear relevant here:

(a) I note that paragraph 9 of Schedule 4 provides a number of alternative means by which the Applicant may define the locality or neighbourhood (set out in (c) (i)-(iii), reference to map being set out at (iii).

(b) Paragraph 6 of the Application Form in this case reads “Willowbrook, Greytree, Ross-on-Wye, Herefordshire, HR9 7JS GPS Co-ordinates” (though no GPS co-ordinates follow).

(c) A tick has been inserted to indicate that a map has been attached for the purposes of Paragraph 6. However, the only map attached is that at Annex A. That is a copy of the Land Registry Title Plan HW20639 which has been manually amended only to the extent of colouring the Application Land orange. The neighbourhood is not marked.

(d) In my Directions I requested the parties to provide further clarification regarding the extent of the neighbourhood (paragraph 16(a)). The Applicant duly provided a plan with his Submissions defining an area edged red.

25. I concluded that it would not be appropriate to deal with Submission 11(3) as a Preliminary Matter. The written description supplied by the Applicant at paragraph 6 of the Application was in practice sufficient for the Objector to identify the relevant neighbourhood in general terms. Based thereon the Objector was able to prepare a very full objection bundle. The new map supplied with the Applicant’s Submission was helpful in clarifying matters, but did not fundamentally change the extent of the neighbourhood on which the Objector had based its submissions. The Objector was not therefore significantly disadvantaged. Accordingly, the balance of justice dictated that the Determination Day be allowed to continue.

The Trigger Event Issue

26. It is convenient to also mention at this point the issues raised by Counsel at paragraph 15 (v) of his Submissions. It is a matter of public record that the Applicant submitted an application for planning permission in respect of the Application Land. The planning application was received by the Council (acting as Local Planning Authority) before it received the current (village green) Application on 6 May 2015. However, the planning application was not published by the Council until 14 May 2015. Section 15C of the Act stipulates that it is the date of publication of a planning application which is decisive as

to whether a trigger event has occurred which would prevent the Council dealing with the current village green Application.

27. Counsel suggested that the absence of an adequate Map meant that the current Application did not become fully valid until the Determination Day itself when the Map was supplied. Accordingly says Counsel this meant that a Trigger Event had arisen by publication of the Objector's Planning Application on 14 May. Again therefore it is argued that the Application should not be allowed to proceed for that reason.

28. While that argument is cogently put, my conclusion at paragraph 25 above applies to this point also, so the argument must fail for the same reasons.

By Right/ As of Right

29. Case law has established that where a landowner gives the public permission to access land for the specific purpose of recreation that use will normally be considered to be "by right", not "as of right", and will not be sufficient to satisfy the statutory test under Section 15(2) of the Commons Act 2006. The public may be notified by the landowner either expressly (by means of notices explaining the basis on which they are permitted access) or impliedly (if acts of maintenance make it clear to users that the land is being made available for their recreational use)[9].

30. The principles set out in Beresford and Barkas were applied more recently in the case of ***Naylor***. I considered that the facts of that case were sufficiently similar to those involved in this Application to warrant referring to the case in my Directions [paragraph 16I], and asking the Applicant and the Objector to address the case in their submissions.

31. In ***Naylor*** an application for registration of land as village green failed because it was found that use by local inhabitants had been "by right" rather than "as of

[9] R (Beresford) v Sunderland City Council [2003] UKHL 60, [2004] 1 AC 889, Lord Bingham at paragraph 5;

right". The land in question was never owned by the local council but had been managed by the council with the consent of owner. It was held that the council's powers to maintain land under relevant legislation, such as the Open Spaces Act 1906, was sufficiently broad to allow for the management of land not owned by the Council. [10]

32. Where there was any doubt over the basis on which the council had maintained land, the Court would be guided by the 'presumption of regularity', a long standing principle of administrative law, which states that where there is no evidence to the contrary, councils will normally be presumed to have acted properly and in accordance with the most relevant statutory power available to them[11].

F. ORAL EVIDENCE FOR THE APPLICANT

33. Mr. Davies presented no witnesses but was cross-examined by the Objector's Counsel on the Application and the contents of his Submission. Mr. Davies confirmed that had taken the lead in preparing the Application on behalf of the other three named Applicants.

34. Counsel criticised the lack of Applicant witnesses on the basis that this deprived him of the opportunity he had anticipated to cross-examine them/ challenge the credibility of the evidence given.

35. Counsel questioned Mr. Davies regarding the wording of the Evidence Questionnaires which the Applicant had circulated. Mr. Davies confirmed that these were 'pro-formas' adapted from other village green applications. Counsel suggested that the wording deliberately 'put fear' into the minds of local residents regarding the likely fate of the land. Mr. Davies denied this was the intention and said he was simply pointing out possible consequences.

R (Barkas) v North Yorkshire CountyCouncil and another [2014] UKSC 31, Lord Neuberger, paragraph 14

[10] Naylor v Essex CC [2014] EWHC 2560 (Admin), paragraph 50.

36. Mr. Davies denied Counsel's suggestion that the wording of the Questionnaires had been misleading in so far as no guidance was given as to what were valid uses for the purpose of the application. There had been some verbal discussions with those who responded, although no record had been kept regarding such discussions.

37. Counsel asked for clarification of the frequency with which the claimed activities had taken place, was it daily or weekly? Mr. Davies was not sure of the legal technicalities on that point.

G. ORAL EVIDENCE FOR THE OBJECTOR

J.A. Hawkins

38. Mr. Hawkins had lived in Willowbrook for 5 years but moved away in January 2016. He had witnessed various people using the Application Land while he was a resident, walking along a well-trodden path. He had seen garden waste tipped on the land. In response to cross-examination from Mr. Davies, Mr. Hawkins indicated that he had walked along the path with his 5 year old daughter and restrained her when she tried to run on to the rest of the land.

B. Rhead

39. A current resident of Willowbrook, having lived there for 5 years and 9 months. Mr. Rhead's Statutory Declaration is at Tab 9, page 317 of the Objector's Bundle. He had witnessed people walking across the Application Land and seen the disposal of garden waste. He had not seen the Application Land used as a play area/ for communal purposes. On the rare occasions his two grandchildren had visited the site they had soon come back as their ball had rolled into the nettles. The appearance of the land had been much improved since Mr. Burford had carried out works thereto recently.

[11] Ditto, paragraph 69.

G. Woodman

40. A former resident of Greytree from 1981-1996. He had visited the Application Land to play/ explore during his childhood. He had mainly seen it used by dog walkers and as a cut-through to the land next door.

C.M. Burford

41. Mr. Burford's Statutory Declaration is at Tab 4, page 9 of the Objector's Bundle. Mr. Burford has lived adjacent to the Application Land since 1999. In the early part of that period it was maintained relatively well. However from 2005 onwards usage diminished rapidly and the Application Land became increasingly dilapidated.

42. Counsel asked Mr. Burford what he interpreted the sign on the land to mean. Mr. Burford indicated that he had understood the Council had operated the Application Land as a public facility.

43. Mr. Burford explained his approach to the issue of a Questionnaire to residents in April 2015 (Tab 6, page 71 onwards in the Objector's Bundle). In the absence of a definite plan depicting the locality he had endeavoured to follow DEFRA guidance on the subject. Question 3 in the Questionnaire sought to obtain more precise information on the use of the Application Land than was made available in the Applicant's Evidence Questionnaires. Mr. Burford's Questionnaires had been issued to properties which could 'see' the Application Land (65 in total). 18 Questionnaires were returned.

H. APPLICANT'S SUBMISSIONS

The 'Mistake' Issue

44. The Applicant suggested in their Submission [paragraph 2.3] that the Council had recently concluded that its past maintenance of the Application Land had

been a mistake, given that the land had never been formally adopted by the Council or its predecessors. Consequently, it was asserted that use by inhabitants had not been "by right" as might have otherwise been the case following the ***Naylor*** case.

45. Officers of the Council were present at the Determination Hearing. I asked the parties whether there was any appetite to ask for further clarification on this issue. On reflection neither Applicant nor Objector wished to hear further evidence on this point. I noted that I could ask for that evidence of my own initiative as Inspector if I felt it was necessary. However, I concluded that the ***Naylor*** case provided sufficient assistance on the legal principles to make that unnecessary. I conclude that the 'Mistake' claim must ultimately fail in my opinion for one or all of the following reasons.

46. Firstly, it is a matter of public record that there have been several waves of local Government re-organisation affecting the Application land over the last 30 years or more. Thus, from 1974 until 1998 the Application Land lay within the area of South Herefordshire District Council (being the authority which granted the 1980 planning permission referred to in paragraph 8 above. In 1998 South Herefordshire was replaced by a 'unitary' authority (Herefordshire), the Council.

47. Secondly, the Applicant faces a more fundamental obstacle. It might certainly be possible for the Council to change its previous policy regarding maintenance of the Application Land. However, to prove that the Council, and its predecessor South Herefordshire, were mistaken in their policy would require a very detailed inquiry into administrative records stretching back over 30 years. Based on the limited evidence presented to the Determination Day I can make no findings either way as to whether the maintenance of the Application Land was mistaken or not. However, I do not think that ultimately matters. The 'presumption of regularity' (mentioned in paragraph 31 above) will also operate here. ***Naylo*****r** establishes clearly that the Council and its predecessor had valid legal powers allowing them to maintain the Application Land. Any current uncertainty at the Council over maintenance does not alter

the fact that the Council's past maintenance gave the impression to members of the public that they were using a public park/ recreational area of some description.

I. OBJECTOR'S CLOSING STATEMENT

48. In his Closing Statement Counsel re-emphasised the extent to which the ***Naylor*** case appeared to support the Objector's submissions. If anything said Counsel the position in this case was clearer than Naylor in so far as the 1980 Planning Permission did provide evidence that there had originally been an intention to dedicate the Play Area for public use, even if the subsequent formalities were never carried out.

49. Counsel submitted that the Applicant's case was a hopeless one given that no substantial witness evidence had been produced for cross-examination. The Applicant's pro-forma Questionnaires appeared to Counsel to be of limited if any evidential value in proving what use had been carried out and how frequently.

50. Additionally, no attempt had been made to contest the works carried out on the Application Land since 2009 by Mr. Davies.

51. The absence of witnesses had deprived the Objector of the ability to challenge the signatures on several of the witness statements which it was alleged had been written by the same person.

J. APPLICANT'S CLOSING STATEMENT

52. Mr. Davies indicated that this whole situation had arisen from lack of appropriate and timely action by the Council. Had the Council or its predecessors complied with their duty to secure the dedication of the Play

Area back in the period 1980 to 1982 there would have been no need for local residents to resort to a village green application.

53. The Council's (lack) of action had effectively deprived local residents of an effective opportunity to act. The Council had been fully aware of the pending dispute in 2015 but still did not act. It chose to step aside from active management of the Application Land in spite of there being a general deficiency of play space in the area.

54. The camera evidence obtained by the Applicant [pages 59-61 of the Bundle] had been obtained after the Application was lodged and was not considered relevant.

55. Mr. Davies could not comment in detail on the allegation made regarding falsification of signatures on witness statements but surmised that there could be innocent explanations e.g. the makers of statements being unwell preventing them signing in person.

K. APPLYING THE LAW TO THE FACTS

56. We now return to the legal test that I set out at the beginning of this report and apply that test to the facts that I have found. I will do so by reference to the various components of the legal test set out in section 15(2) of the 2006 Act.

…a significant number…

57. The balance of the evidence suggests that the Application Land was more actively used in early years following construction of the adjoining houses in 1982. The level of use appears to have declined steadily in recent years (possibly due to reduction in maintenance by the Council making it less appealing to residents).

…of the inhabitants of any locality…or…or of any neighbourhood within a locality…

58. The Applicant did belatedly clarify the extent of the neighbourhood claimed, in the form of the plan attached to its Submissions on the Determination Day. Albeit the neighbourhood consists of essentially two streets there would appear to be sufficient cohesiveness to satisfy the case law regarding neighbourhoods.

…have indulged as of right…

59. I conclude that the use of the Application Land was 'by right' not 'as of right'. The Application itself [Appendix E] records that until 2015 the general belief in the neighbourhood was that the Application Land belonged to the Council. That belief poses an insurmountable challenge for the Applicant in dealing with the ***Naylor*** case. Even if the actions of the Council in maintaining the Application Land were mistaken as claimed by Mr. Davies in his Submission, that does not assist the Applicant, ***Naylor*** continues to apply by virtue of the 'presumption of regularity'.

…in lawful sports and pastimes…

60. I conclude that in recent years, dog walking has become one of the chief uses of the Application Land, along with crossing the Application Land to get to adjoining land. The latter is in itself not capable of being use for the purpose of this Application. However, given my finding that use of the Application Land was 'by right' in any event, that distinction ceases to have any practical impact.

… for a period of at least twenty years ……they continue to do so at the time of the application…

61. I find that use has continued up to the date of the Application albeit at an increasingly reduced level.

L. FINAL CONCLUSION AND RECOMMENDATION

62. For the reasons set out in this Report I conclude that the Application does not meet all the legal tests required by section 15(2) of the 2006 Act. Accordingly I would recommend to the Council that this Application should be rejected.

M. ACKNOWLEDGEMENTS

63. I would wish to record my thanks to Mr. Davies and Mr. Hunter for their assistance during the Determination Hearing. Mr. Davies presented the Applicant's case in a very diligent and helpful manner, in spite of having no legal assistance on the day.

64. Thanks are also due to the Council for their assistance with arrangements for the running of the Determination Hearing.

10th March 2016

Peter Endall
Warwickshire Legal Services
Resources Directorate
Shire Hall
Warwick
CV34 4RL

SCHEDULE OF DOCUMENTS

1. Application dated 5 May 2015.
2. Objection dated 23 July 2015 filed by Harrison Clark Rickerbys, solicitors, comprising a Bundle of 442 pages.
3. Submission of J. Hunter of Counsel dated 23 February 2016 (Objector)
4. Submission of P.N. Davies dated 24 February 2016 (Applicant) including plan depicting claimed neighbourhood edged red.