



WOKINGHAM BOROUGH COUNCIL

A Meeting of the **COMMONS REGISTRATION
COMMITTEE** will be held at the Civic Offices, Shute End,
Wokingham RG40 1BN on
WEDNESDAY 13 JANUARY 2016 AT 7.30 PM

A handwritten signature in black ink, appearing to read 'Andy Couldrick', written in a cursive style.

Andy Couldrick
Chief Executive
Published on 5 January 2016

Our Vision

A great place to live, an even better place to do business

Our Priorities

Improve educational attainment and focus on every child achieving their potential

Invest in regenerating towns and villages, support social and economic prosperity, whilst encouraging business growth

Ensure strong sustainable communities that are vibrant and supported by well designed development

Tackle traffic congestion in specific areas of the Borough

Improve the customer experience when accessing Council services

The Underpinning Principles

Offer excellent value for your Council Tax

Provide affordable homes

Look after the vulnerable

Improve health, wellbeing and quality of life

Maintain and improve the waste collection, recycling and fuel efficiency

Deliver quality in all that we do

MEMBERSHIP OF THE COMMONS REGISTRATION COMMITTEE

Councillors

Chris Bowring
Bob Pitts
Chris Singleton

Tim Holton
Malcolm Richards
Wayne Smith

John Kaiser
Rachelle Shepherd-DuBey
Simon Weeks

ITEM NO.	WARD	SUBJECT	PAGE NO.
1.		ELECTION OF CHAIRMAN FOR THE 2015/16 MUNICIPAL YEAR To elect a Chairman for the 2015/16 municipal year.	
2.		ELECTION OF VICE-CHAIRMAN FOR THE 2015/16 MUNICIPAL YEAR To elect a Vice-Chairman for the 2015/16 municipal year.	
3.		APOLOGIES FOR ABSENCE To receive any apologies for absence.	
4.		DECLARATION OF INTEREST To receive any declarations of interest.	
5.	Wescott	APPLICATION FOR REGISTRATION OF LAND AT WOODCRAY AS A VILLAGE GREEN Recommendation: Refusal.	5 - 14

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Agenda Item 5.

TITLE	Application for registration of land at Woodcray as a Village Green.
FOR CONSIDERATION BY	Commons Registration Committee on 13 January 2016
WARD	Wescott
DIRECTOR	Andrew Moulton, Head Of Governance and Improvement Services

OUTCOME / BENEFITS TO THE COMMUNITY

The decision will provide certainty to the landowner and the public as to the current status of the land.

RECOMMENDATION

That the application for registration of land at Woodcray as a village green should be rejected on the basis that it fails to meet the statutory test for registration under Section 15 of the Commons Act 2006 for the reasons given in the Inspector's Report dated 15th August 2015.

SUMMARY OF REPORT

The report sets out the reasons why the application for registration should be rejected.

The Council is the relevant Commons Registration Authority for land within the Borough of Wokingham.

On 7th March 2013 an application for registration of the land at Woodcray edged yellow on the plan attached to this report was made to the Council by Christopher Benham of 7 Hart Dyke Close Wokingham. The application sought registration of the land as a village green. The application was made under section 15(3) of the Commons Act 2006 ("the Act") and stated that the application was based on the free use of the land for community purposes unstoppped and without permission for over 40 years continuously.

The application land is owned by Brookland Investments Limited and the company objects to the registration of its land as a village green on the basis that the statutory requirements for registration have not been met.

The procedural requirements for dealing with applications are contained in the Commons (Registration of Town or Village Greens) (Interim Arrangements) Regulations 2007. Regulation 6(7) states that the authority must not refuse an application without

giving the applicant a reasonable opportunity of dealing with objections and other matters.

As the solicitor acting for the landowner raised issues of fact on in their objection to registration it was considered necessary to convene a non-statutory public inquiry to examine the factual evidence. To reach a decision on the merits or otherwise of the application without holding an inquiry in order to test the evidence could have rendered any decision by the registration authority susceptible to legal challenge.

A non-statutory public inquiry was held at the Council offices between 1st and 4th September 2014 and then on 24th, 26th & 27th November 2014 during which evidence for and against registration was presented on behalf of the applicant and the landowner.

The Council is legally obliged to take into account the contents of the application for registration and any material accompanying it. It is also obliged to take into account any objections or other written representations; all oral representations made at the public inquiry, the findings made at any site visit and the report and the recommendations of the Inspector following the public inquiry. It has dealt with the application for registration in accordance with Defra Guidelines and its own published procedure for disputed applications.

BACKGROUND

Section 15 of the CA 2006 contains the following material provisions for the registration of new town or village greens:

“Registration of greens

- (1) *Any person may apply to the commons registration authority to register land as a town or village green in a case where subsection (2), (3) or (4) applies.*
- (2) *This subsection applies where –*
 - (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
 - (b) *they continue to do so at the time of the application.*
- (3) *This subsection applies where –*
 - (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
 - (b) *they ceased to do so before the time of the application but after the commencement of this section; and*
 - (c) *the application is made within the period of two years beginning with the cessation referred to in paragraph (b).*
- (4) *This subsection applies where –*

- (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
- (b) *they ceased to do so before the commencement of this section; and*
- (c) *the application is made within the period of five years beginning with the cessation referred to in paragraph (b).*

...

(7) *For the purposes of subsection (2)(b) in a case where subsection (2)(a) is satisfied –*

(a) ...

(b) *where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land “as of right”.*

The meanings of the various expressions used in CA 2006 section 15 have been the subject of numerous court decisions.

...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 trespassers¹. Use must not be merely trivial or sporadic. It must be enough to signify to the reasonable landowner that a right is being asserted and ought to be resisted if the right is not recognised.

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

The legislation provides for the recreational users of the application land to be a significant number of the inhabitants of **either**

- “any locality” (limb (i)) **or**
- “any neighbourhood within a locality” (limb (ii)).

The current jurisprudence is that the word “locality” may have different meanings in limbs (i) and (ii). However, it is limb (ii) that is relied upon in this case.

A locality means an administrative district or an area with legally significant boundaries. It must be more than an arbitrary area drawn on a plan. See the *Paddico* case at first instance². When the *Paddico* case went to the Court of Appeal³, it was said that a locality also had to have some community of interest on the part of its inhabitants.

¹ *R (McAlpine) v Staffordshire CC* [2002] EWHC 76 (Admin) at para. 77

² *Paddico (267) Ltd. v Kirklees Metropolitan Council* [2011] EWHC 1606 (Ch) at para. 97(i)

...have indulged as of right...

As of right means without force, secrecy or permission (or in the Latin phrase *nec vi, nec clam, nec precario*). It is for the party seeking registration to prove 20 years as of right. In *R-v- Oxfordshire County Council ex parte Sunningwell Parish Council* [1999] UKHL 28 Lord Hoffman held that in analysing whether use has been as of right, the Court must consider how the matter would have appeared to the landowner.

“Force” does not just mean physical force. Use is by force in law if it involves climbing or breaking down fences or gates or if it is contentious or under protest⁴. An important issue in this case is whether and, if so, when, use of the application land by local people for informal recreation became contentious. It is considered that the use became contentious after 14th January 2013 this being the date on which the Landowner, through his solicitor, made it clear that it objected to the use of the land.

Use that is secret or by stealth will not be use “as of right” because it would not come to the attention of the landowner. Use must be open so that the landowner can see that it is taking place and can resist it if he wishes.

“Permission” can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied, but not by inaction or acts of encouragement by the landowner⁵. It was held in the *Beresford* case that permission must be revocable or time limited: permission that is unlimited and irrevocable amounts to acquiescence.

...in lawful sports and pastimes on the land...

The words “lawful sports and pastimes” (LSP) form a composite expression which includes informal recreation such as walking, with or without dogs, and children’s play⁶. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way⁷. There is no need to establish that at least one sport and one pastime was taking place on the land.

...for a period of at least twenty years...

In the case of an application under CA 2006 s. 15(3) or (4), it is the 20 years immediately before the cessation of qualifying use. It is immaterial that the statutory test for qualifying user may have changed during the 20 year period⁸.

A number of important procedural issues have been decided by the courts:

³ *Adamson v Paddico* [2012] EWCA Civ 262

⁴ *R (Lewis) v Redcar & Cleveland Borough Council* [2010] 2 AC 7 per Lord Rodger at paras. 88-90 and see *R (Oxfordshire & Buckinghamshire NHS Trust & anor) v Oxfordshire County Council* [2010] EWHC 530 (the *Warneford Meadow* case)

⁵ *Beresford*

⁶ *Sunningwell* at pp 356F-357E

⁷ *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 (the *Trap Grounds* case) at paras 96-105

⁸ *Redcar*: Lord Rodger at paras. 120-121, *Leeds Group plc v Leeds City Council* [2011] Ch 363 at paras 108-110.

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new TVG, it is no trivial matter for a landowner to have land registered as a TVG, and all the elements required to establish a new TVG must be “properly and strictly proved”⁹. The standard of proof is the usual civil standard of proof on the balance of probabilities.
- **Defects in Form 44.** The House of Lords has held in the *Trap Grounds* case that an application is not to be defeated by drafting defects in the application form. Subject to the overriding requirement of fairness to the parties, the issue for the CRA is whether or not the application land has become a new TVG
- **Part registration.** The House of Lords also held in the *Trap Grounds* case that the CRA can register part only of the application land if it is satisfied that part but not all of the application land has become a new green. Indeed, the House thought that a larger or different area could be registered if there was no procedural unfairness¹⁰.

Application of the Law to the present application

Sufficiency of user

The applicant is required to establish “*use for at least 20 years of such amount and in such manner as would reasonably regarded as the assertion of a public right.*” Secondly that the whole of the land was being used for lawful sports and pastimes for not less than 20 years and not just part of it and thirdly that the use would appear to the reasonable landowner to be referable to use for general recreational purposes so as to sustain a claim for registration as a village green rather than as a right of way.

Having regard to the evidence presented at the Inquiry as a whole and the findings of the Inspector, it is apparent that the Applicant has failed to establish the requisite use of the land as a whole in sufficient quality and quantity and in a manner to demonstrate the assertion of a public right to the reasonable landowner and thus fails to satisfy the strict requirement for registration. The application should therefore be rejected for this reason.

The Authority has the power to register a smaller area of the application site if it is found to have satisfied the statutory criteria for registration. At the Inquiry the Applicant invited the Authority to consider registration of a smaller area within the application land comprising the upper and northern fields. This land is marked as areas 1-8 on the plan attached to the Inspector’s Report. Having regard to the evidence presented at the Inquiry it is considered that the applicant has failed to provide evidence of continued use of the reduced area of land for the whole of the qualifying periods, these being identified by the Applicant as between 21st March 1991 and 21st March 2011 or alternatively between 13th January 1993 and 13th January 2013.

It was concluded by the Inspector that there was evidence of use of the reduced area from 1996 but there was no evidence of qualifying use for the whole period. In particular, she found very little evidence of qualifying use between 1991 and 1995 of such quality that the use would have appeared to the reasonable landowner to be referable to use

⁹ *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in *Beresford* at para. 2

¹⁰ Lord Hoffmann at paras 61-62, Lord Scott at para 111, Lord Rodger at para 114, Lord Walker at para 124 and Lady Hale at para 144.

for general recreational purposes rather than use as a right of way. It is therefore recommended that the application for registration of the reduced area of the application land should be rejected for this reason.

Claimed Neighbourhood

The Applicant relied upon 2 alternative neighbourhoods in support of the application. Neighbourhood A comprising Hart Dyke Close and Neighbourhood B which included Neighbourhood A and sections of Finchampstead Road and Luckley Road and the whole of Luckley Wood and Luckley Oakfield School and relied upon the test for neighbourhood within a locality as set out in the Cheltenham Builders case. The Cheltenham Builder's case held that the commons registration authority is required to be satisfied that the specified neighbourhood has a sufficient degree of cohesiveness so to qualify as a neighbourhood within a locality. The Inspector concluded that insufficient evidence was produced to demonstrate that either neighbourhood benefitted from the cohesive factors necessary to satisfy the neighbourhood requirement for the whole of the qualifying period and therefore the application should be rejected for this reason.

Conclusions

The Application fails for the following reasons:

- A. The Applicant has failed to establish that there was continuous qualifying use of the land for at least 20 years; and
- B. The Applicant has failed to prove use by the inhabitants of a qualifying neighbourhood. Neither of the claimed neighbourhoods are neighbourhoods within the meaning of section 15(3) of the Commons Act 2006.

FINANCIAL IMPLICATIONS OF THE RECOMMENDATION

The Council faces severe financial challenges over the coming years as a result of the austerity measures implemented by the Government and subsequent reductions to public sector funding. It is estimated that Wokingham Borough Council will be required to make budget reductions in excess of £20m over the next three years and all Executive decisions should be made in this context.

	How much will it Cost/ (Save)	Is there sufficient funding – if not quantify the Shortfall	Revenue or Capital?
Current Financial Year (Year 1)	£5,000	yes	
Next Financial Year (Year 2)	n/a		
Following Financial Year (Year 3)	n/a		

Other financial information relevant to the Recommendation/Decision

The Council is obliged to determine applications for registration and thus obliged to bear all related costs.

Cross-Council Implications

no impact

List of Background Papers

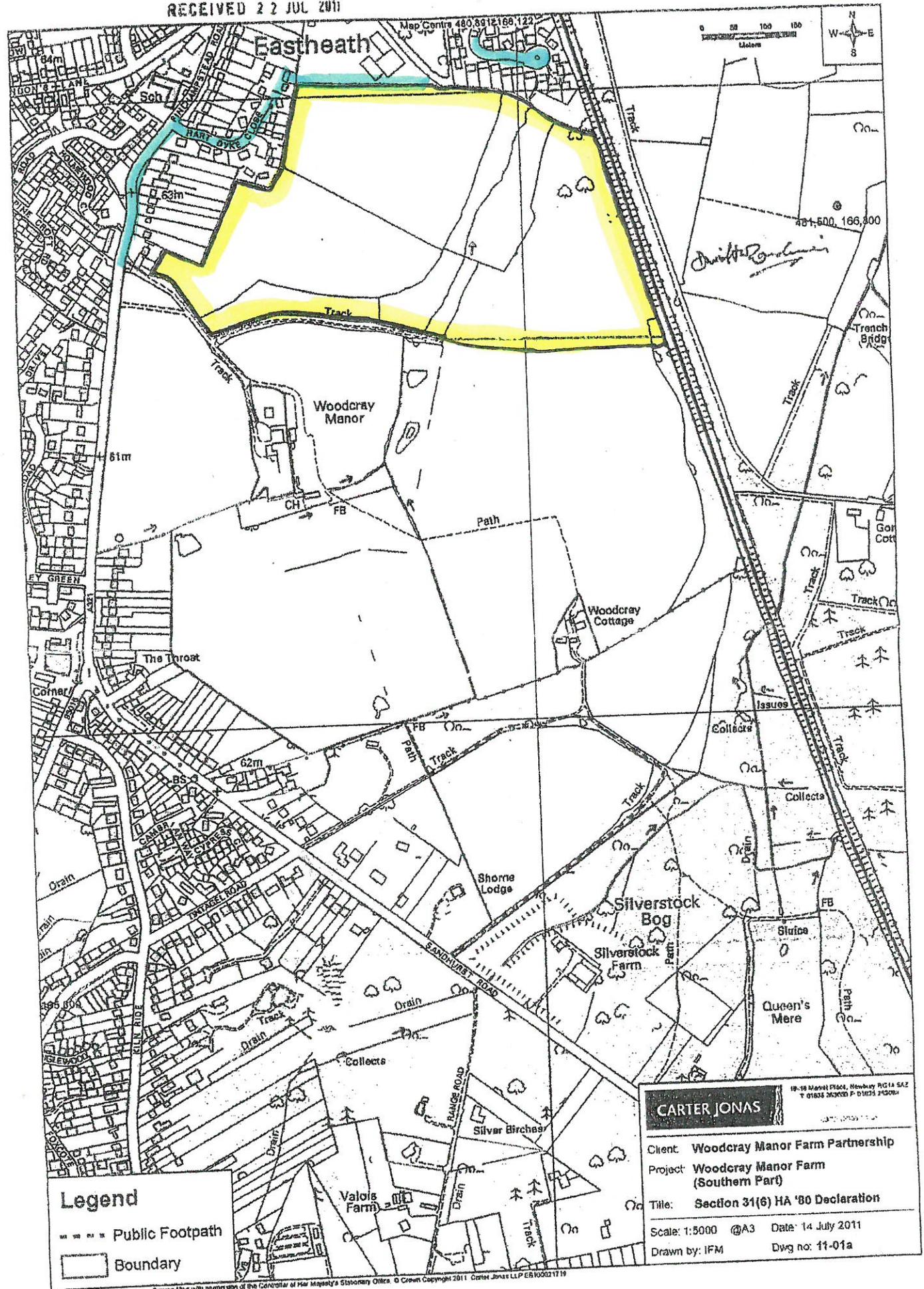
Application; Inspector's Report

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Date 4 th January 2016	Version No. 1

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COL M
07/03/2013

RECEIVED 22 JUL 2011



Legend

--- Public Footpath

□ Boundary

CARTER JONAS

Client: Woodcray Manor Farm Partnership
 Project: Woodcray Manor Farm (Southern Part)
 Title: Section 31(6) HA '80 Declaration

Scale: 1:5000 @A3 Date: 14 July 2011
 Drawn by: IFM Dwg no: 11-01a

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