Coventry City Council

Public report
Planning Committee

Report to
Planning Committee 20 February 2020
Report of

Title:
Application to register land at Juniper Park, Woodridge Avenue as a town or village green

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Is this a key decision?

No

Executive Summary:

The City Council as registration authority has received an application for the registration of Juniper Park, Woodridge Avenue as a Village Green. The purpose of this report is to enable the Planning Committee to consider the application made under the Commons Act 2006 to the City Council as the registration authority regarding the potential registration of land known as Juniper Park, Woodridge Avenue as a Town or Village Green.

In order for land to be registered as a Town or Village Green it must meet certain criteria and if not all of these criteria are met, then the land should not be registered as such. In this instance not all of the criteria are met, as the information that has been submitted shows that use of the land known as Juniper Park, has been 'by right' rather than 'as of right'.

Recommendations:

That Planning Committee are recommended to:

Reject the application to register the land known as Juniper Park, Woodridge Avenue as a town or village green, for the reasons set out in the Inspector's report at Appendix 2 of this report.

List of Appendices included:

Appendix 1
Location plan showing the land subject of the application

Appendix 2
The independent Inspector's report

Appendix 3
Copies of the correspondences, documentary evidence and representations submitted in support and objection to the application are available to view electronically via the following link:
http://planning.coventry.gov.uk/portal/servlets/ApplicationSearchServlet?PKID=799902

Background papers:

None

Other useful documents

None

Has it been or will it be considered by Scrutiny?

No

Has it been or will it be considered by any other Council Committee, Advisory Panel or other body?

No

Will this report go to Council?

No

Report title: Application to register land at Juniper Park, Woodridge Avenue as a town or village green

1. Context (or background)

1.1 Coventry City Council is the registration authority for town and village greens under the Commons Act 2006.

1.2 On 29th November 2018 the Council received an application from Allesley Green Residents Association made under Section 15(1) of the Commons Act 2006, to register Juniper Park, Woodridge Avenue as a town or village green.

1.3 Notices of the application were sent to residents of Allesley Green and affected landowners and the application was advertised by way of site notices and in the Coventry Evening Telegraph. An objection was received from Coventry City Council (as landowner).

1.4 In October 2019 the Council appointed an expert barrister as an independent Inspector to assess the evidence submitted in respect of the application. The Inspector has had the opportunity to assess the evidence submitted by all parties and her report is attached in appendix 2.

2. The relevant statutory requirements

2.1 The Commons Act 2006 is the statutory regime governing town and village greens. The Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 of the Act provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.

2.2 The relevant statutory requirements are contained in Section 15(2) of the Commons Registration Act 2006 which enables a person to apply to register land as a town or village green 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 a least 20 years; and
(b) they continue to do so at the time of the application.

2.3 As Registration Authority, the City Council has a duty to decide whether or not the use of the land subject to the application fully meets **all** the elements of qualifying use under section 15(1) and 15(2) of the Commons Act 2006. In order for the application to be successful the applicant needs to demonstrate that:

(i) the application land comprises “land” within the meaning of the 2006 Act;
(ii) the land has been used for lawful sports and pastimes;
(iii) such use has been for a period of not less than 20 years;
(iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
(v) such use has been as of right; and
(vi) such use continued at the time of the application.

2.4 The Registration Authority is required to either accept or reject the Application solely on the facts. Any other issues, including those of desirability or community needs, are not legally relevant and cannot be taken into consideration. Acceptance means the land will be registered. Rejection means that no registration may take place. Under the current law, land can only have the legal status of a Town or Village Green upon registration.

3. The evidence and submissions

3.1 The Inspector's report contains a detailed analysis of the background of the case, site description, history, the inspector's conclusion, the application of the law and a recommendation. A full copy of the report is attached as **Appendix 2** to this report.

3.2 The evidence which has been considered by the Inspector includes the original application documentation submitted by the applicant and all other correspondence received in respect of the application. In addition to this, all further correspondence between the registration authority and both the applicant and landowner were considered.

3.3 In considering the evidence put forward, the Inspector has therefore had regard to caselaw on the various elements of the statutory criteria required to be established for land to be registered as a town or village green, which are set out in paragraphs 3.8- 3.22 of her report.

4. Consideration of the facts

4.1 ***The Land*** – The Inspector finds the land has clearly defined and fixed boundaries and there is no dispute in any of the evidence that the area of land comprises "land" within the meaning of Section 15(2) of the 2006 Act and as such is capable of registration as a town or village green.

4.2 ***Relevant 20 year period*** – The relevant 20 year period for the application is 29 November 1998 until 29 November 2018.

4.3 ***Locality or neighbourhood within a locality*** – The Inspector notes that the applicants have not specifically identified whether they contend that Allesley Green is a qualifying neighbourhood or locality and the objector argues that it is capable of being neither. In the Inspector's view, Allesley Green is not a recognised area known to the law (such as an established parish or electoral ward).

4.4 On the issue of neighbourhood, the crucial issue is whether it is an area with a sufficient degree of pre-existing cohesiveness. On this matter the Inspector notes that: Allesley Green is a recognised postal address; it has a resident's association (Allesley Green Residents Association); there is a convenience store known as 'Allesley Green One Stop Shop'; it is an area with a recognised name (the Allesley Green Estate); and it is apparent from the applicant's evidence that community events take place on the land and there is a strong sense of community.

4.5 Consequently the Inspector finds that Allesley Green is a qualifying neighbourhood within the meaning of section 15(2) of the 2006 Act.

4.6 ***Use of land for lawful sports and pastimes by a significant number of local inhabitants –*** The Inspector notes that the witness statements submitted in support of the application make reference to frequent informal recreation activities being carried out on the land (which include dog walking, childrens play, den building, sports and picnicking) and that a well maintained play area is situated within the land. In addition to this, there is evidence of formal recreational events taking place (including treasure hunts, May day festivals and carol services).

4.7 It is also apparent from the evidence that the land is used by residents of the Allesley Park Estate, which the Inspector finds unsurprising given its central location within the estate, well laid out nature and accessibility. Indeed the objector acknowledges that local residents have and continue to use the land to indulge in lawful sports and pastimes and the Inspector finds that ‘the evidence submitted demonstrates that the land has been used for lawful sports and pastimes by a significant number of the inhabitants of Allesley Green throughout the relevant twenty year period’.

4.8 ***Use as of right –*** for the use to have been ‘as of right’ for the 20 year period, it needs to have been without secrecy (*nec clam)*, without force *(nec vi)* and without permission *(nec precario)*. There is no indication that use of the land was carried out by stealth as it was done openly and without secrecy. Likewise, there is no indication that the use of the land was by force as there is open access to the land and this use has never been challenged by the landowner.

4.9 The fundamental issue is whether the land has been used ‘as of right’ (where the use is trespassory) or ‘by right’ (with the landowners permission and without trespass). The relevant case here is that of *Barkas,* the details of which are set out in paragraphs 4.20-4.25 of the Inspector’s report.

4.10 From the evidence, it would seem that the land was transferred to the City Council in 1992 (prior to the 20 year period) and the matter of transfer or ownership has not been challenged. The transfer does not identify the purpose for acquiring the land, but the landowner claims it was appropriated as public open space. A S.52 Agreement from 1982 required the estate developers to provide a fully equipped play area and there is no dispute that this was laid out shortly after and has been used as such and maintained by the landowner since.

4.11 The Inspector finds that “as the Land has been owned and held by a local authority for the very purpose of public recreation, laid out as such and maintained as such, and so used by the public throughout the relevant 20 year period, the public have had, and continue to have, a right to use it. They have not used it as trespassers; rather, they were and are entitled to use it for recreational purposes. In such circumstances, it is my opinion that the Land has been used ‘by right’, namely the use has been *precario* and not ‘as of right’. Consequently, I conclude that that element of the statutory criteria has not been established.”

4.12 ***Continuation of use –*** the Inspector finds that use of the land has continued up until the date of the application and indeed continues to be used.

5. The Inspectors conclusion

5.1 In looking at the six criteria, all of which need to be met in order for a town or village green application to be successful, the Inspector concludes that:

(i) the application Land comprises Land which is capable of registration as a town or village green in principle (criteria met)
(ii) the relevant 20 year period is 29 November 1998 to 29 November 2008 (criteria met)
(iii) Allesley Green is a qualifying neighbourhood (criteria met)
(iv) the application land has been used for lawful sports and pastimes by a significant number of the inhabitants of Allesley Green throughout the 20 year period (criteria met)
(v) the recreational use of the land has been 'by right' and not 'as of right' throughout the relevant the 20 year period (criteria **not** met)
(vi) the use of the land for lawful sports and pastimes has continued until the date of the application (criteria met).

5.2 Not all of the six criteria which would allow the land to be registered as a town or village green are met, as the land is being used 'by right' and not 'as of right'.

6. The Inspectors recommendation

6.1 The Inspector recommends that the application to register the land known as Juniper Park as a town or village green be rejected.

7. Evaluation of Options

7.1 The Inspector's findings are not binding on this Committee, but the Committee should have full regard to the appended Inspector's report and the recommendations of the independent Inspector and act fairly and reasonably.

7.2 It is for the Committee to reach its own determination on the matter of fact and law arising as a result of the application. The application should be determined on the facts of the case and not on the merits or otherwise of registration.

7.3 The Inspector has considered the evidence and has been able to give appropriate weight to it with the benefit of having viewed all of the documentation in respect of the application and her own significant experience in village green matters.

7.4 The Committee would need to have clear and relevant reasons to reach a decision which conflicts with the recommendations of the Inspector.

8. Financial implications

8.1 The council is required to determine the application and therefore no financial implications are relevant

9. Legal implications

9.1 There is a duty to determine the application in accordance with the legal requirements as contained in Section 15 of the Commons Act 2006

10. What is the impact on the organisation?

10.1 None

11. Equality and Consultation Analysis (ECA)

11.1 Section 149 of the Equality Act 2010 created the public sector equality duty. Section 149 states:-

A public authority must, in the exercise of its functions, have due regard to the need to:

a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Officers have taken this into account and given due regard to this statutory duty, and the matters specified in Section 149 of the Equality Act 2010 in the determination of this application.

There are no known equality implications arising directly from this development.

12. Implications for (or impact on) climate change and the environment

12.1 None

13. Implications for partner organisations?

13.1 None

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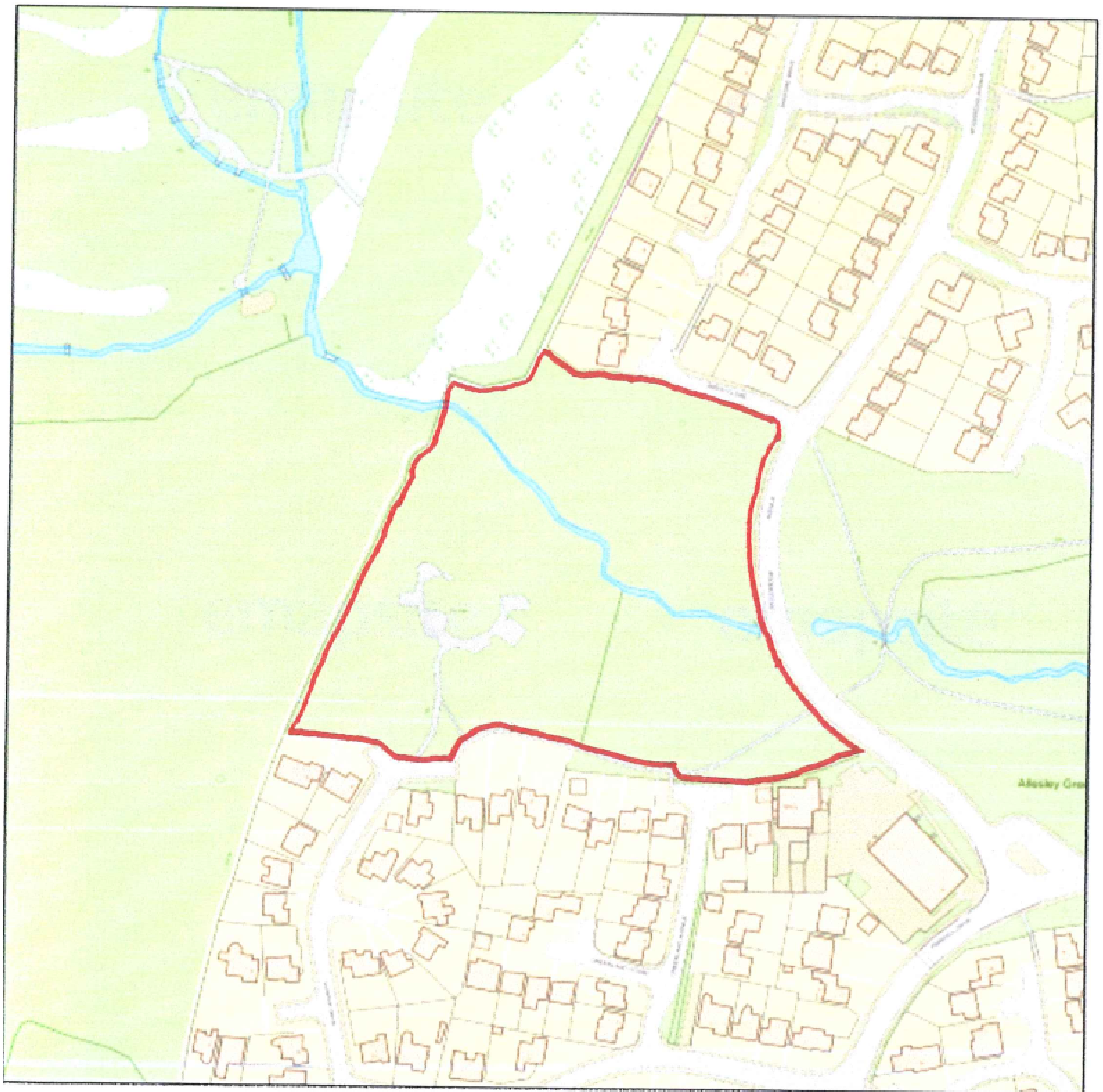
This report is published on the council's website:
www.coventry.gov.uk/councilmeetings

Appendices

Appendix 1 - Location plan showing the land subject of the application



Appendix 2 - The independent Inspectors report

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS JUNIPER PARK,

WOODRIDGE AVENUE, COVENTRY

AS A TOWN OR VILLAGE GREEN

REPORT

of Miss Ruth Stockley

04 February 2020

Coventry City Council

Council House

Coventry

CV1 5RR

Ref: VG/2018/3366

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS JUNIPER PARK,

WOODRIDGE AVENUE, COVENTRY

AS A TOWN OR VILLAGE GREEN

REPORT

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1. INTRODUCTION

1.1 This Report relates to an Application ("the Application") made under section 15(1) of the Commons Act 2006 ("the 2006 Act") to register land known as Juniper Park, Woodridge Avenue, Coventry CV5 7PW ("the Land") as a town or village green. Under the 2006 Act, Coventry City Council, as the Registration Authority, is required to register land as a town or village green where the relevant statutory requirements have been met. The Registration Authority have appointed me as an independent Inspector to consider all the relevant evidence relating to the Application and then to prepare a Report containing my findings and recommendations for consideration by the Authority.

1.2 The determination of the Application is for the Registration Authority, taking into account the contents of this Report. Provided it acts lawfully, the Registration Authority is free to accept or to reject any of my recommendations contained in this Report.

2. APPLICATION

2.1 The Application is made by the Allesley Green Residents Association ("the Applicants"). The Registration Authority's official stamp of valid receipt is dated 29 November 2018. Part 5 of the Application Form describes the Land sought to be registered as follows:

> "*Juniper Park (including Children's Play Area), Woodridge Avenue, Coventry CV5 7PN*"

and its location is identified as being "*Land Parcels 26419640; 26429367; 26433925*". A map showing the Land outlined in red has been submitted marked "Exhibit B". In part 6 of the Application Form, the "locality or neighbourhood within a locality" in respect of which the Application is made is identified as "*Allesey Green, Coventry CV5 7PN*" (sic). A map of that area has been provided at Appendix 3 to a letter from the Applicants to the Registration Authority dated 8 November 2019.

2.2 The Application is made on the basis that section 15(2) of the 2006 Act applies, which provision contains the relevant qualifying criteria. The justification for the registration of the Land is set out in part 7 of the Form and in a Supporting Statement submitted with the Application. The Application is also supported by some 42 witness statements, petition sheets signed by 41 residents, photographs, maps and other documentary evidence.

2.3 The Application was duly advertised by the Registration Authority to which a number of responses were made. One objection ("the Objection") was received from the owner of the Land, namely Coventry City Council in its capacity as Landowner ("the Objector").

2.4 Further representations, correspondence and documentary evidence has been submitted in support of both the Application and the Objection. I have been provided with copies of all the representations, correspondence and supporting documents, all of which I have read and the contents of which I have taken into account in this Report. I shall assume that copies of all the submitted documentation will be made available to the Registration Authority when making its decision, and so I do not set out its detailed contents herein.

2.5 I visited the Site on 9 December 2019. I shall assume that members of the Registration Authority will ensure they are familiar with the Application Land prior to reaching their decision.

3. LEGAL FRAMEWORK

3.1 I set out below the relevant general legal framework within which the Application must be considered and ultimately be determined by the Registration Authority. I shall then proceed to apply the legal position to the facts I find based on all the documentary evidence that has been adduced as referred to above.

Commons Act 2006

3.2 The Application is made pursuant to the Commons Act 2006. That Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.

3.3 The Application seeks the registration of the Land by virtue of the operation of section 15(2) of the 2006 Act. Under that provision, land is to be registered as a town or village green 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.*"

3.4 Therefore, for the Application to succeed, it must be established that:-

- (i) the Application Land comprises "land" within the meaning of the 2006 Act;
- (ii) the Land has been used for lawful sports and pastimes;
- (iii) such use has been for a period of not less than 20 years;
- (iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;

(v) such use has been as of right; and

(vi) such use continued at the time of the Application.

Burden and Standard of Proof

3.5 The burden of proving that the Land has become a village green rests with the Applicants. The standard of proof is the balance of probabilities. That is the approach I have used.

3.6 Further, when considering whether or not the Applicants have discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in ***R. v Sunderland City Council ex parte Beresford***[1] where, at paragraph 2, he noted as follows:-

> "*As Pill LJ. rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111 "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green …". It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met.*"

Hence, all the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on a balance of probabilities.

Statutory Criteria

[1] [2004] 1 AC 889. Although ***Beresford*** was overruled by ***R. (on the application of Barkas) v. North Yorkshire County Council Barkas*** [2014] 3 All ER 178, it was not done so on this point which remains good law.

3.7 Caselaw has provided helpful rulings and guidance on the various elements of the statutory criteria required to be established for land to be registered as a town or village green which I shall refer to below.

Land

3.8 Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration.

3.9 However, it was stated by way of *obiter dictum* by the majority of the House of Lords in ***Oxfordshire County Council v. Oxford City Council***[2] that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered.

Lawful Sports and Pastimes

3.10 It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[3] that "*lawful sports and pastimes*" is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children's play.

3.11 However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way. In ***R. (Laing Homes Limited) v. Buckinghamshire County Council***[4], Sullivan J. (as he then was) noted at paragraph 102 that:-

> "*it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to*

[2] [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.
[3] [2000] 1 AC 335 at 356F to 357E.
[4] [2003] EWHC 1578 (Admin).

walk, with or without dogs, around the perimeter of his fields – and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields."

3.12 Moreover, Lightman J. at first instance in ***Oxfordshire County Council v. Oxford City Council***[5] stated at paragraph 102:-

> "*Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).*"

He went on at paragraph 103 to state:-

> "*The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct*

[5] [2004] Ch. 253.

access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e g, fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights."

The Court of Appeal and the House of Lords declined to rule on the issue since it was so much a matter of fact in applying the statutory test. However, neither the Court of Appeal nor the House of Lords expressed any disagreement with the above views advanced by Lightman J.

Continuity and Sufficiency of Use over 20 Year Period

3.13 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: ***Hollins v. Verney***.[6]

3.14 Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: ***R. (on the application of Lewis) v. Redcar and Cleveland Borough Council***.[7]

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[6] (1884) 13 QBD 304.
[7] [2010] UKSC 11 at paragraph 36.

Locality or Neighbourhood within a Locality

3.15 A "*locality*" must be a division of the County known to the law, such as a borough, parish or manor: ***MoD v Wiltshire CC***;[8] ***R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC***;[9] and ***R. (Laing Homes Limited) v. Buckinghamshire CC***.[10] A locality cannot be created simply by drawing a line on a plan: ***Cheltenham Builders*** case.[11]

3.16 In contrast, a "*neighbourhood*" need not be a recognised administrative unit. Lord Hoffmann pointed out in ***Oxfordshire County Council v. Oxford City Council***[12] that the statutory criteria of "*any neighbourhood within a locality*" is "*obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries*". Hence, a housing estate can be a neighbourhood: ***R. (McAlpine) v. Staffordshire County Council***.[13] Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must be an area which has a sufficient degree of cohesiveness: ***Cheltenham Builders*** case.[14]

3.17 Further clarity was provided on that element by HHJ Waksman QC in ***R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council***[15] who stated:-

> "*While Lord Hoffmann said that the expression was drafted with "deliberate imprecision", that was to be contrasted with the locality whose boundaries had to be "legally significant". See paragraph 27 of his judgment in Oxfordshire (supra). He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported*

[8] [1995] 4 All ER 931 at page 937b-e.
[9] [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.
[10] [2003] EWHC 1578 (Admin) at paragraph 133.
[11] At paragraphs 41 to 48.
[12] [2006] 2 AC 674 at paragraph 27.
[13] [2002] EWHC 76 (Admin).
[14] At paragraph 85.
[15] [2010] EWHC 530 (Admin) at paragraph 79.

neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality… but, as Sullivan J stated in R (Cheltenham Builders) Ltd v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application."

Significant Number

3.18 "*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: ***R. (McAlpine) v. Staffordshire County Council***.[16]

As of Right

3.19 Use of land "*as of right*" is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[17] that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

3.20 "Force" does not merely refer to physical force. User is *vi* and so not "*as of right*" if it involves climbing or breaking down fences or gates or if it is under protest from the landowner: ***Newnham v. Willison***.[18] Further, Lord Rodger in ***Lewis v. Redcar*** stated that "*If the use continues despite the neighbour's protests and attempts to interrupt it, it is*

[16] [2002] EWHC 76 (Admin) at paragraph 71.
[17] [2000] 1 AC 335.
[18] (1988) 56 P. & C.R. 8.

treated as being vi…user is only peaceable (nec vi) if it is neither violent nor contentious".[19]

3.21 "Permission" can be expressly given or can be implied from the landowner's conduct.

3.22 Further, land that is used "by right" is being used with permission and so is not being used "as of right": ***R. (on the application of Barkas) v. North Yorkshire County Council***.[20] I shall refer in more detail to the legal propositions relevant to "by right" use below.

4. APPLICATION OF THE LAW TO THE FACTS

Approach to the Evidence

4.1 I have considered all the written evidence submitted. I emphasise that my findings and recommendations are based upon whether the Land should be registered as a town or village green by virtue of the relevant statutory criteria being satisfied. In determining that issue, it is inappropriate for me or the Registration Authority to take into account the merits of the Land being registered as a town or village green or of it not being so registered.

4.2 I shall consider each of the elements of the relevant statutory criteria in turn as set out in paragraph 3.4 above, and determine whether they have been established on the basis of all the evidence, applying the facts to the general legal framework set out above and to other specific legal principles where relevant. The facts and findings I refer to below are all based upon the written evidence submitted. In order for the Land to be registered as a town or village green, each of the relevant statutory criteria must be established by the Applicants on the basis of the evidence adduced on the balance of probabilities.

The Land

[19] At paragraphs 88-90.
[20] [2014] 3 All ER 178.

4.3 The relevant land sought to be registered is clear. The Application Land is identified on the map marked "Exhibit B" submitted by the Applicants on which it is outlined in red. The Land has clearly defined and fixed boundaries, and there is no dispute in any of the evidence adduced that that area of land comprises "land" within the meaning of section 15(2) of the 2006 Act and is capable of registration as a town or village green in principle and I so find.

Relevant 20 Year Period

4.4 As to the identification of the relevant 20 year period for the purposes of section 15(2) of the 2006 Act, the qualifying use must continue up until the date of the Application. Hence, the relevant 20 year period is the period of 20 years which ends at the date of the Application. The Application Form is officially stamped as being validly received by the Registration Authority on 29 November 2018. It follows that the relevant 20 year period for the purposes of section 15(2) is 29 November 1998 until 29 November 2018.

Locality or Neighbourhood within a Locality

4.5 Turning next to the identity of the relevant locality or neighbourhood within a locality for the purposes of section 15(2), the Application Form in part 6 identifies the locality or neighbourhood within a locality relied upon as Allesley Green. A map showing the area of Allesley Green was provided by the Applicants at Appendix 3 to their letter to the Registration Authority dated 8 November 2019.

4.6 The Applicants have not specifically identified whether they contend that Allesley Green is a qualifying locality or neighbourhood. The Objector argues in its representation dated 22 October 2019 that it is capable of being neither.

4.7 As to it being a locality, it is my view that Allesley Green is not a recognised area known to the law, such as an established parish or electoral ward. Indeed, I note from the

Applicants' representations dated 8 November 2019 in reply to the Objection that Allesley Green is "part of" the ecclesiastical parish of Eastern Green and "part of" the Woodlands Ward. There is no evidence that it is an established area known to the law in its own right. Consequently, I find that Allesley Green is not a qualifying locality.

4.8 As to whether it is a neighbourhood, the crucial issue is whether it is an area with a sufficient degree of pre-existing cohesiveness. In contrast to a locality, a neighbourhood need not be an area known to the law. It can have imprecise boundaries. Nonetheless, it cannot merely be an area drawn on a map. It must be capable of some meaningful description. The issue is ultimately one of fact.

4.9 The Objector contends in its representations that the Applicants have failed to establish "an impression of cohesiveness". In that regard, I note the following as referred to in the Applicants' response dated 8 November 2019 and in the evidence in support of the Application.

4.10 Firstly, Allesley Green is a recognised postal address. That is apparent from the witness statements in support of the Application in which "Allesley Green" is part of the addresses provided. Secondly, it has a Residents' Association known as "Allesley Green Residents' Association", which is the very body which made the present Application. Thirdly, there is a convenience store within the area known as "Allesley Green One Stop" shop. Fourthly, it is clearly a recognised area with a recognised name. The housing estate where the Land is situated is frequently referred to in the evidence as the "Allesley Green Estate". Fifthly, it is apparent from the Applicants' evidence and the community events that take place on the Land that there is a particularly strong sense of community in the area. In such circumstances, it is my opinion that the area known as, and referred to as, Allesley Green is an established community with the requisite degree of cohesiveness to be

regarded as a neighbourhood. It is far from being merely an area consisting of a line drawn on a map.

4.11 Consequently, I find that Allesley Green is a qualifying neighbourhood within the meaning of section 15(2) of the 2006 Act.

Use of Land for Lawful Sports and Pastimes by a Significant Number of Local Inhabitants

4.12 The next issue I turn to is whether the Land has been used for lawful sports and pastimes by a significant number of the inhabitants of Allesley Green throughout the relevant 20 year period. The witness statements in support of the Application set out in some detail the recreational use made of the Land by the writers, their families, and the general community over the years. References are made to frequent informal recreational activities carried out on the Land including pastimes such as recreational walking, dog walking, children's play, building dens, socialising, football, cricket, tug-o-war, picnicking, and enjoying the flora and fauna. Further, the well maintained children's play area is situated within the Application Land. In addition, the Land has been regularly used for more formal and organised recreational events and activities, such as bonfires, Easter Egg and Treasure Hunts, May Day parties and Carol Services. I have seen a number of photographs taken showing recreational activities taking place on the Land.

4.13 Moreover, it is apparent from the addresses on the various witness statements and letters in support of the Application and from the contents of other documents produced advertising events on the Land that it has largely been used by the local inhabitants of the Allesley Green Estate. Indeed, my clear impression from the evidence I have read is that

it is regarded as, and has been regularly used as, an important community asset by many local residents since the 1980's when it was provided as part of the Estate, which was constructed around 1983.

4.14 That is unsurprising given the very nature and location of the Land. It is an attractive and safe area of open space away from traffic which has retained its natural environment with resulting diverse ecological value. There are paths around and through it, and a well equipped children's play area within it. Moreover, it is located within the Allesley Green Estate making it easily accessible to local residents. Given such circumstances, I would expect the Land to have been used for recreational purposes by local people.

4.15 Furthermore, I note that the Objector acknowledges that the Land has been used for lawful sports and pastimes stating in its representations dated 22 October 2019:

> "*The Applicant has provided evidence with the Application which the Landowner accepts shows that the local residents have, and continue to, indulge in lawful sports and pastimes on the Land.*"

4.16 All such activities referred to in paragraph 4.12 above are lawful recreational pursuits. Consequently, taking the above matters into account, I find that the evidence submitted demonstrates that the Land has been used for lawful sports and pastimes by a significant number of the inhabitants of Allesley Green throughout the relevant 20 year period.

Use as of Right

4.17 Turning to whether the Land has been used "as of right" during the relevant 20 year period, it must have been used without secrecy, without force and without permission in order to satisfy the statutory criteria.

Nec clam

4.18 There is no suggestion in the evidence that any of the use was by stealth. On the contrary, it was carried out openly during daylight hours and without any element of secrecy. I therefore find that the use of the Land relied upon in support of the Application has been *nec clam*.

Nec vi

4.19 Similarly, there is no reference in the evidence to any of the use of the Land relied upon being carried out with force, either due to entering the Land using physical force, such as by breaking down a fence, or due to it being contentious, such as where carried out under protest from the landowner. Instead, there has been open access to the Land at all times, and the Landowner has not challenged any users, whether in person or by appropriate signage indicating that the Land was not available for use by the public. I therefore find that the use of the Land has been *nec vi*.

Nec precario

4.20 Instead, it is apparent from the Landowner's representations that the fundamental issue in dispute is whether the use of the Land has been with permission and thus not as of right. It is contended that the use has been "by right" and thereby with permission applying the legal principles set out in the leading case of ***Barkas***.

4.21 In that case, the Supreme Court held that recreational land provided and maintained by a local authority pursuant to section 12 of the Housing Act 1985 or its statutory predecessors was used by the public "by right" and not "as of right" within the meaning of section 15 of the 2006 Act. It further held that a recreation ground provided for public use by a local authority pursuant to any of its statutory powers would similarly be used by the public "by right" and not "as of right". Where land is held by a local authority for the statutory purpose of recreation, and members of the public then use the land for that purpose, then they so use it pursuant to a **statutory right** to do so. They are accordingly

not trespassers, which is a pre-requisite of land being used “as of right”, as they have a right to use the land. In order to be an “as of right” use, **the use must be trespassory**, whether or not tolerated by the landowner.

4.22 Lord Neuberger stated at paragraph 27 of ***Barkas***:

> “*As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a "tolerated trespasser" is still a trespasser.*”

4.23 It was further pointed out in ***Barkas*** that a use “by right” was *precario*, namely with permission, and on that basis not “as of right”. Lord Carnwath stated at paragraph 51:

> “*Those arguments have proceeded on the footing that in effect the sole issue is whether the use of the recreation ground by local inhabitants has been "as of right" or "by right", **the latter expression being treated as equivalent to "by licence" (or "precario")** in the classic tripartite formulation (nec vi, nec clam, nec precario) as endorsed by Lord Hoffmann in the Sunningwell case.*” (My emphasis).

4.24 The Supreme Court went on to overrule the previous decision of the House of Lords in ***Beresford*** having found that it was wrongly decided. In ***Beresford***, the land subject to a village green application had been acquired by a Development Corporation under the then New Towns Act 1965 and had been provided as open land for public recreational use pursuant to its statutory powers thereunder. It was transferred to the Commission for New Towns and continued to be maintained as public open space under the statutory

powers of town corporations. It was subsequently transferred to Sunderland City Council. In such circumstances, applying the principles laid down in ***Barkas***, that land was being used by the public "by right" as it was provided and maintained as public open space pursuant to statutory powers. The public were not using it as trespassers. Hence, it was found in ***Barkas*** that such land should not have been registered as a village green.

4.25 Applying those established legal principles to the evidence, the Land is owned by Coventry City Council, a local authority, as was the position in ***Barkas***. It was apparently transferred to the City Council pursuant to a formal Transfer dated 2 January 1992, namely prior to the commencement of the relevant 20 year period. I say "apparently" as the Plan stated in the Transfer to be annexed has not been able to be located, and I have not had sight of the Land Registry documents relating to the specific Title Numbers stated in that Transfer. Therefore, I have been unable to confirm from the documents supplied by the Objector that the Transfer specifically related to the Land. I recommend that the Registration Authority checks the current title documents held by the Land Registry in relation to the Land prior to the determination of the Application to ensure that the Transfer relates to the Land. For the purposes of this Report, given that ownership of the Land is undisputed, that the description of the land in the Transfer appears to relate to the Land, and that the Landowner has stated in its unchallenged representations that the Land was thereby transferred, I find on the basis of the evidence submitted that, on the balance of probabilities, the Land was transferred to the Council by that Transfer.

4.26 The Transfer does not identify the purpose for which the Land was acquired. According to the Landowner's representations dated 22 October 2019: "*The Land was later appropriated as Public Open Space under the normal formal process.*" Unfortunately, despite a request, the Landowner has not produced any documentation in support of such an appropriation. I must make my findings on the basis of the evidence made available. If any further supporting or contradictory evidence relating to my findings is made available

to the Registration Authority prior to it reaching its decision, such evidence must of course be taken into account by the Registration Authority in determining the Application.

4.27 From the evidence I have, the Land was subject to a Section 52 Agreement dated 19 May 1982 made under the Town and Country Planning Act 1971 requiring the then landowners and developers of the Allesley Green Estate to provide a community playing field and a fully equipped children's play area upon it. It is undisputed that shortly afterwards, the Land was laid out as an area of open space available to the public with an equipped children's play area upon it, and that it has been used by the public as such subsequently. There is a definitive footpath along the north west boundary of the Land and a claimed footpath through the Land. The Land is recorded by the Landowner as "Parkhill Drive Public Open Space" in its record produced at Annexure 8 to its representations and is subject to its Green Space Strategy. The documentation provided by the Landowner also includes correspondence between the Applicants and the Landowner demonstrating that the Land has been maintained by the Landowner as public open space.

4.28 From such documentary evidence, I find that the Land has been owned by the current Landowner, Coventry City Council, since 1992, namely throughout the relevant 20 year period. It was acquired as a recreational area of open space laid out for public use. It has continued throughout the 20 year period to be laid out as a recreational area of open space for public use and has been maintained as such by the Landowner. I therefore further find that, given the above, the Land appears on the balance of probabilities to be held by the Landowner as recreational public open space.

4.29 Applying the legal position to such findings, as the Land has been owned and held by a local authority for the very purpose of public recreation, laid out as such and maintained as such, and so used by the public throughout the relevant 20 year period, the public

have had, and continue to have, a right to use it. They have not used it as trespassers; rather, they were and are entitled to use it for recreational purposes. In such circumstances, it is my opinion that the Land has been used "by right", namely the use has been *precario* and not "as of right". Consequently, I conclude that that element of the statutory criteria has not been established.

Continuation of Use

4.30 As to the final element of the statutory criteria, I find from the evidence that the use of the Land continued up until the date of the Application, namely 29 November 2018. Indeed, the Land remains open to public access as evidenced on my site visit, and the evidence indicates that it continues to be used for recreational purposes, albeit not "as of right".

5. CONCLUSIONS AND RECOMMENDATION

5.1 My overall conclusions are therefore as follows:-

5.1.1 That the Application Land comprises land that is capable of registration as a town or village green in principle;

5.1.2 That the relevant 20 year period is 29 November 1998 until 29 November 2018;

5.1.3 That Allesley Green is a qualifying neighbourhood;

5.1.4 That the Application Land has been used for lawful sports and pastimes by a significant number of the inhabitants of Allesley Green throughout the relevant 20 year period;

5.1.5 That the recreational use of the Application Land has been "by right" and not "as of right" throughout the relevant 20 year period; and

5.1.6 That the use of the Application Land for lawful sports and pastimes continued up until the date of the Application.

5.2 In view of those conclusions, it is my recommendation that the Registration Authority should reject the Application and should not add the Application Land or any part of it to its register of town and village greens for the reasons contained in this Report, and on the specific ground that the Application Land has been used "by right" and not "as of right" throughout the relevant 20 year period.

RUTH A. STOCKLEY

04 February 2020

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