APPLICATION BY MR MARK LAMPERT

TO REGISTER LAND AT BUNCHLEYS, NEW BARNFIELD

AS A TOWN/VILLAGE GREEN

INSPECTOR'S REPORT

Introduction

1. I am instructed by Hertfordshire County Council ('the Council') to advise it in its capacity as registration authority, regarding determination of the application dated 4 March 2013 ('the Application') submitted by Mr Mark Lampert ('the Applicant') pursuant to section 15 of the Commons Act 2006 ('the 2006 Act'). The Application seeks the registration of land at Bunchleys, New Barnfield ('the Land') as a town or village green.

2. Originally the Application was the subject of objections by two parties interested in the Land, being the Homes and Communities Agency ('the HCA') and the Mrs C Horton 1974 Discretionary Settlement ('the Horton Settlement'). However, both those parties have withdrawn their objections, so that the Application is now unopposed.

3. I was initially asked to hold a public inquiry in respect of the Application, and made directions in that regard ('the Directions'). However, I have since been requested to consider the Application on the basis of the documentary evidence available.

4. I now make my recommendation on the basis of

    a) the materials contained in the Inquiry Bundle submitted to the Council by the Applicant pursuant to the Directions;

b) the content of the objections originally submitted by the HCA and the Horton Settlement, (although noting that the objections have been withdrawn[1]);

c) My observations during a site visit to the Land ('the Site View'), which I conducted on 11 May 2017 in the company of the Applicant and Ms Andrea Trendler, a Definitive Map Officer employed by the Council; and

d) The 'Statement on behalf of the Applicant' (and appendices) dated 22 May 2017, submitted by the Applicant following the site visit ('the Closing Submissions').

Statutory Provision

5. The Application was made pursuant to section 15(2). Insofar as relevant, section 15 provides as follows:

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(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.

Preliminary Matters

The Land

6. The Land subject to the Application comprises an irregularly shaped area, situated immediately to the south of the A1001, and immediately to the west of Travellers Lane. It also abuts the former Southfield School site.

7. The Land can broadly be described as follows.

[1] Insofar as factual matters are evidenced by those objections, I must necessarily have regard to those matters as part of the relevant factual matrix, notwithstanding that the objecting parties no longer contest the Application.

- The northern part of the Land, comprises scrub and woodland. There is a recorded public footpath (North Mymms 85) which runs through woodland (broadly east – west) before turning in a southerly direction[2].
- The western part of the Land comprises light, open woodland, with various informal tracks evident.
- The central part of the Land comprises open grassland. The recorded public footpath runs through this area, heading southwards.
- The eastern section, which sits to the east of the grassed area I have just described, is comprised of much thicker woodland although there too some informal tracks are evident.
- At the very southern end of the Land there is a pond; this part of the Land also includes a thin strip of the neighbouring pasture, which forms a boundary around the south western side of the pond.

8. As regards its precise extent, the Land is marked on the plan attached to the Application. However that plan is perhaps not of sufficient scale to identify clearly the area which the Applicant seeks to register. On the ground, the extent of the Land may be defined as follows. To the north, east and south, the Land is bounded by fencing. To the west, the boundary comprises the edge of the treeline, as it fronts onto grazing pasture. The Applicant confirmed on the Site View that in the south western corner, to the west of the pond, the boundary is intended to be a line which runs 3m from the edge of the treeline, and/or the bank which descends down to the pond edge.

9. There appear to be 3 points of access to the Land. Access 1 is located in the north-eastern corner, close by the southern end of the footbridge crossing the A1001. Access 2 is towards the north-western corner, through a break in the treeline where it opens onto the adjacent pasture. Access 3 is in the south-western corner, through a kissing gate located just to the north of the pond.

The 20 Year Period

10. As noted above, the Application was made pursuant to section 15(2) of the 2006 Act.

[2] There is a second, unrecorded footpath which also runs east – west through the wooded area, and which joins the public footpath recorded as FP North Mymms 85.

11. Thus, insofar as the Applicant relies on section 15(2) the relevant 20 year period in respect of which qualifying user by the inhabitants of a neighbourhood/locality must be demonstrated is the period immediately prior to the date on which the Application was made. Thus in the present instance, such period comprises the 20 years from 4 March 1993 – 4 March 2013 ('the Relevant Period').

Neighbourhood/Locality

12. The Application was originally predicated on the use by the inhabitants of a neighbourhood within a locality, with the relevant neighbourhood relied upon being the Parish of North Mymms. Subsequent to the original submission, the Applicant amended his case in this regard, relying upon a new neighbourhood, as depicted on the plan entitled 'the neighbourhood of South Hatfield' ('the Neighbourhood'), and upon the ecclesiastical parish of St Johns as the relevant locality ('the Locality').

The Applicant's Evidence

13. The Applicant has submitted a considerable body of written evidence in support of the Application, contained in the Inquiry Bundle submitted to the Council pursuant to the Directions. In this regard I was provided with written evidence, in the form of statements, letters and questionnaires from approximately 100 witnesses. I note that not all of this evidence was prepared by occupants of the Neighbourhood, however the vast majority of it has been provided by persons living within that area, so that the user it describes gave support for the Application.

14. The Applicant has also provided various additional materials by way of evidence, some of which are relevant to my determination and some of which are not. By way of example I note the letter dated 11 June 2015, written by Mr Grant Shapps MP in support of the Application. Whilst Mr Shapps' support is no doubt well-intentioned, it cannot bear either on my recommendation or indeed on the Council's ultimate determination of the Application. Rather, the question which both I and the Council must address is that of whether or not the evidence in support of

the Application satisfies the various statutory criteria; the issue of whether or not it would be desirable for the Land to be registered as town or village green does not arise.

15. In light of the fact that there is no objection to the Application, and that I have heard no oral evidence in this matter[3], I do not propose to detail the full extent of the evidence and submissions relied upon by the Applicant in support of the Application.

16. Rather, in the following paragraphs I set out the various statutory criteria which the Application must satisfy if it is to justify registration of the Land, and summarise the evidential position as to whether – in my opinion – those statutory criteria have been met.

Inspector's Discussion & Conclusions

Preliminary

17. The burden of proof in the context of the Application is on the Applicant, who must discharge it to the civil standard. That is to say that the Applicant must succeed in satisfying the various requirements of section 15 of the 2006 Act on the balance of probabilities.

18. In the present case, the Applicant must seek to make good the following propositions, namely that:
    - The Land has been used for lawful sports and pastimes;
    - That use has been undertaken by a significant number of the inhabitants of a qualifying locality, or a qualifying neighbourhood within such a locality;
    - The use has been carried on 'as of right' (that is, not 'by force', 'secretly', or 'with permission'); and
    - The use has continued throughout a relevant qualifying 20 year period.

[3] Save in respect of answers given by the Applicant in respect of some limited queries which I raised with him on the occasion of the Site View.

Use of the Land for Sports and Pastimes

19. Having reviewed the written evidence relied upon by the Applicant, I have no doubt that the Land has been used for activities which comprise 'lawful sports and pastimes' for the purposes of the 2006 Act, having regard to the guidance given by Lord Hoffman in respect of this issue in R v Oxfordshire County Council ex parte Sunningwell Parish Council (2000) 1 AC 335.

20. By way of example, I note that witnesses speak variously of both engaging (and seeing others engage) in activities such as walking (with and without dogs), fishing, flying kites, picking fruit (such as blackberries and sloes) and wildflowers, picnicking, bird watching, and children's play. In this context, I note that the activities which the Applicant's witnesses now speak to are far more numerous and diverse than those which were detailed in the evidence originally submitted with the Application. As such, insofar as it was previously suggested by the HCA in their objection that there had not been use of the Land for the requisite sports and pastimes, I would have rejected that ground of objection had the HCA maintained its opposition to the Application.

21. Similarly, I would have rejected the contention previously advanced by the HCA that user had been confined to one or more linear routes (in particular the recorded public footpath). I do not consider the evidence to suggest there has been use only of the footpaths; rather it appears to me that different uses have been carried on widely throughout the Land. Certain activities one can assume would have been confined to particular areas (such as kite flying on the open land, or fishing on the pond), but others I accept would have been undertaken more generally. These would include dog/recreational walking, picnicking and fruit picking. I also conclude that there has been use even of the more closely vegetated areas, for activities such as children's games and nature observation. In this last respect, I note that in Oxfordshire County Council v Oxford City Council and Robinson [2004] EWHC 12, Lightman J approved the registration of a densely vegetated area, notwithstanding it was recognised that much of the land was so heavily vegetated as to be impenetrable. The judge observed:

> *"…overgrown and inaccessible areas may be essential habitat for birds and wildlife, which are the attractions for bird watchers and others"*[4].

[4] At paragraph 95 of Oxfordshire.

22. Thus it is unnecessary for local people to have physically 'used' (in the sense of 'stepped on to') each and every part of land in order for it to be susceptible to registration.

23. As regards the matters raised by the Horton Settlement, I am satisfied that there has been use of the 3m strip above the treeline/bank, to the south west of the pond. Having visited the site, I accept the evidence of the Applicant that this land would have been used in connection with fishing on the pond itself.

24. Accordingly, on balance I am content that qualifying use of one sort or another has taken place over what is effectively the entirety of the Land.

Significant Number

25. As noted earlier in this report, the Applicant has submitted written statements and/or questionnaires from some 100 individuals, which all attest to use of the Land for lawful sports and pastimes. The vast majority of those who have provided this evidence have been resident within the Neighbourhood at the time of their user.

26. In terms of the question of whether the Land was used for recreational purposes by a 'significant number' of the inhabitants of Neighbourhood, I have had regard to the comments of Sullivan J in R (on the application of McAlpine Homes Ltd) v Staffordshire County Council (2002) PLR 1. In that case the judge rejected the proposition that the term 'significant' meant "*a considerable or substantial number*". Rather, the judge concluded that a 'significant' number of users would be that:

> *"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 trespassers"*[5].

27. Having regard to the decision of Sullivan J in McAlpine, I am satisfied that the use of the Land for lawful sports and pastimes has been carried on by a significant number of the inhabitants of the Neighbourhood for the purposes of the 2006 Act.

[5] See paragraph 71 of the decision

Neighbourhood and/or Locality

28. The Applicant's case as regards neighbourhood/locality is that both the Neighbourhood and the Locality satisfy the statutory requirements.

29. I am satisfied that the Locality relied upon is sufficient to satisfy the requirement of the 2006 Act, comprising as it does an administrative unit (see Ministry of Defence v Wiltshire (1995) 4 All ER 931).

30. The position is more complicated as regards the Neighbourhood.

The Law

31. The relevant law as regards this issue is, to my mind, still to be found in the case of R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2004] JPL 975. In that case the judge rejected the submission "*that a neighbourhood is any area of land that an applicant for registration chooses to delineate on a plan*", before going on to say that:

> "*The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so*"[6].

32. The decision in Cheltenham Builders was the subject of some criticism by the House of Lords in Oxfordshire County Council v Oxford City Council and Robinson [2006] 2 AC 674. However, no criticism was made of the court's decision in respect of this particular issue, although I note the statement of Lord Hoffman that the 'neighbourhood' requirement in the statute is "*is obviously drafted with a deliberate imprecision*"[7].

33. The approach in Cheltenham Builders was endorsed by Judge Waksman QC in R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council [2010] EWHC 530, where he observed:

[6] See paragraph 85 of Cheltenham Builders.
[7] See paragraph 27 of Oxfordshire.

"*the factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality [but]...a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore it must be capable of meaningful description in some way*"[8].

34. I am content that the Neighbourhood has ready and obvious boundaries to its south, east and west. These comprise the edges of settlement, as they run up against major roads. The issue of the northern boundary was initially more troubling however, since although I readily understood why the Neighbourhood would exclude the University of Hertfordshire campus to the northwest, I could not immediately see why Woods Avenue and Oxlease Drive should serve as the boundary to the north east.

35. Nevertheless, having considered the Applicant's Closing Submissions, I am content both that the northern boundary along those roads is genuine (as opposed to a mere 'line drawn on a map', as mooted by Sullivan J in Cheltenham), and that the Neighbourhood represents a sufficiently cohesive entity.

36. In so concluding, I have had regard to the various facilities which the Applicant identifies as serving the community (the Hilltop Neighbourhood Centre, the pub, the convenience store and the newsagents), and the various references to the 'community' in South Hatfield such as those found in the estates agents' particulars the Applicant provides at Appendix 2 to his Closing Submissions. I also accept that Oxlease Drive and Woods Avenue themselves serve as something of a boundary, providing the sole route for traffic heading east towards/west away from the A1000 in this vicinity, and thus (at least in a sense) 'separating' the Neighbourhood from the residential areas located to the north of it.

37. On the basis of these and other considerations set out in the Closing Submissions, I accept that the Neighbourhood presents as an area distinct from Roe Green and the residential area north of Oxlease Drive.

[8] See paragraph 79 of NHS Foundation Trust.

38. In so concluding, I have also had regard to the observations of Behrens J in Leeds Group Plc v Leeds City Council [2010] EWHC 810, to the effect that

> *"As a number of judges have said [in introducing the concept of neighbourhood to the legislation] it was the clear intention of Parliament to make easier the registration of Class C TGVs. In my view Sullivan J's references to cohesiveness have to be read in the light of these considerations"*[9].

39. On this basis I conclude that the use has been undertaken by the inhabitants of a qualifying neighbourhood and locality for the purposes of the 2006 Act.

User as of Right

40. As noted above, in order for use of land to justify its registration as town or village green pursuant to the 2006 Act, such use must be carried on 'as of right'. That is to say, user must not be carried on 'by force (nec vi)', 'secretly (nec clam)', or 'with permission (nec precario)'.

41. Whilst there does not appear to be any suggestion that user has been carried on 'secretly', I must briefly set out my reasoning with regard to the suggestions previously advanced by the HCA that user has been carried on either 'by force' or 'with permission'.

User by Force: Signs

Existing Signs

42. I note that there are various signs currently located on the Land.

43. One such sign, erected by the pond, simply carries the warning 'DEEP WATER'. I understand that the sign was erected relatively recently, in place of a previous sign which had apparently been removed and discarded in a wooded part of the Land. That earlier sign bore the same message. Signs of this nature would not have the effect of restricting user; they are merely informative.

44. However, I also saw two other signs on the Land which were worded as follows:

[9] See paragraph 103 of Leeds.

Private Land

Access prohibited except for the use of the public footpath

Please keep to the footpath and keep dogs on a lead

One of these signs was erected in the south western corner of the Land, on the 'kissing gate' installed there. The other sign was erected by the public footpath (North Mymms 85), at a central location on the Land.

45. As regards the effect of such signage I am aware of recent caselaw, in particular the decision of the Court of Appeal in Winterburn v Bennett [2016] 2 P&CR 11. In that matter, which was concerned with the acquisition of rights over a car park as distinct from village green rights, LJ Richards observed:

> *"In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to [take steps such as having solicitors write letters or issue legal proceedings] in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings.*
>
> *The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why*

those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land[10].

46. In the light of the decision in Winterburn, I consider that the erection of these signs described in paragraph 44 above would have the effect of rendering contentious any user of the Land other than of the recorded public footpath.

47. It is necessary therefore, to establish when these signs were erected. Several of the written statements/questionnaires submitted in support of the Application note the erection of these signs. By way of example, the questionnaire submitted by Mr Izzard states, in answer to a query regarding whether he had ever been prevented from using the Land:

"No – however there are now signs"
"Recent signs saying keep off! And stay on pathway!"

In answer to a further query regarding whether any attempt has been made to prevent or discourage user, he states

"Yes – signs saying keep off land + stay on path!"
"Signs now in place recently saying 'keep to the path'!"

Mr Anthony Edwards' questionnaire provides similar responses. The difficulty with such evidence is that it is unclear what is meant by the terms '*recent*' or '*recently*'.

48. Some degree of clarification is provided by the evidence of Stuart Crowley, who refers to such notices being erected "*about a year ago*" (writing in 2015). This is consistent with the user evidence of Adrienne Nix. Thus it appears that signs were erected in the 2014.

49. Fortunately however, the position is confirmed by paragraph 7.4 of the Statutory Declaration of Mr Christopher Beard, previously submitted in support of the HCA's objection to the Application. Mr Beard states in terms that these signs were erected in 2014.

50. Given that the signs were erected in 2014, it follows that they were erected after the Relevant Period, and therefore do not bear on the Application.

[10] See paragraphs 40-41 in Winterburn.

2010 Signs

51. I note that in other questionnaires (see, by way of example, the questionnaire of Mr David Markas, that of Catherine Roe, and indeed that of the Applicant himself), there are also references to a sign (or signs) having been erected by the HCA in 2010. The fact of such signs having been erected in 2010 is broadly consistent with local press cuttings from that period, and also with the evidence of Mr Beard, who confirms that a sign was erected in October 2009, and then later taken down (by the HCA) in April 2010.

52. When objecting to the Application, the HCA had asserted that the erection of this sign was sufficient to defeat the Application, by rendering subsequent user contentious. Notwithstanding the HCA has withdrawn its objection, in the event that the legal effect of the sign was to have rendered user of the Land not 'as of right', then the Council would be compelled to reject the Application.

53. However, I do not consider that the sign erected in 2010 had this effect.

54. The sign was apparently worded '*Private Land No Public Right of Way*'[11].

55. Notification:
    a) that land is in private ownership; and/or
    b) that there is no public right of way across it,

    is not, in my view, sufficient to render use of it for village green purposes as contentious. Rather, such sign would merely have the effect of informing people venturing on to the Land of those two factual matters. The wording does not amount to a prohibition on access, or a prohibition regarding the carrying out of village green activities.

56. Thus I do not consider the 2010 Signs rendered use of the Land forcible.

[11] See the evidence of Mr Beard, at paragraph 5.3 of his statutory declaration, where he confirms that the sign he erected was worded to this effect. See also paragraph 26(b) of the HCA's objection, which confirms the sign was worded in this way.

Permissive User/User 'By Right'

57. There is some suggestion in the documentation before me that use of the Land may have been permissive, on account of the fact that at one time or another licence/permission has been granted to use a linear route across the Land. Alternatively, it is suggested that user has been carried on 'by right', on the basis that local people enjoyed the benefit of a right to use FP North Mymms 85 (it being a recorded footpath on the Definitive Map).

58. I am satisfied that use of the Land for lawful sports and pastimes has not been permissive or 'by right', at least not to the extent of frustrating the Application. Indeed, I am not satisfied that user has been permissive/'by right' at all during the Relevant Period. In this regard I note the following:

    - First, FP North Mymms 85 was only added to the Definitive Map as a public right of way on 9 August 2013 (see paragraph 7.3 of Mr Beard's declaration), such that user would have only become authorised (and therefore 'by right') after the expiry of the Relevant Period (which ended in March 2013).
    - Second, as regards the licence referred to by the Applicant in his Closing Submissions ('the Licence' – which I understand would, if effective, have had the effect of granting permission to use FP North Mymms 85) – ,I am informed by the Applicant that the terms of the Licence were not satisfied. There is no evidence or submission which runs contrary to that assertion, such that I must assume that the Licence never took effect[12].

59. However, even and to the extent use of FP North Mymms 85 was carried on 'with permission' or 'by right' during part of the Relevant Period, I do not consider that this would defeat the Application.

60. In my view, the degree, quality and extent of user described in the user evidence goes far beyond footpath use. Accordingly, I conclude that a notional landowner who had witnessed the use made of the Land during the Relevant Period would have perceived that local people were exercising village green rights over the entirety of the area, irrespective of the legal position in respect of a particular, linear footpath.

[12] In this context I note that no reliance was placed on this by either the HCA or the Horton Settlement.

Summary

61. In summary, I conclude that the use of the Land for lawful sports and pastimes undertaken by inhabitants of the Neighbourhood has been carried on 'as of right'.

Twenty Year Period

62. On scrutinising the written evidence in support of the Application, I conclude that the evidence in support of the Application supports a conclusion that the use of the Land for lawful sports and pastimes has continued throughout the Relevant Period (1993-2013). Indeed, the evidence is indicative that continuous user has been maintained for a period far longer than 20 years.

Conclusions

63. Having regard to the above matters, my conclusions are as follows, namely that:

- The Applicant has demonstrated that the Land has been used for lawful sports and pastimes.

- The Applicant has demonstrated that both the Neighbourhood and the Locality satisfy the statutory requirements of the 2006 Act.

- The Applicant has demonstrated that the user of the Land for lawful sports and pastimes was carried on by a significant number of the inhabitants of the Neighbourhood.

- The Applicant has demonstrated that the user of the Land was carried on 'as of right' during the Relevant Period.

- The Applicant has demonstrated that the user of the Land was carried on continuously throughout the Relevant Period.

64. On this basis, it is my recommendation to the Council that it register the Land as a Town or Village Green pursuant to section 15(2) of the 2006 Act.

Alexander Booth QC

8 June 2017

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