IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BLACK FIRS LANE AND CHELFORD ROAD, SOMERFORD AS A TOWN OR VILLAGE GREEN

AND IN THE MATTER OF THE COMMONS ACT 2006

OPINION

Introduction and Procedural Matters

1. I am appointed by East Cheshire Borough Council (in its capacity as the relevant registration authority under the Commons Act 2006) (the **Registration Authority**) to consider and report upon an application dated 3rd May 2013 (the **Application**) to register land adjacent to Chelford Road and Black Firs Lane in Somerford (the **Land**) as a town or village green.

2. I have been provided with copies of the Application and all the material (including correspondence and statements) provided in support of it; the objections duly made to it; and further correspondence, submissions and evidence from all concerned with the Application. I have had regard to all of that material in compiling my report and recommendations.

3. In a preliminary note dated 14th December 2014, I recommended to the Registration Authority that a written report could be sought in the first instance without the need for a public inquiry and gave a suggested timetable for the filing and serving of further evidence and submissions by the parties.

4. The Applicant takes two procedural issues in its representations. First, that it is a breach of natural justice for the Registration Authority to determine this application given the perceived conflict between itself as landowner/highways authority and registration authority. Second, that any determination should be after a public inquiry rather than by a written report.

5. It is well established that it is acceptable and proper practice for a registration authority with such a perceived conflict to appoint an independent expert to consider the application for registration. Such an approach was endorsed by the Court of Appeal in **R. (Whitmey) v Commons Commissioners [2005] QB 282**. In my view, there is no reason in this case for such an approach to be departed from by referral to a third party local authority or otherwise.

6. It is equally well established that a registration authority may determine an application without a public inquiry in certain circumstances, which will include where it is not necessary for a fact finding exercise to be undertaken to determine an application. I advised in my earlier note that I considered that this was potentially such a case given the points of law raised in the objections and that it would be appropriate for a written report to be obtained in the first instance.

7. The duty is to act reasonably and the Registration Authority, in my view, has so acted in its approach to date by virtue of what I have set out above.

8. Suffice it to say that this report does not undertake a fact finding exercise on the papers but considers the untested evidence in support of the Application at its highest.

9. To the extent that I consider that any matter (whether determinative of the application or not) would properly require determination after a public inquiry, I say so within this report.

10. As a final procedural matter, I note that the Applicant has objected to the late service of evidence by the Council in its capacity as objector. From what I understand, the Council disclosed its evidence and further representations together in a bundle on 27th January 2015. Thus, any new evidence therein was technically disclosed two weeks after the 13th January 2015 deadline. The evidential part of the Council's bundle primarily relates to the dedication of the Land as public highway and includes a number of conveyancing documents from the 1930s. As I understand it, at least some of the documentation has been disclosed previously and indeed is commented on in the Applicant's representations.

11. In my view, no prejudice is caused to the other parties by the late disclosure. The disclosure is relatively incontrovertible documentary evidence and having considered it in detail, it does not significantly alter the Council's position or my view of the issues in this matter. I have therefore had due regard to it but emphasize that it has not proven determinative on any point.

<u>The Purpose of this Report</u>

12. The primary purpose of this report is to consider whether the Application, in whole or in part, can be determined by consideration of certain issues in the matter which the objectors submit are summarily determinative of the Application without the need for a public inquiry.

13. Those issues are whether any part of the Land is excluded from registration by virtue of there having been a relevant trigger event under the statutory regime and whether the consequence of the Land being Highway land (as asserted by the objectors) is that there has not been any, or any sufficient qualifying user of the Land so as to make it registrable.

The Application

14. The Application is dated 3rd May 2013, contained within Form 44 and completed with an appropriate statutory declaration. The Applicant is a Mr. Nicholas Bell of 9 Chelford Road in Somerford.

15. It seeks registration of what is referred to as Somerford Green. The extent of Somerford Green is not particularised within Form 44 but the Land is outlined and cross-hatched in red on the Ordnance Survey plan (scale 1:2500) annexed to the Application.

16. It is a grassed area, with some trees on it, which lies between two tarmacked carriageways known as Chelford Road and Black Firs Lane (which form an inverted "v" shape where they meet) and the land within that v shape which is a combination of agricultural land and residential properties. The Land is not particularly wide in any part and on Black Firs Lane it is intersected by the driveways of a number of residential houses.[1]

[1] I undertook an informal and unattended site visit on 11th February 2015 in order to form a clear impression of the Land.

17. The locality and/or neighbourhood within a locality is not specified in writing in the Application but rather delineated by a hand-drawn line on the plan annexed to the application which effectively encompasses the residential triangle formed by Chelford Road, Black Firs Lane and Holmes Chapel Road. The Applicant has since clarified that this neighbourhood is locally known as the Somerford Triangle and lies within the Parish of Somerford (being the relevant locality).

18. The Application is supported by a number of statements of present and former residents of the aforesaid streets forming the Somerford Triangle. Statements on behalf of approximately 30 present and past inhabitants were provided with the Application. These have been supplemented by further statements served as part of the directions provided for in my preliminary review note.

19. The statements are contained in a pro-forma which provides for the witness to provide details of, among others, their use of the Land, to which period in time it relates and their residence at material times. The statements contain a statement of truth and the witness is invited (by striking out either alternative) to state whether *"I would/would not describe my use to go beyond that which I would lawfully be entitled to do on a public highway, which I understand is restricted to a right to pass and re-pass."* In every case, this clause has been answered in the affirmative. Each statement further asserts that use of the Land has been as of right, and not by permission or force. A pro-forma clause is inserted in this respect.

20. It is reasonable to say that a large range of activities are spoken to in the statements. These range from walking, walking and playing with dogs, horse riding and training, foraging for berries, children's games and playing generally to family gatherings. I consider this in further detail below. This paragraph is intended only as a short summary of the activities undertaken.

21. The Application avers that there are approximately 70 properties within the Somerford Triangle and that the evidence in support of the application demonstrates that there has been a significant number of such residents of the Somerford Triangle using the Land.

Statutory Framework: The Commons Act 2006 (the **2006 Act**)

22. The Application is made under section 15(2) of the 2006 Act. That section provides the following test for registration of land as a town or village green:-

"(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."

23. The burden of proving that the Land has become a town or village green lies with the Applicant. The standard of proof is the balance of probabilities. 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 the balance of probabilities, per the guidance given by Lord Bingham in **R v. Sunderland City Council ex parte Beresford [2004] 1 AC 889.**

24. The Growth and Infrastructure Act 2013 (partly in force as from 25th April 2013) introduced a number of further significant measures to the law on registering new town and village greens under the 2006 Act, which require consideration in addition to the provisions of section 15(2) above.

25. Section 15C of the 2006 Act took effect on 25th April 2013 and excludes the right to apply for the registration of land in England as a town or village green where a trigger event has occurred in relation to the land. The right to apply for registration of the land as a green remains excluded unless and until a terminating event occurs in relation to the land. Trigger and terminating events are set out in Schedule 1A to the 2006 Act. Section 15(C) provides as follows:

"*(1) The right under section 15(1) to apply to register land in England as a town or village green ceases to apply if an event specified in the first column of the Table set out in Schedule 1A has occurred in relation to the land ("a trigger event").*

(2) Where the right under section 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again only if an event specified in the corresponding entry in the second column of the Table occurs in relation to the land ("a terminating event")."

26. Although section 15(C) is only of effect in relation to applications brought on or after the date on which it came into force, by section 16(4) of the 2006 Act, the relevant trigger event may be one which has occurred prior to the coming into force of section 15(C).

Trigger Event

27. It is thus a precursor to an application for registration that the land is not excluded from registration by virtue of the trigger event regime set out hereinabove. It is therefore the appropriate starting point in consideration of the Application, before the traditional criteria for registration under section 15(2) of the 2006 Act are considered.

28. The Registration Authority notified the parties on 17th September 2014 that it was considered that the third trigger event provided for in Schedule 1A of the 2006 Act had occurred prior to the Application, namely:- "*A draft of a development plan document which identifies the land for potential development is published for consultation in accordance with regulations under section 17(7) of the 2004 Act.*"

29. It was said that the relevant event had been that East Cheshire Council had consulted on its Development Strategy and Emerging Policy Principles document in January and February 2013 (the **Development Strategy** document). The Development Strategy presented East Cheshire Council's preferred policy and site options, and identified the Back Lane and Radnor Park site for potential development, which included land forming part of the Land (in particular the upper part of Black Firs Lane which borders the adjacent agricultural land).

30. All parties were given the opportunity to address this issue in further representations. I say at this point that I consider that no party has been prejudiced by the relatively late taking of this point as an opportunity to make representations on the issue was afforded to all parties.

31. The Applicant submits that no trigger event has occurred. Its primary objections are that the Development Strategy document was not a relevant development plan document within the meaning of Schedule 1A (as further defined), that there was therefore no relevant consultation exercise and that in any event no part of the Land was identified for potential development within the meaning of Schedule 1A. I have had due regard to the full submissions of the Applicant.

32. The 2004 Act referred to in the third trigger event to Schedule 1A is the Planning and Compulsory Purchase Act 2004 (the **2004 Act**). The Town and County Planning (Local Planning) (England) Regulations 2012 (the **2012 Regulations**) are made in pursuance of section 17(7) of the 2004 Act and define a "*development plan document*". Regulation 2 thereof provides that:-

"local plan" means any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the [2004] Act these documents are prescribed as development plan documents".

33. The relevant sections of regulation 5 provide as follows:-

"5.—(1) For the purposes of section 17(7)(za) of the Act the documents which are to be prepared as local development documents are—

(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—

(i) the development and use of land which the local planning authority wish to encourage during any specified period;

(ii) the allocation of sites for a particular type of development or use;

(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and

(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(b)where a document mentioned in sub-paragraph (a) contains policies applying to sites or areas by reference to an Ordnance Survey map, any map which accompanies that document and which shows how the adopted policies map would be amended by the document, if it were adopted."

34. The Development Strategy was a document prepared by East Cheshire Council in its capacity as a local planning authority which presented the Council's preferred policy and site options (and a number of alternative options) for the development and use of land. I therefore am of the view that it was a "development plan document" within the meaning of Schedule 1A because it meets the definition provided for by regulation 5(a)(i) and (ii) respectively above.

35. I am further satisfied that the Development Strategy identified land forming part of the Land. The areas of land identified for potential development are clearly set out within the Development Strategy and the plans annexed to the Development Strategy. I do not see any ambiguity between the words used to describe the areas of land for potential development within the Development Strategy document and in the plans annexed to them. Further, in my view, the reference to "potential development" in the wording to the third trigger event defeats any argument that there was insufficient certainty that the strategic site would ever be developed to consider that it was identified land within the meaning of the third trigger event.

36. Having found that the Development Strategy was a development plan document, I am also satisfied on balance that its publication for consultation in January and February 2013 was preparation, publication and consultation in accordance with regulations 18 and 19 of the 2012 Regulations and not a consultation falling outwith of the prescribed regime.

37. In this respect, and as identified on behalf of the objectors, the same is confirmed by the Council's Local Plan Strategy Statement of Consultation dated May 2014 in which the statutory consultation on the Development Strategy and Policy Principles in early 2013 is specifically identified.

38. It is not suggested that there has been any relevant terminating event.

39. It is therefore my conclusion that the part of the Land which falls within the area of land identified in the Development Strategy document is excluded from registration. This has the consequence of severing the parts of the Land which are registrable in two; namely the remaining part of the claimed land on Black Firs lane and the Chelford Road section.

40. It is well-established that a registration authority may register only part of the land contained within any application. As a consequence of this, and for the sake of completeness, I now go on to consider whether any part of the non-excluded areas of the Land would fall to be registrable under section 15(2) of the 2006 Act as well as whether the excluded area of land would in any event have been susceptible to registration. Unless stated otherwise, references to the Land continue to be to the Land as a whole

Highway Land

41. There is a dispute as to whether the Land is Highway land. The Applicant asserts that the objectors have failed to show that the application land is public highway and that no evidence, or in any event, insufficient evidence has been provided for such a conclusion to be reached.

42. I am satisfied that there is overwhelming evidence that the Land is public highway.

43. The inclusion of the Land as publicly maintainable highway on the list kept by the Highways Authority pursuant to section 36(6) of the Highways Act 1980 (the **1980 Act**) has not been challenged. This is strong evidence in itself that the Land is Highway land.

44. The inclusion of the Land on the list is consistent with the dedication of the wide verges adjacent to Chelford Lane and Black Firs Lane to Congleton Rural District Council (a predecessor-in-title to the present highways authority) in the late 1930s as evidenced in the relevant conveyancing material disclosed by East Cheshire Council as objector and the exchange of correspondence in September and October 2007 in this respect. The plan marked "area of land coloured red 10950 sq yards" supports that the Land was being dedicated to such use.

45. Further, the Land has been maintained as highway verge by the Highways Authority at all material times. Whilst it is plain that there has been some concurrent maintenance of parts of the Land by adjacent landowners, such use has been tolerated by the Highways Authority (per email dated 5th October 2007) and I do not consider it to be a factor which takes the Applicant any further forward.

46. I am therefore satisfied that there is strong evidence that the Land in its entirety is highway maintainable at public expense and I reject the Applicant's argument that there is insufficient evidence in this respect. I therefore proceed on the basis that the Land is, on balance, Highway land.

47. Highway land is not precluded by law from being registered but the status of land as highway means that qualifying user under the 2006 Act is markedly constrained by the fact that the public can lawfully do anything reasonable on highway land provided it does not interfere with the public's right of passage: per **DPP v Jones [1999] 2 AC 240**. Such use is by right not as of right and therefore not qualifying user. Among others, recreational walking, with or without dogs, and other activities such as picking fruit would therefore be by right rather than as of right. Furthermore, any significant use of highway land for recreational purposes is capable of amounting to an interference with the highway and may be treated as unlawful (and therefore not use for lawful sports and pastimes).

48. It is this combination of consequences which flow from the Land being Highway land which the objectors say allow the matter to be disposed of without further consideration or a public inquiry. In broad summary they say, first, the public have the right to carry out the vast majority, if not all, the activities on the Land relied upon in support of the Application by virtue of it being a highway. There is therefore no or no sufficient qualifying user of the Land. Second any activity which goes beyond such reasonable user as they are entitled to carry out by right amounts, on balance, to a public or private nuisance which obstructs the highway and which is therefore not a lawful sport or pastime within the meaning of section 15(2) of the 2006 Act.

Qualifying User

49. The Applicant must prove, inter alia, on the balance of probabilities that there has been sufficient qualifying user (i.e. use as of right for lawful sports and pastimes) during the 20 year period (being the 20 years immediately prior to the date of the Application) to allow the Land to be registered.

50. Any use by right rather than as of right is to be discounted from consideration: per **R. (Barkas) v North Yorkshire County Council [2014] UKSC 31**. Where there is use by right by virtue of the presence of a public right of way and alleged use as of right for village green activities, the critical question is how the matter would have appeared to a reasonable landowner observing the user made of his land: per Lightman J in **Oxfordshire County Council v Oxford City Council [2004] Ch 253** and Sullivan J in **R (Laing Homes Limited) v Buckinghamshire County Council [2003] EWHC 1578 (Admin)**.

51. **DPP v Jones** is authority that user of the highway extends beyond a right to pass and repass and extends to a right to carry out other activities which are incidental to the same. In that case it was found that a peaceful and non-obstructive assembly protest on the highway amounted to a reasonable use of the highway and within the permitted uses. I place emphasis on this as it shows how significantly an activity may differ from a right to pass and re-pass and still be characterised as lawful use of the highway.

52. The use for unlawful sports and pastimes will by definition not be qualifying user but it is otherwise recognised that lawful sports and pastimes is a composite expression and to be relatively widely interpreted.

53. However, it will exclude any commercial use and any use by those from outside of the neighbourhood in question is to be discounted.

54. In the present matter, I have had the benefit of a significant number of statements from a significant proportion of the households in the alleged neighbourhood (both past and present residents). They contain a statement of truth and have been prepared with greater detail than is often seen in support of such Applications. I am therefore satisfied that these statements give a clear reflection of the nature of the evidence of user that would be forthcoming at any public inquiry.

55. I have reviewed all the statements in detail. I do not particularise each one herein. There is, on any view, a predominance of activities spoken to in the statements. These include in particular walking, exercising dogs, horse-riding, foraging and child's play. Although there are other activities spoken to including star-gazing, gardening and picnicking, I am satisfied that the substantial proportion of activities referred to in the statements are those listed above (and such other activities which are related to the same such as bird-watching and ferreting).

56. This, in my view, is entirely consistent with the layout of the Land; it is a narrow strip of land in most places which necessarily prohibits any more extensive use of the Land. A cursory review of any number of the statement would yield that these activities have formed the central usage by local residents. I bear in mind that the statements have made clear where relevant, and quite properly so, that some of the activities have not always been undertaken by a linear passage through the Land but rather by, for example, horse training and dog training in confined areas of the Land.

57. I also bear in mind that there have been gatherings and other activities on the Land which the Applicant would argue go well beyond a person passing and re-passing on a highway.

58. As I have set out above, the public can lawfully do anything reasonable on highway land provided it does not interfere with the public's right of passage. In my view, this in practice means that most of the activities relied on must be discounted as qualifying uses for that purpose. Activities such as walking ,exercising dogs, foraging and horse-riding are manifestly such activities and frequently referred to as such in the key authorities. Even those activities which are more incidental to highway use, such as star gazing and children's play still fall comfortably within the confines of reasonable activity on a highway verge and therefore do not in my view amount to qualifying user.

59. The key authority in this area of law determined that a peaceful assembly on the highway was a lawful activity. In my view, any of the instances of picnics, family gatherings, meetings between residents and the like must also be regarded as reasonable uses of the Land by virtue of it being a highway which in turn precludes reliance upon the same in support of the Application.

60. With regard to all the evidence relied upon in support of the Application, I conclude that practically all the user relied on by the Applicant could be regarded as having been enjoyed pursuant to the public's highway rights and therefore must be discounted as qualifying user. What user that remains, if any, is in my view insufficient to warrant registration.

61. Moreover, given the layout of the Land is as a broad highway verge, this is not a case where a reasonable landowner could readily discern between use by right by virtue of it being a highway and any use as of right for green activities. Therefore, I cannot regard uses, for example, for horse and dog training as being activities which fall as green activities rather than use by right even where emphasis has been placed on the non-linear nature of the activity. I also have borne in mind that part of the Land is intersected by a series of driveways to residential properties which make it even more unlikely that there has been any qualifying user over that particular section of the Land.

62. To the extent that it might be argued that the evidence at a public inquiry would come out so as to demonstrate user in a manner which fell outside user by right, in my view any user evidenced at an inquiry would likely be found to present to a reasonable landowner of the Land as either (a) reasonable use by right of the public highway or (b) if not such reasonable use by right of the public highway, then a private or pubic nuisance amounting to an obstruction of the highway and therefore not qualifying user for lawful sports and pastimes.

63. I accept the submission of the objectors as I find that it is likely that most of the activities referred to are activities which the local residents are entitled to do by right by way of the Land being public highway. It follows that I consider that there is insufficient qualifying user of any of the Land so as to make it registrable. Any usage which does not fall to be discounted is, in my view, so minimal that it could not be capable of forming the foundation of registration.

64. I have further made clear that I do not consider the evidential position is rectifiable at a public inquiry for the reasons I have given. It follows that I am satisfied that my conclusion is one properly reached without the need for a public inquiry.

65. In my opinion, the whole of the Land falls to be rejected for registration regardless of any trigger event having occurred for the reasons stated above, namely, that user has been by right and not as of right by virtue of the Land being Highway land.

66. In coming to this conclusion, I have considered the Land as a whole and without reference to the part of it which I consider excluded from registration by section 15(C) of the 2006 Act. Suffice it to say, that I consider that are particular difficulties in demonstrating that the lower part of Black Firs Lane, which is intersected by driveways, would fall to be registrable as a town or village green.

Remaining Criteria

67. I do not consider it appropriate for the remaining criteria for registration to be examined with any finality on a summary basis. However, I make the following observations.

68. I have concerns as to whether the Somerford Triangle is a recognisable neighbourhood within the meaning of section 15(2). But for my findings above, I would require this issue to be tested at a public inquiry. Further, even if I was wrong about the user of the Land not being qualifying user, I would also require the question of whether there had been sufficient qualifying user of the Land by a significant number of local residents for the requisite twenty year period to be tested at a public inquiry.

Conclusion and Recommendations

69. I have concluded as follows:-

69.1 That section of the Land which is identified in the Development Strategy document is excluded from registration and that part of the Application falls to be rejected.

69.2 Regardless of that finding, there has not been sufficient qualifying user of the Land capable of making the Land registrable and therefore the Application should be rejected in its entirety.

69.3 I recommend that the Application be rejected for the reasons I have given and for the reasons for rejection to be recorded as those stated in this report.

70. If there are any queries with this report, please do not hesitate to contact me.

James Marwick

Trinity Chambers

12th February 2015