The Commons Act 2006

and

the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007

Report to Cheshire East Council into an application to register land in the parish of Somerford as a village green

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Report to Cheshire East Council into an application to register land in the parish of Somerford as a village green

1. Cheshire East Council ("the Council") in its capacity as the relevant commons registration authority and exercising its powers under section 111 of the Local Government Act 1972 appointed me to conduct a non-statutory public inquiry and to report to it in respect of a village green application. Mr Nicholas Bell ("the Applicant") made this application under section 15(2) of the Commons Act 2006. His application was supported by written and oral evidence. It seeks the registration of land in the parish of Somerford ("the Land") as a village green. The purpose of the inquiry was for me to consider whether the Land is a village green and to form the basis of this report to the Council. The decision on the application is not for me, but remains with the registration authority.

2. The Council is both the highway authority and, as result of the statutory provisions for town and village green registration, the registration authority. It claims to be the owner of the Land. In such circumstances great care must be taken to act fairly in all respects and to do one's utmost to ensure that justice is, not only done, but also seen to be done. In the procedure I adopted throughout the inquiry I endeavoured to ensure that all involved had a fair hearing, including a full opportunity to answer the points advanced by those opposing them and a full opportunity to cross-examine if they wished to do so. In considering the matter after the inquiry I have re-read the relevant case law with particular care to ensure that no party gained an unfair advantage by the different nature of representation. The Applicant's absence from the end of his case onwards meant that I did not hear his response to the skeleton arguments for each objector or to their closing submissions. I therefore scrutinised these with particular care to see if to consider what points an applicant might make in response to them.

The Land

3. The Land concerned is in the parish of Somerford to the west of Congleton. It is part of the inside of a triangle of land formed by the carriageways of the A54 (Holmes Chapel Road) and two unclassified roads leading approximately northwards from it in an inverted 'V', Black Firs Lane to the east and Chelford Road to the west. The southern A54 side of the triangle is mainly developed, but most of the triangle is farmland. It also contains a nature-conservation area open to the general public and a private fishing lake with associated land. The Land is composed predominantly of green areas that have the appearance of being highway verges on the west of Black Firs Lane and east of Chelford Road. In general they are not unusually wide, varying in width from 8 to 11 metres, although there are small wider areas at each end of Black Firs Lane. The application site comprises these apparent verges. It extends from the carriageway of the minor roads to, in general, the apparent boundaries

adjoining land. Within the Land there are trees, undergrowth, telegraph poles, street signs, two parish council notice board and utility services. Nothing about its appearance distinguishes it from many grass verges. Its surface is not particularly even and it is not laid out in a manner that would facilitate sports and pastimes.

4. In January and February 2013 the Council consulted upon a Development Strategy and Emerging Policy Principles document that it had produced. This proposed the development of an area called Site Congleton 1. Site Congleton 1 the northern third of the apparent western verge of Black Firs Lane. This gives rise to a specific legal issue that I consider below. It is therefore appropriate to recall that it is open to a commons registration authority to register a less extensive area of land as a new village green than that identified in the application if it is not satisfied that qualifying user of the whole of the application land has been proved.[1] The trigger event land is coloured green on drawing A-01-L-002 TE.

5. The southern end of the Land Black Firs Lane is intersected by driveways and in some places has lawns that have been extended onto the Land.

6. The neighbourhood that the Land is said to serve is a blue ovoid shape that encompasses the houses on both sides of the triangle formed by Chelford Road, Black Firs Lane and Holmes Chapel Road.

The Application

7. On 2nd May 2013 the Applicant, who lives at 9 Chelford Road, applied to register the Land as a Green. The application was in the proper form on Form 44 and accompanied by a statutory declaration. It clearly identified the Land on a Plan at the appropriate 1:2500 scale. There has been no application to amend the application.

Objections

8. There were two objectors: the Council in its capacity as local highway authority and hence the highway authority for Black Firs Lane and Chelford Road ("the Highway Authority"); and Richborough Estates Limited ("Richborough"). Mr Christian Hawley counsel represented the Highway Authority and Mr Andrew Piatt solicitor represented Richborough at the inquiry.

Procedural matters

9. I am satisfied that there has been no breach of any statutory provision relating to procedure, no breach of the rules of natural justice, no unfairness and no other procedural failing that has occurred during my consideration of this application, or at any time after the judgment of Steward J. considered below.

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[1] Oxfordshire County Council *v* Oxford City Council ("the Trap Grounds case") [2006] UKHL 25, [2006] 2 AC 674, 24th May 2006.

The Inquiry

10. The inquiry took place over four days in May 2017 (8th 9th, 10th, and 11th) in Congleton Town Hall. The Applicant, a solicitor who practices in criminal law, represented himself until he withdrew from the inquiry at the end of his case. At the request of the Applicant there was an evening session on Monday 8th May to enable those who could not attend during normal working hours to be heard.

11. There was no request for evidence to be taken on oath and I did not consider that this was necessary.

12. I have considered all the written material that was submitted to me and all that was said at the public hearing and to the extent that these are relevant to issues borne them all in mind. I am satisfied that I have sufficient information to make a recommendation in which I have confidence.

The Law

13. The application is based solely upon section 15(2) of the Commons Act 2006. Section 15 (1) and (2) provide:

> *(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)… 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.*

14. Subsection (2) is substantially the same as the repealed section 22(1A)(a) of the Common Registration Act 1965 in its final form. This stated:

> *(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and… -*
>
> > *(a) continue to do so…*

15. Case-law on section 22(1A)(a) will therefore continue to apply and will, in appropriate circumstances, bind the Registration Authority. However care needs to be taken when considering case-law prior to the amendment of section 22 of the 1965 Act by the Countryside and Rights of Way Act 2000 section 98. In considering cases that relate to

applications made before that amendment came into force on 30th January 2001, I have born in mind that a different definition of town or village green applied.[2]

16. The issue under section 15(2) can be divided into the following question:

(1) Do some or all of the activities relied upon by the applicant constitute *"lawful sports and pastimes"*?

(2) Have these activities been indulged in *"as of right"*?

(3) Has this been by either (or both of) *"a significant number of the inhabitants of any locality,"* or *"a significant number of the inhabitants… of any neighbourhood within a locality"*.

(4) Has this been for *"a period of at least 20 years"*?

(5) Was the significant number of inhabitants continuing to do *"to do so at the time of the application"*?

17. The elements are cumulative, *i.e.* the Applicant must prove each of these in order to satisfy the subsection and hence to obtain registration as a green. It is however enough for the Applicant to establish that the significant number of the inhabitants are either of a *"locality"*, or of *"a neighbourhood within a locality"*.

18. Applications to register land as a Green have been the subject of extensive litigation and the case law mentioned below provides considerable assistance in establishing the legal context in which these five questions must be answered.

Lawful sports and pastimes

19. R *v* Oxfordshire County Council *ex parte* Sunningwell Parish Council ("Sunningwell") Lord Hoffman stated that *"dog walking and playing with children* [are], *in modern life, the kind of informal recreation which may be the main function of a village green"*.[3] It is clear that dog and other walking, children's games and similar activities constitute lawful pastimes. It is also clear that use of land for picnics is a lawful pastime.[4]

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2 The material part of which provided: *" "town or village green" means land… on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years."*

3 [2000] 1 AC 335, HL(EW), 24th June 1999, 357.

4 *R* (Lewis) *v* Redcar and Cleveland Borough Council [2010] UKSC 11, [2010] 2 AC 70, 3rd March 2010.

As of right

20. The term *'as of right'* means a user that was not by force, nor stealth, nor the licence of the owner. It does not mean *'of right'*. Rather its meaning is closer to *'as if of right'*. As Lord Bingham stated in *R v* City of Sunderland *ex parte* Beresford ("Beresford"):[5]

> *... "as of right" does not require that the inhabitants should have a legal right since... the question is whether a party who lacks a legal right has acquired one by user for a stipulated period. It is also plain that "as of right" does not require that the inhabitants should believe themselves to have a legal right: the House so held in R v Oxfordshire County Council, ex p Sunningwell Parish Council... It is clear law... that for prescription purposes under... the 1965 Act "as of right" means nec vi, nec clam, nec precario, that is, "not by force, nor stealth, nor the licence of the owner"...*

21. I am satisfied that the use alleged by the Applicant would be not by force or stealth. No force is needed to access the Land. It is open to members of the public who want to use it. The activities relied upon were not carried out by stealth. There has been no express licence to use the Land. There was no evidence of any member of the public being told not to use the Land for lawful sports and pastimes at any time in the 20-year period.

22. Acquiescence by the landowner is at the heart of the doctrine of prescription and it is a question of fact and degree whether local inhabitants did sufficient to bring home to the reasonable landowner that they were asserting a right to use the land.[6] In *R* (Laing Homes Limited) *v* Buckinghamshire County Council Sullivan J (as he then was) said:[7]

> *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 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.*

23. At paragraph 108 he said:

> *From the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.*

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5 [2003] UKHL 60, [2004] 1 AC 889, 13th November 2003, *per* Lord Bingham of Cornhill, paragraph 3.

6 *R* (Lewis) *v* Redcar and Cleveland Borough Council, above.

7 [2003] EWHC 1578 (Admin), [2004] 1 P&CR 36.

24. In Oxfordshire County *v* Oxford City Council ("the Trap Grounds case") Lightman J said (at first instance) 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).*

25. In *R* (Barkas) *v* North Yorkshire County Council Lord Carnwath JSC said:[8]

> *Where there is room for ambiguity, the user by the inhabitants must in my view be such as to make clear, not only that a public right is being asserted, but the nature of that right.*

26. An important question will therefore be whether the land was used by licence of the owner. Before answering that it will be necessary to determine whether it (or part of it) was highway land.

Locality/Neighbourhood

27. A locality is an area with a legally significant boundary, such as the boundary of a local authority, Church of England parish, manor or electoral division or ward.

28. A "*neighbourhood within a locality"* need not be an administrative unit and need not lie wholly within a single locality. As Lord Hoffman explained in the Trap Grounds Case, this phrase was intended to abolish the technicality of the pre-2001 law.[9] However it is still the case that the application site must serve a neighbourhood. Although, as urged by Richborough, a comparison may be made with judgment of Sullivan J (as he then was) in Cheltenham Builders Limited *v* South Gloucestershire District Council,[10] I have not done this

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8 [2014] UKSC 31, [2015] AC 195, paragraph 61.

9 The Trap Grounds Case, [2006] UKHL 25, [2006] 2 AC 674, 24th May 2006, *per* Lord Hoffmann, 691, paragraph 27.

10 [2003] EWHC 2803 (Admin), [2003] 4 PLR 95.

since that judgment was before the amendment to the legislation that was designed to make it less technical. Rather I consider it right to apply the plain English meaning of 'neighbourhood' in interpreting the word in s15(2), bearing in mind the intention to make it less technical. Having done that, I conclude that there must be something that could reasonably be called a neighbourhood, although I should not apply the more demanding test that applies to a locality and I should not be technical. However the area benefitting from the claimed green must not be arbitrary and that I should not go so far as to deprive the word 'neighbourhood' of meaning. If Parliament had meant any area of land it could (and no doubt would) have said so and not said 'neighbourhood'.

"A period of at least 20 years"

29. The period of 20 years under section 15(2) runs until the date of the application.[11]

Significant number

30. In R (Alfred McAlpine Homes Ltd *v* Staffordshire County Council) Sullivan J (as he then was) said:[12]

> *... the inspector approached the matter correctly in saying that "significant", although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? ... the correct answer 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.*

Trigger Event

31. The relatively new Commons Act 2006 section 15C, introduced by the Growth and Infrastructure Act 2013 brings a period of qualifying use to an end upon the occurrence of a *"trigger event"*. The material words of section 15C, which provides for exclusions to the right to register, are:

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

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11 The Trap Grounds Case, *per* Lord Hoffman, 696C.

12 [2002] EWHC 76, [2002] 2 PLR 1, 17th January 2002.

> *(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 set out in the relevant Schedule occurs in relation to the land ("a terminating event").*
>
> *(9) In this section "the relevant Schedule" means—*
> *(a) Schedule 1A, in relation to land in England…*

32. Various trigger events are specified in schedule 1A. These include:

> *3. 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.*

33. The terminating events should also all be considered, but only, as a result of the wording of s15(2) if they occurred before or on the date of the application.

The Burden and Standard of Proof

34. In order to succeed the Applicant must satisfy section 15(2) of the 2006 Act on the balance of probabilities.

35. This does not mean that he does not have to prove his case properly. It is important to bear in mind the words of Pill LJ in R *v* Suffolk County Council *ex parte* Steed *"it is no trivial matter for a landowner to have land, whether in public or private ownership registered as a town green"*[13] and also Lord Bingham's approval of those words and connected observations in Beresford.[14] Those words do not alter the standard of proof to one that is higher than the normal civil standard. They are however a reminder to registration authorities and inspectors of the need for proof and of the need to avoid speculation and guesswork.

36. Although I have felt it right to record this, I have not found this to be a finely balanced matter. Rather I am confident in my findings below.

Somerford Parish Council *v* Cheshire East Borough Council [15]

37. The application was previously considered and rejected on the papers without an inquiry. Somerford Parish Council successfully challenged that by an application for judicial review. In his judgment Stewart J said:

> *6. A central issue is whether the TVG application land is part of the highway. If it is, as found by Mr Marwick, then in the circumstances of this case he was entitled to find that*

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13 75 P&CR 102, CA, 11th July 1996, Pill LJ, 111.

14 Beresford, *per* Lord Bingham of Cornhill, 893C, paragraph 2.

15 [2016] EWHC 619 (Admin) 21st March 2016, Stewart J.

> *it cannot be registerable as a TVG.*[16] *This is because the use could properly then be found as a use by right, not a use as of right. …*

38. Stewart J rejected the Claimant's submission that there was a breach of natural justice in the Council acting as judge and jury in own cause, giving among other reasons the following:

> *… as a matter of principle, appointing an independent legal expert to conduct a non statutory enquiry and make findings is an appropriate mechanism. If the registration authority then rejected those findings that may well give rise to apparent bias. However, subject to the Claimant's arguments on other grounds, that is not the case here. The Defendant accepted Mr Marwick's recommendations.*

39. Steward J found in favour of the Claimant Parish Council because the inspector had admitted late evidence from the Council without giving the Applicant that opportunity to make further representations. That *"was a serious procedural defect which vitiated the fairness of the procedure"*. In considering whether this might have made a different he said:

> *58 … in relation to the 1930s agreements the Claimant submits that Mr Bell did not have the opportunity to address the effect of the 1930s agreements. Had he been given that opportunity he would reasonably have wanted to cross-examine the Defendant's witnesses as to whether there had been agreements dedicating the majority of the verges as highways and, if so, as to whether there had been any acceptance so as to create a highway in respect of the relevant land. In the light of my ruling as to s146/s154, acceptance could also be by use by the public.*

40. The judge recorded that the Claimant's submissions included wanting to test Mr Wood's evidence as to historical maintenance of the land by the Defendant and to cross-examine about it and on inconsistencies.

41. In his discussion he stated, among other things:

> *Under paragraph 3 to Schedule 1(A) the draft of the development plan document consulted upon in January/February 2013 was a trigger event. This is now common ground… Therefore the legality of the Defendant's decision of 16 March 2015 is in issue only in relation to that part of the land not covered by Site Congleton 1. This case and this judgment therefore deals with the validity of the TVG application and the Defendant's decision in relation to it solely insofar as concerns the land in the application which falls outwith Site Congleton 1.*
>
> *The starting point is the list of streets. It is agreed that this is not determinative. However it is a statutory document and the presumption of regularity applies. This particularly so in the context of the Defendant's duty under section 36(6) of the Highways Act 1980. Mr Marwick found that the list of streets was "strong evidence in itself that the land was highway land.*

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[16] At this point in the judgment an endnote states: " DPP v Jones [1999] 2 AC 240".

> *... the plan showing the list of streets is strong evidence that the land is highway land, though not determinative. I accept the force in the point made about the presumption of regularity. Yet the list of streets is not the only evidence and the later evidence does raise serious questions as to its accuracy. The Claimant should be entitled to explore the question of what, if any, evidence supports it.*
>
> *I also see the force in the Defendant's point that it is prima face unlikely that the adjacent landowner would effectively give up the land the subject of the verges, by fencing the agricultural land leaving roadside verges at some stage after the 1936 Ordinance Survey map.*

42. The judge gave reasons why he could not exercise his power not to grant relief tot eh Parish Council. These may be briefly summarised as: reasons why the 1930s agreements might not be relied upon; the growing of potatoes on the land; he could not be satisfied that it was highly likely that creation of a highway by use would have been established; the inspector had relied upon inconsistent late emails; the matter should not have been determined on the papers.

43. Although the Applicant is connected with the parish council, they a different legal persons and he is therefore not legally bound by concessions made by it. He did not amend his application to exclude the Site Congleton 1 land and argued that there was no trigger event, but if there were there would have been a terminating event.

Applications before and during the inquiry

44. The Applicant had raised various points of law in his skeleton argument. In addition to matters I deal with later below, my conclusions in respect of them are:

(1) I was not impressed by his natural justice arguments in respect of who should make the final decision after my report is received. The situation does not seem different in principle from a local planning authority redetermining a planning application in respect of its own land after it has been quashed. However this is a matter for the Council not for me.

(2) I was not impressed by his allegations of improper conduct on the part of the Council. Such allegations should not be made on an "it is thought" or belief as to motivation basis, but only where there is substantial evidence to support them.

(3) I did not take up the Applicant's suggestion (made in his skeleton arguments, but not otherwise) that I should receive evidence in confidence. That would have been contrary to my firm view that all parties should have to opportunity of seeing what other parties said and commenting on it. That is always important, but is especially important whether an attack on character would be involved.

45. I had expected that the applicant would deal with his submissions of law in his closing and that I would be able to ask him about these. His withdrawal from the inquiry meant that this did not occur.

46. In the course of the inquiry there were procedural applications.

47. Richborough applied to admit additional evidence. The applicant objected to this. However I was satisfied that he had had ample time (four weeks) to consider it and admitted it. Nothing occurred later that caused me to change my view that he would not be prejudiced.

48. The Highway Authority applied to admit additional evidence. The applicant objected to this. I read the evidence *de bene esse* and initially upheld his objection as it had been disclosed very late. However the Applicant then proceeded to adduce further new oral evidence himself on the matters that the new Highway Authority evidence had addressed without seeking permission to do so. In the circumstances I was satisfied that fairness required me to allow the new evidence that the Highway Authority had sought to adduce and that the Applicant had sufficient knowledge of the matters not to be prejudiced by admitting that evidence. Nothing occurred later that caused me to change my revised view that my admitting the late evidence would not prejudice him

49. The Applicant made the following applications.

(1) He applied to adjourn the inquiry at the start of the first day stating that the inquiry had not been properly publicised and that he had not notified his witnesses. He had given no prior notice of this point and gave no reason why he had not expressed his concerns earlier. I ruled against him. There was adequate notification. There was no evidence of any person who ought to have known of the inquiry not knowing of it. It was the Applicant's responsibility to notify his own witnesses. He had had ample time to prepare his case. He also raised late notification of the venue. I considered this had no merit. If this was causing him difficulty, he could have contacted the Council. As a solicitor (albeit one not practicing in this field) he should have been aware of the need to avoid unnecessarily increasing costs and not to withhold such concerns until after the inquiry had begun and significant public and private expenditure occurred. Nothing occurred during the course of the inquiry that indicated that anybody who ought to have known of it did not do so.

(2) Later that day he repeated this application after I ruled against him on it without pointing out any change in circumstances since my earlier ruling. I pointed out that I had already made a ruling on the matter.

(3) On the second day he applied to recall witnesses in respect of the neighbourhood issue. I ruled against this since it was clearly an issue from the start, being an express statutory requirement and also a matter on which Mr Marwick had identified as of concern and appropriate for an inquiry in paragraph 68 of his Opinion. There was no good reason why witnesses could not have dealt with it earlier.

50. At various points in the inquiry the Applicant emphasised that village greens were not his area of law. I understand that, but consider, having regard to the way in which he conducted himself that he was conversant with the relevant points of law and was not disadvantaged. His appearing not to understand why a decision-maker might give less weight to an answer in response to a leading question did not impress me. He told me he found difficulty with points of village green law that in my experience of village green inquiries non-lawyers have been able to address without any sign of difficulty. I explained the matters concerned to him.

The Evidence on behalf of the Applicant

51. I have borne all the evidence adduced on behalf of the Applicant in mind. I accept the evidence of Mr Timothy Foden, who impressed me, in full. I considered that the Bell family had a tendency to overstate their case, for example Mr David Geoffrey Bell's statement that he recalls thinking when he bought his house *"it was just like living opposite a village green"* was not credible. Whether the land is or is not a village green under the Commons Act 2006, it does not appear anything like a village green in normal English usage. I was concerned at the Applicant's repeated use of leading questions. As a solicitor (albeit one practising in a different area of law) I would expect him to know why the weight given to answers to such questions might well be reduced. In general I felt that the Applicant's witnesses had a tendency to make the most of events that were unlikely to have occurred often. The evidence adduced by the Applicant was to a considerable extent not clear as to which parts of the Land were being used and I found this lack of detail where activities took place on the Land surprising given its shape. I am less critical of impression as to dates, which is understandable. However this does not alter the fact the Applicant must prove use in the 20-year period. It became clear from questioning that some witnesses were giving evidence as to events that occurred before the commencement of the 20-year period, although this had not been clear from their witness statements

52. I am concerned about one aspect of the written evidence of the witnesses for the objector. The standard form said: *"I would/ would not (delete as appropriate) 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 repass."* This is directly contrary to the decision of the House of Lords in DPP *v* Jones. All the witnesses deleted "would not".

53. I am also concerned that witnesses told the inquiry that they had not seen the plan that showed the Land or the alleged neighbourhood.

The Evidence called on behalf of the Objectors

54. The evidence adduced by the Highway Authority impressed me. I was satisfied that they treated the land as highway land and maintained it. I accept it in full.

55. I asked the Highway Authority to state what it considered were lawful uses of the highway. It responded in writing stating that all the activities in the evidence were lawful uses. This included equine, informal games, overnight camping, dog walking and training, jogging, collecting wild fruit, conkers and fungi, observing nature and stargazing. In its view all the activities carried on the land were lawful uses of the highway.

56. Richborough called the farmers of the land within the triangle. On the basis of his frequent visits to his agricultural land within the triangle, Mr E D Davenport, who normally visited the land within the triangle dally, considered that the claims as to use were *"grossly overstated"* and that the Land was often not suitable for equine use. I accept his evidence and prefer it to the evidence adduced on behalf of the Applicant. Mr C Davenport also thought that the claims were *"greatly exaggerated"*. Although, since he visited the Land less often, I give less weight to this. Mr Aspbury gave expert professional evidence. I accept his evidence as to primary facts, which I found most helpful (as were his photographs), but consider that he adopted too strict and technical an approach to what is a neighbourhood.

Site Visits

57. I visited the Land and its environs unaccompanied on Monday 8th May 2017 and Thursday 14th May 2017. My site visit on Monday 8th May included visiting that application land and the nature conservation area, looking at the two Parish Council notice boards and driving along Back Lane to car park of the nearby playing fields. My site visit on Thursday 14th May 2017 included walking all round the triangle and walking to the nearby playing field by the public footpath that runs northwards from close to the southern end of Black Firs Lane. I also viewed the wider area including other parts of Holmes Chapel Road, Box Lane and Sandbach Road. I did not see any human use of the Land. I did see a dog walker who was not using the Land. The playing fields were being used for casual activities. I saw seven people with dogs, a woman and child playing "kick-about" football, a jogger and a man and child with a go-kart. The playing fields comprised 5 soccer pitches, two rugby pitches, a car park and a substantial area of other land suitable for informal recreation. There were at least three dog-waste bins. I recognise that my site visits were brief 'snapshots in time' and would not determine my recommendation on the level of activity I saw. The houses around the triangle are substantial with gardens.

58. I give greater weight to my assessment of the nature of the Land. This is that that it could be used by lawful sports and pastimes, but, but because of its relatively narrow nature next to through roads would not be particularly attractive for this purpose, particularly in recent years when according to Mr David Geoffrey Bell there had been a lot of rat-running fast traffic. I also bear in mind the ease of access, particularly from Black Firs Lane to the Playing Fields and their much greater attractiveness and suitability for lawful sports and pastimes than an apparent highway verge. The fact that the houses around the triangle had

gardens of sufficient size for children to play in would also limit the likelihood of extensive recreational use of a not particularly convenient verge.

Discussions

Site Congleton 1

59. Before Stewart J it was common ground that the draft of the development plan document consulted upon in January and February 2013 was a trigger event under Schedule 1(A) paragraph 3 of the 2006 Act. Mr Vivian Chapman, a highly respected QC who has great, indeed exceptional, experience of village green matters, made those concessions. The Applicant did not however make the same concession and I must therefore consider the matter afresh.

60. I have no doubt that the concession that the Parish Council made was rightly made. The Development Strategy prepared by East Cheshire Council falls within the definition in the Town and Country Planning (Local Planning) (England) Regulations 2012 regulation 5 and therefore was a development plan document within the meaning of Schedule 1A of the 2004 Act. It follows that a trigger event took place.

61. In his skeleton argument the Applicant submitted that a terminating event had taken place. This was not a point that Mr Chapman had taken. His ground for doing so was that the draft DPD had been replaced by a new document. I do not accept his reasoning. The event to which he refers relates to after the date of his application and, although if he were right might have enabled a new application to be made, would not validate the present retrospectively.

62. It follows that I am of the firm opinion that there is no right to apply to register as a green that part of the Land that falls within Site Congleton 1. If this is correct, the application must fail in respect of that part of the Land. In case I am wrong, I shall nonetheless continue to consider the whole of the application site.

Lawful sports and pastimes

As of right

Is the application site highway land?

63. As Stewart J explained the starting point is the list of streets, but this is not necessarily determinative. It is a statutory document and (particularly given the Council's duty the Highways Act 1980 section 36(6)) the presumption of regularity applies. In the light of the judgment and bearing in mind that a presumption is not determinative, I considered it important that the Applicant should be given the opportunity to cross-examine the Highway Authority's (and indeed Richborough's) evidence on the matter. The Applicant had stated that he wished to cross-examine Mr Wood in paragraph [13] of his skeleton arguments, which are dated 2nd March 2017. He also stated in of his skeleton arguments that he wished to

cross-examine: a representative of the Council as to whether the plan dated 13th May 2013 *"accurately reflected the underlying list of streets"*; Mr Welch; and Mr Davies. In the event the Applicant did not cross-examine anybody. At the end of his case, without have given prior notice that he would do this, he withdrew from the inquiry and took no further action in it. He gave his reasons for doing so. He felt that he had done as much as he could to help the inquiry and that he was not in a position to test the evidence. He was not withdrawing the application and wanted me to take on the role of applicant. He was concerned about the effect on his business of his absence from it. He did not raise any concern about the conduct of the inquiry. I explained that I could not take on the role of applicant.

64. While the presumption of regularity is not necessarily determinative, it is a well-established presumption of some strength. I do not accept the Applicant's submission in his skeleton argument that *"the default position is NOT Highway Land"*. Stewart J considered the position should be tested by an inquiry, but he recognised that the presumption applied. It was a question of whether that presumption was overridden.

65. The Highway Authority's evidence showed that care had been taken in the production of their plans. These were not simply based on an assumption that the verge was highway land, or that the highway extended to hedge, but followed investigation of tithe maps, historic Ordnance Survey maps, Finance maps, the 1930s dedication agreements and Land Registry titles.

66. In the absence of the Applicant I tested such parts of the evidence as I considered requiring testing myself. Far from casting doubt on it, this caused me to reach the firm opinion the Land is all highway land. Nothing that I saw on my site visits gives me any reason to doubt that conclusion.

69. There was credible evidence that potatoes had been planted on the land in the past. By present-day standards this would have been inconsistent with a highway use. It was a matter to which Stewart J had drawn specific attention. Initially I considered that the growing of potatoes might be significant evidence that the Land was not highway land, although it was some time in the past – Mrs Toomer who was born in 1954 said that she remembered the potatoes from when she was "a very little girl" and that she understood that this was from the war. As a result of the evidence about the 'Digging for Victory' campaign and the years that followed it I am satisfied that the planting of potatoes in the 1940s and 1950s is not significant evidence that the land was not highway land and does not weigh against the presumption of regularity. A highway authority would be unlikely to obstruct a government campaign, least of all in wartime, and there would be nothing surprising in some food-producing use continuing after the war into the late 1950s. Apart from the growing of potatoes there was no evidence of anything that would cause me to doubt that the land between the carriageway and the boundaries of neighbouring properties was highway land. In

particular the planting of daffodils on the grassed part of highways by well-meaning residents is a fairly well-known practice and the planting of trees by no means unknown.

70. I am satisfied that the land was used as highway and that it would therefore have been adopted as highway land in any event. The 1930s highway agreements provide some support for the Highway Authority's case, both is respect of the limited areas of land to which they relate and as an indication as to what is likely to have occurred elsewhere, but, in the absence of evidence that displaces the presumption, I have not needed to rely on them. The maintenance of the Land provides further support for the Highway Authority's case. Although I recognise that on occasions a council may inadvertently maintain private land, there is no reason to believe that occurred here. I do not find an absence of documents predating the 1974 local government reorganisation surprising. Rather in my experience it is a common occurrence. On the facts of this application I have no hesitation is saying the presumption of regularity applies and that the Highways Maintainable at Public Expense Plan kept under section 36(6) of the Highways Act 1980 is in all material respects accurate.

71. As a result of the above I am of the firm opinion that all of the land is highway land.

Lawful use of the highway

72. The Highway Authority submits that all of the activities relied upon by the Applicant are lawful uses of the highway. Apart from the selling of cars on the verge (about which I have considerable doubts, but which is not lawful sport or pastime), I agree. This accords with the high authority of DPP *v* Jones mentioned in Stewart J's judgment and which binds me and the Council. It also accords with my view of common sense. None of the activities are of a sort that are unexpected on a highway verge, a nuisance, an impediment to normal use of the highway or otherwise unreasonable. It would be regrettable if highway authorities had to stop such activities in order to prevent verges becoming a village green.

"a significant number of the inhabitants of any locality," or "a significant number of the inhabitants… of any neighbourhood within a locality".

73. The area said to benefit from the alleged green must be either a locality or a neighbourhood. Since the area of land identified by the Applicant is not a legally defined area and does not approximate to such an area, it is clearly not a locality and not capable of being amended to be a locality. The application did not specify a locality, but I do not consider this to be significant. The area is within a locality, namely Cheshire East district, and in any event a neighbourhood for the purpose of s15(2) may be in more than one locality. I do not accept that the fact that it is within two parishes is in itself significant, nor do I find Richborough's argument based on postcodes of assistance since these are designed to relate to the delivery of mail.

74. The relevant issue is therefore whether the land specified by the Applicant is a neighbourhood (or if I am right in taking a more generous view than Richborough whether it approximates to a neighbourhood and amendment can be made without injustice). As explained above I consider that neighbourhood should be given a non-technical plain-English meaning that is not highly restrictive. It follows that I consider the approach to 'neighbourhood' advanced by Richborough and supported by the Highway Authority to be too restrictive and I have not applied this approach

75. The area that the Applicant submits is a neighbourhood has been called Somerford Triangle. There is limited evidence that this name is longstanding and it may have been so. That in itself would not make it a neighbourhood. Something may be called a triangle simply because of its shape without being a neighbourhood, just as a crossroad may be called something cross without being a neighbourhood. In this respect it does not have the effect that the name given to a housing estate may have when it is built.

76. There was no evidence of communal events such as Guy Fawkes Night bonfires or other celebrations, no evidence of a community centre or other location where residents met and no evidence of any community activity primarily for the triangle. Nothing on either of the two parish council notice boards indicated that there was a Somerford Triangle neighbourhood. There was evidence of a neighbourhood watch and one old and neglected neighbourhood watch sign in Black Firs Lane, but no evidence as to the area this Neighbourhood Watch covered or of its name. I sought documentation relating to it from the Applicant, but none was produced.

77. Nothing about the specified area made it a natural neighbourhood. There was no evidence of any location where people from it met such as a place of worship,[17] hall, or pub where this might be expected. There was no school gate within the claimed neighbourhood where parents would be likely to meet and talk. There is a nature conservation area, Black Firs Plantation, but no evidence that this is a meeting place for the specified neighbourhood. There had been a café and shop in Chelford Road, but there was no evidence as to when these closed and the Applicant has not proved that they were open at any time in the 20-year period, let a lone for a significant part of it. The Applicant said in cross-examination that the area had been chosen to correspond with the houses of witness statements he had obtained.

80. It is up to the applicant to specify the neighbourhood, but this should not be taken too far. If I considered that a modest adjustment to the plan would show a neighbourhood, I would have indicated this and considered whether it could be amended without injustice. This was not the case. I agree with Mr Piatt's submissions that the area is "an arbitrary and

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[17] There was reference to a chapel, but this is about two kilometres to the west of the area said to be a neighbourhood.

artificial construct". In my firm opinion the area specified is not a neighbourhood on even the broadest interpretation of the word and does not approximate to such a neighbourhood.

81. The evidence adduced by the Applicant shows that some residents used the Land from time to time. I am satisfied that, given its nature, only a small proportion of the population of the area concerned would have used it more than very occasionally and that the main users were the Bell family and people from outside the area. The "significant number" requirement has not been met.

82. Use by French holidaymakers, Romani Gypsies (not from the area concerned), visitors from villages in Cheshire and Staffordshire and others from outside the area would not count, not would use of the land to park cars or to sell cars. In any event short stays on the edge of a highway would have been normal historically.[18]

83. I have already concluded that the Site Congleton 1 would be excluded in any event because of the trigger event. I also consider that the southern end of Black Firs Lane with its undergrowth and land intersected with its driveways and lawns would not have been used. I would in any event have recommended not registering this land.

"a period of at least 20 years"? Was the significant number of inhabitants continuing to do "to do so at the time of the application"?

84. As mentioned I was not persuaded by the evidence in support of the application about use. That evidence is weakest in respect of the end of the 20-year period. There was no doubt limited use of the Land by the Bell family earlier when the children were young, but I am not persuaded that there was significant later use.

Conclusion and recommendation

85. I am of the firm opinion that the Applicant has not proved that the Land falls within the definition contained in section 15(2). In particular he has not shown any of the following:

- That the use that took place was "as of right";
- That the area specified in the application was a locality or neighbourhood;
- That if it had been a locality or a neighbourhood the use would have been significant for at lest 20 years.

86. A failure to establish any one of these means that the application should be rejected.

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[18] During the course of the inquiry while the Applicant was still present, I drew the parties' attention to the fact that Macpherson J. had made this point to me in a hearing in which I appeared and indeed referred to his own experience when in the Territorial Army,

87. Site Congleton 1 is in any event excluded as a result of a trigger event. I would also have excluded the part of the southern end of Black Firs Lane that is partly intersected with its driveways and lawns and partly overgrown in any event

88. I am of the firm opinion that no part of the Land should be registered as a green and recommend that the application is rejected and that the Land is not so registered.

TIMOTHY JONES

Independent inspector

25th July 2017.