

## **REPORT FOR: LICENSING PANEL**

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<b>Date of Meeting:</b>	10 December 2013
<b>Subject:</b>	Whitchurch Playing Fields – Application under section 15(1) of the Commons Act 2006 to register the land as a Town Green
<b>Responsible Officer:</b>	Hugh Peart – Director of Legal & Governance Services
<b>Exempt:</b>	No
<b>Enclosures:</b>	Report and recommendation of Mr Stephen Morgan following a non- statutory public inquiry (Appendix A)

### **Section 1 – Summary**

Following a non-statutory public inquiry in relation to an application to register Whitchurch Playing Fields as a Town Green, under section 15(1) of the Commons Act 2006, this report presents the findings and recommendation of Mr Stephen Morgan (Inspector).

#### **Recommendations**

The Panel are requested to formally agree:

1. to suspend Committee Procedure Rule 16 which relates to deputations for the duration of this item to enable the Applicant and the Objector to address the Panel for up to 10 minutes each;
2. to amend the Application so it falls to be considered under s15(2); and
3. to accept the report and recommendation of Mr Stephen Morgan (attached at Appendix A) and accordingly refuse to register the land known as Whitchurch Playing Fields as a town green.

## **Representations received**

The Council held a non-statutory public inquiry to consider the merits of the application. Both the Applicant (Mrs Melanie Lewis) and the Objector (the Council in its capacity as landowner) represented and offered representations in the form of oral and written evidence at the Inquiry. A summary of the evidence is contained within the Inspector's report.

Given that both parties and members of the public were afforded an opportunity to make representations at the Inquiry, officers do not consider it to be in the public interest to re-open the discussion and/or debate evidential issues already considered at the Inquiry. Officers are recommending that Members of the Panel suspend the application of Committee Procedure Rule 16 (relating to deputations), to enable the Applicant and the Objector to address Panel Members for up to 10 minutes on any issues/comments they may have with regard to the Inspector's Report.

A copy of the Inspector's report and recommendation was sent to both parties on 1 November 2013, officers acting on behalf of the Registration Authority have not received any comments regarding the content of the Inspector's report.

## **Section 2 – Report**

### **Background**

Under the Council's Constitution this matter falls within the Licensing Panel's terms of reference.

This report concerns an application to register land at Whitchurch Playing Fields, Wemborough Road, Stanmore, HA7 2EQ ("the Land"), as a town green under section 15(1) of the Commons Act 2006 ("the Act").

For the purposes of the Act, the Council is the relevant registration authority. The Council is also the registered proprietor of the freehold interest in the Land and acting in its capacity as landowner has objected to the application. Given that the Council is also the Registration Authority for the purposes of the Act there is an apparent conflict of interest.

In the interests of transparency and maintaining public confidence in the fair and independent determination process, the Council's interests in this matter have been separated to reflect its capacity as Landowner and that of Registration Authority. In practical terms, the Corporate Estates team undertakes the role of Landowner whilst the Director of Legal & Governance Services acts in the capacity of the Registration Authority.

At all times, the Landowner and the Registration Authority were advised separately by two legal officers, operating a 'Chinese wall' working arrangement.

At its meeting of 13 May 2013, members of the Licensing Panel resolved to hold a non-statutory public inquiry for the purposes of considering the merits of the application.

The Council (in its capacity as Registration Authority) appointed Mr Stephen Morgan (Landmark Chambers) to sit as an independent Inspector (“the Inspector”) and consider the merits of the application. The non-statutory public inquiry (“the Inquiry”), was held on the following dates: 11, 12, 13 and 14 June 2013 with consideration of closing submissions on 2 July 2013.

At the Inquiry, both the Applicant and the Objector presented their respective cases by way of written and oral evidence. In his report the Inspector provides a summary of the main relevant points arising from the submitted evidence.

This paper presents the Inspector’s report and recommendation relating to the determination of the application to register Whitchurch Playing Field (“the Land”), as a town green under section 15 of the Commons Act 2006 (“the Act”).

### The Application

On 6 December 2012, the Registration Authority received an application under section 15 of the Act (“the Application”) from Mrs Lewis to register the Land as a town or village green (TVG).

The Application was originally submitted pursuant to section 15(2) of the Act, where:

- “(a) a significant number of the inhabitants of the 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”.

The Applicant requested an amendment to the Application so as to be made under section 15(3), 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;
- (b) they ceased to do so before the time of the application but after the commencement of this section; and
- (c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b)”.

Having sought agreement from the Objector, the Registration Authority accepted the amendment.

As part of her closing submissions the Applicant formally applied to “amend” the Application to be considered under section 15(2) in the event that the Registration Authority considers that it should have been made under section 15(2) (and/or the relevant grounds under s.15(3) are not met).

Having considered the evidence the Inspector has recommended that the Registration Authority determines the Application under section 15(2) of the Act. Members are advised by the reporting officer to consider the Application under the statutory tests pursuant to that provision.

### Summary of the Inspector's Report and Recommendation

The Inspector's report summarises the key points arising from the evidence submitted at the Inquiry.

In advising Panel Members to determine the Application under section 15(2) of the Act, the Applicant must prove, on the balance of probabilities that a significant number of inhabitants used the Land as of right for lawful sports and pastimes for the qualifying period of 6 December 1992 – 6 December 2012.

In his conclusion, the Inspector weighed the evidence given by both parties against the relevant statutory criteria. His findings can be briefly summarised as follows:

- Use as of right (i.e. use without force, stealth or permission) – Based on all the evidence before the Inspector he concluded that the locking of gates E and D on occasions is an example of an implied permission and use of the Land through these gates cannot be said to have been “as of right” throughout the 20 year period. Although he gave limited weight to the Objector's evidence of locking of pedestrian gate A, in his view it still needed to be taken into account when considering the actions by the Objector in locking access points D and E and repairs to holes in the fencing along Abercorn Road.

In addition, he concluded *“that the exclusion of local residents carrying out informal recreational use from parts of the land when matches were taking place”* cannot constitute *use as of right*.

- Significant number of inhabitants using the land for lawful sports and pastimes (LSP) – The Inspector concluded that the evidence demonstrates that local residents were able to and did access the Land for LSP for the relevant 20 year period. However, as stated in his report the Applicant must demonstrate on the balance of probabilities significant use for LSP for the whole of the Land throughout the 20 year period.

The Objector submitted evidence to show use of the land by local schools and in the Inspector's view that use was likely *“to have been regular, particularly in the 1990s/early 2000s in term time ...”*.

The Inspector also found clear evidence of regular pitch bookings by sports clubs and use of the Land by the Baptist Church. The use of the Land by the schools, sports clubs and the Baptist Church, he concludes amounts to permitted formal uses of the Land.

In the Inspector's view, on a regular basis such formal recreational use displaced the qualifying recreation from significant parts of the Land throughout the 20 year period.

- Use by the inhabitants of a locality or neighbourhood within a locality – although the Applicant's evidence did not demonstrate a significant "spread" of local inhabitants had she satisfied the other qualifying criteria the Inspector would have accepted the evidence as submitted.

Having considered the above, the Applicant has failed to satisfy all of the statutory criteria pursuant to section 15(2) of the Act and the Inspector therefore recommends that the Application is refused. It is also important to note paragraph 6.2 of the Inspector's report, where he confirms that he would have recommended refusal of the Application even if it had been considered under section 15(3).

### **Section 3 - Legal Advice**

The process of registering land as a town green under section 15 of the Act is a matter of fact and law. The Applicant and the Objector presented their respective cases at the Inquiry and in producing his report the Inspector has considered all of the evidence against the relevant statutory criteria.

It is for the Applicant to demonstrate (on the balance of probabilities) that all the relevant statutory criteria are met by the Application. In reaching its determination, Members of the Panel must consider the Application against the strict statutory criteria.

Matters relating to an alternative use and/or future proposals for use of the Land are not relevant for the purposes of determining the Application.

The Inspector's report comprehensively covers the statutory requirements for the registration of a town green and demonstrates that the evidence submitted to the Inquiry does not support the registration of the Land as a town green.

Officer advice to Panel Members is to accept the Inspector's recommendations and accordingly reject the Application.

Although, ultimately the decision as to whether to register the Land as a town green rests firmly with the Panel, members are advised that they should have sound arguments based on fact and law if they are minded to go against the Inspector's recommendation - given that failure to do so could risk a challenge to the Council by way of Judicial Review.

If Members do accept the Inspector's report and reject the Application, it is possible that the Applicant may also seek to challenge the Council's decision by way of Judicial Review. Although legal officers cannot provide an absolute guarantee that the courts would decide in its favour in such an event, the Council would at least be able to demonstrate that in the strongest of terms that it reached its decision having considered the facts presented by the parties.

## Recommendations

1. Suspend Committee Procedure Rule 16 which relates to deputations for the duration of this item to enable the Applicant and the Objector to address the Panel for up to 10 minutes;
2. Accept an amendment of the Application so that it is considered as made under section 15(2) of the Commons Act 2006. The relevant 20 year qualifying period for the Registration Authority to consider would therefore be that from 6 December 1992 to 6 December 2012; and
3. Accept the report and recommendation of Mr Stephen Morgan (attached at Appendix A) and accordingly reject the Application to register the land known as Whitchurch Playing Fields as a town green.

## Section 4 - Statutory Officer Clearance

Name: Steve Tingle	<input checked="" type="checkbox"/>	on behalf of the Chief Financial Officer
Date: 28 November 2013		
Name: Linda Cohen	<input checked="" type="checkbox"/>	on behalf of the Monitoring Officer
Date: 28 November 2013		

## Section 5 - Contact Details and Background Papers

**Contact:** Katherine Hamilton, Acting Senior Lawyer – Planning & Regeneration, 020 8424 1890

**Background Papers:** Officer report and minutes of Licensing Panel meeting 13 May 2013