ANNEX 2

In the Matter of

An Application to Register

Land at Witney Meadows Country Park, Oxfordshire

As a New Town Green

OPINION

of Mr VIVIAN CHAPMAN QC

25th. April 2009

Oxfordshire County Council

Chief Executive's Office

Legal Services

County Hall

Oxford OX1 1ND

Ref RDG/29989

64935/VRC/09/36/wp/S1/Witney Opinion

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Introduction

[1] I am instructed to advise whether an application to register land at Witney Meadows Country Park, Oxfordshire as a new town green under s. 15 of the Commons Act 2006 ("CA 2006") is "duly made" for the purposes of the relevant regulations.

The application

[2] By an application in the prescribed Form 44 dated 5th. February 2009[1], Mr. Owen Edwards of Eton Close, Witney applied to Oxfordshire County Council ("OCC") as the relevant commons registration authority ("CRA") to register land at Witney Meadows Country Park as a new town green under s. 15(2) of the CA 2006.

[3] The application land is shown edged red on Map A attached to the application. The land lies in the SE sector of Witney, N of the A40 Witney bypass and W of the River Windrush. Part of the land is the route of a disused railway line. The application land is owned by Witney Town Council. It is part of a larger area managed by Witney Town council as a park. The rest of the park is S of the A40 Witney bypass. Public footpath 410/15 passes through the application land in a N-S direction.

[1] The form is stamped as received on 5th. January 2009 but I infer that the month on the date stamp was incorrect.

[4] The ground of the application is that the application land has been used as of right for recreation by the inhabitants of the N, S, E, W & Central wards of Witney Council for more than 20 years.

[5] The application is supported by the prescribed statutory declaration made by Mr. Edwards.

Supporting evidence

[6] The application is supported by a body of written evidence.

[7] It is said that for many years the application land had been used for general recreation by the people of Witney. Reliance is placed on a newspaper report of 1888 referring to a field by the river as being a popular place on summer evenings, where swimmers would bathe in the river and to a newspaper report of a field being used for sports in 1905. It is doubtful whether these fields comprise the whole of the application land.

[8] It appears from minutes of Witney Town Council that the application land was purchased by the Council in 1988 before any final decision as to the use that was to be made of it and without any reference to the statutory power under which it was to be purchased.

[9] An extract from a Transfer of 30th. September 1988 does not identify the statutory power under which the acquisition was made. The transfer included most of the application land but did not include the site of the disused railway line. It is not clear how or when the disused railway line vested in Witney Town Council.

[10] After the 1988 Transfer (although the precise date is unclear) Witney Town Council opened the application land as a Country Park and maintained it as a public recreational area and encouraged public recreational use.

[11] Numerous witnesses, mostly residents of Witney, have given evidence of using the application land for informal recreation for 20 or more years. Many have completed a standard form questionnaire (which however does not include the disused railway line within the claimed green)

New greens: law and procedure

[12] Section 15(2) of the CA 2006 was brought into force on 6th April 2007 and contains (so far as relevant) the following provision for the registration of new greens:

*"**Registration of greens***

(1) Any person may apply to the commons registration authority to register land 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.

What is a Town or Village Green?

[13] A town or village green is land which is subject to the right of local people to enjoy general recreational activities on it. There is no legal requirement that it should consist mainly of grass, be situated in or in reasonable proximity to a town or village, or be suitable for use by local inhabitants for traditional recreational activities[2]. Greens which were not registered by 31st July 1970 ceased in law to be town or village greens and, so long as they remain unregistered, local people have no recreational rights over them[3].

What is the Effect of Registration?

[14] The effect of registration can be summarised as follows.

- Land becomes a new green only when it is registered as such[4].
- Registration as a new green confers general recreational rights over the green on local people[5]
- Registration as a new green subjects the land to the protective provisions of s. 12 of the Inclosure Act 1857 and s. 29 of the Commons Act 1876, which in practice preclude development of greens[6]

…a significant number…

[15] "Significant" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers[7].

…of the inhabitants of any locality……

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2 *Oxfordshire County Council v Oxford City Council & anor* [2006] 2 AC 674 *per* Lord Hoffmann at paras 3-16, & 37-39, Lord Rodger at para 115 & Lord Walker at paras 124-128 (Lord Scott dissenting at paras 71-83)

3 *Oxfordshire per* Lord Hoffmann at para. 18.

4 *Oxfordshire per* Lord Hoffmann at para 43, Lord Scott at para 110, & Lord Rodger at para 116 (Lady Hale dissenting at para 142 in relation to original definition)

5 *Oxfordshire*

6 *Oxfordshire*

7 *R (McAlpine) v Staffordshire CC* [2002] EWHC 76 (Admin) at para. 77

[16] A "locality" cannot be created by drawing a line on a map[8]. A "locality" must be some division of the county known to the law, such as a borough, parish or manor[9]. An ecclesiastical parish can be a "locality"[10]. It will be seen that the courts have adopted a very narrow construction of "locality". The House of Lords in the *Oxfordshire* case recognised and upheld the narrowness of this definition of "locality". Lord Hoffmann said that it had been decided in the *Sunningwell* case that the narrowness of the definition was qualified only by the fact that it was sufficient if the recreational users of the green came "predominantly" from the relevant locality[11]. However, I think that it must be borne in mind that that this qualification was applied on consideration of an earlier, and narrower, definition of a prescriptive green under s. 22(1) of the Commons Registration Act 1965 ("CRA 1965") in the *Sunningwell* case. Under the current definition, the test is not whether the users come predominantly from the relevant locality or neighbourhood, but whether a significant number of the users come from such locality or neighbourhood.

...or of any neighbourhood within a locality…

[17] A "neighbourhood" need not be a recognised administrative unit. A housing estate can be a neighbourhood[12]. However a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness[13]. A neighbourhood need not lie wholly within a single locality[14]. In the *Oxfordshire* case, Lord Hoffmann pointed out the "*deliberate imprecision"* of the expression. I am inclined to the view that the statutory test is fulfilled if the applicant can prove that a significant number of qualifying users come from any area which can reasonably be called a "neighbourhood" even if significant numbers also come from other neighbourhoods. I do however consider that a neighbourhood must have ascertainable boundaries because only the inhabitants of the relevant neighbourhood have recreational rights over the land: *Oxfordshire* para. 69(i)

…have indulged as of right…

[18] Although the statutory creation of a new green by 20 years' use does not depend on the inference or presumption of a grant or dedication, the expression "as of right" echoes the requirements of prescription in relation to easements and public rights of way. In both cases, qualifying user must be "as of right" because the inference or presumption of a grant or dedication depends fundamentally on the long acquiescence of the landowner in the exercise of

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8 *R (Cheltenham Builders Ltd) v South Glos, DC* [2004] 1 EGLR 85 at paras 41-48

9 *Ministry of Defence v Wiltshire CC* [1995] 4 All ER 931 at p 937b-e, *R (Cheltenham Builders Ltd) v South Glos. DC* at paras 72-84 and see *R (Laing Homes Ltd) v Buckinghamshire CC* [2003] 3 EGLR 69 at para. 133

10 *R (Laing Homes) Ltd v Buckinghamshire CC*

11 *Oxfordshire* **per** Lord Hoffmann at para. 25 applying the ruling of the House of Lords in *R v Oxfordshire County Council ex. p. Sunningwell Parish Council*[2000] 1 AC 335.

12 *R (McAlpine) v Staffordshire CC*

13 *R (Cheltenham Builders Ltd) v Sth Glos. CC* at para 85

14 *Oxfordshire* case per Lord Hoffmann at para 27 disapproving *R (Cheltenham Builders Ltd) v Sth. Glos. CC* at para. 88

the right claimed[15]. The landowner cannot be regarded as acquiescing unless the user would appear to the reasonable landowner to be an assertion of the right claimed[16]. The subjective intentions of the users are irrelevant[17]. User is therefore "as of right" if it would appear to the reasonable landowner to be the assertion of a legal right.

[19] The traditional formulation of the requirement that user must be "as of right" is that the user must be without force, secrecy or permission (or in the time-worn Latin phrase *nec vi, nec clam, nec precario*). If user is by force, is secret or is by permission, it does not have the appearance to the reasonable landowner of the assertion of a legal right to use the land

[20] "Force" does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates or if it is contentious or under protest[18]. There is an undecided question whether user which involves ignoring a prohibitory notice such as "Private Keep Out" is user by force[19].

[21] Use that is secret or by stealth will not be use "as of right" because it would not come to the attention of the landowner.

[22] **"**Permission" can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied, but permission cannot be implied from inaction or acts of encouragement by the landowner[20]. It was held in the *Beresford* case that permission must be revocable or time limited: permission that is unlimited and irrevocable amounts to acquiescence.

[23] In the *Sunningwell* case, the House of Lords said that use "as of right" meant use which is without force, stealth or permission. However, I think that it would be wrong to treat *Sunningwell* as if it had amended the statute to substitute *"without force, stealth or permission"* for the words *"as of right"*. In *Sunningwell*, the House was considering the issue whether users had to have a subjective belief that they were exercising the right claimed. In rejecting the requirement for such subjective belief, the House emphasised the objective nature of user "as of right". The Court of Appeal in the *Redcar* case[21] stated that user *nec vi nec clam nec precario* is not a sufficient condition for user to be "as of right". It is still necessary to comply with the overarching requirement that the user must have the appearance to the reasonable landowner of an assertion of the legal right claimed.

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15 *Dalton v Angus & Co.* (1881) 6 App. Cas. 740 at 773 as cited by Lord Hoffmann in *Sunningwell* at p. 351B and by Lord Walker in *Beresford* at para. 76

16 *R (Lewis) v Redcar & Cleveland Borough Council* [2009] EWCA Civ 3 at para. 35

17 *Sunningwell*

18 *Newnham v Willison* (1987) 56 P&CR 8

19 See the discussion by Sullivan J at first instance in the *Redcar* case at [2008] EWHC Admin 1813 at paras 11-16

20 *R (Beresford) v Sunderland City Council* [2004] 1 AC 889

21 Paras 37-38

[24] Thus, if user is pursuant to a legal right, e.g. under a statutory trust for public recreation under s. 164 of the Public Health Act 1875 or s. 10 of the Open Spaces Act 1906, it is "by right" rather than "as of right". This point was fully discussed by the House of Lords in the *Beresford* case, and it illustrates the fact that "as of right" does not just mean "without force, stealth or permission".

[25] There are hints in the speeches of Lord Hoffmann in the *Sunningwell* and *Oxfordshire* cases that the issue whether recreational user has the appearance to the landowner of the exercise of a legal right may be affected by the interaction between the use of the land made by the landowner and by local people. Lord Hoffmann rejected the view expressed in the *Laing Homes*[22] and *Humphries*[23] cases that land could not acquire town or village green status if the landowner was using the land for purposes that would be unlawful under IA 1857 s. 12 or CA 1876 s. 29 if the land were a green. In cases where the land is subject to low level use by the landowner, there may be no conflict between the use of the land by the landowner and the recreational use of the land by local people. There must be give and take between the landowner and local recreational users. However, if there is a conflict between the landowner's use and recreational use by local people, and the use by local people materially defers to the use by the landowner, the recreational use will not have the appearance to the landowner of use "as of right": the *Redcar* case[24].

…in lawful sports and pastimes on the land…

[26] The words "lawful sports and pastimes" form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play[25]. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way[26].

…for a period of at least twenty years…

[27] In the case of an application under CA 2006 s. 15(2), the period of 20 years is the 20 years immediately before the application (subject to certain exceptions under subsections (6) and (7)).

Procedure

[28] Procedure on applications to register new greens under the CA 2006 is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England)

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22 [2004] P&CR 573

23 *Humphreys v Rochdale MBC* (2004) unreported

24 *R (Lewis) v Redcar & Cleveland BC* [2009] EWCA Civ 3

25 *R v Oxfordshire CC ex p. Sunningwell PC* at pp 356F-357E

26 *Oxfordshire CC v Oxford CC* [2004] Ch 253 at paras 96-105

Regulations 2007[27]. The 2007 Regulations closely follow the scheme of The Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under s. 13 of the Commons Registration Act 1965. Those regulations proved quite inadequate to resolve many disputed applications and registration authorities have had to resort to procedures not contemplated by the Regulations to deal with such applications.

Who can apply?

[29] Anyone can apply to register land as a new green, whether or not he is a local person or has used the land for recreation.

Application.

[30] Application is made by submitting to the registration authority a completed application form in Form 44. The House of Lords in the *Oxfordshire* case has emphasised that the procedure is intended to be simple and informal and that applications are not to be defeated by technical objections to the form of applications provided that the applications are handled in a way which is fair to all parties[28].

Accompanying documents.

[31] Although the application form has to be verified by a statutory declaration by the applicant or his solicitor, there is no requirement that the application should be accompanied by any other evidence to substantiate the application. Instead, reg. 3 provides for the application to be accompanied by any relevant documents relating to the matter which the applicant may have in his possession or control or of which he has the right to production. In many cases, there are few, if any, of such documents as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years.

Evidence.

[32] The applicant is only required to produce evidence to support the application if the registration authority reasonably requires him to produce it under reg. 3(2)(d)(ii).

Preliminary consideration.

[33] After the application is submitted, the registration authority gives it preliminary consideration under reg. 5(4). The registration authority can reject the application as not "duly made" at this stage, but not without giving the applicant an opportunity to put his application in order. This seems to be directed to cases:

- where Form 44 has not been duly completed in some material respect,

[27] There are new 2008 Regulations but, at present, they only apply to a small number of pilot authorities, not including OCC.

[28] Lord Hoffmann at paras 60-62, Lord Scott at para 110, Lord Walker at para 124 & Lady Hale at para 144.

- where the application is bound to fail on its face, e.g. because it alleges less than 20 years use, or
- where the supporting documents disprove the validity of the application

Publicity.

[34] If the application is not rejected on preliminary consideration, the registration authority proceeds under reg. 5(1) to publicise the application:

- by notifying the landowner and other people interested in the application land
- by publishing notices in the local area, and
- by erecting notices on the land if it is open, unenclosed and unoccupied.

Objectors.

[35] Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land.

Objection Statement.

[36] Any objector has to lodge a signed statement in objection. This should contain a statement of the facts relied upon in support of the objection. There is a time limit on service of objection statements. The time limit is stated in the publicity notices issued by the registration authority. However, the registration authority has a discretion to admit late objection statements.

Determination of application.

[37] The most striking feature of the regulations is that they provide no procedure for an oral hearing to resolve disputed evidence. The regulations seem to assume that the registration authority can determine disputed applications to register new greens on paper. A practice has grown up, repeatedly approved by the courts, most recently by the House of Lords in the *Oxfordshire* case, whereby the registration authority appoints an independent inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not. In some cases, procedural fairness will make an oral hearing not merely an option but a necessity[29]. In the *Whitmey* case[30], it was held that the procedure by non statutory public inquiry did not infringe art. 6 of the ECHR because any decision of the registration authority is subject to review by the courts.

Procedural issues.

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[29] *Oxfordshire* case *per* Lord Hoffmann at para 29 approving Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council*

[30] [2005] 1 QB 282.

[38] A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be "properly and strictly proved"[31]. However, in my view, this does not mean that the standard of proof is other than the usual civil standard of proof on the balance of probabilities.
- **Defects in Form 44.** The House of Lords has held in the *Oxfordshire* case that an application is not to be defeated by drafting defects in the application form. The issue for the registration authority is whether or not the application land has become a new green
- **Part registration.** The House of Lords also held in the *Oxfordshire* case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green. Indeed, the House thought that a larger or different area could be registered if there was no procedural unfairness[32].

Applying the law to the application

[39] I now turn to apply these legal principles to the application in the present case. It must be borne in mind that the issue on which I am advising is not whether the application is likely to succeed but only whether it should be rejected at the stage of preliminary consideration as not being "duly made".

[40] It appears to me that the application is duly made in the sense that the application form has been duly completed.

[41] I therefore turn to consider whether the application is bound to fail on its face, e.g. because it alleges less than 20 years use, or whether the supporting documents disprove the validity of the application. It is useful to consider this by reference to the various elements of the statutory test in CA 2006 s. 15(2).

…a significant number…

[42] It appears to me that the applicant has adduced *prima facie* evidence of recreational use of the application land by a significant number of local people.

…of the inhabitants of any locality or of any neighbourhood within a locality…

[43] It appears to me that the applicant has adduced *prima facie* evidence that a significant number of recreational users of the application land are inhabitants of Witney, which, as it has a Town Council, is a "locality" in law.

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[31] *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in *R (Beresford) v Sunderland* at para. 2

[32] Lord Hoffmann at paras 61-62, Lord Scott at para 111, Lord Rodger at para 114, Lord Walker at para 124 and Lady Hale at para 144.

…have indulged… in lawful sports and pastimes on the land

[44] I consider that the applicant has adduced *prima facie* evidence that the application land has been used for informal recreation amounting to "lawful sports and pastimes" as that expression was construed in the *Sunningwell* case.

…as of right…

[45] On the evidence of the applicant, recreational use of the application land has not been forcible or contentious. On the contrary, it has been encouraged by the landowner.

[46] On the evidence of the applicant, recreational use of the application land has not been secret but has been well known to the landowner.

[47] There is no evidence that recreational use of the application land has been permissive. There is no evidence of express permission and, under the principles discussed in *Beresford*, permission cannot normally be inferred from maintenance of the land by the landowner or from the landowner's conduct in encouraging and facilitating recreational use of the land.

[48] There is no evidence that the land was acquired under or appropriated to the statutory trusts of s. 164 of the PHA 1875 or s. 10 of the OSA 1906 so as to confer a legal right on members of the public to use the application land for recreation.

[49] As for the *Redcar* principle, there is evidence that part of the land was let for grazing cattle. However, in my view, this does not necessarily trigger the *Redcar* principle. All depends on whether grazing use materially conflicted with recreational use and, if so, whether recreational use deferred to the grazing use. This raises matters of fact and degree which will require exploration in the light of any objection, but it does not mean that the application is bound to fail.

…for a period of at least 20 years…

[50] The applicant has adduced *prima facie* evidence of recreational use of the application land for at least 20 years before the date of the application.

…and they continue to do so at the time of the application.

[51] The applicant contends that qualifying use was continuing at the date of the application and there is no evidence to suggest that he is wrong on that point.

Conclusion

[52] I conclude that the application is "duly made" and that OCC as CRA should proceed to publicise it inviting objections under reg. 5(1) of the 2007 Regulations.

[53] I emphasise that this Opinion is concerned solely with the question whether the application is "duly made". It is not known what grounds of objection there may be to the application or what evidence might be adduced by objectors. Nothing in this Opinion should be taken as expressing any view on the ultimate success or failure of the application, on which my mind is completely open.

[54] It is important that the CRA should act with fairness, impartiality and transparency and I recommend that a copy of this Opinion should be supplied to the applicant and the landowner.

Vivian Chapman QC
25th. April 2009
9, Stone Buildings,
Lincoln's Inn,
London WC2A 3NN