WALKER MORRIS

Kings Court, 12 King Street, Leeds LS1 2HL. **Tel** 0113 283 2500
Fax 0113 245 9412 **Document Exchange** 12051 Leeds 24
Email erin.keating@walkermorris.co.uk **Web:** www.walkermorris.co.uk

County Solicitor & Head of Law
Legal Services
Oxfordshire County Council
County Hall
New Road
Oxford
OX1 1ND

Our ref ERK/CJD/GLA.276-3

Your ref NL Reg 33/Humpty

16 October 2015

By email only
Richard.Goodlad@Oxfordshire.gov.uk
Katherine.Skinner@Oxfordshire.gov.uk

Dear Mr Clark

In the matter of an application to register Humpty Hill, Faringdon as a town green

We are instructed to act on behalf of Gladman Development Limited, Charles Frances Nigel Allaway and Rosemary Pollock (the "Objectors").

We ask that this letter be put for the attention of the members at the Planning & Regulation Committee meeting on Monday 19 October 2015.

This is another case where an application has been made to register farm land as a town or village green. Rather than reject the claim as misconceived Dr Mynors, the Inspector, has recommended registration. As demonstrated below he was wrong to do so.

Unfortunately, Dr Mynors has not engaged with the Objectors' submissions made to the inquiry and his Report is flawed. The decision of course is for the Planning and Regulation Committee and is not for the Inspector. However so far from it being open, in the light of the Inspector's Report, for the Committee to decide to **register** the land as a town or village green, what it should do is to decide to **reject** the application.

The first error that Dr Mynors made is as to legal basis of the application. As explained at paragraph 26g of the Report by the County Solicitor & Head of Law & Culture, the Inspector concluded that the application fell to be considered under section 15 (3) on the basis that the relevant 20 years use was down to 2011. In fact (in accordance with what Lewison LJ said in *R (Newhaven Port and Properties Limited v East Sussex County Council* [2014] QB 282 at paragraph 29), the application fell to be considered under section 15 (2), on the basis that the permissive use between 2011 and 2013 fell to be disregarded. This was explained to the Inspector at the inquiry and set out in Appendix 2 to the Objectors' closing submissions. In this case what is a clear error can be argued not to make any difference, but it does go strongly to support the suggestion made above that in writing his Report the Inspector did not engage with what the Objectors were saying.

The second error is this. *R (Barkas) v North Yorkshire Council* [2015] AC 195 is a new case in which the Supreme Court had to consider what the requirements were for registration of a new town or village green.

Lord Carnwath said (see paragraph 65 of his speech)

Kings Court, 12 King Street, Leeds LS1 2HL. **Tel** 0113 283 2500
Fax 0113 245 9412 **Document Exchange** 12051 Leeds 24
Email erin.keating@walkermorris.co.uk **Web:** www.walkermorris.co.uk

... in cases of possible ambiguity, the conduct must bring home to the owner not merely that "a right" is being asserted, but that it is a village green right.

What makes the assertion of a "village green right" (or a "town green right" in the case of a town) different from an ordinary right is that it is exercised in connection with a village (or, in the case of a town), a town.

Sometimes, as Dr Mynors will have appreciated, a smaller area can be taken but in the present case the relevant area put forward by the Applicant was Faringdon and Dr Mynors proceeded on this basis. Faringdon is quite a small town but it still has a population at the last census of 7,121. There was oral evidence on behalf of the Applicant from 15 people; and there were, additionally, 73 evidence questionnaires (some of the makers of which had also made written statements) and 38 written statements. 111 (i.e 73 +38) is 1.56%. Moreover the great majority of those who have produced questionnaires or statements live within 200 yards of the site.

The Objectors' point was clearly put to Dr Mynors as members will see if they look at the Objectors' closing submissions available in the Members' Resource Room (it is only necessary to look at paragraphs 28 and 29 of the closing submissions).

Accordingly in the required sense the use was not by the inhabitants of Faringdon; and use was not by a significant number of these inhabitants.

However Dr Mynors does not address the submission. What he does is to consider the question of where those who have used the land at paragraph 186 and says:

... I consider that those using the application land are likely to have come largely from the civil parish of [Great] Faringdon. No doubt the [use] was predominantly from the parts of Faringdon nearest the land, but that will always be true in the case of any open space at the edge of a built up area.

Thus we don't know the reason for why he disagrees with the Objectors. This would not matter if he is right and they (and apparently Lord Carnwath) were wrong: this is a matter the Committee will have to decide. In that context it would be helpful for members to have in mind the case of *Steed* (1995) 75 P & CR 487, an earlier case decided by Carnwath J (as he was then) decided that use by those who lived near to the claimed town green could not say that their use was refereable to the town of Sudbury in which they lived. It is only necessary for members to look at the headnote to get the point:

***Held**, dismissing the application ... Use of the land is not enough. It must be accompanied by an assertion of right and be linked to a right claimed by the inhabitants of a particular locality ... the evidence presented [did not] link the use to a right claimed by reference to any particular locality.*

Just to be clear, there was no doubt in *Steed* that the use was by the inhabitants lived in Sudbury in the *nearby streets* (p505) to the application site.

This is a sufficient for the Committee to reject Dr Mynors's Report. However there is a third error into which he fell.

If members go to the land they will see "on the ground" that it is used by local people to carry out a circular walk. This is because their feet have worn down the grass. This circular path is described by

Kings Court, 12 King Street, Leeds LS1 2HL. **Tel** 0113 283 2500
Fax 0113 245 9412 **Document Exchange** 12051 Leeds 24
Email erin.keating@walkermorris.co.uk **Web:** www.walkermorris.co.uk

Dr Mynors at paragraph 48 of his Report and it is also clearly visible in the aerial photographs. A sample of the aerial photographs are attached to this letter however better copies are available in the Objectors' bundle in the Members' Resource Room. This was referred to by one of the witnesses at the inquiry as "the dog track": it was heavily used by people walking their dogs.

Accordingly, as members will guess one of the points very strongly made at the inquiry, on behalf of the Objectors, was that use of the perimeter footpaths on this very large site (14 acres) did not count.

Once again, Dr Mynors did not deal with the argument and, more specifically, did not discount the footpath use even though he held ... *the **principal** activity, walking, took place **primarily** on the paths*... He failed to make an assessment of the only activity he could properly rely, namely that which took place off the paths. Dr Mynors fell into the same error as the Inspector in *R (Laing Homes) v Buckinghamshire County Council* [2004] 1 P & CR 36 at p573 where the Inspector failed to make any discount in respect of use of perimeter footpaths. In that case, as Sullivan J observed, use of perimeter paths would have suggested to the landowner not that land was being used as a village green but by people exercising public rights of way (see p600).

The final matter we want to draw your attention to is this. There was an issue at the inquiry as to whether in the land was used for grazing cattle in 1996 and 1997. The Objectors' evidence was clear that it had been; witnesses for the Applicant were equally clear that it had not. The barrister for the Objectors said this to Dr Mynors in closing his client's case:

*...you will appreciate why I am emphasising this part of the evidence. The landowner in a case such as this is very often not able to produce hard evidence which might demonstrate that land has been used less extensively than the evidence for the Applicant might suggest. Here is a piece of evidence which does indeed suggest that. **It is necessary to engage with it** and not just pass on as if it is a little puzzle which has no wider significance than whether there were or were not cattle on the land in 1996 and 1997.*

Dr Mynors devotes four paragraphs of his conclusion to the question of use of the land by cattle (paragraphs 169 to 172). As he says the *two accounts are impossible to reconcile.* He concludes that they **were** grazed on the land in 1996 and 1997 (paragraph 170). But he then fails to engage with the Objectors' point that this indicates that the land was used less extensively than the Applicant's witnesses claimed: how could they have failed to see them as the walked round the field – even if they were congregating at the edge of the field, as Dr Mynors suggests?

There are other points that we could make but we think that we have said enough to show that Dr Mynors's Report is both seriously inadequate and, moreover, that on the basis that use is not referable to the inhabitants of the town of Faringdon, it is clear that the land should not be registered as a town green.

The point arises as to what the registration authority should do in these circumstances. First of all, we suggest that the meeting on 19 October 2015 should be deferred. Second, we suggest that you obtain a QC's opinion on the points that we have made. We suggest that he or she will support what we have said. The costs of such a second opinion will be much less than the costs involved in a legal challenge.

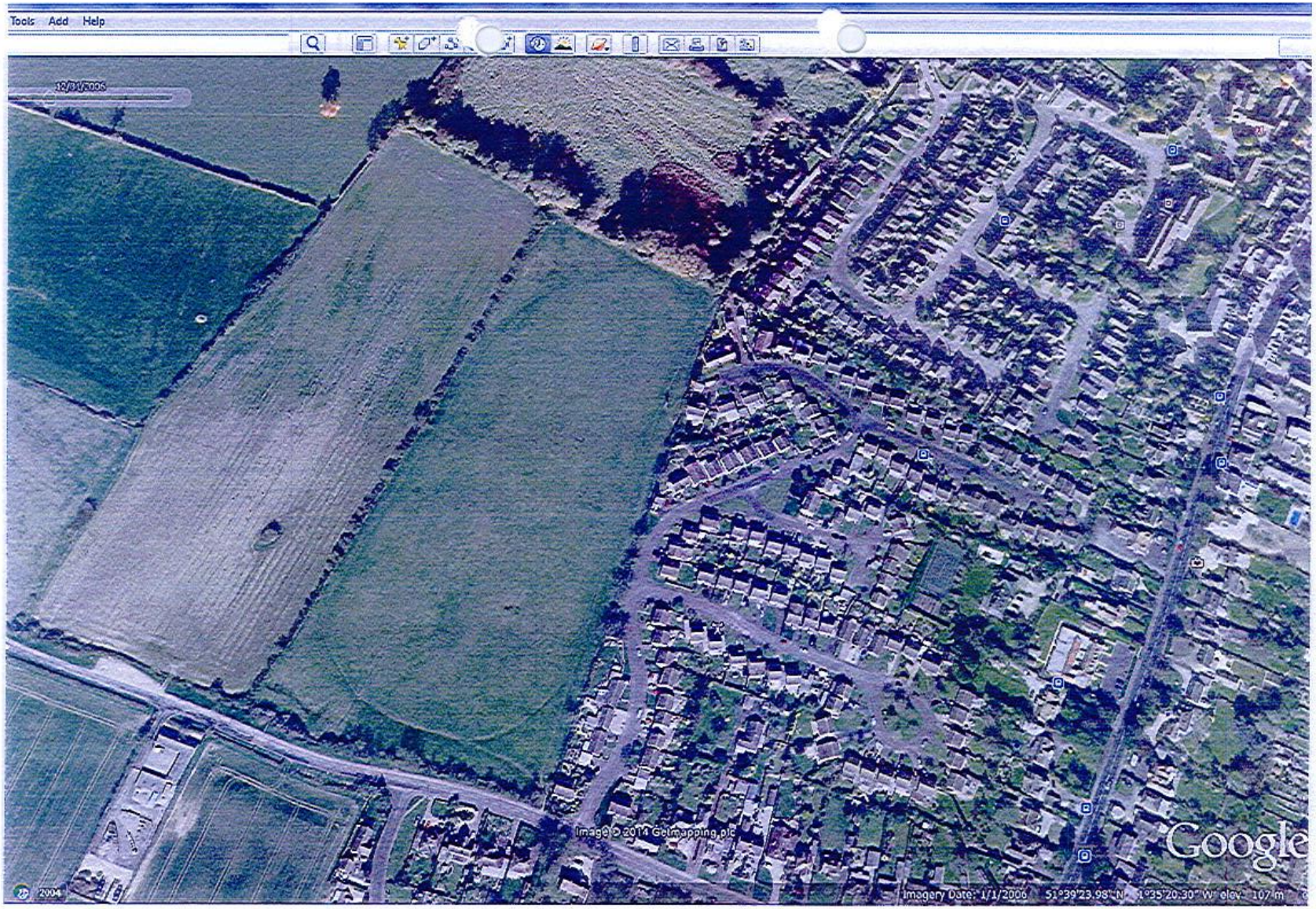
Kings Court, 12 King Street, Leeds LS1 2HL. **Tel** 0113 283 2500
Fax 0113 245 9412 **Document Exchange** 12051 Leeds 24
Email erin.keating@walkermorris.co.uk **Web:** www.walkermorris.co.uk

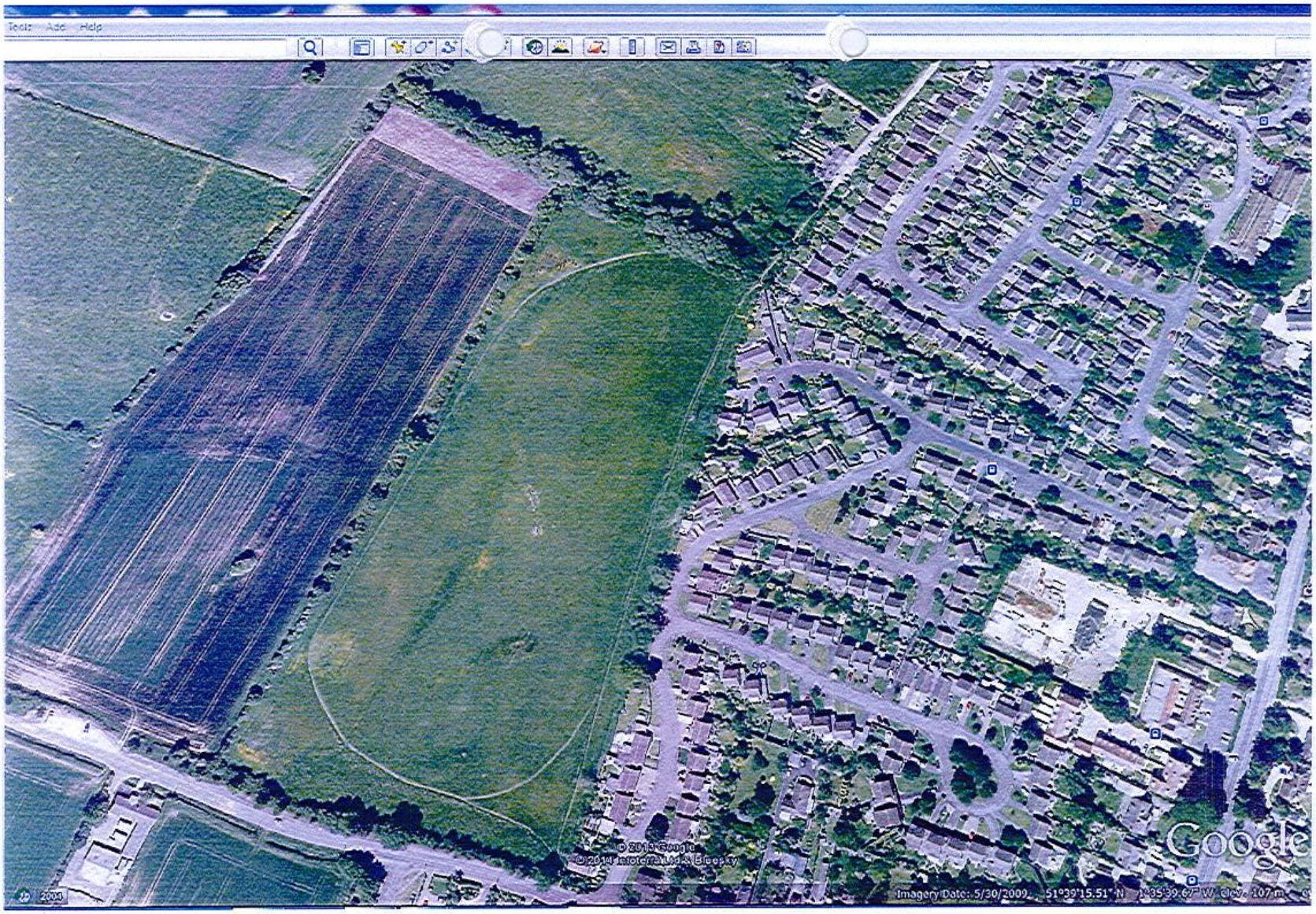
Yours sincerely

Walker Morris LLP

1999

2004


Tools
Add
Help
12/31/2005
Image © 2014 GeoMapping plc
Google
2004
Imagery Date: 1/1/2006 51°39'23.98" N 1°35'20.30" W elev 107 m


Tools Add Help
© 2014 Google
© 2014 Infoterra Ltd & Bluesky
Google
2004
Imagery Date: 5/30/2009 51°39'15.51" N 1°35'39.67" W elev 107 m