

Name of meeting: Licensing and Safety Committee

Date: 24th March 2016

Title of report: Application to register land off Marsh Lane, Shepley as a Town or Village Green

| | |
|--|---|
| Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards? | No |
| Is it in the Council's Forward Plan? | Not applicable |
| Is it eligible for "call in" by Scrutiny? | No |
| Date signed off by Director & name | Jacqui Gedman – 14/03/16 |
| Is it signed off by the Director of Resources? | David Smith – 10/03/2016 |
| Is it signed off by Assistant Director – Legal, Governance & Monitoring? | Julie Muscroft – 10/03/2016 |
| Cabinet member portfolio | Cllr Steve Hall, Portfolio Holder for Planning, Highways and Open Spaces |

Electoral wards affected: Shepley

Ward councillors consulted: Not applicable

Public or private: Public

1. Purpose of report:

To determine the application to register land off Marsh Lane Shepley (shown on the map **at page 1 of** Appendix 1 to this report and known henceforth in this report as "the Application Land") as a town or village green.

2. Key points

The Council has received an application under S15 Commons Act 2006 ("the Act") to register the Application Land as a town or village green on 22 September 2015 ("the Application"). The Council is the Registration Authority for the purposes of the Act

Since the Council is unable to locate any owner of the Application Land after reasonable enquiry, and there have been no objections of substance to the Application, officers for Legal Services of the Council have prepared a report assessing both the method of determination, and the merits of the application itself.

Legal Services' recommendation is annexed to this report at Appendix 2
Under the Terms of Reference of the Delegation Scheme of the Council's Constitution the Licensing and Safety Committee has power to register common land or town or village greens

The officer's report has recommended that the application is accepted with the overall conclusion thus:

Overall conclusions are as follows on the balance of probabilities:

- (a) there has been sufficient use of the Application Land in amount and manner to justify its registration;
- (b) the Application Land has been used by a significant number of the inhabitants of the neighbourhood.

The Committee is now asked to formally determine this application acting as Registration Authority

3. Introduction/ Background Information

3.1 Background documents (available for public inspection):

The documents disclose important facts on which the report is based, which include witness evidence, and have been relied upon in preparing this officers report. This is a large bundle of papers and copies will be available at the hearing. The can also be viewed at http://www.kirklees.gov.uk/business/land_charges/townVillageGreenApplication.shtml

A map, OS plan and photos are attached at Appendix 1

3.2 The Application Land

The Application Land is described fully in the officer's report at Appendix 2 attached hereto and a plan of the Application Land is shown at Appendix 1 attached hereto.

3.3 The Role of Kirklees Council

The Council is appointed by law as the authority responsible for the registration of town or village greens. The Constitution of the Council delegates this responsibility to the Licensing and Safety Committee. The Council must determine whether the Application Land is, in fact, a town or village green. The law on this is explained fully in the officer's report at Appendix 2 and briefly below at paragraph 1.3 of this report. If the Application Land is found to be a town or village green, then the Council must register it.

3.4 The Law of Village Greens

The current definition of a town or village green is set out by the Commons Act 2006 ("the Act") at section 15 thus: "**land ...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 or 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. "**

Any land can be a town or village green: it does not have to be "green", nor does it have to be in a village. Members should note that the Act gives the Registration Authority no discretion. If all of the conditions set out in section 15 are met, then the land is a town or village green and must be registered. If any one or more of the conditions is not met, the land is not a town or village green and the application must be refused.

3.5 The Application

The Application submitted by Shepley Village Association asserts that all of the conditions for the establishment of a town or village green have been met. The Application includes a bundle of signed witness statements and photographs from members of the public, relating to their use of the land.

3.6 The Objection

The Council has received one objection. This objection challenges the facts asserted in the Application. However, the objection was couched in ambiguous terms and appeared to stem from a misunderstanding of the consequences of the Application and ownership of the Application Land. The Objector sought the opportunity to acquire land. Clarification was sought as to the real meaning of the communication. The Objector has indicated that she intends to take possession of a 2m strip of the Application Land adjacent to her property. The intended purpose is to alleviate her concerns regarding damage to her property, although no evidence has been submitted to substantiate this assertion or fear. The Council as Registration Authority is treating the correspondence as a formal objection and assesses it and gives it due weight as set out in the officer's report.

The Applicant has had sight and commented upon the objection and makes comment as set out in the officers report. The Applicant asserts that the use of the Application Land is as described by the witness statements and points to the fact that the objection has no supporting evidence.

It appears that the Registration Authority is not faced with a serious dispute over the alleged use which makes a non-statutory public inquiry appropriate. The correspondence is couched in terms of an objection "I do not wish to object to the whole application. I am objecting to a strip of land parallel to my property," but which in fact is an intention to take adverse possession of a strip of land.

3.7 "As of Right"

The term "as of right" is a technical legal one. It does not mean "by right." It means that the person using the land has neither right nor permission to do so, but he acts openly as if he did have such a right, and the landowner does

nothing to prevent him. The result, over time, is that the landowner, by his inaction, consents to the creation of a new right.

3.8 Application Land Owner

In this case, unlike previous village green applications, the land owner is unknown. In the report at Appendix 2, evidence is presented to show the enquiries which have been made by the Council to ascertain ownership, and advice received on the likelihood of an owner being found. It concludes that a land owner is unlikely to be found.

3.9 The Determination Process

Given the lack of objection, and to all intents and purposes no landowner discovered upon reasonable inquiry, Legal Services considers it reasonable and proper to determine the Application on paper. Detail relating to that conclusion is set out fully in the officer's report at Appendix 2.

4. Implications for the Council

A If the recommendation of the officer's report is NOT followed then: the Council disagrees with the findings, on the balance of probabilities, that the Application Land has been used sufficiently to meet the definition of the Act and does not register it as a TVG. In this eventuality the Application is rejected and the Application Land will retain its current status. Disappointed applicants may seek to bring a claim of judicial review of the decision by the Council or simply reapply. There is no appeal process, merely the opportunity to reapply with more/other evidence;

B If the recommendation IS followed then: the Application Land is registered, and the Application Land will be effectively sterilised from future development. The Council may face a claim of judicial review (by anyone affected e.g. a user of the Application Land or by an individual Member) of the decision on the basis that the officer's report is not robust and an independent process has not been adopted in the consideration of the application. In other words, a paper determination is not good enough in the face of an objection, and that the correct approach should have been by way of an inquiry. Similarly, in the future the land owner may appear to claim that the process was unfair and seek judicial review. Given the research this likelihood is seen as minimal.

C The Application cannot be **deferred** unless the view is taken that all enquiries to discover the land owner have not been exhausted. However the application must be determined efficiently and effectively and there cannot be an open ended deferral. At a point in time there must be either acceptance or rejection of the Application as presented.

4.1 Legal Issues

In addition to the matters of law discussed above, namely that all elements of the definition of a town or village green set out in the Commons Act must be met; there is a risk that a decision of the Council may be subject to judicial review. The decision must therefore be taken strictly in accordance with the law. As indicated, the officer's report is impartial and in accordance with best practice and therefore any decision by this Committee which is not in accordance with the officer's recommendation must be justified in very robust terms, failing which the Council is at risk of a judicial review claim.

4.2 Conclusion

The Assistant Director - Legal & Governance has been consulted and advises that the officer's recommendation should be followed and should, for the reasons set out above, accept the Application.

5. Consultees and their opinions

The Assistant Director - Legal & Governance advises that the recommendation of the officer's report is followed and the Application Land is registered as a town or village green

Reason: best practice has been adopted in conducting enquiries into the search for a landowner. All reasonable enquiries have been made. Second, a robust and independent assessment has been made in respect of the merits of the Application. There has been a proper assessment to evaluate the evidence impartially and rigorously by a legal officer sufficiently familiar and practiced with the law in relation to town and village greens. Consequently it is a safe and satisfactory course of action.

6. Next steps

If the recommendation is followed the Application Land will be registered as a town or village green and the register held by the Registration Authority will be amended.

7. Officer recommendations and reasons

That the Committee determines the application in accordance with the Officers report recommendation as set out in Appendix 2 for the reasons set out in that report

8. Cabinet portfolio holder recommendation

Councillor Steve Hall, Portfolio Holder for Planning, Highways and Open Spaces, recommends registering the land as village green and also notes the high quality of the application.

9. Contact officer and relevant background papers/information

Catherine Walter
Licensing, Local Land Charges and Highways Registry Manager
Tel: 01484 221000
Email: catherine.walter@kirklees.gov.uk

Papers: Appendix 1: Background Papers and Map showing the Claimed Land.

Appendix 2: Officers report and recommendation

10. Assistant Director responsible

Joanne Bartholomew, Assistant Director – Place
Tel: 01484 221000
Email: joanne.bartholomew@kirklees.gov.uk

SHEPLEY VILLAGE GREEN
APPLICATION TO REGISTER AS A VILLAGE GREEN



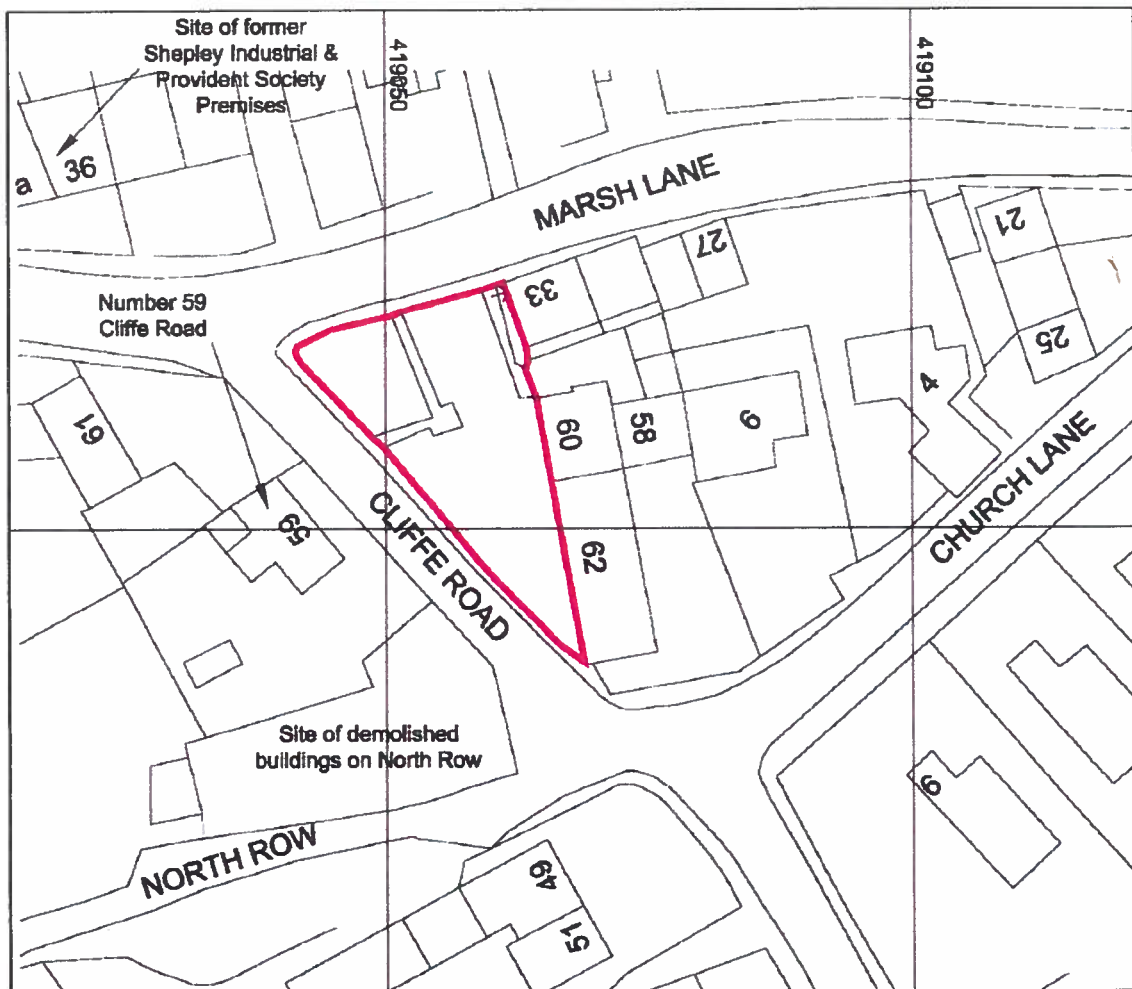
MAY 2015

SHEPLEY VILLAGE GREEN REGISTRATION

JUSTIFICATION

- 1 Shepley Village Green has been used as of right for lawful sports and pastimes for a period in excess of 20 years before the date of this application and this use continues at the date of application [Section 15(2)]. During this period a significant number of the inhabitants of the Village have used the land without interruption or cessation.
- 2 Figure 1 following is a plan of the Village Green and its vicinity, showing the locations referred to in this statement. The triangular shaped Green can be seen in its setting with Marsh Lane on its north side and Cliffe Road to the west. Its eastern boundary is formed by the walls of 33 Marsh Lane and 60 and 62 Cliffe Road. It covers an area of 430m² and in its present form can be seen in Figures 5 and 6.
- 3 The Green has a tarmac pavement on its boundary with Marsh Lane and a concrete mesh border against Cliffe Road. The surface is grassed with some paths laid to gates/doors in house walls.

FIGURE 1 : Plan of Village Green and surrounding area



SHEPLEY VILLAGE GREEN REGISTRATION

- 4 Nineteen individuals have completed questionnaires giving evidence of the use as of right going back to 1940, with one individual providing evidence stretching back to 1931. Many more of the Village inhabitants have engaged in lawful sports and pastimes than these 19 individuals. For instance, large numbers have taken part in the annual carol service and in Village celebrations and religious services. 18 of the individuals have provided letters confirming that the uses of the Green have persisted until 26 April 2015.
- 5 Efforts have been made by individuals and by Kirklees Council to discover the ownership of the Green, but to no avail. Certainly, no challenge has ever been made as to the use of the land by any individual. Kirklees Council regularly cuts the grass and Kirkburton Parish Council has sited a large lit Christmas Tree on the land for many years.
- 6 The nineteen questionnaires show that the main activities have been play, Church Services/Celebrations, walking and the annual carol service. More than twelve of the questionnaires give evidence for these activities, with all witnessing the annual carol service. Other sports and pastimes for which evidence is given include organised and informal sports such as cricket, football and rounders, picnicking, bonfires (from 1940 to 1948) and cycling. Eight individuals refer to painting and drawing having taken place.
- 7 Villagers have planted spring flowering bulbs on the green as shown by the photograph taken in 2009 and attached to Angela Tolson's questionnaire. Photographic evidence of the spring bulbs is also given by and attached to his questionnaire by David Barrans. Mr Barrans also attaches photographs of scarecrows from 2008 and 2012. The 2012 photograph shows a scarecrow wedding pair constructed by Shepley First School.
- 8 The Village celebrations and religious services include maypole dancing as shown in two undated photographs attached to Mr Barran's questionnaire. He also attaches a photograph of the lit Christmas Tree from 2011.
- 9 Colin Secker provides the longest evidence of use as he is able to testify to continual use back to 1931. He has lived in Shepley for all of the time since then. From 1931 to 1956, he lived very close to the Village Green. He gives evidence of an air raid shelter able to accommodate 80 people between 1940 and 1947, and on the presence of a seat; the seat being used by local people to meet and chat on pleasant afternoons. He can also attest the annual carol service being held for the last 36 years and the use of the Green for allotment holders shows and for allotments during the Second World War.

SHEPLEY VILLAGE GREEN REGISTRATION

- 10 John Selwyn Smith can also testify to the continual use of the land for lawful sports and pastimes as he too has lived in the village all of his life, during which time he has not known of any owners. Mr Smith's sister is Catherine Pilkington who has also lived in the Village from birth, except between 1960 and 1967. She has lived very close to the Green and has observed the bonfires, and the Christmas carols with Shepley Band, for many years. Mrs Pilkington has also noted the existence of an air raid shelter on the Green and noted that as a child she played in it for many years until it was dismantled.
- 11 Patricia Lucas has also lived in the Village all of her life and states that she has used the Green "a lot of times during 1946 - 2013". She testifies to having seen the bulb planting and New Year services on the land.
- 12 Frank Appleyard has lived in the Village since 1970 and attests to the Christmas Eve carol singing and the joint church open air services. He has provided copy sheets from an old Ordnance Survey map which although undated, clearly predates many houses built around the Green in the 1960s and 1970s. The Green is shown as undeveloped, as it is today.
- 13 David Billington has been an Editor of the Shepley Village Magazine since before the early 1980s. He has lived in the Village continuously since 1966 and gives evidence of a wide range of uses including carnivals, sword dancing and the millenium celebrations. He states that carol singing and performance by the Shepley Brass Band have taken place annually since around 1977. Mr Billington has written several books on the history of the Village and has not been able to find any record of the landowner. He does have evidence of the land being used by the local band, choirs and children for the Trinity feast as long ago as the late 1800s.
- 14 Mr Billington's book "Shepley: A Glimpse Across Time" is attached to this application. On page 66 it has a photograph of Villagers welcoming in the millennium in 2000, with a significant number of villagers in the photo. The photograph is taken from in front of 59 Cliffe Road and includes the Christmas Tree which is placed on the Green by Kirkburton Parish Council every year.
- 15 Mr Billington has also written a book entitled "Shepley Believe itor Not!" The book has several photographs taken on and around the Green, showing village activities taking place.
- 16 Page 217 carries a photograph (Fig 3) showing a large crowd gathered in front of 59 Cliffe Road. A present day photograph (Fig 2) of this house is shown to aid identification.

SHEPLEY VILLAGE GREEN REGISTRATION

- 17 The bottom right photograph (Fig 3) is likely to have been taken on the occasion of either a carnival in 1909 or the Coronation in 1911. The Shepley Band, some of whose members can be seen wearing sashes in the photograph, apparently on wore these on special occasions.



FIGURE 2

59 Cliffe Road as it is today.

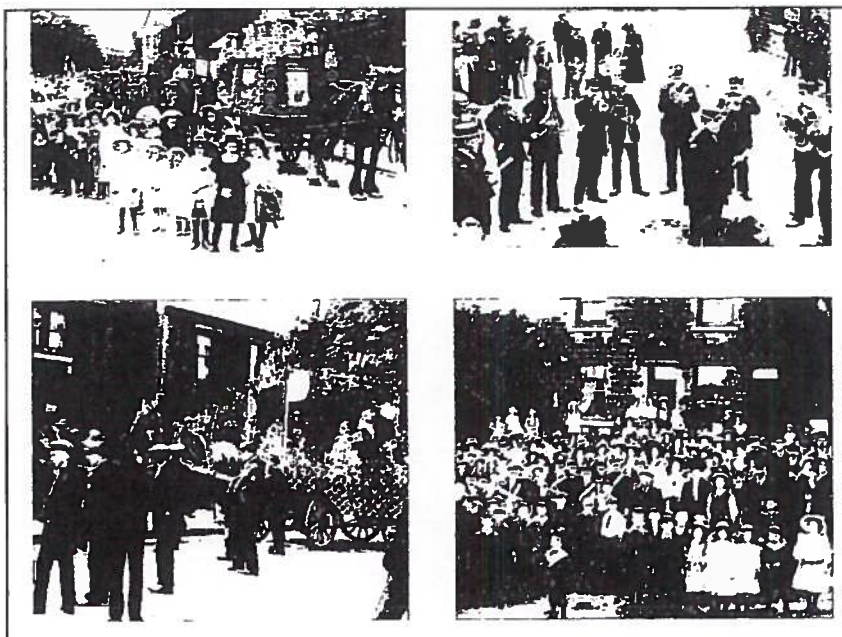


FIGURE 3

Excerpt from page 217 of "Shepley Believe it...or Not"

Bottom right photograph shows large crowd gathered in front of 59 Cliffe Road. A late 1800s/early 1900s village gathering.

- 18 A similar gathering on the Green is shown in a photograph at the bottom of page 119 (Fig 4) . This photograph was taken with now demolished buildings on North Row in the background.
- 19 Two further photographs show the Village Green as it is today (Figures 5 and 6).

SHEPLEY VILLAGE GREEN REGISTRATION

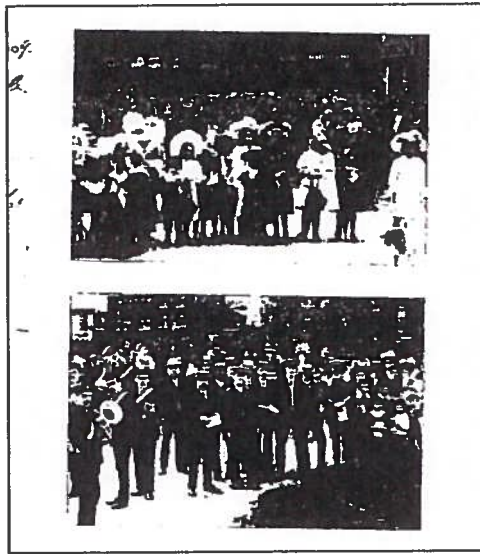


FIGURE 4

Excerpt from page 119 of "Shepley Believe it...or Not". Bottom photograph shows a large gathering on the bottom end of the Green near North Row.



FIGURE 5

The Green as it appears today with Cliffe Road to the right and Marsh Lane to the left.



FIGURE 6

The former Shepley Provident and Industrial Society Ltd building can be seen top right.

The Village Green is in the bottom left with the junction between Marsh Lane and Cliffe Road

SHEPLEY VILLAGE GREEN REGISTRATION

- 20 Shepley Industrial and Provident Society Ltd, the forerunner of Shepley Co-op, had its shop and office at what is now two residential houses, numbers 36 and 36A Marsh Lane. These properties can be seen on the left hand side of the photograph and overlook the Green to their left. The front page from the 1951 Half-yearly Report and Statement of Accounts (Fig 7), reproduced below, shows the Society's address as The Green, Shepley. Another indication of the status of the Village Green.

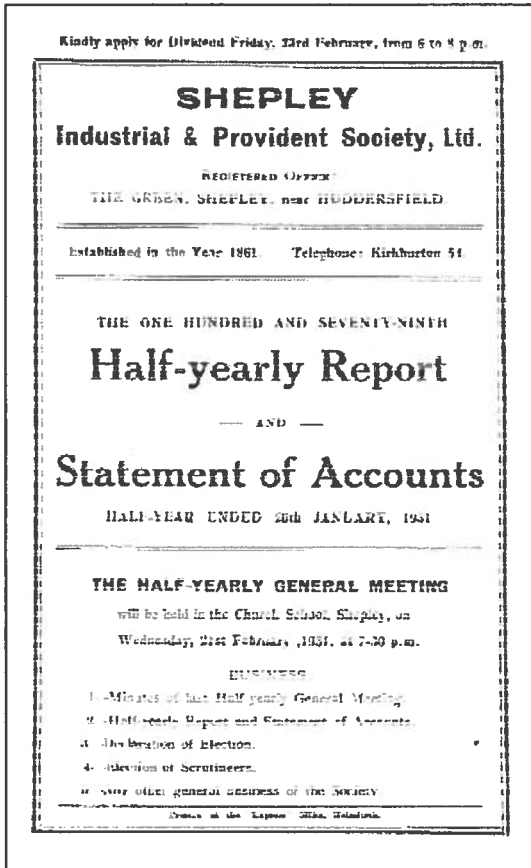


FIGURE 7

Excerpt from Shepley Industrial & Provident Society Ltd Half-yearly Report showing Society address as The Green, Shepley.

- 21 Village legend also has it that cock, bull and bear baiting also took place on the Green from the mid 1600s into the 1800s; the last activity to cease was cock fighting. The Green was well placed between what was then Upper and Lower Shepley.
- 22 Figure 8 shows an extract from the 1893 Ordnance Survey map of Shepley. It can be clearly seen that the Village Green was then in existence and had not been built on. The map is probably slightly later than the map extract attached to Mr Appleyard's Questionnaire.
- 23 Ann Lee adds to Mr Barrans evidence on the use of the Green; her daughter and her friends held sales in aid of charity during the school holidays; and also refers to the Shepley Whitsuntide Parades taking place on the Green.

SHEPLEY VILLAGE GREEN REGISTRATION

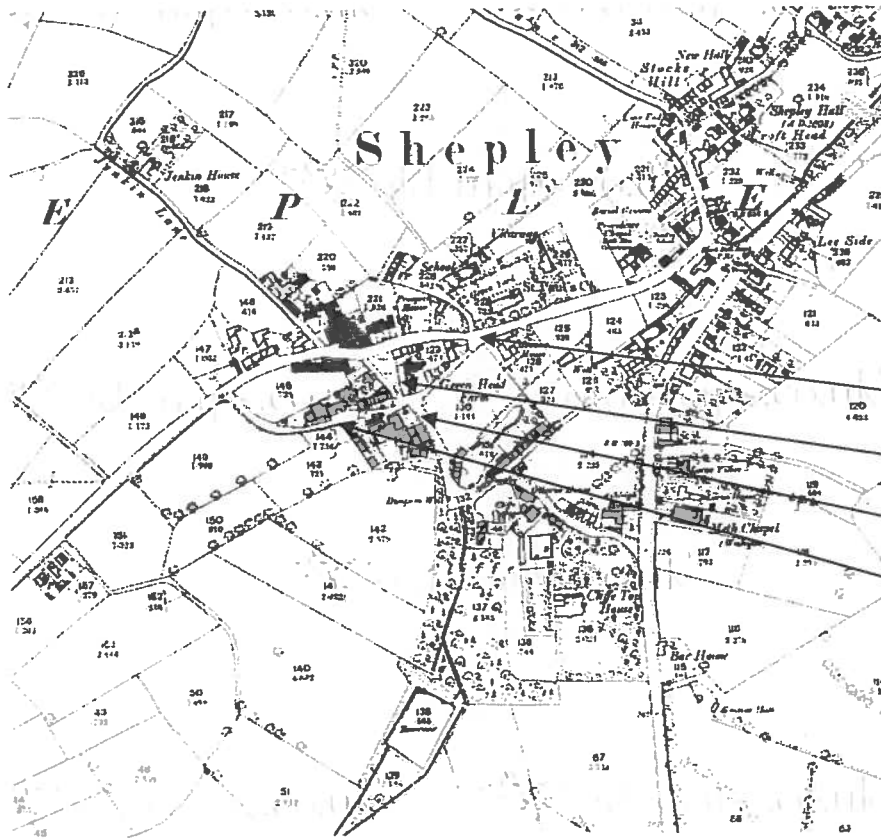


FIGURE 8

Ordnance Survey map extract from 1893 County Series Map

Marsh Lane

Village Green

Cliffe Road

North Row

- 24 Malcolm Hogg draws attention to the display of Scarecrows on the Green and children from Cliffe House (Kirklees Council residential accommodation) drawing the surrounding houses from the Green. Ian Halliwell, who lives opposite the Green on Cliffe Road, has also observed children from Cliffe House Educational Centre using the Green to draw his house and its windows. Carol Warham has taken part in School, Cubs and Brownies activities on the Green, together with acts of worship and carol services.
- 25 Sue Barr has watched her son's school (Shepley First School) plays on the Green as well as taking part in the annual carol service with Shepley Band. John Warham, who was a Board Member at Shepley Co-operative Society notes that band concerts had taken place in December each year for over 30 years, and that historic Co-op gatherings and sports had taken place on the Green in the 1920s.
- 26 Judith Parkes, Dorothy Watkins, David Iredale, Jackie Chatten, Peter Roberts and Angela Tolson have all used the Green for various pastimes, mostly referring to the annual carol service.
- 27 The nineteen individuals who have given evidence in the form of the questionnaires, provide strong evidence of the use of the Village Green for a period well in excess of 20 years stretching back from the present time. The use has been as of right without permission and no challenge has been made to anyone using the land. Evidence of

SHEPLEY VILLAGE GREEN REGISTRATION

use is provided with photographic evidence of use from the 1920s and perhaps earlier.
There has never been a break in the use of the land by the people of Shepley.

APPENDIX

2

APPLICATION TO REGISTER LAND KNOWN AS SHEPLEY VILLAGE GREEN
SHEPLEY HUDDERSFIELD AS A TOWN OR VILLAGE GREEN
APPLICATION KC/VG9

REPORT

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Recommendation: the Application should be accepted.

Introduction

1. I am asked in this case to advise Kirklees Council in its capacity as registration authority for town or village green (RA) in connection with an application to register land known as Shepley Village Green, Shepley as a town or village green.
2. The application was dated 22 September 2015 (“the Application”) and was made by Mr Chris Ballam on behalf of the Shepley Village Association on the basis that section 15(2) of the Commons Act 2006 (“the 2006 Act”) applied. By response from the Planning Inspectorate dated 15th September 2015 it was confirmed that no terminating or trigger event had occurred on the Application Land as required by an amendment to the Commons Act 2006 by the Growth and Infrastructure Act 2013, thus allowing the RA to accept the Application.
3. The Application was supported by 19 completed evidence forms. The evidence forms were those designed by the Open Spaces Society.
4. The Application attracted one objection. Despite all reasonable efforts to bring the Application to the attention of the land owner, no owner has been found.
5. I am asked to provide advice not just in respect of the manner in which the Application should be determined, but also in relation to the merits of the Application. The normal procedure of a non-statutory public inquiry would appear to be unnecessary and wasteful of costs in the absence of any objection of substance. It is appropriate though to produce a report containing a recommendation which would then be placed before the Licensing and Safety Committee as required by the Council’s constitution.

6. In relation to the merits of the Application I am asked to provide a recommendation for the substantive determination of the Application in the event that the Application can be determined on paper. The normal procedure is by way of a non-statutory public inquiry where objections are received.

Appropriate procedure for determination by the Registration Authority

7. Kirklees Council acts in its capacity as registration authority for town or village greens (“the Registration Authority”) and must determine the application (hereafter “the Application”) to register land known as Shepley Village Green Shepley (“the Application Land”) as a town or village green.
8. A useful starting point for approaching the question of the appropriate procedure for the determination of this application is the decision of the Court of Appeal in the case of *Whitmey v The Commons Commissioners*.¹ **In that case Arden LJ said “[i]n cases where it is clear to the registration authority that the application or any objection to it has no substance, the course it should take will be plain.** *If, however, that is not the case, the authority may well properly decide, pursuant to its powers under section 111 of the 1972 Act, to hold an inquiry. We are told that it is the practice for local authorities so to do, either by appointing an independent inspector or by holding a hearing in front of a committee. If the dispute is serious in nature, I agree with Waller LJ that if the registration authority has itself to make a decision on the application ... it should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry.*²
9. Waller LJ said that **“in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts.”**³

¹ [2004] EWCA Civ 951.

² At paragraph 29.

³ At paragraph 66; see also paragraph 62.

10. I have reviewed the papers in detail and this is clearly not a case where it could be said that the Application has no substance to it. On the contrary, there is a bundle of persuasive evidence from nineteen individuals. Equally, though, it is a case where an objection has been received, by way of an letter undated but received on 25th November 2015. The objection and subsequent correspondence is set out in the background papers to this report but in summary the objector says in the first letter :
- “we do not want to fully contest the application”.
 - Makes observations over a period of 3 months since moving to their current address adjacent to the Application Land;
 - Makes comment/expresses opinion on the ability of the land in question to sustain future activity/use as described in the Application because such matters which include: Proximity to houses; land incline; proximity to busy road; proximity to bus route; poor drainage; hazards on the land such as buried air raid shelter/pipes.
11. As a matter of information the objector was informed that the Council is not the landowner and therefore cannot transfer any of the land to the objector
12. The objector replied on 21st December 2015 indicating that she would seek legal advice. Further communication from the Objector on 21 January 2016 indicated that the Objector does not wish “to object to the whole application” but instead only to a strip of land flush to her property being 2 m wide and the length of the property. The Council wrote to the Objector on 28 January 2016 indicating that (i) her proposed course of action to enclose part of the Application Site, if TVG status is granted, would render her liable to prosecution in the Magistrates Court; and (ii) that the fact that the objection relating to the majority of the Application Land was retracted, undermined the cogency of her objection and perhaps the veracity of her evidence and the rectitude of her objection. A deadline of 5th February 2016 was set to clarify her intention. No such reply has been forthcoming. The Council is treating the letter as an objection and giving it appropriate weight in the assessment.

- As regulation 6 of the Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) Regulations 2007 requires the Applicant be given the opportunity to comment on any objection, a summary of the objection was made available on 9 February 2016. The Applicant's comments are set out in the background papers, but in summary his comment is:

- agrees with the Council's analysis of the purpose of the objection ;
- confirms no relevant evidence has been submitted to support the objection;

13. Pertinently, there is no objection from an owner, or indeed any identified landowner. Adverts were placed in the Huddersfield ~~Gazette on~~Examiner on 21 October 2015 and the London Gazette 24th November 2015 (copies of the confirmation are in the background papers). No one came forward. Consequently there is no objection from the land owner to consider.

14. Turning to the assessment of the representations from the adjacent landowner/objector, this has been treated as a formal objection. However, I consider the weight to be given to that objection is considerably lowered for the following reasons: the period of observation and knowledge of the land is extremely limited in time (3 months) and season; the comments seem to be motivated by self-interest rather than genuine objection to the Application and alleged use; it is from one individual only, although I remind myself that the number of objections is not determinative, and that qualitative assessment is important too ; clarification was sought from the objector. She indicated that she would be taking legal advice. Further communication from the objector showed that she intends to object only to a strip of land 2 metres wide adjacent to her house; that she intends to take adverse possession of that strip by erecting a boundary and maintaining it; and the purpose of the objection was to alleviate concerns regarding potential damage to her property; no supporting material to substantiate her opinion or observations has been supplied as evidence; retraction of the original objection in relation the majority of the Application Land is undermined considerably by her later statement and the weight to be given to the limited

amount of her sole witness evidence (3 months referred to above) is further reduced. In these circumstances and for these factors, the substance of the objection is reduced. I therefore give the objection little weight.

It seems to me that the registration authority is not faced with a serious dispute over the alleged use which makes a non-statutory public inquiry appropriate. The ability of the registration authority to rely on written evidence which has not been tested by cross examination is restricted,⁴ but in the absence of dispute the test is the civil standard of the balance of probabilities. *Whitney* demonstrates that the registration authority is under an obligation to put itself in a position where it can properly determine the disputed matters before it.⁵ I consider that in this case the discharge of that obligation does not require a non-statutory public inquiry. I appreciate that this will have costs consequences, beneficial to the authority in this case, but if the council were to be in the opposite position, consequences should not be allowed to deflect the registration authority from the course it should take. The question of fairness to an unknown landowner objector/the possibility that a future owner may come forward, is one factor which must be taken into account in the determination of this application. This risk is detailed below.

15. In my view, the searches which have been undertaken by the Registration Authority and which are set out in the background papers are sufficient to give this risk very little weight in the determination. An alternative search method to ascertain or try to ascertain is set out in the background papers and which is informed by a land law officer of the Council experienced in such research. In summary, such a search appears to be long winded, time consuming, expensive, of very little value to the Council (as registration authority) and ultimately with the little chance of finding an owner .

⁴ See *Alfred McAlpine Homes v Staffordshire County Council* [2002] EWHC 76 (Admin) at paragraph 75 (Sullivan J).

⁵ Cf also the observation of Sullivan J in *Cheltenham Builders Ltd v South Gloucestershire District Council* [2003] EWHC 2803 (Admin) at paragraph 36 that, in accordance with the principle established in *Secretary of State v Tameside Borough Council* [1977] AC 1014, 1065, the registration authority is under an obligation “to take reasonable steps to acquaint [itself] with the relevant information” to enable it to correctly answer the question before it.

16. I do not consider that there are any alternative courses of action open to the registration authority. The registration authority has no alternative but to determine the application. It cannot decide not to determine it. The registration authority has the choice between a paper determination of the matter and determination by way of a non-statutory public inquiry. I have already advised as to how I consider that choice should be exercised. Hearings before committees (a variant of the non-statutory public inquiry procedure) have fallen into disuse. The question of voluntary registration of as a town or village green under section 15(8) of the 2006 Act is not a possibility as there is no known landowner.
17. Given the circumstances set out above, I consider it to be reasonable in the circumstances to continue with a paper determination of the application.

Merits of the case

The Application

18. The Application seeks registration of the Application Land under section 15(1) of the Commons Act 2006 (“the 2006 Act”) on the basis that section 15(2) applied.
19. Section 15(2) of the 2006 Act 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.”
20. The Application was supported by 19 completed evidence questionnaires and other material. It was objected to by way of a letter without supporting material undated but received 25th November 2015. The objection was not followed up nor supported with any material evidence. For the reasons set

out above the matter is proceeding by way to paper determination which forms the subject of this report

21. The relevant 20 year period by which the Application falls to be assessed in this case runs from 1985 to 2015.

The Application Land

22. The Application Land is a small green open space of about 428.4 square metres in area. It is unclassified in the Council's Unitary Development Plan.
23. To the north the Application Land is bounded Marsh Lane; to the west by Cliff Road and to the east it is bounded by the rear gardens of properties 33 Marsh Lane, 62 and 60 Church Lane.
24. There are no recorded public footpaths (recorded on the definitive map). The access points onto the Application site are from Marsh Lane and Cliffe Road. It is unfenced.
25. The Application Land is open grassland. It has been maintained (cut with mower) by the Council for over 19 years.
26. The condition of the Application Land over the relevant period is not one at issue. There are a no trees on the Application Land.

Neighbourhood and Locality

27. In referring to the issue of neighbourhood and locality I use the conventional terminology of "limb (i)" and "limb (ii)" cases. A limb (i) case is one which is put on the basis that use has been by a significant number of the inhabitants of a locality. A limb (ii) case is one which is put on the basis that use has been a significant number of the inhabitants of a neighbourhood within a locality.

28. The answer to question 6 on the application form (form 44) which asks for the locality or neighbourhood within a locality in respect of which the application is made stated that the locality was Shepley parish ward. The area so identified as the locality was shown edged red on Map B accompanying the Application. This was clarified in the application procedure under Regulation 5 (4) of the Commons (Registration of Town of Village Greens) (Interim Arrangements) (England) Regulations 2007 SI 2007 No. 457 (“the Regulations”) which requires the RA not to reject an application without giving an opportunity to correct and make it acceptable. The Application was thus made on the basis of a “limb (i)” case (i.e., on the basis of use by a significant number of the inhabitants of a locality as opposed to use by a significant number of the inhabitants of a neighbourhood within a locality) with the locality being the Shepley Parish ward. In limb (i) cases a locality has to be an area with legally significant boundaries, as recently confirmed by the Court of Appeal in *Adamson v Paddico (267) Limited*.⁶ It appears to me that the ward of Shepley parish has legally significant boundaries.

The Evidence

29. In this section of the report I summarise the respective pieces of evidence. Full copies of the evidence are in the background papers.

(a) The evidence from the Council

On behalf of the Council officers have confirmed:

there are no recorded footpaths across the land; there has been maintenance of the Application Land in the form annual seasonal mowing; that it is reasonable to assume that there is no known owner

⁶ [2012] EWCA Civ 262.

(b) The evidence in support of the Application

In the succeeding paragraphs under this section, I set out a summary of the main features of the evidence given by the witnesses for the Applicant in support of the Application in their evidence forms.

| NAME | PERIOD OF USE | ACTIVITIES |
|----------------------|----------------------|---|
| Judith Parkes | 1980 – 04.8.2013 | Playing, dog walking, church services and celebrations, picnicking, people walking, carols singing |
| Frank Appleyard | 1970 – 12.8.2013 | Drawing and painting, dog walking, church services and celebrations, bird watching, people walking, carol singing |
| Patricia Lucas | 1946 – 17.8.2013 | Carol singing, bulb planting, new year service |
| Catherine Pilkington | 1940 – 11.8.2013 | Playing, drawing & painting, dog walking, church services and celebrations, people walking, bonfire parties, bicycle riding, carol singing, old 2 nd world war shelter was built and used to play in it as a child after the war before it was dismantled. |
| Colin Secker | 1931 – 10.6.2013 | Playing, rounders, dog walking, team games, fetes, cricket, picnicking, people walking, bonfire parties, carol singing. |
| David Billington | 1966 – 7.4.2013 | Playing, church services and celebrations, fetes, carol singing, band playing, dancing, exhibitions. |
| Ann Lee | 1964 – 1999 | Playing, carol singing, parades. |
| Dorothy Watkins | 1968 – 1990 | Playing, people walking, carol singing. |
| Malcolm Hogg | 1983 - 2013 | Playing, drawing and painting, church services and celebrations, football, picnicking, people walking, carol singing. |
| David Iredale | 1975 – 22.7.2013 | Carol singing |

| | | |
|----------------|---------------------|--|
| | | |
| Carol Warham | 1984 – 19.5.2013 | Playing, drawing and painting, dog walking, team games, church services and celebrations, kite flying, people walking, carol singing. |
| Ian Halliwell | 7/2013 – 24.5.2013 | Playing, drawing and painting, church services and celebrations, football, people walking, carol singing, snow activities. |
| John Smith | 1942 – 10.8.2013 | Playing, rounders, dog walking, church services and celebrations, people walking, bonfire parties, bicycle riding, carol singing. |
| Susan Barr | 1981 – 23.5.2013 | Playing, dog walking, church services and celebrations, carol singing. |
| John Warham | 1984 – 17.8.2013 | Drawing and painting, dog walking, church services and celebrations, people walking, carol singing. |
| Jackie Chatten | 4.1988 – 16.11.2013 | Playing, dog walking, church services and celebrations, people walking, carol singing. |
| Peter Roberts | 2005 – 2.5.13 | Dog walking, people walking, carol singing. |
| D Barrans | 1975 – 9.6.2013 | Playing, rounders, drawing and painting, dog walking, church services and celebrations, football, cricket, carol singing. |
| Angela Tolson | 1962 – 14.7.2013 | Playing, drawing and painting, dog walking, church services and celebrations, bird watching, people walking, bicycle riding, carol singing, millennium church service (1 st Jan 2000 (am)). |

All of the witnesses' addresses are set out in full in their witness statements and have been updated to the date of the Application.

(c) The Objector

The objector provides no material evidence save for an assertion of her observations and opinion on the Application Land's suitability for future use of the types alleged.

30. **Findings and analysis**

The Objection

31. This has been treated as a formal objection. However the weight to be given to that objection is considerably lowered for the following reasons: the period of observation and knowledge of the land is extremely limited in time (3 months) and season; the comments seem to be motivated from self-interest rather than genuine objection to the application and alleged use; it is one individual although numbers of objections is not determinative; clarification was sought from the objector but after indicating that she would be taking legal advice there has been no further communication; no supporting material was supplied as evidence. In these circumstances and for these factors, the substance of the objection is reduced. I therefore give the objection little weight. See also paragraph 14 above.

Use as of Right

32. No inference can be made from the Council's maintenance of the Application Land (mowing) as to the acquisition of rights or interest, or ownership. There is no question in this case of the Application Land having been provided to the public for the purposes of recreation under any statutory power (eg the Open Spaces Act 1906, the Public Health Act 1875 or in any other statutory provision) so as to confer a right on the public to use the Application Land for recreation. Therefore in the circumstances there is no question of use of the Application Land having been "*by right*". The Applicant's evidence submitted that use of the Application Land had been "as of right". There had been no force or secrecy and no permission had been sought or given. There had been no attempt by anyone to restrict access. No notices had been posted; no fences or enclosures surrounded the Application Land.

Locality

33. The locality has been identified as the civil parish of Shepley. In my view that is plainly an appropriate locality for the purposes of the Application. The locality of Shepley parish ward has significant legal boundaries.

Sufficiency of Use

34. In assessing the written evidence in support of the Application in relation to the question of use I remind myself that, as it was put by Sullivan J in *Alfred McAlpine Homes*, it is necessary to treat that evidence with caution because it is not subject to cross-examination. In approaching this assessment I first remind myself of a number of substantive principles which need to be borne in mind as established in case law. First, the requisite use which is required to be shown is, as Lord Hope indicated in *Lewis v Redcar and Cleveland Borough Council*,⁷ “use for at least 20 years of such amount and in such manner as would reasonably be regarded as being the assertion of a public right.”⁸ Use which is “trivial and sporadic”, to use Lord Hoffman’s words in *Sunningwell*, may not carry the outward appearance of use as of right.
35. Secondly, as Sullivan J stated in *Cheltenham Builders*, applicants for registration have to “demonstrate that the whole, and not merely a part or parts, of the site had probably been used for lawful sports and pastimes for not less than 20 years. A common sense approach is required when considering whether the whole of a site was so used. A registration authority would not expect to see evidence of use of every square foot of a site, but it would have to be persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years.”⁹
36. Thirdly, in accordance with the observations and guidance of Sullivan J in *Laing Homes Limited v Buckinghamshire County Council*¹⁰ and of Lightman

⁷ [2010] UKSC 11.

⁸ At paragraph 67. See also paragraph 75.

⁹ At paragraph 29.

¹⁰ [2003] EWHC 1578 Admin at paragraphs 98-110.

J in *Oxfordshire County Council v Oxford City Council*¹¹ at first instance, it is necessary to consider the use of paths on the Application Land, the extent to which there has been use of the Application Land not confined to paths and the question of whether use of paths would appear to the reasonable landowner to be referable to their use as such or to be used for more general recreational purposes which would sustain a claim to a new green.

37. In issue for the RA is whether there is significant use of the Application Land. In assessing this argument it is important to consider the legal test. “A significant number” does not mean considerable or substantial. What matters is that the number of people using the Application Land 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 (See R Mc Alpine) Staffordshire CC 2002 EWHC 76 at 71 Admin, and whether that has been proved on the balance of probability ie it is more likely than not.
38. I quote in full: *Alfred McAlpine Homes Sullivan J* said that “significant number” did not mean a considerable or substantial number and that what mattered was 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.”*¹²
39. A further question related to the issue of significant number and which is raised in other cases and which by implication needs to be considered here, is whether there is any requirement for a spread of users across the qualifying area and, if so, how such requirement is to be understood.
40. I consider that there is a requirement for a spread of users across the qualifying area as a matter of principle for two reasons.

¹¹ [2004] EWHC 12 (Ch) at paragraphs 96-105.

¹² At paragraph 71.

41. First, I think that it is necessary that users come from all over the relevant locality because, if it were sufficient that users came from just one part of the locality, the locality requirement would be rendered meaningless and, in substance, it would be sufficient to draw an arbitrary red line on a plan around the area from which users came, which would seem to contradict the requirement for there to be some pre-existing area either known to the law (as a locality) or established as a cohesive unit (in the case of a neighbourhood). Secondly, were the law otherwise, it would create a mismatch between the persons whose use led to the acquisition of rights and the persons who enjoyed the benefit of them, which would be contrary to general prescriptive principles, would impose a greater burden on the land than the landowner had acquiesced in and would thereby infringe the principle of equivalence referred to by Lord Hope in *Lewis*.¹³
42. Third, the conclusion that there is a requirement for a spread of users over the qualifying area is consistent with the way in which Sullivan J dealt with the issue of “significant number” in *Alfred McAlpine Homes*. If evidence is needed of “general” use by the local community and the local community is taken to be the locality or neighbourhood in question, then it does not seem to me that “general” use by the local community is established if that use comes from only part of that locality or neighbourhood. On the facts of *Alfred McAlpine Homes* it is notable that the inspector had found that users had come from all parts of the relevant locality.¹⁴
43. Fourth, some support for the notion of a spread of user is to be gained from a passage in the judgment of HHJ Behrens in *Leeds Group plc* where, in rejecting a submission that, in a limb (ii) case, the locality within which the relevant neighbourhood lay had to be small enough to accommodate a proper spread of qualifying users, the judge appears to have implicitly accepted that there was such a requirement in respect of the neighbourhood itself.¹⁵

¹³ At paragraph 71.

¹⁴ See paragraph 38 of the judgment. The locality in question was the town of Leek.

¹⁵ See paragraph 90.

44. In expressing the view that there is a requirement for a spread of users over the qualifying area, I have not lost sight of what Vos J said in *Paddico* at first instance. Vos J said that he “*was not impressed with Mr Laurence’s suggestion that the distribution of residents was inadequately spread over either Edgerton or Birkby. Not surprisingly, the majority of the users making declarations lived closest to Clayton Fields with a scattering of users further away. That is precisely what one would expect and would not, in my judgment, be an appropriate reason for rejecting registration. None of the authorities drives to me such an illogical and unfair conclusion.*”¹⁶
45. These observations were made in the context of consideration of the unamended definition of a town or village green in section 22(1) of the Commons Registration Act 1965. Vos J returned to the matter in the context of considering the amended definition in section 22(1A) of the 1965 Act where he said again that he did “*not accept Mr Laurence’s spread or distribution point.*”¹⁷ It is not wholly clear whether Vos J was rejecting the principle that some kind of spread was required or whether he was simply rejecting the submission made to him on the facts that the particular spread was inadequate but the more natural reading of what he was saying would appear to suggest the latter rather than the former and I consider that the need for some kind of spread of users is necessary for the reasons which I have already set out above.
46. I do not consider that the conclusion that a spread of users is required is placing an unwarranted gloss on the statutory definition of a town or village green or that it places an obstacle in the way of registration which cannot have been Parliament’s intention. On the contrary, the requirement is in my view a principled consequence of the statutory definition in section 15 of the 2006 Act.

¹⁶ At paragraph 106i).

¹⁷ At paragraph 111.

47. However, the next question is how the requirement for a spread of users is to be interpreted. It is here that the remarks of Vos J are, to my mind, particularly helpful. I consider that the requirement should be interpreted in the light of the pattern of residence of the users one would expect to see. That might well be that one would expect to see most users of the claimed green coming from those houses closest to it and I consider that it would be wrong to suggest that there should be an equal spread or distribution of users from all over the qualifying area. And, as Vos J's remarks suggest, "*a scattering of users further away*" may be sufficient.
48. In this case there appears to be a suitable spread as shown on the submitted plan accompanying in the Application. It is pertinent to note that such a plan was submitted indicating that the Applicant has particularly considered the need to demonstrate a spread of users thus recognising its importance.
49. The pattern of user addresses revealed by the plan could be described as showing a scattering of users in the locality. Further on the sufficiency of use point, the witnesses provide a cross section of time and activities from the earliest in 1940's to more recent arrivals in July 2013. I am prepared to infer for the purposes of assessing this element that there has been sufficiency of use. There is no reason to think that these witnesses have not participated or seen others participate in these activities. Since there are no recorded footpaths on the Application Land then any use of it would be not as a highway use but as activities associated with recreation as asserted by witnesses. All the evidence is suggestive of a well-established use in this regard. It also seems unlikely to me anyone would have desisted from using the land fearing that it was a trespass. This suggests that public passage across the Application Land from either of the surrounding roads would have been unlikely as highway given that the pavement surrounding it would be not much further. The evidence points to the fact that the use of the land was uncontroversial for walking and dog walking, thus falling into recreational activity rather than highway activity in my view. Although there are some paths laid in the grass to gates and doors in house walls which

appear to have been used for the exclusive use of the occupiers and visitors to that particular dwelling, I do not consider that this use is fatal to the Application. In my opinion it does not prevent the whole of the Application Land being used as described and does not form or create any physical obstruction or barrier to the activities described.

50. Again on the question of the sufficiency of use point, in addition to walking/dog walking, there is also a body of use described as play, mainly recreational activity, such as children's play (games) but also adults engaged in play type recreational activities (rounders, cricket, football, bird watching). Many witnesses have described this type of activity.
51. The example of Catherine Joan Pilkington whose description of her own personal use of the Application Land for playing, walking, carol singing etc. was typical and was very much in the nature of a use of the Application Land. Other witnesses gave little different evidence and the overall tenor of the evidence did paint a picture of use largely similar. Given the size, location and condition of the Application Land this is not surprising. All witnesses in support of the Application gave their evidence on the standard form and appears to be without conscious exaggeration to any significant degree.
52. For the avoidance of doubt, I have discounted activities which I consider do not fall into the definition of lawful sports and past times for the purposes of this Application. Specifically, church services and carol singing which I consider fall into the category of "faith/worship"; fetes, snow activities and bonfires I also discount as being too sporadic, seasonal and weather dependent to fall into the definition of general use as refined by case law.
53. The use is varied in type but consistent in the reporting of it by witnesses. I am very mindful of the fact that the evidence questionnaires asked about use of the land and all answers given to that question described similar use. It is not possible to test the understanding of those who completed forms by cross examination (given the lack of objection of substance) and I consider

there is little point in asking individuals to confirm their witness statements in person to the Committee, and thereby test the accuracy of the answers given. Therefore that limits the weight which can be placed on this aspect of the evidence but the answers on the forms provide a sufficient degree of support for the conclusion that the use was as described and in the absence of any contrary evidence, on the balance of probability, I am prepared to infer for the purposes of assessing this element that there has been sufficiency of use.

54. In support of this inference I find that the photographs are useful in objectively evaluating the condition of the Application Land. The condition of the Application Land as revealed by the photographs is generally consistent and supports the written evidence. The overall appearance of the Application Land in the photographs in the 1940's does not appear significantly different from its overall appearance in 2015. I do not regard these photographs as providing any sure basis for judgment but they do appear supportive of the contention that the land has been used as described.

Conclusion

55. I consider that there is a body of evidence that supports, on the balance of probabilities, thus:
56. On the totality of the user evidence, there was significant use of the Application Land for informal recreation described by local residents during the requisite period. In arriving at that finding I have not been persuaded simply by the lack of substantive evidence to the contrary, but instead by the likelihood of such use due to the time span, variety of age ranges of the witnesses, by the size and location of the Application Land, the evidence generally about the level of the grass and other vegetation on the Application Land due to Council mowing; that the activities remained unchanged over the relevant period and some were more appropriate than others according to the season and the weather; there had been constant use for recreation for well over the required 20 year period and all bar three witnesses had used the Application Land for the full period; there was a continuity in the pattern of use reflected in the life cycle of local residents who had used the Application Land as children and then used it with their

own children; equivalent recreational opportunities elsewhere were lacking (see plan and photographs in the background papers from tehthe Council landscape officer)

57. **Recommendation**

For the relevant 20 year period, use of the Application Land has been sufficient in amount and manner to enable the Application to succeed. Accordingly I recommend that the Application should be accepted.

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