APPLICATION BY MR S WOODWARD TO REGISTER HAVEN GREEN AS A NEW TOWN OR VILLAGE GREEN

Comments on the draft Report by the Inspector, Mr Stephen Morgan

Introduction

1. I have been sent the draft report by Mr Stephen Morgan of Landmark Chambers, who has been appointed by Ealing Council to act as independent Inspector to advise on the application by Mr Woodward under Section 15(2) of the Commons Act 2006 (CA 2006) to have Haven Green registered as a town or village green. I have been invited to comment as someone who made representations following two objections lodged on behalf of Ealing Council and an Opinion provided by Mr Vivian Chapman QC.

2. My remarks are limited to comment on the draft report and the addition of some further argument in response to the points raised by Mr Morgan. For ease of reference, I have followed the structure of his document. Other than as indicated, paragraph references are to the numbering in his report.

Approach

3. Mr Morgan says (1.12) that it is not his role to make a decision on the application, and that this rests with the Council in its role as registration authority. I am not in possession of the full text of brief that has been given to him, but it can be assumed that this is substantially as in 1.11(1). This shows that the approach taken by the Council was to limit his task as an independent Inspector largely if not wholly to advising on whether a non-statutory inquiry is required, based on his consideration of the preliminary point of law raised by the Council through Mr Jones (3.4), rather than himself conducting an inquiry. The instruction (1.11(2)) makes it clear that in the Council's view it is the Regulatory Committee which will determine the issue.

4. Regulations for dealing with applications under S 15 are provided in the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. As Mr Morgan states (1.10), there is no specific procedure laid down, but "the practice has developed whereby it is common for a non-statutory Inquiry to be held to enable an independent Inspector to provide a report and recommendation to the Registration Authority". This approach has been suggested in *Whitney* as necessary to demonstrate that the registration authority has acted reasonably.

5. The Council's own procedure, adopted at the same meeting of the Regulatory Committee which approved a reference to the Planning Inspectorate "for an independent expert to provide a report", has two options. The second, which should apply where "the evidence or legal issues are complex or finely balanced and/or the Council owns or has some other interest in the land which is the subject of the application", provides for:

> ii) Determination of the application by Regulatory Committee or a specifically appointed sub-committee following the appointment of and submission of a report from an independent expert appointed by the Planning Inspectorate. The report will be submitted following consideration of written representations or a non-statutory inquiry as the independent expert considers appropriate.

6. In the event, PINS was not able to provide an Inspector. Instead, the Council by decision of the Chair of Regulatory acting on the advice the Legal Department asked Mr Morgan as a leading barrister in the planning field to make a report with the instructions as quoted (1.11). As noted above, these instructions were somewhat limited. As a result, he has restricted himself almost entirely to considering the legal basis for determining the application, and has not examined the factual background in any detail. This I submit falls somewhat short of the advice in *Whitney* para 29 (quoted in 1.10) that, if a dispute is serious in nature, "the registration authority…should proceed only after receiving the

report of an independent expert…who has…held a non-statutory public inquiry". There can be no dissent to the conclusion that the present report does not constitute such an inquiry, as Mr Morgan repeats in his conclusions (5.1). It is therefore probably different from what might have occurred had a report been produced by the Planning Inspectorate, as the Committee originally intended.

7. Such an investigation would have had the same status as a tribunal, so that in addition to the duty if impartiality (observation of the Franks principles) as recognised by Mr Morgan, the Inspector would have had to follow the guidance of the Inspectors' Handbook as laid down by the Planning Inspectorate. This includes a duty to ensure that all the relevant facts are considered, and as stated in paragraph 32 of the Handbook: "Inspectors must not leave matters alone if their judgement or professional expertise indicates that either all of the evidence necessary for a soundly reasoned decision has not been put before them." A fair and impartial finding therefore requires a full report on all the issues, not merely a recommendation on the preliminary "in principle" objection. It needs all the facts to have been considered, and the parties given the opportunity to present their case on those facts.

8. It is clear that the Regulatory Committee will have to rely heavily on the conclusions of whatever report they receive. It is therefore important that this should cover all the facts as well as the statutory tests of CA 2006. I suggest that if there is any doubt about any of these tests, the local facts become of particular significance. In the context of the more limited scope of Mr Morgan's brief, they could affect the decision on whether a local inquiry should be held, irrespective of his own advice.

9. I agree with the point (1.13) that the Council's present policies or plans should have no influence on deciding the merits of the application. Nevertheless its actions and attitude may have a bearing on one of the key tests as I show later, and may therefore be relevant in reaching a balanced decision. They should therefore be included within the examination of the facts.

10. I have no comment to make on Mr Morgan's summary of the application and objections contained in sections 2 & 3, except to concur that the Council's objection through Mr Jones is made as owner of the land, and that it rests (3.4) on the argument that public use of Haven Green has been "by right" rather than "as of right". Although the Council has reserved the right to challenge other elements of the application (3.5), no evidence has been produced which would indicate that there are any strong grounds for doing so.

Assessment

11. In 4.28, Mr Morgan notes that the requirement for use to have been "as of right" is at the heart of the statutory test of eligibility for registration, as asserted by Mr Jones. However in 4.18 it is noted that in *Sunningwell* the House of Lords found that "use that was apparently *as of right* could not be discounted merely because many of the users…were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. It was also held that toleration of the recreational use was not inconsistent with use *as of right.*" It follows that it should also be true that lack of knowledge or indifference as to whether a right *did* exist similarly shows that use *by right* could not be assumed, and hinges on what the users believed at the time. This indicates that there is no inherent incompatibility between use *by right* and use *as of right*. The key, as noted by Lord Hoffman, is the assumption of acquiescence by the landowner.

12. Mr Morgan further notes (4.21 ff) that in *Beresford* the House of Lords held that permission that is unlimited and irrevocable amounts to acquiescence and does not defeat a claim for village green rights. This includes a situation where there is regular maintenance such as grass cutting and the provision of benches.

13. It is a large step from that finding to the assertion in 4.23 that "if the use is pursuant to a statutory right of public recreation then it does seem to be generally accepted that the use is *by right* and not *as*

of right". Mr Morgan does however recognise that this point was "not finally determined" by *Beresford.*

14. The relevance of the reference by Lord Scott to section 10 of the Open Spaces Act 1906 is also unclear, as it applies to "a local authority who have acquired any estate or interest in or control over any open space…under this Act". This does not appear to apply to the acquisition by Ealing Council of Haven Green, which did not take place under that Act, and indeed was accepted as not applicable in *Beresford* in any event (Lord Scott's para 30). His further doubts in his para 52 are heavily qualified by the admission that those arguments were not addressed by the Lords.

The issues

15. As noted above, the limits to the instructions given to Mr Morgan mean that the question of whether the application meets the requirements of CA 2006 Section 15 as reviewed (4.5 to 4.16) has not been considered, beyond the in-principle point raised by Mr Jones.

16. In my earlier submission (2.7), I argued that if that point of principle were granted, then Haven Green would fall under the definition of a town or village green contained in CRA s.22(1). Mr Woodward made the same point (2.6(4)). This question, the consequences and potential remedies should also be addressed.

The position

17. What has been the basis both on which the Council has viewed use of Haven Green and on which local residents have enjoyed it for recreational purposes?

18. Over many years, the Council has treated Haven Green as if it were held by them in the same way as its other parks, playing fields and public open spaces. It is listed in Ealing's Unitary Development Plan (now a "saved policy" in the emerging Local Development Framework) as Public Open Space, alongside many other spaces which are not common land. Many of these spaces are not enclosed and are adjacent to a public highway, thus allowing free 24-hour access. On Haven Green, there is regular grass cutting and other maintenance, and all paths are fully lit. In recent years sign boards have been erected on several such areas, giving the name of the space and little more information other than that the land is under the control of Ealing Parks Department. Reference is made to the existence of bye-laws, but these are not easy to trace. The Council web site has one general set of bye-laws but the schedule does not include all sites; Haven Green is one of those missing.

19. Use of Haven Green by the public for activities such as informal football as well as merely passing across on foot and resting on the several benches is not subject to controls. However over time the Council as landowner has taken several actions which have in fact restricted or threatened free use of the area, or limited the space available for general recreational activity. In recent years these have included
    - allowing part of the north-east corner of the green to be taken over for a bus lay-by
    - laying down a complete segment of the green to formal planting, with extensive flower beds as well as new trees surrounded by hard shrubs
    - permitting the installation of an electricity substation on a 25-year lease from 2008, to provide power for an ice rink and other seasonal commercial attractions; this included a strong justification by the Council to the Planning Inspectorate of the actions despite strong local objections
    - including the whole of the area in a dispersal zone
    - installing CCTV monitoring
    - supporting planning applications (subsequently rejected) which would have encroached on the eastern and southern sides of the green and had a significant adverse impact.

20. Further, the Council has indicated that it intends to revive plans to encroach further on the eastern side of the green, for the provision of bus stops and stands. This general intention has been confirmed by Mr Hayes is his objection (3.8). This clearly shows that he believes the Council now has powers of development which could impinge on the present level of free enjoyment to participate in "sports and pastimes" across the whole green.

21. Local residents, even those with greater awareness than average, could therefore be forgiven for assuming that public use is not entrenched as a legal right, but that the Council might at any time seek to enforce further restrictions. Their regular recreational activities are felt to be conducted on sufferance and dependent on acquiescence.

Consequences of non-registration

22. In 4.3, Mr Morgan states that "the implications of registration are far-reaching for most landowners". Mr Hayes in his objection (3.7) is also of the opinion that such designation would grant additional status and protection. However, Mr Morgan also cites Lord Brown in the *Cleveland* case (4.20), who stated (his para 100) that "…on the proper construction of section 15 of the Commons Act 2006, the only consequence of registration of land as a green is that the locals gain the legal right to continue to 'indulge' in lawful sports and pastimes upon it (which previously they have done merely as if of right) – no more or no less."

23. It is clear that the intent and effect of CRA 1965 and CA 2006 were to provide protection to the rights of the public to continue to enjoy access to and use of land which they have habitually been able to enjoy for recreational purposes, through registration of those rights. There does not appear to be any challenge to the assertion that such use of Haven Green exists and has existed for a considerable time, but the Council's attitude as landowner (as reflected by Mr Hayes) is to want to restrict rights over the land, and to avoid any constraint on its ability to make changes which it might wish to pursue in furtherance of its regeneration or other policies.

24. I submit that it cannot be correct to conclude that the present application falls because both

    a. under CRA 1965 section10 the registration in 1968 of Haven Green as common land is conclusive that it is ***not*** a village green (4.40); *and*
    b. it is outside section 15 of CA 2006 because it is not for a "new" town or village green (4.41).

    If the first premise applies, then the second cannot do so as well. It must be a matter of fact whether or not the land qualifies under CRA 1965 section 22(1) (as amended), where the three definitions are alternatives, and not to be interpreted as if all three parts had to apply. Thus the application should be accepted on the basis of its being either for a new green, or to correct a previous error in its registration.

25. Mr Morgan contends (4.43) that in the light of CRA 1965 section 10 and the *Oxfordshire* decision (which pre-dated the coming into force of CA 2006), whether or not an error was made in 1968 by registering Haven Green as common land rather than as a village green "cannot predetermine the current application". However section 10 should not be treated as a catch-all provision to prevent land previously registered as common land under the same Act as being subsequently re-designated as a town or village green. Such an interpretation would render CA 2006 section 19, section 22 and Schedule 2 otiose. On the contrary, it was clearly the intention of the legislation generally that this should be a possibility, either as an application for land to be treated as a "new" town or village green, or by correction to an earlier registration under CRA 1965.

26. I accept Mr Morgan's point that the specific provisions to correct errors are only so far in force for pilot areas. However I do not accept that these are the only available powers to remedy the situation (4.44). There is a possible course of action even without the implementation of those sections, as a further option exists in section 15(8) whereby "The owner of any land may apply to the

commons registration authority to register the land as a town or village green." That would permit the Council as owner to recognise the previous error and of its own volition move to correct it, possibly by joining itself to the present application. Moreover, the requirements of section 15(2) do not apply to section 15(8).

Conclusions

27. As already remarked, the crux of Mr Morgan's opinion that the application fails to meet the criteria of CA 2006 section 15 is the issue of whether the existing recreational use of the land has been "by right" rather than "as of right". It is not necessary to follow Mr Woodward's argument that *nec precario* means "without asking permission" to observe from the cases Mr Morgan quotes that the law is not as definite on the distinction between the two types of use as he contends. The Council's own actions and attitude to the users of Haven Green have over the years led local residents to the not unreasonable conclusion that their enjoyment of the area has not been guaranteed or necessarily permanent, but has been through acquiescence. Registration as a town or village green would as the legislation intends protect that use which now appears threatened.

28. Mr Morgan nevertheless concludes (4.51 (6)) that, because in his view the application has failed to meet the "as of right" criterion of CA 2006 section 15(2), the Council can proceed without the necessity of a non-statutory inquiry. In my view this is regrettable, as despite his reasoning, it would seem necessary that there should be a complete, objective and balanced assessment on which a judgement can be made and which should reach a position on all the relevant tests and the facts, and not dwell only on one aspect where an objection has been raised. The strength of the case should be seen as a whole and not limited to one element. This is necessary in the context of both CRA 1965 and CA 2006, where the intent of the legislation is clearly to consolidate and protect existing public rights (as noted by Lord Brown in *Cleveland)*, rather than to create an additional limitation, which would be the effect of excluding land enjoyed *by right* even when that land qualified under the definitions of those Acts.

29. I also contend that the report as now presented is not a sufficient basis for the Council to proceed to a determination of the application. This because

    a. the Council's instructions to Mr Morgan did not follow its own protocol as set out in para 5 above. This lays down that in any application where the Council has an interest the independent report should be submitted *after* "consideration of written representations or a non-statutory inquiry as the independent expert considers appropriate". The Council did not instruct Mr Morgan to conduct an Inquiry if he thought fit, but merely to consider whether the holding of such an inquiry was "necessary and appropriate";
    b. the protocol itself does not sufficiently meet the need to act reasonably as laid down in *Whitney*. The paragraphs quoted by Mr Morgan (1.10) make it clear that "if the registration authority has itself to make a decision…it should proceed only after receiving the report of an independent expert …who has…held a non-statutory public inquiry". This in addition to the generally accepted obligations of an Inspector mentioned in para.7.

30. This intervening inquiry is clearly necessary to avoid the impression of the local authority acting as both judge and jury in a matter where it has a direct interest.

In this or similar cases the procedure of the protocol is not adequate for the public interest to be seen to be protected.

31. Finally, in order to meet the test of fairness, I submit that the questions that also need to be addressed in order to deal completely and properly with the application include:
    a. Did the Council in 1968, as Mr Woodward contends and I agree, make a mistake in failing to register Have Green as a town or village green?
    b. If so, what remedies could be applied to correct that mistake?

32. What the Council should be considering is whether Haven Green represents the kind of local asset that the government recognises is the typical town or village green which should be protected. In DEFRA's current public consultation on the subject, it says:

> "In popular perception, a green is found at the core of towns and villages: comprising some green space (invariably mainly down to grass) crossed or bounded by roads (often including the main street), furnished with benches, litter bins, perhaps a letter box and telephone kiosk, and a few venerable trees, and on to which face the church, the pub and perhaps a shop. The green is surrounded by houses, many of them of some considerable age, which either face onto the green (and perhaps can be reached only by crossing over part of the green) or onto roads which bound the perimeter of the green. ... Most such greens were registered in the first wave of registration under the 1965 Act."

If this description fits, the tests of common sense as well as common law dictate that the area should be granted the status the legislation provides for, in the interests of the local residents and citizens of the borough.

AHJM
4 Sept 2011

Appendix A

Minutes of Ealing Council Regulatory Committee, January 2011, Item 9, reads:

Haven Green Village Green Application

The Chair introduced the item and referred the committee to the recommendations.

Resolved:

i.) To note that an application to register Haven Green as a village green has been made.

ii.) To agree that the application should be referred to the Planning Inspectorate for an independent expert to provide a report.

iii.) Note that the report will be submitted to a future meeting of Regulatory Committee for determination of the application.