

TO: PLANNING & REGULATORY COMMITTEE

BY: HEAD OF LEGAL SERVICES

DISTRICT (S): MOLE VALLEY

ELECTORAL DIVISION:
LEATHERHEAD AND
FETCHAM EAST
Tim Hall

PURPOSE: FOR INFORMATION

**TITLE: APPLICATION FOR VILLAGE GREEN STATUS.
LAND AT LEACH GROVE WOOD, LEATHERHEAD**

SUMMARY REPORT

The Committee is asked to note the outcome of a judicial review of a decision of this committee regarding an application by Philippa Cargill to register land at Leach Grove Wood, Leatherhead as a Village Green.

The County Council is the Commons Registration Authority under the Commons Registration Act 1965 and the Commons Act 2006 and administers the Registers of Common Land and Town or Village Greens. Under Section 15 of the 2006 Act the County Council is able to register new land as a Town or Village Green (TVG) on application, provided it meets the statutory criteria.

ANNEXE

Annexe A – Commons Register definitive map

Annexe B – Counsel's summary of the High Court's decision

BACKGROUND

On 25 March 2013, Surrey County Council received an application for a new village green for the land of Leach Grove Wood, Leatherhead. The application was made on the statutory basis that:

“a significant number of 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.”

An objection to the application was received from NHS Property Services Ltd (NHSPS) in its capacity as freehold owner of the application land. The land is adjacent to Leatherhead Hospital.

A non-statutory public inquiry was held before an experienced independent barrister, sitting as the Inspector. The Inspector's report formed a background paper to the report from the Commons Registration Officer to this committee on 23 September 2015.

In his report, the Inspector advised that, because the applicant had not satisfied the neighbourhood test, the application should be rejected. In his opinion there was not sufficient cohesion to form a neighbourhood.

The view of this committee was that there was sufficient cohesion to form a neighbourhood and the committee decided to accept the application and register the land as a new TVG.

Judicial Review

The NHSPS applied to judicially review the decision of this committee and the case was heard in the High Court in June 2016 before Mr Justice Gilbart.

The issues raised in the case were:

- (1) Was the council under a duty to give reasons for its decision?
- (2) If so, what standard of reasoning was required?
- (3) Did the council give adequate reasons for finding that the criteria were met?
- (4) Was the finding that there was a 'neighbourhood' one which the council could reasonably make?
- (5) Given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has the council shown that there was no basis for concluding that there was statutory incompatibility?
- (6) Was the conduct by the council of the meeting which considered the issue fair to the Claimant NHSPS?

The Judge's decision on each issue was:

- (1) There is a duty to give reasons and the reasons given must be of the appropriate standard.
- (2) The appropriate standard is, on controversial issues, not just to consider the issues, but to give reasons for the conclusions reached.
- (3) In this instance, there was no criticism of the committee's approach to the issue. The committee was required to address the 'neighbourhood' question as it stood before them, and the arguments for and against the case. The Inspector's expertise lay in the law and practice relating to village greens, not in their identification, even assuming that such an expertise could exist. It was very much a matter of impression where elected members could have just as much expertise as the Inspector.
- (4) The finding that there was a neighbourhood was undoubtedly a decision which the committee could reasonably make.
- (5) There was an absence of any consideration or reasoning relating to the question of 'statutory incompatibility'. This means that where land is held under one statute it may be incompatible with the land being registered as a TVG. The argument was that the land was held by the NHS for health purposes which was incompatible with the land being used for recreational purposes as a TVG. There was statutory incompatibility and for this reason the judicial review was allowed.
- (6) Concern was raised about the fact that Mr Tim Hall was Chairman of the Committee. The Judge considered that this was a point of no substance. Mr Hall was entitled to present his view as ward member to the meeting, which

he did after vacating the chair, and having given his representations, he left the meeting. In the judge's view he acted with complete propriety, and no complaint can be made of his conduct.

So far as the question of the representations from the two parties were concerned, it was established that Dr Bowes' correspondence was circulated in hard copy, but the correspondence of the NHSPS was not. Further, several members did not receive the latter because the council's email server junked them. As a result, the NHSPS suffered a disadvantage because it was responding to Dr Bowes' late submission.

The judge did not consider that Dr Bowes conduct caused any actual unfairness. He was entitled to send a late submission to the committee in light of the recommendation to reject the application, and the NHSPS was entitled to respond.

The question is whether the disadvantage caused to the NHSPS by members having Dr Bowes's representations before them but not the NHSPS's, caused any actual prejudice which could have affected the decision. In Mr Justice Gilbert's judgement the decision which the committee reached, and the reasons it gave, were unaffected by that.

The decision of the Judge was to uphold the application of the NHSPS and to overturn the decision of this committee, due only to the lack of consideration of the legal concept of statutory incompatibility. This meant that the land was not a TVG.

A more detailed background note is provided at Annexe B by the Counsel's junior barrister, Katherine Barnes, which was prepared following the High Court decision prior to the NHSPS appeal to the Court of Appeal.

Appeal to the Court of Appeal

The original applicant had by now moved out of the area and her application was taken over by Mr Timothy Jones. Mr Jones appealed from the decision of the High Court to the Court of Appeal. The appeal was heard in October 2017 and the judgment was published on the 12 April 2018.

The Court of Appeal overturned the decision of the High Court judge on the grounds of statutory incompatibility. Therefore the land is a TVG.

The NHSPS has been ordered to pay the costs of this council defending itself in the High Court. The council did not take part in the appeal.

Application to appeal to the Supreme Court

The Court of Appeal refused the application of the NHSPS to appeal further. However, the council has now received notification that the NHSPS is applying for an extension of time to apply to the Supreme Court itself for permission to appeal further. The decision of the Supreme Court is awaited as to whether it will allow an extension of time and, as to whether it will allow the NHSPS to appeal. If an appeal is allowed, it is unlikely that the decision will be issued for about another two years.

The grounds of appeal are primarily on statutory incompatibility and on the definition of locality and neighbourhood. They are also testing the need for sufficient reasoning

by the decision maker. Thus, as the law currently stands, the original decision of this committee has been upheld but we wait to see what will happen.

CONTACT

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BACKGROUND PAPERS

All papers referred to in the report