

**TO:** PLANNING & REGULATORY COMMITTEE**DATE:** 29<sup>th</sup> June 2022**BY:** COUNTRYSIDE ACCESS OFFICER**DISTRICT(S)** WOKING BOROUGH COUNCIL**ELECTORAL DIVISION(S):**

WOKING SOUTH

Ayesha Azad

**PURPOSE:** FOR DECISION**GRID REF:** 500973 157630**TITLE:** APPLICATION FOR VILLAGE GREEN STATUS, LAND AT ELMBRIDGE RECREATION GROUND, KINGFIELD**SUMMARY**

The committee is asked to consider whether to register the Land the subject of this Application as a Village Green.

Application for Village Green status by Mr Robert Shatwell (the Applicant) dated 9 December 2019 relating to land at Elmbridge Recreation Ground, Kingfield, Woking.

The County Council is the Commons Registration Authority under the Commons Registration Act 1965 and the Commons Act 2006 which administers the Registers of Common Land and Town or Village Greens. Under Section 15 of the 2006 Act the County Council can register new land as a Town or Village Green on application.

**The recommendation is to REJECT the Application**

**APPLICATION DETAILS*****Applicant***

Mr Robert Shatwell

***Land***

Elmbridge Recreation Ground, Kingfield, Woking.

***Date of Application***

9 December 2019

**ILLUSTRATIVE MATERIAL**

Annex A: Plan of Land submitted with Application

Annex B: Evidence in support of Application

Annex C: Woking Borough Council Objection

Annex D: Applicant's response to Objection

Annex E: Statutory Declaration from Woking Borough Council

Annex F: Applicant's response to Statutory Declaration

## 1. BACKGROUND

- 1.1 On 9 December 2019 Surrey County Council received an application for a new village green for the site of Elmbridge Recreation Ground, Kingsfield, Woking (Annex A). Checks identified a missing signature at section 11, and this was added by the applicant on 5 February 2021.
- 1.2 The Application was made on the basis that “a significant number of the inhabitants of any locality or 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”. The Application was accompanied by 2 photographs of the area, a list of 48 signatories who claimed use of the land for recreation/air and exercise and 4 signatories who claimed that the site had been in constant use for over 20 years as evidence in support of the claim for registration (Annex B).
- 1.3 The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 sets out the process to be followed by any applicant seeking to register a new Town or Village Green and the process to be followed by the Commons Registration Authority. Following changes to the law, under the Growth and Infrastructure Act 2013, the Registration Authority must establish whether an application is valid under section 15C of the Commons Act 2006 before the application can be considered.
- 1.4 The relevant planning authorities were consulted to establish whether there were any trigger events that would result in the inability of the Council to proceed with the Application. No trigger events were identified.
- 1.5 A public notice was placed in the local press on 22 April 2021 with an objection period running until 14 June 2021. The Application was placed on public deposit at local libraries and at the District Council offices.
- 1.6 An objection was received from Woking Borough Council (Objector) as owner of the Application Land on 15 June 2021 (Annex C), and the Applicant was given an opportunity to respond to that objection (Annex D).
- 1.7 Legal advice was sought from the Council’s Legal Services regarding both the evidence submitted in support of the claim, the objection received from the landowner and the Applicant’s response to it.
- 1.8 The Council’s Legal Services sought Counsel’s opinion on whether the Application needed to go to a non-statutory inquiry, or whether the Application should be rejected due to insufficient evidence.
- 1.9 Counsel advised the Council’s Legal Services that the Objector should put material relevant to their argument in the form of a statutory declaration and that the Applicant should be given an opportunity to respond. A statutory declaration by Woking Borough Council was submitted on 3 December 2021 and the Applicant responded to this on 10 December 2021 (Annexe E & F).
- 1.10 Counsel then considered the evidence supplied in the statutory declaration and response and gave advice to the Council on the Application.
- 1.11 The Council’s Legal Services issued a report to the Countryside Access Team setting out their recommendation to refuse the Application on the basis that it fails to meet the criteria set out in Section 15(2) of the Commons Act 2006 for registration as a village green.
- 1.12 Section 6, Analysis and Commentary below sets out the factors to be considered in this case.



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## 6. ANALYSIS AND COMMENTARY

- 6.1 Section 15 of the Commons Act 2006 enables the Commons Registration Authority to register land as a Town or Village Green where certain conditions are met. In this instance the Application was made under section 15(2) which sets out that a TVG can be registered where:
- (a) A significant number of the inhabitants from any locality, or 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.
- 6.2 Counsel's opinion on this Application focused primarily on the 'by right' issue and the argument put forward by the Objector that the Application Land had been held in accordance with its statutory functions under section 12 of the Housing Act 1985 and its predecessor legislation.
- 6.3 In order to be successful in a claim relying on evidence of use, that use needs to have been 'as of right' for the requisite period of time. For the use of land to be 'as of right' it must have been undertaken without force, without secrecy and without permission.
- 6.4 The Applicant submitted evidence that he claimed showed that the Application Land had been used 'as of right' for at least 20 years. This included photographs which identifies the Application Land as well as signatures from residents.
- 6.5 The Objector claimed that the Application Land had been held in accordance with its statutory functions under section 12 of the Housing Act 1985 and its predecessor legislation meaning that the Application Land had been used 'by right' rather than 'as of right' (Annex C). The Objector submitted further evidence on the issue to which the Applicant responded (Annex E & F).
- 6.6 The material submitted by the Objector with the statutory declaration included deeds and documents illustrating that the Application Land was acquired by the Objector in exercise of their statutory functions under the Housing Acts 1936 – 1949.
- 6.7 The Application Land was built and maintained as a recreation ground and was made available to occupiers of the Elmbridge Estate under statutory powers and has subsequently been held under the powers within section 12 of the Housing Act 1985.
- 6.9 The Supreme Court has held that if the land is held under a provision such as section 12(1) of the Housing Act 1985 then members of the public will have a statutory right to use the land and no question of user 'as of right' can arise.
- 6.10 This means that if the use of the land is the same for which the landowner has granted the public permission to use it, then that use cannot be said to be 'as of right', it has been 'by right'. This would be the case regardless of how long the land was used for.
- 6.11 The Applicant has not in their representations disputed that the Objector acquired the Application Land under these statutory powers. They have also not disputed that the Objector held the Application Land under section 12 of the Housing Act 1985.
- 6.12 SCC Legal services have indicated that Counsel's advice to them on the way in which the landowner holds the land is that this defeats any claim that use is 'as of right' and that as a result the application is impossible to allow. Counsel advised that: "*This clearly*

*defeats any claim to be qualifying user under section 15(2) of the Commons Act 2006 because the requirements under that section for registration of a TVG are that the use must be 'as of right' ..."* and that land held under section 12 of the Housing Act 1985 or its predecessors is sufficient for it to be used pursuant to a statutory right and so used 'by right' not 'as of right' making the Application impossible to allow.

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## 7. CONCLUSIONS AND RECOMMENDATION

- 7.1 On review of the Application and evidence submitted, Counsel has advised that the Council should refuse the Application. This is on the basis that the Application Land has been shown to be used 'by right' and not 'as of right'. The requirements of section 15(2) of the Commons Act 2006 have therefore not been satisfied as this requires the use of land to be 'as of right'. This, as such, means that the recreation ground cannot be registered.
- 7.2 The Council would not need to hold a non-statutory inquiry before determining the Application. This is because the important aspects of the relevant facts, specifically the 'by right' 'as of right' issues, are not contentious. The Council can therefore proceed based on Counsel's advice and determine the Application without holding an inquiry. Counsel's advice in summary was: "... *It is clear that the Application does not have substance and the Registration Authority should reject the Application based on uncontentious facts and the law as set out in **R (Barkas) v North Yorkshire County Council** [2014] 2 WLR 13. In these circumstances it is not necessary to hold an Inquiry following the guidance set out by the Court of Appeal in **Whitney**<sup>1</sup>. I would advise that Surrey County Council proceeds to refuse this Application...*"
- 7.3 Therefore, Officers recommend that the Application is REJECTED.

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### CONTACT

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### BACKGROUND PAPERS

All documents quoted in the report.

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<sup>1</sup> **R (Whitney) v Commons Commissioners** [2005] QB 282

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