

## **Planning and Rights of Way Committee**

**25 March 2025**

**Application under S.15 of the Commons Act 2006 for the registration of land claimed to have become a town or village green**

**Land known as Open Space adjacent to Nutham Lane and Cedar Drive, Southwater**

**Report by Executive Director of Law, Assurance and Insight**

**Electoral division: Southwater & Nuthurst**

**Local Member: Nigel Jupp**

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### **Summary**

This is an application made under the provisions of s.15(1) and (2) of the Commons Act 2006 to register land known as open space adjacent to Nutham Lane and Cedar Drive, Southwater, as a village green. The land consists of an open space comprising a large grassy area bounded between the two streets.

The application is supported by 92 evidence forms and 1 statement by the applicant. The evidence is from residents living in close proximity to the claimed land. The land is owned by Southwater Parish Council, who have held it since March 2003 as a public open space in accordance with a restrictive covenant on the title to the land.

The legal tests for the registration of land as a town or village green require that the application must show on the balance of probabilities a significant number of the inhabitants of any 'locality' (or of any 'neighbourhood within a locality') have indulged as of right (i.e. without permission, force or secrecy) in lawful sports and pastimes on the application land for a period of at least 20 years and they continue to do so at the date of the application. Having evaluated all the evidence submitted it is concluded that the application meets the legal tests and therefore the land is recommended to be registered as a village green.

### **Recommendation**

That the land known as open space adjacent to Nutham Lane and Cedar Drive, Southwater, shown hatched black on the report plan attached, with the exception of the play area shown edged red, be registered as a Town or Village Green.

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## **1 Background**

- 1.1 This report concerns an application received on 5 August 2022 from Dr Charles Fentiman of 31 Nutham Lane, Southwater, Horsham, RH13 9GG for the registration of land described as 'open space adjacent to Nutham Lane and Cedar Drive' at Southwater as a village green.
- 1.2 The application is made under Section 15(2) as no restriction on use of the land has occurred, and the twenty-year period of use runs from August 2002 – August 2022.
- 1.3 The land is owned by Southwater Parish Council.
- 1.4 The application land is comprised of a large area of open grassland bordered by trees along its boundary with Cedar Drive and open to access from Nutham Lane and with a size of approximately 2.05 acres (0.83 hectares).
- 1.5 On the land is a rectangular enclosed play area with play equipment, measuring between 12 and 13 metres on each side, and covering an area of 0.04 acres. This play area is clearly signed as being provided by Southwater Parish Council and as such must be excluded from the area claimed as village green if registered as town or village green.
- 1.6 Attached to this report are a location plan (appendix 1a) and a report plan (appendix 1b), which shows the application land hatched black, with the excluded play area in red.
- 1.7 The application is supported by 92 evidence forms, testifying to use by 103 individuals from 81 unique addresses, all within close proximity of the claimed land off Nutham Lane, Southwater. A summary of the user evidence is included in the table at appendix 2 to this report.

## **2 The handling of the application**

### Initial handling of the application

- 2.1 The Growth and Infrastructure Act 2013 inserted new Section 15C and Schedule 1A into the Commons Act 2006, which exclude the right to apply for the registration of land in England as a town or village green where a trigger event has occurred in relation to the land. The right to apply for registration of the land as a town or village green remains excluded unless and until a terminating event occurs in relation to the land. Trigger and terminating events are set out in Schedule 1A to the 2006 Act and broadly relate to whether land is identified for potential development in the planning system.
- 2.2 In accordance, letters were sent to Horsham District Council (HDC) and the Planning Inspectorate (PINS) as relevant local planning authorities on 11 November 2022 requesting identification of any trigger and terminating events affecting the land claimed as village green. Responses were received from HDC (on 19 December 2022) stating that no trigger events had occurred, but that the land had been registered as Local Green Space in the Southwater Neighbourhood Plan 2019-2031.

The application land is marked SNP5 on Neighbourhood Plan Policies Map Inset Map 6. A response was received from PINS (on 6 March 2023) stating that although a trigger event had occurred, a corresponding terminating event had also occurred. Copies of these responses can be read in the background papers (section C).

- 2.3 The National Planning Policy Framework (NPPF), paragraphs 105 to 107 provides a Local Green Space designation (LGS) to protect local green areas of special importance to local communities. This enables communities, in particular circumstances, to identify and protect areas that are of value to them through local and neighbourhood plans. LGS is designated by the planning authority (borough, district, metropolitan or other unitary authority) and once it is in place, it is subject to development restrictions, ruling out new development except in special circumstances. On 23 June 2021, Horsham District Council resolved that Southwater Neighbourhood Plan 2019 – 2031 should be 'made' and become part of the Development Plan for Horsham District Council for the Parish of Southwater. The claimed green is designated LGS under this Neighbourhood Plan (which can be seen in section D of the background papers).
- 2.4 Following the receipt of confirmation that no trigger events were affecting the land, the application was formally accepted.
  - 2.4.1 However, on inspection of the application, it was clear that the application was not duly made, owing to the statutory declaration not having been signed or properly witnessed, and the plans and statement accompanying the application not having been marked as exhibits thereto. The applicant was given the chance to rectify this minor defect, in accordance with Regulation 5(4) of The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The applicant submitted the requisite corrections promptly.
- 2.5 The application was advertised in the West Sussex County Times on 31 August 2023 and the closing date for representations was therefore given as 12 October 2023. Notices were sent to the landowner, Southwater Parish Council, and also displayed on the site as required. The relevant 'concerned local authorities', as defined in the regulations are Horsham District Council and Southwater Parish Council. They were also contacted, the latter as relevant local authority in addition to being landowner, and asked to put a copy of the application on deposit for public inspection.
- 2.6 Site visits were carried out on 12 January and again on 5 October 2023. The claimed area was seen to be a well-maintained green space with even grass growth over the vast majority of the area claimed and with no worn areas. The side of the space bordering Cedar Drive has trees and hedgerow growing all along it, making it inaccessible from that road, but although there are a few trees planted (some very mature) along its edge on the Nutham Lane side, it is easy to access on foot at every point along that boundary. There is a small children's play park in the northern area of the land (see paragraphs 1.5 and 4.5.4), and newly-

created footpath 3794 runs along some of its northern boundary, where it meets land occupied by Little Barn Owls Nursery.

2.7 During the statutory period for representations one objection was received from the landowner, Southwater Parish Council (SPC). The objections can be summarised as follows:

- The application is defective – the applicant had omitted to indicate in section 4 of the application form on which statutory basis the application was made. This omission was corrected by the applicant on 24 August 2023 to indicate the application was made under Section 15(2) Commons Act 2006, however the notice letter was sent to SPC on 22 August before this correction was received. Emails confirming the correction can be seen in the background papers (section G).
- The land is held by SPC as public open space, according to paragraph C12 of the title to WSX276309, of which the claimed land is part, which states:

"A Transfer of the land in this title dated 4 March 2003 made between (1) Bryant Homes Southern Limited (Transferor) and (2) Southwater Parish Council contains the following covenants.

"Restrictive covenants by the Recipient:

With the intention of binding the Property and every part of it (whoever may own it from time to time) and of benefiting the Retained Land and every part of it the Transferee covenants with the Transferor that the Property shall not (save with the prior written permission of the Transferor) at any time be used otherwise than as a public open space.""

- The use of the land has therefore been by right, not as of right, because the public have permission to use the land as a public open space, and therefore the application must fail.
- The full text of the response by SPC can be read in the background papers (section E).

2.8 These points in objection are significant as they demonstrate clearly that Southwater Parish Council hold the land for use by the public as public open space since at least March 2003, which is only 7 months after the start of the relevant 20-year period. This is an important factor in the consideration of the legal tests and will be discussed further in paragraphs 4.3 and 4.5.

2.9 As required under the Regulations, a copy of the letter of objection was sent to the applicant on 12 October 2023 by email. The main points of his response can be summarised as follows:

- A claim that the matter was not discussed fully by SPC, so the response cannot be made on their behalf, only that of the Executive Officer and RFO, Justin Tyler.

- A claim that there is a conflict of interest in this matter involving Mr Tyler and Mr Graham Watkins (deputy chairman of SPC) as representatives of development companies, and he expresses concern about Mr Tyler making statements on behalf of SPC.
  - The belief that Bryant Homes 'gifted' the land to the people of Southwater, including Easteds Barn, a community space, but that the 'spirit' of that agreement has been broken by the leasing of the barn by SPC as a commercial enterprise.
- 2.10 None of the above statements made by the applicant directly respond to the evidence of SPC, and in fact the last point goes some way to confirm the understanding that the land is held for use by the public. The restrictive covenant in the claimed land's title is in any case available to be seen by the public should they so choose. The full text of the response by the applicant can be read in the background papers (section F).

#### Evidence in support of the application

- 2.11 The application was initially submitted with 11 user evidence forms in support, all from residents of Nutham Lane, which is not a sufficient number of users to meet the "significant number" aspect of the legal test detailed in para 3.2 below. It was considered that it was reasonable under Regulation 5(4) to allow the applicant the opportunity to gather more evidence to support the application, if he could accomplish this within a limited timeframe. On 21 November 2023 the applicant was informed of this, and given until 22 December to gather this further evidence. The applicant was also asked to identify more clearly the "locality or neighbourhood within a locality" as he had not yet done so, and to establish whether any new respondents were aware that SPC as landowners held the claimed land as public open space, and whether they had ever seen signs on or near the land displaying this fact. The deadline for gathering this fresh evidence was later extended to 19 January 2024 to account for the festive period and the likelihood of local residents being away or too busy to respond. The full text of these email communications can be read in the background papers (section H).
- 2.12 On 21 November 2023 the case officer also emailed SPC to ask:
- to what extent the fact that SPC holds the land as public open space has been communicated to the residents of the area and the general public at large (for instance if any signs had ever been erected on site to indicate this fact),
  - to show the extent to which the land is held as public open space on a plan of the area, and
  - for details of any maintenance carried out on the green by SPC.
- 2.13 On 18 December 2023, the Clerk to SPC responded with the requested information (as further discussed in para 2.18), including the fact that no

signs have been erected by SPC at any stage on site to indicate its ownership and provision of the claimed green as public open space.

2.14 On 19 January 2024 the applicant returned a further 81 evidence forms, from other streets adjacent or very close to the claimed land. When these forms were examined, it was discovered that the applicant had shortened the original form (a standard version created by the Open Spaces Society which addresses all the questions relevant to evidence-gathering from users for village green applications), for unknown reasons. The new form (NF1) omitted questions such as:

- the frequency of use of the claimed land,
- separating the respondents' uses from those they had witnessed other people making of the land,
- the frequency with which respondents had seen other people use the land,
- whether the respondent has ever been told they do not have permission to use the land,
- whether they have been prevented from using it.

These questions are an important part of the evidence and need to be answered by all respondents in order to ensure the correct decision is made in response to the application. On 18 April 2024, the applicant was asked to request these answers from the 81 new respondents, and given until 30 June to collect the additional information. The applicant compiled a second new form (NF2) covering the above questions which was given to the new respondents, and returned a total of 62 of these on 26 June. The total number of user evidence forms was brought to 92. Examples of both these new forms can be seen in the background papers (section J).

2.15 On NF1 the applicant had included the question "Are you aware that the land is owned by Southwater Parish Council and held by them as Public Open Space?" Most respondents wrote a simple 'yes' or 'no' answer to this question, although a small number wrote that they were now aware, as a result of the village green application. It was important to establish whether any others who answered 'yes' to this question had also only learned recently (in which case their use would have been without knowledge of SPC holding the land as public open space for the benefit of residents) or whether they had known for any length of time that would mean they had used the green in the knowledge they had permission to do so. This distinction will be discussed further in paragraphs 4.3 and 4.5.

2.16 In early August 2024 the case officer contacted any respondents who had answered 'yes' to the question in para 2.15. Contact was made via letter or telephone, and some responses were received via email. Responses were received from almost all of those contacted; at the time of compiling this report 90 definitive answers had been received. 41

respondents now stated that they had known that SPC owned the land and held it as public open space (POS) throughout their use of it, and 49 respondents stated they had not been aware. 3 people did not respond.

- 2.17 An anonymised summary of this new extended user evidence, along with the applicant's description of the "locality or neighbourhood within a locality" which was received on 18 January 2024, was then sent to SPC for their comments.
- 2.18 Simultaneously, the further evidence submitted on 18 December 2023 by SPC (as referred to in para 2.12) was sent to the applicant for his comments. This evidence included their comments on the application, the maintenance schedules, and details of the places it is published that they own the land and hold it as POS.
- 2.19 The evidence received from SPC can be summarised as follows:
- expressing surprise and disbelief that any of the local residents could possibly not have known SPC hold the land as POS, given the recent consultation regarding the disposal of Easteds Barn on land adjacent to the north of the claimed green, which was until recently a community hall also held by SPC for the benefit of the local residents, and
  - enquiring whether the names and addresses of the users had been cross referenced with planning and other documents to check the veracity of claims not to know the land is held by SPC as POS, and requesting the addresses of users in order to perform this cross referencing.

Answers given on user evidence forms have to be accepted by the County Council. It was however necessary to follow up with users on the question of whether they knew they had permission to use the land – as some had not answered and others had answered ambiguously – because it is a crucial question for the legal tests to determine the application. This was done to ensure the question had been both properly understood and answered. It is not necessary to cross reference answers given by users against information recorded by other authorities, or otherwise not directly concerned with the application. Neither is it appropriate for WSCC to give out personal details of users to an interested third party, even if they are the landowner, for the purpose of such cross reference. The full response can be seen in the background papers (section K).

- 2.20 The response received from the applicant on the above evidence can be summarised as follows:
- a contention that, while SPC has advertised that the land is available to the public in the places they specified, they have advertised it as 'open space' not 'public open space', and there is, according to the applicant, a difference because of the protections afforded by the Public Open Space designation;

- some comments on the maintenance schedules produced by SPC and the likelihood, in the applicant's eyes, of the maintenance being carried out as claimed, and
- some criticism of the maps provided by SPC, though what is being criticised is unclear.

Public Open Space is only protected if it is registered as such with the local district council, to benefit from the provisions of local byelaws. This area is not so registered, so whether it is called Open Space or Public Open Space makes no difference. It is protected as a result of being designated local green space in the Neighbourhood Plan, though this is not a bar to registration as town or village green. Beyond confirming the minimal level of signage around the green, the applicant's other comments are opinion-based and cannot form the basis of evidence for the sake of the application. The full response can be read with in the background papers (section L).

- 2.21 These matters being settled, the application was scheduled to be determined at the Planning and Rights of Way Committee on 8 October 2024. However on 7 October SPC contacted WSCC to challenge the plan of the claimed area which had been published with the Committee papers. A small area in the northeast section of the claimed area could not, they asserted, be registered as village green because it formed part of the land demised in the lease to Little Barn Owls Nursery. The plan published with those papers can be seen in the background papers (section M).
- 2.22 As a result of this challenge the application was withdrawn from the Committee agenda for the October meeting in order to investigate. On inspection of the original application, it was discovered that the two plans submitted to support it were marginally different, with the variance difficult to perceive unless inspected intentionally. The first plan included the contested area (and was the plan on which the report plan was based), while the second plan did not. Further, the plan of the claimed land which had been shared with the witnesses with the request that in their evidence they agreed with the boundaries shown, showed yet another variation.
- 2.23 It was decided that as the two plans in the application were conflicting the application needed to be corrected. SPC were asked to provide an up to date plan of the land they held as public open space. They sought the agreement of the full Parish Council and submitted their agreed plan on 21 November 2024. This was passed to the applicant who was asked to decide on the area he wished to claim as village green and resubmit his witnessed application plan. He submitted his updated plan on 27 November 2024, which is the basis for the report plan. On 4 December 2024 he also withdrew the second plan submitted with the original application, to avoid confusion. The updated application can be seen in section B of the background papers.
- 2.24 The updated application was sent on 19 December 2024 to SPC as the landowner, and to Horsham District Council and SPC in their capacities as



relevant local authorities. Notice of the application was also published in the West Sussex County Times on the same day giving a period of public consultation until 30 January 2025.

- 2.24.1 No responses or objections were received, except from the Executive Officer of SPC asking why the applicant had submitted a plan that differed from the plan of public open space as agreed by the Parish Council. He was informed of the applicant's reasoning:
- The area excludes all the area north of the newly-registered public footpath 3794 both to avoid any potential for further challenge over land claimed, and more importantly because he perceives that the vast majority of activities and events giving rise to the claim have occurred in the area south of this path
  - The area excluded running down the western edge of the area designated public open space by SPC is divided from the main recreational area by a hedgerow, is highway verge and therefore unlikely to be capable of registration as a village green, and in any case was not included in the original application plan.
- 2.24.2 The Executive Officer's response was that this reasoning "makes sense". No other response regarding the updated application was received by SPC.
- 2.25 At the same time, all the witnesses giving evidence were sent the updated application plan and asked if they agreed with the updated boundaries. Of the 92 witnesses, 60 responded (65%) to say they agreed. Of the 60, 50 live in the five streets comprising the "neighbourhood within a locality" meaning that 54% of the witnesses both live within the specified neighbourhood and have confirmed the boundaries of claimed green.
- 2.25.1 Agreeing the boundaries of the claimed land is not an essential part of the legal test for registration of the green, however if the witnesses do explicitly agree the boundaries it confirms the land that has been used is same land that is claimed in the application.

#### Summary of evidence in support of the application

- 2.26 The applicant states that the application land is used regularly by the local inhabitants for exercise, walking and training dogs, playing ball games, sporting activities, community celebrations for the late Queen's jubilees, simply sitting and reading under the large oak tree and many other activities. He states it is an open space "large enough for multiple uses without the users getting in each other's way" and that "this field is already a village green without the appropriate designation". He also highlights the protection that would be given to biodiversity and the wildlife species inhabiting the hedgerow along the Cedar Drive side of the green.

2.27 The evidence in support of the application can be summarised as follows:-

- The earliest claimed use among witnesses is in 1970 and 1975. It is unclear how these users were able to use the land before the housing estate was built (Cedar Drive was built in 1985 and Nutham Lane appears to have been adopted as a public highway in 1995) as it is understood that the land was previously a pig farm. All the users claim to have used the land within the relevant 20-year period (August 2002 – August 2022) with the frequency of use ranging from 'a few times a year' to 'daily'.
- 55 out of the 92 who submitted evidence forms claim to have used the land throughout the whole 20-year period.
- There is reference to the land being used for exercise purposes, particularly walking with dogs. Other uses include various ball games, family activities, playing with children, play on the play park area, picnics, bike riding and community celebrations.
- All users refer to seeing others using the land, most on a daily basis.
- Nobody refers to ever having been stopped or turned back, having explicitly obtained permission to use the land or seen any notices on the land giving permission for its use.
- All users claim to be local residents, with most respondents living on Nutham Lane, Hazel Close and Eversfield, which are the three streets in closest proximity to the application land. The green is open to Nutham Lane on two sides and can be accessed within a few metres of many of their front doors.

A more detailed summary of the evidence is included in the table which is in appendix 2 to this report.

### **3 The Law**

- 3.1 Any person may apply to register land as town or village green. The burden of proof falls on the applicant who must properly and strictly satisfy all of the tests that are set out below in order for registration to be made and the standard of proof is the civil one, that is, on the balance of probabilities. This application has been made under s.15 (2) of the Commons Act 2006 which was enacted on 6 April 2007.
- 3.2 Part I of the 2006 Act has only been partially brought into force, with sections 1 to 3 not yet in force. Until that time, the Regulations enable registration authorities to register land, which meets the criteria for registration set out in section 15 of the 2006 Act, in the register of town or village greens maintained pursuant to the Commons Registration Act 1965.

3.3 Subsection 15 (2) 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 twenty years; and*
- (b) *they continue to do so at the time of the application".*

The definition can be broken down into the following elements:

- 3.4 **"... a significant number ..."** "Significant" does not mean considerable or substantial (*R (oao of McAlpine Homes Ltd) v Staffordshire County Council [2002]*). What matters is 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.
- 3.5 **"... of the inhabitants of any locality..."** A "locality" cannot be created by drawing a line on a map. It has been decided that "locality" means an administrative district or an area within legally significant boundaries, such as a borough or parish.
- 3.6 **"... or of any neighbourhood within a locality..."** A neighbourhood need not be a recognised administrative unit. A housing estate can be a neighbourhood. However, a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness. The neighbourhood must fall within a "locality", although the House of Lords has held that it can fall into more than one locality (for which see 3.5 above).
- 3.7 **"...have indulged as of right..."** Use of land "as of right" means use without force, secrecy or permission and does not turn on the subjective beliefs of the users. Force does not mean just physical force – it can be when use is contentious, that is that the landowner takes steps which signify to the reasonable user that he does not acquiesce in the use. Permission can be express or implied, but permission cannot be implied from the inaction or acts of encouragement by the landowner. Toleration, as distinct from permission, will not defeat a claim that use has been 'as of right'.
- 3.7.1 The Supreme Court in the case of *R (Lewis) v Redcar and Cleveland Borough Council & Persimmon Homes (Teeside)* confirmed in 2010 that use of land as a village green can co-exist with a landowner's activities. In the Redcar case the landowner's activity was primarily that of running a golf course although there were 3 fields where hay was cropped annually. If there is a conflict between the landowner's use and recreational use by local inhabitants and the use of the local people materially defers to the use by the landowner, the recreational use will not have the appearance to the landowner of use as of right. This is a question of fact and degree. If the activities of the landowner make no difference to the activities of local people then provided the use is without force, secrecy or permission, it is likely it will be held that the

activities of the local people have the necessary appearance of asserting a right against the owner. The Supreme Court therefore decided that use by the public, despite the public giving way to the co-existing use, satisfied the 'as of right' test.

- 3.8 **"...in lawful sports and pastimes..."** The words "lawful sports and pastimes" form a composite expression, which includes informal recreation such as walking with or without dogs, and children's play so long as there is an established pattern of use. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way (for example simply walking along the line of a path or undertaking activities that are associated with the use of such a path).
- 3.9 **"...on the land ..."** Any land will do. It is not necessary for the land to have the characteristics of a "traditional village green". The Registration Authority must be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land has been used for lawful sports and pastimes.
- 3.10 **"...for a period of at least 20 years..."**
- 3.11 **"... and continue to do so at the time of the application."**

#### **4 Application of the law to the facts**

- 4.1 The application is supported by 92 evidence forms from 81 postal addresses, testifying to use by 103 individuals. For the sake of this analysis, a 'user' is taken to mean an individual or a household. A summary of the evidence contained in the evidence forms is set out in appendix 2 to this report.
- 4.2 The elements of the definition of "village green" can be analysed as follows:
- 4.3 **"a significant number":** The 92 evidence forms submitted by 103 individuals at 81 unique addresses is a considerable number of people submitting evidence in support. Of those submitting evidence 55 users claim they have regularly used the application land throughout the whole twenty-year period of claimed use. All users live either on Nutham Lane, a cul-de-sac which opens directly onto the claimed land, or on a few streets in very close proximity to the land.
- 4.3.1 The significant number of users is depleted, however, as many of them have used the land in the knowledge that it is held by SPC as public open space. This means they were aware they had permission to use the land and consequently their use is 'by right', not 'as of right'. Accounting for those who knew that the land was held as public open space by SPC and so arguably had permission to use the land (41), and those who did not return a response to this question (2), there are 49 users whose use can be said to be 'as of right' as they did not know the land was held as public open space by SPC and used the land as if they had the right to do so. Further discussion regarding use 'as of right' can be found in paragraph 4.5.

- 4.3.2 Even though the number of users whose evidence shows they were using the land 'as of right' is much smaller, the law does not require "considerable or substantial" numbers of users (see paragraph 3.2 above); only 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. 49 individuals (or households) can therefore still be said to be a significant number for the purposes of this element of the test.
- 4.4 **"of the inhabitants of any locality or any neighbourhood within a locality"**. The application initially did not identify a particular neighbourhood, but enclosed a plan (Map 1 appended to the application) on which the applicant states "shows the area of most impact of the proposed village green". The applicant was asked on 21 November 2023 specifically to identify the "neighbourhood within a locality" considered to be local to the green. The response on 18 January 2024 identifies the "neighbourhood within a locality" through a 'Friends of the Field' initiative consisting of Nutham Lane, Hazel Close, Eversfield, Arundel Close and Windsor Close. All but 13 of the user evidence forms are from addresses within these five streets. The other forms come from streets also in close proximity; namely Edinburgh Close, Leeds Close, Easteds Lane, Cornflower Way and Peters Close.
- 4.4.1 Nutham Lane, Eversfield and Hazel Close are a clearly defined group of cul-de-sac streets, all of which have their only point of access via Nutham Lane's junction with Cedar Drive. Cedar Drive acts as a form of ring road around the whole estate and the Nutham Lane area, which includes the claimed green, is one of many residential areas connected by it. Windsor Close and Arundel Close have their entrances onto Cedar Drive within approximately 35m and 105m of the Nutham Lane junction respectively, and are the next-closest residential streets to the Nutham Lane area. The claimed green starts at the Nutham lane Junction, so those people living in Windsor and Arundel Closes are very proximal to the claimed green. Although it is not an obvious area to identify as a "locality or neighbourhood within a locality", the five selected streets are cohesive in that they are those that give the most immediate access to the claimed green, and/or are contained within the Nutham Lane area, which was developed in a single phase in 1994-95. The application therefore successfully identifies a "neighbourhood within a locality" from which the users predominantly come.
- 4.5 **"have indulged as of right"**. The applicant's case is that there has been use of the land 'as of right'. All users refer to seeing other people using the land regularly and none of the user evidence refers to any discussions with the landowner about the status of the land. However, the evidence offered by SPC as landowner gives very reasonable cause to conclude that at least some of the use has been 'by right', i.e. with permission, rather than 'as of right', which requires that no permission has been given, or that user is without knowledge of that permission, i.e. they use the space as if of right.

- 4.5.1 The status of the land as public open space is confirmed by the clause in the title document to the land, as described in paragraph 2.7 above. Although not formally registered as such by Horsham District Council, the attitude of SPC as landowner is also stated by them to be that they consider the public have both the permission and the right to use the land, as per the covenant on it. Although the applicant is concerned about the authority of Mr Tyler to make the statement on behalf of SPC, it is nonetheless the case that he is the duly appointed officer of SPC with a mandate to make such a statement. Furthermore, none of the councillors have contacted WSCC to offer an opinion on or objection to Mr Tyler's statement. It could therefore be fair to conclude that the use of the land has been 'by right', not 'as of right', except for the fact that the public open space attribution is not widely known or publicised.
- 4.5.2 None of the users claim to have seen signs around the green alerting users to the fact that the land is deemed public open space. The respondents with whom the case officer managed to make contact who said they were aware of the attribution usually discovered it in one of three ways, namely they were informed during the process of purchasing their house, they read in particular detail the Neighbourhood Plan which identifies the attribution, or they have previously sat or currently sit on Southwater Parish Council. Otherwise, it is not widely publicised, it is not officially registered with Horsham District Council and there are no signs on the green indicating ownership or permission. Therefore it is entirely possible for users to have used the land on a regular basis without the knowledge that it is held as public open space.
- 4.5.3 As per paragraph 4.3.1 above, there are a number of users who were aware that SPC held the land as public open space and so arguably had permission to use the land and consequently whose use is 'by right', not 'as of right', and therefore must be discounted. Accounting for those who knew SPC held the land as public open space and so had permission to use the land (41) and those who did not return a response to this question (2), there are, however, still 49 users who claim their use is 'as of right' as they did not know the land was held as public open space by SPC and used the land as if they had the right to do so, and whose number collectively is "significant" in terms of the test in paragraph 4.3.
- 4.5.4 As described in paragraph 1.5 above, the play area is enclosed by fencing and is accessed by a gate bearing signs indicating to users that the area is provided by SPC. This demonstrates a clear intention to users that this parcel of land is being used with the permission of SPC. In contrast, no users report ever having seen signs on the green itself indicating that the land is held by SPC and provided as open space for use by residents or the general public.
- 4.5.5 It is therefore considered that use of the land, except for the play area (edged red on the report plan), has been 'as of right', and this element of the test is met.
- 4.6 **"in lawful sports or pastimes"**. To satisfy this element of the test it is necessary to demonstrate, on the balance of probabilities, that general use of the claimed green has taken place which is not explicable as use

associated with the trodden paths. There is only one registered right of way across the land, at its very northern end, and which was only registered as a right of way in September 2023, prior to which it was a permissive path. The site visits and aerial photographs show no evidence of other trodden paths across the field. The use then needs to fall within the legal definition of 'lawful sports and pastimes'. The user evidence forms refer to a wide variety of uses. These include children playing, football, rounders, cricket, walking dogs, walking, picnicking, kite flying, other games, community celebrations, and use of the play park situated on the green, among others.

- 4.6.1 All of these could reasonably be said to fall within the phrase "lawful sports or pastimes", however other than the signed user evidence forms, no other evidence of their taking place has been submitted other than a single photograph included in a statement by the applicant appended to the application form, and which has not been given a caption or any specific context.
- 4.6.2 In order for this part of the legal test to be satisfied, the County Council, in its capacity as the Commons registration Authority, needs to be satisfied that it can sensibly be said that the whole of the application land, with the exception of the play area already discussed at paragraph 4.5.4, has been used for lawful sports and pastimes for the whole of the relevant period. Taken at face value, the signed forms together indicate that this condition has been met.
- 4.7 **"for a period of at least twenty years"**. The application is made under Section 15(2). The 20-year period of claimed use 'as of right' therefore runs from August 2002 – August 2022. The evidence submitted in the witness statements covers varying periods from 1970 to 2022 and therefore covers the period of use. 22 of the users who have used the land 'as of right' state that they have used it for the whole of the 20-year period, and as in paragraphs 2.16 and 4.6 above, these claims must be accepted.
- 4.8 **"and they continue to do so at the time of the application"**. The application is made under Section 15(2) and was received on 5 August 2022. The claim by the applicant, which the user evidence supports, is that all of the users were still using the land at the time of the application.

## **5 Conclusion**

- 5.1 In conclusion, this application has been made to protect by means of a village green registration a piece of land that is already subject to a restrictive covenant in its title document, and is registered Local Green Space in the Southwater Neighbourhood Plan 2019 – 2031. Restrictive covenants can be removed and it is not guaranteed that future Neighbourhood Plans will continue to identify it as Local Green Space.
- 5.2 All elements of the relevant legal test have been made out and it is therefore recommended that the land known as open space adjacent to Nutham Lane and Cedar Drive, Southwater, shown hatched black on the

report plan attached, with the exception of the play area as shown edged red, should be registered as a town or village green.

## **6 Resource Implications and Value for Money**

- 6.1 The County Council is under a duty to investigate town or village green applications. The consideration of the application by officers falls within existing budgets.
- 6.2 Cost implications arise should the decision of the committee be challenged by way of Judicial Review.
- 6.3 The decision taken by the investigating officer and the Planning and Rights of Way Committee is a decision based on strict legal tests and the above costs cannot be a consideration in the determination of the application.

## **7 Risk Management Implications**

- 7.1 The decision is one that must be taken on strict legal tests. If the application is not determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.
- 7.2 In reaching a recommendation the investigating officer has considered the evidence in accordance with the law.

## **8 Crime and Disorder Act Implications**

- 8.1 The application process involves the application of legal tests, which mean that it is not possible to give weight to any effect on crime and disorder.

## **9 Human Rights Act 1998 Implications**

- 9.1 It is unlawful for a public authority to act in any way, which is incompatible with a convention right. The rights, which should be considered, are rights pursuant to Article 8, Article 1 and Protocol 1 and Article 6.
- 9.2 Article 8 protects the right to respect for private and family life including an individual's home. This is a qualified right and there may be interference by a public authority if that authority does so with an intention of protecting the right and freedom of others.
- 9.3 Article 1, Protocol 1 deals with the protection of property. Again, this is a qualified right and interference with it may take place where it is in the public's interest to do so subject to the conditions provided by law. Any interference, however, must be proportionate. The main body of the report identifies the extent to which there is interference with these rights and whether the interference is proportionate.
- 9.4 The Committee should be aware of Article 6, the focus of which (for the purpose of this Committee) is the determination of an individual's civil rights and obligations. Article 6 provides that in the determination of



these rights, an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a great deal of case law. It has been decided that for town and village green matters, the decision-making process as a whole complies with Article 6.

## **10 Equality Act 2010 – Equality Impact Report**

- 10.1 The Committee should be aware that the Equality Act 2010 bans unfair treatment, and seeks equal opportunities in the workplace and in wider society. It also introduced a Public Sector Equality Duty (PSED). The PSED requires us to have due regard in all decision-making processes to the need to:
- a) Eliminate discrimination, harassment, victimisation or other prohibited conduct;
  - b) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and
  - c) Foster good relations between those who share a relevant characteristic and those that do not share it.
- 10.2 The relevant protected characteristics are age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.
- 10.3 An Equality Impact Report has been undertaken.
- 10.4 No relevant impact upon any of the protected characteristics in the Equality Act 2010 emerged during the consideration of this application.

### **Tony Kershaw**

Executive Director of Law, Assurance and Insight

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## **Appendices**

- 1. (a) Report Plan
- (b) Location Plan
- 2. Summary table of Witness Forms

## **Background papers**

- Section A Application form, plans and statement submitted with the original application
- Section B Updated Application form and plans

Section C	Responses from HDC and the Planning Inspectorate regarding trigger and terminating events
Section D	Southwater Neighbourhood Plan 2019-31
Section E	Objection received to the application from Southwater Parish Council (SPC), landowner
Section F	Response from the applicant to SPC's objection
Section G	Emails between WSCC and the applicant confirming the application is made under s15(2) Commons Act 2006 as the land is still in use as though it were already a village green
Section H	Emails between WSCC and the applicant explaining the shortfall in evidence and lack of identified neighbourhood
Section I	Emails between WSCC and SPC requesting further information regarding maintenance and publicising land as public open space
Section J	New forms compiled by the applicant to gather further evidence
Section K	Emails between WSCC and SPC regarding the new evidence submitted by the applicant
Section L	Emails between WSCC and the applicant regarding the evidence submitted by SPC
Section M	Plan of claimed green published with papers for cancelled Committee hearing on 8 October 2024

**\*\* Please contact the case officer to request a copy of the background papers**