

AGENDA MANAGEMENT SHEET

Name of Committee/PAG	Regulatory Committee
Date of Committee	31st January 2006
Report Title	Ashorne Playing Field, Ashorne - Application to Register as Town or Village Green
Summary	An application has been submitted to register as a Town or Village Green an area of land in Ashorne belonging to the owner of Ashorne House. An objection to the application has been lodged by the landowner and other local residents. Regulatory Committee is requested to decide what mode of procedure should now be adopted to allow the County Council to determine the application.
For further information please contact:	P.A.J. Endall Senior Solicitor Tel: 01926 412986
Background papers	An Application under Section 13, Commons Registration Act 1965 dated 31st October 2005. 48 Evidence Questionnaires completed by residents of Ashorne and submitted in support of the application. Letter from Knight Frank Estate Agents dated 8 th November 2005 on behalf of the Landowner. Letter of objection from Miss K.E. Brown dated 8 th December 2005. Letter of objection from Brian and Sharman Povey dated 7 th December 2005. Statement of Objection dated 23 rd December 2005 filed on behalf of Landowner. Letter from Department for Environment Food and Rural Affairs dated 10 th January 2006.

CONSULTATION ALREADY UNDERTAKEN:-

Details to be specified

- Other Committees/PAG's
- Local Member(s)
- Other Elected Members
- Cabinet Member
(reports to the Cabinet, to be cleared with appropriate Cabinet Member)
- Chief Executive
- Legal Peter Endall – Comments incorporated
- Finance
- Other Chief Officers
- District Councils Stratford on Avon District Council - Statutory
Deposittee - No comments received
- Health Authority
- Police
- Other Bodies/Individuals

FINAL DECISION NO

SUGGESTED NEXT STEPS:

Details to be specified

- Further consideration by
this Committee/PAG
- To Council
- To Cabinet
- To a PAG
- To an S & R Committee

To an Area Committee

Further Consultation

Agenda No

Regulatory Committee - 31st January 2005.

Ashorne Playing Field, Ashorne - Application to Register as Town or Village Green

Report of the Strategic Director of Performance and Development

Recommendation

- (1) That the application to register land at Ashorne as a town or village green submitted by Newbold Pacey and Ashorne Parish Council dated 31st October 2005 be deferred pending the outcome of the ***Oxfordshire County Council v. Oxford City Council and Robinson*** case currently pending in the House of Lords.
- (2) That arrangements be made for the holding of an informal local inquiry as soon as possible to provide additional information which the Committee will require in order to finally determine the application following the House of Lords decision.

1. Introduction

- 1.1 By virtue of the Commons Registration Act 1965 the County Council is responsible for maintaining a register of Common Land, and a register of Town and Village Greens located within its area. The County Council is responsible for determining any applications for the addition of land to the registers on the grounds that it has acquired that status in one of the circumstances set out in the 1965 Act.
- 1.2 On 31st October 2005 the County Council received an application from Newbold Pacey and Ashorne Parish Council. The application sought the registration as village green of a parcel of land in Ashorne known locally as "The Cricket Field" or "The Playing Field". The Application Land is depicted on the Plan attached to this Report as Appendix 1. The Application Land belongs to the owner of an adjoining property known as Ashorne House ("the Landowner").

- 1.3 The Application asserts that the land has become village green by virtue of the fact that:
- "Use by local inhabitants"

2 Procedural Requirements

- 2.1 In accordance with the procedure laid down by the 1965 Act public notice of the Applications was given on 18th November 2005 by displaying notices on site and in the local press inviting comments/ objections. A six week objection period was allowed, expiring on the 2nd January 2006.
- 2.2 A formal "Statement of Objection" dated 23rd December 2005 was filed on behalf of the Landowner. Two further letters objecting to the application, dated 17th and 18th December 2005, were also submitted.
- 2.3 The Applicant also submitted further evidence in the form of 48 Evidence Questionnaires from residents of Newbold Pacey and Ashorne for periods ranging between 20 and 80 years asserting that use had been made of the Application Land for various forms of recreation.
- 2.3 It is now necessary for the County Council to finalise arrangements for the determination of the Applications. The 1965 Act does not oblige Councils to follow any particular procedure in determining applications for registration. In considering an Application the Council is exercising a "quasi-judicial" function i.e. it is weighing the evidence provided for and against the Application against the legal criteria set out by the 1965 Act. It is not being asked to form a political judgement as to the desirability or otherwise of the Application. Any procedure adopted must reflect this criteria.
- 2.4 This case differs from similar applications recently dealt with by the Council in that there is an objection outstanding and a clear dispute over the evidence and possibly also the law at stake. It therefore appears particularly important that the procedure adopted should be appropriate to identify and weigh these issues.

3. The Legal Criteria

3.1. The Commons Registration Act 1965 sets out various circumstances under which land may acquire the status of town or village green. For present purposes the relevant criteria are:-

- (a) Has the land been used for lawful sports and pastimes?
- (b) Has the use been by a significant number of inhabitants of any locality, or of any neighbourhood within a locality?
- (c) Has the use been "as of right"?
- (d) Has the use been for not less than 20 years? And
- (e) Has the use continued up until the date of registration

The law in this area has been considered by the House of Lords in the cases of *R. v. Oxfordshire County Council ex.p. Sunningwell Parish Council* [1999] 3 All ER 385 (referred to below as the "*Sunningwell*" case) in *R v The City of Sunderland ex.p. Pamela Beresford* [2003] UKHL 60 and most recently by the Court of Appeal in the case of *Oxfordshire County Council v. Oxford City Council (1) and Robinson (2)* [2005] EWCA Civ 175.

3.2 In this type of application the "burden of proof" is on the Applicant i.e. they must produce sufficient evidence to prove each of the points (a) - (e) mentioned in 3.1. The Applicants must prove their case "on the balance of probabilities" i.e. any given point will be considered as proven if the weight of reliable evidence for that point is greater than the weight of evidence against it.

3.3 Preliminary consideration of the evidence suggests that grounds (a) (c) and (e) will be of particular importance in reaching a decision on this application.

3.4 **Ground (a)** - The Landowner denies that the Applicant has satisfied ground (a). It is asserted that much of the use referred to by the 48 Evidence Questionnaires submitted by the Applicant actually refers to the use of land outside the boundary of the Application Land.

3.5 **Ground (c)** – The Landowner asserts that where use does refer to the Application Land it was by permission of the Landowner and not therefore "as of right".

3.6 **Ground (e)** - As the law currently stands in the light of the *Oxfordshire* case mentioned above this application seems to be bound to fail on this ground. The decision made by the Court of Appeal in that case came as a surprise to many working with village greens. The Court held that since the 1965 Act had been amended in 2000 it now appears possible for a landowner to thwart an application by taking steps after receipt of the

H:\MemberServices\Committee Papers-Loading\Regulatory\Regulatory 06-01-31\Regulatory Com- 31.1.06(clean-16.1.06).doc

application to prevent access by inhabitants or to make it clear that such access is by permission and not as of right. In this case the Landowner has taken such an approach and erected Notices around the Application Land forbidding public access.

- 3.7 The outcome of the **Oxfordshire** case was controversial and an appeal has been lodged by the losing party which is due to be heard by the House of Lords in March 2006 with a decision issuing sometime over the following few months. It is impossible to predict with any accuracy what conclusion the House of Lords will come to but one option could be that the Court decides that the Court of Appeal decision in the **Oxfordshire** case wrongly stated the law.
- 3.8 Accordingly the County Council is placed in an invidious situation regarding this application. On the one hand the Landowner is inclined to the view that the County Council should determine the application immediately in accordance with the current law (which is as stated by the Court of Appeal in **Oxfordshire** unless or until the House of Lords state otherwise). It is suggested that there is no justification for the Council waiting for a change in the law which may never in fact come about, and further that loss and damage will be caused to the Landowner by the resulting uncertainty.
- 3.9 The Applicant by contrast understandably would prefer that the County Council wait until the outcome of the appeal is known (their hope and expectation being that the appeal would go in their favour on the central issue of whether the landowner can defeat applications by erecting warning notices with the result that this application would be much more likely to proceed).
- 3.10 The dilemma faced by the County Council is potentially shared by all other Registration Authorities nationally. This led the Government to issue a guidance letter to Registration Authorities on 10th January. The letter suggests that Authorities should “give careful consideration to deferring determination of greens applications that are currently before them, particularly given the fundamental nature of the issues that are at stake. Our impression is that most authorities are putting applications on hold pending the outcome of [*the Oxfordshire case*]. Once that outcome is known, authorities who have deferred applications will be able to proceed with determining them on their own facts, based on the principles established by the House of Lords judgment”
- 3.11 Government guidance does not have the force of law so technically the County Council is still free to determine this application now should it wish to do so. However, were any legal challenge subsequently brought against the determination reached in such circumstances the Council would face an additional heavy burden in justifying its decision not to comply with the Guidance.

4. Conclusions

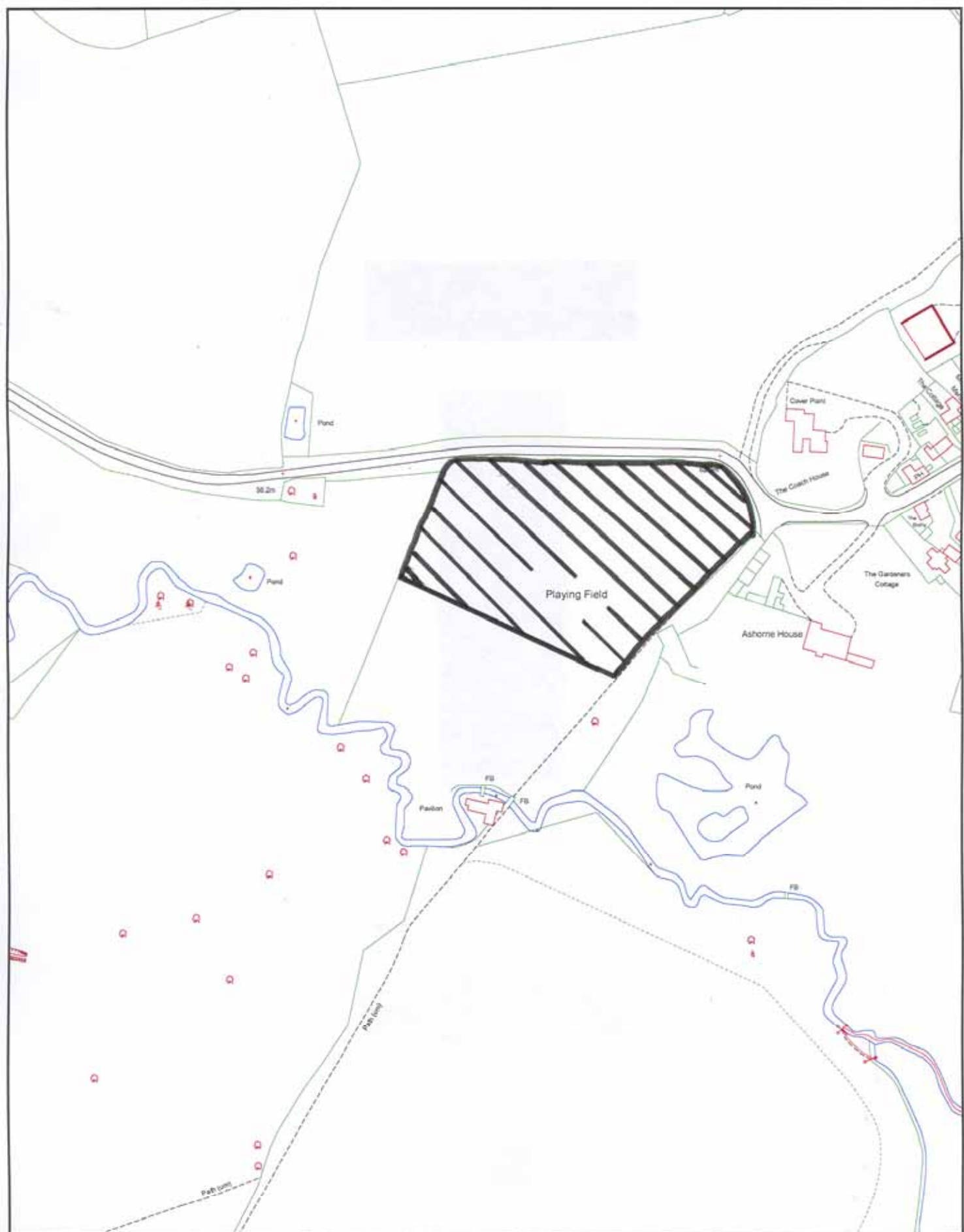
- 4.1 Should it be viewed as appropriate to determine this matter immediately, as the law stands at the date of this Report, there appears to be no alternative but for the County Council to reject this application on the basis of “Ground (e)” as explained in paragraph 3.6 above. Evidence submitted by the Landowner indicates that a substantial number of warning notices have been erected since the Application was lodged and other steps taken to forbid or discourage access by members of the public. On the balance of probabilities it does appear to officers that the required use of the land in question has been effectively interrupted and it has not therefore been “continuous” as required by the Commons Registration Act 1965.
- 4.2 If and when Ground (e) is disposed of that will still leavesubstantial areas of dispute between the Applicant and the Landowner regarding the nature and extent of the use which has been made of the Application Land (Grounds (a) and (c) referred to in paragraphs 3.4 and 3.5 above). In order to resolve that dispute in a proper manner the Committee is requested to authorise the holding of an informal Local Inquiry, presided over by an independent barrister, to hear evidence locally regarding the dispute and to present a report to the Committee to assist it in making a final determination.
- 4.3 Taking all the above points into account it appears to Officers that it would best serve the interests of justice for the Committee to postpone making a final decision regarding this application until the outcome of the House of Lord’s appeal in the **Oxfordshire** case is known. Thus, any decision made in advance of the appeal result could potentially be subject to challenge (by either the Applicant or the Landowner) if the House of Lords were to declare the current interpretation of the Commons Registration Act 1965 (upon which the Council would base its decision) to be wrong.
- 4.4 Also, were the House of Lords to dispose of the “Notice” issue (Ground (e)), it would still be necessary for the Committee to obtain further information on the use of the site via a public inquiry as mentioned in paragraph 4.2 before it could make a proper finding on the Landowner’s other grounds of objection. It seems inappropriate to proceed to a decision before knowing whether such an inquiry will actually be necessary.
- 4.5 Delaying a decision on a matter such as this risks causing injustice either to the Applicant or to the Landowner, or possibly both. However, given the existence of the pending appeal in the **Oxfordshire** case, it appears on balance to be in the interests of justice to delay a decision until the outcome of the appeal is known in order that the Committee can be certain that it is making its decision on a correct understanding of the law and that its determination can be defended should either party seek to bring a legal challenge against it at a later stage.
- 4.6 With a view to keeping delay to an inevitable minimum Committee are being asked to authorise the holding of a local inquiry now so that as much preparation as possible can be carried out in advance of the House of Lords decision.

4.6 Discussions with the Applicant and Landowner are ongoing and any further comments will be verbally reported to Committee.

D.G. CARTER
Strategic Director of
Performance and
Development

Shire Hall
Warwick

31st January 2006



Based upon the ORDNANCE SURVEY mapping with the permission of the Controller of Her Majesty's Stationery Office (C) Crown Copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings.

Warwickshire County Council, 100018285, 2006

Title:

Scale:	1:2500
Grid Ref:	430150,257618
Operator:	PEND
Date:	05/01/2006



**Warwickshire
County Council**
PROPERTY SERVICES DEPARTMENT
SHIRE HALL, WARWICK CV34 4RP
Peter Ridley B Sc(Hons) FRICS MCIQB
Director