Report to:	LICENSING COMMITTEE
Report of: Date of Decision:	Director of Legal Services 16 March 2011
SUBJECT:	Application for the Registration of a Town/Village Green of Westhill Playing Fields, Selly Oak VG1/08 ("the Application")
Key Decision: No	Relevant Forward Plan Ref: N/A
Wards affected:	Selly Oak

1. Purpose of report:

1.1 This report seeks authority to endorse the Inspector's recommendations that the application be allowed and Westhill Playing Field (with slight modification) be registered as a Village Green.

2. Decision(s) recommended:

2.1 To endorse the Inspector's report dated 4th July 2010 and to determine the Application in line with the Inspector's recommendations.

2.2 The Application for the registration of a town/village green in respect of land at Westhill Playing Field, Selly Oak, Birmingham (VG1/08) be granted (with modified plan) for the reasons set out in the Inspector's report.

Lead Contact Officer(s):	Ben Burgerman, Solicitor, Legal Services
Telephone No: E-mail address:	0121 303 8901 ben_burgerman@birmingham.gov.uk

3. Compliance Issues:

3.1 Are decision(s) consistent with the Council's Policies, Plans and Strategies focused on "Global City with a Local Heart"?

Determination of the Application is a legal requirement and is consistent with "Global City with a Local Heart"

3.2 Have relevant Ward and other Members / Officers been properly and meaningfully consulted on this report?

Yes, as part of Licensing Committee deliberations.

3.3 Are there any relevant legal powers, personnel, equalities, regeneration and other relevant implications?

Birmingham City Council is the registration authority ("the Registration Authority") for the purposes of the Commons Act 2006, ("the Act") under which it is required to determine the Application. Under the Constitution, this function is delegated to the Licensing Committee.

In considering the Human Rights Act 1998 implications, the following convention rights and freedoms have been addressed in the preparation of this report;

Article 6 – Right to a fair trial – this was achieved by the appointment of an independent Inspector and the holding of a public inquiry;

Article 8 – Right to respect for private and family life – the determination of a village green application is proportionate because it is based on a statutory test; and

Article 1 of the First Protocol – Protection of property.

3.4 How will decision(s) be carried out within existing finances and resources?

In 2010/11 and ongoing, corporate resources have been identified to fund expenditure relating to village green applications of up to £50,000 per annum. The Resources for 2010/11 have been allocated to Licensing Committee and form part of the Original Budget 2010/11 as approved by this Committee on 17th March 2010. The cost of appointing an Inspector to hold a local public inquiry was in the region of £14000. There are sufficient funds in the 2010/11 budget to cover the costs incurred in the Application.

3.5 Have the main Risk Management and Equality Impact Assessment Issues been considered or concluded and, if yes, what are they and how will they be carried forward to deliver the Council's objectives?

There may be a further cost implication for the Council if the Council's final determination on the Application is judicially challenged. However, the risk of a successful challenge is low as an independent Inspector has made the recommendation that the application be allowed after hearing all of the evidence in a public local inquiry. There are no specific equality impact assessment issues that have been identified.

3.6 How will this report help to inform, further improve or otherwise, help to deliver the Council's BEST initiative?

The principals of achieving excellence have been foremost in ensuring the correct decisions are arrived at/implemented.

4. Relevant background/chronology of key events:

4.1 The Application dated 14th April 2008 was received from Muriel Caddy, Ann Haigh, Joanne Ward, Kevin Bailey and Kathleen Thomas ("the Applicant") on behalf of Friends of Westhill Playing Fields Selly Oak on 13 May 2008. The Application is made under Section 15 (4) of the Act and in accordance with the Commons (Registration of Town or Village Greens) (interim arrangements) (England) Registrations 2007 ("the Regulations") to register the land at Westhill Playing Fields Selly Oak ("the Application Site") as a town/village green. The extent of Application Site (as originally submitted with the Application) is shown on the plan attached hereto as Appendix 1.

4.2 The freehold title to the Application Site is owned by Westhill Endowment Trust ("the Landowner"). Objections were received from the Landowner and Mr M. M. Webb, a local resident, who has since passed away.

4.3 Under the Act, the legal test which will need to be considered is whether at the time the Application was made, the Application Site was land on which, for not less than 20 years, a significant number of the inhabitants of the locality, or of any neighbourhood within a locality, has indulged in lawful sports and pastimes as of right, and they cease to do so before the commencement of Section 15, and the Application was made within the period of five years beginning with the cessation referred to above.

4.4 The Regulations do not prescribe the procedure for determining the Application. Your Committee authorised the commission of an independent Inspector to hold a non statutory inquiry to hear evidence from the parties and assess the requisite facts, and to give the Registration Authority recommendations as to the determination of the Application.

4.5 The Planning Inspectorate was requested by the Registration Authority to appoint an Inspector in order to hold an inquiry and provide a recommendation and as such a public local inquiry was held on 5, 6 and 7 May 2010 to hear all the evidence in the Application. The Inspector has since provided a report to the Registration Authority (Appendix 2).

4.6 Based upon the evidence presented at the Inquiry the Inspector has recommended that the application be allowed because the Applicant has met the tests set out in the Act. The Inspector concluded that a significant number of inhabitants of the neighbourhood lying within the localities of Selly Oak and Weoley wards, have indulged in lawful sports and pastimes on the Application Site (as modified on the amended plan – see Appendix 3) and the land has been used "as of right" for the whole of the 20 year period. Her reasoning for arriving at this conclusion is set out in detail in the report at Appendix 2.

4.7 The amended plan shows an 'Excluded Area' constituting buildings that the Inspector accepted could not physically have been used by the general public for lawful sports and pastimes. As such, the 'Excluded Area' has been removed from the Application Site, in accordance with the Inspector's findings. The Objector has disputed the extent of the 'Excluded Area' as outlined by the Inspector and requested the area should be larger, to include tennis courts and a car park. However, such an approach would not be consistent with the comments made on this point by the Inspector in her report. A surveyor has recorded the precise measurements of the 'Excluded Area', as delineated on Appendix 3.

5.	Evaluation of alternative option(s):
5.1	The Registration Authority has a statutory duty to determine the Application and this lies with Licensing Committee. The only alternative option would be to go against the recommendation of the Inspector and dismiss the Application. This is not advisable as the Inspector is an independent adjudicator who heard evidence from all parties before making her recommendation.

6.	Reasons for Decision(s):
6.1	To determine the Application in line with the recommendation provided in the Inspector's report is the proper course of action because having heard all of the relevant evidence, the Inspector concluded that the statutory test had been met.
6.2	To allow the Application for the registration of a town/village green in respect of land at Westhill Playing Fields, Selly Oak, Birmingham (VG1/08) for the reasons set out in the Inspector's Report.

Signatures (or relevant Cabinet Member(s) approval to adopt the Decisions recommended):

Director of Legal Services: .....

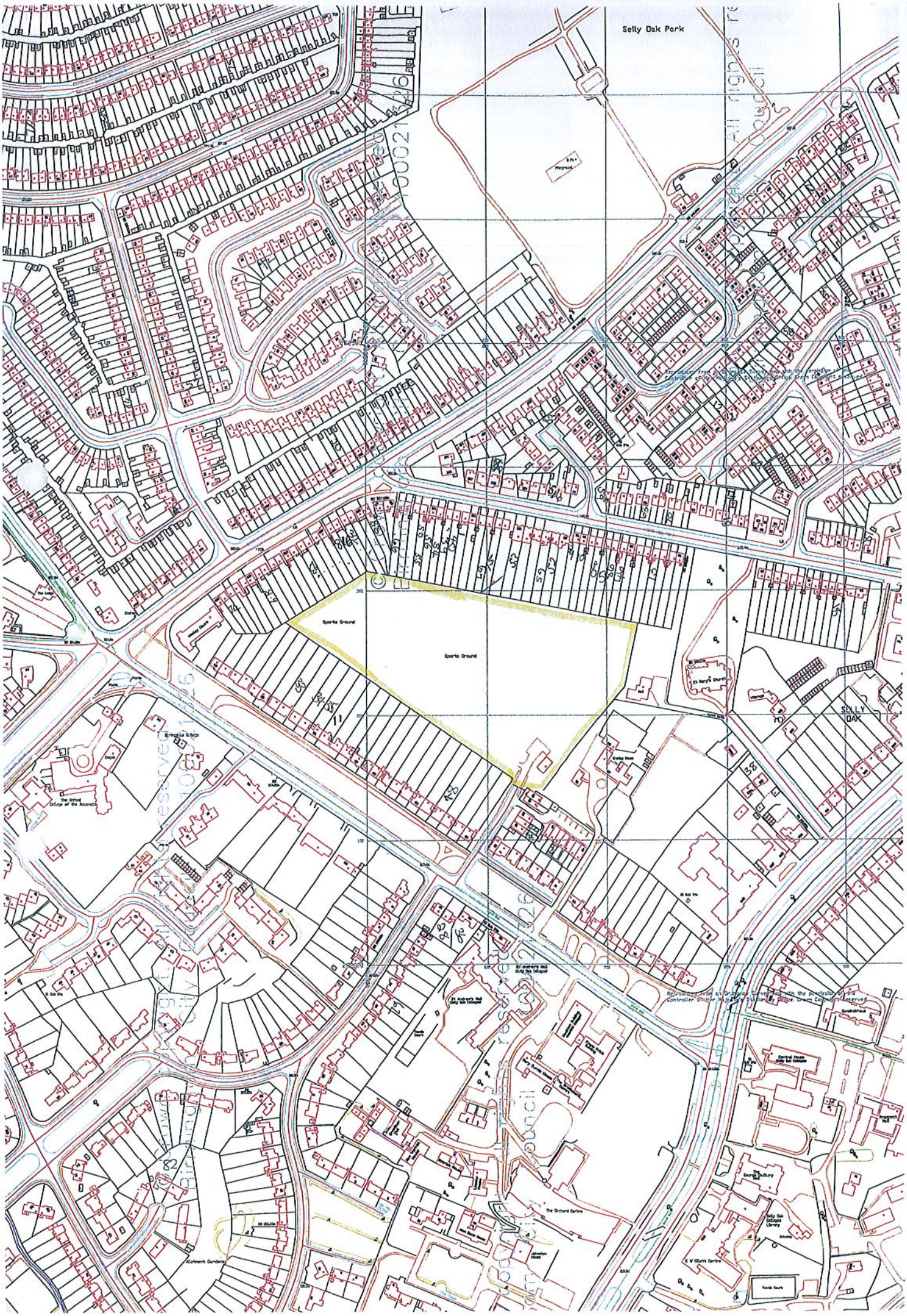
Dated: .....7/03/11.....

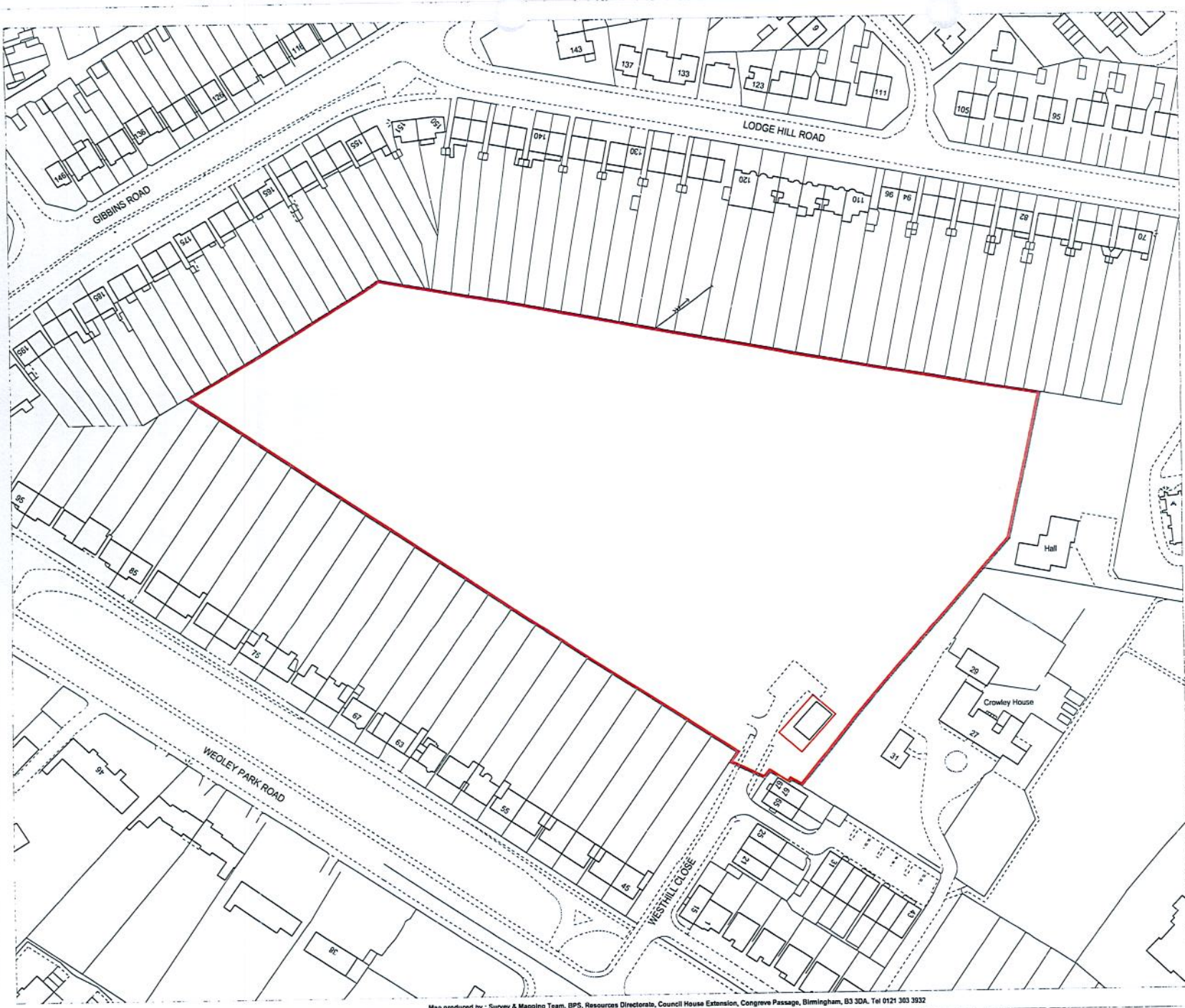
List of Background Documents used to compile this Report:

1. Application and supporting documents submitted by the Applicant.
2. Objections and supporting documents submitted on behalf of the Landowner.
3. The Applicant's response to point 2 above.
4. Inspector's report to the Registration Authority.

List of Appendices accompanying this Report (if any):

1. Plan of Application Site.
2. Inspector's report dated 4th July 2010.
3. Amended plan.


Selly Oak Park
Sports Ground
Sports Ground
SELLY OAK



DRAWING NO. 9984

NOTES

AREA EDGED RED

275	HECTARES APPROX.
679	ACRES APPROX.

Birmingham City Council

Peter Jones, BSc, MRICS
Director of Property
Birmingham Property Services
1 Lancaster Circus
Birmingham, B1 1TR

TITLE

Westhill Playing Fields
Selly Oak

DATE	18/1/2011
SCALE	1:1250
DRAWN	Jon Wilson
O.S.Sheet Ref.	SP0382SW

Map produced by : Survey & Mapping Team, BPS, Resources Directorate, Council House Extension, Congreve Passage, Birmingham, B3 3DA. Tel 0121 303 3932

COMMONS ACT 2006

REPORT

IN RESPECT OF VILLAGE GREEN APPLICATION

RELATING TO LAND AT WESTHILL PLAYING FIELD,

SELLY OAK, BIRMINGHAM

HELEN SLADE MA. FIPROW

(An Inspector with the Planning Inspectorate)

Birmingham City Council Reference: VG1/08

Planning Inspectorate Reference: VG11

Date of Report: 4 July 2010

Case details

- The application was made by Miss Anne Haigh, Mrs Joanne Ward, Mrs Muriel Caddy, Mr Kevin Bailey, and Mrs Kathleen Thomas and is dated 14 April 2008.
- The application has been made under the provisions of Section 15 of the Commons Act 2006.
- The application is for land at Westhill Playing Field, off Weoley Park Road, Selly Oak, to be registered as a village green.

Summary of Recommendation: I recommend that the application be allowed, and that the area of the Westhill Playing Field (with slight modification) be registered as a Village Green.

BACKGROUND AND PROCEDURAL MATTERS

1. I have been appointed by Birmingham City Council, the Registration Authority (hereinafter referred to as the Registration Authority), to hold a non-statutory public inquiry and to write a report containing my recommendation in respect of an application to register land at Westhill Playing Field ('the application land') as a village green. I have been asked to recommend whether or not the application should be upheld, and thus whether or not the land should be so registered.

2. The application was made on 14 April 2008 by five local residents (Miss Anne Haigh, Mrs Joanne Ward, Mrs Muriel Caddy, Mr Kevin Bailey, and Mrs Kathleen Thomas) acting as members of an informally constituted group called the Friends of Westhill Playing Fields Selly Oak. Two objections were received to the application; one from the current landowner, Westhill Endowment Trust ('the principal objector'), and one from a local resident, Mr Michael Webb. Mr Webb has unfortunately passed away since making his objection, but I have taken his written comments into account as his objection remains extant.

3. It should be noted that I have not been supplied with the actual application, only a copy of it together with the applicants' inquiry bundle. I have not been given any reason to think that the copy is at variance in any way with the actual application, but I do not have the details of the valid day of receipt, nor the application number. I have deduced the application number from the correspondence submitted by the parties.

4. I held a public inquiry over three days at the Birmingham and Midland Institute, commencing on 5 May 2010. I visited the site and the surrounding area on my own during the afternoon of 4 May 2010, and made an accompanied site visit at the beginning of the second day of the inquiry (6 May 2010). On that occasion I was accompanied by Miss Haigh and Mrs Caddy, for the supporters, and by Mr Walmsley, Ms Smithen and Ms Murray on behalf of the objectors. Part of the site

visit included a drive around the estate situated between Lodge Hill Crematorium and Selly Oak Park. For that part of the visit the car was driven by Mr Walmsley (representing the principal objector) and I was also accompanied by Miss Haigh (for the applicants) and Ms Murray (for the objectors).

5. During the first day I was asked if I was intending to hold an evening session. I had not previously been requested to do so, and no-one had indicated to me that they wished to attend such a session. I therefore asked the applicants to furnish me with a list of people who wished to speak in the evening so that I could be sure that it was a worthwhile proposition. After some discussion, and the lack of any clear idea of who might wish to attend, I determined that I would not hold an evening session unless it became apparent that I needed to review the situation. No further requests were made, or any desire indicated, and so no evening session was held.

THE APPLICATION LAND

6. The application refers to the application land as Westhill Playing Fields and describes its location as being 'land off Westhill Close'. Westhill Close is a cul-de-sac of houses built on the site of the former Westhill College[1] lying adjacent to Weoley Park Road. The application land forms a roughly triangular parcel of land, surrounded by the rear gardens of residential properties on two sides and on the third side by land belonging to St Mary's Church and to the Home Office. There is a metal gate giving restricted vehicular access to the site from Westhill Close, with a wooden pedestrian chicane to one side, and a small gap to the other. Various other access points to the land exist, or have been created, from the surrounding properties, including from the land belonging to St Mary's Church.

7. Westhill College ('the College') was founded in 1912 as a Sunday School Teacher Training Centre and evolved over the years to provide a wider range of teaching courses. In the late 1950s and early 1960s the college expanded to become a fully-fledged Teacher Training institution and in 1960 it acquired the premises formerly known as Middlemore Homes, a former orphanage, together with the seven acres of land now forming the application land. The premises were converted to form a teaching centre, and the land developed into playing fields to support the physical education curriculum of the college. The application land has therefore been part of the College (including, in recent years, its partner bodies) since 1960.

BOUNDARIES OF THE LAND REFERRED TO IN THE APPLICATION

8. The boundaries of the application site, the localities and the neighbourhood identified by the applicants are shown on maps

[1] I note that in the summary of the principal objector's case submitted by Counsel the former college and the land is sometimes referred to as 'Westfield' but I take this to be an error. Throughout the inquiry the college and the land was called Westhill and I can find no official reference to the college by any other name.

included in the inquiry bundle. 'Map A' is referred to on the evidence questionnaires as being 'the map showing the claimed land and the claimed locality which uses the land'. Each witness was asked to sign the reverse of Map A.

9. Two further plans identify the two localities into which the identified neighbourhood falls: Weoley ward and Selly Oak ward.

10. In his closing statement on behalf of the applicants, Mr Maire submitted a revised map showing an alternative, smaller neighbourhood than that originally identified. This is the map which is listed at the end of this report as Inquiry Document 7. I was also asked to consider the exclusion from registration of part of the application land, due to the presence of two buildings: a pavilion or changing rooms and a small storage building. I have addressed these issues at paragraph 168 in my Reasoning below.

SUMMARY OF THE CASE IN SUPPORT OF THE APPLICATION

11. The applicants argue that during the 20 year period ending on 1 April 2006 a significant number of the local inhabitants of the neighbourhood identified as lying within the two wards of Selly Oak and Weoley have used the application land for a variety of lawful sports and pastimes. Individuals have used the land for a range of activities including (but not exclusively) dog-walking, children playing, blackberry picking and informal games of football and cricket. The land has also been used by a number of local clubs and organisations, many of whose members live within the identified neighbourhood.

12. The applicants claim that the identified use has been as of right, and that it has taken place side-by-side with use by the Westhill College. There has been no interference with the use of the land by the College, both uses co-existing as the land is capable of accommodating a number of activities at once.

13. The applicants state that two signs were erected in the summer of 2006 at points of entry onto the land. Although access continued to be enjoyed, the applicants consider that the signs were erected as a measure to restrict the liability of the landowner in case of injury. The signs forbade entry onto the land without permission, and granted permission to dog walkers on the understanding that the permission could be withdrawn at any time without notice.

14. In support of the application a total of 142 witness evidence forms were submitted, covering claimed use of the land by more than 150 people as some forms were signed by or on behalf of more than one person. These are contained within the inquiry bundle. A number of photographs and a copy of a video (on a computer disc) were also submitted with the inquiry bundle, together with some letters of support.

15. At the inquiry, eight people gave oral evidence in support of their witness evidence forms, including four of the applicants.

SUMMARY OF THE CASE OPPOSING THE APPLICATION

16. The principal objector is the Westhill Endowment Trust ('the Charity'). In their original objection to the application[2] it was argued that the access claimed by the applicants had been exercised variously with general consent or with express permission.

17. It is also the Charity's view that the claimed use of the application land involved not a significant number of residents but rather a few individuals, whose use had been limited and who mainly visited the land when it was not in use by the landowner. The claimed use was too sporadic and trivial to give the impression that it was being exercised as of right, and always deferred to use by the College.

18. The field has been used by either the College or the University of Birmingham (of which the College latterly formed a part) continuously since its acquisition in the 1960s to 2003 (when it was no longer directly associated with the College) for the purposes for which it was bought. As a result of this significant use by the College the application land cannot also have been in continuous use by the local residents for the various alleged sports and pastimes.

19. The Charity also claims that when users were seen by staff or personnel from the College they were generally asked to leave. Furthermore there was signage present on the equipment shed at the playing field and also the old Teaching centre adjacent to the playing field which date back to the late 1980s and early 1990s which stated that the grounds were private and there was to be no trespassing.

20. The application land was securely fenced and the access to the site from Weoley Park Road was gated and locked. There was a secure fence around the playing field and the site was regularly patrolled by security personnel. Open attempts were therefore made to keep the application land secure and to restrict access.

21. The Charity's objection was supported by 25 witness statements, including one from the second objector, Mr Michael Webb. Subsequently, supplementary statements were submitted (as part of the inquiry bundle) from two of the witnesses.

22. Mr Webb's own objection referred to the fact that he had been given specific verbal permission to walk his dog on the site, and also gave details of various problems that had been associated with the site due to vandalism.

23. The principal objector called 10 witnesses to give oral evidence at the inquiry in support of their statements, including the present Company Secretary to the Trust, former members of teaching staff of the College and the University, security staff and groundsmen. A representative of the company who built the properties in Westhill Close also gave evidence.

[2] Contained in inquiry document 9

STATUTORY PROVISIONS

24. Section 15(1) of the Commons Act 2006 ('the 2006 Act') provides that any person may apply to the Registration Authority to register land as a town or village green if certain specified circumstances pertain. The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007[3] ('the 2007 Regulations') brought these provisions into force on 6 April 2007 and set out the procedures to be followed.

25. The application was made on 14 April 2008 and therefore falls to be determined in accordance with the provisions of the 2006 Act. The application form indicates that it has been made in accordance with the provisions of Section 15(4) of the 2006 Act which provides that an application can be made where:

> *(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
>
> *(b) they ceased to do so before the 6 April 2007 (the commencement of this section of the Act); and*
>
> *(c) the application is made within the period of five years beginning with the cessation of use referred to in paragraph (b).*

26. However, sub-section (4) does not apply[4] in relation to any land where:

> *(a) planning permission was granted before 23 June 2006 in respect of the land;*
>
> *(b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and*
>
> *(c) the land—*
>
> > *(i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or*
> >
> > *(ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.*

[3] Statutory Instrument 2007 No. 457
[4] See Section 15(5) of the 2006 Act

27. In determining the period of 20 years use, Section 15(6) states that any period during which access to the land was prohibited to members of the public by reason of any enactment is to be disregarded and treated as though use was continuing. This is intended to allow for situations such as that experienced during outbreaks of Foot and Mouth Disease, where access to land is temporarily prevented. However, no-one has suggested that this is an issue; it was not raised in the documentary evidence or at the inquiry and I have therefore not given it any further consideration.

28. An application must be made in accordance with the 2007 Regulations. These are set out at paragraph 3 and state that an application must:

    (a) be made in Form 44;

    (b) be signed by every applicant who is an individual, and by the secretary or some other duly authorised officer of every applicant which is a body corporate or unincorporated;

    (c) be accompanied by, or by a copy or sufficient abstract of, every document relating to the matter which the applicant has in his possession or under his control, or to which he has a right to production;

    (d) be supported:

        (i) by a statutory declaration as set out in form 44, with such adaptations as the case may require; and

        (ii) by such further evidence as, at any time before finally disposing of the application, the registration authority may reasonably require.

29. The statutory declaration made in support of the application must be made by either:

    (a) the applicant, or one of the applicants if there is more than one;

    (b) the person who signed the application on behalf of an applicant which is a body corporate or unincorporated; or

    (c) a solicitor acting on behalf of the applicant.

30. The task of proving the case in support of registration of the land as village green rests with the person making the application, and the burden of proof is the normal, civil standard: the balance of probabilities.

REASONING

THE VALIDITY OF THE APPLICATION

31. The application has been made under Section 15(4) of the 2006 Act and the application form indicates that the claimed use as of right ceased on 1 April 2006, prior to the commencement of the relevant section of the 2006 Act in April 2007. The application was made on 14 April 2008, and was thus made within 5 years of the claimed use ceasing.

32. No planning permission has been granted in respect of the application land, although a pavilion was built on it in conjunction with the permission relating to the development of the Westhill Close site. Although I understand that planning permission for the site is being pursued, I was provided with no evidence to suggest that Section 15(5) of the 2006 Act is relevant to this application.

33. In their Summary of Case, the principal objector indicated that the validity of the application was not at issue, and this was confirmed at the inquiry.

34. I have been given no reason to think that the application is in anyway invalid and consider that the matter is thus capable of being determined by the Registration Authority.

THE DATE ON WHICH THE CLAIMED USE AS OF RIGHT CAME TO AN END

35. In order to examine the nature and extent of the claimed use it is necessary to identify the 20-year period over which that use took place. It has been clearly established by the courts that for use to be described as being 'as of right' it must be use without force, without secrecy and without permission.[5]

36. The applicants have identified the summer of 2006 as the time at which notices were erected on the site which appeared to alter the situation. They have relied on the date of 1 April 2006.

37. The objectors consider that the signs in question were probably erected in 2005, and that in fact there were always signs of some description on and immediately adjacent to the application land.

38. Nevertheless, there was agreement that the signs referred to by the applicants were erected at some point, and that the wording was not in dispute. The signs indicated that access to the application land was prohibited without permission, and that permission to walk dogs was granted but could be terminated without notice. There was no dispute between the parties that pedestrian access was facilitated by the provision of a stile or 'chicane' arrangement to the side of the locked gate, and a gap on the pavement to the other side of it.

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[5] R v Oxfordshire County Council ex parte Sunningwell Parish Council [1999] 3 W.L.R. 160 [2000] 1 A.C. 335 *('Sunningwell')*

39. No clear argument against the date of 1 April 2006 was presented to me. Mr Walmsley, who gave a very full account of the history of the College and the site in his evidence, stated that the application land was handed over to a trading company, Hillwest Enterprises Ltd, in January 2006. The purpose of the company was to manage the hire and use of the sports pitches and possibly pursue other commercial development of the playing field. He stated that one of the first things that was done was that signs were erected on the site, and agreed that these were the signs referred to by the applicants. The present signs are replacements for the original signs, erected when the land was returned to the control of the Charity.

40. I therefore conclude that in the absence of any clear evidence or argument to the contrary, it is appropriate to take the date of 1 April 2006 as being the date on which the claimed use of the land as of right is deemed to have ceased.

41. This is not affected by the fact that use of the land continued because the use after that date is not relevant to the examination of the matter. The wording of the sign effectively meant that any future access to the site was either prohibited, or that it took place with permission. In other words it could not be described as use 'as of right'.

THE NATURE OF THE CLAIMED USE

The witness evidence forms

42. The applicants have availed themselves of the witness evidence forms designed and made available by the Open Spaces Society. The principal objector pointed out a number of difficulties with relying on these forms. Firstly there is no requirement to give the age of the witness. In this case there are a number of witnesses who are likely to be children. This does not negate their evidence but it does mean that certain aspects of it may need clarification. For example, if they were using the field because they were at Youth Club, they may not have been aware of any consents which may have been secured by the adult leaders of the club.

43. Secondly there is no requirement to indicate in any depth the frequency with which each of the claimed activities were indulged in. This shortcoming was evident when oral evidence was given at the inquiry because it became apparent that some of the claimed activity actually took place on only one or two occasions, or only for a week or two (for example the tennis mentioned by Mrs Caddy).

44. Thirdly, the form asks people to describe activities they have witnessed taking place on the land, but requires no details as to the frequency or the duration of those activities. Furthermore, there is no distinction between activities which may be undertaken by others with permission, and activities which it may be thought are being undertaken as of right. Mr Featherstonehaugh was particularly critical, stating that few of the witnesses indicate that the field was used by the College or for other official educational or club purposes.

He considered that one or two mention the use of the field by the Youth Club or the Kids Club, but no-one makes clear reference to its use for teaching purposes or use by College teams.

45. I have some sympathy with all these criticisms, and cannot emphasise enough the benefit of hearing oral evidence. Mr Maile indicated that they had restricted the number of user witnesses to avoid unnecessary repetition. I must disagree with that approach, because in cases such as this, where one is dealing with facts, repetition is not an issue. Each person's evidence is individual and unique. The more witnesses who are able to give their evidence, the more complete the picture that emerges.

46. Whilst I accept that an inquiry held during the day may be inconvenient or even impossible for some people to attend, I would have been prepared to hold an evening session had there been any indication that it would have enabled additional witnesses to attend. There was no evidence that any witnesses had requested to be heard during the evening, or that they would definitely attend. Nevertheless, additional evidence from those who claim to have used the application land would undoubtedly have provided a clearer impression of the situation and I must take into account the absence of those witnesses in forming a view on the value of the user evidence.

47. I must also take into account the fact that the information provided on the written evidence forms is sketchy, and in my view the forms themselves are of limited value. Some of the questions, particularly Question 23[6], are leading questions and without the opportunity to examine the witnesses provide little valuable evidence at all. The evidence questionnaires are undoubtedly useful as a first step in information gathering, but without follow up their value is compromised.

48. However, I must disagree with Mr Featherstonehaugh's view that the user witnesses have not acknowledged the use of the application land by other organised bodies and more formal team matches. I have examined the user forms carefully and find that out of 142 forms that I have available to me, only 23 make no mention of the use of the land by organised or community groups. The ambiguity of some of the questions on the forms means that the information is included in differing sections of the form, and clearly some people did not understand the question in the first place. For example several witnesses refer to taking part in organised activities themselves (Brownies etc) and yet make no mention of use of the land by the community or organisations. The most frequent references to other activities are those referring to the Kids Club, the Youth Club, Boys Brigade and Brownies. However, there are numerous references to use of the field for cricket matches, football matches, and use by St Mary's School. Four witnesses actually refer to a degree of use by Westhill College for sports or matches. Conspicuously absent however

[6] The question provides tick-boxes suggesting a number of different activities

is any reference to the use of the application land by the College for teaching purposes, most likely explained by the fact that it probably took place at times when the local inhabitants were not actually using the land, and was therefore not witnessed.

49. Overall therefore, although the witness forms have their limitations, careful examination of them does show a high degree of consistency of information. There is no evidence of collusion in the presentation of the evidence. I would have expected more uniform responses if that had been the case. The information is not presented identically by any means, and but the consistency gives the written evidence contained on the witness evidence forms more credence than it might otherwise have.

Lawful sports and pastimes

50. The question of what constitutes lawful sports and pastimes has been considered by the courts, and in particular in the *Sunningwell* case. Lord Hoffman expressed the view that the term 'sports and pastimes' was a composite phrase which covered any activity that could properly be described as a sport or a pastime. The term was relative; the definition of what is a sport or pastime alters through time such that modern informal pastimes such as dog walking and playing with children are just as applicable as more formal sports or pastimes such as cricket or maypole dancing may have been in the past.

51. Several activities have been identified in the user evidence provided by the applicant's witnesses, ranging from formal team games to children playing informally, and including dog walking, picnicking, blackberry picking and flying kites. All of these activities would seem to me to be capable of being legitimately described as 'sports or pastimes'.

52. It is not contested by the objectors that these activities took place to some degree. Rather, it is submitted on behalf of the principal objector that these activities did not take place to the degree or extent claimed by the applicants and that such activities as did take place, or were not exercised, as of right.

53. I am satisfied that the type of activities described would fit the description of lawful sports and pastimes. It is therefore necessary to examine the nature of the claimed in more detail to establish whether or not it is capable of fulfilling the remaining statutory requirements.

Whether the use involved the whole area of the application land

54. It was asserted on behalf of the principal objector that the nature of the application land and its use by the College (and other educational partners) means that the claimed activities could not and did not take place over the whole of the land. The site was marked out with two football or general sports pitches, plus a cricket crease (surfaced with artificial turf) and that the hard-surfaced tennis or netball courts were fenced and gated from the rest of the field. The activities on which the applicants principally relied must have and did take place around

the perimeter of the field only. The dog walkers avoided the pitches and walked around the edge of the field. Children playing hide and seek or other such games would primarily use the perimeter of the field, as would those indulging in blackberry or other fruit picking, because that was where the appropriate vegetation grew.

55. I do not think that it can be a requirement for each sport or pastime to involve use of the whole area of the application land. Assuming that none of the qualifying activity was unlawful in any way it is not necessarily disqualified from being a relevant activity for the purposes of registration of a village green merely because it may habitually have involved the use of only a small part of the application land.

56. However, there is a potential difficulty with the question of dog walking on the application land. At both my site visits it was possible to see a clear path trodden around the edge of the field which corresponds to the route taken by those people who gave evidence of walking their dogs. This particular activity seems to me to be more in the way of adhering to a linear route rather than using the whole area. However, I consider that it is the use of the application land as a whole over a period of time and in a variety of appropriate ways which is the qualifying factor, and not that each activity undertaken must occupy the whole of the land concerned.

57. Several witnesses gave details at the inquiry of other activities in which they had either been involved or which they had witnesses. Mrs Thomas gave evidence of use of the field by her sons in particular and submitted photographic evidence to support her statement. The photographs are not dated but at the inquiry she estimated that they were taken at various different times during 1991 and 1992. These activities (playing casual football and athletic pursuits) can be seen to be taking place on the application land in general and not merely in one area. The photographs also provide evidence of the land being used for formal football matches during the same period, although teams themselves are not identified.

58. Mrs Caddy described her use of the field over a period of time dating from 1980. Most of the use she described related to use of the field by or with her children (her children were born in 1975 and 1980) and latterly (since 2005) for walking her son's dog. Her children used the application land in conjunction with other friends who lived close by in Lodge Hill Road. She explained that the children had used the application land for a variety of children's pursuits: in addition to casual football and cricket they would play hide and seek, build dens and, at the appropriate time, pick blackberries. Mrs Caddy was the only witness at the inquiry to refer to using the tennis courts to play tennis. Her written statement implied that this was a regular activity, but on questioning at the inquiry it emerged that it was for a few weeks during one summer. In general, Mrs Caddy acknowledged that the use of the application land by children was more regular during summer and autumn, but less so in winter.

59. Mrs Ward stated that her daughter had used the netball post on the tennis court for practice, and also referred to the use of the adjacent slope for sledging. Her son had made use of the rugby posts for practise, when they were left in position.

60. Mrs Vaughan gave details of her family using the field regularly between 1988 and 2002 for walking, jogging and playing with the children. Other activities she described included sunbathing and having picnics, golf practice, and blackberry and conker collecting, and seeing other families pursuing similar activities.

61. Mrs Owen talked about playing rounders with family and friends and also organising mini-sports events for the children. She talked about snowball fights and building snowmen, and also made reference to the use of the land for practicing golf. Her own use of the field included walking, and in her written statement indicates that this also involved circuits of the field.

62. Many other witnesses refer to similar activities in their written evidence which is not inconsistent with the oral evidence I heard, although it has not been possible to examine that evidence in more detail.

63. It seems to me that the types of activity which it is claimed have taken place, and which are not disputed by the landowners as having taken place, are activities which by their nature make use of more extensive areas of the application land than merely a circuit around the edge of the field. Whilst there may be some argument about the intensity of such use, there is no doubt in my mind that the land has been used for a variety of purposes by children and adults, and that the use of the land has been in a general manner, and not restricted to certain parts of it. I also consider that the evidence is supportive in showing that much of the claimed use would be likely to have taken place during light evenings, at weekends, and at times of school holidays. This is because much of the activity described involved use by children, and it is at those times when children would be available.

64. I accept that, at times when more organised sports events or matches were being played, any use which may have been being exercised by the local inhabitants at the same time will of necessity have been restricted to the parts of the application land which did not form part of the relevant pitch. Nevertheless, leaving aside the arguments about the frequency with which such formal sports took place on the application land, it is common practice on established village greens for activities such as cricket matches to be played on a regular basis throughout the summer period. At such times it is clear that access to the whole area of a village green for other purposes would be unlikely to be possible or sensible; any other activity being confined to the perimeters of the green for the duration of matches.

65. I therefore cannot accept that the use of the application land for formal sports, whether as part of the college curriculum or whether undertaken by clubs or societies by arrangement, can, in principle, mean that the application land could not be registered as a village

green. Nor do I accept that formal use of parts of the application land has prevented the use of the whole area by the local inhabitants at other times. Indeed I am satisfied that it is more likely than not that at least some use of the whole of the application land has taken place to a greater or lesser degree for the activities and purposes described by the applicants and their witnesses. Whether that use has been continuous throughout the relevant period, and whether or not it has been use as of right are examined below.

Whether the claimed use has been use as of right

66. The judgement in *Sunningwell* set out clearly the definition of what is to be considered usage 'as of right': use must have been exercised without force, without secrecy and without permission. The question of use by permission was thoroughly explored in the *Beresford* judgement[7] which I consider to be very relevant to this particular case. I have already concluded that the claimed use, if it took place, qualified as lawful sports and pastimes, and I am satisfied that what use did take place involved the whole of the application land to some degree. I consider below the question of whether or not sufficient use of the land took place when considering whether the use was exercised by a significant number of the inhabitants of the locality (see paragraph 136 onwards).

Without force

67. Several witnesses for the Trust gave evidence of the extent and nature of the fencing which had been erected around the application land over the years. Physical evidence of various fencing is still visible on the site, but even Mr Walmsley, who provided the most evidence about the history of the site from the owners point of view, was not entirely sure of the history of the fencing. Nevertheless, I am satisfied that there has been some sort of boundary fencing and, in addition, some fencing appropriate to sports pitches for the containment of balls etc.

68. The boundary fencing which was originally present or erected in the 1960s when the land was purchased by the Trust is decrepit where it is still visible, but to all intents and purposes has disappeared. There is, in places, evidence of an intermediate boundary feature, but again it has largely disappeared. More evidence remains of the high sports-type fencing, including evidence of gates in it which were presumably provided to enable the retrieval of balls which had managed to evade it. However, this fence too is out of repair and ineffective in preventing access. There was no suggestion that it was ever a continuous feature, only being erected where there was a need to protect adjacent properties from potential damage. Any fencing which had previously existed around the former tennis/netball court is no longer present, but it was not disputed that such fencing had existed in the past, whilst the application land was in use by the college. It had also been fenced off whilst in use as a compound during the

[7] R (Beresford) v City of Sunderland [2003] UKHL 60

construction work, between approximately March 2004 and September 2005.

69. The gardens which back onto the application land have a variety of boundaries of their own, in various states of repair and functionality, and some have no boundary at all. One or two households appear to have made gaps or gates in their boundaries specifically to provide access to the application land, as worn paths lead to and from them.

70. The boundary between the application land and the church land currently has what appears to be a well-established gap in it.

71. There is evidence that fences have been broken down at times, but although the Trust argued that the fences were repeatedly repaired, close examination of the statements of their witnesses and cross examination of their evidence showed that efforts to repair fencing and gates had petered out in the early 1980s, before the 20-year period I am considering. Repairs had been carried out with varying frequency and eventually the finances simply did not permit further repair work.

72. The judgement in *Sunningwell* suggests that, although initial use of an area might well constitute use by force or trespass, the question to be determined is whether or not the landowner took sufficient action to repel any such incursion such that the continuing access constituted use by force. The evidence of the Trust did not support the continued maintenance of the fencing into the relevant 20 year period with any degree of rigour. In fact, it seemed that the overriding principle was one of tolerance and good-neighbourliness, and an acceptance that people were using the land, especially for dog-walking. Mr Walmsley stated that the Trust (or the College) knew a lot about the neighbouring residents, and in particular about the regular dog-walkers.

73. Furthermore, there is evidence that access across the church yard was not only possible but was permitted by virtue of a sign erected under the auspices of Section 31(3) of the Highways Act 1980. The current churchwarden, Professor Knight, stated at the inquiry that the current signs or an earlier version in the same terms had been in place 'a long time' although he could not say how long. The signs say the following and are positioned at the vehicular entrance to the church and at the footpath entrance:

> *'HIGHWAYS ACT 1980 SECTION 31(3)*
>
> *Notice is hereby given that this is a private path intended to provide access to the church for parishioners and others on church business or given permission by the church. Members of the public are also permitted to pass through the churchyard on foot.*
>
> *Notice is given persuant* (sic) *to the above Act that the road and paths have not been dedicated to the public nor do the permitted uses referred to above constitute any intention to dedicate them.'*

74. Both these routes permit access to the application land through the gap in the hedge or fence-line between the church land and the playing field. At the site visit Mr Walmsley was able to point out that there had originally been a double gate through that same boundary although it has long since become overgrown.

75. Several of the user witnesses who spoke referred to the use of the access across the church yard. This is reflected in the written evidence, where a large number of the witnesses referred to the use of church land to access the application land. It was also acknowledged by the witnesses for the Trust that, even when the building work had been going on in 2003 on the adjoining housing development, access from the church land was not fenced off and there was actually a gate in the boundary which must have been available for use at one time, even if it is now inaccessible.

76. It is therefore clear that there has been longstanding access to the playing field through this particular access point, which was available for use without force. The access across the church land may have been by permission and thus not as of right, but Section 15 of the 2006 Act makes no reference to the necessity of being able to access the application land via public rights of way or any other type of route. The criteria which need to be satisfied relate only to the use of the application land and not to the method of accessing it.

77. Several witnesses who spoke (Mrs Owen, Mrs Caddy, Mrs Vaughan and Mrs Thomas) mentioned accessing the application land through the rear of gardens, either their own or that of neighbours. Although some of this involved climbing over a fence in some cases, in other cases either no barrier exists (i.e. Mrs Owen whose property has no rear fence) or gaps or gates have been created. No evidence was presented to me of any attempts made by the Trust during the relevant period to prevent such access and thus this access cannot be treated as access by force.

78. The ability or otherwise to enter the application land via the College access from Weoley Park Road (what is now effectively Westhill Close) was a major issue at the inquiry. I deal later with other aspects of alleged obstruction to this access, but for the purposes of user by force, there is no evidence of forcible entry by this means from user witnesses. The Trust argued that the gate was frequently locked but their own witnesses confirmed that it was not locked until late in the evening after the use of the college premises had ceased each day. Nevertheless, even when the gate was locked there were alternative means of access to the application land which were available without difficulty if required (i.e. through the church either via the vehicular access or via the pedestrian access).

79. Photographic evidence was presented to the Inquiry on behalf of the Trust to indicate that a sign had been present on the wall of the College which would have been visible to users of the entrance from Weoley Park Road. Unfortunately the photograph is not clear enough to identify the wording, but Mr Walmsley stated in his evidence that it

said "*Westhill College Private Grounds*". It might be argued that deliberate disregard for such a sign would constitute user by force, but this argument was not pursued by the objectors. Even if it had been, I would conclude that in the absence of any action to reinforce the intentions of the landowners, simply walking past such a sign would not constitute user by force. A similar argument applies to any notices which were allegedly affixed to the original pavilion or equipment store which were referred to by the objector and the wording of which was said to be similar. I return to this issue when looking at secrecy.

80. Witnesses on behalf of the principal objector stated that acts of vandalism had been perpetrated over the years and that damage had been caused to the pavilion or original equipment store. This was not contested by the applicants and whilst I accept that such behaviour took place, this does not demonstrate user by force by those indulging in lawful sports and pastimes.

Without secrecy

81. The application land is surrounded on all sides by other land or properties and thus hidden from the general public view. The trees also limit the views into the site from the surrounding properties, but nevertheless it was claimed that the playing field could be seen from certain vantage points within the College, when it was still in use.

82. The objectors claim that their witnesses never or hardly ever saw any activity of the type claimed, and that when people were seen they were either asked to leave or advised that they could continue if their behaviour was responsible (i.e. playing football sensibly or cleaning up after their dogs.)

83. Clearly much of the activity is likely to have taken place in the evenings, at weekends, and during school holidays, particularly those activities which involved children. Nevertheless, the objector does not deny that such use took place; just that it was not as common an occurrence as is being alleged or claimed by the applicants. Indeed the point was made that the evidence of the applicants and that of the objectors was so different that it was irreconcilable.

84. Furthermore, on behalf of the objector it was argued that the use of the application land by the local inhabitants was secretive, because they accessed the land surreptitiously (or in defiance of the notice referred to above in paragraph 79) and at times when it was not in use by the College, so that they were unlikely to be seen.

85. I accept that use of the land by local inhabitants may have taken place principally at times when the College was unlikely to be open or using the field itself, but that is not the same as saying that the use was secretive. Given that the College and a number of its employees were aware that the field was being used for purposes other than that connected to the college itself, I consider that it cannot be concluded that the use of the application land by local inhabitants was secretive.

Without permission

86. Certain activity on the playing field was clearly official and thus in effect by permission. Any activity which related to the educational purpose of the College, or later the University, is unlikely to be qualifying use of the application land in relation to a claim for village green status. It was clear to me that those witnesses who recalled having seen, heard or watched formal football matches, or the occasional cricket match, were probably referring to such activity. No evidence was provided by the objectors of a specific booking system, but Dr Benn said that inquiries were received and passed on to someone else, it not being her responsibility to deal with such matters. The activity itself was therefore not 'as of right' since it was presumably authorised in some official way. I agree with the objectors' view that spectators at such events, whether specifically invited or not, might be considered to be there by implied permission and thus not there 'as of right'. This applies to a number of activities referred to by the applicants' witnesses, and evidenced in photographs submitted by Mrs Thomas.

87. The adjacent church hall plays host to a number of youth activities, some of which make use of the playing field. Difficulties arose over the evidence of Mr Gerald Fage, who originally claimed that no permission had been sought for these activities, and who completed a witness evidence form on behalf of the applicants, but who later altered his view and completed two statements on behalf of the objectors.

88. Mrs Caddy was very gracious about what must have been a disappointing decision on Mr Fage's part, because his original evidence indicated that all use by the Youth Clubs or Kid's Clubs might have qualified as user as of right. Unfortunately Mr Fage was unable to give oral evidence and so his change of heart could not be clarified. Professor Knight endorsed Mr Fage's later claim to have received permission to use the field for Youth Club activities, saying that he had seen a letter and that the permission was long-standing. However, in the absence of any clear evidence of permissions granted in this respect, and in the light of his complete *volte face*, I must treat his evidence with a degree of caution. The applicants were denied any means of testing his evidence as he did not appear at the inquiry to support his revised statements.

89. In his first statement for the objectors, Mr Fage provided a list of the applicants' witnesses who were connected either with the Church activities: either the Youth Club, the Kids Club, the Boys Brigade, Brownies, Guides or Scouts. The applicants did not seek to dispute the connections of the individuals concerned. Indeed if a comparison is made between the list presented on behalf of Mr Fage, and the user evidence forms, there is an almost direct match: the users being quite open about their connections to the organised youth activities. However, the applicants claimed that not all of that claimed use was necessarily associated with the particular organisation. Other use that

the witnesses made of the application land might have been without any potential permission.

90. No evidence of any permission in writing was submitted by the objectors, and thus it is necessary to look at all the circumstances to determine whether it is reasonable to conclude that use was by either express or inferred permission.

91. Several user witnesses, and witnesses for the objector, make reference to having been given permission to use the field for certain purposes. For example, Mrs Carolyn Dyer received permission as a child in 1945 to play there from the previous owners, but her use relates only to the period up to 1952 and therefore has no relevance to this application.

92. Mr Gibson indicates in his user evidence that he was told 'it was fine' for him to be there playing football, and that the caretaker had given him permission to go onto the land. His use of the land extends throughout the relevant 20 year period.

93. Mr Passmore, who has also used the land throughout the relevant period, clearly acknowledged that he sought and obtained permission from the Head Gardener to walk his dog. His form indicates however that he also used the land for jogging and informal sport, suggesting that any permission he sought related only to dog-walking.

94. Mr Thomas of, 5 Widney Avenue, states that he had permission to train his football team (from St Mary's School); but he also used the land with his family at other times, for which he does not indicate that any specific permission was sought. However, in the absence of any chance to clarify the issue, it is reasonable to conclude that playing football with his own children was encompassed by the same permission.

95. For the objector, Mr Clifford confirmed speaking to a lady who acknowledged that she had received permission to walk her dog on the field, and Mr Davies, who was the Head Gardner for much of the relevant period, confirms that he was asked for permission to walk dogs by one or two people. He stated that he never took issue with the two or three regular dog-walkers provided that they cleaned up after their dogs.

96. I look to the judgement in *Beresford* for guidance on this matter, as relied on by both the applicants and the objectors. Since some of the facts in Beresford differ from the facts in relation to the application land I am considering, it would be helpful to identify those.

97. In the case I am considering, the land is not and never has been owned by the local authority. Neither has it ever been managed in such a way as to encourage the use by the public by the provision of any facilities. Use for formal sports appears to have been by arrangement, so that goal posts etc could be erected and removed as appropriate. It is true that the grass has been mown in the past, and pitches marked out, but I accept the arguments of the objectors that

this was clearly for its intended purpose as part of the college playing fields.

98. Nevertheless, it is also true that the College has taken a benevolent attitude towards the local community in not wishing to prevent all use; allowing some uses to continue on what it considered to be a low-level basis, provided they were conducted in a responsible manner.

99. Mr Featherstonehaugh drew my attention to the comments made by Lords Bingham, Rodger and Walker, which point to their view that it is possible to draw an inference of permission or licence from the circumstances, and that it is not always necessary for there to be any form of written statement to that effect. The conduct of the landowner may be sufficient from which to draw the inference. Lord Walker expresses the view that he would prefer to identify such actions as 'non-verbal consents', indicating that there was at least some gesture or overt act on the part of the landowner which imparted the knowledge of the permission to the user. Lord Walker refers to the nod or a wave, whilst Lord Bingham considers that the landowner needs to make clear his intentions by, for example, excluding the inhabitants when he so chooses, demonstrating that at other times the access is because he is permitting it.

100. Mr Maile highlights Lord Walker's view in the same judgement that the actions of the landowner must be overt and have an impact on the inhabitants, such that they are made aware of the precarious or revokable nature of their access. He particularly relies on the comments made by Lord Walker in paragraph 83 of the judgement:

> *"In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends on the landowner's permission...."*

101. I therefore agree that what must be determined is whether or not the landowners 'suffered in silence' and thus tolerated or acquiesced to the use of the application land, or whether the landowners so conducted themselves as to make it clear to the inhabitants that their use of the land was pursuant to its permission.

102. On behalf of the Trust, reliance is placed on the existence of signs indicating that the grounds were private; the permissions alleged to have been given to the church activities; the permissions given (and acknowledged in some cases) to the few dog walkers they consider used the field; the actions of the security staff in allowing young boys and youths to continue to play football responsibly; the ejection of those behaving irresponsibly or incompatibly with the use of the field by the college; and the general understanding amongst the local inhabitants engendered by such behaviour that the use of the application land was by permission only.

103. There certainly appeared to be a general understanding on the part of the employees, whether teaching staff or grounds staff, that the use of the land by the inhabitants was by permission. This was reflected in the evidence of Tansin Benn, Tony Fogarty, Chris Clifford and Eddie Houston for the objectors, although none could say where exactly this impression emanated from.

104. However, none of the inhabitants who gave evidence of use at the inquiry acknowledged either that they had been given permission, or that the use was generally assumed to be permissive. Mrs Thomas acknowledged that she had asked her neighbours whether it was possible to use the field, and was reassured that it was.

105. Nevertheless, I agree with the objectors that there is a tranche of use for which evidence has been submitted but which I must consider disregarding on the basis that it was permissive. The organised use of the field by the various groups attached to the Church is a quite distinctive and discrete activity. Mr Fage's change of stance means that I must regard both his original statement (for the applicants) and his two subsequent statements (for the objectors) as being unreliable. It is most unfortunate that he did not attend the inquiry as his evidence would then have carried much more weight, one way or the other. None of the applicants are in a position to know whether or not Mr Fage or the Church in general did or did not have a permission to use the field, but Mrs Vaughan, who did give oral evidence, shed a little light on the attitude of the groups through her assistance with the Brownies. She stated that she helped out and just took it for granted that when she was asked by the Leader to take the girls out onto the field she just accepted that she could go. She never asked whether permission had been sought, and she did not determine what activities took place.

106. This suggests to me that if there was a permission of any sort, its existence was only known by a few people, and not generally disseminated to those who were using the land. It can hardly therefore be called an overt act, designed to bring to the notice of those using the land that the permission was revocable.

107. I acknowledge the argument put forward by Mr Featherstonehaugh: that if a permission exists, ignorance of it by some users does not make their use 'as of right'. However, I consider that this situation can only apply if there is a well-documented or clearly expressed permission, hard evidence of which can be produced. In this case, there is not. Despite the numerous claims that permission had been granted to the Church, and the fact that the Church groups or other organised youth groups were not necessarily all run by the same leaders, no evidence of any formal permission to any person could be produced.

108. Even if I were to conclude that the use of the field by the Church groups was by permission, I consider that there is evidence of use by some people not connected in any way with the Church and which was not exercised by virtue of any permission, express or implied. This

would include use by children for general playing of games of various types, both team games and recreational activities; dog-walking, hide and seek, picnics, kickabouts, and blackberry picking being the most commonly referred to by witnesses at the inquiry, and in the written evidence of those who do not appear to be connected with the Church activities.

109. Turning to dog walking in particular, although some dog-walkers might have received permission to walk their animals on the field, I do not consider that others who took to doing so could necessarily be assumed to have implied permission until perhaps the erection of the signs by Birmingham University in 1999. The existence of these signs was only brought to light rather late in the inquiry, and Mr Walmsley was recalled to deal with the matter. The signs were erected in accordance with a University-wide approach to the issue of dog-walking. Similar signs are still in evidence in several locations both nearby and on other University sites and say something along the lines of:

> *"University of Birmingham permits dog walkers on its grounds but expects people to act in a reasonable way"*

110. Although the sign in relation to the Westhill College site appears to have been erected in the highway verge, rather than on the actual site, I consider that its meaning is clear. The fact that many people may not have actually passed it or seen it does not, under these circumstances, render it ineffective. Mr Maile sought to rely on the judgment in R (Godmanchester and Drain) v SSEFRA and others [2007] UKHL 28 (*'Godmanchester'*) to show that, by its positioning in particular, it could not be effective as it had not been brought home to the users of the land. I think his reliance on the case is misplaced. The judgement in question relates to the issue of what actions are sufficient to constitute a lack of intention to dedicate a public right of way. Although there are many similarities between the way in which a village green may come into being and the way in which a public right of way may be acquired, there are also significant differences. In this respect Lord Scott's comments in *Beresford* are particularly helpful. He makes the point that a public right of way comes into being through dedication: in other words the period of 20 years use is evidence that the path had been dedicated at some point in the past and that it has been accepted by the public. Village greens are not brought into being by dedication[8]. Thus the question of an owner showing a lack of intention to dedicate does not, therefore, arise.

111. With regard to dog-walking therefore, I accept that some people were given permission to walk their dogs, whether they sought that permission in the first place or whether they were simply given it by a member of the College or University staff at some point. Others, who may have seen these people exercising their pets on the application land and then assumed that it was acceptable for them to do likewise, cannot be deemed to have implied permission in the absence of any

[8] Except now in certain circumstances under the 2006 Act, not applicable in this case

evidence that they were aware that such permissions existed. There is no evidence that they were. The tolerance of the College under these circumstances amounts to acquiescence, and thus guided by the judgement in *Beresford* I conclude that, until 1999 when the signs mentioned in paragraph 109 above were erected, some people who walked their dogs on the application land were doing so as of right. After that date, none of the dog-walking activity can be considered to have been as of right, since the sign gave permission to reasonably-behaved dog-walkers. The sign clearly implies that if the behaviour of the dog or the owner was unreasonable, permission could be withdrawn and was thus precarious.

112. This sign was replaced at some point, on the demise of the union with the University, but it had effectively interrupted the relevant period of 20-years' user 'as of right' as far as dog walking was concerned.

113. I do not consider that this sign gave any permission whatsoever in relation to other use made of the land by the local inhabitants, and so the application must rely on the continuing exercise of other types of activity to show that village green status has been statutorily acquired over a period expiring in 2006, or alternatively show that the 20 year period as a whole expired in 1999. No argument was put to me to consider the earlier period.

114. Neither do I consider that any signs indicating that the land, grounds or buildings were Private (see paragraph 79 above) indicated that permission of any sort was being granted. I have already concluded that the failure to take concerted action to assert the privacy so indicated did not result in user being by force. I do not find that the wording of such a notice in those terms is capable of implying permission for lawful sports and pastimes indulged in by the local inhabitants on the application land.

Conclusion on use as of right

115. Taking all these factors into consideration I conclude that there has been some use of the application land during the relevant period of 20 years (1986-2006) by a proportion of the witnesses which can be regarded as use 'as of right' for lawful sports and pastimes.

116. However during the relevant period of 20 years dog-walking has, for the last six or seven years, been by permission in respect of all such activity. Prior to 1999 some of it had been may have been indulged in by a number of people who had received no permission, express or implied, and thus be as of right up to that time.

117. The use of the land by groups associated with the Church or other organisations is more difficult to resolve. However, I am of the view that whatever 'understanding' may have existed, it was certainly unclear, even in the mind of Mr Fage, who did not initially acknowledge that it existed. The objectors have been unable to produce any written evidence whatsoever in connection with use by organised groups, despite Professor Knight's vague reference to

having seen such a letter. It seems to me that granting specific permission for such activities is a matter which would have been recorded, either in the documents owned by the College or the Charity, or in the documents relating to the groups themselves. In the absence of overt actions on the part of the landowner (or the Church) making it clear to all participants that their use of the application land was by permission, and the absence of any formal written evidence of such a permission, I conclude that such user was as of right.

Whether the qualifying use has taken place for the relevant continuous period of 20 years

118. With regard to dog-walking, any qualifying use during the relevant period of 20 years ceased in 1999 because of the permission implied by the signs erected by the University. If the application for village green status had relied solely upon the activity of dog walking I consider that the application would fail because it has not taken place as of right for the relevant requisite period. However, it is only one activity out of a range of lawful sports and pastimes which have been indulged in, and thus I consider it would be reasonable to take the use up to 1999 into account as qualifying use.

119. In relation to the other activities it is necessary to look carefully at the user evidence forms, because only two of the witnesses who gave evidence at the inquiry were able to provide evidence of use throughout the whole of the relevant 20-year period: Mrs Caddy (from 1980) and Mrs Thomas (from 1985). It is not a requirement that each individual needs to demonstrate 20 years use, but there must be evidence of continuous use by the local inhabitants throughout that period.

120. The applicants provided a summary of the numbers of people using the application land decade by decade, but I have had to study the forms myself to try to identify more clearly the actual numbers involved. Bearing in mind that the majority of users did not give evidence in person at the inquiry, and that I must therefore treat their evidence cautiously, my analysis indicates the following pattern of use:

YEAR	Number of claimed users (all types)
1986	61
1987	67
1988	72
1989	72
1990	76
1992	72
1994	72
1996	75
1998	76
2000	91
2002	99
2004	104
2006	106

121. These figures have to be qualified and tempered by the fact that it includes use by all people who claim to have used the land during that year or period. Adjustment must be made to account for dog walking after 1999; connection to the University[9]; those who were also spectators at organised matches; those who acknowledge that there have been gaps in their usage for a variety of reasons; and those whose use was only occasional or in fact relates to use by other members of their family (who have not submitted separate forms). Accurate adjustment is impossible, given the lack of clarification of the written evidence.

122. It is therefore necessary to take a conservative approach overall, and conclude that it is only possible to say that it is likely that there has been some qualifying use of the land throughout the 20 year period which could be classed as use as of right. In effect, this is accepted by the objectors, although they maintain that the use was not as of right. I have reached a different view on the quality of that use based on the evidence available.

123. I have dealt with the question of the alleged interruption to that period in paragraphs 157 to 167 below.

WHETHER THE QUALIFYING USE HAS BEEN INDULGED IN BY A SIGNIFICANT NUMBER OF INHABITANTS OF THE LOCALITY OR A NEIGHBOURHOOD WITHIN A LOCALITY

[9] E.g. Brenda Merchant whose husband was a lecturer at Westhill for 20 years

The locality or neighbourhood within a locality

124. It is necessary to determine whether or not a significant number of the inhabitants of a locality or a neighbourhood within a locality have indulged as of right in lawful sports and pastimes on the application land. I therefore look first at the question of the extent of the claimed locality or neighbourhood so that the relevant users may be identified.

125. There is no statutory definition contained within the 2006 Act of what is meant by a locality. The case law on the subject relates to the registration of village greens under the Commons Registration Act 1965 as amended by Section 98 of the Countryside and Rights of Way Act 2000. However, the definition of a village green in the 2006 Act is in substantially the same form as the wording contained in the 2000 Act. It has been determined that a locality must be a recognisable division of an area known to the law, such as a parish, borough or electoral ward.[10] It cannot be a line arbitrarily drawn on a map, but must be an administrative unit.[11] Some flexibility has been provided by the inclusion in the relevant criteria of the term 'a neighbourhood within a locality'.

126. The applicants have relied on identifying a neighbourhood as being the relevant area from which the inhabitants who have used the application land originate. This area is delineated on the Map A, included with the application, which the applicants estimate to consist of a total of about 2000 households. The principal objectors calculate that the number of dwelling houses is 1,841 and estimate the total population to therefore be about 4,500, using an average occupancy per dwelling of 2.3.[12]

127. On behalf of the applicants it was argued that the concept of neighbourhood is difficult to grasp and that it is a matter for the Registration Authority to determine, based upon the evidence. This view was based principally on the judgement in *Laing Homes* where Sulivan J agreed that the application form (in that case, Form 30) did not require an applicant to identify a locality. Mr Maile therefore argued that all the applicants were required to do was no more than to suggest what constitutes a locality or a neighbourhood. Ultimately it was for the Registration Authority to look beyond the suggestion to establish whether, for the purposes of the Act and Regulations that area, or some other area, is sufficient to establish whether, as a matter of law, a locality or neighbourhood exists that would support the application.

128. Whilst accepting that the authorities offer little guidance on the subject of localities and neighbourhoods, the objectors relied on the judgement in *Cheltenham Builders* to show that although a neighbourhood gave a large degree of flexibility to applicants, it still

[10] R (Laing Homes Ltd) v Buckinhamshire County Council and SSEFRA [2003] EWHC 1578 (Admin) *('Laing Homes')*
[11] R (Cheltenham Builders) v South Gloucestershire District Council [2003] EWHC 2803 (Admin) *('Cheltenham Builders')*
[12] An average figure supported by the 2006 census

had to display a sufficient degree of cohesiveness. It could not simply be any area of land that an applicant for registration chooses to delineate on the plan. Nevertheless, Mr Featherstonehaugh conceded that the authorities show that it would be open to an inspector to entertain a revision to the area, even against the wishes of both the applicant and the objectors, but there must be some evidential basis for doing so.[13]

129. Ms Haigh and Mrs Caddy were the two people who had most to do with putting the application together. Both Ms Haigh and Mrs Caddy were questioned about the way in which they had approached the question of locality or neighbourhood, and both gave clear and honest answers. They had obviously given considerable thought to the matter, using as a starting point the area from within which the user witnesses were drawn. They then considered the question of what facilities were available to the residents and thus included land to the east of the Bristol Road, that being the location of the local bank, post office and other services. They had also considered which areas should be excluded and came to the view that the Bourneville area constituted a distinctive neighbourhood and stood apart from their own.

130. All of the witnesses who completed witness forms and who signed the map also thereby agreed that the area shown within the green line on that map formed the relevant neighbourhood.

131. Mr Maile put forward an alternative neighbourhood, should the Registration Authority come to the conclusion that the original designated area was not the appropriate one. Clearly, as Mr Featherstonehaugh commented, reducing the area covered by the neighbourhood would affect the question of whether or not a significant number of the inhabitants had used the application land, almost certainly by increasing the proportion of users in relation to inhabitants. Mr Featherstonehaugh argued that the applicants should not be afforded the opportunity to put forward a different case which none of their evidence supported.

132. I reject Mr Maile's argument that it is the Registration Authority's role to identify the relevant locality or neighbourhood. The case cited by him relates to an application made under the Commons Registration Act 1965, and to the relevant application form in use at the time (Form 30). Although I do not have available to me a copy of Form 30 it is clear from the comments of Sullivan J in the judgement that there was no provision on the form for the applicant to identify the locality. In that case, the Inspector had found that there was no requirement in the Form or Regulations for an applicant to commit himself to a legally correct definition of the locality and Sullivan J agreed with him. He commented at paragraph 137 of the judgement that:

[13] R (Oxfordshire and Buckinghamshire Mental Health Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council [2010] EWHC 530 *('Oxfordhire Hospitals')*

'Given the importance of the locality in the statutory scheme it might have been desirable to require an applicant to provide information about the locality served by the village green in the prescribed form, but Form 30 does not require the provision of such information'

133. The application form applicable to the present legislation is Form 44, on which there is a clear question addressed to identifying the locality or the neighbourhood (Question 6). It requires the identification of the area either in writing (by administrative name or geographical area) or by attaching a map. This is the application form used by the applicants in this case, and to which was appended Map A, showing the application land and the neighbourhood.

134. In answer to a question from me, Mrs Caddy said, with commendable frankness and honesty, that she could not put her hand on her heart and justify choosing a smaller area than that which was shown on Map A. That was the neighbourhood as she saw it, and as the other applicants and witnesses understood it.

135. I accept that it is open to me to recommend, or for the Registration Authority to find, that a different area forms the relevant locality or neighbourhood, but agree that there must be evidence to support that. No cogent case was put to me to support a lesser area, and indeed the applicants did not press the case. I therefore conclude that the relevant neighbourhood in respect of this application is that as shown and set out on Map A, and not the reduced area postulated during the closing session of the inquiry and marked on Inquiry Document 7.

Whether the qualifying use has been indulged in by a significant number of inhabitants of the locality

136. A number of different activities are alleged by the applicants and their witnesses to have taken place on the land over the relevant period. It is not necessary for each activity to have been undertaken by a significant number of the inhabitants of the locality, but overall the use of the land for such activities as a whole must be capable of demonstrating that level of usage.

137. The question of what constitutes a 'significant' number of the inhabitants has been considered in the *McAlpine* judgement in the High Court.[14] Sullivan J accepted that the word ought to be given its normal meaning and that it did not mean 'substantial or 'considerable'. What was required was that sufficient people had used the area for informal recreation to indicate that it was in general use by the local community for such purposes, rather than occasional use by individuals as trespassers.

138. Of the 150 or so user witnesses, I heard oral evidence of use from only eight people. Mrs Graham had not known or used the application

[14] R (Alfred McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC 76

land during the relevant 20-year period and so I have disregarded her evidence of use, although it does provide some evidence of reputation.

139. Written evidence forms that have not been supported by oral evidence must be treated with caution with respect to detail, but where they are consistent with the tested, oral evidence I can give them some weight, particularly in respect to the range of activities undertaken.

140. Having concluded that use by the various youth groups was capable of being considered to be use as of right, it demonstrates that significant use of the area was made, particularly during the summer months. The Kids Club is an after-school club and therefore takes place every week-day during term-time. The Boys Brigade, Scouts, Brownies etc are likely to have taken place regularly once a week, at least during term-time. Some of the participants may have come from outside the identified neighbourhood, but a significant number of forms were completed by witnesses who had some connection with these various groups. All the user evidence forms submitted are from people living within the identified neighbourhood.

141. The objectors consider that the users do not represent a significant number when taken in the context of the neighbourhood identified by the applicants. It is true that many, if not most, of the user witnesses live in the properties immediately surrounding the application land, and in particular along Lodge Hill Road and Gibbins Road. It is also true that there are large swathes of properties on Map A from which no users have been identified.

142. However, the test outlined by Sullivan J is not prescriptive. What needs to be demonstrated is that the use of the application land was sufficient to demonstrate use by more than a few occasional trespassers. Using that as a guide, it must be concluded that there was use by substantially more than a few trespassers. The figures I have identified in paragraph 120 above, even when tempered by the uncertainties I have identified, indicate that a significant number of people were likely to be using the application land in any one year. Taking a conservative view, even if only half of the number given for each year were using the land on more than an occasional basis, I consider that it would be sufficient for the landowner to have been aware of the fact. As part of the use was by groups, I consider that that this is even more likely.

143. The objector claims that only one or two people walking their dogs were making regular use of the area, and that they had been given permission. Others using the area were regularly chased away. However the evidence of the Trusts own witnesses does not bear that out.

144. Mr Walls stated that he used to see '*kids on the field playing football*'. He also stated that '*no-one actually gave permission. Jack Priestley*[15] *just said be a little sympathetic if you see them in*

[15] A former Principal of the College

recompense for the noise from students. There was never anything official.' He said he saw children near the tennis courts and near the church among other places and he didn't get heavy handed with them. He just told them to stay away from the buildings.

145. Dr Benn said she was aware that dog walking was going on, but they were accepted as long as they did not go onto the pitches or areas used by her for her work with the students. Although she said that the number involved was '*miniscule*' she also acknowledged that she would not know if local residents used the site at weekends or in the evenings. She confirmed that it was not the culture of the establishment to have a formal policy with regard to use of the field.

146. Mr Clifford acknowledged that the application land tended to be used by teenagers during the 1980s. Not all of them were 'vandals' but some caused inadvertent damage (for example when practicing golf shots). He left the teaching centre in the early 1990s, so his evidence is useful in confirming use of the site during the earlier part of the relevant 20-year period, particularly as he said he spent very little time on the field. If even he knew of, and saw use of the land going on, it must have been sufficient to raise awareness.

147. Even Mr Houston, who was responsible for the security of the site, said that there were usually three types of scenarios:

- Live and let live
- Tell kids to move
- Call the police.

He acknowledged that the instructions he gave to his staff were to ask people to leave but not to put themselves at risk. However he acknowledged that this appeared to be in conflict with the views of the Principal (see paragraph 144 above) and that lots of children used the area in the north west corner. He had also seen 12/13 year olds playing near the church.

148. Mr Walmsley considered that the user witnesses gave the impression that the students of the college were 'invisible' because no-one mentioned the use of the application land for teaching purposes during the day. However, this is likely to be explained by the fact that the use by the local inhabitants, other than a few dog walkers, took place during the evenings and at weekends.

149. A similar statement could be made in reverse: that the use of the application land by the local inhabitants was 'invisible' to the College because it took place in the evenings and at weekends. However, a substantial part of that usage was by the youth groups to which the College claims to have given permission. If permission had been granted to Mr Fage and others to use the land it seems strange that none of the security staff knew about that permission or referred to that use in their evidence, even though some of them were responsible for locking the gate from Weoley Park Road in the evening, and allegedly patrolled the site out of normal working hours.

150. There is clear conflict of evidence between the amount of use claimed by the applicants and the amount of use acknowledged by the landowners. It is relatively easy to explain why the local inhabitants did not acknowledge the use by the students during the day: most of them were not at home or using the application land when the students would have been present for lectures.

151. It is less easy to reconcile why the College appears to have been unaware of the amount of use which was being made of the application land – some of which was allegedly authorised by specific permissions about which no-one seems to have been made aware.

152. Mr Featherstonehaugh considered that the use had to be sufficient to alert the landowner that a right to use the land was being asserted by the local inhabitants. I accept that premise, but if the landowner simply fails to acknowledge what may be staring him in the face, that would not be a reasonable argument to use to turn down and application. Mr Walmsley acknowledged that he had never taken any advice about how to prevent rights being acquired by people; either public rights of way or village green rights. He stated that his principle concern was the insurance liability.

153. The test must be objective: were the local inhabitants making sufficient use of the land to demonstrate to a reasonable landowner that they were acting as though they had the right to use it. If the use of the land by the various youth groups is taken into account as being use as of right, I consider that it is the inescapable conclusion that a significant number of the local inhabitants have indulged in sports and pastimes on the application land.

154. I acknowledge, however, that there may be an element of doubt in some people's minds about whether such organised use could possibly have been going on without some form of permission. If that use was discounted, the amount of qualifying use of the application land would be significantly lower, and my decision might be different. But based on the fact that the security personnel responsible for the site outside normal college working hours were seemingly unaware of any such permission, I must conclude that the youth group use constitutes qualifying use, and thus that use by a significant number of the local inhabitants of the neighbourhood has taken place.

OTHER GENERAL MATTERS TAKEN INTO CONSIDERATION

Whether permitted use by some parties negates qualifying use by others

155. Mrs Thomas indicated that she had asked her neighbour whether it was acceptable for her family to use the application land, and was reassured on that account. However, she was quite adamant that she was not aware of any specific permissions which may have been given to other people. I consider her approach to have been sensible and reasonable, and one likely to have been adopted by other people.

156. The Trust claims that permission was granted to one or two dog walkers and this is supported by the evidence of Mr Webb, and one or two other user witnesses who refer to having received permission to continue using the land for this purpose. There is no evidence that those few people who had specific permission transmitted that knowledge to others in such a way as to imply that their own permission extended to others. There is a substantial majority of users to whom no permission was ever given, and their use of the application land cannot be deemed to be permissive by virtue of permission to one or two people, unknown to them.

Interruption: The access points

157. The Trust alleged that access alongside the former College building would have been impossible during construction works and that use of the application land was thus interrupted during the relevant 20-year period.

158. The route alongside College seems to have been gated and locked from late evening until early morning but it was not locked at other times, including weekends, because access would have been needed by either by the college or by visiting teams using the pitches. During building works, I think it likely that there were times when this access was unavailable. However, other access through church land or direct from back gardens was possible. Furthermore, the developers themselves would have needed access to the compound (on the former tennis courts) and the adjacent car park and thus access for others is also likely to have been possible by that means. It may also have been the case that the field continued to be used for matches etc at certain times, but it was not entirely clear to me whether that use had continued during the construction period or not.

159. Nevertheless, access to the application land through church property has been possible for many years, as demonstrated by existence of the signs negating public rights of way over the two routes concerned, and by the long-standing existence of youth groups, particularly Boys Brigade. Activity on the field by this group and others who used the Church Hall has been exercised for many years, whether or not the alleged permission was given. The existence of a gate, now obstructed, is clear evidence of a long-standing access point which has been superseded by the gap in the fence presently existing. The evidence of Mr Worley confirmed that access to the Hall had not been fenced during construction works. Therefore there has always been access from Lodge Hill Road and from Weoley Park Road via the church access. The evidence forms show that the majority of users accessed the application land, at least some of the time, by this method.

160. Late in the inquiry, the question was raised of access across the front of the College through a sunken garden, and this was clearly not a normal means of entry. Mrs Caddy also referred to access through the College buildings themselves in the past. However, these two routes appeared to have been used by one or two individuals on

relatively few or exceptional occasions, and I have discounted any serious use of these access points.

161. Nevertheless, I am satisfied that there was never a period during the relevant 20 years when there was no access point available onto the land.

Interruption: Flooding of the application land

162. The land has been subject to water-logging and drainage works have had limited efficacy. More recently, some severe flooding due to a blocked drain resulted in some houses having to be evacuated. The College claims that the land has been used regularly and frequently for their own purposes, and thus it cannot at the same time have been unavailable for the local inhabitants. Nevertheless, it was also acknowledged that many sports matches had to be played elsewhere because the ground could not support them. However, there is no evidence that access to the land itself has been prevented for any significant period of time, such that the use of it by local inhabitants can be said to have been interrupted.

Interruption: deference

163. Recent decisions on Village Green applications have been guided by the earlier judgement in *Lewis* in the Court of Appeal[16], which considered the effect of the deference shown by one type of user to use by others. In particular, the deference shown by local inhabitants to the use of the land by the owner or tenant of the land (in that case who were playing golf on golf links). It had been held that such deference was contrary to the concept of use as of right, and thus in such circumstances an application for registration must fail.

164. This judgement has now been overturned in the Supreme Court[17], which has confirmed that it is possible for land to support more than one type of use, with give and take on both sides. What is important for Village Green application purposes is whether the use by the local inhabitants has been exercised as of right, based on the tests established in *Sunningwell.* It is unnecessary to impose any further test.

165. The objectors sought to establish that the attitude of Miss Haigh and others, in avoiding using the pitch areas when they were being used for matches and other college purposes, amounted to a failure on their part to assert that they were using the application land as a Village Green as of right, and also that it interrupted the period of use.

166. I have already dealt with the issue of dual use in paragraph 65 above, but for the avoidance of any doubt, I also consider that it falls into the category of 'give and take'. The Supreme Court judgement in *Lewis* decision also establishes that registration of a Village Green

[16] R (application of R Lewis) Redcar and Cleveland Borough Council and Persimmon Homes [2009] EWCA Civ 3
[17] R (on the application of Lewis) v Redcar and Cleveland Borough Council and another [2010] UKSC 11

neither enlarges the rights of the inhabitants, nor diminishes the rights of the landowner to continue to use the land as he did before.

167. I am therefore not persuaded that the consideration or courtesy shown by the local inhabitants to use of the pitches for matches at certain times demonstrates that their use of the land cannot be considered to be 'as of right', nor that it amounts to an interruption to that use. In any case, it often occurred simultaneously.

MODIFICATION TO THE AREA OF THE APPLICATION LAND

168. Mr Maile, on behalf of the applicants, requested that a modification be made to the area to be registered, if the application was successful, in acknowledgement of the fact that part of the land had been unavailable for use during the relevant period due to the presence of a storage building or pavilion. The location of this area is indicated on Inquiry Document 7 and is adjacent to the access from Westhill Close.

169. No evidence was presented to show that the local inhabitants had used the area of land on which the storage shed or pavilion sits for any of the lawful sports and pastimes claimed. Therefore it would be right to consider excluding that area from any area which is registered as a village green on the basis that it did not fulfil the criteria.

170. However, I am unable to give precise details of the extent of this exclusion, since no measurements were provided to me. This will need to be determined by measurements on site, should my recommendation be accepted and the application land be registered as a village green.

CONCLUSION

SUMMARY

171. The evidence as a whole sets out a picture of increasing use of the application land by local inhabitants over the years, including during the relevant 20 year period between 1986 and 2006, at a time when the College and its managing Trust were facing many challenges to their existence. The College took a benevolent view of the use made of the land by the local inhabitants so long as it did not interfere with its own use of the land, aware of the inconvenience that its existence sometimes caused to local residents and wishing to be a good neighbour. Activity which was antisocial was resisted, and some people were asked to leave as a result, but apart from a very few people whose individual use was acknowledged and sanctioned by college staff on occasions, most use of the land for lawful sports and pastimes was simply tolerated. Much of that use was exercised at times of the day or week when it presented no difficulty to the College, and the College was sufficiently unconcerned about it that no concerted attempts were made to regulate or control it during the relevant period. The application land was regularly used by local groups who used the adjoining Church Hall and for whom no formal permission appears to have been granted.

172. Some formal sports events, such as football matches and cricket matches, took place on some evenings and weekends and some local inhabitants would watch them. These activities, whilst not qualifying as use as of right, do not detract from the fact that at the same time there may have been other people using different areas of the site for other purposes, in much the same way as on many established Village Greens around the country. The two activities are not incompatible.

173. Although the numbers of local inhabitants using the site is not high in percentage terms, the volume of use suggests that it has been significant enough to alert a reasonable landowner to the fact that it was happening. Some staff were aware of it, but none of them seem to have been aware of the existence of any alleged permissions.

174. I conclude that a significant number of the inhabitants of the neighbourhood identified on Map A, lying within the localities of Selly Oak and Weoley, have indulged in lawful sports and pastimes on the application land as modified in paragraph 169 above and shown on the map at Inquiry Document 7.

RECOMMENDATION

175. That the application be allowed, and that Westhill Playing Field be registered as a Village Green, with the exclusion of the small area near to Westhill Close occupied by the storage shed/pavilion.

Helen Slade

INSPECTOR

Planning Inspectorate
Commons and Village Greens
Temple Quay House
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4 July 2010

APPEARANCES

For the Applicants:

Mr Chris Maile	Representative of the *Campaign for Planning Sanity*

Who called:

Ms Anne Haigh	*Applicant and local resident*
Mrs Kathy Thomas	*Applicant and local resident*
Mrs Philomena Vaughan	*Local resident*
Mrs Michelle Owen	*Local resident*
Mr Dave Walton	*Local resident*
Mrs Linda Graham	*Local resident*
Mrs Muriel Caddy	*Applicant and local resident*

Others in support:

Mrs Joanne Ward	*Applicant and local resident*

For the Objectors:

Mr Guy Featherstonehaugh QC	*Counsel, instructed by Cobbetts Solicitors*

Who called:

Mr John Walmsley	*Company Secretary and Clerk to Westhill Endowment Trust*
Dr Tansin Benn	*Associate Professor (Birmingham University) and former lecturer at Westhill College*
Mr George Davis	*Former Head Gardener and Grounds Supervisor and local resident*
Mr Tony Fogarty	*Former Maintenance Operative*
Mr Chris Clifford	*Former member of IT staff, Westhill College*
Mr Alan Worley	*Senior Projects Manager with Crest Nicholson (Midlands) Ltd.*

Mr Eddie Houston	*Former Site Manager of Westhill College*
Mr Andrew Edgington	*Former Sports and Leisure Officer and Estates Manager for Westhill College*
Mr Dave O'Driscoll	*Former Head Groundsman, and Acting Head of Grounds and Gardens Section, Birmingham University*
Mr Terence Walls	*Porter (previously at Westhill College) Birmingham University*

Interested parties

Professor Donald Knight	*Churchwarden, St Mary's Church*
Mrs Christine McCauley	*Local resident*

DOCUMENTS

Submitted by Applicants

1. Three red indexed lever-arch files (Volumes A, B and C) containing copies of the application, witness statements, other statements and letters of support, the witness questionnaires, and legal precedents
2. Response to the objectors initial statements, dated 2 June 2009
3. Revised outline legal statement dated 25 April 2010, and copy of further legal precedent
4. Document from Communities and Local Government web-site regarding neighbourhoods
5. Photographs of signs at St Mary's Church
6. Map and aerial photographs of Westhill College Teaching Centre
7. Map showing exclusions and potential alternative neighbourhood for modified registration request
8. Closing Statement

Submitted by the Objectors

9. Original objection and supporting statements
10. Two black indexed lever-arch files (Bundles A and B) containing a summary of the first (or principal) objectors case with legal submissions, the original objection statement, witness statements and legal authorities.
11. Laminated copy of map of the application site
12. Closing Submissions on behalf of the principal objector
13. Letter of objection from Mr M M Webb (deceased) dated 16 April 2009