

Appendix 2

Arguments against the village green application at Rectory Field, Headley from the submission of The Diocesan Board of Guildford

The arguments set out by the Diocesan Board are summarised below:

- insufficient evidence of use
- certain use has not been as of right
- not all the Land has been used for lawful sports and pastimes
- the effects of tenancies and sub-tenancies
- concern over development

The arguments to support these assertions are set out below:

The applicant has provided insufficient evidence of use:
<ul style="list-style-type: none">• the applicant has not provided evidence to demonstrate that the number of users is above <i>de minimis</i>, and quotes the McAlpine case that a 'significant number' is anything more than <i>de minimis</i> and sufficient to indicate that the Land is in general use by the community
<ul style="list-style-type: none">• the original application contained evidence from 4 individuals only, though further evidence has been received, with 68 separate witnesses• the Diocese calculates that 1.51% of the total population of the parish have provided evidence (or 1.23% of the figure quoted by Headley PC) and it contends that this is not a significant number• on analysis of the evidence provided, only 16 inhabitants suggest use capable of being potentially lawful sports and pastimes, and therefore the figures is 0.29% or 0.35% based on which estimate of the number of inhabitants of the locality of the parish of Headley is used
<ul style="list-style-type: none">• the Diocese reserves the right to address the question of geographical spread of the users• attention is drawn to the fact that there is already a village green approximately 60 metres away
<ul style="list-style-type: none">• the main activity alleged over Rectory Field is walking in some form – 24 users walking, 38 dog walking and 60 using it as a short cut or accessing specific points in the village• the Diocese refers to user evidence that walking along the road adjacent to Rectory Field seemed to witnesses 'dangerous' and therefore used Rectory Field to reach certain destinations in the village – the Diocese submits that this type of walking is not recreational, and took place only over a small proportion of the field, neither of which represent qualifying use• the use of the field for sheep grazing is not compatible with recreational use, particularly with dogs, painting, bicycle riding, children playing, fruit picking and tobogganing• Rectory Field is muddy in winter and after heavy rain, which would deter users for a substantial part of the year• the remaining activities listed in total are only 16 – cites fruit/blackberry

picking (7), tobogganing (1), cycling (2), painting (3), photography (1) and playing with children (2)

- it is pointed out that tobogganing is only possible after snow fall and Lord Scott is cited in the *Oxfordshire County Council v Oxford City Council*, quoting him on whether a tolerant landowner who allows 5th November bonfires would tolerate use throughout the year for recreation
- it is asserted that the fruit picking season is short, and the area where brambles grow is confined to the south east corner of the field; the field is unsuitable for children to play in due to the agricultural activities; the cycling is of a highway nature
- the applicant's citing of cricket matches up till 1939, flower shows and sports days is not accepted, and is outside the requisite 20-year period
- the Diocese does not accept the activities noticed on the Land by witnesses, characterising these as anecdotal and , in any case, with the permission of the sub-tenant of the donkey field
- it is asserted that the 20 year period of use without interruption must be demonstrated prior to 14th January 1991, given that the application was received by the County Council on 13th January 2011
- the three witnesses who say they started using the Land in 1991 are expected to provide strict proof that the use commenced during the period 1st to 13th January for that use to qualify
- it is noted that 31 users indicate their use commenced before 1st January 1991 and that 12 of these accept that there was an interruption in the use of Land from approximately 1988 to 1990, with one witness suggesting it continued until 2001
- the Diocese cites the letter sent by Mr. and Mrs. Whittaker indicating that that sheep were kept in Rectory Field during 1995, and that the gate to the field was locked
- it is not accepted that the witnesses continued to use Rectory Field until the time of the application

Certain use has not been as of right:

- the Diocese argues that permission was given to organisers of the village fete to use Rectory Field as a car park, meaning that implied permission has been granted to local inhabitants to use the field for recreational purposes
- fencing has been erected around the field at various stages in the last 20 years, preventing access
- during the Ellis tenancy, Mrs. Irwin-Brown notified the Diocese that she had permitted users of the village fete to use Rectory Field as a car park for those attending the event, in return for which the organisers were required to cut the grass in the field
- a similar arrangement continues with the present tenant Mr. Luff
- the Diocese cites the judgement in *R (Mann) v Somerset County Council [2012]* as justification for view that this arrangement amounts to a grant of implied permission to local people to use Rectory Field for recreation
- around April 1995 there was fencing around Rectory Field and the access gate was locked to allow sheep to graze – any entry into the field was therefore by force and not as of right, and demonstrates that landowners and tenants were exerting control over the Land

- a sub-tenant erected fencing around the southern half of the field in or around 1999, and therefore any use of this part of the Land is not as of right
- it is argued that the use of the Land for grazing of sheep is incompatible with qualifying recreational use

Not all the Land has been used:

- it is submitted that the entirety of Rectory Field had not been used for 20 years without interruption – which must be demonstrated
- the growing of crops on the field means that users could not have walked all over the field, only on specific routes
- it is asserted that any use, particularly while crops were grown, was only across a single route at any one time, and any use of the field ended in May 2011, when the field was completely fenced and a permissive path around its perimeter was provided

Effect of Tenancies and Sub Tenancies:

- when Rectory Field was subject to a tenancy, until that tenancy was surrendered, there can be no claim made against the Diocese, as it had no right of possession of the land, nor to prevent any '*indulgences of right*'
- the only activity that can be relied up against the Diocese is that taking place between December 2010, until Mr. Luff took up his tenancy

Concern over Development:

- a Defra study of 2009 indicates that many applications are triggered by a perception of threat to land, particularly in connection with development, but the Diocese states that it has no current plans to develop the Land, has been the freeholder of it for over 100 years, and has not developed it to date
- Diocese does not accept that cricket was played on Rectory Field from 1885 to 1939
- Headley already has a village green 60 metres away and contends it is irrelevant whether is a shortage of recreational land in the parish

Summary:

- applicant has failed to provide any evidence to delineate the relevant locality
- has failed to demonstrate that the number of users of Rectory Field is above the *de minimis* threshold
- has failed to demonstrate use 'as of right' – cites implied permission, fencing, rendering any use by force
- Diocese exerted control over the Land by its tenants/sub-tenants
- no relevant/not a sufficient level of recreational use of Rectory Field or sufficient numbers of users indulging in lawful sports and pastimes
- failed to demonstrate use has been on the entirety of the Land – only partial use, and on specific and limited areas (footpaths)
- no continuous 20-year period of use – interruptions by cropping and grazing
- Diocese had no rights of possession of Rectory Field until December 2010
- Submits that necessary legal tests not met for registration of village green rights