

Issues with the Inspector's report on the application to register "The Triangle, Curdridge" as a Town or Village Green ("TVG") (VG240)

Further submission on behalf of the Applicants

Summary

1. The Applicants¹ have now had a limited amount of time to consider the draft "decision report" and the Inspector's Report² in respect of the above and wish to make a number of comments on the latter and on the Inquiry process adopted by the Registration Authority.
2. In particular, we believe that the Inspector has (fatally to the Application) failed to apply the law correctly to the facts in three important respects
 - a. The date on which use as of right ceased
 - b. The decision not to allow an amendment to the dates and in particular the rationale set out at 7.1 – 7.5
 - c. The meaning of "significant" use to be derived from case law throughout the relevant period
3. Furthermore, whilst a great deal of the content of the Inspector's Report is a fair and accurate reflection of the evidence before him at the Inquiry, there are crucial areas where the evidence has not been either correctly recorded and or interpreted, in particular in respect of the use of the land in the period after 2005.
4. As the Inspector correctly acknowledges (at 1.4), the determination of this matter is for the Registration Authority and not the Inspector. We therefore request that the Registration Authority seeks an independent review of the Inspector's Report in the light of this document and of the other information available to it, allowing further representations from the Objector as it deems appropriate, prior to determination.
5. If the Registration Authority proceeds to determine this Application in accordance with the Report then the Applicant(s) reserve their position in respect of the matters set out in this document and in particular will consider both judicial review proceedings and or the submission of a fresh Application based on these submissions.³

The Inquiry process

6. It is acknowledged that TVG Inquiries tend to be complicated affairs which are often coloured by local interests and it is to the credit of the Inspector that he has endeavoured to produce a detailed report within a short period of time. However the Applicants are significantly concerned by some elements of the Report.

¹ Mr Kemp and other supporters on behalf of the Application

² Hereafter "the Report"; numerical references in this document refer to this document unless otherwise stated

³ See *inter alia* Lightman J in *Betterment Properties (Weymouth) Ltd vs Dorset County Council* paragraph 27-28

7. It is for the Registration Authority to decide from whom it wishes to take advice in determining this or any Application. However the weight of case law suggests supports (only) an Inquiry procedure where the Inspector is a barrister with experience in this area of the law (for example Mr Charles George QC, who appeared for the Objector, has acted as an Inspector on numerous occasions). See, for example, Arden LJ in *R (Whitney) v Commons Commissioners (Court of Appeal, 2004)* at paragraph 29 “an independent expert (by which I mean a legal expert)”
8. It should be noted that none of the authorities refer simply to “a lawyer” or “a solicitor”. And, with great respect, it is difficult to imagine that Mr Farthing, selected as Inspector by the Registration Authority, meets the criteria anticipated by the Court of Appeal in *Whitney*.⁴ The Applicants believe that the combined effect of the issues expanded upon below has resulted in a recommendation to reject the Application which is, it is submitted, would not have been reached by a legal expert.
9. In fact, such an expert reviewing the evidence now before the Registration Authority would, it is submitted, be very likely to conclude either that the Application should succeed based on the 20 year period ending in June 2006 or that a fresh Application would be difficult to resist for that period.

Chronology

10. The chronology has been set out clearly here because the Report contains intermittent conflation of two important and distinct events – the 2005 erection of the fencing (with access points) and the use of the land by Mr Collins for depositing soil which began in June 2006. For example:
 - a. The Inspector has not indicated consideration of the use witnessed by Mr Westcott after 2005 merely concluding (erroneously) that his own use after that date was permissive.
 - b. The Inspector has recorded at 4.34 that Mrs West stopped using the land “until the time it was fenced and soil deposited” without attempting to distinguish between these two separate events. [In fact Mrs West used the land until the soil was deposited in June 2006 and not, as the Inspector erroneously concludes, only until 2005]
 - c. Mr (and Mrs) Blogg’s evidence was of use ceasing when the land was too muddy. Accepting that his recollection was imprecise, nevertheless this suggests use up to 2006.
 - d. Mr McNulty (4.56) stopped using the land when it became undesirable. This is more likely to have been the result of soil dumping than the fence being erected but there is no record of “credit” given for his witnessed use by children other than his own up to 2006.
 - e. Mr Pepper (4.62) gave evidence of use until the soil was deposited which was accepted by the Inspector but this is not recorded in his summary at 7.23

⁴ See also Lightman J in the Trap Grounds at first instance (paras 15 ix and x) and subsequently Lord Hoffman when the case reached the House of Lords (para 29)

- f. Mr Bellchamber gave evidence of use by himself, his wife and Mrs Gamblin until at least 2006 (4.101) but this is not recorded in the Inspector's summary.
 - g. Mrs Kemp both used the land and saw others doing so until at least 2006 but this is also omitted from the summary.
11. Evidence was adduced in support of the Application for a period from before 1985 (it is accepted that earlier use is not relevant) until the date of the Application (May or June 2008). The following dates are particularly relevant:
- a. 2005 – The fencing around the Triangle was erected by Mr Collins
 - b. June 2006 – the commencement of dumping of topsoil/inert material (hereafter "soil")
 - c. May/June 2008 – Application VG240 was submitted
 - d. August 2008 – Fencing and prohibitive signs erected
 - e. Feb 2011 – Inquiry
 - f. March 2011 – Report produced
12. It is the contention of the Applicant that user as of right ceased on the date when the Triangle began to be materially used by the Objector for dumping soil for the reasons set out below, and not, as erroneously concluded by the Inspector, with the 2005 fencing. The evidence to the Inquiry shows clearly that this dumping began in June 2006, [a date which is not explicitly captured in the Report but was before the Inquiry a matter of fact].
13. The Transitional Provisions of the 2006 Act provide that an application can be made within 5 years of the date of any challenge which took place prior to 6 April 2007. Accordingly, absent a positive response to this document, the Applicant would also be well advised to consider submitting a new Application in respect of the Triangle but for a 20 year period ending in May 2006⁵.

Why did use as of right not cease in 2005?

14. To understand why this fencing could not render user vi, it is useful to begin with the comments of the Inspector on the relevant law at paragraph 5.2 (Applicant's emphasis)
- a. *"Force" is not confined to physical force. To knowingly use land contrary to the clearly expressed intention of the landowner can be use by force. The best example of this is to ignore a clearly worded sign forbidding entry, but similarly to ignore other actions of the landowner **which unambiguously demonstrate any intention to exclude use** will amount to use by force. R v Oxfordshire County Council ex parte Sunningwell PC [1999] 3WLR 160.*
 - b. *In Sunningwell Hoffman LJ considered the meaning of "as of right" and having dismissed the need for any subjective belief on the part of the user he refers, with approval to the words of Lord Blackburn in Mann v Brodie [188]) 10 App Cas 378.386 "namely that they must have used it in a way which would*

⁵ See Explanatory Note 90 to Commons Act 2006

suggest to a reasonable landowner that they believed they were exercising a right". Hence the test is not what was actually in the mind of the user, but rather how the users' actions would have appeared to a reasonable landowner.

15. It is accepted that the first paragraph would support the conclusion of the Inspector in respect of the erection of the fence in the present case if (and only if) there were evidence that this was an unambiguous demonstration of intent to exclude. However this is not the case.

16. Firstly, the only evidence that the fence was intended to exclude user came from Mr Christopher Collins (the Objector) under cross-examination at paragraph 4.186.

The fence was to keep people off and eventually to contain animals, especially horses. The access points were retained to allow access for lorries. He had not erected gates because of the expense. He restated that it was not his intention to allow the access points to be used by the public to gain access to his land.

17. It is not accepted that simply erecting a fence with access points is sufficiently clear evidence of intent to exclude users to meet the test posed by Lord Hoffman at paragraph 14a above. If the intent really had been to keep people off then Mr Collins could and should have made that clear by other means, for example investing in either signs or gates. As things stood, people were using the land before the fence was erected. At least some of them (see discussion below on significant numbers) continued to do so afterwards. It would therefore have been impossible for Mr Collins to reasonably conclude that he had "seen off" a potential claim of acquired rights.⁶ This point was apparently well made to the Inquiry by Mr Martin Hughes – see 4.17.

18. Furthermore Mr Collins evidence on cross-examination entirely contradicts his evidence-in-chief (as recorded), which was that:

*The purpose of the fencing was to stop people dumping their garden rubbish (**Note - an unlawful activity**) on the site.*

19. Thus even Mr Collins appears uncertain as to what the intent of the fence was – and the fence therefore fails to meet the criteria indicated by Lord Hoffman.

20. In any event, no weight can be given to the evidence of Mr Collins, not merely because of this (and other) inconsistencies but because he provided evidence which, in at least two cases, was both seriously and dangerously misleading.

- a. Mr Collins (4.178) gave ostensibly precise, thorough and detailed evidence in respect of the location, use, staffing and his almost daily site attendance in respect of the 1997 portable office facility and this formed the basis for a considerable amount of the cross-examination carried out on his behalf. It is difficult to understand

⁶ This is a stark contrast with the position identified by Sullivan J in R (Cheltenham Builders) vs South Glos CC [2003] EWHC 2803 (Admin) at pp 70-71

objectively how the discrepancy of 20 years which was subsequently acknowledged on behalf of the Objector could have resulted from a simple error on the part of Mr Collins.

- b. Furthermore, during cross-examination, Mr Kirk drew Mr Collins attention to the fact that his sworn statement was that that there were no paths on the land. His evidence to the Inquiry (4.188) was that there were paths. If one were to accept (as I think one must) that he has some considerable knowledge of the land then, again, it is not easy to conceive of a satisfactory explanation for this discrepancy.

21. There are a number of authorities which add weight to the view that simply installing fencing with gaps cannot render user vi.

22. In *Sunningwell*, where Lord Hoffmann explained at p350H that (emphasis added):

"...It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see Mills v. Colchester Corporation (1867) L.R. 2 C.P. 476, 486). The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right--in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period..."

23. It is established law that vi use is not restricted to physical force but could be by disregard of clearly worded prohibitive signs for example. However it is submitted that, without more, it is simply not possible to conclude that walking through a large gap in a fence renders continuing use vi.

24. It is the submission of the Applicant that the ongoing position being nothing like perpetual warfare⁷ erecting fences with gaps is simply acquiescence to the continuing user as of right, nothing more nor less. Consequently the use from 2005 onwards was wrongly held to be vi by the Inspector.

Disallowing the application to amend

25. It is noted that from the date of the Application, there was a delay in setting up the Inquiry of almost three years (until February 2011). This delay was in itself potentially prejudicial to the Applicant. Had an Inquiry been established within a reasonable time period of the Application (say a year) then, even in the face of a decision based upon the Inspectors incorrect analysis of the effect of the fencing, the Applicant would have had the opportunity to consider whether a further application might have been successful under the transitional provisions of the Commons Act 2006.

⁷ Sullivan J provides a relevant further analysis of vi user in *R (Lewis) v Redcar and Cleveland BC* at first instance pp 13-23

26. However, given the above, the logic of the Inspector at 7.5 falls and the Applicant suggests that it would be sensible for the Registration Authority to reconsider this issue in accordance with paragraph 4 of this submission in a matter of considerable local public interest. Alternatively, a fresh Application would achieve a similar end result (albeit at greater expense) provided that it is made prior to 31 May 2011.

Significant Use

27. Despite hearing (and largely accepting) evidence the Inspector has concluded that there was not significant use between 1988 (and presumably earlier) and 2005. His reasoning is materially flawed.
28. It is accepted that the area is small and most residents use to come on and walk about briefly and do not necessarily stay for long. That use was little and often as evidenced by many witnesses, a considerable number of whom described seeing other users.
29. The judgment of Sullivan J in *McAlpine* (and adopted in all relevant subsequent judgments) was that
- “Significant” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers”*
30. Compare this with the use of Ladydale as evidenced in *McAlpine*. In that case, the area claimed was very considerably larger than the Triangle but user was established successfully on the basis of the evidence of just 6 witnesses for the full 20 year period. Those witnesses had seen others use the land and such use was “credited” (to use the term adopted by the Inspector) on the basis that the land held little attraction to users outside the locality. It should also be noted that the locality in that case had a population of some 20000 rather than the 1000 or so in the parish of Curdridge. This approach to witnessed use, which has been established in TVG case law for a decade, contrasts vividly with that of the Inspector at, for example, 4.104.
31. The lack of attraction to visiting users is absolutely the case here (see for example the evidence of Conrad Collins regarding playing at the “other end of the village” at 4.175) and it is submitted that insufficient weight has been given to the usage observed by many witnesses. As with the children of Mr Hughes, Dr Cheetham, Mr Blogg, Mr Picton-Jones et al, the children seen by Mr Westcott “larking about”; Dr Marsh on BMX’s and using a rope swing; and similarly Messrs Bundell, McNulty, Picton-Jones and many others are unlikely to have (been allowed to) travelled great distances to do so and it is entirely reasonable to conclude that any use by people from outside the locality was minimal. This contradicts the apparent test imposed by the Inspector at, for example, 4.47 (Mr Gregory) where he appears inclined to overlook users who could not be specifically identified by witnesses.

32. It is accepted that use is a matter of fact and degree, it is the number of users which needs to be significant – and (the argument accepted by Sullivan in *McAlpine and Lightman J* in the *Trap Grounds* at first instance) such use is not to be assessed in a statistical or mathematical sense but merely to demonstrate use which is **more than either *de minimis*** or, in the words of Lord Hoffman “so trivial and sporadic as not to carry the outward appearance of user as of right”.
33. In this case – despite the land and locality being very **considerably smaller**, there was (direct and witnessed) evidence of regular use by similar or greater numbers of people than was the case in *McAlpine*. That case being established law, it is submitted that this is more than enough to satisfy the requirement of significant use for the period 1986-2006.
34. Thus applying any test reasonably derived from the decision in the *McAlpine Homes* case, the conclusion of the Inspector at 7.31 and 7.32 fall.
35. For completeness, the logic of the Inspector in assessing the question of significance appears to be wholly inconsistent with *McAlpine* and the conclusion at 7.32 is also unsafe as a result of the issues set out in 10 above.

Other points

36. Additionally, there are a number of other errors in the report which may have contributed to the recommendation of the Inspector that the Application should be rejected. For example:

The Inspector has concluded, based in part on the evidence of Mr Christopher Collins, that Mr Westcott’s use from 2005 was permissive. In addition to the general unreliability of the evidence of Mr Collins, it is difficult to conclude that a (precario) permission for use was granted based on the evidence at 4.9; the phrase “continue to use the land at his own risk” being, at best, ambiguous. Comparing the narrative in the Report with the dicta of Lord Kerr at Paragraph 112 of *R (on the application of Lewis) v Redcar and Cleveland Borough Council (Supreme Court)* it is difficult to see how Mr Westcott’s ongoing use could be described as pursuant to any kind of precario permission which would counter use as of right. Graham Westcott was a heavy user “ Just about every day” . His version of events is different to the one reported by Mr Farthing.

On meeting Mr Collins he explained that his dog will not be happy. I quote from Farthings report “Mr Collins could continue to use the land at his own risk and he had continued to use the land as he had before”

Before the meeting Mr Westcott used the land “as of right” so continued to use the land as he had before which is “as of right”

Mr Westcott did not seek permission for him nor was there permission granted. The only conservation was about the dog. He therefore continued to use the land as of right. Mr Collins was a tolerant land owner who at this point would have known residents were walking on his land.

Furthermore Mr Collins gave evidence (see para 4185 in Farthings report) He did not give permission to anyone to go on the land.

By his own admission Mr Westcott was not 2005 onward permissive.

River Don and it banks Kirk Bramwith South Yorkshire 1984

Mrs Anne West Comment

The Inspector's comments re my statement are incorrect in that I didn't say my children stopped going on the Triangle after 1995. I said they went there without me after 1995 as they were old enough to go unsupervised.

Bob Podesta Comments

: Re: Triangle

I have just read my speech & found that they have not got it write I said that I walked across there in 2006 or there about's.

4.137 Mr Farthing wrote : Under cross examination Mr small said he had no connection with the Collins .

This is incorrect as he confirmed that Mr Collins was a family friend . This is an important fact when considering the Smalls evidence.

Accepting the difficulties of taking evidence by telephone, the description of the attempt to re-establish contact with the very important witness Mrs Maddison (4.87)) is incomplete. The Applicant was endeavouring to redial but Mr George made it clear that he did not wish to continue with his cross-examination. The Applicant believes that, having accepted that Mrs Maddison's potentially vital evidence could be heard in this way, for the Inspector to subsequently change his mind in the middle of her cross-examination was unsatisfactory.

- a. This is entirely inaccurate to conclude at 7.30 that the Parish Council did not support the application. There was a specific resolution to support the application, there is some considerable evidence of Parish Council's support which was provided. [see applicants bundle)and none to the contrary. Consequently, to the extent that the members of the Parish Council (collectively) expressed a view, it was entirely supportive (the individual evidence of Mrs Small notwithstanding). Mr Farthing found it very important and damaging to the applications made out that as there was no support. This has very much coloured his judgement It has been suggested to me that the inspector may have erred in law on the 'need' for parish council support.
- b. In considering the effect of the fencing, the Inspector appears to consider (4.22-4.23) the "acceptance" of Dr Cheetham that it ended use relevant despite Dr Cheetham understandably offering no evidence in this regard as he had by then moved away.

- c. 4186 Farthing reported: Under cross examining Mr Collins acknowledged that he employed many people from the parish. Mr Farthing failed to report that the reason for my comment was that I put to Mr Collins that many of his employees, employees family who lived in Curdridge and Curbridge would not support the application. Which is natural even though they had used the Triangle? For example I had one person on a door step really upset because of a connection she/he could not sign or attend the public hearing. In confidently except her/his request
- d. 4.185 He (Mr Collins) did ask Mr Kemp not dump any more garden waste on the land. This question was thrown at me as I was question Collins. I took it as a effort to put me off so ignored it. To my surprise Mr Farthing decided to mention it and further to my disgust makes his mind up that I did dump garden rubbish.
- e. 4.133 Mr Farthing reports " I do not have any doubt that on an occasion Mr Kemp has used the triangle to dump garden waste. " I am very disappointed in way Mr Farthing was in by these immature taunts the Colins/Small family. If this had happened with Mr George things would have been different.
- f. I would swear on any document bible etc that I have not thrown garden waste into the Triangle. In fact I have built a special trailer to carry garden waste down to the dump in Bishops Waltham. I cart about 15 cubic metres of dead leaves and garden waste each winter.
- g. 4.129 At the time so called blue office affair we found It very difficult to understand and took up much valuable energy and time. Once we had the admission the caravan was in the triangle in 1977 instead of 1977. Mr Farthing closed it off with a statement 1977 was before Mr Kemp was in Thatchers Wood. He obviously had forgotten that I still lived in Curdridge. I lived 300 yards up the road. My real point is I do not believe there ever was a Blue caravan in the Triangle at 1977. With so little time I am unable to establish the facts but i am sure the whole thing was a Hoax.
- h. 7.32 Mr Farthing only gave 4 witness names to complete up to 2008. He forgot to Mr and Mrs Kemp instead he pit down Kemp. Also my wife assisted Mrs Bradshaw (Deceased) her mother across the triangle
- i. 4.602 He was asked if a deposit of soil would affect the growth of the trees. I had hoped to show the witness attached photos but had problems of printing. Mr Collins later confirmed that only good top soil was used on the Triangle. The best solution to find out the truth is to go and excavate it.



The above submission has been completed in a very short time and I reserve the right to alter it and or add to it.

My English has not been proof read and may have clerical errors.

I believe it to be correct.

Rory Kemp