IN RE: AN APPLICATION TO REGISTER LAND KNOWN AS BUSHFIELD, IN THE PARISH OF COMPTON AND SHAWFORD, WINCHESTER, AS A NEW TOWN OR VILLAGE GREEN PURSUANT TO SECTION 15 COMMONS ACT 2006

APPLICATION NO. CVG2 OF 2008

ADVICE ON PRELIMINARY ISSUE

Introduction

1. On 30th. June 2008 Mrs. Barbara Guthrie applied to Hampshire County Council to register a large area of land, of approximately 30 hectares, comprising rough pasture, arable land and part of a former but now defunct and substantially demolished army camp known as Bushfield Camp, together known as 'Bushfield', to the South of Winchester, as a Town or Village Green pursuant to the provisions of section 15 Commons Act 2006. Hampshire County Council is the Registration Authority under the 2006 Act for the relevant area. Section 15 requires the Authority to register land if it has been used 'as of right' for lawful sports and pastimes by the inhabitants of a locality or neighbourhood for twenty years. The application was made specifically under sub-section 15(4), which stipulates that where the user relied upon ceased before the coming into force of the 2006 Act,

the application must be made within five years of that cessation. The Authority considered that the application was not in accordance with the Regulations governing such applications[1] and on a number of occasions asked Mrs. Guthrie to rectify these matters. This she did by 20th. July 2009.

2. The Church Commissioners for England and Wales are the freehold owners of this property the subject of this application. They have objected to the registration, asserting that the necessary requirements set out by statute for registration have not been fulfilled. One of the objections that they raise is that the requirement as to the timing of the application contained within section 15(4) is not satisfied, and that this application has been brought too late to succeed, whatever its other evidential defects.

3. I have been instructed by the Authority to hold an Inquiry into the merits of the application, and to advise the Authority accordingly. At present the intention is that there will be a substantial public inquiry later in the year, at which evidence will be heard and tested. However, the specific objection raised by the Objectors as to the timing of the application and the fulfilment of section 15(4) is a matter that is capable of being considered without further consideration of the evidence. If the objection is a good one, then it would be pointless to proceed with the arrangements for a formal hearing of the evidence and determination of the

[1] The Commons Registration (Interim Arrangement)(England) Regulations 2007.

factual issues. I therefore directed the hearing of a preliminary issue, in the following terms:

> "whether, on the assumed footing that the public use relied upon by the Applicant ended on 13th. July 2003, the Applicant's application was made within the period of five years beginning with that date;"

The Background Facts

4. The facts relevant to the determination of the preliminary issue are not in dispute. On 1st. July 2008 the Authority wrote to Mrs. Guthrie suggesting that the application may not have been duly made in accordance with the Regulations. The letter indicated:

(1) The pro forma statutory declaration did not have inappropriate and alternative parts struck out;

(2) The application did not properly identify the locality or neighbourhood relied upon in support of the application.

(3) The application asserted that the relevant user ceased within 'a period of months during the summer of Summer 2003', but Mrs. Guthrie had supplied evidence that tended to show that usage had ceased in the Spring of 2008.

The letter asked Mrs. Guthrie to consider these matters. Mrs. Guthrie's response dated 11th. August 2008 said this:

> "[Having] searched thorough our records [we] failed to establish a date more accurate than 'during the summer of 2003'. We have one diary entry stating that the land was cleared in mid-May and a photograph of fencing dated July 16th. Certainly our application to record public rights

of way over the land was made on June 17th. 2003 and to that extent our recent submission falls just outside the 5 year time limit for application made under section 15(4) of the 2004 Act. My own statement about the access being prohibited in Spring 2003 is not helpful and I would only say that was related to concerns about the nesting season."

Mrs. Guthrie suggested that the timing of her application had been prompted by communication from the Authority to the effect that a right of way application referred to in the letter might fail, and that on the evidence an application for village green registration might succeed. The application had only been made on the County Council's decision to reject the right of way application, made on 15th. July 2008. She enclosed an amended application form.

5. The Authority were concerned about various procedural matters arising from the application, and sent instructions to leading counsel, Mr. Vivian Chapman QC, to advise. Mr. Chapman advised the Authority (*inter alia*) that Box 4 on the application Form had not been correctly filled in, in that a specific date for the end of user had not been specified. To that extent the application had not been 'duly made' within the meaning of the Regulations. In consequence on 28th. October the Authority wrote to Mrs. Guthrie asking her:

(1) To insert a specific date for the cessation of qualifying user 'as of right';

(2) To provide a map showing the land at not less than 1/2500;

(3) To show the locality as edged in green, not red.

The letter pointed out that if the application was to be amended, the supporting statutory declaration would have to be re-sworn.

6. Mrs. Guthrie replied on 8th. December 2008. She stated that she was unable to specify a definitive date for the cessation of user 'so far', but that the enclosure of Bushfield Down and the erection of permissive signs had not been completed before 1st. June 2003 at the earliest. Mrs. Guthrie asked the Authority for advice as to the matters of fact as to the dates of enclosure, and law, as to the meaning of 'as of right access'. She also asked the Authority to waive the requirement of a large-scale map, on the grounds of cost. The Authority responded on 22nd. December 2008 giving advice as to the legal meaning of 'as of right', stating that it was for Mrs. Guthrie to specify the date of cessation of user, and stating that the Authority had no jurisdiction to waive the statutory requirements.

7. There was no speedy response, and the Authority chased a reply by letter dated 3rd. February 2009. After a holding response on 12th. February 2009, Mrs. Guthrie replied with an amended application on 28th. April 2008. That application now asserted that qualifying user ceased on the following basis:

> "As of right ended when fences were erected. At no time did any person ever indicate by notices or by being present that access was prohibited before that. I have a photograph dated 13th. July which was taken to show the fencing has gone up, although it is not clear whether the entire area was enclosed at that time. As I walk the land daily I know I would

have taken a photograph within 2 or 3 days after the fences were in place. I therefore say that it is my opinion that the date would be any day in the week before 13th. July 2003"

8. On the 1st. July 2009 Mr. Chapman QC further advised the Authority that the application was still not duly made, because the statutory declaration had not been re-sworn with the new map exhibited. Mr. Chapman set out the matters that the Authority might wish to consider before deciding whether to give Mrs. Guthrie further time to correct her application. Mrs. Guthrie delivered the application, with the appropriately sworn statutory declaration to the Authority on 20th. July 2009.

9. The Authority gave its statutory notification of the application to landowners and all others interested in the land on 1st. September 2009.

The Statutory Framework

10. Section 15 of the 2006 Act, insofar as is relevant, states:

"15. **Registration of greens**

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

.....

(4) This subsection applies (subject to subsection (5)) 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 commencement of this section; and

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

(5) Subsection (4) does not apply 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. "

11. The procedure for making and determining an application is set out in the Commons Registration (Interim Arrangements) (England) Regulations 2007. These provide (*inter alia*):

"Scope and Interpretation

2. (4) A requirement upon a registration authority to stamp any document is a requirement to cause an impression of its official stamp as described in General Regulation 3 to be affixed to it, which must bear the date mentioned in the requirement or (where no date is mentioned) the date when it was affixed.

Application to register land as a town or village green

3. (1) An application for the registration of land as a town or village green must be made in accordance with these Regulations.

(2) 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 unincorporate;

(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.

(3) A statutory declaration in support of an application must be made by—

(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 unincorporate; or

(c) a solicitor acting on behalf of the applicant

Procedure on receipt of applications

4. (1) On receiving an application, the registration authority must—

(a) allot a distinguishing number to the application and mark it with that number; and

(b) stamp the application form indicating the date when it was received.

(2) The registration authority must send the applicant a receipt for his application containing a statement of the number allotted to it, and Form 6, if used for that purpose, shall be sufficient.

(3) In this regulation, "Form 6" means the form so numbered in the General Regulations.

Procedure in relation to applications to which section 15(1) of the 2006 Act applies

5. (1) Where an application is made under section 15(1) of the 2006 Act to register land as a town or village green, the registration authority must, subject to paragraph (4), on receipt of an application—

(a) send by post a notice in form 45 to every person (other than the applicant) whom the registration authority has reason to believe (whether from information supplied by the applicant or otherwise) to be an owner, lessee, tenant or occupier of any part of the land affected by the application, or to be likely to wish to object to the application;

(b) publish in the concerned area, and display, the notice described in sub-paragraph (a), and send the notice and a copy of the application to every concerned authority; and

(c) affix the notice to some conspicuous object on any part of the land which is open, unenclosed and unoccupied, unless it appears to the registration authority that such a course would not be reasonably practicable.

(2) The date to be inserted in a notice under paragraph (1)(a) by which statements in objection to an application must be submitted to the registration authority must be such as to allow an interval of not less than six weeks from the latest of the following—

(a) the date on which the notice may reasonably be expected to be delivered in the ordinary course of post to the persons to whom it is sent under paragraph (1)(a); or

(b) the date on which the notice is published and displayed by the registration authority.

(3) Every concerned authority receiving under this regulation a notice and a copy of an application must—

(a) immediately display copies of the notice; and

(b) keep the copy of the application available for public inspection at all reasonable times until informed by the registration authority of the disposal of the application.

(4) Where an application appears to the registration authority after preliminary consideration not to be duly made, the authority may reject it without complying with paragraph (1), but where it appears to the authority that any action by the applicant might put the application in order, the authority must not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action.

(5) In this regulation, "concerned area" means an area including the area of every concerned authority.

(6) A requirement upon a registration authority to publish a notice in any area is a requirement to cause the document to be published in such one or more newspapers circulating in that area as appears to the authority sufficient to secure adequate publicity for it.

(7) A requirement to display a notice or copies thereof is a requirement to treat it, for the purposes of section 232 of the Local Government Act 1972(1) (public notices), as if it were a public notice within the meaning of that section.

Consideration of objections

6. (1) Where an application is made under section 15(1) of the 2006 Act to register land as a town or village green, as soon as possible after the date by which statements in objection to an application have been required to be submitted, the registration authority must proceed to the further consideration of the application, and the consideration of statements (if any) in objection to that application, in accordance with the following provisions of this regulation.

(2) The registration authority—

(a) must consider every written statement in objection to an application which it receives before the date on which it proceeds to the further consideration of the application under paragraph (1); and

(b) may consider any such statement which it receives on or after that date and before the authority finally disposes of the application.

(3) The registration authority must send the applicant a copy of every statement which it is required under paragraph (2) to consider, and of every statement which it is permitted to consider and intends to consider.

(4) The registration authority must not reject the application without giving the applicant a reasonable opportunity of dealing with—

(a) the matters contained in any statement of which copies are sent to him under paragraph (3); and

(b) any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application."

Ms. Ross Crail's Opinion

12. The Registration Authority had sought an Opinion from Ms. Ross Crail of Counsel as to the date upon which an application is 'made' for the purpose of sections 15(3) and (4) where it has been corrected by subsequent amendment under Regulation 5(4). Although that opinion was not specifically sought in connection with this application it was disclosed both to the Objector and to Mrs. Guthrie, and they made their applications in the light of its contents. That Opinion advised:

(1) That the application was to be treated as 'made' for the purposes of section 15(3) and (4) when it was received by the Authority; not the later date when it was put in order under Reg. 5(4).

(2) The obligation to register and date an application under Regulation 4 is the first act that an Authority must take on receipt of an application.

(3) The requirement that the Authority gives an opportunity to correct defective applications is an indication that the initial application is not a nullity when made.

(4) An application may either be rejected because it is not duly made, or on the merits (see regulation 9). Rejection in each case presupposes that an application has been 'made'.

(5) The successful implementation of the procedure for remediation under regulation 5(4) does not result in the application having a different registration number, or being a different application. That application was 'made' when initially received, not when corrected.

(6) The dating of the initial application on receipt under reg. 4 serves a practical purpose in determining when an application is 'made' for the purposes of section 15(3) and (4). There is no provision for re-dating when the application is corrected.

(7) It may be unfair to an applicant, if the date of correction were to be the relevant date of the making of an application, where an application is made

close to the expiry of a time-limit in section 15(3) or (4), if the application is only corrected after the expiry of that period. Such delay may be the fault of the Registration Authority.

(8) The Court's approach to the construction of this legislation has been to protect the applicant's interests rather than the landowner – citing Oxfordshire County Council v. Oxford City Council [2006] 2 AC 674. The policy behind the Act, and its predecessor, is to avoid excessive technicality and to permit amendments where it would be 'fair' to do so.

(9) The jurisprudence as to the validity of applications for non-compliance with statutory requirements indicates that this is a matter of statutory construction, the issue being 'what was intended to be the consequence of non-compliance', citing R v. Secretary of State for the Home Department, ex p. Jeyeantham [2000] 1 WLR 354 at 362G; Seal v. Chief Constable of South Wales Police [2005] 1 WLR 3183 at [34] to [36} (Scott Baker LJ and Ouseley LJ) ; and R v. Soneji [2006] 1 AC 340 at [23] per Lord Steyn.

(10) Although R v. Hampshire County Council ex p. Winchester College [2009] 1 WLR 138 and Maroudas v. Secretary of State for the Environment Food & Rural Affairs [2010] EWCA Civ. 280 considered the issue as to when and in what circumstances an application was 'made' for specific statutory purposes, those cases turned on the specific provision contained in section 67(3) Natural Environment and Rural Communities Act 2006, that for the purpose of that sub-section: "an application under section 53(5) of the [Wildlife and Countryside Act] 1981 is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.". The present statutory regime under the 2006 Act does not provide an equivalent provision.

(11) If the date the application was made were to be the date it was put in proper order under reg. 5(4), the consequence of cessation of user after the date of an application under section 15(2) (which deals with user continuing up to the date of the application) but before the date of correction would be

that that application would have to be amended so as to be made, if at all, under section 15(3). This is some indication of the practical difficulty arising from such a statutory construction.

The Objector's Submissions

13. The Church Commissioners for England and Wales were represented by Mr. Jonathan Karas Q.C. and Mr. Ben Faulkner of Counsel. They submitted that:

(1) Section 15(4) requires an application to be 'made' within 5 years of the cessation of user 'as of right'. The interpretation of that requirement must have regard to the meaning and purpose of the Regulations made under the Act;

(2) The Regulations stipulate by way of mandatory requirement the form and content of an application;

(3) An application that does not comply with those requirements is not validly or duly made; more broadly, it is not made for the purposes of section 15(4) – see Maroudas v. Secretary of State for the Environment Food & Rural Affairs [2010] EWCA Civ. 280; they submitted that where regulations stipulated the content of an application, an application that did not comply with those mandatory requirements was not 'made' for the purpose of the governing Act.

(4) The provisions of Regulation 4, relied in Ms. Crail's analysis, relate to administrative acts that have to be carried out on receipt of the Application. It was significant, submitted Mr. Karas, that these steps were to be taken on 'receipt' of the application, not on its 'being made'. This indicated that receipt was not necessarily the date on which the application was 'made'.

(5) Although the Regulations provide that a Registration Authority should not reject an otherwise invalid application without giving the Applicant a reasonable opportunity to put it in order, the consequence of such remedial activity is that the application is treated as 'made' only when remedied, not when originally made;

(6) This is demonstrated and supported by the content of Regs. 5(1) and (4), which provide that a landowner is only notified of an application when it has been duly made.

(7) The Applicant's contrary contention would lead to an application having been made, but the landowner not necessarily knowing of the application. It was suggested that this would not only be administratively inconvenient, but it would also lead to a situation arising in which a landowner might reasonably believe he was free to take steps to develop the land (because, in an application that might otherwise fall under section 15(3), more than two years had passed since the cessation of user 'as of right') but might not in fact be free.

(8) The Applicant's construction would be a breach of the landowner's human rights under Article 1 of the First Protocol of the European Convention of Human Rights, and Art.6. The Act must if possible be interpreted by the Authority in accordance with the provisions of the ECHR. Whilst the Objector accepted that Section 15 was itself compliant with the Convention[2], given that the provision would interfere with the landowner's right to his property, the procedure itself

[2] Relying on the comments of Lord Hoffmann in Oxfordshire County Council v. Oxford City Council – hereafter referred to as 'Trap Grounds' - [2006] 2 AC 674

must enable him to put his case and challenge the decision. If the application could be in some form of 'limbo' having been effectively made but with the landowner not having been notified, then the landowner would be prevented from taking steps to use his land.

(9) The cases relied on by Ms. Crail in her advice related to the 1965 Act and the Regulations made under it. They were not germane to the interpretation of the 2006 Act and the 2007 Regulations.

(10) Alternatively, the time taken by the Registration Authority to permit Mrs. Guthrie to put her application in order amount to more than the 'reasonable opportunity' stipulated by Regulation 5(4). Therefore, even if the application, when corrected, would have been treated as made when initially received by the Registration Authority, the application should be treated as never having been 'duly made'. Mr. Karas did not suggest that 'reasonable opportunity' in Regulation 5(4) was limited to one 'bite of the cherry'.

The Applicant's Submissions

14. Mrs. Guthrie, who appeared in person, submitted that:

(1) The time taken to correct the various defects in the Application Form did not amount to excessive delay. The law, and the factual background to the application, was complex. As a litigant in person she was not warned of any time by which the matter had to be resolved; and she acted in part on the advice of the Registration Authority.

(2) The Regulations require the Registration Authority to number and date the application when it is received. That is the relevant date in connection with the various time-limits set out in sections 15(3) and (4).

(3) If the application is otherwise corrected by way of remedial correction under Regulation 5(4), the application remains the same effective application that was originally made, albeit one that has been corrected. It was therefore 'made' when first received by the Registration Authority.

The Issues

15. There are it seems to me four sub-questions that arise in connection with the preliminary issue as formulated, and as argued by the parties. These are:

(1) Is an application for registration of a Town or Village Green 'made' for the purpose of section 15(4) of the Act, where the application does not comply with the mandatory requirements relating to the contents of such an application contained in the 2007 Regulations?

(2) If not, what is the effect of the subsequent correction of the application under Regulation 5(4)?

(3) Is it open to the Objector to challenge the time taken by the Applicant to correct her application as being more than a 'reasonable opportunity' to do so within the Regulation?

(4) If so, has the Applicant had more than a 'reasonable opportunity' and what is the consequence of that?

16. Issue 1 - Is an application for registration of a Town or Village Green 'made' for the purpose of section 15(4) of the Act, where the application does not comply with the mandatory requirements relating to the contents of such an application contained in the 2007 Regulations?

Where Parliament enacts that certain consequences shall follow on the occurrence of an act or event, it is a matter of statutory construction as to what the content of the relevant act or event must be. For these purposes, I do not think that consideration as to whether service of a notice or the performance of an act that is said to constitute the relevant is a nullity or not necessarily answers the question. A notice or an act may have certain legal consequences, and hence not be (in the common usage of the term) a nullity, without having the particular effect that is being disputed in the present case. The cases cited by Ms. Crail (R v. Secretary of State for the Home Department, ex p. Jeyeantham [2000] 1 WLR 354; Seal v. Chief Constable of South Wales Police [2005] 1 WLR 3183; and R v. Soneji [2006] 1 AC 340) establish the general propositions that:

(1) an act or notice purportedly made under or pursuant to statutory authority may be effective notwithstanding that it does not comply with all of the requirements of the statutory authority under which it occurs;

(2) It does not follow that because the statutory requirements to be performed in connection with such an act or notice are described in

mandatory, rather than directory, terms, that non-compliance with the requirements renders the notice a nullity; and

(3) It is a matter for the construction of the relevant statutory authority as to whether the failure to adhere to the statutory requirements renders the act or notice ineffective. Is that what Parliament intended?

17. Considering first the wording of the relevant statute alone, the entitlement to make an application is set out in section 15(1):

> "Any person may apply to the commons registration authority to register land ...as a town or village green in a case where subsection (2), (3) or (4) applies."

The sub-sections refer to applications that rely on different period of usage 'as of right'. Section 15(2) applies where such the inhabitants 'continue to do so at the time of the application'; section 15(3) applies where they ceased to do so after section 15 came into force but before the time of the application and the application is made not more than two years after the cessation of use. Section 15(4) is the transition provision that applies where usage ceased before the section came into force.

18. It seems to me that the 'making' of an application here involves the receipt by the Commons Registration Authority of the application itself. On a natural reading of sections 15(3)(c) and 15(4)(c) which stipulate that 'the application [must be] made

within a period of [two or five] years', the application that is being referred to is the application under section 15(1). However, that does not determine the issue as to what sort of application is sufficient for these purposes. On the wording of the Act alone, any application which purported to be an application under section 15(4) which was received by the Registration Authority would be 'made' for the purpose of section 15(4) when it was received by the Authority. It might thereafter be dismissed, either on the merits or for procedural defects, but it would be 'made'.

19. I agree with Mr. Karas QC that in order to determine the true meaning of section 15(1) one must have regard to the statutory regulations that are made under the Act. These are produced pursuant to sections 24 and 59 of the Act. Regulation 3 sets out the mandatory requirements as to the form of the application, its content, and the documents that must accompany it. Regulation 4 sets out what the Authority must do immediately on receipt of the application; whilst regulation 5 sets out the subsequent procedure that must be followed. Regulations 5(1) to (3) deal with the publicising of the application, whilst regulation 5(4) deals with the alternative procedure to be adopted when the application is not 'duly made'. There is no specific definition of what might cause an application not to be 'duly made', but the only realistic contention (in my view) is that it refers to an application that is not made exactly as is required by regulation 3.

20. What is the purpose of giving the Applicant the opportunity, where possible, of putting his defective application in order, rather than requiring him to re-serve a new application? Mr. Karas suggested it was so that the applicant might not be put to the administrative inconvenience of having to produce another application. That may be so, but it does not appear to me to be the most likely or obvious reason. Section 15 expressly sub-divides applications that differ as to the cessation of usage as regards the time when they are brought. Timing is very important to the structure of the statute, perhaps by way of most striking example in the operation of section 15(7). That sub-section directs the authority to disregard permission which prevents user from being as of right where there has (in any event) already been twenty years' user 'as of right' prior to the date permission was given. But this special rule only applies to section 15(2)(b), and hence only applies where the application was made under section 15(2). If user (as of right) has otherwise been stopped before the application has been made, then the rule is unavailable. It is not immediately apparent why this should be so. The legislation is notoriously difficult to apply, both as regards the 1965 Act and the Regulations made under it, and the current Act and Regulations. The applicants are frequently litigants in person. Broadly, the 'periods of grace' found in sections 15(3) and (4) are there to ameliorate the difficulties that arose when an application had to assert and prove user 'as of right' extending to the date of the application[3].

[3] See Trap Grounds at [44], overturning the decision of the Court of Appeal that under the 1965 Act (as amended) user as of right had to continue, implausibly, up until the date of registration by the Authority. Although the amendment to section 22(1A)(b) of the 1965 Act by the Countryside and Rights of Way Act

I conclude from this that the obvious reason why Reg. 5(4) would provide for the correction of an application rather than for its rejection and re-service is precisely to prevent the existence of technical defects in the application leading to the need to make a fresh application, with consequential difficulties in connection with the making of the application in time. If, as I think likely, this is at least one reason behind the formulation of regulation 5(4), it would be a further strong indication that Parliament intended that an application, even if liable to be corrected under regulation 5(4), would none the less be treated as having been made when initially received by the Authority.

21. Mr. Karas suggests that a distinction is to be drawn between the wording of regulation 4, which talks of 'receipt' of an application, and regulations 5(1) which speaks of an application being 'made'. The difference is that it is only where an application is made, i.e. duly made, that the obligation to notify other parties arises. Whilst it may be the case that the obligation to notify only arises where the Authority considers that the application is duly made (as otherwise the Authority should either reject the application or refer it to the Applicant for amendment under Reg. 5(4)), the wording of Reg. 5(1) itself indicates that the making of an application is an historical act, that precedes amendment. The obligations then arising are either to reject the application; to refer to the Applicant for amendment; or to notify the landowner. In all of these cases the application has

2000 provided for a period of grace of an unspecified duration, the anticipated regulation was never enacted.

previously been made, and on the proper construction of Reg. 5(1) it should be read as meaning is 'Where an application has been made...'. In my opinion. the application is 'made' on its initial receipt by the Authority.

22. Had Parliament intended that a defective application was not to be effective for the purpose of the time-limits set out in Sub-sections 15(3) or (4) one would have expected this to have been made clear. Instead, on the objector's construction, Regulation 5(4) would appear to operate as a trap not simply for the unwary, but for the less than perfect. This is unlikely to have been the intention of the legislature, especially given that the 2006 Act was intended to extend the ability to register land by introducing the 'periods of grace'. .

23. Of particular importance is the requirement that a Registration Authority stamp the application, and date it on receipt. The stamping of the document is formal recognition that it has been received by the Registration Authority. Receipt is important for two reasons. The first is that it evidences the date from which the subsequent procedural obligations of the Authority run (see reg. 5(1)). The second is that it evidences the date on which the application is 'made', and therefore whether the requirements of section 15(3) or (4) are satisfied. I note in this regard that the regulations are specific; it is the date of receipt that must be noted, not the date of stamping (contrast reg. 4(1)(b) with reg. 2(4)). The importance of stamping the precise date of receipt arises because it governs the requirement of

satisfaction of the time limits in section 15(3) and (4). I can see no other material requirement for it, under the statute.

24. The only time when stamping is carried out is on the initial receipt of the application. There is no requirement in the regulations to re-stamp (or re-date) an application where the application is originally defective and subsequently corrected under reg. 5(4). Mr. Karas suggested to me that an obligation to re-date an application in those circumstances could be read into the regulations; but I do not think that this is right.

25. Mr. Karas' submissions placed considerable reliance on the decisions of the Court of Appeal in R v. Hampshire County Council (oao Warden and Fellows of Winchester College) [2009] 1 WLR 138 and Maroudas v, Secretary of State [2010] EWCA Civ. 280, where technical deficiencies with applications made to re-categorise rights of way under the provisions of the Wildlife and Countryside Act 1981 led to the applications had not been 'made' for the purpose of the National Environment and Rural Communities Act 2006 ('NERCA'). However, these are decisions that turn on the effect of section 67 NERCA 2006, and the need specifically in connection with that Act for strict compliance with the terms of the Schedule 14 of the Wildlife and Countryside Act 1981 – see Winchester College per Dyson LJ at [6], [36]. The requirement there was that application was made in accordance with the prescribed form – see para. [46].

26. The decision in Maroudas is to the same effect. Although the decision of the Court of Appeal in Maroudas only mentioned the effect of NERCA 2006 briefly, it is plain from the decision appealed from[4] that the issue was the same as in the Winchester case, namely whether an application had been made in terms compliant with section 67(6) NERCA. In my view the decisions in Winchester and Maroudas are of limited if any assistance in determining whether an application is made, for the purposes of section 15(4), if served in a form not complying with the technicalities required by Reg.3 of the 2007 Regulations.

27. I acknowledge the objector's concern that the purpose of the period of grace was to enable landowners to have certainty as to whether their land might be subject to TVG rights, which have the capacity to be highly onerous and restrictive. Mr. Karas is I think right to submit that the provisions of ECHR, and in particular Art. 1 of the First Protocol and Art. 6 apply to the construction of the procedure laid down for the making of a claim to vindicate TVG rights. However I do not think that the consequences are as extreme as he paints them.

28. If the construction of the Act and Regulations that seem to me to be the case is correct, the consequence would be that a landowner who was aware of a cessation of user 'as of right' more than two years previously would not be certain

[4] See [2009] EWHC 628 (HHJ Mackie QC)

that a claim could not be brought; it might be the case that an application had been made in time, but due to its technical invalidity it remained in the limbo created by Regulation 5(4) until after the period of grace had expired. That would appear to be the position here.

29. The consequence of that is that the landowner is at risk if, there having been a very long period of recreational use of his land, lasting at least 20 years, which has stopped, he nonetheless treats the land as available for, for example, sale or development without making appropriate enquiries of the local Registration Authority. Such a landowner (or a prospective purchaser) would no doubt search the register held under the Commons Act, and disclose any entries that had been recorded. The possibility that there might be a pending application would require him to make an additional request of the Registration Authority, as to whether there are any applications pending. Such a possibility is not onerous, and the practical need to do so would not render the legislation a disproportionate interference with the rights of property owners under Art 1. Applying the guidance of the Grand Chamber in Pye v. UK [2008] EHRR 26 the test is whether a 'fair balance' exists between the demands of the general interest (in seeking to register the TVG) and the interests of the landowner. Given the plain purpose in allowing the applicant to make an effective application, even though it may (a) be technically defective and (b) might not be publicised to the landowner until corrected so as to be 'duly made', in my view, it does. I note that the construction

put forward by the objectors might lead to the rejection of otherwise valid applications for technical defaults.

30. The Argument that the Applicant's construction of the statute will lead to an infringement of the Objector's fair trial rights under Art. 6 is one that does not appear to me to be valid. The Authority's decision to refer the matter back to the Applicant for amendment is a decision that is capable of challenge by way of judicial review, as is the Authority's decision as to the satisfaction of the requirements of section 15(4). The availability of judicial review in these circumstances amounts to the satisfaction of the requirements of Art. 6. Capital Bank v. Bulgaria (2007) 44 EHRR 48 which was cited as authority for the proposition that decisions taken without reference to an interested party, and not subject to review, is a very different case. There the substantive decision (to wind up the bank) was itself not subject to challenge. In the present case the point of complaint is the possibility of an initial absence of notification after the commencement of process. There is no question that the substantive issue may or can be determined without such notification.

31. I therefore conclude (as to issue 1 above) that an application for registration of a Town or Village Green is 'made' for the purpose of section 15(4) of the Act, even though the application does not comply with the mandatory requirements relating to the contents of such an application contained in the 2007 Regulations.

In the present case the application was made on 30th. June 2008. Issue 2 therefore does not arise.

32. Issue 3 - Is it open to the Objector to challenge the time taken by the Applicant to correct her application as being more than a 'reasonable opportunity' to do so within the Regulation?

I will set out Regulation 5(4) again. It states:

> "Where an application appears to the registration authority after preliminary consideration not to be duly made, the authority may reject it without complying with paragraph (1), but where it appears to the authority that any action by the applicant might put the application in order, the authority must not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action."

The regulation does not confer a power on the Authority; it restricts its power. If an application is not 'duly made' then it would seem that the Authority may do one of three things. It may simply proceed to notify the interested parties under Reg. 5(1), thus in effect ignoring the defect. If the defect is trivial this may be a wise course of action, and the power to proceed would in my view follow from the conclusion that the application is not a nullity. Alternatively it may reject the application. Thirdly it may refer the application back to the Applicant for amendment. The only restriction in the Regulation is the restriction on rejection. If in the view of the Authority the deficiency is open to correction by the Applicant (and it is likely that any technical omission or evident slip would be) then the

Authority may not at that stage reject the application without giving the Applicant a reasonable opportunity to correct it.

32. It seems to me that the Objector asserts from this Regulation the corollary that where an applicant has had a reasonable opportunity to correct a deficiency but has failed to take it, then the Authority must as a matter of law reject the application. I do not think that this follows from the wording of the Regulations. In my view the Authority may allow the application to proceed to the next stage, or may if it thinks fit offer the Applicant a further opportunity to amend or correct the application. The House of Lords has held that an Authority has power to permit an amendment to be made to an application where it was fair so to do[5]. That case related to applications under the 1965 Act and its associated Regulations. Mr. Karas lightly argued that the power to amend would not be the same under the 2006 Act, as the 2007 Regulations were more prescriptive. In my view the power to amend is beneficial; and the wording of the 2007 Regulations is not such as to imply that such powers do not exist. The reasons that Carnwath LJ put forward as justifying the existence of a power to allow amendments in the Trap Grounds case in the Court of Appeal - [2005] 3 All ER 931 at [102] to [111] appear to me to apply equally to application under the 2007 Regulations.

[5] Trap Grounds at [61]

33. The only restriction on the Authority's decision to allow such further opportunity would be whether that decision was, in the circumstances, perverse. If it was, then it would be liable to be set aside by judicial review. I see no reason for considering the decision made in this case, the authority having received the advice of very experienced leading counsel which indicated that the decision was the Authority's to take, to be perverse.

34. Issue 4 - If so, has the Applicant had more than a 'reasonable opportunity' and what is the consequence of that?

For the reasons that I have set out, I do not think that this question is relevant. Were it to be so, my advice would be that it is for the Authority to assess whether a reasonable opportunity to correct the defects had been had; that the Authority could take into account the fact that the Applicant was acting in person and the relative complexity of the legislation; and that the decision to allow more time to the Applicant could not be said to be perverse. In my view it would be lawful.

35. **Conclusion**

In conclusion, my advice to the Authority is that, on the assumed footing that the public use relied upon by the Applicant ended on 13th. July 2003, the Applicant's application was made within the period of five years beginning with that date. I therefore advise that the Authority should proceed to hold a non-statutory Inquiry to consider the merits of the application.

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10th. May 2012