IN THE MATTER OF:

AN APPLICATION TO REGISTER LAND AT THE PERRINGS, NAILSEA, AS A NEW TOWN AND VILLAGE GREEN PURSUANT TO THE COMMONS ACT 2006

REPORT

OF ROWENA MEAGER (INSPECTOR)

Dated 30 August 2023

Legal Services Department
North Somerset Council
Town Hall
Weston-Super-Mare
BS23 1UJ

1. I have been appointed by North Somerset Council ("the Council") as an Inspector to provide a report in relation to an application made by Nailsea Town Council ("the Applicant") to register land known as "The Perrings" or "Perrings Hill" at Nailsea ("the Application Land") as a new town or village green ("the Application") pursuant to section 15 of the Commons Act 2006 ("the 2006 Act"). The Application is proceeding under reference NSC/TVG/009 and was received by the Council on 30 April 2020. The landowner, and objector, is Persimmon Homes Limited ("the Objector").

2. Section 15 of the 2006 Act provides in so far as relevant:

*"**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.

(2) This subsection applies where –

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they continue to do so at the time of the application."

3. In order to succeed in an application to register land as a new town or village green ("TVG") every component of the foregoing statutory test must be proved to be satisfied on the balance of probabilities. However, this report will not address the Application by reference to all of the statutory criteria at this stage.

4. My remit is limited to considering two particular issues which may be determinative of the Application without the need for a public inquiry to be convened and the remainder of the statutory test to be considered. Those issues are (i) whether planning permission number 2583/75 [B24-B26] dated 28 July

1976 ("the Planning Permission") constitutes a trigger event ("the Trigger Event Issue"), and (ii) whether the use of the Application Land by members of the public has been 'by right' ("the By Right Issue").

5. Before I go on to consider those two issues I will set out briefly set out some background detail concerning the Application Land, its planning history, use and maintenance, all of which are relevant to the matters I need to consider. For the purposes of producing my report I am provided with an Agreed Summary of Facts and a Bundle of Documents, the content of which I also understand has been agreed. References to page numbers in this Report (both above and following) are to page numbers in the agreed Bundle of Documents.

The Application Land: Background Information

6. The Application Land is a roughly triangular shaped parcel of land adjacent to a residential development at The Perrings, Nailsea, which development was permitted pursuant to the Planning Permission. The Planning Permission was granted by reference to a plan which included the Application Land within the 'red line boundary' [B33]. The Application Land therefore forms part of the land to which the Planning Permission related. The Application Land is identified thereon as "*Public Open Space For Adoption*".

7. By clause 6 of Schedule 2 to an agreement dated 28 July 1976 pursuant to section 52 of the Town and Country Planning Act 1971 [B22-B35] the then owner, Comben Land Holdings Limited (a subsidiary of the Objector), was required to provide, within four months of development commencing on site, a landscape planning (sic) scheme. That requirement mirrored condition 6 of the Planning Permission which in fact, refers to a planting (not planning) scheme. There was no provision for the Application Land to be transferred to the local authority notwithstanding that a plan depicting the layout of the proposed development stated, in relation to the Application Land, "*for adoption*".

8. The Application Land was never transferred to the local authority but correspondence from the Council [B74] indicates that its predecessor Council had been maintaining the Application Land for a number of years prior to 1986. It seems that there had been discussions between the Council and landowner about transferring the Application Land to the Council but those discussions had stalled in around the middle of 1986 [B65-B66] and the Council ceased maintenance for a while. There then appears to have been a gap in records until 1997 when solicitors acting for the Objector raised a query with the Council about the installation of picnic tables [B71]. It also appears that play equipment was installed in 1997 [B68].

9. Despite there being no transfer of the Application Land to the Council, the Council did nevertheless resume maintenance of the Application Land. The Application Land was the subject of a maintenance contract from 31 January 2005 and 30 January 2010 [B20-B21] but it is accepted by the parties (according to the Agreed Summary of Facts) that the Application Land was maintained by the Council from the time of the residential development or shortly thereafter until at least December 2021 with a short interruption in the mid 1980s. That maintenance included regular grass cutting. The Council installed picnic tables and inspected and maintained play equipment that it installed on the Application Land and eventually removed the same in or around 2021 when it had come to the end of its useful life.

10. Against the foregoing background I will now consider the two specific issues identified at paragraph 4 above in turn.

The Trigger Event Issue

11. The importance of the Trigger Event Issue is that if a trigger event as defined in Schedule 1A to the 2006 Act has occurred, and no terminating event has subsequently occurred, the Applicant is precluded from making an application

to register land that has been subject to a trigger event as a new TVG pursuant to section 15C(1) of the 2006 Act which provides "*The right to apply to register land as a town or village green ceases to apply if an event specified in the first column of the Table set out in the relevant Schedule has occurred in relation to the land ("a trigger event")*".

12. Schedule 1A to the 2006 Act sets out in a table a series of 'trigger events' and corresponding 'terminating events'. If a trigger event occurs but is followed by a terminating event, the effect of section 15C of the 2006 Act is reversed. The trigger event with which this report is concerned is the first in the table in Schedule 1A, namely "*An application for planning permission, or permission in principle, in relation to the land which would be determined under section 70 of the [Town and Country Planning Act 1990] is first publicised in accordance with requirements imposed by a development order by virtue of section 65(1) of the Act*".

13. The corresponding terminating events are concerned with circumstances where the planning application is withdrawn, refused or not begun within the timeframe required by the permission. If the planning application results in a permission and the development is begun within the relevant timeframe, no terminating event occurs (or will ever occur) and the land to which the permission relates is permanently subject to section 15C of the 2006 Act.

14. Section 15C and Schedule 1A of the 2006 Act were enacted by section 16 and Schedule 4 of the Growth and Infrastructure Act 2013 ("GAIA"). The purpose of the additions to the 2006 Act by GAIA was to protect the integrity of the planning system in circumstances where there was conflict between that and the 2006 Act, as was made clear in the Parliamentary debates:

    - *The relevant Minister (Michael Fallon) explained ... that the clause concerning trigger events "is about protecting the integrity of the planning system … The purpose of [the] reforms is not to stop all town or village green applications, but simply to stop town or village green applications being used where a planning permission has been granted …" (4 December 2012, Col 383).*

- *During the same debate the Minister later went on to criticise [a proposed amendment] stating that it "would mean that the planning process continued to be subservient to the narrower set of considerations that a green application has to be judged against. That cannot be right …" (4 December 2012, Col 385).*
- *At Col 386 - 387 the Minister stated "we have to ensure that the application process for registering new greens does not further undermine the existing planning process, which balances the interests of the community in development against their interests in preserving their local environment. We must tackle that central problem … That is achieved through a series of trigger and terminating events set out in Schedule 4 … When a trigger event has occurred, no application may be made in respect of that land".*
- *"… [The proposed reforms] are a proportionate response to a serious problem. They strike the right balance and put decisions on the future of land where they should be taken – in the planning system, which provides an opportunity for everyone to have their say and for all relevant considerations to be taken into account" (30 January 2013, Col 1627).*

15. By enacting section 15C and Schedule 1A of the 2006 Act, provision was made for land that had been brought within the planning system to be unsusceptible to any corresponding 'control' through the system of TVG registration. Where land has been developed according to a permission (and that development often includes areas of land that are not actually built upon such as the Application Land in this case) that land is thereafter permanently controlled by the planning regime and is removed altogether from the purview of the TVG legislation.

16. Section 16(4) of the GAIA states that "*for the purposes of the application of section 15C of the Common Act 2006 …, it does not matter whether a [trigger event] … occurred before, on, or after the commencement of [that] section*" on 25 April 2013. Accordingly, any trigger event, whether it occurred before or after the

enactment of section 15C of the 2006 Act, is effective to remove the right to apply for registration of a new TVG.

17. In Defra "*Guidance to Commons Registration Authorities in England on Sections 15A to 15C of the Commons Act 2006*" (December 2016), at paragraph 102 in response to the question "*what happens where a trigger event occurred on land prior to the commencement of the new legislation?*" the answer states "*the right to apply is excluded in relation to that land. It does not matter how long ago a trigger event occurred prior to the commencement of section 15C – if no corresponding terminating event has occurred in respect of that land since the trigger event, then the right to apply for registration of a green is not exercisable*".

18. For completeness, Gadsden & Cousins on Commons and Greens, 3rd Ed (2020), at paragraph 15-20 states "*A trigger event which occurred before the commencement of s.15C, indeed many decades before, would still be valid ... A terminating event generally arises where the proposal in no longer live ... If planning permission is granted and implemented, then there is no terminating event and the right to apply to register the land as a green under s.15(1) is permanently excluded ...*".

19. Turning now to consider whether a trigger event has actually occurred in this case. There are two points that are important to note. First, the trigger event identified above and which is potentially applicable in this case is not the actual grant of planning permission but the first publication of an application for planning permission in relation to land. Second, the reference to the planning legislation in Schedule 1A is to applications made pursuant to the Town and Country Planning Act 1990 ("the 1990 Act").

20. The planning application with which this case is concerned pre-dates the 1990 Act. The planning application pursuant to which the Planning Permission was granted was made under the Town and Country Planning Act 1971 ("the 1971 Act"), the predecessor legislation to the 1990 Act. On the face of it, if a trigger event that occurred prior to the enactment of section 15C is still effective to invoke section 15C, any distinction between the 1990 Act and its predecessor

legislation ought not to be material, notwithstanding that Schedule 1A specifically refers to the 1990 Act.

21. Further, section 2(1) of the Planning (Consequential Provisions) Act 1990 provides that "*The substitution of the consolidating Acts for the repealed enactments does not affect the continuity of the law*". Section 2(2) says "*Anything done or having effect as if done under or for the purposes of a provision of the repealed enactments has effect, if it could have been done under or for the purposes of the corresponding provision of the consolidating Acts, as if done under or for the purpose of that corresponding provision*".

22. The effect of the foregoing is that the publication of a planning application under the 1971 Act (a repealed enactment) is to be regarded as if done under the 1990 Act (a consolidating Act). Section 65 of the 1990 Act replaced section 26 of the 1971 Act in terms of publicising a planning application. That which was done under section 26 in relation to publicising the 1975 planning application which resulted in the granting of the Planning Permission is, by reason of section 2(2) of the Planning (Consequential Provisions) Act 1990, to be taken as having been done under section 65 of the 1990 Act.

23. The only 'gap' in the material before me is an evidential one and relates to proof of publication of the 1975 planning application (or lack thereof): the trigger event. However, publication of a planning application was a requirement in respect of any planning application under the 1971 Act and ought to have preceded the consideration of the application and the grant of any permission. I am satisfied that in this case the 'presumption of regularity' fills the evidential gap.

24. In *Calder Gravel Limited v Kirklees MBC* [1990] 60 P & CR 322, 338-339, Sir Nicholas Browne-Wilkinson VC said "*... in certain cases the law raises a presumption ... it is normally known by its latin tag ... [but] I propose to call it "the presumption of regularity". The presumption is that when there has been a long term enjoyment of a right which can only have come into existence by virtue of a grant or*

some other legal act, then the law presumes, in the absence of proof to the contrary, that there was a lawful origin ... The ... presumption of regularity can arise where the validity of an act done by a public authority depends on the existence of a state of facts that cannot, with the passage of time, be proved. The presumption is that the statutory authority has acted lawfully and in accordance with its duty ...".

25. Accordingly, absent evidence to the contrary, I am satisfied that the planning application which resulted in the grant of the Planning Permission was advertised in accordance with the provisions of the 1971 Act that was in force at the time of the application.

26. In light of the foregoing I consider that a trigger event occurred under paragraph 1 of Schedule 1A to the 2006 Act when the planning application which gave rise to the Planning Permission was first publicised. The result is that section 15C of the 2006 Act applies and the Applicant is not entitled to make the Application. On that basis alone the Application should in my view be rejected.

The By Right Issue

27. Turning now to this, the second issue identified in paragraph 4 above. I should just say that my conclusion on the By Right Issue is, in my view, immaterial given my conclusion that the Applicant had no right to make the Application. I am only considering it because I have been expressly instructed to do so, irrespective of my conclusion on the Trigger Event Issue.

28. If use has been 'by right', as distinct from 'as of right', the Application must fail; user 'as of right' being one of the components of the statutory test that must be satisfied. User that is 'as of right' is use that must be, or have been, without force, without stealth and without permission (*nec vi, nec clam, nec precario*). User that is 'by right' is necessarily use by permission (whether express or implied) and cannot, therefore, constitute user 'as of right'.

29. By way of background, at Appendix 5 of the Application [A17] is a statement by the Chairman of the Applicant wherein it is stated "… *when we bought our house in 1979, we were told by the salesperson that the land would be designated as open space. This did happen when Woodspring District Council designated the land which was meant to be transferred from Comben (now Persimmon) to the Council as soon as the development was complete. Due to the Legal Departments at Avon County Council and Woodspring District Council not actually completing the paperwork this did not actually happen at that time. However, it was obviously meant to, as Woodspring and subsequently North Somerset Councils continued to mow the grassed area regularly …*".

30. As noted at paragraph 6 above, the Application Land was identified on the planning application documentation as "*public open space*", both the local planning authority and the landowner intending that it would be kept as open space available for use by the public.

31. It is common ground, as noted in the Agreed Summary of Facts [E1-E3], that "*the Council maintained the land for many years despite it being in private ownership, with some interruption in the 1980s when the proposed transfer [of the Application Land] did not take place. The land included a play area with play equipment … The Council has inspected and maintained the play equipment…*". I have certainly seen some evidence of maintenance by the Council in the form of the Grounds Maintenance Contract for the period 31 January 2005 to 30 January 2010 [B20-B21]. There are also some play area inspection records from 2009 [B69] and 2021 [B70]. Further, I accept, as agreed between the parties, that the maintenance of the Application Land was carried out by the Council since the time that the development was completed save for a short period in the 1980s.

32. Whilst the majority of people completing evidence questionnaires ("EQs") said they did not know who the owner of the Application Land was, a number did

surmise or state that a Council[1] was the owner. That is perhaps not very surprising if they were aware that a Council was maintaining the same through its mowing programme and maintenance of the children's play equipment. A limited number also referred to it being "*common land*" or "*public open space*".

33. It is clear from the large volume of user evidence that the Application Land has been well used by a large number of people and there has not been anything to prevent them from gaining access to the Application Land or telling them to keep off or that it was private property. On the contrary, the provision of young children's play equipment and the regular mowing of the grass would tend to suggest that people were welcome to use the land for recreation which was entirely consistent with the intention that, through the Planning Permission, the Application Land would be kept as open space.

34. Against that background it is necessary to consider the legal principles that apply to an assessment of whether the public's use of the Application Land was permitted. This is not a case in which the public appear to have been expressly permitted to use the Application Land for recreation, either by statutory designation or appropriation or by expressly communicated permission. This is, however, a case in which it is necessary to consider whether there was any implied permission for the public to make recreational use of the Application Land.

35. A useful starting point, which goes back to first principles, is a passage from the speech of Lord Walker in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70 ("*Lewis*") where he said that if a right is going to be obtained by prescription (long use) the persons claiming that right "*must by their conduct bring home to the landowner that a right is being asserted against him so that the landowner has to choose between warning trespassers off, or eventually finding out that they have established the asserted right against him*".

[1] I say "*a Council*" to reflect the fact that there were references to "*the Council*", "*Nailsea Council*", "*Nailsea Town Council*", "*North Somerset Council*" and "*Woodspring*".

36. In *Naylor v Essex County Council* [2014] EWHC 2560 (Admin) ("*Naylor*"), in respect of which decision permission to appeal was refused [2015] EWCA Civ 627, John Howell QC, sitting as a Deputy High Court Judge, stated at [29] in respect of private land that had been maintained by the local authority, that "*There is no doubt that permission to use land may be communicated by conduct. As Lord Bingham stated in R (Beresford) v Sunderland City Council [2003] UKHL 60, [2004] 1 AC 889 ay [5], "a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission'. In that case the registration authority considered that the use had been "by right", by virtue of an implied licence, as the Development Corporation, the Commission for New Towns and then the City Council had maintained the land in question by keeping the grass cut and maintaining perimeter seating and it would have been perceived as a recreational area provided for the use by the public for recreation. This reasoning was regarded by the Supreme Court in Barkas supra as "unimpeachable in common sense and in law" (when finding that the decision in that case by the Appellate Committee was wrong) ...*".

37. At [30] (in *Naylor*) he continued "*In this case the District Council did at least as much by way of management and maintenance as the public authorities did in Beresford ... The Inspector found that the relevant land had been maintained by the District Council "as something which looked like, and was de facto available as, a piece of public open space or park land, or indeed a town or village green" and that "it was unsurprising ... that several witnesses for the Applicant said that (until recent times) they had believed that the land was in fact owned by the Council, as some kind of common or public amenity land*".

38. I note that in correspondence the Applicant said that *Naylor* and *Beresford* do not apply to privately owned land [C15]. That is not correct. *Naylor* did involve private land and as is clear from the foregoing extract, management by a public authority of privately owned land can give rise to implied permission so that

use by members of the public is 'by right' rather than 'as of right'. It will, of course, depend upon the circumstances of any given case.

39. As well as many local inhabitants having said they thought a Council owned the Application Land, there was the perception by some that the Application Land was common land or public open space. The beliefs of those using the Application Land as to whether or not they were entitled to do so cannot influence any determination as to whether user was 'by right' of 'as of right', *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 [D1-D14]. However, this reaction by users does indicate that the way in which the land was presented to the public (whether through maintenance, the provision of play equipment, or some other feature) conveyed a message to the local residents that their use was permitted.

40. In the circumstances of this case I return to the passage from *Lewis* at paragraph 34 above and ask myself whether the landowner, the Objector, was faced with a situation in which it had to choose between having a right established against it or having to warn off the users as trespassers. Given that the Planning Permission expressly recognised the Application Land as "*Public Open Space*" and the Council had regularly maintained and indeed on occasion improved the Application Land (by the provision of play equipment and picnic tables), that state of affairs in my view conveyed a very clear message to the local inhabitants, that those using the Application Land for recreation were doing so pursuant to an implied permission. It is inconceivable, in my view, that the Objector ought to have objected to the public's use in order to prevent a right being established against it.

Conclusion

41. It will be clear from the foregoing that in my view, on the Trigger Event Issue, I consider there to have been a trigger event and that should be an answer to

the Application, the Applicant having no right to make the Application on account of the operation of section 15C of the 2006 Act.

42. Had I not considered there to have been a trigger event I would have taken the view, and so advised the commons registration authority, that use by local inhabitants had been 'by right' and therefore incapable of meeting the statutory requirement under section 15 that user was 'as of right'.

43. I recommend that rather than refusing the Application on substantive grounds (ie on the By Right Issue), the commons registration authority ought to reject the Application on the ground that the Applicant had no right to make the Application at all.

ROWENA MEAGER
No 5 Chambers
30 August 2023