

IN THE MATTER OF SECTION 15 OF THE COMMONS ACT 2006

AND IN THE MATTER OF AN APPLICATION TO REGISTER STOKE LODGE, BRISTOL, AS  
A TOWN OR VILLAGE GREEN

COMMENTS FROM BRISTOL CITY COUNCIL FOLLOWING ON FROM THE REPORT OF  
THE INSPECTOR MR. PHILIP PETCHEY INTENDED TO BE SUBMITTED TO THE PUBLIC  
RIGHTS OF WAY COMMITTEE ON 12 DECEMBER 2016

1. This documents deals with three matters arising from the report of Mr. Philip Petchey dated 14 October 2016, supplied to the applicants and objectors on 20 October 2016. They are:

- (i) Typographical corrections.
- (ii) Deferment of decision.
- (iii) Implied license argument.

2. Typographical corrections

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3. Deferment of decision

The applicant suggests (e-mail 7 November 2016) that the decision to be taken by PROWG should be deferred, on the basis that the recent decision of the court of appeal in Winterburn v. Bennett changes the law decisively as far as the advice is concerned; that he would wish to challenge that decision; and that precedent has been set by the postponement of the Inquiry to await the final decision in Newhaven.

The objector submits that there is no good reason for deferring the decision. It is the duty of a registration authority to apply the statutory test under section 15 of the Commons Act by applying the law as it is. In coming to that conclusion the registration authority have been advised as to the effect of the law (including the decision in Winterburn) by Mr. Petchey. Unless the registration authority disagrees with Mr. Petchey's expert report, they should follow it and make their decision. Secondly, the applicant has no right to challenge the law as laid down in Winterburn directly. He is not a party to that case, and so has no standing or ability to appeal the decision. Thirdly, it appears from the applicant's e-mail that he intends to challenge Winterburn before the authority makes its decision. But the applicant has no right to challenge the legal principle established by Winterburn until the registration authority has made its decision on the applicant's application over Stoke Lodge. If it does so, and follows Mr. Petchey's advice then the applicant (or indeed anyone else affected) can seek to challenge the decision in the Courts. But such a challenge requires a decision to be made by the authority first.

The steps taken by the Inspector as regards the Newhaven decision are not relevant or analogous. The inquiry was adjourned because the decision was in

the process of being appealed, to await the outcome of the pending appeal. There is (we understand from enquiring of counsel in the case) no pending appeal in Winterburn, which decision therefore represents the law at Court of Appeal level, and will continue to do so until such time in the future as it may be overturned either by the Supreme Court in some other case, or by the Court of Appeal if it considers that one of the rare circumstances arises that permit it to depart from its earlier decisions (see Young v. Bristol Aeroplane Co. [1944] KB 718). That is the case with any decision of the Court of Appeal, and the authority should follow and apply the law as laid down.

#### 4. Implied License argument

In the course of its objection the Council raised an alternative argument that, if the use of the land by the public was not contentious, it would have been apparent that it was taking place under an implied license (see the Council's Final Submissions, paras.82-96 (section 6)). This argument does not appear to have been specifically considered by Mr. Petchey (although he has concluded that no other arguments in opposition to the would be successful – Report at para. 461 – that refers to other arguments raised). Given that Mr. Petchey has concluded that the public's use was contentious, and hence not as of right in any event, the matter is presently not worth further consideration.

If however the authority were to decide, notwithstanding Mr. Petchey's report, that it should register this land as a Town or Village Green, then the Council as objector reserves its right to challenge that decision on the basis that the

authority had failed to consider the issue or (we would say) apply the principles there set out, such that it should have rejected the application for that reason.