

ITEM 7

REGULATORY COMMITTEE

2 DECEMBER 2015

APPLICATION TO REGISTER LAND AT WUGHTON ON THE GREEN, MILTON KEYNES AS A VILLAGE GREEN UNDER THE PROVISIONS OF SECTION 15 OF THE COMMONS ACT 2006.

Contact Officer: - Andrew Burton (Rights of Way Officer) 01908 252406.

Recommendation: -

That having considered the Inspector's report (Annex A) the application for Land at Woughton on the Green ("the Land") to be registered as a Town and Village Green pursuant to Section 15 of the Commons Act 2006 ("the 2006 Act") be refused.

Report Purpose

1. The purpose of the report is to present to the Committee the above report of the Inspector further to the Public Inquiry held on the 27th & 28th October, in order that the Committee may determine the application for the Land to be registered as a Town or Village Green under Section 15 of The Commons Act 2006 ("the 2006 Act").
2. The application was made by Dr Andrew Humphries ("the Applicant"). The application was accompanied by 57 evidence questionnaires.
3. The application was accepted by the Council as the relevant Commons Registration Authority (Section 4 of the Commons Act 2006 (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007) ("the 2007 Regulations") on the 18th March 2014.
4. On the 8th July 2015 the Committee resolved that an Independent Inspector be appointed to conduct a short non statutory Inquiry to examine whether in his opinion the use was 'as of right' and to prepare a report to be considered by the Regulatory Committee.

The Land

- 5 The application land is part of a "multi sports site" known as Woughton Sports Ground. It forms part of a wider network of linear parks that were laid out by Milton Keynes Development Corporation during the development of the New Town. The site is bounded by Newport Road to the West, Standing Way (H8) to the South and East and by the Ouzel Valley Park to the North.

The Law

- 6 Under Section 15 (1) of the 2006 Act, anyone may apply to a Commons Registration Authority to register land as town or village green. In order for the land to be so registered a significant number of the inhabitants of a locality, or of any

neighbourhood within a locality, must have indulged, as of right, in lawful sports and pastimes on the land for a period of at least 20 years; and

- i. they continue to do so at the time of the application; or
- ii. they ceased to do so before the time of the application but after 6th April 2007 and the application has been made within two years of the cessation; or
- iii. they ceased to do so before 6th April 2007 and the application has been made within five years of the cessation unless planning permission was granted before 23rd June 2006 in respect of the land, construction works were commenced before that date in accordance with that planning permission, and such works render, or will render, that land permanently unusable by members of the public for the purposes of lawful sports and pastimes.

It is necessary for all of these criteria to have been met before a registration authority can register land as a town or village green

7. Thus the applicant must establish the following:

- i. that there is a locality or neighbourhood within a locality;
- ii. From which a significant number of the inhabitants have used the land for lawful sports or pastimes;
- iii. that the use is as of right;
- iv. that the use has been for a period of not less than twenty years ending on the date of application or ending no more than two years before that date

Locality or Neighbourhood

8. Although the term 'locality' is not defined in the 2006 Act, it is considered that 'at common law a customary right to indulge in lawful sports and pastimes could exist only for the benefit of legally recognised administrative division of the county'. (*Cheltenham Builders Ltd, R (on the application of) v South Gloucestershire District Council [2003] EWHC 2803 (Admin) (10 November 2003)*). Thus a locality should be a legally recognised administrative area, such as civil parish or an electoral division.
9. A neighbourhood does not have to be a legally recognised area. It may be defined by an area drawn on a map, but the area must have a 'sufficient degree of cohesiveness, otherwise the word 'neighbourhood' would be stripped of any real meaning.' (*Cheltenham Builders, as above*).

Significant Number of Inhabitants

10. 'Significant' does not mean considerable or substantial, but the land must be 'in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.' (*R v Staffordshire County Council, ex parte Alfred McAlpine Homes, LTL 17/01/02*).

Lawful sports or Pastimes

11. Dog walking (as long it is over the whole of the land and not confined to specific routes) and playing with children are examples of lawful sports and pastimes. There is no need to show both sports **and** pastimes and no need for communality. (*R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 AC 335*).

As of Right

12. 'As of right' reflects the common law concept *nec vi, nec clam, nec precario*, that is without force, secrecy or permission. There is no requirement that the users believed that they had a right to use the land but that the land is used by the inhabitants of the locality in such a way as to 'suggest to a reasonable landowner that they believed they were exercising a public right'. The use must be more than trivial or sporadic (*R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2001] 1 AC 335*).
13. Likewise, tolerance by a landowner is not fatal to a claim 'as of right' (See *R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2001] 1 AC 335*). The law draws a distinction between an owner's acquiescence in/or toleration of the use of his land by other lawful sports or pastimes and his giving licence or permission for its use. The giving of permission must involve some overt and contemporaneous act by the landowner, such as the erection of signs or notices, whereas toleration may be merely passive (see *R (on the application of Beresford), the City of Sunderland [2004] 1 A.C. 889, known as the Beresford case*).
14. In any event, the use must have taken place openly and in the manner that a person rightfully would have used it (*R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2001] AC 335*).

For Twenty Years

15. As stated in paragraph 5, Section 15 allows a period of grace between the ending of the twenty years' use as of right and the date of the application. Periods of statutory closure (e.g. for a foot-and-mouth disease outbreak) do not provide an interruption to such use.
16. All the relevant statutory provisions and competing rights and interests have been considered in making this report. The recommendation is in accordance with the law and proportionate, having regards to individuals' rights and the public interest.
17. The 2007 Regulations provide that the registration authority must consider every written statement in objection to an application which it receives before the advertised deadline for objections; and may consider any such statement which it receives on or after that date and before the authority finally disposes of the application. It must send the applicant a copy of every statement which it will consider. The registration authority must not reject the application without giving the applicant a reasonable opportunity of dealing with the matters contained in any statement of which copies are sent to him; and any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application.

18. The burden of proof lies on the applicant, who must prove that all the requirements are satisfied. The standard of proof is the civil one, that is, on the balance of probabilities.
19. If there are conflicting representations on matters of fact then it is entirely appropriate to proceed to arrange a non-statutory public Inquiry, presided over by a suitably qualified independent inspector, who would consider the evidence with the benefit of cross examination. After the Inquiry, the inspector will provide a report and a recommendation to the registration authority. This practice has been strongly supported by the Court of Appeal in *R o.a.o (Whitney) v Commons Commissioners [2004] E W C A Civ 951* where Waller L J (with whom Arden L J agreed) stated:

“there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration.”

Effect of Registration

20. Once land has been registered as a town or village green by the Commons Registration Authority it is subject to the same statutory protections as all other registered greens. Local residents will have a guaranteed legal right to indulge in sports and pastimes over it on a permanent basis. Registration as a town or village green is irrevocable and so land must be kept free from development and other encroachments. Any subsequent disposal by the registered freeholder does not alter the right of recreational use.

Human Rights Act 1988 implications

21. Article 1 of the First Protocol concerns the non-interference of the peaceful enjoyment of private property. This right is subject to conditions and interference with this right may be permitted if the need to do so is proportionate. While registration of privately owned property could potentially breach Article 1, the Council is required under primary legislation to determine village green applications.

The Evidence Submitted with the Application

22. As set out above, it is necessary for the applicant to have met all the criteria under S.15 (1) of the 2006 Act before the Registration Authority can register land as a town or village green. However, at Regulatory Committee on 8th July 2015, members resolved that an independent Inspector be appointed to examine the ‘as of right’ criterion. This was to assess whether there was a knock out legal blow on this point alone and whether the application should be refused on this basis.

As of Right

23. There is no evidence of any enclosure of the land or of any forceful entry by the residents. There is no suggestion of any secret use. Users indicated that they had not sought anyone’s permission to use the land nor did they believe it necessary to do so.

Objections

24. The land is owned by Milton Keynes Council who objected to the application. On the criteria relating to 'as of right' the objector stated that:

"That the use has been 'by right' rather than 'as of right'"
25. The Inspector was appointed to determine as to whether the use of the land has been 'as of right'.
26. The Inspector's report outlining his conclusions and providing his findings in light of all the evidence heard at Annex A to this report.
27. In summary he states that the evidence put forward by the Applicant is insufficient in degree to meet the 'as of right' test, namely that the Statutory Test is not satisfied.

Conclusion

28. The Inspector having considered all of the written evidence submitted and having listened to the oral evidence presented at the Inquiry he concluded that: -

'The application land has been used by right, not as of right. Or it has been used by local people under an implied permission granted by the Council.'
29. The Council as Registration Authority accepts the conclusion of the Inspector and recommends that the application be refused because the Applicant has been unable to satisfy the statutory requirement that use of the land has been 'as of right' consequently the Application fails in its entirety.