

## Highways Committee

8 October 2019

Application NL43 for Village Green  
Registration – Romaldkirk



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## Report of Helen Lynch, Head of Legal and Democratic Services

### Electoral division(s) affected:

Barnard Castle West

### Introduction

1. The Council is the registration authority for Town and Village Greens (TVG) under the Commons Registration Act 1965 and the Commons Act 2006 and the function of determining TVG applications falls to the Highways Committee under the Council's Constitution. The Council must act impartially in its determination of TVG applications.

### Purpose of the Report

2. To advise the Committee in determining an application to register land at Romaldkirk, County Durham as a Town or Village Green, under the provisions of the Commons Act 2006.

### Executive summary

3. An application was made to the Council on behalf of Romaldkirk Parish Council to register a parcel of land at Romaldkirk as a village green (the Application).
4. Members of the Highways Committee resolved on 13 September 2018 that the Application should be considered by an independent inspector (Inspector) at a non-statutory public inquiry.
5. The public inquiry was held on 30 April and 1 May 2019. The Inspector has now produced her report making recommendations in respect of the Application.
6. Members of the Highways Committee are now asked to determine the Application.

### Recommendation

7. It is recommended that (for the reasons outlined in this report) Members resolve to **REFUSE** the Application to register the Application Land as a Town or Village Green.

## Background

8. The Application was made by Romaldkirk Parish Council, acting through its chair, Lesley Cutting (the Applicant). A copy of the Application, excluding the supporting user evidence, is attached at **Appendix 1**.
9. The Application was dated 11 September 2016 and was accompanied by a plan showing the area claimed as town or village green (the Application Land) as well as 2 statements in support from users of the claimed TVG. The Application Land is shown edged and hatched in red at **Appendix 2**. The Application was given the reference number NL43 by the Council.
10. A copy of all of the user evidence submitted in support of the Application is attached at **Appendix 3**.
11. As required by Regulations, notice of the Application was published on the Council's website and in the Teesdale Mercury newspaper and a site notice was also erected.
12. Notice of the Application was also given to the owner of the Application Land and a copy of the Application was also placed on deposit with Romaldkirk Parish Council, for public access.
13. Five objection letters were received in respect of the Application. Copies of the letters of objection are attached at **Appendix 4**.
14. The Applicant was given an opportunity to comment upon the objections received and on 19 February 2017 10 further letters in support of the Application were submitted. Copies of these letters are attached at **Appendix 5**.
15. On 11 May 2018 and 2 July 2018, the solicitor acting on behalf of the Commons Registration Authority wrote to both the Applicant and the occupants of the property adjacent to the Application Land. The letters expressed concerns in respect of the use of the Application Land and invited further representations. Copies of these letters are attached at **Appendix 6** and the 1930 Deed is attached at **Appendix 7**.
16. On 27 July 2018 the Applicant submitted 10 further statements in support of the Application together with an Opinion from a barrister responding to the issues raised in the letters. Copies of the further statements are attached at **Appendix 8** and the Counsel's Opinion is attached at **Appendix 9**.
17. On 13 September 2018, this Committee, having considered the evidence submitted, resolved to delegate authority to the Head of Legal and Democratic Services to instruct an independent specialist barrister to hold a non-statutory public inquiry to consider the Application and thereafter prepare a report to Members of the Highways Committee setting out her recommendation(s) to Members in respect of the Application.

18. Ruth Stockley, a specialist TVG barrister was appointed as the Inspector and a public inquiry was held at the Witham Centre, Barnard Castle on 30 April and 1 May 2019.
19. All interested parties were given the opportunity to give oral evidence at the public inquiry.
20. Following the conclusion of the public inquiry, the Inspector produced her report for members of the Highways Committee. A copy of the report is attached to this report at **Appendix 10**.

## **Main implications**

21. The decision on the Application is a matter for this Committee having had regard to all relevant information before it.

## **The Law**

### **The Commons Act 2006**

22. The Commons Act 2006 is the statutory regime governing village greens. Section 15 of the Act sets out the requirements which must be met if the Application Land is to be registered as a TVG. The determination of the Application must focus on whether a village green has come into existence as a matter of law.
23. The Application was made under section 15(1) of the Commons Act 2006 which states that:

*“Any person may apply to the Commons Registration Authority to register land... as a town or village green if subsection (2)... applies.”*

Subsection 2 provides that a TVG has come into existence 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 or 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.”*

24. The definition in Section 15 can therefore be broken down into the following six elements:

24.1 “...a significant number...” – Significant does not necessarily mean substantial or considerable in number. It is necessary to show a general use by the local community as opposed to mere occasional use by trespassers. That is not assessed by a simple headcount of users. There is no need for an applicant to demonstrate a geographical spread of users within the locality.

- 24.2 “...of the inhabitants of any locality...” – This is not defined by any arbitrary margins but must be a recognised county division such as a borough, parish or manor, therefore an ecclesiastical parish can be a locality as required by section 15(2).
- 24.3 “...or any neighbourhood within a locality...” – A neighbourhood must be clearly defined and have a sufficient cohesiveness. It must also be within a locality.
- 24.4 “...have indulged as of right...” – Use “as of right” is use without permission, secrecy or by force. The key issue in user ‘as of right’ is not the subjective intentions of the users but how the use of the land would appear, objectively, to the land owner. Use is “as of right” if it would appear to the reasonable landowner to be an assertion of a right. Permission by the land owner, perhaps in the form of a notice on the land, would mean that the use is not as of right. Equally, use by force, such as where the user climbs over a fence or other enclosure to gain access to the land would not be use as of right. An example of a secret use could be where the use takes place exclusively under the cover of darkness such that it would not be reasonable to expect a landowner to become aware of it.
- 24.5 “...in lawful sports and pastimes on the land...” – This is very broadly interpreted so that general recreational use including walking with or without dogs, children’s play, playing games, picnicking, camping etc would all be included. However, it is important to distinguish mere use or assertion of a public right of way from use for lawful sports and pastimes. The Courts have said that if use could give rise to a public right of way, then whether it should be regarded as mere use/assertion of a public right of way or a qualifying lawful sport/pastime will depend upon how such use would have appeared to a reasonable landowner.
- 24.6 “...for a period of at least 20 years...” – The fulfilment of the 20 years continuous use must immediately precede the date of the application.

### **Burden and Standard of Proof**

25. In order for an application to be successful each aspect of the requirements of section 15(2) must be strictly proven and the burden of proof in this regard is firmly upon the Applicant. The standard of proof to be applied is ‘on the balance of probabilities.’ Therefore, the Applicant must demonstrate that all the elements contained in section 15(2) of the Commons Act 2006 have been satisfied.
26. It is instructive when deciding if an applicant has discharged the burden of proof to have regard to the words of Lord Bingham in **R v Sunderland City Council ex parte Beresford [2004]** as follows:

*‘It is no trivial matter for a landowner to have land, whether in public or private ownership registered as a town green...It is accordingly necessary that all ingredients of the definition should be met before land is registered and decision*

*makers must consider carefully whether the land in question has been used by inhabitants of the locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met.'*

### **Assessment of the Evidence in respect of the Application**

27. The Inspector thoroughly assessed the Application and has tested the evidence at a public inquiry. Applying each of the elements of the Section 15 definition to the facts of the application the Inspector has concluded as follows:

#### **The Land**

28. The Application Land is identified on the map attached at **Appendix 2**. The Application Land has clearly defined and fixed boundaries, and there was no dispute at the Inquiry nor in any of the evidence adduced that that area of land comprises "land" within the meaning of section 15(2) of the 2006 Act. The Inspector therefore concluded that the Application Land was 'land' for the purposes of section 15(2) of the Commons Act 2006.

#### **Relevant 20 Year Period**

29. The Inspector found that the relevant 20-year period for the purposes of section 15(2) was October 1996 until October 2016.

#### **Locality or Neighbourhood within a Locality**

30. The Application Form confirmed that the 'locality' or 'neighbourhood within a locality' relied upon in respect of the Application was "Romaldkirk, Barnard Castle". At the Inquiry, it was confirmed that the Applicant relied upon the locality of Romaldkirk, rather than on a neighbourhood.
31. The Inspector found that Romaldkirk is a village and a parish. As such, it is a recognised and established administrative area with fixed and identifiable boundaries, namely the Parish Council boundaries, and is an area known to the law. The Inspector noted that there was no dispute at the Inquiry that Romaldkirk amounts to a 'locality'. Consequently, she found that Romaldkirk was a qualifying locality for the purposes of section 15(2) of the 2006 Act.

#### **Use of Land for Lawful Sports and Pastimes**

32. The Inspector considered whether the Application Land had been used for lawful sports and pastimes during the relevant 20-year period.
33. Having considered all of the evidence, the Inspector concluded that the Application Land had been used for some recreational activities by local inhabitants of Romaldkirk during the relevant 20-year period.
34. The Inspector had regard to the objector's evidence that they and their family and friends have used the Application Land for recreational activities from time to time. As they are not the owners of the Application Land and are local

inhabitants of Romaldekirk, their use is properly regarded as part of the qualifying use. Further, it was acknowledged by the Inspector that the Application Land had been used post June 2016 by local residents, which is within the relevant 20 year period.

35. Having considered the totality of the evidence of the use of the Application Land, the Inspector found that the use of the Application Land was sufficient to demonstrate that some lawful sports and pastimes have taken place on the Application Land in the relevant 20-year period within the meaning of section 15(2) of the 2006 Act.

### **Use of Land for Lawful Sports and Pastimes by a Significant Number of the Inhabitants of the Locality for at least 20 Years**

36. In assessing the extent of the use of the Application Land, the Inspector discounted any non-qualifying uses. Such use included uses which took place outside the relevant 20-year period.
37. The Inspector found that, having heard the evidence, the primary use of the Application Land had been for dog walking, with the vast majority of users simply walking across the Application Land as part of a longer walk.
38. The Inspector afforded particular weight to the fact that no witness gave evidence that they had used the Application Land as a destination for dog walking. There was no evidence of anyone going to the Application Land to walk their dog round the edge of it a few times, or of throwing a ball for their dog on the Application Land, or otherwise exercising their dog on the Application Land for any period of time other than to walk across it to continue their walk.
39. The Inspector also found that it was necessary to treat some of the written evidence that the Application Land has been used for dog walking with some caution because the impression she gained from the evidence of witnesses in relation to dog walking on the Application Land was that in a number of instances the user walked on the road whilst the dog wandered off onto the Application Land in the course of the walk.
40. In addition, the Inspector found that the use of the Application Land for dog walking, despite being the primary recreational use of the Application Land, was nonetheless relatively limited in terms of both the number of users and the very short period of time users would spend on the Application Land in the course of crossing it.
41. The Inspector found that there was a distinct lack of any evidence that the Application Land was used as a destination by any walkers to walk around or to spend time experiencing its amenity. She found that the very nature of the Application Land and its location in relation to Sennings Lane is such that it would be expected that people would walk over it from time to time simply to cut that corner.

42. In conclusion the Inspector found that some of the use of the Application Land for walking and dog walking was more akin to the exercise of a right of way than the exercise of a right to recreate over the Application Land.
43. As a result, the Inspector felt that the majority of such use ought to be discounted accordingly. However, even if none of such use is so discounted, it was the Inspector's opinion from the evidence, that the use of the Application Land for walking, whether with or without dogs, was very limited both in frequency and the amount of time users were on the Application Land.
44. The Inspector also considered the evidence that at times, the Application Land was difficult to access due to the planting which existed at times which fell within the relevant 20-year period.
45. As such, the Inspector considered that although it may still have been physically possible to access the Application Land, the use of the Application Land for walking significantly declined for a material period of time during the relevant 20 year period.
46. The Inspector also considered that the other uses of the Application Land such as horse-riding, personal training or children's play. Taking all the evidence in its totality, both oral and written, in relation to all the claimed recreational uses of the Application Land during the relevant 20-year period, it was the Inspector's firm view that the qualifying use over the 20-year period was, at its highest, irregular and sporadic rather than of such a nature that would indicate to a landowner that recreational rights were being asserted over the Application Land. Consequently, she found that it has not been demonstrated that the qualifying use was by a significant number of the inhabitants of the locality of Romaldkirk throughout the relevant 20-year period, and concluded that that element of the statutory criteria has not been established.

### **Use as of Right**

47. The Inspector also considered whether the use of the Application Land had been "as of right" during the relevant 20-year period, namely without stealth, without force and without permission.

#### *Nec clam*

48. There was no suggestion in any of the evidence that any of the use was by stealth. On the contrary, the Inspector found that the use which occurred was carried out openly during daylight hours and without any element of secrecy. She therefore found that the use of the Application Land relied upon in support of the Application had been *nec clam*.

#### *Nec vi*

49. The Inspector found that there was no evidence that the qualifying use itself which took place was carried out with force, such as by climbing over a fence or being contrary to a sign or being contrary to challenges. She therefore found that

the use of the Application Land relied upon in support of the Application had been *nec vi*.

### *Nec precario*

50. The Inspector considered the effect of the Deed dated 4 September 1930.
51. The Inspector found that the 1930 Deed conferred rights of common on the villagers of Romaldkirk over a number of parcels of land, including the Application Land, comprising waste land of the Manor of Romaldkirk. It also conferred a right of access to the villagers to all such land. The Deed expressly provided that section 193 of the Law of Property Act 1925 applied to it. The rights of access to the Application Land under the Deed were enshrined in that provision. Section 193(1)(d)(i) provides that such rights of access shall cease to apply to any land over which the commonable rights are extinguished under any statutory provision. The commonable rights over the Application Land referred to in that Deed, and hence the rights of access, were extinguished on 31 July 1970 by virtue of section 1 of the Commons Registration Act 1965 as they were not registered by that date. Consequently, the Inspector found that the express permission for villagers to access the Application Land was extinguished by operation of the law on that date.
52. There was no suggestion in the evidence or submissions of any other express or implied permission being given for the use of the Application Land for recreational purposes. Therefore, the Inspector found that the use of the Application Land relied upon in support of the Application has been *nec precario*.

### **Continuation of Use**

53. The Inspector considered that the qualifying use was continuing as at the date of the Application.

### **Overall Conclusions**

54. The Inspector's overall conclusions were as follows:-
  - That the Application Land comprises land that is capable of registration as a town or village green in principle;
  - That the relevant 20-year period is October 1996 until October 2016;
  - That the locality of Romaldkirk amounts to a qualifying locality;
  - That the Application Land has been used for some lawful sports and pastimes during the relevant 20-year period;
  - That the use of the Application Land for lawful sports and pastimes has been carried out as of right;
  - That the Application Land has not been used for lawful sports and pastimes by a significant number of the inhabitants of the claimed qualifying neighbourhood throughout the relevant 20-year period; and

- That the use of the Application Land for lawful sports and pastimes continued up until the date of the Application.

55. In view of those conclusions, the Inspector recommended that the Committee should reject the Application and should not add the Application Land or any part of it to its register of town and village greens for the reasons contained in her report (and summarised in this report), and on the specific ground that the Applicants have failed to establish that the Application Land has been used for lawful sports and pastimes as of right by a significant number of the inhabitants of a locality or neighbourhood within a locality throughout the relevant 20-year period.

## **Conclusion**

56. The Inspector has carefully considered all of the evidence and has recommended that the Committee refuse the Application for the reason outlined in paragraph 55 above.

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## **Appendix 1: Implications**

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### **Legal Implications**

The decision may be challenged. However, steps have been taken to minimise this risk. All parties have been given full opportunity to make representations and appear at the Committee meeting. The Application has been assessed by an independent TVG barrister.

### **Finance**

N/A

### **Consultation**

All statutory consultation requirements have been complied with.

### **Equality and Diversity / Public Sector Equality Duty**

The Council's Public Sector Equality Duty has been considered. No impacts have been identified.

### **Human Rights**

The recommended decision is in line with domestic legislation and is Human Rights Act compliant. The parties have been afforded an opportunity to make representations and to speak at the Committee Meeting.

### **Crime and Disorder**

N/A

### **Staffing**

N/A

### **Accommodation**

N/A

### **Risk**

N/A

### **Procurement**

N/A