

**Application for Village Green  
Registration  
The Green, Esh Winning**

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**Report of Colette Longbottom, Head of Legal and Democratic  
Services**

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**Introduction**

- 1 The County Council is the registration authority for Town and Village Greens under the Commons Registration Act 1965 and the Commons Act 2006. The County Council must act impartially in its determination.

**Purpose of the Report & Background**

- 2 To advise the Committee in determining an application to register land at the Green, Esh Winning, as Town or Village Green, under the provisions of the Commons Act 2006.
- 3 The application was made by Mr John Wilkinson as chairman of the Friends of Esh Winning Village Green. A copy of the application, excluding the supporting user evidence, is attached at appendix 1. The application was received on 21 July 2009 by the County Council and was accompanied by a plan showing the area claimed as town or village green, a plan showing the locality or neighbourhood within a locality to which the claimed green relates together with 83 letters in support from householders of Esh Winning. The application was given the reference number NL32.
4. A copy of all of the user evidence submitted in support of the application attached at appendix 2. A spreadsheet summary prepared by Officers is also included.
5. As required by the Commons Registration (England) Regulations 2008, Notice of the application was published on the Council's website and in the Northern Echo newspaper.
6. The land subject of the application is owned by the County Council and following publication of the notice of the application, one objection was lodged by the Council's Asset Management section but this was subsequently withdrawn.
7. As there is now no objection to the application and no evidence has been put forward which is contrary to the evidence provided by the applicant, it was felt that there would be no need to hold a Non-Statutory Public Inquiry before Members determined the application. A Non- Statutory Public Inquiry is

usually only necessary where the evidence needs to be tested by cross examination such as where the landowner is opposing the registration.

8. The decision on this application is a matter for this committee. An assessment of the evidence submitted by the applicant has been undertaken by Officers and for the reasons set out in the remainder of this report, Officers are of the view that, with the exception of the footpath area, the statutory test for registration of the application land as a Town or village Green has been met by the applicant. Accordingly, the recommendation is that the land (excluding the footpath) be registered as a Town or Village Green.

## The Law

### The Commons Act 2006

9. Village greens which were not registered as such by July 31<sup>st</sup> 1970 ceased to be village greens and can only now gain that status through registration under the current statutory provisions. Registration brings about general recreational rights and other statutory protection which effectively precludes further development of the site.
10. The Commons Act 2006 is the statutory regime governing village greens and section 15 of the Act set out the requirements which must be met if the land is to be registered. Registration of village greens is determined by the County Council who are the Commons Registration Authority and the process of determination of any application is focused on whether a village green has come into existence as a matter of law.
11. The application in question was made under section 15(1) of the Commons Act 2006 which states that:

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

Subsection 2 states that:

*“a Village Green 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.”*

- 12 The definition in Section 15 can therefore be broken down into the following six elements:
  - 12.1 “...a significant number...” – It is necessary to show a general use by the local community as opposed to mere occasional use by trespassers. It is not assessed by a simple headcount of users.
  - 12.2 “...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). It is acceptable for the users to come “predominantly” from the locality as in ***Oxfordshire CC v Oxford City Council [2006]***.

- 12.3 “...or any neighbourhood within a locality...” – A neighbourhood must be clearly defined and have a sufficient cohesiveness. It must also be within a locality.
- 12.4 “...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. If the use of the land is not sufficient in terms of frequency or regularity to reasonably bring it to the attention of a landowner, then it may be a secret use which again would not be use as of right. Another 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.
- 12.5 “...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, picknicking, camping etc would all be included.
- 12.6 “...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**

- 13 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 the definition of a Village Green in section 15(2) of the Act have been satisfied.
- 14 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.’*

## **Application Land**

- 15 Plan 5a at Appendix 1 shows the area of land subject of the application, edged in red. This plan details an area of unenclosed land bounded to the North by Woodlands Road, to the East by New House Road, to the South by Ridding Road and to the West by Arbourcourt Avenue.
- 16 A Footpath runs over the land providing a pedestrian link from New House Road to Woodlands Road. Although not formally registered as a public footpath, it is likely that public footpath rights have accrued due to the length of time it has been used by the public. To the North East corner of the land (behind the Doctor's Surgery) a multi use games area and children's play equipment have been installed.

## **Ownership**

17. The land subject of the application is in the ownership of the County Council and is registered at the Land Registry under title numbers DU316474, DU316498, DU316518 & DU62111.

## **Assessment of Applicant's Evidence**

- 18 The Council is not in receipt of any evidence which would undermine or contradict the user evidence at Appendix 2 and accordingly, it must be taken on face value and afforded significant weight in the assessment of the application. It is clear that the land subject of the application has been used continuously for at least the 20 years immediately preceding the application in July 2009 for lawful sports and pastimes. It can also be said that the users are almost exclusively from Esh Winning itself. It is necessary to apply each of the elements of the Section 15 definition to the facts of the application as follows:

### *A Significant number*

- 18.1 It is not sufficient that a significant number of local people have used the land for lawful sports and pastimes. There must be a significant number of the users who originate from the whole of the neighbourhood drawn on plan 6a and not just a limited part of it. In that regard, it is to be noted that all of the users live within the area defined on plan 6a with the majority coming from Dene Park and Ridding Court. However, there is a consistent spread of users from other parts of the plan area such as Crowgill Court, Arbourcourt Avenue, Newhouse Avenue and Birch Place. There is therefore a proper distribution of users from the whole of the neighbourhood defined on plan 6a.

### *Inhabitants of the locality/neighbourhood within the locality*

- 18.2 Esh Parish (consisting of the wards of Langley Park, Esh, Quebec and Ushaw) is clearly a Locality. However plan 6a submitted with the application seeks to define a neighbourhood within that locality from which the users of the application land are drawn. The neighbourhood depicted on plan 6a includes Crowgill Court, Newhouse Avenue, Woodlands Road, Birch Place, Dene Court, Ridding Court, Arbourcourt Avenue, West View and Priestburn

Close. These are all residential parts of Esh Winning which may itself be regarded as a neighbourhood. What is shown on plan 6a is therefore a neighbourhood within a neighbourhood which can be conveniently referred to as 'central Esh Winning.' This neighbourhood of central Esh Winning is a cohesive area and is specifically defined on plan 6a, as required by the Act.

#### *Use as of Right*

18.3 The land subject of the application is unenclosed and there is no evidence that any notices seeking to control use have ever been erected on the land by or on behalf of the landowner. There can therefore be no question of use of the land by force. Furthermore, the use detailed in the user evidence is very substantial and is certainly sufficient to bring to the attention of the landowner that rights are being asserted. There can therefore be no question of use by stealth/secretcy. Turning to the issue of permission, there is no evidence that any of the users have ever sought or obtained permission to use the land from the landowner. Accordingly, the use of the land has been 'as of right.'

#### *Lawful sports and pastimes*

18.4 The range of activities undertaken on the application land include dog walking, walking, picnicking, BBQs, camping, tree climbing, blackberry picking, sledging, bike riding, playing of hide & seek, kite flying, bird watching, photography, playing of football, cricket, tennis, golf, & rounders and general playground use. These activities amount to either informal recreation or the playing of games and as such are lawful sports and pastimes.

#### *For at least 20 years and continuing*

18.5 Although the user evidence is that the land has been used from as far back as the 1940s and 1950s, the qualifying period for the purposes of the application is the 20 years immediately preceding the application i.e. July 1989 – July 2009. Approx 75% of those who have provided evidence cover this period and accordingly, there is ample evidence of use of the land during the relevant period and continuing up to the date of the application.

#### *Other issues – the footpath across the land*

18.6 It can be seen from plan 5a and the photographs submitted with the application, that a hard surfaced footpath bisects the application land running diagonally from the corner of Ridding Road and Newhouse Road to Woodlands Road. It is clear from the user evidence that this path is well used by the public to pass and repass, no doubt as a shortcut to the shops. Whilst the path is not recorded on the Council's Definitive Map & Statement (which is the document which formally records public footpaths), it has almost certainly acquired public status by reason of usage. However, such use cannot count as village green use as a landowner would consider the use of the footpath as attributable to its status or potential status as a public right of way rather than use for a lawful sport or pastime. As the applicant has not established use for lawful sports or pastimes over the route of the footpath, it must be excluded from any land to be registered as Village Green.

## **Overall Conclusions**

- 19 With the exception of the footpath over the application land, the applicant has discharged the burden placed upon him of proving on the balance of probabilities that:
- (a) The users are significant in number;
  - (b) The users come from a neighbourhood within a locality as defined on plan 6a;
  - (c) The use of the land which is the subject of the application was used and continues to be used as of right;
  - (d) The use of the land has been for the purpose of lawful sports and pastimes;
  - (e) There has been continuous use of the land for at least 20 years immediately preceding the date of the application.

### **Recommendation:**

- 20 That the area of land shown on plan 5a (excluding the footpath shown shaded blue) at Appendix 1 be registered as a Town or Village Green.

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