

**Application for Village Green
Registration
Belle Vue, Consett**

Report of Colette Longbottom, Head of Legal and Democratic Services

Introduction

1. The County Council is the registration authority (“the CRA”) for Town and Village Greens under the Commons Registration Act 1965 and the Commons Act 2006.

Background

2. In 2009 an application to register an area of land known as Belle Vue, Consett (“the Land”) as a Town or Village Green was submitted to the County Council on behalf of the Consett Green Spaces Group (“the Application”). A copy of the Application and supporting documentation is attached to this report as **Appendix 1**.
3. A plan showing the Land is attached as **Appendix 2** with the Land outlined in green.
4. The County Council, in its capacity as owner of the Land (“the Landowner”) objected to the Application.
5. As is standard in disputed applications, the County Council appointed an independent Inspector, Mr Edwin Simpson of New Square Chambers to hold a Public Inquiry, which sat from 12th – 15th July 2010.
6. The Inspector provided a written report of his findings which was concluded in October 2010 (“the First Report”). A copy is attached as **Appendix 3**.
7. The First Report recommended that the Application should be refused on the basis that user of the majority of the Land had been “by right” rather than “as of right”. The Inspector also recommended that the remainder of the Land did not satisfy the user requirements for registration under section 15(2) of the Commons Act 2006.
8. The First Report was provided both to the Landowner and the Applicant for comment. The representations received from the Landowner and the Applicant were provided to the Inspector who, having considered the representations made, produced a further report in February 2011 (“the Second Report”). A copy of the Second Report is attached as **Appendix 4**.
9. The Second Report again recommended that the Application be refused.

10. The County Council's Highways Committee resolved to refuse to register the Land as a town or village green on 11 April 2011 ("the Decision").
11. On 8th July 2011, Mr Stephen Malpass (a member of the Consett Green Spaces Group) applied to the High Court for permission to judicially review the Decision.
12. On 25th July 2012 the High Court quashed the Decision and the Application has therefore been remitted to the County Council (as the CRA) for re-determination. A copy of the judgment is attached to this report as **Appendix 5** ("the High Court Judgment").
13. Following the Decision, further documentation came to light. These additional documents include Minutes of Consett Urban District Council meetings ("the Additional Documents").
14. Copies of the Additional Documents can be found attached to this report at **Appendix 14**.
15. At its meeting on 3 September 2012 Members agreed to authorise the re-appointment of Mr Edwin Simpson to prepare a supplementary report in light of the High Court Judgment.
16. Both the Landowner and Applicant made representations to the Inspector prior to the preparation of the supplementary report. Copies of these representations can be found at **Appendix 6** and **Appendix 7** respectively.
17. On 19 December 2012, the Inspector provided a further written report setting out his recommendations on the Application in light of the High Court Judgment ("the Third Report"). A copy of the Third Report is attached to this report as **Appendix 8**.
18. The Third Report was provided to both the Landowner and Applicant for comments. Copies of the comments received from the Landowner and Applicant are attached to this report at **Appendix 9** and **Appendix 10** respectively.
19. Having considered the representations received in respect of the Third Report, the Inspector then produced an Addendum to the Third Report ("the Addendum"). A copy of the Addendum is attached to this report at **Appendix 11**.

Purpose of the Report

20. To advise the Committee in determining the Application.

The Role of this Committee

21. The Inspector (as he emphasises at paragraph 27 of his Third Report and paragraph 11 of the Addendum) is not an independent adjudicator, by which

he means that while he is independent of the CRA and has considered all of the evidence, his conclusions are not binding on this Committee.

22. It is for this Committee to reach its own determination on the matters of fact and law arising as a result of the Application.
23. It is for this Committee to determine the Application fairly, putting aside any considerations of the desirability of the Land being registered as a Town or Village Green or being put to other uses.
24. However, that being said, the Inspector has had the opportunity to assess the evidence of all parties. He has had the opportunity to hear witnesses in person and to consider all of the written evidence. It is therefore not appropriate for this Committee to re-open issues regarding the quality of the evidence unless they have good strong reasons for doing so.

The Law

25. The Commons Act 2006 is the statutory regime governing village greens and section 15 of the Act sets out the requirements which must be met if the Land is to be registered. Registration of village greens is determined by the County Council as the CRA and the process of determination of any application is focused on whether a village green has come into existence as a matter of law.

26. The Application is made under s.15(1) of the Commons Act 2006 which states:

“Any person may apply to the commons registration authority to register land as a town or village green if subsection 2 applies.”

27. Section 15(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 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.”

28. The test can be broken down as follows:

“...a significant number of the inhabitants...”

29. It is sufficient 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.

“...of the inhabitants of any locality or any neighbourhood within a locality”

30. This is not defined by any arbitrary margins and must be a recognised county division such as a borough, parish or manor. An ecclesiastical

parish can be a locality as required by s.15(2). It is acceptable for the users of the land to come 'predominantly' from the locality as in Oxfordshire County Council v. Oxford City Council (2006). A neighbourhood must be clearly defined and have a sufficient cohesiveness. It must also be within a locality.

"...have indulged as of right..."

31. Use 'as of right' is use without permission, secrecy or 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 landowner. Use is 'of right' if it would appear to the reasonable landowner to be an assertion of a right. Permission by the landowner, 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.

"...in lawful sports and pastimes on the land..."

32. This is broadly interpreted so that general recreational use including walking with or without dogs and children's play would all be included.

"...for a period of at least 20 years..."

33. The fulfilment of the 20 years continuous use must immediately precede the application under s.15(2).

Burden and Standard of Proof

34. 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 Commons Act 2006 have been satisfied.

35. This Committee must be satisfied, based on the evidence and the reports of the Inspector, that each element of the test has been proven on the balance of probabilities. In other words, it must be more likely than not that each element of the test is satisfied.

The Inspector's Findings

36. The Inspector addresses each of the elements of the test in the First Report and these are set out below:

"...a significant number of the inhabitants..."

37. This is addressed in the First Report at paragraphs 18, 19 and 20. The Inspector concludes that this element of the test is made out on the basis of the evidence presented and the point is (rightly in the Inspector's opinion) conceded by the Landowner.

"...of the inhabitants of any locality or any neighbourhood within a locality..."

38. This issue is dealt with in paragraphs 28 to 30 of the First Report.

39. The Applicant submits that in this case it is a neighbourhood within a locality that falls to be considered. This is described as Consett North-East (the Belle Vue Area) and is shown on the plan attached at **Appendix 12**.

40. The Inspector concludes that the area shown has a sufficient degree of coherence to form a neighbourhood. He also concludes that it is within a locality, that locality being either the Ecclesiastical Parish of Christ Church, Consett, the District of Derwentside, or County Durham.

41. He therefore concludes that this element of the test is met.

42. Again, the Landowner concedes this point.

"...have indulged as of right..."

43. This is the main point of contention and is therefore dealt with in paragraphs 48 - 53 in detail.

"...in lawful sports and pastimes on the land..."

"...for a period of at least 20 years..."

44. The Inspector deals with these two elements of the test together in paragraphs 18 to 27 of the First Report.

45. He concludes that the uses of the Land constitute lawful sports and pastimes and that the evidence submitted establishes that the use occurred over a continuous period of 20 years prior to the Application.

46. He therefore concludes that both these elements of the test are satisfied.

47. In addition, the Landowner again concedes on these two points although it is the Landowner's case that the use was not 'as of right' (see below).

'As of Right'

48. Members will recall that the Inspector (at paragraphs 118-120 of the First Report) previously found that the effect of a Deed dated 4 February 1964 ("the 1964 Deed") was to impress upon almost the whole of the Land a statutory trust entitling the public to use it for the purposes of recreation. The Inspector found that it followed that the use that has been made of the vast bulk of the Land by local inhabitants since at least 1964 had been pursuant to that statutory trust and so "by right" rather than "as of right". The Committee followed this recommendation in making the Decision to refuse the Application.

49. The High Court Judgment found that (for the reasons summarised at paragraphs 35 – 39 and paragraph 44 of the High Court Judgment) the 1964 Deed was not capable of rendering the Land subject to a statutory trust (which would have rendered the use of the Land **by right** rather than **as of right**).

The Landowner's Submissions

50. The Landowner now asserts that the Committee should draw the inference on the totality of the evidence before it (including the Additional Documents) that the majority of the Land (with the exception of the two small parcels of land which are shown edged green and orange respectively on the plan attached to this report at **Appendix 13**) ("the Small Areas") was held from the outset pursuant to section 164 of the Public Health Act 1875 (see **Appendix 6**). This means that the Land was used by right (as it was held for the purposes of enabling public access) and not as of right.

The Applicant's Submissions

51. The Applicant has argued (see paragraphs 7 – 30 of **Appendix 7** and paragraphs 4 – 7 of **Appendix 10**) that the Land was neither originally acquired for the benefit of the public as parks, public walks or pleasure grounds or for the recreation of the public, nor was it subsequently appropriated for such purposes. It is asserted that the majority of the Land was acquired for purposes other than public parks, walks (etc). The Applicant argues there is no evidence that the Land was held from the outset pursuant to section 164 of the Public Health Act 1875 and that, as such, the use of the Land was by right. Therefore, having already satisfied all of the other elements required for registration set out in section 15(2) of the Commons Act 2006, the Land should be registered as a Town or Village green.

The Inspector's Recommendations

52. The Inspector considers the issues raised by the Landowner and the Applicant at paragraphs 19 – 25 of the Third Report and paragraphs 3 – 9 of the Addendum.

53. The Inspector has made a finding of fact and recommends that on the balance of probabilities, the Committee should draw the inference, that the 44 acres or thereabouts acquired by a conveyance dated 9 May 1936 (which is shown (excluding those areas which are also edged in green and orange) edged in black on the plan attached to this report at **Appendix 13**) ("the 1936 Conveyance"), was held from the outset pursuant to section 164 of the Public Health Act 1875 Act. It follows from that inference that user by local inhabitants of the greater part of the Land has since that date been 'by right' rather than 'as of right'. As such, the Inspector recommends that the Application to register this land as a Town or Village Green must fail.

54. The Inspector goes on to consider whether the Small Areas of the Land ought to be registered as Town or Village Green (see paragraphs 121 to 123 of the First Report).

55. In the First Report the Inspector found as a fact that those areas are the least used of the Land. No evidence was presented at the Inquiry of those areas of land being used for walking dogs.
56. He also found as a fact that the Small Areas were was not suited to use for recreational football, flying kites, riding bicycles, sledging or building snowmen as was the case in relation to the remainder of the Land.
57. He therefore advised that, had an application been made for registration of the Small Areas alone, on the basis of the evidence presented with the application, then the Application would likely have failed.
58. In the Third Report, the Inspector confirms (at paragraph 25) that for the reasons outlined in paragraphs 121-123 of the First Report he remains of the view that the CRA ought not, on the basis of this Application, register those areas as Town or Village Green.

Overall Conclusions

59. The Inspectors conclusions are set out in paragraphs 19 to 25 of the Third Report.
60. In summary, the Inspector concludes that:
- a. There is powerful support for the inference that the land acquired under the 1936 Conveyance, was, as a whole, held pursuant to section 164 of the Public Health Act 1875 since its acquisition in 1936.
 - b. The use of this land has therefore been 'by right' as opposed to 'as of right'.
 - c. The evidence with the Application would not support the registration of the Small Areas of the Land not acquired pursuant to the 1936 Conveyance, as on the evidence, there has not been sufficient qualifying use of that area of land.
 - d. The Applicant has therefore failed to strictly prove the elements of the test set out in s15 of the Commons Act 2006.

61. The Inspector therefore recommends that the Application to register the Land as Town or Village Green should be refused.

Recommendation

62. It is therefore recommended that the Application for registration be **REFUSED** for the reasons set out in paragraph 60 above.

Background Papers

Appendix 1: Application form and supporting documentation

Appendix 2: Plan showing Application Land

Appendix 3: First Report of Mr Edwin Simpson dated 11 October 2010

Appendix 4: Second Report of Mr Edwin Simpson dated 15 February 2011

Appendix 5: Judgement of High Court dated 25 July 2012

Appendix 6: Representations on behalf of Durham County Council as Landowner

Appendix 7: Representations on behalf of Consett Green Spaces Group as Applicant

Appendix 8: Third Report of Mr Edwin Simpson dated 19 December 2012

Appendix 9: Further representations on behalf of Durham County Council as landowner

Appendix 10: Further representations on behalf of Consett Green Spaces Group as Applicant

Appendix 11: Addendum to the Third Report

Appendix 12: Plan showing "Belle Vue Area".

Appendix 13: Plan showing Conveyances

Appendix 14: Additional Documents

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Annex 1 – Implications

Finance: Not applicable to this decision

Staffing: Not applicable to this decision

Risk: Not applicable to this decision

Equality and Diversity/Public Sector Equality Duty: Not applicable to this decision

Accommodation: Not applicable to this decision

Crime and Disorder: Not applicable to this decision

Human Rights: The County Council as Commons Registration Authority, has to make a decision in accordance with the law and in particular with the provisions of the Commons Act 2006, given these legal criteria a decision must reflect the legislation despite any other rights of individuals

Consultation: As detailed in the report

Procurement: Not applicable to this decision

Disability Issues: Not applicable to this decision

Legal Implications: Not applicable to this decision