

# Special Highways Committee

21 March 2013



## Village Green Registration West Auckland: Fleece & Nursery

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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 commons registration authority ("the CRA") for Town and Village Greens under the Commons Registration Act 1965 and the Commons Act 2006. The CRA must act impartially in its determination.

#### Purpose of the Report

- 2 To advise the Committee in determining an application ("the Application") to register land known as the Fleece and Nursery land ("the Land") as town or village green under the provisions of the Commons Act 2006. The land lies between Front Street and the Nursery, north of the Green, in West Auckland. The Application is made on the basis of a claimed 20 years' user of the Land to the date of the application for lawful sports and pastimes as of right by a significant number of the local inhabitants.

#### Background

- 3 The clerk to West Auckland Parish Council wrote to the CRA on 21 July 2010 explaining that the Parish Council wished to seek registration of the Land as a village green, and enclosed six letters and eight photographs from villagers in support of their proposed application. Advice was sought from the CRA on how to proceed. The CRA responded on 2 August 2010 enclosing the relevant forms and Defra Guidance.
- 4 By way of further background, the trigger for seeking to make the application appears to have broadly been that ownership of and/or rights over the Land were increasingly in dispute, principally between the Parish Council and the occupiers of properties adjoining the Land, and that steps had been taken by adjoining occupiers to prevent or discourage the use of the Land by local inhabitants.

#### The Application

- 5 The Application was made by Sharon Hall, the clerk to the West Auckland Parish Council ("the Applicant"). A copy of the Application and supporting submission is attached at **Appendix 1**. It was accompanied by a supporting statement, plans of the Land and 23 User Evidence Forms in support. Those user evidence forms are summarised in table form at **Appendix 2**. A further summary of the evidence given of interruptions of the use are at

**Appendix 3.** They are available to view in full on file. Receipt of the Application was acknowledged on 11 August 2011 by the CRA. Following publication of the notice of the Application objections were lodged, and these are attached at **Appendix 4** together with further pre-inquiry correspondence.

- 6 Due to the nature of the supporting evidence and the conflict with the evidence provided by the objectors, the Members of this Committee were advised that a Non-Statutory Public Inquiry would be the most appropriate way forward to test the evidence, Members agreed to this course of action. On the 12 July 2012 and to the appointment of a suitable experienced independent inspector. Miss Ruth Stockley of Kings Chambers, Manchester, a legal expert in Village Greens registration, was appointed to hold a Public Inquiry and thereafter to provide a report with a recommendation for consideration by this committee.
- 7 A Public Inquiry was held over 2 days on 26 and 27 June 2013. The Inspector subsequently reported to the CRA on 13 October 2013, recommending refusal of the Application, and a copy of her report is attached at **Appendix 5**. The report was circulated to the Applicant and other interested parties for final comment. The Applicant responded on 17 November 2013.
- 8 The Applicant subsequently approached officers with a view to supplying a 'presentation document' to the committee. The Applicant was advised of the committee's public speaking scheme allowing for oral submissions at the meeting. They were also advised that if they wished to adduce any further information that this would need to be supplied in advance of the preparation of the report which they did do, attached at **Appendix 6**. A copy of the Applicant's submissions was then sent to the objectors and their comments sought. Those comments, received on 26 February 2014, are attached at **Appendix 7**. Additionally, representations have been received from the local MP, Helen Goodman, and from Lord Foster of Bishop Auckland. Copies of those are attached at **Appendix 8**.
- 9 The decision with respect to this Application rests with this committee. An assessment of the evidence submitted by June 2013 has been undertaken by the Inspector who has had the opportunity to hear witnesses in person and consider all the written evidence supplied to that date. The conclusions in the Inspector's report should be considered by the committee. The further information received since the Inspector's report was produced will be considered further below.

## **The Law**

### **The Commons Act 2006**

- 10 Land that was not registered as a village green by July 31<sup>st</sup> 1970 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.

11 The Commons Act 2006 is the statutory regime governing village greens, the existence of and subsequent registration of which is subject to the fulfilment of all the relevant requirements set out in section 15 of the Act. Registration of village greens is determined by the CRA and the process of determination of any application made is focused on testing the evidence to decide whether a village green has come into existence as a matter of law.

12 The application in question 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 in a case where subsection 2... applies.”*

Subsection 2 applies 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.”*

13 After setting out the evidence for and against the Application in section 4 of her Report, the Inspector set out the legal framework applying to the Application in section 5. Members are referred to that section and in particular to the several elements of the test for deciding whether the Application can succeed; namely whether it has been established that:

(i) The Land comprises “land” within the meaning of the 2006 Act;

(ii) The Land has been used for lawful sports and pastimes;

(iii) Such use has been for a period of not less than 20 years;

(iv) Such use has been as of right (that is, without force, secrecy or permission);

(v) Such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality; and

(vi) Such use continued at the time of the Application.

14 These terms are explained more fully in the Inspector’s Report. Briefly, however:

(i) The land must be clearly defined, but there is no requirement that it be ‘green’ or have any particular characteristics;

(ii) Lawful sports and pastimes is a composite phrase denoting general recreational use. Walking with or without dogs, children’s play, playing games, picnicking etc. would all be included;

(iii) The fulfilment of the 20 years’ continuous use must run until the date of the application. It must be of sufficient continuity and frequency to bring home to the reasonable landowner that recreational rights are being asserted;

(iv) Use ‘as of right’ means without force, stealth or permission; i.e. open and peaceable and without any licence from the owner;

(v) A ‘significant number’ is a matter of impression, meaning a number sufficient to indicate that the land is in general use by the community. Inhabitants of the ‘neighbourhood or locality’ must mean, for a

neighbourhood, a community that is sufficiently cohesive and capable of clear definition; for a locality it must mean a recognised administrative area. Users, even the majority of them, may come from outside the locality, but such extra-local use will not establish village green rights; and

- (vi) For the requirement for continuous use until the application, see (iii) above. If the use was not still continuing at the date of the Application, then (save for where access has been prohibited by statute, e.g. 'foot and mouth' restrictions) the reasons for its cessation are irrelevant.

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

- 15 In order for an application to be successful each aspect of the requirements of section 15(2) must be strictly proven by the Applicant. The burden of proof is the balance of probabilities, and it lies with the Applicant to prove the case. Therefore the Applicant must demonstrate to the satisfaction of the committee that all the elements contained in the definition of a village green in section 15(2) have probably been satisfied.

### **Application Land**

- 16 A plan highlighting the Land to be considered for registration accompanied the Application (see **Appendix 1**). This plan shows two areas of land, joined together, lying north of the rear of the properties on Front Street, west of the Nursery and south of the river Gaunless, excluding a parcel of land lying directly south of the river on which formerly stood the old Mill Cottages. That parcel was acquired by its occupier by adverse possession in around 2008, having been fenced off from the public in around 1994. The Inspector records her findings about the Land in section 3 of her Report at **Appendix 5** and Members are referred to that description.

### **Ownership**

- 17 The Land has no known owner. It appears that a number of parties (including the Applicant and one of the objectors, who is an adjoining occupier) have registered cautions against first registration with the Land Registry.

### **The Evidence**

- 18 The evidence, particularly the oral evidence taken at the Inquiry, is summarised in the Inspector's Report. The CRA originally received 23 User Evidence Forms in support of the Application; these are summarised by the table at **Appendix 2**. The predominant uses claimed in support of the Application were walking (with or without dogs) and children playing.
- 19 Evidence was also given of attempts to prevent or discourage the use. These are summarised in the additional table at **Appendix 3**. A number of users reported that the land had been fenced off one or two years before the Application was made.

- 20 In a supporting letter of 10 August 2011 (see **Appendix 1**) the Applicant described the fencing as having been erected in May 2010 and, “although a troublesome nuisance, has been erected for less than two years and has never denied physical access to the open space (included in this application)”.
- 21 The Applicant’s supporting submission also explained the history of fencing on and nearby the Land. It appears some of the Land was fenced off in around 1993-4. Partly that fencing was of land excluded from the Application site (to the north and west of the Land, adjoining the river) that has since been acquired by adverse possession. Partly the fencing was erected by the owner of the Fleece public house in an effort to stop vehicular access over the Land to one of the adjoining properties (no. 24 Front Street).
- 22 The Applicant’s submission then reported that since 2006 the owner of 24 Front Street had taken vehicular access through the Nursery Land with private and commercial vehicles on a regular basis with many vehicle movements a day, so degrading the appearance and amenity of the Land.
- 23 An objection was received from Mr. Armstrong, the (then) owner and occupier of 24 Front Street. In it, he describes his own use of the Land since his acquisition of 24 Front Street in 1989. He stated that since then, he and his wife had used the land on a daily basis for grazing horses and for vehicular access to the public highway, both to the north across the Nursery and the south across the Fleece. A plan of the routes taken is enclosed at **Appendix 4** with Mr. Armstrong’s objection.
- 24 Mr. Armstrong stated his belief that the Land had not been used as a village green at any time. He submitted that “the land has only been used by dog-walkers and people using it as a short cut to the Front Street and back. The only piece of land that was ever used for recreational purposes was near to the river and this is now owned by Mr S D Robinson” (who had acquired the adjoining land by adverse possession in around 2008, having fenced it off in around 1993-4).
- 25 A further objection was received from Mrs. Joanne Cliff, who similarly stated that the only uses for the Land since 1994 (apart from ‘private’ use by her and her parents, Mr. & Mrs. Armstrong) had been for people to walk their dogs and to get from the Nursery to Front Street and back.
- 26 The Applicant responded, asserting that the Land “is still used for recreational enjoyment although the actions of Mr Armstrong’s and Mrs Cliff’s families in intermittently parking cars, vans, horse boxes and equipment on the land, grazing horses and burning industrial waste do not encourage community activity. Nevertheless that community activity has never ceased.”
- 27 Responses from the objectors disputed a number of the assertions made by the Applicant; however, these responses did not make any further assertions about the use or otherwise of the Land for recreational purposes, save for a statement by Mrs. Cliff that she had played on the land with her friends.

28 The Public Inquiry subsequently took place.

## **The Inspector's Report**

### **Assessment of Evidence**

29 At the Public Inquiry the Inspector heard evidence from a total of 8 people; 4 in support of the Application and 3 in objection, with a further third party; the evidence from these persons is set out clearly in section 4 of the Inspector's Report. In addition to this, written submissions both in support of and against the application were considered by the Inspector. However, she set out in paragraph 4.16 that she and the CRA must bear in mind that the written evidence was not tested by cross-examination. Particularly where that evidence conflicted with the oral evidence given at the Inquiry, the Inspector gave the written evidence less weight as it was not subject to cross-examination.

### **Applying the Law to the Facts**

30 The Inspector concluded that all of the elements of the statutory test were satisfied, with the exception of one. She therefore recommended that the application be refused.

### **Land**

31 There was no dispute that the Land meets the required definition in the 2006 Act and that it was clearly defined: 6.4.

### **20 Year Period**

32 The Inspector found that the relevant 20 year period for analysis was that beginning in August 1991 and expiring on the date of the Application: 6.5.

### **Lawful Sports and Pastimes**

33 The Inspector concluded that some lawful sports and pastimes had been carried out on the Land during the relevant 20 year period: 6.9. However, she noted that the main matter in dispute between the parties was the *extent* of any qualifying recreational use on the Land: 6.8.

### **Locality or Neighbourhood**

34 This is the area whose inhabitants will acquire recreational rights to use a village green. Here, the Inspector found this to be the Parish Council area of West Auckland, which is a recognised administrative area: 6.11.

### **Use as of Right**

35 With the exception of one occasion on which permission to use the Land was purportedly given in 2011, the Inspector found that the use of the Land had been without force, stealth or permission. Accordingly she found that it had been used 'as of right': 6.14.

### **Use by a Significant Number of the Inhabitants of the Locality**

36 The Inspector's analysis was to exclude from the qualifying use that use which took place before the relevant 20 year period commenced; that use which took place by persons from outside the locality; and that use that was more akin to the exercise of public rights of way than the exercise of recreational rights over a Village Green. In particular this meant excluding

the evidence which was of such nature as to suggest that the user was exercising a right of way over specific routes rather than exercising a recreational right over the land generally..

- 37 Having discounted such use, her impression of the evidence was that a significant amount of walking and dog walking on the land took place along a specific linear route as a means of access from one point to another, often using the land as a short cut , rather than recreating over the land generally. Please see paragraph 6.19 of the Inspectors report and also 6.21.
- 38 The Inspector noted “significantly” that no oral evidence was given by any witness of people exercising their dogs over the Land generally or walking over the Land generally rather than along a specific linear route used as a shortcut or as a means of access: 6.20. A number of the written statements referring to walking on the Land were unspecific about whether they were using the Land as a thoroughfare or as a more general recreational facility. Accordingly, given that the burden of proof lies upon the Applicant, the Inspector was unable to assume the latter, which would anyway have been inconsistent with the oral evidence she received: 6.23.
- 39 That left children’s play. The Inspector found that there was a “limited amount of evidence” of such use taking place on the Land during the relevant period by the local inhabitants: 6.24. She noted the evidence of 3 people that children no longer play on the Land since traffic started to use it in around 2006: 6.24. She found that such use was “extremely limited” during the last 5 years of the relevant 20 year period, since 2006 when the Land has been used regularly by traffic: 6.26.
- 40 The Inspector noted evidence that such use had not “entirely” ceased: 6.26. She also considered that other recreational uses of the Land had been “relatively limited” in nature: 6.27, although had “inevitably decreased” since 2006 due to the regular use of the Land for traffic. She concluded that, in her view, that the qualifying use of the Land during the relevant 20 year period had been sporadic and insufficient to demonstrate the assertion of recreational rights over the Land, consequently she found as follows;  
*it has not been established on the balance of probabilities that the qualifying use of the Land has taken place to such an extent and with such a degree of frequency throughout the entire relevant 20 year period to demonstrate to a reasonable landowner that recreational rights were being asserted over the Land.*
- 41 The inspector accordingly found that the Land had not been used by a significant number of the inhabitants of West Auckland for lawful sports and pastimes throughout the relevant 20 year period: 6.28.

#### **Continuation of Use**

- 42 Although the Inspector did not find that the Land had been used to a sufficient extent and continuity to have created a village green, she concluded that such recreational use as did exist continued up until the date of the Application: 6.29.

## Inspector's Conclusions and Recommendation

43 The Inspector therefore concluded that the Land ought not to be registered as a village green. She so recommended, on the specific grounds that:

- (i) the Applicant has failed to establish that the Application Land has been used for lawful sports and pastimes to a sufficient extent and continuity throughout the relevant 20 year period to have created a town or village green; and
- (ii) the Applicant has accordingly failed to establish that the use of the Application Land has been by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period.

## Post-Inquiry Correspondence

44 A copy of the Inspector's Report was sent to the Applicant and to the objectors. The Applicant responded by letter dated 17 November 2013 (**Appendix 6**). The letter made a number of points, not all of which are relevant to the committee's determination of the Application. In relation to the Inspector's findings about insufficient extent and continuity of use, the letter stated:

*[The Inspector] acknowledges that the PC had demonstrated that the land was well used for decades from the 1970s, when it was maintained by the local authority, up to 1994, that is for the first three years of the relevant period (1991 – 2011).*

*After 1994 maintenance stopped and the communal use inevitably declined slightly. Matters got far worse in 2006, when the objectors began to take unauthorised access through The Nursery (later fenced off) and Fleece land, and also using the land as if they owned it for the transfer of scrap from lorry to lorry, etc, and general car parking. This activity understandably hugely reduced the community use in the Nursery and also severely restricting it on the Fleece land – but just for the last five years of the relevant period.*

*The level of use of the Fleece during that period still included occasional communal bonfires, children playing football, trampolining and children's parties, besides those that walk across and dog-walk the area. Whilst not intensively used, because of the objectors' activities, it is a level of activity not dissimilar from that to be found today on many registered village greens in County Durham villages.*

45 Further correspondence from the Applicant was received in February 2014 and is attached to this report at **Appendix 6**. It makes no assertion of continued recreational use of the Land, but details a number of obstacles to that use. A further representation from the Objectors (**Appendix 7**) adds nothing of note.

## Officer Advice

46 The contentious question is therefore whether the use has been sufficiently extensive or continuous over the relevant period to qualify for registration, or if it has been too trivial and sporadic. The Inspector, having discounted



the 'walking' use, concluded that the use for children's recreation and other recreational uses was not sufficient to amount to the assertion of a right: 6.28. The Applicant concedes that the Land 'is not intensively used' (letter of 17 November 2013 at **Appendix 6**) but contends that the use has not 'entirely ceased' (oral evidence of Martin Roberts to the Inspector: **Appendix 5** at paragraph 4.11) and that registration ought therefore to follow. The Applicant's more recent correspondence explains in detail how recreational uses are being discouraged and that in their view the use of the Land by others has "prevented its long-established community use continuing" (**Appendix 6**). However the question for this Committee is not why the use may or may not have taken place, but whether the use did in fact continue for the 20 year qualifying period in question.

- 47 This is a matter of fact and degree in the circumstances of any given case. The nature and degree of user needs to bring home to a reasonable (and in this case, hypothetical) landowner, throughout the relevant 20 year period, that local inhabitants are carrying out activities on the land that are capable of being resisted, or permitted, by the landowner. The Inspector concluded on the evidence before her that they had not.

### **Overall Conclusions**

- 48 Officers concur with the Inspector and that greater weight ought to be given to the evidence that was tested on cross-examination at the Inquiry. The evidence was of generally diminishing use throughout the qualifying period, and which was "extremely limited" (Inspector: 6.26) for the final 5 years. Although the Applicant has since contended (letter of 17 November 2013: **Appendix 6**) that the level of use of the Land in those 5 years was not dissimilar from that on many registered village greens, that is not the appropriate test (because, once a green is registered, there is no requirement on local inhabitants to persist in regular recreational activities as the land is protected anyway.) The Applicant's more recent submission (of 4 February 2014: **Appendix 6**), by setting out how the recreational use has been "prevented", lends support to the Inspector's conclusions that such use did not continue to a sufficient degree for the relevant period.
- 49 It is for Members to come to a determination on this matter. However in your officers' view the Applicant has failed to discharge the burden of proof to demonstrate on the balance of probabilities that the Land has been used for lawful sports and pastimes to a sufficient extent by local inhabitants over the relevant period.

### **Recommendation:**

- 50 That the Application be **REFUSED** for the reasons recommended by the Inspector in paragraph **43** above.

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