

Report to Durham County Council in respect of an Application made pursuant to S15(2) of the Commons Act 2006 by Mr Marek Sochocki as Chair of the Witton Park Village Green Committee to register land north and south of Low Queen Street, Witton Park as a Village Green.

- I) I was appointed as an independent Inspector to provide the above report and held a Public Inquiry at the Crook Civic Centre on the 5th and 6th October 2009. I held an evening session on 5th October 2009.
- II) The land the subject of the application is in multiple ownership as follows:
- (a) Carwood West Developments Ltd of 12, Princess Street, Bishop Auckland, Co Durham;
 - (b) The Trustees for the Methodist Church Purposes of Central Buildings, Old Elm Street, Manchester;
 - (c) Punch Taverns (CPM) Ltd of Jubilee House, Second Avenue, Burton-upon-Trent, Staffordshire;
 - (d) Wear Valley DC (title now vested in Durham CC);
 - (e) Annie Gill 9, Brusselton View, Bishop Auckland, Co Durham;

- (f) Wilfred Swinbank, 23, Holme Dene, Hunwick, Crook;
- (g) Raymond Hewitson, 2, Orchard View, Meadhope Street, Wolsingham, Co Durham.

13 letters of objection were received. The County Council in its capacity as part owner did not register an objection. The application was supported by 62 letters from householders within Witton Park and a Petition.

- III) During the course of the Inquiry those who appeared in objection with the exception of Mr Gill of 44, Park Road and the Reverend Phipps, who expressed no view on issues relating to the southern parcel, all indicated that they did not object to the registration of the southern parcel of land as a Village Green.
- IV) I carried out an unaccompanied site visit at 8:15am on the morning of 05/10/09.
- V) The land in question was declared a Category D village in or about 1959 and thereafter the housing on the land was demolished in stages. In 1959 there were about 650 houses in the village but following the conclusion of the demolition in 1979 only 88 remained. The cleared land was left in a poor condition and a Village Action Committee was set up in or about

1979/80 to restore and enhance what remained of the settlement. In 1980 the Territorial Army cleared the application land of rubble etc. Thereafter Manpower Services were employed by the villagers to level the land and grass it over. A low boundary wall was built around both parcels of land ie. north and south. Trees were planted with the costs being borne by villagers and in 1981 a tree planting scheme was executed to commemorate the Queen Mother's 80th Birthday. In the 1980s some children's play equipment was placed on the southern portion of the land by the then Wear Valley Council. That was removed about 6 years ago possibly for health and safety related reasons. The grass on both sides of Low Queen Street has been cut regularly by the Council for many years.

VI) The above history of matters appeared to be agreed as between the Applicant and those who spoke in objection to the application.

The Law

VII) S15(2) of the Commons Act 2006 was brought into force on 06/04/2007 and contains (so far as relevant) the following provisions for the registration of new greens:

- (1) 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

- (2) This subsection 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 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.

The burden of proving a case for registration lies upon the Applicant on a balance of probabilities. Each element of the test under the statute must be strictly proven.

VIII) A town or village green is land which is subject to the right of local people to enjoy general recreational activities upon it. There is no legal requirement that it should be mainly grass. Greens that were not actually registered as such by 31st July 1970 ceased in law to be town or village greens so long as they remained unregistered. The effect of the current legal regime is that land only becomes a village green once it is registered as such. Thereafter registration confers general recreational rights on local people and confers the protective provisions of S12 of the Inclosure Act 1857 and S29 of the Commons Act 1876 which in practice precludes the development of greens.

(X) I turn now to the specific statutory provisions:

- "... a significant number" - This is not assessed by reference to an arbitrary headcount but rather use must be sufficient to show general use by the local community as opposed to mere occasional use by trespassers (*R (McAlpine) v. Staffordshire CC* [2002] EWHC 76 (Admin) at para 77).
- "... of the inhabitants of any locality ..." - A locality is not simply defined by drawing a line on a map but rather it must be a division of a county recognised in law such as a borough, parish or manor. An ecclesiastical parish can therefore be a "locality" (see *R (Cheltenham Builders Ltd) v. South Gloucestershire DC* [2004] 1 EGLR 65 paras 41 - 48 and *Oxfordshire CC v. Oxford City Council* [2006] 2 AC. It is sufficient for the purposes of the application that the users come "predominantly" from the locality in question (see *Oxfordshire* *ibid* para 25 per Lord Hoffmann).
- "... or any neighbourhood within a locality" - This limb is not relied on in this case and I do not propose to address its legal context for reasons that will appear below.

- "... have indulged as of right ..." - This indicates use without force, secrecy or by permission. The subjective intentions of the users are completely irrelevant - the issue is the appearance of the use to the land owner: user is "of right" if it would appear to the reasonable landowner to be an assertion of right (see *R (Lewis) v. Redcar and Cleveland BC* [2009] EWCA Civ 3 at para 35). Use is forcible once there is knowledge on the part of a trespasser that his/her use is objected to and the use which he or she claims has become contentious (see *Newham v. Williamson and Others* [1988] 66 P&CR 8). There is a general obligation upon a landowner once he/she becomes aware of an assertion of rightful use to take reasonable steps to prevent such use.
- "... in lawful sports and pastimes on the land" - This is a broad concept and involves general recreation use including walking with or without dogs and children's play (see *R v. Oxfordshire CC ex p Sunningwell PC* [2000] 1 AC 335 at pp356F - 357E).
- "... for a period of at least 20 years" - The 20 year period under S15(2) *ibid* must immediately precede the application.

The Evidence

- X) It is only necessary to summarise the evidence in this report. I have taken full notes of the evidence in longhand and these can be supplied by way of a photocopy upon request from the County Council.

In Support of the Application

Mrs Wilson - Has lived in Witton Park ("WP") since 1977 and people have always used all of the land since it was reclaimed. No one part of the land is favoured more than another. People walk it with and without dogs - some follow routes but others do not. Children generally play on it. Nobody ever sought to restrain access by signs or otherwise. Mrs Wilson was cross-examined by Mr Belton who asked if she had seen a caravan on his land (Mr Belton said the caravan had been on the land for "years" but could not be more specific). Mrs Wilson said the caravan had been kept on the highway ie. "The Green" and not the application land.

Mrs McKenna - Has lived in the village over 25 years and had involvement with the youth club. Used to train the 5-a-side squad on the southern parcel and took the younger children on nature walks over the whole application area. She personally walks the land every day and uses the whole area at will. A waterslide is placed on the southern area in summer. She has seen many people using the area. The caravan was on the road and not the application area.

John McKenna - Lived in WP for 34 years. Children played on both parcels and used it all. He has always had dogs and walks them on both sides - no fixed route. His grandchildren now use the land - they use the whole area.

Mrs Richie - Lived in WP 33 years. Regularly walks the southern area - has a route round the edge. Sees children in the northern area - they play games, fly kites, even fly model aircraft over the general northern portion. She once saw a notice placed by Mr Gill on the south - it said "Keep Off" - it was on a tree.

Mrs Hayton - Lived in WP since 1939. Seen extensive use of the south. Once saw a notice placed by Mr Gill on a tree in June 2007 following a meeting - it said "Keep Off" but someone took it down. Never saw any others. The northern land is used less but there are always people walking dogs on it - some keep to paths but others don't. Children play over the whole area and move from one side to the other.

Mrs Anderson - Lived in WP for 14 years. Seen children playing on the whole northern area - even seen wedding photos being taken on both sides.

Leigh Anne Hennessey - Lived in the village for 12 years and has two children (12 and 8 years) who have always played on the application land. The caravan was on the road not the application land.

Mrs Sutton - Was born in WP in 1944 and moved out due to CPO. Has lived on High Queen Street for 38 years. Her children and grandchildren have always played on the application land - in summer husband put up badminton and tennis nets so that the children can play.

Heather Barker - Lived in WP since 1962. Her children are in their twenties and always played on "the green". They played football and rode bicycles - she says she has seen children using both sides of the road ever since it was grassed. Nobody has ever sought to prevent use.

Mrs Pat Wilkinson - Lived in WP for 20 years. Children play on the land most days. Adults from the area use it - dog walkers do not follow any particular path. Ramblers through the area picnic on it.

Mr Bentley - Lived in the village since 1988. He walks both sides with his dog most days "to give him a good run". He sees children - they run around the area. He taught his children to ride their bicycles on the land. He has never seen signs etc. seeking to prevent use.

Louise Crowhurst - Lived in WP for over 20 years. Played on "the green" as a child and takes her own children there. On the north side a paddling pool is placed on the land every summer and it can be there for days. Often sees a boy in a wheelchair on the land (north and south).

Mr James - Lived in WP for over 30 years. His children always played on the application land as a whole as do his grandchildren. His children used to camp on it. A family on the corner sometimes has barbecues on the land. The adults sometimes get together and play football. He sees dog walkers "all day long" over the area.

Mr Martindale - Lived in the village for 15 years. He walks all the land - 70% the south and 30% the north. He walks every morning and evening and when out sees other dog walkers. Often sees children - they use the south portion more than the north but they use both regularly. He has a set route.

Mrs Harwood - Lived in the village 6 years. Is an athlete and litter picker - runs the land and is out often picking litter. The northern field is popular with children - there is a BMX ramp at the top end. Dog walkers do not follow fixed paths necessarily.

Mr Barker - Lived in WP since 1983 and had dogs continuously until 2002. Walked the dogs twice per day. He followed a fixed route when using the northern land. The children's organised games were at the top end but balls would "run out" and the children would run all over the northern land in pursuit.

Alan Gash - Lived in the village for 14 years. He has played football and cricket with his children on the northern land at the top end (mostly they played on the southern land). The northern area is used generally however by kids playing on their bicycles.

Mrs Bryan - Moved into the area in the early 90s and lived at Albion Terrace for 6 years. Exercised her horses on the southern land. She often walks the dog moving diagonally across the southern and northern land to access the railway bridge. This is not a path as such. She has seen children playing over the whole of the northern area. There is no fixed route used by dog walkers.

Mrs Hunniford - Lived in WP for 9 years. She took her children down to the green - mainly the south but not solely - at weekends and in the holidays to play catch, Frisbee etc. She walks a "relaxed" diagonal across the northern land to access the "Paradise".

Mrs Brougham - Lived in WP since 1996. Crosses the southern area every day and it is well used by people. Sees children on the smaller area - they use the top more than the bottom but use it all.

Linda Robson - Lived in the village since 1948. Both parcels well used. In respect of the northern portion they put tents in the rough area and build dens; a tree in the middle has a tyre swing. Two disabled children use it a lot. The south side is well used.

Gail Robson - Born in 1967 and lived in WP all her life. Her son is 9 and uses both parcels for play - it all depends on who is playing out. On the northern parcel the games go on to about 3 parts the way down. Bike riding is all over. A lot of dog walkers use both sides - they just roam about. Before the church was built the area the church is on was used regularly along with the rest.

Dr Bell - Not from the community but lived close by in Ethersley since 1987. Walked across part of southern part for a period in 1987; began walking in vicinity of site in 1990 and then ceased; 5 years ago was retained by Mr James and has visited area several times. Whenever he has visited he has seen both parcels in use - his own experience is that the northern land is used a little more than the southern land by children. In

the northern area the rougher land is used for adventure play with the rest being used for games and bicycle riding.

In Opposition to the Application

Dr Gordon - Representing agents for Carwood West Developments Ltd.

They have no objection to development of the southern parcel - Carwood intend to develop circa 2ha of land in the northern parcel. There is no extant planning permission. He called Mr Gill.

Mr Gill - He referred back to his objection letter. He said he put notices up on the southern land prohibiting access in June 2007 and that his photographs related to that particular exercise. He said he had previously put up notices but he did not have any photographs of those occasions. People ripped up his notices.

Mr Belton - He moved away from WP in 1962 but has a keen interest in the settlement and its history and was Chair of the Action Group that reclaimed the application land. He purchased land on the northern side in the late 1980s with a view to its development - initially as a nursing home. The development value of his land is circa £250,000. He visits the village 2 or 3 times per year. He has not seen many people on the northern portion - there was a caravan on it for years and people dump rubbish on it. He was asked if he accepted that the northern parcel was used by local people

for play and dog walking and he said "Of course - but just because you walk on it doesn't mean you own it. Are you going to give me £250,000?".

Mrs Robinson - Mrs Robinson is a descendant of Raines family who owned property on the land prior to demolition. Mrs Robinson left WP at 17 years of age. The village needs affordable housing - the land to the north is not and never has been in a pristine condition. She has never seen anybody on the northern portion of land - prior to the last 18 months she would drive past the site once a week or fortnight during the day.

Mrs Byrne - Mrs Byrne lives in W P and a part from a 6 year gap has always lived there. She goes through the village every day. She says she has seen Mrs Hennessey's children on the northern land only because it is outside their house. When XX by Mrs Hennessey she accepted that the children's cousins also played on the land and further volunteered that her grandson also played on the land saying "Why not - it is my land".

Mrs Lambard - A descendant of the Hewitson family who had owned houses on Garden Street. Mrs Lambard left the village in 1962 but visited 2 or 3 times per week until circa 2002. Thereafter she visited her aunt every 2 months or so in WP. The visits would be mid-week during the day. Mrs Lambard never saw children playing on the northern land. She did see

a caravan on the land. She wishes to see affordable housing on the land; the village has enough recreational space.

Reverend Phipps - The Methodist Church feels the red line application plan should be redrawn to exclude all land in the church's ownership. He says he cannot comment on use of the area by local people. He believes the land was used for outdoor worship in the past but was not personally involved and so cannot say with any certainty whether this was or was not so. The church may want outdoor worship in the future.

Analysis

- XI) I shall deal with the land south of Low Queen Street firstly. It is perfectly clear that the land to the south of Low Queen Street has been continuously used since about 1980 for lawful sports and pastimes. No objector suggested otherwise. Moreover those users were plainly overwhelmingly from Witton Park itself. Witton Park is an ecclesiastical parish and contains 168 houses with a population of 384 people. The vast majority of those houses are within the settlement also named Witton Park. I conclude that Witton Park parish is a locality. It follows therefore that there has been 20 years (and more) continuous user of the southern portion of the land for lawful sports and pastimes by a significant number of the inhabitants of a locality, namely Witton Park parish.

XII) Mr Gill's evidence in effect denies that the use has been of right and relies in this regard upon the prohibition notices that he placed on the site in June 2007 ie. prior to the application for registration and further notices that he says he repeatedly placed on the land prior to that date. Leaving aside the obvious point that Mr Gill is not a landowner with power to prohibit use of the land I wholly reject Mr Gill's submission for the following reasons:

(a) I have not seen any evidence to corroborate Mr Gill's suggestion that he placed a notice or notices on the land prior to June 2007. Mr Gill does not explain why he did not photograph these earlier alleged notices. Insofar as the Applicant's witnesses did recall the presence of any prohibition notice it was confined to the single notice placed on the land in June 2007. I simply do not find it credible to suggest that earlier notices were placed and yet nobody saw them. I found all of the Applicant's witnesses to be witnesses of truth and the fact that some did not recall the notice of June 2007 is almost certainly explained by the fact that it was removed by an anonymous person or persons within a very short space of time.

(b) Insofar as the notice of June 2007 is concerned I make 2 general observations:

- I do not believe that the notice was actually addressed to local users. The notice was placed on the land the day after a meeting called by local councillors specifically to address the fact that travellers had set up camp on part of the southern portion of land. It seems a reasonable conclusion, despite Mr Gill's evidence to the contrary, that the notice was erected to address the traveller issue;

- The notice was a single notice attached to a tree stating "Private Property - Keep Off - No Trespassing". It is, at a minimum, wholly ambiguous as to what it in fact refers to by reference to subject and area. Is it a reference to the tree itself or some unspecified area around it. On any view it cannot be said to amount to a clear prohibition of the use of the southern area generally.

In conclusion I therefore reject Mr Gill's evidence. I acknowledge the fact that a notice as described was placed on the land in June 2007 but in its own terms it did not amount to a prohibition of use of the southern portion of the land either in whole or in part. Moreover, a landowner must take reasonable steps to prevent use of land when he is on notice that use as of right is being asserted - the placing of a single ambiguous notice does not amount to the taking of reasonable steps.

I therefore recommend that land south of Low Queen Street, Witton as described on the application plan be registered as a Village Green.

Land North of Low Queen Street

- XIII) Once again I find that there has been 20 years and more lawful use of the land for lawful sports and pastimes. Clearly the users have been predominantly from Witton Park parish which, as noted, is a locality in law. As noted I accept the Applicant's witnesses as a whole as witnesses of truth and it is clear that the land has, over the necessary period, been used as a whole by children and dog walkers in particular. Mrs Lambard's failure to see users is likely to be explained by reference to the limited nature of her visits to the area and the times of those visits. The same point can be made in respect to Mrs Robinson's observations. I found Mrs Byrne to be an unreliable witness - initially she asserted only Mrs Hennessey's own children played on the land but then readily moved to accept that Mrs Hennessey's nephew and nieces played on the land as did her own grandchild. Set against her evidence was the overwhelming evidence of usage from other villagers.
- XIV) The Church's concern did not address the legal issues - simply it recorded the Church's wish that their whole land holding should be excluded from any area to be registered. The reason the Church and its car park were excluded from the application was simply to acknowledge that while the

use of the Church's land had occurred until the Church was built in 2006.7 the fact of its being built prevented actual use of the land occupied by the physical structures. However the balance of the Church land continued to be used as part and parcel of the northern portion of land by local people being otherwise unfenced and available.

XV) I finally turn to the caravan issue. Mr Belton was unclear as to exactly where it was or indeed exactly how long it had been in the area - on balance I prefer the evidence of Mrs Wilson, Mrs McKenna and Mrs Leigh Anne Hennessey namely that it was actually parked on highway land. However, even if this were not the case, its presence would have been de minimis so as to be incapable of defeating registration of the whole area.

For the above reasons I recommend registration of the application lands as a whole as a Village Green.

D E MANLEY QC