

# Highways Committee

11 May 2018



## Application NL44 for Village Green Registration Bede Kirk, Barnard Castle

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

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#### Introduction

1. The Council is the registration authority for Town and Village Greens 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.

#### Purpose of the Report & Background

2. To advise the Committee in determining an application to register land at Bede Kirk, Barnard Castle, as Town or Village Green, under the provisions of the Commons Act 2006.
3. The application was made by the Barnard Castle Town Council, acting through its clerk, Michael King (the Applicant). A copy of the application, excluding the supporting user evidence, is attached at Appendix 1 (the Application). The Application was received on 6 July 2017 by the Council and was accompanied by a plan showing the area claimed as town or village green (the Application Land) as well as 6 letters in support from users of the claimed TVG. The Applicant submitted a further 9 letters/emails in support of the Application on 15 March 2018. The Application was given the reference number NL44 by the Council.
4. A copy of all of the user evidence submitted in support of the application is attached at Appendix 2. A map of the Town Council area prepared by Officers showing where the users are drawn from 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 Teesdale Mercury newspaper and a site notice was also erected.
6. Notice of the application was also given to the owner of the land subject of the application and a copy of the Application was also placed on deposit with the Barnard Castle Town Council, for public access.
7. The land subject of the application is part of the grounds to the former Police Station owned by the Office of the Police and Crime Commissioner for Durham (the Owner).

8. Following publication of the notice of the application, two objection letters were received, one from the Estates Department of Durham Constabulary as agents of the Owner dated 8 November 2017 and the other from Railway Housing Association dated 2 November 2017 to whom it is understood that the Owner is proposing to sell the land.
9. The Applicant was given an opportunity to comment upon the two objections received and they did so by letter dated 28 November 2017. A further representation in support of the Application from a resident of Bede Kirk was received by the Council on 15 January 2018.
10. Following submission of the Applicant's additional evidence on 15 March 2018, the Owner was afforded an opportunity to respond to that evidence and the Owner's Solicitor did so by way of a supplemental objection letter dated 22 March 2018.
11. The original objection letters, letter in response from the Applicant, the further representation from the resident of Bede Kirk and the supplemental objection from the Owner's Solicitor are all attached at Appendix 3.
12. Although the Owner opposes the application, they have not directly challenged the Applicant's user evidence and have not put forward any evidence which is contrary to the user evidence provided by the Applicant. Accordingly, 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 or where there are significant legal issues in dispute.
13. 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 the statutory test for registration of the Application Land as a Town or village Green has not been met by the Applicant. Accordingly, the recommendation is that Members should refuse the Application and decline to register the Application Land as a Town or Village Green.

## **The Law**

### **The Commons Act 2006**

14. Village greens which were not registered as such by 31 July 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.
15. 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 Application Land is to be registered. Registration of village greens is determined by the 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.

16. The Application 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.”*

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

17.1 “...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.

17.2 “...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.

17.3 “...or any neighbourhood within a locality...” – A neighbourhood must be clearly defined and have a sufficient cohesiveness. It must also be within a locality.

17.4 “...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.

17.5 “...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. Where the position is ambiguous then it should count as a public right of way use as the less onerous right.

- 17.6 "...for a period of at least 20 years..." – The fulfilment of the 20 years continuous use must immediately precede the date of the application.
18. The Growth and Infrastructure Act 2013 introduced the concept of trigger and terminating events. The purpose of these is to prevent a TVG application where land has been identified for potential development in the planning system. A trigger event would therefore operate to prevent a TVG application from being made where certain events in connection with development of land have occurred unless and until there is a corresponding terminating event, thereby restoring the ability to make an application. These trigger and terminating events are set out in Schedule 1A to the Commons Act 2006. For example, trigger events include publication of an application for planning permission and draft allocation of land in a local plan or neighbourhood plan as well as adoption of that plan. Terminating events include withdrawal of the planning application/plan, refusal and expiry of the planning permission.

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

19. 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.
20. 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**

21. The plan attached to the Application at Appendix 1 shows the Application Land edged in red. It is part of the former Police Station at Bede Kirk, being the grassed/landscaped grounds upon which there are a number of mature trees but not the Police Station building itself or the car park. The steps/footpath from Harmire Road up to the public entrance to the Police Station building are also included but not the remainder of the footpath which leads to the car park.

22. Other than a stone wall on the Western elevation of the Application Land, it is unenclosed and bounded to the West by a vehicular highway known as Harmire Road (beyond which there are residential dwellings) and to the North, East and South by residential dwellings. There are no recorded public rights of way over the Application Land.
23. It is understood that the Police Station closed in 2017.

### **Ownership**

24. The Application Land is in the ownership of the Office of the Police and Crime Commissioner for Durham and is registered at the Land Registry, together with the Police Station building, under title number DU287321.

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

25. 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. An Officer assessment of the user Evidence is attached at Appendix 4. In summary, it is clear that a very small number of members of the public have used the Application Land for lawful sports and pastimes as of right over a 20 year period immediately preceding the application in July 2017. It can also be said that the majority of the users are from Barnard Castle Town Council area itself. However, of the 18 users who have provided evidence, only 3 have provided evidence of use over the whole qualifying period (although 1 user has also provided such evidence for 19 of the 20 years qualifying period). Applying each of the elements of the Section 15 definition to the facts of the application as follows:

#### *A Significant number*

- 25.1 Although significant in this context does not necessarily mean substantial or considerable, it is not considered that 18 users, only 3 of whom have either used the Application Land or observed others doing so over the whole of the qualifying period (discussed further below) is sufficient to show general use by the community as opposed to occasional use by trespassers. It is also considered that the number of users is insufficient to alert a reasonable landowner that rights were being asserted over the Application Land.

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

- 25.2 Barnard Castle Parish is clearly a Locality, as required by the Act. With the exception of 1 user, the users who have provided evidence all live, or have lived, within this Locality during the qualifying period. Although it is uncertain whether the users who have merely been observed by others (children playing and dog walkers) have all come from this Locality, the requirement is only for the users to be predominantly from the Locality.

#### *Use as of Right*

- 25.3 The Application Land is largely unenclosed and there is no evidence that any notices seeking to control use of it have ever been erected on it by or on

behalf of the Owner. Although there is a sign which reads '*strictly visitors to Police Station only*', this is considered to relate to the use of the car park which is not included within the Application Land. Nor is there any evidence that the landowner has sought to challenge the use. There can therefore be no question of use of the land by force. Equally, there is no question of the use being by stealth/secretly. Turning to the issue of permission, there is no evidence that any of the users have ever sought or obtained permission to use the Application Land from the landowner and no evidence that the landowner has ever sought to control or permit the use. Although the landowner asserts that permission can be implied due to the operational nature of the Police Station between 1977 and 2017 with a public counter and out of hours telephone facility at the front of the building, it is of note that the building is not included within the Application Land. Whilst permission therefore may be implied for the public to access the police station building and out of hours telephone service, it cannot relate to the Application Land itself with the exception of the steps/footpath leading to the front of the building. It is considered that members of the public must have used these steps/footpath to access the building and out of hours telephone facility by way of permission as it was the access to a public building providing a public service. Accordingly, it is considered that the use of the Application Land (excluding the steps/footpath) has been 'as of right.'

#### *Lawful sports and pastimes*

- 25.4 The range of activities undertaken on the Application Land include dog walking, children's play/games and socialising as well as wildlife watching and picnicking. With the possible exception of dog walking, these activities amount to either informal recreation or the playing of games and as such are lawful sports and pastimes. Although one user mentions playing ball with a dog which is clearly a leisure activity, it is unclear whether the majority of dog walkers who have used the Application Land have done so by walking a defined route or by walking anywhere on the Application Land. If a defined route has been walked only, it may amount to no more than the assertion of a public footpath rather than referable to a leisure activity (lawful pastime). The landowner has asserted that dog walkers have followed a particular route over the Application Land in order to access the former police houses, rather than undertaking any form of leisure use and whilst the Applicant points out that there is no footway on the Application Land, he does not appear to directly challenge that assertion. It is of note that there is a paved footpath running from Harmire Road to the car park from where access can be gained to the houses at Bede Kirk, although the car park and part of the footpath are not within the Application Land. Given the ambiguity over this issue, it is considered that such use ought to be regarded as the assertion of public footpath rights only rather than a lawful pastime in connection with a village green use. However, it is important to note that even if the dog walking use were to be regarded as a leisure activity entirely referable to village green use, this would not alter the recommendation. It is not considered therefore that this is a determinative issue in the assessment of the Application.

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

- 25.5 Although one user gives evidence of use as far back as 1951 and another from 1958, the qualifying period for the purposes of the application is the 20

years immediately preceding the application i.e. July 1997 – July 2017. Of the 18 users who have provided evidence of use, 2 predate the qualifying period, 1 post-dates it, 4 are from the early 2000s onwards, 1 from the last year only, 1 relates to 19 years of the qualifying period, 3 relate to the whole of the qualifying period and it is unclear what period is being referred to by the other 6. There is no information given as to frequency of the claimed use. It is considered that there is insufficient evidence of use of the Application Land for the whole of the qualifying period and continuing up to the date of the application. The level of use borne out by the evidence is insufficient to bring it home to a reasonable landowner that village green rights were being asserted.

#### *Trigger/Terminating events*

25.6 There are no trigger events relevant to the Application Land.

#### *Other issues – the proposed sale and redevelopment of the Application Land*

25.7 It is apparent that following the closure of the Police Station, the Owner intends to sell the Application Land for residential development to a Housing Association. Indeed, this is referred to in the objection letter from Railway Housing Association and in many of the user evidence letters and representations in support of the Application. The intentions of the Owner in this regard are not material to the determination of the Application or the status of the Application Land as Town or Village Green or otherwise. Members must not therefore place any weight on the desirability or otherwise of the loss of the green space to housing and must determine the application strictly on the basis of an assessment of the evidence and whether the above statutory test is met.

#### **Overall Conclusions**

26. The Applicant has failed to discharge the burden placed upon him of proving on the balance of probabilities that:
- (a) The users are significant in number;
  - (b) There has been continuous use of the land for at least 20 years immediately preceding the date of the application.

#### **Recommendation:**

27. It is recommended that Members resolve to:

Refuse the Application and decline to register the Application Land as a Town or Village Green.

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**Implications of decision**

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**Finance - none**

**Staffing - none**

**Risk – there is a potential risk of legal challenge by an Applicant, should the Application be refused in accordance with the Officer recommendation.**

**Equality and Diversity / Public Sector Equality Duty - none**

**Accommodation - none**

**Crime and Disorder - none**

**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.**

**Consultation – the application has been publicised in accordance with the legislation**

**Procurement – none**

**Disability Issues - none**

**Legal Implications – determination of the Application is a quasi-judicial function and therefore there is a potential for challenge by an aggrieved party by way of Judicial Review.**