

Highways Committee

13 September 2018

Application NL43 for Village Green
Registration
Romaldkirk, County Durham



Report of Helen Lynch, Head of Legal and Democratic Services

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 Romaldkirk, as Town or Village Green, under the provisions of the Commons Act 2006.
3. The application was made by Romaldkirk Parish Council, acting through its chair, Lesley Cutting (the Applicant). A copy of the application, excluding the supporting user evidence, is attached at **Appendix 1** (the Application). The Application was dated 11 September 2016 and was accompanied by a plan showing the area claimed as town or village green (the Application Land) as well as 2 statements in support from users of the claimed TVG. The Application Land is shown edged and hatched in red at **Appendix 2**. The Application was given the reference number NL43 by the Council.
4. A copy of all of the user evidence submitted in support of the application is attached at **Appendix 3**.
5. As required by Regulations, 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 Romaldkirk Parish Council, for public access.
7. Following publication of the notice of the application, five objection letters were received. Copies of the letters of objection are attached at **Appendix 4**.

8. The Applicant was given an opportunity to comment upon the objections received and on 19 February 2017 10 further letters in support of the Application were submitted. Copies of these letters are attached at **Appendix 5**.
10. On 11 May 2018 and 2 July 2018, the solicitor acting on behalf of the Commons Registration Authority wrote to both the Applicant and the occupants of the property adjacent to the Application Land. The letters expressed concerns in respect of the use of the Application Land and invited further representations, particularly in respect of the effect of a Deed dated 4th September 1930 made under the provisions of section 193 of the Law of Property Act 1925. There was a lack of clarity in respect of the status of the Application Land and in particular whether the Application Land was used 'as of right' or 'by right'. Copies of these letters are attached at **Appendix 6** and the 1930 Deed is attached at **Appendix 7**.
11. On 27 July 2018 the Applicant submitted 10 further statements in support of the Application together with an Opinion from a barrister responding to the issues raised in the letters. Copies of the further statements are attached at **Appendix 8** and the Counsel's Opinion is attached at **Appendix 9**.
12. A Non-Statutory Public Inquiry is usually 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. However, in this case, it is felt that there are sufficient areas of dispute in terms of the extent of the use of the Application Site to require a Non-Statutory Public Inquiry to test the evidence in order to assist the Committee in the determination of the Application. A Non-Statutory Public Inquiry is also recommended given the complex legal issues surrounding the status of the land arising from the 1930 Deed.

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. In this instance, there are not considered to be any relevant trigger events.

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.'

Ownership

24. The Application Land is unregistered but is believed to be in the ownership of the Diocese of Leeds.

Overall Conclusions

26. There are a number of issues which need to be tested and considered. It is considered that the threshold for holding a Non- Statutory Public Inquiry has been met.

Recommendation:

27. It is recommended that Members resolve to:

Note the Application and delegate authority to the Head of Legal and Democratic Services to instruct an independent specialist barrister to hold a Non-Statutory Public Inquiry to consider the Application and thereafter prepare a report to Members of the Highways Committee which makes a recommendation to Members in respect of the Application.

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Implications of decision

Finance – There will be a cost to the Authority in holding a Non-Statutory Public Inquiry.

Staffing - none

Risk – there is a potential risk of legal challenge.

Equality and Diversity / Public Sector Equality Duty - none identified

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 will be able to speak at the Committee Meeting.

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

Procurement – a procurement process will need to be followed in instructing a barrister should Members resolve to follow Officer recommendation.

Disability Issues - none

Legal Implications – there is a potential for challenge by an aggrieved party by way of Judicial Review.