

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE

17 September 2012

Report of: Commons Registration Authority

Title: Application to register land known as Easter Garden, High Street Clifton Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006

Ward: Clifton

Officer Presenting Report: Anne Nugent, Senior Solicitor, Legal Services

Contact Telephone Number: 0117 922 3424

RECOMMENDATION

Before arriving at a final determination of the application to register the land known as Easter Garden, High Street Clifton Bristol as a town and village green it is recommended that an independent inspector be appointed to consider representations on the preliminary issue, the issue being whether the application demonstrates 20 years user.

Summary

This report relates to an application to register land known as Easter Garden, High Street, Clifton Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006

The significant issues in the report are:

As set out in the report

Policy

1. There are no specific policy implications arising from this report.

Consultation

- **Internal**

2. Not applicable

- **External**

3. Not applicable

Context

4. The Council as registration authority has received an application to register land known as Easter Garden, High Street Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006 (the Act) from a Mr John Delaney on behalf of the Friends of Easter Garden dated 1 March 2011. Amended on 26 May 2011.
5. A plan of the site, which shows the application land, is shown at **Appendix A** to this report.
6. The application shows land between High Street and Wesley Pace Clifton an area of parkland on the southeast side of Charlton Road Southmead, Bristol
7. The application was in the prescribed form, Form 44, verified by a statutory declaration of Mr Delaney, photographs and 29 questionnaires and other supporting evidence. The questionnaires are in a form using the questions broadly similar to the form, which is produced by the Open Space Society.
8. The basis of the application and qualifying criteria were specified in Section 4 of the application were on the grounds that the application site has become a town or village green by virtue of the actual use of the land. In Section 7 of the application the Applicant summarized the justification for the application as follows:

"The people who maintain are drawn from the local community and they see their efforts as a manifestation of the local residents use of the it as an "as of right" claim. The Friends of Easter Garden feel that they need to control the land sufficiently to sustain its claim to occupy the garden for the purpose of the future attainment of the freehold with regard to the Land Registry.

The Friends of Easter Garden's occupation is in accordance with the objects as stated above and in doing so it does not interfere with the local residents use of it "as of right ". In effect, the Friends of Easter Garden are well aware of how this land was used by local people "as of right" long before FOEG was created and view it's occupation as a "by permission" given by the local community, to turn a piece of derelict land into a wildlife/community garden.

It is a fact that this piece of land has seen enjoyment across several generations, namely children who once played on it, now as adults, grandparents even, now enjoy the garden with their offspring/grandchildren. Some of the letters in part 10 bear this out.

In summary, I wish to make it clear that in this application, the Friends of Easter Garden, as a voluntary body was set up and still is pursuant to the local residents' use of the land.

A full statement is contained in Addendum B to the application.

9. An objection to the registration of the application land has been received from the landowner, Mr Sarjit Singh (the Objector) in the form of a witness statement dated 24 April 2012 together with exhibits. The Objector states that he owns part of the land, which is subject of the application. In particular title numbers BL 64043, BL69854, BL69853 and BL69855. An area of the application land is unregistered, and subject to a caution against first registration.
10. A map showing the area of the application land registered to the Objector is shown at **Appendix B** of this report. The unregistered area is shown cross-hatched.
11. The Applicants responded to the Objections by letter dated 24 May 2012.
12. The Applicants have also submitted further 'late' evidence.
13. The documentary evidence submitted by the parties has been assessed. The short report of CRA officer is attached as **Appendix C**.

Proposal

14. PROWG Committee on behalf of the Council (as statutory Commons Registration Authority) has a statutory duty under the Commons Act 2006 and the regulations made thereunder to determine objectively whether or not the land in question should be registered as a Town or Village Green within the meaning of the Act.
15. Before arriving at a final determination of the application to register the land known as Easter Garden, High Street Clifton Bristol as a town and village green it is recommended that an independent inspector be appointed to consider representations on the preliminary issue, the issue being whether the application demonstrates 20 years user.
16. The inspector will then report back to the CRA with recommendations. CRA will then bring the matter back to PROWG.

Other Options Considered

17. The other options considered are:

- 19.1 Refer the application to an independent inspector for a public inquiry on all the issues;
 - 19.2 Reject the application on the papers.
18. The referral for a full inquiry will put the Council to additional unnecessary expense if the evidence does not prove 20 years user.
 19. Rejecting the application on the papers without a preliminary examination of the issues by an independent inspector could be considered to be unfair and put the Council at risk of legal challenge.

Risk Assessment

20. The options leave the Council open to legal challenge. In spite of the fact that legal challenge in cases of this nature is the exception rather than the norm, it must be pointed out to members that there are, nonetheless, legal risks associated with this decision. There could be questions of the fairness of the proceedings.
21. These risks are mitigated against by the Council's demonstration of a fair and transparent process in its determination of the application and a decision based on detailed consideration of the evidence.

Public Sector Equality Duties

22. Before making a decision, section 149 Equality Act 2010 requires that each decision-maker considers the need to promote equality for persons with the following "protected characteristics": age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Each decision-maker must, therefore, have due regard to the need to:
 - i) Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010.
 - ii) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to --
 - remove or minimise disadvantage suffered by persons who share a relevant protected characteristic;
 - take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of people who do not share it (in relation to disabled people, this includes, in particular, steps to take account of disabled persons' disabilities);

- encourage persons who share a protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- iii) Foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to –
- tackle prejudice; and
 - promote understanding.

Legal and Resources Implications

Legal

23. The City Council in its capacity as Commons Registration Authority has responsibility under the Commons Act 2006 to determine whether the land or a part thereof should be registered as a green.

The Law

24. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority (CRA) to register land as a town or village where it can be shown that:

“A significant number of inhabitants of any locality, or any neighbour within the locality, having indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years”

25. In addition to the above, the application must meet the test under Section 15(2) of the Act in particular that use of land has continued “as of right” until at least the date of the application.

26. The applicant must establish that the land in question comes entirely within the definition of a town or village green, in Section 15(2) of the Act. The Registration Authority must consider on the balance of probabilities whether or not the applicants have shown that:

a significant number of inhabitants of the locality or neighbourhood indulged in lawful sports and pastimes as of right on the land for a period of at least twenty years; and they continue to do so at the time of the application.

27. In its capacity as Registration Authority the City Council has to consider objectively and impartially all applications to register greens on their merits taking account of any objections and of any other relevant considerations. Wholly irrelevant considerations such as the potential use of the land in the future must be left out.

“As of right”

User “as of right” means user without force, secrecy or permission (*nec vi nec clam nec precario*). User as of right is sometimes referred to “as if by right” and must be contrasted with use “by right”. In short:

- a) such rights cannot be acquired by force
- b) the land owner must be aware of the user (in the sense of the way it must be endured openly and in a manner that a person rightfully entitled would use it) and
- c) the landowner must not have consented to the user.

Procedure

28. The application has been made under Section 15(2) of the Act 2006. The regulations that govern the procedure are the (Commons Registration of Town or Village Greens) Interim Arrangements (England) Regulations 2007. There is nothing in the Regulations or the Council’s own procedure preventing the appointment of an inspector to consider the issue of 20 user as a preliminary issue.

Legal advice provided by: Anne Nugent, Senior Solicitor, Legal Services.

29. Financial

(a) Revenue

In the event of any subsequent legal challenge any costs over and above those normally met from existing revenue budgets can be met from the central contingency.

(b) Capital

There are no policy implications arising from this report

Financial advice (Revenue) from Tony Whitlock, Corporate Finance
Financial advice (Capital) from Jon Clayton, Corporate Finance.

Land

There are no policy implications arising from this report

Personnel

Nil

Appendices

Appendix A – Map of Application Land

Appendix B - Map showing extent of Objector ownership

Appendix C - Officer Assessment of evidence

Local Government (Access to Information) Act 1985

Background Papers:

Application papers/ statement of objections/ response available at the Council House, College Green.

Section 15 Commons Act 2006

Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007

07 September 2012

JD5.449

APPENDIX (7) A

Paul D. Brown
Solicitor.

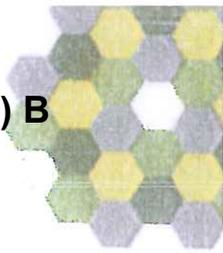


Scale number not applicable

Ordnance Survey map reference ST5774NW

Scale 1:1250

APPENDIX (7) B



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Assessment of Evidence – Easter GardenApplicant's evidence

1. The Application is made on the basis that the land has been used by a significant number of local inhabitants for leisure activities such as ball games, picnicking, playing with children, walks, dog walking and relaxation for a period of more than 20 years. The Applicant asserts that such use has been 'as of right'. In total 29 evidence statements were submitted with the application.
2. Within the application there is reference to the "L-shaped" land, Title Nos. BL64043, BL69853, BL69854 and BL69855. However, the application land also includes an additional piece of land not included in the above Title Numbers. A caution against first registration (under title no BL72939) was lodged by, The Friends of Easter Garden against this land in 2002. According to the Applicant's, in a letter dated 24 August 2011, the additional land 'has no known ownership or deeds'

The Objector's evidence

3. An objection to the registration of the application land has been received from the landowner, Mr Sarjit Singh (the Objector) in the form of a witness statement dated 24 April 2012 together with exhibits. The Objector confirms that he owns part of the land which is subject of the application. In particular title numbers BL 64043, BL69854, BL69853 and BL69855.
4. The Objector summarises his objections on page 9 of his witness statement where he states ,
 - *'The Application does not satisfy Section 15(1) of the Commons Act 2006.*
 - *The application evidence in support of the does not demonstrate 20 years user by a significant number of local inhabitants in any locality or neighbourhood within a locality*
 - *Any user has not been as of right since it has been with the use of force.*
 - *Any user has not been as of right since it has been in the knowledge of the registered proprietor at the material time clearly exercise proprietary right over the Land.*
 - *The reality is that many people oppose the development of the Land and this application is the latest in a long line of attempts to prevent development'*.

Assessment

5. Section 15 (1) of the Commons Act 2006 states that any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies
6. To meet the criteria under Section 15(2) of the Commons Act 2006 states , an application must show that - *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.*
7. The test is a strict one. It is necessary for each of the elements of the criteria in Section 15(2) to be met. It is not sufficient to meet only some of the elements of the test or parts of those elements.
8. The applicant provided 29 witness questionnaires and a petition of 80 si

in support of the application. '*significant number*' does not mean 'a considerable or substantial number' *R (Alfred McAlpine Homes) v Staffs CC [2002]*.

9. The land has been used for a variety of activities including games, dogwalking, picnic etc
10. However, does the application demonstrate 20 years user? The 20 year period is calculated back from the date of the application. The use of the land must be continuous in the sense of not being interrupted for any significant period of time. Whilst there is no need to show that the land is being used every day, the land must have been used and available for use when needed.
11. On the information provided in the application, a wall was erected across the land, preventing access for a period of nine years (1985 – 1994). The Applicants provided further statements from witnesses stating that there was user between 1985 and 1994 despite the wall.
12. The Objector in his evidence has, at paragraph 12, stated that two walls were installed to prevent access in 1986 and the then owners applied for retrospective planning permission. It is not clear if such permission was obtained.
13. The Applicants in their further submissions do not dispute that the land was enclosed but contend that the land was illegally enclosed.
14. The Objector has also stated that any user has not been 'as of right', because '*it has been with the use of force*'. Under Section 15(2) rights cannot be acquired by force, the landowner must be aware of the user (in the sense of the way it must be endured openly and in a manner that the person rightfully entitled has used it) and the landowner must not have consented to the user.
15. The Objector has owned part of the land since 2008. The owner of the other part is unknown. It is also unclear if the wall was built by the owner or on behalf of the owner.
16. PROW Path number 575 runs across the application land.

Conclusion

17. Although there are various issues of dispute between the parties in my view the issue of the wall preventing access until 1994 could be determinative of the application.
18. In my view the issue of 20 years user should be dealt with as a preliminary issue either on the basis of written submissions or at an oral hearing.