BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE

25 June 2018

Report of: Commons Registration Authority

Title: Application to Register Land at Stoke Lodge as a Town and Village Green under the Commons Act 2006, Section 15(2)

Ward: Stoke Bishop

Officer Presenting Report: Anne Nugent

Contact Telephone Number: (0117) 922 3424

RECOMMENDATION

That the committee accept the recommendations of the Independent Inspector set out in his Report dated 14th October 2016 and as confirmed by the High Court in *R(Cotham School) v Bristol City Council* [2018] EWHC 1022 and reject the application to register

Summary

This report concerns an application to register a site known as Stoke Lodge Playing Fields, Stoke Bishop, as a Town Green.

The significant issues in the report are:
The High Court has referred the application for town green status back to the committee for reconsideration in accordance with its judgment.

Policy

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

Consultation

Internal

2. Not applicable

External

3. A non- statutory public inquiry (NSPI) took place between 20th - 29th June 2016 and continued on 13th July 2016.

Context

4. On 12 December 2016 the Committee considered the officer's report (attached

Appendix 1) and the inspector's report and heard public forum submissions. The majority of the committee (with the Chair exercising a casting vote) decided to register the application land as a new town green ("TVG"). The decision to register the land was for the following reasons:

(i) Other than the "as of right" element the Committee accepted the inspector's findings that all the elements of the statutory test were proven on the balance of probabilities.

(ii) That between 1991 and 1996 there were three Avon County Council signs attempting to make the use of the land contentious.

(iii) In Winterburn the Court of Appeal found that landowners can prevent rights being acquired by third parties by displaying clear visible warning signs that the land is private.

(iii) Three members of the Committee considered that the facts of Winterburn were not the same as the facts in this case. Unlike the car park in that case Stoke Lodge Playing Fields is a large piece of land (about 22 acres) and there were only three signs. The small numbers of signs on such a large site was not sufficient to make the use of the land contentious."

5. Cotham School objected to the decision and sent Legal Services a pre action letter. The school's objections could not be resolved and the school sought permission to judicially review this decision. Permission was granted by Mr J Holgate on the 9 May 2017. Having considered the matter at a 2 day hearing in November 2017 and after considering subsequent submissions concerning the Court of Appeal judgment on statutory incompatibility, Sir Wyn Williams quashed the decision to register and remitted the application back to BCC to consider the matter again in the light of his decision (judgment *R(Cotham School) v Bristol City Council* [2018] EWHC 1022 (Appendix 2).

6. The committee will be assisted by a short summary of the various issues including the various grounds the High Court considered in quashing PROWG's decision.

Ground 1: Error of law as to whether the use was "as of right"

7. This ground of challenge to the PROWG decision focused very closely on the issue of signage. The Claimant argued that PROWG's finding was inconsistent with the finding by the Inspector that many users of the land saw the signs. The Council, represented by in-house Legal Services and Mr Stephen Morgan, of counsel, highlighted the fact that the Inspector himself considered that there was inadequate signage from 1996 onwards when the number of signs reduced even further. However the judge was of the view that once PROWG had adopted the findings of fact made by the Inspector as to the extent and visibility of the signage as at the date the signs were erected it was necessary for PROWG to consider in detail whether the state of affairs existing at the date of the erection of the signs had changed, materially, at the commencement of the 20 year period. That was especially so given the clear findings of the Inspector that the signs were in existence between 1991 and 1996 and, further, his findings that a significant number of local inhabitants had actually seen the signs during that period.

PROWG did not undertake that analysis so Ground 1 was successful

Ground 2: Took into Account Irrelevant Matter/Breach of Natural Justice

8. There were two aspects to this ground of challenge. First, that PROWG took into account irrelevant matters in that, during the course of the proceedings on 12 December 2016, Councillor Abraham, in particular, raised matters which were irrelevant. Second, that the Claimant was given no indication, prior to PROWG's decision, that PROWG had received a substantial number of representations to the effect that the Inspector's reliance upon Winterburn was wrong and/or that the decision in Winterburn was distinguishable on the facts. Claimant argued that this constituted a breach of a duty upon the committee to act fairly in its consideration of the application for registration.

9. Although the Judge rejected both aspects of the claim members (of any committee) need to be seen to be objectively unbiased.

Ground 3: Failure to supply adequate reasons for not following the Inspector on contentiousness

10. The judge dealt with both grounds 1 and 3 together. The finding was that PROWG did not explain the basis upon which it was proper to depart from the Inspector's factual conclusions particularly given that the inspector heard all the evidence as to where people walked upon the land and what they saw when they were upon it. The judge considered that it would be "unthinkable" for the decision maker to depart from the recommendation of its Inspector who had produced a closely reasoned and detailed recommendation after hearing oral evidence over many days without providing its own reasons for that departure.

Ground 4: Failure to give reasons for rejecting the submission based on consideration of Mann v. Somerset [2012] EWHC B14

11. PROWG accepted the inspector's recommendation on this issue regarding implied licence (as seen in R (Mann) v Somerset County Council [2012] EWHC B14 (Admin)). The Inspector considered the co-existence of users and the implications of that. He considered the extent of the use of the land by schools, clubs and the University, and the arguments from the objectors that local people had made limited use of the land. The Inspector noted that no-one walking a dog or flying a kite interrupted the game. The Inspector took into account the exclusion of other users of the land at various times. The Inspector was clearly aware of the claimed sports day use, as this is included in his record of the evidence. The Judge rejected this ground, finding no error of law.

Ground 5: Statutory Incompatibility

12. The school alleged that the Inspector was wrong to consider the situation at the point of the application rather than at the point the application is determined. The judge did not make a finding on this.

13. The school also argued that the registration of the land as a TVG would prevent it from complying with the Secretary of State's Directions. The argument being that registration of the land would preclude the School from using the land for PE. The judge did not agree and refused to uphold this challenge.

14. Lastly under this ground the school argued that the Inspector was in error in finding that the Claimant school's duties did not conflict with registration under the Commons Act 2006. This contention of the Claimant failed.

Summary of the Inspector's report

15. Here follows an extract from your officer's report to Committee of 12 December 2016: the Applicant, Save Stoke Lodge Park Land, applied on 4 March 2011 for registration as a Town or Village Green of land at Stoke Lodge, Stoke Bishop, Bristol (the TVG application). This summary sets out the key issues which need to be considered now.

16. The Commons Registration Authority (CRA) received objections from the Council, as landowner (the First Objector), University of Bristol (the Second Objector), Rockleaze Rangers Football Club (the Third Objector) and Cotham School (the Fourth Objector).

17. The Council in its capacity as CRA has responsibility under the Commons Act 2006 (CA 2006) to determine whether the land should be registered as a green. It is for the Applicant to define the application land and then to show that the statutory test is satisfied in relation to the whole of it.

18. Mr Philip Petchey of Counsel was appointed as an independent Inspector (the Inspector) to make recommendations to the CRA on how to deal with the TVG application. The inspector held a non-statutory inquiry to obtain all the evidence and has now submitted his recommendations in a report (Appendix 1).

19. The inquiry sat over 9 days. In this time it heard evidence from 28 witnesses. The evidence of applicant is at paragraphs 35 to 224 of the Report. The evidence of the Council can be found at paragraphs 224 -250; the evidence of Cotham School can be found at paragraphs 251- 304; the evidence of the University of Bristol can be found at paragraphs 304 -331; the evidence of other witnesses can be found at paragraphs 332-334.

20. The Applicant had to show that (para. 335 -337):
    - a significant number of the inhabitants of a locality, or neighbourhood within a locality
    - had indulged in lawful sports and pastimes on the land
    - for a period of at least 20 years down to 7 March 2011; and
    - their use was *as [if] of right.*

21. The burden of proof is to the civil standard (the balance of probabilities). The Inspector considered the effects of registration and non-registration in this case.

22. The Inspector reminded the Council that the issues of whether or not the land should be fenced off; whether or not it should remain open for use by local people; whether or not there is some acceptable compromise which might allow both are not matters for the Inspector or the CRA. The Inspector, and now the Committee, are solely

concerned with an assessment of whether the legal requirements of section 15 (2) have been met.

23. The Inspector considered that the use of the land by local people was significant in any ordinary sense (see paragraphs 338- 342). The inspector reported that the land is an attractive and important piece of open space to which there was ready access by those living in the area. Local people are using the land like a public recreation ground. No single visit would have used the whole of the land but in the course of time they will have ranged all over the land. The Inspector reported that the only thing that might have inhibited local people from using the land was a sense that they ought not to be on the land, which might have been the case if, for example, their use was subject to frequent challenge, but the Inspector advised that there was no such consciousness.

24. The Inspector considered the suggestion that if dog walking and informal recreation are lawful sports and pastimes which may establish a town or village green, then the land has obviously been used for lawful sports and pastimes by people living in the vicinity of the site for lawful sports and pastimes. However, this argument was rejected by the House of Lords in the *Sunningwell* case. Whilst the evidence showed that the land was used as a shortcut to and from places on either side of it, this use does not count towards the establishment of a town green and the Inspector declined to take it into account when reaching his view that there has been significant use of the land.

25. Paragraphs 343 – 360 the inspector considered the extent of the use of the land by schools, clubs and the University, and the arguments from the objectors that local people had made limited use of the land. The Applicant argued that the schools and clubs had made limited use of the land. The inspector considered that whenever a pitch was used by a school or by a sports club it had exclusive use of that part of the land for that period. The inspector noted that no-one walking a dog or flying a kite interrupted the game. Thus in respect of that piece of land for that period, use by local people was interrupted, because pitches of one sort or another covered almost the entirety of land and because in the relevant period there would have been literally thousands of interruptions, thus a claim to registration would fail because the necessary 20 years use has not been shown. On this analysis, the application would fail, but the evidence showed that, subject to occasional issues with dogs, use by local people could co-exist with use by the schools and sports clubs. This was not just a matter of local people going on to the land only when the schools and clubs were not on it. The evidence generally indicated that there was plenty of room elsewhere on the land when it was being used by schools and clubs. More specifically, although none of the parties undertook to analyse for the benefit of the inquiry the complete booking record that a witness produced, and which would have enabled a more precise view to be taken about the matter, the Inspector did not think that the precise extent of the School and clubs use was determinative of the application.

26. The inspector considered the *ad hoc* nature of access to the land and the absence of any signage suggesting that it was available for public use. He found that it seemed

likely that the gates on Shirehampton Road would have been locked and, in any event, these were not directly providing access to the land, but to Stoke Lodge.

27. The inspector then considered the Access points (shown on Appendix 3 to this report). The gates at Access Point [2] look to have been primarily gates to a service yard. Access Points [4], [5] and [6] while going back a long time, look to have been made by made by the use rather than being provided by the Council. Access Point [7], whenever it was made, is a way in over a decaying wall. Access Point [8] was accessed through the service yard. Access Point [9] was, on any view, a gap in the wall and not a "proper" access. Access Point [10] is just a convenient place where people can easily get over the wall. The Inspector accepted that Access Point [3] may have been open and rendered the site freely accessible but it is the only "proper" entrance out of ten.

28. The Inspector considered that the public were trespassers at this time, although some may have *believed* that they were permitted or had some entitlement to go on the land.

29. **Notices** The inspector considered notices at paragraphs 367 -372. The inspector did not accept that the Avon County Council Notice under the Local Government Act 1982 was ambiguous it was confirming the pre-existing situation and was not for first time granting a limited consent.

30. The inspector then considered "as of right" at paragraphs 373 – 412 The qualifying use must be *as [if] of right and* if those using the land actually do have the right, their use will not be "*as [if] of right"* but "*by right"*; the core concept lying behind use which is *as [if] of right* is that it is use by those who behave as if they did have right. The phrase has a precise legal definition – use which is as [if] of right use must be use which is *nec vi nec clam nec precario.* It translates as not *by force, not secretly, not by permission.* Of the three limbs of the definition, relevant to consideration of the effect of prohibitory notices of the kind that the Inspector has held the Avon County Council signs to be is the first limb: *nec vi* or not *by force*.

31. The Inspector made reference to his Report of 22 May 2013 and his then advice to the CRA to conclude that, despite the existence of the Avon County Council signs, use by local people of the land had been "*as of right".* However, the Inspector reminded the decision maker that this was before the recent case of *Winterburn v Bennett 2016* EWCA Civ 482, was decided by the Court of Appeal which established that use which ignores prohibitory notices is not "*as [if] of right".* In his judgment in *Winterburn*, David Richards LJ said:

> *40 … In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right"*

32. The position now is that there is recent high authority which is directly in point and which establishes that use which ignores prohibitory notices is not *as of right.* Thus the

position is that in principle in the present case the signs may render the use of the land by local people contentious and not as of right. The Inspector also considered the further question as to whether the Avon County Council signs were sufficient to render use of the land contentious. At paragraph 391 the Inspector stated ‘‘I thus conclude that signs which were sufficient to render use of the land contentious were in place at the beginning of the twenty year period (1991) and that such use was contentious until at least the time when Avon County Council ceased to exist 1996. This means that the Applicant failed to establish that use was *as of right* throughout the relevant twenty year period and the application must fail”.

33. The Inspector considered if the “Avon County Council” signs were obsolete following the abolition of Avon County Council. The Inspector concluded that these had continuing application and further, at the beginning of the twenty year period, Avon County Council was still in existence.

34. The Inspector then considered whether it is possible that use of the land in the relevant twenty year period had been contentious not because of the signs alone but *also* because of other actions of the landowner or those acting on his behalf. The inspector considered the warnings off were not very frequent and because they were principally aimed at one category of user – anti-social dog walkers – the Inspector consider that they did not have the effect of making the use of the land generally contentious. Thus on the basis that the signs were not sufficient by themselves to render use of the land contentious, the inspector does not consider that the objectors are able to rely on the signs **plus** the warnings off.

35. The Inspector considered whether there was the possibility of confusion was enhanced if the sign was mounted on a single pole, and if it was possible for it to be rotated so that it will not always have been facing those leaving the grounds of Stoke Lodge House. However, on balance, the reasonable landowner would consider that the sign would be construed by local people as applying to the playing fields and not the grounds of Stoke Lodge.

36. The inspector considered whether, together, the facts of the existence of the Avon County Council signs at the beginning of the 20 year period and thereafter until the sign at access point [12] was replaced by the Bristol City Council sign; and the presence of the Bristol City Council sign thereafter are sufficient to have made use of the land contentious within the relevant 20 year period. The inspector considered this issue and concluded at paragraph 400 that by erecting this one sign Bristol City Council could not reasonably have concluded that it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users.

37. The Inspector looked at whether S15(2) or S15(3) CA 2006 applied. S15(2) provides that qualifying use has to continue down to the date of the application. Section 15(3) provides that, in the alternative, qualifying use does not have to continue down to the time of the application but down to a date which may not be more than one year before the date of the application. In the present case, on the basis that qualifying use

ceased at some time in 2009 after 26 March 2009, that cessation would have been less than 2 years before the date of the application (7 March 2011) but more than one year before. On the basis that the law on 7 March 2011 was the same as it is now and that qualifying use ceased in 2009 after 26 March 2009, the application would have been out of time. On this basis, the erection of the Bristol City Council sign in 2009 can have no bearing on a decision to register the land, because if use which is as of right ceased in 2009, the land would still be registrable on the basis of section 15(3) rather than 15(2).

38. **Statutory incompatibility** paragraphs 413 – 412 **-** A local authority is under a duty to ensure that sufficient schools for providing secondary education are available for their area. For this purpose, a local authority may establish and maintain secondary schools. These powers are now contained in the Education Act 1996; before 1996 they were contained in the Education Act 1944. The Inspector considered the key to this issue is the correct time to look at the matter If the correct time is the date of the application, the proposition that there is statutory incompatibility in the present case lacks conviction because at that time both the school and local people were using the land in a way that was not incompatible. If the correct time is now – i.e. the time at which a decision on the application falls to be made – the inspector considered that this has some force because registration will evidently preclude the School from using the land for physical education.

39. The inspector considered that a Court would hold that the relevant date is the date of the application and therefore, however the matter ultimately is rationalised, he advised that the argument on statutory incompatibility failed.

40. N**eighbourhood & locality** paragraph 453 – 460 -The Applicant confirmed that the red line that he had drawn should be taken to be a neighbourhood and not a locality. The legal representative for the School argued that the area that the applicant has defined lacks any degree of cohesiveness and is arbitrary – just a line drawn on a map reflecting where the users come from.

41. The inspector considered that one expects there to be a correlation of some kind between the area where users come from and the relied on locality or neighbourhood within a locality. The inspector did not consider that the application should fail because no neighbourhood within a locality has been demonstrated. With the deletion of Sea Mills, he considered that the area defined by the Applicant is a cohesive neighbourhood.

42. **Conclusion** The Inspector recommended (para 463) that the land be not registered as a town or village green because in the relevant twenty year period use by local people has not been *as of right*. Otherwise the inspector's recommendation would have been that the land should be registered. The inspector did not consider that any of the other reasons argued for by the objectors should lead to the rejection of the application. Here ends the extract from December 2016 report.

PROPOSAL

43. The Committee's duty on behalf of the Council (as statutory CRA) under the Commons Act 2006 and associated regulations is 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.

44. The High Court has given clear guidance on the consideration of the application and the inspector's recommendation, so on this basis, the proposal is that the land be not registered as a town (or village) green, that is that application for registration be rejected for the reasons set out in the inspector's report.

Other Options Considered

45. Whether the inspector's recommendation should be overruled and the land be registered. Given the outcome of the Judicial Review this option was rejected

Risk Assessment

46. If the Committee does not follow the recommendation of the inspector, as upheld by the High Court, the Council risks a further legal challenge.

Public Sector Equality Duties

47. 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 Resource Implications

48 Legal

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 criteria to be applied for successful registration are provided by the Commons Act 2006. The applicant must establish that the land in question comes entirely within the definition of a town or village green, to be found in Section 15(2) of the Commons 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.

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. The Committee must leave out of account wholly irrelevant considerations. Having commissioned the inspector to gather the evidence and to provide his recommendations on the registration or otherwise of the land as a town green and given the decision of the reviewing judge it is likely to be unlawful to decide to register.

<u>"As of right"</u>

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 of right" and must be contrasted with use "by right" (see below).

<u>"By right"</u>

User "by right" means that users already have a statutory or other legal right to use the land for those purposes. Such users are not trespassers. Land is not used "as of right" for lawful sports and pastimes if user is "by right". If land is used "by right" then the statutory test cannot be satisfied.

Legal advice provided by Anne Nugent, Team Leader Solicitor

49 Financial

(a) Revenue

In the event of any subsequent legal challenge any costs exceeding the existing revenue budget will have to be met from Legal's reserves.

(b) Capital

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

Personnel

Not applicable

Appendices:

Appendix 1 –The Inspector's Report
Appendix 2 – *R(Cotham School) v Bristol City Council* [2018] EWHC 1022
Appendix 3 - Plan showing access points

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985
Background Papers:

Applicant and objector's evidence bundles and written submissions

Section 15 Commons Act 2006

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