

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE

12 December 2016

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

1. To consider the application for a deferment of consideration of the Independent Inspector's Report for a period of three months whilst the Applicant seeks further legal advice.
2. Subject to 1 above, to accept the recommendations of the Independent Inspector set out in his Report dated 14th October 2016.

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:

Making a decision on the application for a deferment (that is to adjourn the consideration of the application to register) and the determination of the application to register as a town green.

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

Context

4. 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). The 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).
5. 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.
6. 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).
7. Following receipt of the report, the CRA has circulated it to the parties. The Applicant has indicated to the CRA that it is considering mounting a legal challenge on the grounds that “*any decision relying solely on Winterburn may be unsafe*” and has made an application to the CRA requesting that the Committee’s decision be deferred for an initial period of three months to allow the Applicant to seek legal advice. Appendix 2 details the grounds of the application.
8. Before considering the inspector’s Report the Committee is required to consider the request for a deferment of the determination of the TVG application. There were various extensions of time sought. Further representations were made and on 22 May 2013, the Inspector issued a report to the CRA recommending that the land be registered as a town or village green because he considered that the statutory criteria had been met. In particular he considered that use of the land had been *as of right*; and that an objection based on statutory incompatibility of registration with the statutory purposes for which the land was held fell away in the light of the decision of the Court of Appeal in *R (Newhaven Port and Properties) Limited v East Sussex County Council*. The Inspector suggested that that it would be appropriate to give the parties the opportunity to comment on his Report before it was submitted to Committee, and all took the opportunity to do so. In June 2013 the Council, as First Objector, requested extension of time to make further submissions on the Inspector’s initial Report. This was granted until 28 June 2013. Also in June 2013 the Council requested a further extension of time to make further submissions, this was granted until 26 July 2013.
9. The First Objector, changed its position on notices and further suggested that there should be a NSPI in order to hear evidence about notices; for its part, Cotham School, the Fourth Objector, suggested that a NSPI was needed in order to investigate the extent of the use by schools and by sports clubs. Further, once it became likely that there was going to be an appeal in the Newhaven case, the Council further suggested that further consideration of the matter be deferred until the outcome of that appeal was known.

10. The Inspector considered that it would be appropriate for further consideration of the matter to be deferred. One possible outcome of the appeal in the Newhaven case would have been that it became clear that the application should fail. In these circumstances, of course, the Inspector says he would have advised the CRA to dismiss the application and there would not have been a need for a public inquiry. It was agreed in January 2014 to defer the further consideration of the application until the outcome of Newhaven case.
11. The Supreme Court handed down its decision on 25 February 2015. Following submissions from the parties, the Inspector decided that on its proper interpretation it did not require the application to be dismissed. In all the circumstances, he considered that it was appropriate for there to be a NPSI. This would enable evidence to be led on the statutory incompatibility point, as well as in respect of the use of the land and as to the notices. The Inspector had at an earlier stage reached the view that it would be appropriate to allow the Council, as landowner to alter its position as regards notices. March 15 further directions were given to the parties following the judgment in Newhaven handed down on 24 February 2015). Then in April 2015, the Council requested an extension of time for further submissions to be made on the inspector's Directions which had just been circulated. This was granted until 28 April 2015. At that time (April 2015) the Applicant also requested an extension of time for further submissions to be made on the Inspectors Directions. The Applicant was granted until 16th June 2015 to make its submissions.
12. Once this preliminary matter has been decided the Committee will then either defer the determination or continue with the determination today.
13. 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.
14. 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*.
15. 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.
16. The Inspector has 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.

17. The Inspector considers that the use of the land by local people was significant in any ordinary sense (see paragraphs 338- 342). The inspector reports 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 reports 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 advises that there was no such consciousness.
18. 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.
19. At 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 considers 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, it did seem generally to evidence
20. The Inspector did not think that the precise extent of the School and clubs use was determinative of the application.

21. 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 seems 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.
22. The inspector then considers the Access points (shown on Appendix 1A to this report).
23. 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.
24. 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.
25. **Notices** The inspector considered notices at paragraphs 367 -372. The inspector does not accept that the Avon County Council Notice under the Local Government Act 1982 is ambiguous it was confirming the pre-existing situation and was not for first time granting a limited consent.
26. The inspector then considers “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*.
27. The Inspector makes 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 reminds 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 establishes 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”

28. 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 considers 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 states “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 has failed to establish that use was *as of right* throughout the relevant twenty year period and the application must fail”.
29. The Inspector considered if the “Avon County Council” signs were obsolete following the abolition of Avon County Council. The Inspector concludes that these did have continuing application and further, at the beginning of the twenty year period, Avon County Council was still in existence.
30. The Inspector then considers whether it is possible that use of the land in the relevant twenty year period has 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 considers 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.
31. 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.
32. The inspector goes on to considers 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 considers this issue and concludes 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.

33. The Inspector then looks 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 will 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).
34. **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 considers 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 considers that this has some force because registration will evidently preclude the School from using the land for physical education.
35. The inspector considers that a Court would hold that the relevant date is the date of the application and therefore, however the matter ultimately is rationalised, he advises that the argument on statutory incompatibility fails.
36. **Neighbourhood & locality** paragraph 453 – 460 -The Applicant has 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.
37. The inspector considers 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 does not consider that the application should fail because no neighbourhood within a locality has been demonstrated. With the deletion of Sea Mills, he considers that the area defined by the Applicant is a cohesive neighbourhood.
38. **Conclusion** The Inspector recommends (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 does not consider that any of the other reasons argued for by the objectors should lead to the rejection of the application.

39. The CRA has sought submissions from the other parties to the application for deferment. The Fourth Objector in its submissions has objected to the deferment application (Appendix 3). It has also stated that the *Winterburn* case is not the subject of an appeal to Supreme Court. The First Objector in its submissions also objects to the deferment application (Appendix 4). It has also contended that the Inspector's Report does not specifically consider the argument of implied licence, but because the Inspector has concluded that the public's use was contentious, and not as of right in any event, it not does consider the matter presently worth further consideration.

Proposal

40. This Committee on behalf of the Council (as statutory CRA) 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.
41. Officers recommend that the Committee considers the application for a deferment. If the matter is not deferred officers recommend that the land not be registered as a town (or village) green.

Other Options Considered

42. Whether the inspector's recommendation should be overruled and the land be registered. This was not considered as the inspector's report sets out detailed justification for his recommendation.

Risk Assessment

43. There are no risks associated with this report.

Public Sector Equality Duties

- 18 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

23 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 the Committee must, if it considers that the land should be registered, give reasons for its decision.

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

“By right”

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.

Application for a deferment

- The Committee needs to consider the reasons for the application to defer.
- The Committee needs to consider the reasons for opposing the application to defer.
- Having heard both sides the Committee will then need to make a fair and reasonable decision on the application.
- The decision of *Winterburn* is a binding decision of the Court of Appeal. It could only be overruled by a decision of the Supreme Court. As far as the CRA is concerned the decision is not subject to appeal to the Supreme Court nor the subject of an application for permission to appeal.
- The recommendation by the Inspector is only a recommendation, so if the Applicant wishes to challenge the decision he has to wait for a decision to be made.

Legal advice provided by Anne Nugent, Team Leader Solicitor

24 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 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 and plan

Appendix 1a - Annex 2 to Report- plan showing access points

Appendix 2 – Applicant’s Application for a deferment

Appendix 3- Fourth Objector’s Submissions on deferment

Appendix 4- First Objector’s submissions on deferment

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