

## Report of the Head of Legal, Democratic Services and Procurement

### Rights of Way and Commons Sub-Committee – 13 August 2014

#### APPLICATION TO REGISTER LAND KNOWN AS CWM GREEN, WINCH WEN, SWANSEA AS A TOWN OR VILLAGE GREEN

<b>Purpose:</b>	To consider the determination of the application to register the land in question as a town or village green in light of the recommendation made in the report and addendum of the Inspector.
<b>Policy Framework:</b>	None.
<b>Reason for Decision:</b>	The Authority has a statutory duty to determine the application.
<b>Consultation:</b>	Legal, Finance, Planning and Local Members.
<b>Recommendation(s):</b>	It is recommended that the Application for the above registration be <b>REFUSED</b> in accordance with the recommendation of the Inspector.
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#### 1.0 Introduction

- 1.1 The Council has received an application made by Mr. Brian Walters under Section 15 of the Commons Act 2006 in respect of land known as Cwm Green, Winch Wen, Swansea which is shown on the plan attached as Appendix 1 to this report.
- 1.2 The land in question is in the ownership of the Council.
- 1.3 An objection to the registration of the land has been received from the Council in its capacity of the owner of the land.
- 1.4 In accordance with the procedure previously approved by this Committee, a non statutory inquiry was held before an independent inspector on 25<sup>th</sup> and 26<sup>th</sup> February 2014 to consider the application. The Inspector was Mr. Alun Alesbury, M.A., Barrister at Law.

## **2.0 The Remit of the Inspector**

- 2.1 The role of the Inspector was the act on behalf of the Council solely in its role as Commons Registration Authority. The Inspector had no involvement with the Council in its capacity of landowner or objector, other than in the context of receiving evidence and submissions from the Council in those capacities, as one of the parties to the disputed issues relating to the application.

## **3.0 The Report of the Inspector**

- 3.1 Following the Inquiry the Inspector has written an Interim Report of his findings. A copy of this report is included as Appendix 2. The report was interim in nature because the decision of the Supreme Court in the case of R (Barkas) –v- North Yorkshire County Council (referred to as “the Barkas case”) was imminently expected. The facts of the Barkas case are very similar to those in the application being considered in this report and have direct consequences upon it.
- 3.2 Following the publishing of the decision in the Barkas case, the Inspector invited the parties to comment on the implications of the decision on the application and provided an addendum to his Interim Report which is attached as Appendix 3.

## **4.0 The Role of this Committee**

- 4.1 The Inspector’s findings are not binding on this Committee. It is for the Committee to reach its own determination on the matters of fact and law arising as a result of the Application.
- 4.2 It is for this Committee to determine the Application fairly, putting aside any considerations for the desirability of the land being registered as a Town or Village Green or being put to other uses.
- 4.3 However, the Inspector has had the opportunity to assess the evidence of all the parties and has heard witnesses in person and considered all the written evidence before him. It is therefore not appropriate for this Committee to re-open issues regarding the quality of the evidence unless they had extremely strong reasons to do so.

## **5.0 Legal Test to be Satisfied**

- 5.1 The Commons Act 2006 is the statutory regime governing village greens. Section 15 of the Act sets out the requirements which must be met if the land is to be registered. Registration of town and village greens is determined by this Council in its capacity as Commons Registration Authority. The process of determination of any application is focused on whether a village green has come into existence as a matter of law.

5.2 The application in this case was made under s.15(2) of the Commons Act 2006. That section 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.*

5.3 The test can be broken down as follows:

*“a significant number of the inhabitants . . .”*

It is sufficient to show a general use by the local community as opposed to mere occasional use by trespassers. It is not assessed by a simple headcount of users.

5.4 *“ . . . of the inhabitants of any locality or any neighbourhood within a locality “*

This is not defined by any arbitrary margins and must be a recognised county division such as a borough, parish or manor. An ecclesiastical parish can be a locality as required by s 15(2). It is acceptable for the users of the land to come ‘predominantly’ from the locality. A neighbourhood must be clearly defined and have a sufficient cohesiveness. It must also be within a locality.

5.5 *“ . . . have indulged as of right . . . ”*

Use ‘as of right’ is use without permission, secrecy or 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 landowner. Use is ‘as of right’ if it would appear to the reasonable landowner to be an assertion of a right. Permission by the landowner, 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’.

5.6 If the use of the land is not sufficient in terms of frequency or regularity to reasonably bring it to the attention of a landowner, then it may be a secret use which again would not be use ‘as of right’. Another 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.

5.7 The Supreme Court in the *Barkas* case held that where land is held by a local authority for public recreational purposes pursuant to any statutory power at any time during the relevant 20 year period, use of that land by other is ‘by right’ by the powers of the legislation concerned and not ‘as of right’.

5.8 *“ . . . in lawful sports and pastimes on the land . . . ”*

This is broadly interpreted so that general recreational use including walking with or without dogs and children’s play would all be included.

5.9 “ . . . for a period of at least 20 years . . . ”

The fulfilment of the 20 years continuous use must immediately precede the application under s.15(2). For this purposes of this application the relevant period is measured back from October 2011, with the use continuing at the date of the application.

## 6.0 Burden and Standard of Proof

6.1 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 Commons Act 2006 have been satisfied.

6.2 This Committee must be satisfied, based on the evidence and the report of the Inspector and its subsequent addendum that **each** element of the test has been proven on the balance of probabilities. In other words, it must be more likely than not that each element of the test is satisfied.

## 7.0 The Inspector’s Findings

7.1 The Inspector addresses each of the elements of the test and these are set out below.

7.2 “ . . . a significant number of the inhabitants . . . ”

This is addressed in paragraphs 11.3 to 11.17 of the Interim Report. The Inspector concludes that it has been clearly established that significant members of the identified neighbourhood have used the claimed land over many years.

7.3 “ . . . of the inhabitants of any locality or any neighbourhood within a locality ”

This issue is dealt with in paragraphs 11.7 to 11.12 of the Report. The Inspector takes the view (at paragraph 11.7) that the application form as originally submitted did not make it entirely clear what the Applicant was claiming in regard to this particular aspect of the statutory criteria. However, he has concluded (at paragraph 11.12 that the suggested ‘neighbourhood’ of Bonymaen/Winch Wen was an entirely appropriate area to be regarded as a ‘neighbourhood within a locality’ for the purpose of s.15 of the Commons Act 2006 and was a cohesive area with its own identity.

7.4 “ . . . have indulged as of right . . . ”

This issue is dealt with in paragraphs 11.22 to 11.46 of the Interim report and also in the Addendum at paragraph 7. The Inspector has concluded that following the decision in the *Barkas* case, the use of the land has been ‘by right’ as the public already has a statutory or other legal right to use it.

7.5 “ . . . in lawful sports and pastimes on the land . . . ”

This matter is dealt with by the Inspector in paragraphs 11.18 to 11.19 of the Interim Report. He finds that the evidence is clear that the use of the land by

local people has been for the sort of informal recreation that the courts have indicated should be regarded as falling within the expression “lawful sports and pastimes.”

7.6 *“for a period of at least 20 years; and . . . continue to do so.”*

In paragraphs 11.20 to 11.21 of the Interim Report the Inspector concludes that it was quite clear to him that the land has been well used by local people for recreation for a period very considerably in excess of the requisite period of 20 years, measured back from October 2011 and that the use was continuing at the date of the application.

## **8.0 Formal Conclusion and Recommendation**

8.1 The Inspector’s conclusions and recommendation are set out in paragraphs 9 and 10 of the Addendum to the Interim Report.

8.2 The Inspector concludes that:

a) registration of the application land as a town or village green is not justified in this case because the statutory criteria set out in section 15(2) of the Commons Act 2006 are not met in relation to the site.

b) in particular, the criteria is not met in relation to the use of the land ‘as of right’ in the sense required by the Commons Act 2006.

8.3 The Inspector therefore recommends that the application site should not be added to the statutory Register of Town and Village Greens under section 15 of the Commons Act 2006.

## **9.0 Recommendation**

9.1 It is therefore recommended that the application for registration be **REFUSED** for the reasons set out in paragraph 8.0 above.

## **10.0 Equality and Engagement Implications**

10.1 None.

## **11.0 Financial Implications**

11.1 Refusal of the application will mean that the land is still available for future development or sale.

## **12.0 Legal Implications**

12.1 None over and above those included in the body of the report.

**Background Papers:** Contained in application file.

- Appendices:** Appendix 1: Plan of the application site
- Appendix 2: Interim Report of the Inspector,  
Mr. Alun Alesbury, M.A., Barrister at Law
- Appendix 3: Addendum to the Interim Report