

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

### Rights of Way and Commons Sub-Committee – 28 January 2015

#### APPLICATION TO REGISTER LAND KNOWN AS THE GREEN, ACCESSED OFF Y LLWYNI, LLANGYFELACH, SWANSEA AS A TOWN OR VILLAGE GREEN

#### APPLICATION NO. 2729(S)

<b>Purpose:</b>	To inform the Sub-Committee of the recommendation of the Inspector
<b>Policy Framework:</b>	None
<b>Statutory Tests:</b>	Section 15 Commons Act 2006
<b>Reason for the Decision:</b>	The Authority has a statutory duty to determine the application
<b>Consultation:</b>	Legal, Finance, Planning and Local Members
<b>Recommendation:</b>	It is recommended that:: -  1) The Application for the above registration be <b>REFUSED</b> in accordance with the recommendation of the Inspector.
<b>Report Author:</b>	Sandie Richards
<b>Finance Officer:</b>	Sarah Willis
<b>Legal Officer:</b>	Nigel Havard
<b>Access to Services Officer:</b>	Phil Couch

### 1.0 Introduction

- 1.1 The Council has received an application made by Mrs. Margaret E. Boyter under Section 15(2) of the Commons Act 1996 in respect of land known locally as The Green, Accessed off Y Llwyni, Llangyfelach, Swansea. The application seeks to register the land as a Town or Village Green. A plan of the land in question appears as Appendix 1.

## **2.0 History of the Application**

- 2.1 The land is predominantly owned by this Council and the Council has made an objection to the application. However, some of the Application site belongs to two companies, namely Wilcon Homes Limited and Statuswide Limited which are both companies which had in the past developed housing estates on adjoining land. Neither of these companies objected to Mrs. Boyter's application despite being made aware of the application.
- 2.2 The Head of Legal, Democratic Services and Procurement has used the delegated authority granted by this Committee on 15<sup>th</sup> February 2012 to instruct Counsel to act as an Independent Inspector to advise on the application and the appropriate procedure to be adopted in determining the application.
- 2.3 As reported to members at the meeting of this Committee held on 23<sup>rd</sup> April 2014 the Inspector originally advised that there were issues of fact and law in dispute and that it would be appropriate to hold a non-statutory inquiry.
- 2.4 However, he has reconsidered the application in light of the decision of the Supreme Court in the case of *R (on the application of Barkas) (Appellant) –v- North Yorkshire County Council and Another (Respondent) [2014] UKSC31* which Members were advised of at the meeting of this Committee which took place on 13<sup>th</sup> August 2014.

## **3.0 The Remit of the Inspector**

- 3.1 The role of the Inspector was to 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 from the Council in those capacities, as one of the parties to the disputed issues relating to the application.

## **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 written evidence of all parties in light of the legislation and relevant case law. 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 The Legal Tests 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 the 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 and have direct consequences upon it.
- 5.7 Following the publishing of the decision in the *Barkas* case, the Inspector invited the applicant to comment on the implications on the application.

## **6.0 The Findings of the Inspector**

- 6.1 The Inspector has concluded that following the decision in the *Barkas* case, the use of the land owned by the Council has been 'by right' as the public already has a statutory or other legal right to use it. This is of significance because the Council owned land forms the bulk of the application site throughout the relevant period and that the basis on which the Council has held that land has meant that it has been available for local public use throughout the relevant period.
- 6.2 The Inspector acknowledges that part of the application site is owned by Wilcon Homes Limited and Statuswide Limited. However, he takes the view that to the extent that those companies' ownerships overlap with the application site, the overlap is either minimal or consists of land in the nature of a footpath, which is not inherently a type of land which is likely to be registrable under the Commons Act 2006. This is because the law is clear that the use of land as a fixed route of passage to walk to and fro is not a qualifying 'lawful sport or pastime' for the purposes of this legislation.
- 6.3 Furthermore, the Inspector has noted that the applicant has not in any way suggested that she wishes her application to be considered, but only in relation to the parts of the application site outside the Council's ownership. However, he states that if she had done so, the pieces of land concerned are so tiny in relation to the site as a whole that they would (in his view) render the application completely different in nature from that which was originally put forward. He advises the Registration Authority that such a change would be too great in extent to be regarded as a reasonable modification which could be accepted without prejudicing any other party.

## **7.0 Formal Conclusion and Recommendation**

- 7.1 The Inspector concludes that Mrs Boyter's application as a whole should be dismissed, because the criteria set by Section 15 of the Commons Act 2006 have not been shown to apply in relation to any part of the land.

7.2 The Inspector also makes a specific recommendation, in the light of the way in which the matter has been dealt with in the representations from the parties, that a proper and final decision can be taken by the Registration Authority now, without the need for any further procedural stages, such as the holding of a public local inquiry into the matter. There is in his view no consideration relating to fairness or natural justice which calls for the decision to be delayed any further, or for any further input to be invited from any of the parties or affected landowners.

## **8.0 Equality and Engagement Implications**

8.1 There are no Equality and Engagement implications to this report.

## **9.0 Legal Implications**

9.1 The Council in its role as Commons Registration Authority has a statutory duty pursuant to Section 15 of the Commons Act 2006 and the Commons (Registration of Town or Village Greens) (Interim Arrangements) (Wales) Regulations 2007 to determine applications for land to be registered as a town or village green.

9.2 The effect of registration of land as a town or village green is that it is protected from development for ever and preserved for use by local people.

9.3 The land is predominantly owned by the City & County of Swansea and a conflict arises as the Council is both the Commons Registration Authority and the objecting owner of the land. These roles have to remain separate as far as possible so as to minimise challenge by way of judicial review. The application must be considered purely on the merits of the case by applying the relevant law and in accordance with the principles of natural justice. The usual way of overcoming the conflict caused by the dual role is to appoint an Independent Inspector to consider the application.

## **4. Financial Applications**

4.1 There is no specific budget identified for the expenditure incurred for the determination of applications. Expenditure will be incurred from existing budget provisions.

**Background papers:** Application file.

**Appendices:** Appendix 1: Plan of the application site