

Report of the Head of Legal, Democratic Services and Procurement

Planning Committee – 13 October 2015

**APPLICATION TO REGISTER LAND KNOWN AS CASTLE ACRE GREEN,
NORTON, SWANSEA AS A TOWN OR VILLAGE GREEN**

APPLICATION NO. 2731(S)

Purpose:	To inform the Sub-Committee of the recommendation of the Inspector
Policy Framework:	None
Statutory Tests:	Section 15 Commons Act 2006
Reason for the Decision:	The Authority has a statutory duty to determine the application
Consultation:	Legal, Finance, Planning and Local Members
Recommendation	It is recommended that: <ol style="list-style-type: none">1) the application for the above registration be GRANTED;2) the land of the application site be added to the Register of Town or Village Greens under Section 15 of the Commons Act 2006.
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Finance Officer:	Aimee Dyer
Legal Officer:	Sandie Richards
Access to Services Officer:	Phil Couch

1.0 Introduction

1.1 The Council has received an application made by Dr. Robert Leek on behalf of "The Friends of Castle Acre Green" under Section 15(3) of the Commons Act 2006 in respect of land known locally as Castle Acre Green, Norton, 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 owned by this Council and the Council has made an objection to the application.
- 2.2 The Head of Legal, Democratic Services and Procurement has used the delegated authority granted by this Committee on 15th 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 of the Rights of Way and Commons Sub-Committee on 8th October 2014 the Inspector advised that there were issues of fact and law in dispute and that it would be appropriate to hold a non-statutory inquiry.

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.
- 3.2 Mr. Alesbury is a recognised expert in this area of law and has been appointed on numerous occasions to hold public inquiries in relation to village green applications both by the City & County of Swansea and other local authorities throughout England and Wales.

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(3) 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 ceased to do so before the time of the application but after the commencement of this section; and*
- c) *the application is made within the period of two years beginning with the cessation referred to in paragraph (b)."*

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. 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. 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 *“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.

5.8 *“. . . for a period of at least 20 years. . . .”*

The application was received by the Commons Registration Authority on 29th March 2011. The application states that use of the claimed land “as of right” ceased on 21st April 2009, which was less than two years before the time of the application. 21st April 2009 is therefore the date from which the relevant 20 year period needs to be measured (backwards).

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(3) 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 town or village green in section 15(3) of the Commons Act 2006 have been satisfied.

6.2 This Committee must be satisfied based on the evidence and the report and addendum of the Inspector and subsequent comments by the Council and the applicant as objecting landowner 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 in his report dated 4th March 2015 [which is attached as Appendix 2] and these are set out below.

7.2 “Locality” or “Neighbourhood within a Locality”

This is addressed in paragraphs 11.6 to 11.14 of the Inspector’s Report. The Inspector concludes that the identified ‘neighbourhood’ of Norton sits, and for all material purposes sat, within a legally significant ‘locality’ which accords with the interpretation which the courts have chosen to give to that term.

7.3 “A Significant Number of the Inhabitants” [of the Neighbourhood]

This issue is dealt with in paragraph 11.15 of the Inspector’s report. He notes that the Objector conceded that the Applicant was able to show that a significant number of local inhabitants from the neighbourhood had used the land over the requisite period.

7.4 “Lawful Sports and Pastimes”

This is addressed in paragraph 11.16 of the Inspector’s report. Again, it is noted that the Objector had conceded that those local inhabitants had indulged in ‘lawful sports and pastimes’ on the application land.

7.5 “For a Period of at Least 20 Years”

As noted in paragraph 11.17 of the Inspector’s report, the 20 year period for the purposes of this application was the one ending when ‘permissive’ signs were erected on the land on 12th April 2012.

7.6 “On the land”

It will be seen from paragraphs 11.18 to 11.24 that there was some discussion between the parties regarding the exact extent of the application land. The Inspector has concluded that the hook shaped area referred to was included.

7.7 “As of right”

The issue of most legal significance at the inquiry was whether or not use of the land had been ‘as of right’ and is referred to in paragraphs 11.25 to 11.70 of the report.

7.7.1 The Council, as objecting landowner conceded that local people from Norton had used the application site for more than 20 years up to April 2012 when signs were erected. However, they argued that the local people had been doing so either be implied permission, or possibly ‘by right’ as the exercise of statutory powers by the Council would have given the public the right to be on the land.

7.7.2 Particular consideration is given by the Inspector to the judgment of the Supreme Court in the case of R (Barkas) –v- North Yorkshire County Council [2014] UKSC 31. One of the main points decided by the Court in that case (referred to at paragraph 11.30 of the Inspector’s report) might be that where a local or public authority, having statutory powers to do so, has deliberately provided a piece of land for recreational purposes, it can be taken to have ‘appropriated’ the land for such purposes, even if it has not gone through a formal process of appropriation under section 122 of the Local Government Act 1972. As such, the local people using that land recreationally are not there as trespassers, or ‘as of right’ but are using the land ‘with permission’ or ‘by right’.

7.7.3 However, the Inspector emphasises (as paragraph 11.32) that the Supreme Court in Barkas very specifically did not say that its judgment meant that no open land belonging to a local or public authority can ever be registered as a town or village green if the statutory criteria are otherwise met.

- 7.7.4 Consideration was also given by the Inspector to the evidence provided to the inquiry regarding the way in which the land had been seen by the Council and its predecessors over the years. This point is considered in paragraphs 11.38 to 11.55 of the Inspector's report.
- 7.7.5 The Inspector makes a judgment that the application land is more akin to a piece of open local authority land, acquired for a different purpose and not laid out or identified for public recreational use, but which just happens, through circumstances, to have been available for use by local people for 'lawful sports and pastimes'. He does not view it as land which the Council and its predecessors had allocated for public recreational purposes, even by some less formal process of appropriation or allocation.
- 7.7.6 The Inspector concludes (at paragraph 11.57) that even though the land is owned by the Council it **is** nevertheless capable of being registered under the Commons Act.
- 7.7.7 Consideration was also given to three further issues which the Objector argued showed use of the land to be by permission rather than 'as of right', these being medieval tournament camping, dog fouling signs and bins and signs associated with the Mumbles Development Trust and the Mumbles Way.
- 7.7.8 The Inspector concluded that the evidence resented regarding these issues did not undermine the Applicant's case under the Commons Act.

8.0 Formal Conclusion and Recommendation

- 8.1 The Inspector's conclusions and recommendations are set out in paragraphs 11.71 and 11.72 of the Report.
- 8.2 He concludes that the Applicant has succeeded in making out the case that there was 'as of right' use for lawful sports and pastimes of the whole of the application site by a significant number of the inhabitants of the neighbourhood of Norton for at least the relevant 20 year period.
- 8.3 The Inspector recommends that the application site should be added to the Register of Town or Village Greens, under Section 15 of the Commons Act 2006.

9.0 Representations made by the Council in its capacity as the objecting owner of the application land

- 9.1 The Council (in its role as objecting landowner) and Applicant were provided with a copy of the Inspector's report prior to this meeting.
- 9.2 Mr. Rhodri Williams, Queen's Counsel who represented the Council (in its capacity as the owner of the application land) at the inquiry disagrees with the Inspector's interpretation of the law. He has given his consent for his advice

to his client to be disclosed to this Committee and this is attached as Appendix 3. The Council (as objecting landowner) wishes the Committee to know that it is felt that the Inspector has failed to deal with the Council's express submission that evidence existed which was wholly consistent with its case that the land was held for open space purposes for a significant period of time within the requisite 20 year period and, notably, after 2008.

- 9.3 Furthermore, it is argued on behalf of the Council that the Inspector has not properly applied the law as established in *Barkas* either to the facts of this case, or to the case as submitted on behalf of the Council in its capacity of objector.

10.0 Response of the Inspector and the Applicant to the Landowner's representations

- 10.1 The Advice of Mr. Williams QC was sent to both the Applicant and Inspector for comment.
- 10.2 The Applicant's comments are attached as Appendix 4.
- 10.3 The Inspector has addressed the issues raised by Mr. Williams in an Addendum to his original report with the benefit of having also considered the Applicant's comments. The Addendum is dated 4th September 2015 and is attached as Appendix 5. Members will note from the final sentence of paragraph 8 of the Addendum that the Inspector emphasises his neutral and non-partisan standpoint.
- 10.4 The Inspector states [at paragraph 13 of the Addendum] that nothing in what Mr. Williams says in his Further Advice contains, in his judgment, any new or persuasive points which suggest that he applied the legal tests wrongly.
- 10.5 He concludes [at paragraph 21] that he remains of the view that the land of the application site in this case **should** properly be added to the Register of Town or Village Greens, under Section 15 of the Commons Act 2006.

11.0 Implications of not following the Inspector's Recommendation

- 11.1 If Committee decides not to follow the Inspector's recommendation to register the land as a town or village green members should be aware that the Applicant may bring a claim against the Council by way of Judicial Review in the High Court.
- 11.2 If leave was given by the Court for such a claim to be made the Court would review the law and the correct interpretation of the case law.
- 11.3 The Applicant would only succeed in getting the Committee's decision quashed if it was held by the Court to be a decision no reasonable authority could make.

11.4 The Inspector emphasises at paragraph 8 of his addendum that an authority in its quasi-judicial role should not readily go against the conclusions of its independent legal adviser on such a matter unless there are clearly evident, convincing reasons to do so.

12.0 Recommendation

12.1. It is RECOMMENDED that the application for registration be GRANTED for the reasons set out in paragraph 8 above.

13.0 Equality and Engagement Implications

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

14.0 Financial Implications

14.1 If the land is designated as a town or village green it will not be available for development in the future.

15.0 Legal Implications

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

Background papers: Application file.

Appendices: Appendix 1: Plan of the application site

Appendix 2: Report of the Inspector, Mr. Alun Alesbury, M.A., Barrister at Law, dated 4th March 2015

Appendix 3: Advice of Mr. Rhodri Williams QC, Barrister at Law, dated 9th March 2015

Appendix 4: Comments of the Applicant on the advice of Mr. Rhodri Williams QC

Appendix 5: Addendum to the Inspector's Report dated 4th September 2015