

Report of the Head of Legal and Democratic Services

Planning Committee – 7 June 2016

APPLICATION TO REGISTER LAND KNOWN AS THE RECREATION GROUND OR 'THE REC', OYSTERMOUTH ROAD, SWANSEA AS A TOWN OR VILLAGE GREEN

APPLICATION NO. 2733(S)

Purpose:	To inform the 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 REFUSED;2) that NO PART of the land of the application site be added to the Register of Town or Village Greens under Section 15 of the Commons Act 2006.
Report Author:	Sandie Richards
Finance Officer:	Aimee Dyer
Legal Officer:	Tracey Meredith
Access to Services Officer:	Phil Couch

1.0 Introduction

- 1.1 The Council has received an application by Ms Kathryn Ann Dodd on behalf of the "We Love the Rec" group. The application seeks to register 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. The Council in its capacity as owner of the land has made an objection to the application. A further objection has also been received from a resident from the locality of the application site.
- 2.2 The Head of Legal and Democratic Services has delegated authority to instruct Counsel to act as Inspector and to advise on the application and the appropriate procedure to be adopted in determining the application including whether a public inquiry would be necessary to consider the application. Mr. Alun Alesbury, MA, Barrister-at-law was instructed to advise.

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.
- 3.2 Mr. Alesbury is a recognised expert in this area of law and has been appointed on numerous occasions to advise on applications and 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.
- 3.3 A public inquiry took place over three days on 1st, 2nd and 3rd March 2016 to consider the evidence.

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. He has also had the opportunity of listening to evidence presented on oath at the public inquiry. It is therefore not appropriate for this Committee to re-open issues regarding the quality of the evidence unless they have 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 tests to be satisfied in respect of an application for town or village green status are completely different to those involved for a planning application. The criteria relevant to the granting of a planning permission are, as a matter of law, completely different from those relevant to a Commons Act determination. A Commons Act determination is entirely dependent on matters of *fact* relating to the past history of the land concerned and the legal consequences of those facts, once the facts have been established. Views as to what *ought* to happen (or be permitted to happen) on the site in the future are completely irrelevant.

5.3 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).”*

5.4 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.

5.5 *“. . . 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.

5.6 *“. . . 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'.

5.7 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.

5.8 *"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 application was dated, and received by the Commons Registration Authority, on 25th March 2014. That is therefore the 'time of the application'. The application suggests that use of the claimed land 'as of right' ceased on 30th March 2012, which was less than two years before the time of the application. On that basis 30th March 2012 would be 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 of the Inspector 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 an Advice dated 26th April 2016 (which is attached as Appendix 2) and these are set out below.

7.4 **“Locality” or “Neighbourhood within a Locality”**

This is addressed in paragraphs 11.7 to 11.10 of the Inspector’s Advice and Recommendations. The application put forward the ‘Uplands Electoral Ward’ as being the relevant area to meet one or other of these criteria. During the course of the public inquiry it was established clearly at the Uplands Electoral Ward is co-terminous with the Community area of Uplands, which had been defined under a Statutory Interest of 1983, and had been in existence for a period well in excess of the relevant 20 year period. The Inspector concludes that the application therefore meets this aspect of the statutory criteria.

7.5 **“A significant number of the inhabitants” “Lawful sports and pastimes on the land”**

These two criteria are addressed together in paragraphs 11.11 to 11.12 of the Inspector’s Advice and Recommendations. He concludes that the evidence presented both at the inquiry and in writing showed that the application site had been used by a significant number of the inhabitants of the Uplands Community or electoral ward for lawful sports and pastimes since the 1880s, and that such use has continued ever since subject to interruptions and implied permissions which are discussed in the following parts of the report. Consequently, the Inspector finds that in his judgment the application also meets these two aspects of the statutory criteria.

7.6 **“for a period of at least 20 years”**

This criteria is addressed in paragraphs 11.13 to 11.24 of the Inspector’s report. Members will note in particular that the Principal Objector argued at the inquiry that the Application had made her application under the wrong subsection, it being suggested that she should have made it under subsection 15(2), based on the claimed use still continuing as at the time of the application. However, the Inspector concludes the application can appropriately be determined under subsection 15(3) and that it was in the interests of fairness and justice for the application to be considered under this subsection.

7.7 **“As of right”**

The issue of whether the use of the land has been “as of right” is considered by the Inspector at paragraphs 11.25 to 11.79 of his Advice and Recommendations.

The Principal Objector conceded that the use which has been made by the local inhabitants of the Recreation Ground over the years has been without force, and without secrecy.

However, the issue of whether the use had been “without permission” was disputed by the Principal Objector.

The Inspector discusses the relevant case law and in particular the decision of the Supreme Court in the case of *R (Barkas) –v- North Yorkshire County Council* [2015] AC 195, [2014] UKSC 31 where the Court equated having a statutory right to use a piece of land to having *permission* to use it. This means that if there is something about the basis on which the Council (or its predecessors) held the land concerned which gave the public a right, or a permission to use the land, in particular during the relevant 20 year period, then that land *cannot* be registered as ‘town or village green’ because it cannot have been used so as to meet the ‘as of right’ test.

Consideration is given (at paragraph 11.47 of the Inspector’s Advice and Recommendations) to the fact that the Recreation Ground, although part of the ancient corporate estate’ of the Council’s predecessors since 1762, has since the early 1880s been provided by those predecessors, and then the Council itself, as a ‘public walk or pleasure ground’ under Section 164 of the Public Health Act 1875. As such the public have a right to use the land for recreation, which cannot be removed or ‘withdrawn’ without following an appropriate statutory procedure.

A further argument was put forward by the Principal Objector based on the proposition that the public have been prevented from freely accessing parts or the whole of the application site on numerous occasions during the relevant 20 year period, because the land was being used for the purpose of holding events such as fairs and circuses or for car parking. The Inspector concludes (at paragraph 11.71) that some of these regular interferences with ‘lawful sports and pastimes’ uses were so significant and substantial that they must be taken to have shown that the landowner was asserting a ‘right’ to exclude local people from their own regular use of substantial parts of this land.

8.0 Formal Conclusion and Recommendation

- 8.1 The Inspector concludes (at paragraph 11.80) that the Applicant has **not** succeeded in making out the case that the application site, or any part of it, should be registered pursuant to Section 15 of the Commons Act 2006 and that in particular she has failed to establish that the land, or any part of it, had been used “*as of right*” during the relevant period, within the legal meaning of that expression.
- 8.2 He recommends that no part of the application site at the Recreation Ground should be added to the statutory register of town or village greens.

9.0 Recommendation

- 9.1 It is RECOMMENDED that the application for registration be REFUSED for the reasons set out in Mr. Alesbury’s Advice and Recommendations.

10.0 Equality and Engagement Implications

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

11.0 Financial Implications

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

12.0 Legal Implications

12.1 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: Advice and Recommendations of the Inspector, Mr. Alun Alesbury, M.A., Barrister at Law, dated 26th April 2016