

Report of the Head of Legal and Democratic Services

Planning Committee – 10 May 2016

APPLICATION TO REGISTER LAND KNOWN AS PARC Y WERIN, GORSEINON SWANSEA AS A TOWN OR VILLAGE GREN

APPLICATION NO. 2734(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.
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1.0 Introduction

1.1 The Council has received an application by Gorseinon Community Councillors James Dunkley and Claire Elizabeth Lewis in respect of land known as Parc y Werin, Gorseinon, Swansea. The application is made by Cllrs Dunkley and Lewis in a personal capacity and not on behalf of the Community Council. 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 number of other objections have also been received from residents 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 or in respect of the planning permission granted by the Planning Committee on 8th December 2015 for the development of a new school.
- 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.

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 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(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.”

5.4 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 relevant 20 year period in this application is measured backwards from the date the application was received on 23rd November 2015.

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 town or 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 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 19th February 2016 (which is attached as Appendix 2) and these are set out below.

7.2 Members will note from paragraph 7 of the Inspector’s Advice and Recommendations that the Council as Objector has expressly accepted that the application site at Parc y Werin has been extensively used since the 1920s as a park for recreation by local people and the general public; that there have been no ‘permissive’ signs at the park; and that the gates of the park were not (at any material time) closed or locked.

7.3 However, three main lines of argument have been put forward by the Council as Objector as to why the application site is still not eligible to be registered under Section 15(2) of the Commons Act 2006. These can be summarised as being that the use of the park by the local public was not “as of right” as required by the legislation; that there is a ‘statutory incompatibility’ between the basis on which the Council has held the land concerned and finally that

the Applicants had not identified an appropriate 'Locality' in respect of whose inhabitants the claim for registration was made. The Inspector considers these points as follows:

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

This is addressed in paragraphs 9 and 10 of the Inspector's Advice and Recommendations. He concludes that the administrative area of the Gorseinon Town Council is plainly capable of being a 'locality' for the purposes of the application.

7.5 **Statutory Incompatibility**

The Inspector considers the argument submitted by the Council in its objection that the precise basis on which the Council, and its local government predecessors as owners, have held the various parts of the land at Parc y Werin since their original acquisition. He is of the view that on the information he had considered does not present a clear basis on which it would be appropriate or right to reject the Applicants' claim, without calling on the parties to provide further submissions and evidence in clarification.

7.6 **“As of right”**

The issue of whether the use of the land has been “as of right” is considered by the Inspector on paragraphs 18 to 31 of his Advice and Recommendations.

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 to the fact that part of the present Parc y Werin was purchased by the former Swansea RDC under an Indenture of 1924 under statutory powers under the Housing Acts 1890 to 1919 and further that recreational/leisure use of the relevant part of Parc y Werin by the local public will have been 'by right', not 'as of right', during the whole of the period being considered.

8.0 Formal Conclusion and Recommendation

- 8.1 The Inspector concludes that there is no justification for the convening of a local public inquiry in order to consider the matter further. He takes the view that the application simply cannot succeed as a matter of law because the use of the application site cannot have been 'as of right', in the sense required by the law.
- 8.2 He recommends that no part of the application site at Parc y Werin should be added to the statutory register of town or village greens and that further this decision can properly be taken without convening a public local inquiry.

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 19th February 2016