Report of the Head of Legal, Democratic Services and Business Intelligence

Planning Committee – 6 June 2017

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

Purpose:	To inform the Planning 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(s):	It is recommended that:

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 from Mr. James Dunckley and Ms Claire Lewis (the Applicants) under section 15(2) of the Commons Act 2006 in respect of land known as Parc y Werin, Gorseinon, 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.

1.2 The land subject to the application is owned by the Council. The Council in its capacity of owner of the land is the Principal Objector to the application.

1.3 The application site consists of two adjacent blocks of land, with distinctly different original acquisition history. As set out by the Inspector (at paragraphs

11.22 and 11.25 of his report) very approximately the eastern or north eastern two thirds of the present Parc y Werin (including the area of the bowling greens outside the current application site) was initially acquired by the present Council of the City and County of Swansea's predecessor on a long lease dated 31st December 1921. The south-western (very approximately) one third of the present application site was acquired freehold by the present Council's predecessor by an indenture dated 30th December 1924, as part of a very much larger area of land. The Inspector refers to these areas of land as the "1921 land" and the "1924 land" respectively and considers them separately where the "*as of right"* aspect of the application is concerned. A plan showing the demarcation of the two separate areas of land is included as Appendix 2.

1.4 A number of other representations, both for and against the application were also received by the Commons Registration Authority and were considered by the Inspector.

2.0 History of the Application

2.1 As reported to the Planning Committee on 4th October 2016, Mr. Alun Alesbury, Barrister-at-Law, the Inspector appointed to consider the application advised that there were issues of fact and law in dispute between the Applicants and Principal Objector and that it would be appropriate to hold a non-statutory inquiry.

2.2 A public inquiry took place on 14th to 16th February 2017 at Canolfan Gorseinon Centre to consider the application.

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 as landowner.

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 and 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. In particular, the planning history of the application is not relevant for the purposes of this application.

4.3 However, the Inspector has had the opportunity to assess the evidence of all parties, both on oath at a public inquiry, by perusal of documentation

submitted by the parties and by carrying out a site visit. Furthermore, the Inspector has considered all the evidence 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 application in this case was made under section 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. 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 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 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 Applicants. The standard of proof to be applies is 'on the balance of probabilities'. Therefore, the Applicants 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 Inspector's report 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 8th May 2017 (which is attached as Appendix 3) and these are set out below.

7.2 *""A significant number of the inhabitants"*

This part of the test is addressed in paragraph 11.6 of the Inspector's report. He concludes that the land has been used over many decades by a significant number of the inhabitants.

7.3 *". . . of any locality . . ."*

This criteria is considered in paragraph 11.7 of the Inspector's report. He concludes that Gorseinon is a valid 'locality' for the purposes of section 15 of the Commons Act 2006.

7.4 *"indulged . . . in lawful sports and pastimes on the land"*

The Inspector concludes (at paragraph 11.8) that local Gorseinon people have used the entire area of application land for lawful sports and pastimes over the whole of any relevant 20 year period.

7.5 *"for a period of at least 20 years"*

This criteria is considered in paragraphs 11.9 to 11.14. In particular, the Inspector refers to evidence presented at the inquiry regarding the locking and unlocking of the park gates. However, he states that the practice had ceased before November 1995. Consequently, the requisite 20 year requirement is made out.

7.6 *"as of right"*

The Inspector considers at some length in his report (starting at paragraph 11.15 onwards) whether the application land has been used 'as of right' as is required by section 15 of the Commons Act 2006 or whether it has been used 'by right' or with permission which could be revoked by the landowner. Particular reference is made to the Supreme Court case of *R (Barkas) –v- North Yorkshire County Council [2015] AC 195, [2014] UKSC 31.*

He considers the "1921 land" and the "1924 land" separately in his recommendations at paragraphs 11.32 to 11.58 and paragraphs 11.59 to 11.83 respectively.

The 1921 Land

The 1921 land was acquired by the Council for the express purposes of setting up a 'public walk or pleasure ground' or recreation ground on the land concerned. The Inspector notes (at paragraph 11.33) that by 1932 (if not before that) Parc y Werin had been formed as a 'pleasure ground' because Llwchwr UDC secured byelaws governing Parc y Werin as a pleasure ground.

However, by 1944 Llwchwr UDC acquired the freehold to the land free from incumbrances, with the 1921 lease merging into the freehold, so that the specific lease terms about use and laying out as public walks or recreation ground ceased to exist.

Consequently, the applicants argued that because the land was thereafter held for general purposes, it was no longer a public park or pleasure ground for local people to use 'by right' and that if they carried on using it, they were now doing so 'as of right'. However, the Inspector takes the view (at paragraph 11.44) that the Council did not show any indication of an intent to change the use of the land as a park/recreation ground after 1944.

The Inspector also considers (at paragraph 11.51) the importance given by the Applicants to the decision of the Lliw Valley District Council in the 1970s to permit the temporary stationing of up to 6 caravans for residential use, as a

temporary measure while some houses were being repaired or renovated on an area within the Northern part of Parc y Werin.

The Inspector takes the view (at paragraph 11.58) that the temporary stationing of the caravans did not mean that Lliw Valley had 'appropriated' any of the 1921 land away from the park/recreation ground use to a temporary housing use. He concludes (at paragraph 11.56) that in his judgment the 1921 land has **not** been used "as of right by local people".

The 1924 Land

The 1924 land was acquired by the Swansea Rural District Council as part of a very much larger purchase of land pursuant to a housing scheme under the Housing Acts of 1890 to 1919 for the provision of "houses for the working classes". The Inspector takes the view that the facts and history of the land is similar to that considered by the Supreme Court in the *Barkas* case.

In that case the recreation ground had been provided on what had originally been 'housing land'. The Inspector finds (at paragraph 11.79) that it cannot be plausibly argued that the local public using the deliberately provided 1924 land part of Parc y Werin were doing so as trespassers 'as of right'. In his judgment they were doing so 'by right' or by permission of the owning authority.

8.0 Arguments of Statutory Incompatibility

8.1 In paragraphs 11.84 to 11.106 the Inspector considers the argument put forward by the Principal Objector that registration of the land as a town or village green would be incompatible with the statutory purposes for which the land was held. In particular, it was purported by the Principal Objector that the land had been appropriated in July 2015 for education purposes.

8.2 Having considered the evidence, the Inspector (at paragraph 11.93) is "entirely unsatisfied that the purported appropriation was carried out properly or effectively" and has "very strong reservations about the effectiveness of that as an appropriation at all."

8.3 He commends to the Commons Registration Authority that statutory incompatibility is not a sound basis for rejecting the applicants' application. However, this point does not have any effect on the Inspector's overall conclusions and recommendation based on the arguments as between 'by right' and 'as of right' use of this land by local people.

9.0 Overview Points Made by the Inspector

9.1 In paragraphs 11.107 and 11.114 of his report the Inspector makes overall observations regarding the application. He discusses the need to hold a public inquiry and expresses the view that it is not the role of Commons Registration Authorities to seek to make up for perceived deficiencies in the general law as to the protection from changes to parks, recreation grounds and open spaces in the care and ownership of Local Authorities for other uses.

10.0 Final Conclusions and Recommendations

10.1 The Inspector's conclusions and recommendations are set out in paragraphs 11.115 and 11.116 of his report.

10.2 He concludes that the Applicants have not succeeded in making out the case that any part of the application site should be registered pursuant to section 15(2) of the Commons Act 2006. In particular, they have failed to establish that any part of the land was used 'as of right' for the requisite purposes or period, within the legal meaning of that expression.

10.3 The Inspector recommends that no part of the application site should be added to the Register of Town or Village Greens under Section 15 of the Commons Act 2006.

11.0 Equality and Engagement Implications

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

12.0 Financial Implications

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

13.0 Legal Implications

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

Background Papers: Application file

Appendices:

Appendix 1	Plan showing the application site
Appendix 2	Plan showing the 1921 land and the 1924 land
Appendix 3	Report of Mr. Alun Alesbury, Barrister-at-Law dated 8th May 2017