

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

### Rights of Way and Commons Sub-Committee – 13 August 2014

#### APPLICATION TO REGISTER DISUSED RAILWAY LAND, NORTH-EAST OF STATION ROAD, LLANMORLAIS, SWANSEA AS A TOWN OR VILLAGE GREEN

<b>Purpose:</b>	To consider the determination of the application to register the land in question as a town or village green in light of the recommendation made in the report of the Inspector.
<b>Policy Framework:</b>	None.
<b>Reason for Decision:</b>	The Authority has a statutory duty to determine the application.
<b>Consultation:</b>	Legal, Finance, Planning and Local Members.
<b>Recommendation(s):</b>	It is recommended that 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 Mr. David James Matthews under Section 15(3) of the Commons Act 2006 in respect of disused railway land, north east of Station Road, Llanmorlais, Swansea which is shown on the plan attached as Appendix 1 to this report.
- 1.2 The land in question is held under a long lease by Mr. Richard Beynon.
- 1.3 After the Council had publicised the application approximately 40 statements or letters of objection were received by the Commons Registration Authority as well as some communications which were more neutral in character. However, the principal case in opposition to the application has been co-ordinated on behalf of Mr. Beynon.

1.4 In accordance with the procedure previously approved by this Committee, a non statutory inquiry was held before an independent inspector on 18<sup>th</sup> to 20<sup>th</sup> March 2014 to consider the application. The Inspector was Mr. Alun Alesbury, M.A., Barrister at Law.

## **2.0 The Remit of the Inspector**

2.1 The role of the Inspector was the act on behalf of the Council in its role as Commons Registration Authority. Submissions were made on behalf of the Applicant and the Principal Objector and oral evidence was heard from witnesses on behalf of both sides and subjected to cross-examination and questions from the Inspector. All of the oral evidence was heard on oath or solemn affirmation.

## **3.0 The Report of the Inspector**

3.1 Following the Inquiry the Inspector has written a Report of his findings. A copy of this report is included as Appendix 2.

## **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 evidence of all the parties and has heard witnesses in person and considered all the written evidence before him. 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 Legal Test 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 this 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 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 which again would not be use ‘as of right’. 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 fulfilment of the 20 years continuous use must immediately precede the application under s.15(2). For this purposes of this application the application states that use of the claimed land ‘as of right’ ceased on 21<sup>st</sup> April 2009, which was less than two years before the time of the application. 21<sup>st</sup> 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 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 and its subsequent addendum 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 and these are set out below.

7.2 *"Locality" or "Neighbourhood within a Locality"*

This is addressed in paragraphs 11.6 to 11.11 of the Inspector's Report.. The Inspector concludes that the village of Llanmorlais as defined by the Applicant in the Inquiry is the 'neighbourhood' to be considered for the purpose of this application.

7.3 *"Significant number of the inhabitants"*  
*"lawful sports and pastimes on the land"*  
*"for a period of at least 20 years"*

These issues are dealt with together in paragraphs 11.12 to 11.45 of the Report. The Inspector is of the view (at paragraph 11.22) that use of the land during the relevant period "was so sporadic and minor that it could not reasonably have conveyed to an observant landowner that a right to use the land generally for sports and pastimes was being claimed on behalf of the local community."

The Inspector is also mindful (at paragraph 11.26) of caselaw which states that care should be taken to avoid treating use of what might be linear 'footpath' routes (and activities incidental to such use) as representing elements of a 'lawful sports and pastimes' use of a wider area of land as a whole.

The Inspector has concluded (at paragraph 11.29) that he does not find that a significant number of the inhabitants of Llanmorlais indulged in lawful sports and pastimes on the application land for the relevant period of 20 years.

#### 7.4 “As of right”

This issue is dealt with in paragraphs 11.30 to 11.32 of the Inspector’s Report. The Inspector states that he has no doubt that during the relevant period (1989 to 2009) the local people who did ‘trespass’ on the land did so as if they had the right to do so. However, on the balance of the evidence he takes the view that they did not *in fact* do so in the relevant period, either in significant numbers, or to any extent which can be regarded as significant (as opposed to trivial or sporadic).

#### 7.5 “Application is made within the period of two years [from] the cessation [of use]”

Paragraphs 11.33 to 11.45 deal with this aspect of the legal test. Members will note that this aspect of the statutory criteria attracted a considerable amount of debate and discussion at the Inquiry. The Inspector states (at paragraph 11.44) that he is “not persuaded on the balance of the evidence that there is any more appropriate day than 21<sup>st</sup> April 2009 as the date from which the relevant 20 year period is to be measured back.” However, this does not overcome the Inspector’s more fundamental conclusion that the evidence did not support the view that a significant number of the inhabitants of Llanmorlais had used the land for ‘lawful sports and pastimes’ over the relevant 20 years.

### 8.0 Formal Conclusion and Recommendation

8.1 The Inspector’s conclusions and recommendation are set out in paragraphs 11.45 to 11.47 of the Report.

8.2 The Inspector concludes that on balance, what took place over the relevant period of time “was no more than sporadic and very intermittent ‘trespass’ by a small number of individuals” and further “that the great majority of any such use as did take place was more akin to the use of a linear route from A to B (and back to A again) than use of ‘the land’ of the application site as a whole.”

8.3 The Inspector recommends that ***no part*** of the land to which this application relates should be added to the statutory Register of Town or Village Greens, because on the evidence it does not meet the criteria required for such registration for the reasons explained in the report.

### 9.0 Recommendation

9.1 It is therefore recommended that the application for registration be **REFUSED** for the reasons set out in paragraph 8.0 above.

### 10.0 Equality and Engagement Implications

10.1 None.

## **11.0 Financial Implications**

11.1 There are no financial implications for the Council as the land is not in Council ownership.

## **12.0 Legal Implications**

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

**Background Papers:** Contained in application file.

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

Appendix 2: Interim Report of the Inspector,  
Mr. Alun Alesbury, M.A., Barrister at Law