

Report of the Interim Head of Legal and Democratic Services

Planning Committee – 7 February 2017

APPLICATION TO REGISTER LAND AT TIRMYNYDD ROAD, THREE CROSSES, SWANSEA AS A TOWN OR VILLAGE GREEN

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	<p>It is recommended that:</p> <ol style="list-style-type: none">1) the application for the above registration be GRANTED other than the part of the application land consisting of a length of public highway known as Orchard Drive.;2) that the land of the application site OTHER THAN the part of the application land consisting of a length of public highway known as Orchard Drive be added to the Register of Town or Village Greens under Section 15 of the Commons Act 2006.3) that a note be included in the Register of Common Land that the land of the amended application site is also included in the Register of Town or Village Greens, and that a corresponding note be included with the new entry to be inserted in the Register of Town or Village Greens.
Report Author:	Sandie Richards
Finance Officer:	Paul Roach
Legal Officer:	Tracey Meredith
Access to Services Officer:	Phil Couch

1.0 Introduction

- 1.1 The Council has received an application by the Three Crosses 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 the Somerset Trust and is already registered as common land. There have been a number of objections to the application, one from Geraint John Planning Limited, on behalf of both the Somerset Trust and Edenstone Homes Limited and a separate one on behalf of the Gower Commoners' Association.
- 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 two days on 25th and 26th October 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(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 application was dated 12th November 2015, and received by the Council as Registration Authority on or about that date, so that date represents the 'time of the application', from which the relevant 20 year period needs to be measured (backwards) – subject only to the consideration which is given in the Inspector's report whether Section 15(7)(b) of the 2006 Act relating to permission given after 20 years use already established, has any application to the present case.

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 a Report dated 21st December 2016 (which is attached as Appendix 2) and these are set out below.

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

This is addressed in paragraphs 11.7 to 11.10 of the Inspector's Report. He concludes (at paragraph 11.9) that the Applicant has produced ample evidence that significant, as opposed to 'isolated' or 'sporadic' numbers of the people of Three Crosses claim either to have used or seen others using the application land recreationally over considerable periods.

7.5 **"Locality" or "neighbourhood within a locality"**

These two criteria are addressed together in paragraphs 11.11 to 11.12 of the Inspector's Report. He concludes that the Applicant had defined the boundaries of the suggested neighbourhood of Three Crosses village on a plan in what appeared to him to be an entirely sensible way.

7.6 **"Lawful sports and pastimes on the land"**

This criteria is addressed in paragraphs 11.13 to 11.42 of the Inspector's report. The Inspector noted that a number of the major topics in dispute came under this sub-heading.

It is noted in the report that much of the application site was overgrown when visited by the Inspector in October 2016. In coming to his recommendation the Inspector considered the collective impression given by all of the evidence which has been given by individuals, as to their own use, and the use of the land which they have seen being made by others, including oral evidence and evidence questionnaires

He has formed the judgment (at paragraphs 11.24) that there was abundant evidence of significant use of the application land by residents of Three Crosses for "*lawful sports and pastimes*", over several decades, going back much further than 20 years from the application. However, he also states (at paragraph 11.25) that it is clear that such use has undoubtedly become less intensive over the more recent decades, as vegetation has tended to grow up after the installation of cattle grids on the outer edge of the village which brought to an end the regular grazing of this land by most free-roaming animals.

The Inspector takes the view (at paragraph 11.26) that changes over time (and in particular the general trend towards more overgrown-ness) in the vegetation on the land did cause a change in the pattern of usage of the land by local people.

He also takes the view (at paragraph 11.34) that use of the north-west to south-east public footpath across the land must be discounted from the claim, along with any activities which were merely incidentally to path usage. Likewise, the Inspector found that there was no evidence at all that the public carriageway (with pavements) of part of Orchard Drive which crosses the

south-eastern part of the site was ever used for any other purpose than that of public highway.

7.7 “As of right”
“... for a period of at least 20 years”
“... continue to do so at the time of the application”

All three of these criteria are considered together by the Inspector at paragraphs 11.43 to 11.54. When considering the “*as of right*” criterion specific consideration is made by the Inspector of one licence granted on 28th September 2013 to the Common Good Trust of Three Crosses to cut/mow the land during the licence period and to take away the grass and trimmings.

Consideration is also given to another licence granted in the summer of 2014 by letter to enable the re-installation at the extreme northern tip of the application land of replica fittings relating to an historic well which had previously been operational there.

The Inspector is of the view (at paragraph 11.49) that it seems to him impossible reasonably to construe a formal Licence given to a Common Good Trust merely to “cut/mow the Premises” as representing a sufficient ‘permission’ to local inhabitants as a whole to use the land recreationally, so as to transform the position from the previously occurring ‘as of right’ use to use by permission, or ‘by right’.

Similarly, he finds it impossible to see how on any basis the second licence could have been argued expressly or implicitly to have given local people ‘permission’ to use the application land generally for recreation, or ‘lawful sports and pastimes.’

The Inspector concludes (at paragraph 11.52) that on the balance of the evidence the ‘as of right’ recreational use of the land by the local people of Three Crosses has taken place continuously for a period going back much further than 1993, right through to September 2013 and beyond.

8.0 Formal Conclusion and Recommendations

- 8.1 The Inspector makes his formal conclusion and recommendations in paragraphs 11.61 to 11.62 of his report.
- 8.2 It is his clear conclusion (at paragraph 11.61) that on the evidence and submissions in this case that the Applicant has succeeded in showing, on the balance of probabilities, that the criteria requisite for registration under section 15(2) of the Commons Act 2006 are met.
- 8.3 The only exception to this relates to the part of the original application site consisting of a length of the public highway (carriageway plus footways either side) known as Orchard Drive.

9.0 Recommendation

- 9.1 It is RECOMMENDED that the application for registration be GRANTED for the reasons set out in Mr. Alesbury's Advice and Recommendations other than the part of the application land consisting of a length of public highway known as Orchard Drive.;
- 2) that the land of the application site OTHER THAN the part of the application land consisting of a length of public highway known as Orchard Drive be added to the Register of Town or Village Greens under Section 15 of the Commons Act 2006.
- 3) that a note be included in the Register of Common Land that the land of the amended application site is also included in the Register of Town or Village Greens, and that a corresponding note be included with the new entry to be inserted in the Register of Town or Village Greens

10.0 Equality and Engagement Implications

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

11.0 Financial Implications

- 11.1 The application land is not owned by this Council and as such there are no financial implications.

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 original application site

Appendix 2: Advice and Recommendations of the Inspector, Mr. Alun Alesbury, M.A., Barrister at Law, dated 21st December 2016

Appendix 3: Plan showing area of land to be excluded from the application area.