

# Agenda Item 6.

<b>TITLE</b>	<b>Application for Registration of Land at Limmerhill as a Village Green</b>
<b>FOR CONSIDERATION BY</b>	Commons Registration Committee on 28 March 2018
<b>WARD</b>	Evendons
<b>DIRECTOR</b>	Andrew Moulton, Assistant Director Governance

## **OUTCOME / BENEFITS TO THE COMMUNITY**

The decision will provide certainty to the landowner and the public as to whether local inhabitants have the right to indulge in lawful sports and pastimes on the application land.

## **RECOMMENDATION**

That the application for registration of land known as Limmerhill Field as a new village green should be rejected on the basis that it fails to meet the statutory test for registration under Section 15(3) of the Commons Act 2006 for the reasons given in the Inspector's Report dated 18<sup>th</sup> September 2017 and her Supplemental Report dated 18<sup>th</sup> October 2017.

## **SUMMARY OF REPORT**

This report sets out the reasons why the application for registration of the land (the application land) shown edged red on the plan attached at Appendix A should be rejected. The recommendation is made after consideration of the application and the accompanying material submitted by the applicant, the landowner's objections against registration and after consideration of the recommendations of the Inspector based on her findings following a non-statutory inquiry into the application, the subsequent comments received from the Applicant and the Objector and after consideration of the relevant law.

## **BACKGROUND**

1. Members are referred to the Inspector's findings which are set out in detail in her report dated 18<sup>th</sup> September 2017 and her supplementary report dated 18<sup>th</sup> October 2017 copies of which have been supplied to them in advance of the meeting and which are also available for inspection on the Council's website at the following page: <http://www.wokingham.gov.uk/roads-and-outdoor-maintenance/footpaths-and-bridleways/modification-orders/>. Members are also referred to the parties' comments on the Inspector's Reports namely the Applicant's comments dated 22<sup>nd</sup> November 2017 and the letters received from the Objector's solicitor dated 28<sup>th</sup> September 2017 and 7<sup>th</sup> November 2017 all of which have been supplied to them in advance of the meeting and which are available on the Council's website. The Inspector's observations dated 9<sup>th</sup> December 2017 on the Applicants comments of 22<sup>nd</sup> November 2017 are also included.
2. The Council is the relevant Commons Registration Authority for the application land. On 8<sup>th</sup> June 2015 an application for registration of land at Limmerhill Field as a new village green was submitted by Lynn Forbes. The application was dated 24<sup>th</sup>

May 2015 and was made under section 15(3) of the Commons Act 2006 on the basis that 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 that the application was made within 2 years of the use ceasing.

3. The application stated that the qualifying use of the application land had ceased on 30<sup>th</sup> September 2014 by the erection of fencing but during the Inquiry the Applicant sought to amend this date to 18<sup>th</sup> September 2014 on the basis that it was accepted that fencing on the land was erected on or around 18<sup>th</sup> September 2014.
4. The application land is owned by Monopro Limited and the company objects to the registration of its land as a village green on the basis that the statutory requirements for registration have not been met.
5. The procedural requirements for dealing with applications are contained in the Commons (Registration of Town or Village Greens) (Interim Arrangements) Regulations 2007. Regulation 6(7) states that the authority must not refuse an application without giving the applicant a reasonable opportunity of dealing with objections and other matters.
6. As the solicitor acting for the landowner raised issues of fact in their objection to registration it was considered necessary to convene a non-statutory public inquiry to examine the factual evidence. To reach a decision on the merits or otherwise of the application without holding an inquiry in order to test the evidence could render any decision taken on the application susceptible to legal challenge.
7. A non-statutory public inquiry was held at the Council offices between 12<sup>th</sup> December and 20<sup>th</sup> December 2016 during which evidence for and against registration was presented on behalf of the applicant and the landowner respectively. An accompanied site visit took place on the morning of the final day of the inquiry. Following the Inquiry the Inspector presented her initial report and her supplementary report advising the registration authority on the application.
8. Before arriving at a decision on whether to accept or reject the application for registration, the Council is legally obliged to take into account the contents of the application for registration and any material accompanying it. It is also obliged to take into account any objections or other written representations; all oral representations made at the public inquiry, the findings made at any site visit and the report and the recommendations of the Inspector following the public inquiry.
9. The registration authority may depart from the findings and recommendations of the Inspector if it considers that it would be appropriate to do so. In relation to the current application it is considered that the recommendations of the Inspector should be followed for the detailed reasons as set out in the report and the supplementary report.
10. The Council dealt with the application for registration in accordance with Defra Guidelines and its own published procedure for disputed applications and having regard to the recommendation of the Inspector appointed to consider all the

relevant facts it is recommended that the application for registration of the land should be refused.

### **Statutory Criteria to be met for registration**

11. The Application for registration was made under Section 15(3) of the Commons Act 2006. Section 15 contains the following material provisions for the registration of new town or village greens:

#### ***“Registration of greens***

(1) *Any person may apply to the commons registration authority to register land as a town or village green in a case where subsection (2), (3) or (4) applies.*

Subsection (3) applies where –

*(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*

*(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).*

12. The meanings of the various expressions used in CA 2006 section 15 have been the subject of numerous court decisions.

#### **...a significant number...**

“Significant” does not mean a considerable or substantial number. What is relevant is that the land was used by the inhabitants generally rather than a few individuals so that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers<sup>1</sup>. Use must not be merely trivial or sporadic. It must be enough to signify to the reasonable landowner that a right is being asserted and ought to be resisted if the right is not recognised.

#### **...of the inhabitants of any locality or of any neighbourhood within a locality...**

The legislation provides for the recreational users of the application land to be a significant number of the inhabitants of **either**

- “any locality” **or**
- “any neighbourhood within a locality”.

In this case the applicant relied on both. The “locality” was identified as the Evendons West Ward of the Wokingham Town Council and the “neighbourhood within a locality”

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<sup>1</sup> *R (McAlpine) v Staffordshire CC* [2002] EWHC 76 (Admin) at para. 77

was identified as the neighbourhood of Woosehill within the locality of Wokingham Borough.

A locality means an administrative district or an area with legally significant boundaries. It must be more than an arbitrary area drawn on a plan. See the *Paddico* case at first instance<sup>2</sup>. When the *Paddico* case went to the Court of Appeal<sup>3</sup>, it was said that a locality also had to have some community of interest on the part of its inhabitants.

A neighbourhood within a locality is less rigid so that the requirement to identify a recognised administrative unit does not apply but the area must have a sufficient degree of cohesiveness to show that the users have a common link.

### **...have indulged as of right...**

As of right means that the use has been carried out without force, secrecy or permission (or in the Latin phrase *nec vi, nec clam, nec precario*). It is for the party seeking registration to prove 20 years use as of right. In *R-v- Oxfordshire County Council ex parte Sunningwell Parish Council* [1999] UKHL 28 Lord Hoffman held that in analysing whether use has been as of right, the Court must consider how the matter would have appeared to the reasonable landowner.

“Force” does not just mean physical force. Use is by force in law if it involves climbing or breaking down fences or gates or if it is contentious or under protest<sup>4</sup>.

Use that is secret or by stealth will not be use “as of right” because it would not come to the attention of the landowner. Use must be open so that the landowner can see that it is taking place and can resist it if he wishes.

“Permission” can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied, but not by inaction or acts of encouragement by the landowner<sup>5</sup>. It was held in the *Beresford* case that permission must be revocable or time limited: permission that is unlimited and irrevocable amounts to acquiescence.

Thus when considering whether the use has been as of right it will be necessary to consider whether the landowner has acquiesced in the use of his land by local people for recreation. Signs prohibiting entry onto the land would ordinarily be significant as evidence that the landowner did not agree to the use of his land by the public.

### **...in lawful sports and pastimes on the land...**

The words “lawful sports and pastimes” (LSP) form a composite expression which includes informal recreation such as walking, with or without dogs, and children’s play<sup>6</sup>. It

<sup>2</sup> *Paddico (267) Ltd. v Kirklees Metropolitan Council* [2011] EWHC 1606 (Ch) at para. 97(i)

<sup>3</sup> *Adamson v Paddico* [2012] EWCA Civ 262

<sup>4</sup> *R (Lewis) v Redcar & Cleveland Borough Council* [2010] 2 AC 7 per Lord Rodger at paras. 88-90 and see *R (Oxfordshire & Buckinghamshire NHS Trust & anor) v Oxfordshire County Council* [2010] EWHC 530 (the *Warneford Meadow* case)

<sup>5</sup> *Beresford*

<sup>6</sup> *Sunningwell* at pp 356F-357E

does not include walking of such a character as would give rise to a presumption of dedication as a public right of way<sup>7</sup>. There is no need to establish that at least one sport and one pastime was taking place on the land.

**...for a period of at least twenty years...**

In the case of an application under CA 2006 s. 15(2) the user of the land as of right must have been carried out for at least 20 years up to the date of the application. In the case of an application under CA 2006 s. 15(3) or (4), it is the 20 years immediately before the cessation of qualifying use. It is immaterial that the statutory test for qualifying user may have changed during the 20 year period<sup>8</sup>.

13. A number of important procedural issues have been decided by the courts which are of relevance to the Application:

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new TVG, it is no trivial matter for a landowner to have land registered as a TVG, and all the elements required to establish a new TVG must be “properly and strictly proved”<sup>9</sup>. The standard of proof is the usual civil standard of proof on the balance of probabilities.
- **Defects in Form 44.** Case law<sup>10</sup> provides that an application is not to be defeated by drafting defects in the application form. Subject to the overriding requirement of fairness to the parties, the issue for the CRA is whether or not the application land has become a new TVG
- **Part registration.** The House of Lords also held in the *Trap Grounds* case that the CRA can register part only of the application land if it is satisfied that part but not all of the application land has become a new green. Indeed, the House thought that a larger or different area could be registered if there was no procedural unfairness<sup>11</sup>.

**Application of the Law to the present application**

14. It should be noted by the panel that in determining the application there is no scope for discretion of any kind. It is no trivial matter for a landowner to have their land registered as a town or village green. The effect of registration would mean that the local public have recreational rights over the land in perpetuity and the landowner would be unable do anything on the land which is not conducive to its use as a village green. Thus each of the elements for registration as set below must be properly and strictly proved by the Applicant before the land can be registered. Consequently, it should be noted that it is irrelevant

<sup>7</sup> *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 (the *Trap Grounds* case) at paras 96-105

<sup>8</sup> *Redcar*: Lord Rodger at paras. 120-121, *Leeds Group plc v Leeds City Council* [2011] Ch 363 at paras 108-110.

<sup>9</sup> *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in *Beresford* at para. 2

<sup>10</sup> *R.(Church Commissioners for England) –v-Hampshire County Council* (2004) 1WLR 4555; *R.(On the Application of the Master Fellows and Scholars of College of St. John the Evangelist in the University of Cambridge) –v- Cambridgeshire County Council* (2017) EWHC 1753

<sup>11</sup> Lord Hoffmann at paras 61-62, Lord Scott at para 111, Lord Rodger at para 114, Lord Walker at para 124 and Lady Hale at para 144.

whether it would be desirable to register the land as a town or village green on the basis either that it has been used by local residents or on the basis that there is a shortage of recreational land in the area. Registration will be dependent solely on whether the each element of the statutory criteria for registration are met. These are considered below:

**Sufficiency of use as of right for lawful sports and pastimes for a continuous period of 20 years**

15. The applicant is required to establish “*use for at least 20 years of such amount and in such manner as would reasonably regarded as the assertion of a public right.*” Secondly that the whole of the application land was being used for lawful sports and pastimes for not less than 20 years (and not just part of it) and thirdly that the use would appear to the reasonable landowner to be use which was for general recreational purposes so as to sustain a claim for registration as a village green rather than use as a right of way. The guidance of Lightman J. in the Trap Grounds case provides that if the position is unclear, the inference should be drawn in favour of the less onerous consequence to the landowner.

16. The Inspector inferred from the worn tracks shown on the aerial photographic evidence presented at the Inquiry that public use of the application land had been taking place from about the year 2000 and not for the whole claimed period (See Paragraph 300 of the Report and Paragraph 9 of the Supplementary Report).

17. The Inspector also found that the predominant use of the land was for dog walking on the worn perimeter track and that, as a consequence, the Applicant had failed to show use of sufficient quality and quantity to reasonably demonstrate to the landowner that the public right being asserted over the land was use for lawful sports and pastimes (Paragraph 299 of the Report). She concluded that the application thus fails to satisfy the strict requirement for registration.

18. The Inspector found that discounting the use referable to use as a potential public right of way left evidence of use of the land for lawful sports and pastimes by just 5 witnesses and of these, only two could give evidence of use for the entire claimed period (Paragraph 292 of the Report). Consequently, she concluded that such use was not of the quality or quantity required so as to have put the landowner on notice that village green rights were being asserted across the whole of the land and thus she recommended that the application should be rejected for this reason.

**Of the inhabitants of any locality or of any neighbourhood within a locality**

19. The evidence presented by the Applicant in this respect was that the users came from either the locality of Evendons West Ward of Wokingham Town Council or that alternatively the users came from the claimed neighbourhood of Woosehill within the Borough of Wokingham. The ward of Evendons West is a recognised electoral ward and therefore is a qualifying locality for the purposes of the Commons Act 2006. However, the claimed qualifying neighbourhood of Woosehill within the Borough of Wokingham does not satisfy the statutory criteria because the Applicant failed to demonstrate any degree of social cohesiveness within the claimed neighbourhood within the meaning of section 15(3). Thus it is recommended that the applicant’s contention that the neighbourhood of Woosehill is a qualifying neighbourhood for the purposes of the 2006 Act should be rejected.

**Have indulged as of right in lawful sports and pastimes on the land for at least 20 years**

20. The relevant period under consideration was September 1994 to September 2014 as the Applicant accepted that by September 2014 fences had been erected on the land and thus any use thereafter would not have been as of right. The Inspector concluded from the evidence that the public use of the land did not begin until around 2000. Furthermore, the Inspector found that the evidence taken as a whole showed that main use of the land was referable to use as a public right of way as the users had walked over defined tracks as opposed to use for lawful sports and pastimes and thus the use would not have indicated to a reasonable landowner that a public right for informal recreation was being asserted over his land (Paragraph 299 of the Report and Paragraph 9 of the Supplementary Report). Thus it is recommended that the application should be rejected on the basis that the evidence does not support a finding that there has been use of the land for lawful sports and pastimes for the required 20 years.

21. The Authority has the power to register a smaller area of the application site if it is found to have satisfied the statutory criteria for registration. At the Inquiry the Applicant invited the Authority to consider registration of a smaller area within the application land comprising the upper and northern fields.

22. The Inspector concluded that there was no evidence of qualifying use of the smaller area of the land for the whole period. In particular, she found very little evidence of qualifying use between 1991 and 1995 of such quality that the use would have appeared to the reasonable landowner to be use referable to use for general recreational purposes rather than use as a right of way. It is therefore recommended that the application for registration of the reduced area of the application land should be rejected for this reason.

23. It should be noted that the Inspector's Report and Supplementary Report were sent to the Applicant and the Objector for their comments. The Objector responded on 7<sup>th</sup> November 2016 inviting the Council to reject the application for registration on the grounds as set out in the Inspector's Reports. However, in her response to the reports dated 22<sup>nd</sup> November 2017, the Applicant disagreed with the Inspector's findings.

24. The applicant was of the view that the Inspector should not have concluded that the use of the land was largely attributable to use as a public right of way because the worn paths were not public rights of way and that because they criss-crossed the land the use should have been considered to be use for lawful sports and pastimes as opposed to use for linear walking. The Applicant also considered that the Inspector was wrong to discount activities in the vicinity of the worn paths such as blackberry picking and exploring the stream as use referable to use incidental to use as a public right of way as opposed to use for lawful sports and pastimes and was of the view that such use when taken as a whole would have indicated to a reasonable landowner that recreational rights were being asserted by the public as opposed to the assertion of a public right of way. Additionally the Applicant considered that the Inspector should not have found that the use of the land for lawful sports and pastimes did not extend for the whole of the qualifying period.

25. The Applicant's comments were referred to the Inspector for consideration and after further consideration she reiterated that the applicant had failed to satisfy each and every one of the qualifying criteria for registration. The Inspector was of the view that the Applicant's comments effectively re-stated the evidence of use for lawful sports and pastimes presented on behalf of the applicant at the inquiry and further that she continued

to be satisfied that while the evidence showed there was increased public use of the land from 2000 onwards that the use would appear to the reasonable landowner as putative use of the land as a public right of way and the use did of the land was not in such significant numbers so as to indicate to the landowner that the land was in use for informal recreation by the local community and thus the Applicant's further comments did not include any material which would persuade her to depart from her findings.

26. Consequently it is recommended that the Application should be refused for the reasons set out in the Inspector's Report dated 18<sup>th</sup> September 2017 and her Supplementary Report dated 18<sup>th</sup> October 2017.

## FINANCIAL IMPLICATIONS OF THE RECOMMENDATION

***The Council faces severe financial challenges over the coming years as a result of the austerity measures implemented by the Government and subsequent reductions to public sector funding. It is estimated that Wokingham Borough Council will be required to make budget reductions in excess of £20m over the next three years and all Executive decisions should be made in this context.***

	How much will it Cost/ (Save)	Is there sufficient funding – if not quantify the Shortfall	Revenue or Capital?
Current Financial Year (Year 1)	N/A	N/A	
Next Financial Year (Year 2)	n/a		
Following Financial Year (Year 3)	n/a		

### Other financial information relevant to the Recommendation/Decision

The Council is obliged to determine applications for registration and thus obliged to bear all related costs.

### Cross-Council Implications

No impact

### Reasons for considering the report in Part 2

Not applicable

### List of Background Papers

- Application;
- Inspector's Report dated 18<sup>th</sup> September 2017 & Inspector's Supplementary Report dated 18<sup>th</sup> October 2017;
- Objector's Comments dated 7<sup>th</sup> November 2017;
- Applicants Comments on Inspector's Reports dated 22<sup>nd</sup> November 2017;
- Inspectors Observations dated 9<sup>th</sup> December 2018 on Applicants Comments of 22<sup>nd</sup> November 2017

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