

**Report of the City Solicitor**

**Report to Plans Panel North & East**

**Date: 1 December 2016**

**Subject: : APPLICATION TO REGISTER LAND AT GLEDHOW FIELD, GLEDHOW PRIMARY SCHOOL ROUNDHAY AS A TOWN OR VILLAGE GREEN UNDER THE PROVISIONS OF SECTION 15(1) OF THE COMMONS ACT 2006**

Are specific electoral wards affected? If yes, name(s) of ward(s): Roundhay	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Is the decision eligible for call-in?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, access to information procedure rule number: Appendix number:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

**Summary of main issues**

1. On 4 August 2015 an Application was submitted to Leeds City Council, in its role as Commons Registration Authority, for registration of land known as Gledhow Field, Gledhow Primary School, Roundhay as a Town or Village Green pursuant to Section 15 of the Commons Act 2006.
2. The Council as Commons Registration Authority ("CRA") is legally obliged to consider such applications.
3. The Council as landowner and the governing body of Gledhow Primary School have objected to the Application, together with approximately 350 individual objectors.
4. Under the Council's Constitution Members of the relevant Plans Panel have responsibility for the determination of applications and the purpose of this Report is therefore to obtain a decision as to the procedure that should be followed in order to resolve the applications and in particular whether in the circumstances outlined a non-statutory public hearing should be held.

## **Recommendations**

5. Members are requested to consider the relevant issues and evidence outlined in this Report and agree that a non-statutory public hearing be called and an inspector be appointed by the City Solicitor, with a view to undertaking an examination of the evidence submitted by the parties concerned and to prepare a report in relation to his/her findings for consideration at a future meeting of the Plans Panel.

### **1. Purpose of this report**

- 1.1 To inform members of the Application submitted to the Council by Mr Paul Sellars (“the Applicant”) for the registration of areas of land identified by the Applicant to be Gledhow Field, Gledhow Primary School, Lidgett Lane (“the Application Site”), as shown edged red on the plan appended as background document 7.1 below as a Town or Village Green under the provision of section 15(1) of the Commons Act 2006
- 1.2 To advise members of the relevant issues which should be taken into account in considering the application and to seek a determination as to the procedure that should be followed in order to resolve the applications and in particular whether in the circumstances outlined a non-statutory public hearing should be held.

### **2. Background information**

- 2.1 The Council is the Commons Registration authority under the provisions of the Commons Act 2006 and is obliged to amend the statutory register where any unregistered land in the Metropolitan District of Leeds becomes a town or village green within the meaning of the Act.
- 2.2 On 4 August 2015 the Council received the Application from the Applicant, dated 3 August 2015, for the registration of the Application Site as a town or village green, accompanied by 12 witness statements in support. A further 30 witness statements in support of the application have subsequently been submitted by the Applicant.
- 2.3 The Application Site is owned by Leeds City Council and vested with the Local Education Authority. The Site formed part of an area of land acquired by the Council in 1945 for the specific purpose of education provision, with no restrictions on the title as to the Site’s use.
- 2.4 On the 16 March 2016 the Chief Planning Officer under delegated powers gave preliminary consideration to the Application and determined that from the information received the Application should be advertised and the landowner informed and that details of representations and objections received be reported to the Plans Panel.
- 2.5 On the 24 March 2016 a statutory notice detailing the Application was duly affixed at various locations to the perimeter of the Application Site and published in the Yorkshire Post. A copy of the Application with statutory notice was circulated to Parties holding an interest in the Application Site on the same date and Ward Members were also notified.
- 2.6 In accordance with the objection period stated on the statutory notice, objections to the Application were submitted to the CRA on behalf of the Council as landowner,

governing body of Gledhow Primary School and approximately 350 individual objectors.

### **3. Main issues**

- 3.1 The fact that an application site may appear to be available for public use does not automatically mean it will qualify as Town or Village green as there are other factors to take into account as referred to later in this report. A person making an application for the registration of land as a town or village green must, if they wish to succeed, prove their case. If they fail to provide sufficient and persuasive evidence in respect of any key statutory requirement then the application will be rejected.
- 3.2 Land ownership is irrelevant to the question of potential registration of a site as a town or village green. A Landowner is unlikely to want their land to be encumbered by village green status but this issue is unconnected to the determination by CRA of whether an application meets the statutory test laid down by the Common Act 2016.
- 3.3 Planning merits and social needs are also immaterial. There may be strong social and planning arguments for the site remaining available for use by local people for recreational purposes, but these cannot be taken into account for the purpose of determining the application for registration.
- 3.4 Town and Village green applications are in the main contentious issues and there are many recent examples of appeals being lodged as a consequence of decisions made by registration authorities. It is therefore considered prudent to ensure that all the facts pertaining to an application and any objections thereto are carefully and thoroughly examined. This is particularly relevant where there is disputable evidence, or where there is no clear and concise written evidence to be certain that either party is correct in its submissions.

### **The Statutory Test**

- 3.5 In order for an application to succeed, it must satisfy each element of statutory test laid down under the provisions of provisions of Section 15 of the Commons Act 2006. The test is whether (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.
- 3.6 The issues, which need to be considered in respect of the applications, are therefore:
  - 3.6.1 Has the site been used by a significant number of the inhabitants of any locality, or of any neighbourhood within a locality
  - 3.6.2 Has the user by inhabitants been “as of right”?
  - 3.6.3 Has the site been used for lawful sports and pastimes?
  - 3.6.4 Has this use taken place over a period of twenty years?
  - 3.6.5 Was the use continuing at the time of the application?

### **Significant Number**

- 3.7 The question of 'significant number' is not defined in the Act and has been held to be a matter of impression. In R (Alfred McAlpine Homes Limited v Staffordshire County Council (2002) it was said that the number need not be considerable or substantial, but was a matter of impression for the decision-maker on the evidence and what mattered was that the numbers involved had to be sufficient to indicate that it is general use by local people rather than occasional use by individuals as trespassers.

### **Inhabitants of any Locality, or of any Neighbourhood within a Locality**

- 3.8 The issue here is what constitutes a locality and can that locality be identified. Locality has to be an area known to law. It can be an administrative area of a city or borough, a ward, a parish (either administrative or ecclesiastical) or even an ancient manor.
- 3.9 A neighbourhood means an area with a sufficient degree of cohesiveness and that requirement for cohesiveness is not simply satisfied by drawing a line on a plan.
- 3.10 The CRA has to be satisfied that the claimed user had been by the inhabitants of an area that could be properly described as a "locality" or "neighbourhood" within a locality. Whilst it is not necessary to show user exclusively by the inhabitants of the locality or neighbourhood within a locality that use must be predominantly by local inhabitants.
- 3.11 In the present case the completed Application form stated that the 'Locality or neighbourhood within a locality in respect of which the application is made' was Gledhow. Subsequently, the Applicant has identified a lesser area, based on a Polling District, which he considers to be the 'neighbourhood' relevant to the application. The Council as landowner and School Governors consider that this revision to the application fundamentally alters the application and, as such, is prejudicial and should not be allowed by the CRA.
- 3.12 It should be noted, however that judicial authority appears to support the view that is a matter for the relevant CRA to decide, on the evidence actually presented to it, what are the boundaries of the relevant 'neighbourhood' or 'locality'; irrespective of the subjective belief of any users of the site that they were doing so as inhabitants of any particular 'locality' or 'neighbourhood'.
- 3.13 On the issue of definition "neighbourhood" and "locality" the preliminary view of the CRA is that Objectors should be given further opportunity to present further arguments in relation to the amendment made by the Applicant and also to express their views (with associated evidence) as to the appropriate 'neighbourhood' in general. The appropriate forum for this is considered by the CRA to be the holding of a non-statutory public hearing into the application, before an independent Inspector.

### **Use as of Right**

- 3.14 The activities undertaken on the land must have taken place; without resort to force; without secrecy; and without any express or implied licence or permission from the landowner. The use must be "as of right" meaning that the right has

become established by the use of the land, as opposed to “by right” where rights to use the land have been granted by the landowner.

### **Lawful Sports and Pastimes**

- 3.15 The 2006 Act contains no definition of the phrase “lawful sports and pastimes” but in order to pass the test for registration purposes it may be reasonable to presume that the “sports and pastimes” must be (i) lawful; (ii) definite; (iii) and engaged in by more than isolated individuals.
- 3.16 The House of Lords, in *R-v-Oxfordshire County Council ex parte Sunningwell Parish Council* (1999), rejected the argument that the sports and pastimes need to be communal, or include formal sports or organised events, in order to justify registration. Informal modern activities such as dog walking and playing with children are said to be relevant for this purpose as traditional ones such as maypole dancing. So long as evidence is available of a clear pattern of recreational use by local inhabitants it does not matter what types of lawful sports and pastimes are indulged in by the inhabitants.

### **Twenty Years Use**

- 3.17 The relevant use must continue throughout the whole 20 year period relied upon.

### **Continuing User**

- 3.18 The House of Lords held *R-v-Oxfordshire County Council ex parte Sunningwell* that the relevant 20 year period concerned was the 20 years immediately before the date of the application. The qualifying use must continue at the date of application.

### **Determination of whether the Statutory Test has been made out**

- 3.19 In the 2004 case of *R (Whitney) v The Commons Commissioners*, the Court of Appeal considered the powers of registration authorities to decide disputes. The Court held that the duty of the CRA is to decide the application reasonably and fairly. The duty to act reasonably requires the CRA to bear in mind that its decision carries legal consequences. It has to consider both the interests of the landowner and the possible interests of their local inhabitants. This means that there should not be any presumption for or against registration.
- 3.20 If the registration authority accepts the application, amendment of the register may have a significant effect on the owner of the Land. Likewise, if the authority wrongly rejects the application, the rights of the applicant and of local inhabitants will not receive the protection intended by Parliament.
- 3.21 In a case where there is serious dispute, the CRA will almost invariably need to appoint an independent expert to hold a non-statutory public inquiry, and find the requisite facts, in order to obtain the proper advice before proceeding to decide the application. Additionally, the CRA may consider it had an obligation to hold an Inquiry where the registration authority has a conflict of interest because it also owns the land in question.
- 3.22 The High Court judgment of *R v Cheltenham Builders Limited* [2003] reaffirmed the findings of previous case law that where an application is

contentious in nature and the evidence requires testing, some form of oral hearing will in practice be necessary.

- 3.23 It was noted in that judgment that although there is no provision for such a procedure in the governing regulations it is understood that Commons Registration Authorities organise non-statutory hearings where the written submissions disclose significant conflicts of evidence. In addition it was confirmed that the authority has an implied duty to take reasonable steps to acquaint itself with the relevant information and that oral procedure seems essential if a fair view is to be reached where conflicting recollections need to be reconciled, even if the absence of statutory powers makes it a less than ideal procedure.

#### **“Statutory Incompatibility”**

- 3.24 A further reason for holding a non-statutory public hearing chaired by an independent inspector is the need to examine the doctrine of “Statutory Incompatibility” which arose in the case of *R (Newhaven Port and Properties Limited) v East Sussex County Council* [2015] AC 1547. The Supreme Court found in that case that registration of Harbour Authority land as a Town or Village Green would have been incompatible with the statutory functions required to be exercised. It was held that where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the Commons Act 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes.
- 3.25 As part of their objections, both the Council as landowner and the governing body of Gledhow Primary School asserted that registration of the Application Site as a Town or Village Green is legally impossible because registration would be incompatible with the statutory functions of the Council as local education authority. This is on the basis that land which the school occupies and to which the application relates has been acquired for, held and is to be used for educational purposes.
- 3.26 More recent case law has indicated that where land is owned by a statutory body for an identified statutory function, it does not necessarily mean that use as of right for public recreation is incompatible with that function, notwithstanding that the range of uses may be inhibited as a result of that recreational use. The question of whether statutory incompatibility will apply in any particular case is both law and fact dependent. Therefore, the raising of a ‘statutory incompatibility’ argument by an objector is not a straightforward one, resolvable by legal arguments in isolation. Consequently it is considered by the CRA that the appropriate means of determining whether the ‘statutory incompatibility’ argument applies in the present case would be for it to be dealt with as part of a non-statutory public hearing into the application as a whole.
- 3.27 It is acknowledged that the cost associated with holding a public hearing is likely to exceed £10,000. This may include the appointment of an inspector for a preliminary hearing of half a day to resolve administrative issues and the hearing itself which may last up to a week in total, the hiring of a venue, the cost of the inspectors reports, plus officer time for making appropriate arrangements and attending the hearings.

3.28 It is however considered that in view of complex legal points at issue, the contentious nature of the application, the level of public interest and scrutiny and also the fact that the Application Site is owned by the Council; that a public hearing should be held in the interests of transparency and to underline the Council's impartiality and independence as Commons Registration Authority. Such a course of action is also considered to reduce the potential of legal challenge.

## **4. Corporate considerations**

### **4.1 Consultation and engagement**

4.1.1 Following initial consideration the application was circulated to parties with an interest in the Application Site and to relevant Ward Members.

4.1.2 A statutory public notice of the application was advertised in the Yorkshire Post and posted around the perimeter of the Application Site.

### **4.2 Equality and diversity / cohesion and integration**

4.2.1 The proposal in this report has no adverse implications for the Council's Policy on Equality and Diversity

### **4.3 Council policies and best council plan**

4.3.1 As Commons Registration Authority the Council is legally obliged to determine Town and Village Green applications impartially and with reference to the statutory provisions concerning Town and Village Green applications and relevant case law

### **4.4 Resources and value for money**

4.4.1 Whilst it is not possible to predict the actual costs associated with a Village Green application it is likely that in the event that a public inquiry is called and an inspector appointed to consider and report his/her findings the costs will be in excess of £10,000. The costs will increase substantially in the event that the decision of the Council is the subject of legal challenge.

### **4.5 Legal implications, access to information, and call-in**

4.5.1 The determination of an application involves the taking of a quasi-judicial decision which may be the subject of legal challenge. It is therefore essential that the evidence relating to each application is properly tested prior to a decision being taken.

### **4.6 Risk management**

4.6.1 All decisions made by the Council are susceptible to legal challenge, decisions concerning village green applications appear more so in view of the imprecision of certain elements of the statutory test.

## **5. Conclusion**

- 5.1 In view of the fact that the application sites are in Council ownership and the legal complexities involved it is concluded that it would be prudent for a non-statutory public hearing, chaired by an independent inspector to be held in the interests of transparency and impartiality.



## **6. Recommendations**

- 6.1 Members are requested to consider the relevant issues outlined above and agree that a non-statutory public hearing be called and an independent inspector be appointed by the City Solicitor, with a view to undertaking an examination of the evidence submitted by the parties concerned and to prepare a report in relation to his/her findings for consideration at a future meeting of the Plans Panel.

## **7. Background documents<sup>1</sup>**

- 7.1 Application Form dated 3 August 2015, with location plan, for the registration of the Application Site as a Town or Village green  
<http://www.leeds.gov.uk/council/Pages/Register-of-Common-Land-Towns-or-Village-Greens-.aspx>

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<sup>1</sup> The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.