

Report of The City Solicitor

PLANS PANEL EAST

Date: 1st December 2011

Subject: Subject: Application to register land at Pit Hill Churwell as a Town or Village Greens under the provisions of Section 15(1) of the Commons Act 2006

APPLICANT
N/A

DATE VALID
N/A

TARGET DATE
N/A

Electoral Wards Affected:

Morley North

Ward Members consulted
(referred to in report)

Specific Implications For:

Equality and Diversity

Community Cohesion

Narrowing the Gap

SUMMARY OF MAIN ISSUES:

1. An application has been submitted for the registration of an area of land at Pit Hill, Churwell as a Town or Village Green under the provisions of Section 15(1) of the Commons Act 2006.
2. The Council as Commons Registration Authority is legally obliged to consider village green applications.
3. The application site is in private ownership and objections to the application have been received from the owners of the site and other interested parties.
4. Under the Council's Constitution Members of the relevant Plans Panel have responsibility for the determination of such 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 application 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 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 an application submitted to the Council by a group identifying itself as 'Save Pit Hill Churwell ("the applicant") for the registration of an area of land referred to by the applicant as Pit Hill, Churwell ("the application site") shown edged red on the attached plan, as a Town or Village Green under the provisions 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 application 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 the 14 December 2010 the Council received the application from the applicant, supported by 120 witness statements for the registration of the application site as a town or village green
- 2.3 A Land Registry search reveals that the application site is owned jointly by Mr. H. L. Gaythorpe and Mrs. M. Gaythorpe and Mr. T. J. Wooding and Mrs. J. Wooding. There is also a Unilateral Notice in respect of an agreement to purchase made between the land owners and Persimmon Homes.
- 2.4 The site is situated in Churwell and is bounded on the western edge by the M621 motorway, to the north by a lane known locally as 'Tan House' and to the east and south by residential development along May Avenue, Hepworth Avenue, Daffil Grove, Smools Lane and Daffil Grange Way.
- 2.5 On the 27th January 2011 a site visit was undertaken. It was noted that two definitive footpaths (Morley Paths 30 and 40) crossed the application site, and that there were four related formal access points. The site also featured non-definitive footpaths and could be accessed from seven other informal access points. Signs were observed at two access points with the wording 'Private Property Keep Out Manor House Farm'. It was not clear as to when these signs were erected. Two further signs were observed on a subsequent site visit.
- 2.6 The site visit also revealed that a section of the application site situated adjacent to Hepworth Avenue did not appear to be accessible to the public due to the existence of extensive fencing. The applicant was notified of this and on 16 March 2011 a letter

was received from the applicant confirming that the fenced off area was to be removed from the application site. An amended application plan was therefore submitted, which is the plan that is attached to this report

- 2.7 On the 25th March 2011 the Head of Planning Services under delegated powers gave preliminary consideration of the application and determined that from the information received the application should be advertised and the land owners informed and that details of representations and objections received be reported to the Plans Panel..
- 2.8 On the 27 May 2011 notice of the application was sent to the land owners and to Persimmon Homes as well as Ward Members.
- 2.9 On the 30th May 2011 notices were duly affixed to various lighting columns in the immediate vicinity of the application site and on the same date notice was duly published in the Yorkshire Post.
- 2.10 Objections to the application were subsequently from the joint land owners, Mr. P. Blakely who rents an area of land within the application site, Dacres Commercial on behalf of Persimmon Homes and Mr C Wilson, the brother of Mrs Wooding.
- 2.11 The parties involved have been given an opportunity to consider each others representations with a view to agreeing some common ground and to ascertain if there was any further information that would enable the Registration Authority to make a determination as to the status of the application site. This correspondence concluded on 1 November 2011 from which is clear that there would not appear to be any common ground and parties involved retain their stated positions as applicant and the objectors.

3 MAIN ISSUES:

Consideration of the Application

- 3.1 The fact that the application site appears to be available for public use does not automatically mean that it will qualify as Town or Village greens 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 must be rejected.
- 3.2 Land ownership is irrelevant to the question of whether the applicant has made out a proper case. Landowners are unlikely to want their land to be encumbered by village green status but their wishes (and the financial implications involved) must be left wholly out of account in determining the issues which arise.
- 3.3 Planning merits and social needs are also irrelevant. There may be strong social and planning arguments for land remaining available for use by local people for recreational purposes, but these should not be taken into account for the purpose of

determining the application for registration. The determination process involves an analysis of relevant facts and the application of law to them.

- 3.4 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.

Outline of relevant issues

- 3.5 The relevant provisions of Section 15 of the Commons Act 2006 are as follows:

- (1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2).... applies.
- (2) This subsection 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.

- 3.6 The issues, which need to be considered in respect of the application, is therefore:

- Has the land been used for lawful sports and pastimes?
- Has this use taken place over a period of twenty years?
- Have a significant number of the inhabitants of a locality or of a neighbourhood with a specific locality indulged in lawful sport and pastimes?
- Has the user by inhabitants been “as of right”?
- Did they continue to do so at the time of the application?

Has the application site been used for lawful sports and pastimes?

- 3.7 Written evidence has been submitted to support the application indicating that the following sport and pastimes have taken place:

- Children playing, kite flying, walking, jogging, cycling, general relaxation and exercise, kicking a ball, bird and wildlife watching, organised games, picnics and sledging.

- 3.8 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.

- 3.9 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.
- 3.10 In their letter of objection Mr. and Mrs Wooding (the joint owners of the application site) state that they acquired the land in 1983. Prior to that date Mr. and Mrs. Gaythorpe (the other joint owners of the application site) were tenant farmers of the land from 1959 to the date of purchase. Mr. and Mrs. Wooding claim that the part of the application site was and still is rented out as allotments. The remainder was farmed by Mr. Gaythorpe until his retirement in 1992 and is now rented to Mr. Blakeley who regularly ploughs the land which makes it unsuitable and sometimes virtually unusable.
- 3.11 It is also contended on behalf of the owners that any activities could have taken place on the rights of way that run through the site rather than on the site as a whole.
- 3.12 Observations – The applicants have submitted evidence that would appear to show a distinct pattern of recreational activities. The landowner however indicates that such activities could not have taken place on a continuous basis because the land had been ploughed and was therefore unusable. These are clearly matters of dispute that require further examination.
- Has there been 20 years use?**
- 3.13 Witness statements in support of the application indicates use of the application site for a variety of sports and pastimes for periods in excess of twenty years and that they continue to do so.
- 3.14 Although the majority of the land was ploughed in January 2011 and is currently unusable for sports and pastimes as a consequence, the applicant maintains, that in the period of 20 years up to the date of the application the land had not been ploughed and was available for recreational use at all times.
- 3.15 The objectors insist that the land had been farmed without interruption since the late 1950's and that from the late 1980's into the 1990's it was used for growing seed hay for horses, which is incompatible with recreational use because it is an irritant. In addition, intermittent ploughing has rendered the site unusable at times. Mr Blakeley has stated that he grew barley on the land between 1992 and 2003.
- 3.16 Observations – As with the part of the statutory test concerning lawful sports and pastimes there is a fundamental dispute between the parties as to whether the land could in circumstances outlined by the landowner be used for a continuous period of twenty years. Again this is considered to be a matter that requires further examination.

Has use been as of right?

- 3.19 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.
- 3.20 The witness statements in support of the application indicate that free and unrestricted access to the application site has been enjoyed for the purpose of recreational activities which have taken place openly without hindrance.
- 3.21 According to the statement submitted on behalf of the joint owners trespassers on the land have been told to stick to the public right of way by Mr Blakeley. The owners also indicate that replacement signage was placed on the application site on the 14th March 2005 stating “Private Property keep out of Manor House Farm”. These notices were placed on the site frontage with Daffil Grove and Hepworth Avenue and along the Public Rights of Way. The land owners also claim that cast iron signage clearly stating that the land was “Private Property” was in situ when they purchased the land and was present for a significant period. It is contended that any other access to the site is taken via the public rights of way that run through the site.

Is there a specific locality – or a neighbourhood within a locality?

- 3.22 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.
- 3.23 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.
- 3.24 The registration authority 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.
- 3.25 The applicant has identified Churwell, Morley shown on the map at appendix 1 marked as Morley Town Council’s Churwell Ward and showing the electoral boundary of Churwell. The objectors have submitted that the area is not a “locality” or “neighbourhood” but is rather a random collection of streets identified for no other reason than the proximity to the application site.
- 3.26 Observations – Again this is a matter of dispute and it is considered requires further examination.

Has there been use by a significant number of inhabitants of the locality or neighbourhood within a locality?

- 3.27 The question of ‘significant number’ 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.
- 3.28 The application is supported by 120 witness statements, the majority of whom are residents of Churwell
- 3.29 Observations – There would appear to be a significant number of inhabitants to satisfy this part of the test provided the registration authority can be satisfied that the statutory test referred to in 3.22 has been met.

Is there continuing user at the date of the application?

- 3.30 The application and supporting evidence suggests that use of the application site has taken place over a period in excess of twenty years and continued up to the date of application. It is contended by the objectors that efforts have been made to prevent unauthorised use by the erection of signs at various locations on the boundaries of the application site prohibiting access and that any other access to the site have been taken via public rights of way or otherwise by force.
- 3.31 Observations – again this is a matter of dispute between the parties and requires further examination.

Public Hearing

- 3.32 In the 2004 case of R (Whitney) v The Commons Commissioners, the Court of Appeal considered the powers of registration authorities to decide disputes. In her leading judgment, Lady Justice Arden stated as follows:-

“ In order to act reasonably, the registration authority must bear in mind that its decision carries legal consequences. If it accepts the application, amendment of the register may have a significant effect on the owner of the landLikewise, if it wrongly rejects the application, the rights of the applicant will not receive the protection intended by Parliament. In cases where it is clear to the registration authority that the application or any objection to it has no substance, the course it should take will be plain. If, however, that is not the case, the authority may well properly decide, pursuant to its powers under section 111 of the 1972 Act, to hold an inquiry. We are told that it is the practice for local authorities so to do either by appointing an independent inspector or by holding a hearing in front of a committee. If the dispute is serious in nature, I agree with Waller LJ that if the registration authority has itself to make a decision on the application it should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry where the registration authority has a conflict of interest because it also owns the land in question..... it can appoint an independent legal expert to conduct a non-statutory inquiry into the factual position and make findings.”

- 3.33 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.

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 submission 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.

- 3.34 The cost associated with a hearing is likely to be in excess of £10,000.00. This would include the appointment of an inspector for preliminary hearing of half a day to resolve administrative issues and the hearing itself which is likely to last for at least three days, the hiring of a venue, the cost of the inspectors reports, plus officer time for making appropriate arrangements and attending the hearing.

It is however considered that in view of complex legal points at issue a public hearing should be held in the interests of transparency and to underline the Council's impartiality and independence as Registration Authority.

4 CORPORATE CONSIDERATIONS

4.1 Consultation and Engagement

- 4.1.1 Following initial consideration the application was circulated to the land owners and the parties holding an interest and relevant Ward Members. Public notices of the application was advertised in the Yorkshire Post and posted on 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 City Priorities

- 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 the application is properly tested prior to the taking of any decision.

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 CONCLUSIONS

5.1 In view of the legal complexities involved it is concluded that it would be prudent for a public hearing to be held in the interests of transparency and impartiality

6 RECOMMENDATIONS

6.1 Members are requested to consider the relevant issues and evidence outlined above and agree that public hearings be called and an inspector be appointed by the City Solicitor, with a view to under 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

7.1 Application Form and supporting witness statements for the registration of land at Pit Hill Churwell as a town or village green

7.2 Objections of the landowners and other interested parties to the application to register land at Pit Hill Churwell as a town or village green

Pit Hills in Churwell

CELESTRO ROAD

Cemetery

65.1m

Brio Const & Ware Bay
Def
Farnley Wood Back
Go Camm Bay

Dismantled Railway

Track

58.8m

70.5m

Pit Hills (unm)

M 621

This is the extract
referred to in the
Application of the
Application
15/3/11

AKWAL RYATT
COMMISSIONER FOR OATHS
STAPLETON GARDNER & CO
STONELEIGH HOUSE
COMMERCIAL STREET
MORLEY LEEDS LS27 8HN



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