

Report of The City Solicitor

Report to Plans Panel (West)

Date: 8th December 2011

Subject: Applications to register land at Butcher Hill, West Park and Old Farm Drive, Leeds as Town or Village Greens under the provisions of Section 15(1) of the Commons Act 2006

Are specific electoral Wards affected?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, name(s) of Ward(s): Kirkstall and Weetwood		
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. Applications have been submitted by Councillor Bernard Atha to register three areas of land in the ownership of Leeds City Council as Town or Village Greens under the provisions of the Commons Act 2006.
2. The Council as Commons Registration Authority is legally obliged to consider village green applications.
3. The Council as landowner has objected to all three objections.
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 applications and in particular whether in the circumstances outlined non statutory public hearings should be held.

Recommendation

5. Members are requested to consider the relevant issues and evidence outlined in this report and agree that public hearings 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 3 applications submitted to the Council by Cllr. B.Atha and the Spen Hill Residents Association, Moor Grange Action Group, West Park Residents Association, Kirkstall Crusaders, Hawksworth Community Association and Inner North West Area Committee (“the Applicant”) for the registration of areas of land identified by the Applicant to be Butcher Hill Playing Fields, West Park Playing Fields and land off Old Farm Drive (“the application sites”), as shown edged red on the plans numbered 1-3 attached as Town or Village Greens 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 applications 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 non statutory public hearings 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 29th June 2010 the Council received the 3 applications referred to above. The Butcher Hill Playing Fields application was accompanied by 34 witness statements supporting the application, West Park Playing Fields was accompanied by 34 witness

statements supporting the application and the land off Old Farm Drive was accompanied by 36 witness statements supporting the application

- 2.3 The application form for Butcher Hill contained a reference to the possibility of adjoining land which forms the playing fields of Abbey Grange Church of England High School being included within the application site. Following consultation between Councillor. Atha on behalf of the Applicant and the registration Authority the application plan was amended to include this additional land, however, Councillor Atha subsequently requested the Council as Commons Registration Authority to exclude the area of land forming the School playing fields from the application.
- 2.4 Land Registry searches revealed that all 3 application sites are owned by the Council.
- 2.5 On the 26th July 2010 site visits were undertaken where it was observed that no physical barriers existed to preclude use of the application sites by members of the public. Photographs taken at the same time from various parts of the application sites will be available to view by members during the consideration of this report.
- 2.6 On the 20th September 2010 the Head of Planning Services under delegated powers gave preliminary consideration of the applications and determined that from the information received the applications should be advertised and the landowner informed and that details of representations and objections received be reported to the Plans Panel.
- 2.7 On the 29th September 2010 copies of the applications were sent to officers in the Council representing the Council as landowner and Ward Members were notified accordingly.
- 2.8 On the 1st October 2010 notices were duly affixed at various locations to the perimeter of the application sites and on the same date notice of the application was published in the Yorkshire Post.

2.9 On 30th November 2010 Objections to each application were subsequently received from the Council as landowner

3 Main issues

Consideration of the Applications

- 3.1 The fact that the application sites appear to be available for public use does not automatically mean that they 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 applications, are therefore:
- 3.6.1 Has the land been used for lawful sports and pastimes?
 - 3.6.2 Has this use taken place over a period of twenty years?
 - 3.6.3 Have a significant number of the inhabitants of a locality or of a neighbourhood with a specific locality indulged in lawful sport and pastimes?
 - 3.7 Has the user by inhabitants been “as of right”?
 - 3.8 Did they continue to do so at the time of the application?

Have the application sites been used for lawful sports and pastimes?

- 3.9 The applications contained the following information in relation to each individual area of land
- 3.9.1 Butcher Hill Playing Fields - Written evidence has been submitted to support the application indicating that the following sport and pastimes have taken place: dog walking, children playing, football, rugby,

cricket, baseball, sunbathing, walking, jogging, picnics and general relaxation.

3.9.2 West Park Playing Fields – Written evidence has been submitted to support the application indicating that the following sports and pastimes have taken place: galas, sports days, camping, dog walking, cricket, football, golf, walking, jogging, children playing, cycling, scooting, bonfires, a “street” party, blackberry picking and general relaxation.

3.9.3 Old Farm Drive – Written evidence has been submitted to support the application indicating that the following sports and pastimes have taken place: children playing, dog walking, football and cricket.

3.10 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.

3.11 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.

3.12 The objections to the applications are summarised as follows:

3.12.1 Butcher Hill Playing Fields – The application site was purchased by the Council in two phases on the 3rd October 1928 and 7 October

1957 respectively. The site contains three football pitches with surrounding open space.

It is asserted that the land has been dedicated to the public as a pleasure ground which creates a substantive right for the public to use the land. The site is also the subject of byelaws made under the Public Health Act 1875 and the Open Spaces Act 1906 which relate to the general regulation of “pleasure grounds, public walks and open spaces”.

It is further stated that the football pitches within the application site are hired from the Council by a number of football teams on a seasonal basis to play local and FA and league fixtures and that the permissive use therefore serves to interrupt any use by local inhabitants.

3.12.2 West Park Playing Fields – The application site was acquired by the Council in two phases as part of larger land acquisitions. Part of the application site was purchased by the Council in February 1931 for use as playing fields. The other part of the application site was purchased by the Council in July 1947, with a covenant to use the land as open space or playing fields and not to erect any buildings other than sports pavilions without the consent of the vendor

The majority of the site is subject to byelaws made under the Public Health Act 1875 and the Open Spaces Act 1906. It is stated that the football pitches within the application site are hired from the Council by a number of football teams on a seasonal basis to play local and FA and league fixtures and that the permissive use therefore serves to interrupt any use by local inhabitants.

3.12.3 Old Farm Drive – the site was acquired by the Council as part of 3 larger land acquisitions in 1954 and 1955. As with the Butcher Hill Playing Fields and West Park Playing Fields the site is subject to

byelaws made under the Public Health Act 1875 and the Open Spaces Act 1906. It is stated that the site is held by Parks & Countryside for the purposes of maintaining it as local green space

- 3.13 Observations – From the evidence submitted by the Applicant there appears to be a clear pattern of recreational use of the application sites. The landowner claims that the sites are all held for recreational purposes and are subject of byelaws which seek to control the activities undertaken. The arguments put forward in relation to this part of the statutory test would appear to have a direct link to paragraphs 3.17 to 3.21 and the use of the sites “as of right” As there are issues of dispute in relation to this part of the statutory test it is considered that the evidence submitted requires further examination

Has there been 20 years use?

- 3.14 Witness statements in support of the applications indicate use of the application sites for a variety of sports and pastimes for periods in excess of twenty years and that this use is continuing.
- 3.15 Notwithstanding the witness statements submitted with the applications the landowner puts the Applicant to proof that qualifying use of each application site has been by a significant number of people.
- 3.16 Observations – From the evidence submitted by the Applicant there would appear to be continuous use of the application sites for a period in excess of twenty years

Has use been as of right?

- 3.17 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.

- 3.18 The witness statements in support of the applications indicate that free and unrestricted access to the application sites has been enjoyed for the purpose of recreational activities which have taken place openly without hindrance.
- 3.19 In the objection to all three applications it is stated that the application site dedicated to the public as a pleasure ground within the meaning of section 164 of the Public Health Act 1875 which creates a substantive right for the public to use the land and that the public use is “by right” and not “as of right”.
- 3.20 In commenting on the objections the Applicant has asserted that local inhabitants were not aware that the site had been dedicated for public use and that no notice to this effect had been erected on site. In respect of West Park and Butcher Hill, the Applicant has also commented that the Council has not produced any documentation to show that the land was appropriated by the Council for recreation or health purposes.
- 3.21 Observations – From the evidence submitted by the parties there is a dispute as to whether the application sites are used “as of right” – where the rights have become established by the use of the land or “of right” - where the landowner has granted permission for members of the public to use the land. This is another matter of dispute that requires further examination..

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 the following localities in respect of which each of the applications are made:
- 3.25.1 Butcher Hill – Kirkstall Ward
 - 3.25.2 West Park Playing Fields – Weetwood
 - 3.25.3 Old Farm Drive – Kirkstall Ward
- 3.26 In commenting on the objections received the Applicant has also made reference to the following neighbourhoods:
- 3.26.1 Butcher Hill – The Spens being a distinct area contained within and bounded by Spen Lane Butcher Hill and the railway line.
 - 3.26.2 West Park Playing Fields – West Park being a distinct area contained within Spen Lane, The Ring Road, Spen Lane and the boundary of Leeds University.

- 3.26.3 Old Farm Drive – Moor Grange being a distinct area contained within and bounded by Spen Lane, The Ring Road and Butcher Hill.
- 3.27 Notwithstanding the above, the Landowner has stated that the Applicant is required to demonstrate a locality or a neighbourhood within a locality and the landowner has therefore put the Applicant to proof on those issues.
- 3.28 Observations – Again this part of the statutory test is in dispute and it is considered that this is an issue that requires further examination.

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

- 3.29 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.
- 3.30 The applications are supported in each case by over 30 witness statements. The Landowner has stated that a number of persons who have written letters supporting the applications are referring to areas of land outside the application sites. The Applicant has stated that where inhabitants refer to more than one application site it is because they support all three applications as being used freely as of right for more than twenty years.
- 3.31 Observations – From the evidence submitted by the applicant it would appear to indicate that the use of the sites have been used by a significant number of

inhabitants. The landowner has disputed the evidence submitted by the applicant and again it is considered that it is an issue that requires further examination.

Is there continuing user?

- 3.32 The applications and supporting evidence state that use of the application sites has taken place over a period in excess of twenty years and has continued up to the date of the applications.
- 3.33 Observations – There does not appear to be a dispute as to the continued use of the application sites but as indicated previously the use of the sites is in dispute.

Exchange of further correspondence

- 3.34 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 sites. This correspondence concluded on 3 October 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 Landowner.
- 3.35 The Applicant has challenged the right of the Council's Chief Recreation Officer to object to the applications on behalf of the Council. The response of the Landowner is that the objections were signed by the Council's Chief Recreation Officer, acting under a sub-delegation from the Council's Director of City Development. The Director of City Development has delegated authority from the Council's Executive Board in relation to the management of the Council's land holdings and in relation to recreation services, and has authority to sub-delegate his powers to named officers.

Public Hearing

3.36 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.”

3.37 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.

3.38 The Applicant has made reference to the cost of full hearings and has requested the landowner withdraw the objections and allow members of the Panel to consider the issues and if satisfied recommend approval to the Council. The Landowner has declined to accept this approach and retains its position.

3.39 It is acknowledged that the costs associated with three hearings (even if they are dealt with on consecutive days by the same inspector) are likely to exceed £20,000. This would include the appointment of an inspector for a preliminary hearing of half a day to resolve administrative issues and the hearings themselves which are likely to last for at least 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.

It is however considered that in view of complex legal points at issue and the fact that the application sites are all owned by the Council public hearings 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 applications were circulated to the land owning departments and relevant Ward Members and public notices of the applications were advertised in the Yorkshire Post and posted at each of the sites.

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

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 £20,000. 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

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 fact that the application sites are in Council ownership and the legal complexities involved it is concluded that it would be prudent for public hearings to be held in the interests of transparency and impartiality

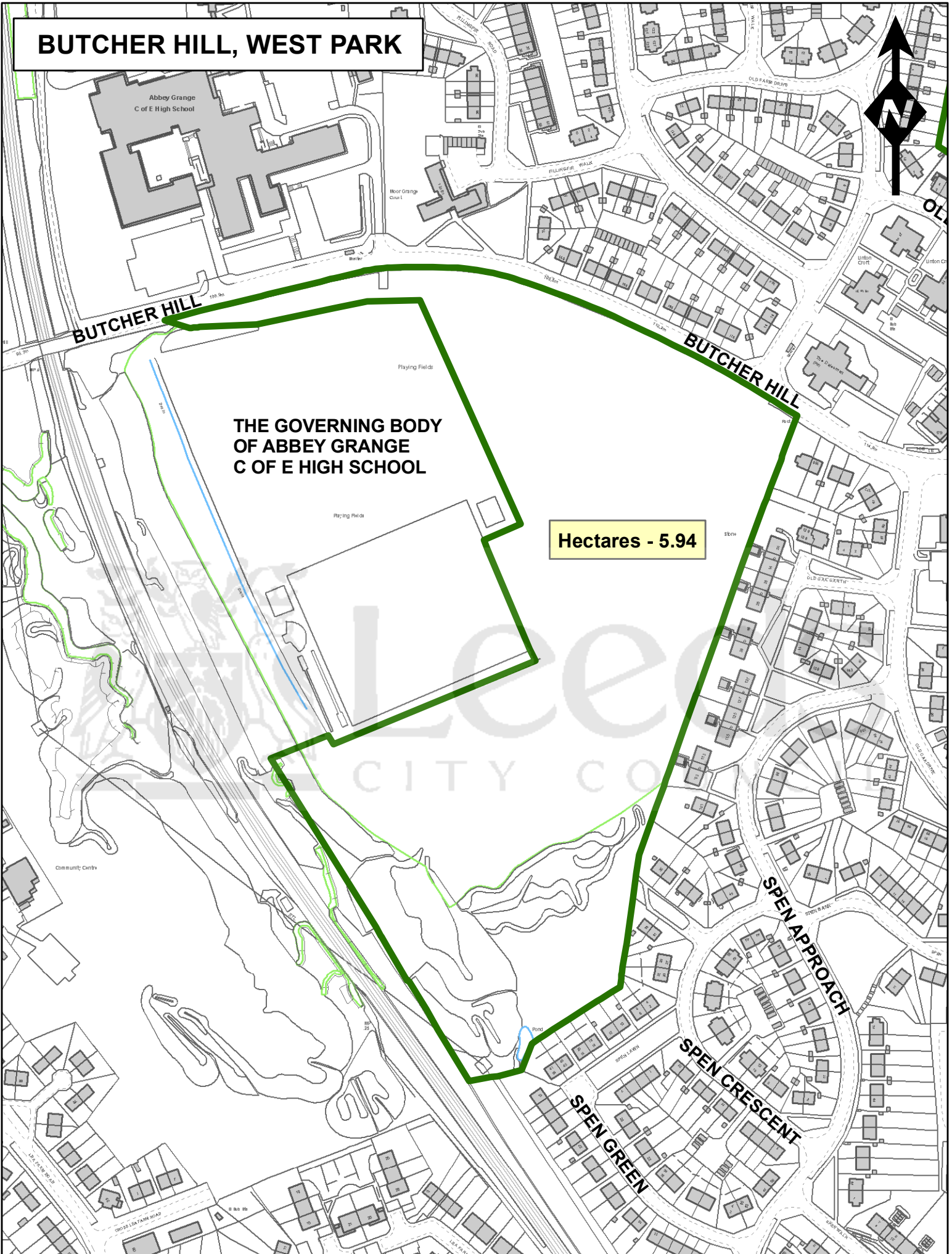
6 Recommendations

- 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 undertake 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 Butcher Hill Playing Fields as a town or village green
- 7.2 Objection of the landowner to the application to register Butcher Hill Playing Fields as a town or village green
- 7.3 Application Form and supporting witness statements for the registration of West Park Playing Fields as a town or village green
- 7.4 Objection of the landowner to the application to register West Park Playing Fields as a town or village green
- 7.5 Application Form and supporting witness statements for the registration of land at Old Farm Drive as a town or village green
- 7.6 Objection of the landowner to the application to register land at Old Farm Drive as a town or village green

BUTCHER HILL, WEST PARK



Hectares - 5.94

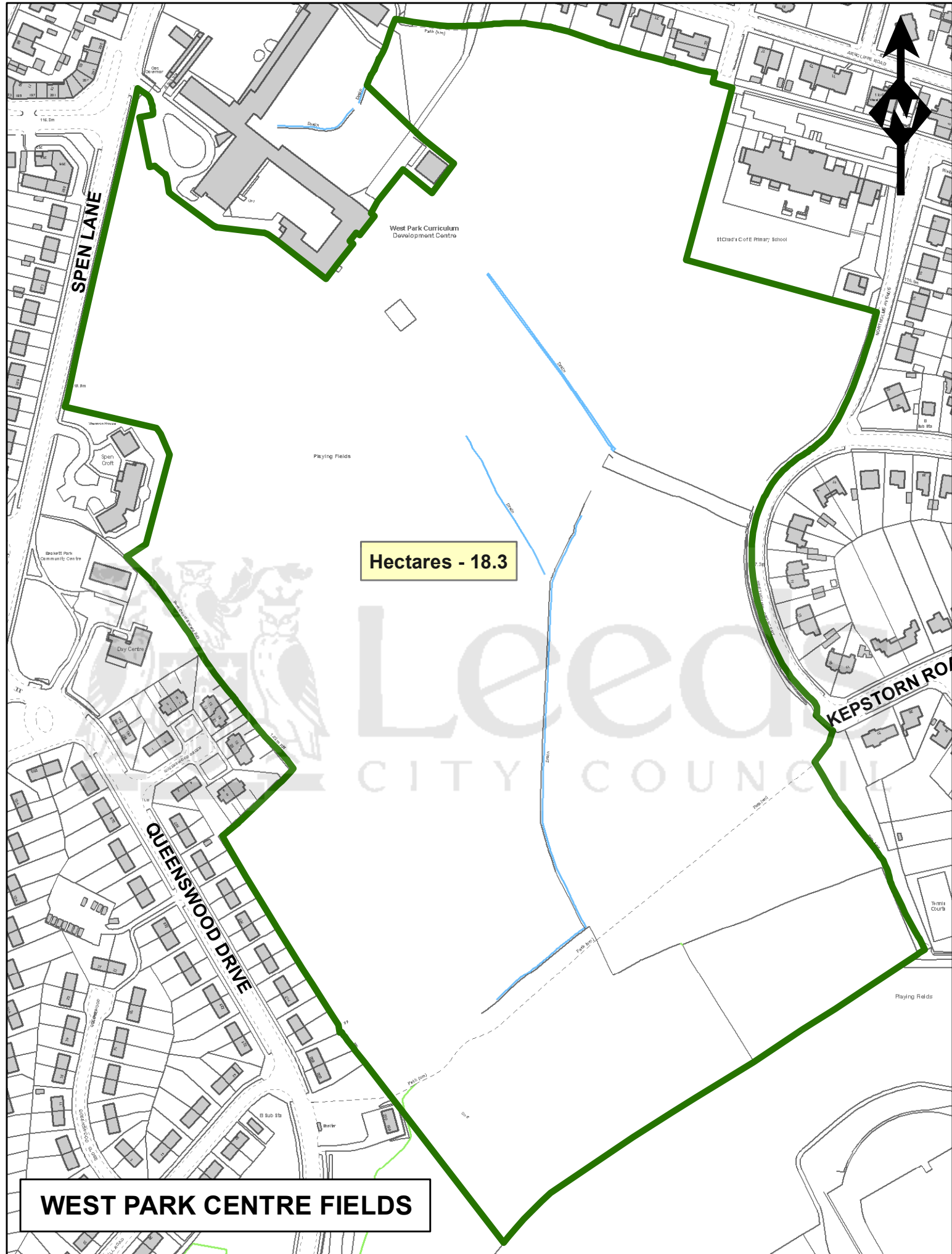
THE GOVERNING BODY
OF ABBEY GRANGE
C OF E HIGH SCHOOL

GIS - 5115 Scale - 1/ 2500 O.S Ref - SE 2537 09.08.2010 JKS

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Hectares - 18.3

WEST PARK CENTRE FIELDS

GIS - 5114 Scale - 1/ 2500 O.S Ref - SE 2537 09.08.2010 JKS

OLD FARM DRIVE, WEST PARK



Hectares - 1.53

GIS - 5113 Scale - 1/ 1250 O.S Ref - SE 2537 09.08.2010 JKS

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