

**Report of** the City Solicitor

**Report to** Scrutiny Board (Regeneration)

**Date:** 17 January 2012

**Subject:** The process for the registration of land as town and village greens

Are specific electoral Wards affected? If relevant, name(s) of Ward(s):	<input type="checkbox"/> Yes	<input checked="" 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. Section 15 of the Commons Act 2006 sets out the statutory criteria that must be satisfied in order for a village green application to be successful.
2. The function of determining village green applications lies with the Council as Commons Registration Authority, and where there are objections to an application the decision is taken by the relevant Plans Panel. The function is a quasi-judicial one and the determination of applications must be made strictly on the evidence and cannot be based on what the decision maker considers to be the best outcome.
3. There is no prescribed statutory procedure setting out the method by which such applications must be determined, but it is essential that applications are dealt with in a manner that complies with the rules of natural justice.

### Recommendations

4. Members are asked to note the contents of this background report, and to advise officers of any specific matters that they wish to see addressed in the forthcoming report to the February Scrutiny Board.

## **1 Purpose of this report**

- 1.1 This Board has indicated that it wishes to scrutinise the way in which the Council currently handles village green applications from receipt to determination, and as part of this review the Board has asked to review one or more case studies relating to previously determined applications.
- 1.2 This report is intended to serve as a background paper which outlines both the statutory provisions under which village green applications must be assessed and the current practice of the Council in handling village green applications.
- 1.3 It is intended to bring a further report to the February meeting of this Board which will examine one or more case studies in respect of previously determined applications. Members are also asked to consider whether there are any other matters which they wish to see addressed in that report.

## **2 Background information**

- 2.1 Section 15 (1) of the Commons Act 2006 provides that:

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) (3) or (4) applies

Applications will ordinarily be made under the provisions of Section 15(2) of the Act

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

- 2.2 It is also possible for applications to be made under either

- i) Section 15(3) where a minimum 20 year period of use ceased before the time of the application but after 6 April 2007 and the application is made within 2 years of the date that the use came to an end, or
- ii) Section 15(4) where a minimum 20 year period of use ceased before 6 April 2007 and the application is made within 5 years of the date that the use came to an end

- 2.3 Each of the criteria set out in Section 15(2) must be satisfied in order for a village green application to be successful. The criteria are considered in more detail below:

- 2.3.1 **Use by a significant number of inhabitants of the locality or neighbourhood within a locality**

An application may either relate to use by a significant number of inhabitants of a 'locality' or alternatively of a 'neighbourhood within a locality'.

A 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.

A neighbourhood is an area with a sufficient degree of cohesiveness and that requirement for cohesiveness is not simply satisfied by drawing a line on a plan.

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.

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.

### **2.3.2 Use of the application site as of right**

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.

### **2.3.3 Use of the application site for lawful sports and pastimes**

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.

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 as 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.

### **2.3.4 Use of the application site over a period of 20 years**

An application would need to be accompanied by witness statements evidencing that use of the application site (of a nature that meets the various tests referred to above) has taken place for a period in excess of 20 years

### **2.3.5 Continuing Use**

For the purpose of Section 15(2) (b) witness statements accompanying the application would also need to confirm that the use of the application site continued to take place at the date of the application. In this regard, use is considered to continue if permission to use the land is given by a landowner in circumstances where 20 or more years use “as of right” has already taken place.

## **3 Main issues**

- 3.1 The determination of an application to register land as a new a town or village green involves the taking of a quasi-judicial decision. The decision maker cannot make its decision based on what it thinks would be the best outcome, but must base its decision strictly on the evidence and take into account only the material considerations and ignore all irrelevant matters. It is a complex area of law which is demonstrated by the number of cases which have reached the House of Lords (now the Supreme Court) over recent years.
- 3.2 There is no set method by which an application has to be determined; the legislation is silent as to the procedure to be followed for the determination of applications. However, it is essential that application are dealt with in a manner that complies with the rules of natural justice and that evidence relating to an application is properly tested prior to the taking of any decision. Where an application is contentious in nature and the evidence requires testing, some form of oral hearing will in practice be necessary. Many authorities, including Leeds, will appoint an independent inspector to hold a non-statutory inquiry to test the evidence and report back to the decision making body.
- 3.3 Whilst all decisions made by the Council are susceptible to legal challenge, decisions concerning village green applications may be more so in view of the imprecise nature of certain elements of the statutory test referred to above.

## **4. Current Practice for Processing Village Green Applications**

- 4.1 Applications to register land as a new town or village green under the provisions of Section 15 of the Commons Registration Act 2006 are submitted to and administered by the Council in its statutory role as Commons Registration Authority.
- 4.2 Legal Services and Planning Services currently administer applications received in this capacity in accordance with the following procedure.
- 4.3 Following receipt of an application, officers within Legal Services carry out an initial high level review as to whether the content of the application together with any supporting documentation is sufficient on the face of it to justify proceeding further.

- 4.4 This process involves checking that the application form has been completed and signed correctly in accordance with statutory requirements and assessing whether in general terms sufficient information and supporting evidence appear to have been provided.
- 4.5 At this preliminary stage no conclusive decision is taken as to whether the above criteria have been met. If it is considered, however, that there is sufficient evidence to make out an arguable case that the statutory tests have been met, authorisation will then be sought from the Chief Planning Officer to formally advertise the application.
- 4.6 If little or no evidence in relation to the use of the land has been provided by way of witness statements, or there are any discrepancies the applicant will be requested to provide further information. If such information is not forthcoming, Legal Services will consult with the Chief Planning Officer with a view to rejecting the application.
- 4.7 Assuming the application is taken forward; notice of the application is posted on site and advertised in the Yorkshire Post or other local newspaper. This notice must give a minimum period of 6 weeks for the making of objections or other representations in support of the Order and gives detail of where the full application can be viewed.
- 4.8 A copy of the full application is also sent to the owner of the land and any other party holding an interest. In addition the Chief Planning Officer and Members for the Ward within which the land is located will be notified. In the event that the land is partially or fully owned by the Council a full copy of the application and accompanying documentation will also be sent to the Director of the owning Department, the Director of City Development and the Chief Planning Officer.
- 4.9 Following the expiration of the objection period, any objections received are forwarded to the applicant for comment. Any comments from the applicant in this regard are in turn forwarded to the objectors for consideration. This process is repeated as necessary until neither party has any further new material comments to make.
- 4.10 In circumstances where there are no objections received to such an application, then, in accordance with the current scheme of delegation the application can be determined by the Chief Planning Officer. Where there are objections however, then the application must be reported to the relevant Plans Panel for determination. Current practice is to obtain a decision from the Plans Panel in the first instance as to the procedure that should be followed in order to determine the application.
- 4.11 Where there is conflicting evidence in respect of one or more of the criteria that must be satisfied, then, the Panel are generally recommended to approve the holding of a non statutory public inquiry chaired by an independent Inspector, to examine the evidence submitted by the parties, and to prepare a report and recommendation for the Plans Panel's consideration.

- 4.12 The report looking at case studies to be prepared for the next Board meeting will provide more detail about how this aspect of the process has operated in practice. The length of such inquiries does depend generally upon the extent of conflicting evidence and also the amount of evidence and number of witness statements submitted.
- 4.13 Whatever the mechanism for considering the evidence, the decision itself remains with the Plans Panel to either grant or reject the application.
- 4.14 Once the application has finally been determined by Plans Panel, all interested parties will be notified of the decision. If the application has been accepted the Register of Town and Village Greens will be amended accordingly.

## **5 Corporate Considerations**

### **5.1 Consultation and Engagement**

- 5.1.1 None

### **5.2 Equality and Diversity / Cohesion and Integration**

- 5.2.1 No implications

### **5.3 Council policies and City Priorities**

- 5.3.1 This background report has no direct implications for any council policies or city priorities

### **5.4 Resources and value for money**

- 5.4.1 None

### **5.5 Legal Implications, Access to Information and Call In**

- 5.5.1 None

### **5.6 Risk Management**

- 5.6.1 No issues arise from this background report

## **6 Conclusions**

- 6.1 This report is a background paper provided in advance of a report to the February Board which will look in more detail at one or more example case studies of previous applications determined by the Council.

## **7 Recommendations**

- 7.1 Members are asked to note the contents of this background report, and to advise officers of any specific matters that they wish to see addressed in the forthcoming report to the February Scrutiny Board.

## **8 Background documents**

8.1 None