

Report of the City Solicitor and the Director of City Development

Report to Scrutiny Board (Regeneration)

Date: 28 February 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):Kirkstall and Weetwood	<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. The function of determining village green applications lies with the Council as Commons Registration Authority, and 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. Where the land in question is in the ownership of the Council then it also has a different and distinct role and responsibility as landowner. In particular, where the land comprises playing fields or green spaces currently managed by the Council's Parks and Countryside service the potential registration of this land as town or village green may have implications for the broader public use and management of that land.
3. Where there is a dispute as to the facts supporting an application and therefore as to whether the statutory test has been made out, this should be tested through an inquiry process involving oral evidence and cross examination. The rules of natural justice oblige the Council to undertake a fair hearing and to ensure that all the relevant evidence is before the decision maker. It follows that where the Council as landowner has relevant material and evidence that should be before the decision maker as it would if presented by a third party landowner.

4. This approach is relevant to the three as yet undetermined village green applications relating to the Butcher Hill and West Park playing fields and land at Old Farm Drive.

Recommendations

Members are asked to note the contents of this report, and to comment as appropriate on the current arrangements that the Council has for determining town and village green applications

1 Purpose of this report

- 1.1 At its meeting on 19 December 2011 Scrutiny Board requested a report on the Council's process for dealing with applications for the registration of land as town and village greens. A background report was presented to the Board at its meeting on 17 January 2012 setting out the legislative context and outlining the current procedure the Council follows for considering such applications.
- 1.2 This report builds on the previous report and considers the current procedures in more detail with a particular focus on the different roles of the Council where it is both the Commons Registration Authority and landowner for land which is the subject of a town or village green application, and how it manages these two different functions in parallel. As specifically requested by the Board, this report touches on the role of the Council as landowner in respect of three current applications within the Kirkstall and Weetwood wards. It assesses the role of the Council as landowner as part of the decision making process, considers what this adds to the process and the potential implications that would flow if the landowner did not play an active part in the decision making proceedings. This is considered in respect of the process of determining the applications. Given the fact that these applications are currently undetermined, it would not be appropriate to attempt to review the evidence that might be put forward as part of that process as to do so could prejudice the requirement for a fair hearing in due course.
- 1.3 In order to provide an overall picture, this report also provides information about the number of village green applications received since 2004 and looks at a case study of an application previously considered. At the request of the Board, it also outlines alternative measures for protecting and preserving greenspace.

2 Background information

- 2.1 Section 15 of the Commons Act 2006 provides that any person may apply to have land registered as a town or village green where a significant number of inhabitants of a locality or neighbourhood have, for a period of at least twenty years, indulged 'as of right' (i.e. without permission, force or secrecy) in lawful sports and pastimes (which would include activities such as dog walking, informal games and community events such as fetes and flower shows).

- 2.2 The determination of an application to register land as a new 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.
- 2.3 As outlined in the previous report to the Board, there is no fixed procedure for determining applications to register Town or Village Greens. However, where the evidence is in dispute, or where for example, the Council has more than one role (i.e. as landowner and commons registration authority) it is particularly important to demonstrate that the Council has considered the application in an impartial, transparent and independent way. Therefore, there is considerable merit in holding a public hearing or inquiry. A public hearing is not the same as a public meeting and the purpose of the hearing is to enable a proper airing of the evidence both for and against the application, and for the parties to put forward their views as to what conclusions should be drawn from the totality of the evidence.
- 2.4 Such an inquiry/hearing can either be conducted by an inspector (in practice often a barrister specialising in this area of law) which is the current practice at the Council or alternatively the Plans Panel itself could potentially fulfil this role (as Plans Panel West has indicated it wishes to do in respect of the three applications at Butcher Hill playing fields, West Park playing fields and land off Old Farm Drive). The inquiry process requires an appropriate degree of procedural discretion to ensure all parties have a fair hearing taking into account principles of natural justice, administrative law and human rights (to the extent that they are engaged). It is inevitable that the inquiry process involves the hearing of live evidence not just an examination of written statements and the challenge of that evidence through cross examination and through questions from the 'inspector'. The key principles are therefore fairness, openness and impartiality.
- 2.5 Prior to the Plans Panel taking on the role of the 'inspector' there is a considerable amount of information that it must become familiar with in addition to the relevant statutory test and the case law that accompanies it. Officers will be recommending to the Plans Panel that before Members hold the three inquiries they first instruct officers to prepare and deliver a programme of training which covers the legislation and case law, the requirements that must be met if the hearing is to be seen as being fair and techniques of questioning and cross examination as methods of extracting and testing evidence beyond those usually used in determining planning applications.
- 2.6 Ensuring that all parties have had a fair hearing and that the statutory tests are properly understood and applied is key. Particularly so given the implications that flow from registration of land as town or village green.
- 2.7 Land which has been registered as a town or village green receives considerable statutory protection that effectively means that the land cannot be developed. For instance, section 12 of the Inclosure Act 1857 makes it a criminal offence to undertake any act which causes injury to the land or which interrupts the use and enjoyment of the land as a place of exercise and recreation, whilst section 29 of the

Commons Act 1876 makes it a public nuisance to inclose the land or to erect any structure other than for the better enjoyment of the land as a town or village green.

2.8 There is a great deal of legal uncertainty as to the rights that would arise as a result of the registration of land as town or village green and how these would coexist or override the rights of the owner of the land to manage and use the land in the way they would wish to in the future. This is highlighted in the Defra publication "Management and Protection of registered town and village greens", published in January 2010 (Appendix 1) which sets out some of the frequently asked questions that arise when considering town and village greens. However the following principles have been established by the courts:-

- The right to enjoy lawful sports and pastimes on a green does not extend to the public at large but is only exercisable by inhabitants of the locality or the neighbourhood within the locality in which the green is situated
- As registration confirms a 'right' to use the green for lawful sports and pastimes this means that the right can be exercised free of charge
- Local; inhabitants have a right to take part in any lawful sport or pastime on the green, not just those activities which were enjoyed during the period of use which led to the green being registered

2.9 Since 2004, the Council has received a total of eleven applications for town or village green registration. Four of these are currently undetermined, (namely the three applications referred to in this report which Plans Panel West has decided to convene its own inquiry to consider and a further application relating to Pit Hill Churwell in respect of which Plans Panel East has decided to appoint an independent inspector and hold a non statutory inquiry). In respect of the remainder, three were withdrawn or not proceeded with, one was rejected without a hearing and one was registered without objection. Non statutory inquiries were held into the other two applications following which the Plans Panel determined to reject one application and register one.

2.10 A case study is attached to this report as Appendix 2 which outlines the process in relation to a village green application for land off Highbury Mount at Meanwood that was considered by way of a non statutory inquiry. Also attached is a copy of the relevant Plans Panel report and the Inspector's report. Although this is clearly specific to its own facts, this does give some idea of how the process works in practice and also the level of detail contained in the Inspector's report and hence the thoroughness of the examination of the evidence required. This inquiry involved 90 written statements, 8 witnesses for the applicant and 6 for the objector. The Hearing lasted 2 days plus ½ day site visit following which the Inspector produced a 47 page report for Members consideration and determination.

3 Main issues

The different roles of the Council in respect of town and village green

- 3.1 The Council has three distinct roles in respect of town and village green. Namely:-
- As Commons Registration Authority – The Council has the statutory responsibility for registering common land or town or village green. The function of considering applications for registration lies with the Chief Planning Officer, unless objections are received in which case such applications are to be determined by the relevant Plans Panel. The function is quasi-judicial in nature and decisions on applications must be taken strictly on the evidence – there is no discretion as to the preferred outcome.
 - As Landowner/manager of parks and greenspace – The Council has a much broader responsibility to ensure that its land is utilised in the wider public interest and in respect of existing parks and greenspace that this is maintained and made available for the wider public good in accordance with the Council's overall policy and strategy
 - As Planning Authority – The Council does not have a direct role in respect of town and village greens, but does have a role in respect of the provision of 'greenspace'. The UDP contains a number of designations aimed at protecting greenspace (N1) and protected playing pitches (N6).
- 3.2 The scheme of delegation approved by the Council separates out the functions of the Council as landowner which are exercised by the Director of City Development (in conjunction with the Director of the Service in whom the land is vested if that is different) and as Commons Registration Authority exercised by the Chief Planning Officer and Plans Panel.

The current procedure and the role of the Council as landowner

- 3.3 The procedure allows for the landowner to object, where it considers that the legal tests are not met for registration. In that regard, in accordance with the Council's current procedure, the ability to 'object' and put forward evidence applies to the Council as landowner in the same way as it does where the landowner is a third party.
- 3.4 It is essential that applications 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 the Council is also the landowner and has relevant evidence which is material to the consideration and 'testing' of the application, then it could be considered incumbent on the part of the Council to ensure that the information is before the decision maker. Not to do so could result in an erroneous decision being made, which once made cannot readily be revised or revoked.

The role of the Council as owner of land which is currently subject to three current undetermined applications for village green in the Kirkstall and Weetwood wards

- 3.5 Although it would not be appropriate for this report to rehearse the representations that the Council as landowner may wish to make to the Plans Panel when it

determines the village green applications in due course, at the request of this Board, this report seeks to set out the reasons why the Council has taken the view that it should make such representations.

- 3.6 The current applications relate to the Butcher Hill and West Park playing fields situated in the Kirkstall and Weetwood wards respectively and an area of public greenspace at Old Farm Close in the Kirkstall ward.
- 3.7 Butcher Hill Playing Fields are located in the Kirkstall Ward, and include approximately 6 hectares of land managed by Parks and Countryside as public open space. The site is designated as green space where policy N1 applies and as Urban Green Corridor where policy N8 applies. It also lies with the Green Belt where policy N32 applies. The site functions primarily as a recreation ground and includes 2 full size football pitches and 1 mini football pitch marked out on the site with accompanying posts during the football season.
- 3.8 West Park Playing Fields are located in the Weetwood Ward and include approximately 15 hectares of land managed by Parks and Countryside. The majority of the site is designated green space where policy N1 applies. The north eastern part of the site is designated as protected playing pitch where policy N6 applies. The entire site is within an Urban Green Corridor where policy N8 applies. The south eastern part of the site is also designated as Leeds Nature Area (Morris Wood). The site functions primarily as a recreation ground and includes 2 full size football pitches, and 1 mini football pitch marked out on the site with accompanying posts during the football season.
- 3.9 Old Farm Close is an area of public green space of approximately 1.5 hectares located in the Kirkstall Ward, and is managed by Parks and Countryside. The site is an area of local green space with no formal recreation facilities and is designated as green space where policy N1 applies.
- 3.10 The Council as landowner considers that it has relevant evidence which refutes the evidence put forward in support of these applications and demonstrates that the legal tests for registrations are not met. All three application sites are currently available for public use and are actively managed by Parks and Countryside. The playing fields both include full size and mini football pitches and are hired out to a range of different teams, often to people who fall outside of the proposed registration boundaries.
- 3.11 As highlighted earlier in this report, there is much uncertainty as to the implications of registration and the effect of this on the future use and management of registered greens. This uncertainty is considered below in respect of the registration of these three applications:-
 - Firstly it is clear that the rights to use land which has been registered as a town or village green will only be exercisable by people who live in the local community. As Defra state, “the right to enjoy lawful sports and pastimes on a green does not extend to the public at large, but is only exercisable by inhabitants of the locality in which the green is situated.” Currently, the Council provides public open space on an equal basis for all the people of Leeds. Officers would therefore recommend that care is taken when considering

applications to register Council public open space as a town or village green, given that this will impact upon the rights which people have to use the land and that the effect of this change over the long term is difficult to predict with certainty.

- Registration of Council land as a town or village green could impact on the way that it is managed by the Council and the way in which the Council sometimes charges for use of it, particularly for organised team sports and events. Defra states that “Inhabitants of the locality within which a green is situated have the right to use that green for lawful sports and pastimes. By definition any right can be exercised free of charge.” Given that the Council charges for pitch hire and sometimes for the use of land for events, registration may alter the way in which the Council charges in the future and its freedom to do so.
- The Council may not be able to undertake works to land that has been registered as a town or village green with the freedom that it does now. Members will be aware that the Council has placed fences around public open space on an increasingly frequent basis to prevent unauthorised vehicular access. In addition, sports team also often need spectator rails to be erected to ensure that they comply with the relevant sporting governing body standard. However, if Council land is registered as a town or village green then any such proposals will need to be considered in the context of the rights of local inhabitants to use the land for lawful sports and pastimes and as such the Council may not have the same freedoms to undertake works that it does now.

3.12 The Council as landowner considers that, given these parcels of land are already available for and are actively in public use, and can be managed and developed going forward as part of the Council’s Parks and Green Space strategy, the uncertainty that would arise as a result of registration is a significant factor in the decision to make representations. A further relevant factor is the relative permanency of town and village green status. Basically, once land has been registered as a town or village green, it can only be deregistered with the approval of the Secretary of State and then only if the owner of the land makes replacement land available (which will itself then be registered as a town or village green).

3.13 In view of the above the Council as landowner considers that the long term impact of the registration of Council land as a town or village green both in respect of any current issues that arise with respect to the management and provision of public open space, but also to how they may develop in the future and the level of uncertainty that this brings are all pertinent to the decision to make representations.

The implications of the approach taken by the Council as landowner in relation to future applications in relation to Council owned land

3.14 The Council’s Parks and Countryside service currently manages approximately 4,000 hectares of parks and green space. This includes 7 major parks, 62 community parks and 95 recreation grounds, as well as 155 hectares of local green space, which include 144 playgrounds and 500 sports facilities ranging from

skateboard parks to golf courses, all of which play host to approximately 600 events a year. In addition, the service also manages 96 allotment sites, 812km of public rights of way and 156 nature conservation sites, as well as 22 cemeteries and 3 crematoria.

- 3.15 All parks and green spaces are managed in accordance with the national standard, namely in line with Green Flag criteria. The Parks and Green Space strategy, which was endorsed by Executive Board in 2009, has a key priority for all community parks to reach Green Flag standard by 2020.
- 3.16 The three sites referred to in paragraph 3.6 are typical of many parks and green spaces throughout Leeds, and officers are of the opinion that there is the potential for further applications in the future. Indeed, the Open Spaces Society is actively encouraging local communities to 'get a green' by seeking to register land as a town or village green as part of the new neighbourhood planning system.
- 3.17 It is therefore important to have regard to the potential for the Council's approach in relation to these three applications to be seen as a precedent for other registration applications.

Alternative means of protection of greenspace

- 3.18 There are a number of alternative means of protecting existing greenspace where this is land in the Council's ownership, including the following:-
- The Council formally dedicates the land as public open space. The Council would be able to continue to manage the land as it does now but would not be able to dispose of it without consulting with the general public and taking into account any representations that they might have.
 - The Council leases the land to local residents for use for community/recreational purposes. Residents would need to establish a community organisation or similar body to take a lease of the land. It may be possible for the Council to reserve rights to continue to use the land for existing purposes such as football pitches and to retain the income from such use. It is also possible that Park & Countryside could continue to manage and maintain the land under a contractual arrangement with the community body.
 - The Council sets up a recreation ground/open spaces charity to manage and maintain the land. It is envisaged that the land would be transferred or leased to the charity and that the trustees of the charity would include local ward members for the land concerned. As with a lease to a community body, it is possible that Parks & Countryside could continue to manage and maintain the land under a contractual arrangement with the charity. An existing charity such as Wades, could also be considered.
- 3.19 In addition, the draft National Planning Policy Framework (NPPF) proposes that a new designation of land as Local Green Space should be introduced into the plan making process through both local and neighbourhood plans. The draft document proposes, in summary, that the designation should be used in circumstances where

the green space is in reasonably close proximity to a centre of population or urban area, is demonstrably special to a local community, is local in character and doesn't overlap with Green Belt. The effect of such designation would be to rule out new development other than in very special circumstances, but the designation is not intended to provide any rights to 'use the land', simply to protect it.

4 Corporate Considerations

4.1 Consultation and Engagement

4.1.1 The Executive Members for Development and Economy and Leisure have been consulted on this issue.

4.2 Equality and Diversity / Cohesion and Integration

4.2.1 No implications

4.3 Council policies and City Priorities

4.3.1 The Greenspace Strategy for the Council outlines how the Council intends to manage and develop greenspace in the city over the long-term. The potential for existing public open space to be designated as a Town or Village Green, would have implications for the ongoing implementation of this strategy due to the impact that such a change could have on the respective rights of the Council and users.

4.4 Resources and value for money

4.4.1 None

4.5 Legal Implications, Access to Information and Call In

4.5.1 None

4.6 Risk Management

4.6.1 The principal risk highlighted in this report is the potential uncertainty over the implications of Town and Village Green status over the long term.

5 Conclusions

5.7 Leeds City Council undertakes a range of roles in relation to this issue, Commons Registration Authority, Landowner and Planning Authority. Given the relative permanency of Town and Village Green status and the importance given to the public open space for all the people of Leeds, it is recommended that careful consideration is given to the long-term consequences of Town and Village Green Status being granted to existing public open space.

6 Recommendations

Members are asked to note the contents of this report, and to comment as appropriate on the current arrangements that the Council has for determining town and village green applications

7 Background documents

7.1 Report to Scrutiny Board (Regeneration) of 17 January 2012