

**Report of the Chief Planning Officer & Head of Legal Service**

**Report to Plans Panel South and West**

**Date: 7th March 2024**

Subject: APPLICATION TO REGISTER LAND AT SUNNYBANK LANE RECREATION GROUND, SUNNYBANK LANE, THORNBURY, BRADFORD, BD3 7DG AS A TOWN OR VILLAGE GREEN UNDER THE PROVISIONS OF SECTION 15(1) OF THE COMMONS ACT 2006

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

**Summary of main issues**

1. On 24 June 2019 an application was received by Leeds City Council, in its role as Commons Registration Authority ("CRA"), for registration of land known as Sunnybank Fields, Sunnybank Lane, Thornbury, as a Town or Village Green pursuant to Section 15(2) of the Commons Act 2006.
2. The Council as Commons Registration Authority ("CRA") is legally obliged to consider such applications.
3. Bradford Metropolitan District Council as landowner, has objected to the Application.
4. Under the Council's Constitution, Members of the relevant Plans Panel have responsibility for the determination of applications. 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 the circumstances outlined in this report seeks approval for the appointment of an independent inspector to review the evidence and confirm if a Public Inquiry or a non-statutory written representations procedure for the Application

should be initiated. The Chief Planning Officer is delegated to proceed with the recommendations of the Independently appointed inspector on whether the Application ought to be dealt with by way of Public Inquiry or Written Representations. The matter will be returned to Plans Panel when the Inspector has prepared his/her report with recommendations on the Application after examination of the evidence submitted to date.

## **Recommendations**

- a. Members are requested to consider the relevant issues outlined in this Report and agree the appointment of an independent Inspector by the City Solicitor to undertake a review of the evidence and confirm whether a Public Inquiry or non statutory Written Representation procedure should be initiated to progress the Application further.
- b. Delegate authority to the Chief Planning Officer to proceed with the recommendations of the Inspector on whether a non statutory Public Inquiry or Written Representations is adopted for the Application.
- c. Subject to the Application proceeding by way of Public Inquiry or Written Representation, for the Independent Inspector to undertake an examination of the evidence submitted by the parties concerned and prepare a report in relation to his/her findings for consideration at future meeting of this Plans Panel.

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

- 1.1. To inform members of the Application submitted to the Council by Mr Kalvinder Malik ("the Applicant"), for the registration of land identified by the Applicant to be Sunnybank Lane Recreation Ground, Sunnybank Lane, Thornbury, Bradford, BD3 7DG ("the Application Land"), as shown edged red on the plan appended (as background document 7.1 below) as a Town or Village Green under the provisions of section 15(1) and 15(2) 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 Public Inquiry or non-statutory procedure by way of Written Representations should be initiated on the advice of an independent Inspector appointed to report to the Council on that basis.

### **Background Information**

- 1.3. The Council is the Commons Registration Authority (CRA) under the provisions of the Commons Act 2006 ("CA 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 CA 2006).

- 1.4. On 24<sup>th</sup> June 2019, the Council received the Application from Mr Malik for the registration of the Application Land as a Town or Village green, accompanied by photographic evidence, questionnaires and petition in support of the Application.
- 1.5. Despite the Bradford postal address given for the Application Land, it lies within the Metropolitan District of Leeds, and therefore the administrative area of the Council, although it is very close to the boundary with Bradford. The Application Land is owned by Bradford Metropolitan District Council (“BMDC”).
- 1.6. On the 10<sup>th</sup> September 2020, the Chief Planning Officer under delegated powers, gave preliminary consideration to the Application and determined that from the information received, the Application should be advertised, the landowner informed and that details of representations and objections received be reported to the Plans Panel.
- 1.7. On the 18<sup>th</sup> September 2020, a statutory notice detailing the Application was duly affixed at various locations to the perimeter of the Application Land and published in the Yorkshire Post. A copy of the Application with statutory notice was circulated to parties holding an interest in the Application Land on the same date and Ward Members were also notified.
- 1.8. In accordance with the objection period stated on the statutory notice, an objection to the Application were submitted to the CRA from BMDC on 9<sup>th</sup> November 2020. The two main planks of the objection were that recreational use of the Application Land was on the basis of permission (express, implied and “*by right*”), thereby not being “*as of right*” as required by section 15(2) of the CA 2006, and that the Application was also defeated by the doctrine of statutory incompatibility (i.e. it was held for a statutory purpose incompatible with its registration as town or a village green and could not therefore be registered as such it would be statutorily incompatible to do so. Objection was further made on the ground that the Application had not properly identified the qualifying area (whether a “*locality*” or a “*neighbourhood within a locality*”), which was relied on for the purpose of the Application. BMDC supported its objection with witness statements and documentary evidence, including material from their records, in relation to the statutory purposes of its holding of the Application Land.
- 1.9. In March 2021, the Applicant provided a detailed response, including a lengthy document in reply to the objection itself, as well as a document in reply to BMDC’s witness statements. All BMDC’s grounds of objection were contested and arguments put forward seeking to contest BMDC’s claims that the use of the Application Land was with permission or “*by right*”, that registration should fail on the ground of statutory incompatibility and that a qualifying area had not been properly identified.
- 1.10. In turn, BMDC was given an opportunity to respond to the Applicant’s response and it finalised its response in March 2022, re-emphasising its contention that the Application should fail on the basis of statutory incompatibility, as well as again

making the point that a qualifying area had not been properly established.

- 1.11. The Applicant submitted a further reply at the end of March 2023 which, in particular, returned to the “by right” and statutory incompatibility grounds of objection, arguing that neither had been made out by BMDC, and also made detailed submissions on the issue of the qualifying area, with particular emphasis placed on why the requisite degree of cohesiveness should be found to exist for the purposes of the neighbourhood limb of section 15(2). The Applicant’s further reply also raised a number of questions seeking answers from both the City Council as CRA and BMDC as objector.
- 1.12. The legal principles of the objections and replies are set out below. This report does not seek to examine or give weight to either party in their submissions to date (as this would be the role of the independent inspector) but rather sets matters out for the next stage of determination of the Application itself.

## **2. Main issues**

- 2.1. The fact that an application site may appear to be available for public use does not automatically mean it will qualify as Town or Village Green as there are other factors to take into account as referred to later in this report. A person making an application for the registration of land as a Town or Village Green must, if they wish to succeed, prove their case. If they fail to provide sufficient and persuasive evidence in respect of any key statutory requirement, then the application will be rejected.
- 2.2. Land ownership is irrelevant to the question of potential registration of a site as a Town or Village Green. A Landowner is unlikely to want their land to be encumbered by Village Green status but this issue is unconnected to the determination by the CRA of whether an application meets the statutory test laid down by the CA 2006.
- 2.3. Planning merits and social needs are also immaterial. There may be strong social and planning arguments for the site remaining available for use by local people for recreational purposes, but these cannot be taken into account for the purpose of determining the application for registration.
- 2.4. Town and Village Green applications are in the main contentious issues and there are many recent examples of appeals being lodged as a consequence of decisions made by registration authorities. It is therefore considered prudent to ensure that all the facts pertaining to an application and any objections thereto are carefully and thoroughly examined. This is particularly relevant where there is disputable evidence, or where there is no clear and concise written evidence to be certain that either party is correct in its submissions.

### **3. The Statutory Test**

- 3.1. In order for an Application to succeed, it must satisfy each element of the statutory test laid down under the provisions of Section 15(2) of the Commons Act 2006. The test is whether: (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and (b) they continue to do so at the time of the Application.
- 3.2. The issues, which need to be considered in respect of the Application, are therefore:
- 3.2.1. Has the site been used by a significant number of the inhabitants of any locality, or of any neighbourhood within a locality ?
  - 3.2.2. Has the user by inhabitants been “as of right” ?
  - 3.2.3. Has the site been used for lawful sports and pastimes ?
  - 3.2.4. Has this use taken place over a period of twenty years ?
  - 3.2.5. Was the use continuing at the time of the Application ?

### **4. Significant Number**

- 4.1. The question of ‘significant number’ is not defined in the CA 2006 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. The issue for the decision maker is whether there was a sufficient continuance of use of sufficient intensity to bring home to a reasonable observer, and in particular to the landowner, that lawful sports and pastimes of some sort were taking place throughout the period which are attributable to the acquisition of a TVG right (see *R (Barkas) v North Yorkshire CC* [2015] AC 195). The key question is “how the matter would have appeared to the owner of the land”, and is not at all concerned with “evidence of the individual states of mind of people using [the land]”: *R v Oxfordshire CC ex p Sunningwell* [2000]

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

- 4.2. 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.

- 4.3. 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.
- 4.4. The CRA has to be satisfied that the claimed user had been by the inhabitants of an area that could be properly described as a “locality” or “neighbourhood” within a locality. It is not necessary to show user exclusively by the inhabitants of the locality or neighbourhood within a locality.
- 4.5. It should be noted, however that judicial authority appears to support the view that this is a matter for the relevant CRA to decide. This is on the basis of the evidence actually presented to it, what are the boundaries of the relevant ‘neighbourhood’ or ‘locality’; irrespective of the subjective belief of any users of the site that they were doing so as inhabitants of any particular ‘locality’ or ‘neighbourhood’.

## **5. Use As of Right**

- 5.1. 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.

## **6. Lawful Sports and Pastimes**

- 6.1. The Commons Act 2006 contains no definition of the phrase “lawful sports and pastimes” This expression was considered by the House of Lords in the R v. Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 A.C. 335. Lord Hoffmann explained that “sports and pastimes” are a single composite class. Provided an activity can properly be called a sport or pastime, it falls within the composite class. It is difficult to conceive of any lawful recreational activity that would not fall within this very broad class. For example, it was expressly held in Sunningwell that dog-walking and playing with children are forms of modern recreation that would satisfy the description [at 357A-D]. Other activities that are commonly relied upon include kite-flying, fruit-picking and football.
- 6.2. It is important to distinguish the use of footpaths also from user for sports or pastimes. In Oxfordshire County Council v. Oxford City Council [2004] EWHC 12, Lightman J stated that where the public have walked over defined tracks, this will usually only go as far as to establish public rights of way, unless the user has been wider in scope or the tracks are of such character that user of them could not have given rise to a presumption of dedication at common law as a public highway. Not every part of the application land must have been used for particular sport or

pastime for that particular activity to be relevant. The question is whether the land as a whole has been used for recreation for the relevant period, taking all qualifying activities into account such evidence relating to this part of the statutory test

## **7. Twenty Years Use**

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

## **8. Continuing User**

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

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

9.1. In the 2004 case of R (Whitney) v The Commons Commissioners, the Court of Appeal considered the powers of registration authorities to decide disputes. The Court held that the duty of the CRA is to decide the Application reasonably and fairly. The duty to act reasonably requires the CRA to bear in mind that its decision carries legal consequences. It has to consider both the interests of the landowner and the possible interests of their local inhabitants. This means that there should not be any presumption for or against registration.

9.2. If the registration authority accepts the Application, amendment of the register may have a significant effect on the owner of the land. Likewise, if the authority wrongly rejects the application, the rights of the applicant and of local inhabitants will not receive the protection intended by Parliament.

9.3. In a case where there is dispute, as is the case here, it prudent for the Registration Authority to appoint an independent expert to examine the evidence and find the requisite facts, in order for the CRA to obtain the proper advice before proceeding to decide the Application.

9.4. Some relevant guidance from case law is provide in the Court of Appeal decision in

*Whitney v Commons Commissioners*<sup>1</sup>. In that case Arden LJ said: “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*” She also observed that “[t]he authority may indeed consider that it owes an obligation to have an inquiry if the matter is of great local interest”.

Waller LJ said that, “...in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration”.

- 9.5. Upon review of the application itself it appears to officers that the seriousness of the dispute in the present case lies not so much in relation to the facts (which, it is considered, is the type of dispute adverted to in *Whitmey*) but in the application of the legal principles relied on by BMDC in the main planks of their objection to the facts. On that basis it is a matter for the Independent Inspector to consider on review of the evidence whether it is necessary to examine the evidence by way of Public Inquiry or Written Representations procedure and confirm to the Council. The appointment of a barrister specialising in town and village green matters to discharge this function would therefore ensure that the Application is considered independently by an inspector with the relevant expertise and in a manner properly meeting the particular demands of the case.

## **10. “Statutory Incompatibility”**

- 10.1. A further reason appointing an Independent Inspector is the need to examine the doctrine of “Statutory Incompatibility” which arose in the case of *R (Newhaven Port and Properties Limited) v East Sussex County Council* [2015] AC 1547. The Supreme Court found in that case that registration of Harbour Authority land as a Town or Village Green, would have been incompatible with the statutory functions required to be exercised. It was held that where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the Commons Act 2006 does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes.
- 10.2. Notwithstanding the observations made above, the leading case of *Lancashire County Council* establishes that the issue of statutory incompatibility can be fact-dependent and may not be capable of being resolved by legal argument alone but requires further evidence. The Commons Registration Authority ought to be guided by the recommendations of an Independent Inspector.

## **11. Corporate considerations**

### **Consultation and engagement**



- 11.1. Following initial consideration the Application was circulated to parties with an interest in the Application Land and to relevant Ward Members.
- 11.2. A statutory public notice of the Application was advertised in the Yorkshire Post and posted around the perimeter of the Application Land .

## **12. Equality and diversity / cohesion and integration**

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

## **13. Council policies and best council plan**

- 13.1. 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.

## **14. Resources and value for money**

- 14.1. Whilst it is not possible to predict the actual costs associated with a Village Green Application in the interest of ensuring the evidence is properly considered and is dependent on the recommendation of mode of Inquiry or written representation by the Inspector. The appointed Inspector will produce a report of his/her findings which are estimated to cost with or without a Public Inquiry in the region of £5,500 - £10,000. The costs will increase substantially in the event that the decision of the Council is the subject of legal challenge.

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

- 15.1. The determination of the Application involves the taking of a quasi-judicial decision which may be the subject of legal challenge. This decision is not subject to call in.

## **16. Risk management**

- 16.1. 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.

## **17. Conclusion**

- 17.1. In view of the evidence that has been submitted by both parties in relation to a complex area of law, it is concluded that it is necessary to appoint an independent inspector to confirm if a Public Inquiry or Written Representation Procedure be initiated and delegate authority to proceed based on these recommendation to the Chief Planning Officer. The recommendations are set out to ensure that the Application is dealt with transparently and impartially.

# MAP: EXHIBIT (A)

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## SOUTH AND WEST PLANS PANEL

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SCALE : 1/2500

