

**Decision Maker:** DEVELOPMENT CONTROL COMMITTEE

**Date:** Tuesday 25<sup>th</sup> November 2014

**Decision Type:** Non-Urgent                      Non-Executive                      Non-Key

**Title:** LAND KNOWN AS BECKENHAM GREEN LOCATED BETWEEN HIGH STREET AND ST GEORGE'S ROAD FOR REGISTRATION AS A TOWN OR VILLAGE GREEN

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**Chief Officer:** Director of Corporate Services

**Ward:** Copers Cope

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1. Reason for report

The Council is the Registration Authority for town and village greens within its area. Section 15 of the Commons Act 2006 provides that land can become a new green if a significant number of the inhabitants of any locality or 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. They must continue to do so at the time of the application or meet the alternative qualifying period specified in section 15. The Council received an application dated 24<sup>th</sup> March 2014 to register land comprising the area of ground known as Beckenham Green bounded by High Street Beckenham and St Georges Road, Beckenham on the basis that it has become a Town Green. After completion of the statutory requirements, it is the duty of the Council as registration authority to decide whether or not the area should be registered as a new Town or Village Green, or whether to cause a public inquiry to be held for an Inspector to make a recommendation in this respect. The purpose of the report is to set out the legal position and the evidence for members to make that decision.

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2. **RECOMMENDATION(S)**

**To decline to register the land as a new town or village green for the reasons set out in the report.**

### Corporate Policy

1. Policy Status: Existing Policy:
  2. BBB Priority: Quality Environment
- 

### Financial

1. Cost of proposal: Not Applicable:
  2. Ongoing costs: Not Applicable:
  3. Budget head/performance centre:
  4. Total current budget for this head: £
  5. Source of funding:
- 

### Staff

1. Number of staff (current and additional):
  2. If from existing staff resources, number of staff hours:
- 

### Legal

1. Legal Requirement: Statutory Requirement:
  2. Call-in: Not Applicable: This report does not involve an Executive decision
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### Customer Impact

1. Estimated number of users/beneficiaries (current and projected):
- 

### Ward Councillor Views

1. Have Ward Councillors been asked for comments? Yes
2. Summary of Ward Councillors comments:

### 3. COMMENTARY

Land, once registered as a Town or Village Green, will remain available for continued enjoyment by the inhabitants for recreational use. Registration does not in itself confer any recreational rights that did not exist prior to registration. The practical effect of registration is only to confirm the existence of such rights. Consequently, a registered Town Green is held in the same way as any other land and, although nothing should be done which would interfere with the lawful recreational activities of the local inhabitants, the owner is not required to maintain it in a suitable state for such activities. A significant consequence of registration is that the land cannot be developed in such a way as would make it impossible to exercise those rights

There is a legal framework which must be applied to any application for such a registration.

#### **3(1) Requirements of S15 of the Commons Act 2006**

The application was made by Mr David Wood in terms of S15(2), which states:

##### *15 Registration of greens*

*(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), (3) or (4) 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.*

The burden of proof lies on the applicant to establish to the civil standard of balance of probabilities. Thus, in order to fulfil this requirement, the applicant must prove the various elements of the requirements, namely:

a) “A significant number...”

This does not necessarily mean substantial, but should be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers. Provided that a significant number of the inhabitants of the claimed locality or neighbourhood are among the users, it does not matter that many come from elsewhere. The requirement is to establish a clear link between the locality or neighbourhood and the proposed town or village green.

b) “... of the inhabitants of any locality...”

A “locality” cannot be created by drawing a line on a map. It must be some division of the county known to law, such as a borough, parish or manor.

c) “...or of any neighbourhood within a locality...”

Where a locality is relied on, for instance a town, it can be a relevant locality even if it is not (or is no longer) a recognisable local government unit.

d) "... have indulged as of right..."

As of right means that it is not use by force, stealth or with the licence of the owner. This does not turn upon the subjective belief of the users. The use must be judged objectively, from the standpoint of a reasonable owner.

e) "... in lawful pastimes..."

This is a composite expression which includes informal recreation such as walking, with or without dogs, and childrens play. Use that is more in the nature of a right of way, a cut-through or a shortcut will not fall to be considered as a lawful sport or pastime

f) "...on the land..."

"Land" is defined as including land covered by water, but is generally accepted as excluding buildings.

g) "...for a period of at least 20 years..."

The relevant use must generally continue throughout the whole of the 20 year period.

h) "...and they continue to do so at the time of the application."

In order to satisfy the criteria in S15(2) the qualifying use must continue at the date of the application.

### **3(2) The application and supporting evidence**

The application may be made by any person, and should be done by completion and service of the Form 44, which contains an affidavit in support of the application and a map showing the location of the land in question.

Mr David Wood has made the application. An Ordnance Survey map was submitted showing the area in question. Although the area is identified on the Ordnance Survey as Beckenham Green the land is not shown in as Register of Town and Village Greens as a designated green

A supporting statement and statutory declaration were submitted by the applicant, together with an extract of the Minutes of the Council's Recreation Committee dated 8<sup>th</sup> September 1970.

The application fulfilled the basic requirements and was accepted by the Council as Registration Authority. The Registration Authority therefore proceeded with publicising the application and requesting comment from the public.

During the consultation period **one letter of inquiry** was received. This asked what the application to register the land as a Town or Village Green means as isn't it already a green for public use so what difference will this registration mean.

### **3(3) Opposing submissions**

The London Borough Bromley in its capacity as landowner was advised of the application.

They responded within the consultation period as follows:-

“I note that Mr Wood has not included any supporting evidence at all; there is nothing indicating the nature of the recreational activities undertaken by the local population, nor the number of people using the land or the frequency of use. The only thing he mentions is that he planted a tree there in 1973.

Whatever the merits of the application however, the applicant makes the point himself that the land has been appropriated to recreation use and that it is designated as POS. It is in fact a public park. On that basis the use by the public is by right and not as of right and consequently, in accordance with the recent North Yorkshire CC case, the application should be rejected as it does not meet the TVG registration requirements.”

### **3(4) The applicant's response**

A copy of the above mentioned documentation, was sent to the applicant The applicant was invited to make any further submissions and responded with the following points:-

“In my original application and answering the comment made by Susan Fraser, Solicitor (employed by Bromley?) I had mistakenly assumed both parties were clearly aware how the public benefits by using Beckenham Green. These include simply enjoying the open green space for a quiet sit down, communing with the natural world during a walk, to visiting the regular markets, fairs and occasional concerts held on the Green for the enjoyment of all residents and friends.

I have never regarded it as a ‘Park’ in the same manner as Kelsey Park or Croydon Road Recreation Ground for instance and it is not named as such. Having seen the area recover from World War 2 bombing via a temporary car park and subsequently an open green space for the benefit of the townscape and residents of and visitors to Beckenham I am loath to see it lost to any possible development project or revert back to a car park.

It was mentioned by the appointed architect, Julian East, overseeing the Beckenham town centre improvements, at the June meeting of the Council's Working Party, that he was minded to introduce more paving and hard surfaces on the Green. I immediately interjected that we did not wish to see a ‘Town Grey’ rather than the current pleasant green landscape in that location. As a ‘Town Grey’ it could still be a park but registration as a Town Green would prevent such spoiling of our valuable asset.

With Bromley on both sides of the argument it is no doubt difficult to see the change of status. However one thing does strike me.

If changed to a Town Green who would maintain it; would it be LBB or would I have to get the mower out. There are already Beckenham Green Friends who do some planting and maintenance and enjoy the open space.

‘By right’ and ‘as of right’ quoted by Ms Fraser and the reference to the North Yorkshire CC case is interesting but is hardly relevant in this case as it is not land left over from a housing development. As a ‘park’ Beckenham Green can be used by right of LBB apparently but as a Town Green it is open to all so far as I can understand it.

I am sure all residents are pleased to be able to access the land by courtesy of LBB but to protect it in perpetuity for the people it should be registered under Section 15 of the Commons Act 2006 in line with my application.

I hope an approval recommendation will be put to the DCC in due course.”

### **3(5) Analysis**

Having made a valid application, it is for the applicant to show, on the balance of probabilities, that the application land fulfils all the criteria for registration.

The tests mentioned in part 1 of this document should therefore be applied.

a) “A significant number...”

The application is not supported by evidence of numbers of users. There have been no supporting statements other than as detailed in this report, and no one came forward as a result of the publication of the application other than the letter of inquiry referred to.

If we are to take it that the applicant and the letter of inquiry writers have used the area as required, for the requisite time, this does not amount to a body of actual evidence that a significant number of people have done so.

There would therefore appear to be a lack of evidence to support this aspect of the definition

b) & c) “..of the inhabitants of any locality or of any neighbourhood or locality...”

Similar comments apply as in relation to the first point. With a lack of supporting evidence, it is difficult to take these points any further.

There would therefore appear to be a lack of evidence to support this aspect of the definition

d) “... have indulged as of right...”

In relation to this aspect of the definition, attention must be paid to the letter of objection by the Council in their capacity as landowner and to the terms of the resolution of the Recreation Committee dated 8<sup>th</sup> September 1970. The Minute states:

“The Council at their meeting on 27<sup>th</sup> July, 1970 adopted the Development Committee’s recommendation (Minute 215) that the island between High Street, Albemarle Road and St. Georges Road, adjoining the church, be retained as an open space. For many years the site had been maintained as a closed grass area but numerous complaints had been received about its appearance. The land which comprised some 1.95 acres was surrounded by shops and offices and the Director of Parks felt that it would satisfy a demand if developed for passive recreation and so improve the appearance of the area.

RECOMMENDED that the island site between High Street, Albemarle Road and St Georges Road be appropriated to the Recreation Committee for use as public open space”

As public open space, the right to access the area would be “by right” (ie in exercise of a legal right to do so, as opposed to “as of right”.(ie without permission, force or secrecy).The

public is entitled to use the land for lawful sports and pastimes in accordance with any bylaws regulating its use.

In a case decided this year [*R(Barkas) v North Yorkshire County Council*], the Supreme Court decided that “...where the owner of the land is a local authority which has lawfully allocated land for public use (whether for a limited period or for an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land “as of right”, simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years. It would not merely be understandable why the local authority had not objected to the public use; it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private landowner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights.”

This would therefore appear to preclude the registration in terms of the application.

e) “...in lawful pastimes...”

The applicant has not given any indication of the activities which it is claimed would constitute “lawful pastimes”. There would therefore appear to be no actual evidence to support this aspect of the definition.

f) “...on the land...”

The land is open land.

g) & h) “...for a period of 20 years and they continue to do so at the time of the application”

Reference should be made to points a – e above.

There would therefore appear to be no evidence to support this aspect of the definition.

### **3(6) Conclusions**

As may be seen from the analysis above, it is not considered that the application can succeed.

The recent Supreme Court decision indicates that land which is held by a local authority for a purpose which allows the public to have access to it, is likely to be used “by right” as opposed to “as of right”.

This being the case, it would appear that the application falls at this hurdle.

For the sake of completeness, it would appear that, even if this were not the case, the application would fall generally in relation to the other strands of the test as there is a lack of actual supporting evidence as to the nature and extent of the claimed use of the land. The evidence as to actual user is limited and one is left to draw inferences from the appropriation of the land as public open space as to what the actual use has been over the qualifying

period. There is no evidence of “unusual additional facts” that could justify an alternative conclusion.

### **3(7) Options**

The Council as Registration Authority may decide to register or decline to register the land as a new Town or Village Green on the basis of the application and the evidence before them.

Alternatively, the Council may wish to cause a Public Inquiry to be held before a suitably qualified Inspector. If an inquiry is held, the Inspector would consider the application and evidence, hear witnesses, and apply the law to the facts and then report to the Council with a recommendation as to whether or not to register the land as a new Town or Village Green.

If the applicant or landowner is not satisfied with the outcome of the application, the remedy open to them is to seek a judicial review of the decision of the Council as registration authority.

## **4. FINANCIAL IMPLICATIONS**

If a Public Inquiry is to be held, the cost could amount to £15 – 20,000.

## **5. LEGAL IMPLICATIONS**

Addressed in the body of the report

## **6. PERSONNEL IMPLICATIONS**

If there was to be a Public Inquiry, then one member of staff would be required to act on behalf of the Council as Registration Authority and one on behalf of the Council as landowner, together with any staff required as witnesses.

<b>Non-Applicable Sections:</b>	Policy Implications
Background Documents: (Access via Contact Officer)	The file containing the application and other documents referred to in this report may be obtained from the writer and will be available to members prior to the committee