

Decision Maker: DEVELOPMENT CONTROL COMMITTEE

Date: Tuesday 9 February 2016

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

Title: LAND AT HAVELOCK RECREATION GROUND - APPLICATION FOR REGISTRATION AS A TOWN OR VILLAGE GREEN

Contact Officer: Marion Paine, Lawyer
Tel: 020 8461 7647 E-mail: Marion.Paine@bromley.gov.uk

Chief Officer: Director of Corporate Services

Ward: Bromley Town;

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 27th March 2015 to register land comprising the Havelock Recreation Ground, Bromley 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.

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.
-

Customer Impact

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

Ward Councillor Views

1. Have Ward Councillors been asked for comments? This report is being copied to Ward Councillors, whose comments will be reported verbally
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 Village 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 Donald Alastair Scott 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.

Donald Alastair Scott, an individual who advised that he was representing the Friends of Havelock Recreation Ground, the constitution of which was also submitted to the Council, made the application.

A map was submitted showing the area in question, and the applicant identified the "locality or neighbourhood" as the eastern portion of Bromley Town Ward and southwestern portion of Bickley ward, as illustrated on an accompanying map.

A statutory declaration , accompanied by a detailed analysis of why the applicant felt that the area should be declared as a new Town Green were submitted by the applicant, together with extensive questionnaire and survey information from users of the area, with a comprehensive analysis of that information.

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.

3(3) Opposing submission

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

They responded within the consultation period summarised as follows:-

1. The application includes the nursery situated on the land in a building which was formerly a pavilion but has been leased as a nursery since at least 1996 and fenced off from the remainder of the land. As such it has not been used by the public and should be removed from the application as it does not meet the statutory requirements, and
2. As the applicants have pointed out, the remainder of the land is and has since the 1950's been maintained and used for recreation purposes and is designated as Urban Open Space (it is included in the parks and recreation ground byelaws under the Open Spaces

Act 1906) and the Council is therefore effectively inviting the public to use it, making their use of the land *by right* and not *as of right* as is necessary to meet the statutory requirements for registration as a town or village green.

3(4) The applicant's response

Having received the above mentioned objection, a copy was sent to the applicant, who was invited to make any further submissions in respect of these comments and who responded with the following points in summary:-

1. In respect of the nursery area, it was acceptable to the applicant that this is removed from the application
2. The purpose of the application is to formalise the protection of the land from development and other forms of detrimental activity for the benefit of the Council and local residents.
3. The status of Town Green would give the Council a robust defence against pressure of increased housing density and declining recreational space. Pointing out that legislation generally makes it an offence to interrupt or encroach on such a designated area.
4. Surveys conducted by the applicant's group and by councillors, together with the lack of objections received, demonstrate the depth and unanimity of feeling of local residents in the face of any threat to the preservation of the recreation ground as it is now.
5. The recreation ground was created over a period of 10 years in the last century by the Council on behalf of residents, doubtless partially funded by them through their rates. Whether its use is now *by right* or *as of right* is surely of very little consequence; what we are seeking is the protection of the land in terms of the Commons Act which affords it greater protection than other legislation of Inclosure Acts and Open Spaces Acts.

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) – c) "A significant number of the inhabitants of any locality or of any neighbourhood or locality..."

The applicant has carried out detailed research by way of surveys and questionnaires and their evidence appears to show that the recreation ground has been and still is well used by local residents for recreational purposes.

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

This is a crucial statutory test which must be applied to the application. The applicant has agreed throughout that the area was created by the Council as a recreational facility, with the

public using it by virtue of the Council permitting them to do so, openly and without fear of challenge. Whilst the applicant considers that whether its use is by right or as of right is surely of very little consequence, this is not the case. It is in fact a crucial statutory test which has been the subject of significant court decisions.

As a recreational facility covered by Council byelaws, and managed by them for recreational purposes, 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, by force or secrecy).The public is entitled indulge in lawful sports and pastimes there.

In a recent case [*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.

This decision was clarified by the other recent decision of *R(Goodman) v Secretary of State for the Environment, Food and Rural Affairs*, in relation to the implied appropriation of land for recreational use. In the Goodman case there was a challenge to the finding that land had been appropriated from employment to recreational use by implication. This challenge was upheld due to a lack of evidence that the Council had intended to appropriate the land to its new purpose.

In the current application, the land is clearly held and managed for recreation purposes, so the *Goodman* point does not arise.

e) “...in lawful pastimes...”

This must be more than use that is in the nature of a right of way, but can include walking, football or bird watching for example. The applicant has indicated in their survey analysis that activities have taken place which would constitute “lawful pastimes”.

f) “...on the land...”

If the other elements of the application were fulfilled, the plan would require to be amended to exclude the nursery.

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

The uses indicated by the applicant’s analysis would appear to fulfil the time requirement.

3(6) Conclusions

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

Whilst it is not considered relevant by the applicant, the *by right* versus *as of right* distinction is fundamental to the application, and in this case the application fails to fulfil this requirement.

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.

If the Council is of the view that the application fails to meet the statutory requirement for registration, but wished to register the area as a town green in any case, they have the option of voluntarily registering it.

This would mean refusing the current application and proceeding to use their powers as the owner of the land in terms of S15(8) of the Commons Act which states that “*The owner of any land may apply to the commons registration authority to register the land as a town or village green*”. If such an application is made then the Council as Registration Authority must grant the application if it is satisfied that the applicant is the owner of the land and that any consents required (eg charge or lease holders) have been obtained. Such an application does not need to satisfy any of the other tests required when a non owner third party makes such an application.

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 is 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.

Non-Applicable Sections:	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.