

REGULATORY COMMITTEE
15th December 2004

COMMONS REGISTRATION ACT 1965 (as amended)
APPLICATIONS FOR THE REGISTRATION OF A
TOWN GREEN: LAND AT PENLEIGH PARK,
WESTBURY

Purpose of Report

1. To inform the Committee of four applications which have been received to register land at Penleigh Park, Westbury, as a town green under the Commons Registration Act 1965, and to seek a decision on the applications.

Background

2. The Commons Registration Act, 1965 required all common land and town or village greens to be formally registered. County Councils were charged with compiling the register of such land.

Failure to register any land within the prescribed period, which expired in 1970, resulted in that land ceasing to be common land or town or village green.

3. Further registrations may be made in certain very specific circumstances.

Under Section 22 (1A) of the Commons Registration Act 1965 (inserted with effect from 30th January 2001 by Sections 98 and 103(2) of the Countryside and Rights of Way Act 2000) land will be a town or village green:

“ If it is land on which for not less than twenty years a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged in lawful sports and pastimes as of right and either:-

- (a) continue to do so; or
- (b) have ceased to do so for not more than such period as may be prescribed or determined in accordance with prescribed provisions.”

No regulations have yet been made under paragraph (b).

4. If any application to register land as common land or as town or village green is submitted, the County Council as registration authority is required to advertise the application in the local press and on site, inform the other local authorities in the area, and the owner, lessee, tenant or occupier of the land concerned. A period of not less than six weeks is allowed for objections to the application to be lodged.

The application and objections must then be considered by the Registration Authority and a decision made as to whether the land is to be registered or not. Whilst there is no formal right of appeal against a rejected application, it is open to the applicant to seek a judicial review of the Authority's conduct if he believes it to constitute an abuse

of power or to be wrong in law, unreasonable, procedurally improper, biased, or contrary to legitimate expectations.

5. At its meeting on 3rd October 2001 the Environmental Services Sub-Committee considered a report on an application to register land at Penleigh Park, Westbury from Mr Patrick Taylor (Appendix One). The appendices to that report are in the Members' Room. The Sub-Committee resolved that the land should not be registered as a town green since the land was a facility provided by West Wiltshire District Council for public use by implied licence. This decision took account of the law as it stood at that time. Thirty-three further applicants had also submitted claims relating to Penleigh Park but as no fresh issue was raised over and above those raised in Mr Taylor's application, Counsel's advice was that these applications could be refused on legal grounds without referring them to Members.
6. Mr Taylor and the other applicants subsequently lodged judicial review proceedings in the High Court challenging the Council's decision. The facts were reported to Regulatory Committee on 10 April 2002 (Appendix Two). However, on consideration of the Council's case and the law, particularly the Court of Appeal decision in the Beresford case, the applicants decided to withdraw their judicial review claims on the basis that the Council would not pursue them for costs. This was reported to the Regulatory Committee on 15th May 2002 by the Director of Corporate Services.
7. In November 2003 in the case of R (on the application of Beresford) v Sunderland City Council (the Beresford Case) the House of Lords reversed a decision of the Court of Appeal on the issues of implied licence and use as of right. It was the Court of Appeal decision in the Beresford case that formed the basis of the Council's decision to reject the application by Mr Taylor in October 2001.
8. The circumstances of that case were that in 1977 Sunderland City Council had constructed wooden seats along the perimeter of an area of grassland and laid out a hard surface cricket pitch. The Council mowed the grass regularly. In 1999 the applicant and other local residents submitted an application to the Council for the land to be registered as a town or village green on the grounds that the inhabitants of the locality had indulged in 'lawful sports and pastimes as of right' for not less than 20 years within Section 22(1) of the 1965 Act. The Council refused the application on the ground that the use had not been as of right, but by virtue of an implied licence from the owners, relying on the provision of seating and the cutting of the grass as justifying the inference that those who used the land did so with permission from the owners. The applicant kept appealing the decision until the case reached the House of Lords.
9. The House of Lords decided that there had been no evidence before the Council to support the conclusion that the user by the local inhabitants had been otherwise than 'as of right' within the meaning of Section 22. The fact that the Council and its predecessors in title had been willing for the land to be used as an area for informal sports and games, had provided some minimal facilities and had mowed the grass regularly, could not be regarded as acts amounting to the giving of permission.
10. On 15th March 2004, Mr Eli Manasseh of 122 Oldfield Park, Westbury, wrote to the County Council saying that he would be acting as agent for four of the applicants who applied to the County Council in 2001.

The applications concerned are from:

Mrs Susan Illsley	(Appendix Three)
Mrs Carole Taylor	(Appendix Four)
Mr Charlie Taylor, deceased	(Appendix Five)
Mrs Sylvia Taylor	(Appendix Six)

The land concerned is partly in the ownership of West Wiltshire District Council and partly in the ownership of Persimmon Homes (Wessex) Limited. Persimmon's ownership is shown cross-hatched black on the plan (Appendix Seven).

With regard to the application from the late Mr Charlie Taylor, the County Council has received Counsel's advice that the death of an applicant does not cause an application to abate.

11. The County Council has agreed that the evidence which accompanied the applications made in 2001 could be considered in support of the current applications.
12. The applications were advertised and representations were received from the following:
 - (i) letter dated 20th July 2004 from Mr Gareth Owens, the Legal Services Manager of West Wiltshire District Council. The District Council has not objected to the application but has requested that consideration of the application is deferred until April 2005. The District Council has recently started a procurement process for a comprehensive leisure and recreational needs assessment of the District. As part of this process, the Council will consult with Town and Parish Councils and the assessment will include information on what area and type of open space is needed/wanted for every community. The District Council has asked that if the matter is not to be deferred, they should be given the opportunity for further comment.
 - (ii) letter dated 23rd August 2004 (with plan) from Davies and Partners, Solicitors for Persimmon Homes (Wessex) Limited. Davies and Partners question the accuracy of the plans used in the applications and dispute the claimed 20 year period of use.

In addition, letters in support of the applications have been received from Mr Francis Morland and Mrs Joyce Smith.

The County Council has also received approximately 160 letters in support of the applications of which more than 70 are from addresses in Westbury.

13. Mr Manasseh has commented on the representations in his letter of 19th November 2004.
14. Copies of the applications with the accompanying statements, the representations, Mr Manasseh's comments on the representations and the letters in support of the applications are available for inspection in the Members' Room.

Main Considerations for the Council

15. In order to meet the requirements of the Commons Registration Act 1965 (as amended), the applicant must demonstrate that the land has been used by a significant number of local inhabitants for lawful sports and pastimes as of right for not

less than 20 years and that such use has continued to the date of the application. Each of these requirements is examined below.

Local Inhabitants

16. The use must be mainly, but need not be solely, by a significant number of inhabitants of any locality or of any neighbourhood within a locality. The statements in support of the applications are from residents of Westbury.

Actual Use for Lawful Sports and Pastimes

17. The applications assert that the land has been used for lawful sport and pastimes. The statements accompanying the applications contain details of the use of the land all of which are qualifying uses. An analysis of the statements is available for inspection in the Members' Room.

As of Right for not less than 20 years

18. Interpretation of the phrase 'as of right' is directly affected by the decision of the House of Lords in the Beresford case (paragraph 9 refers). To qualify 'as of right' the use must have been open. It must have been achieved without the use of force. Finally it must not have been used under licence from the owner. The users need not necessarily believe that they have any right to go on the land. It is, however, necessary for the applicants to provide evidence to satisfy the tests of use without force, without secrecy and without permission.

The statements in support of the applications say that the users of the land did not believe they needed permission from the owners. The applicants also rely on the Beresford decision in that any acts undertaken by West Wiltshire District Council, such as cutting the grass, were not sufficient to demonstrate use by implied licence.

The applicants claim that the application sites became a town green by actual use of the land by local inhabitants for lawful sports and pastimes as of right for not less than 20 years. Out of the 41 statements made in support of the applications by Mrs Illsley, Mrs Carole Taylor and Mr Taylor, more than 30 refer to continuous use for more than 20 years at the date of the applications. Of the 31 statements in support of Mrs Sylvia Taylor's application, 27 refer to continuous use at the date of the application.

Continuing Use

19. As stated above, the statements in support refer to use continuing up to the date of the applications.

Environmental Impact of the Recommendation

20. If the applications are approved the land will have the status of a town green.

Risk Assessment

21. The Council could be challenged in the High Court, which could have serious costs implications. Members must therefore be fully satisfied that the legal tests have been met if they are minded to grant the applications.

The issues involved are of considerable local importance as is clear from the number of responses received.

Financial Implications

22. The cost of a non-statutory local inquiry (the Inspector's fee and the hiring of a hall) would be in the region of £5,000 - £15,000 depending on the length of the inquiry.

Any successful legal challenge could result in a costs order against the County Council.

Options Considered

23. Members may feel that since this case is particularly contentious, it may be appropriate to appoint an Inspector to hold a non-statutory local inquiry.

Members may:

- (i) approve the applications or any of them
- (ii) reject the applications or any of them
- (iii) decide that a barrister, experienced in this area of the law, be appointed as an Inspector to hold a non-statutory local inquiry and to make a recommendation to the Committee on the applications.
- (iv) defer consideration until April 2005 as requested by West Wiltshire District Council.

Reason for Recommendation

24. The applications are the subject of much local interest. If Members are minded to consider the applications, they must be satisfied that the legal tests have been met.

Recommendation

25. Members are asked to determine whether the land at Penleigh Park, Westbury should be registered as a town green, whether the decision should be deferred or whether a non-statutory local inquiry should be held.

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The following unpublished documents have been relied on in the preparation of this Report: None.