

REGULATORY COMMITTEE  
21 May 2008

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**COMMONS ACT 2006**  
**APPLICATION FOR THE REGISTRATION OF A**  
**TOWN OR VILLAGE GREEN: PLAYING FIELDS AT GEORGE WARD SCHOOL,**  
**MELKSHAM**

**Purpose of Report**

1. To ask the Committee to consider the application of Andrew Charles Newman to register the George Ward School Playing Fields as a town or village green under section 15 of the Commons Act 2006 and to seek a decision on the application.

**Background**

2. Under the Commons Registration Act 1965, all common land and town or village greens were required to be formally registered. County Councils as registration authorities were charged with compiling a register and failure to register land within the prescribed period, which expired in 1970, resulted in that land ceasing to be common land or town or village green.
3. However, under section 22(1A) of the Commons Registration Act 1965 (inserted with effect from 30<sup>th</sup> January 2001 by the Countryside and Rights of Way Act 2000), land could continue to be registered provided the Registration Authority was satisfied that it met the statutory criteria.
4. The Commons Act 2006 came into force in part on 6 April 2007. The Act amends the definition of a town or village green and sets out the circumstances in which a new registration can be effected. If a green is registered, it means that the inhabitants of the locality would have the legal right to indulge in lawful sports and pastimes over the land. Further, it is an offence to do any act which injures a green or interrupts the use or enjoyment of it and to construct anything on it.
5. Whilst an application under the Commons Act 2006 must be processed in accordance with The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, these have not amended the advertising and objecting requirements. If an application to register land as common land or as a town or village green is submitted and is validly made, the Registration Authority must 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 must be allowed for objections to the application to be lodged.
6. 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, the applicant or an objector may seek permission from the High Court to judicially review the authority's decision if he/she believes it to constitute an abuse of power or to be wrong in law, unreasonable, procedurally improper, biased, or contrary to legitimate expectations.

### **Main Considerations for the Council**

7. On 30 July 2007, Andrew Newman applied to the County Council to register the George Ward School Playing Fields as a town/village green. The application site, which is part of the George Ward school, lies on the Bath/Shurnhold road to the northwest of Melksham and is shown hatched in black on the plans attached to Mr Newman's application (**Appendix 1**). There are two playing fields separated by a road. The land is owned by Wiltshire County Council (WCC) which intends to sell it in order to secure funding for a new school, Melksham Oak Community School at Woolmore Farm near Bowerhill, Melksham.
8. Mr Newman's application is accompanied by a statutory declaration and 57 supporting statements.
9. Mr Newman's application was advertised in November 2007 and in January 2008 an objection was received from WCC as landowner. WCC challenges the user evidence and Mr Newman's ability to satisfy the statutory requirements for registration and submits that the application should be dismissed. It follows that there is a conflict of interest between WCC's position as owner of the land and its position as Registration Authority. Officers have dealt with the conflict of interest by erecting a Chinese Wall between the officers dealing with the registration functions and those dealing with landowning and objection. Officers also consider that the WCC's impartiality as Registration Authority would be strengthened if the application were to be referred to a non-statutory public inquiry. This issue is considered further at paragraph 51.
10. Mr Newman has submitted a response to WCC's objections dated February 2008. Mr Newman maintains that the statutory criteria are satisfied.
11. In March 2008, further objections were received from Melksham Town Youth FC, Melksham Park Football Club, Shaw Hockey Club, Melksham 1<sup>st</sup> Sports Facilities Group and West Wiltshire District Council (WWDC). Each of these objectors states that its prime concern is that the use of the land for formal sports provision could be lost if the playing fields are registered as a village green.
12. These objections were received after the deadline for objections. However, paragraph 6(2)(b) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 provides that the Registration Authority may consider such statements up to the time it finally disposes of an application. In the circumstances, officers decided to consider these statements in the interest of fairness to all parties.
13. Mr Newman has submitted a further response to these objections.

14. Copies of all the documents are available in the Members' Room and are also available for inspection through either of the report authors.
15. In order to meet the requirements for registration under section 15(2) of the Commons Act 2006, Mr Newman must demonstrate that "*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 they continue to do so at the time of the application*". Each of these requirements is examined below.
16. The standard of proof is the usual civil standard of the balance of probabilities.

#### A significant number

17. "Significant" does not mean considerable or substantial. In this context, what matters is that the use is sufficient to indicate that the land is, in general, used by the local community rather than occasional use by individuals as trespassers (see *R (McAlpine) v Staffordshire CC* (2002)).
18. In this case, 57 witnesses have filled out questionnaires confirming their use of the land. Officers consider that, in itself, this is persuasive evidence that there has been general use of the site by a significant number of the local community.
19. Against this, however, WCC, as landowner, does not accept the accuracy of the user evidence. It maintains that the playing fields have been extensively used for organised sporting activities by the school and its licensees and that trespass by local people has been trivial and sporadic. It says that the playing fields are fenced and surrounded by prohibitory signs and that trespassers seen by school staff have been asked to leave. Moreover, it says that there is a public footpath crossing the Dunch Lane field and any use associated with a public footpath must be disregarded.
20. In addition, WWDC submits that "*the proportion of the overall use of the playing fields by the local community for non-school sports and pastimes represented by the use, alleged in the application, by the residents of the confined network of streets around Dunch Lane is not significant for the purposes of the Act*". Melksham Town Youth FC, Melksham 1<sup>st</sup> and Shaw Hockey Club also challenge whether the qualifying criteria has been met on the basis that the school playing fields are not available for the public during school hours and the astroturf facility has to be booked to be used.
21. There is plainly a conflict of evidence and officers believe that the evidence should be tested orally in order to determine whether the application meets this element of the statutory test.

#### Inhabitants of any locality or neighbourhood within a locality

22. A locality must be a distinct and identifiable community such as a division of the county known to law, like a borough, parish or manor. An ecclesiastical parish

can be a locality. A neighbourhood within a locality can be a housing estate (R (McAlpine) v Staffordshire CC (2002)).

23. Mr Newman defines the locality as the Shurnhold area of Melksham which is shown (but not defined) on Plan B attached to his application at **Appendix 1**.
24. WCC, as landowner, submits that the map at Plan B does not define the boundaries of the Shurnhold area and that a neighbourhood must have defined boundaries so that (a) the significant number test can be applied and (b) the landowner can identify the persons entitled to use the application land for recreation.
25. Further, WCC does not accept that (i) a significant number of the recreational users of the application land come from the Shurnhold area, (ii) that the applicant has sufficiently defined the Shurnhold area or (iii) that the Shurnhold area has sufficient cohesive qualities to amount in law to a "neighbourhood".
26. WWDC acknowledges that Shurnhold is or would be a locality or a neighbourhood for the purposes of the Act. However, it says that the area lived in by the applicant and those who have completed user questionnaires does not constitute the Shurnhold area as referred to in the application, as Shurnhold is a wider area to the west of Melksham town centre on the A350 road.
27. The applicant strongly rejects these submissions and maintains that the addresses of those who have completed user evidence forms "*constitute the vast majority of houses within the community referred to as Shurnhold*". Mr Newman maintains that the area is a distinct neighbourhood within the town of Melksham.
28. Officers consider that it is likely that Shurnhold is a neighbourhood within the locality of Melksham. However, in light of the vigorous objections, officers believe that the evidence should be tested orally in order to determine whether the application satisfies this requirement.

#### Use as of right

29. In order to demonstrate that the use of the land has been of right, the use must have been open, that is, without force, stealth or permission and does not turn on the subjective beliefs of the users: R v Oxfordshire CC ex p Sunningwell PC (2000). It was also held in that case by the Court of Appeal that a prohibitory notice prevents user as of right.
30. This requirement has to be considered in relation to the application site as a whole. As mentioned in paragraph 7, the school has playing fields on two sites on opposite sides of Dunch Lane. On the first site, which is adjacent to the school buildings, there is an astroturf pitch containing two all-weather pitches (built in 2004/2005) as well as playing fields. The astroturf pitches are surrounded by high fencing and the gates are locked at night. The field on the north side of Dunch Lane has a public right of way running through it (although use of the right of way does not give rise to village green rights). There is evidence that the application site is surrounded by prohibitory notices.

31. The applicant has provided considerable evidence of use of the application site in the form of 57 statements from people confirming their use of the land for recreational purposes. 51 of these state that their use of the land has never been prevented or subject to permission. Many of the users acknowledge the existence of the prohibitory notices but say that notwithstanding the notices, access was never restricted and the gates have always been open. Indeed, houses from 80 Dunch Lane to 104 Dunch Lane have gates in their rear gardens that open onto one of the playing fields. There is also an access point through a children's play area.
32. Against that, it is undisputed that there are prohibitory notices on site (although there is no evidence as to how long they have been on site). It is also clear that some users have acknowledged that they obtained permission from the school to use the land at certain periods.<sup>1</sup> There is also evidence that part of the playing fields were hired out to users out of school hours. Shaw Hockey Club confirms, for example, that it books and pays for the astroturf facilities for 8 months per year. Melksham Town Youth FC also confirms that it pays many thousands of pounds to use the school's astroturf facilities.
33. The headteacher of the school has provided a statement in which he says that the playing fields are an integral part of the school and are in use on a daily basis all year round as part of the school curriculum. He also says that it is school policy to ask members of the public to leave the school site. Statements have been provided by members of staff who have done this and indeed one of the users, P W Rawlings, confirms that he/she has been asked to leave the playing fields by groundsmen and the police.
34. WCC also submit that given the primary purpose of the application land is for organised sports arranged or authorised by the school, it could not be suggested that *"trespassers on the land acted in such a manner as to manifest to the landowner the appearance of exercising any overriding legal right."* It concludes that *"any trespassory use deferred to the primary use and so was not "as of right"*.
35. WWDC agrees that any use of the school playing fields was not "as of right" but subject to the priority of the overriding use of the school and, therefore, *"at the least with the implied permission of the public authorities in control of the school"*. Melksham Town Youth FC, Melksham 1<sup>st</sup> and Shaw Hockey Club also maintain that the application does not meet the qualifying criteria.
36. Mr Newman has been given the opportunity to comment on the objections. He has now clarified that *"those areas which are fenced off and hired out for fee and capable of being used with permission only, including the MUGA (astro turf) are not intended to be part of this application"*. He maintains, however,

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<sup>1</sup> For example, a local resident's group obtained permission from the school to use the front field for sports for the Jubilee Party in 1977. Mr Currey obtained permission to use the land from a teacher for after school athletics practice (date unknown). P W Rawlings said that he/she obtained permission from the headmaster in about 1970 to use the land. Mr and Mrs White said they obtained the headmaster's permission to use the land for golf practice (date unknown). Mr and Mrs Griffiths obtained permission from the caretaker and headteacher in 1993 for carparking. Mr and Mrs Whittick obtained permission and a key to use the tennis courts and permission for car boot sales, fetes etc.

that, although there are some exceptions, the community as a whole believed it had a right to use the land.

37. In the circumstances, given the body of evidence which has been submitted and the unusual character of the site, officers consider that this is a case which requires oral evidence to determine precisely which, if any, area of the application land can satisfy this criteria.

#### Lawful sports and pastimes

38. Mr Newman states that the land has been used for lawful sports and pastimes. The statements which accompany the application contain details of the use of the land including informal recreation such as walking, sports, children's play, blackberry/sloe picking, fetes and community celebrations.
39. The objectors do not dispute that these activities satisfy the statutory criteria. WCC, however, states that any use associated with the public footpath crossing the land would not amount to lawful sports and pastimes.
40. Officers concur that the activities described satisfy the statutory criteria but agree with WCC's submission that use of the public right of way should be disregarded.

#### The land

41. It is necessary to consider whether the whole of the land subject to the application has been used for informal recreation by local people.
42. Mr Newman has recently clarified that that part of site which is fenced off and capable of use with permission only, no longer forms part of his application. Given the unusual nature of the site, it is difficult to determine precise boundaries without further evidence.

#### Use for a period of at least 20 years

43. Mr Newman claims that the application land 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.
44. The relevant 20 year period will be from 1987 to 2007. It is not necessary for each witness to have used the land for 20 years: it is the body of evidence taken as a whole which must demonstrate use continuously throughout the 20 year period.
45. A summary of the user evidence is at **Appendix 2**. Some 37 of the 57 individuals who signed questionnaires say that they used the land from 1987 (and before) and most of these individuals say that they continued use of the land to the date of the application. 12 users commenced use of the land after 1987. 4 users did not state their years of use and 4 users used the land prior to

1987 only. It follows that there is considerable evidence of use and this statutory condition appears to have been met

46. WCC, as landowner, denies that there has been qualifying use of the application land during that or any other 20 year period.

#### **Conclusion on evidence**

47. It is difficult to determine on the basis of the evidence submitted whether the applicant can satisfy the statutory requirements. Officers consider that the evidence will need to be tested orally at a non-statutory public inquiry before an inspector experienced in this area of law. This would also enable WCC to maintain its impartiality as Registration Authority and ensures fairness to all parties.

#### **Environmental Impact of the Recommendation**

48. Approval of the application for registration would result in the site being registered as a town green under the Commons Act 2006.
49. Should the application to register fail, the land will be sold for development. Planning and development issues are not, however, relevant in determining whether the statutory requirements for registration of a town/village green have been met.

#### **Risk Assessment**

50. If the application is approved, the George Ward School Playing Fields would be entered in the register as a town/village green. Any person aggrieved by the inclusion of the land in the register may appeal to the High Court.
51. If the application is rejected, particularly on the basis of the papers alone, there is a high risk that the applicant would seek a judicial review if he believes the decision to be wrong in law or procedurally improper. Moreover, the applicant may have grounds for a challenge on the basis that there is a conflict of interest between the County Council's role as Registration Authority and landowner. If so, this matter could generate significant public and political interest. There could also be cost ramifications which are dealt with in paragraph 54 below.

#### **Financial Implications**

52. If the application is approved and the land entered in the register as a town/village green, it could not be sold as a development site. This would, therefore, have financial implications for WCC and could impact upon the development of the new school. This is not, however, a relevant issue in the determination of this application.
53. If the application is referred to a non-statutory public inquiry, the costs of such an inquiry would be borne by WCC. The cost to WCC, as Registration Authority, of holding an inquiry based on a three day hearing, is estimated to

be in the region of £5,000 to £7,500 which comprises advertising, hire of accommodation and Inspector's fees and expenses. This excludes WCC's costs as landowner. Again, this is not a relevant issue in the determination of this application.

54. There would also be financial implications if there were a High Court challenge to any decision made. High Court proceedings are invariably expensive and frequently generate a significant costs liability, which could be in excess of £50,000.

### **Options Considered**

55. Members may:-

- a) approve the application;
- b) reject the application. If so, Members are advised to give reasons for the rejection;
- c) decide that a barrister experienced in this area of law be appointed as an Inspector to hold a non-statutory local inquiry and make a recommendation to the Committee on the application.

### **Reasons for Recommendation**

56. There is a conflict of evidence and the objectors challenge the applicant's ability to satisfy the statutory requirements. On the evidence submitted, it is difficult to determine whether the applicant is able to satisfy the statutory requirements. Officers, therefore, consider that the evidence will need to be tested orally at a non-statutory public inquiry before an inspector experienced in this area of law.
57. Moreover, there is a conflict of interest between WCC's position as Registration Authority and its position as landowner. Any decision made by WCC on the papers alone would be open to challenge, with the resulting costs implications.
58. By appointing an Inspector to hear the evidence at a non-statutory public inquiry and make a recommendation to the Committee, WCC would maintain its impartiality.

### **Recommendation**

59. Members are asked to refer the application to a non-statutory local inquiry and to request the Inspector to make a recommendation to the Committee on the application.



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Unpublished documents relied upon in the production of this report: None.