
COMMONS ACT 2006 – SECTION 15(1) AND (2) APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN – THE PLAY AREA IN MORRIS ROAD/COLLEGE FIELDS IN THE BARTON PARK/COLLEGE FIELDS RESIDENTIAL AREA, MARLBOROUGH

Purpose of Report

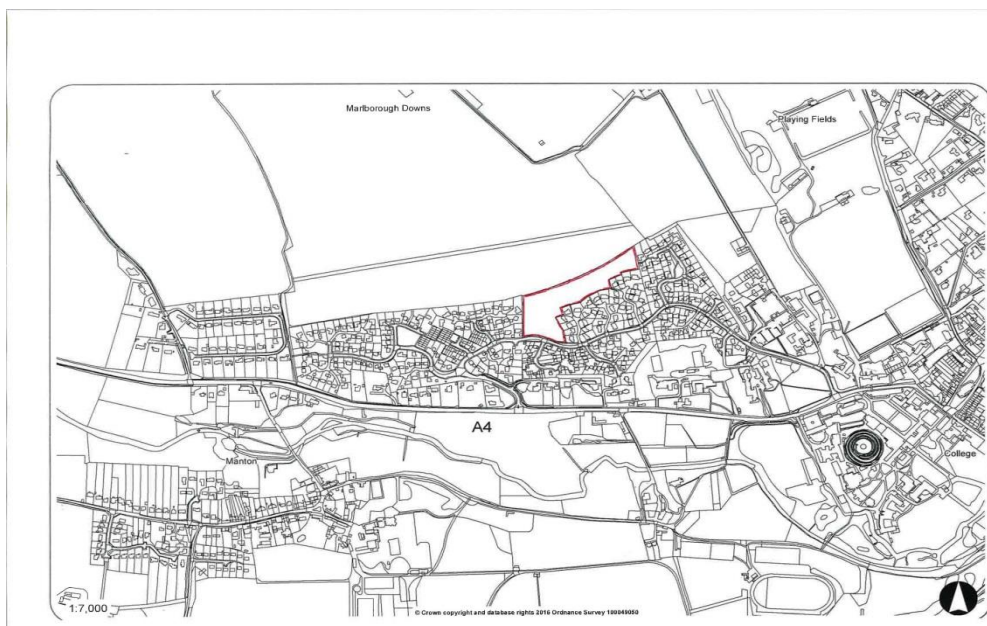
1. To seek approval to appoint an independent Inspector to hold a non-statutory public inquiry and provide an advisory report for the Eastern Area Planning Committee on the application to register land as a town or village green in Barton Park/College Fields, Marlborough.

Relevance to Council's Business Plan

2. Working with the local community to maintain an up-to-date register of town and village greens to make Wiltshire an even better place to live, work and visit.

Background

3. On 18 May 2015 Mr. I. Mellor, resident of Barton Park, applied to Wiltshire Council as commons registration authority ('CRA') to register the play area in Morris Road/College Fields, Barton Park as a town or village green under Sections 15(1) and 15(2) of the Commons Act 2006. The application land is shown edged red on the plan below:



4. The applicant stated on his application form that the land the application relates to was planned as open space with the housing development; it was transferred to Kennet District Council and has been used by the community for over 25 years. Nineteen statements concerning use of the land were submitted with the application in its support. Kennet District Council owned the land from 1993 and ownership was transferred to Wiltshire Council in 2009 when it became a unitary authority.
5. Receipt of the application was advertised in the Wiltshire Gazette and Herald on 30 July 2015 and on site. Two objections were received to the application, one from Wiltshire Council as land owner and the other from solicitors acting on behalf of Marlborough College. Ninety five representations on the application were received by the Council as a result of the public notice posting.

Main Considerations for the Council

6. Wiltshire Council is the commons registration authority and has a statutory duty to determine the application. The burden of proof lies on the applicant for registration of a new green. All the elements required to establish a new green must be properly and strictly proved. The standard of proof is the civil standard of proof on the balance of probabilities that ‘a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged as of right in lawful sports and pastimes over the land for a period of at least 20 years and that use is continuing at the time of application’. The council, as CRA, has no investigative duty in relation to village green applications which would require it to find evidence or reformulate the applicant’s case. The CRA is entitled to deal with the application and the evidence as presented by the parties (the applicant and landowner and any parties objecting to the application). There are currently no regulations in force which set out a process by which a CRA should determine applications of this type.
7. The application is disputed. Wiltshire Council, as landowner, objects to the application on the following grounds:
 - “1. *The land has been the subject of a series of Planning Agreements under Section 52 of the Town and Country Planning Act 1971, culminating in an Agreement dated 10 February 1983 and a Supplemental Agreement dated 29 March 1985 between Kennet District Council (1) Marlborough College (2) and W E Chivers and Sons Limited (3) whereby Marlborough College agreed to convey to the Council not less than four and a half acres as an open space area which corresponds in location with the site of the application.*
 2. *By Transfer dated 19 August 1993, the land was transferred to Kennet District Council.*
 3. *From 1 April 2009 Wiltshire Council became unitary authority merging Wiltshire County Council with Kennet District Council and the other three District Councils.*
 4. *The land is maintained by Wiltshire Council as a public open space under a current maintenance contract.*
 5. *The application does not satisfy the use “as of right” requirement and the application should therefore fail.”*

8. Section 15 of the Commons Act 2006 provides that to register land as a town or village green it must be shown 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.

9. The Supreme Court Judgement given on 21 May 2014 in R (on the application of Barkas) (Appellant) v North Yorkshire County Council and another (Respondents) is the leading authority on whether use has been “as of right”, which satisfies the legal criterion for registration, or “by right”, which does not. In the words of Lord Neuberger:

“ 24...where the owner of the land is a local, or other public authority which has lawfully allocated the land for public use (whether for a limited period or 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 them 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 twenty 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 owner, 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.”

10. Marlborough College objects to the application for the following reasons:

- (i) Failure to demonstrate use by a significant number of inhabitants of the claimed locality.
- (ii) Failure to demonstrate continuous use (by a significant number) for the whole of the claimed 20 year period.
- (iii) Any claimed use of the claimed land by members of the public has been “by right” not “as of right”.

11. There is a serious dispute regarding the factual evidence in this case, the application is of great local interest and Wiltshire Council owns the land which the applicant seeks to register as a town or village green. The council, as CRA, must determine the application in a manner fair to all the parties. This may be achieved by appointing an independent Inspector who would normally be a barrister who is an expert in village green law to either advise the council on how to proceed with determining the application or to hold a non-statutory public inquiry and produce a non statutory recommendation to the council for the council’s consideration. In holding a public inquiry an independent inspector considers the evidence and submissions and law relied upon by the applicant and the objectors and reports on these to the council with a recommendation of how to determine the application. The inspector’s recommendation could then be considered by the Eastern Area Planning Committee. The committee could either accept the inspector’s recommendations or, if the committee found the inspector’s recommendation

has significantly erred in law or in fact, could reject the recommendation. However, if the inspector's recommendation is rejected by committee and there is no evidence of significant errors in law or fact in the recommendation, there would be an increased risk of the committee's decision being challenged in judicial review proceedings in the High Court.

12. The committee's attention is also brought to the High Court decision in the case of *Somerford Parish Council v Cheshire East Borough Council (1)* and *Richborough Estates (2) 2016* where the High Court quashed the local Borough Council's decision not to register land as a new town or village green on the basis of procedural error. The High Court's decision in the *Somerford Parish Council* case reinforces the Court's view that there is a need for a commons registration authority to hold a non-statutory public inquiry where there are sufficient disputes over evidence and or factual issues.
13. Where a town or village green application is refused by a CRA the applicant can appeal that decision by way of judicial review to the High Court. Applications of this nature usually, as can be seen from paragraph 29, focus closely on the procedure used in the decision making process. To safeguard both the reputation of the council and to avoid the serious financial costs of defending an action for judicial review it is imperative that the proper procedure is followed by the council in the decision making process.

Overview and Scrutiny Engagement

14. The determination of Town and Village Green applications is governed by statutory regulations, relevant case law and non-statutory guidance.

Safeguarding Implications

15. There are no safeguarding implications arising from this report.

Public Health Implications

16. There are no public health implications arising from this report.

Corporate Procurement Implications

17. The procurement implications of processing the application are dealt with under the Financial Implications section below.

Equalities Impact of the Proposal

18. There are no equalities impacts arising from the proposal.

Environmental and Climate Change Considerations

19. There are no known environmental and climate change considerations arising from this report.

Risk Assessment

20. The financial and legal risks are set out in the Financial Implications and Legal Implications sections in paragraphs 21 to 30 below.

Financial Implications

21. There is no mechanism by which a CRA may charge the applicant for processing an application to register land as a town or village green and all the costs for holding a non-statutory public inquiry are borne by the council. There is no budgetary provision for such non-statutory processes.
22. The estimated costs of holding a non-statutory public inquiry would include those for an initial read and drafting directions and further directions if considered necessary, site visit, preparation for the inquiry and first day and refreshers (time spent on the inquiry in excess of the original time estimate for the inquiry) writing the report, expenses (capped at 45p per mile travel and hotel accommodation at £100 per night). The normal hourly rate is £110 per hour. Total inquiry costs will depend on how long the inquiry will need to sit but are estimated at this early stage to be in the region of £16,000 to £18,000.

Legal Implications

23. Where the CRA decides not to register the land as a town or village green, the only right of appeal open to the applicant is through judicial review proceedings and challenging the lawfulness of the decision in the High Court. The court's permission to bring proceedings is required and the application must be made within three months of the date of the decision to determine the village green application
24. The landowner is also able to seek a judicial review of the CRA's decision to register their land as a town or village green.
25. Judicial review proceedings are a complex area of administrative law where as previously stated every aspect of the law and facts relevant to the decision (in this case the relevant statute is the Commons Act 2006 together with village green case law) and the decision making process would be subject to detailed analysis by the High Court. Due to the complexity of such cases the legal costs can quickly escalate. If the judicial review proceedings are not successfully defended, the Aarhus convention (concerning the legal costs for environmental cases) does limit the costs liability so far as the council as CRA is concerned (if the case is lost) to £35,000; however, the CRA would also be required to meet its own legal costs to defend the case (which would be a broadly similar sum if not more depending on the issues that may arise during the proceedings) in addition to the applicant's costs. The applicant's potential maximum costs liability if their case is unsuccessful is £5,000.
26. The issue of 'pre-determination' or approaching decision with a 'closed mind' (or having already made up their mind on the application before considering the evidence and the inspector's recommendation and making the decision) is a serious allegation and one that a CRA must avoid. There is a potential reputational issue for a commons registration authority if after a legal challenge a court was to make a finding that 'pre-determination' took place before a committee made a formal decision to determine an application to register land as a town or village green.

27. The Committee should note that the Growth and Infrastructure Act 2013 amended the Commons Act 2006 to:
- (i) reduce the period within which a town or village green application can be made (after the requisite 20 years of recreational use “as of right” has ceased) from two years to one year;
 - (ii) allow landowners to deposit a map and statement to protect their land from registration as a town or village green, whilst allowing access to the land;
 - (iii) exclude the right to apply to register land as a town or village green under Section 15(1) of the 2006 Act where any of a number of specified events (‘trigger events’) occurs.
28. If the decision is quashed by the High Court either by consent or after a substantive hearing it will be sent back to the CRA to be re-made.
29. A recent High Court case has considered the procedural issues for determining an application to register land as a town or village green. In March 2016 the High Court considered an application by a parish council for judicial review of the decision of Cheshire East Borough Council concerning an application to record two verges as a town or village green (*Somerford Parish Council v Cheshire East Borough Council & Anor* [2016] EWHC 619). The application for judicial review was made on the following grounds:
- (i) Cheshire East Borough Council breached the rule of natural justice by acting as its own judge.
 - (ii) Counsel instructed by the Borough Council was not independent.
 - (iii) There were procedural errors; counsel allowed the Borough Council to put in evidence out of time and the applicant was given no opportunity to respond to the late evidence.
 - (iv) The Council should have held a public inquiry before making its recommendation.
30. The High Court rejected the first two arguments and held that a commons registration authority is entitled to determine a town and village green application providing it instructs independent legal counsel and secondly, legal counsel is deemed to be independent and any communications with that independent counsel would not be considered to be legally privileged. The High Court held that it was procedurally unfair for the applicant not to have been given a chance to respond to the evidence which was, itself, submitted out of time. In addition, the judge found that the dispute as to whether or not the grass verges were highway was serious enough to necessitate a public inquiry. The decision of the Borough Council was therefore quashed on grounds (iii) and (iv).

Options Considered

31. Members of the Committee must consider the following possible decisions open to them:
 - (i) To appoint an independent inspector to advise the council on how to proceed with determining the application
 - (ii) To appoint an independent inspector to hold a non-statutory public inquiry and produce an advisory report with his or her findings and recommendations for the council's consideration as CRA.

Reasons for Proposal

32. There is a serious dispute regarding the evidence and the application is of great local interest. Wiltshire Council owns the land which the applicant seeks to register as a town or village green. In paragraph 30 above the Committee's attention was brought to the High Court judgement in the case of Somerford Parish Council v Cheshire East Borough Council. The case was brought to the High Court on the basis of procedural error by the Borough Council. The case highlights a number of practical points for the Committee to note and consider regarding privilege, equity and the importance of public inquiries in determining an application to register land as a town or village green in disputed cases and where the land is owned by a local authority. The decision of the High Court also reinforces the findings in R (Whitmey) v Commons Commissioners and the need for a commons registration authority to hold a non-statutory public inquiry where there are sufficient disputes over factual issues.
33. Where the CRA decides not to register land as a town or village green there is no right of appeal to the council as CRA or for example to the Secretary of State as there is in relation to a planning application. The applicant's course for redress is by way of an application for judicial review made to the High Court. Applications of this nature usually, as can be seen in paragraph 29 above, focus closely on the procedure used in the decision making process. To safeguard both the reputation of the council, and to avoid the serious financial costs of defending an action for judicial review, it is imperative that the council adopts the proper decision making process in dealing with this application.

Proposal

34. To seek approval to appoint an independent Inspector to hold a non-statutory public inquiry and provide an advisory report for the Eastern Area Planning Committee on the application to register land as a town or village green in Barton Park/College Fields, Marlborough.

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The following unpublished documents have been relied on in the preparation of this Report:

None

Appendices:

None