

**REPORT FOR DECISION**

<b>Agenda Item</b>	
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<b>MEETING:</b>	<b>PLANNING CONTROL COMMITTEE</b>
<b>DATE:</b>	<b>28 SEPTEMBER 2004</b>
<b>SUBJECT:</b>	<b>DETERMINATION OF AN APPLICATION TO REGISTER LAND KNOWN AS 'THE LODGES', WALSHAW, BURY AS A TOWN OR VILLAGE GREEN UNDER THE COMMONS REGISTRATION ACT 1965</b>
<b>REPORT FROM:</b>	<b>COUNCIL SOLICITOR</b>
<b>CONTACT OFFICER:</b>	<b>Deborah Wilkes Legal Services Town Hall</b>

<b>TYPE OF DECISION:</b>	<b>Non Key Decision</b>
<b>REPORT STATUS:</b>	<b>For Publication</b>

<b>PURPOSE/SUMMARY:</b>	<p>This report contains information regarding the determination of the application for registration of a town or village green at The Lodges Walshaw under the Commons Registration Act 1965.</p>
<b>OPTIONS AND RECOMMENDED OPTION (with reasons):</b>	<ol style="list-style-type: none"> <li>1. Determine the application following the Inspector's recommendation to reject the application to register the land as a town or village green</li> <li>2. Register the land as a town or village green, thereby rejecting the Inspector's recommendation.</li> <li>3. Defer determination and resolve to obtain a further opinion to assist the Council in clarifying the issues</li> </ol> <p>Recommended Option: See conclusion</p>

<b>IMPLICATIONS -</b>	
<b>Financial Implications and Risk Considerations</b>	

<b>Corporate Aims/Policy Framework:</b>		
Do the proposals accord with the Policy Framework?	Yes x <input type="checkbox"/>	No <input type="checkbox"/>
Are there any legal implications?	Yes x <input type="checkbox"/>	No <input type="checkbox"/>
<b>Considered by Monitoring Officer:</b>	Yes x <input type="checkbox"/>	Comments
The Monitoring Officer is satisfied that the guidance set out in this report and the report to Committee on 7 <sup>th</sup> October 2003 is consistent with the statutory requirements placed on the Council as Registration Authority		
<b>Statement by Director of Finance and E-Government:</b>		
<b>Staffing/ICT/Property:</b>		
<b>Wards Affected:</b>	Church Ward	
<b>Scrutiny Interest:</b>		

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**TRACKING/PROCESS**

**DIRECTOR:**

Chief Executive/ Management Board	Executive Member/ Chair	Ward Members	Partners
Scrutiny Panel	Executive	Committee	Council

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**1.0 BACKGROUND**

Registration of land as a town or village green under the Commons Registration Act 1965 ("the 1965 Act") is a very serious matter for the landowner. It deprives the land of all development value and of virtually all use value. This is a consequence of two legislative provisions. Section 12 Enclosure Act 1857 and Section 29 of the Commons Act 1876 respectively which prohibit:-

"Any ... act to the interruption or for the use or enjoyment thereof as a place for exercise and recreation (Section 12 of the 1857 Act)"; and " any inclosure ...erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green..." (Section 29 of the 1876 Act).

This means in practical terms that there can be no built development or fencing or ploughing on such greens once registered. The only activities which may be carried on by the landowner, or occupier on the land are those which would not have been inconsistent with the use of the land for lawful sports and pastimes prior to registration of the land.

As a consequence it is for the Applicant who seeks village green status to satisfy the Registration Authority (the Council) that the requirements of Section 22 (1)(A) of the 1965 Act are satisfied. Section 22(1) of the Commons Registration Act 1965, as amended by Section 98 of the Countryside and Rights of Way Act 2000, contains a three part definition of a town or village green. The relevant section in this particular case being land which falls under sub-section 1(A) is land on which, for not less than 20 years, a significant number of inhabitants of any locality or any neighbourhood within the 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....

As indicated earlier, to establish that a particular area therefore qualifies under this section an applicant must show six matters, or, in other words, to satisfy six tests with their evidence. The burden of proof is therefore squarely upon the Applicant and it is not for the landowner to defend his land against various claimed uses. It is imperative that all tests are fulfilled. Failure on a single point fails the whole application. These tests are:-

1. That there is a relevant "locality" whose inhabitants have indulged in relevant activities on the land.
2. That the activities have been indulged in (predominantly) by the inhabitants of that locality as distinct from the public at large.
3. That the activities in which the inhabitants have indulged on the land may properly be described as lawful sports and pastimes.
4. That those activities have been sufficiently often indulged in and/or are of such a character as to bring home to the landowner that a right has been asserted.
5. That the activities have taken place over a period of not less than 20 years.
6. That the activities have been indulged in "as of right".

The Council as Registration Authority has an obligation to properly investigate the claim, to weigh the available evidence, apply the relevant legal principles and then to make an informed determination of the claim that the land should be registered as a town or village green.

### **Procedure for Determination– The Statutory Framework**

The Registration Authority is highly aware of the implications for the landowner of a successful application. It is a complex area of law and one which demands probity of the highest order in its determination. Despite its complexity and the implications of a successful application, the Regulations (the Commons Registration (New Land) Regulations 1969) forming the statutory framework for determination of this matter are non prescriptive. It is for individual authorities to procedurally flesh out the bare bones of the Regulations.

There is no provision in the Regulations for an oral hearing, for the compulsion of witness or for the taking of evidence on oath. However this Council, like many Registration Authorities adopted the formula of instructing Counsel to hold a non statutory Public Inquiry where oral evidence is heard and after which Counsel writes a report to the Authority with a recommendation of how the application should be

determined. That was the procedure adopted in the famous House of Lords Sunningwell case and there Lord Hoffman did not think it was inappropriate. Indeed in another case (R v Suffolk County Council ex parte Steed) the judge recommended such a procedure saying that some oral procedure seems essential if a fair view is to be reached where conflicting recollections needs to be reconciled even if the absence of statutory powers make it less than ideal.

In the Court of Appeal in that same case Counsel attached importance to Council Members having the opportunity to make their own assessment of the submitted evidence when performing their duty under the Regulations. Therefore where an Inquiry is held Counsel's report should summarise the oral evidence.

Therefore to meet those standards of fairness, openness and procedural propriety the Committee resolved on 7<sup>th</sup> October 2003 to hold a Non- Statutory Public Inquiry.

Now the application before the Committee has had the benefit of this procedural regularity. The Inspector heard the evidence given in person, and this was tested by cross examination by Counsel for both sides. His written report prepared on 13<sup>th</sup> August 2004 explains the nature of the application and the objections to it. He summarises the evidence in support of and the evidence against the registration and then goes on to apply the law to the facts and make a recommendation to the Authority to reject the Application.

## **2.0 ISSUES (brief)**

Including statements on issues of:-

Risk Management

Diversity

- § Identify purpose of decision
- § Identify rights/equalities to be protected
- § Assess impact on rights/equalities
- § Balance rights/equalities against any restrictions
- § Training/Development/Information needed to ensure decision correctly put into practice

and any further details of:-

Consultations

## **3.0 CONCLUSION (brief)**

### **Consequences of rejecting or accepting the recommendation of the Report**

The Inspector can only make a recommendation. The decision has to be that of the Registration Authority.

If the Committee rely on the content and reasoning of this report and reject the application, then the disappointed applicant's "appeal" procedure is by way of Judicial Review. To succeed on an application for leave for Judicial Review the applicant would have to prove an error of law or unreasonableness in the decision making process of the Registration Authority.

If the recommendation by the Inspector in the report to reject the application is not followed and the land does become registered as town or village green then the objectors have an immediate right of appeal under Section 14 of the 1965 Act to the High Court. In this case the High Court is not confined to remedying errors of law but may consider the overall merits of the amendment.

As indicated earlier, the fact that the Registration Authority decided to hold a non statutory Public Inquiry is evidence of its thorough and reasonable approach to this case. It is the Council Solicitor's view that the content and reasoning of the report was brought about in the optimum circumstances of a non statutory Public Inquiry held over 3 days where both Applicant and Objector had the benefit of Counsel to present their case conduct the Inquiry on their behalf. The independent Barrister sitting as Inspector was experienced in this area of the law and suitable for the role.

However, since the report has been made available to the public the Registration Authority has received further submissions (which have been filed but not considered) from Applicant and representation the Open Spaces Society (acknowledged only) to have the report scrutinised by another independent Barrister. There is no provision in the Regulations for the acceptance or consideration of further submissions. The Council Solicitor can express no opinion on this except to say that if the Members choose to adopt a "belt and braces approach" to their decision making then they may resolve to have the report scrutinised. This may result in the Inspector filing a supplemental report.

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**List of Background Papers:-**

Claim and supporting evidence

Objection and supporting evidence

Committee report dated 7<sup>th</sup> October 2003

Report by Alan Evans, Barrister as Inspector dated 13<sup>th</sup> August 2004

Letter from the Open Spaces Society dated 23 August 2004

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