

Division: North Hinksey

PLANNING & REGULATION COMMITTEE – 15 APRIL 2019

**COMMONS ACT 2006:
IN THE MATTER OF AN APPLICATION TO REGISTER
HARCOURT HILL FIELD, HARCOURT HILL, OXFORD
AS A TOWN OR VILLAGE GREEN**

Report by Director of Law and Governance

Introduction and Background

1. On 19 March 2012 Martin Hockey, on behalf of the Harcourt Hill Residents' Association, of Ardmore Stanton Road, Oxford applied to the County Council as commons registration authority under Section 15 of the Commons Act 2006 ("the Act") to register land known as Harcourt Hill field, Harcourt Hill ("the Application Land") as a town or village green. A copy of this application is attached at Annex 1
2. The County Council as commons registration authority accepted that the application was "duly made" and it was subsequently publicised in accordance with statutory requirements.

A substantive objection was received from the then land owners and it was intended to hold a public inquiry in 2014. However, the Application Land was then sold to the Oxford Preservation Trust ("OPT"). Nonetheless the application was maintained by the Applicant and OPT objected to it. Thus, the application falls to be determined by the County Council as the commons registration authority.

3. By Section 15 (1) of the Act any person may apply to the commons registration authority to register land as a town or village green ("TVG") where subsection (2) (3) or (4) applies. In this case the application was made under Section 15 (3) of the Act which at the time of the application set out the following criteria for registration:
 - 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;
 - b) they ceased to do so before the time of the application but after the commencement of this section;
 - c) the application is made within the period of 2 years beginning with the cessation referred to in paragraph (b)".

The courts have undertaken extensive scrutiny of the statutory criteria and thus the application of the statutory criteria to the facts of this case must be undertaken in accordance with a substantive body of case law.

4. The County Council's role as commons registration authority is to assess the application and if it qualifies for registration to register the Application Land as TVG. In carrying out this assessment the County Council is required to look back over the use of the land and apply the statutory tests accordingly. The potential future use of the land or its desirability in planning or any other terms is not relevant to the assessment that the County Council as commons registration authority must undertake.
5. The application raises some issues as to fact interwoven with the application of the law and the County Council decided to appoint Ned Westaway, a barrister experienced in this area of law, to act as an inspector at a public inquiry and then report to the County Council on his conclusions. Essentially the role of the inspector is akin to that of an independent expert.

The Application; Land at Harcourt Hill Field, Oxford

6. The application form describes the Application Land as Harcourt Hill Field adjoining Grosvenor Road and Vernon Avenue in North Hinksey Parish. The Application Land is shown coloured red on the map attached at Annex 2.
7. The Application Land is a grass meadow of an irregular shape sloping gently from the north west to the south east. On the north-west side and part of the north-east side it is bounded by Grosvenor Road and Vernon Avenue respectively and was open to the road, that was unfenced until September 2010. The remainder of the north east boundary, the eastern boundary and the western boundary comprise boundary hedges and in part fence bordering another field. On the south side there was access to a woodland with a nature trail.
8. In September 2010 post and rail fencing was erected around the entire perimeter of the field and gates installed which at that time were kept locked.
9. The whole of the application land is registered at HM Land Registry under title number ON325845. The registered proprietor is now the Oxford Preservation Trust.

The Town Green Application and Public Inquiry

10. The application form was duly signed by Mr Hockey and supported by the prescribed statutory declaration. The applicant submitted several additional pieces of information in support of his application including a supporting application and some 44 evidence questionnaires by other residents who used the Application Land. On 1 March 2013 the applicant provided an updated version of the plan attached to his application. This was as requested by the registration authority. This is the map that appears at Annex 2.

11. Having been received by the County Council and accepted as “duly made”, the application was duly published in accordance with regulation 5 of the Commons Registration (Registration of Town and Village Greens) (Interim Arrangements) (England) Regulations 2007 by publication in a local newspaper, posting notices on site, and placing copies on public deposit. A copy of the statutory notice, application and plan were also served on the land owner.
12. A substantial objection was received from the land owner and the principal grounds for objection were in summary as follows:
 - 12.1 The use of the Application Land had been with the permission of the land owner;
 - 12.2 On a related point the application was out of time;
 - 12.3 The existence of electric fencing around the land for several months in 2003 constituted an interruption in qualifying user;
 - 12.4 It had not been established that the nature of the use was for lawful sports and pastimes as required for a successful application.

The applicant submitted counter submissions and it was concluded that a public inquiry would be appropriate in order to test the evidence and explore the conflicting allegations.

- 13 However, a sale of the Application Land to OPT was negotiated and concluded and it is understood there was some discussion between OPT and the applicant as to whether the site should be registered as a TVG with the consent of the new landowner but that was not agreed. It is understood there was also some discussion as to whether the application should be continued although, since the application had been adjudged to be duly made and advertised as such, the matter had been put into the public domain and thus was no longer dependent solely on the wishes of the applicant.
- 14 In any event the applicant maintained his application and OPT were not inclined to concur with it. Both the applicant and OPT indicated that they did not wish to submit further evidence but there was not full accord that the matter should be decided on the papers alone without an inquiry and thus an inquiry was convened. However since no one attended at the inquiry apart from a courtesy attendance on the part of Gilliane Sills, a representative of the applicant, the inspector proceeded to produce his report on the basis of the papers submitted coupled with a site visit. In the circumstances of the case the County Council produced a core bundle of documentation which had been lodged or otherwise referred to.
- 15 This has meant that the inspector has not been enabled to test various aspects of the evidence and he has specifically raised this on several instances in his report and how this and some limitations of the user questionnaires has been relevant to the conclusion.

Inspector's Report

- 16 The Inspector's report is appended At Annex 3.

17. The Inspector's report contains a section on the factual background. This points out that the wider site of which the Application Land forms part has had an extensive planning history. In 1994 planning permission was granted for change of use of land at Hinksey Hill Farm from agriculture to a golf course and nature park and there was a planning condition requiring the submission and approval of a management plan for the proposed nature park prior to the commencement of development. The final version of the management plan was produced by Cobham Resource consultants. It had been amended to include all of the Application Land since it had been previously identified that it had been omitted. It was appended to a Section 106 agreement of 4 March 2002. That agreement expressly set out that the land owner should provide a nature park on the Green Land as shown on plan E and this includes all of the Application Land.
18. The Inspector identifies that it seems that limited, if any, management has actually taken place on the Application Land in contrast to the rest of the nature park and that the nature trail runs adjacent to but not on the Application Land.
19. The Inspector's report also contains a commentary and explanation of the application of various case law to the components of the statutory criteria for registration of a TVG under Section 15 (3) of the Act
20. The Inspector in his report then proceeds to work through the constituents of the statutory criteria by reference to this case and in summary concludes as follows:
 - 20.1 Use of the Application Land ceased on 15 September 2010 by virtue of the erection of fencing around the perimeter of the Application Land so that the relevant 20-year period was from 15 September 1990 to 15 September 2010.
 - 20.2 It is not accepted that the application was out of time.
 - 20.3 The erection of electric fencing in 2003 was not to such an extent or for such period of time as to interrupt public use.
 - 20.4 The great majority of local inhabitants' use of the Application Land was linear use of paths generally in the direction of the nature trail. This would be consistent with emerging footpath rights and as such should be discounted for the purposes of the application. The Inspector previously advised that the use by local inhabitants must be referable to the use as a TVG rather than some lesser assertion of rights such as a public right of way and that whilst both sets of rights are not necessarily mutually exclusive it was held in the Trap Ground Case that if the position was ambiguous "*the inference should generally be drawn of the exercise of the less onerous right (the public rights of way) rather than the more onerous (the right to use as a green)*". These points are covered at paragraphs 24 and 37 – 44 of the Inspector's report and are a matter where the Inspector identifies that the inability to probe the evidence was material.

- 20.5 There is a reasonable argument that non walking activities were only occasional. This appears at paragraph 46 of the Inspector's report and again the limitations of the documentary evidence are referred to.
- 20.6 The area identified in the application constitutes a neighbourhood within a locality compliant with the statutory criteria.
- 20.7 The use by the local inhabitants of the Application Land during the relevant period was by licence and therefore not as a right. The Inspector does not consider that because the Application Land was part of the nature park this of itself made the use permissive but that overall it seemed to him that the essential message from the land owners was clear: "that a nature park would be established and that the public would be allowed to access to those parts not required for nature conservation including the Application Land".
- 20.8 Thus, the Inspector recommends that the County Council refuse the application because:
- 20.8.1 He is unable to conclude that the use by inhabitants of the qualifying neighbourhood for the 20-year period between 15 September 1990 to 15 September 2010 was by a sufficiently significant number of people and over a sufficiently wide area to bring home to a reasonable land owner that village green rights, as opposed to public rights of way, were being asserted over the Application Land; and
- 20.8.2 The previous land owners communicated to local residents that the Application Land was part of a nature park to which public access was by permission and despite inconsistencies in presentation a reasonable local inhabitant would have understood the message.

RECOMMENDATION

- 21. Having received the opinion of the Inspector set out at Annex 3 to this report the Committee is recommended to refuse the application for registration as a new town or village green of the plot of land known as Harcourt Hill Field Oxford.**

NICK GRAHAM

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Background papers: Inquiry bundle

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