

PLANNING & REGULATION COMMITTEE – 15 APRIL 2013

COMMONS ACT 2006: IN THE MATTER OF AN APPLICATION TO REGISTER NORTH LANE POND, WESTON-ON-THE-GREEN, OXFORDSHIRE AS A TOWN OR VILLAGE GREEN

Report by the County Solicitor & Head of Law & Governance (Legal Services)

Introduction

1. On 28 June 2010, Norman Boardman, Simon John Davis and Susan Daenke (“the Applicants”) of Weston-On-The-Green, Oxfordshire applied to the County Council as Commons Registration Authority under Section 15 of the Commons Act 2006 to register land known as The Duck Pond or North Lane Pond, Weston-On-The-Green, Oxfordshire (“the Application Land”) as a Town or Village Green. This application, a copy of which is attached at Annex 1, was submitted formally in pursuance of the Act and has now to be determined by the County Council.
2. The Planning & Regulation Committee have delegated powers to determine such applications, provided they are ‘duly made’.
3. The application was considered objectively by Rights of Way & Commons and Legal Services as to whether the application was ‘duly made’. The application was accepted as ‘duly made’ on 2 August 2010 and was subsequently publicised in accordance with the statutory requirements. In notifying the Applicants, the Council informed them that part of the land appeared to be recorded as public highway and therefore may need to be excluded from any registration.
4. Objections and representations were received during the statutory 6-week objection period from the Oxfordshire County Council in its capacity as highways authority (“the Lead Objector”); Mr Sam Cook, architect; Ms Jane Hanney of Blake Laphorn solicitors on behalf of the Applicants; and Mr Nick Misselke of Acquireland.
5. In its Objection dated 18 October 2010 the Lead Objector argued that much of the land was in law public highway and therefore did not qualify for registration as a new green under s15(2) Commons Act 2006.
6. There then followed an extended period of representations by the Applicants and the Lead Objector on the highway status of the land.
7. The Commons Registration Authority subsequently sent the application and objections to an independent barrister for an Opinion on the issue of the highway status of the land and its effect on whether the land could be registered as a green. Counsel gave an Opinion dated 19 December 2013 a

copy of which is appended at Annex 2. The main points to note are summarised below.

The Application Site: Land at North Lane Pond, Weston-On-The-Green, Oxfordshire

8. The application form describes the Application Land as Weston on the Green Duck Pond, being 'land and pond on the north side of North Lane, Weston on the Green'. The Application Land is shown edged red on the Application Map included as part of Annex 1.
9. Part of the application land is recorded by the Council (as highways authority) as public highway. The Commons Registration Authority has power to register a smaller or different area where is just to do so (Oxfordshire County Council v Oxford City Council and another [2006] UKHL 25 at para 61 per Lord Hoffman) and the appropriate recommendation will be set out in the course of this Report.
10. Part of the land (broadly corresponding to the pond which is not part of the public highway) is subject to a caution against first registration under title number ON163309. The caution title refers to the pond having been a village amenity to the limits of living memory.
11. The locality relevant to the application is the Parish of Weston-on-the-Green.

The Town Green Application

12. The application form was duly signed by the Applicant and supported by the prescribed Statutory Declaration. The Applicant submitted several additional pieces of information in support of his application, including supporting evidence exhibits and several statements from users of the application land.

The Determination of the Application

13. Having been received by the Commons Registration Authority 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 was also served on the Director for Environment & Economy of the Oxfordshire County Council as highways authority.
14. The statutory objection period expired on 18 October 2010. An objection was received from the Lead Objector dated 18 October 2010. Representations were also received from Mr Sam Cook of the Coleman Hicks Partnership; Ms Jane Hanney of Blake Laphorn solicitors on behalf of the Applicants; and Mr Nick Misselke of Acquireland.

15. The principal ground for objection by the Lead Objector was that the use of part of the Application Land has not been 'as of right' but rather under a statutory right to do so. This is because the land (excluding the pond area) was throughout the relevant 20-year period recorded by the Council in its capacity as highways authority as public highway, being part of the highway verge. The Lead Objector did not object to the application in so far as it affected non-highway land.
16. The House of Lords case of DPP v Jones [1999] 2 A.C 240 held that "the public highway is a public place which the public may enjoy for any reasonable purpose, provided that the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these classifications there is a public right of peaceful assembly on the highway."
17. In light of this case, the Lead Objector argued that the use of the land for lawful sports and pastimes was not 'as of right' as required by s15 Commons Act 2006, because such use was within the public's general right to use highway land for any reasonable purpose. The application, in the Lead Objector's submission, must therefore fail.
18. The registration authority subsequently wrote to the applicants to seek their comments on the objections. In doing so it noted that it had no legal jurisdiction to determine the highways status of the land. The applicants were therefore asked whether they wished to proceed with the application on the basis that the land was highway, or to seek to challenge the Lead Objector's view of the highway status of the land.
19. There then followed an extended period of time during which the Applicants sought to challenge the highway status of the land and apply at the suggestion of the Lead Objector for certain protective provisions under the Oxfordshire Act 1985 to be applied to it. These applications ultimately were not successful and the Lead Objector informed the Applicants of this in September 2012.
20. The registration authority subsequently instructed Dr Charles Mynors, a barrister experienced in the law of village greens, to advise on this matter. Dr Mynors was asked to advise as follows:-
 - a) consider and advise on whether the application can properly be rejected as to the public highway area based on the existing evidence and representations of the parties;
 - b) advise on whether there are further factual and/or legal issues which the parties should be invited to address.
21. Counsel subsequently provided a written Advice dated 19 December 2012 (Annex 2).
22. It is important to note at this stage that the County Council as Commons Registration Authority is essentially neutral in this matter. It is simply concerned to assess the application and register the Application Land if it

qualifies properly for registration. As such this role is entirely separate from its interest as highways authority and Lead Objector in relation to the application. The legal work in relation to these issues has been dealt with by different legal officers in Legal Services and management procedures have been put in place to ensure that no actual conflict of interest situation arises.

Counsel's Recommendations

23. Counsel considered the application and questions at length and in considerable detail and his findings on the matters raised by the Applicants and Lead Objector are set out fully in his Advice dated 19 December 2012 and are summarised briefly as follows.
24. A copy of the plans referred to by Counsel, showing the Brown Land and the Pink Land, are appended hereto as Annex 3.
 - a. The status of the application land in highway law is relevant, since a public highway carries with it a right for the public to use it for all reasonable purposes (*DPP v Jones*). Such use will therefore be under a right to do so and not 'as of right' and will not therefore count towards village green rights accruing.
 - b. Some public recreational activities on public highway land may unreasonably interfere with the right of the public to pass and re-pass, such use would arguably be unlawful and would not therefore count towards village green rights accruing.
 - c. A registration authority must therefore determine whether land subject to a village green application is a highway maintainable at public expense, before it can assess whether it has been used 'as of right'.
 - d. After a detailed analysis of the facts and relevant highway law, Counsel concludes that it is more likely than not that most of the Application land (possibly including some of the pond, which has changed in size over the years) is highway maintainable at the public expense.
 - e. In relation to the Pink Land, Counsel finds that this land is not part of the highway and has generally been used for lawful sports and pastimes (principally birdwatching) for upwards of 20 years by local people. He therefore recommends that the Pink Land be registered.
 - f. In relation to the Brown Land, Counsel advises that the principal question is whether the use of this land was 'lawful'.
 - g. Some of the activities relied on by the Applicant include the erection of a duck house, excavation works to the pond, the deposit of silt, the erection of fencing and unauthorised planting. Counsel concludes that such activities would probably be prohibited under the highways legislation and would therefore have been unlawful at the time.

- h. He further considers that unlawful occupation, enclosure and obstruction of the highway would have amounted to a public nuisance.
 - i. He advises that other uses relied on, such as keeping and feeding ducks, picnics and others (see para 4.25 of the Advice) generally fall within the ambit of 'sports and pastimes' and were probably lawful when carried out. However, these activities fall within the scope of the public's general right to use highway land and are not therefore 'as of right'.
 - j. Counsel therefore recommends that the Brown Land should not be registered as a town or village green.
25. In view of these conclusions and the more detailed discussions of the law and evidence in his Further Advice, Counsel recommends that the application be rejected.
26. The County Solicitor supports these conclusions.

REGISTRATION OF A SMALLER AREA

27. The conclusions set out in Counsel's advice, if adopted by the registration authority, mean that only part of the Application Land should be registered. The registration authority's discretion to do so is set out in the case of *Oxfordshire County Council v Oxford City Council and another* [2006] UKHL 25 as follows:
- "[T]he registration authority is entitled, without any amendment of the application, to register only that part of the subject premises which the applicant has proved to have been used for the necessary period. It is hard to see how this could cause prejudice to anyone. Again, I add that there is no rule that the lesser area must be substantially the same or bear any particular relationship to the area originally claimed." (para 61 per Lord Hoffman)
28. As the Pink Land is entirely within the original application area and does not therefore affect any new or different landowners, the registration authority may exercise this discretion without the need for further publicity of the application.

RECOMMENDATION

29. **Having received the Advice of Counsel set out in Annex 4 to this report, the Committee is RECOMMENDED to:-**
- (a) **APPROVE** the application for registration as a new Town or Village Green of that plot of land known as North Lane Pond, Weston-On-The-Green, Oxfordshire that site being identified coloured pink on the map appended to this report;
 - (b) **REJECT** the application for registration as a new Town or Village Green that plot of land known as North Lane Pond, Weston-On-

The-Green, Oxfordshire that site being identified coloured brown on the map appended to this report.

PETER CLARK
County Solicitor & Head of Legal Services

Background papers: Appendices to Form 44
Objection by the Oxfordshire County Council (in its capacity as highways authority) dated 18 October 2010
Representations by Acquireland dated 13 October 2010
Representations by the Coleman Hicks Partnership dated 13 October 2010
Representations by Applicant dated 15 & 17 October 2010
Representations by Applicant dated 28 January 2011
Representations by Oxfordshire County Council (in its capacity as highways authority) dated August 2011
Letter from Land & Highways Records, OCC dated 16 August 2012

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