

Lancashire County Council

Commons and Town Greens Special Sub-Committee for VG105

Friday, 26th April, 2013 at 10.00 am in Cabinet Room 'D', County Hall, Preston

Agenda

Part 1 (Open to Press and Public)

No. Item

1. Apologies

2. Disclosure of Pecuniary and Non-Pecuniary Interests

Members are asked to consider any Pecuniary and Non-Pecuniary Interests they may have to disclose to the meeting in relation to matters under consideration on the Agenda.

3. Minutes of the meeting held on 19 March 2013 (Pages 1 - 4)

4. Commons Act 2006 (Pages 5 - 28)
The Commons Registration (England) Regulations 2008
Determination of a Village Green Application Ref No VG105 relating to land at Bradley Lane Pond Field, Eccleston

5. Urgent Business

An item of urgent business may only be considered under this heading where, by reason of special circumstances to be recorded in the Minutes, the Chairman of the meeting is of the opinion that the item should be considered at the meeting as a matter of urgency. Wherever possible, the Chief Executive should be given advance warning of any Member's intention to raise a matter under this heading.

I M Fisher
County Secretary and Solicitor

County Hall
Preston

Agenda Item 3

Lancashire County Council

Commons and Town Greens Special Sub Committee for VG105

Meeting held on Tuesday 19 March 2013 at 10am in Cabinet Room D at County Hall, Preston

Minutes

Present: County Councillor T Jones (Chair)

County Councillors: F De Molfetta P Steen

1. Apologies

There were no apologies.

2. Membership Chair and Terms of Reference

County Councillor De Molfetta nominated County Councillor Tony Jones as Chair of the Sub Committee. The nomination was seconded by County Councillor Peter Steen.

Resolved : That

- i. The Terms of Reference, as set out in the report, be agreed
- ii. County Councillor Tony Jones be appointed Chair of the Sub Committee

3. Disclosure of Personal/Prejudicial Interests

None were disclosed.

4. Commons Act 2006; The Commons Registration (England) Regulations 2008; Determination of a Village Green Application Ref No VG105 relating to land at Bradley Lane Pond Field, Eccleston

The Chairman introduced the item, explaining that the Sub Committee intended to listen to and consider the evidence and information presented at the meeting, asking such questions as they considered appropriate in accordance with the procedure set out in the Directions to parties (Appendix 1).

Present on behalf of the Objector were:

Martin Carter, Counsel for the Objector
David Forshaw, Planning Manager, Northern Trust, Landowner and Objector
Mike Pocock, Partner, Pinsent Masons for the Objector
Elizabeth Wiseman, Solicitor, Pinsent Masons for the Objector

It was reported that there was a preliminary issue to resolve, being the status of the Applicant's 'application to withdraw', on the basis of a letter received from the Applicant indicating his wish to withdraw the Application. A copy of the letter and related correspondence was circulated and added to the Applicant's Bundle at document 7.

The Objector was invited to make representations on the status of the application to withdraw. The Objector requested that the Sub Committee treat the Application as withdrawn making reference to paragraph 7.13 of Defra's "Guidance to commons registration authorities and the Planning Inspectorate for the pioneer implementation" issued September 2011 ("Defra's guidance") and to the case of Oxfordshire County Council v Oxford City Council and another and others ("Trap Grounds case") as referred to at paragraph 7.13.5.

The Chairman then adjourned the meeting to enable the Sub Committee to consider the status of the 'application to withdraw'.

On resumption of the meeting, the Chairman advised that:

- It was confirmed that the second Applicant, Eccleston Parish Council had resolved to withdraw its previous support for VG105 in March 2012;
- The Applicant was merely withdrawing witnesses and himself from the Hearing only and that there was no reference of the other 16 user forms in support of the Application.
- Moreover, there was no indication in the application to withdraw that the applicant was withdrawing any of his evidence submitted in support. Therefore, although the applicant was not present at the hearing, all the written evidence remains submitted and would be duly taken into account.
- In accordance with Defra's guidance the Sub Committee considered it in the public interest to determine a duly made application so that the status of the land is clarified.
- Application to withdraw was given with short notice (1.5 days prior to the commencement of the Hearing).
- It was considered that no prejudice was caused to the Objector. The Objector was advised that the Hearing was more likely to proceed on the day.

For these reasons, the Sub Committee considered that the application should not be treated as withdrawn and that the Sub Committee would listen to and consider the evidence and information presented at the meeting and would ask such questions as considered appropriate.

The Chairman then confirmed that the Hearing would continue to follow the procedure set out in the Directions and that a decision would be made at a later meeting having received a further report and officer recommendation before determining the Application. The Objector confirmed that they intended to call one witness, Mr Patrick Hemmings.

The Chairman adjourned the meeting at this point.

On resumption of the meeting, the Sub Committee heard the evidence of Mr Patrick Hemmings. Mr Hemmings read his summary statement and then answered questions put by the Sub Committee.

The Sub Committee requested the Objector to provide his closing statement in writing by 5pm on Friday 22 March.

Resolved: That the Sub Committee is to receive a further report and officer recommendation before it determines the Application at its next meeting.

Next Meeting

The next meeting of the Commons and Town Greens Special Sub Committee for VG105 is scheduled to be held on Friday 26 April in Cabinet Room D at County Hall, Preston, commencing at 10:00am.

I M Fisher
County Secretary & Solicitor

County Hall
Preston

Agenda Item 4

Commons and Town Greens Special Sub Committee for VG105

Meeting to be held on Friday 26 April 2013

Electoral Division affected: Chorley Rural West
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Commons Act 2006

The Commons Registration (England) Regulations 2008

Determination of a Village Green Application Ref No. VG105 relating to land at Bradley Lane Pond Field, Eccleston

(Appendices A and B, and the Applicant's Bundle and Objector's Bundle refer)

Contact for further information:

Miss Ravinder Amrith, 01772 536098, Office of Chief Executive,
ravinder.amrith@lancashire.gov.uk

Please note, that due to the size of the Applicant's Bundle and Objector's Bundle of evidence, it is not possible to make them available electronically. Any person wishing to view the papers may do so by appointment and should contact in the first instance Josh Mynott on 01772 534580.

Executive Summary

An Application relating to land north of Bradley Lane, Eccleston, known as Bradley Lane Pond Field, to be registered as a Village Green.

Recommendation

The Special Sub Committee reject the Application on the grounds set out in the Conclusion section of this report.

BACKGROUND

This report relates to an Application made under Section 15 of the Commons Act 2006 ("the 2006 Act") to register land described as Bradley Lane Pond Field situated to the north of Bradley Lane, Eccleston as a town or village green ("the Application").

Under the 2006 Act, Lancashire County Council is the Commons Registration Authority ("Registration Authority") for Lancashire and is required to register land as a town or village where the relevant statutory requirements have been met. The Commons Registration (England) Regulations 2008 (as amended) ("2008 Regulations") apply in Lancashire and prescribe the procedure for making applications to amend the registers of common land and town or village greens. Under the 2008 Regulations, the Registration Authority is required to determine the Application.

The Regulatory Committee at its meeting of 11 December 2012 was advised that Application VG105 required that oral evidence be heard and tested through cross examination and that a Hearing would be arranged at which members of a Special Sub Committee would listen to evidence and then determine the application. The Regulatory Committee approved the establishment of 'The Commons and Town Greens Special Sub-Committee for VG105' ("the Sub Committee").

On 1 February 2013, the Registration Authority served 'Directions for Hearing' ("Directions") on the Applicant and Objector to ensure the smooth running of the hearing and fairness to all parties and the public (Appendix A refers). Prior to the Hearing a paginated bundle of documents was prepared by the Objector and for the Applicant, containing all the documents they wished to rely on. The Sub Committee was provided with the Applicant's Bundle and the Objector's Bundle prior to the Hearing. In this report references to the Applicant's bundle are given the preface of "AB", followed by the document number and page number(s) where relevant. References to the Objector's bundle use the preface "OB".

The Sub Committee, in accordance with the Directions, undertook a site visit on the afternoon of Wednesday 13 March 2013 accompanied by officers of the Registration Authority, the Applicant Mr David Walton and Mr David Forshaw for the Objector.

By a letter dated 15 March 2013, the Applicant informed the Registration Authority that he did not wish to pursue the application to register the village green and that neither he nor any of his proposed witnesses would be attending the Hearing scheduled for 19 March. The Applicant further stated that, as no case would be put forward in support of the application at the hearing, he invited the Registration Authority to treat the application as withdrawn. Papers relating to 'application to withdraw' are at AB/Doc7.

The Sub Committee held a Hearing on the morning of 19 March 2013. The Applicant did not attend nor did any other person in support of the application or any third parties. The Objector was represented by Mr Martin Carter of Counsel. At the outset of the Hearing, one preliminary issue arose concerning the status of the Applicant's 'application to withdraw'. Having heard from the Objector that the application should be treated as withdrawn, the Sub Committee's view was that for the reasons set out in the minutes to the meeting of 19 March 2013 and the decision was that the application should not be treated as withdrawn. The Sub Committee confirmed it would proceed to determine the Application, taking into account all the written evidence submitted by the Applicant and the Objector, together with the oral evidence adduced at the Hearing.

The Objector called one witness to give oral evidence and in addition, the Objector was requested by the Sub Committee to provide written closing statement and pursuant to that, the Registration Authority received such closing submissions 22 March 2013 at OB/Doc16.

COMMONS ACT 2006

Section 15 of the 2006 Act sets out the criteria for the registration of land as a new town or village green. This section came into force on 6 April 2007. Land can

become a town or village green where 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 (s15(2)) or, where use ceased after 6 April 2007 and the application is made within two years of the date on which use ceased (s15(3)), ('qualifying period'). Other qualifying periods exist but are not applicable to this application.

THE APPLICATION

The Application relates to land north of Bradley Lane, Ecclestone, known as Bradley Lane Pond/Field, ("the Land") to be registered as a village green. The Applicant is Mr David Walton and the Application was received 8 September 2011.

The Application has been submitted on the basis that the Land has become a village green because a significant number of the inhabitants of the Parish of Ecclestone have indulged as of right in lawful sports and pastimes on the Land for a period of at least 20 years. For the purposes of the qualifying period, the Land shown edged red attached as AB/Doc 2 at page 224 has been sub-divided. The Application in respect of the Land shown edged yellow is made pursuant to s15(2) to which use continued at the time of the application ('the Bradley Lane Field') and the Application in respect of the Land shown edged blue is made pursuant to s15(3) to which use ceased after 6 April 2007 and the Application is made within two years of the date on which use ceased ("the Bradley Lane Pond").

ADVICE

The Evidence

Case for Applicant

As the Applicant indicated, he did not attend the Hearing. Therefore, there was no oral evidence on behalf of the Applicant or no other person in support of the Application. Whilst all the Applicant's written evidence must be taken into account, the Registration Authority must bear in mind that it has not been tested by cross examination nor made available to be so tested and as such, the Registration Authority should attribute such evidence less weight.

The Objector has commented in OB/Doc16 on the quality of the written user form evidence that "given the nature of the standard Open Spaces Society user forms, the entries that are made in them are often brief. A few words used to describe user cannot be afforded much weight without explanation or testing. This is because it is not possible to form a true impression of the nature and quality of that evidence from such brief descriptions. If a person describes more than one activity and say that they visited the site with a given frequency over a lengthy period of time, it is not possible to test whether the user occurred as claimed (or at all), whether the nature of the user changed over time, what activities were conducted with what frequency, where and when they were carried out, whether user was spread across the site so that it can be said that the whole of the application land was used and so on." This ought to be accepted.

Case for Objector

Oral evidence objecting to the Application was given by Mr Patrick Hemmings who read his summary witness statement at OB/Doc3 expanded upon at the Hearing, and answered questions by the Sub Committee for the purposes of clarification, making reference to his full witness statement at OB/Doc2. The contents of Mr Hemmings' oral evidence is confirmed in the Objector's closing submissions and ought to be accepted as a true record at OB/Doc16 and also referred to when considering the elements of section (15(2) and 15(3) below. Mr Hemmings gave oral evidence in an open, straightforward and helpful way and was regarded as giving credible evidence that ought to be accepted.

In addition, three other witnesses provided statements contained in the Objector's Bundle, again the Registration Authority must bear in mind that in relation to the elements of that evidence which has not been tested by cross examination, (the Registration Authority did not accept the Objector's invitation for the Sub Committee to ask questions of those witnesses prior to the Hearing due to time constraints and in the interests of fairness to both parties) the written evidence must be given less weight than evidence that has been tested. Nonetheless, in relation to the contents of the evidence provided in two of the three witness statements that is corroborated by the oral evidence given by Mr Hemmings, that evidence ought to be attributed more weight because Mr Hemmings' evidence has been tested.

Application of the Law to the Facts

All of the evidence put before the Hearing, both orally and in writing and the Objector's closing submission at OB/Doc16 has been considered taking into account the weight properly attributable to such evidence and the burden and standard of proof which is, all elements required to establish that Land has become a town or village green must be properly and strictly proved by an applicant on a balance of probabilities.

The elements of the section 15(2) and section 15(3) statutory criteria will be considered in turn and whether they have been established on the basis of all the evidence, applying the facts to the relevant legal framework as set out Appendix B. In order for the Land to be registered as a town or village green, each of the statutory elements must be established by the Applicant on the evidence adduced on the balance of probabilities.

Land

There is no difficulty in identifying the relevant land sought to be registered. The Application Plan at AB/Doc2/page 224 is the definitive document identifying the Land that is the subject of the Application. The Land is then further subdivided under section 15(2) edged yellow and referred to in this report as the "Bradley Lane Field" and under section 15(3) referred to as the "Bradley Lane Pond". Bradley Lane Field and the Bradley Lane Pond comprise "land" within the meaning of section 15(2) and s15(3).

Use for Lawful Sports and Pastimes

Lawful sports and pastimes is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. It includes present day sports and pastimes and the activities can be informal in nature. It includes recreational walking, with or without dogs. However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way.

The Applicant's evidence of the use of the Land is largely contained in the 35 evidence questionnaires submitted with the Application. The activities referred to in that evidence as having taken place on the Land over various periods include walking, dog walking, bicycle riding, football (it is noted that football is the most recorded activity (see 'Use As of Right ' below)), cricket, rounders, golf practice, fishing in the pond, nature studies, bird watching, picnicking, picking berries, kite flying, model aircraft flying, frisbee games, sledging, snowballing throwing and making snowmen. Hence, the various activities referred to in the Applicant's evidence would therefore amount to "lawful sports and pastimes".

As against such evidence, the Objector has pointed out that some of the user evidence refers to the use of the Land as part of a way from 'A' to 'B'. An assessment of the extent of use akin to exercising a right of way rather than a right to use the Land for lawful sports and pastimes within the meaning of Section 15(2) and Section 15(3) cannot be made from the Applicant's written evidence. It is clear that the use of land to walk along any particular line for the purpose of passing and re-passing (as a short-cut or to access another piece of land), is not a qualifying use and such use must be discounted from consideration.

It ought to be accepted, on the tested evidence of Mr Hemmings, that some of the lawful sports and pastimes have not taken place on the Land, references being made to "The Rec" and "The Factory Field" (see below). Mr Hemmings also provided tested evidence that some of the photographic evidence provided by the Applicant and specifically AB/Doc1/photographs 13, 17, 20, 22 and 23 relates to land which is not the Land. It is also noted (see below) that use of the Land for football matches, football training and those watching the same, did so with permission of the Landowner.

Mr Hemmings did confirm to the Sub Committee that the photograph marked "Feeding Ducks Spring 2003" at OB/Doc8/page 121 was a photograph taken from the Applicant's Bundle and the pond pictured (albeit cropped version) could not be indentified to be the Bradley Lane Pond. However, referring to AB/Doc1 being the same photograph in its full, uncropped version, shows that the pond pictured is the Bradley Lane Pond with houses numbered 49, 51 and 53 Bradley Lane shown in the distance.

Mr Hemmings' tested evidence that he has not seen anyone using the Land for any recreation purposes ought to be accepted. However, that does not establish that such use has not taken place at all but, rather, that it has not taken place when Mr Hemmings was on the Land.

Nonetheless, on all of the evidence available it can be accepted on balance that some use referred to by the Applicant would have taken place on the Land.

Use by a significant Number of the Inhabitants of any Locality or of any Neighbourhood within a Locality

In order to determine this issue, it is necessary to identify the appropriate locality or, alternatively, neighbourhood within a locality.

The locality identified in section 6 of the Application is the "Parish of Eccleston". The Application is entirely silent on the question of neighbourhood and it must follow that the application must rest on whether a locality can be proven. It is now settled law that if an application is advanced solely on the basis of a locality then there must be a single locality and that locality must be an area that can be identified as having significant boundaries. There is direct authority that a parish is an area with legally significant boundaries and it ought to be accepted that the locality "Parish of Eccleston" has been identified.

Accepting that the Applicant has proven a locality, then it is necessary for him to prove that the Land had been used throughout the twenty year period by a "significant number" of those inhabitants of the Parish of Eccleston. In determining that issue, it is inappropriate to seek to quantify a "significant number" in percentage terms and that "significant number" need not be considerable or substantial or even a majority. Instead, the fundamental question is whether the number of people using the Land from that identified locality is sufficient to indicate to the landowner that it is in general use by the local community of that particular locality for recreational purposes rather than merely being used occasionally by individuals. Moreover, in order to establish the statutory requirements, the users of the Land must be shown to have originated from the whole of the identified locality and not merely from a limited part of it. A situation where users originate from only a small section of a locality would not be sufficient. There must be a proper distribution of users such that it can properly be said that the use has been by the inhabitants of that locality.

Applying that legal position to the evidence, the Plan provided by the Objector at OB/Doc12 shows the distribution of users. There are a total of 35 pieces of user evidence (from a total of 39 people if forms completed in the name of "Mr & Mrs" are counted as two items). It is apparent from that Plan, and indeed from the addresses of the users themselves, that the users are concentrated around Cotswold Close and a short length of Bradley Lane and not distributed throughout the locality and therefore considered against the locality of Eccleston it cannot properly be concluded that there has been usage by a significant number of the inhabitants of the parish, as opposed to a significant number of the inhabitants of the Cotswold Close / Bradley Lane area which is not a claimed, still less proven, locality or neighbourhood. Furthermore, the Objector's comment on the qualitative aspect of the user evidence (see above Evidence – Case for the Applicant) must be noted, since the written evidence of the users has not been tested and having considered some elements of the test above, are not free from criticism, supporting further that user has not been by a significant number of the local inhabitants.

Use for not less than 20 years

The qualifying use must be shown to have taken place for a period of not less than 20 years. Such use in respect of the Bradley Lane Field must have continued up to the date of the Application (s15(2)), as the Application is dated 8 September 2011, the relevant period is 8 September 1991 to 8 September 2011. Such use in respect of Bradley Lane Pond, use must have ceased after 6 April 2007 and made within two years of the date on which use ceased (s15(3)), the Bradley Lane Pond was fenced off 7 June 2010, the relevant period is 7 June 1990 to 7 June 2010. User evidence can also be relied upon in relation to an earlier or later period, but irrespective of any such earlier or later use, the qualifying use must still have been ongoing from at least 8 September 1991 onwards until 8 September 2011 in respect of the Bradley Lane Field and 7 June 1990 onwards until 7 June 2010 in respect of the Bradley Lane Pond, and must have been continuous throughout those periods.

From the user evidence, some 19 people have used the Land for more than 20 years during the relevant periods. The Objector indicates that the other evidence does not cover a twenty year period. It is not necessary for particular individuals to have used the Land for the full period of twenty years, but there should be evidence that local inhabitants taken together have used the land for the full period. The frequency of use by individual users varies.

In evaluating the Applicant's written evidence, it is significant that some users clearly mistake the Land for other areas in their user evidence forms for example references are being made to "The Rec" are references to the land north of the Land and others refer to the Land as "The Factory Field" now occupied by what was Middlewood Close. It is significant that Mr Hemmings' unchallenged evidence is that references to community activities referred to by some users such as fetes, car boot sales, fireworks celebrations and fireworks are references to the land where Middlewood Close is now located and that such activities have not taken place on the Land. As already considered under "lawful sports and pastimes" above, some user evidence indicates use of the Land as a short cut and to access playing fields and such use must be discounted. A significant proportion of user evidence in connection with the football club's use, has also been proved to be with permission (see below), all permissive use must be discounted.

The Objector has also referred to Mr Hemmings' tested evidence on the access onto the Land in the period pre-1982, and that for someone to get onto the Land they would have to climb over a fence, a locked gate from Bradley Lane or hedge to get onto the Land. The Objector confirms "Mr Hemmings could demonstrate that by pointing out that when the playing field which previously occupied the site of Middlewood Close was used, it had to be accessed from the area around "The Rec" by taking a westerly route around the Carrington Centre and could not be accessed from the school field which lies to the east of the Land. The fence between the Land and the school land was only removed in 2006." Whilst it is noted that this evidence pre-dates the relevant period, the Objector's submission that user evidence pre-1982 is either wrong or use is by force and thus raises further questions on the reliability on the user evidence as a whole, ought to be accepted.

It is also significant from the findings at the site inspection that alternative land was widely available for use. To the north of the Land there is the jubilee playing field, the Eccleston playing field (where senior football takes place) and the recreation ground comprising a playground and a skateboard park owned by Eccleston Parish Council. In addition, the Land adjoins to the east with Lancashire County Council owned school field and since 2006, there has been no clear defined boundary so it appears on inspection that the Land and the school's land forms one piece of land. It ought to be accepted that the alternative land and the school land may have deterred many from using the Land, particularly for certain purposes and lends itself to confusion as to which land was actually used.

From the available user evidence, there is no means of clarifying the land used, assessing the extent to which the walking was used as a short cut or crossing point to a location elsewhere, how much use was with permission or simply incorrect. This goes to the Objector's accepted argument on the quality of the user form evidence not being afforded much weight without explanation or testing.

Given that use must be sufficiently frequent and not merely sporadic in nature, that it must give the landowner the appearance that rights of a continuous nature are being asserted and given the burden of proof, it is considered that the Applicant has failed to establish on the balance of probabilities that the qualifying use has taken place on the Land, continuously throughout the relevant 20 year period.

Use As of Right

The remaining issue is whether the use of the land has been "*as of right*". In order to be "*as of right*", the use must have been without secrecy, without force and without permission.

It is notable that football was the most recorded activity within the user's evidence. Mr Hemmings' tested evidence refers to use for football which was with revocable permission and so was not "*as of right*". Mr Hemmings' oral evidence confirmed that from 1982 to 1994, Eccleston and Heskin Football Club ("EHFC") had an informal Licence arrangement with the landowner. From 1994, the Licence was formalised in writing at OB/Doc2, being terminable with one year's notice at OB/Doc2/para 3.3., or for cause at any time at OB/Doc2/para 4.1. The Licence was thus revocable and so user in pursuance of the Licence was precarious and so not "*as of right*". The Objector's submission that as the Licence permitted use as a playing field for EHFC, use of the playing field by spectators must also have been part of the permitted use. It ought to be accepted that a football match would draw family and friends as spectators and their use pursuant to the Licence would also be "*by right*" as opposed to "*as of right*". It can be further accepted that use by the visiting teams would be part of the permitted use. Mr Hemmings also addressed the evidence of adults playing football on the Bradley Lane Field on a Tuesday night and his uncontested evidence confirmed that they were in fact EHFC players who trained on a Tuesday and brought their own goal posts with the permission under the Licence.

Mr Hemmings' oral evidence also referred to the written evidence of Robert Taylor and Robert Bryce regarding other activities on the Land. In particular, Mr Hemmings' tested evidence corroborated the evidence of Mr Taylor, that the tournament use

was permissive, tournaments raised money and further added that charges were being made to take away food vans for a pitch. It ought to be accepted that the Licence and charges to participate and sell take away food is good evidence that use was with permission.

In evaluating the Applicant's written evidence it is noted that a significant amount of users either participated in or observed football tournaments and training and without having tested the evidence on balance it ought to be accepted that such use was with permission.

Whilst it has been accepted (under the heading 'use for lawful sports and pastimes' above) that some use would have taken place on the Land, it has been accepted (under the heading 'use for not less than 20 years' above) that there is insufficient clear and reliable evidence of other user which was unconnected with EHFC to meet the statutory elements for registration.

CONCLUSION

The decision as to whether all the elements of the section 15(2) and 15(3) have been established is one for the Sub Committee to determine, taking into account all the evidence which must to be considered in its entirety. Having taken into account all such evidence and submissions made, for the reasons given in this report, it is considered that the Applicant has, on the balance of probabilities, failed to establish all those elements on the following grounds:

- (a) That the use of the Land for lawful sports and pastimes has not been carried out by a significant number of the inhabitant of the parish of Eccleston;
- (b) That the use of the Land for lawful sports and pastimes has not taken place throughout the relevant 20 year period;
- (c) That the majority of the use of the Land has not been as of right.

In view of those conclusions, it is recommended that the Sub Committee should not add the Land to the register of town and village greens.

Consultations

In accordance with the Directions the Registration Authority duly published a notice of the date, time and venue of the Hearing on its website on 4 March 2013, in the Chorley Guardian on 6 March 2013 and by posting two notices on Bradley Lane near the Land and displaying the Notice at the Hearing venue.

Implications:

This item has the following implications, as indicated:

Human Rights

Human Rights implications would only arise should it be determined to register the Land as a village green. In that scenario, Article One of the First Protocol to the European Convention of Human Rights is applicable which entitles everyone, including a company, to a right to the peaceful enjoyment of their property. If the Land is registered, the owners would be precluded from developing their Land. However, that must be balanced against the public interest in registering land as village greens where the local inhabitants have established their rights over that land to use it for recreational purposes in order to ensure the protection of such rights.

If the Land was not registered, that would result from it not being established that the Land was a village green in which case the local inhabitants would have any recreational rights over the Land that ought to be protected. There does not appear to be any human rights implications from the scenario.

Risk management

The decision to be made by the Sub Committee could be subject to judicial challenge.

Local Government (Access to Information) Act 1985 List of Background Papers

Paper	Date	Contact/Directorate/Tel
LSG4/RKA/3.645	17 April 2013	Miss Ravinder Amrith Office of Chief Executive 01772 536098 ravinder.amrith@lancashire.gov.uk

Reason for inclusion in Part II, if appropriate

N/A

DIRECTIONS FOR HEARING

**IN THE MATTER OF SECTION 15 OF THE COMMONS ACT
2006**

**AND IN THE MATTER OF AN APPLICATION FOR THE
REGISTRATION OF LAND AT BRADLEY LANE POND FIELD,
ECCLESTON AS TOWN OR VILLAGE GREEN**

APPLICATION VG105

This Hearing ("Hearing") to be held by Lancashire County Council as Commons Registration Authority ("Registration Authority") is a hearing of evidence by "The Special Sub-Committee for VG105" ("the Special Sub-Committee") to assist in the determination of the above application in respect of land at Bradley Lane Pond Field, Eccleston ("the Site"). It is not an 'inquiry' under The Commons Registration (England) Regulations 2008 ("Regulations") or a 'hearing' under the Regulations. These Directions are issued by the Commons Registration Authority to try to ensure the smooth running of the Hearing and fairness to all parties and the public.

1. The Applicant by 18 February 2013 serve on the Registration Authority and on the Objector (see Schedule 1) the following:-
 - 1.1. A list of all the witnesses the Applicant intends to call to give evidence.
 - 1.2. Only insofar as not already provided, signed written witness statements containing the evidence of each witness on which the Applicant intends to rely.
 - 1.3. Where a witness statement exceeds one thousand five hundred words (1,500), a written summary shall in addition, be required.

2. The Objector by 18 February 2013 serve on the Registration Authority and on the Applicant (see Schedule 1) the following:-
 - 2.1. A list of all the witnesses the Objector intends to call to give evidence.
 - 2.2. Only insofar as not already provided, signed written witness statements containing the evidence of each witness on which the Objector intends to rely.
 - 2.3. Where a witness statement exceeds one thousand five hundred words (1,500), a written summary shall in addition, be required.
3. The Applicant and the Objector by 4 March 2013 serve on the Registration Authority and each other the following:-
 - 3.1 A skeleton argument including a summary of any legal arguments that they intend to rely upon at the Hearing and copies of any legal authorities to be relied upon.
 - 3.2 A paginated and indexed bundle containing any additional documents on which the Applicant and Objector intend to rely upon.
4. All documents served on the Registration Authority shall be submitted to Miss Ravinder Amrith, Solicitor, at County Secretary and Solicitors Group (Ref: LSG4/RKA/VG105/3.645), P.O. Box 78, County Hall, Preston PR1 8XJ.
5. Documents to be served on the Applicant and the Objector shall be sent to those persons at the addresses listed in Schedule 1 attached hereto.
6. The date, time and venue of the Hearing will be publicised by the Registration Authority by:-
 - (i) posting a notice on or near the Application Site for 14 days prior to the commencement of the Hearing;
 - (ii) publishing a notice on the website of the Registration Authority;
 - (iii) publishing a notice in the local newspaper circulating in the locality where the Site is situated during the 14 day period prior to the commencement of the Hearing;

- (iv) displaying a notice at the Hearing venue during the days that the Hearing is sitting;
7. The Hearing will commence at 10.00 am on Tuesday 19 March 2013 at County Hall, Fishergate, Preston PR1 8XJ and will continue if necessary on the subsequent 2 days.
 8. The Hearing will generally sit between 10.00 am and 5.00 pm with a 1 hour's break for lunch and 15 minute breaks mid-morning and mid-afternoon.
 9. The Hearing will be conducted as follows, subject to any changes made at the Special Sub-Committee's discretion: -
 - 9.1 The Applicant shall be invited to make a short Opening Statement if he so wishes.
 - 9.2 The Applicant shall call each of his witnesses in turn and each witness shall give his evidence. If the Applicant wishes the witness to read their written statement, in the case of a statement where a summary has been provided, only that summary shall be read at the Hearing. Each witness will be subject to cross examination by the Objector, and re-examination as appropriate and be asked any questions the Special Sub-Committee or their adviser may have.
 - 9.3 The Objector shall be invited to make a short Opening Statement if he so wishes.
 - 9.4 The Objector shall call each of his witnesses in turn and each witness shall give his evidence. If the Objector wishes the witness to read their witness statement, in the case of a statement where a summary has been provided, only that summary shall be read at the Hearing. Each witness will be subject to cross examination by the Applicant, and re-examination as appropriate and be asked any questions the Special Sub-Committee or their adviser may have.
 - 9.5 The Special Sub-Committee shall then invite any additional evidence from interested members of the public or any other third parties with cross examination by the opposing party.

- 9.6 The Objector shall be invited to make any closing statement he wishes to make and if required by the Special Sub-Committee to submit the same in writing, time scales to be agreed at the Hearing.
- 9.7 The Applicant shall be invited to make any closing statement he wishes to make and if required by the Special Sub-Committee to submit the same in writing, an agreed time after that submitted by the Objector.
10. Having the permission of the landowner, the Special Sub-Committee may make an inspection of the Site at a time to be arranged at the Hearing. No further evidence will be accepted during that Site visit. Should the Special Sub-Committee decide to make an inspection of the Site, the Applicant will be asked if he wishes to be present or represented at such site inspection and if the Applicant wishes to be present or represented the Special Sub-Committee will also invite the Objector to be present or represented. The inspection does not need to be postponed if the Applicant or their representative is not present at the appointed time.
11. Any person interested in the subject-matter of the Hearing may appear at the Hearing in person or by a representative.
12. The Special Sub-Committee may, at any stage of the Hearing, prevent any person from –
- (a) giving evidence,
 - (b) cross-examining a person giving evidence, or
 - (c) presenting any matter,
- if the Special Sub-Committee considers it to be irrelevant or repetitious.
13. The Special Sub-Committee may –
- (a) require a person to leave the Hearing
 - (b) prevent a person from participating in the Hearing by giving evidence, cross-examining a person giving evidence, or presenting any matter; or
 - (c) permit a person to remain at, or participate in, the Hearing only on specified conditions.

14. The Special Sub-Committee may proceed with the Hearing in the absence of any person entitled to appear at it.
15. The Special Sub-Committee may take into account any written representations or evidence or any other document received by the Special Sub-Committee from any person before or during the Hearing, provided that the Special Sub-Committee discloses it at the Hearing.
16. The Special Sub-Committee may –
 - (a) adjourn at any time and for any length of time during the Hearing ;
 - (b) adjourn to another date;
 - (c) adjourn the Hearing to the Site of any land affected by the application or proposal, and conduct part of the Hearing at that site in conjunction with a Site inspection.
17. Parties should note that these Directions may be revised.

DATED this 1ST day of FEBRUARY 2013

Miss Ravinder Amrith
Solicitor for the Commons Registration Authority

DIRECTIONS FOR HEARING

**IN THE MATTER OF SECTION 15 OF THE COMMONS ACT
2006**

**AND IN THE MATTER OF AN APPLICATION FOR THE
REGISTRATION OF LAND AT BRADLEY LANE POND FIELD,
ECCLESTON AS TOWN OR VILLAGE GREEN**

APPLICATION VG105

SCHEDULE 1

ADDRESS FOR SERVICE

APPLICANT

Mr David Walton
51 Bradley Lane
Ecclestone
Chorley
PR7 5RJ

OBJECTOR

Michael Pocock, Partner
Pinsent Masons LLP
3 Hardman Street
Manchester
M3 3AU

Commons and Town Greens Sub-Committee**Guidance on the law relating to applications to register land as a Town or Village Green (received after April 2007 under S15 Commons Act 2006)**

The Commons Act 2006 ("the Act") makes provision for the registration of common land and of town or village greens. Registration Authorities were created under 1965 legislation to maintain two registers, namely one for common land and the other for town and village greens. The County Council is the Registration Authority for the County of Lancashire.

Section 15 of the Commons Act 2006 sets out new criteria for registering greens and came into force on 6 April 2007. It supersedes the criteria laid down in Section 22 of the 1965 Act, and applies to applications made on or after 6 April 2007. (The law under the 1965 Act continues to apply to all applications made prior to that date.)

The wording of Section 15 is –

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where–

- (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; and
- (b) they continue to do so at the time of the application.

(3) This subsection applies where–

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, 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; and
- (c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).

(4) This subsection applies (subject to subsection (5)) where–

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, 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 commencement of this section; and
- (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

(5) Subsection (4) does not apply in relation to any land where–

- (a) planning permission was granted before 23 June 2006 in respect of the land;
- (b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and
- (c) the land–

- (i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or
- (ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied—

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land “as of right”.

Each of the elements of the definition must be satisfied by the Applicants on a balance of probabilities and guidance below deals with each element in turn.

Land

In order that it is clear what is sought to be registered, the Land must be clearly identified and the extent of the land must be shown on a plan submitted with the Application form.

There are no restrictions on the kind of land which may qualify for registration. It need not have any particular physical characteristics. Moreover, it is apparent from case law that overgrown or otherwise inaccessible areas may still be part of the land capable of registration as a whole as they may still be used for recreational purposes, such as flower beds and shrubberies in a public garden admired by walkers through the garden, or areas of land which is habitat for birds and wildlife and is part of a recreational experience in using the land.

It is advised that land may also include land covered by water, e.g. a pond or stream.

It is advised that the evidence may justify the registration of only part of the Application land by the Registration Authority.

It is advised that the Registration Authority must decide on a common sense approach as to whether the land or part of it has been used for at least twenty years with use having continued and for the required recreational purposes. For this purpose, it is required to take into account where appropriate the physical condition of the land during the relevant time period, bearing in mind that the physical condition may have changed during that period.

If any substantial part of the land by reason of its physical character has not been used for the twenty year period for the required recreational purposes, then that part may not have become a Green and may also affect whether the rest of the area of the land has satisfied the statutory tests. A registration authority would not expect to see evidence of use of every square metre but evidence does have to persuade that for all practical purposes it could sensibly be said that the whole of the site has been used.

Use for Twenty Years and continuing

It is advised that the 20 year period of use can be made up of several lesser periods of use by individuals using the application land so long as those lesser periods overlap and form a continuous unbroken period of use of twenty years. That use must not be interrupted over the twenty year period.

If the application seeks to satisfy S15 (2), the use must "continue" to the date of the application and therefore not only must the use be sufficient during the twenty year period claimed, but also for the period of time afterwards until the application is made. In effect, for at least the twenty year period immediately before the application there must have been sufficient as of right user.

If the use of the land has already ceased and the application seeks to satisfy S15 (3) the use will have ended on or after 6th April 2007 but not longer than 2 years before the application.

Significant Number

"Significant" is not defined in the Act and must be given its ordinary meaning in each individual case. The judicial guidance in case law is that a "significant number" should not be quantified in terms of a percentage of the neighbourhood or locality in question. Moreover, it need not be a substantial number nor the majority of those inhabitants. Instead "a significant number" means a number that is sufficient to indicate that the land is in general use by the local community for recreational purposes rather than being used occasionally by individuals as trespassers.

In the McAlpine case in 2002, there were six witnesses able to give evidence of use over the entire twenty year period and they gave evidence not merely about what they did themselves, but also about what they saw others doing. That evidence was supported by many other witnesses who were able to talk about their use during parts of the twenty year period. The court found that written evidence was to be treated with caution, but looking at the totality of evidence, the conclusion that it was consistent with and supportive of the oral evidence was one which one was entitled to reach. The conclusion reached as to whether use has been by a significant number has to be supported by an analysis of all the evidence and not based upon speculation.

Evidence of public footpaths or other highways leading to the land, the ease or difficulty of getting onto the land and the existence of any signs are all relevant circumstances to be considered.

It is for the applicant to prove use over the full 20 years and the continuing period. It is advised that such use would have to be by a significant number of inhabitants throughout those 20 years and the continuing period.

There may be concern if there is a concentration of usage from only part of the locality but recently the court was unimpressed with the argument that the supporters were inadequately spread over the claimed localities. Mr Justice Vos was on the particular facts of the case was not surprised that the majority of users lived closest to the application land but there is a strong argument that the view of Vos J was obiter anyway and the Court of Appeal in considering the matter did not address the issue. Also recently three independent inspectors have found that spread of user was important and it seems probable that spread is still relevant and evidence is required to show that user is sufficiently distributed to be sufficient to give the impression of the use of the application land by the inhabitants of the locality or neighbourhood

Inhabitants

The requirement that the use of an application site must have been by inhabitants is an aspect that has not been clarified to any great extent by case law.

There is no recent judicial guidance as to whether inhabitants would have to own a property or actually live there, or live there for the whole year or maybe even just work in the neighbourhood. In one very old case of 1797, which related to the inhabitants of a parish being entitled to make use of a particular village close for lawful games and pastimes, Mr Justice Heath ruled that renting a shop and working there twice a week was sufficient to establish inhabitancy in that matter.

It is advised that children are capable of being inhabitants.

Locality or Neighbourhood within a Locality

It is settled law that if an application is advanced solely on the basis of a locality there must be a single locality and it must be identified as having legally significant boundaries

A locality still needs to be shown even though use may have been evidenced as being by a neighbourhood within that locality.

An area with legally significant boundaries is generally understood to include a borough, parish, or ward . Whether that identity be a civil or ecclesiastical parish, a district or unitary authority would seem to be immaterial, provided it is a recognised locality known to law.

Mr Justice Sullivan further stated that the term neighbourhood, although not required to be a unit recognisable at law, must nevertheless be a cohesive entity. It is not any area of land that an applicant chooses to delineate upon a plan and he felt that the registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness.

The locality or neighbourhood itself ought to be identified in the application form.

It does not matter that many or even most users come from elsewhere so long as a significant number come from the locality or neighbourhood.

A neighbourhood is a cohesive area and capable of meaningful description in some way.

Where an application is advanced on the basis of use by a neighbourhood it is settled law that the reliance can be placed by an applicant on a neighbourhood or neighbourhoods within a locality and or localities. In a recent case two areas each qualified as a neighbourhood.

Use of the Land for Lawful Sports and Pastimes

For land to be registered as a town or village green, it must be shown that it has been used for lawful sports and pastimes. They need not be the traditional activities that took place on greens, but can be present day and informal activities. Lord Hoffmann in the Sunningwell case which reached the House of Lords in 1999 said that dog walking and playing with children were, in modern life, the kind of informal recreational activities which may be the main use of a village green. However, the use must be a recreational one to qualify.

It was also stated in the Sunningwell case that “sports and pastimes” is a single composite class and not two separate classes of activity. It is sufficient if an activity is either a lawful sport or pastime for it to fall within that composite class.

The use of the land for lawful sports and pastimes must be distinguished from the use of a right of way over the land or walking along an identified track. In the Oxfordshire case at the High Court hearing in 2004, the Judge considered the scenario where there are tracks across the land and whether their use may be a qualifying use for either a claim for a public footpath or for a green or both. The critical question in his view was how it would have appeared to a reasonable landowner as to whether the use of tracks would have appeared referable to the use of a public footpath or the use of the green for recreational activities or both. He considered that where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one point to the other, then use confined to the track may readily be regarded as referable to use as a public highway alone. He considered that it would be different if users of the track veer off the track and play or meander leisurely over and enjoy the land on either side. Such use is more particularly referable to use as a green.

Where a track which is already a public footpath crosses the land, the starting point must be to view the use as referable to the exercise of the established right of way.

It is suggested that lawful sports and pastimes have to be established as regular uses over the whole of the site. In the Cheltenham Builders case, the site had been so overgrown in places that it could not have been so used, and in the Laing Home case in 2003, there had been established footpaths around the edge of the site which had been used, but less evidence as to the use of the remainder of it.

The Courts have held that a common sense approach should be adopted to consider whether for all practical purposes the whole of the site has been used to such an extent as to indicate the assertion of a continuous right. The question in all cases should be how a reasonable landowner would have interpreted the use made of his land. The Court of Appeal in the Oxfordshire case confirmed that the question is how a reasonable landowner would have interpreted the use made of the land.

It is considered that extensive activity around the edge of an application site or on parts of an application site only would possibly not be sufficient to confer green status on the interior of the application site or on other parts of it.

There is an element of fact and degree when considering what parts have been used. It may not be essential to show that lawful sports and pastimes have taken place within an overgrown thicket, provided they have taken place all round it.

The recreational use must be continuous and not have suffered a material interruption throughout the twenty year period, although no-one expects the local inhabitants to indulge in lawful sports and pastimes every day for 24 hours throughout the twenty year period. There will be days when no lawful sports and pastimes take place at all, but it is advised that an intermission is not the same as an interruption.

It is suggested that the use must be sufficiently frequent and not merely sporadic in nature. It must give the landowner the appearance that rights of a continuous nature are being asserted. Moreover, at times when the lawful sports and pastimes were not being carried out, there must have been nothing else taking place on the land which would have prevented them taking place.

Use can be continuous even if there are periods when in practice the land is inaccessible, for instance if there was flooding. However, it is a different matter if the land is inaccessible because of physical activities carried out by the landowner, e.g. engineering works, which are inconsistent with the use of the land for lawful sports and pastimes.

Use of tracks across the land will possibly only be referable to building up a public right of way and each application will need to be considered carefully with careful cross examination of users to determine where they go on the land and for what purpose.

Use must be “As of Right”

For a use to be “as of right”, it must be exercised without force, without secrecy and without permission. User must also be such as to give the outward appearance that the user is being asserted and claimed as of right – openly and in the manner that a person rightfully entitled would have used it.

Use by force would possibly be use which is carried out by climbing a locked gate or where fences and prohibitory signage are torn down or ignored. It would probably be use by force. Whenever it is contentious or allowed under protest. User may be contentious when the landowner is doing everything consistent with his means and proportionately to the user to contest and endeavour to interrupt the user. What the users understood from the signage or notice is relevant. The actions of the landowner in previous applications about the land may also be relevant.

Use by secrecy could occur if the land was used at times and in a manner that a landowner could not expect to be aware of it, such as during hours of darkness when landowner was away.

Use by permission can be as a result of either express or implied consent from the landowner.

Express consent, whether oral or in writing to go on the land, would cause the use to be with permission and therefore not as of right. Since the Beresford case heard by the House of Lords in 2003, it is likely that such express consent would have to have been actually communicated to the user and be revocable or time limited. Permission which is unlimited may not preclude as of right use.

An implied permission to use land can arise where a landowner’s conduct is such that it makes it clear to users that the use of his land is pursuant to his permission. However, it was made clear in Beresford that permission could not be implied from mere inaction on the part of the landowner with knowledge of the use to which his land was being put. An owner who knows of the ongoing use but cannot be bothered to do anything about it or knows there is little he could realistically do about it and turns a blind eye would be tolerating the use, but this would not be consenting to nor permitting the use which would then likely to be as of right.

Instead, for permission to be implied, a landowner needs to take some positive acts to make users aware that their use of his land is with his permission. It appears that what is required is overt conduct by the landowner such as making a charge for admission or asserting his title by the occasional closure of land to allcomers or erecting appropriate signs demonstrating that access to the land depends upon his permission. In contrast, conduct merely amounting to positive encouragement to use the land is not sufficient to amount to implied permission, such as grass cutting or the provision of pitches.

It is advised that use by permission for even a short period might be sufficient to stop a twenty year period of use "as of right" from running, although a new twenty year period of lawful sports and pastimes can recommence as soon as the period of permitted use ceases. Hence, to prevent the accrual of the right, it would not be necessary for a notice prohibiting entry or granting permission by the owner to remain in place throughout the twenty year period. Local inhabitants excluded from parts of the land when ticketed festivals or a cordoned off funfair was held on only a few occasions meant that the application failed. The landowner had permitted the land to be used for his private purposes and by his conduct had demonstrated to the public that their use was permissive.

User as of right cannot be established if the use is actually "by right" under a statutory right to do so. Land held expressly as open space under the Open Spaces Act 1906 is held under a recreation trust and not able to be registered. If land is held under a statute for recreation, playing field, gardens etc careful consideration as to whether use is "by right" will be required. The Open Spaces Act is one Act to consider but also the Physical training and recreation Act 1937 and Public Health Act 1875 and possibly others and byelaws or church measures.

Effect of Registration

One of the most important effects of registration in practice is that it impedes development.

Under the Enclosure Act 1857, it is an offence to do any act whatsoever to interrupt the use or enjoyment of a town or village green as a place for exercise or recreation. Secondly, the Commons Act 1876 provides that any enclosure or encroachment of a town or village green is a public nuisance and thus a criminal offence actionable by any claimant who can show special damage.

Lord Justice Pill in the Steed case stated that it was no trivial matter for a landowner to have land registered as a Green.

It was the view of the Court in the Oxfordshire case that the registration of a green coming into existence since 1970 does establish "rights" for the local inhabitants to use the land for recreational purposes and the nineteenth century statutory provisions do still apply to such new greens.

April 2013

