

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)

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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