



## PLANNING COMMITTEE

27th May 2010

### Report of Head of Planning and Building Control

#### Proposed Village Green Status for Land adjacent to Boatman's Rest Public House, between High Street and St. John's Close, Walsall Wood, Walsall Application Number: 04/2479/VG/E1

##### 1.0 **PURPOSE OF REPORT**

To enable Committee to consider an Application under Section 13 of the Commons Registration Act 1965 ("the 1965 Act") by Mr Frank John Wilkes to Walsall Metropolitan Borough Council as Registration Authority ("RA") to register land adjacent to the Boatman's Rest Public House, between High Street and St John's Close, Walsall Wood as a village green.

##### 2.0 **RECOMMENDATIONS**

To accept the recommendations and conclusions of the Inspector's report and resolve not to amend the register of Towns and Village Greens by including the land adjacent to the Boatman's Rest, High Street, Walsall Wood as a town or village green.

##### 3.0 **FINANCIAL IMPLICATIONS**

None arising from the report.

##### 4.0 **POLICY IMPLICATIONS**

The site falls within High Street Walsall Wood Local Centre. Policy S5 of the Unitary Development Plan states opportunities for town centre uses including leisure uses (Class D2) may be acceptable provided they are an appropriate scale. Policy LC1 seeks to redress deficiencies in the provision and accessibility to urban open spaces that provide for sport and recreation, both formal and informal.

##### 5.0 **LEGAL IMPLICATIONS**

The Commons Registration Act 1965 provides for the RA to maintain a register of Towns and Village Greens within its area. Section 13 of the 1965 Act provides for the amendments of the register to take place where any land becomes a town or village green. The Application was received prior to the new Commons Registration Act 2006 coming into force. The 2006 Act deals with all Applications to register land as a town or village green made after 6<sup>th</sup> September 2007. As the current Application for St John's Close predates September 2007, the provisions of the 1965 Act still applies.

5.1 Section 13 of the 1965 Act does not give any details of the procedure to be followed when determining an application. Instead, the relevant procedure to be

followed is largely set out in the Commons Registration (New Land) Regulations 1969. In particular, under Regulation 5(7) of the 1969 Regulations, the RA needs to undertake a preliminary consideration of the Application to ascertain that it is “duly made”. In essence, that the Applicant has complied with procedural requirements.

- 5.2 Assuming that the Application is duly made, the next step is for the RA to give the appropriate notice of the Application to every person other than the Applicant, who the RA has reason to believe to be an owner, lessee, tenant or occupier of any part of the land affected or likely to wish to object to the Application.
- 5.3 Once the six weeks notice period has expired, the RA should then proceed to consider the objections along with the Application. If no objections are received, the RA should then proceed to determine the Application by assessing whether the Applicant has established each of the requisite elements of a town or village green. Regulation 6(3) of the 1969 Regulations provide that where written and signed objections are received by the RA, the Applicant should be given a reasonable period to respond to the objections as well as any other matter which on the face of it appear to be grounds for the rejection of the Application and the Application can be determined. It is upon the expiry of this period that the RA should determine whether to hold a non-statutory inquiry conducted by an independent person. The regulations do not make any express provision for an inquiry.
- 5.4 Nonetheless the RA has a general discretion to hold a non-statutory inquiry so long as the ultimate decision remains with the RA.
- 5.5 A non-statutory inquiry is generally appropriate in two particular circumstances, namely:-
  - (a) where there is a serious and material factual dispute between the Applicant and Objector which is difficult to resolve from documentary evidence alone; or
  - (b) where one of the objectors is the Council itself as is the case with the current Application.
- 5.6 In relation to the current Application, the RA considered it appropriate to hold a non-statutory inquiry conducted by an independent person as the Objector to the Application was Walsall Council in its Estates capacity. The decision to hold a non-statutory inquiry is not a legal requirement. The ultimate decision as to whether or not the land should be registered as a town or village green rests with the Council’s Planning Committee.
- 5.7 The RA has to determine whether the Application land meets the statutory criteria.
- 5.8 “Town or Village Green” is defined by Section 22(1) of the 1965 Act in three ways, usually referred to as Class (A) Statutory Greens, Class (B) Customary Green and Class (C) Prescriptive Green. In this case, if the land is a town or village green it can only be because it is a Class (C) green.

5.9 The RA has to determine whether the land qualified on the date of the Application as a Class (C) village green as defined in Section 22(1)(A) of the 1965 Act as amended by Section 98 of the Countryside and Rights of Way Act 2000.

*“...land on which for not less than 20 years a significant number of the inhabitants of any locality, or any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right and.....continue to do so.”*

5.10 The burden of proof as to whether the land has become a village green rests with the applicant.

5.11 The qualifying use of the land should continue for 20 years up until the date of the Application (Oxfordshire County Council v Oxford City Council and Robinson [2006] UK HL25).

## 6.0 HUMAN RIGHTS

Bearing in mind Article 6 of the Convention on Human Rights entitling a person whose civil rights are to be determined a right of a fair hearing for an independent and impartial tribunal, the RA took the view that the consideration of the Application by an independent inspector in the form of a non-statutory inquiry to be appropriate.

## 7.0 EQUAL OPPORTUNITY IMPLICATIONS

None arising directly from this report.

## 8.0 ENVIRONMENTAL IMPACT

None arising directly from this report.

## 9.0 WARD(S) AFFECTED

Aldridge North and Walsall Wood.

## 10.0 CONSULTEES

Officers in Legal Services have been consulted in the preparation of this report.

## 11.0 CONTACT OFFICER

Alison Deakin  
Principal Planning Officer 01922 652487

## 12.0 BACKGROUND PAPERS

Application reference 04/2479/VG/E1.

David Elsworthy  
Head of Planning and Building Control.

**Development Control Committee**  
**29<sup>th</sup> April 2010**

**12.0 BACKGROUND AND REPORT DETAIL**

- 12.1 The Application was made by Mr Frank John Wilkes of St. John's Close, Walsall Wood to register the application land known as land adjacent to the Boatman's Rest Public House, between High Street and St. John's Close, Walsall Wood as a village/town green (referred to as "the land"). The Application was dated 1<sup>st</sup> October 2003.
- 12.2 Mr Wilkes contended that the land became a village green on 1<sup>st</sup> October 1983 by virtue of the use of the application land by local inhabitants for lawful sports or pastimes as of right for not less than 20 years.
- 12.3 The Application relates to two parcels of land between High Street and St. John's Close on either side of the southerly access to St. John's Close. The larger parcel is 1363 sq m and adjoins the Boatman's Rest Public House and the smaller parcel is 160 sq m and lies between St. John's Close and the adjacent car park to St. John's Medical Centre. The large parcel is planted with trees and the smaller parcel has one tree upon it. Both parcels are relatively flat and are grassed. A path crosses the larger parcel and there are benches (and a public art sculpture) on the High Street frontage.
- 12.4 The Application was accompanied by a statutory declaration in support by Mr Wilkes dated 1<sup>st</sup> October 2003, an evidence questionnaire submitted in support by Mr Wilkes dated 26<sup>th</sup> September 2003 and 11 statements of evidence from St. John's Close residents. There was also a plan showing the land subject to the Application and various photographs including Silver Jubilee Celebrations from June 1977 and undated photographs of children playing in the snow and in summer months, and children playing in August 2003.
- 12.5 Following notice given by the RA of the Application nine letters of support were received and one letter of objection. The supporting letters state the Village Green would provide a much needed green space in the area and that the site has been constantly used by residents and their families for sport and leisure activities since the early 1970's when the houses were first built, including a celebration for the Queen's Silver Jubilee in 1977. One supporter states the Council have maintained the land in a tidy condition and strung Christmas lights around the site. Supporters consider it an asset to the area that enhances what would become a traffic dominated corridor along the High Street and offers a place to appreciate the natural environment. Another letter states that additional planting and pathways would further enhance the green and note that dog fouling is a problem. The owner of the smaller parcel of land indicated that they have no objections to registering the land as a village green.
- 12.6 The objection was from the Council's Estates & Asset Management Department on behalf of the Council as land owner of the larger parcel of land. The objection states that the land has not been used for lawful sports and pastimes for a continuous period for 20 years as the land has only been used occasionally by a small number of individuals only, it is used on an occasional basis only to gain access to the shops and other amenities in the local centre, there is no evidence

that games are played on a regular basis as there are no marking on the grass, the land is too dangerous for children to play as it abuts the A461 and the Council has never observed such activities and the site is mainly of value for its visual amenity. The Objector also states that the land has a number of mature trees, bushes and bulbs and is maintained by Green Spaces as an urban open space of visual amenity value as acknowledged by supporters. There is also a sign on the land prohibiting access except with the express consent of the Council. These factors make it clear that the Council is trying to regulate use of the land.

- 12.7 As the Council was objecting in its capacity as land owner of part of the site, the RA took the view that, in order to preserve procedural fairness and avoid any potential conflict of interest, an Independent Inspector should be appointed to reside over a non-statutory inquiry.
- 12.8 The inquiry was held over 2 days, namely 16<sup>th</sup> and 17<sup>th</sup> September 2009 with the evidence of the Applicant, supporters and objectors being heard. The Inspector's recommendations are attached as the report dated 24<sup>th</sup> November 2009. The Inspector was a barrister experienced in this area of the law.
- 12.9 The Commons Registration Act 1965 provides for each RA to maintain a register of town and village greens within its area. Section 13 of the 1965 Act provides for the amendment of the register to take place where any land becomes a town or village green.
- 12.10 The process of determining whether or not the Application should be registered as a town or village green involves applying the facts contained in the Application and submitted in evidence to the law. This is the legal framework in which the independent inspector determined the Application and makes his recommendation.

The Applicant must prove that the application land should be registered as a Town Village Green on the basis that it meets the criteria for registration under Section 13 of the Commons Registration Act 1965. As the current Application was made in October 2003, the definition of Town Village Green which the Inspector has to consider was inserted into Section 22 of the 1965 Act by Section 98 of the Countryside and Rights of Way Act 2000. That section inserted a new Section 22(1A) into the 1965 Act which had the effect that land could be registered as a Town Village Green if it fell within the subsection by virtue of Section 22(1A).

Land falls within this subsection if it is land on which where for not less than 20 years a significant number of inhabitants of any locality, or of any neighbourhood within a locality has indulged in lawful sports and pastimes (LSP) as of right and either:-

- (a) continue to do so; or
- (b) has ceased to do so for not more than such period as may be prescribed or determined in accordance with prescribed provisions.

No provisions were ever prescribed and paragraph (b) is irrelevant.

Therefore, for the Application to succeed it must be established that:-

- a) Lawful sports and pastimes - has there been a use of land for lawful sports and pastimes (this includes present day sports and pastimes and the activities can be informal in nature – it includes dog walking and playing with children but not walking of such a character it would rise to a presumption of dedication of a public right of way)
- b) Has the use of the land been for at least 20 years continuing up to the date of the Application (the use can be for any 20 year period, but it must be continuous to the date of the Application)
- c) Locality or neighbourhood within a locality – a “locality” must be a division of the County known to law, such as a borough, parish or manor: A locality cannot be defined simply by drawing a line on a plan. In contrast, a “neighbourhood” need not be recognised as an administrative unit. For example, a housing estate can be a neighbourhood. However, a neighbourhood cannot be any area drawn on a map. Instead it must have a sufficient degree of cohesiveness
- d) Significant number – “significant” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that the use of the land signifies that it is in general used by the local community for informal recreation rather than occasional use by individuals as trespassers.
- e) 20 year period – the qualifying use can be for any 20 year period, but it must continue up until the date of the Application. Therefore, the only period upon which the applicant can rely on is a period of upwards of 20 years ending with the date of the Application.
- f) Continuity of use over 20 year period – the qualifying use of the lawful sports and pastimes must be continuous throughout the relevant 20 year period.
- g) As of right – use of the land “as of right” is a use without force, without secrecy and without permission. There is no longer a need to show that the use is such as to give the outward appearance to a reasonable landowner that the use is being asserted and claimed as of rights by local inhabitant: (Regina (Lewis) -v- Redcar and Cleveland Borough Council (2) 2010)
- h) Continuation of Use – The use must continue as of right until the date of the Application

12.11 The Inspector considers the evidence from the Applicant and the evidence from the Council as land owner; the latter setting out why he feels the Application does not meet the legal criteria set out below.

The applicant has to prove that the Application meets the following requirements inserted into Section 22 of the Commons Registration Act 1965 by Section 98 of the Countryside and Rights of Way Act 2000. By Section 22(1a):-

Case law provides useful rulings and guidance on the requirements of the statutory criteria set out above. The Inspector having considered the evidence, made recommendation to the Council in its capacity as a RA, either that the authority registers the land because the Application has satisfied the statutory criteria and therefore either:-

- (a) the land should be registered as a town or village green; or
- (b) that the Application and evidence submitted fails to meet the statutory criteria and therefore should not be registered.

The report prepared by the independent inspector is only a set of recommendations to the RA. The independent inspector has now power under the Council's Constitution to determine the Application itself or any substantive matter.

Accordingly, providing the Council in its capacity as RA acts in a lawful manner, the Development Control Committee is free to accept or reject any of the recommendations outlined in the Inspector's report.

However, as a public body, the RA must give regard to the statutory principles upon which the Application must be determined. The Application must be determined in accordance with the legal criteria set out in Section 13 of the Commons Act 1965 and the case law as amended by Section 98 of the Rights of Way Act 2000.

Guidance is given in the case of R -v- Sunderland City Council ex-parte Beresford [2004] where it was stated that all of the ingredients of the definition of a village green should be met before it is registered and the decision makers must consider carefully whether the land in question has been used by the inhabitants of the locality for the indulgence of what are properly to be regarded as lawful sports and pastimes and whether the 20 years indulgence is met.

The burden of proof lies on the applicant to show that the land has become a village green. All of the elements required to establish that the land has become a town village green must be "properly and strictly proved" on the balance of probabilities.

### **12.13 Summary of Inspectors Conclusions and Recommendations**

In his report, the Inspector states in his conclusion:-

1. In my view, this application should fail and the application site should not be registered as a TVG for the following reasons:
  - (a) There is no proven neighbourhood and while there is a proven locality of the Aldridge North and Walsall Wood ward, the applicant has not shown that a significant number of the inhabitants of that locality used the application site for lawful sports and pastimes throughout a full twenty year period up to 1<sup>st</sup> October 2003;

- (b) That the small parcel of the application site was, at the date of the application to register is as TVG, part of the adopted highway and cannot qualify for registration as a TVG;
- (c) That use of the small parcel was not use as of right because the evidence demonstrates only modest use such that a reasonable landowner would not conclude that the land was used by local inhabitants asserting a right to use it for LSP ;
- (d) That the large parcel was not used as of right because the evidence does not show that it was use which would suggest to a reasonable landowner that the local inhabitants were asserting a right for them to use the land for LSP. The absence of protest about the presence of the Christmas tree for a period over Christmas for 10 or 12 years of the 20 year period, despite the modest area occupied by it, would have reinforced the impression given to a reasonable landowner that the local people were not asserting a right to use the land for LSP themselves;
- (e) That there is inadequate evidence to show continuity of user throughout a twenty year period by local inhabitants, given that there were only five live witnesses who can establish at least 20 years of use and only four other households who have provided written evidence of twenty years of use. The remaining evidence works back from the end of the twenty year period such that there is insufficient evidence of user at the beginning of the twenty year period to meet the statutory criteria.

Accordingly, in the case of the Application relating to the Council owned land at St John's Close, the independent inspector has concluded that the legal requirements necessary to register the land as a Town Village Green has not been met.

Even though the case of Regina (Lewis) v Redcar & Cleveland Borough Council referred to at paragraph 12.10 (g) has been decided post the Inspector's Report the need to satisfy all the criteria in Section 13 of the Commons Registration Act 1965 as amended has not been met by the Applicant.

04-2479-VG-E1 - Land adjacent Boatman's Rest, High Street-St.John's Close, Walsall Wood

