

Agenda Item 5.1



Regulatory and Other Committee

Open Report on behalf of Andy Gutherson, Executive Director of Place

Report to:	Planning and Regulatory Committee
Date:	02 September 2019
Subject:	Application for Village Green status on Land at Millfield Road, Market Deeping

Summary:

The Committee are requested to consider the report of the Inspector and make a decision on the application to register land on Millfield Road, Market Deeping as a town or village green

Recommendation(s):

That the recommendation of the Inspector be accepted and that the Committee reject the application to register as a town or village green the land at Millfield Road, Market Deeping on the grounds that the statutory criteria for registration under section 15 of the Commons Act 2006 have not been satisfied.

Background

1. The purpose of the report is to present to the Committee the recommendation of the Inspector further to a public inquiry held between the 8 -11 January 2019, so that the Committee can determine the application for land at Millfield Road, Market Deeping (" the land") to be registered as a Town or Village Green under section 15 of the Commons Act 2006 (" the 2006 Act").
2. On 21st June 2017, an application was submitted by the applicant to register the land as a town or village green under section 15(2) of the 2006 Act. The application was accompanied by thirty two evidence questionnaires and a list of names and addresses of an additional thirty six users. Most of the people who completed the questionnaires live or have lived in the vicinity of Millfield Road.
3. The application was accepted by Lincolnshire County Council acting as the Commons Registration Authority (section 4 of the 2006 Act) and advertised in accordance with Regulation 5 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations ("the 2007 Regulations").

The Land.

4. The land is an area of approximately 32.126 acres (13.7 hectares) of flat agricultural farmland laid mainly to grass and comprising of two fields, a northern field and south field. A culverted drain separates the two fields with access between the two. A public footpath (Public Footpath No. 2 Market Deeping) crosses the land and runs in an east- west direction from Millfield Road to the A15 bypass. The registered freeholder of the land is Lincolnshire County Council who purchased the land in 1920 so that the land could be used as a small holding. A plan showing the location of the land is included at Appendix B.

The Relevant Law.

5. Under section 15(1) of the 2006 Act, anyone may apply to a Commons Registration Authority to register the land as a town or village green.
6. In order for the land to be registered as a town or village green the applicant has to demonstrate on the balance of probabilities that;-
 - a significant number of the inhabitants of a locality, or of any neighbourhood within the locality
 - have indulged as of right
 - in lawful sports or pastimes on the land
 - for a period of at least twenty years and
 - that this use continued to the date of the application
7. It is necessary that all of these criteria are met before a registration authority can register the land as a town or village green. Therefore if any one element is not satisfied then the application must be rejected.

"Locality or neighbourhood".

8. Although the term "locality" is not defined in the 2006 Act, it is considered that it should be legally recognised administrative areas such as a civil parish or an electoral division. Whereas a neighbourhood does not have to be a legally recognised area, it may be defined by an area drawn on a map but the area must have a 'sufficient degree of cohesiveness' and may include facilities such as a church, shops or community facilities within it.

"Significant Number of Inhabitants".

9. 'Significant' does not mean considerable or substantial, but the land must be 'in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.'

"Lawful Sports or Pastimes".

10. Dog walking (as long as it is over the whole of the land and not confined to specific routes) and playing with children are examples of lawful sports and pastimes. There is no need to show both sports and pastimes and no need for communal, solitary recreation can be included.

"As of Right".

- 11 'As of right' reflects the common law concept "*nec vi, nec clam, nec precario*", that is "without force, without stealth or without permission of the landowner". There is no requirement that the users believed that they had a right to use the land but that the land is used by the inhabitants of the locality in such a way as to 'suggest to a reasonable landowner that they believed they were exercising a public right.' The user must be more than trivial or sporadic.
- 12 Likewise, toleration by a landowner is not fatal to a claim 'as of right'. The law draws a distinction between an owner's acquiescence in or toleration of the use of his land by others for lawful sports or pastimes and his giving licence or permission for its use. The giving of permission must involve some overt and contemporaneous act by the landowner, such as the erection of signs or notices, whereas toleration may be merely passive. In any event, the user must have taken place openly and in the manner that a person rightfully entitled would have used it.

"For Twenty Years"

- 13 The land must have been used for a full twenty year period that is calculated retrospectively from the date of the application. Periods of statutory closure (e.g. for a foot-and-mouth disease outbreak) do not provide an interruption to such use.

Procedure

14. The 2007 Regulations provide that the registration authority must consider every written statement in objection to an application which it receives before the advertised deadline for objections; and may consider any such statement which it receives on or after that date and before the authority finally disposes of the application. It must send the applicant a copy of every statement which it will consider. The registration authority must not reject the application without giving the applicant a reasonable opportunity of dealing with the matters contained in any statement of which copies are sent to him; and any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application.
16. The burden of proof lies on the applicant, who must prove that all the requirements are satisfied. The standard of proof is the civil one, that is, on the balance of probabilities.
17. If there are conflicting representations on matters of fact then it may be appropriate to proceed to arrange a non-statutory public inquiry, presided over by a suitably qualified independent inspector, who would consider the evidence with the benefit of cross examination. After the inquiry, the inspector will provide a report and a recommendation to the registration authority. This practice has been strongly supported by the Court of Appeal in *R o.a.o (Whitmey) v Commons Commissioners [2004] E W C A Civ 951*.

Effect of registration

18. Once land has been registered as a town or village green by the registration authority it is subject to the same statutory protections as all other registered greens. Local residents will have a guaranteed legal right to indulge in sports and pastimes over it on a permanent basis. Registration as a town or village green is irrevocable and so land must be kept free from development and other encroachments. Any subsequent disposal by the registered freeholder does not alter the right of recreational use.

The Evidence Submitted with the Application

19. The applicant stated in her application form that the land is a valued piece of open space that has been used by the people living in the area since the 1960's. It also states that the "users believed that they had an existing legal right to go onto the land". The owner of the land had been seen by a few people and no attempt had been made to prevent them from using the land. Four entrances were identified on the eastern boundary as the routes used to enter the land.

"Locality or Neighbourhood."

20. The applicant defines the neighbourhood as the Parish of Market Deeping, which is a legally defined locality.

"Significant Number of Inhabitants".

21. The majority of the users of the land are local residents that live in Market Deeping; others live in Deeping St James or the surrounding areas.

"Lawful Sports and Pastimes."

22. The activities cited on the evidence questionnaires include: jogging, walking, with or without dogs; fruit picking; enjoying wildlife; photography; bird-watching; used as an area of contemplation and children playing. There is no evidence of any use inconsistent with lawful sports and pastimes. Several people indicated that they also attended the two day agricultural show, the Deepings Show.

"As of Right."

23. There is no evidence of any enclosure of the land or of any forceful entry by the residents. There is no suggestion of any secret use. Users indicated that they had not sought anyone's permission to use the land nor did they believe it necessary to do so. They still used the land despite the Deeping Show taking place and the footpath being closed. Signage erected at the entrances were misleading as the sign "Private Farm" was erected adjacent to an adjoining field, the users had assumed that this indicted the adjoining field where farming activity regularly took place. One sign had been damaged/vandalised for many years.

"For Twenty Years."

24. The relevant 20-year period for claiming use is the 20 years immediately before the application. As the application was made on the 21 June 2017, the start of the relevant 20-year period would be 21 June 1997.
25. The evidence presented indicated that the land had been used for many years and that the use was still continuing when the application was made.

The Objections

26. Objections were received from the landowner, Lincolnshire County Council. The objections include:
 - The land had been used for agricultural purposes for arable crops of wheat and barley and for the grazing of cattle and sheep. It had also been used for an annual two day agricultural show since the 1960's up to 2013;
 - The user evidence shows that the majority of the use has been accessed via a public right of way, as the public already have a legal right to use the land to pass and repass over the footpath is "by right";
 - The land has been entranced and locked and fenced. In 2006 signs were erected at the entrances of the land stating "private farm"; "no trespassing" and "please keep to the public footpath". The signs were erected to warn the public that the land was regarded as private and the tenants of the land had asked the public not use the land;
 - The majority of users had attended the Deepings Show and that use was with the permission of the owner who had granted an agricultural tenancy to the Deeping Show and the public had to pay an entrance fee to enter the event, the use could not be regarded as being "as of right";
 - The use cannot have continued for the whole of the statutory period as the land had been used for agriculture it had been ploughed up and cropped and the Deepings Show formally closed the public right of way for the period of the show until 2013 therefore creating a break in usage.
27. Due to the fact that conflicting representations on matters of fact the Commons Registration Authority determined that a non- statutory inquiry should be held, it appointed Mr Martin Edwards to act as the independent Inspector. A public inquiry was held in Market Deeping from 8- 11 January 2019. The Inspector heard evidence from both the applicants and her supporters and the objectors.
28. The Inspector's report outlining his conclusions and providing his recommendation in light of all the evidence he heard at the inquiry is in Appendix A.

Conclusion

29. Mr Edwards considered all the written evidence submitted with the application and the oral evidence presented at the inquiry and based his recommendation on whether the evidence indicates that the statutory criteria for registration have been met.

"Locality or Neighbourhood."

30. He also considered that the applicant has correctly identified a relevant locality and therefore has satisfied the statutory test.

"Significant Number of Inhabitants."

31. He considered that the documentary evidence and evidence from the applicants witnesses show that a significant number of the local inhabitants has used the land over the entire 20 year period claimed and that the use was such that the landowner should have been aware of that use. He points out the landowner had become aware of the use in 2006 when it erected the signage.

"Lawful Sports and Pastimes."

32. He concluded that the land had been used for a variety of lawful sports and pastimes. He pointed out that as a public right of way crossed the land, he had discounted any evidence relating to this use.

"As of Right"

"Use by stealth"

33. He considered that there has been no evidence to show that the use of the land has been by stealth as the land is large and open and visible with a public footpath crossing it. The landowner was aware that local residents were using the land as they erected signage in 2006.

"Use by force"

34. He considered that this should be regarded as two separate elements:-

(a) **Actual forcible entry onto the land**

He considered that whilst "*some unidentifiable people may have broken down fences or forced their way through hedges (the evidence was unclear)*" any users who did not do so and who were not aware of the original damage their use could be regarded as being "as of right".

(b) **The effect and presence of signage erected**

He considered that forcible entry can also arise where suitable and visible perimeter signs are erected. The evidence submitted showed that the

landowner had erected signage in June 2006 at the entrances to the land after being made aware that the land was being used by "dog walkers". He considered that the signage erected;-

- One sign stating "private farm";
- Five signs stating "no trespassing";
- Two signs stating "please keep to the footpath";

35. He formed the view that he was required to consider if the landowner had erected a sufficient number of suitable placed, visible and clearly worded signs that would draw the attention of the local inhabitants using the land other than walking on the public footpath that their use was being challenged.
36. He considered relevant case law to assist with his determination, at paragraph 112-116 he has highlighted passages that he has indicated will assist the members with their deliberations.
37. He concluded that only a relatively limited number of small signs were erected, the wording used was not sufficiently clear to bring to the attention of the reasonable user of the land that the landowner was opposing their use of the land. The "private farm" sign was ambiguous and located in a position that the message it conveyed was not clear as to indicate the use of the land in question and not the adjacent farmland. Similarly the size and location of the "no trespassing" signage was not sufficiently clear when viewed in context. He concluded that the signage did not amount to use by force.
38. However he has stated that this conclusion based upon the evidence this was a finely balanced decision and that it is open to members to debate and to reach a decision that may disagree with his conclusion and recommendation.

"Use by permission"

39. From the evidence he found that during the twenty year period the land had been let under a tenancy agreement to the Deeping Agricultural Show for grazing and with the specific permission that they could hold an annual show once a year. The Show was a substantial event that occupied the land for a number of days that included when the equipment was being set up and dismantled and the event itself. For the duration of the show (i.e. the two days) the public footpath across the land was formally closed and had been obstructed by temporary structures such as the treasurers and members office, red cross and mother and baby facilities and the secretary office. Various sections of the land were fenced off for livestock and other purposes including siting of marquees. Entrance fees were charged and generated a significant amount of gate money. The organisers of the show had maintained control for health and safety purposes and good order.

40. He concluded that the presence, nature, operation and scale of the Show was such that the landowner had made it clear each and every year that the Show operated that they were exerting their right to exclude the local inhabitants and that any use of had been with their permission. He therefore concluded that this relevant part of the statutory test had not been met.
41. Mr Edwards concludes that the application fails because the applicant has failed to satisfy all of the requirements of the statutory tests. He therefore recommends that the application be rejected.
42. The Committee is recommended to accept his recommendation and reject the application to register the land at Millfield Road Market Deeping as town or village green.

Consultation

a) Have Risks and Impact Analysis been carried out??

No

b) Risks and Impact Analysis

n/a

Appendices

These are listed below and attached at the back of the report	
Appendix A	Report of Mr Edwards dated 19 July 2019
Appendix B	Plan showing application site

Background Papers

No background papers within Section 100D of the Local Government Act 1972 were used in the preparation of this report

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