

| Local Members Interest | |
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| J McMahon | Cannock Village |

Countryside and Rights of Way Panel – 3 July 2020

Commons Registration Act 1965 – Section 13

Application to register land known as ‘The Green’ at Cannock Road, Heath Hayes, Cannock, as a Town or Village Green

Report of the Director of Corporate Services

Recommendation

1. That the Application Reference Number NVG5 for the registration of land known as the Green at Cannock Road Heath Hayes Cannock as a Town or Village Green should
 - (i) fail for the reasons set out in the Inspector’s Report dated 28 May 2020 and
 - (II) that the land should not be registered as a Town or Village Green.
2. That the applicants should be notified that the reasons for refusal of the application are those contained in the Inspectors report dated 28 May 2020.

PART A

Why is it coming here – what decision is required

1. Staffordshire County Council is the Registration Authority responsible for maintaining the register of Town or Village Greens under the Commons Act 2006, (“The Act”). Determination of applications for land to be registered as a Town or Village Green falls within the terms of reference of the Countryside and Rights of Way Panel of the County Council’s Regulatory Committee.
2. The Panel is acting in a quasi-judicial capacity when determining these matters and must only consider the facts, the evidence, the law and the relevant legal tests. All other issues and concerns must be disregarded.
3. To consider an application by the late Mrs Sandie Bowen and Mr Derek Baseley, to register land known as the Green at Cannock Road Heath Hayes Cannock as a Town or Village Green under Section 13 of the Commons Registration Act 1965.
4. To consider the report of Mr William Webster, Barrister at Law, an Independent Inspector appointed by the County Council, in its capacity as Registration Authority, who presided at an abortive non-statutory public inquiry held on 17 March 2020 and subsequently dealt with the matter on the documentation alone.
5. To decide, having regard to and having considered, the Application and the accompanying documentation, the objections to the Application, the Inspector’s Report, his findings of law and of fact, and his conclusions and recommendation as whether to accept or reject the Application.

PART B

Background:

6. The County Council is the Commons Registration Authority ("the CRA") responsible for maintaining the register of Town or Village Greens under the Commons Act 2006 ("the Act").
7. Under the current prevailing legislation applications for TVG's fall to be considered and determined in line with the Act. However, this application was made under the provisions of the previous legislation, the Commons Registration Act 1965 (the 1965 Act"). It also predated amendments that were made to the legislation in 2001.
8. Accordingly, as the Inspector sets out in his report at page 2, (Copy attached as Appendix C), the law applicable is set out in the 1965 Act, any regulations made, and what constitutes a TVG has a sharper more restrictive definition.
9. The County Council was the CRA under the 1965 Act.
10. The applicants made the application under section 13(b) of the 1965 Act which states:

Regulations under this Act shall provide for the amendment of the registers maintained under this Act where:

(b) any land becomes common land or a town or village green
11. The definition of what constitutes a TVG is given in s22 of the 1965 Act and the applicable part of that definition is

Land ... on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.
12. The application was made in July 2000, and there was some discussion over the maps and the area of land which was claimed to have become TVG. This is usefully summarised in the Inspector's report at pages 18 to 22 of his report. The application was duly accepted and given the reference number NVG5. A copy of the Form 30 and accompanying statutory declaration is attached as Appendix A.
13. The procedure for dealing with applications at this time was set down in the Commons Registration (New Land) Regulations 1969 and are substantially the same procedure as exists today. The CRA duly advertised the application, notified the landowner, and one objection was received. That objection was from the landowner, Staffordshire County Council ("the owner").
14. The practice in cases such as this where the landowner is the same body as the registration authority is to separate its functions and put in place what is commonly referred to as a "Chinese wall". In effect the officers on either side of the matter have no contact other than that made formally, have different reporting and supervising regimes and the files are kept completely separate. Whilst it does appear incongruous on the face of it there are precedents in law firms for this type of separation. The best analogy might be that of barrister's chambers where members of that particular set may be employed by the opposing parties.
15. The legislation then as now provides no procedure for determining applications where the evidence is disputed. Whilst it is, on occasion, possible to determine disputed applications on paper, where that is not the case the practice is to hold a non-statutory public inquiry into the matter. This process has been repeatedly approved by the courts including the Supreme Court.

16. The CRA, in line with accepted practice appointed an independent expert, Mr William Webster, a barrister versed in this area of law, to act as an Independent Inspector to
 - (i) advise on whether the application could be decided without recourse to an oral hearing
 - (ii) if not, to advise on the procedure to be followed and
 - (iii) to act as the Inspector for that process and
 - (iv) to report with his findings of fact and recommendations in the law so as to enable the CRA to more properly determine the application.
17. The effect of appointing an independent expert to look into and advise on the matter was also to show a separation between the CRA and the case such as to remove any doubts about the two roles of the Council having any interaction and negate any insinuation of collusion.
18. Mr Webster advised that the facts were sufficiently in dispute that the matter could not be decided on the documentation alone and that the matter should proceed to a non-statutory public inquiry.
19. CRA officers wrote to the applicants in May 2019 enquiring as to whether they wished to pursue the application. It transpired that Mrs Bowen had sadly passed away. No other reply was received. Officers then contacted the Parish Council to ascertain if they would be willing to act as the applicant in lieu of the original applicants. The Parish Council declined.
20. As this matter had been held in abeyance for so long but still required a determination the Inspector recommended that the CRA hold a pre-inquiry hearing to which the public would be invited and over which he would preside. The intent was to see if either a successor to the original applicants could be found or assistance for Mr Basely would be forthcoming.
21. CRA officers duly arranged a hearing for September 2019 and the Inspector deals with this hearing, the proceedings and the aftermath in his report at para 7. The owner instructed counsel to update their original objection and to represent them at the pre-inquiry hearing.
22. A non-statutory inquiry was arranged for 17 March which was to take place over 4 days and the Inspector issued directions on 20 January which were circulated to all parties. The Inspector deals with the period leading up to the inquiry and the dealings with the applicant's representative from para 8 onwards.

The Public Inquiry

23. The Public Inquiry was accordingly held at the Heath Hayes Community Centre, which was a suitable venue close to the area of land claimed as a village green, on Tuesday 17 March.
24. The date of the inquiry coincided with the increased concern over coronavirus and the threat it presented. Officers did discuss the issue with the Inspector and it was felt that the Inquiry should go ahead but instead of 4 days duration given the situation it may need to be curtailed to one day.
25. The Inquiry was duly opened by the Inspector. The objector was represented by Mr Paul Wilmshurst of Counsel and Ms Ally Brereton, a legal officer employed by the owner.

26. Neither the applicant nor any representative attended the inquiry. A summary of events is given by the Inspector at para 13 and the following paragraphs.
27. A witness for the owner, a Mr Mike Winks, did attend the inquiry and the Inspector asked several questions of this witness to clarify the question of under what appropriation had taken place with regard to this land and how it was held. A summary is contained within the report at paras 132 to 135.
28. The Inspector closed the Inquiry and invited closing submissions. The objector subsequently did so and these are attached at Appendix E
29. Officers did discuss with the Inspector the viability of reconvening the Inquiry at a later date and the latter recommended that the application proceed to be considered. This is referenced in the Inspectors Report at para 15.
30. Following receipt of the closing submissions the Inspector produced his report on the application, dated 28 May 2020 along with appendices. A copy of the report is attached at appendix C and the associated appendices at Appendix D

The Inspector's Report

31. Mr Webster has submitted a 53 page report to the Registration Authority which includes references to all the associated documentation. Officers have provided copies of the pages the Inspector refers to from the relevant bundles referenced. Those from the objector's bundle are attached as Appendix F and from the Registration Authority bundle at Appendix G
32. Within his report the Inspector has broken down the requirements of the statute as set out in the 1965 Act. A summation of the questions to be addressed in deciding whether the land in question can be regarded as a TVG is set out at para 159.
33. The Inspector has based his findings of fact on the evidence and the documents containing such. In considering the different questions following on from para 159 the Inspector has set out each question and his findings using each question as a section heading.
34. In summation the Inspector finds that two components of the statutory requirement are not satisfied.
35. Firstly, that the land has not been used for Lawful sports and pastimes for the requisite 20 years. The nature of the usage would appear to be more in line with that of persons using it as a highway rather than for recreational activities. Use would appear to have been confined to tracks rather than the wider area of land. The inspector deals with this by dividing the land up into parcels and his analysis can be found at paras 167 to 172 inclusive.
36. The Inspector also found that a significant part of the land was subject to an interruption in use thus preventing the full 20 year period from being attained. This is referenced at para 173.
37. Secondly that the application failed on a point of law. This is due to the fact that the land was appropriated for a purpose that is incompatible with registration as a TVG and that it continues to be held for that purpose. Put succinctly the land was acquired for highway purposes and were the land to be registered as TVG it would render that intended use either impossible or significantly restricted so as to render it untenable.
38. The Supreme Court in recent judgments has found that where this is the case, i.e. the land has been acquired for statutory purposes that are incompatible with it

becoming a TVG, then the land cannot be registered as such. The Inspector has summarised the case law and effect in paras 174 to 180.

39. Members need to carefully consider the findings of fact and law set out in these paragraphs. The attention of the Panel is drawn to the Inspector's recommendation at para 181.

Officer's comments

40. Members are aware that the use by the public must apply to all of the land and must not be in the nature of highway use, i.e. using a set A to B line or confining use to a narrow track. While it is open to the CRA to decide that only part of the land qualifies as a TVG the nature of the use of that part must not be that of a highway. If the claim is that the land has been used for sports and pastimes this must include all of the land and not a track.
41. The evidence in this instance would strongly suggest that while the public have used the land it has not been akin to lawful sports and pastimes but rather that of passage from one point to another; more supportive of a claim for a public highway instead of a TVG.
42. Members will be aware that the use by members of the public must be for a full period of 20 years and not be subject to interruption. Should the latter occur then the qualifying period of time ceases to run and must start afresh. This is applicable to part of the land and so a claim for that section must fail.
43. Finally, it is a matter of law that the nature of the owner's landholding, that is for highway purposes, prevents any registration as a TVG. In effect even if it was proven that all other factors were satisfied this would still thwart and stop registration.
44. After careful consideration of his report your Officers, who are acting on behalf of the Registration Authority, accept the Inspector's findings of facts, his application of the law and relevant legal tests and his conclusion and recommendation.

Determination of the Application

45. The function of the Inspector is to establish the facts, apply the relevant law to the facts and make a recommendation to the Registration Authority.
46. It is the function of the Registration Authority to determine the Application, having regard to the evidence before the inquiry, the documentary evidence, the Inspector's findings and conclusions and the relevant burden of proof.
47. The burden of proof rests upon the applicant to show that, on the balance of probabilities, the Application Land has become a town or village green.
48. In order to meet that test, the Panel need to be satisfied that it is more probable than not that the Application Land has become a Town or Village Green.
49. The applicant and the objectors have had the opportunity to present all of their evidence to the Inspector and to make representations. The Inspector has conducted an in-depth analysis of the available evidence and documentation. Finally, he has given detailed justification for his recommendation.
50. Nonetheless, it is a matter for the Panel to consider the whole of the Inspector's report, along with the further representations made by the Applicant and the Inspector's response to those, and then to decide whether or not to determine the Application on that basis.

51. Should the Panel decide to reject the Inspector's findings they would need to have good reasons based upon either the facts or the application of the relevant legal tests for disagreeing with the Inspector's conclusion.
47. In the case of previous applications, the advice of your officers has been that a site visit by the Panel to view the Application site was not essential. Your Officers consider that the Panel does not need to make a site visit in this instance.

Equalities Implications

48. This report has been prepared in accordance with the County Council's Equal Opportunities Guidelines.

Resource Implications

49. This report has no direct resource implications. The cost of holding the public inquiry into the application has been met from existing budgetary provision. If the Panel decision is challenged by way of an application for judicial review there will be significant additional resource and financial implications.

Legal and Risk Implications

50. The effect of the Panel decision if in line with both the Inspector's and Officer's recommendation will be to refuse to add the area of land applied for to the Register of Town and Village Greens.
51. It is up to the Panel to make the decision but if the Panel decides to accept the Application, that is to reject the inspector's recommendation, members must be aware that this decision must be based upon the applicable law and a finding of facts which differs substantially from the Inspector's conclusions.
52. There is a possibility of the Panel's decision being successfully challenged by way of Judicial Review. Officers consider this risk to be low if the decision is based upon the facts and applicable law.

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INDEX TO APPENDICES

| | |
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| Appendix A | Copy of Form 30 and accompanying statutory declaration and map |
| Appendix B | Public Inquiry bundles held on deposit |
| Appendix C | Inspector's Report |
| Appendix D | Inspector's Appendices 1 to 4 |
| Appendix E | Objector closing submissions |
| Appendix F | Copies of pages referred to in Inspectors Report as OBJ/ |
| Appendix G | Copies of Pages referred in Inspectors Report as CRA/ |