



Committee report

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| Committee | APPEALS SUB COMMITTEE |
| Date | 30 MARCH 2015 |
| Title | PROPOSED REGISTRATION OF LAND AT NORTHWOOD PARK, COWES, AS A TOWN OR VILLAGE GREEN |
| Report of | THE HEAD OF PLANNING AND REGULATORY SERVICES |

EXECUTIVE SUMMARY

1. Members are asked to decide whether a town or village green status should be placed on land known as Northwood Park, Cowes.
2. Evidence for and against has been submitted by applicant and objectors and, in considering the evidence, it is thought that none of the land requested to be a village green fulfils the necessary four tests, and therefore the land cannot be registered as a village green.
3. If land is registered it confirms the existence of customary rights of recreation for the inhabitants of the locality over that land. However, it should be noted that this does not prevent the land owner from using the land in the manner he had done during the 20 year period described in the application.

BACKGROUND

4. On 25 November 2011, the Isle of Wight Council, as registration authority, received an application to register an area of land known as Northwood Park, Cowes, as a town or village green.
5. The application was made by Paul Taylor, of Crossfield Avenue, Cowes, under Section 15(2) of the Commons Act 2006.
6. The application claims that land known as Northwood Park, Cowes became a town or village green on 24 November 2011 "by the actual use of the land by the local inhabitants for lawful sports and pastimes as of right for not less than 20 years" between 1991 and 2011 and that this use is continuing.
7. A paper summarising the background and the statutory requirements for the registration of a town or village green is attached at Appendix A.
8. Plans showing the application site and relevant area mentioned later in the report are attached at Appendix B.

9. The application and accompanying documents is attached at Appendix C.
10. The applicant has submitted 30 evidence questionnaires in support of the application, he also submitted 128 forms from a user survey undertaken in the park in 2010, summarised and attached in Appendix D.
11. Following advertisement of the application one 'no comment' and one objection was received, both of which are attached at Appendix E.
12. A response by the applicant can be found attached as Appendix F.

LOCATION AND SITE CHARACTERISTICS

13. The application land is shown for identification only edged with a dotted black line on Plan A in Appendix B. The total area of the land is approximately 7.11 hectares (17.57 acres).
14. The park includes grassed areas with tarmac paths and many trees of varying ages. The area includes a children's playground and a war memorial.
15. There are several entrances to the site from Baring Road; Church Road; Union Road; Ward Avenue; and the public car park in Park Road.
16. The land envelops, but does not include, Northwood House, Park Court, St Mary's Church, the bowling green and the tennis courts.
17. The north-west, north and east boundaries back onto residential properties, the south-west and south boundaries are adjacent to a car park and highways.
18. The area is within the Cowes conservation area, is designated as open space in the Island Plan; and is designated nationally as a historic park and garden.

RELEVANT HISTORY

19. The land and premises known as Northwood House and grounds was the subject of a deed of gift from Herbert J Ward in 1929, it was gifted to Cowes Urban District Council for the use continuously as pleasure grounds for the inhabitants of Cowes.

STRATEGIC CONTEXT

20. As registration authority, the council has a duty to fairly dispose of the application on its merits. This report demonstrates that the council has arrived at its decision in an appropriate and fair way.

CONSULTATION

21. In the process of considering this application the following consultation has been carried out.
22. Public advertisement

In accordance with the requirements of the 1965 act, 2006 act, and the 1969 regulations, the application was advertised by notices placed on site and in the Isle of Wight County Press on Friday 27 January 2012. Copies of the application and supporting documents were made available for public inspection at the Newport Help Centre in County Hall, the planning offices at Seaclose, Newport and at Cowes Library from 27 January 2012 to 10 March 2012. (The purpose of this advert was to consult with the general public.)

23. Relevant council departments

Notice of the application was sent to Property Services, which responded saying that the land is not owned by the council, but that the council is the custodian for the people of Cowes.

24. Parish and town councils

Notice of the application was sent to Cowes Town Council, which said they do not wish to comment.

25. Local member

Notice of the application was sent to the local member at the time of the application, and the current member. No comment was received.

FINANCIAL / BUDGET IMPLICATIONS

26. The financial implications of any village green application are variable, depending on the chosen method of assessment of the application. The only costs that remain constant in all such application are the advertising costs in the consultation process of approximately £90.
27. The land subject of this application is owned and maintained by Northwood House Charitable Trust. There will be no financial implications to the council in this respect.
28. The variable costs might be the cost of commissioning an independent inspector's report which could amount to around £5,000 or the cost of holding a non-statutory public inquiry which could be in the region of £20,000 (depending on the length of the inquiry and the number of witnesses).
29. There is no provision in the village green budget for the cost of a review by an independent inspector or public inquiry. The council, as the registration authority, has a statutory duty to determine village green applications. The committee must decide the application on its merits using whatever procedure it considers best suited for the purpose. It is proper that the committee is made aware of the possible financial implications of the alternative options, but identifying a source of funding should not influence its decision.

CARBON EMISSIONS

30. There will be no change in the council's carbon emissions in the determination of this application.

LEGAL IMPLICATIONS

31. The general legal situation in regard to town and village greens is included in the summary attached at Appendix A.
32. The application has to be determined on the evidence in accordance with the legislation cited above. The courts have provided useful guidance on how to interpret the relevant statutory provisions of the criteria for registration. If members find the application satisfies all the statutory conditions then the application must be accepted and the land must be registered as a town or village green. If the applicant has failed to meet any one of the statutory conditions then the application has to be rejected.
33. If members are unable to determine the application, an independent inspector can be appointed to consider the evidence and prepare a report back to the committee providing a recommendation on whether the land should be registered. However, it is important that members note the appointment of an inspector is to assist the council in its registration function. Responsibility for determination remains with the committee throughout.
34. In this particular application as a result of investigation and consideration of objections the applicant has indicated that she would be satisfied if areas G, H and J only were granted village green status. The relevant legislation is silent on whether it is possible for the committee to make a decision in respect of part of an application, as such there would appear to be no reason why the committee should not consider this as an option and for that reason it is included within the options available.
35. In January 2004, the High Court considered the question of decision-making in respect of a part of an application. In the case of Oxfordshire County Council, Oxford City Council and Catherine Mary Robinson, the Honourable Mr Justice Lightman confirmed that the 1969 regulations made no provision for amending the application or accepting the application with modifications. He held that it is the duty of the registration authority to determine the status of the land the subject of the application, but stated that there was no reason why there should not be registration of a lesser area than that shown on the application if there is no substantial difference, and there may be no difference if the reduction in the area causes no irremediable prejudice to third parties.

Implications under the Human Rights Act

36. Article 1 of the first protocol – The use of land registered as a village green is severely limited so far as the landowner is concerned. The owner of the land may object on the grounds that it is an infringement of his human rights to the peaceful enjoyment of his possessions. However, although the registration of the land as a green restricts the use of a landowner, it does not deprive him of legal ownership and his interests must be balanced with the public interest. This right is a qualified right and although registration may infringe his enjoyment of his land, this is permitted as it would be necessary by virtue of the legislative provisions.
37. Article 6 – Any decision taken by the council is subject to subsequent control by judicial review if unlawful, irrational or unreasonable. This therefore provides for an appropriate appeal mechanism and satisfies the article.

EQUALITY AND DIVERSITY

38. The council, as a public body, is subjected to taking due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between people. This is known as the equality duty. Equality and diversity issues have been assessed through an equality impact assessment. It is considered that there will be no impact to any of the groups noted under the Equality Act 2010 (protected characteristics: age, disability, gender reassignment, marriage/civil partnership, pregnancy/maternity, race, religion/belief, sex and sexual orientation).

PROPERTY IMPLICATIONS

39. There are no property implications as a result of this report.

SECTION 17 CRIME AND DISORDER ACT 1998

40. It is not anticipated that the options placed before the committee will have any implications under the Crime and Disorder Act 1998.

OPTIONS

41. Options open to the committee are as follows:
- a) If the application satisfies all the statutory conditions for registration – the land may be registered as a town or village green.
 - b) If the application fails to satisfy one or more of the statutory conditions for registration – the application must be rejected.
 - c) If only part of the land satisfies all the statutory conditions for registration – that part of the land may be registered as a town or village green.
 - d) If the evidence is contradictory – the application may be referred to an independent inspector to review the evidence and, if appropriate, seek additional or oral evidence or hold a non-statutory public inquiry. The recommendation of the inspector can then be reported back to the committee for decision.

RISK MANAGEMENT

42. A considerable volume of evidence has been submitted and the parties have had an opportunity to comment on the body of evidence produced. All evidence submitted to the council at the time of writing has been accepted and considered. The application must be determined strictly on legal issues and evidence.
43. If the application is rejected the applicant can seek a judicial review if he or she believes the decision was wrong in law or procedurally improper.
44. If the application is rejected, the implications are that access to the land in question can be prohibited to members of the public.

45. If the application is partly or completely accepted, it will prevent the owners of the permitted land from developing it or using the land in a way that would exclude members of the public using the land for legal sports or pastimes, and the council have considered the equality implications through the equality impact assessment process. Registration may have an impact on the future potential value of the land, however, it would not prevent the land being used in the manner it was in the 20 year period as detailed in the application and would not devalue it beyond its current value for its use during the 20 year period.
46. If the application is accepted, any person aggrieved by the registration of the land as a town or village green has a right of appeal to the High Court which may quash the decision if he can satisfy the court that a mistake has been made or if the court deems it just to rectify the register.

EVALUATION

47. The application is made under Section 15 of the Commons Act 2006
48. The statutory conditions for the land to be registered as town or village green is that the land has been used:
 - 1) by local inhabitants;
 - 2) for lawful sports and pastimes;
 - 3) as of right;
 - 4) for not less than 20 years;
49. For the claim to succeed the applicant must prove that, on the balance of probabilities, all four statutory conditions are met. If any one condition is not proven then the application must fail. Each part is evaluated in turn.
50. Evidence submitted:

Prior to evaluation of the evidence and objections submitted it is necessary to give clear detail of that which has been supplied by members of the public in support of the application. The reason for this is it has given in two formats that sometimes duplicate the information submitted or do not provide detail concerning certain aspects of the criteria detailed above, but could be seen to assist with others. The evidence comes in two formats two these being a questionnaire using the Open Spaces Society (OSS) template and a short questionnaire devised initially as a survey of use of the park. The survey was carried out in 2010. Of these, the OSS format offers the greater level of information, but latter could be seen to add weight to specific criteria such as use by local inhabitants and lawful sports and pastimes.

In analysis of the information it is seen that there are 30 OSS questionnaires and 128 user survey questionnaires submitted with the application. Of the 128 user survey questionnaires, three of those answered are by people who have also filled in the OSS document, thus duplicating and distorting the data analysis process. As such these should be discounted as they do not offer any additional information. It should be pointed out it is not thought that this has been done intentionally.

A significant number of inhabitants of any locality, or of any neighbourhood within a locality

51. The term “*significant number*” has never been defined, but it has been accepted that it did not have to be a substantial or considerable number. What is relevant is that the land is used by inhabitants in general rather than occasional use by just a few individuals as trespassers. If a neighbourhood is small then only a handful of users may suffice provided they can give evidence of their own and others observed using the land during the 20 year period.
52. The “*locality*” or “*neighbourhood*” must be an identifiable area. It can be a parish, a village, a town or some other area that can be recognised as a community in its own right.

Applicant's evidence

53. The locality detailed in the application is Cowes parish. Of the 155 useable pieces of evidence submitted to justify Northwood Park being registered as a village green it is seen that 134 of those people said to be using the park live within the Cowes parish. The remaining 21 people live outside the area and as such can not be used to demonstrate use by inhabitants of the neighbourhood within the locality.

Objector's evidence

54. The objectors make no comments regarding the locality or neighbourhood in reference to this application.

Evaluation of evidence

55. The locality detailed in the application is the parish of Cowes, this is a recognised parish detailed on OS maps and as such is seen to be legitimate. To satisfy this criterion it is necessary for applicant to demonstrate that a significant proportion of Cowes use Northwood Park. From looking at the evidence it is seen that only 134 of those who have submitted information live in the parish of Cowes. This in itself is only a small proportion of the population of Cowes. However in 30 OSS documents it is seen that the area has a wider use beyond those who filled in this document. This would increase the number to a far high proportion of the Cowes population. This could be increased to an even higher number given the park's location and accessibility (detailed on the maps submitted with the application). It is also seen that the general consensus of all objectors' or supporters' information that this is a piece of open ground made accessible to the locals. Because of this, it is considered that a significant proportion of locals could use it for pastimes and recreation.

CONCLUSION

56. The applicant does appear to **have proven** that, on the balance of probabilities, use of the land is by a significant number of inhabitants of a locality or neighbourhood within a locality for the purposes of the definition of Section 15 of the Commons Act 2006.

Statutory condition 2.

For lawful sports and pastimes

57. The term “*lawful sport and pastimes*” can include all manner of activities, organised or unorganised, formal or informal, continuous or intermittent, all year round or seasonal. Activities such as walking with a dog, playing with children, studying wildlife, picking blackberries and strolling about are all acceptable activities for a modern village green.

Applicant’s evidence

58. The application and supporting questionnaires describe a number of activities that are undertaken on the site and that can be described as lawful sports and pastimes. These range from walking and dog walking, to watching nature and photography. The full list of activities is detailed in the summary of statements in Appendix D.

Objector’s evidence

59. There is no opposition from the objector to the claim that lawful sports and pastimes have been carried out in Northwood Park.

Evaluation of the evidence

60. From evaluation of the evidence submitted it is seen that some statements show that the area is used for short cuts, this is not considered to be a lawful pastime. It is also seen that bowls and tennis is described as an activity. Whilst they are considered to be lawful it is presumed they would have been carried out in areas excluded from the application by the applicant; and as such would not be considered to demonstrate proof of the area being used for lawful sports and pastimes. However, whilst some of the evidence can be discounted there is an overall proof of collective use for lawful sports or pastimes.

CONCLUSION

61. On the basis of the written evidence submitted, the applicant appears to **have proven** that, on the balance of probabilities, Northwood Park has been used for lawful sports and pastimes for the purposes of the definition of Section 15 of the Commons Act 2006.

Statutory condition 3

As of right

62. The term “*as of right*” requires the applicant to prove that those using the land for recreation have done so without force, without secrecy and without permission. The land must be easily accessible (not gained by breaking down fences) and the use be carried out openly (not by stealth or only by night). The landowner must be aware of the use and have done nothing to either object to or prevent the use nor have consented to the use.

For the purposes of this report it would be useful to also define the term ‘of right’. This means the user has been given the right to use the land by the owner, whether agreed or implied.

Applicant’s evidence

63. Of the applicant's evidence it is seen that only 30 responses offer information that may demonstrate that the area had been used as of right. Of these, three could be discounted as they are submitted by people who live outside the parish of Cowes and could not be considered to be part of the locality. The remaining 27 pieces of evidence state that they had not asked permission to use Northwood Park nor were they prevented from use at any point. They also state there were no fences or notices that may have prohibited use in the qualifying 20 year time period.

Objector's evidence

64. The objector provides several pieces of evidence that may demonstrate that the land has not been used "as of right" and has been used "of right". These are as follows:
- 1) They point to the fact the park was dedicated to the people of Cowes and the public has been licensed to access the land in accordance with the charitable purposes of the charity that owns the land since 1929. As such it is proposed that the public have used the land by licence and thus the public have had a legal right of access. This is said to be 'of right' not 'as of right'.
 - 2) The management of the park was given to Cowes Urban District Council; this was later passed to Medina Borough Council in 1978, and then the Isle of Wight Council in 1995. As such the land has been managed as a park for the public over the 20 year period stated in the application. The council no longer manages the park, but in the period it has, the relevant council sat as one of the trustees of Northwood House and Park for the purposes of managing the property.
 - 3) The public use of the park was regulated by the creation of bylaws. These prevented use of the certain areas and gave the right to restrict use of certain areas of the park for a specific use. Similarities are made here with Lord Justice Walker's comments on R (Beresford) v Sunderland City Council where it is said: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."
 - 4) The objector makes comparison between this application and the judgement given in Judicial Review in the R (Barcas) v North Yorkshire County Council and Scarborough Council. In this case Lord Justice Walker is quoted "Where Land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of the public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation."

Evaluation of evidence

65. The applicant bases their reasoning on the fact that people have used the area as of right because they have never been stopped or prevented in any way from using Northwood Park. This seems reasonable, but in the same way a member of public can also use any area of land specifically provided to the public for the purposes of recreation, without being approached to stop. This would not necessarily mean they were using it as of right as it may have been designated an open space etc. and as such the right of use had been given to them.

The objectors rely on previous precedent set in similar cases and the fact the council have managed the land for the purposes of public recreation and created bylaws for this reason.

It may be considered correct that the park was given to the public by deed of covenant and it may be argued that this means that the land is used 'of right', not 'as of right'. However, this is only true if the general public using the park are aware of this. Otherwise it is still possible for them to be thought to have been using the area 'as of right'.

The problem with the objector using *R (Beresford) v Sunderland City Council* appeal precedents is that it has since been thought in Supreme Court decisions that it can no longer be relied upon as reference. It is also noted the *R. (Barcas) v North Yorkshire County Council* and *Scarborough Council* has since been further appealed against at the Supreme Court and the latter judgement would be more relevant. However, it is seen that there are similarities in both cases in as much that the council has managed areas of land for public recreational purposes and in both it was thought that the public were using it 'of right' and not 'as of right'. The reason for this is the council were providing the space under the statutory framework of various acts such as the Housing Act 1936 or the Open Spaces Act 1906 etc. As such the right had been given to the public to use the space. This is not the situation with this particular case as no legal statute required the council to manage or provide the area for the public to use. As such it cannot be certain that the public had been given the right to use the area through a legal statute and were using the area 'of right' as opposed to 'as of right'.

The argument that the use of the land was regulated by the use of bylaws would be correct if the bylaws had been correctly advertised. A similar finding was found in the *Newhaven Port and Properties Ltd vs East Sussex County Council* High Court judgement. Here it was agreed that bylaws could be seen to regulate the use of an area of land thus have the ability to withdraw right of use or control it in some way and in doing so make its use 'of right' and not 'as of right'. However, it is necessary for the public to be aware of such bylaws and the council's ability to use such powers. This would have to be done through advertising the fact by appropriate signage. This is where this application is similar; the public were not made aware that of this and thus could be thought they have been using the area 'as of right'.

The point raised by the objector regarding the similarities of the *R (Barcas) v North Yorkshire County Council* and *Scarborough Council* case, and the application, is that the park is provided to the public by a deed and is obviously managed solely for these purposes. The Lord Justice Walker's comment may be thought to be relevant in relation to the use of the land whether under statutory trust or not. This has been

added to in some sense in the Supreme Court decisions regarding the case North Yorkshire County Council case. It suggests that there could be some inference given by the fact the council had been maintaining the land for the specific purposes of public recreation. As such, a right had been given and done so under a statutory power. Whilst this is not applicable here as the council had not maintained the park under statutory power, but as part of its agreed requirements as a trustee. However, following the Supreme Court reasoning it could be said the fact of maintenance by the council for the sole purposes of public recreation, it could also be implied that they and the trustees were giving the public the right of use and as such they could not have been using the area 'as of right'.

CONCLUSION

66. On the basis of the written evidence submitted the applicant appears **not to have proven** that, on the balance of probabilities, the whole of the applied for area of Northwood Park has been used as of right for the purposes of the definition of Section 15(2) of the Commons Act 2006.

Statutory condition 4.

For not less than 20 years

67. The “20 years” claimed must be the full 20 years without interruption. It is necessary to show that the land was available for use and the inhabitants used the land for recreation for the whole of the twenty year period.

Applicant's evidence.

68. The applicant relies on use during the 20 year period from 1991 to 2011 and continuing. The questionnaires and letters submitted indicate use through some or all of the qualifying period.

Objector's evidence.

69. The objector does not deny that the majority of the Northwood Park has been used for a 20 year period; but it questions smaller areas such as the following:
- The area that was the putting green as this area could only be accessed by paying customers. Labelled Y on Plan B in Appendix B.
 - The area under the park benches, the flower beds, the war memorial, the area that tree trunks occupy, and the old Ice House could not have been used for the 20 year period. The reason being these areas would not have been accessible or allowed to be used for lawful sports and pastimes.

Evaluation of evidence

70. From the information provided it would seem that the applicant has demonstrated he has use of most of the land detailed in the application for the given 20 year period. The 27 open spaces evidence gives detail of regular use of the area by the collective whole and demonstrates this is the case. However, it is seen that the area that was the putting green could not have been used over this period as access was restricted to paying customers.

The objector's statement that areas such as those under park benches, flower beds etc is not usable, is not sufficient to rebuff the applicants claim as it is not necessary to use every square centimetre of the land in question. This would not be possible and legal precedent shows us that large areas of the land can be inaccessible, but still be registered as a village green. The reason for this being they are seen to be a recreational asset, add to the ambiance and are part of the amenity that facilitates the use of the land for legal sports and pastimes. This is seen in the *Trap Ground* case where it was argued that a large area of the Trap Ground was a marshy pond and inaccessible. However, this large area of inaccessible land was still considered acceptable to register as a village green when the case was appealed to the Lords.

CONCLUSION

71. On the basis of the written evidence submitted the applicant appears to **have proven** that, on the balance of probabilities, the area of Northwood Park excluding the putting green labelled Y on Plan B in Appendix B, has been used for a period of not less than 20 years for the purposes of the definition of Section 15 of the Commons Act 2006.
72. On the basis of the written evidence the applicant appears **not to have proven** that, on the balance of probabilities, the area of the putting green in Northwood Park labelled Y on Plan B in Appendix B has been used for a period of not less than 20 years for the purposes of the definition of Section 15 of the Commons Act 2006.

RECOMMENDATION

Option (b) The application fails to satisfy one or more of the statutory conditions for registration – the application must be rejected.

APPENDICES ATTACHED

- [Appendix A](#) - Background acts.
- [Appendix B](#) - Plans.
- [Appendix C](#) - Application and supporting papers.
- [Appendix D](#) - Summary of supporting statements.
- [Appendix E](#) - Papers of objection.
- [Appendix F](#) - Responses to objections.

BACKGROUND PAPERS

Legislation

Commons Act 2006 http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060026_en.pdf
Commons Registration Act 1965 (as amended by CROWA 2000).
<http://www.legislation.gov.uk/ukpga/1965/64>

Equality Act 2010. http://www.equalities.gov.uk/equality_act_2010.aspx
Human Rights Act 1998. <http://www.legislation.gov.uk/ukpga/1998/42/contents>

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