

 <b>Nottinghamshire County Council</b>	<b>Report to Culture Committee</b>
	<b>2<sup>nd</sup> December 2014</b>
	<b>Agenda Item: 4</b>
<b>REPORT OF SERVICE DIRECTOR (HIGHWAYS)</b>	
<b>APPLICATION TO REGISTER A TOWN OR VILLAGE GREEN – LAND AT LEEMING LANE RECREATION GROUND, MANSFIELD WOODHOUSE</b>	

**PROPOSAL: APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN**

**LOCATION: BETWEEN WELBECK ROAD AND LEEMING LANE SOUTH (LEEMING LANE RECREATION GROUND), MANSFIELD WOODHOUSE**

**APPLICANT: MR C. A. BARTON**

### **Purpose of the Report**

1. To consider an Application to register land as a Town or Village Green (“TVG”) under section 13 of the Commons Act 1965, made to Nottinghamshire County Council as Registration Authority. The Registration Authority’s responsibility to determine the application is a quasi-judicial function and is separate from all other functions carried out by the Authority. The decision as to whether or not the application satisfies the criteria for registration must be based entirely on the evidence submitted. The land subject to the application is outlined on the plan attached at Appendix 1.

### **The Site and Surroundings**

2. The application land comprises of two separate fields divided by a mature hedgerow. To one side of the hedgerow (north-west side) the field comprises of rough grassland sloping down towards Welbeck Road, to the other (south-eastern) side the field is level, laid to grass and appears to be maintained as part of the Leeming Lane Recreation Ground. The land is open along its north western and southern boundaries. Photographs showing the application land are attached at Appendix 2.

## Background Information and Advice

3. The application was submitted by Clive Anthony Barton (now deceased), a resident of Pleasley, Mansfield, and was made to register land described by him as the “full area of Leeming Lane Rec” as a TVG (hereafter referred to as “the application land”).
4. Where land is registered as a Town or Village Green the right of the public to use the land for recreational activities is protected from then on. Land can only have the legal status of a TVG upon registration.
5. The applicant states that use of the land by “local inhabitants” was “as of right” by virtue of the Mansfield Woodhouse Inclosure Award (1854). Officers duly checked the Award which is held at the Nottinghamshire Archives office. However, it was found that the application land was **not** allotted as part of the Award as stated by the applicant. The Award map shows that it was the adjacent land (parcel 28a) that was awarded as a “place of exercise and recreation for the inhabitants of the said parish and neighbourhood”. Ownership of parcel 28a was allotted to the Church Wardens and Overseers of the Poor. The Awarded land was subsequently recorded as a TVG (being part of the registered land VG44). Relevant extracts from the Award are shown at Appendix 3.
6. The application land abuts onto the existing Leeming Lane Recreation Ground which was registered as a TVG on 1<sup>st</sup> August 1972, registration number VG44 (hereafter referred to as “the registered land”). Relevant extracts from the Register of Village Greens are shown at Appendix 4.
7. Three user evidence forms were submitted from residents living on Leeming Park and Highland Close. These forms refer to use of the “Recreation Ground” for various sports and pastimes commencing from 1944, 1963 and 1998 respectively. The named sports and pastimes listed are walking, kite flying, cricket, football, swingball, rounders, socialising, dog walking, sun bathing, mushroom picking, playing, gardening, watching wildlife, attending firework parties, sunbathing and exercise.
8. Although the TVG application was made under the provisions of the Commons Registration Act 1965, at the time the application was made (November 2006), certain provisions of the Commons Act 2006 had already come into force. In June 2008 advice was sought from Mr Jonathan Mitchell, Barrister at Ropewalk Chambers as to the procedure for dealing with the application during this ‘transitional’ period. Counsel duly advised that the appropriate tests to be applied were those set by the Commons Act 2006.
9. The applicant contends that the land became a TVG on the 26<sup>th</sup> November 2006. Accordingly, the test in subsection (2) of section 15 of the 2006 Act applies whereby;
  - A significant number of the inhabitants of any locality, or 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

There was no suggestion that the activities stated in evidence ceased at any time prior to the making of the application.

10. Committee must therefore decide whether or not the application fully meets **all** the elements of qualifying use for land to have become capable of registration as a TVG. The applicant must establish on the balance of probabilities (the civil standard of proof) that use had been;
- i) by a significant number of the inhabitants,
  - ii) of any locality or of a neighbourhood within a locality,
  - iii) having indulged “as of right” (i.e. without force, secrecy or permission),
  - iv) in lawful sports and pastimes,
  - v) on the land,
  - vi) for a period of at least twenty years,
  - vii) and that such use continued up until the time of the application.
11. Committee is required to either accept or reject the application solely on the facts. Any other issues, including those of desirability or community needs are not legally relevant and cannot be taken into consideration. Acceptance means the land will be registered. Rejecting the application would mean that no registration would take place.
12. Officers also requested that Counsel advise the Registration Authority as to the merits of the evidence submitted in support of the application, and whether the application should be subject to further consideration (by way of example: a public inquiry). In summary, Counsel concluded the following:
- “it appears to me that the evidence in support is lacking in the necessary precision to enable the Council properly to register the land as a town or village green. The witnesses are not clearly speaking only of the parcel of land, which is now sought to register, but also of the already registered green and of land to the south west of the access road. I do not consider that it can sensibly be said on the balance of probabilities that the parcel of land in question has been shown to have been used in the necessary manner by the requisite people for the relevant period”.
13. Based on the evidence submitted with the application, Counsel advised that the Registration Authority should refuse the application. A complete copy of Counsel’s advice is attached at Appendix 5.

## **Consultation**

14. Following the advertising of the application and formal notification to interested parties (April 2009), one objection was received from the landowner, Mansfield District Council (MDC). The objection can be summarised as follows;
- (a) The application does not demonstrate evidence of use by a significant number of inhabitants nor has the applicant demonstrated the locality being relied upon and the numbers using the land from that locality.
  - (b) It is in fact the registered land (VG44) that is being used as stated. The user evidence forms give no specific evidence for use of the application land but refer to the Recreation Ground as a whole. Two of the evidence forms specifically refer to use on the land that is already registered.

- (c) On inspection in 2009, it was observed that the application land forms a steep gradient on which some of the claimed activities would be “impossible”. The land was covered with grass 5ft high and no access existed from the adjacent back gardens. MDC state again that this suggests that the activities described in the user evidence forms relate to use of the already registered area.
  - (d) If the application land is deemed to be part of the Leeming Lane Recreation Ground then use cannot be “as of right” as use has been with permission of the District Council.
  - (e) The application land is subject to the District Council’s Open Space and Pleasure Ground byelaw which came into force on 5 August 1975. The byelaw was made pursuant to section 164 of the Public Health Act 1875 which enabled local authorities to provide land for public recreation and therefore use cannot be “as of right” *[N.B. The byelaw identifies two different areas of land; the “Leeming Lane Playing Fields” and the “Leeming Lane Recreation Ground”]*. A copy of the byelaw is attached at Appendix 6.
  - (f) The sports and pastimes listed in the user evidence forms are consistent with how the land is held by the District Council under the byelaw which regulates its use. The application discloses use that is consistent with this permission and therefore use cannot be “as of right”.
  - (g) MDC urges the Registration Authority to refuse the application.
15. As is legally required, a copy of the objection was forwarded to the applicant for comments. The applicant’s response is summarised as follows;
- (a) In living memory (since 1920) the land to the side of the steps has been completely open and used by the community for sports and leisure pursuits. It has been used as a sledging field for the town and is the best point to view the town below.
  - (b) There has always been a broken line of ancient mature hawthorns on the land, “you could always walk through it at any point”. The recent wire fencing was erected by the Woodhouse Society on behalf of the community to help protect the line of hawthorns. It forces people to walk around the hedge line rather than through it.
  - (c) There is no boundary nor has there ever been a boundary between registered land and the application land. “Local community members” sub-consciously refer to the “rec” as meaning the application land and the registered land as one. There has never been any action, indication or notice to indicate any difference.
  - (d) The Great Wake Hills appear very clearly in the Inclosure Award of 1854. The land has been used by the local community from early medieval times *[Officers would comment that this is not disputed. The awarded land (parcel 28a) is named within the award as “Great Wakehill” and subsequently formed the basis of the registration as a village green under reference: VG44]*.
  - (e) As a schoolboy the applicant walked across the whole area every day for twelve years.
  - (f) Up to 1970 sand was freely taken from the land by “everybody”.

- (g) 5 Evidence Forms and not 3 were submitted with the application [*Officers would comment that Mr Barton's application specifically refers to "3 completed and signed evidence forms" and that this was acknowledged upon receipt of the application*]. The applicant further states...The case of *MacAlpine Homes v Staffordshire County Council* (2002) held that the term "significant" in respect of the number of users does not mean a considerable or substantial figure. When determining whether the evidence shows use by a significant number of the inhabitants of any locality that would be very much a matter of impression...If 6 witnesses has been taken as the norm in these matters then there are 5 users plus myself as witnesses here [*Advice has been sought from Legal Services who comment that the High Court actually stated in McAlpine that the number of people using the land had to be sufficient to signify that the land was in general use by the local community*].
- (h) The sloped area is less than one quarter of the application land and has deliberately been left as a natural wild area giving users a "chance to quietly commune with nature".
- (i) The land was used by the community many centuries before the Mansfield District Byelaw in 1975.
16. Subsequent to the MDC objection, the District Council submitted the following statement in 2013; A lease made between Mansfield District Council and the Mansfield Woodhouse Millennium Green Trust (commencing on 6 September 2002 for a term of 99 years) demised the land for use as a Millennium Green for the benefit of local people. This further strengthens the District Council's assertion that the use of the application site cannot be "as of right". Clause 3.1 of the Declaration of the Trust (dated 21<sup>st</sup> October 1998) sets out that the land shall be used "for the benefit of the inhabitants and to be used forever as an area for informal recreation play and other leisure-time occupations a meeting area or place for community events and for any other lawful purpose consistent with these trusts and for the general benefit of the community". A copy of the Lease and Declaration of Trust (executed by Mr Barton as a Trustee) is attached at Appendix 7.

## The Legal Test

17. Committee must decide whether or not the claimed use fully meets **all** the elements of qualifying use for land to become capable of registration as a TVG. The applicant must establish on the balance of probabilities that use on the land had been;
- (i) *by a significant number of the inhabitants*
18. Only three user evidence forms were submitted with the application. Such limited evidence does not demonstrate that the land was in general use by the local community.
- (ii) *of any locality or of a neighbourhood within a locality*
19. For the purposes of the TVG legislation a "locality" means an administrative district or an area within legally significant boundaries. A "neighbourhood" is a non-administrative area which exhibits cohesiveness by virtue of its physical location and/or shared services/facilities. A plan ("Plan B") is referred to in each of the evidence forms as being "the extend of the neighbourhood of Leeming Lane Rec [sic]". The boundary drawn on "Plan B" does not correspond with any recognised "**locality**". However, Section 98 of the Countryside and

Rights of Way Act 2000 amended Section 22 of Commons Registration Act 1965 by inserting “or of any neighbourhood within a locality” as an additional type of locality. Equally, it is also noted that no evidence has been submitted as to what makes the claimed area a “**neighbourhood**”. Two of the evidence forms state that people using the land travel from “anywhere/everywhere” which suggests users come from outside the area shown in Plan B. Consequently, the applicant has failed to identify either a “locality” or a “neighbourhood within a locality” for the purposes of the legislation. A copy of the plan attached to the application and referred to as “Plan B” within the user evidence forms is attached at Appendix 8.

*(iii) have indulged as of right*

20. The Supreme Court judgment (R. (on the application of Barkas) -v- North Yorkshire County Council (2014)) considered the meaning of the phrase “as of right” in respect of TVG applications. The Court held that people taking part in recreational activities on land held by a local authority as a recreation ground under statutory powers (in that case under S.12(1), Housing Act 1985) did so “by right” rather than “as of right” and therefore any application to register a TVG on such land would fail on that basis. Accordingly, in this case, where the application land is owned by Mansfield District Council, who allocated the land (or at least part of it) as a “Pleasure Ground” for public recreation under the Public Health Act 1875, from 1<sup>st</sup> September 1975 use of that land is “by right” and is not “as of right”. However, as the byelaw does not contain any explanatory map or plan to show the extent of the land, there is some uncertainty as to exactly what land is affected i.e. the schedule to the byelaw only describes the land thus; the “Leeming Lane Playing Fields” and the “Leeming Lane Recreation Ground”.
21. Further clarification as to the extent of the byelaw land was sought from MDC who stated a ‘belief’ that the land edged red as shown on the plan at Appendix 9 constituted the “Leeming Lane Playing Fields”. Some further assistance in defining the relevant extents was found on historic Ordnance Survey maps published early last century. These maps identify one single field as being the “Recreation Ground” which suggests that the adjacent land was the “Playing Field” (in the absence of any other candidates). Extracts taken from an Ordnance Survey 25” map (published in 1917) and a 6” map (published in 1938) are attached at Appendix 10. On balance it appears more likely than not that the field 422 (as annotated on the OS maps) and fronting onto Leeming Lane constituted the “Leeming Lane Playing Fields” and therefore **is** subject to the 1975 byelaw. However, it is also noted that field nos. 422 and 424 were separated by a fence or hedgerow (which is still present). As field 424 fronts onto Welbeck Road and is steeply sloped, it seems less likely that this field was part of the “Leeming Lane Playing Fields” described in the byelaw. Furthermore, MDC have already stated that use of this land for sports and pastimes would be “impossible” due to the incline.
22. An aerial photograph taken in 1974 (one year before the byelaw came into force) confirms that field 422 was laid to grass in the manner of a municipal playing field, while field 424 appears to consist of rough grassland/vegetation. A copy of the 1974 aerial photograph is attached at Appendix 11. Therefore, on balance it seems less likely that the northern section of the application land was subject to the 1975 byelaw. However, it is noted that this land was also subject to a lease between MDC and the Mansfield Woodhouse Millennium Green Trust (Appendix 8). Millennium Greens were created in celebration of the new millennium with grant funding from the Millennium Commission. Under the terms of the lease the land is held as a Millennium Green as a place for “air and exercise” and to “meet others and pursue leisure activities and pastimes” for all persons living or permanently employed within the locality. As such, during the term of the lease (which commenced in 2002 for 99 years) use of the land

for such activities as are being claimed was by permission of the landowner (MDC) and was not “as of right”.

*(iv) in lawful sports and pastimes*

23. The activities undertaken by those who completed evidence forms are lawful sports and pastimes for the purposes of the legislation.

*(v) on the land*

24. The user evidence forms do not clearly identify the land and therefore do not sufficiently demonstrate use of the land.

*(vi) for a period of at least twenty years*

25. Only two evidence forms indicate use for the requisite period (1986-2006) in referring to use dating back to 1944 and 1963. Such limited evidence fails to make the case for the land having been used for a period of at least twenty years.

*(vii) and that use continued up until the time of the application*

26. All three evidence forms indicate use up until the application.

## **Other Options Considered**

27. Due to the nature of user evidence and the complexity of the law relating to TVG applications a public inquiry could be held to further test and clarify the evidence. The use of a public inquiry for such applications has been approved of by the courts as being in the interests of openness and fairness. However, given that use of the land up to the time of the application was undeniably “by right” rather than “as of right” there is no prospect that the application could succeed even if the evidence were tested at a public inquiry. The provisions of the Human Rights Act regarding the right to a fair hearing have been considered in reaching this conclusion.

## **Reason for the Recommendation**

28. The applicant has failed to demonstrate use by a significant number of inhabitants from the purported neighbourhood highlighted on “Plan B” (Appendix 8).
29. The applicant has failed to demonstrate that the area being relied upon is either a locality or a neighbourhood within a locality. This omission is important as the burden of proof for such an area lies squarely on the applicant.
30. Use of the application land has been “by right” and not “as of right” by virtue of the Mansfield District Council Byelaw (1975) and the lease between MDC and Mansfield Woodhouse Millennium Green Trust (2002).
31. The applicant has failed to demonstrate that the claimed lawful sports and pastimes occurred on the application land as opposed to other nearby land, including the already registered town/village green.

32. The applicant has failed to demonstrate that the land has been in use as a Town or Village Green for a period of twenty years.

## Statutory and Policy Implications

33. This report has been compiled after consideration of implications in respect of finance, equal opportunities, human resources, crime and disorder, human rights, the safeguarding of children, sustainability and the environment and those using the service and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

## RECOMMENDATION/S

1) It is **RECOMMENDED** that Committee rejects the application for the reasons set out above.

**Andrew Warrington**  
**Service Director Highways**

**For any enquiries about this report please contact:**

Eddie Brennan (0115 9774709)  
Definitive Map Officer

## Constitutional Comments (SJE – 21/11/2014)

This decision falls within the Terms of Reference of the Culture Committee to whom, by virtue of Council Resolution 2014/027, responsibility for the exercise of the Authority's functions relating to common land and town or village greens has been delegated.

## Financial Comments (SEM 21/07/14)

There are no specific financial implications arising directly from this report.

## Background Papers

Except for previously published documents, which will be available elsewhere, the documents listed here will be available for inspection in accordance with Section 100D of the Local Government Act 1972.

Leeming Lane Town or Village Green Application (Ref. NVG350) case file

# Nottinghamshire County Council Town or Village Green Register

### Electoral Division(s) and Member(s) Affected

Mansfield North  
Joyce Bosnjak  
Parry Tsimbiridis