



Gloucestershire
COUNTY COUNCIL



**COMMONS AND RIGHTS OF
WAY COMMITTEE**

10.00 AM

Monday 21 September 2009

MEETING ROOM 1

MEETING PAPERS



COMMONS AND RIGHTS OF WAY COMMITTEE

TIME: 10.00 am
DATE: Monday 21 September 2009
VENUE: Meeting Room 1, Shire Hall, Gloucester.

AGENDA

ITEM	TOPIC	CONTACT
1.	Apologies	Linda Love (01452) 425240
2.	Election of Chairperson- To elect a Chairperson for the ensuing year.	Linda Love (01452) 425240
3.	Minutes- To approve as a correct record the Minutes of the meeting held on 15 April 2009. Please note that the minutes were circulated to previous members of the Committee who agreed their content.	Linda Love (01452) 425240
4.	Public Questions- To answer any written or public question about the matters, which are within the powers and duties of the Committee. The closing date/time for the receipt of questions is 10.00am on Monday 14th September 2009. To answer any oral question(s) put by members of the public. Depending on the nature of the questions asked it may not be possible to provide a comprehensive answer at the meeting, in which case a written answer will be supplied as soon as reasonably possible after the meeting.	Linda Love (01452) 425240
5.	Members' Questions- To answer any written	Linda Love

members questions. The closing date/time for the receipt of questions is **10.00am on Monday 14 September 2009.**

(01452) 425240

6. **APPLICATION FOR REGISTRATION OF AN AREA OF LAND AT THE REAR OF CHRISTCHURCH AS A TOWN OR VILLAGE GREEN** – To consider the attached report of the Director of Law and Administration.

June Moores
(01452) 425099

RECOMMENDED

THAT the application by Terry Robson for the registration of land to the rear of Christchurch, Gloucester as a Town or Village Green pursuant to Section 15 of the Commons Act 2006 should be refused for the reasons set out in the Inspectors report dated 28 April 2009.

7. **APPLICATION FOR REGISTRATION OF AN AREA OF LAND KNOWN AS LAKE 104, FAIRFORD AS A TOWN OR VILLAGE GREEN** – To consider the attached report of the Director of Law and Administration.

June Moores
(01452) 425099

RECOMMENDED

THAT the application by Suzanne Jones on behalf of the Fairford Environment Society (the applicant) for the registration of an area of land known as Lake 104 Fairford as a Town or Village Green pursuant to Section 15 of the Commons Act 2006 should not be granted as the applicant has not shown that the land in question has been used for lawful sports and pastimes by the inhabitants of the locality in accordance with the statutory provisions.

NOTES

1. MEMBERSHIP- Councillors Allen, Booth, Cordwell, Hibbert, J Nash, Robinson, V Smith, Vines and Wheeler.
2. DECLARATIONS OF INTEREST-Members requiring advice or clarification about whether to make a declaration of interest are invited to contact the Monitoring Officer (Nigel Roberts Tel; 01452 425201/fax: 426790/e-mail nigel.roberts@gloucestershire.gov.uk) prior to the commencement of the meeting.
3. Will Members please sign the attendance list.
4. Please note substitution arrangements are in place as detailed in the Constitution.
5. If you have any general enquires relating to this agenda please contact Linda Love, Democratic Services Unit, Resources Department, Shire Hall, Gloucester. GL1 2TG. TEL. (01452) 425240. E-mail linda.love@gloucestershire.gov.uk
6. **EVACUATION PROCEDURE**-in the event of the fire alarm sounding please leave as directed in a calm and orderly manner and go to the assembly point, which is **outside the main entrance to Shire Hall in Westgate Street.** **Please remain there and await further instructions.**

REGULATORY BOARD
COMMONS & RIGHTS OF WAY COMMITTEE

6

AGENDA ITEM:

**APPLICATION FOR REGISTRATION OF AN AREA OF LAND KNOWN AS LAKE
104 FAIRFORD AS A VILLAGE GREEN**

The Commons Act 2006

Report of the Director of Law and Administration

1. Purpose of Report

To consider the following application:

Nature of application: Application for the registration of an area of land known as Lake 104 Fairford as a Town or Village Green.

Town of Fairford:

Name of Applicant: Suzanne Jones on behalf of The Fairford Environmental Society

Date of Application: 12th April 2008

2. Recommendation

That the application by Suzanne Jones on behalf of The Fairford Environmental Society ("the Applicant") for the registration of an area of land known as Lake 104 Fairford (which is shown numbered in red A -W on the map annexed hereto (6 A) as a town or village green pursuant to Section 15 of the Commons Act 2006 should not be granted as the Applicant has not shown that the land in question has been used for lawful sports and pastimes by the inhabitants of the locality in accordance with the statutory provisions.

3. Resource Implications

The legal costs in taking each application to the committee is in the region of £10,000.00. In addition, there are administrative costs in processing the application and the giving of the requisite statutory notices. Should any of the parties desire a "non-statutory public enquiry" before final determination by the registration authority, the costs will be significantly increased. In this case and objection was received to the application within the statutory period and a non statutory inquiry took place on the 19th to 24th January 2009 at the Community Centre, Fairford, concluding with a further one day hearing on the 11th February 2009. The Applicant and the Objector were both represented by Counsel.

4. **Sustainability Implications**

No sustainability implications have been identified with respect to this application.

5. **Statutory Authority**

Section 15 of the Commons Act 2006 provides for the amendment of the register of town or village greens maintained by the County Council as registration authority, where "any land becomes a town or village green".

6. **Departmental Contact**

This is June Moores, Lawyer, Highways, Legal and Democratic Services, telephone Gloucester (01452) 425099, email: june.moores@gloucestershire.gov.uk .

7. **General**

This is an application under Section 15 of the Commons Act 2006 which provides for the amendment of the Register of Town or Village Greens maintained by the County Council where "any land becomes a Town or Village Green". Any person may made an application to the Authority for the amendment of the register provided that the criteria set out in Section 15 of the Act for the establishment of a town of village green is met. The County Council is obliged to consider any such application, duly made, in accordance with the relevant application and to register any land should that statutory criteria be met.

8. **Report Description**

The area of land the subject of this application, is known as Lake 104 Fairford is about a half mile to the east of Fairford, and lies to the south of the main A417 road. This is an area of land covering some 40 hectares which is surrounded by a large lake, trees, vegetation and green space. The precise location of the land is shown on the plan attached to this Report at (...6...A) and numbered in red A-W. The plan also contains reference to a number of points on the ground, each identified with a letter, you will note in the Inspectors Recommendation that the witnesses whilst giving evidence at the non statutory public inquiry and Counsel in their submissions have referred to those areas by letter. The lake is a relatively recent creation, having been formed as part of quarry workings which finished in the 1980s and were landscaped – it is a significant issue as to precisely when they finished, and what sort of extent of work carried out in those final years. There are two islands within the lake. The boundaries of this application land are to the west (points A-T on the annexed plan 6 A) immediately adjacent to a public footpath; the footpath lies within the application site. To the south (points T to N) the boundary follows the northern bank of a waterway, the Coln Brook, itself flowing from the River Coln. The eastern boundary (points M to I) is a

fence line separating the application site from a further lake, whilst the northern boundary (points A to I) lies along hedging and the edge of a wood line. The land within the application site is open. At point N the land shelves in a very shallow manner into the lake; at other points the banks of the lake are relatively steep. There are no buildings presently on the site, although at some time in the recent past there have been. The Ordnance Survey plan shows structures at the south-east corner of the land that were used in connection with the extraction of gravel both from Lake 104 and from other pits – a track; a hopper; a conveyor; a grader; and a weighbridge, together with an electricity sub-station.

There are recorded public rights of way that run to and through the application land. They are presently shown on the definitive map held by Gloucestershire County Council as surveying authority. The public footpaths are shown with a dashed black bold line on the attached plan (6 B)e It is fair to say that the public footpaths have not always been fenced off as shown on the photographs annexed to this Report at (...C...C) and Members will also see from the video that some of the fences have been damaged.

Also the public footpaths have changed over the years some have been moved by diversion orders so that they might run the perimeter of the land from which it was intended to extract further sand and gravel.

8. **Background**

The Commons Act 2006 changes the criteria for registration of a new green which was established by the previous Common Registration Act 1965 (now repealed). Section 15 of the Act permits applications based on claimed use for 20 years or more to be considered and if appropriate for the land to be included in the register thus protecting its status for the future. The procedure which has to be followed is set out in the relevant regulations which are the Common (Regulations of Town and Village Greens) (Interim Arrangements) (England) Regulations 2007

9. Members should be aware of the difference between common land and village green. Common land is land over which another person is entitled to exercise rights of common or land which was historically considered to be waste of the manor and not subject to rights of common. Such land is normally in private ownership.

Rights of common are legal rights exercisable only by certain individuals (the commoners) who live in certain properties or in a certain area. These rights may include:

- Grazing sheep or cattle (herbage)
- Taking peat or turf (turbary)
- Taking wood (eseovers)
- Taking fish (picscary)

There is a common misconception that common land is land in public ownership that any person has the right to enter. This is not necessarily so and it was not until the Countryside & Rights of Way Act 2000 that the public were granted a legal right of access (on foot only) over registered common land.

10. Village Greens

Village greens are usually areas of land within defined settlements or geographical areas which are used for sports and pastimes. Unlike common land there is no general right of public access over village greens, which are instead reserved for use by the inhabitants of the neighbourhood or locality. A village green may be privately owned although in practice many greens are owned by the local Parish Council. Some greens may also have rights of common over them. In respect of this application the Applicant has applied to register the land in question, Lake 104 Fairford under Section 15.2 of the Commons Act 2006 as the Applicant says that a significant number of the inhabitants of any locality, or of 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.

11. Application and Background

11.1 The Applicant is representing many of residents and their children who have used the application land and has made an application for the registration of the area of land known as Lake 104 Fairford in the Town of Fairford in the Cotswold District in the County of Gloucestershire as a town or village green pursuant to Section 15 of the Commons Act 2006. By the application dated 13th March 2008 and actually officially recorded by this Council on the 15th April 2008 and made on form 44, the Applicant requested the commons registration authority of Gloucestershire County Council to register the land in question as a town or village green on the basis that the inhabitants of the locality have indulged in lawful sports and pastimes as of right for not less than 20 years on the land, the land becoming registerable on 12th April 2007, the date on which access to the land was prevented by the erection of a fence.

11.2 The Applicant supports its application in the case of Lake 104 Fairford with some 26 evidence questionnaires. Members should refer to page 13 item 21 and page 75 annex B of the Inspectors Report which mentions that the witnesses said that they have used the land to walk with and without a dog, pick blackberries, picnic, bird watch etc all of which are lawful sports and pastimes.

12. The regulations referred to above prescribe a procedure for dealing with applications for new town or village greens. Notice of the application must be given to the owner/occupier of the land and anyone likely to object to it. Notice has to appear in the local paper and to be advertised locally. In addition unless the authority feel that it is not reasonably practicable a notice

has to be affixed to any part of the land which is "opened unenclosed and unoccupied". There is a period of not less than six weeks for objections to be made to registration authorities. It is then required to consider any statement in objection if it is made in writing and signed by that person. The authority may consider any statement it receives before finally disposing of the application and if statements are received each party has to be given the opportunity to comment on the representations received. Subsequently, a report is prepared to the Director of Law and Administration for the members of the committee to consider in the usual way. It should be noted that there is no right of appeal against the authority's decision laid down in the legislation.

13. In this case formal notice of the application was given on 15th May 2008 and served in accordance of the requirements of the regulations. The authority advertised for objections to the application through the local newspaper on 15th May 2008. Also Notice of the application was served on the Applicant, Open Spaces Society, the Landowners and Local Council Members. Also the application was placed on deposit at Fairford Parish Council, Cotswold District Council and the Main Reception at Shire Hall Gloucester.

14. **Objections and Representations**

An objection was received on the 26th June 2008 and was served by Charles Planning Associates on behalf of Cygnet Investments. They gave various objections to the application, namely that:

- (i) Land which was substantially covered by water could not be registered as a Town or Village Green;
- (ii) The usage is insufficient to justify registration, starting too late, and (insofar as pastimes on the water are concerned) not being a lawful sport or pastime;
- (iii) Such usage as there was, was not as of right, being with force;
- (iv) An electoral ward cannot be a locality for the purpose of the Commons Act 2006;

15. **Legal Comments**

15.1 Having complied with the procedural requirements it is the County Council's duty as Registration Authority to consider the application, any objections received and dispose of the application by acceptance or rejection. To do this the committee must consider the statutory criteria contained in Section 15(2) of the 2006 Act as defined above. Under the 2006 Act any person may apply for a town or village green registration and this includes a body corporate or unincorporated (such as an ad hoc association of neighbours).

15.2 The circumstances in which applications may be made under Section 15(2), (3) and (4) are as follows:

Section 15(2) where use is continuing at the time of application.

This arises where 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 application.

Section 15(3) where use ended no more than two years before application.

This arises where a significant number of the inhabitants of any locality, or of any neighbourhood within a locality have similarly so indulged, that they cease to do so after 6 April 2007 but before the time of the application, and the application is made within two years beginning with the cessation.

Thus an owner of land which may have been used for qualifying activities after 6 April 2007 but is no longer so used, and who, before 6 April 2007, could safely develop his land provided no application to register had been made, has now to be sure either that there is no recent period of 20 years qualifying use which may be invoked or at least two years of non-use passes before he can safely develop his land.

Section 15(4) where use ended before 6 April 2007.

This arises where a significant number of the inhabitants of any locality or of any neighbourhood within a locality has similarly so indulged, but they have ceased to do so before 6 April 2007 and the application is made within five years beginning with the date of cessation of use.

In other words, Section 15(4) makes a special transitional provision where recreational use 'as of right' ended. Other special arrangements apply on the situation only, where construction works under planning permission affecting the land began before 23 June 2006.

When determining the application the relevant regulations which deal with the making and disposal of applications by the registration authorities are The Common (Regulations of Town and Village Greens) (Interim Arrangements) (England) Regulations 2007. These interim regulations make no mention of the machinery for considering the application where there are objections. In the past this has sometimes been done by a Panel of Members, or more normally by the holding of a local hearing, usually before a Barrister (or sometimes before a Solicitor or Planning Inspector). Sometimes termed as 'non statutory inquiries'. These local hearings are quasi-judicial in character and derive from the exercise by the registration authority of its ancillary powers under Section 111 of the Local Government Act 1972 i.e to do acts calculated to facilitate or are incidental or conducive to the discharge of their functions and such powers would cover the institution of an inquiry in an appropriate case.

In this instance as an objection was received and not resolve. Both parties were asked if they would like a non statutory hearing to be held and they agreed.

16. The Criteria for Registration of the Land as a Town or Village Green

Section 15(1) of the Commons Act 2006 enables any person to apply to register land as a Town or Village Green in a case where subsections 2,3 and 4 applies

Section 15 (2) applies where

- (a) a significant number of the inhabitants of any locality, or of 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
- (b) they continue to do so at the time of the application

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

16.1 A significant number

This term has never been defined but in R –v – Staffordshire County Council ex parte Alfred McAlpine Homes Ltd (2002) - Sullivan J said that 'significant' did not mean a considerable or a substantial number. He said that the correct answer is that what matters 'is that the number of people using the said land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers'. It is then very much a matter of impression whether user is by a significant number of the inhabitants of any locality or of any neighbourhood within a locality. If, of instance, the neighbourhood is a small one then only a handful of users may suffice provided they can give evidence of their own user and that observed by them in the case of others for the whole of the 20 year period.

16.2 The inhabitants of any locality, or of any neighbourhood within a locality

The origins of this lay in the fact that it has long been the common laws of England, before the law changed in 1965, that a customary right to indulge in sports and pastimes could only exist for the benefit of some legally recognised administrative division of the county otherwise it would be termed a right in gross which would be a right without limit on the number of people using it which could not support a claim to a Town or Village Green, Indeed, in Ministry of Defence –v- Wiltshire County Council 1995 Lord Justice Harman held that a locality had to be an administrative area known to the law, such as a parish or village.

It is perfectly possible for a neighbourhood to straddle more than one locality as in the Oxfordshire County Council –v- Oxford City Council 2006 known as

the Trap Grounds Case . In other words , no objection can be taken to straddling if an identifiable local community lies within the curtilage of more than one administrative area.

16.3 What then constitutes a neighbourhood within a locality

In Cheltenham Builders Ltd –v South Gloucestershire District Council 2003 Justice Sullivan stated that whereas the term locality in the context of Town or Village Greens meant a legally recognised administrative unit, a neighbourhood need not be an administrative unit and might include a housing estate.

The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word 'neighbourhood' would be stripped of any real meaning. If parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register as a village green, it would have said so.

16.4 Lawful sports and pastimes

The type of activity which historically was accepted had to be something more than a mere wandering as it is "local sports and pastimes" required to satisfy the tests and not "exercise or recreation". The types of activity included "dancing around the maypole and otherwise enjoying recreation, organised racing, dancing, horse riding, playing cricket, practicing archery and "playing all lawful village sports, games and pastimes". However, for a rate of recreational use to be upheld there has to be no commercial activity.

As for types of activity that now constitute sports and pastimes, the House of Lords in the Sunningwell case rejected the argument that these need to be communal or to include formal sports or organised events in order to justify registration. The informal modern activities such as dog walking and playing with children are as relevant for this purpose as traditional ones such as maypole dancing. So long as evidence is available of the clear pattern of recreational use, principally by local inhabitants, it does not matter what types of lawful sports or pastimes are indulged in. In the Sunningwell case, the evidence showed The Glebe had been used for solitary or family pastimes such as walking, tobogganing or family games but not for anything which could properly be called a sport. As a matter of language, the Court decided that "sports and pastimes" is not 2 classes of activity but a simple composite class which uses 2 words in order to avoid arguments over whether an activity is a sport or pastime. Also there is no requirement that 'lawful sports and pastimes' must be organised sports – Lord Hoffman held that dog walking or playing with children were the kind of informal recreation that may be the main function of a village green. It is however important that the user brings to the mind of the landowner (whoever he is) that a right to recreation is being exercised. Thus, a walk across a village green may be more consistent with the exercise of a right of way, which would not prove a general recreational

right. It is accepted that the lawful sport and pastime must take place on the land itself.

The concept of lawful sports and pastimes is very wide, based on centuries of experience. Lawful sports and pastimes are certain, reasonable and continuous recreational activities. The activity needs to take place on the land itself. So for instance bird watching from an adjoining garden does not qualify.

The lawful sports and pastimes may be either formal and structured, eg organised teams, or informal and unstructured eg children playing, a family walking, flying a kite, walking the dog, picking blackberries. There must be an established pattern of use and the use must not be 'trivial or sporadic'.

The judicial and commissioner decisions are numerous. Each case turns to its own particular facts. To help Members the following have found to be within the definition:-

Achery and shooting

Cricket, formal and informal.

Riding horses and ponies and racing.

Children playing.

Village dancing.

Maypole celebrations.

Fishing.

Football and rounders.

Sketching, drawing and painting.

Idling by the river by way of walking, fishing and picnicking.

Walking the dog.

Wandering and promenading by way of pastime recreational walking.

Taking together, and depending upon their inherent nature, the lawful sports and pastimes must have been exercised continuously, albeit perhaps seasonally, during the period specified in the application.

Therefore all the activities relied on by the Applicant are capable of being lawful pastimes.

17. The term "as of right"

17.1 This involves statutory prescription which is a legal process by which long user of another's land is converted into a legal right to use the land

As of right is at the heart of Town and Village Green Law. The meaning of the expression as of right remains far from clear. The claimant must, however, show that he has used the right as if he has used the right as if he were entitled to it, for otherwise there is no ground for presuming that he enjoys it under a grant. What it comprehends is user which is NOT by force, stealth or with permission of the landowner. In short (a) such rights cannot be acquired

by force; (b) the landowner must be aware of the user; and (c) the landowner must not have consented to the user

The essence of the rule is that the claimant must prove not only his own user but also circumstances which show that the landowner acquiesced in it as in an established right (*Sturges –v- Bridgman 1879*)

17.2 In *Sunningwell* the House of Lords held that those using the land as of right do not need an honest belief in their right to enjoy lawful sports and pastimes on the land – they could either have such a belief or be well aware that they were trespassers or have no view on the subject at all. The question is how the user would have appeared to the owner of the land. Put another way, it means that the user relied on has to be open and in a manner in which a person rightfully entitled would have used the land. Provided the landowner acquiesces in this without complaint or protest then, after 20 years, user is likely to have been as of right.

17.3 The most recent case looking at the term 'as of right' is *R –v- Redcar and Cleveland Borough Council ex parte Persimmons Homes (Teeside) Ltd (Redcar Case)* this case involves an issue whether or not locals defer to the landowners' superior use. If they do then the recreational user is not regarded as being as of right even though it may still be without force, stealth or secrecy. There was a new application involving land which had, until shortly before the application, been used (in part) as a golf club (the first and eighteenth holes and a practice course were all situated on the land). The unsuccessful claimant sought to judicially review the decision of the registration authority to reject the application on two grounds, one of which was on the basis that the land had not be used as of right since the recreational use of the land deferred to its extensive use as a golf course. In short the recreational use was giving way to the golf users.

17.4 Was there deferment to the landowner's use in this case? The objector argued that the various uses by the landowner of the land (see the Inspectors Report at page 51 item 82; that is permitting cattle and sheep to be kept on the land, fishing, cadet use, military usage, camping during the air tattoo, water skiing/shooting, archaeological use, untrammelled by the public use, demonstrated that the public in fact deferred to the landowner. The objector further argued that he behaviour of the public would not be perceived by the landowner as asserting a public right over the application land.

17.5 The Inspector felt that such deferment did take place and I would refer Members to page 72 item 127. The Inspector went on to say that looking at how the public used the land; the relationship between the two; and how the public asserted its rights (or failed to do so) a reasonable landowner would conclude that the public had not asserted a right to use the land for the relevant twenty year period, but had plainly acknowledged the landowner's better private rights.

18. Conclusion

The applicant has not demonstrated user as of right by the inhabitants of the neighbourhood of Fairford of the Application Land or any part of it for twenty years. The use of the land is “as of right” if it is neither by force, stealth or permission.

There is no significant evidence of permissive use of the land by the inhabitants of Fairford for lawful sports and pastimes, save insofar as Mr. Fletcher (a onetime owner of the land) may have allowed his friends or colleagues to go camping, fishing or water skiing on the Lake. The Inspector felt that the usage was insufficient to change the character of such local usage as did take place to permissive usage.

Use “by force” –the Inspector felt that signage indicated a lack of public rights over the application land, fencing made it apparent that the public access was not accepted and challenges indicated the same.

The Inspector felt that the public deferred to the landowner’s use and therefore must fail as in the decision of the Redcar case mentioned above.

19. Post Inspectors Report

Since receiving the Inspectors Recommendation this Authority has received representations from the Applicant and one of the witnesses Mr. Wardle. These representations have been sent to the objector who has also responded. I do not intend make any reference to these representations other than to attach them to this Committee Report so that Members may refer to them should they wish. As previously mentioned a non-statutory inquiry took place in respect of this matter in which both parties were able to present their case. The Inspector is a QC highly qualified in this area of law. He is totally independent and reached his conclusion based on the evidence given at the inquiry.

20. Recommendation

I recommend therefore that the Inspectors Recommendation that the application land should not be registered as a village green be upheld

Background Documents

Documents	Received
Application	Suzanne Jones – The Fairford Environmental Society
Objection	Charles Planning Associates on behalf of Cygnet Investments
Inspectors Report	Dated 17 th April 2009
Letter from Mr. Wardle	Dated 4 th July 2009

Letter from Mrs. Suzanne Jones	Dated 13 th July 2009
Letter from Charles Planning Associates	Dated 31 July 2009