

Application Number: **CLR/VG17**
Date Registered: **16 August 2013**
Parish: **Norton St Philip**
District: **Mendip**
Member Division: **Frome North**
Local Member: **David Fothergill**
Case Officer: **Andrew Saint**
Contact Details: **01823 359796**
asaint@somerset.gov.uk

Description of Application: **SECTION 15, COMMONS ACT 2006: APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN AT SHEPHERDS MEAD, NORTON ST PHILIP**
Grid Reference: **ST 7763 5579**
Applicant: **Norton St Philip Parish Council**
Location: **Shepherds Mead, Norton St Philip**

1. Summary of Key Issues and Recommendation(s)

1.1. On 13 August 2013 Norton St Philip Parish Council submitted documents purporting to be an application to register Shepherds Mead, Norton St Philip as a Town or Village Green. Those documents were received by the County Council on 16 August 2013. Following a number of amendments (discussed further below) they were confirmed as a duly made application. The extent of the application land is shown on the plan which accompanied the application (included here as appendix 1).

1.2. Objections were received to the application. The nature of those objections were such that they necessitated the holding of a non-statutory public inquiry.

1.3. The inquiry was held between 13 and 28 March 2017. Both the applicant and the objector called a number of witnesses and presented detailed submissions as to both the validity of the application and the sufficiency of the supporting evidence.

1.4. A copy of the Inspector's report is attached as appendix 2.

1.5. Based on the Inspector's findings, and for the reasons set out in his report, it is recommended that the application to register land known as Shepherds Mead, Norton St Philip as a town or village green be:

- i) accepted in so far as it relates to the land edged red on plan H9-2018-1 (appendix 3¹) and that that land be registered as town or village green; and
- ii) rejected in so far as it relates to the rest of the application land.

2. Background

2.1. By virtue of section 4 of the Commons Act 2006 (the 2006 Act) the County Council is a commons registration authority, in which capacity it is obliged to keep a register of town or village greens and to determine applications to register land as a town or village green.

2.2. Applications to register land can be made under Section 15 of the 2006 Act. However, since April 2013, the right to make an application has been restricted so that it no longer applies to land which is subject to a 'trigger event'.

2.3. Trigger events are defined in the 2006 Act² but typically relate to planning matters. For example, a town or village green application cannot be made in relation to land following the publicising of an application for planning permission relating to that land.

2.4. Following a trigger event, the right to make a town or village green application would only become exercisable again if/when there is a terminating event. As with trigger events, terminating events are defined in the 2006 Act³. In the planning application example of a trigger event given above, a relevant terminating event would be the withdrawal or refusal of the planning application. Whether or not any trigger events relate to Shepherds Mead is discussed in more detail below.

2.5. The application in the present case has been made under section 15(1) of the Commons Act 2006 where the circumstances in section 15(2) apply. This means that, in order to grant the application, the Committee has to be satisfied that a significant number of inhabitants of a locality, or of a neighbourhood within a locality, have indulged "as of right" in lawful sports and pastimes on the land which is the subject of the application for a period of at least 20 years and that they continued to do so at the time of the application.

2.6. The decision as to whether or not the land is registerable has to be made on the basis as to whether each of the elements in section 15(2) have or have not been satisfied on the balance of probabilities. There is no place therefore, in coming to its decision, for the Committee to have regard, for example, to the desirability or the suitability of the land for use as a town or village green. It must therefore disregard any such matters. This is a quasi-judicial process and the Committee does not have any administrative discretion in making its decision.

¹ This plan has been jointly provided by the applicant and the objector. They have both agreed that the red line accurately represents the area that the Inspector has recommended be registered as a town or village green. This agreement should not necessarily be taken as confirmation that either party accept the recommendation to be correct; only that the plan accurately reflects the geographical area described by the Inspector.

² Schedule 1A of the Commons Act 2006.

³ Schedule 1B of the Commons Act 2006.

2.7. There is no statutory right of appeal against the decision. It can only be challenged on ordinary public law grounds by way of judicial review or by way of an application to rectify the register to the High Court under section 14(b) of the Commons Registration Act 1965.

2.8. The effect of registration of land as a town or village green is that its status as such is conclusively established. That status cannot thereafter be changed on the basis that the landowner has other plans for the land which would be inconsistent with its status as a town or village green. The relevant owner continues to be the owner of the land after registration but their use of it is subject to the primary right of the local inhabitants to indulge in lawful sports and pastimes

2.9. At its meeting on 3rd February 2009 the Regulation Committee endorsed the County Council's process for assessing and determining applications to register land as a town or village green. This provides that, where the evidence does not at the outset clearly indicate a particular course of action, a full assessment of the evidence, for and against the application, should be carried out by an independent Inspector at a non-statutory public inquiry. Whilst such inquiries are not a legislative requirement under the Commons Act 2006, they may be carried out under ancillary powers contained in section 111 of the Local Government Act 1972. The Courts have indicated their approval of this being a reasonable means of assessing an application. The Court of Appeal in *R (Whitney) v Commons Commissioners (2004)* commented that, where there was a serious dispute, the practice of conducting a non-statutory public inquiry should be followed 'almost invariably'.

2.10. Where, as in this case, an inquiry is held it is not the role of the Inspector to determine the application but to advise the Council on its proper determination. Having held the inquiry, they submit their report containing their findings and conclusions to the Council with a recommendation as to whether or not, in their opinion, the application should be granted. The Council is not bound by the Inspector's recommendation, it is for the Committee, on behalf of the County Council as Commons Registration Authority, to make the decision on the application, having regard to the Inspector's report. However, in circumstances where a legally qualified and experienced inspector has heard all the evidence and reached a reasoned conclusion, it is suggested that the County Council would need a very good reason to make a decision which was contrary to the recommendation.

3. The Application

3.1. Documents purporting to be an application were received from Norton St Philip Parish Council on 16 August 2013. However, at that stage the County Council were unable to accept it as 'duly made'. Significantly the map which accompanied the application was not to the prescribed scale.

3.2. In accordance with Regulation 5(4) of the Interim Regulations⁴ the applicant was given an opportunity to remedy those deficiencies which had been highlighted to them. They revised their forms and submitted them to the County Council on 4

⁴ The Commons (Registration of Town and Village Greens)(Interim Regulations)(England) Regulations 2007.

September 2013. At this stage the application was confirmed as duly made (sometime later a further flaw in the application was identified, however this is discussed further below).

3.3. Having received the application, the County Council asked Mendip District Council and the Planning Inspectorate to confirm whether or not there were any trigger or terminating events affecting the application land. Both confirmed that no trigger events had taken place.

4. The Application Land

4.1. The Parish Council's plan showing the extent of the application land, known as Shepherds Mead, is included at appendix 1. The site is situated in Norton St. Philip and comprises approximately 4.82 hectares. The land slopes gently downhill from east to west with the slope being greater at the north end of the land and levelling out in the south. Until recently, there has been a mound of earth in the southern end of the land and some trees.

4.2. During the relevant period the land has, at times, been used variously to take a hay crop and to keep animals (sheep, cows and horses).

4.3. There are 4 main entrance or exit points onto the application land. These are located on Tellisford Lane, Town End and Upper Farm Close and in the north east corner of the site. Each of these access points, together with those rights of way shown on the Definitive Map as crossing the land, are shown on appendix 4.

5. Consultation and Objections

5.1. Following receipt of the application there was a statutory 6 week objection period during which time one letter of objection was received. That letter was written on behalf of both Ms Ford, the landowner, and Malcolm Lippiatt Homes Limited who have an agreement with Ms Ford to develop part of the application land.

5.2. The grounds for objection were lengthy and detailed but can broadly be summarised as follows:

- i) That the application was not properly made on account of discrepancies with the statutory declaration and accompanying map.
- ii) Notwithstanding point (i), the TVG application was not properly made until 4 September when it was resubmitted with additional evidence. By that date there was a planning application (ref: 2013/1821) affecting part of the site which would have acted as a trigger event.
- iii) Even if the planning application referred to in (ii) did not act as a trigger event an earlier planning application (ref: 2013/1045) would have done despite the TVG application land falling outside of the 'red line'.
- iv) That there is insufficient 'as of right' use to satisfy the criteria set out in section 15 of the 2006 Act.

5.3. The applicant put forward counter arguments in response to all of the above points.

5.4. As a result of the representations, and in particular the conflict in evidence relating to the level of 'as of right' use of the application land, the County Council considered it necessary to hold an independent inquiry.

6. The Inquiry

6.1. Mr Wilmshurst, a barrister specialising in town and village greens, was appointed by the County Council as inspector to conduct the inquiry. The inquiry ran from 13 – 28 March 2017 during which a considerable amount of evidence was heard. In addition both parties (i.e. the applicant and the objector) put forward very detailed submissions on various points of law. The evidence and submissions are discussed in some detail in the Inspector's report (appendix 2). It is important that the report is read and understood in full prior to any decision on this matter being made. However, in order to assist, some of the main issues considered at the inquiry and the Inspector's conclusions are briefly summarised below.

Was the application duly made

6.2. As mentioned above, application forms were initially submitted in August 2013. However, they were found at the time to be defective and the applicant was given an opportunity to correct them.

6.3. Amended documents were submitted in September 2013. At the time these documents were confirmed as a duly made application. However, by 2016 it had become apparent that the statutory declaration which accompanied the September 2013 documents was flawed. The applicant was given a second opportunity to correct their application by providing a properly worded statutory declaration. They submitted revised documents within one month of being informed of the flaw; i.e. by February 2016. At the inquiry it was argued that the revised February 2016 statutory declaration was also flawed and that therefore, even by March 2017, there was still not a duly made application relating to the application land.

6.4. Having considered all the arguments put to him and the relevant case law, the Inspector agreed with the objector that the documents submitted (i.e. those from August 2013, September 2013 and February 2016) did not amount to a duly made application. However, he did not agree that the applicant had already had nearly two and a half years to put the application right. On those occasions where errors had been highlighted the applicant put had updated their application within the timeframes that had been required of them; this had amounted to a total of less than two months. In light of this the Inspector went on to conclude that the applicant had not exceeded a reasonable opportunity to amend their application and should be given a last chance to perfect it (i.e. to provide an appropriately worded statutory declaration and plan to accompany their application).

6.5. On 22 March 2018 the County Council wrote to the applicant offering them a further opportunity to correct their application in line with the Inspector's recommendation. A correctly made statutory declaration accompanied by a plan to the correct scale was received by the County Council on 4 April 2018. The application is therefore deemed to have been duly made. Importantly, the various corrections have a retrospective effect in that, despite it containing errors, the

application is now considered to have been duly made on the date that it was first received by the County Council (i.e. 16 August 2013).

Trigger events

6.6. As referred to above, the objector identified two planning applications which they considered to be trigger events and which, in their view, were sufficient to remove the right to apply in relation to at least some of Shepherds Mead.

6.7. The first of these (referenced 2013/1045) was received and publicised by Mendip District Council in May 2013; i.e. prior to the TVG application being made. Planning application 2013/1045 sought permission for the erection of houses and garages within an area outlined red. None of that red area touched upon the village green application land. However, it was contended that the implementation of planning application 2013/1045 would have required the installation of a foul sewer connection across the claimed village green. Furthermore, the proposed development would also involve the construction of a new permissive footpath on the village green application site.

6.8. In relation to the first of these, the Inspector found that the location of the foul sewer connection would not have been ascertainable from the face of the application and that it therefore did not result in a trigger event.

6.9. In relation to the second matter, the Inspector found that no planning application was being made in relation to the area crossed by the proposed new permissive footpath. The construction of the path was simply a suggested condition within the application. This being the case it did not result in a trigger event

6.10. Irrespective, of the above arguments the Inspector also concluded that reference to the foul sewer connection and the permissive path within the planning application did not constitute a trigger event because they fell outside of the area identified as necessary for the proposed development (i.e. the area outlined in red) in the planning application. This being the case planning application 2013/1045 did not 'relate' to the village green application land and so could not be a trigger event for the purposes of the current village green application.

6.11. The Inspector was able to deal with the second planning application in a quicker fashion. That application does relate to a large part, but not all, of the village green application land. However, it was not received by Mendip District Council (the planning authority) until 28 August 2013, two weeks after the village green application had been made. A planning application only acts as a trigger event if it is received and publicised prior to a village green application.

6.12. In light of the evidence and submissions that he heard, the Inspector concluded that there were no trigger events which would have removed the right of the Parish Council to make their application on 13 August 2013.

Foot and Mouth

6.13. During the inquiry it was contended that, as a result of various orders and regulations, it was made a criminal offence to use the public rights of way in and

around the application land during the 2001 Foot and Mouth outbreak. It was argued that, as access to the application land was predominantly along these rights of way, that access would inevitably have involved a criminal offence. Based on this the objector went on to argue that use during the time of the rights of way closures would not qualify for the purposes of the current application. This would clearly be material to the question of whether or not the land had been used for lawful sports and pastimes during the 20 years prior to the application (i.e. 1993 to 2013).

6.14. The Inspector agreed with the objector that, during much of the foot and mouth outbreak, use of the footpaths would have been a criminal offence. However, section 15(2) of the 2016 Act (under which the application was made) does not require a would-be town or village green to benefit from a lawful access. While use of the footpaths may have been temporarily criminalised during foot and mouth, it was not an offence to use the rest of the land. As such, use of that land could continue to qualify for the purposes of town and village green registration.

Sufficiency of evidence

6.15. As mentioned above, in order for the application land to be registered the applicant needs to demonstrate that a significant number of inhabitants of a locality, or of a neighbourhood within a locality, have indulged “as of right” in lawful sports and pastimes on the land which is the subject of the application for a period of at least 20 years and that they continued to do so at the time of the application.

6.16. In this case the suitability of the parish of Norton St Philip as a ‘locality’ was not disputed. Argument in relation to the sufficiency of the evidence therefore related to whether or not the inhabitants of the parish of Norton St Philip had used the application land as of right, for lawful sports and pastimes during the period 1993 to 2013.

6.17. The applicant submitted 96 user evidence forms to the inquiry many of which were supported by additional statements. Of those who completed forms, 15 also gave oral evidence at the inquiry.

6.18. The objector submitted statements from 16 individuals of whom 10 gave oral evidence.

6.19. Much of the evidence from both parties related to the level and nature of use of the application land. Having considered that evidence, the Inspector concluded that more often than not use of the land constituted walking on ‘defined routes’ (by which the Inspector was referring to both the public rights of way shown on the Definitive Map and the walked routes around the perimeter of the field).

6.20. In some circumstances it is possible for use of defined routes to be qualifying evidence in terms of a town or village green application, but this is by no means inevitable. In determining whether or not use of a defined route is qualifying, one must consider how the matter would have appeared to the owner of the land. Would it have appeared as if a right was being asserted over the whole land? Use of defined routes must therefore be considered in the context of other use of the land. In this case, the Inspector was of the view that:

‘a reasonable landowner on the spot would not have understood in respect of the northern and central areas that a right was being asserted over the whole of the land. What was described by the oral witnesses in cross-examination simply did not convince me that I could make a finding that there was sufficient off path activity going on. What is left is use which is in my view in the nature of a right of way⁵’

6.21. In other words the Inspector found that the evidence was not sufficient to demonstrate that the northern and central areas of the application land had been sufficiently used for lawful sports and pastimes during the relevant 20 year period. As a result that part of the application land did not meet the criteria set out in section 15 of the Commons Act 2006 and was not capable of being registered as a town or village green.

6.22. However, the southern tip of the land, while part of the same field as the central and northern parts discussed above, was considered to be a distinct area which was used in a different way to the rest of the application land. The extent of the ‘southern tip’ is shown outlined red on the plan attached as appendix 3.

6.23. Evidence was presented to the inquiry that the grass in the southern tip was generally shorter than that on the rest of the field. In addition, there was a small mound⁶ which was an attraction particularly for children playing various games. Furthermore, this area was generally more intensively used by families.

6.24. In light of this the Inspector concluded that:

‘In contrast to the central and northern sections where I found that there was little off path activity going on, in the south I find that a reasonable landowner would have clearly understood that [the] more varied and mixed pattern of walking...combined with the persistent general use by local children (and parents) of the mound and the area south of it ... was an assertion of rights across the whole of that section.’⁷

6.25. The Inspector further concluded that

‘...I am satisfied on the balance of probabilities that the southern part of the land was used by a significant number of the inhabitants of the locality for lawful sports and pastimes. Further that such use was *as of right*⁸’.

7. Conclusion

7.1. The validity of the Parish Council’s application to register Shepherd’s Mead as a town or village green has been challenged on a number of grounds. Of particular note is the contention that:

⁵ Paragraph 713 of the Inspector’s report.

⁶ There was some dispute as to the origins of the mound. However, it was a significant feature which was on site throughout the 20 year period.

⁷ Paragraph 729 of the Inspector’s report.

⁸ Paragraph 731 of the Inspector’s report.

- i) the application land (or parts therefore) were effected by trigger events which meant that an application was not capable of being made; and
- ii) the application forms (including the necessary statutory declaration) had not been correctly completed and so the application was not duly made.

7.2. Having heard detailed submissions from both parties, the Inspector concluded that there had in fact been no trigger event. He did however agree with the objector that the statutory declaration accompanying the application had not been duly made.

7.3. There is provision within the regulations governing applications to register town and village greens for applicants to be given an opportunity to correct errors within their applications⁹. In light of this, and in accordance with the Inspector's recommendation, the Parish Council were given an opportunity to perfect their application. This has now been done and so it is considered that there is a duly made application to be determined.

7.4. Having accepted the application as duly made, the County Council is under a duty to determine whether a significant number of inhabitants of a locality, or of a neighbourhood within a locality, have indulged "as of right" in lawful sports and pastimes on the land which is the subject of the application for a period of at least 20 years and that they continued to do so at the time of the application.

7.5. A considerable amount of evidence relating to the use of the application land was heard over the 14 days that the inquiry sat. Having heard and considered all of that evidence in some detail, the Inspector concluded that there had been insufficient qualifying use of the northern and central parts of Shepherds Mead to satisfy the statutory criteria set out in section 15(2) of the Commons Act 2006.

7.6. However, the nature of the use in the southern tip of the land (shown outlined in red on appendix 3) differed from that of the rest of the site. Here the evidence was of a more varied and mixed pattern of walking together with persistent general use by local children and their parents. The inspector found the level of 'as of right' use by the inhabitants of Norton St Philip over the relevant 20 year period to have been sufficient to have led a reasonable landowner to understand that a right to lawful sports and pastimes was being asserted over the whole of the southern tip.

7.7. In light of his findings the Inspector has recommended that:

"Bearing in mind the type of activities which I have found to have been taking place I should think that the most appropriate recommendation would be the [Commons Registration Authority] to register as new town or village green all the land south of a point 2 metres to the north of the mound [as shown on plan H9-18-1].

My recommendation in respect of the rest of the land is that it should be rejected for the reasons I have set out above. However, this is all subject to the my recommendation at paragraph 89 above. At the current time the application

⁹ Regulation 5(4) of The Commons (Registration of Town and Village Greens)(Interim Regulations)(England) Regulations 2007

is, in my view, not duly made but the Applicant is entitled to a further period of 14 days to perfect the application.

The CRA should give reasons for its decision deal with the application in the way I have indicated. Those reasons can be described as “for the reasons set out in the Inspector’s Report.”¹⁰

7.8. Officers attended the inquiry and have subsequently given careful consideration to the Inspector’s report. The Inspector has had the opportunity to hear witnesses giving evidence and to ask questions of them himself. He has also been able to evaluate the documentary evidence and legal submissions presented to him. In light of his findings and conclusions, officers fully endorse the Inspector’s recommendations and these are reflected in the recommendation to the Committee.

8. Recommendation

8.1. That the application to register land known as Shepherds Mead, Norton St Philip as a town or village green be:

- iii) accepted in so far as it relates to the land edged red on plan H9-18-1 and that that land be registered as town or village green; and
- iv) rejected in so far as it relates to the rest of the application land.

¹⁰ Paragraphs 732-734 of the Inspector’s report.

List of Appendices

1. Plan showing the application land
2. The Inspector's report
3. Plan H9-18-1 showing the extent of the land recommended for registration
4. Plan showing access points and rights of way.

All other background papers including the application and the full submissions from both the applicant and objector are available on request from the relevant case officer.