

## **Gambling, Licensing & Regulatory Committee**

13 March 2017

Report of the Assistant Director - Planning and Public Protection

### **Application to Register Land as a Town or Village Green**

#### **Summary**

1. This report seeks Members' determination of an application to register land known as Holgate Community Garden and Play Park (also known as Upper St Paul's Terrace play area) as a town or village green.
2. The Council is the Commons Registration Authority under the Commons Act 2006 ("the Act") and administers the Registers of Common Land and Town or Village Greens. Under Section 15 of the Act the Council is able to register new land as a town or village green on application. The determination of an application must be based on whether the statutory criteria for registration are fulfilled.

#### **Background**

3. An application to register land at Holgate Community Garden and Play Park (also known as Upper St Paul's Terrace play area) as a town or village green was received by the Council on 14 September 2016 on behalf of Friends of Holgate Community Garden. The land is identified on the plan appended to the application.
4. If the land is registered as a village green, it will be subject to statutory protection and give local people the right to indulge in sports and pastimes over it on a permanent basis. The land must be kept free from development or other encroachments and nothing should be done which will interfere with these activities. Registration can therefore be destructive of the value of land to its owner, as the owner is severely restricted in what future use can be made of the land.
5. The relevant legislation for this particular application is the Act and its associated Regulations. Under the Regulations, the Council is under a duty to advertise an application that is duly made and notify the landowner (if known) and any person known to have an interest in the land. A period of time is allowed for objections to be lodged. If any

objections are received, the applicant is given the opportunity to comment on them. At the end of the consultation process, the evidence submitted for and against the application has to be considered and a decision taken on whether the application satisfies the statutory requirements for registration.

6. For the application to succeed, the Applicant has to prove, on the balance of probabilities, that certain statutory criteria set out in section 15(2) of the Act have been met. These are as follows:
  - (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.
7. It is for the applicant to establish that all the elements of the statutory criteria for registration are met. One of the criteria is that the usage of the land is required to be 'as of right' (and not 'by right' i.e. not by permission). This is an essential ingredient in an application for registration. An applicant must be able to show that the users of the land had no legal right to use the land but nevertheless did so as if they had such a right.
8. The Council as landowner of the application site and the proposed developer of the application site have objected that application to register should be rejected, as the use of the land has been 'by right' i.e. permissive, and not 'as of right'. This is on the basis that the application site has been held by the Council since 1979 for the specific purpose of being open space pursuant to its statutory powers as landowner.
9. The applicant was provided with a copy of the objections and given an opportunity to comment. The applicant responded that it accepts the objectors' submission that the use of the land has been by right and not as of right at and that being the case, it does not wish to take its application for registration further.
10. The handling of the application and the objections has been kept strictly apart by Officers.

## **Consultation**

11. The application was formally advertised and an objection was received from the Council in its capacity as freehold landowner of the application site. An objection was also received on behalf of the York Central Partnership as promoters of the York Central site which comprises the application site.
12. A comment was received in support of the application (after the end of the statutory consultation period).

## **Options**

13. Option 1 - Refuse the application.  
  
Option 2 – Not to determine the application.

## **Analysis**

14. The Supreme Court has held that where land is held and laid out as public recreational land by a local authority pursuant to e.g. Public Health Acts or the Open Spaces Act, the public have a statutory right to use that land for recreational purposes. Therefore, their use is pursuant to that statutory right to do so, and so is 'by right' rather than 'as of right' i.e. it is regarded as a use with permission.
15. The Council acquired the site in 1973 through use of compulsory purchase powers. In 1979 the Council resolved to appropriate the site for the purposes of s.120 (1)(b) of the Local Government Act 1972. Section 120(1) (b) of the Local Government Act 1972 allows a principal council to acquire land by agreement for the benefit, improvement or development of the area. In 1979 the Secretary of State for the Department of the Environment and Transport consented to the appropriation by the Council of the site under section 47 of the Housing Act 1957 for the purpose of open space. The Council appropriated the site in November 1979 for the purpose of being open space and has since then held the site for open space.
16. The effect of this factual position is that members of the public are legally entitled to use the land 'by right'. On the facts of this case therefore, as usage of the land is 'by right' and not 'as of right', the statutory criteria for registration cannot be met.
17. Defra guidance states that applicants do not have an automatic right to withdraw applications and that the registration authority has discretion

either to take no further action on the application, or to go ahead and determine the application, based on the evidence available.

18. Given that one of the objectors to the application is the Council itself, Officers on the part of the registration authority consider that it is appropriate for the application to be formally determined even though the applicant does not wish to progress the application.
19. It is common practise for a registration authority to appoint an independent person to advise it (usually by way of a public inquiry) as to whether an application should be accepted or refused when there are objections or other concerns about the fulfilment of the statutory criteria for registration. There is particular merit in this approach when the Council is both objecting as the landowner and sitting in a quasi-judicial capacity to determine an application, as it removes any perception of adverse conflict of interests.
20. Although it may be that there is an arguable case in respect of all the other statutory criteria which could be tested by an independent person, Officers on the part of the registration authority consider it unnecessary to undertake this process in this particular case, as regardless of the determination of other elements of the test, the requirement for usage 'as of right' cannot be satisfied. That being the case, the land does not fall to be registered as a town or village green.
21. Therefore, it is recommended that the application be refused because the statutory criteria for registration cannot be met. Option 2 is not recommended.

## **Council Plan**

22. This report supports the council plan priorities of "*a prosperous city for all; a focus on frontline services; a council that listens to residents*". In particular, through following the correct procedures for this application the council has engaged with the local community.

## **Implications**

23. The implications arising directly from this report are:

**Financial** - N/A

**Human Resources (HR)** – N/A

**Equalities** – N/A

## **Legal –**

Officers' recommendations and conclusions are based on relevant legal principles and case law.

Under the Act, there is no statutory right of appeal to the Secretary of State against the Council's decision and the only challenge to a decision made by this Committee would be through the process of judicial review.

**Crime and Disorder – N/A**

**Information Technology (IT) – N/A**

**Property – N/A**

**Other – N/A**

## **Risk Management**

24. Members are aware that any decision which is unreasonable or unlawful could be open to legal challenge resulting in loss of reputation and potential financial penalty.
25. The report details the options available to the Committee in determining the application and recommends that a decision be reached. Provided the decision complies with the proper grounds for considering the application as set out within this report there are no known risks involved with this recommendation.

## **Recommendation**

26. To refuse the application.

Reason: As one of the statutory criteria for registration has not been met.

## Contact Details

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	<b>Report Approved</b>	✓	<b>Date</b> 3 March 2017

<b>Wards Affected:</b> Holgate
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## Annexes:

Annex 1 - Application by the Friends of Holgate Community Garden for the Registration of Land as a Town or Village Green received 14<sup>th</sup> September 2016