CITY OF YORK COUNCIL

Licensing and Regulatory Committee

5 March 2010

Report of the Director of City Strategy

APPLICATION TO REGISTER LAND KNOWN AS FULFORD CROSS GREEN, YORK AS A TOWN OR VILLAGE GREEN

Summary

1. The purpose of this report is to consider an application under Section 13 of the Commons Registration Act 1965 ("the 1965 Act") to register land known as Fulford Cross Green, York as a town or village green. The extent of the application is illustrated on the plan attached to the application at Annex 1 (outlined in green). Copies of all the documents submitted in connection with the application are annexed as 1 to 5.

Background

2. The procedure for submitting and determining the application is set out in The Commons Registration (New Land) Regulations 1969 ("the Regulations"). If the application land comes within the statutory definition of a town or village green, the Commons Registration Authority must register the land as such in the register of town or village greens maintained by it in accordance with the 1965 Act.

3. The Council, acting as the Commons Registration Authority, must determine the application. The responsibility is to decide whether or not the land subject to the application satisfies the statutory criteria for registration based on the evidence submitted. The Council's Constitution provides for the application to be determined by this Committee.

4. Consideration of applications for town or village green registration is a quasi-judicial matter. Therefore the Committee is not allowed to make a decision based simply on what it thinks would be the best outcome. The decision must be based strictly on the evidence and take into account only the material considerations and ignore all irrelevant matters. In this case, the Council is also the freehold owner of the application land. In determining this application, the Council must separate its duty as Registration Authority from its function as landowner. Members must not permit the fact that the Council owns the land to influence their decision.

5. In anticipation of any argument that the Council has a conflict of interest as landowner and cannot independently determine the application, this

application has been carefully handled. It would not be appropriate for the same officers to be involved in objecting to the proposal as landowner and then advising the Committee on how the application should be determined. Therefore, a strict division – or Chinese wall – has been set up amongst the officers and this separation has been observed by officers of the Council since the application was received.

6. The application was made by Dr Fiona Johnson of 23 Fulford Cross, Fulford, and York to register land known as Fulford Cross Green (the 'application land') as a town or village green.

7. The applicant claimed that the land became a village green on 31 August 2003. It is claimed that it has been used by local residents for recreational activities such as football, cricket and children playing. These activities are claimed to have been exercised as of right for a period in excess of 20 years. The application was supported by a statutory declaration by Dr Johnson, a statement, photographs and 31 statements of use from supporters (including the applicant) in the form of completed proforma questionnaires. There was also a plan showing the application land (annexes 1 and 2). Annex 2 available on request.

8. The Council is freehold owner of the application land. A statement of objection was received from the Head of Property Services on behalf of the Council as landowner (Annex 3). The Council denied that the activities set out above have taken place in the way stated by the applicant for the relevant period by a particular neighbourhood within a locality, and argued that the recreational use of the application land had been permissive. The applicant responded to the Council's objection that residents have never been given permission to use the land or been discouraged or prevented from doing so for the relevant period; that the Council's maintenance of the land does not undermine their use of the land 'as of right'; that Fishergate Ward is an administrative unit and that Fulford Cross represents a distinct neighbourhood by virtue of its isolation and strong community spirit (Annex 4).

9. It is understood that the applicant moved to London at around the end of 2006, with the application unresolved. The applicant did not leave a forwarding address and the Registration Authority has been unable to contact her in connection with this application. It is, however, incumbent on the Registration Authority to determine the application, even if the applicant does not pursue it. In circumstances where the applicant has moved away, Defra advises Registration Authorities that those individuals whose evidence questionnaires supported the application should be given the opportunity to take over the application. Letters have accordingly been sent to all the original supporters but none has been willing to take on this function.

10. As the application must be determined, it is therefore necessary for the Registration Authority to determine the application on the basis of the information that has been put forward on behalf of the applicant and the objector. Although a practice has developed amongst local authorities whereby the Registration Authority appoints a legally qualified independent inspector to conduct a non-statutory public inquiry into a disputed application and to report whether it should be accepted or not, there is no legal

requirement to do so. Given the absence of the applicant, and the absence of any supporter who wishes to take over the application, it is not considered that this is a case which warrants an inquiry to be held. It is considered appropriate to determine the application on the basis of the written evidence submitted.

11. While new applications to register town or village greens would be made and considered under the Commons Act 2006, this application falls to be considered under section 13 of the 1965 Act. In order for the application to succeed, the applicant must demonstrate that the application land has become a town or village green as defined in section 22 of the 1965 Act (as amended by section 98 of the Countryside and Rights of Way Act 2000). The burden of proof lies upon the applicant to satisfy the Registration Authority (the Council) on the balance of probabilities that all the requirements of section 22 of the 1965 Act are satisfied. These are that the application land is land on which "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 for a period of at least 20 years; and they continue to do so at the time of the application".

12. This can therefore be broken down into a number of elements:-

- 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.

13. It is imperative that all the above requirements are fulfilled and the burden of proof is upon the applicant. Failure on a single point fails the whole application.

Consultation

14. The application was received on 10 October 2003 and validated on 15 October 2003 and given the unique identifying number NEW/VG/20. A notice was published in the Yorkshire Evening Press on 11 February 2004 and also sent to all parties with an interest in the land. These were identified as City of York Council as Landowner.

15. The appropriate procedures were followed by the applicant for making the application and by the Registration Authority for advertising the application and for consultation.

Options

16. Option A - To accept the application and to register the application land as a town or village green.

17. Option B - To reject the application on the ground that having taken into account all the evidence and submissions put forward on behalf of the applicant and the objector, there is insufficient evidence that all the necessary elements of the registration criteria have been satisfied.

Analysis

18. The applicant must establish each of the following factors if their application is to succeed. They must show 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.

The burden of establishing these factors lies on the applicant and all of the factors must be strictly proved. The standard of proof is the balance of probabilities. Each of these factors is considered below (and slightly out of turn) on the basis of the information referred to in Annexes 1 to 5.

a) The locality or neighbourhood within a locality

i) Applicant's submission

The applicant describes the neighbourhood as Fulford Cross, within the locality of Fishergate Ward and claims that this is a distinct neighbourhood by virtue of its isolation from other residential land and its strong community spirit.

ii) Objector's submission

The objector comments that the applicant has failed to demonstrate either that those using the application land inhabit a locality that is an administrative unit known to law, or else a neighbourhood that is demonstrably a cohesive unit within a single such administrative unit.

iii) Assessment

Case law relating to village green applications has found that the locality to which a town or village green relates must be an administrative area known to law, such as a parish or borough. The area outlined in red and asserted by the applicant on Map 'FJ1' at Annex 1 could not considered to be a locality.

Therefore that the applicant has to satisfy the criteria 'neighbourhood within a locality'. A neighbourhood within a locality need not be recognised administrative unit. A housing estate can be a neighbourhood. However, a neighbourhood cannot just be any area drawn on a map; it must be a

cohesive, identifiable and recognisable area and must fall within a locality. It can span more than one locality. A significant number of the users must come from the neighbourhood.

The applicant has described the neighbourhood as Fulford Cross within the locality of Fishergate Ward and has delineated this area on map FJ1. There is no evidence to explain why part of Fulford Road falls within the area selected, other than by reason of its geographical proximity to the application land. On balance, however, it would seem reasonable to conclude that the majority of users live within a cohesive neighbourhood in the vicinity of the application land, as the questionnaire evidence suggests that most of the individuals claiming use of the application land are from Fulford Cross.

The Committee may therefore conclude that this element of the registration criteria is satisfied.

b) A significant number of inhabitants

i) Applicant's submission

31 statements in the form of completed questionnaires submitted as evidence in support of the application have been completed by residents of Fulford Cross, Fulford Road and Homeyork House.

ii) Objector's submission

The objector comments generally that the applicant has failed to demonstrate that the predominant use of the site is by the inhabitants of a particular locality, or of a particular neighbourhood within a locality.

iii) Assessment

Whether the evidence establishes qualifying use by a significant number of inhabitants is a matter for the judgement of the decision maker. The law has not prescribed a set percentage in these cases. The correct approach is that the number of persons using the 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. The use has to be by a significant number of inhabitants all the way through the 20 year period.

There are 89 dwellings in the neighbourhood as defined by the applicant (comprising 25 dwellings in Fulford Cross, 62 in Homeyork House and 3 in Fulford Road). The applicant provided 31 evidence questionnaires (including her own) in support of the application. Of these, 13 claim to have used the land for the full 20 years, 9 users claim to have used the land daily, 4 state 'nearly every day', and the others state their use is either once or more a week or frequent or regular or do not indicate their level of use. The conclusion reached as to whether use has been by a significant number of the inhabitants of the neighbourhood must have an evidential basis and not be based upon vague statements and speculation as to the intensity of the use. Evidence collected by proforma questionnaires is, by its nature, of less

assistance than, for instance, an individually drafted and detailed witness statement. It is not possible to conclude from the proforma evidence that the number of persons using the land was sufficient to signify to the landowner that the land was in general use by the local community for informal recreation.

The committee may therefore conclude that the applicant has failed to demonstrate that a significant number of the inhabitants of the neighbourhood within the locality have used the application land for the requisite period.

c) Indulged in lawful sports and pastimes

i) Applicant's submission

The evidence questionnaires refer to a number of activities that are claimed to have been carried out on the land. These include children playing, ball games and picnics.

ii) Objector's submission

The objector has not commented specifically on this element.

iii) Assessment

'Lawful sports and pastimes' is an expression not just restricted to organised games and activities. It has been held by the House of Lords that informal activities such as playing with children and informal cricket and football are sufficient to satisfy this element. The recreational activities claimed to have been indulged in on the land can be considered to constitute lawful sports and pastimes.

d) As of right

i) Applicant's submission

The information provided in the evidence questionnaires claims that residents have had free and open access to the land to carry out the various activities and have not been discouraged from using the land through fencing, notices or other means. They also claim that they have never sought or been given permission to use the land.

The applicant refers to the case of Sunderland City Council v Beresford which was considered by the House of Lords in 2003. The applicant refers to the encouragement of the use of the application land by provision of play equipment, planting of trees, and maintenance and states that in the Beresford case it was decided that this reinforced rather than undermined the impression that members of the public were using the land as of right.

ii) Objector's submission

The objector argues that it is a matter of fact that the Council and the school have during the period relied upon made it clear both by their own uses and

management of the site that specific permission would be required and was duly obtained for the planting of trees and for the installation of play equipment. Therefore the use cannot be as of right.

iii) Assessment

This element of the criteria generally causes the most difficulty in determining applications. To establish that the use of the application land is “as of right”, it is necessary for the applicant to provide evidence that the inhabitants have used the land without force, without secrecy and without permission.

It has been held by the courts that ‘as of right’ does not require users of the land to give evidence of their personal belief in their right of use. Further, use which is apparently as of right, cannot be discounted merely because users were subjectively indifferent as to whether a right existed or even had private knowledge that it did not. User is ‘as of right’ if it would appear to the reasonable landowner to be the assertion of a legal right.

Permission can be express or implied, but permission cannot be implied from inaction or acts of encouragement by the landowner. Toleration by the landowner, as distinct from permission, will not defeat a claim that use has been ‘as of right’.

The objection received from City of York Council as landowner states that the Council has been the freehold owner of the land since 1914. It does not appear to be in dispute that the Council is the landowner.

There is mention in some questionnaires of a fence around the application land but it is accepted that this was removed some time in the 1960s and therefore before the start of the 20 year period relied upon. There is no information to suggest that formal or informal recreation was enjoyed on the application land by force or secrecy. Nor is there any suggestion that the landowner prohibited the use of the land.

In this case, however, there is an issue about whether use of the application land was undertaken with the permission of the landowner. There is no evidence of an express licence to the users, so consideration must therefore centre on whether use was pursuant to an implied licence. The objection claims that during the 20 year period relied upon, permission was sought by the users to erect children’s play equipment and plant trees on the land and that such permission was duly granted. The objector has supplied to the Registration Authority documentary evidence to support its assertion that the school and the Council’s views and consents were sought by residents and the Ward Committee on the planting of trees and the installation of play equipment on the application land. This is at Annex 5.

The argument in the Beresford case referred to by the applicant was directed as to whether it was ever possible to imply a licence by a landowner to use land, and if so whether the facts of the case could properly be held to give rise to such an implication. It was decided that in principle it might be possible to imply a licence where the facts warranted such an implication. In this case, in view of the information provided by the objector, it is considered that the

evidential burden as to whether the user was as of right or by implied licence has not been discharged by the applicant.

In the circumstances, it would be reasonable for the Committee to conclude that the applicant has provided insufficient evidence to satisfy it that this element of the criteria has been discharged.

e) A period of at least 20 years continuing up to the date of application and continuing.

i) Applicant's submission

The applicant relies on continuous use during the twenty year period to 31 August 2003. Of the 31 questionnaires submitted in support of the application, all of them indicate use throughout some or all of the qualifying period. Seven of the users claim to have used the land for the 20 year qualifying period or more. Any use by the school of the land has been at most rare and minimal and has not impeded the continuous use of the land by local residents.

ii) Objector's submission

The objector comments that the applicant is unable to demonstrate uninterrupted user of the application land for the twenty year period prior to 31st August 2003 because:

> The land has always been considered and used as part of the adjacent Fulford Cross School site. It has been actively managed by the school and the Council over that time including regularly cutting the grass and maintaining landscaping, and from time to time the removal of unauthorised occupiers and parked cars and applications from local residents to use the site.
>
> Local residents have sought the Council's views and consents on the planting of trees and installation of play equipment on the site.

iii) Assessment

The Committee needs to satisfy itself that the activities were taking place as of right continuously from at least 1983 without a significant break. This finding must have a factual basis and cannot be based on speculation that the use has continued to a sufficient intensity throughout the relevant period. The proforma nature of the questionnaire evidence is insufficient to demonstrate a clear and compelling picture of the period or duration and frequency of any use of the application land. It is an inadequate evidential basis for finding that a significant pattern of recreational activity on a regular basis was sustained throughout the relevant period.

In the circumstances, it is considered that the applicant has not discharged the evidential burden of this test.

Conclusion

For the application to succeed, the applicant must prove her case on all of the elements set out paragraphs 11 and 12 above. The evidence suggests that, on the balance of probabilities, the claimed use of the application land was (a) by inhabitants of a neighbourhood within a locality and (d) for lawful sports and pastimes. On the question of whether the usage was (b) by a significant number of the inhabitants of the neighbourhood, (c) as of right and (e) occurred for 20 years, the evidence is far from conclusive. It would therefore be reasonable for the Committee to conclude that the applicant has not provided sufficient evidence to demonstrate that, as a matter of fact, these elements are properly and strictly proved. Only if the Committee is satisfied that all the registration criteria are satisfied, can it agree to registration. The Committee must refuse the application if it considers that not all the necessary elements have been satisfied.

Corporate Priorities

19. The Council as Registration Authority has an obligation to properly determine the claim that the land should be registered as a town or village green, regardless of the Council's corporate priorities.

20. Implications

Financial Such matters should not form part of the Committee's consideration.

Human Resources (HR) None

Equalities None

Legal For an application to succeed, each of the elements required by section 22 of the 1965 Act must be established. The burden of proof lies firmly on the applicant, who must provide sufficient evidence to prove, on the balance of probabilities, that as a matter of fact, all of the elements required to establish that the application land has become a town or village green are properly and strictly proved.

The decision as to whether the land should be added to the register of town and village green rests with the Registration Authority whose decisions are exercised by Members of the Licensing and Regulatory Committee. The decision of the Committee is a legal decision and is not a matter of policy. The 1965 Act gives the Registration Authority no discretion. If all of the conditions set out in section 22 of the Act are met, then the land is a village green and must be registered. If any one or more of the conditions is not met, the land is not a village green and the application must be refused.

Under the 1965 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 of the procedure and processes that have been applied to the determination.

Officers have applied the legal criteria referred to in paragraphs 11 and 12 above to the information put forward on behalf of the applicant and the objector. Officers' recommendations and conclusions are based on relevant legal principles and case law and in order to avoid any legal challenge, members are strongly advised to accept the recommendation in this report.

- **Crime and Disorder** None
- **Information Technology (IT)** None
- **Property** None
- **Human Rights Act 1998**

  It is unlawful for a public authority to act in any way which is incompatible with a Convention right. A matter to be considered is whether the Council's role as Registration Authority and owner of the application land is compatible with Article 6 of the European Convention on Human Rights.

  It s considered that there is no violation of Article 6 (right to a fair trial) for the following reasons:

  a) any decision taken by the Council is subject to subsequent control by judicial review. Although the statutory provision for judicial review is limited to the legality of the decision and not its merits, it constitutes sufficient compliance with the Convention; and

  b) primary legislation, namely the Commons Registration Act 1965, requires the Council to take the decision. Section 6(2) of the 1998 Act provides that public authorities can act in a way incompatible with Convention rights where the public authority must act because of the provision in primary legislation.

- **Other.** None

Risk Management

21. Potential risks are those of judicial review of the procedure and processes that have been applied to the determination.

Recommendations

22. That the Committee refuses the application on the ground that there is insufficient evidence to satisfy it that all the necessary elements of the registration criteria have been satisfied, in particular that it is not satisfied that usage of the application land for recreational sports and pastimes was by a significant number of the inhabitants of the neighbourhood as of right and occurred for 20 years.

Contact Details

Authors:

Verlie Riley
Commons Registration Officer
Tel No.551671

Sandra Branigan
Senior Assistant Solicitor
Tel No. 551040

Chief Officer Responsible for the report:
Michael Slater
Assistant Director City Strategy (Planning and Sustainable Development)

Report Approved Yes **Date** 22 February 2010

Specialist Implications Officer(s)
Legal
Name: Sandra Branigan
Title: Senior Assistant Solicitor
Tel No: 55 1040

Wards Affected: List wards or tick box to indicate all **All** √

For further information please contact the author of the report

Background Papers:

Application for registration referred to in paragraph 1

Annexes

Annex 1 Application plan showing the application land and neighbourhood
Annex 2 User evidence questionnaires – available on request.
Annex 3 Objection
Annex 4 Applicant's response to Objection
Annex 5 Objector's supporting evidence