

## BRISTOL CITY COUNCIL

## PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE

*Date 27 January 2014*

**Report of:** Service Director: Legal

**Title:** Application for land known as Wellington Hill Playing Field, Bristol to be registered as a town or village green made under the Commons Act 2006

**Ward:** Horfield/Bishopston

**Officer Presenting Report:** Tom Dunsdon, Solicitor, Legal Services

**Contact Telephone Number:** 0117 922 2546

**RECOMMENDATION**

Register the land known as Wellington Playing Fields, Bristol, outlined in red on the amended application map, as a Town Green in pursuance of the Commons Act 2006.

**Summary**

This report relates to an application for land known as Wellington Hill Playing Field, Bristol to be registered as a town or village green made under the Commons Act 2006

**The significant issues in the report are:**

As set out in the Report

**Policy**

1. There are no specific policy implications arising from this report.

**Consultation****Internal**

2. Not applicable

**External**

3. Notices of the application was served upon interested parties, published in the Bristol Post and on the Council's website, and posted on the application land. Notices were published in accordance with the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

## Context

4. On 13 October 2010, the Council, as the Commons Registration Authority (CRA), received an application dated 30 September 2010 to register land known as Wellington Hill Playing Field, Horfield, Bristol to be registered as a town or village green Bristol made under the Commons Act 2006.
5. The plan of the application land (as amended to exclude two small pieces of land adjacent to the land occupied by the Scouts) is set out in Appendix A to this report (the application land). On 22 June 2011 the Applicant confirmed that he had no objection to the application being amended to exclude the small piece of land adjacent to the land occupied by the Scouts. More recently the Applicant agreed to a further slight reduction of the land to allow access to the Scout Hut site.
6. The application in the prescribed form, Form 44, was verified by a statutory declaration of Mr Gavin Boby. The application is supported by two bundles of signed evidence questionnaires (220) relating the use of the land and a petition with numerous signatures.
7. The Applicant asserted that the land has been used by a significant number of inhabitants, in Horfield, Lockleaze and Bishopston, Bristol. The inhabitants had indulged as of right in lawful sports and pastimes for activities including cricket, football, cub-scouting and walking on the land for a period of at least 20 years (from 1989) under section 15(2) of the Commons Act 2006 and continue to do so at the date of the application.
8. An objection to the registration of the application land supported by documentary evidence was received from the landowner, Bristol City Council (the Objector) on 27 May 2011. The basis of the objection was *'the usage of the land by the public for 'lawful sports and pastimes' has not been 'as of right', as required by section 15(2) Commons Act'*.
9. The Objector's submissions were that the use of the Wellington Hill Playing Fields has not been as of right because use of the application land has been either: With the Council's permission, or by force, as evidenced by broken fencing and the ignoring of notices which had made the use contentious.

10. Both the Applicant and the Objector made further representations to the CRA. The Applicant contended that their evidence demonstrated the users have never sought permission to use the Playing Fields, and that the many activities for which they have used the field fall outside the purposes contemplated under the Education Act 1936. As regarding the use by force, the Applicant submitted that the Objector's own evidence confirmed that there has not been a fence where the Playing Fields abutted Wellington Hill since 1980, and access to the application land could not have been over through or around a fence.
11. As regards the use in contravention of notices making such use contentious, the Applicants denied that the notices were sufficient to make the use contentious. The Applicants called upon the Council to prove that the notices were displayed at all entrances, and when they were put up and removed.
12. In June 2012 PROWG Committee resolved to refer this matter to an Independent Inspector.
13. The Inspector, having gone through the documentation and additional representations and documents considered that some form of oral hearing would be necessary but that the hearing could be limited to the elements of the "as of right" versus the "by right" issue.
14. In February 2013 the Objector requested, and the Applicant agreed, that matter be held in abeyance pending outcome of i) the decision in *Newhaven Port and Properties Ltd v East Sussex Council (2013) EWCA Civ 276* and ii) outcome of a similar TVG application.
15. The Objector submitted witness evidence from Council Officers exhibiting photographs in support of its contention that there were signs erected on the site.
16. On 18 December 2013 the Objector informed the CRA that the Council as Landowner no longer wished to proceed with its objection to the application and that the objections were withdrawn. The CRA informed the Applicant of the situation.
17. Given that the only aspect of the use of the land which was being challenged was whether or not the land had been used "as of right" and given that that objection has now been withdrawn there is no need to proceed with the public inquiry if the matter can be determined on the papers.
18. An Assessment of the Evidence at Appendix B shows that all the elements of the statutory test have been met.

## **Proposal**

19. This Committee on behalf of the Council (as statutory Commons Registration Authority) has a statutory duty under the Commons Act 2006 and the regulations made thereunder to determine objectively whether or not the land in question should be registered as a Town or Village Green within the meaning of the Act.
20. Officers consider that the matter can be determined on the papers.
21. Officers recommend registration of the land known as Wellington Playing Fields, Bristol, outlined in red on the application map, as a Town Green in pursuance of the Commons Act 2006.

## **Other options Considered**

22. The other options considered are:
  - 21.1 Refuse the application
  - 21.2 Refer the matter to a Non -statutory Public Inquiry.
23. There is no legal basis to refuse the application at this stage.
24. It is a matter for the Applicants to satisfy the CRA that all the elements of the statutory test have been shown. The factual dispute between the parties as to the signage has not been tested at a public inquiry. Referring the matter to a public inquiry would in all likelihood resolve the dispute as to signage, however, as the Objector has withdrawn its opposition there is no evidence to counter that of the Applicant.
25. If the Committee decides not to follow the officer's recommendation, it must have sufficient reason for reaching a different conclusion.

## **Risk Assessment**

26. Whilst legal challenge in cases of this nature is the exception rather than the norm, it must be pointed out to members that there are, nonetheless, legal risks associated with this decision.
27. The risk is, however, low as it would be the landowner who would be most likely to be aggrieved by registration and it has withdrawn its objection to the application.

## **Public Sector Equality Duties**

28. Before making a decision, section 149 Equality Act 2010 requires that each decision-maker considers the need to promote equality for persons

with the following “protected characteristics”: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Each decision-maker must, therefore, have due regard to the need to:

- i) Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010.
- ii) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to --
  - remove or minimise disadvantage suffered by persons who share a relevant protected characteristic;
  - take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of people who do not share it (in relation to disabled people, this includes, in particular, steps to take account of disabled persons' disabilities);
  - encourage persons who share a protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- iii) Foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to –
  - tackle prejudice; and
  - promote understanding.

## **Legal and Resources Implications**

### **Legal**

29. The City Council in its capacity as Commons Registration Authority has responsibility under the Commons Act 2006 to determine whether the land or a part thereof should be registered as a green.

### **The Law**

30. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority (CRA) to register land as a town or village where it can be shown that:

*“A significant number of inhabitants of any locality, or any neighbour within the locality, having indulged as of right in law*

*sports and past times on the land for a period of at least 20 years”*

31. In addition to the above, the application must meet the test under Section 15(2) of the Act ie. use of land has continued “as of right” until at least the date of the application.
32. The Applicant must establish that the land in question comes entirely within the definition of a town or village green, in Section 15(2) of the Act. The Registration Authority must consider on the balance of probabilities whether or not the Applicants have shown that:

*a significant number of inhabitants of the locality or neighbourhood indulged in lawful sports and pastimes as of right on the land for a period of at least twenty years; and they continue to do so at the time of the application.*

33. In its capacity as Registration Authority the City Council has to consider objectively and impartially all applications to register greens on their merits taking account of any objections and of any other relevant considerations. Wholly irrelevant considerations must be left out.

#### “As of right”

34. User “as of right” means user without force, secrecy or permission (*nec vi nec clam nec precario*). User as of right is sometimes referred to “as if by right” and must be contrasted with use “by right”.

#### Procedure

35. The application has been made under Section 15(2) of the Act 2006. The regulations that govern this procedure are the (Commons Registration of Town or Village Greens) Interim Arrangements (England) Regulations 2007. The Growth and Infrastructure Act 2013 does not impact upon this application as the application was made some time before this Act came into effect.
36. The Committee has a written procedure which provides that where there is no significant conflict of evidence, or no significant objection, the case will be dealt with on the paperwork. The decision will be taken by the delegated officer or PROWG as appropriate. Whether or not an independent inspector needs to be appointed prior to determination, particularly where the Council is the landowner, is a matter for PROWG.

**Legal advice provided by:** Anne Nugent, Legal Services

37. Financial

**(a) Revenue**

In the event of any subsequent legal challenge any costs over and above those normally met from existing revenue budgets can be met from the central contingency.

**(b) Capital**

There are no policy implications arising from this report

**Financial advice (Revenue):** Tony Whitlock, Finance

38. Land

There are no policy implications arising from this report.

**Appendices**

Appendix A- Map of Application land

Appendix B – Assessment of Evidence

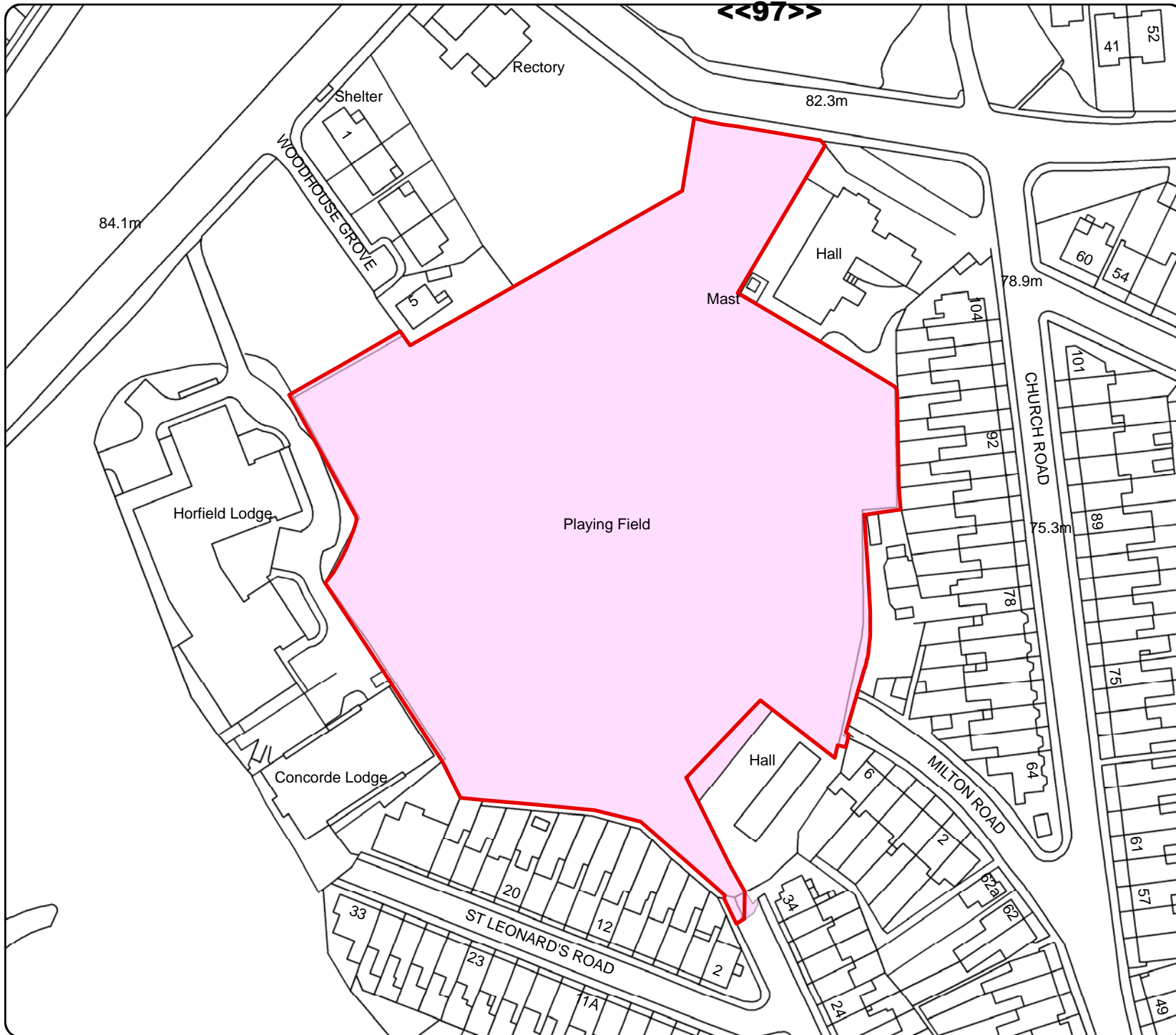
**Local Government (Access to Information) Act 1985**

**Background Papers:**



The application papers/ statement of objections/ response available at City Hall, College Green.

Section 15 Commons Act 2006

Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007



## Land at Wellington Hill

-  Land to be registered to Town and Village Green
-  Bristol City Council Ownership

SITE PLAN : To ensure boundary accuracy, please refer to deeds.

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Ordnance Survey 100023406.



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### PROPERTY

Plan No : LW/TMP/001  
 Prop ID Ref : N/A  
 Polygon Ref : N/A  
 Scale : 1:1,250@ A4  
 Date : 17/01/2014



### CORPORATE PROPERTY

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**Wellington Hill Playing Field, Horfield, Bristol.****Background**

1. This matter relates to an application dated 30 September 2010 and received On 13 October 2010 from Mr Gavin Boby to register land known as Wellington Hill Playing Field, Horfield, Bristol (the application land) to as a town or village green Bristol made under the Commons Act 2006 (CA 2006) .
2. A plan of the application land is set out in Appendix A to the PROWG report.

**Assessment**3. The legal test

Section 15(1) CA 2006 provides that ‘ Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies’. For the application to succeed the legal test under Section 15(2) (a) and (b) of the Commons Act 2006 must be met. The test is as follows – “That a significant number of the inhabitants of any locality, or of any neighbourhood in a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at 20 years, and they continue to do so at the time of the application”.

4. The burden of proof

The burden of proof lies on the Applicant to demonstrate that the criteria are satisfied. The standard of proof is the civil one – that is “on the balance of probabilities”, or put simply, that it is more likely than not.

5. A significant number of inhabitants..... have indulged as of right in lawful sports and pastimes on the land for a period of at 20 years,

A ‘significant number of inhabitants’ of an area means the sufficient usage to indicate to the landowner that what is being asserted is a general right, not a succession of trespasses . The application is supported by in excess of 220 people. There is no requirement that a number of users from the neighbourhood is considerable or substantial, or the majority of the inhabitants of a neighbourhood have used the land.

What is important is that it be such number as would indicate to a landowner that the right in question was being claimed by the local inhabitants. According to Sullivan J in R –v- Stafford County Council Ex Parte Alfred MacAlpine Homes Limited [2002] EWHC 76,

*“...what matters is that the number of people using the land in question has to be significant to indicate that their use of the land signifies that it is in general use by the local community for informal recreation”.*

6. Neighbourhood/locality

One of the requirements is that the usage be by a significant number of the inhabitants of a 'locality' or of a 'neighbourhood within a locality'. Section 6 of the application form says 'please show the locality or neighbourhood within a locality in respect of which the application is made'. In Section 6 the applicant has stated 'Horfield and Bishopston'. Both 'Horfield' and 'Bishopston' are Council wards, an electoral ward is an appropriate 'locality' for the purposes of the Commons Act 2006.

7. 'Neighbourhood' is an area that is recognisable as having a degree of coherence such that people would recognise it as being separate from the areas immediately surrounding it i.e. 'a cohesive area' and as such it a question of fact. An applicant is required to identify an area that is sufficiently cohesive, although in contrast to "locality", a "neighbourhood" need not be a recognised administrative unit. In Section 7 the applicant refers to and provides a location plan with blue dots identifying 'the address of each statement' and where the great majority of users lived. On the evidence submitted, it seems to me the vast majority of those supporting the application came from BS7, Horfield and Bishopston, both being recognisable postal areas of Bristol and recognisable neighbourhoods.

8. ....have indulged as of right in lawful sports and pastimes on the land for a period of at 20 years.

Having regard to section 7 of the application and the evidence in support, it is my view that there is sufficient evidence of regular use by a significant number of people for lawful sports and pastimes of the application land as a whole the 20-year period.

9. As of right

In order for use to qualify under the Commons Act 2006, it must be used, as of right, which means, without force, secrecy, or permission (*nec vi, nec clam, nec precario*). The main issue in this application was whether

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any recreational use prior to September 2010 was “ *by right*” rather than “*as of right*”. Were the users acting as if they had a right to use the land? The Objector sought to rely on the notices that were in place to render the use of the land as contentious and thus not “as of right”. Although the Applicants denied that the notices were sufficient to make the use contentious the Objectors have now withdrawn their objections. Therefore, on the information from the Applicants, the Applicants have demonstrated that it is more likely than not that the use of the application land has been “*as of right*”

**Conclusion**

10. The Applicant has established the matters required by Section 15 of the Commons Act in respect of this application to register the land as a Town or Village Green under the provisions of the Commons Act 2006.