

Bath & North East Somerset Council

MEETING:	Regulatory (Access) Committee
MEETING DATE:	29 November 2011
TITLE:	Kaynton Mead TVG Registration Application
WARD:	Newbridge

AN OPEN PUBLIC ITEM

List of attachments to this report:

- Appendix 1 – Application to register 'The Track, Kaynton Mead' as a Town or Village Green
- Appendix 2 – Plan of land to which the Application relates
- Appendix 3 – Inspector's report dated 29 September 2011

1. THE ISSUE

- 1.1 An Application has been received by Bath and North East Somerset Council in its capacity as Commons Registration Authority ("the Authority") to register land known as 'The Track, Kaynton Mead' in Lower Weston, Bath as a Town or Village Green ("TVG"). The Application was advertised and an objection was received from Bath and North East Somerset Council's Property Services department.
- 1.2 An independent expert, Mr Leslie Blohm QC of St John's Chambers in Bristol ("the Inspector") was appointed by the Authority to conduct a non-statutory public inquiry and then report with a recommendation in relation to the Application. The Regulatory (Access) Committee ("the Committee") is asked to consider the Application and the Inspector's report and to determine whether 'The Track, Kaynton Mead' should be registered as TVG.

2. RECOMMENDATION

- 2.1 The Committee is recommended to refuse the Application and not register the land shaded blue, green or red on the plan attached at Appendix 2 ("the Plan") as a TVG.

3. FINANCIAL IMPLICATIONS

- 3.1 The potential financial implications, for the Council as landowner, of the land being successfully registered are not a legally relevant consideration in the determination of the Application.

4. THE REPORT

4.1 **Application.** On 1 April 2010, Vanessa Lopez of 30 Ashley Avenue, Pam Richards of 1 Station Road, Karen Hill of 117 Newbridge Road and Suzanne Davies of 29 Kaynton Mead in Bath (“the Applicants”) applied under section 15 of the Commons Act 2006 (“the 2006 Act”) to register land known as ‘The Track, Kaynton Mead’ as a TVG. The Application, excluding the user evidence forms, is contained at Appendix 1; (the user evidence forms are available upon request). The Application was made on the basis that the land qualifies for registration by virtue of section 15(3) of the 2006 Act; however, at the Inquiry detailed below, the Applicants’ advocate requested on their behalf that the Application be amended so as to bring it under section 15(2) of the 2006 Act namely 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”.

4.2 The land to which the Application was originally made included an area to the south of nos. 131 to 153 Newbridge Road which is shown shaded blue on the Plan and is hereafter referred to as “the Blue Land”; however, the Applicants stated that this land was erroneously included in the Application. On 22 May 2010 the Applicants submitted a new map and Statutory Declaration which stated that the Application only related to the land shaded green on the Plan. At the Inquiry the Applicants’ advocate sought to amend the Application further by including two strips of land shown shaded red on the Plan; there was no objection to their inclusion from any party at the Inquiry. The land to which the Application relates is therefore as shown shaded green and red on the Plan contained at Appendix 2. This land is owned by Bath and North East Somerset Council and is hereafter referred to as the ‘Application Land’.

4.3 The Application was accompanied by 79 user evidence forms detailing use of Application Land from 1962 up until the date of the Application. The Authority has a statutory duty under the 2006 Act to consider and dispose of the Application.

4.4 **Assessment and Advertising.** On 28 April 2010, Officers of the Authority made a preliminary assessment of the Application and determined that it had been duly made.

4.5 On 3 June 2010, the Application was advertised by placing a notice in the Bath Chronicle and on the Authority’s website and serving notice on all interested parties including Property Services, the ward members and the Applicants. Additionally, notices were placed at five conspicuous locations around the Application Land and maintained on site until 9 August 2010.

4.6 On 20 July 2010, Bath and North East Somerset Council’s Property Services (“the Objector”) objected to registration of the Application Land as a TVG (“the Objection”) on the grounds that;

- i. the land has been used ‘by right’ rather than ‘as of right’,
- ii. the land has not been used by the inhabitants of the stated neighbourhood within a locality, and
- iii. the land has been used for way of passage rather than as a TVG.

Additionally, 211 letters of support for the Application were received from members of the public during the two month advertising period.

- 4.7 On 3 August 2010, the Objection was forwarded to the Applicants to give them an opportunity to respond to the points raised. On 16 August 2010, the Applicants responded to the Objection and challenged each of the points raised. On 16 September 2010, Officers of the Authority made an assessment of the Objection and the Applicants' response to the Objection. It was concluded that there remained significant points of dispute between the Applicants and Objector and it was therefore decided that a non-statutory public inquiry should be held to assess the evidence and relevant areas of law.
- 4.8 **Non-Statutory Public Inquiry.** The Authority subsequently instructed the Inspector, who is a barrister and an independent expert in TVG law, to preside over a non-statutory public inquiry ("the Inquiry") into the Application.
- 4.9 The Inquiry was scheduled to open on 13 June 2011 and to run for four days in the Council Chamber, Guildhall, High Street, Bath, BA1 5AW. On 12 May 2011, the Inquiry was advertised by placing a notice in the Bath Chronicle and on the Authority's website and by serving notice on all interested parties including the Objector, the ward members and the Applicants. Additionally, notices were placed at five conspicuous locations around the Application Land and maintained on site until 18 June 2011.
- 4.10 The Applicants and Objector were both given the opportunity to present their evidence, call witnesses, cross-examine witnesses, make legal submissions and present their cases for and against registration. At the opening of the Inquiry, the Applicants' advocate sought to amend the section of the 2006 Act under which the Application was made as detailed in paragraph 4.1 above and to amend the land to which the Application relates as detailed in paragraph 4.2 above. The Applicants' advocate also sought to amend the 'locality' to the parish of St John's Lower Weston and the 'neighbourhood' to Locksbrook, which runs between the southern side of Newbridge Road and Westfield Park, Brassmill Lane and Locksbrook Road. The Inspector also carried out a site visit accompanied by both the Applicants and Objector. The Inquiry concluded on 15 June 2011.
- 4.11 On 29 September 2011, the Inspector issued his report on the Application and recommended the Authority should decline to register the Application Land as a TVG. On 3 October 2011, the Authority sent the Inspector's report to the Objector and Applicants and asked both parties to provide any comments they may have on the report; neither party provided any comments on the report or recommendation.

5. STATUTORY TEST

- 5.1 The statutory test under consideration is set out in section 15(2) of the 2006 Act, which states 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 Application is considered in full in the Inspector's report contained at Appendix 3 and members of the Committee are advised to read the report in full before reaching a decision regarding the Application. Additionally, the constituent parts of this test are considered in turn below.

- 5.2 The Authority can only consider whether the legislative test set out in the 2006 Act have been met. The Authority cannot take into account whether registration is deemed desirable nor what may or may not happen to the land in the future.
- 5.3 **“a significant number”** The Application Land must be used by a significant number of people. This does not mean ‘*a considerable or substantial number*’ but it does need to be a level of use sufficient to show that the land is in general use by the local inhabitants rather than just use by a few individuals or an isolated group within the community. The Inspector addresses this test in paragraphs 59 to 63 of his report.
- 5.4 The Applicants submitted user evidence forms detailing use of the Application Land during the relevant period. A number of the individuals who completed these forms attended the Inquiry to give evidence of their use of the land and were cross-examined by the Objector’s advocate and questioned by the Inspector. A number of witnesses who gave evidence stated that they saw other inhabitants of Locksbrook using the Application Land in addition to those who gave evidence to the Inquiry.
- 5.5 After the construction of Kaynton Mead in 1995 the Application Land was clearly in general recreational use by the local inhabitant. Prior to 1995, the Application Land was more wild and potentially more hidden more public view. However, witnesses stated that even prior to 1995 use of the land was substantial and the Inspector found them to be honest witnesses.
- 5.6 At paragraph 63 of his report, the Inspector states that; *“I conclude therefore that a significant number of inhabitants of the community have used the land for recreation for the relevant period of twenty years.”* This test is therefore considered to have been met.
- 5.7 **“of the inhabitants of any locality, or of any neighbourhood within a locality”** A locality, or any neighbourhood within a locality, is the area inhabited by the users of the Application Land. A ‘locality’ is an area which is capable of being defined by reference to some division of the country known to the law. A ‘neighbourhood within a locality’ is an area within a locality with a sufficient degree of cohesiveness. The Inspector addresses this test in paragraphs 52 to 55 of his report.
- 5.8 As detailed in paragraph 4.10 above, the Applicants’ advocate amended the Application to relate solely to the neighbourhood of Locksbrook within the locality of the parish of St John’s Lower Weston. Locksbrook has specific boundaries, a cohesive character and local facilities and is identified on Ordnance Survey maps.
- 5.9 At paragraph 55 of his report, the Inspector states that; *“I conclude that the general perception of the location of ‘Locksbrook’ of which I heard is a correct one, and that the claimed neighbourhood is a sufficiently cohesive area to justify that description, throughout the relevant period of twenty years.”* This test is therefore considered to have been met.

- 5.10 **“have indulged as of right”** Use of the land must be ‘as of right’ which means that use must be without force, without secrecy and without permission. The Inspector addresses this test in paragraphs 64 to 70 of his report.
- 5.11 There has been no suggestion that any use by the public has been by force, secrecy or permission. However, the Application Land has been held under section 9 of the Open Spaces Act 1906 throughout the relevant 20 year period and this gave the public the right to use the land as general open space. The Application Land was therefore used ‘by right’, rather than ‘as of right’ as required by the 2006 Act.
- 5.12 At paragraph 70 of his report, the Inspector states that; “...usage of the land has not been ‘as of right’ as required by the statute.” This test has not therefore been met.
- 5.13 **“in lawful sports and pastimes”** The Application Land must be used for lawful sports and pastimes which can include a wide range of activities including, but not limited to, dog walking, football and nature watching; the activities must not be contrary to the law such as prize-fighting. The Inspector addresses this test in paragraphs 56 to 58 his report.
- 5.14 Witnesses at the Inquiry gave evidence of their use of the Application Land for a wide range of activities including walking, dog walking, child’s play, riding bicycles, ball games and blackberry picking. The Inspector rejects the suggestion that the land was used as a highway and notes that the user was not of a nature as to give the landowner the impression that the land was being used simply as a through route.
- 5.15 At paragraph 58 of his report, the Inspector states that; “*In my view the usage that there was would have been substantially referable to usage for recreational purposes.*” This test is therefore considered to have been met.
- 5.16 **“on the land”** ‘The land’ means the Application Land as detailed in paragraph 4.2 above.
- 5.17 The lawful sports and pastimes detailed in paragraph 5.14 above have taken place on the Application Land and this test is therefore considered to have been met in relation to the Application Land. The Applicants offered no evidence in relation to the Blue Land and it has therefore not been demonstrated that this test has been met in relation to the Blue Land.
- 5.18 **“for a period of at least 20 years and they continue to do so at the time of the application”** The Application Land must be used for a full period of 20 years. The Application was made on 1 April 2010 and the Application Land must therefore have been used from this date back to 1 April 1990.
- 5.19 Witnesses at the Inquiry detailed use of the Application Land going back several decades and at paragraph 57 of his report, the Inspector states that; “...I accept the evidence of a number of the witnesses, that the land has been used since beyond the commencement of the twenty year period for these purposes, and that the usage continues up to the present day.” This test is therefore considered to have been met.

5.20 **Conclusion.** As summarised above and detailed in the Inspector’s report, the Application Land has not been used as of right by a significant number of the inhabitants of Locksbrook for lawful sports and pastimes. This land does not meet the legislative tests set out in the 2006 Act. No evidence was offered in support of the Blue Land and it has not therefore been demonstrated that the Blue Land has been used as of right by a significant number of the inhabitants of Locksbrook for lawful sports and pastimes either. Therefore, neither the Application Land nor the Blue Land should be registered as TVG.

6 RISK MANAGEMENT

6.1 A risk assessment related to the issue and recommendations has been undertaken, in compliance with the Council's decision making risk management guidance.

7. EQUALITIES

7.1 A proportionate equalities impact assessment has not been carried out as the Application must be considered solely in relation to the test set out in the 2006 Act.

8. CONSULTATION

8.1 *Ward Councillor; Cabinet Member; Other B&NES Services; Service Users; Local Residents; Community Interest Groups; Monitoring Officer*

8.2 Extensive consultation was carried out as detailed in paragraphs 4.5 and 4.9 above.

9. ISSUES TO CONSIDER IN REACHING THE DECISION

9.1 Legal Considerations; as detailed in paragraph 5.1 above.

10. ADVICE SOUGHT

10.1 The Council's Monitoring Officer (Divisional Director – Legal and Democratic Services) and Section 151 Officer (Divisional Director - Finance) have had the opportunity to input to this report and have cleared it for publication.

Contact person	Graeme Stark, Senior Rights of Way Officer
Background papers	‘The Track, Kaynton Mead’ TVG case file User Evidence Forms Joint Evidence Bundle Joint Bundle of Authorities
Please contact the report author if you need to access this report in an alternative format	