

Committee: General Purposes Committee	Date: 9 September 2014	Classification: Unrestricted	Report No:
Report of: Corporate Director Development and Renewal		Title: Application for registration as town or village green – Wapping Green	
Originating officer(s) Jackie Odunoye, Service Head Strategy, Regeneration and Sustainability David Galpin, Service Head Legal Services		Wards Affected: Wapping & Shadwell	

REASONS FOR URGENCY

The report was not ready for circulation in time to meet the usual deadline of publication 5 clear days in advance of the meeting. It is understood, however, that the applicants would like to have the matter determined as soon as possible. If the report is not accepted at this meeting, then it would be delayed to the meeting scheduled for 10 December meeting. Members may consider that it would be preferable to avoid that delay.

1. SUMMARY

- 1.1 The Council received an application to register the land known as Wapping Green as a “Town or Village Green” under the Commons Act 2006, which it needs to determine. The Council is the Registration Authority for the purposes of the Commons Registration Act 1965 and is responsible for compiling and maintaining the Registers of Common Land and Town or Village Green and for any amendments to the Registers.
- 1.2 The procedure for registration is laid down in the Common Registration (New Land) Regulations 1969 (“the Regulations”).
- 1.3 Under section 15 of the Commons Act 2006 a person may apply to the Commons Registration Authority (the Council) to register land as a town or village green where a significant number of inhabitants of any locality or 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.

- 1.4 The application must be determined on legal issues and evidence. The Council's function as registration authority is to consider the evidence for and against the application. If the application satisfies the legal requirements, then the Council should accept the application, however if the legal requirements are not fully met then the Council must reject the application.
- 1.5 If the application is accepted, the Council is under a duty to advertise the accepted application in the local newspaper and then allow a period of 6 weeks to allow for any objections to be lodged. If objections are received, the applicants will be permitted to consider them and make responses. Once the 6 week period has elapsed, the Land will be registered on the Register of Town & Village Green and as a local land charge. If the application is rejected, the applicant must be informed of the reason(s) of the rejection. There is no formal right of appeal but the applicant can seek a Judicial Review if he or she believes the decision made to be wrong in law or procedurally improper.
- 1.6 No procedure has been laid down by the Commons Registration Act 1965 or the Regulations as to how the applications should be determined which is left entirely to the registration authority.
- 1.7 In the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (as amended) the power to register a town or village green is specified as a non-executive function. The Council has not delegated the function to a committee or to an officer. Under paragraph 3.3.6 of Part 3 of the Council's Constitution the terms of reference of the General Purposes Committee are set out and include:

(v) Any other functions which under the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 may not be the responsibility of the Executive and which are not delegated elsewhere under this constitution.

In consequence it is for the General Purposes Committee to determine any application for registration of land as Town or Village Green.

2. **RECOMMENDATIONS**

The General Purpose Committee Committee is recommended to:-

- 2.1 Refuse the application on the ground that the inhabitants of the locality, or neighbourhood have not indulged in lawful sports and pastimes on the land for a period of 20 years "as of right."

3. BACKGROUND

- 3.1 On 19 March 2012 the Turk's Head Charity made an application under Section 15 of the Commons Act 2006 to register land as a Town or Village Green. The land is known as Wapping Green and is situated adjacent to Wapping Lane, Watts Street and Meetinghouse Alley, Wapping.
- 3.2 The applicants sought to protect this existing area of open space which is maintained by the Council from development pressures upon land in the area.
- 3.3 The application did not contain sufficient appropriate information to fulfil the criteria of section 15 of the Commons Act 2006 to justify formal consideration by this Committee and it was rejected at a preliminary stage.
- 3.4 On 30th April 2013 The Turk's Head Charity submitted a further application to register the land. The application is Appendix 1 to this report and it is this application which the Committee is asked to determine. The 105 witness statements submitted are not appended but will be available for inspection at the meeting and the seven 12" x 8" photographs will be displayed at the meeting.

4. CONSIDERATION OF THE APPLICATION

- 4.1 The application consists of the standard Form 44 application form and 10 exhibits including one supporting statement, map of the locality, map of the application site, schedule of broad uses of the land, schedule of clubs and organisations believed to have used the land, statements of support, 105 witness statements, plans and seven photographs.
- 4.2 The application form states that the application is based on section 15(2) of the Commons Act 2006. The basis of the application is that the land has been used by the local inhabitants for a period of 20 or more years as of right from 1984 to April 2013, and continues to be used for lawful sports and pastimes. The application then asserts that a significant number of the inhabitants (including clubs and organisations) who live within the 'locality' both past and present have used the village green for a range of sports and pastimes which are set out in greater detail in the supporting statement of evidence as:
- Cricket, Football, Tug of War, Rounders, running, family games, kite flying, playing tag, kicking a ball informally, charity events, army exercises, birthday parties, jubilee parties, carol singing, recycling fair, toddlers learning to walk, workers resting during lunch breaks, walking, wildlife watching, general relaxation and exercise, live music and dancing, dog walking

4.3 The applicants have also mentioned some specified uses being:

- as an open space for enjoying sports, children playing games, picnics and relaxing.
- Since 2010 the applicants Turk's Head Charity have used the land for its annual Wapping Shindig
- an exercise ground by the Army stationed at Tobacco Dock during the London Olympic period.
- Council's uses of the land for recycling events and fun run days.
- holding of outdoor events that would not otherwise take place, e.g. the Summer Shindig, carol singing at Christmas and the Spring recycling fair.
- Use of the land by the elderly as a place to sit down and to rest as it is close to shops and to their homes which do not have gardens or balconies.

4.4 The application cites the various clubs/organisations which use the Land for sports and pastimes:

St Peter's London's Docks school
St Patrick's school
Turk Head's charity for Wapping Shindig
Turner's Old Star for jubilee parties
British Army
The London Borough of Tower Hamlets
History of Wapping Trust
Community Solutions for Spring Recycling fair

4.5 The application then refers to the issue of locality citing Lord Hoffman in the House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 where he stated that both the owner of the land and the user should work in partnership to ensure that each are not entitled to interfere with the others' rights or uses. The application states that the context of that case can be applied in this case where the Council can allow on occasions certain clubs and others whether payment by a fee or otherwise to use the land for formal sports which can take place side by side with but not interfering with the others' rights.

4.6 The above mentioned case ruled that several different localities could be regarded as 'the locality' for the purposes of section 15(2). In this case, the locality is referred to as Wapping and Shadwell.

4.7 The supporting statement in the application form then states that it is not a requirement that all of the users of the land are inhabitants of the locality and that all that is required is to demonstrate that by illustration citing the finding of the High Court in *R (McAlpine Homes Ltd) v Staffordshire County Council* [2002] EWHC Admin 76, there being sufficient numbers to signify that the land was in general use by the local inhabitants. The applicants believe that this has been achieved with the number of representations made in the application.

They state that not only sufficient evidence has been submitted but that the evidence is of such quality as to demonstrate clearly that this land and its use should be registered as a village green.

- 4.8 The supporting statement in the application then refers to the fact that the inhabitants of the locality (this case being Wapping and Shadwell) have been using the land for 20 years from October 1992 until October 2012 for lawful sports and pastimes “as of right” without let or hindrance, except to the extent as set out in their statement of support and that on no occasion have the Council challenged the applicants or any other inhabitant of the locality to the use of the land except to the extent that on some limited occasions part of the land has been used for formal sports in particular the use of playing pitches for football matches by local clubs. They also add that the act of spectating these matches would also be considered a pastime. The supporting statement goes on to state that the exclusive use on occasions of the land by clubs and organisations contributed to the general use of the land as a village green
- 4.9 Para 2 of the supporting statement refers to a significant number of inhabitants of the locality both past and present who have used the land for a range of sports and pastimes (listed out in a schedule within Appendix F). It then goes to state that a number of clubs and organisations from the locality have used the land for formal and informal sports and leisure activities whom live in the locality. Exhibit E lists these clubs and organisations which are believed to have used the land during the 20 year period.
- 4.10 Exhibits G and H to the supporting statement contain a list of individuals and their witness statements supporting the application and describing their use of the land. It is evident from the witness statements that members of the public generally have been able to access and use the land for sports and pastimes unimpeded for a period in excess of 20 years.
- 4.11 Exhibit I to the supporting statement provides two letters of support for the application to register the land as a village green by both History of Wapping Trust and the Parish of St Peter's London Docks (referred to earlier). There is a quote by former Councillor Emma Jones but this is not endorsed by her so arguably does not add any weight to the application.

5. WAPPING GREEN

The land is on the corner of Wapping Lane and Watts Street and adjacent to Meetinghouse Alley. It is within the localities of both Wapping and Shadwell wards. It is an area of open green space which is surrounded by residential buildings. The Council is the freehold owner of the land the majority of which was transferred to the Council from the Greater London Council in 1983 for housing and ancillary purpose.

6. LEGAL CONSIDERATIONS

6.1 Town and village greens are defined in the Commons Registration Act 1965 (as amended by the Countryside and Rights of Way Act 2000), as land:

- which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality
- or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes
- or if it is land on which for not fewer than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right.

6.2 Section 15(1) of the Commons Act 2006 states 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.

6.3 Section 15(2) applies where the land has been used as of right for lawful sports and pastimes for 20 years or more before the application was made and this continues after the date of the application.

6.4 The Council has the authority to deal with the application to register the land as village green as a non-executive function pursuant to The Local Authorities (Functions and Responsibilities) (England) Regulations 2000; Schedule 1; B. Licensing and Registration functions; Item 37 which gives the power to the Council to register common land or town and village green.

6.5 The application has to prove that the land satisfies the four part test:

- 1) the land has been used by a significant number of inhabitants of any locality or neighbourhood,
- 2) for "Lawful Sports and Pastimes",
- 3) for not less than twenty years
- 4) "As of Right".

If any one of the four criteria is not met, then the application will fail.

6.6 1) “Significant number of Inhabitants in any locality or neighbourhood”

In *R (McAlpine Homes Limited) v Staffordshire County Council* [2006] EWHC Admin 76, Sullivan J held that “significant number of inhabitants” does not need to be a considerable or substantial number. It was a matter of impression for the decision maker on the evidence and what mattered was that the number of people using the land in question had to be sufficient to indicate that their use of the land signifies that is a general use by the local community for an informal recreational use, rather than occasional use by individuals as trespassers. The applicant will be required to show that the recreational use of the land is predominately, but not exclusively used by the people who live in the locality or neighbourhood. The evidence supporting this application, in particular, the number of witness statements made by local residents regarding their recreational use of the land satisfies this criterion.

6.7 2) “Lawful Sports and Pastimes”

The activities do not need to be formally organised or have some form of communal element. In the case of *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 the House of Lords held that there must be an established pattern of recreational use rather than something trivial or sporadic. The applicant will have to show that the activities relied upon are a sport or pastime rather than referring to using the land simply as a means of access which will not qualify. The activities listed in support of this application satisfy this criterion.

6.8 3) “for not less than twenty years”

Using the context of the immediate local area to the Land, there are a large number of witness statements contained in the application to show that the land has been used by a significant number of local inhabitants for over 20 years.

6.9 4) “As of Right”

The concept was discussed in the House of Lords in the case of *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385. To satisfy the criterion of “as of right” the applicant will need to demonstrate that the recreational use of the land has been without force (i.e. unrestricted access to the land), secrecy (i.e. openly) and without permission (i.e. no consent either expressly or implied has been given by the owner).

6.10 On 21 May 2014, the Supreme Court delivered a landmark judgment in the case of *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31, upon whether public use was “as of right”. Lord Neuberger explained the meaning of “as of right” in the following terms –

...it is, I think, helpful to explain that the legal meaning of the expression “as of right” is, somewhat counterintuitively, almost the converse of “of right” or “by right”. Thus, if a person uses privately owned land “of right” or “by right”, the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is “as of right”, it is without the permission of the landowner, and therefore is not “of right” or “by right”, but is actually carried on as if it were by right – hence “as of right”. The significance of the little word “as” is therefore crucial, and renders the expression “as of right” effectively the antithesis of “of right” or “by right”.

- 6.11 In the same case, Lord Carnwath urged that care needed to be taken with the “as of right”/“by right” dichotomy, but nevertheless considered that –

Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to “warn off” the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights.

- 6.12 In the *North Yorkshire County Council* case the Council asserted that the land subject to the application was acquired for housing purposes and was laid out for public recreational purposes pursuant to section 12(1) of the Housing Act 1985 or its similar predecessor so that members of the public were encouraged by the landowner with statutory authority to use the land for recreational purposes and that the relevant period of 20 years had not even started to run and could not do so until the Council ceased using the land under section 12(1) of the Housing Act 1985. The Supreme Court found that in those circumstances the use of the land by the public was “by right” and not “as of right.” The use had the express or implied permission of the landowner. For rights to be acquired “as of right” long use is required despite the landowner.
- 6.13 Wapping Green is open grassland which does not have any fencing or other physical boundary to restrict access. The recreational activities referred to in the application are all done openly and not in secret.
- 6.14 However the issue of “without permission” needs to be looked at more carefully. Use cannot be claimed as of right if it is apparent that the uses claimed by the applicants have not simply been tolerated but encouraged. The Council holds the land on trust for housing and ancillary purposes being recreational use and enjoyment by the general public. The Council has provided benches to encourage use of the land by the public. The Council has general bye-laws which cover the use of land provided to the public.
- 6.15 Looking at the status of the land as ancillary to the surrounding housing land and subject to the Council’s bye-laws, coupled with the fact that the Council as owner of the land has encouraged use of the land by providing seating and maintaining the land for public use in addition to erecting signboards welcoming

visitors to enjoy their visit (as shown in one of the photographs in Exhibit J), it is evident that permission has been given by the Council to use the land for recreational use and that use is “by right” rather than “as of right.”

- 6.16 The factual situation in the *North Yorkshire* case is very similar to the instant case. In *North Yorkshire* the land had been acquired for housing purposes and under section 12(1) of the Housing Act 1985 and its predecessor the Housing Act 1936, a local authority may, in connection with housing accommodation provide:
- buildings adapted for use as shops
 - recreation grounds
 - other buildings or land which will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided
- 6.17 In respect of Wapping Green, the Council became the owner of this housing land upon the demise of the Greater London Council. At that time in 1983, Wapping Green had been laid out in its present form and was maintained by the Council as an amenity area/park. It is evident that the area had been established by the GLC or its predecessor pursuant to the Housing Act powers to provide recreation grounds in connection with housing accommodation.
- 6.18 Maintenance of the land as an amenity area/park demonstrates the Council’s willingness to encourage pastimes and in view of the acquiescence and encouragement of the public use of the land, such use has not been “as of right” but “by right”.
- 6.19 The fact that the public use has not been “as of right” means that the criteria for registration of the land as town or village green under Section 15(2) of the Commons Act 2006 have not been met and the application must be refused.

7. REQUEST BY THE APPLICANTS

- 7.1 Prior to the Supreme Court decision in May 2014 dialogue with the Applicants had been taking place and the Applicants were aware that the application fulfilled most if not all of the criteria for registration. Following the Supreme Court decision, the applicants have taken account of the fact that the decision has impacted adversely upon the application. They are aggrieved that had the application been determined in a more timely fashion, the determination might have been different to the outcome which is now recommended. In consequence they have requested that the Council as landowner should voluntarily register the land as town or village green.
- 7.2 This committee’s jurisdiction is limited to the non-executive function of the determination of any application for registration of land as town or village green.

Use of Council owned land is an executive function and any decision in that regard would be a matter for the Mayor and Cabinet.

8. FINANCE COMMENTS

8.1 There are no financial implications associated with this report.

9. LEGAL COMMENTS

9.1 All relevant legal considerations are included in the body of the report.

**Local Government Act, 1972 Section 100D (As amended)
List of “Background Papers” used in the preparation of this report**

Brief description of “background papers”	Name and telephone number of holder and address where open to inspection.
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None

14. APPENDICES

Appendix 1 – Application for registration of town or village green (to follow)