

DEVELOPMENT CONTROL AND REGULATION COMMITTEE

Meeting date: 13 August 2019

From: Acting Executive Director – Economy & Infrastructure

NL0057: - APPLICATION FOR REGISTRATION OF LAND AT CUMREW AS A NEW TOWN OR VILLAGE GREEN

1.0 EXECUTIVE SUMMARY

- 1.1 Cumbria County Council is the registration authority for town and village greens under the Commons Act 2006.***
- 1.2 An application has been received from Mr James Fowler on behalf of Cumrew Parish Council, to register an area of land at Cumrew as a new town or village green. The application was made under section 15(2) of the Commons Act 2006.***
- 1.3 Section 15(2) specifies the legislative requirements for the registration of land as town or village green. For the application to be successful all statutory requirements must be met. Failure to meet one or more of the statutory requirements will result in the application being refused.***
- 1.4 The purpose of this report is to request Members to make a decision as to whether the land should be added to the Council's register of town and village greens.***

2.0 POLICY POSITION, BUDGETARY AND EQUALITY IMPLICATIONS, AND LINKS TO COUNCIL PLAN

- 2.1 The relevant outcome in the Council Plan 2018 - 2022 is that people in Cumbria are healthy and safe.***
- 2.2 This matter is a decision-making process of a quasi-judicial nature. There should be no policy or political consideration given and any potential financial implication should be ignored.***

3.0 RECOMMENDATION

- 3.1 *It is recommended that the Committee rejects the application, on the grounds that not all of the statutory criteria contained at section 15(2) of the Commons Act 2006 have been satisfied.*

4.0 BACKGROUND

- 4.1 On 30th August 2011 the Council, as registration authority for town and village greens (“the Registration Authority”), received an application (“the Application”) from Mr James Fowler, on behalf of Cumrew Parish Council (“the Applicant”), for the registration of land referred to as ‘Cumrew Village Green and Fellside Lonnin’ (hereafter called the “Application Land”) as a new town or village green under Section 15 of the Commons Act 2006 (“the 2006 Act”).
- 4.2 Please note that on 10th September 2015 Cumrew Parish Council authorised the responsibility to progress the Application to Mr Philip Leslie Robinson. For the purposes of this report, and as he was also working on behalf of the parish council, I will also simply refer to Mr Robinson as “the Applicant”.
- 4.3 A copy of the Application and supporting documentation is attached to this report at **Appendix 1** (please note that for pragmatic purposes I have only included an indicative sample of the user evidence statements received, along with a summary of all statements received. A full copy of all submitted statements received can be provided on request).
- 4.3.1 You will note that the Applicant submitted the following evidence in support of the Application:
- 22 user evidence statements from a total of 34 residents (some residents chose to jointly submit statements)
- 4.4 The Application Land comprises of areas of grassland towards the centre of the village of Cumrew. A plan showing the Application Land coloured in red is attached separately to this report at **Appendix 2** for ease of reference. You will note that the land is divided into strips and sections and is dissected by driveways and ‘Fellside Lonnin’, which the Applicant chose to exclude from the Application Land as a result of correspondence with the Registration Authority. The final amended plan upon which the Application will be judged was submitted on 30th November 2015, and it is that plan which is attached at **Appendix 2**.
- 4.5 A Land Registry search was carried out which confirmed that the Application Land itself was not registered with the Land Registry, but that MRH Minerals Limited (“MRH”) owned the freehold mines and minerals under the land. MRH were consulted throughout the process, in line with the Commons Registration (England) Regulations 2014 (“the 2014 Regulations”), but did not provide any response.
- 4.6 After correspondence with the Applicant, in which the Application Land and neighbourhood or locality were redefined, the Application was accepted as

being duly made on 3rd March 2017 and the notice of Application was placed on site, advertised on Cumbria County Council's website, and also sent to all relevant interested parties in accordance with Schedule 7 of the 2014 Regulations. Anyone wishing to make a representation to the Application had until 21st April 2017 to do so in writing (please note that it is the redefined and agreed plans of the Application Land and locality that are included within the appendices of this report).

- 4.7 Two representations were received in relation to the Application, from Carlisle City Council, and Mr and Mrs Cranwell, whose property abuts part of the Application Land. Copies of these representations are included at **Appendix 3**. Please note that Carlisle City Council requested that the points raised in their representation should be treated as general comments, rather than objections.
- 4.8 Copies of both representations were served on the Applicant, and the Applicant responded, focusing primarily on the objection received from Mr and Mrs Cranwell. This response, received on 23rd May 2017, is included as **Appendix 4**.
- 4.9 Site visits were carried out of the Application Land on the 3rd March 2017 and the 4th June 2018. Photographs taken on these site visits are numbered and included as **Appendix 5** and will be referred to later in this report.
- 4.10 Following the site visits, the Application was assessed by the Registration Authority. Having initially viewed the Application as one that might be recommended, after a more detailed review of the evidence officers concluded differently. It was deemed that the user evidence submitted was wholly inadequate to satisfy the criteria required for the land to be registered as a town or village green, the reasons for which will be outlined further on in this report.
- 4.11 With this in mind I wrote to the Applicant on 29th August 2018, 27th November 2018 and the 24th January 2019, suggesting that new user evidence should be gathered and submitted. Evidence questionnaire templates were supplied with the August letter and it was suggested that the Applicant may wish to use these as a basis to gather the relevant user evidence. The Applicant responded to these letters, intimating their frustration at the request, which in their opinion amounted to starting the process from scratch. It was explained that the submission of new evidence would not amount to a new application, but would simply add to the existing application; however, no further evidence has been received.
- 4.12 With no further evidence having been received the Applicant was offered the opportunity to make oral representations on 7th March 2019, under Regulation 27(7) of The Commons Registration (England) Regulations 2014. The Applicant has not responded to this invite.

The Law

4.13 The 2006 Act governs town and village greens, Section 15 sets out the requirements which must be met if an application to add land to the town and village green register is to be successful.

4.14 The Application is made under Section 15 (1) of the 2006 Act which states:

“Any person may apply to the commons registration authority to register land as a town or village green if subsection 2... applies”

4.15 Section 15(2) provides that a town or village green has come into existence where:

“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.”

4.16 The statutory conditions referred to in Section 15 (1) and (2) above can be broken down as follows:

- i. **A significant number;**
- ii. **of the inhabitants of any locality or any neighbourhood within a locality;**
- iii. **have indulged as of right;**
- iv. **in lawful sports and pastimes on the land;**
- v. **for a period of at least 20 years and continue to do so at the time of the application.**

4.17 For land to qualify as a town or village green under the 2006 Act, the use of the land must satisfy all the statutory tests. Failure to meet any one of the tests means that the application land cannot be registered as village green.

The application of the law to the facts and evidence of the application:

4.18 The application complies with the formal requirements as to form and content contained in the 2006 Act.

4.19 The statutory criteria as set out above is considered in relation to the application as follows:

- i. **A significant number:**

“Significant” does not mean considerable or substantial. What matters is that the number of people 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 as trespassers.

The Application was supported by 34 individuals, on a total of 23 letters. The total village population at the time of submission is stated as 42. The wider area, including the entire parishes of Carlotton and Cumrew, had an estimated population of 120 at the time of the 2001 census.

No individuals were seen to be using the Application Land at the time of the two site visits; however, I consider that the evidence provided is sufficient, in principle, to show that a significant number of local residents have used the Application Land, and therefore, in my opinion, this element of the criteria is satisfied by the quantity of responses received.

ii. **Of the inhabitants of any locality, or of any neighbourhood within a locality:**

After correspondence with the Registration Authority the Applicant submitted a plan on the 23rd October 2015 identifying the parishes of Carlotton and Cumrew as the locality upon which they rely.

The Courts have defined a 'locality' as being an area capable of being defined by reference to some division of the country known to the law. Carlotton and Cumrew are civil parishes with a common parish council, and therefore, in my opinion, qualify as a locality.

iii. **Have indulged as of right:**

"As of right" is a legal term meaning that for the land to become a town or village green it must be used without force, without secrecy and without permission.

There has been no indication that the use of the land has been through force or secrecy. The user evidence questionnaires support this notion, and indeed the site visits of 3rd March 2017 and 4th June 2018 found the Application Land to be open and easily accessible from the main road through Cumrew (see **Appendix 5.1**) and Fellside Lonnin' (see **Appendix 5.2**) with no barrier or fence to inhibit access. Some sections of the Application Land had become somewhat overgrown by the time of the second visit (see **Appendix 5.3**), but in my opinion it would still require no force to access the land.

Permission of the land can be expressly given or implied from the landowner's conduct. A Land Registry search identified MRH Minerals Ltd ("MRH") as the owner of the freehold mines and minerals of the land. Despite being notified MRH have not commented throughout the process. There is no signage or anything else present on the land that would indicate that the public were being given permission to use the land.

I am therefore satisfied that use of the land has been without force, without secrecy and without permission, and therefore has been as of right. I believe this element of the criteria has been satisfied.

iv. **In lawful sports and pastimes on the land:**

The letters received in support of the application were submitted in 2011 along with the original application. At that stage Fellside Lonnin' ("the Footpath") was included as part of the Application Land (copies of the original plan on which the user evidence received was based have been included at the end of **Appendix 1**, alongside the sample user-evidence letters received). It is therefore difficult to determine if some of the activities listed on these letters were related to the grass verges which form the current Application Land, or the Footpath itself which has now been excluded from the application.

Many of the letters are quite brief and do not offer a detailed description of the sports and pastimes being carried out. Activities such as "used to access the fells" and "used as a public path" seem to be indicative of use of the now excluded Footpath, rather than the current Application Land. These activities are suggestive of a right of way, as opposed to village green use. "Moving livestock" could not be considered a sport or pastime, and in any case I'd suggest that this activity would have been carried out on the Footpath too.

It was established in the Sunningwell case that lawful sports and pastimes do not have to be either organised sports or have a communal element. Solitary and informal activities, such as dog walking or children playing are sufficient, as long as there is an established pattern of use and it is not 'trivial and sporadic'.

Many of the user-evidence letters received list walking, or dog walking as an activity. Whilst these could be classed as a sport or pastime it is unclear exactly where these activities were taking place. If people were simply walking along the Footpath from A to B, and not wandering onto the claimed land, then this would not constitute village green use. The overgrown nature of some of the verges (see **Appendix 5.3**) would seem to indicate that much of the walking was limited to the Footpath itself.

It is accepted that activities such as nature walks, children playing, blackberry picking, picnics and birdwatching would have been more suited to the grass verges which form part of the Application Land, if the verges were not so overgrown.

The Applicant contends that the overgrown nature of some of the verges included within the Application Land would not prohibit activities such as birdwatching and blackberry picking, and would in fact allow for the enjoyment of wild flowers. My view would be that if some areas were as overgrown during the 20 year period as they were at the time of the June 2018 site visit, then it would be hard to envisage activities such as bird watching taking place on those areas of the Application Land. It is important to remember that the user

themselves would have to be on the Application Land, it would not be enough to be standing on the relatively clear Footpath, watching birds in the more overgrown areas.

Carlisle City Council appear to share my concerns, and although they do not object to the application as such, they do state that it would be “difficult to imagine what ‘lawful sports and pastimes’ could be carried out on this location”.

The area of land closest to the roadside upon which there is a phone box, litter bin and bench (shown as part of appendices 5.1 and 5.3) would seem to be more conducive to a wider range of potential sports and pastimes. It certainly appears to be more maintained and amenable. However, the responses submitted are very limited in their content. There are very few details about the frequency in which these activities were being carried out and on which piece(s) of the Application Land they took place.

In my opinion I consider that this element of the criteria is not satisfied. Some activities listed do not appear to be sports and pastimes, it is unclear if the listed sports and pastimes were being carried out on the Application Land, and there is very little evidence as to the frequency in which these sports and pastimes were being carried out.

v. **For a period of at least 20 years, and continue to do so at the time of the application**

The application was received on the 30th August 2011 and as such the period of use claimed runs from 30th August 1991 to the 30th August 2011.

The user evidence submitted via the 23 letters is relatively ambiguous with regards to the dates of use. Most submissions list the year in which the respondents moved to the area; however there is very little indication as to whether or not the respondents have used the land continuously since that date. Potentially, 6 of the 23 letters cover the whole 20 year period of claimed use, but again, it would be speculative to suggest that some of the respondents had used the Application Land throughout this entire period as the evidence provided is not very detailed.

Only 4 of the 23 letters submitted indicate any frequency of use of the land, and so not only is it difficult to determine exactly which years the respondents are claiming to have used the Application Land, but it is also difficult to determine any frequency of continuation of any claimed use.

In my opinion the user evidence submitted is not detailed enough to satisfy this element of the criteria.

In order for the Application to be successful the Applicants must prove that all of the statutory criteria set out in section 15(2) of the 2006 Act have been met. In my opinion the Applicants have, on the balance of probabilities, not proven every element of the criteria.

5.0 LEGAL IMPLICATIONS

- 5.1 The Council has a statutory duty to keep a register of Common Land and since the implementation of Part 1 of the 2006 Act, has the power to amend the register. The Council's Constitution at Part 2G 2.1) f) i) delegates this responsibility to the Development Control and Regulation Committee.
- 5.2 In considering the Application, Members must consider all of the evidence available to them, and must be satisfied that the evidence shows that each aspect of the statutory conditions set out at Section 15(2) of the 2006 Act have been met. The burden of proof in this regard is firmly upon the Applicants to provide the required evidence. The standard of proof to be applied is the usual civil standard "on the balance of probabilities", i.e. it must be more likely than not.
- 5.3 The role of this Committee is to reach its own determination on the matters of fact and law arising as a result of the Application. It is for Members to determine the Application fairly, putting aside any considerations of the desirability of the land being registered as a town or village green or being put to other use.
- 5.4 Although the findings of the Officer Recommendations are for the Committee to proceed with determination and rejection of the Application, the Committee is not bound to follow the Recommendation; providing that in reaching its decision it applies the correct legal principles and duly considers the evidence. Therefore Members are free to accept or reject any of the Recommendations in the report. If the members reject the Officer's findings and decide either not to determine the Application, or to accept the Application and add the Application Land to the register of town and village greens, the Committee should set out their reasons at the meeting.
- 5.5 Please note that if Members were minded to accept the Application then the matter would have to be deferred to first allow the landowner a chance to make oral representations.
- 5.6 There is no right of appeal against a Committee decision. The route for any challenges would be via judicial review in the High Court, where the issue would be whether the Committee had misdirected itself in law. Should a judicial review application be successful, the Council would be obliged to re-determine the Application, a successful judicial review application would not of itself determine that the Application Land was or was not a town or village green.
- 5.7 All other legal considerations, issues and implications have been addressed within the detail of the report.

6.0 OPTIONS

- 6.1 The Committee may accept or reject the Recommendation.
- 6.2 If the Recommendation is accepted the register of town or village greens will not be amended and the Application Land will not be registered as a town or village green.
- 6.3 Members should note that the decision of the Committee in relation to an application to register a new town or village green is a legal decision and is not a matter of policy or discretion.

7.0 CONCLUSION

- 7.1 I am of the opinion that the evidence that has been provided by the Applicant is not sufficient to satisfy the criteria set out in section 15 (2) of the 2006 Act.
- 7.2 I consider it reasonable that this Committee resolve that the Application be rejected and the Application Land is not added to the register as a new town or village green.

Angela Jones
Acting Executive Director – Economy and Infrastructure
24 July 2019

APPENDICES

Appendix 1 – Application Form and Supporting Evidence
Appendix 2 – Plan of Application Land
Appendix 3 – Representations Received
Appendix 4 – Applicant’s Response to Representations
Appendix 5 – Site Visit Photographs

IMPLICATIONS

Staffing:	None
Financial:	There would be cost implications in the event of an application for judicial review, however the Council is the registration authority and therefore has a statutory duty to decide applications.
Property:	None
Electoral Division(s):	Great Corby and Geltsdale Ward
Human Rights:	The Council as registration authority has to make a decision in accordance with the law and in particular with the provisions of the 2006 Act, given these legal criteria a decision must reflect the legislation despite any other rights of individuals.

PREVIOUS RELEVANT COUNCIL OR EXECUTIVE DECISIONS

No Previous relevant decisions

CONSIDERATION BY OVERVIEW AND SCRUTINY

Not considered by Overview and Scrutiny

BACKGROUND PAPERS

Commons Act 2006

Commons Registration (England) Regulations 2014

Defra Part 1 of the Commons Act 2006: Guidance to Commons Registration Authorities and the Planning Inspectorate 2015.

Commons Registration Act 1965

R (Barkas) v North Yorkshire County Council [2014]

R v Oxfordshire County Council and others, ex parte Sunningwell Parish Council, (House of Lords, 1999)

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