

North Yorkshire County Council

Planning and Regulatory Functions Committee Sub- Committee

Minutes of the meeting held on 14 June 2013, commencing at 10.00 am at Sneaton Village Hall, Sneaton, Whitby.

Present:-

County Councillors David Blades, Robert Heseltine, Bill Houlton, Andrew Lee (as Substitute for Janet Sanderson) and Cliff Trotter.

Apologies:-

Apologies were received from County Councillor Janet Sanderson.

There were approximately 40 members of the public present.

1. Appointment of Chairman

The Clerk explained that the Chairmanship of the Planning and Regulatory Functions Committee Sub-Committee would now be a permanent appointment, rather than a rolling appointment as had been the case during the previous County Council.

Resolved –

That County Councillor Robert Heseltine be appointed Chairman of the Planning and Regulatory Functions Sub-Committee for the full term of the County Council until the County Council elections scheduled for May 2017.

County Councillor Robert Heseltine in the Chair

Copies of all documents considered are in the Minute Book

2. Minutes

Resolved -

That the minutes of the meeting held on 26 April 2013, having been printed and circulated, be taken as read and be confirmed and signed by the Chairman as a correct record.

3. Appointment of Vice-Chairman

Resolved -

That County Councillor David Blades be appointed Vice-Chairman of the Sub-Committee for the full term of the County Council, until the County Council elections scheduled for May 2017.

4. Public Questions or Statements

The Democratic Services Officer reported that other than those persons who had registered to speak on items listed on the agenda there were no questions or statements from members of the public.

5. Application to Register land as Town or Village Green – Castle Park, Whitby

Considered –

The report of the Corporate Director, Business and Environmental Services on an application (“the Application”) for the registration of an area of land at Castle Park, Whitby identified on the plan at Appendix 1 to the report (“the Application Site”) as a Town or Village Green.

Mr Doug Huzzard, the County Council’s Town or Village Greens Officer, presented the report, highlighting how the application had been made in May 2009 and following a decision by the Planning and Regulatory Functions Sub-Committee on 3 June 2011 was referred to an inspector for a non-statutory public inquiry to be held to hear evidence and then make a recommendation to the County Council in its role as Registration Authority.

He noted that the enquiry was held at Sneaton Castle, Whitby between 30 April 2012 and 2 May 2012 and the Inspector’s resulting report was attached as an Appendix to this report. The Committee were advised that the Inspector had recommended that the application be refused on the basis that it failed to meet all the relevant legal criteria necessary for an application to be successful.

Mr Huzzard highlighted the relevant legal criteria relating to applications for Town or Village Greens as being Section 15 (2) of the Commons Act 2006. He provided full details of those criteria and noted that all had to be met for an application for Town or Village Green status to be approved. It was noted that the Inspector had determined that the relevant qualifying 20 year period for consideration was May 1986 until May 2006 and that the locality of the electoral ward of Mayfield was the qualifying neighbourhood within the locality.

From the evidence provided the Inspector had concluded that it had not been demonstrated that a significant number of residents had taken part in exercise of lawful sports and pastimes in such a way which amounted to them having indulged “as of right” in that exercise.

Mr Huzzard noted that the Inspector had discounted use of the land where this had been by RAF family and personnel as she considered their use to be “by right” rather than “as of right”. She also discounted use outside the relevant 20 year period, use which was not by local inhabitants and use which was akin to the exercise of a public right of way rather than exercise of wider recreational rights.

The Inspector did not question that the land had been in use throughout the relevant 20 year period but concluded that sufficient qualifying use had not been demonstrated across the whole of that period.

Mr Huzzard stated that it was not obligatory for the Registration Authority to follow the findings of an Inspector but it had to demonstrate through its decision making that it had proper regard to the Inspector's report and it must act lawfully in any decision it reached. He noted that in the event that the Committee were to resolve to accept the officer's recommendation contained within the report the applicant would be entitled to make an application for judicial review however it was his opinion that there was no reason to warrant a departure from the Inspector's findings and that the authority would have proceeded appropriately in following those.

Mr Huzzard provided a series of photographs giving a contextual view of the application site.

The County Council's legal representative, Catriona Gatrell noted that a letter had been submitted to Members, from a supporter of the application, prior to the meeting which had been marked private and confidential. It was noted that this matter, due to its demarcation, had not been provided to the objectors to the application and, therefore, should be disregarded.

A Member referred to a letter appended to the report from Mrs Joanne Wood which outlined concerns regarding additional time that had been given to the objector to submit an objection to the application and wondered if it was right and proper to take account of the objections if they were out of time and ask for clarification regarding the reasons for the delay.

The County Council's legal adviser, Simon Evans, highlighted the process of public notification that Town or Village Green applications had to go through. He noted that the registration authority had to take account of representations made before the issue was submitted for decision, however, the authority may also take into account any representations made prior to undertaking that decision. He noted that the representations from the objector were within that period prior to the decision being made and were relevant, therefore would assist with the decision making process.

The applicant Sue Grimoldy submitted a written address to the Committee which was read out by the Clerk. She highlighted how at a previous meeting of the Committee Members had made a brave decision when reviewing the application in allowing a substantial part of the land to be classified as a village green, she suggested this was brave as it went against the recommendations of the inquiry inspector. She noted that there were few cases of this but it was not unheard of where Councillors were satisfied that all the legal requirements were covered. She considered that the previous Committee felt that they had dealt with all the legal aspects and had come to a considered decision. Unfortunately the threat of a judicial review had brought the application back to the Committee and Members had to make the decision again. She noted that a recommendation within the report had been made out in the strongest terms but she hoped that Members were able to consider the evidence and the decisions made in an open minded way when reaching their decision.

She noted that the Inspector had stated within her report that it could only be a set of recommendations to the Registration Authority and that, as such, it was free to accept or reject any of her recommendations. She noted that the Inspector clearly believed the area, other than that of the old tennis courts, fitted the criteria of a village green as she had stated:-

That the application land comprises land that is capable of registration as a Town or Village Green in principal.

That Castle Park is a qualifying neighbourhood within the qualifying locality of Mayfield Ward.

That the relevant 20 year period was 16 May 1986 until 16 May 2006.

That the use of the remainder of the application land for lawful sports and pass times had been “as of right” throughout the relevant 20 year period.

The sticking points within the Inspector’s report were:-

That the application land had not been used for lawful sports and pass times throughout the relevant 20 year period to a sufficient extent and continuity to have created a Town or Village Green;

That the use of the application land for lawful sports and pass times had not been carried out by a significant number of inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period.

She considered there were two very subjective words contained within the statements and the weight of evidence was clearly judged significantly on those witnesses who were brave enough to stand before the inquiry. She noted many others felt unable/not capable of facing what they saw as a court case, but there was a wealth of supporting written evidence.

The two words on which the judgement stood were sufficient and significant, subjective words on which each person may on hearing them come to an entirely different decision. Neither were measurable in numbers. She suggested that each and every person who used the land was significant and that the opportunity for them and future generations to be able to use the land was also significant. In relation to sufficient again she suggested it was difficult to measure. She felt again that this was a subjective decision and while the Inspector felt that there wasn’t sufficient use she would question the definition used. She believed the old saying regarding law was that it was better that ten guilty persons escaped than one innocent suffer. She felt that it was better that one or two in each and every generation had the right to use the land rather than condemn the whole estate by taking away their choice and rights to use the land. She asked Members to consider the two points when making their decision and view them from the residents point of view because then they became sufficient and significant.

She also believed that case law could be interpreted in many ways and the selection of cases used to prove a point could easily be used to support not deny the application.

Local resident Mrs Joanne Wood addressed the Committee in favour of the application.

She noted that the Minutes of the meeting held on 11 January had been noted as approved and she strongly disapproved as to the reasons why the matter had returned to the Committee. She noted an amendment was made to the application and the Registration Authority was then satisfied that all the relevant criteria set out in Section 15 (2) had been met. She believed that due to the amendment being made there was no legality issues that the objector could rely upon or relate to for any claim for judicial review on the decision made to be successful. In respect of the report presented at today’s meeting she disagreed with the opinion that there was no reason for the Committee to warrant a departure from the Inspector’s finding in respect of the whole of the area of the land. With reference to the Inspector’s report she considered it very intense and unfair. She suggested that the Inspector contradicted herself thereby not making sense and had relied on her own assumptions to reach and conclude her

recommendation of refusal. The report had no conflicting evidence of proof for the Inspector to relate to and conclude that all the relevant criteria set out in Section 15 (2) had not been met apart from the two tennis courts. She considered this unacceptable as not even an expert could turn assumptions into legal fact.

She noted that the Inspector stated that she had relied mostly and put more weight on oral evidence than written. The Inspector also stated that all Members of the Committee should take into account all written evidence before reaching their decision. She suggested that should that be the case for all those reasons it would be wrong for the Committee to follow the recommendations of refusal.

She stated that the application was thorough and honest along with the witness evidence submitted in support, and all documentation presented throughout, stated facts on what had happened and that she was in a position to submit a recommendation and had done so through her report.

The Inspector's report, following detailed analysis of the evidence provided, recommended the registration authority to reject the application on four separate grounds, they being:-

- The use of the land had not been "as of right".
- There had been insufficient use of the land for this to be registered as Town or Village Green.
- The evidence provided did not demonstrate sufficient use of the land for lawful sports or pastimes within the period highlighted.
- Much of the use during the qualifying period had been "by right".
- He stated that there was little evidence of use to suggest that this had been wholly by local residents, with a great deal of use suggesting that people came in from neighbouring locations to use the land, neither was there evidence of large scale use.
- He considered that the inspector had used the appropriate guidelines correctly, and her decision had been sound, therefore, the application should be rejected.

At the conclusion of Mr Booths address Members were invited to ask questions and clarify matters and the following issues were discussed:-

- The Chairman asked to clarify the issue as to whether Members were not allowed to pass judgement on the Inspector's report as they were not present at the hearing. The County Council's legal representative, Catriona Gatrell, emphasised that the final decision was ultimately with Councillors and noted that the Inspector had stated that. She emphasised that the Inspector had been appointed to hold an enquiry which would enable evidence to be produced allowing a recommendation to be made on whether the application was appropriate, based on that evidence. She noted that Members could come to a different decision as to what was recommended by the Inspector's report but had to give appropriate reasons as to why they did not concur. She noted what had been stated by Mr Booth and considered that it was more difficult for Members to come to an informed decision having not heard the evidence directly.
- A Member suggested that the decision within the Inspector's report was based on a balance of probabilities, and that she had considered that the

use “as of right” was less than the use “by right”. He considered that there was an argument to say that the balance could be the other way and that the recommendation was based purely on her interpretation of that balance of probabilities. In response Mr Booth considered that it was the Inspector’s appropriate position to interpret the evidence given and then make a judgement based on the balance of probabilities. He emphasised that on such matters the issue did not have to be proven beyond reasonable doubt as that only applied to matters of criminality. As such he considered it was appropriate that when weighing up the evidence she provided the recommendation based on the balance of probabilities.

- A Member raised concern that evidence given outside the qualifying period by a representative of the landowner, the main objector, had been given considerable weight as part of the evidence given to the enquiry. Mr Booth stated in response that the issues raised were statements of fact as to what had been seen, however, the Inspector did not express her views in relation to those facts, as that was not her role, she had been appointed to make a judgement based on the evidence provided. He emphasised that it was not appropriate for the Committee to revisit the submitted evidence, as that was the role of the public inquiry. A Member raised concerns that such evidence was taken account of as part of the public inquiry. The County Councils Legal Adviser, Simon Evans, highlighted the evidence referred to, within the Inspector’s report and noted that this highlighted that the issues raised were beyond the 20 year qualifying period and that the issues that had been raised were qualified by her within the statement at that point. Mr Booth highlighted how the Inspector had given weight to evidence provided, through her summing up of the reports, and considered that to be appropriate. In response the Member considered that the Inspector’s report stated that evidence submitted in relation to usage outside the qualifying period of May 1986 to May 2006 had been discounted, however, she still gave consideration to the issues raised by the objector and his observer outside of that period. He considered that to be contradictory. In response Mr Booth emphasised that the context to how the Inspector had considered evidence given outside the qualifying period had been outlined within the report. He also noted that the County Council’s Legal Advisers were present to give Members a steer on how they should interpret details provided within the Inspector’s report and, therefore, was satisfied with that.
- A Member asked whether it would have been appropriate to have the Inspector in attendance at the meeting, in person, to answer questions raised in relation to the report. In response the County Council’s Legal Adviser, Catriona Gatrell, stated that this was not the usual practice as the opinion of the Inspector was set out in the report and the Committee usually relied upon that.
- A Member sought clarification from Mr Booth in relation to his statement that this was a village green application and not a planning application. In response Mr Booth highlighted how for planning applications Members had to balance up a number of considerations informing their view on an application, whereas with town and village green applications the statutory guidelines had to be met for these to proceed. Should it not be

evident that the guidelines had been met then the application had to be refused. He considered it important that Members only took account of the statutory criteria as that was what applications had to be determined upon.

The County Council's Legal representative, Catriona Gatrell, reminded Members of their responsibilities in terms of the action they could take in respect of the application. She emphasised the need for them to provide reasons as to how they came to their decision and of the need for them to take account of the statutory criteria when reaching that decision.

Members discussed the report and information provided, in depth, and the following issues and points were highlighted:-

- The Inspector's report highlighted the non-qualifying use between 1986 and 2006, the qualifying period, and how the Inspector had interpreted that use. It was noted that the statutory criteria had to be fully met for the application to be supported and it was not considered, through the evidence given, that this was the case.
- The issue of use of the land "as of right" as opposed to "by right" had not been fully clarified. There was still uncertainties as to whether service personnel who had bought their houses were using the land "as of right" or how that was determined. It was also considered that no clarification had been provided as to whether such rights applied to their family, etc. The Member considered that it was difficult to challenge what the Inspector's interpretation of that was and suggested there was a lot of acceptance that this was the fact. In response the County Council's Legal Adviser, Catriona Gatrell, emphasised that the Inspector had considered the evidence provided to her and had come to the conclusion that persons living in accommodation related to their employment, ie service personnel, were using the land "by right". Once they had purchased their property and the housing was no longer linked to that employment then this was not "by right". She considered that the Inspector's interpretation of family use was set in Section 6.25 of her report where she suggested that the burden of proof lay with the applicant. Referring to the same section of the report the Member noted that the Inspector had stated that all use of the land by RAF personnel should be discounted as they had used the land "by right" and he wondered where the evidence for that was outlined. Catriona Gatrell considered that that was a reasonable assumption as RAF personnel and their family were using the land "by right" by way of securing the housing through their employment. The County Council's Legal Adviser, Simon Evans, indicated that the issue relating to the use "by right" by RAF personnel was not an assumption but had been determined that this was the case due to the employment rights related to the housing provision. A Member considered that a lot of effort had been put into the Inspector's report in discrediting a lot of the evidence provided in support of the application. He accepted the points raised by the Inspector but considered that there was no justification in dismissing all the evidence provided due to the "by right" issue of use by RAF personnel. He considered some of that evidence to be of use as documenting the use of the land and suggested that some of the use given in that evidence would have been "as of right" during the relevant 20 year period.

Catriona Gatrell emphasised that the Inspector's report did not dismiss all of the evidence, and had taken account of the qualifying evidence. She noted that the public right of way use and use by children had not been ruled out and had been analysed alongside other evidence. She considered that the Inspector had taken account of all the issues raised in determining whether they were appropriate for use in the consideration of the application. A Member referred to residents exercising their dogs on the land and the reference within the Inspector's report to specific routes being used around the site. He considered that should dogs be walked on the land, for exercise purposes, it was unlikely that a specific route would be followed and that the whole of the area would be used for recreational purposes. Catriona Gatrell stated that the Inspector had been using case law in relation to this element of the evidence, where specific reference had been made to dog use in terms of village green applications and how that was considered to be akin to the use of a public right of way. She noted evidence had been given regarding the exercising of dogs and the wider use of the land, but much of that had related back to use by RAF personnel and therefore had been discounted as it had been "by right". In the evidence, as a whole, only 2-3 people had been using the land to exercise their dogs in the manner outlined by the Member.

- A Member asked why consideration was only given to a specific 20 year period in relation to village/town green applications. Catriona Gatrell stated that the qualifying 20 year period of use had to be demonstrated in such applications and in terms of this application the qualifying time worked back from when the "as of right" use of the land potentially ceased, when signs were put up preventing use in 2006.
- A Member considered that many people had been using the land over a number of years for recreational purposes and suggested that it was very difficult to determine use "by right" as opposed to use "as of right". He asked whether there was a criteria in place in terms of the number of people using the land that would qualify that for town or village green status. Catriona Gatrell stated that the Inspector set out what she considered was significant usage within her report. She noted that there was no specific guidance in relation to the term significant but noted the large amount of evidence provided. She noted, however, that a great deal of that evidence had not come from the inhabitants of the Castle Park area and therefore had been discounted as it did not pass the statutory test. She highlighted the case law set out by the Inspector in her report at Section 5.18. It was emphasised that this would have to be qualifying significant usage as non-qualifying usage would be discounted.

Members moved to the final part of the determination process. A Member noted the public inquiry that had taken place, the evidence that had been provided and the Inspector's report that resulted. As a result he suggested that the relevant statutory criteria had not been met in terms of applications for town or village greens and, therefore, recommended that the application be refused. Another Member agreed with that, noting that the Inspector had gathered evidence in respect of the application over a three days period and had not considered that the application could be supported.

A Member suggested that the Inspectors report was based on too many assumptions and on the balance of probabilities that the majority of usage was "by right" rather than

“as of right”, however, he considered that that position was open to argument and that the matter was very finely balanced. He reiterated his position, as he had outlined early in the meeting in terms of the walking of dogs, the use of the area by service families when they had bought their properties and noted that many of these had become private dwellings before the qualifying period. He also noted the evidence provided by the objector outside the qualifying period and the credence that had been given to that evidence, despite large amounts of evidence in favour of the application having been discounted. He concluded, therefore, that the application should be supported.

The Chairman thanked those that had attended the meeting for providing their statements and for being clear and concise in the arguments that they had set out. He agreed with the Member that had stated that the matter was a very finely balanced situation but found it difficult not to support the recommendations set out by the Inspector following the submission of evidence to the public inquiry.

Resolved –

That the Application be refused because the Registration Authority is not satisfied that it meets all the relevant criteria set out in Section 15(2) of the Commons Act 2006 for the reasons set out in the Inspector’s report dated 12 August 2012, appended to the report.

The meeting concluded at 12.25 pm.

SL/ALJ