Application to register land at Dumpton Park Drive, Broadstairs as a new Town Green

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A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Tuesday 25th May 2010.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land at Dumpton Park Drive, Broadstairs has not been accepted.

Local Members: Mr. R. Bayford and Mr. B. Hayton Unrestricted item

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Introduction

1. The County Council has received an application to register land at Dumpton Park Drive, Broadstairs as a new Town Green from local resident Mrs. L. Coussins ("the Applicant"). The application, dated 26th January 2009, was allocated the application number VGA608. A plan of the site is shown at **Appendix A** to this report and a copy of the application form is attached at **Appendix B**.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008.

3. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Village Green where it can be shown 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;

4. In addition to the above, the application must meet one of the following tests:
   - **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or
   - **Use of the land 'as of right' ended no more than two years prior to the date of application**, e.g. by way of the erection of fencing or a notice (section 15(3) of the Act); or
   - **Use of the land 'as of right' ended before 6th April 2007** and the application has been made within five years of the date the use 'as of right' ended (section 15(4) of the Act).

5. As a standard procedure set out in the regulations, the Applicant must notify the landowner of the application and the County Council must notify every local authority. The County Council must also publicise the application in a newspaper circulating in the local area and place a copy of the notice on the County Council's website. In addition, as a matter of best practice rather than legal requirement, the County Council also places copies of the notice on site to provide local people with the opportunity to comment on the application. The publicity must state a

period of at least six weeks during which objections and representations can be made.

The application site

6. The area of land subject to this application ("the application site") consists of a small area of grass of approximately 150 square metres situated between property numbers 132 and 134 Dumpton Park Drive at Broadstairs. It is bounded on two sides by walls and fencing, but open on the remaining two sides. Access to it is via the footway of Dumpton Park Drive.

The case

7. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities 'as of right' for more than 20 years.

8. Included in the application were twelve statements from local residents asserting that the application site has been available for free and uninhibited use for lawful sports and pastimes over the last twenty years and beyond. A summary of the evidence in support of the application is attached at **Appendix C**.

9. Also received in support of the application were a number of photographs showing community events taking place, use of the land by local residents and maintenance of the application site by local residents. Several newspaper cuttings reporting a community party that took place on 11th July 2009 were also provided, as well as a CD containing photographs and a video of the event. In addition, a petition in support of the application containing 73 names was included.

10. Letters of support from the local Ward Councillors (Cllrs. Russell and Peppiatt), the Deputy Mayor of Broadstairs and St. Peter's (Cllr. D. Lawson) and the former local MP Dr. Stephen Ladyman were also submitted in support of the application.

Consultations

11. Consultations have been carried out as required and the following comments have been received.

12. The Broadstairs Society wrote to express its support for the application but did not have any evidence to offer.

13. Cllr. C. Wells also wrote in support of the application, stating that the local residents had enjoyed the use of the land for community and amenity purposes over a number of years. He states that the land has traditionally been a meeting place for dog walkers and horse riders, and has been used for a number of community events.

Landowner

14. The application site is unregistered with the HM Land Registry and there is no known owner. However, Thanet District Council ("the District Council") claims to have an interest in the land and has submitted an objection to the application.

15. The objection is made on the following grounds:
    - Due to the size of the site, it is questionable as to whether it could sustain all the activities claimed to have taken place;
    - Use has not been by a significant number of the residents of the locality;
    - Residents living within several hundred metres of the same road cannot be considered either a neighbourhood or a locality for the purposes of Village Green legislation; and
    - A number of those who have made statements have not clearly stated that they have actually used the land - they have merely indicated that they would support such use.

Legal tests

16. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:
    (a) Whether use of the land has been 'as of right'?
    (b) Whether use of the land has been for the purposes of lawful sports and pastimes?
    (c) Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?
    (d) Whether use has taken place over period of twenty years or more?
    (e) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?

I shall now take each of these points and elaborate on them individually:

(a) Whether use of the land has been 'as of right'?

17. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the *Sunningwell*[1] *case*, it is considered that if a person uses the land for a required period of time without force, secrecy or permission (*nec vi, nec clam, nec precario*), and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired and further use becomes 'as of right'.

18. In this case, there is no evidence to suggest that the use of the land by local residents has not been 'as of right'. In its objection, the District Council does not seek to dispute the evidence of use, nor has it adduced evidence to suggest that such use has been ever been challenged or hindered in any way.

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[1] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council [1999] 3 All ER 385*

(b) Whether use of the land has been for the purposes of lawful sports and pastimes?

19. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. It is not necessary to demonstrate that both sporting activities *and* pastimes have taken place since the phrase 'lawful sports and pastimes' has been interpreted by the Courts as being a single composite group rather than two separate classes of activities[2].

20. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. The Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[3].

21. In this case, the evidence demonstrates that the land has been used for a number of recreational activities, as well as local community events. The summary of evidence of use by local residents at **Appendix C** shows the full range of activities claimed to have taken place.

22. The District Council questions whether, given the small size of the application site, it would have been capable of sustaining the activities alleged to have taken place. The physical nature of the site will restrict the type of activities that are capable of taking place on it. Clearly, it does not lend itself to the types of sports (e.g. football or cricket) that one might expect to see on a larger application site, but it is capable of supporting a number of pastimes, including those referred to in the application. A pastime is an activity which amuses and serves to make time pass agreeably: sitting in deckchairs, children playing, dog walking and socialising with neighbours all fall within this definition. Since 'lawful sports and pastimes' within the context of the Act are one composite group (see above), it matters not that the vast majority of activities relied upon constitute only pastimes.

23. The District Council also criticises the quality of the evidence submitted in support of the application, stating that whilst many people record their observations of use, there is little evidence of actual use of the application site. It is true that there are flaws in the user evidence. Whilst providing a broad overview of the use of the land in general terms, there is little in the way of detail as to the exact nature of the use, the frequency and regularity of such use, or the duration of such use.

24. Reference is made in the application form and in a few of the statements to community events such as croquet, barbeques and picnics, but there is no information regarding the dates or frequency of such events, or whether they have been taking place throughout the relevant period. In support of the application, a number of photographs were subsequently submitted showing a community bonfire night and a fete (the latter also being evidenced by newspaper articles). However, these events appear to have taken place during 2009, after

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[2] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

[3] *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

the submission of the application, and are therefore outside the relevant twenty year period (which runs retrospectively from the date of the application, i.e. January 1989 to January 2009).

(c) Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?

25. The right to use a Village Green is restricted to the inhabitants of a locality or of a neighbourhood within a locality and it is therefore important to be able to define this area with a degree of accuracy so that the group of people to whom the recreational rights are attached can be identified. Identifying the relevant "locality" or "neighbourhood within a locality" can be problematic but it does not matter if the applicant fails to precisely defined the correct locality in his application; the burden is not on the applicant to establish the correct locality at the time of application, but rather on the Registration Authority to satisfy itself that there is a relevant locality (or neighbourhood) at the time of registration[4].

"locality"

26. The definition of locality for the purposes of a village green application has been the subject of much debate in the courts and there is still no definite rule to be applied. In the Cheltenham Builders[5] case, it was considered that *'…at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality… there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition*'. The judge later went on to suggest that this might mean that locality should normally constitute '*some legally recognised administrative division of the county*'.

27. At part 6 of the application form, the Applicant specifies the locality as 'Dumpton Park'. This is not a legally recognised administrative boundary and thus would not satisfy the requisite legal test. It is therefore necessary to consider whether there is a relevant locality.

28. As shown on the plan at **Appendix D**, the application site is situated within the Thanet District Council ward of Viking. It is also within the County Parish of Broadstairs which covers a much wider area. Both of these areas are recognised at law and could constitute a relevant locality. Alternatively, it has also been held by the Courts that an ecclesiastical parish could form a recognised locality since they are known to the law and have defined boundaries[6]. The application site falls within the ecclesiastical parish of St Peter in Thanet and this would be equally capable of constituting a locality.

"a significant number"

29. The word "significant" in this context does not mean considerable or substantial: '*a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number… what matters is that the*

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[4] *Oxfordshire County Council v Oxford City Council* [2006] 4 All ER 817
[5] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at page 90
[6] *R (Laing Homes Ltd.) v Buckinghamshire County Council* [2003] 3 EGLR 70

number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers'[7]. Thus, what is a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the application site.

30. In this case, the application is supported by evidence of use from 10 households, each situated within a maximum of 150 metres from the application site (as shown on the plan at **Appendix E**). Even taking the smallest potential locality (in geographical terms), which would be the Viking ward of Thanet District Council, evidence of use from 10 households living immediately adjacent would be insufficient to demonstrate that the land had been use by the community as a whole.

31. In cases where the "locality" is so large that it is difficult to show that the application site has been used by a significant number of people from that locality (as is the case here), it will be necessary to consider whether there is a relevant "neighbourhood" within the wider locality.

"neighbourhood within a locality"

32. On the subject of neighbourhood, the Courts have held that '*it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood… The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning*'[8].

33. Although it is accepted that, in all probability, only those living closest to a piece of land are likely to use it for recreational purposes, there is still a requirement for the purposes of Village Green registration to show that the land has been used by the residents of a defined area or, as suggested by LJ Pill in a case known as <u>Steed</u>[9], '*something more than a place or geographical area – rather a distinct and identifiable community such as might lay reasonable claim to a town or village green'.*

34. There is, of course, no generally accepted or recognised number of local inhabitants required in order for the use of a piece of land to give rise to the acquisition of Village Green rights. However, had it been Parliament's intention that use of any piece of land by a small number of people living in just one nearby street, then this would undoubtedly have opened the floodgates for Village Green applications across the country. The very nature of a 'village' green implies that it has been used by a not insignificant number of local residents from a recognisable community – a community which, at the very least perhaps, consists of a grouping of streets or roads which form a cohesive entity.

35. The District Council is of the view that '*the residents live along several hundred metres of road which can hardly be considered a neighbourhood or indeed a*

[7] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[8] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at page 92
[9] *R v Suffolk County Council, ex parte Steed and another (1995)*

locality'[10]. In response, the Applicant states that the group of houses in question form a discrete geographical area stretching along Dumpton Park Road between its junctions with Salisbury Avenue and Bay View Road, being bounded to the rear by the railway line and to the front by a steep escarpment on the seaward side of Dumpton Park Road. The Applicant also adds '*it is, in its culture and regard by the inhabitant of it, a village and the area applied for is its village green. This, however, does not mean that only the people who live along this stretch of Dumpton Park Drive use the green. Many people from the further locality of the Bay View Road and Salisbury Avenue houses use it to exercise their dogs and stop and chat with their neighbours as well as attending community activities...*'[11].

36. Until recently, it had been thought that use of an application site should be predominantly by residents of the neighbourhood or the locality (i.e. it was not necessary for use to be exclusively by the residents of a neighbourhood or locality). However, the 'predominance test' has now been removed[12] and use by people from outside the relevant neighbourhood or locality is to be disregarded. In this respect there appears to be some uncertainty regarding the exact boundaries and extent of the neighbourhood relied upon by the Applicant in this case; she asserts that the relevant neighbourhood consists only of the few houses along Dumpton Park Drive but adds that people from outside that neighbourhood also use the site. Under the new interpretation, their use would have to be disregarded.

37. The question to be considered is whether the small group of houses along Dumpton Park Drive are capable of constituting a qualifying neighbourhood. It is not clear in this case that the neighbourhood asserted by the Applicant is a 'neighbourhood' in the true sense of the word. It is neither a separate cohesive entity nor an identifiable community within the wider locality; rather it is a group of houses that are geographically proximate to the immediate vicinity of the application site.

38. The fact that the neighbourhood as relied upon by the Applicant is unsuitable is further qualified by the requirement for use to have been in general use by the local community. It is true that a qualitative, rather than quantitative, approach is required, but if the neighbourhood is unduly restricted, a reasonable landowner might conclude that use of the application site was by a few individuals living in the immediate vicinity rather than the general local community as a whole asserting a right to use the land as a Town Green; as such, s/he would have no reason to resist such use. The Applicant states that there is evidence of use from the wider community (i.e. from Salisbury Avenue and Bay View Road) but has not adduced such evidence in support of the application. On the evidence currently available, therefore, it cannot be said that use has been by a significant number of the residents of the locality.

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[10] See letter of objection from Mr. J. Thomson on behalf of Thanet District Council dated 25/11/09

[11] See letter from Mrs. L. Coussins (the Applicant) dated 07/05/10 at pages 4-5

[12] Following the decision in *R(Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxforshire County Council* [2010] EWHC 530 (Admin)

(d) Whether use has taken place over a period of twenty years or more?

39. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. Where there has been no challenge to the use of the land and use 'as of right' is continuing, the twenty-year period is to be calculated retrospectively from the date that the application was made.

40. In this case, the application was made in January 2009. Therefore, the relevant twenty-year period ("the material period") is 1989 to 2009.

41. The vague nature of the witness statements means that it is difficult to pinpoint exactly when each of the witnesses began using the applications site. They have, however, provided dates when they first moved to the area and it is possible to draw an inference that their use has been since that time, but this is only an inference and it is not possible to conclude decisively on the information available.

(e) Whether use of the land by the inhabitants is continuing up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?

42. The Commons Act 2006 requires use of the land to have taken place 'as of right' up until the date of application or, if such use has ceased prior to the making of the application, to fulfil one of the alternative criterion set out in sections 15(3) and 15(4) of the 2006 Act (as set out at paragraph 4 above).

43. In this case, there is no suggestion from the evidence submitted both in support of and in objection to the application that the use of the land by the local residents for the purposes of informal recreation has ceased prior to the making of the application.

44. Therefore, it appears that use of the land has continued up until the date of application and as such it is not necessary to consider the other tests set out in sections 15(3) and 15(4) of the Act.

Conclusion

45. From close consideration of the evidence submitted, I have concluded that the legal tests concerning the registration of the land as a Town Green (as set out above) have not been met.

Recommendation

46. I recommend that the County Council informs the applicant that the application to register the land at Dumpton Park Drive, Broadstairs has not been accepted.

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The main file is available for viewing on request at the Environment and Waste Division, Environment and Regeneration Directorate, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

Background documents

APPENDIX A – Plan showing application site
APPENDIX B – Copy of application form
APPENDIX C – Table summarising user evidence
APPENDIX D – Plan showing the District Council wards
APPENDIX E – Plan showing the area within which users reside