Application to register land at Bunyards Farm, Allington as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Tuesday 10th December 2024.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 12th September 2024, that the Applicants be informed that the application to register the land at Bunyards Farm, Allington as a new Village Green has not been accepted.

Local Member: Mr. A. Kennedy Unrestricted item

Introduction

1. The County Council has received an application ("the Application") to register land at Bunyards Farm at Allington as a new Town or Village Green from Mr. C. Passmore, Mr. J. Willis, Mr. T. Wilkinson, Cllr. P. Harper, Mr. T. Walker and Mr. D. Edwards ("the Applicants").

2. The Application has been made under section 15 of the Commons Act 2006, which 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;

3. The Application was initially supported by 10 user evidence questionnaires, with a further 53 questionnaires in support of the Application subsequently being provided by the Applicants. The Application was made under section 15(2) of the Commons Act – i.e. on the basis that use of the Application Site has continued 'as of right' until the date of the Application – such that the relevant twenty-year period under consideration is 8th June 2001 to 8th June 2021.

The Application Site

4. The land subject to the Application ("the Application Site") consists of an area of land of approximately 37.5 acres (15 hectares), comprising formerly arable farmland, situated between Beaver Road at Allington and the Maidstone railway line. The Application Site is shown on the plan at **Appendix A**.

5. There are no public rights of way crossing the Application Site, but the Applicants' case is that access to it has been available from a number of points around the site. Those points are shown on the plan attached at **Appendix B** (along with other notable features), and can be described as follows:
   - **Access A** is a historical field gateway on the north-eastern side of the Application Site that is no longer accessible due to development on the neighbouring land;

- **Access B** comprises the open and unrestricted boundary of the land with the Godwin Road development, which has been available since around 2017 (but was part of the working farmyard, and not accessible, prior to that);
- **Access C** is situated on Beaver Road, roughly opposite its junction with Juniper Close, between a line of hedgerow and a green mesh fencing which is believed to have been installed by the developers of Corben Close (to secure the development site);
- **Access D** is located at the other end of the green mesh fencing, on the southernmost corner of the Application Site, and is an open gap between that fencing and the adjoining treeline that has been available since around the completion of the Corben Close development in late 2001 or 2002;
- **Access E** is a path running through a gap between mature trees between the Application Site and the neighbouring pear orchard;
- **Access F** was historically located in a natural break in the mature tree line but has been obstructed by makeshift fencing; and
- **Access G**, located towards the railway line on the south-western boundary of the Application Site, comprises a (currently overgrown) break in the tree line where there are remnants of old fencing.

6. The nature of the Application Site has varied considerably over the last few decades. Historically, it has long been in agricultural use and, for many years until 1998 it was used for holding cattle as lairage (where animals are held prior to being taken to slaughter). After 1998, there was some sporadic use of the land for the grazing of horses and, in 2003, 25 to 30 cows were moved onto the site at short notice as a result of a fire at another farm (staying at Bunyards Farm for a period of four weeks). No further livestock was kept on the land after this time, although a hay crop was taken from the land in 2006, and fertilizer applied and mulch spread in 2017. Since that time, the lack of grazing and maintenance on the land has meant that nature has taken its course, such that the grass has become overgrown and self-seeded trees and clumps of brambles have appeared.

7. Finally, it is to be noted that the entirety of the Application Site is the subject of a separate outline planning application for a residential development comprising some 400 homes (reference 22/00409/OEAO). That application is currently under consideration by the Tonbridge and Malling Borough Council (in its capacity as the Local Planning Authority), but has no bearing whatsoever upon the outcome of the Village Green application.

Background

8. The entirety of the Application Site is registered to the Trustees of the Andrew Cheale Will Trust under Land Registry Title number K436532 (“the Landowners”). BDW Trading Ltd. have a legal interest in the land in the form of an option to purchase (“the Objectors”).

9. At the consultation stage, a joint objection to the Application was received from the Landowners and the Objectors on the basis that the application fails to meet the requirements of section 15 of the 2006 Act for a number of reasons, and therefore should be refused. In particular, it was suggested that, throughout much of the relevant period, the Application Site was fenced and in active agricultural use (for the grazing of cattle, taking of a hay crop and grazing by horses) such

that the land was securely fenced and any use of it has been in exercise of force, and, since agricultural use ceased, the land has become overgrown to the extent of making it unsuitable for recreational purposes.

Previous resolution of the Regulation Committee Member Panel

10. The matter was previously considered at a Regulation Committee Member Panel meeting on 15th September 2023[1], at which Members accepted the recommendation that the matter be referred to a Public Inquiry.

11. Accordingly, Officers instructed a Barrister ("the Inspector") experienced in this area of law to hold a Public Inquiry and to report her findings back to the County Council. A Public Inquiry took place over four days in March 2024 at which the Inspector heard evidence from witnesses both in support of and in opposition to the application. The Applicants were ably represented at the Inquiry by Mr. Passmore and Mr. Duncan Edwards, whilst the Landowners and Objectors were represented by Mr. Douglas Edwards of Kings Counsel.

12. The Inspector published her report ("the Inspector's report") on 12th September 2024, and her findings are discussed below.

Legal tests and Inspector's findings

13. 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 of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, has ceased no more than one year prior to the making of the application?
    (e) Whether use has taken place over period of twenty years or more?

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

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

14. In order to qualify for registration as a Village Green, recreational use of the Application Site needs to have taken place 'as of right' throughout the relevant twenty year period. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*'). In this regard, the concept of 'force' is not limited solely to physical force, but instead applies to any use which is contentious or exercised under protest[2]: "*if, then, the inhabitants' use of the land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-*

[1] The minutes of that meeting are available at: Agenda for Regulation Committee Member Panel on Friday, 15th September, 2023, 10.00 am
[2] Dalton v Angus (1881) 6 App Cas 740 (HL)

contentious"[3]. As such, if a landowner takes steps to indicate that he objects to informal use of his land, then that use will not be considered 'as of right'.

15. In this case, there was no indication that informal recreational use of the Application Site had taken place in a secretive or permissive manner, but one of the key issues before the Inspector was the degree to which access to the Application Site had taken place in exercise of force, and there was much debate at the Inquiry as to the state of the fencing around the Application Site during the relevant period (2001 to 2021) and the various access points used to gain entry to the site.

16. At the start of the material period, the Application Site was no longer used for commercial livestock farming, although there was some sporadic use of the site for grazing horses, and the Inspector considered[4] that the fencing must have been in "generally good enough condition to contain the horses" (albeit that it is unclear whether any internal electric fencing was used). This time also coincided with the construction of new homes at Juniper Close and Beaver Road, and the arrival of new families to the area, such that there may well have been some attraction to seek to access the land for recreation via Access C. However, in this respect, she noted[5]:

> *"at this time, notwithstanding there was no livestock on the land, I consider it must have been clear that it was private property and had recently been farmed. The haulage yard and farmhouse were still occupied and the livestock proof fencing must have still been in some kind of decent condition given the very short passage of time since farming ceased. Anyone climbing over a fence or through it would know that they were entering the land by force. If fencing was broken, either at Access C or along the south-western boundary, then it would have been apparent that this had been done by others in order to gain access to the land unlawfully."*

17. The Inspector also found that, prior to the construction of Corben Close (at the very start of the material period), the developers erected a very secure green mesh fence around the perimeter of the construction site (presumably to secure it and prevent public access), which was contiguous with the boundary of the Application Site between Access C and the southernmost corner of the Application Site. This would have prevented access to the site via Access D, and would also have necessitated a very circuitous walk for the residents of Juniper Close and Beaver Road to reach access points E, F and G (which was unlikely in practice).

18. It was not possible to identify, on the evidence available, the precise date upon which access to the Application Site via Access D first became available, but the Inspector concluded that:

> *"Access D was therefore non-existent throughout the period of the Corben Close development's construction. This period of construction straddled the start of the relevant period. [One witness] said that she was the first family to move into the Corben Close development in March 2002 and some of the houses were still being built then... I do not know the exact date when the*

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[3] R (Lewis) v Redcar and Cleveland Borough Council [2010] UKSC 11 at paragraph 92 per Lord Rodger

[4] At paragraph 151 of the Inspector's report

[5] At paragraph 152 of the Inspector's report

majority of the green fence was taken down but I find that it was most likely to have been after July 2001 [i.e. the start of the material period]."

19. Insofar as Access B was concerned, prior to the Godwin Road development, the Inspector found[6] that "*there was no access at all from this point as it was part of the working farmyard which was gated*". However, the effect of the Goodwin Road development, completed in around 2017, was to demolish the yard and open up the Application Site to the public: "*since that event, the land has been free and open to the public with no suggestion that users are trespassers*"[7].

20. Finally, Access A comprised an internal boundary between fields and appeared to the Inspector[8] *"to have been used mainly to enter the northern field from the application land to go to the pillbox… and go back again rather than as a route into the application land from a public road or footpath"*, whilst there was evidence that fencing had, in the early years, been in place at Access G but, in any event, that access appeared to have largely fallen into disuse following the completion of the Corben Close development and the creation of other accesses nearer to the residential properties[9].

21. It is clear from the user evidence that the overwhelming majority of users were accessing the Application Site via access point C. Although the Inspector accepted[10] that the repairs to the fence at Access C were 'pretty elementary' and undertaken only on a 'very ad hoc and infrequent basis', she ultimately concluded[11] that, at the start of the material period (when the scale of informal recreational use was less than it was towards the latter stages):

    "[those responsible for the land] were clearly aware that the Access C fencing was being broken and they took some steps to repair it. They were therefore not acquiescent in my view and, although I consider it would have been open to them to have done more at that time, I consider that, on the balance of probabilities, they did do enough to indicate to users of the land that they should not be entering it via Access C. Anyone stepping over or through the fencing would have been aware that their use was contentious and anyone walking through broken or cut fencing would have (or ought to have) seen the remains of it on the ground… and also ought to have been aware that they were entering forcibly."

22. In respect of the other access points along the south-western boundary at that time (E, F, G), she concluded[12] that there had been stock-proof fencing in place (comprising three strands of barbed wire) and that:

    "This was not a case where a fence simply fell down. It would have been obvious that the wire had been broken and it was private land where users were trespassing against the will of the landowner. I therefore consider that, despite the lack of active repairs, it was enough for the landowner to assume that the existence of that fencing, which had been stock proof only

[6] Paragraph 12 of the Inspector's report
[7] Paragraph 166 of the Inspector's report
[8] Paragraph 188 of the Inspector's report
[9] Paragraph 157 of the Inspector's report
[10] Paragraph 159 of the Inspector's report
[11] Paragraph 177 of the Inspector's report
[12] Paragraph 179 of the Inspector's report

two years previously, was still at that time a clear indication to users that they should not be accessing the land.".

23. Accordingly, the Inspector's view[13] was that, on balance of probabilities, all use of the Application Site at the start of the relevant period was by force. She further found[14] that use continued to be by force *"until the Corben Close development was completed [in late 2001 or 2002] and the green mesh fence was partially removed and Access D was opened up. After that, use of the application land has at all times been 'as of right'"*.

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

24. The term 'lawful sports and pastimes' comprises (for the purpose of Village Green registration) a composite class that can include commonplace activities such as dog walking, children playing, picnicking and kite-flying. 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. Indeed, 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*'[15].

25. In this case, as mentioned above, the nature of the Application Site has changed considerably over the material period, it having long been used as a field for regular cattle grazing (shortly prior to the start of the material period), to use by the landowner practically ceasing (towards the middle of the material period), and then it gradually becoming overgrown and unkempt (as it is today). That in turn has affected the manner in which the Application Site is capable of being used for recreational purposes.

26. Whilst there was evidence of the use of the Application Site for activities such as blackberry picking, children playing, cycling and wildlife observation, the overwhelming majority of the evidence in support of the Application refers to walking. This is highly relevant because, in cases where the use comprises predominantly of walking, it will be necessary to differentiate between use that involves wandering at will over a wide area and use that involves walking a defined linear route from A to B. The latter will generally be regarded as a 'rights of way type' use and, following the decision in the Laing Homes[16] case, falls to be discounted. In that case, the judge said: '*it is important to distinguish between use that would suggest to a reasonable landowner that the users believed they were exercising a public right of way to walk, with or without dogs... and use that would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of the fields*'.

27. As noted[17] by the Inspector in this case, the changing nature of the Application Site has meant that, latterly, it has become *"far, far more difficult to walk on the*

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[13] Paragraph 179 of the Inspector's report
[14] Paragraph 189 of the Inspector's report
[15] 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, ex parte Sunningwell Parish Council [1999] 3 All ER 385
[16] R (Laing Homes) v Buckinghamshire County Council [2003] 3 EGLR 70 at 79 per Sullivan J
[17] At paragraph 192 of the Inspector's report

land other than on defined paths", which users are forced to stick to *"because the grass/ shrub/ brambles/ self-seeded trees etc. are so extensive elsewhere"*. The Inspector identified a number of 'main paths', including a circular route around the field, a clear path between Accesses D and E, and two paths entering the wooded area which converged into one as it exited into the field, and overall considered that the use of the land was of a path-type use rather than the assertion of a more general right of recreation across the whole site.

28. In support of this view, the Inspector said[18]:

> *"In general, people are using the main routes around the land I have identified above (the paths from the entrances and in the woodland and the circular walk in the field part). There are a number of smaller additional paths on the land, some more dominant than others, however all of the paths are strongly defined and they themselves are the facilitator, creating the various walks over the application land and connecting up the various accesses, rather than the application land being a space to use recreationally as a whole. That is not to say that some users would not stick to the main routes and I accept the evidence that some users, wearing wellies and perhaps with dogs, would go off-path and push further through the undergrowth, for example when following a dog or to get to a clump of brambles to pick blackberries. However, I am not convinced that the majority of users would be attracted to doing this given the hostile nature of the vegetation growth, even if it were physically possible… The nature of the land simply does not lend itself to off-path activity such that the use of the routes might fall to be considered ancillary, or part of, the totality of the use. The possible exception might be within the woodland where people have gone off the paths to construct rope swings or carry out other activities, such as den building or building camp fires, but this is a very minor part of the whole application land. The question is not whether anybody ever walks off a path but whether it is done with sufficient intensity and frequency to assert a village green right.*
>
> *…*
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> *In my view… it is evident that people were using the land on defined worn paths created by regular usage along defined routes before the end of the relevant period in a manner consistent with how I witnessed the use of the land on my site visit. Accordingly, the Applicants have failed to establish the assertion of the village green right throughout the relevant period because the assertion of a village green right changed organically to the assertion of public rights of way before the end of the relevant period as a result of nature taking over and forcing users of the land to stick to defined routes.*

29. Accordingly, whilst the Inspector agreed that there had been use of the Application Site by local residents, she considered that the nature of that use, latterly, was a 'public rights of way type of user' and not of a quality to assert Village Green rights.

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

[18] At paragraphs 193 and 194 of the Inspector's report

30. The right to use a Town or 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.

31. The definition of 'locality' for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the Cheltenham Builders[19] 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*'.

32. 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 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*'[20]. Thus, it is not a case of simply proving that 51% of the local population has used the Application Site; what constitutes a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the Application Site.

33. In this case the Applicants originally relied upon the "*Allington neighbourhood in the parish of Aylesford south of the railway line*" as the relevant 'neighbourhood within a locality'. However, an amendment was subsequently sought by the Applicants so as to rely instead upon the "*Allington ward within the borough of Maidstone*". There was no dispute between the parties that the electoral ward of Allington was a qualifying locality for the purposes of this legislation.

34. The Inspector agreed and further noted[21] that *"if all of the use had been qualifying, contrary to my findings, then it would have been by a significant number of local inhabitants of Allington."*

(d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than one year prior to the making of the application?

35. 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, section 15(3) of the 2006 Act provides that an application must be made within one year from the date upon which use 'as of right' ceased.

36. In this case, the Application was made on reliance upon section 15(2) of the 2006 Act – i.e. on the basis that use of the Application Site had not ceased at the time of making the Application on 8th June 2021.

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[19] R (Cheltenham Builders Ltd.) v South Gloucestershire District Council [2004] 1 EGLR 85 at 90
[20] R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council [2002] EWHC 76 at paragraph 71
[21] Paragraph 195 of the Inspector's report

37. There has been no suggestion that use of the site ceased prior to that date, and indeed the open boundary with the Godwin Road development means that – in the absence of a fence – it would have been impossible to prevent access to the Application Site in any event.

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

38. 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. In this case, the relevant twenty-year period ("the material period") is to be calculated retrospectively from the date of the application, and is therefore 8th June 2001 to 8th June 2021.

39. There was no dispute that the Application Site had been used for recreational purposes during the material period (subject to the comments above as to the nature of that use) and a number of the witnesses attested to use of the Application Site throughout the relevant twenty-year period.

The Inspector's conclusion

40. Having carefully considered the evidence, the Inspector's overall conclusion[22] was that *"the application should fail in full for the following reasons:*
    - *(i) The applicant has failed to show that the use of the application land for lawful sports and pastimes was 'as of right' throughout the relevant period because use was 'by force' from the start of the relevant period in June 2001 until the creation of Access D when the Corben Close development was completed after the start of the relevant period in June 2001;*
    - *(ii) The applicant has failed to show that the use of the application land was in the nature of the assertion of a town or village green right throughout the relevant period because the use of the application land was in the nature of the assertion of public rights of way only, by the end of the relevant period in June 2021."*

Subsequent correspondence

41. On receipt, the Inspector's report was circulated to the Applicants, the Landowners and the Objectors for their comments.

42. The Applicants noted that the outcome was disappointing, but had come following a very detailed Public Inquiry to get to the facts, and they did not wish to make any submissions in respect of the Inspector's report.

43. The Landowners did not have any further comments to make, and the Objectors confirmed, in light of the Inspector's report, that there was nothing further they wished to add, other than to invite the County Council to reject the Application in light with the Inspector's recommendations.

[22] Paragraph 197 of the Inspector's report

Conclusion

44. The main reason for recommending a Public Inquiry in this matter, as set out in the previous report to the Member Panel, was that there was a serious dispute as to the nature of the access to the Application Site (which was further complicated by the number of alleged entry points). There were also questions as to the quality of recreational use (and the degree to which it was 'path-type use'), and also whether the landowner's activities had in any way interrupted or interfered with the recreational use of the Application Site. The holding of a Public Inquiry has enabled considerably more detailed examination of these issues of fact and degree (compared with the written evidence), and has allowed a much clearer picture of the usage of the Application Site to emerge.

45. The matter continues to turn primarily on the issue of access, and it is now evident that entry to the Application Site during the very early part of the material period was not 'as of right' on account of the presence of fencing (including stepping across broken fencing) that would have made it clear to any users that the land was private and any use of it was contentious, i.e. against the landowner's wishes. It has also now been established that, during the latter part of the material period, the overgrown state of the Application Site made it difficult for users to do anything on the land other than follow the well defined paths across and around it; such use is not qualifying use for the purposes of Village Green registration.

46. The Officer's view is that the parties' evidence and submissions have been carefully examined by the Inspector, and the matter has been thoroughly scrutinised. It is considered that the Inspector's report accurately represents both the evidence and submissions made, and the law as it currently stands.

47. Accordingly, it is considered that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met, such that the land subject to the Application (shown at **Appendix A**) should not be registered as a new Village Green.

48. It is to be noted that, if Members were to approve the recommendation set out below, and the Applicants remained aggrieved, it is open to the Applicants to apply for a Judicial Review of the decision in the High Court.

Recommendation

49. I recommend, for the reasons set out in the Inspector's report dated 12th September 2024, that the Applicants be informed that the Application to register the land at Bunyards Farm, Allington as a new Village Green has not been accepted.

Accountable Officer:
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Case Officer:
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Appendices

APPENDIX A – Plan showing Application Site
APPENDIX B – Plan showing access points and other notable features

Background documents

Inspector's report dated 12th September 2024