Application to register land known as Barton Playing Field at Canterbury as a new Town Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Tuesday 14th September 2010

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 27th November 2009 and his supplementary report dated 15th July 2010, that the applicant be informed that the application to register the land known as Barton Playing Field at Canterbury has not been accepted.

Local Member: Mr. M. Northey Unrestricted item

Introduction and background

1. The County Council has received an application to register land known as Barton Court Playing Field at Spring Lane in Canterbury as a new Town Green from local resident Dr. S. Bax ("the applicant"). The application, dated 10th May 2007, was allocated the application number 595. A plan of the site is shown at **Appendix A** to this report.

Procedure

2. The application has been made under section 15(1) of the Commons Act 2006 and regulation 3 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. These regulations have, since 1st October 2008, been superseded by the Commons Registration (England) Regulations 2008 which apply only in relation to seven 'pilot implementation areas' in England (of which Kent is one). The legal tests and process for determining applications remain substantially the same.

3. Section 15(1) 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 County Council must notify the owners of the land, every local authority and any other known interested persons. It 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 large playing field situated in the St. Martin's area of the city of Canterbury, which is known locally as Barton Playing Field. The application site forms a rectangular shape that is bounded on all sides by adopted highways known as Spring Lane, Pilgrims Road and Pilgrims Way (part of which is recorded on the Definitive Map of Public Rights of Way as Byway Open to all Traffic CC41). The application site is shown on the plan at **Appendix A**.

7. The greater part of the application site is owned by Barton Court School whilst the remainder is owned by Chaucer Technology School. There is close cooperation between the staff of the schools and the site is used by both schools for sports activities both during the school day as part of the teaching curriculum and for after-school clubs and events. Formal access to the site is via two pedestrian gates at each end of the field, and via a vehicular access gate along Pilgrims Way.

Previous resolution of the Regulation Committee Member Panel

8. Objections to the application were received from Canterbury City Council, eight local residents, the KCC Local Education Officer. Barton Court School and Chaucer Technology College also objection to the application in their capacity as landowners.

9. The matter was considered at a Regulation Committee Member Panel meeting on Wednesday 12th November 2008, where Members accepted the recommendation that the matter be referred to a non-statutory Public Inquiry for further consideration.

10. As a result of this decision, Officers instructed Counsel experienced in this area of law to act as an independent Inspector. A non-statutory Public Inquiry took place at The Guildhall in Canterbury commencing on Monday 14th July 2009 and continuing over a period of 5 days, during which time the Inspector heard evidence from all interested parties. The applicant and the landowning objectors were represented by Counsel at the Inquiry.

11. The Inspector subsequently produced a detailed written report of his findings dated 27th November 2009. The Inspector's findings and conclusions are summarised below, but a full copy of the Inspector's report is available from the Case Officer on request.

Legal tests and Inspector's findings

12. 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 the 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 by the inhabitants is continuing up until the date of application?*

I shall now take each of these points and elaborate on them individually in accordance with the Inspector's findings:

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

13. 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'.

14. Whilst there was no evidence to suggest that use had been with permission or in secrecy, there was much debate at the Inquiry as to whether the use had been with force. As the Inspector explains:

> "'Force' does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates or if it is contentious or under protest. Where for example there is a 'state of perpetual warfare' between the landowner and user, then the use would not be 'as of right'".

15. In this case, issues arose as to whether the site had been fenced in its entirety, whether the access gates had been locked, and the existence of prohibitory notices.

Fencing

16. The Inspector heard evidence, and was satisfied, that at the beginning of the qualifying period, there was a chain link fence in place around the application site. This was acknowledged by several witnesses (on both sides) at the Inquiry and supported by photographs produced by the landowning objectors taken in the early 1990s. The evidence was that, during the whole of the relevant twenty year period, this fence had been the subject of persistent vandalism. Although some of the witnesses did not recall repairs to the fencing, the evidence was that the damage to the chain link fence was repeatedly repaired by the schools' ground staff, who described the situation as a 'constant battle' against the vandalism.

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

17. In 2000, due to the deterioration of the chain link fence, the schools commissioned a joint project to replace the fence with a welded mesh fence. This was done by contractors. The Inspector found that:

> "...it enclosed the whole of the application site when completed and that Mr. Sutherland [member of staff at Chaucer Technology School], who was involved in the commissioning of the project, satisfied himself that this was the case, as did Mr. Plowman [member of staff at Barton Court School]. I am satisfied that it only remained intact for a short period before the former pattern of vandalism started again. The balance of the evidence suggests that it remains intact only for a matter of weeks before the "battle" to respond to vandalism began again. Mr. Plowman in particular records that it was in place for about six weeks before the damage to the fence recommenced."[2]

18. The contention that the fencing continued to be repaired by the schools' ground staff when required and as expeditiously as manpower and resources allowed was supported by several witnesses and by the production of invoices which refer to the purchase of sections of welded mesh fence between 2001 and 2004.

19. The fencing was finally replaced in 2007 by a more substantial fence, although this was not completed until after the application was made and is therefore outside the relevant twenty-year period.

Gates

20. There are three means of formal access to the site: two pedestrian gates and one vehicular entrance. The Inspector found that there was conflicting evidence at the Inquiry as the extent to which these gates were locked. He found that:

> "First, the policy of both schools was to lock the gates. That this was the case is entirely consistent with the efforts made to maintain the fence around the school to prevent trespass and the policy of staff to challenge trespassers (which I refer to below); I find it unlikely that it was not the practice to lock gates given the considerable efforts made to repair damage to the fence to prevent unauthorised access. Secondly, I find that the Chaucer School was particularly careful to lock its gate in order to prevent the students of that school using the application site as a shortcut at the end of the school day and thereby interfering with on-going Barton Court School lessons. Thirdly, as with the fence, the vandalism extended to the gates and locks. The evidence I heard is that locks on the gates were cut leaving the gates openable. The school would purchase replacement locks. However, I find that there would have been periods of several weeks, particularly where locks were damaged during the holidays, before the locks were replaced. This in my view goes a considerable way to explaining why several witnesses for the applicant did not recall the gates being locked..."[3]

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[2] Paragraph 186 of the Inspector's report dated 27th November 2009
[3] Paragraph 190 of the Inspector's report dated 27th November 2009

Notices

21. The Inspector also heard conflicting evidence regarding notices. Many witnesses did not recall any notices on the application site, but members of school staff do recall notices being present at various points in time, particularly near the gates.

22. The Inspector found that the notices were:

> "...sporadically present during the qualifying period and in particular in 1994 and after the erection of the welded-mesh fence in 2000 near the Barton School gate, and during part of 1993 and 1994 near the Chaucer School gate. However, notices were the subject of consistent vandalism. The limited periods during which these notices were in place, their localised position explains why the applicant's witnesses did not recall the presence of these notices."[4]

Inspector's conclusions regarding use 'as of right'

23. Following a careful analysis of the issues surrounding the fencing, gates and notices, the Inspector concluded that the landowner had not tolerated or acquiesced to the recreational use of the application site during the relevant twenty-year period and, indeed, had actively taken steps to prevent public access through the repeated attempts to secure the fencing and replace the broken locks. He said:

> "The landowners have during the whole of the qualifying period gone to considerable lengths in my view to resist and physically prevent trespass onto the application site. Both the chain link fence in existence at the start of the qualifying period and the subsequent welded mesh fence were the subject of consistent and determined vandalism. The landowners' response was continually to repair openings which were made in the fence as quickly and effectively as time and resources permitted. This is not in my view consistent with a landowner tolerating or acquiescing in trespassory use of his land. The decision to replace the chain link fence with a more robust structure in 2000 is clearly consistent with a landowner seeking to resist trespassory use.
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> The fact that vandalism and subsequent trespass continued does not in my view detract from the overall conclusion that the landowners were doing all they reasonably could do, or be expected to do, to resist entry onto their land. The position is akin to the 'perpetual state of warfare' referred to in *Smith v Brundenell-Brice*...
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> ... I consider that throughout the qualifying period, the landowners did all they reasonably could be expected to have done to prevent unauthorised user of the application site.
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> ...

[4] Paragraph 193 of the Inspector's report dated 27th November 2009

> On the basis of the evidence concerning repairs to fences and locking of, and replacement of locks to, gates, I conclude that the landowners were not during the qualifying period tolerating or acquiescing in local inhabitants' use of the application site but were taking active steps to physically prevent that use."[5]

24. For these reasons, the Inspector was unable to conclude that use of the application site had been 'as of right'.

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

25. 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[6].

26. 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*'[7].

27. In respect of the use of the land for lawful sports and pastimes, the Inspector found:

> "the overall impression I derive from the evidence in support of the application is that for the vast majority, use was not daily but more irregular and in some cases even occasional. Many witnesses referred to weekend use only or use generally only during school holidays. Nevertheless there has been a consistent pattern of use for recreational purposes."[8]

28. The Inspector concluded that there had been material use of the application site for lawful sports and pastimes during the relevant twenty-year period such as to satisfy this element of the legal tests.

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

29. 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*[9] case, it was considered that *'…at the very*

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[5] Paras 205, 206, 207 and 209

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

[7] *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 at 397

[8] Paragraph 195 of the Inspector's report dated 27th November 2009

[9] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

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*'.

30. Where the locality is large, it will also be necessary to identify a 'neighbourhood' within the locality. 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*'[10].

31. Finally, use must have been by a significant number of local inhabitants. 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*'[11]. 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.

32. In support of this application, the applicant relied upon the neighbourhood of 'Barton and Spring Lane' within the wider locality of the ecclesiastical parish of St. Martin and St. Paul. At the Inquiry, the objectors conceded that the area described by the applicant as demonstrating a neighbourhood and locality were properly so described and met the legal requirements.

33. The Inspector concluded that:

> "... the level of use of the application site during the qualifying period was such as to be described as general use by the community for informal recreation. Although, as I have found, few individuals have in fact used the application site very regularly, nevertheless, when considered collectively during the qualifying period there has been a pattern of general use by the community rather than occasional and sporadic.
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> ...
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> I am satisfied that the neighbourhood 'of Barton and Spring Lane', as described by [the applicant], demonstrates a sufficient degree of cohesiveness to be regarded properly as a neighbourhood. I have no reason to doubt the validity of the parish of St. Martin and St. Paul as a locality. I conclude and advice therefore that this element of the qualifying definition is met."[12]

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[10] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 92
[11] *R (Alfred McAlipne Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[12] Paragraphs 199 and 201 of the Inspector's report dated 27th November 2009

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

34. 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 up until the date of application. In this case, the application was submitted in 2007 and therefore the relevant twenty-year period ("the material period") is 1987 to 2007.

35. The Inspector accepted the applicant's evidence that the land had been used for a period of at least twenty years.

(e) *Whether use of the land by the inhabitants is continuing up until the date of application?*

36. Section 15(2) of the Commons Act 2006 requires that use of the application site continues up until the date of application.

37. There was no dispute at the Inquiry that use had continued until the date of the application.

Subsequent correspondence

38. On receipt, the Inspector's report was forwarded to the applicant and the landowning objectors for their information and further comment.

39. The applicant initially asked that, due to a landmark case being heard by the Supreme Court which might potentially have a bearing on the outcome of the application, consideration of the application was deferred until the Supreme Court's decision had been issued. Whilst the County Council was not prepared to defer its decision indefinitely on the basis of another case, circumstances were overtaken by events and the expedited decision of the Supreme Court was issued earlier than expected.

The decision in *R (Lewis) v Redcar and Cleveland Borough Council* ("*Lewis*")

40. The Inspector's report was written on the basis of the Court of Appeal's decision in *R (Lewis) v Redcar and Cleveland Borough Council*[13]. It had been held by the Court of Appeal that, in addition to being without force, secrecy or permission, recreational use must also appear to a reasonable landowner as the assertion of a right. If, therefore, users actively avoided part(s) of the application site because they were, at the time, in use by the landowner, it was previously thought their use was not 'as of right' since they modified their behaviour and, in doing so, 'deferred' to the landowner. This was known as the 'deference principle'.

41. In his report, the Inspector applied the deference principle and referred to the fact that when parts of the application site were in use by the schools, the vast majority of recreational users actively avoided those areas so as not to interfere with school activities. This, in the Inspector's view, afforded a further reason, in addition to the fencing issues referred to earlier in this report, why the application should be rejected.

[13] [2009] 4 All ER 1232 (CA)

42. However, in its judgement delivered on 3rd March 2010[14] the Supreme Court overruled the Court of Appeal's decision. The Supreme Court took the view that it was a matter of 'common sense and courtesy' and that it was immaterial that there may have been concurrent usage of the land both by the landowner and by recreational users. The Court held the additional requirement imported into the law by the deference principle was not correct, and that the definition of use 'as of right' should be restricted simply to use which was without force, secrecy or permission.

Comments on the Inspector's report and the *Lewis* decision in the Supreme Court

43. As stated above, the main parties were provided with the opportunity to comment on the Inspector's report and the *Lewis* decision.

44. The landowning objectors' position is that the decision in *Lewis* makes no difference to the outcome of this application. The Inspector's recommendation was that the application should be rejected on the basis that the applicant had failed to demonstrate that use of the application site had been 'as of right' because the landowners had not tolerated or acquiesced to the recreational use of the site (i.e. due to the repeated attempts to secure the site). The issue of 'deference' was very much, in the objectors' view, subsidiary to the principal finding that use had not been 'as of right'. Therefore, any change in the law in relation to 'deference' is immaterial to the applicant's failure to satisfy one of the legal tests for registration of the land as a new Town Green.

45. The applicant's position is that following the decision in *Lewis*, the elements of the Inspectors report which deal with deference should now be ignored due to the change in the law. Whilst the applicant accepts that the test to be considered is how the recreational use would have appeared to a reasonable landowner (i.e. did the landowner have the opportunity to resist such use), he argues that the Inspector has misinterpreted the law by failing to consider whether or not the landowners' actions made it sufficiently clear to the recreational users that the landowners were not acquiescing to such use.

Further legal advice

46. As suggested by the applicant, further legal advice was sought from independent Counsel who had no previous involvement with the case. However, Counsel did not feel that it was appropriate to advise on the matter and that it was for the Inspector, who had had the benefit of hearing the evidence first hand at the Inquiry, to provide further advice on his report following the comments received from the parties and in light of the change in the law.

47. The Inspector issued a supplementary report and recommendation dated 15th July 2010. In that advice, he sets out the main principles deriving from the decision in *Lewis* and confirms that following the change in the law, it is no longer necessary to address the requirement for use as of right beyond considering whether the use indulged in was without force, secrecy or permission.

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[14] [2010] 2 All ER 613 (SC)

48. Having applied the facts of the case to the new legal position, the Inspector concludes:

> "...I consider it plain that, through the repair and replacement of fencing during the qualifying period and through the policy and practice of locking gates, the Landowners were making considerable efforts to interrupt and prevent trespassory use of the application site by local residents and by reason thereof use by local inhabitants was forcible or *vi* and therefore was not as of right. It is, of course, well established that the question of use as of right falls to be considered from the perspective of the landowner... Moreover, as I conclude in the main report a number of local inhabitants who stated that they had used the application site were, unsurprisingly, well aware of the repairs and replacement of the fencing... I consider that the use of the application site by local inhabitants in the context of the fencing works commissioned and carried out by the landowners and the practice of locking gates is a clear example of use which is not to be regarded as "as of right"... The substance of my conclusions at paragraphs 205 to 209 of the main report [quoted at paragraph 23 of this report] therefore remain valid having regard to *Lewis* albeit in respect of the test as to whether the fencing works and the locking of gates rendered use by inhabitants forcible or *vi* rather than in the context of a more generalised test as to whether the Landowners were tolerating or acquiescing in trespassory use. I recommend therefore that application 595 be rejected on this basis"

Conclusion

49. Having heard the evidence presented by both parties at the non-statutory Public Inquiry and having considered the Inspector's thorough and detailed analysis of the evidence (contained within his report), I conclude that the requirements of the Commons Act 2006 have not been met in this case.

Recommendation

50. I recommend, for the reasons set out in the Inspector's report dated 27th November 2009 and his supplementary report dated 15th July 2010, that the applicant be informed that the application to register the land known as Barton Playing Field at Canterbury has not been accepted.

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Case Officer:
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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