Application to register land known as Grasmere Pastures at Whitstable as a new Village Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Tuesday 22nd February 2011.

Recommendation: I recommend that a non-statutory Public Inquiry be held into the case to clarify the issues.

Local Members: Mr. M. Harrison and Mr. M. Dance Unrestricted item

Introduction

1. The County Council has received an application to register land known as Grasmere Pastures at Whitstable as a new Village Green from the Grasmere Pastures Residents Action Group ("the Applicant"). The application, dated 14th September 2009, was allocated the application number VGA617. 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**.

Background

2. Members should be aware that this application is a resubmission of a previous application for the same site which was rejected at a meeting of the Regulation Committee Member Panel on 30th April 2007. That application was made under the Common Registration Act 1965 ("the 1965 Act"), which has now been superseded by provisions contained in the Commons Act 2006 ("the 2006 Act").

3. The Commons Act 2006 is silent on the question of whether repeated applications are permissible. DEFRA's view on repeated applications is that, as a general rule, an identical (or near identical) application to one previously made would entitle the County Council to refuse to accept it on the basis that the matter has already been determined[1]. However, DEFRA also say that where an application was made under the 1965 Act, which was determined and refused, it is open to the applicant to make a fresh application for the same purpose under the 2006 Act if the applicant believes that the new application would be successful because the statutory criteria had changed[2].

4. In this case, the applicant has adduced a significant amount of new evidence not previously considered by the County Council. Additionally, there have been substantial changes in the law since the last application was determined which would have a direct bearing on the application. As such, it is considered appropriate that the County Council considers the new application on the basis that it is substantially different to the previous application and that the new evidence needs to be taken into account in the context of the current legal

[1] i.e. the common law grounds of *res judicata*: 'a matter [already] judged'
[2] See DEFRA's 'Guidance to commons registration authorities and PINS for the pioneer implementation'

position in order to determine whether the County Council's earlier decision remains appropriate.

Procedure

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

6. 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;

7. 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).

8. 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

9. The area of land subject to this application ("the application site") consists of a large area of open uncultivated land of approximately 16.3 hectares (40.3 acres) in size situated between South Tankerton and Chestfield, on the outskirts of Whitstable. The application site is shown in more detail on the plan at **Appendix A**.

10. Access to the application site is via Public Footpaths CW88 (which runs across the application site between Grasmere Road and Ridgeway) and CW89 (which runs between Richmond Road and Public Footpath CW88).

The case

11. 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.

12. Included in the application were 152 user evidence questionnaires from local residents demonstrating use of the application site for a range of recreational activities for a period in excess of 20 years. A summary of the evidence in support of the application is attached at **Appendix C**.

Consultations

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

14. The Chestfield Parish Council has written to express its support for the application.

15. The Canterbury City Council has written to confirm that it has no objection to the application.

Landowner

16. The application site is owned by OW Presland Ltd and registered with the HM Land Registry under title number K503254. Kitewood Estates Ltd has an interest in the application site on the basis that it is the sole shareholder of OW Presland Ltd and holds an option to purchase the land.

17. An objection to the application has been received from RadcliffesLeBrasseur, solicitors who act on behalf of OW Presland Ltd and Kitewood Estates Ltd. The objection is made on the following grounds:
    - That the locality specified by the applicant is not a qualifying locality for the purposes of Village Green registration;
    - That the principal use of the application site has been in exercise of the Public Footpaths which cross the land and not for the purposes of lawful sports and pastimes;
    - That during the several months where hay crops were growing and being harvested, there was not indulgence in lawful sports and pastimes on the application site by a significant number of the local residents; and
    - That use of the application site was not 'as of right' throughout the relevant period due to the erection of 'private property' notices.

Legal tests

18. 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 meets one of the criteria set out in sections 15(3) or (4)?

(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'?

19. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the Sunningwell[3] 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.

20. The application has been made on the basis that use of the application site ceased to be 'as of right' from October 2004 by the erection of fencing along the Ridgeway (the eastern boundary of the application site). Although some of the users say that this fencing lasted only a very short period before it was pulled down by persons unknown and other say that access to the site was still possible via entrances on the northern and western edge of the field, the fencing is strong evidence of the landowner wishing to restrict public access to the site. Many of the user evidence questionnaires refer to the erection of fencing as interrupting or deterring their use and as such we can be satisfied that use of the application site did cease to be 'as of right' from October 2004.

21. For reasons set out later in this report, the fact that the use of the application site ceased to be 'as of right' in October 2004 (i.e. prior to this application being made) is not fatal to the application. The relevant twenty-year period is calculated retrospectively from this date and for the purposes of this application is therefore 1984 to 2004.

22. In this case, there is no suggestion that use of the application site during this period has been with secrecy or that any permission has was granted for the use of the site for the purpose of informal recreation.

23. Some use of the application site would be considered to be 'with force' after the erection of the fencing (but only where they had gained entry at points where the fencing had been vandalised). However, there is no evidence that there was any fencing, or indeed other physical barriers to use, prior to 2004.

24. The objectors argue that use of the application site was contentious during the latter part of the relevant twenty-year period due to the erection of notices. They say that, on 20th May 2004, the farmer signed a tenancy agreement and "shortly thereafter" he erected a sign at the Grasmere Road entrance onto the application site. No information is provided by the objectors as to the nature, wording, date of erection or exact location of this sign. The objectors also say that on 22nd September 2004 the landowner caused to be put up notices contesting use of the application site. Although a copy of the notice has been provided, no information has been provided as to the number or location of the notices on the application site. Additionally, the objectors say that a 'private property – no trespassing notice' has been in existence from at least May 2004 to the present day at the junction of Richmond Road and Ridgeway.

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

25. The applicant disputes that any notices were erected on or around the boundaries of the application site prior to the installation of the fencing in October 2004 and states that there is no evidence to substantiate this. This assertion is supported by the evidence of the users, none of whom recall any sort of notice on the application site prior to 2004. Some of the users do recall a notice at the junction of Richmond Road and Ridgeway, but this refers to a small triangle of land which does not form part of the application.

26. There is, therefore, a conflict regarding the erection of notices on and/or around the application site in September 2004 and there is insufficient evidence to conclude definitively whether in fact the notices were erected at that time.

Public Footpaths CW88 and CW89

27. The objectors' position is that the principal use of the application site has been for the purposes of walking along the designated Public Footpaths. Such use is not considered to be 'as of right' because it is in exercise of an existing right and would not have appeared to a reasonable landowner as the assertion of a right to indulge in lawful sports and pastimes on the application site.

28. The applicant strongly contests this assertion and confirms that the application places no reliance whatsoever on the existence of the Public Footpaths. The applicant says that there is ample evidence from the questionnaires submitted in support of the application that the application site has been used by many residents for a great variety of purposes throughout the whole of the relevant period.

29. In cases where Public Footpaths cross the application site, it is important to be able to differentiate between use which is pursuant to an existing right to walk along a defined route and use which is of a more general recreational nature. The issue was considered by the Courts in *Laing Homes*[4], in which the judge said that: '*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*'

30. The exercise of distinguishing between types of use is something that is very difficult to achieve on paper. It is a question of evidence that requires more detailed scrutiny, preferably by way of the cross examination of witnesses in a public forum.

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

31. 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

[4] *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70 at 79 per Sullivan

sports and pastimes' has been interpreted by the Courts as being a single composite group rather than two separate classes of activities[5].

32. 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*'[6].

33. In this case, the evidence demonstrates that the land has been used for a number of recreational activities. The summary of evidence of use by local residents at **Appendix C** shows the full range of activities claimed to have taken place, which include kite flying, nature observation, picnics and playing with children.

34. However, by far the majority use of the application site has been for the purposes of walking (with or without dogs). As stated above, there is a question as to the degree of use which has been on the Public Footpaths which requires further clarification before a conclusion can be reached.

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

35. 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.

"locality"

36. 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[7] 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*'.

37. The Applicant specifies the locality at Part 6 of the application form as "the Canterbury City Council ward called Chestfield and Swalecliffe".

38. The objectors say that an electoral ward cannot be a relevant locality for the purposes of Village Green registration. However, since the objection was made, the Courts have confirmed that an electoral ward is a qualifying locality for the purposes of Village Green registration[8].

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[5] *R v. Oxfordshire County Council and another, Sunningwell Parish Council* [1999] 3 All ER 385
[6] *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
[7] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[8] *Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch)

39. The objectors also argue that the locality relied upon by the applicant cannot be a qualifying locality because it has not been in existence throughout the whole of the relevant twenty year period. The current electoral ward of Chestfield and Swalecliffe did not come into existence until May 2003.

40. The law is silent with regard to whether a locality must have been in existence throughout the whole of the material period. However, the Courts have recently considered a situation in which the locality relied upon by the applicant had ceased to exist in 1937[9]. In that case, the Court held that that provided that the boundaries of the ward could be defined, the fact that it ceased to be an administrative unit in 1937 did not prevent it from being a locality for the purposes of Town or Village Green registration. This would appear to be authority for the proposition that the qualifying locality need not been in existence throughout (or indeed at all) during the relevant twenty year period.

41. Therefore, despite the objectors' assertions to the contrary, it appears that the electoral ward of Chestfield and Swalecliffe could be a qualifying locality.

"a significant number"

42. 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*'[10]. Thus, 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.

43. In this case, the evidence demonstrates that there has been regular use of the application site by a large number of local residents and this is evidenced by the large number of user evidence forms submitted in support of the application. The application is supported by 152 user evidence questionnaires from persons living in the locality, demonstrating use of the application site over a considerable period.

44. Additionally, there is anecdotal evidence from several users that, when the hay cropping took place, their use was never challenged by the farmer. One of the witnesses[11] says "we used the field all year round, even when they harvested the hay the children loved to watch the tractor and the driver waved to them", whilst another[12] recalls "at harvest time I usually had a chat or a friendly wave from the then tenant of the land". This would indicate that those with an interest in the land were aware that it was in general use by the community.

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[9] *Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch). Note that the High Court's decision in this case was appealed but the specific issue of whether the electoral ward in question could be a qualifying locality was not considered by the Court of Appeal. See *Leeds Group plc v Leeds City Council* [2010] EWCA Civ 1438

[10] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

[11] See user evidence questionnaire of Mrs. V. Wiggans

[12] See user evidence questionnaire of Mr. D. Barker

(d) 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)?

45. 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.

46. In this case, as discussed above, use of the application site 'as of right' ceased in October 2004. The application has therefore been made under section 15(4) of the Commons Act 2006 which allows applications to be made in cases where use 'as of right' ceased prior to April 2007, provided that such applications are made within five years from the date upon which use 'as of right' ceased.

47. If use of the application site ceased to be 'as of right' in October 2004, then under this provision the applicant would have until October 2009 to make an application. In this case, the application was made on 14th September 2009 and was therefore within the five year period of grace provided for by the legislation.

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

48. 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, use of the application site 'as of right' is continuing and, as such, the relevant twenty-year period ("the material period") is calculated retrospectively from the date of the application, i.e. 1984 to 2004.

49. The user evidence summarised at **Appendix C** demonstrates that there has been use of the application site in excess of the last twenty years.

50. However, the objectors' argue that use of the application site has not taken place for a full twenty year period since, due to the hay cropping activities which took place on the land, recreational use would, by necessity, have been interrupted on an annual basis for several months of the year. They say that there is therefore no continuity of user throughout the relevant period.

51. The applicant states that the objectors attempt to imply that the cutting and gathering of long grass was akin to a form of cultivation of the land is a misrepresentation of the facts. The applicant is of the firm view that no operations such as ploughing, fertilising or weed treatment has ever been undertaken and adds that no one has ever complained about damage to the hay crop by local residents.

52. The evidence of the objectors regarding the effect of the hay cropping is at odds with the evidence submitted in support of the application. According to the users, it did not interfere with their use of the land. For example, one user[13] states "all children seem to like tractors and were fascinated at hay cropping time watching the man in the tractor working. The speed of the tractor was such that we were not in any danger and the person driving was extremely friendly and stopped to talk to us...".

[13] See user evidence questionnaire of Mrs. P. Spencer

53. There is also disagreement regarding the duration of the hay cropping activities. The objectors state that the process took several months. The applicant's witnesses say that the cutting of the hay took no more than 3 or 4 days each year.

54. Clearly there is a question with regard to the continuity of the use throughout the twenty year period which requires further investigation.

Conclusion

55. Although the relevant Regulations[14] provide a framework for the initial stages of processing the application (e.g. advertising the application, dealing with objections etc), they provide little guidance with regard to the procedure that a Commons Registration Authority should follow in considering and determining the application. In recent times it has become relatively commonplace, in cases which are particularly emotive or where the application turns on disputed issues of fact, for Registration Authorities to conduct a non-statutory Public Inquiry[15]. This involves appointing an independent Inspector to hear the relevant evidence and report his/her findings back to the Registration Authority.

56. Such an approach has received positive approval by the Courts, most notably in the Whitmey[16] case in which Waller LJ said this: '*the registration authority has to consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration*'.

57. It is important to remember, as was famously quoted by the Judge in another High Court case[17], that '*it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green... [the relevant legal tests] must be 'properly and strictly proved'*. This means that it is of paramount importance for a Registration Authority to ensure that, before taking a decision, it has all of the relevant facts available upon which to base a sound decision. It should be recalled that the only means of appeal against the Registration Authority's decision is by way of a Judicial Review in the High Court.

58. The conflicts between the evidence of the users and that of the objectors in this case means that it appears that a Public Inquiry would be the most appropriate way forward.

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[14] Commons Registration (England) Regulations 2008

[15] The Public Inquiry is referred to as being 'non-statutory' because the Commons Act 2006 does not expressly confer any powers on the Commons Registration Authority to hold a Public Inquiry. However, Local Authorities do have a general power to do any thing to facilitate the discharge of any of their functions and this is contained in section 111 of the Local Government Act 1972.

[16] *R (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951 at paragraph 66

[17] *R v Suffolk County Council, ex parte Steed* [1997] 1EGLR 131 at 134

Recommendation

59. I recommend that a non-statutory Public Inquiry be held into the case to clarify the issues.

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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 locality