Application to register land known as 'Coronation Field' and 'the Village Green' at Wittersham as a new Village Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Friday 31st October 2008

Recommendation: I recommend that the County Council informs the applicant that the application to register the land known as 'Coronation Field' and 'the Village Green' at Wittersham has not been accepted.

Local Member: Mr. M. Hill OBE Unrestricted item

Introduction

1. The County Council has received an application to register land known as 'Coronation Field' and 'the Village Green' at Wittersham as a new Village Green from local resident Mrs. M. Lewis ("the applicant"). The application, dated 12th September 2006, was allocated the application number 592. 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 13 of the Commons Registration Act 1965 and regulation 3 of the Commons Registration (New Land) Regulations 1969. These regulations came into force on the 3rd January 1970 and provide for applications to be made to register new Village Greens in accordance with section 22 of the 1965 Act

3. Although the Commons Registration Act 1965 has now been replaced by the more recent Commons Act 2006, since this application was received prior to the coming into effect of the 2006 Act, it must be dealt with under the original legislation.

4. For the purpose of this application, therefore, section 22 of the 1965 Act (as amended by section 98 of the Countryside and Rights of Way Act 2000) applies. It defines a Village Green as:

   'land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either:

   (a) Continue to do so, or

   (b) Have ceased to do so for not more than such period as may be prescribed or determined in accordance with prescribed provisions'.

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 put up notices on site to publicise the application. The publicity must state a period of at least six weeks during which objections and representations can be made.

The Case

6. The area of land subject to this application ("the application site") consists of two adjoining (but distinct) areas of land situated at the centre of the village of Wittersham at the junction of Stocks Road (the B2082) with The Street. The first area of land, known as 'The Village Green', consists of a landscaped garden incorporating a surfaced walkway, benches and formal planting. The second area of land, known as 'Coronation Field', is essentially a playing field. Access to the application site is via two entrances, one on Stocks Road and the other on The Street.

7. The application has been made on the grounds that the application site has become a 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. It is understood that, although the application itself relates to usage over the 20 year period preceding the date of application, there is evidence of a similar pattern of use dating from the mid-1950s, when a local benefactor paid for the acquisition of the land as a 'space' for the village.

8. Included in the application were eight detailed statements of use 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 further 41 user evidence questionnaires were also submitted in support of the application. A summary of the user evidence is attached at **Appendix C**.

Consultations

9. Consultations have been carried out as required and a large number of responses were received.

10. Members should be aware that part of the application site (Coronation Field) was subject to two planning applications made to Ashford Borough Council in 2006 for the provision of a new Village Hall and parking facilities. Although both planning applications were subsequently withdrawn, the issue has remained very emotive within the village and local opinion on the matter has been divided.

11. This already delicate situation was made worse by the circulation of an anonymous leaflet throughout the village containing what can best be described as personal and subjective views actively inviting people to raise objections to the application for Village Green status. The leaflet bore a copy of the formal KCC Notice of Application on the front and had the misleading appearance of having originated from KCC, to which the applicant (along with other local residents) raised serious concerns. In response to this, and to ensure the County Council's impartial stance in relation to the determination of the application, a short statement was produced which was read out by the Chairman of the Parish Council at the Parish Meeting and included in any subsequent items of correspondence received in relation to this application.

12. As a result of the consultation, 44 letters of objection to the application were received, including a petition against the registration of the Coronation Field as a Village Green. A summary of the letters of objection is attached at **Appendix D**. It should be noted that, due undoubtedly to the circulation of the anonymous leaflet referred to above, many of

the letters of objection refer to the benefits of the construction of the proposed Village Hall and the perceived need for the Parish Council to retain control of the land.

13. However, it is important to note that the County Council is not able to take into consideration issues relating to suitability, desirability or amenity when determining the application, since the application must be determined solely on the legal tests set out in section 22 of the Commons Registration Act 1965 (as described above).

14. In addition to the letters of objection summarised in Appendix D, a similar number of 'standard format' letters were also received. These letters, identically worded, stated that objections were made on the grounds "*that Coronation Field has not been observed to be in general use by a significant number of local inhabitants; that the Parish Council, as elected representatives of the community, should retain the right to manage the land for the benefit of the whole community in Wittersham; and that there is already a Village Green in Wittersham at Woodlands View and sufficient access to other publicly maintained open space*".

15. It is, however, difficult to place any great deal of weight to these, not least because many arrived without a legible name or address, but more importantly because they provide a shared view in response to an emotive issue rather than provide any actual evidence in rebuttal to the application. Therefore, in considering the consultation responses, Members should be mindful that it is the substantive content of the objections received that is relevant, and not their number.

16. Another point of significance is that the vast majority of the letters of objection received appear to relate only to Coronation Field (upon which it was proposed that the new Village Hall should be built) rather than the more formal landscaped area known as 'the Village Green'. Indeed, some of those objecting to the registration of Coronation Field as a Village Green have stated that they would have no objection to 'the Village Green' being formally registered as such: for example, one objector states "*both the area behind the War Memorial [the Village Green] and the larger playing field behind [Coronation Field] were given as a space for the village, but only the landscaped garden can truly be said to serve the purpose of a village green. I would be happy for this smaller area only to be included in the Register of Village Greens*".

Landowner

17. The application site is owned entirely by Wittersham Parish Council, having been bequeathed to the Council (by way of a conveyance in 1954) to be held as '*a space for the benefit of the Parish of Wittersham*'.

18. The Parish Council has responded to the effect that it has felt it inappropriate to discuss the matter at the Parish Council meeting (and as such to respond formally to the application) since six of the seven Councillors had declared an interest in the matter. However, the Parish Council advised that a public meeting had been held, during which local residents had been encouraged to respond individually.

Legal tests

19. In dealing with an application to register a new 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, neighbourhood 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?

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

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

20. The definition of the phrase 'as of right' has been considered in recent High Court case law. Following the judgement in the *Sunningwell*[1] *case*, it is now 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'.

21. In this case, there is no evidence of any of the users ever having been verbally challenged or physically prevented from gaining access to the land, nor is there any suggestion that use of the land has been secretive. Indeed, the land was originally acquired as a space for use by the inhabitants of the village. In his detailed witness statement, Mr. Lyon (who has known the land since 1984) confirms that "*...we have been able to enter the site freely by the designated access points which are never locked. We have entered without using any force and used the site in full and open view. Our use has never been challenged by the landowner"*. This view is echoed in the other witness statements submitted in support of the application.

22. However, the key issue in this case concerns the third limb of the definition of 'as of right', which relates to the granting of permission. Permission, in the context of access to land, can take various forms: it can be express permission which is communicated to local residents (e.g. by way of a notice placed in a prominent position on the site) or it can be express permission which is not communicated to local residents (e.g. by way of a formal deed intended to permit recreational use of the land). Alternatively, permission may be implied when overt actions are taken by the landowner to communicate to the users that their use is conditional and may be terminated at any time, for example, by charging a fee for entry.

23. Finally, there may be instances where there is neither any express permission nor any communication with the users. For example, such a situation may arise where land is held in a statutory public trust (e.g. under the Public Health Act 1875 or the Open Spaces Act 1910) for the specific purpose of public recreation; users may not

[1] *R v. Oxfordshire County Council, ex p. Sunningwell Parish Council (2001)*

necessarily be aware of this trust, but their use is nonetheless 'by right' (because the trust specifically provides a right for them to be there) and therefore not 'as of right'.

24. In this case, it was brought to the attention of the County Council that local byelaws had been made in relation to the application site. A copy of the byelaws is attached at **Appendix E** for reference. Whilst the content of the byelaws themselves are of little significance, they refer to having been made under section 164 of the Public Health Act 1875. This has raised a serious question as to whether the application site is held under the 1875 Act, the consequences of which are that the use of the land has been with permission (i.e. by virtue of a statutory trust) and not 'as of right'. This issue is considered in further detail later in this report.

(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. 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; solitary and informal kinds of recreation are equally as valid.

26. In this case, the evidence demonstrates that a range of recreational activities have taken place on the land, including blackberrying, dog-walking, nature-watching and photography. The table summarising evidence of use by local residents at Appendix C shows the full range of activities claimed to have taken place. This test is therefore satisfied.

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

27. 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[2] 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*'.

28. At Part 4 of the application form, the applicant identifies the locality as being the parish of Wittersham. The applicant describes in her witness statement the facilities available in the local area, which include a Church of England Primary School, a Parish Council, a Village Hall, a Church, a sports club and a number of social groups (e.g. Toddlers, Brownies and WI). All of these facilities are reminiscent of the sort of 'cohesive entity' described in the *Cheltenham Builders* case. Furthermore, it is clear from plotting the addresses of those having provided user evidence onto a map (see **Appendix F**) that all reside within the administrative parish of Wittersham, which provides a clearly defined and legally recognised locality. The test in relation to locality is therefore satisfied.

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[2] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council (2003)*

29. In terms of the 'significant number' issue, this was considered in the *McAlpine Homes*[3] case, in which it was held that significant did not necessarily mean considerable or substantial: Sullivan J stated that what matters is that the number of users has to be sufficient enough to indicate that '*their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers*'.

30. One of the main criticisms of the application from the objectors is that the application site has not been in frequent use by the local residents. One objector states "*from my observations, its present use is almost nil. I pass it most days with my dog and have never seen a soul on it*", whilst another adds "*the Parish Council developed a Parish Plan in 1998 in which it stated that Coronation Field was largely underused, re-emphasising the point that the field was not used by a significant number of people, even then. It is even less used at the present time*".

31. The applicant's evidence is that the application site has been in regular usage for informal recreation by the local community and this view is supported by several witnesses living close by. One of those (who lives opposite the application site) states "*we have observed... that other villagers have used the field and the Village Green on a daily basis for such activities as dog walking, ball games, including golf practice... occasionally, we have seen the field being used for organised games for local clubs, in particular the Brownies and the Youth Club*".

32. Some of the objectors have attempted to quantify this use in percentage terms (i.e. as percentage proportion of the total population of the village who use the land). For the reasons set out in the *McAlpine Homes* case (see paragraph 29 above) this is not the correct approach. Instead, it is necessary to consider how the situation would have appeared to a reasonable landowner.

33. It is clear from the Parish Plan referred to by one of the objectors that the Parish Council were aware in 1998 (during the material period) that the land was being used, albeit that it was largely underused. The Parish Council had the opportunity at that time to assert its right as landowner and to challenge the local inhabitants' use of the land. For reasons which will become clearer later in this report, they did not; but this does not mean that use was not by a 'significant' number of local inhabitants within the meaning of the 1965 Act and, despite the volume of objections received asserting the land is little used, it is difficult to ignore the not insignificant amount of user evidence (some of which refers to use on a daily basis) produced in support of the application. Once again, the test to be applied here is a more qualitative rather than quantitative one.

(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, since the application was submitted in 2006, the requisite twenty-year period is 1986 to 2006 ("the material period").

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[3] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council (2002)*

35. From the user evidence submitted, there appears to have been use of the land over a considerable period. Of the 49 witnesses who have provided user evidence, 17 have used the land during the whole of the material period, with some having used the land far beyond the start of the material period in 1986. There is no evidence to suggest that such use has ever been interrupted for any significant period.

36. The 'usergram' at **Appendix G** clearly illustrates that use has taken place over a continuous period of at least twenty years and as such I am satisfied that this test has been met.

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

37. The application in this case is dated 12th September 2006. There is no evidence to suggest that the application has been submitted in response to actions taken to prohibit or restrict use of the land by local residents (for example, the erection of a notice or physical barrier). Therefore, it can be concluded that the use of the land by the local inhabitants did continue up until the date of application.

Counsel's advice

38. Due to the complex and emotive nature of the application, Counsel's advice on the matter has been sought. Counsel expressed a serious concern regarding whether the use of the land was capable of being 'as of right'. This concern was in response to a copy of byelaws relating to the application site that had been provided by an objector during the consultation process.

39. The existence of byelaws is not a fact which, itself, automatically disqualifies land from becoming registrable as a Village Green. In fact, the applicant has questioned the validity of the particular byelaws in relation to the application site by virtue of the fact that they have not been prominently displayed or placed on deposit with the local Borough Council. However, such debates are largely irrelevant and indeed the byelaws themselves are, in many ways, a 'red herring' since the significance of the existence of byelaws lies not in their content, but rather in the particular legislative provision under which they were made and under which the Parish Council acquired (and now holds) the land in question.

40. In this case, the byelaws were made in 1979 '*under section 164 of the Public Health Act 1875... with respect to a pleasure ground and a recreation ground... [being] the Village Green and the Recreation Ground known as Coronation Playing Field, Wittersham'*. They were confirmed by the Secretary of State in July 1979 and took effect on 1st August 1979.

41. Section 164 of the 1875 Act provides that '*any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds…*'. The fact that the byelaws were made under this section of the 1875 Act suggests that the application site may have been a purchased (or 'appropriated') under the 1875 Act, the effect of which (as explained at paragraph 24 above) would be to render use of the land 'by right' and not 'as of right', since

appropriated land would have been entrusted in the local authority and held for the specific purpose of 'public walks or pleasure grounds'.

42. In the case of the application site at Wittersham, it has not been possible to trace any formal deed of appropriation under the 1875 Act. The original conveyance provided for the land to be conveyed to the Parish Council '*to hold... as a space for the benefit of the Parish of Wittersham*' but did not state the legislative provision under which the Parish Council acquired the land. However, Counsel was of the view that the decision in the *Poole*[4] case supported the notion that an acquisition of land by a public authority can be inferred to have been made in exercise of powers under various Acts (including the Public Health Act 1875) despite the absence of any direct documentary evidence to that effect.

43. The question which then arises (in the absence of a formal deed of appropriation under the 1875 Act) is what evidence is available regarding the circumstances of the acquisition of the land and, more importantly, the statutory power under which the Parish Council was acting when it acquired the land. It is clear from the original 1954 Conveyance that the intention was for the land to be dedicated to the local inhabitants for recreation purposes and both the applicant and various objectors make reference to the fact that the land was purchased by a local person for the benefit of the village. The unqualified use of the word 'space' in the Conveyance is unhelpful but, considering the context as a whole, it could feasibly be inferred that 'space' was intended as a reference to 'public' or 'open' space, otherwise the Conveyance would have been pointless. This proposition is supported by the fact that there is no evidence to suggest that, during the material period, the Parish Council has ever sought to restrict the recreational use[5] of the land and has not conducted its management of the land in a manner which would be inconsistent with its acquisition as a recreational space for the inhabitants of the village (for example, by restricting or impeding access).

44. Having concluded, on a balance of probabilities, that the land was held under a statutory trust for public recreation (i.e. s164 of the 1875 Act), Counsel went on to consider the effect of this on the 'as of right' usage of the land. This issue arose in a House of Lords case known as *Beresford*[6], in which Lord Walker said "*where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers... the position would be the same if there were no statutory trust in the strictest sense, but land had been appropriated for the purpose of public recreation*".

45. The fundamental principle behind 'as of right' concept is the fact that, in order to acquire rights, those using the land must start off as trespassers. The acquisition of rights cannot occur if those using the land for recreational purposes already have a right to do so. If land is held by a local authority for recreational purposes then those using the land are not trespassers; they are already there 'by right'. For this reason, Counsel was of the view that the application site was not capable of registration as a Village Green.

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[4] *Attorney-General v Poole Corporation (1937)*

[5] Reference was made in paragraph 10 to applications for planning permission to construct a new Village Hall on the application site in 2006, but this was outside the material 20 year period and arguably may not have been inconsistent with the use of the land as a 'space' for the village.

[6] *R(Beresford) v Sunderland City Council (2004)*

46. Regulation 6(3) of the Commons Registration (New Land) Regulations 1969 states: *'the registration authority... shall not reject the application without giving the applicant a reasonable opportunity of dealing with the matters contained in the statements of [objection] and with any other matter in relation to the application which appears to the authority to afford prima facie grounds for rejecting the application'*. As such, Counsel advised that, before making a recommendation to the Regulation Committee Member Panel, it would be appropriate to write to the applicant informing her that there may be possible grounds for recommending to the Member Panel that the application should be rejected, and providing an opportunity for the applicant to respond accordingly. A copy of this letter ("the regulation six letter") is attached at **Appendix H** for reference.

Applicant's response

47. A copy of the applicant's response is attached at **Appendix I**. For ease of reference, the main points are summarised below:
    - The Local Government Act 1972 requires byelaws to be available for public inspection at the offices of the authority by whom the byelaws are made. Neither the Parish Council nor the Ashford Borough Council hold any byelaws in relation to the land and this raises a serious question as to the validity of the byelaws.
    - It is accepted that the Parish Council does hold the land in trust (statutory or charitable) to be kept as an open space for the benefit of the Parish but there is little to distinguish the present case with other similar Village Green applications at South Road Recreation Ground at Hythe [which was referred to a Public Inquiry] and Heartenoak Playing Fields at Hawkhurst [which was registered as a Village Green] and consistency of approach should be applied.

48. In response to the applicant's latter comments it should be noted that each Village Green application is unique and is dealt with upon the facts of each individual case. In the Hythe case, there was no evidence initially to support the contention by the landowner that the land was held under a public statutory trust and there was a serious question regarding continuity of use, hence the need for a Public Inquiry to test the evidence. In the Hawkhurst case, although the land was owned by the Parish Council, there were no known byelaws and the issue of appropriation simply did not arise: the County Council has no investigative duty and can only take decisions in Village Green matters based on the evidence presented to it by the relevant parties.

49. With regard to the former comments, there was obviously some belief at the time that the byelaws were made (in 1979) that the land was held under a public statutory trust for the powers under section 164 of the 1875 Act to be used; it is unlikely that the byelaws would have been confirmed by the Secretary of State had the Parish Council not had the power to make them in the first place. Whether or not the correct procedures were followed subsequent to the confirmation of the byelaws is an entirely separate question and not one which is directly relevant to the Village Green application.

Conclusion

50. From the evidence submitted, it is clear that the residents of the locality of Wittersham have enjoyed the land for recreational purposes over a period of time far in excess of the requisite 20 years without any form of challenge from the Parish Council (as

landowner). There appears to be, from the user evidence submitted in support of the application and the letters received from objectors, some conflict as to the extent of the usage of the land (the 'significant number' issue discussed at paragraph 30 above). This is essentially a question of fact and degree that is difficult to resolve on paper and may benefit from further examination in a public forum.

51. However, there is one issue, it would appear, that presents a 'knock-out blow' for the application and which cannot be overcome: the question of the public statutory trust under which the application site is considered to be held. Despite the lack of a formal Deed of Appropriation, the existence of the byelaws made under section 164 of the Public Health Act 1875 and the manner in which the Parish Council has acquired and managed the land, provides a persuasive argument in favour of the land being held under the 1875 Act. In the absence of any strong evidence to the contrary, it has to be assumed that the land is held under the 1875 Act and, therefore, that use of the land is 'by right' and not 'as of right'.

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

Recommendations

53. I recommend that the County Council informs the applicant that the application to register the land known as 'Coronation Field' and 'the Village Green' at Wittersham has not been accepted.

Accountable Officer:
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Case Officer:
Miss. Melanie McNeir – Tel: 01622 221511 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the Countryside Access Service, Environment and Waste Division, 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 – Summary of letters of objection
APPENDIX E – Copy of byelaws relating to application site
APPENDIX F – Plan showing the relevant locality
APPENDIX G – Usergram showing period of use
APPENDIX H – Copy of the "regulation six" letter sent to the applicant
APPENDIX I – Applicant's response to "regulation six" letter