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 Wednesday 12th November 2008.

Recommendation: I recommend that the County Council endorses the advice received from Counsel that a non-statutory Public Inquiry be held into the case to clarify the issues.

Local Members: Mr. M. Northey Unrestricted item

Introduction

1. The County Council has received an application to register land known as Barton Playing Field as a new Town Green from local resident Dr. S. Bax ("the applicant"). The application, dated 8th May 2007, was allocated the application number 595. A plan of the site is shown at **Appendix A** to this report and a copy of the application form is attached at **Appendix B**.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and regulation 3 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. These regulations came into force on the 6th April 2007.

3. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Town or 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 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 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).

7. The application has been made on the grounds that the application site has a long history as a space for public recreation which pre-dates the use of the site by the schools which began in 1960. The applicant asserts that there is extensive evidence of recreational use 'as of right' by local residents for a period well in excess of twenty years.

8. Included in the application were a detailed statement in support, 28 signed user evidence questionnaires and a CD-ROM containing audio recordings of the interviews along with a video of the field showing recreational use. A table summarising the evidence of use was also provided by the applicant and this is attached at **Appendix C**. Additionally, a further 14 signed user evidence questionnaires were submitted by the applicant prior to the commencement of work on the application.

Consultation

9. Consultations have been carried out as required. A number of responses, both in support of and in objection to the application, have been received. These are summarised below.

10. A number of local residents (20 in total) wrote in support of the application, adding their evidence of use to that already provided by the applicant. The local County member, Mr. M. Northey, also wrote in support of the application on the grounds that the land has been used on a daily basis for a variety of purposes 'as of right' and there has always been a general belief locally that the land was for common use.

11. Objections to the application were received from the following:
    - Canterbury City Council objects on the grounds that Town Green status may severely impact upon any future improvements and enhancements to the site for the benefit and enjoyment of the children, public and wider community that it serves.
    - Eight local residents have written in objection to the application. These appear to have been written in response to the local distribution of a flyer entitled 'save Barton field' by the applicant. The gist of these letters is that the field has not been open for public use for many years and indeed was originally fenced off when the land was given to the schools in the 1960s. The fence has been broken down through acts of vandalism but was repaired on occasions. Local residents have only gained access to the land through damage to the fence and never has use been 'as of right'. A smaller field nearby was widely used for recreational purposes for many years, but in recent times it has not been maintained, therefore making it unsuitable for informal sporting activities.
    - The local KCC Education Officer, Maggie Gregory, has objected to the application on the grounds that the land is private land designated as sports pitches for Barton

Court Grammar School and Chaucer Technology College. She adds that access to the site by local residents has not been unhindered for the last twenty years due to the existence of a fence and therefore any access that did occur was via acts of vandalism to the fence. She further adds that, in her view, if the land is registered as a Town Green, it is likely to become impossible, or at least very dangerous, for the schools to continue to use the sports pitches.

Landowners

12. There has been some confusion regarding the ownership of the site, with the applicant asserting that the County Council was part-owner along with Barton Court Grammar School and Chaucer Technology College. The applicant had concerns that the County Council's alleged interest in the land would seriously impede the County Council's ability to make an impartial decision on the application.

13. However, inspection of Land Registry documentation along with modern base maps has revealed that the County Council, in fact, has no interest in the application site. It would appear that the land was originally owned by the County Council but was transferred to the schools when they acquired Grant Maintained status during the 1990s. No part of the playing field remained in KCC ownership, although the highways to the south and east (Pilgrims Way and Pilgrims Road) are owned by the County Council. Therefore, despite assertions to the contrary, the County Council has no current interest in the application site and the ownership is as shown on the plan attached at **Appendix D**.

14. The current landowners, Barton Court School and Chaucer Technology College, have both objected to the application. The schools are concerned that private land designated as school playing fields is being considered for Town Green status. Their objections are made on the grounds that use of the field by local residents has not been 'as of right' as force has been used to gain access by vandalising fencing which has been in place since the late 1960s. The schools assert that they use the fields on a weekly basis for school activities and for extra curricular activities beyond these hours and, as such, the claimed continuous use by the local residents is not a valid one. The illegal use of the field has led to children being injured by broken glass and metal drinks cans and PE staff have found needles on the field which is a serious cause for concern.

15. In addition, the schools argue that the legislation does not permit the type of dual or shared usage envisaged by the applicant; use as a Town or Village Green must be 'as of right' at all times and the legislation does not permit the sort of joint venture whereby the local residents use the land when the owner does not require it. In support of this, the schools state that the evidence shows that use has been mostly during school holidays and at weekends when there is no one in the school to prevent access and further add on a general point that the fact that the residents are aware that the land is a school playing field means that their use cannot have been 'as of right'.

Applicant's response to the objections

16. The applicant has taken the opportunity to extend his arguments in two further detailed submissions. He argues that the objections are mainly misguided and entirely insubstantial, and the objectors have misunderstood many elements of the application.

In his view, the objectors make bold assertions and yet offer no evidence to support them, thereby painting a false picture of the situation. In addition, evidence given by some of the objectors shows a woeful ignorance of the schools and the local area.

17. The applicant then sets out in detail the requirements for registration of land as a Town Green and discusses each requirement in turn:
    - **Significant number** – the applicant argues that despite assertions from an objector that use of the application site was by others from outside (i.e. it was by scattered individuals and in some cases by scattered groups) evidence from surveys and user evidence statements he has submitted show regular use by a large number of residents.
    - **Locality and local people** – the applicant refutes the assertion by the objectors that the ecclesiastical parish of St Martins and St Pauls is unacceptable as a locality for the purposes of complying with registration. The statement by an objector that predominant use is by others from outside of the parish is also refuted on the basis that submitted evidence clearly upholds the fact that use is clearly shown by local residents not only living close to the site but from right across the parish.
    - **Lawful sports and pastimes –** In this respect, the assertion made by the objectors that some of the activities listed in the application are outside the scope of 'recreational' activity is accepted by the applicant yet at the same time he takes the opportunity to reiterate that there are many other listed activities which do come very firmly within the legal definition. Furthermore, all of those activities had taken place over the requisite twenty year twenty year period.
    - **Without permission –** The applicant is of the view that, despite assertions to the contrary from the objectors, there is no evidence to suggest that during the twenty year qualifying period that any one received permission to use the field. He further argues that the objectors have confused licence and acquiescence and submits that the school never gave permission (licence) but in effect acquiesced in the public use of the field thus promoting an impression that use was as of right. To add weight to this argument the applicant refers to adduced evidence that indicates that many of his witnesses were not in fact aware of who actually owned the land anyway and so therefore could not seek permission from anybody even, I assume, if they had wanted to. As further emphasis of this point further argument is given that even from the schools evidence there are statements indicating that no permission was granted and he cites relevant examples.
    - **Without Force –** With regard to the question as to whether use was without force, the applicant argues this is perhaps the heart of the case. In defence against accusations from the objectors that the local residents only gained access to the site by breaking down and vandalising boundary fencing the applicant asserts there is no actual evidence to substantiate this. He further argues that there is authority in reference text to the fact that if persons enter a field through a gap created by others then those persons are not guilty of entering the field with force. He points out it is not important whether the field was fenced or not. What is important he argues is whether local people continue to use the field. He points out the field was not completely fenced. There were many gaps. Gates were left open or unlocked. There was no real evidence of the erection of visible and effective signs. Use was therefore without force.
    - **Without secrecy –** The applicant argues that there is evidence from the objectors themselves which support their knowledge that the field was being used by local residents. He disputes the assertion by the objectors that use was at weekends only and thus in secret because school staff were not there to witness such use.

Counsel's advice

18. Given the complexity and emotiveness of the matter, Counsel's advice on this issue has been sought. Counsel was of the view that, on the face of it, the application should be rejected on the grounds that the evidence presented by the applicant suggests that the majority of local users deferred to use of the application land by the schools. This issue was considered by the *Laing Homes*[1] case which dealt with the impact of agricultural activities in respect of applications to register land as a Town or Village Green and clarified that local inhabitants moving out of the way to enable the landowner to carry out such activities creates an interruption to the required twenty-year period of use. This is known as the 'deference issue' and, in essence, means that recreational user which defers to use by the landowner is not 'as of right' because it does not appear to the landowner to be the assertion of a right.

19. Regulation 6(3) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 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 possible grounds for rejecting the application'*. As such, a letter was sent to the applicant informing him that there may be possible grounds for recommending to the Member Panel that the application should be rejected, and providing an opportunity for him to respond accordingly. A copy of this letter ("the regulation six letter"), which summarises the evidence received from Counsel, is attached at **Appendix E** for reference.

Applicant's response to "regulation six" letter

20. A copy of the applicant's response is attached at **Appendix F**. In the main, the applicant offered new arguments in relation to the issue of deference and distinguishes the current application with the circumstances in the Laing Homes case. The applicant's view is that there was no deference in the current application because there is a significant difference in the circumstances in the present case compared to those that were relevant in the Laing Homes case.

21. In the present application, the applicant argues that the issues relating to deference do not, in his view, apply to this application. This is because the schools were fully aware of the use of the land by local residents and rather than either party 'deferring' to the other's use of the land, there has been shared use of the field between the schools and the residents. Furthermore, he argues there is no evidence that the landowners' use in practice actually conflicted with that of the local residents. The applicant also states that it was impossible for recreational users to defer since they did not know or acknowledge that anyone else owned the land or had any prior right to use the land; if they did not know who owned the land, they could not correctly be deferring.

22. In the applicant's view, the fact that the land concerned is also a school playing field is irrelevant as there is no legal impediment in law or practice to registering such land as a Town or Village Green and even if the land were to be so registered, the schools would, according to the applicant, have the legal right to continue to use the land as playing fields for their own purposes.

---

[1] *R (Laing Homes Ltd) v. Buckinghamshire County Council (2003)*

23. The applicant also attempts to draw parallels between the present case and other, in his view, similar Village Green applications both in Kent and other parts of the country. It is not necessary for the purposes of this report to go into detail regarding these, save to say that the vast majority of Village Green applications are, by their very nature, complex and rely upon a very specific area of law. Indeed, the circumstances in each case are nearly always unique and hence each case must be treated on its own merits; despite the applicant's assertion to the contrary, there is no such thing as a 'straightforward' application to register land as a Town or Village Green.

Further advice from Counsel

24. Following receipt of the applicant's comments in relation to the original advice from Counsel, and in response to a threat from the applicant of Judicial Review action in the event of the application being rejected, the County Council sought a second opinion from different, more senior Counsel.

25. Counsel's view was that since the application turns primarily on the issue of deference and the evidence of use is a matter of fact and degree (i.e. it concerns the inter-relationship between the landowner and the recreational users), it is necessary to establish the exact facts of the case before applying the relevant legislation. Counsel was also of the view that the evidence presented could not, under the circumstances, be taken at face value and requires cross-examination in order to obtain a better understanding of the patterns of use of the field by the various parties.

26. There is also a further issue in that a recent High Court case known as *Redcar*[2], which related to an application to register part of a golf course as a Village Green and approved the principle set out in the Laing Homes case, is due to be heard in the Court of Appeal before the end of the year. Counsel's advice was that any decision in the current case should not be made until the outcome of the *Redcar* appeal is known.

Conclusion

27. The issue of a school playing field being registered as a Town or Village Green is not one which has previously arisen in this county. Members of the panel, and indeed members of the public, may well be deeply concerned to see such an application being considered by the County Council. However, it is important to recognise that it is not for the County Council, in its quasi-judicial role as Registration Authority, to distinguish between those types of land that it is considered desirable to register and those which it is not; case law from the House of Lords has established that there is no identifiable 'type' of land that should be registered as a Town or Village Green. Instead, the County Council has no option but to be guided solely by the legal tests set out in the Commons Act 2006 (and associated case law).

28. In this case, it is considered that the question as to whether there was deference or not (as has been argued by the parties involved) cannot be resolved on paper and can only be properly examined by way of testing that evidence through the non-statutory Public Inquiry process. This practice has been approved by the courts, most recently in the *Whitmey*[3] case in which Lord Justice Waller said this: '*the registration authority has to*

[2] *R (Lewis) v Redcar and Cleveland Borough Council (2008)*
[3] R (Whitmey) v Commons Commissioners (2004)

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'.

29. In my view, before any decision is taken, the County Council should heed Counsel's advice to hold a non-statutory Public Inquiry to explore the issues further. The application is evidently very emotive locally and acceptance or rejection of this application will have a significant impact upon the future management of Barton Playing Field and it is important for all concerned that the true status of the application site be determined based upon all of the information available.

Recommendations

30. I recommend that Members endorse the advice received from Counsel and that a non-statutory Public Inquiry be held into the case to clarify the issues.

Accountable Officer:
Dr. Linda Davies – Tel: 01622 221500 or Email: linda.davies@kent.gov.uk
Case Officer:
Miss. Melanie McNeir – Tel: 01622 221628 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the Countryside Access Service, Environment and Waste, 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 (supplied by applicant)
APPENDIX D – Plan showing ownership of application site
APPENDIX E – Copy of "regulation six" letter (dated 29/05/08)
APPENDIX F – Applicant's response to "regulation six" letter (dated 28/08/08)