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

A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Tuesday 26th February 2013.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 11th November 2012 and the further advice dated 31st January 2013, that the applicant be informed that the application to register land known as Grasmere Pastures at Whitstable has not been accepted.

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 Town or Village Green from Mrs. E. Watkins on behalf of the Grasmere Pastures Residents Action Group ("the applicant"). The application, made on 14th September 2009, was allocated reference number VGA617. A plan of the site is shown at **Appendix A** to this report.

Procedure

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

3. Section 15(1) 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 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

6. The area of land subject to this application ("the application site") is known locally as Grasmere Pastures and is situated between the residential areas of South Tankerton and Chestfield on the northern outskirts of the town of Whitstable. The application site consists of approximately 16.3 hectares (40.3 acres) of rough grassland which is bounded to the north by the Ridgeway (also known as Bridleway CW40), to the south and west by the rear of residential properties in Grasmere Road and Richmond Road, and to the east (roughly) by Swalecliffe Brook. The application site is shown in more detail on the plan at **Appendix A**.

7. Access to the application site is via Public Footpath CW88 (which runs across the application site between Grasmere Road and Ridgeway) and Public Footpath CW89 (which runs between Richmond Road and Public Footpath CW88). Both paths were formally recorded on the Definitive Map of Public Rights of Way in 2009 following a successful application by the applicant under section 53 of the Wildlife and Countryside Act 1981.

8. The application site is owned by OW Prestland Ltd and registered with the HM Land Registry under title number K503254. Kitewood Estates Ltd. is the sole shareholder in OW Prestland Ltd. and the holder of an option to purchase the application site. During the consultation process, an objection to the application was received from solicitors acting on behalf of OW Prestland Ltd. and Kitewood Estates Ltd. ("the first objector"). A further objection was also received from Mr. M. Lewer CBE QC, former director of OW Prestland Ltd ("the second objector").

Previous resolution of the Regulation Committee Member Panel

9. The matter was considered at a meeting of the Regulation Committee Member Panel on Tuesday 22nd February 2011, where Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration.

10. As a result of this decision, Officers instructed Miss Lana Wood ("the Inspector"), Counsel experienced in this area of law, to hold a Public Inquiry, acting as an independent Inspector, and to report her findings back to the County Council.

The Public Inquiry

11. A pre-Inquiry meeting, for the purpose of determining the matters to be addressed and the procedure to be followed at the Inquiry, was held in Whitstable on Monday 23rd May 2011. Written directions to all parties confirming the format of the Inquiry and procedure for the submission of evidence were circulated shortly thereafter.

12. The Public Inquiry was opened on Monday 5th September 2011, but was promptly adjourned due to the submission of a significant volume of new evidence by the applicant. Due to various further unforeseen circumstances, the Inquiry did not

resume until Tuesday 17th April 2012. The Inspector sat for a total of 12 days, hearing evidence both in support of and in opposition to the application.

13. At the Public Inquiry, the applicant was represented by Ms. Isabella Tafur and Mr. David Graham of Counsel (instructed by the Kent Law Clinic on behalf of the applicant). The first objector was represented by Miss. Ross Crail of Counsel, and Mr. M. Lewer CBE QC represented himself.

14. The Inspector subsequently produced a detailed written report of her findings dated 11th November 2012. The report itself (including appendices) runs to approximately 350 pages and a full copy is available from the Case Officer on request. The Inspector's findings are summarised below.

Legal tests and Inspector's findings

15. 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 of 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 in accordance with the Inspector's findings.

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

16. The statutory scheme in relation to Village Green applications is based upon the English law of prescription, whereby certain rights can be acquired on the basis of a presumed dedication by the landowner. This presumption of dedication arises primarily as a result of acquiescence (i.e. inaction by the landowner) and, as such, long use by the public is merely evidence from which a dedication can be inferred.

17. In order to infer a dedication, use must have been 'as of right'. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*'). In this context, force refers not only to physical force, but to any use which is contentious or exercised under protest[1]: "*if, then, the inhabitants' use of the land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious*"[2].

18. In this case, there was no suggestion that any recreational use of the application site had been secretive in nature or had taken place with any express or implied permission from the landowner. The Inspector was also satisfied that there had not been any verbal challenges to use during the relevant period.

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[1] *Dalton v Angus* (1881) 6 App Cas 740 (HL)
[2] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

19. However, the Inspector was required to consider whether recreational use had at any point been contentious and whether the recreational use would have had the outward appearance of the assertion of a public right.

The hay crop

20. At the Public Inquiry, the Inspector heard a considerable amount of evidence relating to the condition and recreational use of the application site during the relevant period. In particular, there was much debate as to the taking of an annual hay crop from the land. On this issue, the Inspector rejected the applicant's assertion that the application site had been uncultivated grassland and, instead, preferred the objectors' evidence that the application site had been used to grow and harvest a hay crop on a commercial basis. The growing period was, roughly, between May and September each year and the harvest operations took between eight days and two weeks to complete, depending on the weather and the farmer's other commitments.

21. The Inspector found that recreational use of the application site had been tolerated by the landowner for the months of the year outside of the growing season and that responsible use during the growing season had also been tolerated. However, the attitude of the users, based on the evidence given at the Inquiry, was that the application site was not, as a whole, used during the growing season and that any use had been restricted to paths around the perimeter of or across the application site. In this respect, she considered that[3]:

> "*it is clear in my judgement that this use would not have been such in all the circumstances as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land: although the motivation [of the users] might have been to avoid damaging the growing crop, the outward appearance would have been of a footpath type use*".

22. This will be relevant because recreational use that has the outward appearance of being akin to the use of a public right of way is generally not qualifying use for the purposes of Village Green registration. 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*'.

23. Accordingly, the Inspector considered that such use should be discounted when determining whether the application site had been used in the requisite manner. She said[5]:

> *"in my judgement a reasonable landowner would have regarded people walking, cycling or dog walking on the tracks as exercising a right which potentially might give rise to a public footpath claim, rather than to a village*

[3] see paragraph 17.9 of the Inspector's report dated 11th November 2012
[4] *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70
[5] see paragraph 17.25 of the Inspector's report dated 11th November 2012

green claim, and I therefore consider that such use ought to be discounted when considering whether the applicant has shown sufficient qualifying use of the application land for village green purposes".

Notices and fencing

24. The Inspector heard much evidence regarding the issue of fencing, notices and mounds dug around the perimeter to impede access to the application site. There was much dispute and considerable debate at the Inquiry, particularly in relation to the date that the notices were erected and the mounds dug.

25. Having considered all of the evidence, the Inspector was able to conclude that a locked gate was erected on the north-western corner of the field (on the boundary of a small area excluded from the application site) by 14th September 2004.

26. She also found that two notices stating 'private property no trespassing' were erected on 7th September 2004 at the eastern and western end of the Ridgeway (Bridleway CW40). This was confirmed by the minutes of a meeting of the Chestfield Parish Council (held on 13th September 2004) which record that '*the Clerk referred to the problems currently being experienced at Grasmere Pasture… there was concern about the installation of "Private Property" notices on 8 September 2004, and news that the Grasmere Pasture area is to be fenced*'. The Inspector concluded that effect of this minute was to demonstrate that[6]:

"in fact the effect of the actions completed by the landowner by 13th September 2004 was to bring home to a substantial number of local residents the fact that the access to the application land was henceforth to be resisted by the landowner, despite the fact that other entrances were not signed"

27. In relation to the mounds, the Inspector was not able to identify the date upon which these were dug. She considered that it was likely that they were constructed when the fencing contractor was on site, and probably as early as (but not before) 16th September 2004. In addition to the mounds fencing was also erected on the boundaries of the application site. It was common ground at the Inquiry that the fencing along the Ridgeway was not completed before 15th September 2004. The Inspector considered on the basis of the evidence before her that it was likely that a run of fencing had been erected (including across the Grasmere Road and Richmond Road entrances to the application site) by 20th September 2004 but that the run of fencing along the Ridgeway was not completed until early October. However, both the mounds and the fencing had been erected outside of the relevant period (which ended on 14th September 2004).

28. Overall, the Inspector concluded that the actions taken by the landowner had been sufficient to convey to a reasonable user that his use had become contentious[7]:

"the combination of the two signs together with the new locked gate were in my judgement sufficient to convey to any reasonable member of the public using those entrances to the field the fact that his access to and use of the land was no longer being tolerated.

[6] see paragraph 18.48 of the Inspector's report dated 11th November 2012
[7] see paragraphs 18.55 and 18.57 of the Inspector's report dated 11th November 2012

> …
>
> *I am satisfied that by erecting notices reading "Private Land No Trespassing" at either end of the Ridgeway boundary of the field, the landowner took reasonable steps, proportionate to the user which he wishes to prevent, to bring his opposition to the use of his land by local people for recreation to the actual notice of those using his land."*

Conclusion on 'as of right'

29. As a result, the Inspector found that use of the application site would not have been 'as of right', either during the growing period within the first half of the twenty year period (use instead being a rights of way type use) or during the very latter part of the twenty year period (due to use becoming contentious as a result of the notices and locked gate).

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

30. 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[8].

31. 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*'[9].

32. In this case, the Inspector heard evidence that the application site had been used for a range of recreational activities during the relevant period. Such activities included walking and dog walking, children's play (including ball games), kite flying, model aeroplane flying and snow play.

33. However, as noted in the preceding section, there was an issue regarding the use of the application site during the growing season for the hay crop. The Inspector found that during the growing season, most residents did not use the whole of the application site but, rather, stuck to the paths through the hay and the perimeter of the field, and she was not persuaded that people had played ball games on the hay when it was growing or that bicycles had been ridden through the growing hay. She found that some residents (mostly dog walkers but also kite and model airplane flyers) had used the whole of the application site during the growing season, and that the number of residents making such use of the application site during the growing season increased over the years, so that in the early years it did not cause any significant loss of the crop, but by 1994 it was causing significant damage to the growing crop.

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

[9] *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

34. Her conclusion on the recreational use of the application site was[10]:

> *"Having regard to all of the evidence, I am not satisfied that the level of use of the land at the beginning of the relevant period during the growing season was such that it would have appeared to a reasonable landowner to have the character of the assertion of a public right to use the whole of the application land for recreation rather than the assertion of a public right of way across the tracks. The level of use increased over the period and by 1994 it probably was sufficient to have appeared to be the assertion of a public right.*
>
> *I am satisfied, having regard to all the evidence, that the application land was used throughout the relevant period by a significant number of local residents outside the growing season for lawful sports and pastimes, and particularly immediately after the hay was cut. Once the hay was cut people did not need to keep to the paths and could walk wherever they pleased on the field…*
>
> *In my judgement, a reasonable landowner, having regard to the extent of use of the application land both outside and during the growing season for the latter half of the application period, could not have failed to appreciate that the local inhabitants were asserting a right which he needed to resist if he wished to prevent in maturing into a prescriptive right, despite the fact that the land was being farmed for hay. However, I am not satisfied that the level of use by the local people during the early years of the relevant period, being largely confined, as I find, to the paths across and around the application land during the growing period, and only extending across the whole of the application land during the fallow period, was such that a reasonable landowner would have regarded it as having the character of the assertion of a public right to use the application land for recreation."*

35. At the Inquiry, the objectors also argued that when recreational activities resulted in damage to the growing crop, those activities could not be considered lawful sports and pastimes. The Inspector considered this issue in her report[11] and was satisfied that in order for activities enjoyed on the field to be lawful sports and pastimes, those activities must not be activities that involved the commission of a criminal offence. She was further satisfied that it would have been obvious that walking or cycling through the growing hay, or enjoying other activities, would cause damage to the crop so that an offence under section 1 of the Criminal Damage Act 1971 might be committed.

36. In this case, the Inspector found that use of the application site during the growing season in the latter part of the relevant period did, as a matter of fact, cause damage and resulted in significant loss of the hay crop. The damage was such that it prompted the tenant farmer to complain complaint to the landowner about it. The Inspector considered it arguable, therefore, that such use as there was of the application site, other than the footpaths, during the growing season would not have been qualifying use because it would not have been a *lawful* sport or pastime.

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[10] see paragraphs 17.44, 17.45 and 17.46 of the Inspector's report dated 11th November 2012
[11] see paragraphs 17.47 onwards in the Inspector's report dated 11th November 2012

37. The Inspector's overall conclusion regarding this issue was therefore that although there was evidence to suggest that the application site had been used for a range of recreational activities during the relevant period, the evidence was that such use during the growing season (particularly during the early part of the relevant period prior to 1994) was restricted to paths through the growing crop which would have consisted of a rights of way type use rather than the assertion of a right to recreate over the whole of the land.

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

38. 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.

39. 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[12] 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*'.

40. In cases where the locality is large, it will also be necessary to identify whether there is a qualifying 'neighbourhood within a locality'. A neighbourhood is a much more fluid concept: '*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*'[13]. It should be noted that the neighbourhood relied upon may fall within one or more localities and, similarly, there may be more than one qualifying neighbourhood within the relevant locality or localities[14].

41. The applicant's case was South Tankerton and Chestfield are each 'neighbourhoods' with the 'locality' of Canterbury City Council's administrative area. Alternatively, the applicant contended that the electoral ward of Chestfield and Swalecliffe was capable of constituting a qualifying 'locality'.

42. There was some debate at the Inquiry as to whether an electoral ward was capable of being a qualifying locality within the definition of the 2006 Act. The objectors' case was that an electoral ward is not capable of constituting qualifying locality and, even if it is, the present-day Canterbury City Council ward of Chestfield and Swalecliffe could not be relied upon because it only came into existence in 2003. On this issue, the Inspector concluded that an electoral ward is a potentially qualifying locality but accepted the objectors' submission that application could not

[12] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[13] *R (Cheltenham Builders Ltd. v South Gloucestershire District Council* [2004] 1 EGLR 85 at 92
[14] *Adamson v Paddico (267) Ltd and Kirklees Metropolitan Borough Council and others* [2012] EWCA Civ 262

succeed on the basis of the Chestfield and Swalecliffe ward as it was not in existence throughout the whole of the relevant period.

43. The Inspector did, however, accept the applicant's alternative case that South Tankerton and Chestfield were each 'neighbourhoods' with the 'locality' of Canterbury City Council's administrative area. Although the objectors did not seek to challenge the suggestion that the area administrated by Canterbury City Council was a qualifying locality, they did take issue with the description of Chestfield and South Tankerton and the Inspector heard argument from both sides as to whether or not these areas could constitute qualifying nrighbourhoods.

44. Having considered those arguments, the Inspector concluded that both Chestfield and South Tankerton both had a sufficient degree of cohesiveness to justify being described as individual neighbourhoods.

"a significant number"

45. The word "significant" in this context does not mean considerable or substantial: '*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*'[15]. Thus, the test is a qualitative, not quantitative one, and what constitutes a 'significant number' will depend upon the individual circumstances of each case.

46. Although the Inspector heard a considerable amount of evidence in relation to the recreational use of the application site, and was satisfied that it had been used by a significant number of local residents in the latter part of the relevant period, as is noted above, the Inspector was not satisfied that during the early part of the relevant period a significant number of the local residents had used the whole of the application site, particularly during the growing season.

(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)?

47. 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, the application must have been made either within two years from the date upon which use 'as of right' ceased or, if use 'as of right' ceased prior to 6th April 2007, within five years from the date upon which use 'as of right' ceased.

48. In this case, the application was made on 14th September 2009. It was common ground that use 'as of right' had ceased prior to 2007 and, as such, the applicant had a five year period of grace within which to make her application. In order for the application to succeed on this point, therefore, the earliest date upon which use 'as of right' can have been challenged must be 15th September 2004.

49. When the application was originally made, the applicant contended that use had ceased to be 'as of right' in October 2004. However, it later became apparent that the landowner had taken various steps to challenge recreational use prior to that time and the issue before the Inspector was therefore whether use of the

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

application site had continued to be 'as of right' up until 15th September 2004. If use cased to be 'as of right' prior to this time, the effect would be that the applicant had not made her application within the prescribed five year period of grace and, consequently, the application would not be capable of meeting this element of the legal tests.

50. As is noted above, the Inspector found that use of the application site ceased to be 'as of right' on 8th September 2004 when 'private property no trespassing' notices were erected by the landowner. Although this is only a matter of days before the 15th September cut off point, nonetheless, the application was therefore not made within the necessary five year period.

51. Strictly speaking, the application should fail on this point alone as indeed it is not an issues that can be remedied (e.g. by the submission of further evidence). However, as is noted elsewhere in this report, there are a number of other deficiencies in the application which have led the Inspector to recommend rejection of this application and it is not the case that this application would fail solely on a technicality.

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

52. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. In this case, the twenty year period relied upon by the applicant ("the material period") is 15th September 1984 to 15th September 2004.

53. In light of her findings in relation to the other legal tests, the Inspector concluded that[16]:

> *"I was not satisfied that the level of use of the land as a whole at the beginning of the relevant period up until about 1994 was sufficient to signify the assertion of a right by the local inhabitants. Furthermore, I was not satisfied that use as of right continued right to the end of the relevant period 15th September 1984 – 15th September 2004: in my judgement the combination of the two 'PRIVATE NO TRESPASSING" sings which were erected on the Ridgeway boundary of the field on 7th September 2004, together with the erection and padlocking of a new gate on 14th September 2004, was sufficient to convey to any reasonable member of the public using those entrances to the field the fact that his access to and use of the land was no longer going to be tolerated. Accordingly, use as of right ceased before the end of the relevant period. The application should be rejected for this reason."*

Inspector's conclusions

54. The Inspector's overall conclusion was that the application should fail. She said:

> "*I conclude that the applicant has failed to show use as of right of the application land by a significant number of local inhabitants for the whole of the relevant period. This is for two reasons: (1) because the applicant has failed to satisfy me that such use as there was of the application land in the period 1984-1994 was sufficient to have the appearance of the assertion of a right to use the whole of the application land for lawful*

[16] see paragraph 21.13 of the Inspector's report dated 11th November 2012

sports and pastimes and (2) because I am persuaded that the steps taken on behalf of the landowner by 14th September 2004 to secure the land and deter trespassers were sufficient to communicate to a reasonable user of the application land that his use was contentious and therefore that use did not continue, as is required for the statutory test to be satisfied in this case, down to 15th September 2004".

Subsequent correspondence

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

Objectors' comments

56. Mr. P. Watkins, on behalf of the first objector (OW Prestland Ltd. and Kitewood Estates Ltd.), wrote to confirm his support for the Inspector's recommendation but did not have any comments to make on the report.

57. Mr. M. Lewer, the second objector, also confirmed his support for the Inspector's recommendation (see **Appendix C**). He said that case had involved a considerable amount of oral and documentary evidence, and the thorough approach of the Inspector to the evidence could be seen in the four appendices to the report that, collectively, run to 244 pages. That approach had enabled her to assess which witnesses were reliable and where, on a balance of probabilities, the truth on issues of fact lay. Mr. Lewer considered it significant not only that some of the evidence given at the Inquiry by the applicant's lead witnesses had been described the Inspector as inaccurate and confused, but also that the Inspector heard from only six witnesses in support of the application whose evidence she was able to call reliable.

58. Mr Lewer considered that the Inspector had rejected key elements of the applicant's case and had made two significant findings of fact that were fatal to the applicants case; namely that the level and nature of use of the application site during the first ten years of the relevant period had not been sufficient to demonstrate to a reasonable landowner that the application site had been in recreational use by the local community and that notices erected early in September 2004 had been sufficient to render any recreational use contentious by communicating to the users that access to the application site was no longer being tolerated. Mr. Lewer concluded by saying that "*after a lengthy and very thorough hearing and a comprehensive analysis of the evidence presented and of the law, the Inspector decided in favour of the objectors. On that basis I ask the committee to adopt the report and recommendations of the Inspector and reject the claim*".

Applicant's comments

59. The applicant responded by way of a letter from the Kent Law Clinic dated 18th December 2012, a copy of which is attached at **Appendix B**. The applicant's view was that the Inspector had made "*a number of fundamental error of approach in the report which render her overall recommendation to refuse the application unsound*".

60. The applicant expressed concerns that the Inspector had applied her own, additional test when considering the evidence (namely whether a reasonable owner

would have regarded inhabitants as asserting a general right of recreational use). This, according to the applicant, is contrary to the recent decision in *Lewis*[17] in which the Court confirmed that the only requirement when deciding whether recreational use was 'as of right' was for use to have taken place without force, without secrecy and without permission. Thus, it was submitted that the Inspector erred in considering whether the landowner would have assumed that rights were being asserted by the users instead of simply looking at whether use of the application site had taken place 'as of right' during the relevant period.

61. The applicant did not agree with the Inspector's conclusion that use of tracks across and around the application site should be discounted. It was submitted that walking on tracks is a lawful pastime and there is no reason why use of the application site for waking up and down cannot be referable both to use as a path and qualify towards Village Green registration. The applicant further added that there was no reason why fruit picking should be attributed to use of a footpath (and hence discounted as qualifying use).

62. Another criticism of the Inspector's report was that she had found it to be strongly arguable that the trampling down of hay constituted a criminal offence and, thus, that any recreational activities which involved damage to the hay crop during the growing season would not fall within the category of a lawful sport or pastime. The applicant cited the example of a worn crease resulting from playing cricket and argued that all sporting activities on grass will inevitably lead to some wear and tear to the grass. Furthermore, the Inspector had made no finding that any individual had knowingly or recklessly damaged the crop so as to be liable of criminal damage.

63. The applicant disputed that there had been insufficient qualifying use of the application site between 1984 and 1994 on the basis that users had stuck to the beaten tracks through the hay during the growing season. The applicant's position was that there is no indication in the Commons Act 2006 that Parliament intended to exclude hay meadows from registration as a Village Green and it would be wrong to deny the inhabitants' right to recreation on the basis of obvious use for seven months or so of the year, merely because during some years they kept off the crop whilst it was growing.

64. Finally, the applicant challenged the Inspector's finding that the notices erected by the landowner in September 2004 had been sufficient to render use contentious. The test to be applied is whether the landowner had done all that was reasonable and proportionate to the use in question, to endeavour to contest and interrupt it, and to make clear that his protest would be backed by legal action or physical obstruction. In this case, only two signs were initially erected around the application site, despite there being at least six entrances, and the signs did not state that trespassers would be prosecuted.

65. Overall, the applicant considered that the only fair and lawful outcome of the application was to register the land as a Town or Village Green.

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[17] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11

Further advice

66. In light of the comments received, further legal advice was sought. As the original Inspector has now left the Bar to take up a public appointment, it was not possible to seek further advice from her. Instead, a different Counsel (Mr. Tom Cosgrove) was instructed to read the report, as well as the comments received from the parties, and to provide advice as to how the County Council should proceed.

67. The written advice received, a copy of which is attached for reference at **Appendix D**, reviewed in turn each of the applicant's five main criticisms of the report.

68. On the first issue, Counsel agreed that it is clear following the decision in *Lewis*[18] that the tripartite test of whether user was without force secrecy or permission is sufficient to establish whether use by local inhabitants has taken place 'as of right'. However, Counsel noted that the rationale behind 'as of right' is acquiescence, which means that the landowner must be in a position to know that a right is being asserted and acquiesce in the assertion of that right. Therefore, as a matter of law, it is relevant to consider whether the nature and frequency of use enabled a reasonable landowner to know that local inhabitants were engaging in recreational activities on the land. Counsel did not consider that the overall approach by the Inspector was in error or that there was any identifiable error of law in her approach; rather, she set out the correct overall legal test and applied it properly.

69. In relation to the exclusion from qualifying uses of walking along defined tracks, Counsel advised that it is permissible in law, depending on the facts, for certain elements of use to be discounted. The approach of the Inspector was, in Counsel's view, correct and she applied such legal principles and formed her conclusions in a way that appears to be reasonable. Counsel did not consider there to be any force in the applicant's criticism on this point.

70. Counsel's view on the treading down of the grass is that the applicant is wrong to assert that a recreational activity would be lawful even if criminal offences were carried out at the same time. In any event, the issue did not form part of the Inspector's reasons for recommending rejection of the application and as such the County Council need not place any reliance on this aspect of the Inspector's report in determining the application.

71. Counsel did not see any merit in the applicant's criticism of the Inspector's approach to the use of the application site during the growing season. He considered the analysis of the Inspector to be sound and her findings reasonable in light of the evidence and law she refers to.

72. Finally, Counsel rejected the applicant's proposition that the Inspector was wrong to find that the landowner had taken reasonable steps to bring his opposition to the recreational use of the land to the attention of the users. He considered that the Inspector accurately set out the applicable and relevant law and addressed properly the points raised by the parties on this issue.

[18] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11

73. Overall, the further advice received suggests that there is little merit in the applicant's comments and no obvious reason to depart from the Inspector's recommendation.

Conclusion

74. For the reasons set out above and, having carefully considered the Inspector's thorough and detailed analysis of the evidence (contained in her report) as well as the comments received from the parties and the further advice obtained from Counsel, it would appear that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met and, accordingly, none of the land the is the subject of the application is capable of registration as a new Town or Village Green.

Recommendation

75. I recommend, for the reasons set out in the Inspector's report dated 11th November 2012 and the further advice dated 31st January 2013, that the applicant be informed that the application to register land known as Grasmere Pastures at Whitstable has not been accepted.

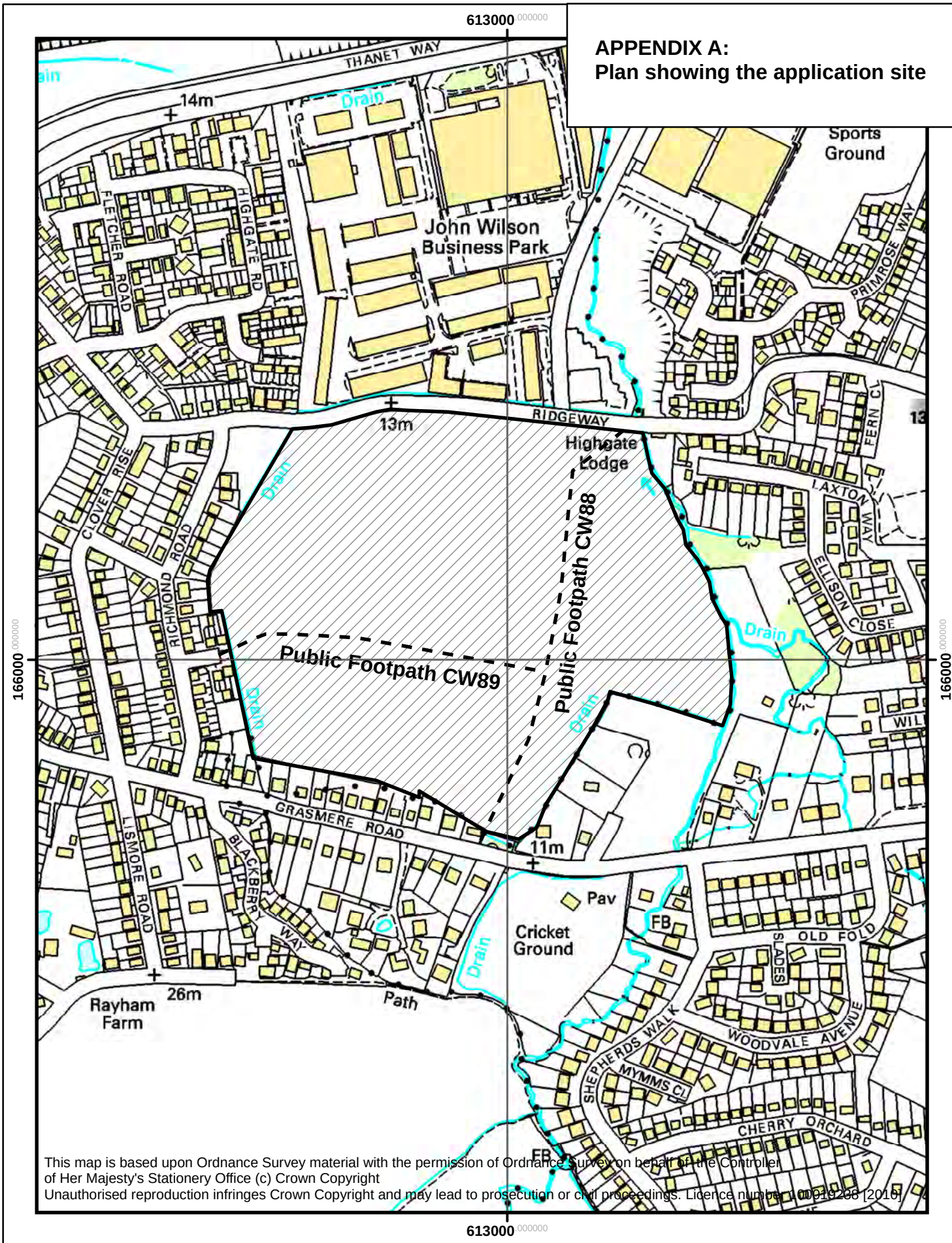
Accountable Officer:
Mr. Mike Overbeke – Tel: 01622 221513 or Email: melanie.mcneir@kent.gov.uk
Case Officer:
Miss. Melanie McNeir – Tel: 01622 221511 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the Countryside Access Service, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

Background documents

APPENDIX A – Plan showing application site
APPENDIX B – Applicant's comments on the Inspector's report (in the form of a letter dated 18/12/12 from the Kent Law Clinic)
APPENDIX C – Objector's comments on the Inspector's report (in the form of notes from Mr. M. Lewer received on 06/12/12)
APPENDIX D – Further advice from Counsel (dated 31/01/13)

APPENDIX A:
Plan showing the application site



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Land subject to Village Green application at Grasmere Pastures, Whitstable

Scale 1:5000

Kent County Council

APPENDIX B – Applicant's comments on the Inspector's report (in the form of a letter dated 18/12/12 from the Kent Law Clinic)

Ms Melanie McNeir
Countryside Access Service
Kent County Council
Invicta House
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Maidstone
Kent ME14 1XX

18 December 2012

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Dear Ms McNeir

Re: Application 617 to register land known as Grasmere Pastures, Whitstable, Kent as a Town or Village Green

I am writing as solicitor on behalf of the Applicant and would be grateful if you could put this letter before the Regulation Committee Member Panel.

We have now had an opportunity to consider the lengthy report of the inspector Miss Lana Wood dated 11 November 2012 ('the Report') which we trust you will consider carefully and in full before determining whether to grant my Application to register the Pastures as a Town or Village Green ('TVG').

While we wish to pay tribute to the time and effort that Miss Wood has clearly put into considering our application, it is regrettably obvious that she has made a number of fundamental errors of approach in the Report which render her overall recommendation to refuse the application unsound. We are writing to point these out and urge you not to follow her recommendation.

They are, in brief:

- application of her own extra-statutory test for whether the use of the pastures qualifies to allow registration;
- wrongly discounting admitted use of the land from consideration;
- wrongly suggesting that treading down the grass renders activities on the Pastures unlawful.
- wrongly placing decisive weight on the extent of recreational use of the land during the hay-growing season without regard to the overall extent of the use; and

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- inconsistent and flawed treatment of the evidence as to whether the landowners had acted proportionately to contest local residents' use of the land.

These errors amount to clear errors of law and any decision which was made that adopted Miss Wood's reasoning would be susceptible to be quashed on an application for judicial review. We feel duty-bound to point them out so that a lawful decision can be made by you as the Registration Authority.

I should once again remind you that our legal submissions to Miss Wood were set out in detail in our Opening and Closing Submissions and I urge you also to consider those for yourselves when deciding whether to adopt her recommendations.

The erroneous overall test applied

Miss Wood's executive summary says:

> *'the Applicant failed to satisfy me that such use as there was of the application land in the period 1984-1994 was sufficient to have the appearance of the assertion of a right to use the whole of the application land for lawful sports and pastimes'.*

At paragraph 11.17, she says:

> *'The question the Registration Authority must address in deciding whether the application land should be registered in spite of the hay growing or other activity carried out with the authority of the landowner is the following: whether use has been such as would have appeared to a reasonable landowner to be the exercise of a public right. In reaching a conclusion on that question, the Registration Authority should have regard to the use made of the land by the owner, as relevant to the question of whether a reasonable landowner would have regarded people using it for sports and pastimes as doing so as of right.'*

At paragraph 17.17 she says:

> *'...I think that the key issue is how the owner's own use of the application land affects the question of whether a reasonable landowner would have regarded people using the land for sports and pastimes as doing so as of right.'*

What Miss Wood has done is to take as her touchstone an overarching test of whether a reasonable owner would have regarded inhabitants as asserting a general right of recreational use. She applies that test again and again (e.g. at paras 11.32, 17.9, 17.20, 17.25, 17.30, 17.39, 17.44, 17.46, 21.7, 21.10)

That approach is directly contrary to the decision of the Supreme Court in *Lewis v Redcar* [2010] UKSC 11.

The *Lewis* case was about use of a golf course for (amongst other activities) recreational dog-walking. The dog-walkers were acting *nec vi, nec clam, nec precario* (not by force or contentiously, nor by stealth, nor by revocable permission of the owner). They kept out of the way of the golfers and the question was whether it mattered that by appearing to defer to the golfers a reasonable landowner would not have thought they were asserting a right to use the land. The court had to decide whether there was an additional test that had to be satisfied other than the traditional 'tripartite test' that use be *'nec vi, nec clam, nec precario'*, in order to qualify as use 'as of right' for the purpose of section 15.

Miss Wood's error seems to have arisen because she has taken a single sentence (underlined below) of Lord Hope's judgment in *Lewis* out of its context. At paragraphs [53] he set out the issues and at [67] he gave his determination:

> '[53] As Lord Walker JSC has explained, the question is whether the land ought to have been registered. In an attempt to focus their arguments more precisely, the parties were agreed that it raised the following issues. (1) Where land has been extensively used for lawful sports and pastimes nec vi, nec clam, nec precario for 20 years by the local inhabitants, is it necessary under section 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging? (2) If the answer to (1) is "yes", does the mere fact that local inhabitants did not prevent the playing of golf by walking in front of the ball (or seeking to prevent the playing of strokes by golfers) preclude the use from being "as of right" under section 15(4) ? (3) If the answer to (2) is "no", did the local authority (and the inspector) err in law in concluding that the inhabitants' use was not "as of right", given what the inspector described as "overwhelming evidence" that recreational use of the land by local people deferred to the golfing use?...
>
> [67] ...it is, I think, possible to analyse the structure of section 15(4) in this way. The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land... And they must have been doing so "as of right": that is to say, openly and in the manner that a person rightfully entitled would have used it. <u>If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see R (Beresford) v Sunderland City Council [2004] 1 AC 889 , paras 6, 77), the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case</u>. If he does, the second question is whether that claim can be made out. Once the second question is out of the way—either because it has not been asked, or because it has been answered against the

owner—that is an end of the matter. There is no third question. The answer to the first issue... is: No.'

Lord Hope's underlined sentence, taken out of context, might suggest that there is a test of whether there is 'user...of such amount and in such manner as would reasonably be regarded as being the assertion of a public right'. But in fact it is clear that use by a significant number of inhabitants, for lawful sports or pastimes will *ipso facto* be "user...of such amount and in such manner as would reasonably be regarded as being the assertion of a public right", unless one limb of the 'tripartite test' was satisfied so that user was not 'as of right'. In other words, Lord Hope's underlined sentence was recapitulating what he had just said previously. He was not ruling that there was some overarching test. That is clear from his ruling on the identified issues that "there is no third question". It is also clear from the judgments of his colleagues.

Lord Brown said (at [107]):

> **'I see no good reason whatever to superimpose upon the conventional tripartite test** for the registration of land which has been extensively used by local inhabitants for recreational purposes **a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging. As Lord Walker of Gestingthorpe JSC has explained, there is nothing in the extensive jurisprudence on this subject to compel the imposition of any such additional test.'** [My emphasis].

Lord Kerr agreed (at [116]):

> 'I am content to accept and agree with **the judgments of Lord Hope DPSC, Lord Walker and Lord Brown JJSC that no overarching requirement concerning the outward appearance of the manner in which the local inhabitants used the land is to be imported into the tripartite test. The inhabitants must have used it as if of right but that requirement is satisfied if the use has been open in the sense that they have used it as one would expect those who had the right to do so would have used it; that the use of the lands did not take place in secret; and that it was not on foot of permission from the owner.** If the use of the lands has taken place in such circumstances, it is unnecessary to inquire further as to whether it would be reasonable for the owner to resist the local inhabitants' use of the lands. **Put simply, if confronted by such use over a period of 20 years, it is ipso facto reasonable to expect an owner to resist or restrict the use if he wishes to avoid the possibility of registration.'** [My emphasis].

This position was put beyond any conceivable doubt by the Court of Appeal in the case of *London Tara Hotel v Kensington Close Hotel* [2011] EWCA Civ 1356 where Lord Neuberger MR at [28] explained the effect of *Lewis*:

'28 In *Redcar* [2010] 2 AC 70 , Lord Walker gave the leading judgment, with which three of the other four Justices expressly agreed. He said that "[t]he proposition that 'as of right' is sufficiently described by the tripartite test *nec vi, nec clam, nec precario* (not by force, nor stealth, nor the licence of the owner)" was "established by high authority" – see at [2010] 2 AC 70, para 20, citing, *inter alia* , observations of Lord Davey and Lord Lindley in Gardner [1903] AC 229 , and of Lord Bingham and Lord Rodger in Beresford [2004] 1 AC 889. Lord Hope reached the same conclusion at [2010] 2 AC 70, para 67, when he said that "the owner will be taken to have acquiesced in [a use] — unless he can claim that one of the three vitiating circumstances applied in his case". Lord Brown and Lord Kerr also expressed the same view at [2010] 2 AC 70, paras 107 and 116 respectively. Lord Rodger said at [2010] 2 AC 70, para 87, that, "the basic meaning of ['as of right'] is ... *nec vi, nec clam, nec precario* ". [My emphasis].

Thus, it is clear that where user comprises lawful sports and pastimes, indulged in by a significant number of inhabitants of the locality (i.e. more than just a few individual trespassers, as Miss Wood accepted at paragraph 21.4), the land must be registered unless one of the three vitiating factors applies.

In wrongly considering what rights a hypothetical landowner would take to have been asserted by inhabitants partaking in individual activities (as to which see further the next section of this letter) instead of simply asking whether overall the use was for lawful pastimes and sports by a significant number of people, Miss Wood arrived at completely the wrong conclusion on use.

<u>Wrongly discounting use of tracks across and around the land (and other evidence of use of the whole field)</u>

Miss Wood said at paragraph 17.25:

> *'I accept the objectors' submission that use of the recognised footpaths and other defined routes should be discounted for the purposes of the application when considering to what extent the Applicant has shown that the land has been used for lawful sports and pastimes.'*

At paragraph 23.10, Miss Wood said:

> *'During the growing period, most local inhabitants kept to the worn paths across the field. In my judgment a reasonable landowner would have regarded this use [as] the exercise or excessive exercise of a potential right of way, and it therefore falls to be*

disregarded when considering whether it would have appeared to a reasonable landowner that a general right to use his land for recreation was being asserted.'

Even if - which we do not accept - Miss Wood was right that the whole question boils down to the overall impression a reasonable landowner would get, this approach was wrong. It was wrong because the use of the land had to be considered as a whole, including the use of informal tracks. Walking on tracks is a lawful pastime just as other activities on the land were. The Commons Registration Act 2006 does not say that walking is to be discounted. There is no reason why use of land for walking up and down cannot be referable *both* to use as a track/path *and* qualify towards TVG registration as a 'lawful pastime'. If overall, the whole of the land was used for lawful sports and pastimes then it must be registered. The use of tracks is one component in the overall use of the land. Even if by itself walking along any one track would not be sufficient to evince use of the whole of the land, it *contributes* to that impression of use of the site. It is wrong to 'discount' it, because that would leave a distorted picture of the level of use of the field as a whole.

Miss Wood also discounted other activities which were specific to particular parts of the field at paragraph 17.39:

'...the area along the brook was the attractive area for nature observation...any real nature study...took place there and would not therefore have been regarded by a sensible landowner as evidence of a claim to use the whole of the application land for lawful sports and pastimes, but rather as specific to that area. Similarly the fruit and elderflower activities could only, because the bushes were in the hedges around the field, have taken place around the edges of the application land, and in my judgment would have been regarded as an excessive use of the perimeter footpath, rather than as an assertion of a right to use the whole of the application land'.

Again, by wrongly discounting every activity which took part in particular parts of the Pastures, Miss Wood artificially airbrushes them from the scene and artificially obscures the true impression that the Authority would get (or a hypothetical landowner would have got if Miss Wood's analysis of *Lewis* were correct) from all the activities on the land taken as a whole.

If Parliament intended greens only to be registered where the whole field was used at once (the only common example would be for team sports) then it would not have used the word 'pastimes' as well as 'sports' in section 15 of the Commons Act 2006.

Doubtless, when considering paragraph 17.39, Councillors will also agree that it is unreal to attribute fruit-picking - not an activity involving walking up and down in a line - to use of a footpath. And in any event, there was no legally recognised 'perimeter footpath' to which one could attribute such activities.

Lastly, on the subject of evidence of user of the land it was bizarre for Miss Wood to accept that there was rubbish strewn all over the field which the farmer had to pick up (paragraph 17.29), but not to accept that it was more likely than not attributable to use of the whole of the field. This Authority has to reach a decision on the evidence 'on the balance of probabilities': what is more likely than not. Miss Wood's implausible explanation was that "The rubbish could well have blown or been thrown from a position other than that in which it was eventually found". The proposition that empty bottles and cans would be thrown from the margins so as to be evenly distributed across a forty-acre field is utterly incredible. Nor are they the sort of thing that one would throw for a dog to catch as the dog could harm itself in biting them. Moreover, if rubbish had been blown then unless the wind blew evenly from all directions and the field were entirely flat (neither of which is the case) the rubbish would naturally accumulate at one side or the other. It would not be so evenly distributed that the farmer Mr Goldsmith had to 'walk the whole field' and take a day to pick it all up (see our Closing Submissions para 114(b) pp.54-5 and Mr Goldsmith's statement at p.30 of the Objectors' bundle at paragraph 9).

Wrongly suggesting that treading down of grass rendered use of the field unlawful

Miss Wood was apparently prepared to accept as 'strongly arguable' the absurd submission of the Objectors that use of the field was probably unlawful (paragraphs 17.53 and 21.11). The argument was that the trampling – even to a minute extent – of grass constituted criminal damage to the landowner's property, which would be unlawful and hence any pastimes resulting in the treading-down of the grass would also be unlawful pastimes.

Of course, *all* sporting activities on grass will require people to tread on the grass, and so will result in some greater or lesser degree of wear to the grass. An obvious example would be a worn crease resulting from playing cricket. If the Objectors' submission were correct, then no grassy area could ever be registrable as a Green. It is obvious that Parliament could not have intended the Commons Act to have such a meaning, as this would defeat its purpose.

The Objectors have explained that since walking is itself a lawful pastime the test in Section 15 is met even if criminal offences are committed at the same time when the pastime is carried out. The safeguard against hooliganism being used to establish village green rights is the requirement that qualifying use be *'nec vi'* – peaceable. Plainly, deliberate vandalism would be *vi*.

Further or alternatively, since to establish the offence of criminal damage a 'guilty mind' (*mens rea*) is also required as well as damage and Miss Wood made no finding that the witnesses had any such guilty mind, it is not open to the Registration Authority on the evidence to find that any criminal offences were committed. Miss Wood accepted that *"some members of the public, living in towns and used to walking on grass in their gardens and in parks, might fail to address their minds to the possibility that by walking on a growing*

hay crop they will damage it" (paragraph 16.19). She made no finding that any individuals had knowingly or recklessly damaged the crop.

Further, this Registration Authority is not entitled to find that crimes were committed by specific individuals without proof of their conviction or holding a fair trial of the issue because it would be a breach of natural justice and contrary to the presumption of innocence.

In any event, the House of Lords has ruled that the commission of criminal offences will not bar the acquisition of a prescriptive right over land provided that the offence is subject to a defence that the landowner consented (*Bakewell Management Ltd v Brandwood* [2004] UKHL 14; [2004] 2 A.C. 519, especially Lord Scott's speech at [25], [46] and [47]).

Lastly, even if walking on the growing crop amounted to criminal damage and could not count as a 'lawful pastime', Miss Wood found as a fact that no damage was caused by walking on the grass outside the growing season (paragraph 17.45). Accordingly, the land was used for lawful sports and pastimes by a significant number of people for at least 7 months annually, and should properly be registered on that basis alone. See the next section of this letter on this point.

Wrongly attributing decisive weight to use of the land in the growing season

After hearing all the oral testimony and reading all the documentary evidence, Miss Wood found as facts that:

- *"[t]he growing period each year was from between mid-April and mid-May, depending upon the weather, until harvest, in late July, August or early September, again depending upon the weather and on Mr Goldsmith's other commitments. The land was therefore fallow from at least mid-September until mid-April each year"* (Report, paragraph 16.2). That is, a minimum of 7 months of the year, every year.

- *"...the application land was used throughout the relevant period by a significant number of local residents outside the growing season for lawful sports and pastimes, and particularly immediately after the hay was cut. Once the hay was cut people did not need to keep to the paths and could walk wherever they pleased on the field..."* (paragraph 17.45).

- There was use of the field *"largely confined...to the paths across and around the application land during the growing period"* each year from 1984-1994 during the growing season (albeit artificially disregarded entirely by Miss Wood) (paragraph 17.46, cf 17.22, 17.31).

- From about 1994 to the end of the relevant period, the use of the land during the growing season would itself *"have appeared to a reasonable landowner to have the*

character of the assertion of a public right to use the whole of the land for recreation rather than...the tracks" (paragraph 17.44).

Miss Wood accordingly recommends refusal of the application on grounds of insufficient use solely for the reason that inhabitants stuck to the beaten tracks through the hay while it was growing between 1984 and 1994. I have already explained that whether the use would have appeared to a hypothetical landowner to be asserting a public right is emphatically not the test to apply. I have also explained why it is wrong to simply ignore the use of the tracks, rather than viewing it as part of a broader picture of use of the whole field. Still less is it correct to artificially and arbitrarily break down the pattern of use and to say that because the users *during the summer* would not have appeared to a hypothetical landowner to be asserting a right to walk on every part of the field, that is a reason for refusing registration when they did so during the rest of the year.

If one stands back and looks at Miss Wood's overall findings about use of the field, the whole of it was always used for 20 years for at least 7 months of each and every year for recreation, such that a reasonable landowner on the spot would have realised that the use was of all parts of the land and was not confined to tracks.

On village greens and commons, inhabitants and landowners have to exercise 'give and take' and 'let and let live' (*Lewis v Redcar* [2010] 2 A.C. 70 - Lord Walker at [73]-[75], Lord . In *Lewis* Lord Walker, whose judgment as I have explained was concurred in by the other Supreme Court Justices, said (paragraph [76]):

> '...it would be wrong to assume, as the inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use of the land as of right for lawful sports and pastimes. It is simply attributable to an acceptance that where two or more rights coexist over the same land there may be occasions when they cannot practically be enjoyed simultaneously.'

Hay meadows are just the sort of land that would traditionally be village greens (as in *Fitch v Fitch* 170 E.R. 449; (1797) 2 Esp. 543). In *Lewis,* Lord Walker noted (paragraph [28]) that

> "Taking a single hay crop from a meadow is a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring. Fitch v Fitch (1797) 2 Esp 543 is venerable authority for that."

There is absolutely no indication in the Commons Act 2006 that Parliament intended to exclude hay meadows from registration. It would be wrong and inconsistent with the principle of 'give and take' to deny the local inhabitants' right to registration on the basis of year-in, year-out obvious use for 7 months or more, merely because on some years they deferred to the farming activities and kept off the crop while it was growing.

In *R (Newhaven Port and Properties Ltd) v East Sussex CC* [2012] EWHC 647 (Admin); [2012] 3 W.L.R. 709, the application land was a beach which was submerged and entirely inaccessible for 42% of the time, and was wholly uncovered by water for only a few minutes each day. Unlike the field in our case, the beach was unused for most of the time (see paragraphs [61] and [63] of Mr Justice Ouseley's judgment). Nevertheless Mr Justice Ouseley concluded (at [70]) that that discontinuity of use was no reason to refuse to register the land:

> *"The lawful recreational use does not have to be the sole or even dominant use of the land. The dominant use of the land is what happens when it is wholly or partly covered by water. Its dominant characteristic is that most of it is covered by water most of the time. But it is not of the essence of a registrable village green that the qualifying recreational use be the sole or dominant use, or that it has any characteristic beyond that it has lawfully occurred as of right for the requisite period"*

As Mr Justice Ouseley recognised, section 24(4) of the Commons Act 2006 allows the Registration Authority no discretion to register the land provided that it has been used throughout the relevant period on a non-trivial basis by a significant number of local inhabitants. *'[T]he scope of the phrase "town or village green" is a matter of law; whether the facts found showed that an area of land falls within it, is not left by statute to the reasonable judgment of the decision-maker'*. Accordingly, on the facts found by Miss Wood as inspector the Registration Authority is not only entitled to register the Pastures but must do so.

Inconsistent and flawed approach to the question of the landowner's contestation of the use

Miss Wood adopted the wrong approach when determining that the landowner's actions had rendered the trespass on the Pastures '*vi*' (forcible and/or contested). She found as a fact that the only action which the landowner had taken to contest or interrupt residents' use by 15th September 2004 (the end of the relevant period) was – after at least 20 years of inaction – to erect a gate on the edge of an adjacent and hitherto overgrown corner of the field which it is not sought to register as part of the Application, and to erect a total of 2 signs saying "Private Land No Trespassing", one at either end of the Ridgway, on about 8th September 2004. (See paragraphs 18.24, 18.26-18.29; 18.34, 18.46, 18.47). There were 6 entrances to the Pastures but only 2 had been marked with signs. The signs did not say that trespassers would be prosecuted. Users of the field had seen the farmer, but the farmer had not tried to exclude the inhabitants despite having been well aware of them. Nor had the landowner.

The test for whether use is *'vi'* is whether the landowner had done all that was reasonable proportionate to the use in question, to endeavour to contest and interrupt it, and to make clear that his protest would be backed by legal action or physical obstruction (Mr Justice Pumfrey in *Smith v Brudenell-Bruce* [2002] 2 P. & C.R. 4 at [12]).

Ordinarily, erection of prohibitory signs and/or gates cannot in itself be sufficient to prevent use of land being 'as of right'. Section 31 of the Highways Act 1980 says:

> '(1) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
>
> [...]
>
> (3) Where the owner of the land over which any such way as aforesaid passes—
> (a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and
> (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,
> the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway'

Subsection (3) would not be required if erection of a sign prevented use being 'as of right'; instead it goes to the owner's intention. See *R (Godmanchester Town Council) v Secretary of State for the Environment and Rural Affairs* [2007] UKHL 28; [2008] 1 AC 221 where Lord Hoffmann said at [24]:

> '...there may be a notice which says "No right of way. Trespassers will be prosecuted". Nevertheless, for upwards of 20 years members of the public have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. Their user will satisfy section 31(1) but the landowner, even on the most objective test, will have satisfied the proviso [in s.31(3)].' [Emphasis added].

The requirement in the town and village green legislation for use to be 'as of right' was intended to import the same test as for highways (*R v Oxfordshire CC ex parte Sunningwell PC* [2000] 1 A.C. 335, H.L. at 354-356 by Lord Hoffmann).

The doctrine of *'vi'* (which literally means 'force' and is the root of 'violent') discourages landlords from sleeping on their rights. It requires them to take all reasonable action against trespassers before those trespassers' long-standing use rights will be precluded from counting towards acquisition of a legal right. At the same time, it protects landowners who are too poor or infirm to contest the trespass, or are cowed by intimidating, armed or

violent trespassers. In such circumstances even if no force is used by the trespassers it may be unreasonable to require the landowner to confront them.

In this case, the trespassers were largely middle-aged and retired residents and their children and grandchildren. They were in no sense intimidating or aggressive. The landowner had the means to do more than post 2 signs in the ground and put up a gate (without any fence) over the 20 year period, and such was freely admitted in cross-examination. When people continued to walk on the field in defiance of the signs, there was no further action taken against them before 15th September 2004 to indicate that the landowner would contest their use of the land.

In fact, in the days and weeks immediately following the end of the relevant period, the landowners *did* take more active steps to contest the user of the land. More signs were put up. The new tenant farmer told people orally to leave the land. He erected a wire fence around the field from 16th to 20th September 2004. He blocked the entrances to the field with piles of earth. He ploughed a strip around the perimeter. These steps were relatively straightforward, quick and cheap, and each and any could have been taken at any time during the relevant period. None of them were.

This was despite the landowners being aware of the recreational use of the land, and having been warned by their planning agent Mr Watkins to take action to contest the use at least as early as 2001. The landowners had 'slept on their rights'.

The question is not what some users of the field subjectively feared, but what the signs and gate communicated to a reasonable user of the field. The landowner had not objectively made clear that he would fence off the whole of the application land, nor that he would take court action against those trespassing. The residents continued to use the field without further obstruction or contest. Many of them may well have feared that their access would be prevented but in the absence of further overt action by the landowner that cannot prevent the land being registrable. As Lord Hoffmann observed (above), even a sign saying that trespassers will be prosecuted may not prevent trespassers' use being 'as of right' if in fact the notice appears to be a 'dead letter' and no other action is taken.

In those circumstances, Miss Wood was quite wrong to determine that *"the landowner took reasonable steps, proportionate to the user...to...have conveyed to a reasonable user the fact of the landowner's..* [sic – 'opposition' presumably is meant] *and his intention, if the signs were ignored, to take further steps by obstruction or legal action"*.

Miss Wood only reached this surprising conclusion on the basis that she should take into account the evidence that a significant number of users of the field had actually become aware of the signs by 13th September and feared that the land would be fenced (paragraph 18.29), and that it was wrong to consider evidence of what the landowner actually did after 14th September. She said:

'I do not think that the right approach is to look at all the action eventually taken... to infer what was proportionate because...those steps could easily, and inexpensively, have been taken at a much earlier date; rather I think I should take a snapshot of the application land as it was at the end of the relevant period... '

'Although the issue is not what the users, subjectively, understood, but rather what a reasonable user would have understood, in arriving at an assessment as to what a reasonable user would have understood I am entitled to and do have regard to what users actually understood.' (paragraphs 18.54 and 18.56)

That is completely inconsistent and unfair. The evidence of what the landowners actually did was evidence of what they reasonably could have been expected to do, just as much as the evidence of what the users actually knew was relevant to what a hypothetical reasonable user would have known.

Further and in any event, even if it finds it was unreasonable to expect the landowners to have done more to contest the open and peaceable use of the land, it is open to the Registration Authority to disagree with the inspector's opinion that the existence of an isolated gate in one hitherto overgrown corner of the field and the signs on one side of the field was sufficient to contest the trespass by *all* users of the field including those using other entrances, to make it clear that access to the *whole* 40 acres of the field would be prevented by fencing. That cannot be correct as a matter of common sense.

Conclusion

For the reasons set out above, I am sure that you will agree that Miss Wood's recommendations are based on flawed reasoning and inconsistent treatment of the evidence. The only fair and lawful outcome of this application is to register the land as a Town or Village Green.

Yours sincerely

Elaine Sherratt.

Elaine Sherratt

Clinic Solicitor

APPENDIX C: Objector's comments on the Inspector's report (in the form of notes from Mr. M. Lewer received on 06/12/12)

Whitstable TVG Inquiry on Grasmere Pastures

Comments by 3rd Objector (Michael Lewer) on Inspector's report.

Inspector's role One vital role of the inspector is to hear and assess the oral evidence, so that she can reach her conclusions and recommendations having observed witnesses giving and being questioned on their evidence, and has had time and opportunity further to test their credibility by comparing their evidence with evidence available in contemporaneous documentation. The oral factual evidence in this claim came from 23 witnesses, 16 on behalf of the applicant, 6 for the objectors and 1 single local resident: the documentary evidence was voluminous. The thorough approach of the inspector to the evidence she heard can be seen in the 4 appendices she has provided to her report, which contain her typed up note of the oral evidence and run to 244 pages.

Witness credibility Wherever the cases being presented were in conflict that exercise enabled her to assess which witnesses were reliable and where the truth on issues of fact probably lay. There is no substitute for that procedure. In my submission a committee without those advantages should not substitute any of their own views on the facts for those of the inspector. It is very significant that after a strong and strongly worded campaign to obtain TVG status for this field, the inspector was not able to describe as either reliable or honest (which were descriptions she gave to the evidence of witnesses whose evidence she accepted) the evidence of any of the applicant's 3 principal witnesses who had been members of the committee of the 'Grasmere Pastures Residents Action Group', and who gave oral evidence.

Principal witnesses Statements by the lead witness relating to use of the land were described by the inspector as 'inaccurate and potentially misleading' (para 13.36, p.47) and 'did not really bear scrutiny' (13.37). The inspector 'approached his evidence with a degree of caution and did not accept it unless it was corroborated by other evidence' (13.39). Of the witness who in 2009 had helped draft the supporting statement for the application, as well as providing his own questionnaires, she concluded that his early evidence was inaccurate and/or misleading (13.73, p.54). Of the witness in whose name the application was presented the inspector said her recollection had become confused, and that her evidence could not be relied upon except where it was corroborated (13.13.45, p.49).

Other witnesses for applicant She reached similar conclusions on a further 7 of the 16 witnesses called for the applicant, in each instance recommending that their evidence should be approached either with caution or was unreliable. That means that of the witnesses called to support the applicant's case she criticised on the basis of their credibility over half (62.5%) (including that of the applicant herself). She heard from only 6 witnesses for the application whose evidence she was able to call honest or reliable.

Findings of fact Despite the case forcefully put forward by the applicant to Kent CC in 2009 in the Supporting Statement and in evidence that until 1984 the field had been uncultivated grassland, that it was common land, that local residents had uninterrupted use of the land, and that the erection of a fence in 2004 was the first time in living memory that anybody had asserted a right to ownership, the inspector's finding at para 16, 1-3 (p.59) of her report wholly rejected every aspect of such a case. She rejected the applicant's assertion that the field was uncultivated grassland during the relevant period, by which she meant every year from 1984 to 2004, and found that during that period the 'application land was used to grow a hay crop which was grown and harvested on a commercial basis'. She added that growing and harvesting of hay was an important part of the farmer's business, whose cultivation of the field had included ploughing and reseeding it in 1989 (para 16.14, p.61) and fertilising and spraying it annually (para 16.3-5).

As well as rejecting the core of the applicant's case the inspector made 2 significant factual findings based on her assessment of the witnesses' credibility. Each is fatal to the claim.

First she found that the level of use of the field by local people during the first 10 years or so of the 20 year period would not have appeared to a reasonable landowner to have the character of the assertion of a public right to use the whole field, rather than an assertion of a public right of way on the tracks (para 17.44-46, p.72).

Secondly she found that notices saying 'no trespassing' sufficient to bring home to a reasonable person that use had become contentious, were placed at both ends of the Ridgeway (the bridle way giving access to the field) on 7 or 8 September 2004 (see inspector's findings at para 18.25-30 and 18.49-50, pp.80 and 87). It followed from that finding that the application had to be made within 5 years of that date. It was not made until 14 September 2009 (para 3.12, p.8), and accordingly was not made within the 5 years allowed by the statute. The timing and the placing of the 2 notices and their effect on local

people in the circumstances of the access available into the field was an issue with which the inspector dealt. The inspector said (para 18.55, p.88) that in her judgement the signs were appropriately positioned in relation to the 2 entrances to the field, and in combination with a locked gate were sufficient to convey to any reasonable member of the public using those entrances to the field that access to and use of the land was no longer being tolerated. She added (18.56) that the signs had quickly become notorious so that users of the field would have been likely to have been aware that their use of the field was contentious, and (18.57) that by erecting notices at either end of the Ridgeway the owner had taken reasonable steps, proportionate to the use he wished to prevent, to bring his opposition to the notice of those using his land (see also 21.13, p.105) . These are findings of fact, based on what the law requires.

Issues of law There were also issues of law, in which the inspector held:

a that both Chestfield and South Tankerton satisfied the test of being neighbourhoods within a locality (para 21.3, p.104), which the objectors had contested.

b that a 'significant number ' of inhabitants was not to be considered by reference to the size of the population of each neighbourhood, as the objectors had argued, but by whether the number of individuals using the land was sufficient to signify that it was in general use by the local community (para 21.4, p.104)

c in an appropriate case land which was in use for hay cropping could be registered as a village green (para 11.17, p.31), though she was not satisfied, having regard to all the evidence, that that was the situation here (para 17.44, p.72).

d it was not possible to imply, from the finding that the field had been ploughed and reseeded in 1989, that a licence that permitted use of the land had been given to the public (11.18, p. 31, and 17.14-16, p.66).

Conclusion After a lengthy and very thorough hearing and a comprehensive analysis of the evidence presented and of the law, the inspector decided in favour of the objectors. On that basis I ask the committee to adopt the report and recommendations of the inspector and reject the claim.

Signed Michael Lewer

APPENDIX D – Further advice from Counsel (dated 31/01/13)

VILLAGE GREEN ADVICE – KENT CC

ADVICE

Introduction

1. I am asked to advise Kent County Council in relation to a report of an inspector[1], Miss Lana Wood ('the inspector'), dated 11th November 2012 ('the report')[2]. The report related to an application to register land known as Grasmere Pastures, Whitstable, Kent as a town or village green and was produced following a public inquiry ('the land'). I am asked, in particular, to provide my opinion on the report in the context of issues raised by parties involved at the inquiry.

2. I have been provided with the following material:

(i) A copy of the report[3] (but not the various appendices)[4].

(ii) A letter dated 18th December 2012 from the Kent Law Clinic on behalf of the Applicant.

(iii) A document headed 'comments by the 3rd Objector (Michael Lewer) on Inspector's report which is undated[5].

The report

3. The inspector concluded that:

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[1] Appointed pursuant to the Commons Registration (England) Regulations 2008/1961 (as amended). Kent is one of the pilot authorities to which the 2008 regulations apply.

[2] I have taken my instructions to be set out in an e-mail dated 18.12.12 from Melanie McNeir together with subsequent e-mails confirming the terms of my instruction.

[3] Running to some 108 pages and dated 11.11.12

[4] It is important to note that I have not seen any of the material available to and before the inquiry.

[5] I note that the e-mail dated 20.12.12 from Melanie McNeir refers to enclosing representations from the 'second objector'. I have not seen those, but assume that reference was meant to be to the third objector representations which I have seen? I proceed on that basis.

"*the Applicant has failed to show use as of right of the application land by a significant number of local inhabitants for the whole of the relevant period for two reasons:*

(1) because the Applicant has failed to satisfy me that such use as there was of the application land in the period 1984-1994 was sufficient to have the appearance of the assertion of a right to use the whole of the application land for lawful sports and pastimes and

(2) *because I am persuaded that the steps taken on behalf of the landowner by 14th September 2004 to secure the land and deter trespassers were sufficient to communicate to a reasonable user of the application land that his use was contentious and therefore that use did not continue, as is required for the statutory test to be satisfied in this case, down to 15th September 2004*[6]."

4. She accordingly recommended that the application should be rejected[7].

Reasoning

5. The application was made under qualifying criteria in s.15 (4) of the Commons Act 2006 ('the 2006 Act'). To succeed there accordingly needed to be a qualifying period of use of at least 20 years with that use ceasing before the commencement of section 15 (6 April 2007) and with the application then being made within a period of 5 years after the cessation of use. The inspector clearly and accurately set out such provisions in the report[8] as well as providing a summary of relevant law and procedure[9].
6. The relevant 20 year period identified was 15th September 1984- 15th September 2004[10]. The key issues and the particular issues of fact and law which arose as agreed between the parties were clearly set out in section 6 of the report.

[6] Executive summary, p.3; also at conclusions, para 22.1, p.108.
[7] Para 22.2, p.108.
[8] Paragraphs 3.2-3.4, pps 7-8.
[9] Report at paragraphs 3.5-4.54 – although I note that the footnote references appear to go awry from paragraph 4.4 following – there does not appear to be any relevant footnotes for footnote 4, para 4.4, p.10 or thereafter until one arrives at page 26?
[10] Para 3.12, p.9

7. It is clear that the report is a thorough one. It has gone into great detail and has set out clearly the relevant competing arguments at the inquiry as well as detailed conclusions as to fact and law on the identified key issues. I do not set out or refer to all such matters in detail in this advice, but focus in the issues which have been raised by the applicant at this stage. The letter from the 3rd objector (Mr Lewer) is largely descriptive and, as one might expect, in agreement with the inspector.

Use

8. In relation to the issue of use, having set out her views on the evidence the inspector concluded (at 17.44-17.46):

"Conclusions on use

Having regard to all the evidence, I am not satisfied that the level of use of the land at the beginning of the relevant period during the growing season was such that it would have appeared to a reasonable landowner to have the character of the assertion of a public right to use the whole of the application land for recreation rather than the assertion of a public right of way across the tracks. The level of use increased over the period and by 1994 it probably was sufficient to have appeared to be the assertion of such a public right.

I am satisfied, having regard to all the evidence, that the application land was used throughout the relevant period by a significant number of local residents outside the growing season for lawful sports and pastimes, and particularly immediately after the hay was cut. Once the hay was cut people did not need to keep to the paths and could walk wherever they pleased on the field. Although it is clear from the consistent positioning of the paths over the years that a considerable number of people must still have chosen to stick to the paths, the oral evidence of the Applicant's witnesses supported by the Hiblen photographs showed that a significant number did not. This use did not cause damage to the growing crop and was tolerated by the landowner without challenge until August or September 2004.

In my judgment, a reasonable landowner, having regard to the extent of use of the application land both outside and during the growing season for the latter half of the application period, could not have failed to appreciate that the local inhabitants were asserting a right which he needed to resist if he wished to prevent it maturing into a prescriptive right, despite the fact that the land was being farmed for hay. However, I am not satisfied that the level of use by the local people during the early years of the relevant period, being largely confined, as I find, to the paths across and around the application land during the growing period, and only extending across the whole of the application land during the fallow period, was such that a reasonable landowner would have regarded it as having the character of an assertion of a public right to use the application land for recreation."

9. In short, the inspector considered that there was insufficient use of the whole of the application land during the growing season for the use to appear to have been the assertion of a public right between the beginning of the relevant period and about 1994.

10. In section 21 of her report, the inspector applied in summary form the law to the facts she had found. She revisited the use points and stated (at paragraphs 21.5-21.8):

"*I was not persuaded by the First and Second Objectors' argument that the effect of the ploughing and re-seeding of the land in 1989 was to render use after that date impliedly permissive.*

In my judgment the correct interpretation of the authorities is that part-time user, in the sense of use for part only of the year, including sequential user by the landowner and by local residents within each year of the relevant period, is potentially capable of satisfying the test for registration, if the use by local residents in all the circumstances was such as would have appeared to a reasonable landowner to be the exercise of a public right.

The application land was farmed for hay each year during the relevant period. During the fallow period, local inhabitants used the application land freely. The pattern of use during the growing period changed over the relevant period. At the beginning of the relevant period there was little trespass into the growing crop by local inhabitants, and in my judgment such use as there was would

not have appeared to be the assertion of a right by the local community, but rather as use by individuals as trespassers. However, by about 1994, local residents had begun to use the field more widely, even during the growing period, and by this time, in my judgment, a reasonable landowner looking at the position would have regarded this use as the assertion of a right by the local community to recreate on the land as a whole. Accordingly, from 1994 onwards, but not before, it would have been reasonable to expect the landowner to resist or restrict the use if he wished to avoid the possibility of the land being registered as a village green.

In my judgment therefore, the Applicant has failed to show that the application land has been used as of right by a significant number of local inhabitants for the whole of the relevant period, but has only succeeded in showing that it has been so used since about 1994. The application should be rejected for this reason".

Steps taken by landowner

11. In relation to the issue of what steps had been taken by the landowner in the relevant period, the inspector made various findings as to what had been done on the site. She concluded that (at paragraphs 18.55-57):

"In my judgment the two signs which had been erected within the relevant period were appropriately positioned in relation to the two entrances to the field to which they related. The combination of the two signs together with the new locked gate were in my judgment sufficient to convey to any reasonable member of the public using those entrances to the field the fact that his access to and use of the land was no longer going to be tolerated.

Although the Applicant urged me to find that the failure to erect a sign at the entrance to the field at the end of the Richmond Road cul de sac, or, as I find, at the entrance from Grasmere Road within the relevant period, meant that the message that use had become contentious would not have been effectively communicated to those using the field, in fact, it is apparent that the signs quickly became notorious, so that even those users, such as Mrs Watkins, who habitually used the Richmond Road entrance and walked a circuit within the field, would have been likely, if they used the field, to have

been aware of the fact that their use of the land was contentious before the end of the relevant period. Although the issue is not what the users, subjectively, understood, but rather what a reasonable user would have understood, in arriving at an assessment as to what a reasonable user would have understood, I am entitled to and do have regard to what the users actually understood.

Standing back and looking at the situation as a whole, I am satisfied that by erecting notices reading "Private Land No Trespassing" at either end of the Ridgeway boundary of the field, the landowner took reasonable steps, proportionate to the user which he wished to prevent, to bring his opposition to the use of his land by local people for recreation to the actual notice of those using his land. These signs would have conveyed to a reasonable user the fact of the landowner's .. and his intention, if the signs were ignored, to take further steps by obstruction or legal action."

12. At the end of her report (section 21, paragraphs 21.13) she stated:

"*I was not satisfied that the level of use of the land as a whole at the beginning of the relevant period and up until about 1994 was sufficient to signify the assertion of a right by the local inhabitants. Furthermore I was not satisfied that use as of right continued right to the end of the relevant period 15th September 1984-15th September 2004: in my judgment the combination of the two "PRIVATE PROPERTY NO TRESPASSING" signs which were erected on the Ridgeway boundary of the field on 7th September 2004, together with the erection and padlocking of a new gate on 14th September 2004, was sufficient to convey to any reasonable member of the public using those entrances to the field the fact that his access to and use of the land was no longer going to be tolerated. Accordingly, use as of right in this case ceased before the end of the relevant period. The application should be rejected for this reason*."

Issues raised by applicant – assessment.

13. The applicant now claims that the inspector has made a '*number of fundamental errors of approach in her report'* which it is said render the recommendation to reject '*unsound*[11]'. A

[11] Letter dated 18.12.12, page 1.

number of points are raised in the letter dated the 18th December 2012 ('the letter') and I deal with each in turn.

Erroneous test?

14. First, it is contended that the inspector applied her own '*extra statutory test for whether the use of the pastures qualifies to allow registration*'[12].

15. The inspector noted in several places and in broadly similar terms in her report (as referred to in the letter, p.2) that a relevant issue was whether the use has been as such as would have appeared to a reasonable landowner to be the exercise of a public right and/or whether a reasonable landowner would have regarded people using the land…as doing so as of right.

16. As a matter of law it is clear, following R (Lewis) v Redcar and Cleveland [2010] UKSC 11 that, the tripartite test of whether the user was nec vi, nec clam, nec precario (without force, secrecy or permission) was sufficient to establish whether local inhabitants use of land for lawful sports and pastimes was '*as of right'* for the purpose of s.15 of the 2006 Act. The unifying element in each of these three vitiating circumstances is that each constitutes a reason why it would not be reasonable to expect the owner to resist the exercise of the right claimed.

17. However, when considering such matters it is important to remember that the rationale behind '*as of right*' is acquiescence. The landowner must be in a position to know that a right is being asserted and acquiesce in the assertion of the right (i.e. not resist or permit). It is well settled that what matters therefore – when considering the evidence what can properly be a relevant consideration – is how the matter would have appeared to the owner of the land.

[12] Letter page 1

18. In Redcar (which was primarily a case about legal consequences of deference), the Supreme Court clarified that deference is neither an additional requirement to the definition of use as of right not a bar to registration in any event.

19. The inspector, as I have noted above, recommended rejection partly on the basis that the use of the land in the period 1984-1994 was not sufficient to have had the appearance of a right to use the whole of the application land. It was the level and sufficiency of the use that she was concerned with in recommending rejection. In particular, her view was that in the earlier years there was little trespass into the growing crop by local inhabitants so that a significant number of them could not be said to have used it as of right.

20. In the context of whether the nature of the use was sufficient Lord Hoffman was clear in Sunningwell that there may be cases where ' *the user is so trivial or sporadic so as not to carry the outward appearance of user as of right*[13].

21. As a matter of law it is relevant in such a context – whilst accepting that each case will depends on the particular facts and be a matters evident – to consider whether the user enabled a reasonable landowner to know that local inhabitants were carrying out activities on his land. As to the nature of the user, in the Oxfordshire[14] case Lord Hoffman noted – in the context of considering evidence of types of use (dog walking, recreational walking on track)- that Lightman J had provided sensible guidance at first instance. Lightman J had[15] said:

'*The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both'*

22. It is well settled law, as I have noted above, that what matters in such instances – in the context of user as of right –is how the matter would have appeared to the owner of the land

[13] At 357D
[14] [2006] UKHL 25
[15] At 702-703

(or if there were an absentee owner to the reasonable owner on the spot). That was affirmed in Redcar by Lord Walker[16]. The subjective belief of users of the land is irrelevant. As Redcar made clear however it is relevant to ask, to the extent I have explained above, how the use would have appeared to a reasonable landowner.

23. In such a context I do not consider that the overall approach by the inspector is in error. She has set out the correct overall legal test[17] and applied it properly in my view. The issue of what a reasonable landowner would have considered was not being used as a distinct test which sought to add to or supplant the tripartite test relating to use as of right, but rather as a relevant consideration and question in addressing aspects of the tripartite test as well as in the context of sufficiency and adequacy of any such use.

24. The applicant's letter suggests that use by a significant number of residents for lawful sports or pastimes will ipso fact be user of such amount and in such a manner as would reasonably be regarded as being the assertion of a public right- so that, it is argued, the underlined sentence from Lord Hope (ref pages 3 and 4 of the applicant letter) in Redcar was merely recapitulating what he had just said previously. In my view Lord Hope was accepting - in line with earlier authorities – that in answering whether there has been a sufficiency of user in terms of adequacy and sufficiency of use it may be relevant to ask what would have been '*reasonably regarded*' as having taken place by a landowner.

25. The quote from Lord Brown (p.4) in the letter is again in my view taken somewhat out of context. At that stage of his judgment Lord Brown was concerned with the position where land had been extensively used and so no issues of adequacy or sufficiency were in issue.

[16] At paras 36 ('how the matter would have appeared to the owner of the land'), 67 ('as would be reasonably be regarded')
[17] See for example at para 3.8, p.8-9

26. The position is in fact also made clear by the further case relied upon by the applicant, London Tara Hotel v Kensington [2011] EWCA 1356 – although not in a part of the judgment of Lord Neuberger referred in the letter. At paragraph 29 of the judgment the court made it clear that for the landowner (Tara) to succeed in showing that no prescriptive rights had accrued:

"*it seems to me clear that Tara would have to show that the use of the roadway from 1980 by KCH and its predecessors was vi , clam , or precario , when judged by the actual use as viewed from the perspective of a reasonable person in the position of Tara*".

27. In short, it is relevant to consider what the hypothetical reasonable landowner would have regarded such use as being 'as of right'. That was exactly the test being suggested by the inspector in the various references referred to by the applicant.

28. Taken in isolation and out of context, I accept that some parts of the report might appear to place too much emphasis on the views of a reasonable landowner. However, read as a whole I do not consider there to be an identifiable error of law in approach by the inspector.

Wrongly discounting use of tracks across and around the land (and other evidence of use of the whole field)

29. The applicant has set out various quotes from the report in the letter (from paragraphs 17.25, 23.10[18] & 17.39).

30. The thrust of the point being made appears to be that the inspector was wrong to exclude or discount use of tracks for walking and/or the areas along the brook and perimeter footpath.

[18] NB - I do not have a paragraph 23.10 in my report – my report ends at para 22.2)

31. I do not consider there to be force in this point. Whilst each case needs to be considered on the particular facts it is - in principle – legally acceptable to make such discounts. I refer to relevant law below.

32. Walking of a character as might give rise to a presumption of a dedication as a public right of way or which appears to a reasonable landowner as being an exercise of a right of way might be considered not to justify registration[19]. The courts have recognised that it is sensible to look at the user as a whole and decide, adopting a common sense approach, to what – if any – claim the use is referable. The issue arose in Laing Homes [2004] 1 P & CR 36 and Sullivan J discussed the approach at paragraphs 102-110 especially.

33. I note that the inspector quoted such passages in her report[20]. It is clearly permissible in law, depending on the facts, for elements of such use to be discounted. I have considered the approach to evidence set out in the report by the inspector. I consider her suggested approach for the registration authority to take set out in paragraphs 11.32-36 of the report to be correct in terms of the legal approach. In my view the inspector has applied such legal principles and formed her conclusions in a way that appears[21] to be reasonable.

34. Nor do I consider there to be merit in the suggestion that the findings in relation to rubbish (paragraph 17.29) were '*bizarre*' but that is a matter that the authority may wish to consider, it having been raised by the applicant.

Treading down grass

[19] Hoffman in Oxfordshire at 702-3 referring to Lightman J at first instance at 102-3.
[20] Paragraphs 11.28ff
[21] So far as I can tell without having seen the evidence

35. This issue was considered by the inspector but did not form part of her reasons for recommending rejection given her other findings[22]. In paragraph 21.11 of her report she indicated:

"*Although I recommend rejecting the application for other reasons, I consider that it is strongly arguable that such use of the application land, other than the paths, as there was during the growing season was not use for lawful sports and pastimes because it damaged the growing crop*."

36. The inspector formed the view on the evidence that such activity as she referred to (see paragraphs 17.47-53 especially) rendered certain elements of the use unlawful.

37. The use of the word lawful has been interpreted by reference to the old caselaw – in particular Fitch v Fitch (1797) 2 Esp 543. Lord Hope in Redcar stated that the case of Fitch indicates "*that the user must not be such as would be likely to cause injury or damage to the owner's property"*[23]. Thus, it is the manner in which the sport or pastime is carried out that is relevant to its manner, and not merely the nature of the sport or pastime per se.

38. I do not consider that the applicant is correct to assert (page 7 of letter) that walking (for example) would be lawful even if criminal offences were carried out at the same time as such a pastime. Such a proposition does not accord with Redcar. In addition, an offence under section 1of the CJA can be committed either intentionally or recklessly[24] so that the comments by the applicant as to the inability of the registration authority to agree with the inspector – especially in light of her approach in paragraph 17.50 – is in my view also incorrect.

[22] See paragraph 17.47
[23] At paragraph 67
[24] Where a defendant is aware of the risk of damage being causedand it is unreasonable to take the risk – see R v G [2004] 1 AC HL

39. I do not consider the reference in Bakewell is of assistance to the applicant. The case did not directly concern village greens and in any event the relevance of it was correctly considered by the inspector at paragraph 17.52 of the report.

40. But the key point here is that the registration authority need not place any reliance on this aspect of the report in any event as it did not form part of her reasoning for recommending rejection.

Wrongly attributing decisive weight to the use of the land in the growing season

41. In the letter (p.8) the applicant refers to various facts found by the inspector. The argument that follows is somewhat repetitive and reliant upon earlier arguments which I have dealt with above. Reliance is then (p.9) placed on Redcar and the judgement of Lord Walker to illustrate the point that hay meadows were not intended to be excluded from registration. In fairness to the inspector she has extensively quoted from and analysed the judgment of Lord Walker in Redcar and accepted in part the general contentions argued for by the applicant at the inquiry – see especially paragraphs 11.12-11.13.

42. I consider the analysis of the inspector to be sound and her findings reasonable in light of the evidence and law she refers to. I do not consider that the arguments put forward by the applicant under this heading provide any basis for suggesting the report was flawed in law or approach.

Inconsistent/flawed approach to the question of the landowner's contestation of the use.

43. The applicant in essence contends that on the facts found relating to steps taken by the landowner (notices and locked gate) the inspector was wrong to find that the landowner took reasonable steps, proportionate to the user which he wished to prevent, to bring his opposition to the use of his land by local people for recreation to the actual notice of those using his land and that these signs would have conveyed to a reasonable user the fact of the landowner's

opposition and his intention, if the signs were ignored, to take further steps by obstruction or legal action.

44. I do not consider the approach of the inspector was inconsistent or unfair as is alleged in the letter. The inspector accurately set out the applicable and relevant law (see especially report at paragraphs 18.2-18.16) and addressed properly the points raised by the parties on this issue - with particular reference to the CA in Betterment. The applicant is correct in saying that the registration authority is entitled to disagree with the inspector, but I do not consider there to be an obvious basis for so doing.

Approach of the registration authority

45. I have reviewed the points raised by the applicant above. I do not consider them to have merit for the reasons I have expressed.

46. The role of the registration authority at this stage is to determine the application and in doing so to take into account all relevant considerations and in particular the matters set out in regulation 28 of the 2008 regulations and the matters set out in relevant Defra guidance[25].

47. That exercise will need, obviously, to include careful consideration of not only the report but the representations received from the parties and the matters referred to in them[26]. In that regard the decision makers will need to grapple with the points raised and at least indicate that they have been considered. How they are approached is a matter for the authority. I have provided my view on the basis of the documents I have been provided with and focussing primarily on issues of law that have been raised.

[25] Sept 2011 to pilot authorities, section on determination especially: http://archive.defra.gov.uk/rural/documents/protected/common-land/craguide.pdf

[26] For example the opening/closing submissions referred to in the letter from the applicant, p.2, 3rd paragraph. I have not seen such submissions.

48. Any subsequent challenge by way of judicial review to a decision will face a number of hurdles provided that the decision process has properly considered relevant matters. I do not descend into detail in this advice as the broad ambit of such challenges will, no doubt, be well known to those instructing me.

49. If I can be of any further assistance please do not hesitate to contact me.

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31st January 2013