Application to register land known as Chaucer Fields at Canterbury as a new Town or Village Green

A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Tuesday 29th July 2014.

Recommendation: I recommend that Members endorse the Inspector's advice (contained in her report dated 22nd January 2014) to proceed with this application on the basis that section 15(7)(b) of the Commons Act 2006 does not have retrospective effect.

Local Member: Mr. G. Gibbens Unrestricted item

Introduction

1. The County Council has received an application to register land known as Chaucer Fields in the city of Canterbury as a new Town or Village Green from a group of local residents, namely Mr. J. Barton, Mr. R. Norman, Mrs. P. Cherry, Mrs. S. Power and Mr. A. Pearlman ("the applicants"). The application, made on 21st April 2011 was allocated the application number VGA635.

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 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Village Green where it can be shown that:

   'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

4. In addition to the above, the application must meet one of the following tests:

   • **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or

   • **Use of the land 'as of right' ended no more than two years prior to the date of application**[1], e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

5. A full copy of section 15 of the 2006 Act is provided for ease of reference at **Appendix A**.

6. As a standard procedure set out in the 2008 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

[1] Note that from 1st October 2013, the period of grace was reduced from two years to one year (due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013). This only applies to applications received after that date and does not affect any existing applications.

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

7. The area of land subject to this application ("the application site") is situated adjacent to Chaucer College on the University of Kent campus in the city of Canterbury. The application site consists of approximately 17.6 hectares (43.5 acres) of meadow and woodland which forms a green space between the main university buildings and the residential estates in the vicinity of Salisbury Road in the St. Stephen's area of the city of Canterbury. The application site does not have any officially recognised name, although it has latterly become known locally informally as Chaucer Field.

8. Access to the application site is via its unfenced boundary along University Road[2], or via the Public Rights of Way (Public Footpaths CC5 and CC6 and Bridleway CC8) which cross and abut the site, providing access from the residential estates to the south and east of the application site.

Previous resolution of the Regulation Committee Member Panel

9. As a result of the consultation, an objection to the application was received from the University of Kent ("the University") in its capacity as landowner. The objection was made on the following grounds:
   - That the documentation submitted in support of the application is not sufficient to prove that a significant number of the inhabitants of the locality have indulged in lawful sports and pastimes on the land between 1991 and 2011;
   - That there is clear evidence that the use of the application site is with the permission of the University, communicated by notices positioned at each entrance to the application site throughout the relevant period; and
   - That use has not been by a significant number of the residents of the locality or neighbourhood and such use as was made was confined to footpaths and desire lines.

10. The matter was considered at a meeting of the Regulation Committee Member Panel held on Tuesday 11th September 2012, at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration.

11. As a result of that decision, Officers instructed an independent Barrister ("the Inspector") experienced in this area of legislation to hold a Public Inquiry and to report her findings back to the County Council. A pre-Inquiry meeting was held on Thursday 13th December 2012 and arrangements were made for the Public Inquiry to commence on Monday 18th March 2013 and continue, as necessary, during that week.

[2] University Road is a private road but Public Footpath CC69 runs over it thereby providing a public right of access on foot.

Proposed amendment to the application

12. Prior to the commencement of the Public Inquiry, the applicants contacted the County Council[3] to advise that they wished to amend their application, stating that:

> *"having taken Counsel's advice and having further considered the evidence, we wish to pursue the application under section 15(2), and not under section 15(3) as originally stated. On the basis that permission has been given to use the land, we shall rely upon section 15(7)(b) in conjunction with section 15(2). We note that this has a bearing on the 20 year period to be considered, and for this reason we wish to make use of evidence covering the entire period referred to in the evidence questionnaires and witness statements, from 1944 to 2011".*

13. As Members will be aware, section 15(2) of the Act applies in situations where use of the application site 'as of right' is continuing up until the date of the application, whilst section 15(3) applies where use has ceased to be 'as of right' prior to the making of the application. In this case, the application had been made under section 15(3) on the basis that use of the application site had already ceased to be 'as of right' by virtue of the erection, by the University, of notices granting permission to local residents to use the application site. Those notices, which read "*The University of Kent at Canterbury hereby gives notice that the land is private property and any access by members of the public is by licence only and may be revoked at any time*", had been erected by the University in March 2011 (i.e. several weeks prior to the making of the application). Thus, the twenty year period relied upon by the applicants in the application as originally made was March 1991 to March 2011.

14. Section 15(7)(b) of the Act provides that, where the application site has already been used for a full period of twenty years and permission is subsequently granted for the recreational use of the land, '*the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land 'as of right'*". The effect of this provision is therefore that where a landowner grants permission for recreational use after local residents have already been using the application site for a period of at least twenty years, that permission will not be sufficient to constitute a formal challenge to such use or to cause 'as of right' use to cease.

15. In this case, it is clear that the applicants, instead of making their application under section 15(3) of the Act (i.e. on the basis of use 'as of right' ceasing in March 2011), could equally have made their application under section 15(2) of the Act (i.e. on the basis of use continuing) in conjunction with the provision in section 15(7)(b) of the Act (so that the University's 2011 permissive notices would be disregarded).

16. However, the added complication in this case is that the University contends that recreational use of the application site has taken place on a permissive basis

[3] By way of a letter dated 31st January 2013

since late 1989 or early 1990 when it had previously erected permissive notices. It is not clear (as yet) whether or not these notices were still in place by March 1991 or their effect on 'as of right' use at that time. The applicant therefore seeks to rely on section 15(7)(b) of the Act in order to disregard the permissive notices erected in late 1989 or early 1990.

17. The issue that is in dispute between the parties is whether section 15(7)(b) of the Act can be relied upon in instances where the grant of permission preceded the commencement of section 15 (which was brought into force on 7th April 2007). If section 15(7)(b) of the Act is not considered to have retrospective effect, and the University were to succeed in demonstrating that use of the application site had been permissive for any part of the period March 1991 to March 2011, the application would unavoidably fail.

18. The University responded to the applicant's proposed amendment by suggesting that the Inquiry could not proceed as scheduled if the amendment were to be allowed due to the time required to research the evidence going back to 1944 and that, in any event, section 15(7)(b) did not have retrospective effect and could not be relied upon in respect of a grant of permission pre-dating the coming into effect of the legislation on 7th April 2007. The University further suggested that, in order to prevent unnecessary work and costs for all parties, a hearing ought to be held to consider this preliminary issue before proceeding to hear the user evidence in full at a Public Inquiry.

19. Accordingly, on the advice of the Inspector, a hearing was held on 18th March 2014 at which both parties made representations before the Inspector on this issue. The Inspector subsequently prepared a report (dated 22nd January 2014) setting out her findings and recommendation to the County Council as to how it should proceed with this matter. The report is summarised below, but a full copy is available on request from the case officer.

The applicant's case

20. The applicants' case is essentially that there is nothing to suggest that the language "permission is granted" used in section 15(7)(b) was intended to apply only to permission granted after that section came into force; it can and should be applied to permission granted at any time. Indeed, there are other provisions within section 15 (namely section 15(6) which relates to periods of statutory closure) which clearly apply to events that occurred prior to the coming into effect of the legislation on 7th April 2007.

21. The applicants' suggest that the section 15(7)(b) was introduced to prevent local residents from losing out in cases where the landowner had granted permission for lawful sports and pastimes and they had been induced by a false sense of security and therefore took no steps to secure registration of the land as a Village Green. The policy aim was therefore to protect the position of local residents because, if a grant of permission was made after 20 years' use and local residents had no reason to suspect that their use was being challenged, there would be no reason for them to make a Village Green application and, eventually (due to the specified periods of grace), their right to do so would be lost. In this regard, the applicants note that the provision was not exceptional in widening the range of circumstances in which land could qualify for Village Green status and

followed the general trend of legislative reform to make registration easier. As such, the provision should be interpreted in the applicants' favour.

The University's case

22. The University's case is that section 15(7)(b) is not naturally read as being retrospective because it employs the present tense ("is granted") rather than "has been granted", and can be contrasted with other sub-sections where the past tense is used to refer specifically to events pre-dating the commencement of section 15. Furthermore, the applicants' construction of section 15(7)(b) would conflict with the presumption against retrospectivity applicable in the interpretation of statutes[4]. Accordingly, any ambiguity should be resolved against a retrospective construction.

23. The University also suggests that three provisions weigh against giving section 15(7)(b) retrospective effect:
    - As the law then stood (prior to the 2006 Act), a landowner could bring 'as of right' use to an end by erecting a permissive notice and it would be contrary to principle for that defence against registration to be removed afterwars without compensation;
    - The Commons Registration Act 1965 (which preceded the 2006 Act) provided that if land was not registered prior to 31st July 1970 it was no longer registrable, but the applicants' submission opens up the possibility of reliance being placed on receational use going back decades, which cannot be right;
    - Decisions of Commons Registration Authorities as to the registrability of land as a Village Green were and are intended to be subject to the doctrine of *res judicata*[5] (i.e. not reopened) and it cannot have been Parliaments for the 2006 Act to allow the merits of previous decision to be reopened by new applications on the basis that a grant of permission had not been sufficient to defeat use 'as of right'.

The Newhaven[6] case

24. The Newhaven case concerned an application to register an area of tidal beach as a Village Green. The owners, Newhaven Port and Properties Ltd., sought a judicial review of East Sussex County Council's decision to register the land as a Village Green. The claim was upheld by the High Court but the decision was reversed, and the appeal dismissed, in the Court of Appeal.

25. None of the factual issues of that case are relevant to the question under consideration, but of note is the fact that both courts were asked for, and declined to make, a declaration of incompatibility[7] between section 15(4) of the 2006 Act (i.e. the five year period of grace) and the European Convention of Human Rights.

---

[4] In English law there is a presumption that legislative provisions do not operate retrospectively unless the wording of the statute makes it clear that Parliament intended the provision to be retrospective.
[5] The Common Law doctrine of *res judicata* refers to "a matter [already] judged" and prevents relitigation of the same claim.
[6] *R (Newhaven Port & Properties Ltd) v East Sussex County Council (No 2)* [2013] EWCA Civ 673
[7] A 'declaration of incompatibility' is a declaration issued by judges in cases where they consider that a provision of primary legislation (i.e. an Act of Parliament) is incompatible with the UK's obligations under the European Convention of Human Rights (incorporated into English law by the Human Rights Act 1998).

26. Giving his reasons, Lewison LJ (in the Court of Appeal) reviewed the statutory provisions contained in section 15 of the 2006 Act and noted that:

> *"29. The overall aim of the 2006 Act is not in doubt. It is to legitimise long recreational use by local inhabitants of open spaces, provided that the use has continued 'as of right' for a period of 20 years. As mentioned, use as of right means use without force, without stealth and without permission. Accordingly use as of right can, in principle, be stopped if the landowner grants permission for the use, or prevents access to the land. All rights of registration under section 15 require the local inhabitants to establish 20 years' use 'as of right'.* ***Thus under section 15 it remains open to a landowner to prevent use from being use as of right if within the 20 year period he grants permission for the use to continue****, or bars access to the land. Thus each of the gateways to registration takes as its starting point the fact that the landowner has acquiesced in public recreational use for at least 20 years.*
>
> *30.* ***Once the 20-year period has expired, section 15(7) prevents a subsequent grant of permission from having this effect****. It does this by providing that for the purpose of section 15(2)(a) use as of right is treated as continuing. However, the grant of permission was only one way in which use could be prevented from counting as use as of right. Another way was by barring access to the land, with the consequence that either (a) any subsequent use of the land would not be use without force or (b) the use would cease altogether. Where that happens after the commencement of section 15, section 15(3) gives the inhabitants a period of two years in which to make their application for registration. Since section 15(3) only applies if use continues after the commencement of the section, there was no need to provide for section 15(7) to apply to section 15(3)(b), since the use as of right would be deemed to be continuing (and hence not to have ceased) as a result of section 15(2)(b).*
>
> *31. Section 15(4) applies where three conditions are satisfied. The first is that local inhabitants have indulged in lawful sports and pastimes as of right for 20 years. Thus it will have been open to the landowner, before the expiry of the 20 year period, to have prevented the use from being use as of right by the grant of permission or barring access. Section 15(4) is therefore predicated on the assumption that the landowner has not availed himself of that opportunity. So the starting point is that the local inhabitants have established a full period of 20 years' use as of right. The second condition is that use as of right ceased before the commencement of the section. As noted, use will cease to be use as of right if it is forcible or permissive. But section 15(7) applies only for the purposes of section 15(2)(b). It does not apply to section 15(4).* ***If, therefore, a landowner granted permission for use to continue after the expiry of the 20-year period, but before the commencement of the section, then the use will have ceased to be use as of right*** *for the purposes of section 15(4). This is more favourable to the landowner that the position of the landowner under section 15(2) or section 15(3)" (emphasis added in bold).*

27. Although not directly concerned with the interpretation of section 15(7)(b), the presumption in the Newhaven case appears to have been that section 15(7)(b) applies only to post-Act permission and does not operate retrospectively.

The Inspector's conclusions and recommendation

28. Having heard and carefully considered the parties' submissions, the Inspector concluded that she preferred the University's interpretation of section 15(7)(b) of the 2006 Act (i.e. that it does not apply to permissions granted prior to the commencement of the section) to that of the applicants. She considered that[8]:

> *"As a matter of the language of section 15(7)(b) itself, the natural reading of the words "permission is granted" seems to me to be as referring exclusively to permissions granted once the section has come into force, rather than as extending to permissions granted up to 35 years previously. The expression connotes the initial act by which the landowner gives permission, not the continuation of a pre-existing state of affairs.*
>
> *That reading is reinforced by the absence from subsection (7) of any uses of the past tense: "is satisfied", "indulge", "is prohibited", "are to be regarded as continuing so to indulge", "is granted" and "is to be disregarded in determining whether persons continue to indulge" are all naturally read as prospective rather than retrospective. I agree with both parties that subsections (7)(a) and (7)(b) should if possible be interpreted consistently and I do not see how "indulge as of right in lawful sports and pastimes immediately before access is prohibited" is to be read as "indulge or indulged as of right in lawful sports and pastimes immediately before access to the land is or was prohibited"."*

29. She further added that it would be surprising, if section 15(7)(b) was intended to apply to pre-commencement permissions, that the reach of the provision was not clearly spelled out for the benefit of all concerned (including landowners) and that the obvious reading of section 15(4) in conjunction with section 15(7)(b) is that pre-commencement permissions following 20 years' qualifying user were dealt with by section 15(4) and post-commencement permissions following 20 years' qualifying user were dealt with by section 15(7)(b).

30. In respect of the Newhaven case, the Inspector noted that the Court of Appeal accepted the rationale that the longer grace period specified in section 15(4) of the 2006 Act (and applying only to pre-commencement cessations) was that where a landowner had granted permission for use between expiry of a 20-year period of qualifying user and commencement of section 15, section 15(7)(b) would not be available to applicants, so they would have to apply within the grace period allowed by section 15(4) if they were to succeed. The Court of Appeal's approach was clearly, in her view, that section 15(7)(b) was not retrospective, and it would not be appropriate for the County Council to depart from the Court of Appeal's analysis.

31. For these reasons (and others which are set out in full in her report), the Inspector's recommendation[9] to the County Council is as follows:

> *"to decide that on its proper construction, section 15(7)(b) of the Commons Act 2006 does not allow reliance on user as of right terminated by a grant of permission preceding the date of commencement of section 15, and to proceed with the consideration and determination of the*

[8] See paragraphs 76 and 77 of the Inspector's report
[9] See paragraph 108 of the Inspector's report

application (and any other section 15 application by the applicants) on that basis".

The parties' comments on the Inspector's report

32. On receipt a copy of the Inspector's report was forwarded to the parties for their comments.

33. The applicants rejected the Inspector's recommendation and urged the County Council to reconsider the position. They suggested that the Inspector's conclusion that, on a natural reading of section 15(7)(b), the provision refers exclusively to permissions granted after the 2006 Act came into force (on 7th April 2007) is flawed and reiterated their view that the wording "is permitted" is apt to refer to any permission, whether granted before or after commencement of the Act. The applicants added that neither the Inspector nor the County Council was bound to follow the reasoning in the Newhaven case in support of the conclusion that section 15(7)(b) is retrospective, and argued that the case did not directly turn on the interpretation and effect of section 15(7)(b) and there was no argument one way or another before the Court of Appeal on this point. In any event, the applicants' preferred course of action was to adjourn the Inquiry until the Supreme Court's decision on the matter.

34. The University initially chose not to make any comments but, having had sight of the applicants' comments, noted that it would be perverse for the County Council to reject the Inspector's recommendations and, instead, it ought to proceed with the Inquiry in accordance with the Inspector's recommendation that the application be considered and determined on the basis of a period of use between 1991 and 2011. The University suggested that to do otherwise would be to proceed on a mistaken basis of law, thereby resulting in further delay and prejudice to the University as landowner.

Conclusion

35. The parties' comments have been referred back to the Inspector and, having considered these, she has advised that she can see nothing within the comments of either party to change the conclusion previously reached in her report of 22nd January 2014. The Inspector reiterated her disagreement with the applicants' case that section 15(7)(b) can be applied to pre-commencement permission and confirmed that the advice and recommendation contained in her report still stand.

36. She also noted that, since receipt of the parties' comments, Newhaven Port and Properties have withdrawn their appeal to the Supreme Court so that there is no longer any question of adjourning further consideration of the application to await the outcome of the appeal to the Supreme Court. Thus, this leaves the Court of Appeal's judgement as the sole authority and, in the Inspector's view, the County Council ought to follow its approach.

37. It should be noted that the Inspector's advice also accords with DEFRA's current guidance[10] that '*in DEFRA's view, section 15(7)(b) can be relevant only to a permission which was granted on or after 6th April 2007, the date on which that provision came into force (because it cannot have been intended to have retrospective effect on the actions of landowners who had taken steps, before that date, to bring to an end use as of right)*'.

38. Therefore, having had regard to all of the submission made by the parties, as well as the advice provided by the Inspector, it would appear that the appropriate way to proceed with this matter is on the basis that section 15(7)(b) is not retrospective and, accordingly, that the Inquiry therefore proceed (subject to any further amendments proposed by the applicant) to consider the use of the application site between March 1991 and March 2011.

Recommendation

39. I recommend that Members endorse the Inspector's advice (contained in her report dated 22nd January 2014) to proceed with this application on the basis that section 15(7)(b) of the Commons Act 2006 does not have retrospective effect.

Accountable Officer:
Mr. Mike Overbeke – Tel: 01622 221568 or Email: mike.overbeke@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 01622 221511 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the PROW and Access Service, Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

Appendices

APPENDIX A: Section 15 of the Commons Act 2006

[10] See paragraph 8.10.72 of DEFRA's '*Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate for the pioneer implementation*' (January 2014 edition).

APPENDIX A:
Full text of section 15 of the Commons Act 2006

15 Registration of greens

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where—
(a) 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; and
(b) they continue to do so at the time of the application.

(3) This subsection applies where—
(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
(b) they ceased to do so before the time of the application but after the commencement of this section; and
(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).

(4) This subsection applies (subject to subsection (5)) where—
(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
(b) they ceased to do so before the commencement of this section; and
(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

(5) Subsection (4) does not apply in relation to any land where—
(a) planning permission was granted before 23 June 2006 in respect of the land;
(b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and
(c) the land—
(i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or
(ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied—
(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and
(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land “as of right”.

(8) The owner of any land may apply to the commons registration authority to register the land as a town or village green.

(9) An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land.

(10) In subsection (9)—

"relevant charge" means—

(a) in relation to land which is registered in the register of title, a registered charge within the meaning of the Land Registration Act 2002 (c. 9);

(b) in relation to land which is not so registered—

(i) a charge registered under the Land Charges Act 1972 (c. 61); or

(ii) a legal mortgage, within the meaning of the Law of Property Act 1925 (c. 20), which is not registered under the Land Charges Act 1972;

"relevant leaseholder" means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted.