Application to register land known as Hospital Field at Brabourne as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on 28 March 2018.

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

Local Member: Ms. C. Bell (Ashford Rural East) Unrestricted item

Introduction

1. The County Council has received an application to register land known as Hospital Field at Brabourne as a new Town or Village Green from the Brabourne Parish Council ("the applicant"). The application, made on 1st February 2016 was allocated the application number VGA669. A plan of the site is shown at **Appendix A** to this report and a copy of the application form is attached at **Appendix B**.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014.

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 one year 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. As a standard procedure set out in the 2014 Regulations, the County Council must publicise the application by way of a copy of the notice on the County Council's website and by placing copies of the notice on site to provide local people with the opportunity to comment on the application. Copies of that notice must also be served on any landowner(s) (where they can be reasonably identified) as well as the relevant local authorities. The publicity must state a period of at least six weeks during which objections and representations can be made.

[1] Reduced from two years to one year for applications made after 1st October 2013, due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013.

The application site

6. The piece of land subject to this application ("the application site") comprises an arable field of approximately 24 acres (9.7 hectares) in size situated to the north of properties in Mountbatten Way and extending between Lees Road and Canterbury Road. Access to the application site is via three Public Footpaths; two which diagonally cross the site and a third which runs along its southern boundary (to the rear of the properties in Mountbatten Way).

7. The application site is shown in more detail on the plan at **Appendix A**.

The case

8. The application has been made on the grounds that the application site has been freely used by local residents for a variety of recreational activities, without challenge, and for a period in excess of twenty years.

9. Included in support of the application were 61 user evidence questionnaires. A summary of the user evidence submitted in support of the application is attached at **Appendix C**.

Consultations

10. Consultations have been carried out as required. No responses have been received.

Landowner

11. The vast majority of the application site is owned by Mr. R. Johnson and Ms. C. Johnson ("the landowners") and is registered with the Land Registry under title number TT40521. It is currently let under an agricultural tenancy to a local farmer.

12. A small slither of land in the south-western corner (abutting Lees Road) is registered under title number K414908 to the Kent County Council; the County Council's Property Team has been consulted but no response has been received.

13. An objection to the application has been received from Gladman Developments Ltd. ("the objector") which has a promotion agreement with the landowners and has made an application for planning permission to develop the land for residential development. That application is the subject of a separate process with the Planning Inspectorate and has no bearing upon the determination of the Village Green application.

14. The objection has been made on the following grounds:
    - that the applicant is put to strict proof as to the status of the alleged neighbourhood and the boundaries of the localities relied upon;
    - that use consists primarily of walking the existing Public Footpaths which is not qualifying use for the purposes of the Village Green application, and any wider recreational use is insufficient to demonstrate that the land has been in regular usage by the local community;
    - that the site has been used for the growing of crops on a five-year rotation such that the site as a whole has not been available for recreational use; and

- that some use has been challenged by the tenant farmer or has taken place with the landowners' permission.

15. In support of the objection, the objector has provided 13 witness statements from people familiar with the application site, including both landowners and the tenant farmers. The substance of those statements is that any use observed of the site has been predominantly along the existing Public Footpaths and that any wider recreational use that may have taken place would necessarily have been interrupted by the agricultural use of the site (predominantly for wheat and barley crops). It is also suggested that claims of recreational use have only arisen recently, apparently in response to proposals to develop the land.

16. The objector's position is that there is a serious dispute about the application and the only just way for the application to be dealt with is to hold a Public Inquiry.

Legal tests

17. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:
    (a) Whether use of the land has been 'as of right'?
    (b) Whether use of the land has been for the purposes of lawful sports and pastimes?
    (c) Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?
    (d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, has ceased no more than one year prior to the making of the application?
    (e) Whether use has taken place over period of twenty years or more?

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

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

18. 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.

19. 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[2]: "*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*"[3].

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

20. In this case, there is no evidence or suggestion that access to the application site has been gained forcibly and indeed any such assertion would be unsupportable given the Public Footpaths crossing the site. Nor is there any suggestion that use of the application site has taken place secretively.

21. The objectors assert that equestrian use of the application site has been challenged by the tenant farmer, whilst metal-detecting has taken place by virtue of express permission. If that is the case, then those uses ought to be discounted as they would not have taken place 'as of right'.

22. There is an issue that arises here with regard to the public rights of way that cross the application site, and the degree to which the 'walking' cited in the user evidence is referable to those rights of way. Walking along a Public Footpath would be use that is in exercise of an existing right – i.e. 'by right – and not 'as of right'. This is because, in order for a right to be acquired, users must initially be using the land as trespassers, only acquiring a right after twenty years' unchallenged use.

23. In this case, there is an unusually dense network of public rights of way on or abutting the application site. The path running along the southern boundary of the application site is recorded on the Definitive Map of Public Rights of Way as Public Footpath AE276, whilst two further Public Footpaths (AE274 and AE275) diagonally cross the site.

24. A large amount of the user evidence summarised at **Appendix C** refers to walking. Whilst a small number of users make reference to unrestricted usage across the whole field, for the remainder it is almost impossible on paper to differentiate between general recreational walking (which involves wandering over a wide area) and walking which involves the public rights of way on and around the application site. It seems likely, on balance, that at least some of the use of the application site for walking (and indeed similar linear activities such as jogging or cycling) was not use that can be described as being 'as of right' and the degree of general recreational use, as opposed to public rights of way type user, is therefore an issue which requires further consideration before any firm conclusion can be reached on the 'as of right' test.

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

25. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. 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*'[4].

26. The summary of evidence of use by local residents at **Appendix C** shows the range of activities claimed to have taken place on the application site. These

[4] *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

include walking, playing with children, fruit picking, nature observation and kite flying.

27. As is noted above, it will be necessary in this case to differentiate between walking which is in exercise of an existing public rights of way and walking which constitutes wandering at will over a wider area; use which comprises the former will need to be discounted. The objector's position, which is disputed by the applicant, is that the majority of use has taken place on the Public Footpaths (and therefore falls to be discounted). However, it is not possible to reach any conclusion on the basis of the evidence currently available.

28. Some of the activities cited are at odds with the objector's evidence regarding the intensive agricultural use of the application site; for example, activities such as kite flying, ball games or frisbee could not have taken place during periods when it is alleged that the land was used for crops such as wheat, barley or oilseed rape. Indeed, the agricultural use of the land, and the resultant impact upon recreational use, is a further issue of dispute between the parties.

29. The objector's evidence in this regard is that the land was used annually for high-density crops which, at their peak during summer months, would reach 1 to 2 metres in height; it would be impossible for anyone to walk through, let alone recreate, on the land without causing substantial damage to the crop and no such damage has been observed. However, the applicant does not accept that the application site has been farmed in the manner described and suggests that the land has been left fallow for many years, with a large area on the western side of the site set aside and uncropped; in any event, case law has established that low-level agricultural use is not inherently incompatible with Village Green registration[5].

30. As such, it is not possible to conclude, without further investigation, whether the land has been used in the requisite manner.

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

31. 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.

32. 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[6] 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*'.

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[5] In this regard, the applicants rely upon the judgement in *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11

[6] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

33. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible that that of a locality, and need not be a legally recognised administrative unit. On the subject of 'neighbourhood', the Courts have held that '*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*'[7].

34. In this case, the applicant relies (at part 6 of the application form) on 'the neighbourhood of Brabourne Lees in the localities of the civil parishes of Brabourne and Smeeth'.

35. There can be little debate that the civil parishes of Brabourne and Smeeth are both legally recognised administrative areas capable of constituting qualifying localities for the purposes of Village Green registration. Case law has established that, in the case of a 'neighbourhood within a locality', the locality need not be a single entity[8].

36. With regard to the neighbourhood, the objector's position is that the applicant must prove its case with regard to whether Brabourne Lees is a qualifying neighbourhood for the purposes of Village Green registration. However, the objector has not offered any evidence as to why Brabourne Lees could not be a neighbourhood for this purpose.

37. As can be seen from the user evidence summary at **Appendix C**, a large number of the witnesses identify themselves as living in Brabourne Lees, with one describing it as having 'a local reputation for being a close-knit community, good for families with a shop, post office, pubs etc' and several others also referring to community facilities. Furthermore, as can be seen from the plan at **Appendix D**, the village is shown on maps as Brabourne Lees and forms a discrete and identifiable residential area in an otherwise rural location.

38. As such, and in the absence of any evidence as to why Brabourne Lees could not be a qualifying neighbourhood, it would appear that the application site has been used by the residents of a cohesive neighbourhood within two legally recognised localities.

"a significant number"

39. The word "significant" in this context does not mean considerable or substantial: '*a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number… what matters is that the number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than*

[7] ibid at page 92
[8] See *Oxfordshire County Council v Oxford City Council* [2006] EWHC 76

occasional use by individuals as trespassers'[9]. Thus, it is not a case of simply proving that 51% of the local population has used the application site; what constitutes a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the application site.

40. In this case, a large amount of user evidence has been submitted in support of the application – 61 witnesses in total – of which 25 witnesses use the land on an at least weekly basis.

41. On the face of it, such use is likely to have been sufficient to indicate that the land was in general use by the community, although this test is to be viewed in the context of the comments above regarding the exercise of existing rights (i.e. use of the Public Footpaths) and the extent to which the land was capable of being used for recreational purposes (given the alleged agricultural use).

(d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than one year prior to the making of the application?

42. 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, section 15(3) of the 2006 Act provides that an application must be made within one year from the date upon which use 'as of right' ceased.

43. In this case, the application is made under section 15(2) of the 2006 Act and there is no evidence that actual use of the application site for recreational purposes ceased prior to the making of the application.

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

44. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. In this case, use 'as of right' did not cease prior to the making of the application on 1st February 2016. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 1996 to 2016.

45. The user evidence submitted in support of the application (and summarised at **Appendix C**) indicates that 36 of the 61 witnesses have used the application site throughout the material period, with some use going back as far as the early 1970s. As such, it would appear that the application site has been used for a period in excess of the required twenty years (subject to the issues raised above and whether the use can properly be considered qualifying use for the purposes of Village Green registration).

Conclusion

46. As has been noted above, there are serious disputes between the applicant and the objector in this matter, particularly in respect of the degree to which use has been confined to the rights of way crossing the site and in respect of the impact upon recreational use of the agricultural operations taking place on the application

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

site. The opposing views can only properly be reconciled by way of a hearing at which both parties can have the opportunity to give oral evidence and challenge each other's evidence in respect of the disputed points.

47. Both the applicant and the objector agree that a Public Inquiry is the most appropriate way to proceed in this case, and it would appear that the County Council is unable to reach a sound decision in this matter on the basis of the information currently available.

48. Provision for holding a Public Inquiry is made in the 2014 Regulations; the process involves the County Council appointing an independent Inspector (normally a Barrister) to hear the relevant evidence both in support of and in opposition to the application, and report his/her findings back to the County Council. The final decision regarding the application nonetheless remains with the County Council in its capacity as the Commons Registration Authority.

49. Such an approach has received positive approval by the Courts, most notably in the Whitmey[10] case in which Waller LJ said this: '*the registration authority has to consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration*'.

50. It is important to remember, as was famously quoted by the Judge in another High Court case[11], that '*it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green... [the relevant legal tests] must be 'properly and strictly proved'*. This means that it is of paramount importance for a Registration Authority to ensure that, before taking a decision, it has all of the relevant facts available upon which to base a sound decision. It should be recalled that the only means of appeal against the Registration Authority's decision is by way of a Judicial Review in the High Court.

Recommendation

51. I recommend that a Public Inquiry be held into the case to clarify the issues

Accountable Officer:
Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk
Case Officer:
Mr. Chris Wade – Tel: 03000 413475 or Email: chris.wade@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.

Background documents

[10] *R (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951 at paragraph 66
[11] *R v Suffolk County Council, ex parte Steed* [1997] 1EGLR 131 at 134

APPENDIX A – Plan showing application site
APPENDIX B – Copy of application form
APPENDIX C – Table summarising user evidence
APPENDIX D – Plan showing claimed neighbourhood and localities