

## Application to register land known as the Cherry Orchard Playing Field at Herne as a new Town or Village Green

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A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Monday 14<sup>th</sup> December 2009.

**Recommendation: I recommend, for the reasons stated in the Inspector's report dated 18<sup>th</sup> September 2009, that the applicant be informed that the application to register the land at Cherry Orchard Playing Field Herne has not been accepted.**

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Local Member: Mr. G. Marsh

Unrestricted item

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### Introduction

1. The County Council has received application to register land known as the Cherry Orchard Playing Field at Herne as a new Village Green. This application has been made by local resident Mrs. R. Bowley ("the applicant"). The application, dated 27<sup>th</sup> January 2004, was allocated the application number VG583. A plan of the site is shown at **Appendix A** to this report.

### Procedure

2. This application has been made under section 13 of the Commons Registration Act 1965 and regulation 3 of the Common Registration (New Land) Regulations 1969. These regulations came into force on the 3<sup>rd</sup> January 1970, and regulation 3 enables the making of an application where, in accordance with section 22 of the 1965 Act, after the 2<sup>nd</sup> January 1970 any land becomes a Town or Village Green.
3. Although the Commons Registration Act 1965 has now been replaced by the Commons Act 2006, because this application was received prior to the coming into effect of the new 2006 Act, it must be dealt with under the former legislation.
4. For the purpose of this application, therefore, section 22 of the 1965 Act (as amended by section 98 of the Countryside and Rights of Way Act 2000) applies. It defines a Village Green as:  
*'land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either:*
  - (a) *continue to do so, or*
  - (b) *have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions'.*
5. As a standard procedure set out in the regulations, the County Council must notify the owners of the land, every local authority and any other known interested persons. It must also publicise the application in the press and put up a site

## **The application site**

6. The area of land subject to this application (“the application site”) consists of a large playing field situated adjacent to the A291 Canterbury Road in the Village of Herne. It is bounded in the main by residential properties and is accessed via entrances from Canterbury Road to the west of the site, Woodrow Chase to the north and alleyways leading from School Lane to the south.

## **Landowner**

7. In response to the application, an objection was received from the landowner, Canterbury City Council (“the objector”) on the basis that user had not been as of right because use of the application site is with the permission of the City Council. This view is based on several points:
  - That the City Council has maintained control over the use of the land by charging a fee for the hire of the football and cricket pitches, thereby asserting a right as the landowner to exclude any other users of the application site.
  - That since the land is held under the Physical Training and Recreation Act 1937, use by local residents is pursuant to a right which already exists and is therefore ‘by right’ and not ‘as of right’
  - That a Notice erected under the County of Kent Act stating that it is an offence to remain on the premises after having been asked to leave provides a further manifestation that the use of the land by local residents occurs with the permission of the City Council.

## **Previous resolution of the Regulation Committee Member Panel**

8. The matter was considered at a Regulation Committee Member Panel meeting on Tuesday 2<sup>nd</sup> September 2008. A copy of the Officer’s report is attached at **Appendix B** for reference. At this meeting, Members accepted the recommendation that, following advice received from Counsel, a non-statutory Public Inquiry should be held into the case to clarify the issues.
9. As a result of this decision, Officers instructed Counsel experienced in this area of law to act as an independent Inspector. A non-statutory Public Inquiry took place at St Paul’s Hall, St Mary’s Church, Herne from Monday 18<sup>th</sup> May to Wednesday 20<sup>th</sup> May 2009, during which time the Inspector heard evidence from interested parties and carried out an accompanied site visit.
10. The Inspector subsequently produced a detailed written report of her findings which is attached at **Appendix C**.

## **Legal tests and Inspector’s findings**

11. 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 a neighbourhood within a locality?*
- d) *Whether use has taken place over period of twenty years or more?*
- e) *Whether use of the land by the inhabitants is continuing up until the date of application?*

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'?***

12. The definition of the phrase 'as of right' has been considered in recent High Court case law. Following the judgement in the *Sunningwell*<sup>1</sup> case, it is now considered that if a person uses the land for a required period of time without force, secrecy or permission (*nec vi, nec clam, nec precario*), and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired and further use becomes 'as of right'.
13. The Inspector concluded that in her judgement use of the land for recreational purposes by the local inhabitants was not use 'as of right'. The evidence at the Public Inquiry was that during the whole of the relevant period the landowner marked out football and cricket pitches on the land according to the season and let those pitches and the associated facilities to teams for organised games at a fee. The behaviour of the local inhabitants has been such as to communicate to a reasonable landowner that they understand and accept that the teams who have booked to play are entitled to exclusive use of the pitches when they have booked them. The local inhabitants ensure that they conduct themselves at such times so as not to interfere with the matches and adjust their own activities accordingly. A reasonable landowner would not, therefore, have been under the impression that the local inhabitants were asserting a right to use the land at all times for recreation.
14. In the Inspector's view, the use of the application land for recreational purposes by the local inhabitants has not been as of right because it would not have had the appearance to a reasonable landowner of being as of right.

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

15. 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, for example.
16. The Inspector concludes that there was ample evidence of use of the application land over the whole of the relevant period for dog walking, walking and children's play.

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<sup>1</sup> *R v. Oxfordshire County Council, ex p. Sunningwell Parish Council (2001)*

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

17. The Countryside and Rights of Way Act 2000 inserted a new section dealing with locality into section 22 of the 1965 Act. It should now be shown that the use made of the land has been and continues to be by the inhabitants of any locality, or of a neighbourhood within a locality. The use need not be exclusively by local inhabitants, but they should be the significant number. A locality must comprise more than a geographical area and should be a distinct and identifiable administrative unit. Neighbourhoods must have a sufficient degree of cohesiveness, but need not be a recognised administrative unit.
18. Here the Inspector found that the whole of the application site has been used by a substantial number of local inhabitants, sufficient to indicate to a reasonable landowner that the whole of the site was in use by local inhabitants generally for recreation.
19. However, she concluded that the applicant had failed to identify a qualifying locality which has existed for the whole of the relevant period. The locality upon which the applicant relied was the Civil Parish of Herne and Broomfield, but evidence produced during the Inquiry satisfied the Inspector that Herne and Broomfield had only existed as a Civil Parish since 1996.
20. The applicant had therefore failed to show a qualifying locality and, additionally, had failed to demonstrate the existence of a suitable 'neighbourhood within a locality' that would comply with the statutory definition. The onus was on the applicant to show qualifying areas and, in the Inspector's view, she failed to discharge that burden.

**(d) Whether use has taken place over period of twenty years or more?**

21. 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. Where there has been no challenge to the use of the land and use 'as of right' is continuing, then the twenty-year period is to be calculated retrospectively from the date that the application was made.
22. In this case, the application was made in January 2004. Therefore, the relevant twenty-year period ("the material period") is 1984 to 2004.
23. In this respect, the Inspector identified from the evidence presented to her, that there had been use of the application site for a period in excess of 20 years.

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

24. The Commons Registration Act 1965 (as amended by the Countryside and Rights of Way Act 2000) required that use of the application site continues up until the date of registration. However, this was overturned in a recent House of Lords case, known as the *Oxfordshire*<sup>2</sup> case, in which it was held that use need only continue up until the date of application and not registration.

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<sup>2</sup> *Oxfordshire County Council v Oxford City Council and Catherine Mary Robinson (2006)*

25. The Inspector accepted that the use of the application land continued until the date of the application.

### **Inspector's conclusions**

26. The Inspector has therefore identified four reasons why, in her opinion, the relevant legal tests have not been met:

- Use of the application site by local residents has not been 'as of right';
- Local residents modified their behaviour to give the appearance to the landowner that they were not asserting a right to be there;
- The applicant failed to identify a locality or neighbourhood within a locality; and
- Use was 'by right' through the provision and management of the local facilities by the Canterbury City Council.

27. On receipt, the Inspector's report was forwarded to the applicant and the main objector for their information and further comment.

### **Applicant's response**

28. The applicant's response to the Inspector's report is attached at **Appendix D**. The applicant contends that the report is flawed for several reasons:

- Firstly, that the Inspector has failed to fully impart the findings of the House of Lords in the *Beresford* case and that the provision of recreational facilities by the Canterbury City Council does not undermine the 'as of right' use by the public but reinforces it. The landowner was encouraging local people to use the land. This heightens the fact their use was 'as of right'.
- Secondly, that the Inspector has failed to properly advise the Registration Authority in her report that it would be possible to register those parts of the application site which are never used for organised football and cricket. In these identified areas, the local residents were not deferring to the landowner but simply moving away from the pitches and the areas immediately surrounding them when an organised match took place. The evidence therefore was that local residents never deferred to the landowner in respect of the land as a whole. Parts of the land are therefore capable of registration.
- Thirdly, that despite the Inspector's conclusions to the contrary the County Council should conclude that the Herne and Broomfield Parish Council area is a qualifying locality for the purpose of the 1965 Act. The Inspector does not allege that the inhabitants came predominantly from outside of this locality.

### **Objector's response – Appendix E**

29. The objector's response to the report (attached at **Appendix E**) is that the Registration Authority can and should follow the recommendation of the Inspector who has written a careful and legally correct report.

30. The Inspector's conclusion that the residents of the locality have not been using the land 'as of right' because their behaviour has not been such as to communicate to a reasonable landowner that they are asserting a right is amply justified by reference to case law and the facts of the case.

31. The Inspector has correctly analysed the matter in terms of deference and applied the appropriate case law. The case cited within the applicant's response is not relevant to this application. The question to answer is how the matter would have appeared to the owner of the land.
32. It is a perfectly proper approach to look at the application site as a whole and to ask whether a reasonable owner would take the view that people were asserting a right to use it. The Inspector's approach at looking at the land as a whole is correct and it is not necessary for the landowner to use every part. In addition to this, there has been deference in a much wider area than just the marked out pitches. The pitches are moved and there are areas around and behind the pitches which are used by match officials and spectators.
33. It would be wrong to register part of the application site because it is not possible to know which part to register and because it would be an unworkable area.
34. A locality has to exist for twenty years in order to be a qualifying area. The definition could not be satisfied if over the qualifying period it was not used by the inhabitants of a locality because the locality relied upon did not exist.

#### **Further response by the Inspector**

35. All Post Inquiry responses have been sent to the Inspector for any further comment she may have wished to make.
36. The Inspector has considered these additional comments and has no further comment other than to state that the applicant's arguments that were put before her during the Inquiry have been considered and taken into account before issuing her report.
37. The Inspector sees no reason to deal further with the additional points raised by the applicant and feels that the Inquiry itself would have been the correct forum in which to have raised these. Ample opportunity had been given for this.

#### **Conclusions**

38. Having heard the evidence presented by both parties at the non-statutory Public Inquiry and considered the Inspector's thorough and detailed analysis of the evidence (contained within her report) and the post Inquiry representations made by representatives of the main parties, it has been concluded that the requirements of the Commons Registrations Act 1965 have not been met in this case and that the County Council should not therefore register the land subject to the application as a new Village Green.

#### **Recommendations**

39. I recommend, for the reasons stated in the Inspector's report dated 18<sup>th</sup> September 2009, that the applicant be informed that the application to register the land at Cherry Orchard Playing Field Herne has not been accepted.

Accountable Officer:

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Case Officer:

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The main file is available for viewing on request at the Environment and Waste Division, Environment and Regeneration Directorate, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

### **Background documents**

APPENDIX A – Plan showing application site

APPENDIX B – Copy of the report presented to the Regulation Committee Member Panel meeting of 2<sup>nd</sup> September 2008

APPENDIX C – Copy of Inspectors Report and Recommendations

APPENDIX D – Copy of further representation on behalf of the applicant

APPENDIX E – Copy of further representation on behalf of the objector