Application to register land at Cryalls Lane at Sittingbourne 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 Tuesday 18th June 2019.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 27th November 2018, that the applicant be informed that the application to register land at Cryalls Lane at Sittingbourne has not been accepted.

Local Member: Mr. M. Whiting (Swale West) Unrestricted item

Introduction

1. The County Council has received an application to register land at Cryalls Lane at Sittingbourne as a new Town or Village Green from local resident Mr. M. Baldock ("the applicant"). The application, made on 30th October 2015, was allocated the application number VGA666. 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

[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.

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 situated on the western side of Cryalls Lane, opposite its junction with Brisbane Avenue, at Sittingbourne. It comprises a former cherry tree orchard of approximately 9.1 acres (3.7 hectares), accessed via an opening opposite Brisbane Avenue. There are no recorded Public Rights of Way crossing or abutting the application site, although the site is crossed by a number of worn (informal) paths.

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

8. The majority of the application site registered with the Land Registry (under title number K492436) to Ward Homes Ltd. (now part of BDW Trading Ltd.). A parcel of land in the north-eastern corner of the application site is registered to South Eastern Power Networks PLC under title number TT7600.

Previous resolution of the Regulation Committee Member Panel

9. During the consultation period, both landowners made representations in opposition to the application.

10. Ward Homes Ltd. ("the main objector") submitted that use of the application site had not taken place 'as of right' due to the existence of notices and physical obstructions on the application site, that much of the evidence relied upon was akin to 'rights of way' type of usage (i.e. walking linear routes), that much of the evidence of use came from those living outside of the claimed neighbourhood and that the number of witnesses is insufficient to conclude that use has been by a 'significant number' of local residents.

11. South Eastern Power Networks ("SEPN") objected to the application on the basis that a small section of the application site was the subject of planning consent (for an extension to the existing electricity sub-station situated on the north-western edge of the application site). It was contended, and subsequently accepted by the applicant, that the effect of that consent was to suspend the right to apply for Village Green status for that section of land.

12. The matter was considered at a Regulation Committee Member Panel meeting on 23rd October 2017[2], at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration.

13. As a result of this decision, Officers instructed a Barrister 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.

[2] The minutes of that meeting are available at:
https://democracy.kent.gov.uk/ieListDocuments.aspx?CId=182&MId=7810&Ver=4

The Public Inquiry

14. The Public Inquiry took place at the UKP Leisure Club at Sittingbourne on 19th to 21st June 2018, during which time the Inspector heard evidence from witnesses both in support of and in opposition to the application. The Inspector also undertook an accompanied site visit with representatives of both parties.

15. It is to be noted that at the pre-Inquiry meeting, the applicant agreed to amend the boundaries of the application site so as to exclude an area in the north-eastern part of the site owned by SEPN and subject to planning permission (referred to above) as well as excluding a further strip of land within the ownership of Ward Homes Ltd. that is subject to rights to lay electric cables. Although, following this amendment, SEPN no longer had any ownership interest in the application site (as amended), the company maintained an active role in the Inquiry on the basis of other rights held by it in respect of the land owned by Ward Homes Ltd. (including the presence of underground cables and a right of access to the land for the inspection of overhead cables).

16. Following the Inquiry, the Inspector produced a written report dated 27th November 2018 ("the Inspector's report") setting out her findings and conclusions. These are summarised below.

Legal tests and Inspector's findings

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[3]: "*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*"[4].

20. There was no suggestion in this case that any recreational use of the application site had taken place secretively. Although there was initially a suggestion by the main objector that, in around 2004, a ditch had been dug along the boundary with Cryalls Lane to prevent access to the site (and that any access thereafter was in exercise of force), it was conceded at the Inquiry that the ditch had been dug primarily to prevent vehicular access and pedestrian access was apparently still possible by way of earth bridges. There was no other suggestion that use had taken place in exercise of force. However, there was a question as to whether use of the application site had taken place by virtue of permission granted by the landowner.

21. The main objector's evidence was that notices had been placed on site stating that the land was owned or managed by Ward Homes and any use of it was with the consent of the owner. It was suggested that notices to this effect had been erected by an employee of the main objector on the Cryalls Lane frontage of the application site in 2003 and again (by another employee) in 2006; photographs had apparently been taken, although it was not possible for the main objector to produce copies of those photographs at the Inquiry[5]. There also appears to have been a lack of clarity as to the precise wording and locations of the alleged notices.

22. Despite the main objector's assertion to the contrary, the Inspector accepted that none of the local inhabitants had ever seen any signs on the application site, nor in fact had two of the objector's witnesses. Indeed, she expressed concerns regarding a number of discrepancies in the main objector's evidence on this issue and said[6]:

> *"I simply cannot reconcile [that] evidence with the clear and unanimous position of everyone else at the inquiry (and in written evidence) who had never seen any signs at any point and also the documentary photographic evidence from November 2008 and May 2009".*

23. Accordingly, the Inspector concluded that the main objector had failed to establish that permissive notices had been erected on the application site and she was satisfied that recreational use had therefore taken place 'as of right'[7].

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

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[3] *Dalton v Angus* (1881) 6 App Cas 740 (HL)

[4] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

[5] there was some suggestion they may have been destroyed in an office flood which occurred in December 2015 (although this was some 8 months after the main objector's initial objection to the application)

[6] Paragaph 117 of the Inspector's report. See also paragraphs 118 to 123 for a more detailed analysis of the discrepancies

[7] Paragraph 147 of the Inspector's report

24. 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*'[8].

25. Although the Inspector heard evidence that activities such as jogging, children's ball games and fruit picking had taken place on the land, she found that by far the predominant use of the land during the relevant period was for walking (especially dog walking); indeed, a some of the witnesses were not able to recall any other activities taking place on the application site.

26. In cases where the claimed usage consists largely of walking along defined tracks, it will be important to distinguish between use that involves wandering at will over a wide area and use that involves walking a defined linear route from A to B. The latter will generally be regarded as a 'rights of way type' use and, following the decision in the Laing Homes[9] case, falls to be discounted. In that case, the judge said: '*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*'. If the position is ambiguous, then the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the village green right)[10].

27. In the current case, the physical condition of the land is relevant. The former cherry orchard that stood on the land appears to have been bulldozed by the previous landowners some time in the 1980s. By the start of the relevant twenty-year period for the purposes of the Village Green application (i.e. 1995), after many years of neglect, the Inspector found that the land was overgrown with strong vegetation (especially brambles) but nonetheless accessible by way of mud paths. In early 2004, the land was cleared and the ditch along Cryalls Lane was dug. There has been no formal clearing of vegetation since that time and aerial photographs indicate that the land has become increasingly overgrown over time, although they do consistently show a clear and well-defined perimeter path around the site as well as two east-west worn paths.

28. The Inspector summarises her findings of fact on the nature of the recreational use as follows[11]:
    - *"Walking and dog walking have always been by far the most predominant activities that have taken place on the land;*
    - *The majority of those using the land for walking and dog walking would have used throughout the relevant period the main circular path around the land and the two east-west paths which cross the land. These paths have remained consistent throughout the relevant period.*

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[8] *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

[9] *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70 at 79 per Sullivan J

[10] Oxfordshire County Council v Oxfordshire City Council and Robinson (2004) Ch 253 at [102]

[11] Paragraph 130 of the Inspector's report

- *People may well have strayed off these paths to look at something of interest or to congregate and chat with fellow walkers but these activities were incidental to their path use.*
- *A minority of people may also have used subsidiary paths which are less well defined and have come and gone during the relevant period. However, by the end of the relevant period the land was already sufficiently overgrown that the only use of it could be via the main circular and east-west paths.*
- *Other activities such as children playing off-path have been trivial and sporadic and have not occurred throughout the relevant period – for example, they are unlikely to have occurred for the year following the clearing of the land by Ward Homes in 2004 when the land was extremely muddy and also would not have occurred when the land was very overgrown at the end of the relevant period".*

29. The Inspector considers the relevant case law in detail at paragraphs 132 to 139, noting that whilst it is not necessary for every square foot of the land needs to have been walked on, it will be important that a reasonable landowner observing the use is able to deduce that a Village Green right is being asserted (as opposed to a less onerous public right of way).

30. The Inspector considered that two separate categories of path existed on the application site; firstly, the 'main' circular and east-west paths that have been consistent throughout the material period and well used by walkers and, secondly, a number of informal paths that have come and gone with the seasons and changing condition of the land. She considered that use of the first category of path ought to be discounted, such use clearly giving the outward impression of being a 'public rights of way' type of use. However, the same could not be said of the second category of path and the question was therefore whether the use of the second category of path, along with other recreational activities, was sufficient to indicate that the land was being used by a significant number of the local inhabitants throughout the relevant period.

31. As such, the Inspector concluded that[12]:

> *"In my view, whatever the position may have been at the start of the relevant period when the land was much more accessible generally, by the tail end of the relevant period the land was sufficiently overgrown that it was physically impossible to do anything but use the main paths and thus there was no – or practically no – residual use to consider. I also find that there must have been an inevitable dip in recreational activities after the major clearing in early 2004 when the field was extremely muddy and not suitable for cycling, or children's games etc. Furthermore, such activities naturally only took place when children were of a certain age (indeed, the rugby 'place making' spoken of only took place in light of the World Cup in 2003). It is therefore difficult to be certain about periods of time (this is further exacerbated in the case of the written evidence which has not been tested at the inquiry).*
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> *It is clear to me that walking and dog walking were by far the most extensive uses of the application land… and any other activities were*

[12] Paragraphs 140 to 142 of the Inspector's report

very sporadic. Walking and dog walking must have been predominantly limited to the main paths for at least the end part of the relevant period (as they are today) due to topography and therefore I find that the applicant has failed to establish town and village green use of the land throughout the relevant period.

However, even if I am wrong about the condition of the land in 2005, I do not consider that residual use of the minor paths and other recreational activities were of a sufficient continuance and of a sufficient intensity to bring home to a reasonable observer, and in particular the landowner, that lawful sports and pastimes of some sort were taking place throughout the period which were attributable to the acquisition of a TVG right."

32. Overall, she did not consider that the evidence of use presented was sufficient to assert that the application site was in regular use by the local community for lawful sports and pastimes throughout the relevant period.

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

33. 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.

34. 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[13] 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*'.

35. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also be 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*'[14].

36. In this case, the applicant sought to rely upon the neighbourhood of the housing estate known as the 'New Zealand Estate' situated within the locality of the ecclesiastical parish of Borden.

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[13] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[14] ibid at page 92

37. There was no dispute at the Inquiry that the ecclesiastical parish of Borden was capable of constituting a qualifying locality for the purposes of Village Green registration.

38. With regard to 'neighbourhood', the Inspector made the following observations[15]:

> *"The New Zealand Estate was built as a single housing estate and pre-dates the neighbouring 'Australia Estate'. I walked around the estate and the Australia Estate during my site visit and was able to observe that they have different housing styles and characters. The New Zealand Estate is not only identifiable by its New Zealand place names but also has a predominance of bungalows. I accept that a lot of those who moved in when the New Zealand Estate was built have stayed and thus there is now an older community and a strong one where residents look after each other. I also accept that an estate agent or a taxi driver would identify the 'New Zealand Estate' as a distinct geographical area with clear boundaries (e.g. there is a single access road into the Estate off Borden Lane). The New Zealand Estate has been since 2001 within the Parish of Borden, whereas the Australia Estate is unparished".*

39. She later went on to conclude[16] that - by virtue of its consistent style and date of housing, clear boundaries and themed street names - the New Zealand Estate was a cohesive and clearly identifiable neighbourhood that was distinct from its neighbouring areas; it was clearly not, in her view, an area that had simply been cobbled together for the purposes of the Village Green application. As such, she was satisfied that the statutory test is met in respect of the neighbourhood and locality elements.

"a significant number"

40. 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 occasional use by individuals as trespassers*'[17]. 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.

41. In this regard, the Inspector found that[18]:

> *"Whilst I accept that a few resilient users of the land have ventured off the main paths – even potentially when it has been very overgrown – I do not consider that these isolated examples indicate general use of the application land by the community throughout the relevant period such that it could be said to be by a 'significant number' of local inhabitants. My view is that the activities which were not referable to the main paths*

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[15] Para 124 of the Inspector's report
[16] Para 155 and 156 of the Inspector's report
[17] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[18] Paragraphs 144 and 145 of the Inspector's report

were sporadic and de minimis especially at the tail end of the relevant period. My conclusions are a matter of impression having heard the oral evidence and read the written evidence. There is no absolute numbers test for 'significant number'.

Accordingly, given the lack of sufficient evidence of use of the application land beyond walking and dog walking and activities incidental to that on the main circular and east-west paths, I conclude that the applicant has failed to discharge the burden of proof of showing user by a 'significant number' of local inhabitants throughout the relevant period and has, further, failed to show that a TVG right was being asserted throughout the relevant period. I therefore recommend that the application should fail on this basis".

(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(3) of the 2006 Act on the basis that use of the application site ceased on 31st July 2015. This is the date upon which the main objector made written submissions in opposition to a previous Village Green application in respect of the same site[19]. It is considered that these submissions constituted a challenge to recreational use of the site and, as such, use ceased to be 'as of right' as of that date.

44. The date of the current application is 30th October 2015 and therefore it was made within one year from the date upon which recreational use ceased to be 'as of right' (as required by the Act).

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

45. 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' ceased on 31st July 2015. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 31st July 1995 to 31st July 2015.

46. The Inspector heard evidence from a number of witnesses at the Inquiry, several of whom had used the application site in excess of the twenty-year period. However, as noted above, she did not consider that use had taken place with the requisite sufficiency, particularly during the latter part of the material period.

[19] A previous application in respect of the same site was received on 31st March 2015, but was not taken forward due to it being affected by a 'trigger event' in Schedule 1A of the Commons Act 2006.

Statutory Incompatibility

47. In addition to the legal tests set out above, the Inspector also considered submissions that had been made to her at the Inquiry on the issue of 'statutory incompatibility'. In R (Newhaven Port and Properties Ltd.) v East Sussex County Council[20], the Supreme Court held that, regardless of the legal tests set out in section 15 of the Commons Act 2006, in cases where land is held for statutory purposes that are inconsistent with its registration as a Village Green, it is not capable of registration as such. The application site in that particular case formed part of the operational land of the port of Newhaven.

48. In the current case, SEPN made representations that registration as a Village Green would impede its ability as a Licenced Electricity Distribution Network Operator to undertake works on the application site (such as digging or other maintenance operations to access the underground or overhead cables) that might be required so as to comply with its duty to maintain the safety, efficiency, reliability and security of the electricity network. Such works would most likely contravene the provisions contained in section 12 of the Inclosure Act 1857 (which make it an offence to undertake any act which causes 'injury' to a green or interferes with recreational use) and section 29 of the Commons Act 1876 (which render disturbance of the soil a public nuisance). There is currently no specific authority as to whether the digging up of a Village Green in exercise of a different statutory duty (to maintain power cables in this case) would create an offence under these Victorian statutes.

49. The Inspector did not consider that the position here was comparable to that in the Newhaven case. She explained[21] that in Newhaven, the Port Authority had a very specific set of duties that would be clearly impeded by the registration of its land as a Village Green and the Court was satisfied that there was a 'clear incompatibility' between the use of the land as a working harbour and its registration as a Village Green.

50. She concluded[22]:

> *"I do not consider that SEPN's duties are anywhere near as "clearly impeded" by registration of the land as a village green as the Port Authority's were. As I have said, the likelihood of the land needing to be 'injured' is infrequent and it is not clear if this would necessary be a breach of the Victorian statutes in any event. I consider that SEPN could carry out its duties to OFGEM post-registration on a day-to-day basis with only a theoretical risk of prosecution were it to have to cause temporary damage to the land itself or impede public recreation (albeit this would be a rare occurrence and has not, as far as SEPN is aware, occurred in the last 40 years). I also note that, unlike in Newhaven, SEPN does not hold the land for a statutory purpose. It merely has the benefit of certain rights in the form of easements and wayleaves. Such rights could be terminated by the landowner at any time, in any event.*

[20] [2015] UKSC 7
[21] Paragraph 163 of the Inspector's report
[22] Paragraphs 164 and 165 of the Inspector's report

…on balance, the existence of the underground cables and wayleaves are insufficient to prevent registration of land as a village green. Given the extent of the electricity network, it is very hard to believe that there are not numerous examples of village greens where there is some form of underground apparatus which may require maintenance or repair at some point. I do not consider that the Victorian statutes were designed to prevent that sort of activity and I consider it highly unlikely that any prosecuting authority would treat them in that way".

Inspector's conclusion

51. The Inspector's overall conclusion[23] was that the application should fail because the applicant had failed to demonstrate that "there has been qualifying user by a 'significant number' of local inhabitants throughout the relevant period and that a TVG right was being asserted throughout the relevant period".

52. Her recommendation to the County Council was that the application ought therefore to be rejected.

Subsequent correspondence

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

54. The main objector offered support for the Inspector's findings and recommendation.

55. The applicant raised concerns that one of the aspects of his case had not been addressed in the Inspectors' report. It was not in dispute that on 23rd June 2008, the main objector had deposited a statement with the County Council under section 31(6) of the Highways Act 1980. This provision enables a landowner to confirm what, if any, public rights of way exist on his land and to confirm that no additional ways are dedicated for public use. It has the effect of preventing the acquisition (through use) of any further public rights of way by enabling the landowner to demonstrate that he has no intention to dedicate such rights.

56. The applicant's position is that the deposition of the statement by the main objector meant that any subsequent use of the paths around and across the application site would not have had the appearance to the landowner of being a 'rights of way' type of use, and could not be attributable as such, because the landowner had already taken steps to ensure that no such rights could be acquired. Therefore, as the use of the paths could not be relied upon to acquire any public rights of way, it must be considered as qualifying use for the purposes of the Village Green application.

57. The Inspector dealt with this point in a separate note[24] and, whilst accepting that she had not directly addressed it in her original report, she did not consider that it had any bearing on her recommendation. She said:

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[23] Paragraph 166 of the Inspectors' report
[24] Dated 5th March 2019

"The question is how the use would have appeared to an objective landowner and whether the conduct brings home to the owner that a TVG right is being asserted. The fact that emergent footpath use is highly unlikely in reality to result in the acquisition of a PROW right due to the depositing of a statement does not mean that it is TVG use. In my opinion, such use would appear to a reasonable landowner to be footpath use which they had ensured could not result in PROWs being established by virtue of having deposited the statement. It is not a use which has the character of the assertion of a TVG right.

Therefore, I maintain my view that the use of the 'main' circular and east-west paths would bring home to a landowner the assertion of a public right of way and not a village green right (even though the depositing of the statement means that it is highly unlikely that any PROWs could ever be established on the land).

Accordingly, my recommendation in the Report that the application should fail in full for the reason that the applicant has failed to show that there has been qualifying user by a 'significant number' of local inhabitants throughout the relevant period and that a TVG right was being asserted throughout the period stands".

Conclusion

58. It is clear that this case turns on the nature of the recreational use of the application site, particularly with regard to the use of the worn paths on the site and the extent of the recreational use towards the latter part of the material period. That is an issue that turns on findings of fact and the overall impression arising from the evidence, not only in terms of that heard orally at the Inquiry but also the Inspector's summary of that evidence as well as the written evidence submitted in support of the application.

59. No challenge is made to the Inspector's summary of the evidence presented at the Inquiry (set out at paragraphs 12 to 100 in her report). The impression given by the evidence is that walking and dog walking had comprised the '*predominant activity*' (see paragraph 16) and that the '*worn paths reflect the routes that people predominantly use*' (see paragraph 39). One witness went so far as to say that it was '*impossible to do anything but walk around the land*' (see paragraph 29). There was evidence that at least some of that walking involved using the land as a short-cut to the wider PROW network and/or local schools (see for example paragraphs 21, 22, 23, 28 and 60).

60. It is fair to say that walking was not the only activity that took place on the land; reference was also made by witnesses to activities such as children playing and fruit picking taking place on the land. By contrast, though, those activities were dependent on the physical condition of the land and were necessarily restricted during periods of thick vegetation covering the land or the muddy state of the land following its clearance in the mid-1990s. Activities beyond walking (or running) were not an everyday occurrence and more sporadic in nature, particularly towards the latter part of the material period. On balance, it is unlikely that they were sufficient in nature and frequency to indicate to the landowner that the land was in general recreational use by the community, outside of the rights of way

usage.

61. In terms of the applicant's comments on the section 31(6) issue, it does not follow that the landowner should have been aware that a Village Green right was being asserted (as opposed to a right of way) merely because he had taken steps to protect his land against the formal creation of Public Footpaths. Section 31(6) exists to provide a (non-physical) means by which landowners can protect their land, but that is not to say that continued usage should then be capable of giving right to an alternative right. Indeed, there may well be situations in which a landowner is perfectly happy to allow access to his land, but simply does not want the public to acquire a formal right of way (in which case section 31(6) can be used to prevent this). Regardless of the existence of the s31(6) statement in this case, the use of the defined tracks would nonetheless still have had the outward appearance of a rights of way usage (albeit that formal rights could not be acquired), rather than a general right to recreate over the whole of the application site.

62. It is considered that the Inspector's approach is correct in every respect and, accordingly, that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met, such that the land subject to the application (shown at **Appendix A**) should not be registered as a new Village Green.

Recommendation

63. I recommend, for the reasons set out in the Inspector's report dated 27th November 2018, that the applicant be informed that the application to register land at Cryalls Lane at Sittingbourne has not been accepted.

Accountable Officer:
Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 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 – Plan showing application site

Background documents

Inspector's report dated 28th November 2018
Inspector's response to the applicant's comments dated 23rd January 2019