Application to register land known as King George Playing Field at Hawkhurst as a new Village Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Friday 19th February 2010.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land known as King George Playing Field at Hawkhurst has not been accepted.

Local Members: Mr. R. Manning Unrestricted item

Introduction

1. The County Council has received an application to register land known as King George Playing Field at Hawkhurst as a new Town or Village Green from local residents Mrs. J. Wood, Mr. D. Buckle and Mr. R. Sheath ("the Applicants"). The application, dated 24th November 2008, was allocated the application number VGA605. 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 Commons Registration (England) Regulations 2008.

3. Section 15(1) of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Town or Village Green where it can be shown that:

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

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

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

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

   • **Use of the land 'as of right' ended before 6th April 2007** and the application has been made within five years of the date the use 'as of right' ended (section 15(4) of the Act).

5. As a standard procedure set out in the regulations, the Applicant must notify the landowner of the application and the County Council must notify every local authority. The County Council must also publicise the application in a newspaper circulating in the local area and place a copy of the notice on the County Council's website. In addition, as a matter of best practice rather than legal requirement, the County Council also places copies of the notice on site to provide local people with

the opportunity to comment on the application. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

6. The area of land subject to this application ("the application site") consists of a recreation ground of approximately 2.5 hectares (6 acres) in size situated adjacent to Moor Hill (A229) and Hastings Road (B2244) in The Moor area of the village of Hawkhurst. The application site consists of a grassed open space (incorporating tennis courts, a play area and a pavilion).

7. The perimeter of the application site is fenced and access to the site is via two pedestrian gates and a stile along the boundary with the footway of Moor Hill and via the vehicular entrance to the car park (also from Moor Hill).

8. Members should be aware that the application site has been the subject of a planning application to Tunbridge Wells Borough Council for the demolition of the existing Sports Pavillion and the erection of a new community centre as well as separate storage outbuildings, a car park and an outdoor playground. Planning permission for the scheme was granted on 15th May 2009.

9. The granting of planning permission has no effect upon the Village Green application and it is not within the County Council's remit to consider the impact of the proposed development or the desirability of registering the land as a new Village Green. The County Council, in its capacity as the Commons Registration Authority, is restricted solely to whether the strict legal tests set out in section 15 of the Commons Act 2006 have been met. This is purely a matter of evidence.

The case

10. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities 'as of right' for more than 20 years.

11. Included in the application were 19 user evidence questionnaires from local residents asserting that the application site has been available for free and uninhibited use for lawful sports and pastimes over the last twenty years and beyond. A summary of the user evidence is attached at **Appendix C**.

12. Also included within the application were photographs showing Hawkhurst United Football club on the land between 1935 and 1982.

Consultations

13. Consultations have been carried out as required.

14. In response to the consultation, 20 'standard format' letters of objection have been received from local residents. These letters, identically worded, set out the history of the acquisition of the site and object on the grounds that the site has been actively managed and strictly controlled by the Parish Council and use of it has not been 'as of right'.

15. It is, however, difficult to place any great deal of weight to these letters since they provide a shared view in response to an emotive issue rather than provide any actual evidence in rebuttal to the application. The letters appear to have been produced and circulated by the Parish Council and thus the words used and views expressed are perhaps aligned more to an agreement with those of the Parish Council rather than the individual thoughts of those objecting. In considering the consultation responses, it is always the substantive content of the objections received that is relevant, and not their number.

Landowner

16. The application site is managed by Hawkhurst Parish Council ("the Parish Council").

17. The application site was acquired by the Parish Council by way of a Conveyance dated 3rd June 1935. The Conveyance refers to the land having been acquired under the provisions of the Local Government Act 1894 and stipulates that the land '*is required by the Council for the purpose or purposes of a Recreation Ground and it is intended that the said land shall be dedicated to the use of the Public solely for the purpose of recreation*'. A copy of the conveyance is attached at **Appendix D**.

18. On 29th April 1938, the application site was the subject of a declaration of trust which provided that it '*shall be preserved in perpetuity as a Memorial to His late Majesty King George V under the provisions of the King George's Fields Foundation and shall henceforth be known as "King George's Field"*'.

19. The King George's Fields Foundation was set up shortly after the death of King George V in 1936 with the aim '*to promote and to assist in the establishment throughout the United Kingdom of Great Britain and Northern Ireland of playing fields for the use and enjoyment of the people*'. The Foundation was established as a Charity and funds were raised, initially by way of a National Appeal, to facilitate the acquisition, construction and equipment of land for recreational use. In 1965, the Foundation was dissolved and responsibility transferred to the National Playing Fields Association (now known as Fields in Trust).

20. Today, the application site is a registered Charity (no. 1085101) and the land is vested in the Members of Hawkhurst Parish Council as the Trustee of the Charity.

21. The Parish Council has objected to the application on the basis that use of the application site has been by virtue of the conditions of the charitable trust and the 1935 conveyance (which specifically provide for the use of the land for recreational purposes) and therefore not 'as of right'.

Legal tests

22. 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 has taken place over period of twenty years or more?
(e) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?

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

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

23. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the *Sunningwell*[1] *case*, it is 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'.

24. In this case, there is no evidence of any of the users ever having been verbally challenged or physically prevented from gaining access to the land. Nor is there any evidence that use of the land has been with secrecy. Although the site is fenced around its perimeter and the vehicular access gate to the site is locked overnight, access to the site is easily achievable through the pedestrian gates and the stile along Moor Hill.

25. The key issue in this case concerns the third limb of the 'as of right' concept: permission. Permission in this context can take various forms. It can be express or implied, and it may or may not be communicated to the recreational users of the land.

Express permission: the Notice

26. In support of their objection, the Parish Council refers to a notice displayed on the site which reads: '*King George V Playing Field, The Moor. This recreation area is the property of the King George V Playing Field Trust who give consent for the lawful use of the land for recreational purposes. The Trustees are Members of Hawkhurst Parish Council*'. The inference is that this notice confers a form of express permission to use the site. A photograph of the notice is attached at **Appendix E**.

27. However, this notice is dated November 2008. The application for Village Green status was made on 24th November 2008. Therefore, it is possible that there may have been a period of a few days or weeks during which the notice was in situ prior to the application being made. In any event, the notice has little impact upon whether use has been 'as of right'; it is now well-established that in order to be effective, permission must not only be communicated, but it must also be revocable[2].

[1] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council [1999] 3 All ER 385*
[2] *R(Beresford) v Sunderland City Council* [2003] UKHL 60

Implied permission: statutory acquisition of the land

28. Particularly in cases where the application site is owned by a local authority, it is important to determine the powers under which the site was acquired in order to determine whether the use of the land by the local residents has been by virtue of an implied permission.

29. As stated above, the land was acquired by the Parish Council in exercise of its powers under the Local Government Act 1894 ("the 1894 Act"). Section 8(1)(b) of the 1894 Act enabled Parish Councils '*to provide or acquire land... for a recreation ground and for public walks*'. Section 8(1)(d) of the same Act conferred on Parish Councils a power '*to exercise with respect to any recreation ground, village green, open space, or public walk, which is for the time being under their control... such powers as may be exercised by an urban authority under section 164 of the Public Health Act 1875... in relation to recreation grounds or public walks, and sections 183 to 186 of the Public Health Act 1875 shall apply accordingly as if the Parish Council were a local authority within the meaning of those sections...'.*

30. Section 164 of the Public Heath Act of 1875 ("the 1875 Act") provided 'urban authorities' with a power to *'purchase or take on lease, lay out, plant, improve and maintain lands for the purpose of being used as public walks or pleasure grounds...*'. It did not apply to Parish Councils at the time that Hawkhurst Parish Council acquired the application site in 1935.

31. However, in the Local Government Act 1972 ("the 1972 Act") the provisions of the 1894 Act (under which the Parish Council acquired the application site) were repealed. At the same time, the provisions of the 1875 Act (previously only applicable to 'urban authorities') were extended and became directly applicable to Parish Councils. It is therefore considered that land which was acquired and held as a public walk or recreation ground under section 8(1)(b) of the 1894 Act was thereafter (i.e. on the coming into effect of the 1972 Act on 1st April 1974) held under and for the purposes of section 164 of the 1875 Act.

The effect of section 164 of the Public Health Act 1875

32. The specific issue of the effect of this provision on an application to register land as a Town or Village Green has never been before the Courts. There is, however, judicial support for the proposition that land held under section 164 of the Public Health Act 1875 is the subject of a statutory trust, with members of the public being the beneficiaries of the trust.

33. In *Hall v Beckenham Corporation*[3], the land concerned was held under the 1875 Act and the judge found in that case that "*as far as the local authority is concerned, if the land is purchased under their statutory powers, it is dedicated to the use of the public for the purpose of a park"*[4]. He added later in his judgement "*I think that the Beckenham Corporation are the trustees and the guardians of the park..."*[5].

[3] *Hall v Beckenham Corporation* [1949] 1 All ER 423
[4] *Hall v Beckenham Corporation* [1949] 1 All ER 423 at 426
[5] *Hall v Beckenham Corporation* [1949] 1 All ER 423 at 427

34. In *Blake v Hendon*[6], it was considered that "*the purpose of section 164 of the Act of 1875 is to provide the public with public walks and pleasure grounds. The public are not a legal entity and cannot be vested with the legal ownership of the walks and pleasure grounds which they are to enjoy. But if they could be given the beneficial ownership, that is what they should have...*".

35. More recently, the House of Lords has considered the effect of a similar provision (namely the Open Spaces Act 1906) on an application to register land as a Town or Village Green. In *Beresford*[7], Lord Walker said this: "*where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers... the position would be the same if there were no statutory trust in the strictest sense, but land had been appropriated for the purpose of public recreation*".

36. The fundamental principle behind the concept of 'as of right' is that, in order to acquire rights, those using the land must start off as trespassers. The acquisition of rights cannot occur if those using the land for recreational purposes already have a right to do so. Therefore, if land is held by a local authority specifically for the purposes of recreation, those using the land are not trespassers – they are already there 'by right'. Since they do not start off as trespassers, their use cannot be 'as of right' and thus they cannot acquire a new right.

37. Therefore, it can be concluded that use of the application site by the local residents has been in exercise of an existing right created by virtue of a public statutory trust and as such was not 'as of right'.

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

38. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. It is not necessary to demonstrate that both sporting activities *and* pastimes have taken place since the phrase 'lawful sports and pastimes' has been interpreted by the Courts as being a single composite group rather than two separate classes of activities[8].

39. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. The Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[9].

40. In this case, the evidence demonstrates that the land has been used for a wide range of recreational activities, including walking (with and without dogs), ball games, picnics, playing with children, running and watching other sports activities.

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[6] *Blake (Valuation Officer) v Hendon Corporation* [1961] 3 All ER 601 at 607
[7] *R(Beresford) v Sunderland City Council* [2003] UKHL 60 at paragraph 87
[8] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385
[9] *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

The table summarising evidence of use by local residents at **Appendix C** shows the full range of activities claimed to have taken place.

41. It should be noted that some of the activities cited in the user evidence questionnaires may be the subject of an implied form of permission. For example, some witnesses refer to taking part in formal games of football or cricket, or attending village fetes. Such activities are likely to have taken place by licence from the Parish Council (and, probably, on payment of a fee). Therefore, such use would be attributable to some form of formal authorization rather than informal recreational use 'as of right'. However, given the recommendation in this case, it is not necessary to conclude definitively on this point.

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

42. The definition of locality for the purposes of a Town or Village Green application has been the subject of much debate in the Courts and there is still no definite rule to be applied. In the *Cheltenham Builders*[10] 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*'.

43. In this case, the applicant states that the relevant locality is 'The Moor, Hawkhurst'. The Moor is that part of Hawkhurst village which, broadly speaking, lies to the south of the main centre of the village of Hawkhurst, and is centred on the A229 (Moor Hill) and B2244 (Hastings Road) crossroads. It is not a legally recognised administrative area of the county, but could well satisfy the definition of a neighbourhood within the wider locality of the parish of Hawkhurst.

44. However, given that the land was originally acquired by the Hawkhurst Parish Council and is managed by the Parish Council on behalf of the inhabitants of the whole village, it seems appropriate, particularly if the land is used for community (i.e. village-wide) activities, that the relevant locality is the administrative parish of Hawkhurst.

(d) 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. 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.

46. In this case, the application was made in November 2008. Therefore, the relevant twenty-year period ("the material period") is 1988 to 2008.

47. Of the 19 user evidence questionnaires submitted in support of the application, all but one documents use of the application site throughout the material period. In the

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

majority of cases, use of the field has taken place for over 40 years, with one witness referring to use as far back as 1935.

48. Therefore, it can be concluded that use of the land has taken place over a period of over twenty years.

(e) Whether use of the land by the inhabitants is continuing up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?

49. 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, to fulfil one of the alternative criterion set out in sections 15(3) and 15(4) of the 2006 Act (as set out at paragraph 4 above).

50. In this case, there is no suggestion from the evidence submitted both in support of and in objection to the application that the use of the land by the local residents for the purposes of informal recreation has ceased prior to the making of the application. As discussed above, the Notice erected by the Parish Council has little impact upon use of the land 'as of right'.

51. Therefore, it appears that use of the land 'as of right' has continued up until the date of application and as such it is not necessary to consider the other tests set out in sections 15(3) and 15(4) of the Act.

Conclusion

52. It is clear from the evidence submitted in support of the application that the application site has been used by a significant number of the residents of the locality for the purposes of lawful sports and pastimes over a considerable period. However, as discussed above, it would appear that such use has been in exercise of the public statutory trust created by the Public Health Act 1875; it has been 'by right' and not 'as of right'.

53. It is therefore concluded that the legal tests concerning the registration of the land as a Town or Village Green (as set out above) have not been met.

Recommendations

54. I recommend that the County Council informs the applicant that the application to register the land known as King George Playing Field at Hawkhurst has not been accepted.

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

Background documents

APPENDIX A – Plan showing application site
APPENDIX B – Copy of application form
APPENDIX C – Table summarising user evidence
APPENDIX D – Copy of conveyance dated 3rd June 1935
APPENDIX E – Notice displayed in Sports Pavillion on the application site