

## **Update from the Public Rights of Way & Access Service Common Land and Village Greens**

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A report by the Public Rights of Way and Access Service Manager to Kent County Council's Regulation Committee on Thursday 27th January 2022.

### **Recommendation:**

**I recommend that Members consider this report and note its content.**

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### **Progress with the determination of Village Green Registration Applications**

- 1 This report provides a brief overview of the progress made in determining applications to register Town and Village Greens in the county of Kent.
  - 1.1 Under section 15(1) of the Commons Act 2006, any person may make an application to the County Council, in its capacity as the 'Commons Registration Authority', to register land as a new Town or Village Green, provided that it can be shown that the land has been used:
    - As of right (i.e without force, secrecy, or permission);
    - For a period of at least 20 years;
    - For the purposes of lawful sports and pastimes;
    - By a significant number of the inhabitants of any locality or any neighbourhood within a locality; and
    - Use has continued up to the date of application or, where use has ceased to be as of right, it did so no more than one year prior to the date of application.
  - 1.2 It is to be noted that, as a result of changes introduced under the Growth and Infrastructure Act 2013, the County Council may not consider applications to register new Village Greens where the land in question is subject to a planning application or has been identified for development in a Local or Neighbourhood Plan. These are known as 'trigger events' and the full list can be found in Schedule 1A of the Commons Act 2006. If, following consultation with the relevant planning authorities, it is found that an application site is affected by a 'trigger event', the application must be returned to the applicant with no further action taken by the County Council.
  - 1.3 If the County Council is able to progress with the application (i.e. there are no live 'trigger events'), the application will be advertised for a period of six weeks by way of notices on site and on the County Council's website. Any representations will then be forwarded to the applicant for comments. As there are no Officer delegated powers in relation to applications made under the Commons Act 2006, all applications are ultimately referred to a Regulation Committee Member Panel for determination. The Panel will then normally decide whether to accept the application (and register the land as a Village Green), reject the application, or refer the matter to a Public Inquiry for further consideration.
  - 1.4 In determining Village Green applications, the County Council must rigidly apply the criteria set out in section 15(1) of the Commons Act 2006 and summarised at paragraph 1.1 above; no account may be taken of other matters, such as the

suitability or desirability of registering the land as a Village Green. It should also be noted that the County Council does not, itself, have the power to investigate applications and therefore, where there is a conflict in the evidence provided or facts are disputed by the parties involved, an Inspector (who is normally a Barrister specialising in this area of law) is appointed and Public Inquiry held at which evidence, both in support of and in opposition to the application, is heard. The Inspector will prepare a report and a recommendation, having had the opportunity to hear all of the evidence, although that recommendation is not legally binding upon the County Council and the decision ultimately rests with the Regulation Committee Member Panel.

- 1.5 The determination of Village Green applications is a quasi-judicial function of the County Council and, as such, the only right of appeal against a decision of the Member Panel is by way of an application for Judicial Review of the decision in the High Court (on the basis that the decision was unlawful, unreasonable or the subject of some sort of procedural impropriety).
- 1.6 Village Greens enjoy significant statutory protection. Under the Inclosure Act 1857, it is a criminal offence to (amongst other things) undertake any acts which cause injury to the surface of the green or interrupt the use and enjoyment of the green as a place for exercise and recreation (e.g erect fencing), and under the Commons Act 1876 it is considered a public nuisance to encroach upon, enclose or erect any structures on a Village Green. Accordingly, the registration of land as a Village Green places a significant constraint upon its future use by the landowner and it is therefore no surprise that applications to register land as Village Green are often strongly contested.
- 1.7 The determination of Village Green applications is made all the more complex by the constantly evolving case law – indeed, it was once described by a Court of Appeal judge as ‘an area of unusually vigorous legal activity’. For example, in 2015 a whole new legal test, known as the ‘statutory incompatibility’ test, emerged from the decision of the Supreme Court in the Newhaven Port case (in which it was held that the recreational rights cannot be acquired over land in cases where such rights would be incompatible for the statutory purposes for which the land was held). In the last 3 years, a further three cases have been all the way up to the Supreme Court on this issue alone. This constant evolution in the manner in which the legal tests are to be interpreted has had a direct bearing on the progress and determination of a number of applications made to the County Council; in two current applications, there have been significant delays pending the outcome of the other cases before the Supreme Court which potentially have a direct bearing upon the recommendation to the Member Panel.

### **Voluntary applications to register land as a Village Green**

- 2 Under section 15(8) of the Commons Act 2006, it is possible for any landowner to apply to the County Council to register land in their ownership as a new Village Green. This can be a useful tool for Parish Councils seeking to protect their land against any future development (for example, to safeguard against a future Council seeking to sell the land for development) and also to ensure that amenity land provided as part of new developments is afforded the strongest form of statutory protection against any future changes.

- 2.1 As is noted above, once land is registered as a Village Green its use is severely constrained by the Victorian statutes (such that registration requires careful consideration as it may not always offer the best solution), but a number of Parish and District/Borough Councils across the county have nonetheless utilised this legislation to protect their land.
- 2.2 Applications to voluntarily register land as a new Village Green are considerably more straightforward as they need not include any evidence of previous recreational use. All that is required is proof of ownership and (if applicable) the written consent of anyone else with a legal interest in the land.

### **Current Village Green Applications**

3. Since 2005, the County Council has determined just under 100 applications made under section 15 of the Commons Act 2006, resulting in the registration of 52 new Town or Village Greens (often after a Public Inquiry). The implementation of the Commons Act 2006 – which replaced previous legislation and for which Kent was one of seven ‘pilot authorities’ to trial the updated legislation and new provisions – resulted in an influx of Village Green applications and led to a backlog of 9 to 12 months between an application being received and work commencing on it. Today, those backlogs have been cleared and it is normally possible to begin working on a new application fairly soon after confirmation by the relevant planning authorities that no ‘trigger events’ apply in relation to it.
- 3.1 There are currently 7 outstanding applications to record Village Greens and these are listed at **Appendix A**. Two of those applications have been the subject of very lengthy Public Inquiries (and the Inspector’s reports are due imminently), and one of those applications is currently the subject of legal challenge.

### **Other applications to amend the Registers**

4. In addition to dealing with applications to register new Village Greens, the County Council (as ‘Commons Registration Authority’) is also responsible for dealing with other kinds of applications to amend the Registers of Common Land and Town or Village Greens (“the Registers”). The Commons Act 2006 introduced a raft of previously unavailable measures to amend the Registers to allow for both new or historical events to be recorded and mistakes to be corrected. For example, in some cases the extent of the registered Common Land or Village Green was incorrectly recorded on the Registers (the majority of which were originally compiled under the Commons Registration Act 1965).
- 4.1 As with applications to register new Village Greens, these other applications also involve a process of public consultation and, ultimately, referral to the Regulation Committee Member Panel for determination.
- 4.2 There are currently four applications outstanding to amend the Registers, all of which relate to pieces of Common Land which, it is alleged, have either been incorrectly recorded or omitted altogether in error from the Registers. One of the applications involves 16 pieces of land, each of which requires careful assessment of historical documentation before any recommendation can be reached.

## **Recommendation**

5. I RECOMMEND Members consider this report and note its content.

### **Contact Officer:**

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