Application to register land at Bybrook Road / The Pasture at Kennington as a new Town or Village Green

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A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Wednesday 20th September 2023.

Recommendation: I recommend that the Applicant be informed that the application to register the land at Bybrook Road / The Pasture at Kennington as a Town or Village Green has not been accepted.

Local Member: Mr. P. Bartlett (Ashford Central) Unrestricted item

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Introduction

1. The County Council has received an application to register an area of land at Bybrook Road at Kennington as a new Town or Village Green from the Kennington Community Council ("the Applicant"). The application, made on 23rd September 2020, was allocated the application number VGA684.

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.

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[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 land subject to this application ("the Application Site") comprises a roughly square area of grassed open space fronting property numbers 50 to 64 The Pasture at Bybrook Road (opposite its junction with Rylands Road) at Kennington, near Ashford. The Application Site is separated from the front gardens of these properties (and from amenity land to the west of it) by a tarmac path, which provides unhindered access to, but does not form part of, the Application Site.

7. The Application Site is shown on the plan at **Appendix A**, and an aerial photograph showing the site taken in 2009 (i.e. the middle of relevant twenty-year period) is attached at **Appendix B**.

The case

8. The application has been made on the grounds that the Application Site has become a Town or Village Green by virtue of the recreational use of the land 'as of right' by local residents for a period in excess of twenty years.

9. According to the Applicant, the Application Site was purchased from the liquidators of the original developer of the site by London and Country Housing Ltd. in March 2020. This was brought to the attention of the Applicant in August 2020, following which an extraordinary meeting of the Community Council was held at which it was resolved to apply for Village Green status and to have the land registered as an Asset of Community Value (approved by Ashford Borough Council in December 2020). The land was sold, once again, to the current owner in October 2020 (i.e. following submission of the Village Green application).

10. The Applicant's case is that the Application Site was laid out as open space when the area was developed for housing in around 1967 and provides a small area of informal green space for local residents to engage in lawful sports and pastimes. Access to the land has never been restricted in any way, and it has been maintained by Ashford Borough Council.

11. Included with application was a statement of support from the Applicant, plans showing the Application Site and consultation area, and 22 user evidence questionnaires.

12. The evidence questionnaires submitted in support of the application refer to the use of the Application Site for a number of activities, including children playing, football and dog walking. The user evidence is summarised in the table at **Appendix C**.

13. The Applicant initially identified the 'Grosvenor Hall' ward of Kennington Community Council as the relevant locality, but subsequently requested an amendment to the application to rely upon an area marked on a map and described as 'Bockhanger' as the qualifying neighbourhood, within the wider locality of the civil parish of Kennington Community Council.

14. The application has been made under section 15(2) of the Commons Act – i.e. on the basis that use of the Application Site has continued 'as of right' until the date

of the application – such that the relevant twenty-year period for the purposes of the application is September 2000 to September 2020.

Consultations

15. Consultations have been carried out as required.

16. Ashford Borough Council confirmed that it had no objections to the application and noted the benefit of providing and securing green space which would add to existing provision.

17. The County Councillor for Ashford Central, Mr Paul Bartlett, confirmed his support for the application in his capacity both as the local Member and also a regular passer-by of the Application Site. He added that he had walked dogs on the land.

18. Three letters of support were also received from local residents who had already submitted evidence in support of the application.

Landowners

19. The Application Site is currently registered to Sibel Ucur ("the Landowner") under title number TT115872. Ms. Ucur acquired the land in October 2020, with a view to developing the site.

20. An objection to the application has been received from Collyer Bristow LLP on behalf of the Landowner, on the basis that:
    - The locality relied upon by the Applicant comprises a very small area and it is more appropriate to consider the locality as Kennington;
    - Much of the evidence refers to use of the land by children and grandchildren, such that there would necessarily have been a significant gap in use;
    - The situation of the land alongside a busy road makes it an unsuitable place for children to play freely, particularly given the close proximity of a designated play area (in Rylands Road) and other green space nearby away from busy roads;
    - The small size of the Application Site makes it unsuitable for use for activities such as ball games, walking dogs, and fireworks;
    - Several statements refer to the use of the land for VE day celebrations and NHS clapping, but these are both specific to 2020 and do not serve to demonstrate general and/or longstanding use;
    - Reference to riding bikes in the user evidence is more likely to be referable to the tarmac paths abutting the Application Site; and
    - Searches of websites, social media and local newspapers have yielded no results at all relating to the recreational use of Application Site, in contrast to The Ridge Playing Field nearby.

21. The Landowner's case is that the evidence indicates that the land is used only by a very limited group of people, and that the application has been made with a view to thwarting development proposals, as opposed to being a legitimate attempt to protect a genuine Village Green.

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 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'?

23. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the Sunningwell[2] 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.

24. In this case, access to the Application Site is completely unrestricted from all four sides of it (see also photographs at **Appendix B**). There is no evidence on the ground, or in the available documentation, that the site has ever been enclosed, nor are there any notices in place seeking to regulate use in any way.

25. None of the users of the Application Site refer to any permission having been granted and there is no suggestion that any recreational use has taken place secretively.

26. The Landowner has not advanced any submissions to the effect that use of the Application Site has not been 'as of right'.

27. Accordingly, this test appears to have been met.

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

28. 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*'[3].

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[2] *R v. Oxfordshire County Council and another, Sunningwell Parish Council [1999] 3 All ER 385*
[3] *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

29. The summary of evidence of use by local residents at **Appendix C** shows the activities that are claimed to have taken place on the Application Site.

30. The Landowner's position is that the small size of the Application Site necessarily restricts the use to which it can be put, and makes the land unsuitable for activities such as ball games or dog walking. In response, the Applicant notes that suitability is subjective and the Landowner's views are not borne out by the evidence.

31. The Application Site measures 20 metres wide and 17 metres long; a game of badminton, as mentioned by one of the users, could feasibly be accommodated, as well as small football 'kickabouts' by children, and it is possible to envisage that small dogs might be exercised on the land (e.g. by throwing a ball). However, it would be difficult to see how activities such as riding a bike (other than by very small children) could take place in any meaningful manner on the grassed area (as opposed to the adjoining tarmac path). Indeed, at least one of the users refers to children roller-skating and scootering '*around the path surrounding it [the Application Site]*', which is not a direct use of the Application Site itself.

32. Reference is made in the user evidence to community events, such as celebrating the 75th Anniversary of VE Day and the 'NHS clapping' which took place in response to the recent pandemic. The Landowner suggests that these activities are specific to 2020 and do not demonstrate general or longstanding use of the Application Site. Perhaps of more relevance is that 2020's VE Day celebrations took place during the first national lockdown, at a time when people were still required to 'stay at home', and such that any gatherings on the Application Site itself would not have been lawful. The NHS clapping referred to took place primarily on people's doorsteps and, again, any community congregation for this purpose on the Application Site is likely to have been unlawful until at least the 'rule of six' was abolished (after the submission of the application). For these reasons, it is more likely that these activities were either not directly associated with the Application Site, or were not, strictly speaking, *lawful*.

33. Reference is also made to other community events such as 'bank holiday get-togethers' and barbeques. However, no dates have been provided in respect of these events and (despite a request) no photographs are available of these social events, which suggests that they are more likely to have taken place on a sporadic basis.

34. There is also some suggestion that the Application Site has been used for bonfire night celebrations and fireworks. The Landowner suggests that such use would be unsafe and indeed, as can be seen from the attached photographs at **Appendix B**, a telegraph pole is situated on the southern side of the site, with cables spanning overhead to the adjoining properties, such that this kind of use is unlikely to have been appropriate. In any event, the setting off of fireworks in a public place without the necessary permission (no copies have been provided) is an offence under section 80 of the Explosives Act 1875 and, therefore, any such use is unlikely to be considered a *lawful* sport or pastime for the purposes of Village Green registration.

35. Therefore, in terms of *qualifying* user for the purposes of the Village Green application, this leaves:

- Children playing;
- Dog walking (although this would be limited by virtue of the size of the site); and
- Social gatherings (which appear to have been sporadic in nature).

36. There are reasons why the land might be an attractive place for local children to play, with one user citing that the use of other recreational land nearby by teenagers/youths could be 'intimidating', and another explaining that this was a convenient place for their children to play whilst 'keeping an eye on them' when gardening. The question, however, is whether use of the land overwhelmingly for the purpose of children playing was sufficient to indicate to a reasonable landowner that the Application Site was in general use by the community as a whole. This matter is addressed further below.

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

37. 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.

    Locality

38. 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[4] 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*'.

39. In this case, the Applicant originally relied upon the Grosvenor Hill ward of Kennington Community Council as the relevant locality. However, the application was subsequently amended by the Applicant to rely upon the area marked on a plan (at **Appendix D**) and described as 'Bockhanger' as the qualifying neighbourhood, within the locality of the civil parish of Kennington Community Council.

40. There is evidently no doubt that the civil parish of Kennington Community Council is a legally recognised administrative unit, and therefore a qualifying locality for the purposes of section 15 of the Commons Act 2006. However, the civil parish covers a very large area such that it would not be possible to demonstrate (as required) that a 'significant number' of the residents of the parish as a whole had used the Application Site.

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

Neighbourhood

41. In 2001, to deal with such scenarios, the Government introduced the concept of 'neighbourhood' to the legal test relating to Village Green registration. In situations where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it is also necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible than that of a locality, and 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*'[5].

42. In the current case, the Applicant has provided a plan showing a 'consultation area', which it is suggested is the qualifying neighbourhood for the purposes of this application (see **Appendix D**). However, the plan does not appear to relate to any recognisable boundaries, and its boundaries appear to be defined by reference to households that have provided evidence of use in support of the application. This is not the correct approach: a neighbourhood must be capable of definition and it cannot simply be any contiguous geographical area that has been delineated, in an arbitrary fashion, on a plan for the purposes of a Village Green application[6].

43. Moreover, the area defined on the plan does not correspond with the description given of the consultation area 'customarily referred to as being in Bockhanger'. The area of Bockhanger is a much larger area within the wider town of Ashford: it is recognisable in that the name appears on Ordnance Survey base maps (see **Appendix E**) and it also has a number of community facilities that serve the area, including Bockhanger Library, Bockhanger Post Office and (until 2019) the Bockhanger Community Centre. These facilities are all located outside of the 'consultation area' marked on the plan provided by the Applicant, and clearly serve a much wider area.

44. For the reasons stated above, the 'consultation area' marked on the plan cannot be considered a qualifying neighbourhood for the purposes of this legislation. However, the community of Bockhanger would appear to have the sufficient degree of cohesiveness and would therefore be a qualifying neighbourhood for the purposes of this application.

"a significant number"

45. In addition to the above, the County Council also needs to be satisfied that the Application Site has been used by a 'significant number' of the residents of the 'neighbourhood within a locality'. 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*

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[5] ibid at 92

[6] Ibid at 85 per Sullivan J: *"I do not accept the defendant's submission that a neighbourhood is any area of land that an Applicant for registration chooses to delineate upon a plan"*

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'[7]. Thus, 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.

46. In this case, the evidence submitted in support of the application comes from 22 properties that are all located within a maximum distance of 110 metres (as the crow flies) from the Application Site. Thus, it is concentrated from within a relatively small area, within the wider neighbourhood of Bockhanger. The question to be addressed is, therefore, whether the Application Site has been used by a 'significant number' of the residents of Bockhanger. Although there is no legal requirement for a spread of users across the relevant neighbourhood, the issue falls to be determined on whether it would have appeared to a reasonable landowner that the land was in general use by the community as a whole.

47. In support of the application, 22 user evidence questionnaires were provided. One user did not use the land, other than for a short period of unstated duration for the purposes of walking with a walker following a hip operation (although it is not clear if this activity took place on the land itself or the tarmac path around it), whilst a further four refer only to use by their children (which, although supportive, is not direct evidence of use)[8].

48. Of the remaining 17 users, only seven have used the land throughout the material period (2000 – 2020). Although it is not a necessary condition that all of the users have used the land for the full period of twenty years, the Applicant needs to be able to establish that recreational use took place *throughout* the required period (i.e. including the early part). Of those seven users:
    - User 2 (as numbered in the table at **Appendix C**) refers only to occasional use for socialising and watching children playing;
    - User 11 refers to occasional use for the purpose of playing football with grandchildren, which presumably took part in the latter part of the period;
    - User 12 states 'my children play' which implies current use (as opposed to use at the start of the material period);
    - User 13, who has known the land since 1977, used it for 'playing as a child' which is likely to refer to a time preceding the material period;
    - User 17 has known the land since 1985 and used it with children and grandchildren, which implies there is likely to have been a gap in use that may have coincided with the early part of the material period;
    - User 19 refers to daily use with children and grandchildren, but once again there are no dates and it seems likely there was a gap; and
    - User 20 moved to the area in 1975 and refers to children playing 'when toddlers' which may pre-date the material period.

[7] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[8] Users 6 and 8 state that their 'children used when younger' (from 2010 (user 6)) and 1992 (user 8)). User 9 (from 2016) states 'my children play' and user 18 (1980-2010) states that 'children and grandchildren used it')

49. Thus, even taking the evidence at its most generous and assuming that it applies throughout the stated period of use, only a maximum of seven users can attest to using the Application Site at the very start of the relevant period in 2000 – and even then there is some ambiguity as to the nature and duration of that use – of which two used the land only occasionally, one used it monthly, one 'daily/weekly' and the remaining three on a daily basis. Regular use of the Application site by only three users at the start of the material period is not considered to be "significant" in the context of a large urban and densely-populated neighbourhood such as Bockhanger.

50. Therefore, whilst the use of the Application Site more recently might just be sufficient to indicate that the land was in general use by the community (although there are some doubts about this), on the evidence available, the nature and frequency of the use at the start of the material period certainly was not.

(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?

51. 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.

52. 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. As such, this test is met.

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

53. 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 in 2020; the relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 2000 to 2020.

54. The user evidence submitted in support of the application (and summarised at **Appendix C**) indicates, on the face of it, that recreational use of the Application Site has taken place in excess of the required twenty-year period. However, for the reasons previously discussed, some of that use falls to be discounted on the basis of it having been either not 'lawful' or too sporadic, and the overall paucity of evidence of recreational use of the Application Site (especially during the early part of the material period) affects other parts of the legal test.

Conclusion

55. When making an application under section 15 of the Commons Act 2006, the burden of proof is on the applicant to demonstrate that, on a balance of probabilities, the legal tests have been met. As has been noted in the Courts[9], it is 'no trivial matter' for a landowner to have land registered as a Village Green, such

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[9] R v *Suffolk County Council ex p Steed* (1996) 75 P&CR 102 at 111

that the relevant legal tests must be 'properly and strictly proved'. Therefore, in order for the application to succeed, all five of the legal tests set out above must be met; if one test fails, then the application as whole falls to be rejected.

56. The evidence in this case suggests that the Application Site has been used primarily by residents of the properties in the immediate vicinity of the site (presumably as an extension of their gardens) and overwhelmingly for the purposes of children playing. Some of the uses cited are not 'qualifying' (either because they were not 'lawful' or did not take place on the land), whilst others (community events) appear to have taken place only sporadically. Due to the size of the land, dog-walking could only have taken place in a limited manner and the evidence in respect of the primary use of the land (for children playing) is arguably vague and ambiguous.

57. There is no dispute as to whether the recreational use of the land has been challenged in any way, and there is no substantive difficulty in terms of identifying a qualifying neighbourhood within the locality. However, the frequency of the recreational use relied upon by the applicant (on the basis of the evidence available) is not sufficient to indicate that the Application Site has been used in a manner sufficient to indicate that the land was in general use by the inhabitants of Bockhanger generally (as opposed to a relatively small number of individuals). This is particularly so at the start of the relevant period, where only three users can attest to regular use of the Application Site.

58. Accordingly, it is not considered that the application meets all of the tests for registration as a Village Green as set out in section 15 of the Commons Act 2006.

Financial implications

59. The determination of Village Green applications is a quasi-judicial function of the County Council and, accordingly, any financial implications can have no bearing whatsoever on the Member Panel's decision. However, Members should be aware that, whatever decision is reached, the only right of appeal open to the parties is an application to the High Court for Judicial Review, which potentially carries significant legal costs for all concerned.

60. If Members are not satisfied with the recommendation, the Panel may refer the matter to a Public Inquiry for further consideration of the evidence. However, that approach also carries significant costs to all parties and should only be adopted where it is considered that there are material conflicts within the evidence that are irreconcilable on paper.

Recommendation

61. I recommend that the Applicant be informed that the application to register the land at Bybrook Road / The Pasture at Kennington as a Town or Village Green has not been accepted.

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Case Officer:
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Appendices

APPENDIX A – Plan showing Application Site
APPENDIX B – Photographs of the Application Site
APPENDIX C – Table summarising user evidence
APPENDIX D – Plan showing ‘consultation area’
APPENDIX E – Ordnance Survey map showing local place names