

Application to register land known as Oakwood Park at Maidstone as a new Town or Village Green

A report by the PROW and Access Service Manager to Kent County Council's Regulation Committee Member Panel on 27th February 2019

Recommendation: I recommend that the County Council refers the application to the Planning Inspectorate for determination.

Local Members: Mr. R. Bird and Mr. D. Daley (Maidstone Central) Unrestricted item

Introduction

1. The County Council has received an application to register land known as Oakwood Park at Maidstone as a new Town or Village Green from Mr. I. Cooper, Mr. P. Harper, Mrs. M. Lakeland, Mr. J. Lakeland and Mrs. J. Kehily ("the applicants"). The application, received on 25th January 2017, was allocated the application number VGA671. A plan of the site is shown at **Appendix A** to this report.
2. Members should be aware from the outset that the purpose of this report is not to determine this application, but rather to consider whether the County Council is in a position to determine this application, for the reasons which are set out in more detail below.

Procedure

3. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014.
4. 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;
5. 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).
6. 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

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.

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.

The application site

7. The area of land subject to this application (“the application site”) comprises playing fields of approximately 32 acres (13 hectares) in size, situated between Queen’s Road and Oakwood Road in the town of Maidstone. The application site is shown in more detail on the plan at **Appendix A**.
8. The application site has recently been secured by way of palisade fencing along its southern and western boundaries, thereby precluding public access (the northern and eastern boundaries already being secured by way of a stone wall and neighbouring properties). Prior to the erection of the palisade fencing, access to the site was freely available from the footway of the road crossing the Oakwood Park site.
9. Members may be wondering whether the nature of the application, as a school playing field, makes it capable of registration as a Village Green. There is some case law in this regard, notably in *R (Cotham School) v Bristol City Council* [2018] EWHC 1022 in which Judge Sir Wyn Williams decided that registration of the land as a Town or Village Green would not have precluded the carrying out of the School’s duties to provide suitable outdoor space for P.E, albeit more inconveniently. The judge rejected the contention that registration of the land was precluded by virtue of the fact that it was a school playing field (on the basis that there was no statutory incompatibility between the two uses).

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 with the application were 32 user evidence questionnaires and statements from local residents detailing their use of the application site over a period in excess of twenty years, as well as photographs of recreational activities taking place on the site. A further 61 evidence questionnaires were subsequently submitted in support of the application. The evidence refers to use of the application site for a number of recreational activities, including dog walking, blackberrying, photography and nature observation.

Consultations

12. Consultations have been carried out as required and the following responses have been received.
13. Twenty-eight local residents wrote in support of the application, with many adding to the evidence of use already submitted in support and/or confirming wider community use of it for recreational purposes over many years.

14. Three members of staff from the St. Augustine Academy (including the Principal) and local Member Mr. D. Daley wrote in objection to the application

Landowners

15. The western part of the application site is owned by the Kent County Council (as registered with the Land Registry under title number K942821) and leased to the St. Augustine Academy. The eastern part of the application site is owned by the Oakwood Park Grammar School (under title number K982273), the land having been transferred to it in 2011 by Kent County Council.

16. An objection to the application has been received from Invicta Law, representing all three of the above organisations (“the objectors”), and is made on the grounds summarised below:

- The material provided by the applicants is nowhere near sufficient to demonstrate that the relevant legal tests have been met;
- Access to the application site was via limited points which would necessarily have restricted the walking routes used on site to linear ‘rights of way’ type of use (as opposed to a wider right to recreate on the land);
- Any recreational use has predominantly been concentrated around the perimeter of the application site and has not taken place on the parts of the application site laid out as sports pitches;
- The majority of those using the site live in the immediate vicinity of it such that use has not taken place by a significant number of the inhabitants of Maidstone and, in any event, Maidstone is not a qualifying locality;
- There has not been a sufficient quantity or quality of recreational use to justify registration;
- Use of the application site has not been ‘as of right’ due to the existence of signs stating that the land is private property during the relevant period, and some use has been by virtue of implied permission (e.g. by school pupils outside of school hours);
- Village Green status is incompatible with the use of the application site as a school playing field (and would prevent it from being used as such); and
- The construction of a car park on an area excluded from the application site, which was subject to planning permission, means that the whole of the application site ought to be considered as being affected by a ‘trigger event’ for the purposes of Schedule 1A of the Commons Act 2006.

Applicant’s response to the objection

17. As required by Regulation 25(3) of the 2014 Regulations, copies of all of the representations received were sent to the applicant for comment.

18. The applicant’s position is:

- The application is soundly based on the requirements of the legislation;
- There is substantial evidence to support the application; sufficient for a registration to be made and accepted;
- The whole of the application site has been used for well over a twenty-year period for lawful sports and pastimes as shown by the submitted evidence;
- The locality is amended to Fant and Heath Wards of Maidstone Borough Council. There is considerable evidence from people within that area and areas immediately adjoining;

- When reading all of the evidence in support of the application, it is clear it covers quality and quantity in respect of lawful sports and pastimes;
- The use of the site over a long period back to the 1960's and beyond has been continually "as of right" and in no way can it be considered contentious. Nobody has ever been asked to leave the site or challenged on their use of the site; and
- There is nothing in the fact that the land is owned by the Oakwood Park Grammar School and Kent County Council, leased to St Augustine Academy which precludes a valid application for a TVG application under Section 15 of The Commons Act 2006.

Legal tests and discussion

19. The responsibility for determining applications under section 15 of the Commons Act 2006 normally rests with the County Council in its capacity as the Commons Registration Authority. However, more recently, it has been recognised that there may be circumstances in which it is not appropriate for the County Council to determine an application. Under those circumstances, the application must be referred to the Planning Inspectorate who will take on the responsibility for considering the application (including by the holding of a Public Inquiry where necessary) and issuing a decision.

20. The circumstances referred to above are set out in Regulation 26(3) of the Commons Registration (England) Regulations 2014 which states that an application must be referred to the Planning Inspectorate in cases where:

'the registration authority has an interest in the outcome of the application or proposal such that there is unlikely to be confidence in the authority's ability impartially to determine it...'

21. Critically, it is to be noted that the requirement to refer the application to the Planning Inspectorate is not a discretionary one and the County Council is under a legal duty to refer an application if the 'confidence test' (set out above) is met; Regulation 26(2) states that *'in the cases specified in paragraphs (3) [i.e. the confidence test] and (4), a registration authority **must** refer to the Planning Inspectorate for determination by it – (a) any application made to the registration authority in accordance with these Regulations...'* (emphasis added).

22. DEFRA's guidance² to Commons Registration Authorities in this respect states that:

'the registration authority should not refer a case simply because it has an interest in the outcome, but where the interest would seriously call into question the registration authority's ability to determine it impartially. An application relating to land owned by the registration authority should not qualify as the authority's role is to determine the application in accordance with the objective criteria in the 2006 Act. Nor should a registration authority refer a case simply because it (whether an officer, Member, committee or executive) has discharged a function or expressed views on a related matter in a different context. For

² Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477907/cra-guidance-201504.pdf

example, an application to register land as a new village green where the registration authority grants planning permission for development of the land or expressed support for the development. If the registration authority owns the land, there might not be confidence in its ability to impartially determine the application, but if an independent inspector is appointed to determine the application then the decision will be impartial'.

23. It is not the first time that such an issue has arisen in this county. On 22nd February 2011, the Regulation Committee Member Panel considered a case involving land known as The Long Field at Cranbrook where the application site was owned by the County Council and had been the subject of a planning application for the construction of a new care home. At the time of the meeting, the planning application had been withdrawn pending the outcome of the Village Green application, but members nonetheless agreed, on the basis of the County Council's significant interest in the outcome of that case, that the Village Green application ought to be referred to the Planning Inspectorate for determination.
24. Similarly, on 5th March 2013, the Regulation Committee Member Panel considered an application in respect of a piece of land at Bishops Green in Ashford, where the County Council (as landowner) had applied for residential development of the site. Once again, Members agreed that the County Council's significant interest in the outcome of the application made it appropriate for it to be referred to the Planning Inspectorate for determination.
25. In the current case, although no planning permission has been sought to develop the land, the erection of the fencing has, in practice, the same effect as any proposal to develop the land – i.e. to permanently exclude recreational users from the application site. The exclusion of the public benefits the County Council's use of the land for other purposes and there is therefore a clear conflict between the County Council's position as landowner and its position as the Commons Registration Authority. The fact that the local County Councillor has strongly opposed the application also adds weight to the argument that any determination by the County Council could not be viewed as entirely impartial.
26. There is an additional issue in that the objectors (including the County Council's Property Team) have been actively engaging with the applicants in an effort to seek an alternative arrangement with regard to access; the fact that these discussions have been taking place very much suggest that it is in the interests of the County Council for the Village Green application not to succeed.
27. The difficulty for the County Council in its capacity as Commons Registration Authority is that even if the applicants were to agree to withdraw the application, there is no absolute right to do so and the Regulations do not explicitly accommodate such a scenario. Based upon previous advice, the County Council would need to advertise the proposed withdrawal of the application and Members would then be faced with a difficult decision of whether or not to allow the withdrawal of an application which, if withdrawn, would be substantially to the County Council's advantage. It would arguably be very difficult for any decision by the County Council to withdraw an application

in which it had a vested interest to be viewed externally as an entirely neutral and unbiased one (as would otherwise be the case if the County Council had no interest in the land in question).

28. Finally, there is some precedent in this regard, notably in the case of land known as Moorside Fields at Lancaster³. In that case, Lancashire County Council, in its capacity as landowner, had opposed an application to register land comprising a school playing field and three adjacent plots of land as a Village Green. Part of the Village Green application site was proposed for use as an extension to the school building. The Village Green application was referred to the Planning Inspectorate, who went on to determine the application; by inference, the Inspectorate agreed that there was a sufficiently serious conflict between the Authority's function as the Commons Registration Authority and its capacity as landowner (and indeed Local Education Authority).

29. As is noted in paragraph 24 above, whilst no imminent development appears to be proposed on the application site, the erection of the fencing (at no doubt substantial cost to the landowner) has the same effect as developing the land in that it results in the permanent exclusion of public access. Any discussions with a view to restoring such access merely add weight to the proposition that the County Council could not be seen as determining the application in the entirely impartial manner required.

Conclusion

30. The options available to the Member Panel at this stage are as follows:

- To refer the matter to the Planning Inspectorate for determination (on the basis of the conflict of interest); or
- To decide that the application should be determined by the County Council in due course.

31. The Officer's firm view is that, considering the comments expressed above, it would not be appropriate under the circumstances for this application to be determined by the County Council. Indeed, the circumstances of this application appear to fall squarely within the provisions of Regulation 26(3), where the Commons Registration Authority has a significant interest in the outcome of the application, and the correct course of action in this case would be for the application to be referred to the Planning Inspectorate for determination.

32. If, however, Members are not minded to agree with the Officer's recommendation, then a further report will be put to a future meeting of the Regulation Committee Member Panel with a view to the determination of the application.

Recommendation

33. I recommend that the County Council refers the application to the Planning Inspectorate for determination.

³ *Lancashire County Council, R (on the application of) v Secretary of State for Environment, Food and Rural Affairs & Anor* [2018] EWCA Civ 721

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

Appendices

APPENDIX A – Plan showing application site