Application to register land at Grove Park Avenue in the parish of Borden 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 8th July 2018, that the applicant be informed that the application to register land at Grove Park Avenue 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 Grove Park Avenue at Borden, near Sittingbourne, as a new Town or Village Green from local resident Mr. M. Baldock ("the applicant"). The application, made on 31st May 2016, was allocated the application number VGA668. A plan of the site is shown at **Appendix A** to this report.

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.

[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 piece of land subject to this application ("the application site") is officially situated within the parish of Borden, although it is also commonly referred to as part of Sittingbourne. It consists of a strip of grassed open space of approximately 0.57 acres (0.23 hectares) in size situated at the junction of Wises Lane and London Road (A2) and extending east along a corridor between the northern side of Grove Park Avenue and the southern side of fencing abutting the London Road (A2). Access to the application site is unrestricted via the footways of Wises Lane and Grove Park Avenue. The application site is shown in more detail on the plan at **Appendix A**.

7. It is to be noted that the majority of the application site is owned by Taylor Wimpey UK Ltd. and is registered with the Land Registry under title number K91230. A rectangle of land in the north-western corner of the application site is registered to the Highways England Company Ltd. under title number K937957. Both landowners have been notified of the application, but neither has responded.

Previous resolution of the Regulation Committee Member Panel

8. Following the consultation, objections to the application were received from Swale Borough Council ("the Borough Council") and Montagu Evans LLP on behalf of Mulberry Estates Sittingbourne Ltd. ("the objector"), which is the promoter of development on land to the south of Wises Lane that may require part of the application site for highway improvements.

9. The Borough Council expressed concern regarding the impact of the Village Green application on planning for future development and noted that it would be inappropriate to designate Village Green status for the application site as it could prejudice proper planning for development needs and supporting infrastructure (on the basis that the junction of Wises Lane and the London Road (A2) was key to achieving access to a major development site to the south of the Village Green application site).

10. The second objection, from Mulberry Estates Sittingbourne Ltd., was made on the basis that the application site has been identified as highway land and was therefore was not capable of registration as a Village Green.

11. 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.

12. 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 can be found at:
https://democracy.kent.gov.uk/ieListDocuments.aspx?CId=182&MId=7810&Ver=4

The Public Inquiry

13. The Public Inquiry took place at the UKP Leisure Club at Sittingbourne on 18th and 19th April 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.

14. The Inspector subsequently produced a written report dated 8th July 2018 ("the Inspector's report") setting out her findings and conclusions. These are summarised below.

Legal tests and Inspector's findings

15. 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'?

16. In order to be qualifying use for the purpose of Village Green registration, it must have taken place 'as of right'; this means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*'). Permission in this context includes not only the express permission of the landowner, but also situations whereby use is by virtue of some existing right (e.g. where the land is specifically provided for the purposes of public recreation).

17. In this case, there is no suggestion that use of the application site took place secretively or forcibly; however, there is an issue as to whether use of the land can be considered to be in exercise of an existing right. The objector's position is that the application site is highway land and, that being the case, any use of it is therefore by virtue of the right to use it for highway purposes.

    <u>Whether the application site is highway land</u>

18. The first issue before the Inspector was whether the application site is highway land. In this regard, she heard independent oral evidence from the County Council's Senior Highway Definition Officer and considered documentary evidence, including Council records and a deed dated 28th January 1969 ("the 1969 Deed") in which the County Council agreed to take over the road now known as Grove Park Avenue and all verges (including the greater part of the application site) as a highway maintainable at the public expense.

19. Whilst there was no documented evidence to confirm that the adoption took place, she considered[3] that it had done on the basis that the County Council (and Swale Borough Council as its agent) had always maintained the land and the road itself is recorded in the List of Streets[4].

20. In respect of the small rectangle of land in the north-western corner of the application site, the Inspector was satisfied that this had been acquired by the Department of Transport in connection with he construction of the A2 and that, following the de-trunking of the A2, the ownership automatically passed to the County Council as Highway Authority under section 265 of the Highways Act 1980 (albeit that Highways England remains the registered landowner) and it has been treated as adopted highway[5].

21. She considered that in both cases the legal presumption of regularity should apply (i.e. that the authority has acted lawfully and in accordance with its duty) and recommended "*as a matter of fact that the registration authority should consider the whole of the application land as highway land*"[6].

The legal consequences of the land being highway land

22. Having concluded that the whole of the application site was highway land, the Inspector went on to consider the legal consequences of that in the context of the Village Green application.

23. Her starting point was that the statutory definition of a Village Green (both in the current Commons Act 2006 and its predecessor the Commons Registration Act 1965) has never expressly precluded highway land from being registerable as a Village Green. However, the case law in respect of the expression 'as of right' indicates that where use is permitted by the landowner, it cannot be qualifying use for the purposes of Village Green registration; indeed, it will normally only be qualifying use where it is trespassory in nature.

24. She referred to the House of Lords decision in DPP v Jones [1999] 2 AC 240 and noted that:

> *"[that case] is not to do with registration of land as a town or village green. The issue was, rather, whether the public were trespassing on highway land by holding a peaceful, non-obstructive assembly. It was held that they were not trespassing. The public highway is a public place that the public might enjoy for any reasonable purpose, provided that the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the public's primary right to pass and repass, and within those qualifications there was a public right of peaceful assembly on the highway.*

---

[3] Para 39 of the Inspector's report

[4] The List of Streets is '*a list of the street within [the] area which are highways maintainable at public expense'* required to be kept by the Highway Authority under section 36(6) of the Highways Act 1980. For Kent, this is available at: http://www.kent.gov.uk/roads-and-travel/what-we-look-after/roads/public-and-private-roads

[5] Para 40 of the Inspector's report

[6] Paras 41 and 42 of the Inspector's report

DPP v Jones is thus authority (of the highest level) that the extent of activities that may lawfully carried out on the public highway is far greater than simply using the highway to pass and re-pass. Anything reasonable can be done provided it does not obstruct the right of passage or cause a nuisance.

Applying that then to the wide ambit of lawful sports and pastimes which may be carried out on town or village greens means that a vast number (if not all) activities that are normally carried out on a town or village green may also lawfully be carried out on a highway verge. That being so, such activities would be lawful in any event on highway land and thus not capable of founding the acquisition of a prescriptive right by user 'as if of right'. Another way of putting it is that the public are not trespassing on the highway verge when they carry out these sorts of activities".

25. Her overall conclusions on this point were as follows:

"(a) There is nothing per se which precludes highway land from being registered as a town or village green;

(b) Indeed there may be in existence a number of pieces of land which are highway land which are registered, in particular there are a number of footpaths which cross town or village greens;

(c) However, qualifying user has to be 'as of right' rather than by virtue of an existing right which the public already have to use the land;

(d) The range of activities which the public may carry out on highway land is wide following DPP v Jones. The right extends to anything reasonable which does not interfere with the public's right of passage or cause a nuisance.

(e) If an activity were such as to cause a public or private nuisance, then it may not be a 'lawful' sport or pastime in any event".

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

26. 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*'[7].

27. The user evidence given at the Inquiry is set out at paragraphs 67 to 117 of the Inspector's report. That evidence indicates that the application site was used for a range of recreational activities, including ball games, children playing 'hide and seek', BBQs, frisbee, picnics and golf practice.

28. However, the key issue before the Inspector was whether any of that use could be considered 'as of right' and therefore qualifying use for the purposes of an application under section 15 of the Commons Act 2006. As set out above, for the

[7] *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

use to be 'as of right' it needed to be unconnected to the lawful use of the land as highway verge. In this regard, the Inspector concluded that[8]:

> *"the application is bound to fail on account of there being no use of the application land which can qualify as a 'lawful sports and pastime' for the purposes of acquiring a village green prescriptive right. This is because all of the activities which local residents have carried out on the land have been lawful uses of the highway verge and thus they undertook those activities by virtue of a pre-existing right they had. They were not trespassers".*

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

29. 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.

30. 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[9] 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*'.

31. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also 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*'[10].

32. In this case, it is not in dispute that the relevant locality is the parish of Borden[11], which is of course a legally recognised administrative division.

33. On the question of neighbourhood, the applicant originally relied upon 'Grove Park Avenue' but, prior to the Inquiry, also advanced two further potential neighbourhoods known as the 'Wises Lane Estate' and 'South West Sittingbourne'.

34. It was suggested by the objector that Grove Park Avenue was not, of itself, capable of constituting a qualifying neighbourhood, it being a single street and

---

[8] Paragraph 125 of the Inspector's report
[9] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[10] ibid at page 92
[11] Para 22 of the Inspector's report

therefore too small to constitute a neighbourhood for the purposes of a Village Green application. However, the Inspector disagreed with this argument and, having regard to recent case law[12], considered instead that the answer would most likely depend upon the particular characteristics of the area. She said[13]:

> *"I note that there is no limit on size for a neighbourhood (whether that may be large or small). It may well be that a single street has sufficient cohesiveness to be regarded objectively as having a distinct identity from the surrounding streets. In the case of Grove Park Avenue, there are strong factors to suggest this is so. In particular, it is a cul-de-sac and so has clear boundaries. The houses were all built together at the same time and so the residents arrived at once and formed an instant community which has stayed, as [one witness] explained. There is a Neighbourhood Watch and, although it encompasses other streets, each street has its own representatives who report to [the neighbourhood watch coordinator]. It is clear that the residents of Grove Park Avenue feel a particular identity and hold events together such as the BBQs and street parties referred to. I do not consider that Grove Park Avenue can in any way be said to be an artificial construct 'cobbled together' for the purposes for the village green application. In my opinion, Grove Park Avenue is sufficiently cohesive to be regarded as a neighbourhood in its own right".*

"a significant number"

35. 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*'[14]. 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.

36. In this regard the Inspector found that, had the recreational use submitted in support of the application been 'as of right' (which, in her opinion, it was not for the reasons set out above) then she would have been satisfied that it would have been sufficient to indicate that the land was in general use by the community[15].

(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?

37. 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.

---

[12] *R (Oxfordshire and Buckinghamshire NHS Foundation Trust) v Oxfordshire CC* [2007] EWHC 776 (Admin)
[13] Para 132 of the Inspector's report
[14] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[15] Para 137 of the Inspector's report

38. In this case, the application is made under section 15(2) of the 2006 Act and no evidence has been presented to suggest that the actual use of the application site for recreational purposes ceased prior to the making of the application. However, as stated above, it has not been possible to conclude that the recreational use taking place did so 'as of right'.

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

39. 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 on 31st May 2016. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 31st May 1996 to 31st May 2016.

40. The Inspector heard evidence in support of the application from 9 witnesses, collectively spanning the material period. Although she does not conclude specifically on this point, she was satisfied that the use of the application site was sufficient to indicate that it was in general use of the community and, by implication, throughout the material period.

Inspector's conclusion

41. The Inspector's overall conclusion was that[16]:

> *"the application should fail in full for the reason that the applicant has failed to show that:*
>
> *(i) Any of the recreational use of the land that took place during the relevant period was 'as of right'. This is because, on balance, the evidence shows that the whole of the application land is highway land. The use which took place was carried out lawfully by virtue of the public's right to use the land as highway land and thus cannot amount to use which can go towards the acquisition of a prescriptive right".*

Subsequent correspondence

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

43. The objector did not submit any comments in respect of the report.

44. The applicant disputes the Inspector's findings in respect of the small rectangle land owned by Highways England as well as her interpretation of the House of Lords decision in DPP v Jones.

45. In terms of the Highways England parcel of land, the applicant asserts that it is a matter of opinion whether or not this is considered highway land and an issue that could equally be argued both ways. In response, the Inspector notes that her finding on this point has been reached on a balance of probabilities on the basis of the evidence before her.

[16] Paragraph 138 of the Inspectors' report

46. With regard to the DPP v Jones case, the applicant's position is that whilst this case is frequently cited as authority for the proposition that the public have a wide-ranging right of access on highway land (provided there is no interference with the right to pass and repass), the decision was not unanimous, with two of the five Lords sitting on the case giving dissenting judgements. The two dissenting Lords both argued that the legal authorities clearly supported the proposition that the public's rights to use the highway are limited to passage, re-passage and anything incidental or ancillary to that right. As such, the judgement should be read such that activities that take place on the highway are not undertaken 'by right' but rather on the basis that they would not be unreasonable in certain circumstances. The decision does not create any right as such to use the highway for recreational purposes; most of the use on the Village Green application site is therefore of a nature that is tolerated as opposed to in exercise of a legal right.

47. The Inspector's response to this point is that the passage relied upon by her in the DPP v Jones case is the *ratio decidendi* (i.e. the passage that establishes the legal precedent) whilst the dissenting judgements relied upon by the applicant are not legally binding and do not carry the same weight as the *ratio decidendi*. She agrees that the test to be applied depends upon the individual circumstances of each case and the kind of activities that are expected to take place on a highway verge are different to those one would expect to see on a main road. She adds that there is no binding court judgement specifically dealing with the recreational use of highway land in the context of section 15 of the Commons Act 2006, and her job as an Inspector is to make a recommendation on the basis of the view that the courts are most likely to take.

48. As such, having carefully reviewed the applicant's comments, the Inspector remains of the view that the application should be refused in full.

Conclusion

49. The crux of the matter in this case appears to be whether the application site can be considered 'highway land', which in turn informs the conclusion as to whether use of the application site can be considered 'as of right'.

50. There can be little doubt, on the basis of 1969 Deed, that it was clearly the intention of the developer for the road now known as Grove Park Avenue and the associated verges (which form part of the application site) to become highways maintainable at the public expense. The active maintenance of the road and verge by the County Council, and the inclusion of Grove Park Avenue on the 'List of Streets' suggests beyond any reasonable doubt (and in the absence of any documentary confirmation) that the adoption took place as set out in the 1969 Deed. The rectangle of land on the north-western side of the application site, whilst excluded from the 1969 Deed, appears to have been treated the same as the remainder of the site in terms of maintenance (there being no physical delineation between the two parts) and was originally acquired by the Department of Transport for highway-related purposes. The County Council, in its capacity as Highway Authority, considers this to be highway land - indeed, it is included as such on their mapping - and therefore, on a balance of probabilities, it would not be unreasonable to conclude that it is. Accordingly, the whole of the application site appears to be highway land.

51. That being the case, it is necessary to determine whether the recreational activities that took place on the application site did so 'as of right' or whether they can be considered an extension of a 'highway-type use'. As is noted by the Inspector, there is no direct judicial authority on this issue in the context of Village Green applications and, as such, the closest guidance available is the judgement in DPP v Jones. That case was not concerned with a Village Green application, but with the question of whether a peaceful assembly on the highway verge could be considered an act of trespass. The majority judgement held that any reasonable activity that does not obstruct the highway or create a nuisance is not trespassory in nature – i.e. that the public's right to use the highway extends to such activities. Looking at the evidence of recreational use submitted in support of the application, few (if any) of the activities could properly be said to constitute a nuisance or an obstruction and, as such, it is difficult to consider those using the application site doing so as trespassers; the users had an existing right to use the land by virtue of it forming part of the highway verge, and therefore use was not 'as of right'.

52. Having carefully reviewed the Inspector's analysis of the evidence (contained in her report), it would appear that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met and the land subject to the application (shown at **Appendix A**) should not be registered as a new Village Green.

Recommendation

53. I recommend, for the reasons set out in the Inspector's report dated 8th July 2018, that the applicant be informed that the application to register land at Grove Park Avenue 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 7th July 2018
Inspector's response to applicant's comments dated 10th September 2018
Deed dated 28th January 1969 between George Wimpey Ltd. and Kent County Council