APPENDIX A

Village Green Applications

Guide to the law

The purpose of this Appendix is to provide a guide to the legislation governing the registration of land as a town or village green (referred to throughout the rest of this Appendix as 'Village Green'). The law was revised in 2006 with the introduction of the Commons Act 2006 ("the Act"). This was partly in response to series of cases in the higher courts concerning village green applications and their use in challenging development.

A registered village green has the benefit of the protection of two Victorian statutes: the Inclosure Act 1857 and the Commons Act 1876. The Inclosure Act 1857 s12 prevents nuisances on the land such as the deposit of matter on the land or injury being caused, by giving power to the parish council to bring prosecutions. The Commons Act 1876 s29 sets out that any interference with the soil of a village green will be deemed a public nuisance, unless it is provided for the better enjoyment of the green. It is this section that effectively prevents development on a Village Green.

Central Bedfordshire Council's ("the Council") involvement is that it has a statutory duty to maintain a register of village greens as the Commons Registration Authority ("the registration authority"). This duty was imposed by virtue of the Commons Registration Act 1965 and continues through the provisions of the 2006 Act. This duty includes determining applications into whether land should be included on the register.

The Act does not provide a definition of a Village Green, but does provide that land meeting the criteria below can be registered as a town or village green (an extract from the Act (Section 15) is provided in Appendix B);

<u>An outline of Section 15 of the Act</u>

It is open to any person to apply to the relevant registration authority to register land as a green under Section 15(1). But only the owner of the land may apply to register under Section 15(8).

An application under Section 15(1) must indicate which one of the following criteria is claimed to apply:

- Use continuing – Section 15(2) applies where land has been used "as of right" for lawful sports and pastimes for 20 years or more before the application is made, and this use continues at the date the application is submitted.
- Use ended no more than two years ago – Section 15(3) applies where recreational use "as of right" for 20 years or more ended on or after 6 April 2007 but no more than two years before the application is submitted.
- Use ended before 6 April 2007 – Section 15(4) makes a special transitional provision for cases where recreational use "as of right" for 20 years or more ended before 6 April 2007. In such a case, the applicant must apply within five years of the date the use "as of right" ceased. Other special arrangements apply, in this situation only, where construction works under a planning permission affecting the land began before 23 June 2006.

The registration authority must also look for evidence of:

- the other criteria in Section 15(2), (3) or (4) having been met, namely that:

  (i) a significant number of
  (ii) the inhabitants of any locality, or of any neighbourhood within a locality

(iii) have indulged… in lawful sports and pastimes
(iv) as of right
(v) on the land
(vi) for a period of at least 20 years

- where relevant, the date of cessation of such use;
- where relevant, any interruption of such use owing to statutory periods of closure;
- where relevant, any planning permission affecting the land.

If the criteria for registration are proved to be satisfied in respect of only a part or parts of the Village Green specified in the application, the registration authority may register just that part or parts

An analysis of the criteria required to be met for land to be registered as a town or village green is provided below.

(i) Significant Number

What is a significant number is to be judged on a case by case basis, following the decision in McAlpine Homes v Staffordshire County Council (2002). It does not have to be considerable or substantial. The evidence provided in support of the application should show that the purported or alleged Village Green is in general use by the local population rather than sporadic use by trespassers.

(ii) Locality, or neighbourhood within a locality

This is a concept that can be hard to grasp. It is not enough to say that the land is used; the land has to be used by people living near the land. The presence of people from outside the locality is not fatal to an application, but the predominant use should be by the local inhabitants.

A locality has been defined as an area known to the law, such as a parish or an electoral ward. This may lead to evidential problems as the area may be quite large and the question of what is a 'significant number' of that area may be raised.

For this reason the idea of the 'neighbourhood within a locality' has been introduced to the criteria. What the applicant should not do is draw an arbitrary line around all the addresses of the people who gave evidence to delineate a 'neighbourhood'. If the neighbourhood is to be relied on then it must have a certain degree of cohesion, have recognizable features. A small village within a large parish, or a distinct part of a built-up area that has retained such features as local shops, a pub or two, a church or such other features of a settled community could be considered to be a 'neighbourhood'.

(iii) Lawful sports and pastimes

What qualifies as a lawful sport or pastime has been the subject of many Court and Commons Commissioner decisions. Organised sports such as football and cricket qualify, as do informal leisure activities such as dog walking, kite flying and community events such as fetes. There is no need for the same activities to continue throughout the year and again it is how the pattern of use appears to the landowner that is important to determine whether the users appear to be exercising a right.

(iv) As of Right

This criteria used to be referred to by the Latin phrase Nec vi, nec clam, nec precario or without force, without secrecy, without permission.

An early case in a series of recent relevant litigation examined the phrase "as of right". In the Sunningwell case it was decided that the phrase did not mean that each user has to use

the land with the belief that he is entitled to do so. The court held that what was important was how the use appeared to the owner, not what the users were thinking.
As to the elements: without force – if the land is only accessible through the use of force, by breaking a gate or climbing a fence then the use will not be 'as of right'.
As to the element without secrecy – the use should be open and overt to the landowner.
The final element without permission – the use of the land must be without the permission of the landowner, which does not need to be written permission. Signs on the land stating that the use was with the permission of the landowner would be enough to negate an application. Signs forbidding entry might be sufficient as the use could be considered to be with force and therefore not 'as of right'.

A case concerning a Village Green application in respect of land in Sunderland examined the position whereby a local authority who provided sports facilities and seating and kept the grass mown. It was held that this was not sufficient to imply that permission was being granted, and that the land could be registered.

The test, as set out in another case, is how things appear to the landowner and his reactions.

The Act has a built in safeguard for situations where use of the land is challenged, by either fencing or notices. Section 15(3) allows a period of two years from the cessation of use of the land as of right for an application to be made. Section 15(7) covers the situation whereby a landowner seeks to frustrate an application by granting permission for the lawful sports and pastimes to continue once the land has already been used as of right for twenty years; the subsection states that such use is to be regarded as continuing to be 'as of right'.

(v) Land

The 2006 Act applies to all land in England other than the New Forest, Epping Forest and the Forest of Dean (Section15(1)). It states that it applies to land covered by water (Section 61(1)) the Interpretation Section), so an application that included a pond could be entertained.

(vi) For a period of twenty years

It is not the case that each user must have used the land (the subject of the application) for twenty years. The use over that time-period can be made up of as many users as is needed to present a picture of continuous use of the land by local residents for at least twenty years.

The application process

The process begins with the applicant completing and submitting a CR44 Form and evidence to the Council. There is a review of the application and then a notification exercise and objection period. The evidence is weighed up and a decision taken.

The determination of the application for a new village green is based on a consideration at the outset of the application form. An application can be rejected if the application is not properly made, or is technically deficient. An opportunity to address such a defect should be afforded to the applicant if the defect is easily remedied.

When an application is submitted it is usually accompanied by user evidence that the applicant has gathered. Sometimes this is in the form of historical research, setting out the history of the land, and sometimes this is in the form of questionnaires completed by users of the land.

If an application is initially accepted then the appropriate Town or Parish Councils are notified and the application is advertised by way of notices on the site and public notices in the relevant local newspaper. Anyone identified as a landowner in the application is also

notified. This gives an opportunity for objections to the application to be raised and also further support to be submitted during a six week notification period.

All the information is then considered. Often the evidence is overwhelmingly one-sided and the recommendation is an obvious one. If the evidence is finely balanced then a non statutory public inquiry before an expert or a planning inspector is organised. A report following the inquiry is written by the expert/inspector with a recommendation. This forms the basis of the report to the Committee with a recommendation, which is usually accepted by the Committee.

There is no set method by which an application has to be determined. Some authorities use delegated officer powers, others use a Committee or Lead Member resolution. In reaching a decision on the evidence, again there is no set process. Some authorities rely on officer judgment, others will hold a hearing before Members while others will hold a non-statutory public inquiry into the application in order for a planning inspector or an expert to hear the evidence before coming to a conclusion, which the party determining the application can accept or reject.

Rights of Appeal

When the Council decides to accept an application the land is entered on the Council's register of town or village greens. It is then open to the landowner to make an application to the Secretary of State under Section 16 of the Act to have the land de-registered, provided the land is under 200 square metres, If the land is over 200 square metres the application to the Secretary of State must include a proposal that alternative land is registered in its place. The Council is not involved in this process.

If the Council declines to accept the application the only right of appeal is a judicial review.