Annex A

Report No.
CSD14095

London Borough of Bromley

PART ONE - PUBLIC

Decision Maker:	**DEVELOPMENT CONTROL COMMITTEE**
Date:	**Wednesday 9 July 2014**
Decision Type:	Non-Urgent Non-Executive Non-Key
Title:	**LAND AT UPPER ELMERS END ROAD & CROYDON ROAD - APPLICATION FOR REGISTRATION AS A TOWN OR VILLAGE GREEN**
Contact Officer:	Marion Paine, Lawyer Tel: 020 8461 7647 E-mail: Marion.Paine@bromley.gov.uk
Chief Officer:	Director of Corporate Services
Ward:	Kelsey and Eden Park;

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1. Reason for report

The Council is the Registration Authority for town and village greens within its area. Section 15 of the Commons Act 2006 provides that land can become a new green if a significant number of the inhabitants of any locality or 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. They must continue to do so at the time of the application or meet the alternative qualifying period specified in section 15. The Council received an application dated 30th August 2013 to register land comprising the triangular area of ground bounded by Upper Elmers End Road, Croydon Road and Elmerside Road in Elmers End on the basis that it has become a Town Green. After completion of the statutory requirements, it is the duty of the Council as registration authority to decide whether or not the area should be registered as a new Town or Village Green, or whether to cause a public inquiry to be held for an Inspector to make a recommendation in this respect. The purpose of the report is to set out the legal position and the evidence for members to make that decision.

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2. RECOMMENDATION(S)

To decline to register the land as a new town or village green for the reasons set out in the report.

Corporate Policy

1. Policy Status: Existing Policy:
2. BBB Priority: Quality Environment

Financial

1. Cost of proposal: Not Applicable:
2. Ongoing costs: Not Applicable:
3. Budget head/performance centre:
4. Total current budget for this head: £
5. Source of funding:

Staff

1. Number of staff (current and additional):
2. If from existing staff resources, number of staff hours:

Legal

1. Legal Requirement: Statutory Requirement:
2. Call-in: Not Applicable: This report does not involve an Executive decision

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Customer Impact

1. Estimated number of users/beneficiaries (current and projected):

Ward Councillor Views

1. Have Ward Councillors been asked for comments? No
2. Summary of Ward Councillors comments:

3. COMMENTARY

Land, once registered as a Town or Village Green, will remain available for continued enjoyment by the inhabitants for recreational use. Registration does not in itself confer any recreational rights that did not exist prior to registration. The practical effect of registration is only to confirm the existence of such rights. Consequently, a registered Village Green is held in the same way as any other land and, although nothing should be done which would interfere with the lawful recreational activities of the local inhabitants, the owner is not required to maintain it in a suitable state for such activities. A significant consequence of registration is that the land cannot be developed in such a way as would make it impossible to exercise those rights

There is a legal framework which must be applied to any application for such a registration.

3(1) Requirements of S15 of the Commons Act 2006

The application was made by Marie Pender in terms of S15(2), which states:

15 Registration of greens

(1)Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2)This subsection applies where—

(a)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; and

(b)they continue to do so at the time of the application.

The burden of proof lies on the applicant to establish to the civil standard of balance of probabilities. Thus, in order to fulfil this requirement, the applicant must prove the various elements of the requirements, namely:

a) “A significant number…”

This does not necessarily mean substantial, but should be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers. Provided that a significant number of the inhabitants of the claimed locality or neighbourhood are among the users, it does not matter that many come from elsewhere. The requirement is to establish a clear link between the locality or neighbourhood and the proposed town or village green.

b) “… of the inhabitants of any locality…”

A “locality” cannot be created by drawing a line on a map. It must be some division of the county known to law, such as a borough, parish or manor.

c) “…or of any neighbourhood within a locality…”

Where a locality is relied on, for instance a town, it can be a relevant locality even if it is not (or is no longer) a recognisable local government unit.

d) “… have indulged as of right…”

As of right means that it is not use by force, stealth or with the licence of the owner. This does not turn upon the subjective belief of the users. The use must be judged objectively, from the standpoint of a reasonable owner.

e) "… in lawful pastimes…"

This is a composite expression which includes informal recreation such as walking, with or without dogs, and childrens play. Use that is more in the nature of a right of way, a cut-through or a shortcut will not fall to be considered as a lawful sport or pastime

f)"…on the land…"

"Land" is defined as including land covered by water, but is generally accepted as excluding buildings.

g)"…for a period of at least 20 years…"

The relevant use must generally continue throughout the whole of the 20 year period.

h)"…and they continue to do so at the time of the application."

In order to satisfy the criteria in S15(2) the qualifying use must continue at the date of the application.

3(2) The application and supporting evidence

The application may be made by any person, and should be done by completion and service of the Form 44, which contains an affidavit in support of the application and a map showing the location of the land in question.

Marie Pender, an individual who advised that she was representing the West Beckenham Residents Association made the application. There was no supporting documentation from the residents association, but this simply meant that Ms Pender should be regarded as the applicant. This has no bearing on the substance of the application.

A map was submitted showing the area in question, and the applicant identified the "locality or neighbourhood as Elmers End.

A supporting statement and statutory declaration were submitted by the applicant, together with a historic map and photographs showing the area in 1928, and a sign erected there in 1998.

The application fulfilled the basic requirements and was accepted by the Council as Registration Authority. The applicant was given the opportunity to submit evidence in support of the application, but did not do so. The Registration Authority therefore proceeded with publicising the application and requesting comment from the public.

During the consultation period **one letter in support** of the application was received. This stated that the writers had lived in Beckenham since 1977 and that they "…can confirm that the land noted has been used lawfully by a significant number of local inhabitants for these 36 years or more". The writer also stated that they had a grandparent who lived in Elmers End after the Great War and had a parent who was born in St Margaret's Road in 1923.

3(3) Opposing submissions

In the consultation period, **one letter of objection** to the application was received. The writer stated that they had "…lived in Beckenham for more than 20 years and do not remember seeing the land used for lawful sports and pastimes as mentioned in the public notice in that amount of time, it does not lend itself easily to be used for games as it has roads as boundaries and no fences." The writer goes on to day that they regard the area as a roundabout with grass and flower beds, with a building in the middle which used to be public toilets, which have been closed.

The London Borough Bromley in its capacity as landowner was advised of the application.

They responded within the consultation period as follows:-

1. "The application is currently deficient as there is no evidence whatsoever that a significant number of local residents have used the land for lawful games and pastimes; the applicant merely asserts that they have done so with no supporting evidence.
2. The plan supplied does not show the current layout of the site – I have attached a plan and aerial photograph taken from our current digital mapping system, which shows a fourth footpath crossing the land and also a reasonably substantial building in the middle of it. The building consists of the former public toilets, which have been closed down and which we are currently in the process of selling.
3. As the Inspector in the Queens Gardens TVG inquiry found (paras 56 and 57 of his report), buildings are not 'land' for the purposes of the Commons Act 2006 and should not be registered as new town greens; the toilet block must therefore be taken out of the application.
4. The application land includes public highway, as it covers the footpath running around the majority of the site. This cannot be village green as it is highway and used for passage and repassage. You may wish to check the status of the footpaths running across the land with highways."

In addition, they made the following comment in their capacity as highway authority:-

"The grassed area is surrounded by adopted highways and is maintained under the maintenance contract. The public obviously have full access to it. Having spoken to colleagues we are of the opinion that it is part of the maintainable highway. As highway it would be open and available for the public to use and the Council would maintain it…"

3(4) The applicant's response

Having received all of the above mentioned documentation, a copy was sent to the applicant together with a draft of the substance of this report, advising her of the analysis and conclusions which follow this section, and the recommendation for declining to register the land as requested. The applicant was invited to make any further submissions in respect of these documents and responded with the following points:-

" **-** I made the application as Chair of the West Beckenham Residents Association. I am sorry if I did not make my position with the Association clearer.
- You state that the plan supplied does not show the current layout of the site. The plan is a download of the current Ordnance Survey map of Elmers End Green. We were required to provide such a map (scale 1:2500 and showing the land in question in colour) under Q5 of the application form, but there was no requirement to show further detail.

- We do not consider the Green to be part of the Highway itself, but a long standing piece of open land. We consider the highway to run around the Green, which is designated under Bromley's Unitary Development Plan as protected Urban Open Space, not a highway. Part of this land is being sold to a third party and therefore is presumably not part of the "Highway", so the rest of the green space is also not part of the "Highway" "

Ms Pender also seeks to address this committee.

The points raised in this response can be dealt with as follows:-

The first and second comments address points which have had no part in the consideration of the application. The mention of the building on the site is a separate matter and the fact that it was not shown on the applicant's plan is not significant in consideration of its status.

The part of the land which is being sold to a third party comprises a building which cannot be considered as "land" for the purposes of the statute, The rest of the application site will continue to be held and maintained as it is at present, with access permitted to the public.

3(5) Analysis

Having made a valid application, it is for the applicant to show, on the balance of probabilities, that the application land fulfils all the criteria for registration.

The tests mentioned in part 1 of this document should therefore be applied.

a) "A significant number…"

The applicant has stated that residents of Elmers End have indulged in lawful sports for the requisite period of time. This was repeated by the writer of the supporting letter.

Neither of these statements is supported by evidence of numbers of users. There have been no supporting statements other than as detailed in this report, and no one came forward as a result of the publication of the application other that the writer referred to.

If we are to take it that the applicant and the supporting letter writers (2 signatories to the letter) have used the area as required, for the requisite time, this does not amount to a body of evidence that a significant number of people have done so.

There would therefore appear to be a lack of evidence to support this aspect of the definition

b) & c) "..of the inhabitants of any locality or of any neighbourhood or locality…"

Similar comments apply as in relation to the first point. With a lack of supporting evidence, it is difficult to take these points any further.

There would therefore appear to be a lack of evidence to support this aspect of the definition

d)"… have indulged as of right…"

In relation to this aspect of the definition, attention must be paid to the second comment by the Council in their capacity as highway authority.

As a highway, the right to access the area would be "by right" (ie in exercise of a legal right to do so, as opposed to "as of right".(ie without permission, force or secrecy).The public is

entitled to do anything reasonable on highway land which does not interfere with the right to pass and repass. Such activities can include lawful sports and pastimes.

In a case decided this year [*R(Barkas) v North Yorkshire County Council]*, the Supreme Court decided that *"…where the owner of the land is a local authority which has lawfully allocated land for public use (whether for a limited period or for an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority haas not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years. It would not merely be understandable why the local authority had not objected to the public use; it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private landowner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."*

This would therefore appear to preclude the registration in terms of the application.

e) "…in lawful pastimes…"

This must be more than use that is in the nature of a right of way, but can include walking, football or bird watching for example. The applicant has not given any indication of the activities which it is claimed would constitute "lawful pastimes". There would therefore appear to be no evidence to support this aspect of the definition.

The application statement refers to the recording of the land as meadows, footpaths and fields in historic records, and refers to the installation of an ornamental sign marked "Elmers End" on the land, together with some tree planting, co-funded by the local authority. It is questionable whether these activities would be classed as "lawful pastimes" in relation to the definition. In addition, they would appear to have been done with the active support of the Council as landowner, which goes back to the distinction between "by right" and "as of right").

Similarly, the applicant makes reference to the display of captured German trophies at the end of the First World War. It is questionable if this would come under the heading of "lawful pastimes" notwithstanding the point that this was not a continuing activity.

There would therefore appear to be no evidence to support this aspect of the definition

f) "…on the land…"

If there was sufficient evidence to support the other elements of the application, the plan would require to be amended to exclude the building, and possibly also the defined footpaths, particularly those at the edges of the area shown on the applicant's plan

g) & h) "…for a period of 20 years and they continue to do so at the time of the application"

Reference should be made to points a – e above.

There would therefore appear to be no evidence to support this aspect of the definition.

3(6) Conclusions

As may be seen from the analysis above, it is not considered that the application can succeed.

In the first instance, the land is regarded as maintainable highway, the definition of which is "an area of land which the public at large have the absolute right to use to 'Pass and Repass without let or hindrance". The recent Supreme Court decision indicates that land which is held by a local authority for a purpose which allows the public to have access to it, is likely to be used "by right" as opposed to "as of right".

This being the case, it would appear that the application falls at this hurdle.

For the sake of completeness, it would appear that, even if this were not the case, the application would fall generally in relation to the other strands of the test as there is a lack of supporting evidence as to the nature and extent of the claimed use of the land.

3(7) Options

The Council as Registration Authority may decide to register or decline to register the land as a new Town or Village Green on the basis of the application and the evidence before them.

Alternatively, the Council may wish to cause a Public Inquiry to be held before a suitably qualified Inspector. If an inquiry is held, the Inspector would consider the application and evidence, hear witnesses, and apply the law to the facts and then report to the Council with a recommendation as to whether or not to register the land as a new Town or Village Green.

If the applicant or landowner is not satisfied with the outcome of the application, the remedy open to them is to seek a judicial review of the decision of the Council as registration authority.

4. FINANCIAL IMPLICATIONS

If a Public Inquiry is to be held, the cost could amount to £15 – 20,000.

5. LEGAL IMPLICATIONS

Addressed in the body of the report

6. PERSONNEL IMPLICATIONS

If there was to be a Public Inquiry, then one member of staff would be required to act on behalf of the Council as Registration Authority and one on behalf of the Council as landowner, together with any staff required as witnesses.

Non-Applicable Sections:	Policy Implications
Background Documents: (Access via Contact Officer)	The file containing the application and other documents referred to in this report may be obtained from the writer and will be available to members prior to the committee