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committee DEVELOPMENT & REGULATION

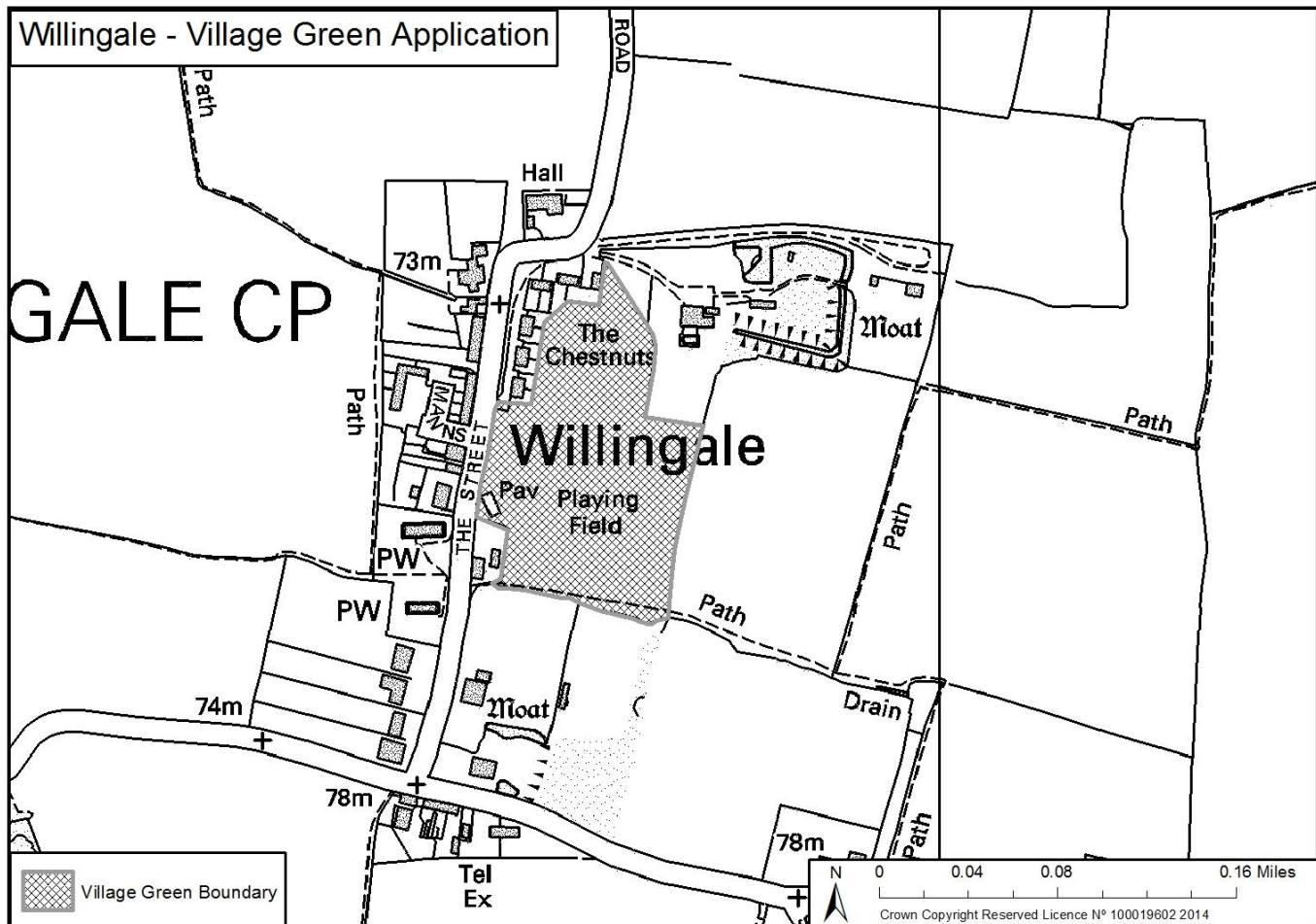
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TOWN AND VILLAGE GREENS

APPLICATION TO REGISTER LAND AT WILLINGALE GLEBE, WILLINGALE AS A TOWN OR VILLAGE GREEN

Report by Director for Essex Legal Services

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1. PURPOSE OF REPORT

To consider an application made by Willingale Parish Council under Section 15(2) of the Commons Act 2006 ("the 2006 Act") as amended, to register land at Willingale Glebe also known as Willingale Cricket Field as a Village Green.

2. BACKGROUND

Essex County Council is the commons registration authority in relation the 2006 Act and has a duty to maintain the Registers of Commons and Town and Village Greens. Under Section 15 of the 2006 Act applications can be made to the Registration Authority to amend the Register.

The County Council has received an application dated 30 April 2013 made by Willingale Parish Council to register the application site as a Town or Village Green under the provisions of Section 15(2) of the 2006 Act.

The application was advertised in the local press and on site on 8 August 2013. Notice was also served on the identified landowner belatedly on 2nd October 2013. The County Council received one objection to the application, from the landowner.

In the case of Village Green applications the County Council has a discretion whether to hold an oral hearing before confirming or rejecting the application as there is no prescribed procedure in the relevant legislation. Where there is a dispute which "is serious in nature", to use the phrase of Arden LJ in *The Queen (Whitney) v The Commons Commissioners [2004]* EWCA Civ. 951 (para 29), a registration authority "should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry".

The objection, as examined in further detail below, indicated there is a permission to use the land by the grant of a series of leases, the existence of which is not disputed. There are some cases where a "knock out blow" does arise i.e. it is possible to reject an application on legal grounds following a consideration of the papers. This potentially saves money and avoids an inquiry the outcome of which could be foregone conclusion before the hearing of any evidence. The objector's point, if maintained, may have fallen into this category but, as it has been withdrawn, this does not now have to be considered.

Arrangements had been put in hand for a non-statutory public inquiry and directions issued for the exchange of papers. On 1st October 2014 the landowner wrote to withdraw their objection.

The inquiry was cancelled and this decision now falls to be made on the untested evidence which is no longer challenged by the landowner.

In their letter of 1st October the landowner indicated that The Chelmsford Diocesan Board of Finance remained of the opinion that the use of the land has not been as of right given the permission under the leases. Their full comments are in section 6

below.

3. THE APPLICATION SITE

The application form referred to a plan on which the application site is marked and is transposed onto a map of the area on the front page of this report. The applicant described the land as 'Willingale Glebe (also known as Wilingale Cricket Field)' located 'on the east side of The Street in the centre of the village of Willingale'. It lies to the east of the main village street called the Street and forms a green space partly fronting onto that road.

There is a pavilion, used by the cricket club, on the land and the applicant has agreed that this area should not be retained as part of the application area so the application area is amended to that extent. The pavilion is shaded in grey within the application area on the application plan and can be seen on the plan on the front of this report and falls outside the area now under consideration. The remaining application area is cross hatched.

There is pedestrian access across the land to the field beyond. Public Footpath 7 is recorded on the Definitive Map and crosses the application land.

4. DEFINITION OF A TOWN OR VILLAGE GREEN

The burden of proving that the land has become a town or village green lies with the applicant and the standard of proof is the balance of probabilities. In order to add the application land to the Register of Town and Village Greens it needs to be established 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."

Because the applicant relies on s15 (2) of the 2006 Act it has to also be the case that the use continues at the time of the application.

5. THE APPLICATION

In May 2013 an application was made to the County Council to register the land as town or village green based on use between 1947 - 2013. The application stated that the land had become a Village Green for the following reasons. "Indulgence by a significant number of inhabitants of Willingale as of right in lawful sports and pastimes for a period of at least 20 years under section 15(2) of the Common Act 2006 as witnessed by enclosed signed statements showing use for activities including children's play, dog-walking and watching cricket over a period extending from 1947 to the present day. Also as witnessed by evidence of community use of the land as of right for hosting the annual village fete for at least the last 20 years. This attached evidence of community use of the land is provided by our own Willingale Community Archive Project. Also as witnessed by photographic evidence of community volunteers maintaining the land (and hedge boundaries and pedestrian gate in written statements on questionnaires) as of right for use by the residents of Willingale." Under part 11 of the form entitled 'any other information relating to the application', the application was stated to be submitted by Stuart

Bosworth, chairman of the parish council, on behalf of the parish council and the residents of Willingale 'that we represent. News of this application and requests for evidence over the last 20 years was communicated to parish residents via the parish council funded quarterly publication of 'What's On in Willingale', our parish magazine. The community in Willingale are fully supportive of this application to preserve this important open green space in the heart of our village. I do not know of any person interested in challenging this application."

With the application a letter was provided from the Cricket Club identified as the 'relevant leaseholder' and stated to be 'consenting to this application ... to register Willingale Glebe for village green status under section 15(2).'

Additional documents were provided in relation to the proceeds of the Village day, the parish magazine, photographs of the site in use and being maintained, and 21 user questionnaires.

The applicant is aware of the leases of the land.

During the period 1992 to 1997 the first lease was to the parish council. The applicant contends that the uses for the Village day and regular uses for dog walking, watching cricket, children playing, cycling and fruit picking were not covered by the terms of the lease. Based on copies provided by the objector, the first lease was in fact from 1981. The area subject to the lease is the area shown on Appendix 1 and this did not include the northern part of the application area.

During the period 1997 to 2012 and thereafter the leases were to the Cricket Club. The Cricket Club is a private members club with a membership of 20 in 2013 drawing on 18 out of the parish. They say that the parish council and parishioners had no knowledge of the terms of the lease agreement before the objection was made. Specific permission had been given by the Cricket Club for swings to be placed on the land and for the annual Village Day. They viewed this as an invitation to use the land and reinforced the impression that local people were using the land 'as of right'. The area subject to the second lease is the area shown on Appendix 2 and differs from the parish council lease in the following respects - it applies to the entire application site except for small strip at south west corner and it includes land beyond the application area at the north east corner.

The applicant says there has been no specific consent for dog walking, cycling, casual games and pastimes and fruit picking. No action has been taken to obstruct casual uses of the Glebe which has open pedestrian access. There has never been any 'private land' or 'keep off' signs or other security or permissions. They suggest that if the leases had been to the parish council they should have had a statutory duty to inform residents that the rights to use the field had changed.

They also referred to an earlier lease in 1965 with the Trustees of the Willingale (Church Field) Playing Field Association for use of the Glebe for recreational purposes. This represented various local associations including the cricket club and the parish council. They suggested that when the committee could no longer be sustained, it fell to the parish council who later no longer wished the responsibility and the Cricket Club, as main user, became the leaseholder.

6. LOCALITY

In part 6 of the application form the applicant stated this was 'within the parish of Willingale' and provided a further map. It is understood that the parish boundaries form the locality area for the application. This is a legally compliant locality for a village green application.

7. OBJECTION

The landowner is the Chelmsford Diocesan Board of Finance. They previously objected to the registration on the basis that permission to use the land had been given under three leases. They set out the details of the various permissions they had granted to use the land in the leases which analysis is set out below. The objection has now been withdrawn.

A Lease dated 21 July 1981 of the southern part of the application site with access permitted over all or remaining parts of the application site to Willingale Parish Council. The Lease was granted for use as 'village playing field' and 'organised games only' and was for 20 years. This lease was surrendered at the time the Willingale Cricket Club was incorporated on 12 October 1995 and a new term commencing on 1 June 1996 entered into shortly thereafter.

The Lease dated 14 February 1997 was entered into with Willingale Cricket Club of the application site except for small strip at south west corner and with additional land at the north east corner and subject to access over a defined route across the southern part of site. The Lease term was 15 years. The use was specified as 'playing field and public open space'. It included provision for determination by notice and development was anticipated.

A Lease dated 7 June 2012 of the application site with additional land at the north east corner was granted to Willingale Cricket Club for 15 years from 1 June 2011. The use was stated to be as 'playing field and for a public open space'.

Both the 1981 and 1997 leases reserved rights of way for the landowner's adjoining tenants.

The landowner was not aware of any steps to ensure compliance with the terms of the leases. The pavilion is assumed to have been used as such from 1992 to 2012. The landowner's solicitors confirmed that the leases provide for the use of the land as public open space, not just as a cricket ground, and that the use demonstrated has been given permission since at least 1981. They reserved their right to object on other grounds and asked for the application to be rejected.

In withdrawing their objection the solicitors for the landowner made the following comments: - "The Chelmsford Diocesan Board of Finance are firmly of the opinion that in this instance the use of the land has not been as of right given the permission that subsists or subsisted under the leases to Willingale Parish Council and/or Willingale Cricket Club since 1981 and from their further investigation in their archives before this. However, in this instance the Board has decided for

pastoral reasons not to proceed further in this matter especially given its commitment to the land remaining a cricket pitch through its recent grant of a lease with the benefit of business security of tenure to the local cricket club. Accordingly the Board hereby withdraws their objection to the application.”

8. OUTLINE OF THE RELEVANT ISSUES

The relevant issues for consideration are:

- A. Has the use been for lawful sports and pastimes?
- B. Has there been 20 years of such use?
- C. Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes or is there a neighbourhood within a locality of which a significant number of the inhabitants have so indulged?
- D. Has the user by inhabitants been as of right?

A. Has the Use Been for Lawful Sports and Pastimes?

The onus is on the applicant to establish his case with sufficient certainty as to the nature, extent and time of the alleged activities and the locality of those who are claimed to benefit from the rights. The applicant set these out in their supporting information with the application. The uses indicated in Appendix 3 would be uses which could be termed lawful sports and pastimes.

Use of the recorded highway route (footpath 7, Willingale) across the site would be taken to be by virtue of those public rights but the users do not define their use of the land in those terms. To the extent that pedestrian use and dog-walking follows any definitive map footpath, that use can be attributed to the exercise of a right of way and as such is not relevant to the village green application.

The relevant test is: “how the matter would have appeared to the owner of the land”. It needs to be demonstrable that it was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. As Lord Neuberger recently stated in the *Barkas* case (Supreme Court, 21 May 2014) ‘the persons claiming that right – ‘must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him.’ It follows that, in the cases of possible ambiguity, the conduct must bring home to the owner, not merely that ‘a right’ is being asserted, but that it is a village green right.” Applying this test, can it be concluded that the use was sufficient to bring to the notice of a reasonable landowner the fact that village green rights were being asserted? Here the landowner initially indicated that they viewed all use as being within the ambit of the lease permissions they had granted, which included a wider range of use than just use by the lessee but subsequently withdrew their objection to registration.

B. Has there been 20 years use?

Use of the claimed land is continuing at the present date. The applicant has indicated that they rely on use from 1992 to 2012.

All the users completing questionnaires were continuing to use the land when they completed their forms in 2013. During the qualifying period 13 questionnaires demonstrate use in the earliest part of the period. Taken together there is evidence of use as set out in Appendix 3 over the claimed period of 20 years up to the date of the application.

C. Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes or is there a neighbourhood within a locality of which a significant number of the inhabitants have so indulged?

The applicant indicated that the use of the site was by residents of the Willingale parish area and the applicant provided 2 plans which indicated the addresses from which the users of the claimed green who had submitted evidence questionnaires derive. This indicated that 11 of the users lived on some part of The Street in Willingale which is the road to the immediate west of the playing field. The remaining 10 users live on Wood Lane (leading out of The Street to the south east), Quires Green (further to the east, just short of the parish boundary) and Dukes Farm off Dukes Lane (leading out of The Street to the north east). Users therefore come from a reasonable spread around the claimed locality.

D. Has the user by inhabitants been as of right?

The applicant indicates there has been no challenge to use by signage on the site.

The critical issue raised by the landowner was whether the use that has taken place can be said to fall wholly within the uses which were subject to the permissions issued by them.

The 1981 lease was granted for use as 'village playing field' and 'organised games only'. This did not apply to the northern part of the application. The lease of 1997 was for use as 'playing field and public open space'. This applied to the entire application site except for small strip at south west corner and with additional land at the north east corner. The lease of 2012, which relates to the very end of the user period claimed, was for use as 'playing field and for a public open space'. This applied to the application site with additional land at north east. Considering the terms of the three leases it may have been difficult for a landowner to discern a user which was within or without the lease as the uses would encompass a wide range of activities and users. Although the landowner has not taken steps to enforce the terms of the permissions contained in the lease, the landowner may be said to have acted in a way inconsistent with accepting that the land was village green when they granted these leases. However, the landowner has effectively conceded these points by not continuing their objection and there is no imperative for the commons registration authority to look behind this.

9. ASSESSMENT OF THE EVIDENCE

The remaining issue to be decided is in relation to which parts of the application land has the applicant demonstrated use sufficient to establish the grounds for registration under the 2006 Act. As indicated above, not all the application site was

included in the 1981 lease and an area beyond the application site was included in the 1997 lease. The 1981 lease did not apply to the northern part of the application. This would mean that part of the land applied for did not have lease permission prior to 1997 but this is not entirely within the 20 year period claimed. By 1997, lease permission covered the entire application site except for a small strip at south west corner. So from 1997 to 2012 this small strip did not have lease permission, but by 2012 it was also covered.

The user evidence does not differentiate different uses on different parts of the land and the overall impression is that the land was used as one parcel... whilst it may be difficult to identify specific evidence of use over the part of the land that was not included in the 1981 leased area, as the landowner is no longer taking the permission point, the potential differences in use of the leased and not leased areas over the 20 year period appear more theoretical than real in terms of the grounds for registration.

10. LOCAL MEMBER NOTIFICATION

The local member has been consulted and any comments will be reported.

11. CONCLUSION

The user evidence is adequate to demonstrate lawful sports and pastimes. The locality claimed satisfies the various legal tests. In the absence of an objection that the leases should be persuasive evidence that use of the majority of the land applied for has been with permission from 1992 to 2012, such use and the quality of that use 'as of right' is in fact unchallenged by the landowner.

12. RECOMMENDED

That the application is accepted in relation to the land shown cross hatched on the plan at the front of this report, which comprises the application site as applied for but excluding the pavilion, and the land is registered as a town or village green.

BACKGROUND PAPERS

Application by Willingale Parish Council dated 30 April 2013 with supporting papers.

Objection by Chelmsford Diocesan Board of Finance.

Further comments by applicant and objector.

Local Member Ongar and Rural

Ref: Jacqueline Millward CAVG/81