

**DR/16/15**

committee DEVELOPMENT & REGULATION

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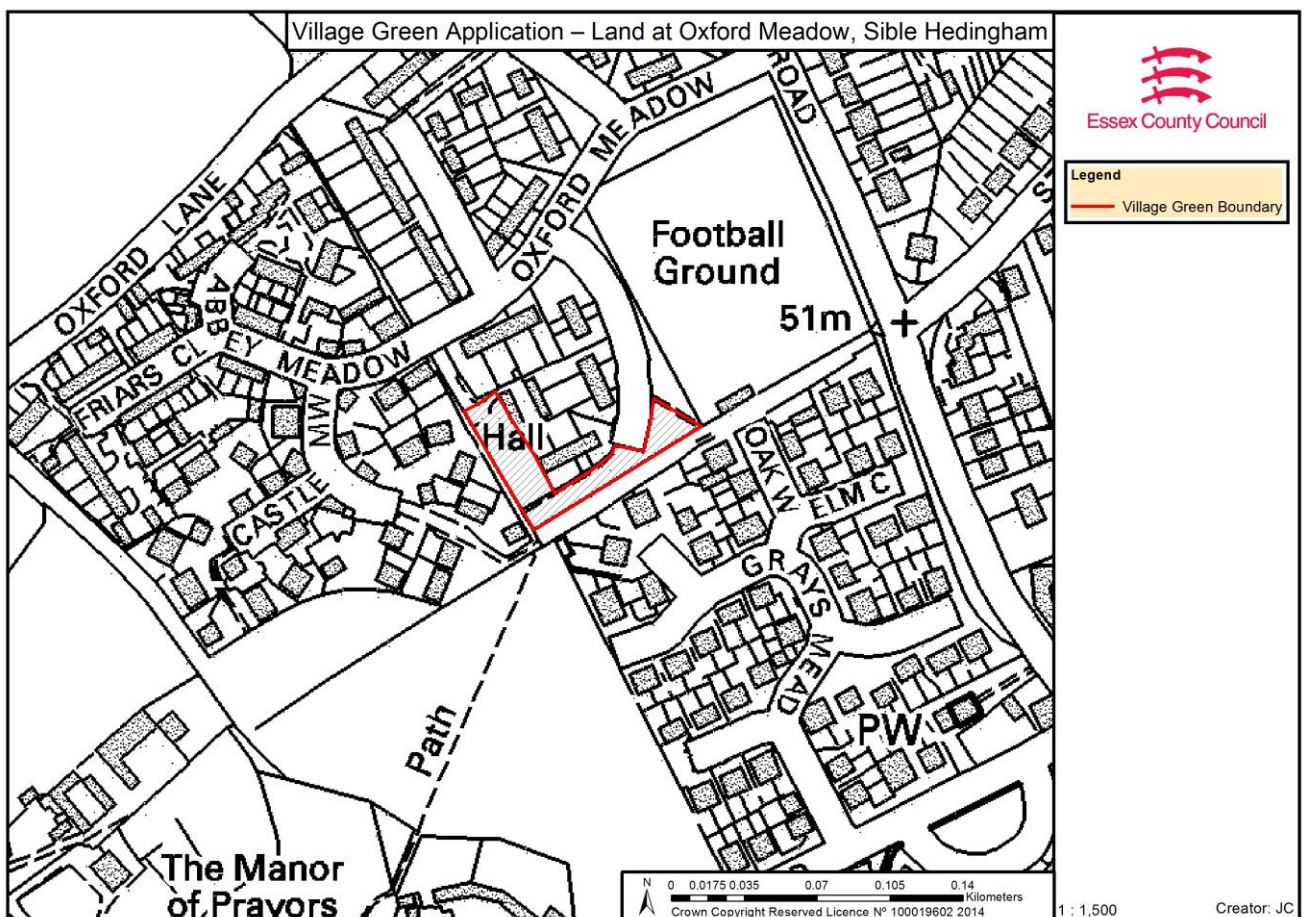
## VILLAGE GREEN APPLICATION

**Application to register land known as 'Land off Oxford Meadow', Sible Hedingham, Essex 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 Mrs Lisa Babbs of 76 Oxford Meadow, Sible Hedingham as a town or village green pursuant to Section 15(2) of the Commons Act 2006 (“the 2006 Act”).

## **2. BACKGROUND TO THE APPLICATION**

The application dated 24 April 2013 was made by Mrs Babbs as a local resident. The area applied for is on the plan at the front of this report.

Essex County Council is the Commons Registration Authority in relation to the 2006 Act and caused a non-statutory public local inquiry to be held into the matter over a period of two days on 6<sup>th</sup> and 7<sup>th</sup> January 2015 before Mr Alun Alesbury of counsel. At the inquiry evidence and submissions were given in support of the applicant and on behalf of the objector, Braintree District Council.

With the agreement of the parties all of the oral evidence was heard on oath or solemn affirmation.

The Inspector made a preliminary and unaccompanied site visit on 5th January before the start of the inquiry and made a further accompanied site visit with representatives of the parties after close of the evidence to the inquiry on 8th January 2015. In addition to going on to the site and looking at all of it during an accompanied site visit the Inspector visited parts of the area in the vicinity that had been referred to in the evidence and carried out a walk from Hedingham School to the centre of the village and then to the site with the agreement of the parties.

In addition to the oral evidence at the inquiry, the objector had provided documentary evidence in advance of the inquiry date and additional documents were produced during the inquiry. All the material submitted was taken into account by the Inspector.

The Inspector’s report is appended as Appendix 1 and he makes a recommendation at paragraphs 11.69 and 11.70 that the application should be refused so the site should not be added to the Register of Town and Village Greens.

Before the site can be included on the Register of Town or Village Green’s the Applicant must be able to satisfy the Commons Registration Authority of the criteria set out in section 15 of the 2006 Act. These are;

- Is there a qualifying locality or neighbourhood?
- Have lawful sports and pastimes taken place on the land by a significant number of inhabitants of the locality or neighbourhood?
- Have these activities been carried out “as of right” as opposed to having been done with permission or by right?
- Have the activities been carried on uninterrupted for 20 years?

### **3. THE CASE FOR THE APPLICANT**

The Applicant, Mrs Babbs, called 2 local witnesses to give evidence and gave evidence herself.

Mr David Church lives at 9 Castle Meadow, Sible Hedingham. He has lived there since 1996. He gave evidence that he had walked on the site weekly and that he had seen children playing, dog walking, team games, football, cricket, people walking, cycling and skateboarding. He had never asked for permission to use the site and nor had anyone given him permission. He had never been prevented from using the land nor had any fencing or notices been erected to prevent or discourage use. The inspector's summary of Mr Church's evidence is at paragraphs 7.7 to 7.33 of his report at Appendix 1.

Mrs Shirley Flegg lives at 25 Castle Meadow, Sible Hedingham. She has lived there since 1987. She stated that she had walked on the site daily and had participated in rambling, picnics, family games, sledging and dog walking. Furthermore she had witnessed children playing, rounders, dog walking, team games, football, cricket, picnicking, walking and cycling. She also had never been prevented from using the site nor had anything been done to prevent local residents using the site. The inspector's summary of her evidence is at paragraphs 7.34 to 7.51 of Appendix 1.

Mrs Babbs gave evidence that she has lived at 76 Oxford Meadow since 2006 but had known of the site since 2004. With her family she has used the site for games and other recreational activities almost daily. She stated that others walk across the site to reach other places and that it is used by others for dog walking and games. The inspector's summary of her evidence is at paragraphs 7.52 to 7.70 of Appendix 1.

In her submissions to the Inquiry she was ready to amend the application to exclude the Civil Defence hut and Scout hut because they were used by permission by the Objector. But she went onto to submit that the site had enjoyed uninterrupted use with no impediment for over 60 years since the estate was built. She stated that several of those local residents who had completed evidence questionnaires had lived in the village since they were born.

Mrs Babbs emphasised that the site had not been enclosed or fenced.

The Applicant had not made clear in her application form the rationale of the area she had identified on her application form as the relevant 'locality' or 'neighbourhood within a locality' as the map she had provided suggested an area of the village with relatively clear borders on its north-western and south-eastern sides but otherwise was bounded by an arbitrary east-west and north-south lines of the edges of the large scale ordnance survey extract she had provided. At the inquiry she put forward the whole of the Civil Parish of Sible Hedingham to be treated as the locality for the purposes of the Inquiry and no lesser area as a relevant neighbourhood. No objection was made to this amendment by the objector.

The inspector's summary of her submissions is at paragraphs 8.1 to 8.24 of Appendix 1.

#### **4. THE CASE FOR THE OBJECTOR**

When the application was advertised Braintree District Council objected to the application although the majority of the land in the area that they had owned had been transferred to the Greenfields Housing Association. At the inquiry they called 3 witnesses.

Mr Nicholas Day is the Parks and Open Spaces Manager of the District Council and has been since November 2004. He gave evidence of the parts of the site that had been maintained by the District Council and for which they had been used. The play area had been refurbished in 2005 and 2014. The more recent work had been partly funded by Greenfields Housing Association. Some of the signage also dated from the most recent refurbishment. The signage provided information to the users of the play equipment so did not relate to the rest of the application site. The inspector's report of his evidence is at paragraphs 9.1 to 9.9 of Appendix 1.

Mr Alan Mayle is currently Building Controls Manager with the District Council but has been an employee since 1983. His evidence included information about the various dates when housing in the area of the site had been constructed between the 1950s and early 1990s with Oxford Meadow being certificated in 1992. The inspector's report of his evidence is at paragraphs 9.10 to 9.12 of Appendix 1.

Mrs Sarah Stockings is the Property Law Manager and has been employed by the District Council since 2005. She gave evidence that the District Council's predecessor Authority, Halstead Rural District Council purchased the site in 1952 for the purpose of a housing site and by 1956 had created the Oxford Meadow housing estate. She then went on to give evidence of the various property transactions relating to the Scouts and the transfer of the District Council's housing stock to Greenfields Housing Association in 2007 followed by a transfer of the land west of the garages and 77 Oxford Meadow more recently and maintenance arrangements that have taken place since the transfers. The transfers included part of the application site. The only land now owned by the District Council was the land of the play area, transferred back to them in 2010. The inspector's report of her evidence can be read at paragraphs 9.13 to 9.35 of Appendix 1.

In the submissions of the Objector it was said that the part of the site that was used by the Scouts under permission contained in a lease could not be part of any Village Green; this equally applied to a Civil Defence hut leased to the County Council. This is on the basis that they were using it with the clear permission of the District Council and to satisfy the criteria under section 15 of the 2006 Act the local residents had to use the land "as of right" as opposed to "by right" on the basis of permission given by the District Council. The use of the land claimed was more in the nature of a route to short cut to other places rather than as a destination village green.

It was further argued by the District Council that the Applicant had failed to

establish that a significant number of qualifying residents had used the site for recreational purposes. Although there is no settled definition of “significant” it was argued that the evidence presented did not show that that threshold had been reached.

An important point was made by the Objector in relation to whether the site had been used “as of right” or “by right”. To qualify for registration the use by the residents has to be “as of right”. This means that the use of the site has to be based on long term use without permission being given by the owner or without use being lawful for some other reason.; In this case the site had been acquired by Braintree District Council’s predecessor under legislative powers in such a way to show that it had been made available for recreational purposes. The Objector argued that parts of the site were used with their permission in the case of the Scout hut and the Civil Defence hut. The part of the site that had been disposed of to Greenfields was advertised as land to be sold pursuant to statute under section 122 of the Local Government Act 1972 by the District Council and thus it could not be argued that the use was “as of right”. The inspector’s summary of the submissions of the Objector can be read at paragraphs 10.1 to 10.50 of Appendix 1.

## **5. THE ANALYSIS OF THE INSPECTOR**

The inspector needed to assess the evidence produced at the inquiry and in the process leading up to that against various tests set out in the legislation and his conclusion on each relevant aspect is set out below.

### **‘Locality’ or ‘Neighbourhood within a locality’**

The Applicant had identified the civil parish as the relevant neighbourhood. The inspector said that the commons registration authority can accept the Parish of Sible Hedingham as the qualifying “locality” for the purposes of section 15 of the 2006 Act. This still means that the applicant needs to have demonstrated that there has been a significant number of inhabitants from this area using the site in assessing the statutory test.

### **‘A significant number of the inhabitants of the locality’**

Only 3 witnesses were called for the Applicant and so could be cross-examined. There were over 100 evidence questionnaires completed by local people however the Inspector considered that, as these people could not be cross examined, their evidence has less value than those who appeared to give evidence in a contested case. The inspector considered it appropriate to discount walking users who were using parts of the land which more or less corresponded to the footpaths and footways on the land as a route of passage or to get to and from their houses. Based on the evidence of the witnesses at the inquiry, the Inspector concluded that there was an insufficient number of residents of Sible Hedingham that had used the site in the way required by section 15 of the 2006 Act. Case law has made it clear that the number had to be significant enough for a “reasonably observant landowner” to recognise that a general right was being asserted on behalf of the inhabitants rather than a small number of incidents of trespass by a small group

(per paragraph 11.12 of Appendix 1). Sible Hedingham is a large village and the applicant's case did not show anything approaching a 'significant number' of the inhabitants of that locality had made any material use of the land for lawful sports and pastimes during the 20 year period required .

### **'Lawful sports and pastimes'**

The evidence showed that most of the inhabitants using the site did so along footpath routes on the land. The Scouts had used part of the site and the north-western limb of the site had been used for car parking in connection with the Parish Church to the west. None of these activities are lawful sports and pastimes as the walking across the land has more the character of being used as a route of passage than for sports and pastimes. The Inspector concluded that the evidence did not meet this statutory criterion.

### **'On the land'**

The Inspector said that the site had not had a uniform use and different parts were used for different purposes. Although the southern part had some use by children for playing he was not satisfied that it had been used by sufficient children for sports and pastimes sufficient to constitute as of right use by a significant number of locality inhabitants. Another part of the site was used by the Scouts until 1999 and this was with permission. The southern arm of the site at its eastern end had been used by children as a play area. The area of sloping ground was only popular in a cold winter for sledging.

The small play area at the extreme eastern end of the site had been an equipped play area since 2004/5 and used as such since by younger children.

### **'For a period of at least 20 years'**

The 20 year period for the application runs from April 1993 to April 2013, the application having been received on 25<sup>th</sup> April 2013. The Inspector was not satisfied that the site had been used for sports and pastimes for this period by a significant number of inhabitants, other than perhaps the children's play area. Although some use of the site had been used for sport and pastimes it was not sufficient to satisfy the statutory test.

### **'As of right'**

The Inspector relied on the Supreme Court case of ***Barkas (R (Barkas) v North Yorkshire County Council*** [2014] UKSC 31) that was cited by the Objector and is now a leading case on the subject which decided that there can be an implied permission given to inhabitants to use land acquired by a local authority. This site was acquired under the housing legislation and the District Council, through its predecessor Council, had given an implied permission or rights to enjoy the site. Moreover the Inspector concluded that the use of the site by the Scouts was with permission. Thus the inhabitants were not using the site as of right but with the permission of the District Council so the quality of user was not of the type requisite to enable the land to be registered.

Even if he had been satisfied on some of the other legal tests he would have been inclined to conclude their use of the land was 'by right' or 'by permission' and not 'as of right' in relation to most of the site. The area around the Scout hut was slightly less clear but, even if a **Barkas**-type argument did not apply, there was unconvincing evidence to establish the other statutory criteria.

His conclusion was that registration as a town or village green is not justified because the criteria in section 15(2) of the 2006 Act are not met and his recommendation to the Commons Registration Authority is that no part of the application site should be added to the Register. The Inspector's analysis of the various statutory tests can be read in full at paragraphs at 11.1 to 11.68 of Appendix 1.

He also made reference to a very recently published judgement in **R (Newhaven Port and Properties Ltd) v East Sussex County Council** [2015] UKSC 7 and concluded that it had no material bearing on his conclusions.

## **6. LOCAL MEMBER NOTIFICATION**

The local member has been consulted. Any comments from Councillor Finch will be reported.

## **7. RECOMMENDATION**

That:

The inspector's analysis of the evidence in support of the application is accepted and his recommendation is accepted that the application made by Lisa Babbs dated 24<sup>th</sup> April 2013 is rejected for the reasons set out in the inspector's report and in summary in this report.

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### **BACKGROUND PAPERS**

Application dated 24<sup>th</sup> April 2013 with supporting papers.  
Inspector's report

Local Member: Hedingham

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Ref: Jacqueline Millward CAVG/80