

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	20 April 2016
Title:	Application for registration of land known as 'Top Field', Springvale, Kings Worthy as town or village green (Application Nos. VG 262 and VG 267)
Reference:	7457
Report From:	Director of Culture, Communities and Business Services

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1) Summary of decision area:

1.1. Hampshire County Council is the Commons Registration Authority for the purpose of exercising functions under the Commons Act 2006. Two applications have been made by Mrs. Mary Mould for the registration of land known as 'Top Field', Springvale, in the parish of Kings Worthy, as a town or village green. The landowner objects to the application. The recommendation is that a non-statutory public inquiry be held, looking at both of these two applications together, as they cover the same land.

2) Legal framework for the decision:

2.1. S.15 COMMONS ACT 2006

Registration of greens:

s.15(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.

s.15(2) This subsection applies where-

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

2.2 THE COMMONS (REGISTRATION OF TOWN OR VILLAGE GREENS) (INTERIM ARRANGEMENTS) (ENGLAND AND WALES) REGULATIONS 2007

Consideration of objections

s.6(1) Where an objection is made under section 15(1) of the 2006 Act to

register land as a town or village green, as soon as possible after the date by which statements in objection to an application have been required to be submitted, the registration authority must proceed to the further consideration of the application, and the consideration of statements (if any) in objection to that application, in accordance with the following provisions of this regulation.

(2) The registration authority –

(a) must consider every written statement in objection to an application which it receives before the date on which it proceeds to the further consideration of the application under paragraph (1); and

(b) may consider any such statement which it receives on or after that date and before the authority finally disposes of the application.

2.3 COMMONS ACT 2006, SECTION 15, AS AMENDED BY SECTION 16 OF THE GROWTH AND INFRASTRUCTURE ACT 2013 AND THE COMMONS (TOWN AND VILLAGE GREENS)(TRIGGER AND TERMINATING EVENTS) ORDER 2014

s.16 Restrictions on the right to register land as town or village green

(1) In the Commons Act 2006, after section 15B (as inserted by section 15 of this Act) insert –

“15C Registration of greens: exclusions

(1) The right under section 15(1) to apply to register land in England as a town or village green ceases to apply if an event specified in the first column of the Table set out in Schedule 1A has occurred in relation to the land (“a trigger event”).

(2) Where the right under section 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again only if an event specified in the corresponding entry in the second column of the Table occurs in relation to the land (“a terminating event”).

(8) For the purposes of determining whether an application under section 15 is made within the period mentioned in section 15(3)(c), any period during which an application to register land as a town or village green may not be made by virtue of this section is to be disregarded.

(2) Schedule 4 (which inserts the new Schedule 1A to the Commons Act 2006) has effect.”

Schedule 1A

Exclusion of right under section 15

Trigger events	Terminating events
An application for planning permission in relation to the land which would be determined under section 70 of the 1990 [Town and Country Planning] Act is first publicised in accordance with requirements imposed by any development order by virtue of section 65(1) of that Act.	(a) The application is withdrawn. (b) A decision to decline to determine the application is made under section 70A of the 1990 Act. (c) In circumstances where planning permission is refused, all means of challenging the refusal in legal proceedings in the UK are exhausted and the decision is upheld.

Agenda Item:

	<p>(d) In circumstances where planning permission is granted, the period within which the development to which the permission relates must be begun expires without the development having been begun.</p>
<p>2. An application for planning permission made in relation to the land under section 293A of the 1990 Act is first publicised in accordance with subsection (8) of that section.</p>	<p>(a) The application is withdrawn.</p> <p>(b) In the circumstances where planning permission is refused, all means of challenging the refusal in legal proceedings in the UK are exhausted and the decision is upheld.</p> <p>(c) In circumstances where planning permission is granted, the period within which the development to which the permission relates must be begun expires without the development having been begun.</p>
<p>3. A draft of a development plan document which identifies the land for potential development is published for consultation in accordance with regulations under section 17(7) of the 2004 [Planning and Compulsory Purchase] Act.</p>	<p>(a) The document is withdrawn under section 2(4) of the 2004 Act.</p> <p>(b) The document is adopted under section 23(2) and (3) of that Act...</p>
<p>4. A development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the 2004 Act.</p>	<p>(a) The document is revoked under section 25 of the 2004 Act.</p> <p>(b) A policy contained in the document which relates to the development of the land in question is superseded by another policy by virtue of section 38(5) of that Act.</p>
<p>5. A proposal for a neighbourhood development plan which identifies the land for potential development is published by a local planning authority for consultation in accordance with regulations under paragraph 4(1) of Schedule 4(B) to the 1990 Act it applies by virtue of section 38A(3) of the 2004 Act.</p>	<p>(a) The proposal is withdrawn under paragraph 2(1) of Schedule 4B to the 1990 Act (as it applies by virtue of section 38A(3) of the 2004 Act).</p> <p>(b) The plan is made under section 38A of the 2004 Act...</p>
<p>6. A proposal for a neighbourhood development plan which identifies the land for potential development is made under section 38A of the 2004 Act.</p>	<p>(a) The plan ceases to have effect.</p> <p>(b) The plan is revoked under section 61M of the 1990 Act (as it applies by virtue of section 38C(2) of the 2004 Act).</p> <p>(c) A policy contained in the plan which relates to the development of the land in question is superceded by another policy by virtue of section 38(5) of the 2004 Act.</p>
<p>7. A development plan for the purposes of section 27 or 54 of the 1990 Act, or anything treated as contained in such a plan by virtue of Schedule 8 to the 2004 Act, continues to have effect (by virtue of that Schedule) on 25th April 2013 and identifies the land for</p>	<p>The plan ceases to have effect by virtue of paragraph 1 of Schedule 8 to the 2004 Act.</p>

potential development.	
8. A proposed application for an order granting development consent under section 114 under the 2008 [Planning] Act in relation to the land is first publicised in accordance with section 48 of that Act.	(a) The period of two years beginning with the day of publication expires. (b) The application is publicised under section 56(7) of the 2008 Act...
9. An application for such an order in relation to the land is first publicised in accordance with section 56(7) of the 2008 Act.	(a) The application is withdrawn. (b) In circumstances where the application is refused, all means of challenging the refusal in legal proceedings in the UK are exhausted and the decision is upheld. (c) In circumstances where an order granting development consent in relation to the land is made, the period within which the development to which the consent relates must be begun expires without the development having been begun.
<p>“3.—(1) Schedule 1A(1) to the 2006 Act is amended as follows. (2) In the second column of the Table, in the entry corresponding to the trigger event set out in paragraph 3, after paragraph (b) insert—</p>	
<p>“(c) The period of two years beginning with the day on which the document is published for consultation expires.” . (3) In the second column of the Table, in the entry corresponding to the trigger event set out in paragraph 5, after paragraph (b) insert— “(c) The period of two years beginning with the day on which the proposal is published for consultation expires.”</p>	
<p>(4) After paragraph 7 insert— 7A. A draft of a local development order under section 61A(2)(2) of the 1990 Act which would grant permission for operational development of the land is first published for consultation in accordance with provision included (by virtue of paragraph 1 of Schedule 4A to that Act(3)) in a development order made under section 59 of that Act.</p>	<p>(a) The draft is withdrawn. (b) The order is adopted by resolution of the local planning authority (and, accordingly, comes into effect by virtue of paragraph 3 of Schedule 4A to the 1990 Act) (but see paragraph 7B of this Table). (c) The period of two years beginning with the day on which the draft is published for consultation expires.</p>
<p>7B. A local development order which grants permission for operational development of the land is adopted by resolution of the local planning authority (and, accordingly, comes into effect by virtue of paragraph 3 of Schedule 4A to the 1990 Act).</p>	<p>(a) Where the order includes (by virtue of section 61C(1) of the 1990 Act(4)) provision which, however expressed, has the effect that the grant of permission ceases to apply on a particular day, that day passes. (b) The order is revoked under section 61A(6) or 61B(8)(a) of that Act(5). (c) A revision of the order prepared under</p>

Agenda Item:

	<p>paragraph 2 of Schedule 4A to that Act(6) which provides that operational development of the land is no longer permitted is adopted.</p> <p>(d) A direction is given under provision included in the order by virtue of section 61C(2) of that Act specifying that the permission granted by the order does not apply in relation to the land.</p>
<p>7C. A draft of a neighbourhood development order which would grant permission for operational development of the land is first published for consultation by a local planning authority in accordance with regulations made under paragraph 4(1) of Schedule 4B to the 1990 Act(7).</p>	<p>(a) The draft is withdrawn under paragraph 2(1) of Schedule 4B to the 1990 Act or treated as so withdrawn by virtue of paragraph 2(2) of that Schedule.</p> <p>(b) The order is made under section 61E(4) of that Act(8) (but see paragraph 7D of this Table).</p> <p>(c) The period of two years beginning with the day on which the draft is published for consultation expires.</p>
<p>7D. A neighbourhood development order which grants permission for operational development of the land is made under section 61E(4) of the 1990 Act.</p>	<p>(a) Where the order includes (by virtue of section 61L(1) of the 1990 Act(9)) provision which, however expressed, has the effect that the grant of permission ceases to apply on a particular day, that day passes.</p> <p>(b) Where the order provides (by virtue of section 61L(5) of that Act) that development permitted by the order must begin before the end of a specified period, that period expires without the development having been begun.</p> <p>(c) The order is revoked under section 61M(1) or (2) of the 1990 Act(10)."</p>
<p>(5) After paragraph 9 insert—</p>	
<p>"10. A notice is published by virtue of section 6 of the Transport and Works Act 1992(11) that an application has been made under that section, in circumstances where the notice contains a statement that a direction for deemed planning permission in respect of the land under section 90(2A) of the 1990 Act(12) is being applied for.</p>	<p>(a) The application for a direction is withdrawn.</p> <p>(b) In circumstances where the direction is refused, all means of challenging the refusal in legal proceedings in the United Kingdom are exhausted.</p> <p>(c) In circumstances where the direction is given, the period within which the development to which the direction relates must be begun expires without the development having been begun."</p>

3) Applicant:

Mrs. M. Mould,
 3 Brooke Close,
 Kings Worthy,
 Winchester,
 SO23 7PG.

4) Landowner/objector:

Landowner: Drew Smith Limited,
Drew Smith House,
7-9 Mill Court,
The Sawmills,
Durley,
Southampton,
SO32 2EJ.

Drew Smith Limited is represented by Paris Smith LLP.

Drew Smith is the principal objector in this case.

5) Description of the land (please refer to the maps attached to this report)

5.1 The land which is the subject of the applications VG262 and VG 267 ('the Land') is shown edged blue on the plans annexed to this report. It consists of approximately 18.83 hectares of land (VG 262) and this figure includes the Land which is the subject of application VG 267 which is, in effect, a re-application. The Land is comprised in the registered title number HP 385054.

6) The applications:

6.1 The application for VG 262 was received on 13th May 2013, but took time to perfect to the point that it was considered to be 'duly made'. It states that the Land should be registered as town or village green because it has been used by a significant number of the inhabitants of a locality for lawful sports and pastimes for at least 20 years, and use of the Land still continued. The map accompanying the application showed the Land that was the subject of the application on an Ordnance Survey map, dated 2013. This shows the whole of Top Field, as it was in 2013, without any development having taken place on it, and it was initially rejected by the registration authority because it 'bled off' the paper in two places, so the precise boundary of the Land to be considered was not clear.

6.2 The application was accompanied by a statement in support of the application, a map showing access points and photographs of those points. In addition, 124 signed user evidence forms (with 48 further forms provided in 2014 and late 2015), attest to use of the Land, either by the signatories themselves, and/or members of their families. Typical uses described are 'walking', 'dog walking', 'jogging', 'wild berry picking', 'picnics', 'kite flying' and 'general play'. All of these are lawful sports and pastimes, and activities capable of supporting registration of land as a town or village green.

6.3 The County Council, acting in its capacity as the commons registration authority is required to comply with the provisions of section 16 of the Growth and Infrastructure Act 2013. Instead of, as formerly, processing the duly made application as it stood, the County Council is required to consult the local planning authority, Winchester City Council, to ascertain whether all, or any, of the land being claimed could be considered for the registration of village green rights – see details of the relevant legislation in the box at the start of this report. Accordingly,

on 2nd September 2013, enquiries were made with the Planning Department of the City Council attaching a clear map showing the Land subject to the application. The response written on 20th September was that planning permission had been issued in respect of an application for land shaded red on a different plan attached to the letter (see **Appendix 1**), and this constituted a 'trigger' event. The section of Top Field covered by this planning permission cannot be considered for the registration of village green rights. However, the Defra Guidelines of February 2014 on the effects of the Growth and Infrastructure Act advise at paragraph 95 that '*for the portion of land not subject to the exclusion, the application should proceed as usual*'. It is, therefore, the intention of the County Council to proceed to a determination of the part of the Land lying outside the red line shown on the map sent by Winchester City Council, and all interested parties were informed of this.

- 6.4 The County Council needs to operate a waiting list for the processing of village green applications, and the applicant and landowner have been advised accordingly. On 18th February 2015 it was confirmed to a representative of the landowner that application VG 262 would be given priority over other cases in the waiting list, and would be the next to be processed, because there had been a trigger event on the land, in accordance with the Council's processing priority policy.
- 6.5 In January 2015, the landowner put forward an argument that the trigger event outlined to the County Council in September 2013 also included a landscape buffer, a footpath and mitigation land, as part of a section 106 agreement (see map at **Appendix 4**, where the section 106 buffer zone is shown by purple hatching immediately south of the new development of houses, and the section 106 buffer is shown outline by a pecked red line at the south eastern corner of the land). It was argued by the landowner that it '*did not consider that the scope of a planning application for the purposes of the trigger event is limited to the red line boundary*', that is the land with planning permission. It was submitted that the area of Top Field encompassed in the section 106 works, lying within the remaining area of land still subject to determination for village green rights, should also be excluded, and asserted that there was a '*strong case*' to defeat the application on a number of grounds.
- 6.6 Since the Growth and Infrastructure Act does not mention section 106 agreements, often a feature of the planning process, the County Council approached Defra for advice on how to treat this argument. The advice eventually received was that the County Council should take its own view about any section 106 agreement and its effects on the application. The County Council went back to the local planning authority seeking clarification. The planning authority advised that their view was that the 'red line land' subject to a planning application is the type of land referred to in section 15C(1) of Schedule 1A. The red line land for the first application (categorised as a trigger event in the September 2013 letter) did not include land that was subsequently the subject of the section 106 agreement associated with that first application, which land would come within section 15C(1). This appears to mean that Winchester City Council does not consider that section 106 land is included in the description of a trigger event, but there is no case law to assist with this.
- 6.7 On 14th July 2015, a further letter was received from the Planning Department of Winchester City Council, stating that their initial response letter of 20th September 2013 had omitted to advise the County Council that there were two earlier

planning applications in respect of a slightly different area of Top Field, with the latter permission extending the time within which an application for reserved matters approval had to be made, to 28th March 2015. Because no application for reserved matters approval had been received by that date, it was considered to have expired, thereby being a corresponding 'terminating' event, as set out in Schedule 1A to the Growth and Infrastructure Act. This meant that a small section of the Land, shown on a plan as hatched blue on **Appendix 2**, had been excluded from processing. That exclusion had expired, so rendering it eligible for consideration once more. The County asked the applicant if she wished to re-apply for this small section of land, and this is now the application VG 267, relying on the evidence provided in 2013 for the original application, which was for the whole of Top Field.

- 6.8 On 27th July 2015, the local planning authority wrote to the County Council again, having apparently further re-examined the planning material relating to Top Field that was available to them. In this letter, the planning authority had identified the Winchester District Local Plan Review Adopted 2006, which contained a Policy RT.5. The significance of this is that Policy RT.5 is a Saved Policy in the Winchester District Local Plan Part 1 Joint Core Strategy Adopted March 2013. Some of the land identified in this policy (see **Appendix 3** for a map of the part of Top Field involved, marked RT.5) was within the red line land for application VG 262, and it was felt by the planning officer that this document '*may be*' a further trigger event. If this is the case, then another section of the Land has become ineligible for processing. Further inquiries were made of the City Council as to whether or not this Policy is a trigger event, and the response was that '*it is not clear cut whether Policy RT.5 would fall within trigger events 4 and 7*'. It was hoped that the County Council would appreciate why the word '*may*' was used in imparting the discovery of this new information. Members of the Regulatory Committee should be aware that Defra advice on this new legislation of 2013 is that registration authorities should ask for the required information from local planning authority for the Land applied for, and Defra has also advised registration authorities that they should rely on what they receive in response, because planning authorities are experts in their subject.
- 6.9 To summarise the problems posed by this sequence of events, officers compiled a map showing the areas of the original full application (VG 262) affected, and the areas concerned in the different planning events, that may or may not affect how these two applications are processed, at **Appendix 4**.
- 6.10 The County Council has already been put on notice by the landowner that it intends to object to this application, when the Council was asked to '*give further consideration...to your decision to register the application*'. Some of the grounds on which it intends to object are detailed in paragraph 7.1. The landowners have also responded with a fuller submission, and a summary of their objections is as follows:
- the applicant and supporters have not provided evidence to demonstrate that the whole of Top Field has been used for lawful sports and pastimes between October 1993 and October 2013, the qualifying period and, even if such use had occurred, there are interruptions to that use which prevent registration.
 - these interruptions include agricultural use – evidence has been provided by the farmer of the growing of barley, rape seed, wheat and oats, supported by documentary evidence, including payments by the Rural Payments Agency.

- any use causing damage to the crops would not qualify for village green use.
- reliance is placed on expert evidence which purports to show the land under arable cultivation for periods of time during which the users claim the land was being used for lawful sports and pastimes.
- the objector provides evidence that signage renders the use not 'as of right'.
- reference is made to a Definitive Map Modification Order for highway use around the perimeter of the field.
- arguments are set out referring to the effects of trigger events relating to planning permission and a local plan review.

6.11 In accordance with the Regulations, the landowners' objections were sent to the applicant for comment. A representation submitted by Counsel on behalf of the Top Field Action Group and endorsed by the applicant, states that there are limitations on the use of expert aerial photography, that the applicant has not had a reasonable chance to produce full witness statements, instruct an expert herself or cross-examine the objector's witnesses. The submission is not intended to be a point by point rebuttal and commends the decision to hold a non-statutory public inquiry, in view of the fact that the applicant has not been supplied with full documentation by the objector. It questions assertions made by the objector and submits that there is a serious dispute of fact and law, which it is entirely reasonable to put before an expert Inspector to obtain a recommendation.

7) Issues to be decided:

- 7.1 Officers consider that there are matters of fact and law which need to be considered in more detail, namely
- the landowner contends that use of the Land was confined to the footpaths
 - there was interruption of use by agricultural activities
 - use of gates preventing use or rendering any use by force
 - whether the section 106 land falls within the type of land described in section 15C(1) of Schedule 1A as constituting a trigger event affecting land outside the red line land
 - whether the saved Policy RT.5 is, or is not, a trigger event
- 7.2 There appear to be clear conflicts between the evidence submitted in support of the application and the arguments put forward by the landowner, conflicts which would directly affect the determination of the application. There is, therefore, a need to have this evidence tested at a non-statutory public inquiry, where witnesses will have the opportunity to attend, give evidence and be available for cross-examination. This will ensure that any future determination of these applications is made with the knowledge that the evidence has been fully tested, and both the applicant and objectors have had the opportunity of exploring the application fully, in public.
- 7.3 What exactly constitutes a trigger event has not yet been the subject of case law, since this is very recent legislation. Advice has been sought by the County Council from Defra on the matter of section 106 land, which is admitted not to have been considered by the legislation. The planning authority appears to view this as not the kind of land that falls within the wording of Schedule 1A, and the landowner considers that it does, so the registration authority will require advice

from the inspector whether it does, or does not.

- 7.4 The same applies to the saved policy described above, where the planning authority itself appears unsure about its status as a trigger event.
- 7.5 In these circumstances, officers consider that it would be unsafe to determine the application on the basis of the paper application only and that, in the interests of fairness to both parties, it is appropriate to arrange a non-statutory public inquiry, to test the evidence both for and against the application.
- 7.6 In considering the matters raised in this report, Members are welcome to inspect the representations and evidence submitted by each party.
- 7.7 Members may, of course, take the alternative view that, in the light of the nature of the arguments described, they do consider it appropriate to determine this matter without recourse to a public inquiry. If this is the case, then they can reject the recommendation and officers will bring a full report, describing the evidence both for, and against, the application to a later Committee meeting.
- 7.8 If the recommendation in this report is accepted, then it is anticipated that the non-statutory public inquiry will be held during June or July 2016.

8) Recommendation:

- 8.1 That, in connection with the application to register land known as 'Top Field', Springvale, Kings Worthy, as a town or village green (two applications VG 262 and VG 267), a non-statutory public inquiry be held, and the inspector appointed to conduct the inquiry be asked to hear evidence for and against the application, advise on matters relating to the 2013 legislation, and then to prepare a written report advising the Registration Authority whether to accede to, or to reject, the application.**

CORPORATE AND LEGAL INFORMATION ABOUT THIS DECISION:

Hampshire safer and more secure for all:	yes/no
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	yes/no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	yes/no
Corporate Improvement plan link number (if appropriate):	
OR	
This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because the County Council, in its capacity as Commons Registration Authority, has a legal duty to decide whether or not the register of towns and village greens should be amended.	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report.

(NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

(Quote list of documents here: e.g. list the relevant letters, memos, etc. and their location)

Document

File: VG 262 and VG 267

Location

Countryside Access Team
Room 0.01
Castle Avenue
Winchester
SO23 8UL

IMPACT ASSESSMENTS:

1. Equality Duty

1.1.

2. Impact on Crime and Disorder:

2.1.

3. Climate Change:

This report does not require impact assessments but, nevertheless, requires a decision because the County Council, in its capacity as Commons Registration Authority, has a legal duty to amend the register of town and village greens in the circumstances described in this report.