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Woodcock Hill village green

Full name

R (on the application of Patricia Strack on behalf of Woodcock Hill Village Green Committee) (Claimant) v *Secretary of State for the Environment, Food and Rural Affairs, Laing Homes, and Hertsmere Borough Council (Defendant and interested parties).*

Neutral citation no

[2023] EWHC 655 (Admin)

Link to judgment

www.bailii.org/ew/cases/EWHC/Admin/2023/655.html

Summary

The high court judge, Mr Justice Lane, dismissed an application for judicial review of the decision of the Secretary of State for Environment, Food and Rural Affairs to allow the deregistration and exchange of part of Woodcock Hill village green under section 16 of the Commons Act 2006 (the 2006 act). The judge considered that the inspector had not erred in law.

Background

The ten-hectare Woodcock Hill village green at Borehamwood in Hertfordshire was registered in December 2008 as VG120 on the basis of 20 years' use, as of right, for lawful sports and pastimes, by a significant number of inhabitants of the locality. The land is on the north side of the A411 Barnet Lane on the south side of Borehamwood.

The claimant, the Woodcock Hill Village Green Committee (WHVGC), had maintained the land for biodiversity until permission to do so was withdrawn by the landowner, Laing Homes, in 2018. In 2020 Laing Homes applied, under section 16 of the 2006 act, to deregister 3.3ha (about one third of the village green area) and to offer in exchange 3.6 ha on the west side of the green. The release land formerly was rough grassland with scattered trees, shrubs, and hedgerows but had become largely overgrown and difficult to access, with the exception of one well-trodden footpath. The replacement land was grazed pasture and woodland.

Laing Homes did not have an immediate purpose for the release land, claiming that the exchange was to provide a larger, and more accessible and improved village green on

adjacent land. However, it made no secret of its aspiration to develop the land for housing, although it had no proposals yet.

WHVGC and others submitted a combined objection. The society also objected.

The main arguments presented by the objectors were that the exchange land was further from the neighbourhood whose inhabitants had rights to enjoy the green for lawful sports and pastimes, and that there would be a reduction in biodiversity.

The decision of the inspector, Barney Grimshaw, was published on 24 May 2022 (ref COM/3262817). The inspector granted the application. WHCV challenged the decision in the high court, and the case was heard by Mr Justice Lane on 15 February 2023.

Section 15(2)(a) of the 2006 act provides that land may be registered as a town or village green (TVG) where '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'. (The land originally was registered under s.13(b) of the Commons Registration Act 1965, but the criteria for registration broadly were the same.)

Section 16(6) of the 2006 act provides that, in determining an application for the deregistration and exchange of common land or TVG the Secretary of State for Environment, Food and Rural Affairs (in England) shall have regard to (a) the interests of persons having rights in relation to the release land (and in particular persons exercising rights of common over it); (b) the interests of the neighbourhood; (c) the public interest; and (d) any other relevant matter.

Joe Thomas of Landmark Chambers, representing WHVGC, challenged the inspector's decision on two grounds.

First, he considered that the inspector had erred when considering the interests of the neighbourhood in section 16(6)(b). The inspector should not have stated, and then proceeded, on the basis that 'the public' has a right to use the TVG. In fact, it is only the neighbourhood identified in the application which led to registration of the TVG which have that right. In this case that neighbourhood comprised the properties in specified streets to the north and east of the green. This legal error, in his view, 'infected the inspector's overall conclusion'. The inspector concluded that there was no reason why one community should take precedence, but only one community had the right to use the land, and that community was disadvantaged by the exchange. The inspector took account of those outside the specified neighbourhood, which was an immaterial consideration in evaluating the neighbourhood test; the interests of those residents with rights was not separately evaluated.

Second, he argued that the claimant had told the inspector that there was 'a viable fallback option', that the claimant and others have the right to maintain and enhance the accessibility and ecological value of the release land. They proposed to continue doing this despite the landowner's withdrawal of consent, because nature conservation was a lawful sport and pastime. The inspector had disregarded this and assumed that the degradation of the release land would continue.

Discussion

The judge considered the grounds of the appeal. Ground 1 of the appeal was based on the submission that the phrase 'the interests of the neighbourhood' in section 16(6)(b) of the

2006 act is confined to the neighbourhood which was relied upon when the green was first registered. He said [paragraph 69]:

> Although one starts from the position that a word or phrase in a particular Act bears the same meaning throughout, that assumption can be displaced. In the present case, I am in no doubt that the use of 'neighbourhood' in section 16(6)(b) is different from the use of that word in section 15; and that a 'neighbourhood' for the purposes of section 16(6)(b) does not mean merely the 'neighbourhood within a locality' in which 'a significant number of the inhabitants … indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years'.

He continued:

> … if registration has come about as a result of use of the town or village green by the inhabitants of a 'locality' as opposed to a 'neighbourhood' in its section 15 sense [eg a registration using the definition of TVG in section 22 of the Commons Registration Act 1965, before the 2006 act took effect], then a green so registered will fall outside the scope of section 16(6)(b). There is no corresponding provision within section 16 which addresses the interests of a 'locality' in the way in which the claimant says section 16(6)(b) does, where a town or village green is registered as a result of use by the inhabitants of a neighbourhood. That points powerfully to giving 'neighbourhood' in section16(6)(b) a wider meaning' [70].

The claimant also argued that the inspector conflated the rights of the inhabitants by reference to which registration occurred and the position of those in the wider area, in particular those living to the west of the proposed replacement land. However, the judge considered that the inspector 'was plainly aware of the distinction between those with a formal legal right to use the green and the wider public' [76]. He said ' … the inspector carefully and repeatedly distinguished between the "defined neighbourhood" and the broader "neighbourhood" ' [77].

The central plank of ground 1 was that the claimant argued before the inspector that the interests of those living to the west of the replacement land were of less relevance than the interests of the inhabitants of the defined neighbourhood. The judge concluded that the statutory scheme in section 16 contained no such hierarchy. The appropriate national authority is required to have regard to three categories of interests, and there is no suggestion that the interests of persons having rights in relation to the release land (a) should be treated any differently from the interests of the neighbourhood (b), or the public (c). In any case, he said: 'In any exchange, there are likely to be winners and losers. The task facing the relevant national authority is to have regard to the positions of all, so as to decide, on balance, whether the proposed exchange is or is not "inadequate" ' [84]. He concluded that 'the inspector was considering the interests of the 'neighbourhood' in the correct way' [88].

Ground 2 contended that the inspector erred in his consideration of what the claimant described as the fallback option (WHVGC's intention to resume management of the release land without consent). The judge cautioned against the use of the concept of fallback, but the essence of the argument was the way in which the inspector dealt with the public interest concerning nature conservation. Mr Thomas argued that, whatever may have been the position in the recent past concerning maintenance and enhancement of the proposed release land, the inhabitants of the defined neighbourhood have the right to improve the land by cutting back shrubs, creating ponds and installing benches, and that the inspector failed to take this into account.

The judge considered that the inspector did have express regard to this but that he did not need to reach a conclusion on who was right, since the inspector placed weight on the fact that, in practice, little work had been carried out since permission was withdrawn by Laing Homes.

The appeal therefore failed on both grounds.

Comment

It is interesting that the 2006 act uses the term 'neighbourhood', with two different meanings, in two sections. The judge found that 'neighbourhood' in section 16 does not have the same meaning as in section 15 not least because it would make no sense if the entitlement belonged to a locality (as it does for TVGs registered under the Commons Registration Act 1965). Indeed, even if it did have that specific meaning in relation to an entitlement belonging to a neighbourhood, it must have a broader, less well-defined meaning in relation to an exchange of common land.

It is unfortunate that the recreational right-holders of the neighbourhood or locality are impliedly recognised in section 16(6)(a) of the 2006 act, which then goes on to say that particular regard is to be had to 'persons exercising rights of common over' the release land, but not persons with recreational rights over the land. The problem perhaps arises because section 16 and the relevant guidance are written with common land rather than TVGs in mind. Yet, as the judge notes [45], 'The inspector did not include a separate section regarding the interests of those having rights in relation to the release land.' While such interests (other than those exercising rights of common) do not appear to trump other considerations, including the interests of the wider neighbourhood, it is not obvious that the interests of those having rights were given express and specific consideration.

On the second ground the judge found that WHVGC had not been maintaining the green since the 'desist' notice in 2018, and therefore it was of no consequence whether it had the right to maintain the land (and did not decide the point). That said, one wonders whether the inspector was right to value the applicant's commitment to maintain the replacement land, given that it cynically had suppressed maintenance of the release land to help secure its objectives.

The society made a donation of £3,000 from its legal fund towards WHVGC's costs in the high court.