IN THE MATTER OF

RINGMER PARISH COUNCIL

VILLAGE GREEN

PROPOSAL FOR REPLACEMENT SKATEPARK

OPINION

Introduction and factual background

1. I am instructed by Ian Davison of Surrey Hills Solicitors LLP to advise Ringmer Parish Council in relation to a proposal for a replacement skatepark in the village of Ringmer.

2. The Parish Council have been seeking to reprovide an existing skatepark facility which has been lost/is due to be lost as a result of development proposals affecting land at Anchor Field. I have been provided with a site suitability study. That study identifies two suitable locations for a skatepark which are upon the Ringmer village green ("**the Green**").

3. The Green was registered in 1968. It is currently host to a war memorial, commemorative benches, drains, a children's play area with a hard surface, an asphalted area to allow cars to drive onto the Village Green, several concrete/asphalt paths and a cricket pitch. The Green also has commemorative Jubilee Gardens as well as a grade II listed well house and pump.

4. The freehold is owned by the Glyndebourne Estate. The Parish Council were granted a 25 year lease to the Parish Council in 1988 which has now determined through effluxion of time; a draft lease dated 2016 has been provided to me but this is unsigned.

5. I am asked to provide advice as to the limitations upon constructing a skatepark on the Green and specifically:

   (1) whether a skatepark could as a matter of principle be constructed on the Green;

   (2) what changes the Parish Council should seek in its leasehold arrangements to ensure the acceptability in the terms of the lease and its length properly to justify the provision of the skatepark.

6. I start by outlining the statutory regime relating to town and village greens (hereinafter referred to as village greens) before turning to the two questions asked.

Requirements under the village green legislation

Characteristics of a village green

7. The essential characteristic of a green is that the inhabitants of the town, village or parish should have an immemorial customary right to use it for exercise and recreation, including the playing of lawful games. The origins of the right lie on local law rather than the general common law which required an inference that the custom should have existed since 1189; an inference later supported by a presumption arising from a 20 year period of enjoyment.

8. Until the 1960s there was no system for the registration of village greens, although a number of acts had been passed to protect them (see further below). The need for registration was addressed by the Commons Registration Act 1965 ("**the 1965 Act**") which provided a mechanism for regularising greens. Despite the recommendations of the Royal Commission which underpinned it, the 1965 Act did not define the rights which local inhabitants enjoy over a village green or remove the ownership of the village green from the traditional landowner and vest it in the local authority.

9. The amended definition of a village green now reads:

> "…"town or village green" means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes as of right for not less than twenty years or which falls within subsection (1A) of this section.
>
> (1A) Land falls within this subsection if it is land on which for not less than 20 years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either:
>
> (a) continue to do so, or
>
> (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.""

Local inhabitants' rights over registered village green

10. Given the absence of any definition of the rights of local inhabitants over a village green within the statutory scheme, establishing the precise extent of those rights can be difficult, but the Supreme Court in ***R. (on the application of Lewis) v Redcar & Cleveland BC*** [2010] 2 A.C. 70 concluded that, once registered as a green, land could be used generally for sports and pastimes and that "sports and pastimes" formed a single composite class of recreational activities.

Landowners' rights over village green

11. As a result of the 1965 Act's choice not to vest village greens in local authorities, it remains possible for land which is registered as a village green to be bought and sold as any other land can, but subject to the rights of local inhabitants to use the land for recreation.

12. The landowner's rights are not lost as a result of registration and can be exercised in any way so long as they do not interfere with the recreational rights arising on registration: see ***TW Logistics v Essex***

CC [2021] 2 W.L.R. 383 in which the interaction was described as being subject to a "give and take principle".

Protection of village greens

13. Specific protection is given to the village greens under two Victorian statutes: section 12 of the Inclosure Act 1857 and s.29 of the Commons Act 1876.

14. Section 12 of the Inclosure Act 1857 (as amended), pursuant to a recital which records that "*it is expedient to provide summary means of preventing nuisances in town greens and village greens, and on land allotted and awarded upon any inclosure under the said Acts as a place for exercise and recreation"* creates an offence:

> "…If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, …"

and provides a power for such manure, soil, ashes or rubbish to be removed at costs to be recovered from the offender.

15. Section 29 of the Commons Act 1876 (39& 40Vict c 56) expands the scope of s.12 by deeming certain matters to be a public nuisance, including not only the inclosure of or encroachment on a village green but also the erection of structures or buildings otherwise "*than with a view to the better enjoyment of such … village green*".

> "Amendment of law as to town and village greens"
>
> "An encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section 12 of the said Inclosure Act 1857, he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned. This section shall apply only in cases where a town or village green or recreation ground has a known and defined boundary."
>
> (my emphasis)

16. It has been observed on a number of occasions that the language of the s.12 of the 1857 Act particular appears to be drawn quite wide: as DEFRA's guidance[1] observes, strictly construed, these provisions would have the effect that "*an act which causes <u>any</u> injury to a green would appear to be an offence under section 12 of the 1857 Act and <u>any</u> disturbance or interference with the soil of the green (other than for the purpose of better enjoyment of the green)".*

17. There is also an apparently freestanding prohibition on the laying of "any manure, soil, ashes, or rubbish, or other matter or thing thereon".

18. However, as DEFRA suggests and any court considering these matters is likely to focus on the questions of whether *"material harm has been caused to a green and whether there has been interference with the*

[1] "*Management and Protection of Registered Town and Village Greens*", Defra, 2010 at section 1.

public's recreational enjoyment. Other issues that might be relevant include the proportion of a green affected by the development or activity and the duration of the interference."

19. This has been, to some extent supported by the courts, albeit that the issue appears to have only arisen in the context of challenges to a decision to register. In ***R. (on the application of Laing Homes) v Buckinghamshire CC*** [2003] EWHC 1578 (Admin) at [58], Sullivan J said that mowing a green to facilitate its use for sports and pastimes would not be in breach of s.12 or s.29 of the 1876 Act.

20. In relation to s.29, the editors of ***Gadsen*** comment specifically on the question of whether the section prohibits the erection of desirable structures on village greens at 16-17:

> "The section is not altogether happily worded. Any encroachment or inclosure on a green is forbidden. However, by implication an erection on a green with a view to enhancing better enjoyment (for example, a cricket pavilion) is allowed. The erection of a building for better enjoyment is also unlikely to interrupt the use or enjoyment of the place for exercise and recreation, which is an offence under the Inclosure Act 1857 s.12, but it can hardly be other than an encroachment or an inclosure. It may be that the intention of the Act is that encroachments and inclosures are only deemed to occur when they are carried out by a person intending to deprive the inhabitants of rights over part of the land without any countervailing benefit. Thus, it would be unlawful to enclose any part of a green for private purposes or to interfere with the surface by, say, establishing a car park or to take possession by, say, driving an entranceway to a house across a green. Whilst it may be permissible to erect buildings which are directly related to the enjoyment of the place for exercise and recreation (such as a bandstand, cricket pavilion, changing rooms or toilets) other buildings which might be considered desirable community facilities (such as a village hall) would be unlawful."

Issue 1: Whether a skatepark could be constructed on the Green?

21. My instructions do not describe the features of the skatepark being considered. However, I imagine involve (in simple terms) the excavation of a bowl area which is then lined with concrete to create a multi-directional ramp area, potentially also with the creation of additional jump ramps above ground.

22. It appears to me that there are a number of aspects of such works which could potentially conflict with the legislation protecting village greens:

    (1) Pouring concrete might be said to involve laying "*any manure, soil, ashes, or rubbish, or other matter or thing thereon"* (contra s.12);

    (2) Digging a bowl might be said to be an act causing "*injury of such town or village green or land*" (s.12) or a "*disturbance of the soil*" (otherwise than with a view to the better enjoyment of such town or village green or recreation ground) (s.29);

    (3) Creating an area which can only be used for skateboarding/rollerblading might be said to amount to either an "*interruption of the use or enjoyment thereof as a place for exercise and recreation*" (s.12) or an erection (otherwise than with a view to the better enjoyment of such town or village green or recreation ground) (s.29).

23. As will be apparent, all of the potential s.29 offences are dependent on whether the works are "*with a view to the better enjoyment of… the village green*". Better enjoyment connotes some improvement in the quality of village green for its purposes of recreation and lawful sports. So, if the Parish Council were

of the view that the skatepark would improve the quality of the Green by increasing and improving the opportunities for recreation on it, then that is likely to be sufficient to satisfy section 29: it would be directly related to the enjoyment of the place for exercise and recreation. While it might be said that the skatepark results in the loss of part of the Green for the purposes of dog-walking or informal football, I note that this would be potentially be the case for creation of any kind of more formal sporting area (i.e. a multi-use games area or a cricket pitch). There might be some argument to be had if the effect of providing the skatepark was to sensibly diminish the ability of other (non-skating) members of the local community to enjoy the Green for other forms of recreation, but this does not appear to be an issue here given the size of the Green. There should be adequate opportunity to site the skatepark in such a way that only minimal conflict arises with other users[2].

24. The prohibition on "interruption" of the use or enjoyment of the Green plainly falls to be dealt with in the same way: if the provision of the skatepark improves the opportunities of local inhabitants it cannot sensibly be said to interrupt use or enjoyment.

25. I also consider that, in practice, the courts would be highly unlikely to construe section 12 of the 1857 Act to prevent digging and laying of concrete/materials for the creation of ramps when it was for the benefit of local inhabitants use and enjoyment of the Green. As my instructions note, such an approach to the statutory language would dramatically restrict what could be done to improve and make use of village greens: potentially many other features which have been created in modern times would also be an offence (for example the war memorial, the asphalt paths and the play area).

26. This seems to be why DEFRA treat the overriding purpose of s.12 (as well as s.29) as being addressed to the question of whether "*material harm has been caused to a green and whether there has been interference with the public's recreational enjoyment"*, although that might include consideration of "*the proportion of a green affected by the development or activity and the duration of the interference*."

27. While a purposive approach to s.12 has not been definitively confirmed by a court, I note that in ***R. v Oxfordshire CC Ex p. Sunningwell Parish Council*** [2000] 1 A.C. 335 at [57], Lord Hoffmann summarised the effect of s.12 and s.29 in the following terms:

> "There is virtually no authority on the effect of the Victorian legislation. The 1857 Act seems to have been aimed at nuisances (bringing on animals or dumping rubbish) and the 1876 Act at encroachments by fencing off or building on the green. But I do not think that either Act was intended to prevent the owner from using the land consistently with the rights of the inhabitants under the principle discussed in *Fitch v Fitch* 2 Esp. 543."

28. Further, I think that s.12 of the 1857 Act is capable of being read in a way that is consistent with this principle.

    (1) As noted already, the prohibition on disturbing the soil is already subject to a proviso from which it can be inferred that disturbance with a view to better enjoyment is not prohibited. Read alongside this, the reference to "injury" must in my view connote more than a physical

[2] Here I note the assessments against criteria F within the site suitability report.

disturbance of the Green and must involve consideration of whether material harm to the rights of local inhabitants has occurred.

(2) The prohibition on laying "*any manure, soil, ashes, or rubbish, or other matter or thing thereon"* must also be interpreted in the context of section as a whole, and although the categories of things which it is prohibited to lay are apparently open ended the meaning of "or other matter or thing" must be interpreted having regard to what is known as the *eiusdem generis* principle: i.e. that the generality of the general words is limited by the ascertainable class of the more particular words in which context they arise. So here, the class of manure, soil, ashes or rubbish relates to material which when left on land for a period of time start to form part of it[3]; a very different category to materials used for the purposes of developing the land into a new use (i.e. asphalt or concrete).

29. In my view, such arguments are more than enough to give confidence to the Parish Council that it is entitled to provide facilities on the Green (such as a skatepark) if (i) that facility offers opportunities for recreation and sport (ii) it is free and open to all local inhabitants and (iIi) the provision of the facility does not sensibly diminish the opportunities for other pre-existing forms of recreation on the Green.

30. In terms of explaining this as part of the Parish Council's forthcoming consultation, I would suggest relying on DEFRA's summary of the approach which the courts are likely to take (at [18] above), the extract from ***Gadsen*** quoted at [20] and an explanation of why the creation of a skatepark will not have a significant effect on the enjoyment of other users of the Green.

Leasehold arrangements

31. The Parish Council's leasehold interest in the Green appears to have expired. Although a lease is still registered with HM Land Registry under title number ESC152423, its term came to an end in 2012 and I do not see that it is likely that it could be argued that the Green is occupied for business purposes under the Landlord and Tenant Act 1954.

32. An unsigned 2016 draft lease has been provided to me but as those instructing note, this has not been executed or registered.

33. It therefore appears that the Parish Council is currently occupying the Green under either a tenancy at will or an implied periodic tenancy. In either case, it is unlikely to have any security of tenure.

34. In one sense, this may not be of significant concern: the registration of the Green prevents the landowner from doing very much with the Green and it is unlikely that they would move to disturb the skatepark once constructed – especially if they have given consent for it (which is still required as the terms of the expired lease will inform the implied terms of any period tenancy or tenancy at will).

[3] The 1857 Act predating modern awareness of the non-perishability of plastic waste

35. However, the Parish Council is likely to regard it as prudent to ensure that it has legal rights of some longevity which allow it to protect the skatepark once built. Accordingly, I would suggest that they seek to enter into a new lease which could be in similar terms to those apparently offered in 2016.

Conclusion

36. For the reasons given above:

    (1) The Parish Council can be confident that it would be lawful for it to provide a skatepark on the Green, if the tests at [29] are met.

    (2) I would advise the Parish Council to enter into a new lease of the Green prior to providing the skatepark.

37. As presently instructed, I have nothing further to add, but can be contacted in chambers if additional points arise.

Matthew Dale-Harris

Landmark Chambers

16 April 2021.

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VILLAGE GREEN

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