



COMMONS AND VILLAGE GREEN REGISTRATION PANEL

WEDNESDAY, 14 OCTOBER 2015

**11.30 AM OR AT THE CONCLUSION OF THE PLANNING COMMITTEE MEETING,
WHICHEVER is THE LATER - COUNCIL CHAMBER, COUNTY HALL, LEWES**

MEMBERSHIP - Councillors Philip Howson, Richard Stogdon and Francis Whetstone

A G E N D A

- 1 Appointment of Chair
- 2 Minutes of the meeting held on 23 April 2014 (*Pages 3 - 4*)
- 3 Disclosure of Interests
Disclosure by all Members present of personal interests in matters on the agenda, the nature of any interest and whether the Members regard the interest as prejudicial under the terms of the Code of Conduct.
- 4 Urgent items
Notification of any items which the Chair considers urgent and proposes to take at the appropriate part of the agenda.
- 5 Application for land at the corner of Harley Shute Road and Edinburgh Road, St Leonards on Sea, to be registered as a town or village green (*Pages 5 - 60*)
Report by the Assistant Director, Operations
Communities, Economy and Transport
- 6 Application for land at the Hollycroft Field, Chapel Lane, East Chilmington, to be registered as a town or village green (*Pages 61 - 90*)
Report by the Assistant Director, Operations
Communities, Economy and Transport
- 7 Any other items previously notified under agenda item 4

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6 October 2015

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REGULATORY COMMITTEE

COMMONS AND VILLAGE GREEN REGISTRATION PANEL

MINUTES of a meeting of the Commons and Village Green Registration Panel held at County Hall, Lewes, on 23 April 2014.

PRESENT - Councillors Daniel (Chair), Field and Stogdon.

1. APPOINTMENT OF CHAIR

1.1 Councillor Daniel was appointed as Chair for the meeting.

2. REPORTS

2.1 Copies of the reports and documents referred to below are contained in the minute book.

3. APPLICATION FOR LAND WEST OF STATION ROAD PLUMPTON GREEN LEWES TO BE REGISTERED AS A TOWN OR VILLAGE GREEN

3.1 The Panel considered a report by the Assistant Director, Operations – Communities, Economy and Transport.

Reasons for the decision

3.2 After consideration of all the evidence submitted to the Registration Authority, the Panel found that all of the necessary criteria has been met and therefore on the balance of probabilities they would accept the application of Plumpton Parish Council, pursuant to section 15(8) of the Commons Act 2006 to have land west of Station Road, Plumpton Green, Lewes registered as a town or village green.

3.3 RESOLVED – that the application to register the land adjacent to west of Station Road, Plumpton Green, Lewes be accepted and the land registered as a town or village green.

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Committee: Commons & Village Green Registration Panel

Date: 14 October 2015

By: Assistant Director, Economy, Transport and Environment

Title: Application for land at the corner of Harley Shute Road and Edinburgh Road, St Leonards on Sea, to be registered as a town or village green

Applicant: Peter Jones

Application No: 1358

Contact Officer: Natalie McLean 01273 482628

Local Member: Councillor Kim Forward

Recommendation

To reject the application of Mr Peter Jones, pursuant to section 15 of the Commons Act 2006, to register land at the corner of Harley Shute Road and Edinburgh Road, St Leonards on Sea as a town or village green.

This report contains three parts as follows:

Part A: Details of the Application

Part B: Summary of the Relevant Law

Part C: Application of the Relevant Law to the Evidence

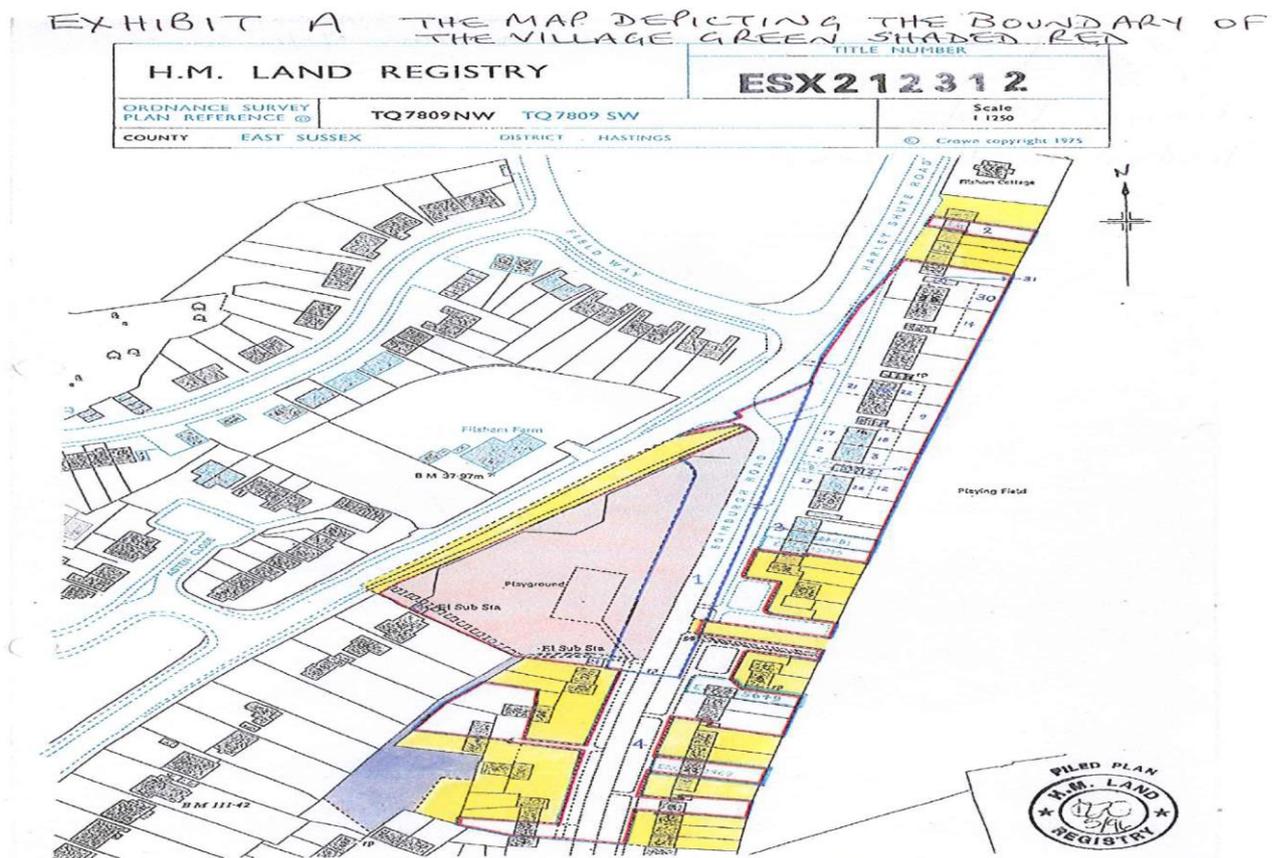
PART A – DETAILS OF THE APPLICATION

Receipt of a completed Application

1. The County Council received the completed Application on 16 March 2012. The Application seeks to register the Land as a town or village green by virtue of the operation of Section 15 (2) of the Commons Act 2006. Under that provision, land is to be registered as a town or village green where:-
 - a) 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; and
 - b) they continue to do so at the time of the application.

The Site

2. The Application land (“the Land”) is roughly triangular in shape and is located in between the apex of Edinburgh Road and Harley Shute Road, with residential properties bordering its south western side. It is shown red on the map accompanying the Application.



This official copy is issued, and shows the state of this title plan, on 14 November 2011 at 14:12:37. It is admissible in evidence to the same extent as the original (s.67 Land Registration Act 2002). This title plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground. See Land Registry Public Guide 19 - Title Plans and Boundaries. This title is dealt with by Land Registry, Coventry Office. © Crown Copyright. Produced by Land Registry. Reproduction in whole or in part is prohibited without the prior written permission of Ordnance Survey. Licence Number 100026310.

3. The Land has one owner, Amicus Horizon Limited, who own the land under title number ESX 212312. The results from the Land Registry search undertaken on 2 May 2012 can be found in the file of evidence at appendix 4 of the Background Documents.
4. Members are referred to the plan and Application at appendix 1.

Consultations and representations:

5. The Application was advertised on site and in the Hastings Observer on 30 March 2012 (appendix 2 and the photographs at appendix 6 of the Background Documents File of Evidence).
6. All interested parties, including Hastings Borough Council, were sent copies of the notice, and copies were made available to view by members of the public at County Hall, Lewes, and Hastings Borough Council offices in Hastings. These documents were held on deposit between 30 March 2012 and 11 May 2012 (copies of the correspondence sent out can be found at appendix 3 of the background documents).
7. The Local Member (at the time), Councillor Joy Waite, was informed of the Application by way of letter dated 20 March 2012 (appendix 3 of the background documents).
8. This Application has received one objection, from the landowner Amicus Horizon Limited. This will be explored in depth in Part C of this report, and the objection is attached at Appendix 2 of this report.

9. Copies of all submissions and evidence can be found in the background papers in the Members' Room.

PART B – SUMMARY OF THE RELEVANT LAW

Statutory Criteria - the Commons Act 2006

10. The Application was made pursuant to the Commons Act 2006. That Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.
11. The Application seeks to register the Land by virtue of the operation of Section 15 (2) of the 2006 Act. Under that provision, land is to be registered as a town or village green where:-
- (a) a significant number of the inhabitants of any 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.
12. The application is subject to subsection (6) which provides that in the determination of the relevant 20 year period, any period during which access to the land was prohibited to members of the public by reason of any enactment must be disregarded.
13. Therefore, for the Application to succeed, it must be established that:-
- (i) the Application Land comprises “land” within the meaning of the 2006 Act;
 - (ii) the Land has been used for lawful sports and pastimes;
 - (iii) such use has been for a period of not less than 20 years;
 - (iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
 - (v) such use has been as of right, i.e. without force, without secrecy, and without permission (*nec vi, nec clam, nec precario*).
14. There is no distinction in law between a ‘town’ or ‘village’ green. The term ‘town’ green simply tends to be used where the green is physically situated in a town or other urban area.

The Burden and Standard of Proof

15. The burden of proving that the Land has become a town or village green rests with the Applicant for registration. The standard of proof is the balance of probabilities.
16. Further, when considering whether or not the Applicant has discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in ***R. v Sunderland City Council ex parte Beresford***¹ where, at paragraph 2, he noted as follows:-

As Pill LJ. rightly pointed out in *R v Suffolk County Council ex parte Steed* (1996) 75 P&CR 102, 111 “it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ...”. It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years’ indulgence or more is met.

¹ [2004] 1 AC 889.

17. Hence, all the elements required to establish that land has become a town or village green must be properly and strictly proved by the Applicant on the balance of probabilities.

Relevant Case law on the Statutory Criteria

18. Case law has provided helpful rulings and guidance on the various elements of the statutory criteria required to be established for land to be registered as a town or village green which I shall refer to in turn below.

i) Land:

19. Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration.

20. It was stated by way of *obiter dictum* by the majority of the House of Lords in **Oxfordshire County Council v Oxford City Council**² that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered. In that case, the Trap Grounds application site did not fit the traditional image of a village green. Part of it comprised reed beds and a significant part of the remainder consisted of scrubland. It was thus “*not idyllic*” in the words of Lord Hoffmann. The majority view given by Lord Hoffmann was that the physical characteristics of land could not in themselves preclude it from being a village green. In justifying that view, he noted in particular that there was no authority, either at common law or in statute, which supported the proposition that the definition of a village green should be so restricted, and further, that any test to that effect would be inherently uncertain and too vague.³ It is also relevant to note that the Commons Act 2006 passed subsequently did not seek to further restrict the definition of a village green in that regard.

21. An alternative minority view was expressed in **Oxfordshire County Council v Oxfordshire City Council** by Lord Scott who noted that some new village greens registered did appear to be stretching the concept of a village green beyond the limits which Parliament intended. He noted the ordinary dictionary meaning of a “*green*” as being “*a piece of public or common grassy land*” which ought to be applied in constructing section 22(1) of the Commons Registration Act 1965, the predecessor to Section 15 of the 2006 Act, rather than land being registered that no one would recognise as a town or village green.⁴

22. In the recent Court of Appeal case of **R (Newhaven Port and Properties Ltd) v East Sussex County Council**⁵ it was established that the ordinary words used by Parliament to define a town or village green were broad enough not to preclude a tidal beach as constituting land for the purposes of the Commons Act 2006. In addition, it was established that use did not have to be continuous, or the main use of the land, providing that the level and nature of use had to be that which, judged objectively, would make a landowner aware that the public were asserting a right.

ii) Lawful Sports and Pastimes:

23. It was made clear in **R. v Oxfordshire County Council ex parte Sunningwell Parish Council**⁶ that “*lawful sports and pastimes*” is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children’s play. These activities can vary depending on the time of year or ‘according to changing tastes or wishes [of the user]’.⁷

² [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.

³ *Ibid* at paragraph 39.

⁴ *Ibid* at paragraphs 71 to 83.

⁵ [2013] EWCA Civ 276

⁶ [2000] 1 AC 335 at 356F to 357E.

⁷ J. Riddall, ‘Getting Greens Registered: A guide to law and procedure for town and village greens’ (2007), paragraph 43

24. However, this element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way.⁸

iii) Continuity and Sufficiency of Use over 20 Year Period:

25. The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: **Hollins v Verney**⁹.

26. It is required that the user evidence illustrates that the land subject to the application has been enjoyed for a period of at least twenty years. This period is calculated retrospectively from the date of first challenge. In the absence of a challenge the submission of the application is sufficient to bring use of the land into question. Therefore, in this case initially it will be necessary to show use from 1992 – 2012. If there is any challenge to use within this period then the relevant twenty year period shall be altered to reflect the challenge.

27. It is not vital for every user to have used the land for a period of twenty years rather it is 'necessary... that all the evidence taken cumulatively shows that there has been use by the local inhabitants for twenty years.'¹⁰

28. Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: **R. (on the application of Lewis) v Redcar and Cleveland Borough Council**.¹¹

iv) Locality or Neighbourhood within a Locality:

29. A "locality" must be a division of the County known to the law, such as a borough, parish or manor: **MoD v Wiltshire CC**,¹² **R. (on the application of Cheltenham Builders Limited) v South Gloucestershire DC**,¹³ and **R. (Laing Homes Limited) v Buckinghamshire CC**.¹⁴ A locality cannot be created simply by drawing a line on a plan: **Cheltenham Builders** case.¹⁵

30. In contrast, a "neighbourhood" need not be a recognised administrative unit. A housing estate can be a neighbourhood: **R. (McAlpine) v Staffordshire County Council**.¹⁶ However, a neighbourhood cannot be any area drawn on a map. Instead, it must have a sufficient degree of cohesiveness: **Cheltenham Builders** case.¹⁷

31. Neighbourhood may include one or more neighbourhoods, provided that they are neighbourhoods within a locality.¹⁸

v) Significant Number:

32. "Significant" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general used by the local community for lawful sports and pastimes, rather

⁸ See Sullivan J. in *R. (Laing Homes Limited) v. Buckinghamshire County Council* [2004] 1 P & CR 573 at 598.

⁹ (1884) 13 QBD 304.

¹⁰ J. Riddall, paragraph 51

¹¹ [2010] UKSC 11 at paragraph 36.

¹² [1995] 4 All ER 931 at page 937b-e.

¹³ [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.

¹⁴ [2004] 1 P & CR 573 at paragraph 133.

¹⁵ [2003] EWHC 2803 (Admin) at paragraphs 41 to 48.

¹⁶ [2002] EWHC 76 (Admin).

¹⁷ [2003] EWHC 2803 (Admin) at paragraph 85.

¹⁸ *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438

than occasional use by individuals as trespassers: **R. (McAlpine) v Staffordshire County Council**.¹⁹

vi) As of Right

33. Use of land “as of right” is a use without force, without secrecy and without permission. It was made clear in **R. v Oxfordshire County Council ex parte Sunningwell Parish Council**²⁰ that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

34. “Force” may mean physical force to gain access to land, for example by breaking a padlock or cutting down a fence. In **Cheltenham Builders** it was also confirmed that force may not just mean violent acts, but also use of the land subsequent to the landowner signifying his objection to use of it.²¹

35. There has been no judicial comment on the meaning of use “without secrecy” and accordingly it should be interpreted in its ordinary meaning: open use which is capable of being noticed by the landowner.²²

36. “Permission” can be expressly given or be implied from the landowner’s conduct, but it cannot be implied from the mere inaction or acts of encouragement of the landowner: **R. v Sunderland City Council ex parte Beresford**.²³ Tolerance does not imply consent.

PART C – APPLICATION OF THE RELEVANT LAW TO THE EVIDENCE:

Application of the Commons Act 2006 and Caselaw

a) Land

37. The Application has identified a sufficiently defined area of land for registration, as can be seen by the plan at paragraph 2 of this report.

b) Local inhabitants of any locality or neighbourhood within a locality

38. The user evidence questionnaires (appendix 5) contained a question which attempts to illustrate the cohesiveness of the local community by asking the user to tick boxes as to what recognisable facilities are available to the inhabitants of the locality. A list of seven facilities are stated including school, community hall, church and shops. There is also a box inviting the addition of information on any other facilities that are available. The vast majority of users completed this section and the findings are in the below table 1.

Table 1 Recognisable facilities available to inhabitants in the local community

Features	School	Church	Shops	Public House	Sports Facility	Community Hall	Community Association
No. of Users	40	28	38	40	1	4	1

39. The above table indicates that the area immediately surrounding the Land has the template features which illustrate the cohesiveness of a local community, with 40 users stating the presence of a school and public house, and 38 the presence of shops.

¹⁹ [2002] EWHC 76 (Admin) at 77.

²⁰ [2000] 1 AC 335.

²¹ [2003] EWHC 2803 (Admin) at paragraph 91.

²² J. Riddall, paragraph 29

²³ [2004] 1 AC 889.

40. The West St. Leonards Ward, within the town of Hastings, is identified as the claimed locality. A Ward is capable of amounting to a locality. 41 out of 42 users are resident in this Ward (the 42nd being the then local councillor), and it is considered that, on the balance of probabilities, the Land is enjoyed by the inhabitants of a locality.
41. Furthermore, the applicant cites the central section of the West St Leonards Ward as the specific neighbourhood within a locality. Whilst the area depicted between the arbitrary red lines drawn by the applicant would perhaps have too high a population to consider 42 users as a 'significant number', examination of the user evidence shows that 41 users, excluding the local councillor, live within 1km of the Land, with the vast majority living within 500 metres (appendix 3 to this report). The area highlighted by the red lines on the plan of West St Leonards Ward (appendix 4 to this report) places the Land in the centre, equidistant from each boundary by approximately 600 metres. However the vast majority of the residents live in the area between Asten Close and Edinburgh Road (39 of 42), an area of approximately 0.25 km².
42. Table 1 supports that the area surrounding the Land is sufficiently cohesive, coupled with the proximity of the users submitting evidence forms, so as to make a local community within the Ward and therefore satisfy this limb of the section 15(2) test.
43. It is also of note that it is not necessary for the land to only be enjoyed by local residents rather it is sufficient that the land is used 'predominantly by inhabitants of the [locality].'²⁴

c) Lawful sports and pastimes on the land

44. There is a question on the user evidence questionnaires which asks the user to list all the activities they have seen taking place on the land. There are approximately nineteen listed activities including dog walking, children playing and football. Table 2 outlines the specific findings:

Table 2 Activities participated in on the Land

Activity	No. of Users	Activity	No. of Users
Football	30	Cricket	16
Picnicking	10	Socialising	7
Children Playing	33	Cycling	17
Dog Walking	22	Rounders	6
Kite Flying	9	Frisbee	3
Gliders	1	Ball games	2
Tennis	1	Scout Groups	1
Police Neighbourhood Watch	1	Birthday Parties	1
Walking	8	Skateboarding	3
Scoters	1		

45. The three most frequent activities witnessed are children playing (33 users), football (30 users) and dog walking (22 users). Other common activities participated in or witnessed included cycling and cricket.
46. In light of the **Sunningwell** case the activities referred to in paragraphs 44 and 45 are suitable to be considered as lawful sports and pastimes. On the balance of probabilities there is sufficient evidence to illustrate that lawful sports and pastimes have been enjoyed on the Land. Accordingly, this element of the test has been satisfied.

²⁴ *R v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council* [2000] 1 A.C. 335

d) For a period of at least 20 years

47. All 42 of the user evidence forms submitted records use of the Land for a period in excess of twenty years - some of which demonstrate use in excess of fifty years. Whilst a considerable amount of user evidence states the Land to be enjoyed frequently (28 of the users state weekly use), there is not a requirement to show use occurred at such a rate, rather the land 'must have been used and available... when needed.'²⁵ The relevant twenty year period is 1992-2012, with this Application bringing the status of the land in to question. Table 3 illustrates the specific findings regarding length of use, and table 4 regarding frequency.

Table 3 Length of use by users submitting evidence

No. of Years	20 years or more	30 years or more	40 years or more	50 years or more
No. of Users	42	18	6	5

Table 4 Frequency of Use

Frequency	Daily	Weekly	Monthly	Yearly
No. of Users	7	28	4	3

48. Upon examination of the user evidence forms it is submitted that, on the balance of probabilities, use of the claimed land has been enjoyed for a period of at least twenty years.

e) Have indulged as of right

49. Once it has been established that those who have used the land are of a locality it must be established that they have enjoyed the Land as of right. The meaning of 'as of right' has received legal clarification from Lord Hoffmann, who was of the opinion that it should be construed to mean, 'not by force, nor stealth, nor the licence of the owner.'²⁶ It has taken this meaning because it is not reasonable for the owner to resist actions of user because;

rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user²⁷

50. The decision of the Supreme Court in **Redcar**²⁸ further clarified the law with Lord Brown being of the opinion that there is 'no good reason to superimpose upon the conventional tripartite test'²⁹ for the registration of land as a town or village green. Accordingly, each arm of the test shall be identified and analysed individually. For use to be as of right each part must be satisfied.

(i) Not by force

51. The parcel of land in question does not have any fences or obstructions preventing access to it from members of the public and is in effect open land - thus it would be impossible to gain access via physical force. In addition, there is no evidence of the landowner signifying its objection to use of the land. Accordingly, use has not been by force and this part of the test has been satisfied.

(ii) Not in secrecy

²⁵ *Ibid* at paragraph 52

²⁶ *R v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council* [2000] 1 A.C. 335

²⁷ *Ibid*

²⁸ *R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and Another* [2010] 2 A.C. 70

²⁹ *Ibid* at para. 107

52. The land has been used frequently and openly by members of the public and we have no reason to believe this has been performed in secrecy. Therefore this part of the test has also been satisfied.

(iii) Not with permission

53. The user evidence questionnaire specifically asks if permission was ever sought for activities on the Land. The users consistently responded that no permission was ever sought or indeed obtained. However it is submitted that there are issues surrounding permission which affect the outcome of this application.

Pre 1996

54. The Land was purchased by Hastings Borough Council (then the County Borough of Hastings) in 1950. The conveyance (found in appendix 3 of the background documents) between the Kites and Hastings Borough Council of 2 June 1950 states that the Land is being transferred with the intention of it remaining a public open space:

'(2) The Corporation for themselves and their assigns and to the intent that this covenant shall be binding on the land hereby conveyed into whosoever hands the same may come hereby covenant with the Vendors that they will at all times hereafter keep and maintain the said land hereby conveyed as an open space and free from buildings or erections except such structures as may be incidental to the use of the land as a public space or park...'

55. As previously stated, the user evidence suggests that the Land has been used by local inhabitants as a recreation ground for many years. The fundamental issue arising is therefore whether the Land has been used by those local inhabitants "as of right" so as to establish that particular element of the statutory criteria to justify the Land's registration as a town or village green or, rather, whether it has been so used by the inhabitants "by right" so that such statutory requirement has not been established and the Land could not be registered as a town or village green.

56. In **Brockwell**³⁰ the House of Lords were of the opinion that occupation by a local authority was in reality occupation by the public because *'the county council [were] merely custodians and trustees for the public.'*³¹

57. In **Hall v Beckenham Corporation**³² Finemore J was of the opinion that *'if land is bought under s.164 of the Act of 1875 (Public Health Act) for that purpose it is dedicated to the use of the public for the purpose of a park.'*³³ The statutory purpose for which the Land was to be held is not specified in the 1950 Conveyance or on the registered title.

58. In **Tranter**³⁴ Morris LJ was of the opinion that *'the real occupiers of the park are the public'*³⁵ in a situation when the local authority has, by virtue of a deed, acquired a park in accordance with the Act of 1875. This, in the opinion of Devlin LJ in **Blake**³⁶, *'is sufficient material from which to infer that beneficial ownership has passed to the public and to negative occupation by the local authority.'*³⁷

59. If the Land was acquired under s. 164 of the Act of 1875 it would appear appropriate to conclude that use was *by right* because the beneficial ownership has effectively passed to the

³⁰ Lambeth overseers v London County Council [1897] AC 625

³¹ Ibid at 630

³² [1949] 1 KB 716

³³ Ibid at 726

³⁴ Sheffield Corporation v Tranter [1957] 1 WLR 843

³⁵ Ibid at 857

³⁶ Blake v Hendon Corporation [1962] 1 QB

³⁷ Ibid at 301

public. Accordingly, the application would fail because it could not be shown that the public have indulged in use of the Land as of right.

60. However, the Public Health Act 1875 permits local authorities to maintain lands for the purpose of public walks or pleasure grounds that have been purchased or leased. Where payment has not been made the Open Spaces Act 1906 may be applicable, permitting a local authority to:

*Acquire by agreement*³⁸...and undertake the entire or partial care, management, and control of any such open space...whether any interest in the soil is transferred to the local authority or not.³⁹

61. At section 10 of the 1906 Act it goes on to state:

*[a] local authority who have acquired any estate or interest in or control over any open space...under this Act shall...hold and administer the open space...in trust to allow, and with a view to, the enjoyment thereof by the public as an open space.*⁴⁰

62. The issue of whether land owned by a local authority and used as open space was used “as of right” or “by right” was considered in some depth, albeit on an *obiter* basis, by the House of Lords in **Beresford**.⁴¹ Lord Scott made express reference to section 10 of the Open Spaces Act 1906 which provides that a local authority who have acquired any interest in or control over any open space under the 1906 Act shall thereafter hold and administer that open space in trust for the general public and allow the public to use it and enjoy it as an area of open space.⁴²

63. He went on to state that as the local inhabitants’ use of such open space would have been pursuant to the trust imposed by section 10, that use “*would have been subject to regulation by the council and would not have been a use “as of right”*”.⁴³ However, and significantly, he further noted that although section 10 which imposes such a trust only applies where the open space is acquired by a local authority **under the 1906 Act**, it was arguably unnecessary for it to be expressly stated in the deed of transfer or in a council minute that the land was so acquired under that Act for that to be the case. Instead, he stated *obiter*:-

*“It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply”.*⁴⁴

64. Again, at the end of his Judgment, Lord Scott noted:-

*“Where “open space” land comes into the ownership of a “principal council”, I think there to be strong arguments for contending that the statutory scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or Section 21(1) of the New Towns Act 1981 are applicable, excludes the operation of section 22(1) of the Commons Registration Act 1965.”*⁴⁵

65. He thereby indicated that when a local authority owns land that has been acquired or appropriated as public open space and is used as such, there is a strong argument that such land could not be registered as a town or village green.

66. Similar observations were made by Lord Walker who stated, again *obiter*, that:-

³⁸ S. 9(a) OSA 1906

³⁹ S. 9(b) OSA 1906

⁴⁰ S. 10(a) OSA 1906

⁴¹ [2004] 1 AC 889.

⁴² At paragraph 29.

⁴³ At paragraph 30.

⁴⁴ At paragraph 30.

⁴⁵ At paragraph 52.

“Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation.”⁴⁶

67. Hence, although that issue has not been definitively determined by the Courts, there is strong *obiter dicta* from the House of Lords, which is clearly highly persuasive authority albeit not binding, that land owned by a local authority for the very purposes of public recreation, and which is used for such purposes, is not used as of right by the public, but rather is used pursuant to the right the public have to use the land under the statutory trust or otherwise.

68. Moreover, it seems that the view held is that where land is specifically held by a local authority as public open space and is used as such, then it cannot be used by local inhabitants as of right.

69. Use as of right is effectively use as a tolerated trespasser where the landowner chooses to take no steps to prevent such use but, rather, acquiesces in that use. Local inhabitants thereby ultimately gain a right to use the land for recreational purposes after having used it for qualifying purposes as of right for the relevant 20 year period if all the other statutory criteria are met. Yet, where land is held as public open space, users are not tolerated trespassers at all, and so are not using the land as of right.

70. Instead, they are **entitled** to use the land for recreational purposes, either pursuant to a statutory trust if the land has been acquired pursuant to the Open Spaces Act 1906 or pursuant to alternative statutory provisions such as the Public Health Acts or merely by virtue of the fact that the land is publicly held as public open space. It is pursuant to that substantive right which the public already have, that they enter onto the land and use it.

71. Further, the landowner cannot preclude such use in such circumstances. As found in **Barkas**, he has no option but to allow users to use land as public open space provided they are using it lawfully.⁴⁷

72. More crucially, the Barkas case was appealed to the Supreme Court in 2014⁴⁸. The Court unanimously dismissed the appeal, ruling that, so long as land is held under a provision, such as section 12(1) of the 1985 Act, members of the public have a statutory right to use the land for recreational purposes, and therefore use the land “by right” rather than “as of right.” In the Supreme Court’s leading judgement by Lord Neuberger which agreed with North Yorkshire County Council;

“So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land “by right” and not as trespassers, so that no question of user “as of right” can arise”. (para 21).

73. Following the Court of Appeal ruling in the Barkas case, the County Council sought advice from Counsel (Ruth Stockley) on the implications of the ruling for this application. A copy of the advice received is contained in Appendix 5 to this report. The Supreme Court ruling in 2014 confirmed the Court of Appeal ruling so the advice remains applicable to the law as it stands today.

⁴⁶ At paragraph 87.

⁴⁷ *Barkas v North Yorkshire County Council and Scarborough Borough Council* [2013] 1 WLR 1521

⁴⁸ *R (on the application of Barkas) (Appellant) v North Yorkshire County Council and another (Respondents)* [2014] UKSC 31 *On appeal from* [2012] EWCA Civ 1373

74. Whilst the 1950 conveyance is silent as to the statutory power under which the Land was acquired, the one specific purpose referred to in the 1950 Conveyance for its acquisition was *'that they will at all times hereafter keep and maintain the said land hereby conveyed as an open space and free from buildings or erections except such structures as may be incidental to the use of the land as a public space or park...'*
75. This is cogent evidence that the Land was conveyed for the purpose of its use as public open space. This suggests that the purpose for the Land's acquisition was to use it as a public space or park. No other potential purpose for its acquisition is referred to in the 1950 Conveyance. Moreover, it is of note that, as a matter of fact, the Land has been so used. It is laid out and maintained as a public recreation ground and it has been used as such by the local inhabitants for many years. On the balance of probabilities, therefore, this evidence establishes that the Land was acquired by the public body for the purpose of it being used as a public recreational ground.
76. Turning to the statutory power under which the recreation ground was provided, the register of title makes reference to the Land having the benefit of, and being subject to *"the easement and other rights prescribed by Paragraph 2 of Schedule 2 of the Housing Act 1980 or Paragraph 2 of Schedule 6 of the Housing Act 1985."* Additionally, in its letter of Objection, dated 11 May 2012, the Objector states on the fourth page that Hastings Borough Council *"maintained the Land...pursuant to the Council's power under various Housing Acts until it was transferred with many other properties to 1066 Housing Association."* That statement is not disputed by the Applicant in his response of 29 June 2012 and there is no other available evidence that suggests to the contrary.
77. Therefore, based on the available evidence, and applying the Supreme Court's Barkas Judgement, it is submitted that the Land was used for recreational purposes "by right" during the Borough Council's period of ownership until 1996 and so such use was accordingly not "as of right." Given that the relevant 20 year period is March 1992 until March 2012, it follows that the Land has not been used "as of right" throughout the relevant 20 year period. It is submitted that the application should be rejected on that particular ground.
78. Given those circumstances, on the balance of probabilities it is concluded that the Land was acquired and was held by Hastings Borough Council, between 1950-1996, as a recreation ground or open space for the local inhabitants of St Leonards on Sea. Consequently, the local inhabitants had a right to use the Land; so have used it by right rather than 'as of right'. The statutory criteria for registration of the Land as a town or village green under s15(2), due to it not being possible to show a twenty year period of 'as of right' use, has therefore not been satisfied.

Post 1996

79. In addition, Schedule D of the Transfer from Hastings Borough Council to 1066 Housing Trust (appendix 3 of the background documents) contains the conditions which are imposed upon a tenant purchasing a property (regarding a right to buy arrangement). This includes the following:
- '8. To contribute a fair share towards the cost of repairing and maintaining any joint or shared access ways and open spaces whether grassed or not together with their perimeter walls fences or hedges (if any) which have been provided for the use or benefit of the property and other premises in the vicinity such share to be assessed in the proportion which the property bears to the other premises benefitted or enjoying the use of the facilities and amenity aforementioned. In this Schedule the words 'open spaces' shall be interpreted to include forecourts parking areas and drying areas as well as areas of amenity and public recreation'.*
80. It is submitted that this demonstrates the control the current landowner has over the land, and the ability to impose such conditions indicates use has been by right, rather than as of right. There is also the issue of the sign submitted as part of the landowner's objection. This sign

warns of potential fines for dog fouling, and bears the Amicus Horizon motif. Whilst alone this would not be conclusive of control of the Land it is suggested that, since the sign must have been erected post 2007 (after the creation of Amicus Horizon), or at least amended after 2007, then the landowner has made some attempts to make public stipulations as to how the land is used (reference to a dog patrol etc) and subsequently there is an argument that the use would have been by right.

81. It is therefore submitted that it cannot be shown, on the balance of probabilities, that use of the land has been as of right for the full twenty year period needed to satisfy the statutory test.

Considerations into the feasibility of holding a Public Inquiry

82. The Commons (Registration of Town or Village Greens) (Interim Arrangements)(England) Regulations 2007 require that the Local Authority consults on the proposed Green before making a determination. This process has been duly undertaken.

83. The Authority retains discretion as to whether to hold an Inquiry, and must give consideration as to whether or not one should be held. An Inquiry would be conducted by an independent Inspector or expert and would enable members of the public to put their view across in adversarial proceedings. The Inspector or expert would make recommendations and it would then be for the Authority to decide whether or not to accept any or all of those recommendations.

84. Those in favour or against the application have had the opportunity to submit their representations and these have been made available to the Panel, in full, for Members to read in the usual way and have been analysed in this report.

85. The cost implications and further delay which would be introduced into the process in holding a public inquiry would also be considerable. Furthermore, as the land involved is not owned by ESCC, and the issues are purely legal in nature, rather than factual, there would be little benefit to be obtained from holding a public inquiry.

86. The Committee is permitted to use its discretion when determining what course of action to follow; it can accept the officer recommendation put forward, it can adjourn the matter and seek further information, or as set out above, the Panel can request that a public inquiry be held.

Conclusion

87. After careful consideration of all the evidence submitted to East Sussex County Council, it is submitted that the Applicant has not, on the balance of probabilities, satisfied each element of the statutory criteria for registration, and thus the Application ought to be rejected on that ground.

88. There is insufficient evidence to show that the local residents of 'The Green' at the corner of Harley Shute Road and Edinburgh Road, St Leonards on Sea have indulged in lawful sports and past times, as of right, for a period of twenty years and that they continued to do so at the time of the application. Accordingly, section 15(2) of the Commons Act 2006 has not been satisfied.

89. The objection received by the County Council does counter the evidence to support the Application.

Recommendation

90. It is recommended that the application to register the land at the corner of Harley Shute Road and Edinburgh Road, St Leonards on Sea as a town or village green be rejected and the register of town and village greens held at the County Council not be amended.

Karl Taylor
Assistant Director
Economy, Transport and Environment

Contact Officer: Natalie McLean 01273 482628)

Local Member: Councillor Kim Forward

Appendix 1 – Application

Appendix 2 – Objection

Appendix 3 – Location of questionnaire respondents

Appendix 4 – Locality within a neighbourhood plan

Appendix 5 – Ruth Stockley – Kings Chambers, Manchester, advice

Background Documents

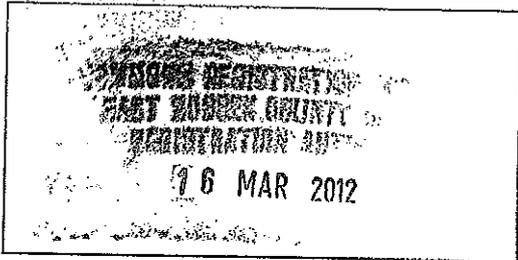
File of evidence

- Appendix 1- Application and accompanying plans
- Appendix 2- Notice of Application and newspaper proof
- Appendix 3- Consultation and responses
- Appendix 4- Land Registry results
- Appendix 5- User Evidence Forms
- Appendix 6- Photographs of the proposed village green

Commons Act 2006: Section 15

Application for the registration of land as a Town or Village Green

Official stamp of registration authority indicating valid date of receipt:



Application number:

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

Applicants are advised to read the 'Guidance Notes for the completion of an Application for the Registration of land as a Town or Village Green' and to note the following:

- All applicants should complete questions 1-6 and 10-11.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete questions 7-8. Section 15(1) enables any person to apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete question 9.

1. Registration Authority

To the

EAST SUSSEX COUNTY COUNCIL
COUNTY HALL
ST ANNE'S CRESCENT
LEWES
EAST SUSSEX BN7 1UE

Note 1
Insert name of registration authority.

Note 2

If there is more than one applicant, list all names. Please use a separate sheet if necessary. State the full title of the organisation if a body corporate or unincorporate.

If question 3 is not completed all correspondence and notices will be sent to the first named applicant.

Note 3

This question should be completed if a solicitor is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here.

2. Name and address of the applicant

Name:

Full postal address:

Telephone number:
(incl. national dialling code)

Fax number:
(incl. national dialling code)

E-mail address:

3. Name and address of solicitor, if any

Name:

Firm:

Full postal address:

Telephone number:
(incl. national dialling code)

Fax number:
(incl. national dialling code)

E-mail address:

Note 4

For further advice on the criteria and qualifying dates for registration please see section 4 of the Guidance Notes.

* Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.

4. Basis of application for registration and qualifying criteria

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5.

Application made under **section 15(8)**:

If the application is made under **section 15(1)** of the Act, please **tick one** of the following boxes to indicate which particular subsection and qualifying criterion applies to the case.

Section 15(2) applies:

Section 15(3) applies:

Section 15(4) applies:

If **section 15(3) or (4)** applies please indicate the date on which you consider that use as of right ended.

If **section 15(6)*** applies please indicate the period of statutory closure (if any) which needs to be disregarded.

5. Description and particulars of the area of land in respect of which application for registration is made

Name by which usually known:

THE SWINGS OR THE GREEN

Location:

LAND AT THE CORNER OF HARLEY SHUTE ROAD AND EDINBURGH ROAD, ST LEONARDS ON SEA

Shown in colour on the map which is marked and attached to the statutory declaration.

Common land register unit number (if relevant) *

6. Locality or neighbourhood within a locality in respect of which the application is made

Please show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked:

CENTRAL SECTION OF WEST ST LEONARDS WARD
EXHIBIT B

Tick here if map attached:

Note 5

The accompanying map must be at a scale of at least 1:2,500 and show the land by distinctive colouring to enable it to be clearly identified.

Only complete if the land is already registered as common land.

Note 6

It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village or street).
 If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly.

7. Justification for application to register the land as a town or village green

Note 7

Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

THE LAND HAS BEEN USED BY THE INHABITANTS OF THE LOCALITY AS DESCRIBED AND SET OUT IN SECTION 6 ABOVE FOR A PERIOD OF 41 YEARS FROM 2ND JUNE 1950 UNTIL THE CURRENT DATE (AND CONTINUES TO DO SO) FOR LAWFUL SPORTS AND PASTIMES, WHICH ARE SET OUT IN GREATER DETAIL WITHIN THE ACCOMPANYING STATEMENT (APPENDIX 1) AND SUPPORTING EVIDENCE, AS OF RIGHT AND IN THE BELIEVE THAT THE LAND WAS AND IS A VILLAGE GREEN FOR THE PURPOSES OF PRESCRIPTION OBTAINED AT COMMON LAW AND OF THE RELEVANT ACT AND REGULATIONS.

A SIGNIFICANT NUMBER OF THE INHABITANTS BOTH PAST AND PRESENT HAVE USED THE VILLAGE GREEN FOR A RANGE OF SPORTS AND PASTIMES WHICH ARE SET OUT IN BRIEF WITHIN THE SCHEDULE ATTACHED AT EXHIBIT H TO THIS APPLICATION.

THE APPLICANT AND OTHERS WILL AND DO AVER THAT THEY HAVE USED THE LAND AS A VILLAGE GREEN AS OF RIGHT WITHOUT LET OR HINDRANCE.

IN RELATION TO THE LOCALITY THEN REFERENCE SHOULD BE HAD TO THE COMMENTS OF LORD HOFFMAN IN OXFORDSHIRE COUNTY COUNCIL V OXFORD CITY COUNCIL WHERE HE STATED THAT LOCALITY SHOULD BE VIEWED AS LOCALITIES, AND THEREFORE WHERE THE CATCHMENT ZONE OF THE LOCALITY APPEARS TO REFER TO MORE THAN ONE DEFINED LOCALITY THEN IT SHOULD AND DOES INTEND TO BE A REFERENCE TO LOCALITIES.

AS SUCH THE APPLICANT BELIEVES THAT ALL RELEVANT CRITERIA REQUIRED TO BE DEMONSTRATED IN ORDER FOR THE LAND TO BE ENTERED IN THE REGISTER OF VILLAGE GREEN HAS BEEN MET.

Note 8

Please use a separate sheet if necessary.

Where relevant include reference to title numbers in the register of title held by the Land Registry.

If no one has been identified in this section you should write "none".

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

8. Name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green

AMICUS HORIZON LIMITED
GROSVENOR HOUSE,
125 HIGH STREET,
CROYDON
CR0 9XP

Note 9

List all such declarations that accompany the application. If none is required, write "none".

This information is not needed if an application is being made to register the land as a green under section 15(1).

9. Voluntary registration – declarations of consent from 'relevant leaseholder', and of the proprietor of any 'relevant charge' over the land

Note 10

List all supporting documents and maps accompanying the application. If none, write "none"

Please use a separate sheet if necessary.

10. Supporting documentation

SEE ATTACHED LIST OF SUPPORTING DOCUMENTS
APPENDIX A SECTION 1

Statutory Declaration In Support

To be made by the applicant, or by one of the applicants, or by his or their solicitor, or, if the applicant is a body corporate or unincorporate, by its solicitor, or by the person who signed the application.

¹ Insert full name (and address if not given in the application form).

I, PETER COLIN JONES, solemnly and sincerely declare as follows:—

² Delete and adapt as necessary.

1.² I am ((the person (one of the persons) who (has) (have) signed the foregoing application)) ((the solicitor to (the applicant) (³ one of the applicants)).

³ Insert name if Applicable

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in part 5 of the application.

Complete only in the case of voluntary registration (strike through if this is not relevant)

4.⁴ ~~I hereby apply under section 15(8) of the Commons Act 2006 to register as a green the land indicated on the map and that is in my ownership. I have provided the following necessary declarations of consent:~~

- ~~(i) a declaration of ownership of the land;~~
- ~~(ii) a declaration that all necessary consents from the relevant leaseholder or proprietor of any relevant charge over the land have~~

Cont/

⁴ Continued

~~been received and are exhibited with this declaration; or
(iii) where no such consents are required, a declaration to that effect.~~

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared by the said PETER COLIN JONES)

at ST LEONARDS ON SEA)

this 9TH day of MARCH 2012)

P. Jones

Signature of Declarant

Before me *

Signature:



Address: 50 Glenleigh Park Road
Bexhill-on-Sea
East Sussex TN39 4EE

Qualification:

Justice of the Peace.

* The statutory declaration must be made before a justice of the peace, practising solicitor, commissioner for oaths or notary public.

Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

REMINDER TO OFFICER TAKING DECLARATION:

Please initial all alterations and mark any map as an exhibit

APPENDIX A

VILLAGE GREEN REGISTRATION

LAND AT THE CORNER OF HARLEY SHUTE ROAD AND EDINBURGH ROAD

INFORMATION NOTES FOR INCLUSION IN FORM 44

List of attached documents Section 10

Appendix '1' Additional information unable to be included within the application form due to space restraints.

Exhibit A: Map of Village Green site shaded red

Exhibit B: Map of locality – West St Leonards Ward

Exhibit C: Map of locality supporting Evidence Questionnaire

Exhibit D: Map of Village Green from Google Earth

Exhibit E: Land Registry Official copy of register of title

Exhibit F: Copy of Restrictive Covenant

Exhibit G: Copy letter from East Sussex County Council 1980

Exhibit H: Schedule of broad use of Village Green

Exhibit J: Schedule of Village Green Questionnaires

Exhibit K: Copy photos of local resident using the playground

APPENDIX 1

Additional information unable to be included within the application form due to space restraints.

Background

The land in question was originally transferred by the Kite family (owners of Filsham Farmhouse) to Hastings Borough Council in 1950 with a restrictive covenant (exhibit F) attached to the land.

The covenant was made by the Kite family with all best intentions to the local community for use as a public open space or park and free from any buildings or erections. This use has been respected by Hastings Borough Council and East Sussex County Council.

A copy of the Land Registry title (exhibit E – page 6 charges register Nos 1 & 2) shows the covenant remains in force.

A copy of the Land Registry map of the village green (exhibit A) shows the Playground area clearly marked.

A letter in 1980 from East Sussex County Council to the executors (exhibit G) recognised and respected the covenant when asking for permission regarding the proposed of hardening footway facilities over the land. The original letter is held by Mr Jon Green the current owner of Filsham Farmhouse.

Current Position

Since the transfer of this land to Hastings Borough Council and then Amicus Horizon the land has been used as a childrens playground and recreational area and continues to be used in this way. 42 Evidence Questionnaires are enclosed (exhibit J) which shows the use of the land (exhibit H). 41 of the Evidence Questionnaires are from residents who live within 500 yards of the land with the other questionnaire completed by the local councillor for West St Leonards Ward. Copy photos by local resident Brenda Wadey of 53 William Road of her family using the playground are enclosed (exhibit K). The original photos are held by Brenda Wadey.

The Google Earth photo (exhibit D) also shows the playground area and recreational area.

This land is the only public recreational space in this area of West St Leonards Ward. There are 3 schools within 100 yards of the land (West St Leonards Primary School, Saxon Mount and St Leonards Academy) and the playground and recreational area is a busy meeting place for children and their parents. Over the past few years the playground equipment consisting of swings, slide, seesaw, rocking horse and roundabout have been removed. Enquiries by residents to Hastings Borough Council over their removal were advised this was under Health and Safety grounds.

At the beginning of November Amicus Horizon advised local residents of their intention to develop the land for housing. However, local residents have recently been advised that this development is currently not in their 3 year plan for 2012 – 2015.

Richard Palmer
 Legal Officer
 East Sussex County Council
 PO Box 2714
 County Hall
 St Anne's Crescent
 Lewes
 East Sussex
 BN7 1UE

PO Box 322
 SITTINGBOURNE
 ME9 8PQ

DX156880 Sittingbourne 3

T: 0800 121 60 60* or 01795 434 606**

F: 01795 434 344

E: contactus@amicushorizon.org.uk

www.amicushorizon.org.uk

*Calls may be recorded and monitored for
 quality and training purposes.*

11 May 2012

Dear Madam

**Village Green Application pursuant to Section 15(1) and 15(2) Commons Act
 2006**

**Land at the corner of Harley Shute Road and Edinburgh Road, St Leonards on
 Sea (the "Land")**

Statement on behalf of the Objector

We wish to make the following points in relation to the application to register the Land as a new town or village green.

We are the freehold owner of the Land which is coloured yellow on the plan at Appendix 1. The Land is the subject of the current Application to register it as a Town or Village Green, and we object to the Application on the following grounds.

Ultimately we do not consider that the Application establishes the facts necessary to support a successful Application. Section 15(1) and (2) of The Commons Act 2006 state as follows:

"(1) Any person may apply to the commons registration authority to register land as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where:

(a) 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; and

(b) they continue to do so at the time of the application."

Section 15(2) sets out the criteria that an applicant must prove before a piece of land can be registered as a town or village green. The onus of proof lies on the Applicant and all the elements required to establish a new green must be properly and strictly proved. It is only the criteria set out in section 15(2) which are relevant to a town and village green application and any other information should not be taken in to account when making the final decision.

The Application itself states as justification for the registration of the Land that it has been used by the inhabitants of the locality for lawful sports and pastimes as of right and in the belief that the Land was and is a village green for a period of 41 years from 2 June 1950 until the current date. Primarily we do not accept that the Land has been used "as of right" and we do not think that the Applicant has shown on the balance of probabilities that the Land has been used for the past 20 years "as of right".

Before getting into the detail surround use "as of right" we would like to set out the reasons why we object to the evidence produced in support of the Application to prove and satisfy the other criteria in section 15(2) of The Commons Act 2006. The Application relies heavily, both on the application form itself and in the questionnaires completed by local residents, on the fact that the local residents believe the Land to be a public green space or a village green. The belief and understanding of the local residents or the public at large is irrelevant to a town and village green application and is not a criteria that should be considered when making the decision to register the Land. Public green space is a planning concept and is irrelevant to a town and village green application.

The Application is also justified by reference to a restrictive covenant over the Land which was introduced by a Transfer dated 2 June 1950 between Ethel Maud Kite and Alfred Nugent Kite (1) and Hastings Corporation (2). The Applicant suggests that the covenant was made by the Kite family with the intention of the Land being maintained for use as a public open space or park free from any buildings or erections. The Applicant further states that this covenant has been respected by Hastings Borough Council and East Sussex County Council. As evidence of this the Applicant has appended a letter dated 1980 from East Sussex County Council to the executors of the Kite family asking for permission to extend and alter the footpaths across the Land. Although the covenant may have been upheld by the owners of the Land since 1950 the fact that there is a covenant is completely irrelevant to the Application for registration of the Land as a town or village green. The Commons Act 2006 does not make it a criteria to registration that the land can never be built upon (although we reserve our rights as to whether the restrictive covenant has this affect). Further the Application makes reference to us, AmicusHorizon Housing Association, advising local residents in November 2011 of its intention to develop the Land for housing but that we have now confirmed that the Land is no longer within our 3-5 year development plan. Again, the fact that we may have intended previously to develop the Land (we reserve our rights in relation to the restrictive covenant over the Land) and may have now indicated otherwise is irrelevant to an Application to register land as a town or village green as it is not set out as a criteria in section 15(2) of The Commons Act 2006.

The Applicant has provided 42 questionnaires, all of which are formulaic and generic, in support of the Application. It is clear that Mr Peter Colin Jones of 85 Harley Shute Road is vehemently opposed to any potential development of the Land in the future. When we began a public consultation in November 2011 about the potential future development of the Land we were met with significant opposition. Although we have not yet applied for planning permission for the Land it appears to us that the local residents may constitute a group of people whose primary purpose is to object to any future development on this Land. It appears that they will oppose, in any way they can, the potential for development of the Land and the registration of a village green is one such way of achieving this objective. Accordingly, the evidence supplied in support of the Application should be carefully scrutinised.

In relation to the evidence submitted in support of the Application it is not accepted by the Objector that the evidence shows anything other than casual and sporadic use. In particular the questionnaires completed in support of the Application were all signed and dated December 2011 or January 2012. The Application was made on 9 March 2012. At the time that the questionnaires were signed our consultation for development of the Land was in place and the local residents would have considered it our intention to develop the Land. It may therefore have been the case that the local residents who signed the questionnaires were incentivised to do so by the thought that the Land would be developed. Again there is potentially an ulterior motive for those filling in the questionnaires as they wished to object to and prevent any potential future development of the Land.

Of the uses of the Land alleged, there are a number of questionnaires which allege dog walking, meeting friends, riding bikes and playing ball games. Although the questionnaires set out the time period over which the person filling out the questionnaires has used the land they do not give detail of the dates over which the specific activities took place. Further, frequency of use is not specified in the questionnaires. Other alleged uses have been kit flying and picnics and a public meeting place. Although the Land is large it is bordered by roads and we don't consider that it would be safe to fly kites and Frisbees so close to regularly used roads. We therefore question the frequency of these uses.

Another alleged use is a place to hold Police Neighbourhood Meetings. We do not consider this to be evidence of use for lawful sports and pastimes as required by section 15(2) of The Commons Act 2006. It would seem that this alleged use is more in line with public neighbourhood watch rather than lawful sports and pastimes.

5 One questionnaire states that *"every other bit of green land around here has been built on or is used for parents of School children to park on and ruin while they collect their children from school."* This shows the opposition of the local people to development of any type in the area. Many if not all of the questionnaires refer to there being no other green open space in the area, even though there are three Schools in the area. We do not agree with this. Harley Wood is only a short distance away, and is all open space. It is therefore simply not true that all open spaces in the area have been built upon. Although we do not agree with this statement, we wish to reiterate again that it is not at all relevant whether there are any other spaces in the area of people to use as amenity land. Further, the fact that previously open space has been built upon is not a relevant criteria and should not be considered when making the decision about registration as a village green.

The only photographic evidence is provided by one local resident and all four photographs show use of the children's play area which used to be located on the Land but which has been removed for health & safety reasons. Although the photographs are dated it is not noted the time period over which the Land has been used in that way. Further, there is no photographic evidence of any other use of the Land other than the children's play area which is no longer on the Land.

There is a "Warning" Notice erected on the Land, which shows the AmicusHorizon logo. It is clear from the sign that AmicusHorizon, as the landowner (we would like to note here that almost every person who filled in a questionnaire confirmed that they were aware that AmicusHorizon were the landowner), erected the notice and would be the organisation enforcing it. The notice warns people to clear up after their dogs thus setting out conditions of use for the Land. The notice also states that there are regular patrols of the area by dog wardens. This shows that we, as landowner, control the Land and arrange for patrols to be carried out regularly to ensure people

are using the Land in a permitted way. This sign is one example of the fact that we control the Land and permit residents to use it within the boundaries of certain conditions we enforce from time to time. This means the local residents have not been using the Land "as of right" but rather "with a right" or permission granted by us. This notice clearly evidences the control and maintenance we have over the Land and that we are willing to punish people who do not use the Land within the rules that we have set out.

As set out above, the Objector does not consider the Application to have shown all of the relevant criteria set out in section 15(2) of The Commons Act 2006. However we also have reviewed documentation relating to the Land which we feel sheds a considerable amount of light on the nature of the use of the various open spaces in the locality. It is not accepted by the Objector that any of the use of the Land described by the Applicant is "as of right". The documents, set out in detail below, demonstrate that such use by inhabitants of the estate and their visitors is permissory or by right as follows.

The acquisition of this estate was originally made by 1066 Housing Association from Hasting Borough Council pursuant to the Stock Transfer Agreement dated 22 February 1996 ("Transfer Agreement"). 1066 Housing Association was taken over by AmicusHorizon Housing Association subsequently and thus AmicusHorizon took over the obligations under the Transfer Agreement.

Prior to the Transfer Agreement being entered into with 1066 Housing Association, Hastings Borough Council ("the Council") maintained the Land and continued to hold it, with the rest of the estate, pursuant to the Council's powers under various Housing Acts until it was transferred with many other properties to 1066 Housing Association pursuant the Transfer Agreement. The Council has confirmed to the Objector that as the Land was designated as Amenity Land prior to the Transfer Agreement with 1066 Housing Association. The Council has further confirmed that it maintained the Land as open space/play area for use by the local residents.

This estate includes some open spaces and car parking areas which are described as "Amenity Areas" in the Transfer Agreement. The "Property" to be transferred is defined in the Transfer Agreement as including *"and all amenity areas, unadopted roads and car parking areas...comprised in the various pieces or parcels of land more particularly delineated and hown edged red on the Plans..."*. These areas are edged red on plans attached at Annex 3 to the Transfer Agreement. Schedule 1 of the Transfer Agreement further describes the garden land, amenity areas, play areas and unadopted roads as *"The garden land, amenity areas, play areas, communal parking areas and unadopted roads owned by the Council and adjacent to or adjoining the Residential Property or Garages and Garage Plots...."*

Schedule D of the Transfer to 1066 Housing Trust sets out conditions to be imposed upon any tenant purchasing a property from 1066 Housing Trust. Some important conditions for our purposes are as follows:

"5. Not to do or omit to do or suffer to be done or omitted to be done anything on in under or over the property which may cause nuisance or annoyance to any adjoining or neighbouring land whether or not such land is occupied by tenants of the Association."

"8. To contribute a fair share towards the cost of repairing and maintaining any joint or shared access ways and open spaces whether grassed or not together with their

perimeter walls fences or hedges (if any) which have been provided for the use or benefit of the property and other premises in the vicinity such share to be assessed in the proportion which the property bears to the other premises benefitted or enjoying the use of the facilities and amenity aforementioned. In this Schedule the words "open spaces" shall be interpreted to include forecourts parking areas and drying areas as well as areas of amenity and public recreation."

These obligations show that the Council held the Land for the benefit of the residents and this was passed to 1066 Housing Trust (and subsequently AmicusHorizon) and in turn to its residents. It also shows that the owner of the Land has always imposed, and continues to impose, conditions on the use of the Land by residents.

The Council can provide open spaces on an estate for the residents and their visitors pursuant to their powers in successive Housing Acts. The Council acquired the Land in 1950 from local landowners and since then use of the Land, during the Council's ownership, will have either been permissive or by right. The Council as the local authority would have exercised rights under various Housing Acts to lay out and construct public streets or roads and open spaces on land acquired for housing purposes (Section 13 (1) Housing Act 1985, Section 107 Housing Act 1957 and earlier and similar provisions in Housing Act 1936) or Section 164 Public Health Act 1876 (power to maintain lands for the purpose of being used as public walks or pleasure grounds) or Open Spaces Act 1906 (power to hold and administer open space to allow and with a view to the enjoyment thereof by the public as an open space and maintain and keep the open space in good and decent state).

On the transfer to 1066 Housing Association in 1996, 1066 took over the role previously fulfilled by the Council of providing open spaces for the recreation of tenants of the estate, their families and visitors. The Transfer Agreement required, in clause 10, 1066 Housing Association to adopt an agreed form of Tenancy Agreement for secure tenants in the form set out in the Eighth Schedule. The form of tenancy agreement contains references to tenants' obligations in relation to communal areas and facilities as follows:

"13a The tenant and any person living on the premises whether permanently or temporarily and any visitor to the premises must not cause damage to any property owned by the Council and must not deface or damage any wall, door, fence or other part of any premises owned or within the control of the Council, by graffiti or other means."

"13.c Not to permit, incite or allow any person living on the premises nor any visitor to commit any act amounting to a nuisance, annoyance, disturbance or "harassment" as set out in clause 13a, nor to cause damage to property owned by the Council or within the control of the Council."

"13.d The tenant shall be responsible for the behaviour of any person living permanently or temporarily on the premises including any visitors to the premises.....Tenants shall be held responsible for the behaviour of such persons whilst they are present in the premises and while they enter or leave the premises and/or common parts and/or the common areas."

"14. Not to make noise so as to cause annoyance or nuisance to neighbours or adjoining occupiers, nor to permit or allow any person living in the premises nor any visitor to make such noise. Tenants, those living with them and their visitors should have consideration towards neighbours and adjoining occupiers when playing radios,

records or C.D players, tape recorders, instruments, or when using DIY tools and other equipment.”

“29 Not to park motor cars or motorcycles or any other vehicles...where they could obstruct emergency access or exit points, or where they could cause inconvenience, nuisance or potential danger.”

It is submitted by the Objector that the above clauses would be meaningless if the tenants and their visitors were not permitted to use the communal facilities and areas.

The Right To Buy form of lease does not contain a definition of “communal areas” but it does include the following obligations:

“3.18 Not to do or permit to be done upon or in connection with the Flat or the Building anything which shall be or tend to be a nuisance annoyance or cause of damage to the Landlord or its tenants or any of them or to any neighbouring adjoining or adjacent property or the Estate or neighbourhood or the owner or occupiers thereof.”

“Schedule 2: Easement Rights and Privileges: paragraph 2. Full right and liberty for the Tenant and all persons authorised by him....at all times by day or night to go pass or repass on foot only over the common pathways on the Estate and by motor vehicle over the common roadways on the Estate.”

“Schedule 3: Rights Excepted and Reservations: paragraph 2. The right at any time hereafter to rebuild alter or change the use of any of the adjoining or neighbouring buildings in any manner whatsoever together with the right to erect further buildings or structures on the Estate and to enlarge the Estate by the addition of further land with or without buildings.....”.

These provisions clearly show that we, as landowner, exert control over the Land giving the residents right to use the Land and other areas and by reserving our rights to change the estate if necessary.

The various forms of lease annexed to the Transfer Agreement as referred to above are evidence of the forms of lease used by the Council at the relevant time. Consistency was also guaranteed in respect of Tenancy Agreements. Exercise by a tenant of the right to buy will have carried with it such rights, subject to such conditions, as were pertinent to the tenancy prior to the exercise of the right to buy. Transfers from the Council effected other than pursuant to the Housing Act 1985 will similarly have carried with them such rights and privileges as were appurtenant to the land pursuant to Section 62 Law of Property Act 1925, the operation of which is not excluded by the pro forma Transfer annexed to the Transfer Agreement so anyone who is a successor in title to the Council will have acquired the rights and privileges afforded to residents of the Estate.

Relevant provisions of Section 62 law of property Act 1925 are as follows:

62(1) A Conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied or

enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

62(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses or other buildings conveyed, or any of them, or any part thereof.

The evidence submitted on behalf of the Applicant makes many formulaic references to the use of the land being open and without secrecy or permission. It is submitted that it would be a very strange state of affairs indeed if Council or Housing Association tenants were trespassers if they entered on parcels of open space laid out on their estate. It is the Objector's case that any use of the Application Land is consistent with the provision of open spaces by the landlord of a housing estate for recreational purposes with the permission of the landlord, and not as of right, as evidenced by the Right To Buy and the Tenancy Agreement. The evidence submitted by the Applicant to the effect that no one challenged the use of the open spaces by local residents is entirely consistent with such use being by permission, as is evidence by the "warning notice". If the owner of the Application Land had not permitted use of the application land for recreational purposes, it would have more likely been fenced and the signs would say "trespassers keep out" not "no dog fouling", which actually clearly shows that the owner intends for people to use the Land to walk their dogs. The object of the "warning notice" is clearly to ensure that the Land can be enjoyed by residents of the estate and their guests without being concerned about dog fouling.

The Objector, for the reasons shown above, does not accept that any of the evidence adduced by the Applicant does anything to support the Applicant's claim that the use of the green is "as of right", and submits that instead such evidence supports that use by residents was by permission.

The use described by the Applicant is entirely consistent with the permissive use of open spaces within the Council and latterly Housing Association's estate. The documents set out and referenced above demonstrate any use of the Application Land for recreational purposes will have been wholly consistent with the provision of these amenities by the owner of the estate from time to time for the residents and their visitors and with permission. The Applicant's belief in the capacity in which the Application Land was used is mistaken as these documents clearly demonstrate. Further, the fact that the "warning notice" states that a patrol happens regularly on the site and shows AmicusHorizon's logo shows that any non-permitted use the Land will be monitored and dealt with by the landowner. It is submitted that the lack of fences preventing use is consistent with permission granted by the landlord rather than the assertion of rights by the Applicant against the owners.

We consider that the primary motivation of the Applicant is to prevent any future development on the Land.

Finally we do not accept that the Applicant has shown that the Land has been used by a significant number of people within a locality, or within a neighbourhood in a locality and we reserve our right to expand upon this point at any Hearing.

We also reserve our right to submit an amended objection statement in the light of our further research and generally.

We have not appended the documents referred to in this Statement due to their size. We will arrange for copies of the documentation to be sent to you shortly under separate cover.

On the basis of the above grounds we request that the Application be refused. Should you feel that you are not able to refuse the Application, we request that the evidence produced by the Application in relation to user of the application site should be tested by cross-examination at a non-statutory public enquiry.

Yours faithfully



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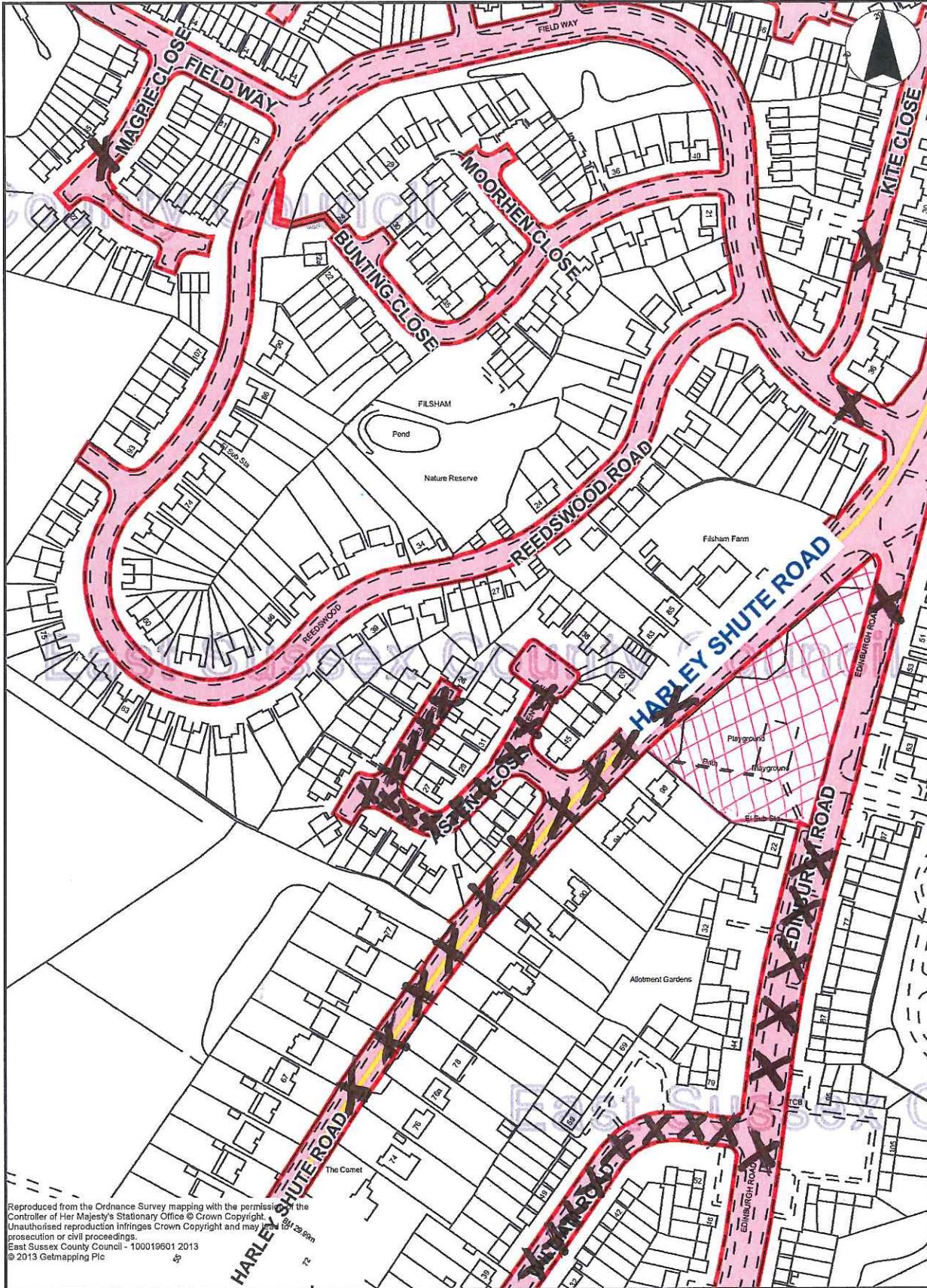
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Appendix 1

Plan showing the Land

A.

- Proximity of resident submitting evidence forms, to the proposed TVG.



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East Sussex County Council	Information may not be current. Consult Highway Land Information Team for confirmation.	
County Hall St Anne's Crescent Lewes	Date: 3 Oct 2013	Land tinted pink is considered to be adopted highway. The highway boundary, where researched, is shown in red outline. WHERE NO RED LINE IS SHOWN, THERE MAY BE MORE HIGHWAY THAN IS SHOWN IN PINK.
	Scale: 1: 2500 NGR: 578265 109486	

NB. This map shows 41 of the Page 39 users - the 42nd is approximately 1.2km east of the proposed TVG (shown in red hatching)

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WEST ST. LEONARDS WARD

- Polling Stations

EXHIBIT B THE MAP DEPICTING THE BOUNDARIES OF THE LOCALITY OF THE VILLAGE GREEN

Appendix 4



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RE: LAND AT HARLEY SHUTE ROAD, ST LEONARDS ON SEA

ADVICE

1. I am asked to advise East Sussex County Council ("the Council") in its capacity as Registration Authority for the purposes of the Commons Act 2006 ("the 2006 Act") upon an application dated 09 March 2012 ("the Application") made by Mr Peter Jones ("the Applicant") pursuant to section 15(2) of the 2006 Act to register land known as "The Swings" or "The Green" at the corner of Harley Shute Road and Edinburgh Road, St Leonards on Sea ("the Land") as a town or village green.

BACKGROUND

2. An Objection was received to the Application from Amicus Horizon Limited, the current owner of the Land, to which the Applicant responded. The Application was then placed before the Council's Commons and Village Green Registration Panel on 29 October 2013 with an Officer Report recommending that the Application be rejected. At that meeting, the Panel resolved to adjourn the determination of the Application to enable specialist advice to be sought, particularly in relation to the effect of a particular covenant contained in a Conveyance of the Land dated 02 June 1950 between the Kites and the County Borough of Hastings ("the Conveyance").

3. By that Conveyance, the Land was conveyed to The Mayor Alderman and Burgesses of the County Borough of Hastings on 02 June 1950. It was subject to a covenant on behalf of the County Borough of Hastings, which became Hastings Borough Council, that was binding on its successors in title, that:-

“they will at all times hereafter keep and maintain the said land hereby conveyed as an open space and free from any buildings or erections except such structures as may be incidental to the use of the land as a public open space or park...”

Hastings Borough Council continued to own the Land until 1996. It was then transferred to 1066 Housing Association Limited, which owned the Land until 2010 when it was transferred to the current owner, Amicus Horizon Limited.

4. I shall consider each of the issues raised in my Instructions in turn on the basis of the documentation and information provided.

EFFECT OF CONVEYANCE BETWEEN 1950 AND 1996

5. The first matter concerns the effect of the 1950 Conveyance during the period of Hastings Borough Council’s ownership of the Land between 1950 and 1996 in the context of the determination of the Application.

Legal Framework

6. The starting point is section 15(2) of the 2006 Act on which basis the Application has been made. That provision contains the relevant statutory criteria which must each be established by the Applicant on the balance of probabilities in order for the Land to be registered. It provides:-

“This subsection applies where—

- (a) 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; and*
- (b) they continue to do so at the time of the application.”*

Thus, one of the fundamental elements of the statutory criteria is that the qualifying use of the Land must have been “*as of right*”. Use of land “*as of right*” is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*.

7. However, in addition, recent caselaw has established that land that is used “by right” is not being used “as of right” and so such use cannot be relied upon in support of registration. The leading case on that issue is currently the Court of Appeal’s decision in *Barkas v. North Yorkshire County Council*.¹ In his Judgment, with which the other two Lord Justices agreed, Sullivan LJ made it clear that the earlier House of Lords decision in *R. v. Sunderland City Council ex parte Beresford*² is authority for the following propositions:-

- (i) that there is a distinction between a use of land “by right” and a use of land “as of right”;
- (ii) that, if a statute, properly construed, confers a right on the public to use land for recreational purposes, their use of that land will be “by right” and not “as of right”; and

¹ [2013] 1 WLR 1521.

² [2004] 1 AC 889.

(iii) that section 10 of the Open Spaces Act 1906 is an example of land which is provided by a local authority as open space which the public use for recreational purposes “by right”.³

8. Further, Lord Justice Sullivan went on to state:-

*“I can see no sensible reason for drawing a distinction between land held under section 10 and land which has been appropriated for recreational purposes under some other enactment”.*⁴

Significantly, he explained that “appropriation” in that context was not to be understood in the narrow sense of appropriated for the purpose of public recreation under section 122 of the Local Government Act 1972. Instead, **land is “appropriated for recreational purposes” in the *Barkas* sense if it is provided or made available by a local authority for the purpose of public recreation in exercise of statutory powers to do so.** In such circumstances, the land is then used by the public “by right” and not “as of right”.

9. I should add that the *Barkas* decision is being appealed to the Supreme Court and such appeal is listed to be heard on 02 April 2014. However, the Court of Appeal decision represents the current state of the law on the “by right” and “as of right” issue.

Application of Law to Facts

10. Applying the present legal position to the Application Land and the 1950 Conveyance in relation to the period up until 1996, the fundamental question

³ At paragraph 26 of his Judgment.

⁴ At paragraph 34.

is whether during that period the Land was provided or made available by a local authority for the purpose of public recreation in exercise of statutory powers to do so. If it was, the Land was used “by right” during that period and not “as of right”.

11. According to the information I have seen, the Land was, as a matter of fact, made available by The County Borough of Hastings, which became Hastings Borough Council, as a public recreation ground throughout its period of ownership between 1950 and 1996 and was so used by the public. That is so stated in Appendix 1 to the Application,⁵ in paragraphs 7.16 and 7.34 of the Panel Report, and in the Objection. Thus, the issue is then whether the Land was made so available for that purpose during that period pursuant to a statutory power to do so.

12. The Conveyance is silent as to the statutory power under which the Land was acquired in 1950. Further, the purpose for its acquisition is not expressly stated in the Conveyance. Nonetheless, the covenant it contains as set out in paragraph 3 above is cogent evidence that the Land was conveyed for the purpose of its use as public open space. Indeed, that covenant specifically requires the Land to be kept and maintained for that purpose and restricts any structures on the Land to those incidental to its use as a public open space or park. It does not seem to me that the acquisition of the Land could reasonably have been for any other purpose given the wording of that covenant together with the lack of any reference in the Conveyance to any other purpose.

⁵ I assume that is supported by the user evidence which I have not seen.

Moreover, that purpose for its acquisition is supported by the fact that the Land was thereafter laid out, maintained and used as a public recreation ground throughout its ownership by the Borough Council. In those circumstances, it is my view that the evidence establishes on the balance of probabilities that the Land was acquired by the public body for the purpose of it being used as a public recreational ground.

13. That being so, it is then necessary to turn to the statutory power under which it was so provided. In its letter of Objection dated 11 May 2012, the Objector states on the fourth page that Hastings Borough Council “*maintained the Land and continued to hold it, with the rest of the estate, pursuant to the Council’s powers under various Housing Acts until it was transferred with many other properties to 1066 Housing Association*”. That is not disputed by the Applicant in his response of 29 June 2012 and I have seen no evidence nor any suggestion to the contrary. Moreover, given the location of the Land within a residential area and that, according to the Objector in the above paragraph of its Objection, it was transferred by the Borough Council in 1996 to a Housing Association together with many other properties, such evidence gives further support to the Land having been held by the Borough Council pursuant to housing legislation. Indeed, that conclusion is given added force by the fact that the relevant register of title I have seen makes reference to the Land having the benefit of and being subject to “*the easements and other rights prescribed by Paragraph 2 of Schedule 2 of the Housing Act 1980 or Paragraph 2 of Schedule 6 of the Housing Act 1985*”.

14. Housing legislation contains, and previously contained, various powers conferred on a housing authority to lay out open space, namely section 79(1)(a) of the Housing Act 1936, section 107 of the Housing Act 1957 and subsequently section 13(1) of the Housing Act 1985. A housing authority also has the power, with ministerial consent, to provide a recreation ground, namely in section 80(1) of the Housing Act 1936, section 93(1) of the Housing Act 1957 and section 12(1) of the Housing Act 1985. From the factual circumstances and the available evidence, it seems to me that the Land was made available by the Borough Council for the purpose of public recreation pursuant to one of such statutory powers. All such powers engage the *Barkas* principle, namely there has thereby been an appropriation of the Land for the purpose of public recreation throughout the Borough Council's ownership of the Land, with the consequence that its use for that purpose during that period was "by right" and not "as of right".

Conclusion

15. Therefore, on the basis of the available evidence and applying the law as it currently stands, it is my opinion that the Land was used for recreational purposes "by right" during the Borough Council's period of ownership until 1996 and so such use was accordingly not "as of right" during that period as concluded in the Officer Report. Given that the relevant 20 year period is March 1992 until March 2012, it follows that the Land has not been used "as of right" throughout the relevant 20 year period and is consequently bound to be rejected on that particular ground.

EFFECT OF CONVEYANCE POST 1996

16. The next issue raised is whether the covenant in the 1950 Conveyance is of any significance post 1996 when the Land was transferred to 1066 Housing Association Limited. I have not seen a copy of that Transfer nor am I aware whether it remained subject to the covenant. I note, for example, that there does not appear to be a reference to that covenant nor to the 1950 Conveyance at all in the register of title.

17. However, in any event, the *Barkas* principle applies only to land owned and held by a local authority rather than by a private landowner. As I understand the position, 1066 Housing Association Limited was a private limited company, as is the current landowner, and not a local authority. Although it had public related objectives, *Barkas* would not be engaged and the Housing Association would be subject to the same principles as any other private landowner. Thus, in my view, the Land would not have been used “by right” post the 1996 Transfer.

18. Nonetheless, it does not automatically follow that the Land was consequently used “as of right”. On the contrary, as noted above, for land to be used “as of right”, it must be used without force, stealth or permission. Land will not be used “as of right” if it is used with force, with stealth or with permission, **or** if it is used “by right”.

19. In that regard, the Objector contends that the Land has been used with implied permission and thus not “as of right” post 1996. The question thus arising for

the Panel to consider in relation to the period post 1996 is whether the use was then *precario*, applying the principles laid down by the House of Lords in *Beresford*. It was found in that case that an implied permission could arise where a landowner's conduct was such that it made it clear to local inhabitants that the use of his land was pursuant to his permission. However, permission cannot be implied from the mere inaction of the landowner with knowledge of the use to which his land was being put. Instead, the landowner has to do something positive and overt to make the public aware that their use of his land is by his licence so that they ought to know that the land is being used by them only with his permission and not as of right. Conduct amounting to positive encouragement to use the land is not in itself sufficient to amount to an implied permission. Instead, examples given in that case of circumstances where an implied consent may well arise on the facts included where the landowner made a charge for entry to the land or where the owner occasionally closed the land to the general public or where appropriate signs were erected. Each of those examples would amount to an overt act communicating to the public that their use of the land was subject to the landowner's permission and was not as of right.

20. That matter is ultimately a determination of fact for the Panel on the basis of all the evidence applying the above legal principles. Consideration will need to be given to whether acts such as the erection of signs prohibiting dog fouling and having dog patrollers on the Land were sufficient to clearly indicate to local inhabitants of the relevant locality or neighbourhood within a locality

that they were using the Land only with the Landowner's permission which could be revoked at any time.

21. As indicated above, it is my firm view that the Application is bound to be rejected on the basis of the current law on the ground that the use was "by right" and consequently not "as of right" between March 1992 and the Transfer in 1996. However, if the law is changed by the Supreme Court in *Barkas*, or if the Council wishes to also consider whether the use was "as of right" post 1996 in any event, then the fundamental issues to address are those raised in paragraphs 19 and 20 above to which I refer.

EFFECT OF CONTROL OF LAND BY HOUSING ASSOCIATION

22. As to whether the Objector's submissions concerning control of the Land by the Housing Association pursuant to the Housing Acts would be sufficient to defeat the Application, those submissions are to be considered in the context of whether the Land has been used with permission post 1996 applying the principles in *Barkas* set out above.
23. Ultimately, it is a question of fact for the Panel whether the control of the Land by the Housing Association was sufficient to amount to overt conduct making it clear to local inhabitants of the claimed locality or neighbourhood within a locality that their use of the Land was with the Landowner's permission which could be revoked by the Landowner at any time. However, the following are of note. The conduct must be overt and clear to the users. Hence, terms indicating the Landowner's control of the Land contained in

individual tenancy agreements would only be known to those individual tenants. I assume that the residents of the claimed neighbourhood within a locality, which area I have not had sight of, were not all tenants of the Housing Association. Insofar as they were tenants and/or are tenants of the current Landowner, then the terms of the tenancy agreements that have been referred to by the Objector may well be regarded as sufficient to indicate the Landowner's control to the extent that the Landowner was merely permitting usage to those tenants if they abided by such conditions. If so, their use would consequently be *precario* and would need to be discounted from the qualifying use. However, the contents of the tenancy agreements would not result in the use of the Land by other local people being *precario*. Without being aware of the extent of the users that were tenants and those that were not, I am unable to provide any view as to the overall implications of that matter in the context of the Application.

24. In contrast, the signage and dog patrollers would have been evident to the wider public. However, the fundamental question of fact is whether they were sufficient to indicate to users that their use was subject to the Landowner's permission which could be revoked at any time. A sign with clear wording to that effect which was visible and was in situ for a material part of the relevant 20 year period would cause the use to be *precario*. Similarly, such a sign which sought to control recreational uses of the Land may be regarded as causing the use to be *precario*. Nonetheless, a sign that merely says "no dog fouling" would not seem to me to be sufficient to have that effect. Such a sign is effectively an attempt to enforce the law over dog fouling which applies

irrespective of whether or not the use is “as of right”. Similarly, the position would be the same in relation to dog patrols if their primary purpose was to ensure that dog walkers obeyed the law. In my view, such would not be reasonably interpreted by a member of the public that they were only able to use the Land with the Landowner’s permission, and so would not cause the use of the Land to be *precario* and thus not “as of right”.

DISCRETION TO APPLY OBITER STATEMENTS

25. The next matter I am asked to consider is whether there is any discretion available to Members of the Panel not to follow the *obiter* comments made by the House of Lords in *Beresford* and elsewhere in relation to the “as of right” and “by right” issue. It is of course the position that *obiter* observations by a Court do not amount to binding precedent. Thus, Members are not in principle bound by such observations. Nonetheless, they ought to be taken into account as being of persuasive authority, and the weight to be given to them is particularly significant when they are observations made by the House of Lords. Indeed, it is uncommon even for the Court of Appeal not to follow *obiter* observations by the House of Lords and they would only do so after careful consideration and for good reasons. Thus, the Panel would need to provide express and cogent reasons for disagreeing with such *obiter* comments. Further, a failure to follow such observations would also in itself give the unsuccessful party to an application a ground to challenge the Members’ decision in principle.

26. However, in my view, that issue no longer arises given the Court of Appeal's more recent decision in *Barkas*. The legal position set out by Sullivan LJ which I refer to above was not *obiter* but part of the *ratio* and so IS binding on the Panel unless and until it is overturned by the Supreme Court. Applying that decision to the present circumstances, for the reasons given above, it is my firm view that the Land was used "by right" between 1992 and the Transfer in 1996. It is open to the Panel to apply the law in *Barkas* to the circumstances and conclude otherwise if they have good reason for doing so. It is not, though, open to the Panel to determine not to apply the law as stated in *Barkas*, unless and until it is overturned.

SUSPENSION OF RIGHTS

27. The remaining issue raised concerns whether it is open to the Panel to determine that town or village green rights were "suspended" whilst the Land was owned by Hastings Borough Council and then "re-established" once transferred out of public authority ownership. In my view, the short answer is "no" for the following reasons.
28. The Application has been made pursuant to section 15(2) of the 2006 Act which I have set out in full in paragraph 6 above. That requires the qualifying "as of right" use to have taken place "*for a period of at least 20 years*" AND to be continuing "*at the time of the application*". The effect of that statutory wording as interpreted by caselaw is that the use can have taken place for merely 20 years, or for any longer period whatsoever, but in any case, that use

must be a **continuous** one over at least 20 years⁶ AND that continuous 20 year use must still be taking place as at the date of an application. In other words, at the very least, it must be taking place at the date of the application and have done so continuously for 20 years immediately prior thereto, namely throughout “the relevant 20 year period”. That is further confirmed by the wording of section 15(6) which provides that for the purposes of determining the relevant 20 year period, “*there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment*”. That has been used in practice where access was prohibited during the foot and mouth outbreaks. The cessation of use of land on that very specific ground does not prevent the use from otherwise being continuous because of that statutory provision, and the accrual of any town or village green rights is thereby effectively “suspended” during that time and then resumed. Notably, though, there is no other provision preventing the use from otherwise needing to be continuous throughout the entirety of the relevant 20 year period that could be relied upon in this instance.

29. Instead, the Application is dated 9 March 2012 and was received by the Council on 16 March 2012. Thus, in order to be registered, the Land must be found by the Panel to have been used for the qualifying use as of right continually from at least March 1992 until March 2012. That includes the period from March 1992 until the Transfer in 1996.

⁶ See *Hollins v. Verney* (1884) 13 QBD 304.

30. It follows that even if the Land was used “as of right” for lawful sports and pastimes by a significant number of the local inhabitants of the claimed neighbourhood within a locality prior to the 1950 Conveyance, for however long a period, that subsequent period of “by right” use would prevent the requisite use been established throughout the relevant 20 year period, which is the relevant statutory test that the Council must apply. It is the continuous use of the Land for that relevant 20 year period and no other which section 15(2) requires to be established, irrespective of the extent of the use prior to and subsequent to those dates.

CONCLUSION

31. In conclusion, it is my view in relation to the “as of right” issue that the Land was used “by right” and so not “as of right” for a material part of the relevant 20 year period, namely from March 1992 until the date of the Transfer in 1996. On that ground, and on the basis of the law as it presently stands, it is my opinion that the Application should be rejected. However, given that that very issue is to be considered by the Supreme Court in April 2014, albeit that the ultimate decision may be some weeks later, the Council may wish to give consideration to deferring its decision, subject to the views of the Applicant and the Objector. As I am appearing in that case on behalf of the Registration Authority, North Yorkshire County Council, I can provide any updates if required in due course.
32. I advise accordingly, and if I can be of any further assistance, please do not hesitate to contact me.

RUTH A. STOCKLEY

03 February 2014

Kings Chambers

36 Young Street Manchester M3 3FT

5 Park Square East Leeds LS1 2NE and

Embassy House, 60 Church Street, Birmingham B3 2DJ

RE: LAND AT HARLEY

SHUTE ROAD, ST

LEONARDS ON SEA

ADVICE

East Sussex County Council
Legal Services
Governance Services
P.O. Box 2714
County Hall
Lewes
East Sussex
BN7 1UE

Your Ref: TVG1
Our Ref: RS 346130

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Agenda Item 6

Committee: Commons & Village Green Registration Panel

Date: 14 October 2015

By: Assistant Director, Economy, Transport and Environment

Title: Application for land at the Hollycroft Field, Chapel Lane, East Chilton, to be registered as a town or village green

Applicant: East Chilton Parish Council

Application No: 1359

Contact Officer: Natalie Mclean, Legal Order Officer 01273 482628

Local Member: Councillor Sheppard

Recommendation

To reject the application of East Chilton Parish Council, pursuant to section 15 of the Commons Act 2006, to register land at Hollycroft Field, Chapel Lane, East Chilton as a town or village green.

This report contains three parts as follows:

Part A: Details of the Application

Part B: Summary of the Relevant Law

Part C: Application of the Relevant Law to the Evidence

PART A – DETAILS OF THE APPLICATION

Receipt of a completed Application

1. The County Council received the completed Application on 17 March 2014. The Application seeks to register the Land as a town or village green by virtue of the operation of Section 15 (2) of the Commons Act 2006. Under that provision, land is to be registered as a town or village green where:-
 - a) 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; and
 - b) they continue to do so at the time of the application.

The Site

2. The Application land (“the Land”) is roughly rectangular in shape and is located at the area known as Hollycroft Field, Chapel Lane, East Chilton. The land constitutes 3.1 acres. It is flat open land bordered on two side by hedges, one side bordered by a football pitch (which is not part of the application) next to a wood and open to Hollycroft on the south side. It is bisected by

	part)	
23 April 1947	Alfred Carlisle Sayer, Arthur Gerald Miller, Lt Colonel Charles Harold Noel Adams (first part) and Herbert Ivor Powell Edwards, Nora Theodora Imogen Powell Edwards (second part) and The Rural District Council of Chailey (third part)	All that part of Stantons Farm, north side of Chapel Lane having an area of 4.124 acres, being part of field number 211 on OS ma0 1910 edition. (this includes the remaining part of the Land)

Consultations and representations:

6. The Application was advertised on site and in the Sussex Express on 25 April 2014 (copies at appendix 2 of the background document file of evidence)
7. All interested parties, including Lewes District Council as the relevant District Council, were sent copies of the notice, and copies were made available to view by members of the public at County Hall, Lewes, and Lewes District Council offices. These documents were held on deposit between 25 April and 6 June 2014 (copies of the correspondence sent out can be found at appendix 3 of the background document file of evidence).
8. The Local Member, Councillor Sheppard, was informed of the Application by way of letter dated 24 April 2014 (appendix 3 of the background document file of evidence).
9. This Application has received one objection, (appendix 4) from the landowner Lewes District Council. This will be explored in depth in Part C of this report. The objection is contained at Appendix 2 of this report.
10. Copies of all submissions and evidence can be found in the background papers in the Members' Room.

PART B – SUMMARY OF THE RELEVANT LAW

Statutory Criteria - the Commons Act 2006

11. The Application was made pursuant to the Commons Act 2006. That Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.
12. The Application seeks to register the Land by virtue of the operation of Section 15 (2) of the 2006 Act. Under that provision, land is to be registered as a town or village green where:-
 - (a) a significant number of the inhabitants of any 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.
13. The application is subject to subsection (6) which provides that in the determination of the relevant 20 year period, any period during which access to the land was prohibited to members of the public by reason of any enactment must be disregarded.
14. Therefore, for the Application to succeed, it must be established that:-
 - (i) the Application Land comprises “land” within the meaning of the 2006 Act;

- (ii) the Land has been used for lawful sports and pastimes;
- (iii) such use has been for a period of not less than 20 years;
- (iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
- (v) such use has been as of right, i.e. without force, without secrecy, and without permission (*nec vi, nec clam, nec precario*).

15. There is no distinction in law between a 'town' or 'village' green. The term 'town' green simply tends to be used where the green is physically situated in a town or other urban area.

The Burden and Standard of Proof

16. The burden of proving that the Land has become a town or village green rests with the Applicant for registration. The standard of proof is the balance of probabilities.

17. Further, when considering whether or not the Applicant has discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in ***R. v Sunderland City Council ex parte Beresford***¹ where, at paragraph 2, he noted as follows:-

As Pill LJ. rightly pointed out in *R v Suffolk County Council ex parte Steed* (1996) 75 P&CR 102, 111 "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ...". It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met.

18. Hence, all the elements required to establish that land has become a town or village green must be properly and strictly proved by the Applicant on the balance of probabilities.

Relevant Case law on the Statutory Criteria

19. Case law has provided helpful rulings and guidance on the various elements of the statutory criteria required to be established for land to be registered as a town or village green, which I shall refer to in turn below.

i) Land:

20. Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration.

21. It was stated by way of *obiter dictum* by the majority of the House of Lords in ***Oxfordshire County Council v Oxford City Council***² that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered. In that case, the Trap Grounds application site did not fit the traditional image of a village green. Part of it comprised reed beds and a significant part of the remainder consisted of scrubland. It was thus "*not idyllic*" in the words of Lord Hoffmann. The majority view given by Lord Hoffmann was that the physical characteristics of land could not in themselves preclude it from being a village green. In justifying that view, he noted in particular that there was no authority, either at common law or in statute, which supported the proposition that the definition of a village green should be so restricted, and further, that any test to that effect would be

¹ [2004] 1 AC 889.

² [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.

inherently uncertain and too vague.³ It is also relevant to note that the Commons Act 2006 passed subsequently did not seek to further restrict the definition of a village green in that regard.

22. An alternative minority view was expressed in ***Oxfordshire County Council v Oxfordshire City Council*** by Lord Scott who noted that some new village greens registered did appear to be stretching the concept of a village green beyond the limits which Parliament intended. He noted the ordinary dictionary meaning of a “green” as being “a piece of public or common grassy land” which ought to be applied in constructing section 22(1) of the Commons Registration Act 1965, the predecessor to Section 15 of the 2006 Act, rather than land being registered that no one would recognise as a town or village green.⁴
23. In the recent Court of Appeal case of ***R (Newhaven Port and Properties Ltd) v East Sussex County Council***⁵ it was established that the ordinary words used by Parliament to define a town or village green were broad enough not to preclude a tidal beach as constituting land for the purposes of the Commons Act 2006. In addition, it was established that use did not have to be continuous, or the main use of the land, providing that the level and nature of use had to be that which, judged objectively, would make a landowner aware that the public were asserting a right.

ii) Lawful Sports and Pastimes:

24. It was made clear in ***R. v Oxfordshire County Council ex parte Sunningwell Parish Council***⁶ that “lawful sports and pastimes” is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children’s play. These activities can vary depending on the time of year or ‘according to changing tastes or wishes [of the user]’.⁷
25. However, this element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way.⁸

iii) Continuity and Sufficiency of Use over 20 Year Period:

26. The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: ***Hollins v Verney***⁹.
27. It is required that the user evidence illustrates that the land subject to the application has been enjoyed for a period of at least twenty years. This period is calculated retrospectively from the date of first challenge. In the absence of a challenge the submission of the application is sufficient to bring use of the land into question. Therefore, in this case initially it will be necessary to show use from 1994-2014. If there is any challenge to use within this period then the relevant twenty year period shall be altered to reflect the challenge.
28. It is not vital for every user to have used the land for a period of twenty years rather it is ‘necessary... that all the evidence taken cumulatively shows that there has been use by the local inhabitants for twenty years.’¹⁰

³ *Ibid* at paragraph 39.

⁴ *Ibid* at paragraphs 71 to 83.

⁵ [2013] EWCA Civ 276

⁶ [2000] 1 AC 335 at 356F to 357E.

⁷ J. Riddall, ‘Getting Greens Registered: A guide to law and procedure for town and village greens’ (2007), paragraph 43

⁸ See Sullivan J. in *R. (Laing Homes Limited) v. Buckinghamshire County Council* [2004] 1 P & CR 573 at 598.

⁹ (1884) 13 QBD 304.

¹⁰ J. Riddall, paragraph 51

29. Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: **R. (on the application of Lewis) v Redcar and Cleveland Borough Council**.¹¹

iv) Locality or Neighbourhood within a Locality:

30. A “locality” must be a division of the County known to the law, such as a borough, parish or manor: **MoD v Wiltshire CC**;¹² **R. (on the application of Cheltenham Builders Limited) v South Gloucestershire DC**;¹³ and **R. (Laing Homes Limited) v Buckinghamshire CC**.¹⁴ A locality cannot be created simply by drawing a line on a plan: **Cheltenham Builders** case.¹⁵

31. In contrast, a “neighbourhood” need not be a recognised administrative unit. A housing estate can be a neighbourhood: **R. (McAlpine) v Staffordshire County Council**.¹⁶ However, a neighbourhood cannot be any area drawn on a map. Instead, it must have a sufficient degree of cohesiveness: **Cheltenham Builders** case.¹⁷

32. Neighbourhood may include one or more neighbourhoods, provided that they are neighbourhoods within a locality.¹⁸

v) Significant Number:

33. “Significant” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general used by the local community for lawful sports and pastimes, rather than occasional use by individuals as trespassers: **R. (McAlpine) v Staffordshire County Council**.¹⁹

vi) As of Right or By Right

34. Use of land “as of right” is a use without force, without secrecy and without permission. It was made clear in **R. v Oxfordshire County Council ex parte Sunningwell Parish Council**²⁰ that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

35. “Force” may mean physical force to gain access to land, for example by breaking a padlock or cutting down a fence. In **Cheltenham Builders** it was also confirmed that force may not just mean violent acts, but also use of the land subsequent to the landowner signifying his objection to use of it.²¹

36. There has been no judicial comment on the meaning of use “without secrecy” and accordingly it should be interpreted in its ordinary meaning: open use which is capable of being noticed by the landowner.²²

37. “Permission” can be expressly given or be implied from the landowner’s conduct, but it cannot be implied from the mere inaction or acts of encouragement of the landowner: **R. v Sunderland City Council ex parte Beresford**.²³ Tolerance does not imply consent.

¹¹ [2010] UKSC 11 at paragraph 36.

¹² [1995] 4 All ER 931 at page 937b-e.

¹³ [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.

¹⁴ [2004] 1 P & CR 573 at paragraph 133.

¹⁵ [2003] EWHC 2803 (Admin) at paragraphs 41 to 48.

¹⁶ [2002] EWHC 76 (Admin).

¹⁷ [2003] EWHC 2803 (Admin) at paragraph 85.

¹⁸ *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438

¹⁹ [2002] EWHC 76 (Admin) at 77.

²⁰ [2000] 1 AC 335.

²¹ [2003] EWHC 2803 (Admin) at paragraph 91.

²² J. Riddall, paragraph 29

38. In *R(on the application of Barkas) v North Yorkshire County Council and Another* the Supreme Court held that a playing field which had been maintained by the local authority under the Housing Act 1985, s 12(1) and used by the local inhabitants as a recreational ground for more than 50 years could not be registered as a town or village green under the Commons Act 2006, s 15 as the inhabitants use had not been ‘as of right’.

39. The issue was the meaning of the words ‘as of right’ and ‘by right’ and more particularly where a local authority has owned the land during the relevant 20 year period under statutory provisions, when it can be said that the use of such land has been ‘by right’ and not ‘as of right’.

40. The Barkas case legal arguments centred around the meaning ‘as of right’ in that the statutory purchase and maintenance of the land meant that the land in question was used permissively, therefore ‘by right’ rather than ‘as of right’.

41. In the Supreme Court’s leading judgement by Lord Neuberger which agreed with North Yorkshire County Council;

“So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land “by right” and not as trespassers, so that no question of user “as of right” can arise”. (para 21).

PART C – APPLICATION OF THE RELEVANT LAW TO THE EVIDENCE:

Application of the Commons Act 2006 and Caselaw

a) Land

42. The Application has identified a sufficiently defined area of land for registration, as can be seen by the plan at paragraph 2 of this report.

b) Local inhabitants of any locality or neighbourhood within a locality

43. The user evidence questionnaires (appendix 5 of the background document file of evidence) contained a question which attempts to illustrate the cohesiveness of the local community by asking the user to tick boxes as to what recognisable facilities are available to the inhabitants of the locality. A list of twelve facilities is stated including school, community hall, church and shops. There is also a box inviting the addition of information on any other facilities that are available. The vast majority of users completed this section and the findings are in the below table 1.

Table 1 Recognisable facilities available to inhabitants in the local community

Features	School catchment area	Church	Shops	Public House	Sports Facility	Community Hall
No. of Users	15	37	1	9	27	1
Features	Police	Neighbourhood watch	Central feature	Other	Residents Association	Community activities

²³ [2004] 1 AC 889.

No. of users	12	10	10	7	3	30
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44. The area is in a rural hamlet within the parish of East Chilton and is identified as the claimed locality. 44 out of 45 users are resident in the Parish (the 45th now living in Brighton), and it is considered that, on the balance of probabilities, the Land is enjoyed by the inhabitants of a locality.

45. Furthermore, the applicant cites the housing estate Hollycroft as the specific neighbourhood within a locality. Whilst the area depicted between the arbitrary red lines drawn by the applicant would perhaps have too high a population to consider 45 users as a 'significant number', examination of the user evidence shows that 44 users live within 1km of the Land, with the vast majority living within 10 metres of the proposed village green. Table 1 supports that the area surrounding the Land is sufficiently cohesive, coupled with the proximity of the users submitting evidence forms, so as to make a local community within the Ward and therefore satisfy this limb of the section 15(2) test.

46. It is also of note that it is not necessary for the land to only be enjoyed by local residents rather it is sufficient that the land is used 'predominantly by inhabitants of the [locality].'²⁴

c) Lawful sports and pastimes on the land

47. There is a question on the user evidence questionnaires which asks the user to list all the activities they have seen taking place on the land. There are approximately nineteen listed activities including dog walking, children playing and football. Table 2 outlines the specific findings:

Table 2 Activities participated in on the Land

Activity	No. of Users	Activity	No. of Users
Football	39	Cricket	30
Picnicking	35	Community celebrations	37
Children Playing	42	Cycling	36
People Walking	42	Rounders	29
Kite Flying	26	Snowballing	3
Bird watching	11	Ball games	0
Other (golf practice)	2	Drawing and painting	8
Team games	31	Carol singing	5
Dog Walking	42	Bonfire parties	12
Fetes	40	Fishing(casting)	3
Blackberry picking	38		

48. The three most frequent activities witnessed are children playing (42 users), people walking (42 users) and dog walking (42 users). Other common activities participated in or witnessed included fetes, footballing and blackberry picking.

49. In light of the **Sunningwell** case, the activities referred to in paragraphs 47 and 48 are suitable to be considered as lawful sports and pastimes. On the balance of probabilities there is sufficient evidence to illustrate that lawful sports and pastimes have been enjoyed on the Land. Accordingly, this element of the test has been satisfied.

d) For a period of at least 20 years

²⁴ *R v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council* [2000] 1 A.C. 335

50. 15 of the user evidence forms submitted record use of the Land for a period in excess of twenty years. Whilst a considerable amount of user evidence states the Land to be enjoyed frequently (21 of the users state daily use), there is not a requirement to show use occurred at such a rate, rather the land 'must have been used and available... when needed.'²⁵ The relevant twenty year period is 1994-2014, with this Application bringing the status of the land into question. Table 3 illustrates the specific findings regarding length of use, and Table 4 regarding frequency.

Table 3 Length of use by users submitting evidence

No. of Years	Under 20	20 years or more	30 years or more	40 years or more	50 years or more
No. of Users	21	12	8	2	2

Table 4 Frequency of Use

Frequency	Daily	Weekly	Monthly	Yearly	unspecified
No. of Users	21	11	8	4	1

51. Upon examination of the user evidence forms, it is submitted that, on the balance of probabilities, use of the claimed land has been enjoyed for a period of at least twenty years.

e) Have indulged as of right

52. Once it has been established that those who have used the land are of a locality it must be established that they have enjoyed the Land as of right. The meaning of 'as of right' has received legal clarification from Lord Hoffmann, who was of the opinion that it should be construed to mean, 'not by force, nor stealth, nor the licence of the owner.'²⁶ It has taken this meaning because it is not reasonable for the owner to resist actions of user because;

rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user²⁷

53. The decision of the Supreme Court in **Redcar**²⁸ further clarified the law with Lord Brown being of the opinion that there is 'no good reason to superimpose upon the conventional tripartite test'²⁹ for the registration of land as a town or village green. Accordingly, each arm of the test shall be identified and analysed individually. For use to be as of right each part must be satisfied.

(i) Not by force

54. The parcel of land in question does not have any fences or obstructions preventing access to it from members of the public and is in effect open land - thus it would be impossible to gain access via physical force. In addition, there is no evidence of the landowner signifying their objection to use of the land. Accordingly, use has not been by force and this part of the test has been satisfied.

(ii) Not in secrecy

55. The land has been used frequently and openly by members of the public and we have no reason to believe this has been performed in secrecy. Therefore this part of the test has also been satisfied.

²⁵ *Ibid* at paragraph 52

²⁶ *R v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council* [2000] 1 A.C. 335

²⁷ *Ibid*

²⁸ *R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and Another* [2010] 2 A.C. 70

²⁹ *Ibid* at para. 107

(iii) Not with permission

56. The user evidence questionnaire specifically asks if permission was ever sought for activities on the Land. The users consistently responded that no permission was ever sought or indeed obtained. However, it is submitted that there are issues surrounding permission which affect the outcome of this application.
57. There is no dispute that the Land has, as a matter of fact, been used by local inhabitants as a recreation ground for many years. Instead, the fundamental issue arising is whether the Land has been used by those local inhabitants “as of right” (so as to establish that particular element of the statutory criteria to justify the Land’s registration as a town or village green) or, rather, whether it has been so used by the inhabitants “by right” (so that such statutory requirement has not been established and the Land could not be registered as a town or village green.)
58. Lewes District Council submitted their objection (appendix 2 to this report) citing that the public use was ‘by right’ and not ‘as of right’ and relies on the following;
- Hollycroft Field and the housing estate was acquired by the Rural District Council of Chailey, LDC’s predecessor authority for the purposes of Part V of the Housing Act 1936, which enabled a local authority to provide housing accommodation for the ‘working classes.’
 - From the laying out of the Field as a recreation ground until the present day it has been made available to the occupiers of the housing estate and the public under a statutory power, originally section 80 of the Housing act 1936 then latterly section 12 of the Housing Act 1985.
 - Hollycroft Field was lawfully held by Lewes District Council under the Housing Act 1957 and is now lawfully held under section 12 of the Housing Act 1985.
59. In the Barkas case the Supreme Court ruled that, so long as land is held under a provision, such as section 12(1) of the 1985 Act, members of the public have a statutory right to use the land for recreational purposes, and therefore use the land “by right” rather than “as of right.” In the Supreme Court’s leading judgement Lord Neuberger stated:-
- “So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land “by right” and not as trespassers, so that no question of user “as of right” can arise”. (para 21).
60. There is evidence that the Land was acquired and was held by Lewes District Council under the various Housing Acts as listed above for the local inhabitants of East Chilmington. Following the ruling in Barkas, the local inhabitants had a right to use the Land, so have used it ‘by right’ rather than ‘as of right’. The statutory criteria for registration of the Land as a town or village green under s15(2) have, therefore, not been satisfied.

Considerations into the feasibility of holding a Public Inquiry

61. The Commons (Registration of Town or Village Greens) (Interim Arrangements)(England) Regulations 2007 require that the Local Authority consults on the proposed Green before making a determination. This process has been duly undertaken.
62. The Authority retains discretion as to whether to hold an Inquiry, and must give consideration as to whether or not one should be held. An Inquiry would be conducted by an independent Inspector or expert and would enable members of the public to put their view across in adversarial proceedings. The Inspector or expert would make recommendations and it would then be for the Authority to decide whether or not to accept any or all of those recommendations.

63. Those in favour or against the application have had the opportunity to submit their representations and these have been made available to the Panel, in full, for Members to read in the usual way and have been analysed in this report.
64. The cost implications and further delay which would be introduced into the process in holding a public inquiry would also be considerable. Furthermore, as the land involved is not owned by ESCC, and the issues are purely legal in nature, rather than factual, there would be little benefit to be obtained from holding a public inquiry.
65. The Committee is permitted to use its discretion when determining what course of action to follow; it can accept the officer recommendation put forward, it can adjourn the matter and seek further information, or as set out above, the Panel can request that a public inquiry be held.

Conclusion

66. After careful consideration of all the evidence provided to East Sussex County Council, it is submitted that the Applicant has not, on the balance of probabilities, satisfied all elements of the statutory criteria for registration.
67. The Land was acquired and held by Lewes District Council under the Housing Acts and consequently, the local inhabitants had a right to use the Land during the requisite 20 year period. Accordingly, section 15(2) of the Commons Act 2006 has not been satisfied and the Application ought to be rejected on that ground.
68. The objection received from Lewes District Council does counter the evidence to support the Application.

Recommendation

69. It is recommended that the application to register the land at Hollycroft Field as a town or village green be rejected and the register of town and village greens held at East Sussex County Council not be amended.

Karl Taylor
Assistant Director
Economy, Transport and Environment

Contact Officer: Natalie McLean (01273 482628)

Local Member: Councillor Sheppard

Appendix 1 – Application

Appendix 2 – Objection

Background Documents

File of Evidence

- Appendix 1- Application and accompanying plans
- Appendix 2- Notice of Application and newspaper proof
- Appendix 3- Consultation and responses
- Appendix 4- Objection
- Appendix 5- User Evidence Forms
- Appendix 6- Photographs of the proposed village green

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SCHEDULE

Regulation 2(2)

Forms

Form 44

Commons Act 2006: Section 15

Application for the registration of land as a Town or Village Green

Official stamp of registration authority indicating valid date of receipt:

Application number:

1359

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

Applicants are advised to read the 'Guidance Notes for the completion of an Application for the registration of land as a Town or Village Green' and to note the following:

- All applicants should complete questions 1 to 6 and 10 and 11.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete questions 7 and 8 as appropriate. Section 15(1) enables any person to apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for the voluntary registration under section 15(8) should, in addition, complete question 9.

Note 1
Insert name of registration authority.

I. Registration Authority

To the

EAST SUSSEX COUNTY
COUNCIL

Note 2

If there is more than one applicant, list all names. Please use a separate sheet if necessary. State the full title of the organisation if a body corporate or unincorporate.

If question 3 is not completed all correspondence and notices will sent to the first named applicant.

Note 3

This question should be completed if a solicitor is instructed for the purposes of the application. If so, all correspondence and notices will be sent to the person or firm named here

2. Name and address of the applicant

Name:

Full postal address:

Postcode

Telephone number:
(incl. national dialling code)

Fax Number:
(incl. national dialling code)

E-mail address:

3. Name and address of solicitor, if any

Name:

Firm:

Full postal address:
Postcode

Telephone number:
(incl. national dialling code)

Fax Number:
(incl. national dialling code)

E-mail address:

Note 4

For further advice on the criteria and qualifying dates for registration please see section 4 of the Guidance Notes.

** Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period*

4. Basis of application for registration and qualifying criteria

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5.

Application made under section 15(8):

If the application is made under section 15(1) of the Act, please tick one of the following boxes to indicate which particular subsection and qualifying criterion applies to the case.

Section 15(2) applies:

Section 15(3) applies:

Section 15(4) applies:

If section 15(3) or (4) applies, please indicate the date on which you consider that use as of right ended.

If section 15(6)* applies please indicate the period of statutory closure (if any) which needs to be disregarded.

Note 5

The accompanying map must be at a scale of at least 1:2,500 and show the land by distinctive colouring to enable it to be clearly identified.

**Only complete if the land is already registered as common land.*

Note 6

It may be possible to indicate the locality of the green by reference to an administrative area, such as that of a community or town council, electoral ward or other area sufficiently defined by name (such as a village or street). If this is not possible, a map should be provided on which a locality or neighbourhood is marked clearly.

5. Description and particulars of the area of land in respect of which application for registration is made

Name by which usually known:

HOLLYCROFT FIELD

Location:

O/S REF TQ 373 751 34 59
HOLLYCROFT, CHAPEL LANE,
EAST CHILTINGTON BN 7 3

Shown in colour on the map which is marked and attached to the statutory declaration.

Common land register unit number (if relevant) *

6. Locality or neighbourhood within a locality in respect of which the application is made

Please show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked:

THE PARISH OF EAST CHILTINGTON
LEWES DISTRICT

Tick here if map attached:



7. Justification for application to register the land as a town or village green

Note 7

Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

PLEASE SEE ATTACHED
CASE FOR SUPPORT

Note 8

Please use a separate sheet if necessary.

Where relevant include reference to title numbers in the register of title held by the Land Registry.

If no one has been identified in this section you should write "none".

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

Note 9

List all such declarations that accompany the application. If none is required, write "none".

This information is not needed if an application is being made to register the land as a green under section 15(1).

Note 10

List all supporting documents and maps accompanying the application. If none, write "none".

Please use a separate sheet if necessary.

8. Name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green

LEWES DISTRICT COUNCIL
SOUTHOVER HOUSE
SOUTHOVER ROAD
LEWES
EAST SUSSEX BN7 1AB

9. Voluntary registration – declarations of consent from ‘relevant leaseholder’, and of the proprietor of any ‘relevant charge’ over the land

10. Supporting documentation

- WITNESS STATEMENTS INCL MAPS
- CASE FOR SUPPORT , 2 PAGES
- SUMMARY OF EVIDENCE , 2 PAGES
- MAPS: 1:25,000 ✓
1:1500

Note 11

If there are any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration).

Full details should be given here or on a separate sheet (if necessary).

11. Any other information relating to the application

Note 12

The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or unincorporate.

Date:

17-3-2014

Signatures:

A. Toomey

REMINDER TO APPLICANT

You are advised to keep a copy of the application and all associated documentation. Applicants should be aware that signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence. The making of a false statement for the purposes of this application may render the maker liable to prosecution.

Data Protection Act 1998

The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the registration authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public

Statutory Declaration in Support

To be made by the applicant, or by one of the applicants, or by the applicant's or applicants' solicitor, or, if the applicant is a body corporate or unincorporated, by its solicitor, or by the person who signed the application.

¹ Insert full name (and address if not given in the application form).

I, ^{JENNI} J. TOOMEY, ¹ solemnly and sincerely declare as follows:

² Delete and adapt as necessary.

1. ² I am ((the person (one of the persons) who (has) (have) signed the foregoing application)) ((the solicitor to (the applicant) (¹ one of the applicants)).

³ Insert name if applicable.

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in Parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in Part 5 of the application.

⁴ Complete only in the case of voluntary registration (strike through if this is not relevant).

4. ⁴ I hereby apply under section 15(8) of the Commons Act 2006 to register as a green the land indicated on the map and that is in my ownership. I have provided the following necessary declarations of consent :

- (i) a declaration of ownership of the land;
- (ii) a declaration that all necessary consents from the relevant leaseholder or proprietor of any relevant charge over the land have

Cont/

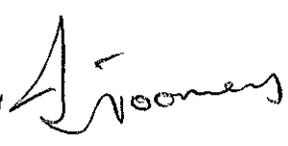
need

Continued

been received and are exhibited with this declaration; or
(iii) where no such consents are required, a declaration to that effect.

And I make this solemn declaration conscientiously believing the
same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared by the said JENNI TOOMEY
at KEEPERS COTTAGE, NOVINGTON
LANE, EAST CHILTINGTON, LEWES,
BN7 3AU
this 17th day of MARCH 2014

Signature of Declarant 

Before me* CORNELIUS MARCOLM MEYER

Signature: 

Address: KEEPERS COTTAGE, NOVINGTON LANE, EAST
CHILTINGTON, LEWES, EAST SUSSEX, BN7 3AU

Qualification: SOLICITOR OF THE SUPREME COURT

* The statutory declaration must be made before a justice of the peace, practising
solicitor, commissioner for oaths or notary public.

Signature of the statutory declaration is a sworn statement of truth in presenting the
application and accompanying evidence.

REMINDER TO OFFICER TAKING DECLARATION:

Please initial all alterations and mark any map as an exhibit

APPLICATION FOR VILLAGE GREEN STATUS, HOLLYCROFT FIELD

CASE FOR SUPPORT

The land

The application for Village Green Status is for the area of land known as the Hollycroft field, East Chiltington, Sussex. This land constitutes 3.1 acres to the north of Hollycroft, in the rural hamlet of East Chiltington. It is flat, open land, bordered on two sides by hedges, one side by football pitch that borders a wood, and open to Hollycroft on the South side. It is bisected by a 'grasscrete' path to a small sewage works in the north-west corner. This path also provides access to the neighbouring field and adjacent footpaths and appears on some local maps as a footpath. In terms of structures, the land includes a basketball court, all weather table tennis table, and a 'Rotunda', which is a community-built open sided shelter, next to the basketball court.

The Hollycroft field is owned by Lewes District Council, whom, we understand, acquired it at the same time of the construction of the Hollycroft housing during the 1940s. The field is currently listed as an Asset of Community Value. The adjacent football pitch, which is not physically separated from the land, is leased from LDC by East Chiltington Parish Council and is not part of this application.

The locality – East Chiltington

The Hollycroft field is in the centre of the Parish of East Chiltington. East Chiltington is a rural hamlet, with a scattered population which forms a narrow strip, about 6 miles long and two miles wide at its widest point. The southern part of the parish, including the Hollycroft field, is within the South Downs National Park. East Chiltington has two principal clusters of housing; those around the centre (approx 34 houses) which includes Hollycroft, the principal area of social and affordable housing in the parish; and another around Pouchlands, a converted former hospital, which is physically located next to South Chailey, about two miles from the Hollycroft field (around 70 households). The remainder of the houses in the Parish are scattered in the countryside and along its single track lanes (around 65 houses¹).

East Chiltington has a pub and a church, though no shop, school or village hall. It also has a vibrant community, of which the Hollycroft field is an important part. The construction of the Rotunda by community volunteers (with funding support from Veolia), the fact that the basketball court was a result of the Parish Action Plan, and the purchase by the Parish Council of a table tennis table and a marquee in which to hold events, are all indicators of

¹ These figures are approximate because they are derived from the electoral register, which may not cover all households. They do not reflect any formal designation.

the value of the field to the community. The majority of the regular users of the field come from the area immediately adjacent, but it is also used by many others from the within parish.

Use of the field 'as of right'

Our case is that the Hollycroft field has been used 'as of right' for the period from 1993-2013. Our evidence for this also covers periods dating back to the construction of Hollycroft in 1947/8, but this is not the focus of this application.

We are submitting 45 witness forms that cover all or part of this period. Of these, 12 contain additional statements, 15 offer photographs in support of the case, and 25 state a willingness to give evidence in a person at an enquiry should this be required. 25 of the supporting forms cover at least the whole period from 1993. The majority (31) come from people who live, or who lived, in the area closest to the Hollycroft field (within a short walk). However, users have also come from further afield within the parish.

Statements attest that:

1. The Hollycroft field has been used for diverse recreational purposes: sports and games such as cricket, stoolball, rounders, basketball, table tennis, tennis; bike riding; dog walking; blackberry and sloe picking; children's and adults' parties; barbeques; picnics; golf; igloo-building; community events such as parties, fetes, Millennium and Jubilee celebrations; harvest supper, formal meetings in the Rotunda.
2. Use has been without permission, force or secrecy. During the period claimed, the land has never been fenced, nor have any signs ever been in place to restrict access. People access the Hollycroft field simply by walking from Hollycroft, or via a footpath through the woods. There has never been any attempt to prevent use of the land, by the owner, or anyone else. An annual 'parish party', organized by the Parish Council, has taken place over the last five years. On these occasions only, has permission been sought from the owner, Lewes District Council, by the parish clerk, in order to fulfill Parish Council insurance requirements. The users of the field would not have not been aware of such permissions.

In summary, the Hollycroft field is a vital open space for an area that is in other respects not well-endowed with meeting places. Apart from the communal use of the field for events and the day to day use as a recreation ground, this open space affords a safe play ground for children and a meeting place for adults. There is a clear case for its acquisition of village green status.

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Lewes District Council

Southover House,
Southover Road,
Lewes BN7 1AB
01273 471600
01273 484488 minicom
www.lewes.gov.uk

BY HAND	direct	01273 484347
EAST SUSSEX COUNTY COUNCIL	dial	
COMMUNITIES, ECONOMY & TRANSPORT	e-mail	marsali.stuart@lewes.gov.uk
COUNTY HALL		k
ST ANNE'S CRESCENT	my ref	MR/MLMS/
LEWES	your ref	Chris Kingham Rights of Way Access CET
EAST SUSSEX BN1 1UE	date	5 June, 2014

FAO CHRIS KINGHAM RIGHTS OF WAY ACCESS CET

Dear Sirs

**Re: Commons Act 2006 - Application to register land as a village green –
Hollycroft Field Chapel Lane East Chiltington (O/S Ref. TQ3737515459)**

Further to your letter of 25 April, enclosing a copy of the application and supporting evidence, please accept this letter as the District Council's statement in objection to the application, which the registration authority is obliged to consider in accordance with the Commons (Registration of Town or Village Green) (Interim Arrangements) (England) Regulations 2007.

The District Council relies on the following:-

1. Hollycroft Field and the adjacent housing estate were acquired by the Rural District Council of Chailey, Lewes District Council's predecessor authority, for the purposes of Part V of the Housing Act 1936. Part V of the Housing Act 1936 enabled a local authority to provide housing accommodation for the working classes.
2. From the laying out of Hollycroft Field as a recreation ground until the present day, it has been made available to the occupiers of the housing estate and the public under a statutory power, originally section 80 of the Housing Act 1936 and latterly section 12 of the Housing Act 1985.
3. Hollycroft Field was lawfully held by Lewes District Council under the Housing Act 1957, and is now lawfully held by Lewes District Council under section 12 of the Housing Act 1985.
4. Use of the land by local inhabitants is therefore 'by right' and not 'as of right'.

5. The District Council contends that the fact that Hollycroft Field may be used or may have been intended to be used by persons other than the persons for whose principal benefit the statutory power under the Housing Act existed, does not invalidate the exercise of the Council's statutory power. The District Council relies on authority given in the case of *HE Green and Sons v Minister of Health (No 2)* [1948] 1KB 34 . This case was given further consideration on appeal in *Barkas v North Yorkshire County Council* [2012] EWCA Civ 1373. The Supreme Court upheld the decision of the Court of Appeal in *R. (on the application of Barkas) v. North Yorkshire County Council and another* [2014] UKSC 31.
6. User 'by right' is not use 'as of right' as required by Section 15 (3) (a) of the Commons Act 2006.
7. The principles upon which the District Council relies are set out in *R. (on the application of Barkas) v. North Yorkshire County Council and another* [2014] UKSC 31.

Please find enclosed statutory declaration in support of the objections raised by the District Council.

Please acknowledge receipt of this statement in objection and statutory declaration in support.

Yours faithfully



Catherine Knight
Assistant Director of Corporate Services

Encl. Stat. Dec. (1) and exhibits (3)

I GILLIAN MARSTON, Director of Service Delivery of Lewes House Southover House Southover Road Lewes East Sussex BN7 1AB do solemnly and sincerely declare that:-

1. I am the Director of Service Delivery for Lewes District Council with responsibility for the housing function of Lewes District Council and overall responsibility for housing services. I make this declaration in respect of the application to register Hollycroft Field, Chapel Lane, East Chiltington ("the Recreation Ground") as a new town or village green under the Commons Act 2006. The Recreation Ground is shown edged red on the plan now shown to me marked "GM1".
2. Lewes District Council is a local housing authority for the purposes of Part I of the Housing Act 1985. The housing estate at Hollycroft, Chapel Lane, East Chiltington (the "Estate") and the Recreation Ground are within the area of Lewes District Council acting in its capacity as local housing authority.
3. The Council's Tenancy Manager has made a search of existing records held by the Housing Services Department. Most of the historic records were destroyed when the Council adopted a paperless management system.
4. The Tenancy Manager and the Housing Officer for the area including East Chiltington have gone through such records as are still available and interviewed council officers with direct knowledge as to how the Council manages the Recreation Ground. The few remaining files still in existence demonstrate that Lewes District Council and its predecessor authority have managed the Estate and the Recreation Ground in their capacities as the local housing authority.
5. The Estate and the Recreation Ground were acquired by the Rural District Council of Chailey, Lewes District Council's predecessor authority, for the purposes of Part V of the Housing Act 1936. Part V of the Housing Act 1936 enabled a local authority to provide housing accommodation for the working classes.
6. The main area of the Estate was acquired by a conveyance of 22nd day of January 1946 and made between Alfred Carlisle Sayer Arthur Gerald Miller and Lt. Colonel Charles Harold Noel Adams of the first part Herbert Ivor Powell Edwards and Nora Theodora Imogen Powell Edwards of the second part and The Rural District Council of Chailey of the third part. A copy of the conveyance dated 22nd day of January 1946 is now shown to me marked "GM2"

7. Title as to the remaining part of the Estate together with the Recreation Ground was acquired by a conveyance of 23rd day of April 1947 and made between Alfred Carlisle Sayer Arthur Gerald Miller and Lt. Colonel Charles Harold Noel Adams of the first part Nora Theodora Imogen Powell Edwards of the second part and The Rural District Council of Chailey of the third part. A copy of the conveyance dated 23rd day of April 1947 is now shown to me marked " GM3"
8. Both conveyances contain a recital that the land was acquired for the purposes of Part V of the Housing Act 1936.
9. Part 5, section 80 of the Housing Act 1936 included a power to provide and maintain, with the consent of the Minister of Health and if desired jointly with any other person, in connection with any such housing accommodation, any recreation ground, which in the opinion of the Minister would serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation was provided.
10. Section 80 of the Housing Act 1936 was repealed and substantially re-enacted in the Housing Act 1957, whose provisions were in turn repealed and substantially re-enacted in section 12 of the Housing Act 1985. Section 12(1) reads as follows:

"12(1) A local housing authority may, with the consent of the Secretary of State, provide and maintain in connection with housing accommodation provided by them under this Part—

 - (a) buildings adapted for use as shops,
 - (b) recreation grounds, and
 - (c) other buildings or land which, in the opinion of the Secretary of State, will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided."
11. The land at Hollycroft was partly developed as public sector housing accommodation in 1946. The remainder of the land was set aside as a recreation ground provided and maintained by the Rural District Council of Chailey, and Lewes District Council as statutory successor, in their capacities as local housing authority in connection with the housing accommodation.
12. Lewes District Council cannot find any copy records relating to the ministerial consent but has no reason to believe that the proper consent was not obtained.

13. The Recreation Ground is currently held by Lewes District Council as Housing Revenue Account land. It has not been appropriated for any other purpose. Grounds maintenance is recharged to the Housing Revenue Account.
14. To the best of my knowledge the Recreation Ground was lawfully held by the Rural District Council of Chailey under section 80 of the Housing Act 1936 and its Housing Act 1957 re-enactment.
15. To the best of my knowledge the Recreation Ground was lawfully held by Lewes District Council under the Housing Act 1957, and is now lawfully held by Lewes District Council under section 12 of the Housing Act 1985.
16. From the laying out of the Recreation Ground until the present day, the Recreation Ground has been made available to the public under a statutory power, originally section 80 of the Housing Act 1936 and latterly section 12 of the Housing Act 1985. The use of the land by local inhabitants is therefore "by right" and not "as of right".

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1835

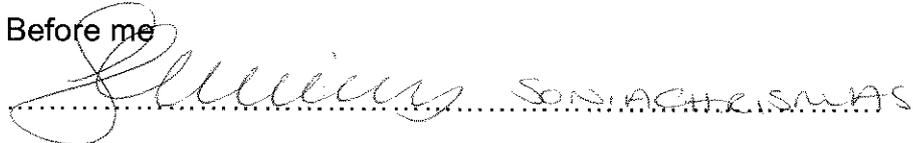
DECLARED at Beverley Ogdenz company

this 5th day of June 2014



(signature of declarant)

Before me



(signature of person before whom declaration is made)

(insert description of person taking declaration)

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