



## COMMONS AND VILLAGE GREEN REGISTRATION PANEL

WEDNESDAY, 15 NOVEMBER 2017

10.30 AM COUNCIL CHAMBER, COUNTY HALL, LEWES

MEMBERSHIP - Councillors Phil Boorman, Bob Bowdler and Chris Dowling

### A G E N D A

- 1 Appointment of Chair
- 2 Minutes of the meeting held on 14 October 2015 (*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 Application for land at the Hollycroft Field, Chapel Lane, East Chilmington, East Sussex to be registered as a town or village green (*Pages 5 - 56*)  
Report by the Assistant Director, Operations
- 5 Urgent items  
Notification of any items which the Lead Member considers urgent and proposes to take at the appropriate part of the agenda.

PHILIP BAKER  
Assistant Chief Executive  
County Hall, St Anne's Crescent  
LEWES BN7 1UE

7 November 2017

Contact Simon Bailey, Democratic Services Officer,  
01273 481935  
Email: [simon.bailey@eastsussex.gov.uk](mailto:simon.bailey@eastsussex.gov.uk)

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## COMMONS AND VILLAGE GREEN REGISTRATION PANEL

MINUTES of a meeting of the Commons and Village Green Registration Panel held at County Hall, Lewes on 14 October 2015.

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PRESENT: Councillors Richard Stogdon, Francis Whetstone and Ian Buchanan

### 1 APPOINTMENT OF CHAIR

- 1.1 Councillor Stogdon was appointed as the Chair for the meeting.
- 1.2 It was noted that Councillor Buchanan was present as a substitute for Councillor Howson.

### 2 MINUTES OF THE MEETING HELD ON 23 APRIL 2014

- 2.1 The minutes of the meeting held on 23 April 2014 were signed by Councillor Stogdon as a correct record.

### 3 REPORTS

- 3.1 Reports referred to in the minutes below are contained in the minute book.

### 4 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

- 4.1 The Panel considered a report by the Assistant Director Operations, Communities, Economy and Transport.
- 4.2 After consideration of the evidence submitted to the Registration Authority, the Panel concluded that the statutory criteria had not been made out.
- 4.3 The Panel expressed grave concern that the terms of the 1950 conveyance, referred to in paragraphs 54, 74 and 75 of the report, which sought to *“keep and maintain the said land hereby conveyed as an open space and free from building or erections except such structures as may be incidental to the use of the land as a public open space or park...”* had not been adhered to by Hastings Borough Council on the further transfer of the land to 1066 Housing Trust and subsequently Amicus Horizon.
- 4.4 The Panel RESOLVED to refuse the application to register land at the corner of Harley Shute Road and Edinburgh Road, St Leonards as a town or village green.

#### Reasons

- 4.5 While the Panel were unanimous in their view that alternative legal remedies should be sought by the Applicant, in the light of the charitable covenant included in the conveyance to Hastings Borough Council by the donor of the land in 1950, they did not consider that there was sufficient evidence to register the land.

5 APPLICATION FOR LAND AT THE HOLLYCROFT FIELD, CHAPEL LANE, EAST CHILTINGTON, TO BE REGISTERED AS A TOWN OR VILLAGE GREEN

5.1 The Assistant Director Operations, Communities, Economy and Transport sought a deferral of consideration of the report, to allow for investigation of further evidence provided after publication of the report.

5.2 RESOLVED to agree to the deferral of the application to register land at Hollycroft, East Chiltington as a town or village green until such time as the further evidence has been assessed.

(The meeting ended at 12.10 pm)

CHAIR

**Committee:** Commons & Village Green Registration Panel

**Date:** 15 November 2017

**By:** Assistant Director, Transport and Operations

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

**Applicant:** East Chiltington Parish Council

**Application No:** 1359

**Contact Officer:** Natalie Mclean, Legal Order Officer 01273 482628

**Local Member:** Councillor Jim Sheppard

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## **Recommendation**

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

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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**

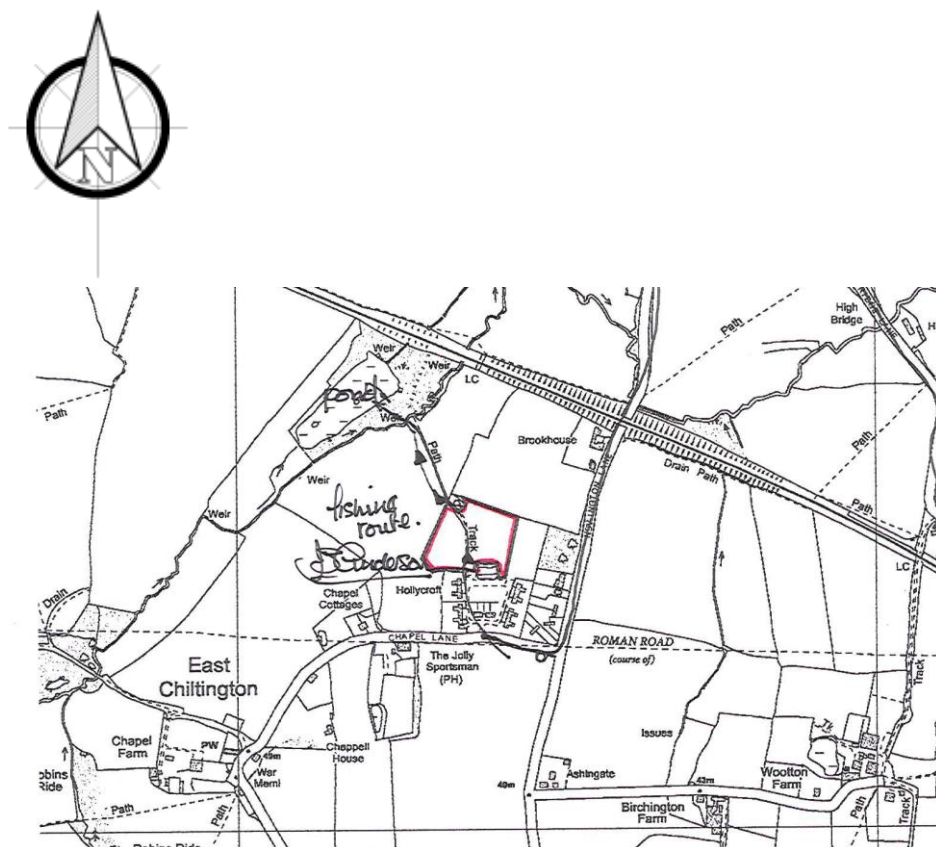
### **Receipt of a completed Application**

1. The County Council received the completed Application on 17 March 2014. The Application seeks to register 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 Chiltington. The Land constitutes 3.1 acres. It is a flat open area 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 (a residential development) on the south side. It is bisected by a Grasscrete path to a small sewage works in the north-west corner. The land includes a basket ball court, all weather table tennis table and a 'rotunda' (community built open sided shelter.)



3. The Land is shown red on the map accompanying the Application. Members are referred to the plan and Application at Appendix 1.

### Land Ownership

4. The Land has one owner, Lewes District Council (LDC). LDC have supplied a statutory declaration with copies of various conveyances relating to the Land in support of their objection.
5. The evidence produced by LDC shows that the Estate and Recreation Ground were acquired by the Rural District Council of Chailey (LDC'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.
6. Hollycroft Field was lawfully held by LDC under the Housing Act 1957 and is now held by LDC under section 12 of the Housing Act 1985.

### Conveyances held that affect part of the land

Date of conveyance	Parties	Area of land
22 January 1946	Alfred Carlisle Sayer, Arthur Gerald Miller, Lt Colonel Charles Harold Noel Adams (first part) and Herbert Ivor	Part of Chapel Farm, north side of Chapel Lane having an area of 3.400 acres, field

	Powell Edwards, Nora Theodora Imogen Powell Edwards (second part) and The Rural District Council of Chailey (third part)	number 211 on OS map 1910 edition. (this includes part of Land)
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 Stanton's Farm, north side of Chapel Lane having an area of 4.124 acres, being part of field number 211 on OS map 1910 edition. (this includes the remaining part of the Land)

### **Consultations and representations:**

7. The Application was advertised on site and in the Sussex Express on 25 April 2014 (please see Tab 1 of the file of evidence (FOE)).
8. 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 Tab 2 FOE).
9. The Local Member, Councillor Jim Sheppard, was informed of the Application by way of letter dated 24 April 2014.
10. This Application has received one objection, (Tab 3 FOE) from the landowner Lewes District Council. This will be explored in depth in Part C of this report.
11. 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**

12. 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.
13. 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.
14. 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.
15. 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*).

16. 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

17. 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.
18. 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***<sup>1</sup> 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.

19. 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

20. 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 are referred to in turn below.

#### i) Land:

21. 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.
22. It was stated by way of *obiter dictum* by the majority of the House of Lords in ***Oxfordshire County Council v Oxford City Council***<sup>2</sup> 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

<sup>1</sup> [2004] 1 AC 889.

<sup>2</sup> [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.



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.<sup>3</sup> It is also relevant to note that the Commons Act 2006, which was subsequently passed, did not seek to further restrict the definition of a village green in that regard.

23. 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.<sup>4</sup>
24. In the recent Court of Appeal case of ***R (Newhaven Port and Properties Ltd) v East Sussex County Council***<sup>5</sup> 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:

25. It was made clear in ***R. v Oxfordshire County Council ex parte Sunningwell Parish Council***<sup>6</sup> 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]’.<sup>7</sup>
26. 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.<sup>8</sup>

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

27. The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: ***Hollins v Verney***<sup>9</sup>.
28. 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. From the Applicant’s further submission it is contended that the Applicant is not considering use prior to 1993. Thus the qualifying period is 1993-2013
29. 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.’<sup>10</sup>

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<sup>3</sup> *Ibid* at paragraph 39.

<sup>4</sup> *Ibid* at paragraphs 71 to 83.

<sup>5</sup> [2013] EWCA Civ 276

<sup>6</sup> [2000] 1 AC 335 at 356F to 357E.

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

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

<sup>9</sup> (1884) 13 QBD 304.

<sup>10</sup> J. Riddall, paragraph 51

30. 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**.<sup>11</sup>

iv) Locality or Neighbourhood within a Locality:

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

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

33. Neighbourhood may include one or more neighbourhoods, provided that they are neighbourhoods within a locality.<sup>18</sup>

v) Significant Number:

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

vi) As of Right or By Right

35. 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**<sup>20</sup> that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

36. “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.<sup>21</sup>

37. 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.<sup>22</sup>

38. “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**.<sup>23</sup> Tolerance does not imply consent.

<sup>11</sup> [2010] UKSC 11 at paragraph 36.

<sup>12</sup> [1995] 4 All ER 931 at page 937b-e.

<sup>13</sup> [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.

<sup>14</sup> [2004] 1 P & CR 573 at paragraph 133.

<sup>15</sup> [2003] EWHC 2803 (Admin) at paragraphs 41 to 48.

<sup>16</sup> [2002] EWHC 76 (Admin).

<sup>17</sup> [2003] EWHC 2803 (Admin) at paragraph 85.

<sup>18</sup> *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438

<sup>19</sup> [2002] EWHC 76 (Admin) at 77.

<sup>20</sup> [2000] 1 AC 335.

<sup>21</sup> [2003] EWHC 2803 (Admin) at paragraph 91.

<sup>22</sup> J. Riddall, paragraph 29

39. 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'.

40. The issue was the meaning of the words 'as of right' and 'by right' and more particularly where a local authority has owned and maintained 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'.

41. 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'.

42. 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).

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

### **Application of the Commons Act 2006 and Case law**

#### **a) Land**

43. 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**

44. The user evidence questionnaires (Tab 1 FOE) 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	Neighbour	Central	Other	Residents	Community

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<sup>23</sup> [2004] 1 AC 889.

		-hood watch	feature		Association	activities
No. of users	12	10	10	7	3	30

45. 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 (included in the Application Papers at Appendix 1).

46. 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.

47. 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].'<sup>24</sup>

c) Lawful sports and pastimes on the land

48. 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		

49. 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.

50. In light of the **Sunningwell** case, the activities referred to in paragraphs 48 and 49 are suitable to be considered as lawful sports and pastimes. On the balance of probabilities there is

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

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

51. 15 of the submitted user evidence forms submitted recorded use of the Land for a period in excess of 20 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.'<sup>25</sup> The relevant 20 year period is 1993-2013, 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

52. 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 20 years.

e) Have indulged 'as of right'

53. 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.'<sup>26</sup> 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 user"<sup>27</sup>

54. The decision of the Supreme Court in **Redcar**<sup>28</sup> further clarified the law with Lord Brown being of the opinion that there is 'no good reason to superimpose upon the conventional tripartite test'<sup>29</sup> 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

55. 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

<sup>25</sup> *Ibid* at paragraph 52

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

<sup>27</sup> *Ibid*

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

<sup>29</sup> *Ibid* at para. 107

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

56. 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

57. 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 need to be addressed for this application.

58. 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.)

59. LDC submitted the only objection (Tab 3 FOE) 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.

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.'

60. The evidence that the Land was acquired and was held by LDC under the various Housing Acts as listed above for the local inhabitants of East Chiltington has been considered by Counsel for the County Council, Counsel's Report is attached (Appendix 2) and should be read in full in conjunction with this report.

61. The main points are summarised here:-

- The only issue is whether the use by the public was 'as of right' or 'by right' and this burden of proof is upon the Applicant to show that, on the balance of probabilities use was 'as of right'.
- There is no dispute between parties that the use was without force or secrecy however it is disputed whether the use was with permission.
- LDC claim use was with permission and therefore 'by right' for 2 reasons;
  - i) LDC and its predecessor authority exercised discretionary powers under section 80 Housing Act 1936 and section 12 1985 Act. Whilst there is no

evidence of the Ministerial consent, LDC rely on the presumption of regularity. LDC claim the use of the land for recreational purposes after exercising those statutory powers was by right as the use was with permission; and

- ii) LDC and its predecessors had carried out positive acts to facilitate the permissive use and therefore use is by right.
- LDC have not produced other evidence of acts of maintenance or management of the land for recreational purposes.
- The Applicant has put forward evidence and submissions to argue that the statutory powers under section 80 of the 1936 Act or section 12 of the 1985 Act were not exercised by LDC and, therefore, use was not with permission.

62. Having considered all of the evidence and submissions of both parties Counsel has concluded that:-

- the evidence and submissions of the Applicant (Tab 4 FOE) are sufficient to rebut any LDC evidence and establish that on the balance of probabilities it is more probable than not that the statutory powers as mentioned above had not been exercised. Accordingly there is no statutory permission for public use of the Land for recreational purposes and, therefore, such use of the Land after 1993 was “as of right”;
- LDC’s alternative submission, that the public recreational user of the Land was by implied permission, also fails. The limited evidence LDC have produced to support this submission is not sufficient to show that either LDC, or its predecessor authority, set the land out as recreation ground or took any positive steps of maintenance or management for the purpose of allowing the public to use it for recreational purposes.

63. Based on the evidence and submissions of both the Applicant and LDC (considered in detail in Counsel’s report) the conclusion is that the use of the Land for the relevant 20 year period was, on the balance of probabilities, “as of right” not “by right” i.e. without permission.

64. The statutory criteria for registration of the Land as a town or village green under s15(2) have, therefore, been satisfied.

### **Considerations into the feasibility of holding a Public Inquiry**

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

66. 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.

67. 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.

68. The 2015 October report, (attached as Tab 6 FOE) was due to be submitted to the Commons & Village Green Panel on 14 October 2015. However on the 12 October 2015, the Applicant informed the County Council that they wished to submit further new evidence. Therefore, the report was deferred until such time as the relevant parties could consider the new evidence.

69. The County Council carried out further lengthy consultations and received additional submissions from each party. Following which, the County Council offered the Applicant and

LDC a non-statutory public inquiry, which both parties declined. Both parties did, however, accept that the application could be decided by way of written representations. The County Council instructed Counsel to consider all evidence and representations.

70. The Panel 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**

71. After careful consideration of all the evidence provided to the County Council, it is submitted that the Applicant has, on the balance of probabilities, satisfied all elements of the statutory criteria for registration. The use of land for the relevant period, which is accepted, was on the balance of probabilities 'as of right'.
72. The objection received from Lewes District Council does not counter the evidence to support the Application.

## **Recommendation**

73. It is recommended that the Application to register the land at Hollycroft Field as a town or village green be accepted and the register of town and village greens held at East Sussex County Council be amended.

Karl Taylor  
Assistant Director – Transport and Operations

Contact Officer: Natalie McLean (01273 482628)

Appendix 1 Application and accompanying plans  
Appendix 2 Counsel Opinion 12 March 2017

## **Background Documents**

### **File of Evidence (FOE)**

Tab	1	Notice of Application and newspaper proof
Tab	2	Consultations and responses
Tab	3	Objection and landowner further submissions
Tab	4	Applicant further submissions
Tab	5	Photographs of the proposed TVG
Tab	6	October 2015 Report



## 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:

1. Registration Authority

To the

**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:

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 54 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**

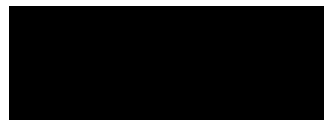
**Note 12**

*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:



**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.

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

*Jenni J. Toomey*  
I.....<sup>1</sup> solemnly and sincerely declare as follows:

<sup>2</sup> Delete and adapt as necessary.

1,<sup>2</sup> I am ((the person (one of the persons) who (has) (have) signed the foregoing application)) ((the solicitor to (the applicant) (<sup>3</sup> one of the applicants))).

<sup>3</sup> 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.

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

4.<sup>4</sup> 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/



rued

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

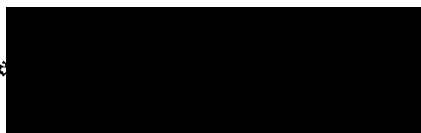
at KEEPERS COTTAGE, NOVINGTON  
LANE, EAST CHILTINGTON, LEWES,  
BN7 3AU  
this 17<sup>th</sup> day of MARCH 2014

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 houses<sup>1</sup>).

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

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<sup>1</sup> 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.

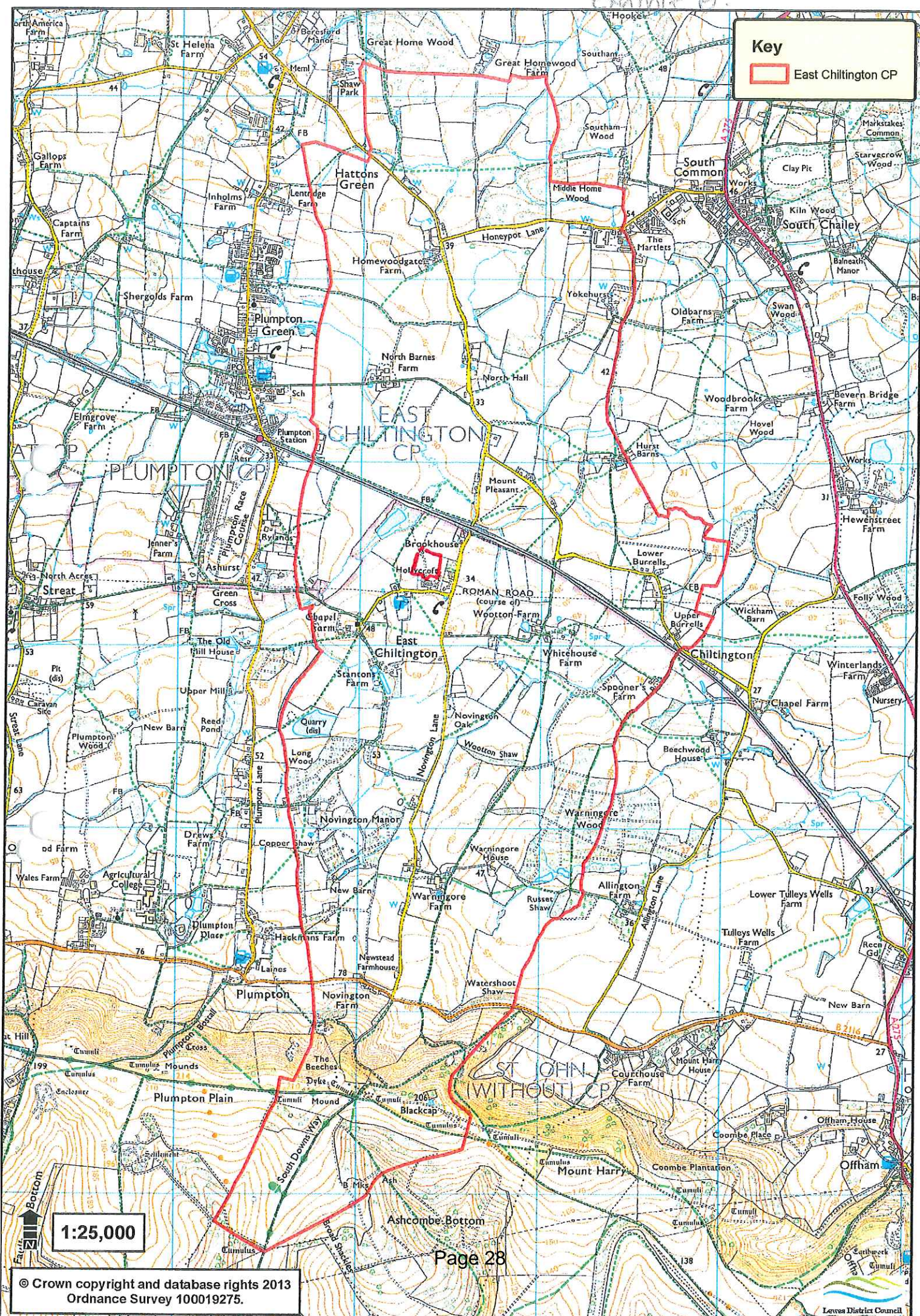
We are submitting 45 witness forms that cover all or part of this period. Of these, 12 contain additional statements, 15 offer photographs in support of the case, and 25 state a willingness to give evidence in a person at an enquiry should this be required. 25 of the supporting forms cover at least the 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.

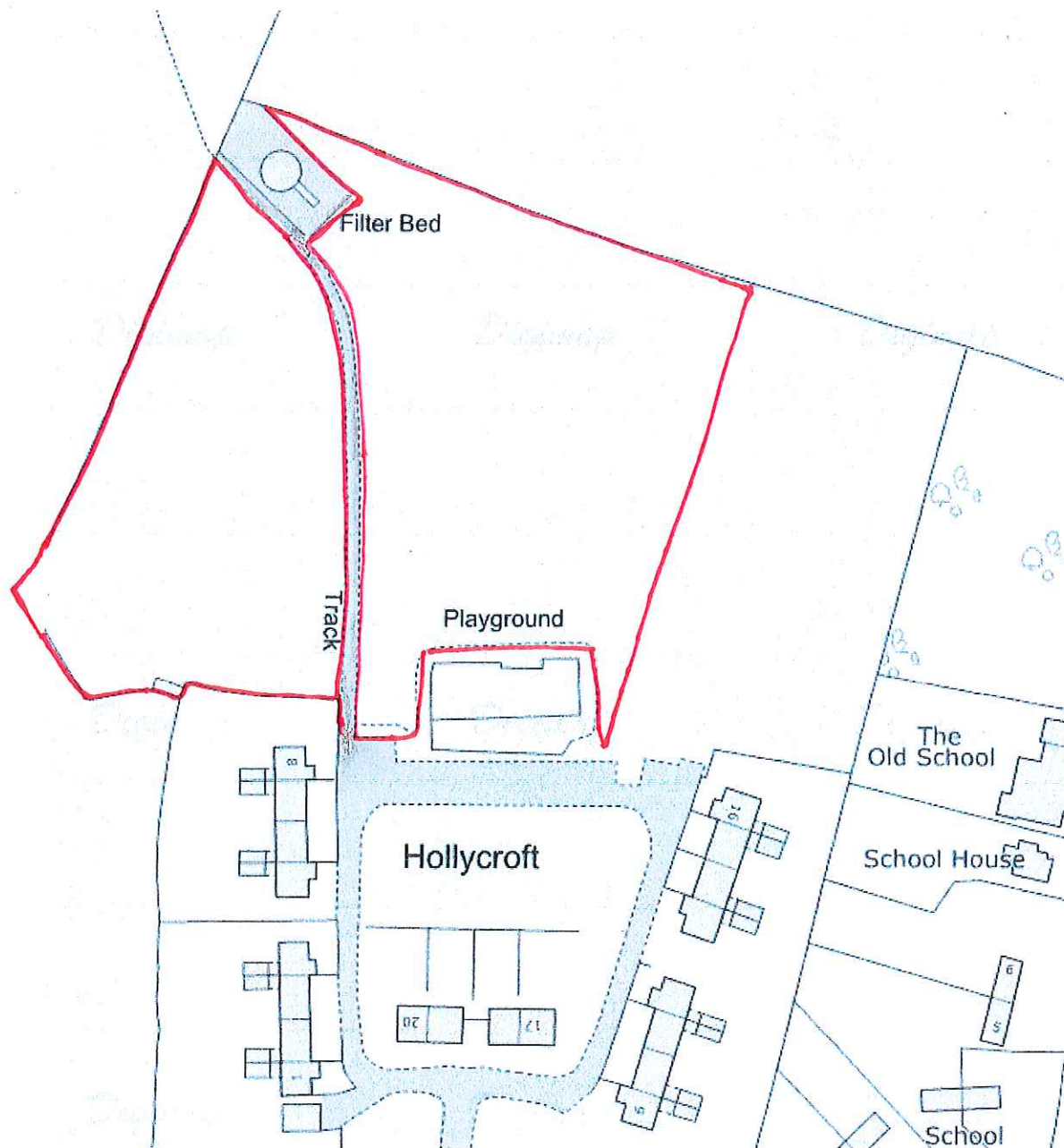






HOLLYCROFT, EAST CHILTINGTON. LAND CLAIMED AS VILLAGE GREEN OUTLINED IN RED

SCALE APPROX 1:1500



VILLAGE GREEN APPLICATION FOR HOLLYCROFT FIELD, EAST CHILTINGTON  
EVIDENCE SUMMARY

NAME	ADDRESS (OR EARLIER ADDRESS IF MOV	TIME PERIOD COV 1993 or earlier	ADDITIONAL PHOTOS?	WILLINGNESS TO GIVE ORAL EVIDENCE?
ANDERSON, John and Sheila	Southover Cottage	1977-1989	1	
BATES, Barbara	1 Hollycroft	1974-2013	1	
BATES, Neil	1 Hollycroft	1974-2013	1	
BLACK, Hamish	Brook House Studios	1979-2013	1	1
BLACK, Yvonne	Brook House Studios	1979-2013	1	1
CRIPPS, Carole	63 Hurstbarns Cots.	1977-1984	1	
CRIPPS, Ian	2 Pinewood/Jolly Sportsman	1958-2013	1	
CRIPPS, Jakki	Hewenstreet Farmhouse	1977-2013	1	
CRIPPS, Marina	2 Pinewood/Jolly Sportsman	1972-2013	1	
CUMMERSON, Rivkah	6 Hollycroft	2011-2013	1	1
DAVID, Patrick	9 Hollycroft	2000-2013	1	1
EVERSHED, Claire	8 Hollycroft	1991-2013	1	1
FARMELO, Chris	Ashingate	2010-2013		1
FARMELO, Deb	Ashingate	2010-2013		1
FOWLER, Kenneth	19 Hollycroft	2010-2013		1
FUNNELLO, Carol	8 Hollycroft	1991-2013	1	1
FUNNELL, Charlotte	8 Hollycroft	1992-2013	1	1
FUNNELL, Laura	8 Hollycroft	1994-2013		
FUNNELL, Steven	8 Hollycroft	1991-2013	1	1
HARRIS, Alan	The Old School	1982-2013		
HARRISON, Elizabeth	9 Hollycroft	2000-2013	1	1
HASKELL, Lesley	Deer Park Cottage	1979-2013	1	
HEASMAN, Mary	3 Hollycroft	1986-2013		1
HOPKINS, Suzi	White House Farm	1999-2013		1
HUTCHINSON, Paulette	11 Hollycroft	2006-2013	1	1
ISRAEL, Stephen	White House Farm	1999-2013	1	1
KRATLI, Saverio	6 Hollycroft	2011-2013		1
MANVILLE, William and Jean	2 Hollycroft	1946-2013		1
PEARCE, Michelle and Michael	13 Hollycroft	2006-2013	1	1
SANDS, Dave	17 Hollycroft, now lives in Brighton	1959-2013	1	1
SHOPLAND, Teresa and SYMES	6 School Cottages	1987-2013	1	1
SHORT, Jo	12 Hollycroft	2005-2013 though away 2008-2012		

SMITH, Anna	Chapel House	2010-2013		1	1
SYMES, Chris	School House	1987-2013	1	1	1
SYMES, Mary	School House	1987-2013	1		1
SYMES, William	School House	1995-2013			
TOOMEY, Jenni	Bowling Green	1996-2013	1	1	1
UPTON, Clive	30 East View Fields/6 Hollycroft	1970-2011	1		
UPTON, Gwen	30 East View Fields/6 Hollycroft	1970-2011	1		
WADE, Hazel	18 Hollycroft	1980-2013	1		
WARD, Amber	12 Hollycroft	2005-2013	1		1
WEBBER, Michael and Gilly	2 School Cottages	2008-2013			
WHEELER, Hilda and Ray	15 Hollycroft	1974-2013	1	1	
WHITE, Jo	10 Hollycroft	2011-2013		1	1
WINCHESTER, Stacey	19 Hollycroft	2010-2013			
			25	12	25
				15	

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**COMMONS ACT 2006**

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A VILLAGE  
GREEN**

**LAND AT HOLLYCROFT FIELD, EAST CHILTINGTON, EAST SUSSEX**

**OPINION**

1. I am asked to advise on behalf of East Sussex County Council, ["the Council"], as to the merits of an application made pursuant to section 15(2) of the Commons Act 2006, ["the 2006 Act"], to register an area of land as a town or village green. My conclusions are summarised from paragraph 54 onwards at pages 21 to 23 below.

2. The application is made by East Chiltington Parish Council, ["ECPC"], in respect of land, ["the Land"], known as Hollycroft Field, Chapel Lane, East Chiltington. The Land extends to 3.1 acres and is flat and open. It is bordered on two sides by hedges, on one side by a football pitch, (the pitch is not part of the application), and on the south side is open to an area of housing known as Hollycroft. I visited the Land and the surrounding area on the 26<sup>th</sup> January 2017.

3. The application is accompanied by 45 User Evidence Forms, although six of those<sup>1</sup> give direct evidence of use from two people taking the evidence of use to 51 people.

4. The Land is owned by Lewes District Council, ("LDC") which is the only objector to the application. Its letter of objection is dated the 5<sup>th</sup> June 2014, and in which LDC refers to the Council's consultation letter of the 25th April which had enclosed a copy of the application and supporting evidence. The basis of the objection can be summarised as follows:

- a) The Land was acquired by the Rural District Council of Chailey, LDC's predecessor authority for the purposes of Part V of the Housing Act 1936,

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<sup>1</sup> The forms are from John and Shelia Anderson, William and Jean Manville, Michelle and Michael Pearce, Teresa Shopland and Robert Symes, Michael and Gilly Webber and Hilda and Ray Wheeler.

["the 1936 Act"], which enabled a local authority to provide housing for the working classes;

- b) Since the Land was laid out as a recreation ground it was made available to the occupiers of the Hollycroft estate under the statutory power within section 80 of the 1936 Act and subsequently under the similar provisions within section 12 of the Housing Act 1985, ["the 1985 Act"].
- c) LDC holds the Land under section 12 of the 1985 Act.
- d) Use of the Land by the local inhabitants was "by right" and not "as of right".
- e) The fact that the Land may be used by persons other than local inhabitants does not invalidate the exercise of the statutory power within section 80 of the 1936 Act or section 12 of the 1985 Act.
- f) User "by right", rather than "as of right", will not count as qualifying user in support of the application under the 2006 Act.
- g) LDC relies upon the case of *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31.

5. The letter of objection enclosed a statutory declaration of Gillian Marston dated the 5<sup>th</sup> June 2014 with three exhibits including 2 conveyances by which the LDC's predecessor in title acquired two parcels of land which the Land forms part of. Both conveyances contain a recital that the land was acquired for the purposes of part V of the 1936 Act.

6. It is also useful to set out at this stage certain paragraphs of the statutory declaration as follows:

*"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 that are still in existence demonstrate that Lewes District Council and its predecessor authority have managed the Estate and the Recreation Ground in their capacities as local housing authority....*

*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...*

12. *Lewes District Council cannot find any copy records relating to ministerial consent but has no reason to believe that proper consent was not obtained.*<sup>2</sup>

16. *From the laying out of the Recreation Ground until the present day, the Recreation Ground has been made available to the public.....”*

7. At this stage, I note the following as regards the basis of objection and evidence in support:

- a) Other than the issue of whether use of the Land was “as of right”, LDC alleging that it was not as it was “by right”, LDC does not allege that any of the other qualifying criteria for an application under section 15 of the 2006 Act have not been met.
- b) There is no evidence from “*The Tenancy Manager*” or “*the Housing Officer*” as referred to in the statutory declaration, nor is either of them named. There is also no record of the interviews as alleged in paragraph 4, nor direct evidence from those unnamed council officers.
- c) Although it is alleged that “*The few remaining files that are still in existence demonstrate that Lewes District Council and its predecessor authority have managed... the Recreation Ground*”, no evidence of the files is produced nor are any specific details given as to what management of the Recreation Ground was carried out.
- d) There is no evidence produced as to when or how the Recreation Ground was provided and subsequently maintained by LDC or its predecessor authority. There is no evidence as to how and when it was laid out, nor any evidence of ongoing maintenance.
- e) Not only can the relevant government consent not be found for there to have been a valid exercise of the discretionary statutory power within section 80 of the 1936 Act or section 12 of the 1985 Act, there is also no evidence of an exercise of the power such as a resolution or other documentary evidence, nor any evidence that the ministerial consent was sought.

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<sup>2</sup> It is taken that this is reference not only to the ministerial consent required for a valid exercise of the discretionary power within section 80 of the 1936 Act, but also to the consent of the Secretary of State required for a valid exercise of the discretionary power within section 12 of the 1985 Act. My references to ministerial consent herein shall include both consents.

8. Following this, the matter was then considered by officers of the Council and a report was prepared to its Commons and Village Green Registration Panel which was due to convene on the 14<sup>th</sup> October 2015. That report was however never presented because shortly prior to then the ECPC informed the Council by letter dated the 12<sup>th</sup> October 2015, that “*important and new material evidence had just come to light*”. In summary ECPC alleged that the new evidence showed that between 1978 and 1989, the Land was fenced off and used exclusively as farmland. The ECPC alleged that it was therefore not made available by LDC, or its predecessor authority, as public amenity land and not used as such prior to 1989. Accordingly it alleges that any use of the Land was “as of right” and not “by right”.

9. In support of the allegation in the letter of 12<sup>th</sup> October 2015, ECPC subsequently produced three letters from witnesses as follows:

i) A letter of the 6<sup>th</sup> November 2015 from Mrs Sharon Vaisey who farmed Birchington Farm, East Chiltington from 29<sup>th</sup> September 1978 with her first husband, Mr Derrek White. The Farm formed part of the Wootton Farm Estate which was owned by the Council until 1998. In the letter, Mrs Vaisey states that she was shown the Land by a Mr Alger in September 1978 which she understood had no formal agreement on it but which had historically been used by the tenant of Birchington Farm to keep the Land tidy. Mrs Vaisey confirms that their use of the Land was to cut hay off it until 1986. There is no mention in the letter of any public use of the land for recreation.

ii) A letter of the 4<sup>th</sup> November 2015 from Barry Manville of 16 Hollycroft. In that letter Mr Manville says that until about 1986 the Land was fenced off and farmed. He worked, as a farm labourer, for both Mr & Mrs White and for Mr Alger before them, and Mr Manville says that the Land was used for arable purposes and by Mr Alger for cattle. The fence was to stop access to the Land and also to prevent the cattle from straying.

iii) A letter of the 4<sup>th</sup> November 2015 from Andy Manville of 2 Hollycroft. He also worked during the school holidays for both Mr & Mrs White and for Mr Alger and his recollection of the use of the land prior to around 1986 is largely consistent with that of Mr Barry Manville.

10. The Council carried out further consultation as a result of the new evidence which lead to a lengthy and protracted exchange of submissions and further evidence between LDC and ECPC. The main issues arising from that exchange is summarised below, together with my observations on some of the matters raised, but full reference should be made to those submissions in considering the matter.

11. The initial response from LDC was in an e mail from Mark Reynard<sup>3</sup>, the Head of Legal Services. In that e mail, LDC responded to the further evidence of ECPC. It also provided new evidence by way of an agreement, ("the Licence"), made between LDC and Derek White dated the 4<sup>th</sup> of January 1985 and allowing for the mowing of the Land and taking the hay or grass therefrom, but not more than twice during the license period which expired on the 2<sup>nd</sup> January 1986. Mr White paid the LDC £35.00 for the benefit of the Licence.

12. The response of LDC can be summarised as follows:

- a) There was no evidence of a lease of the Land between 1978 and 1989, although it had found the Licence as referred to above;
- b) It believes that the Licence reflects the practice which would have occurred between 1978 and 1989 in respect of the Land, namely, an annual licence allowing for not more than two cuts to the Land and the hay/grass crop taken therefrom;
- c) It alleges that there is no reason to believe that this practice prevented the recreational use of the Land by the public and is therefore not inconsistent with LDC's assertion that use was "by right" and not "as of right".
- d) It alleges that the arrangement is consistent with the evidence of Mrs Vaisey and the purpose which she notes which was "to keep the land tidy" and take hay from it.
- e) It asserts that the LDC's Parks Manager had stated that from at least as early as 1990, maintenance of recreation grounds was by private contractors and it is stated that it is believed that prior to this it was common for LDC to rely upon mowing licences to maintain recreation grounds.

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<sup>3</sup> My e mail is undated as it is included within the e mail trail which was subsequently sent to the ECPC on the 8<sup>th</sup> February 2016.

- f) It notes that the Licence did not permit the licensee to fence off the Land.
- g) LDC note the apparent inconsistency between the new evidence of Mr Barry Manville and Mr Andy Manville, and Dr Harrison in alleging that the Land was not used by the public for recreation prior to 1989, and the evidence of users submitted with the application.
- h) LDC alleges that there is an inconsistency between the ECPC saying on the one hand there was no public access prior to 1990 and on the other hand that there was public access “as of right”.
- i) LDC repeats its position that from the laying out of the Land as a recreation ground, until today, that this was done as an exercise of the power under section 80 of the 1936 Act and section 12 of the 1985 Act and accordingly public use for recreation, whenever it occurred was “by right” and not “as of right”.

13. In respect of these further submissions from LDC, at this stage I note the following:

- a) It does appear in my view that there may be some conflict between what some of the users said in their evidence forms as regards their use of their Land during the period 1978 to 1986/1989 and what is said within the further representations by ECPC. However, the user evidence forms are not so detailed as to break down how much use of the Land there was by them during this period, how regularly it was used and if so for what purposes. These are the sort of issues which would be explored through further evidence if they were relevant to determine the matters in dispute.
- b) LDC claims that the position now adopted by ECPC in claiming that there was no public access prior to 1990 but also claiming that use was “as of right”, is logically inconsistent. In my opinion there is nothing necessarily inconsistent in this position. In my view the position of ECPC is that it is the public use of the Land from 1990 onwards which it relies upon as being “as of right” and amounting to sufficient use to satisfy the criteria of section 15 of the 2006 Act. The case of ECPC does not rely on evidence prior to 1990 and its case is that either before or after 1990 any public use of the Land for recreational purposes could not have been “by right” but there is no need to consider the

nature of any use prior to 1993. It is on this basis that I will be considering the matter in my opinion.

- c) Other than the Licence, there is little by way of further evidence within the further submissions. It is noted that despite the submissions, there is no evidence provided by the “Council’s Park Manager”, who is not named, and nothing to link maintenance of the Land in the way it is alleged to be common practice. There is no evidence of what maintenance, whether directly by LDC or by private contractors, was carried out by or on behalf of LDC in respect of the Land.
- d) The Licence itself makes no reference to the purpose for which the Land is to be mown, no more than twice per year, other than to allow for the taking of the hay or grass therefrom and, by virtue of clause 5, in so doing to keep the Land in a clean and tidy condition. It does not appear on the face of the Licence that the purpose is to keep the Land in a clean and tidy condition, in and of itself, and nowhere is there any reference to Land being used for public recreation or to any of the relevant provisions of the 1936 Act or the 1985 Act.
- e) The Licence did not include the mowing of the football pitch adjacent to the Land which must have been maintained by other means despite being owned by LDC. This would seem inconsistent in my view with LDC’s claim that it was by the use of such licences that it maintained land which it owned for recreational use.

14. On the 11<sup>th</sup> February 2015, ECPC made a statement responding to these further submissions by LDC. In that statement ECPC confirm that the use period relied upon is from 1993 onwards<sup>4</sup> and it does not rely upon any evidence of use prior to then. In addition, ECPC refer to the fact that the Licence is for one year only and it is speculation as to what earlier or subsequent licences may have said. Furthermore, there is no evidence as to whether the terms, particularly as regards fencing of the Land, were adhered to during the relevant year, and there is no evidence that it was required not to be fenced in any other licences if any were in fact created.

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<sup>4</sup> Paragraph 3 of the statement.

15. In addition, the statement of ECPC alleges a distinction between the present circumstances, from those in the *Barkas Case* as relied upon by LDC. Three issues are submitted in support for the distinction:

- a) There is no evidence of the necessary Ministerial consent under section 80 of the 1936 Act having been obtained, or at least having been requested, in order to demonstrate a valid exercise of the discretionary power within that section<sup>5</sup>;
- b) There is no evidence that the Land was ever initially laid out as a recreation ground by either LDC or its predecessor authorities pursuant to those powers. In addition there is no evidence that it was maintained as such by LDC or its predecessors. ECPC refer to the fact that the Licence makes no mention of this purpose and as it would only be cut not more than twice per year, with a hay or grass crop being taken, this would in fact suggest the contrary.
- c) The fact that the playing field, adjacent to the Land, was not maintained by a mowing licence, undermines the assertion made by LDC that this was the way that LDC carried out maintenance of its land which had been laid out and provided as a recreation ground.

16. Following this, on the 16<sup>th</sup> May 2015, LDC submitted a final response to the statement made by ECPC. The submissions of LDC in that statement can be summarised as follows:

- a) LDC accepts that the Land has been open to the public to use for recreation for at least the last 20 years.
- b) The Land was acquired by LDC's predecessor in title expressly for the purposes of Part V of the 1936 Act.
- c) Since 1946 the Land has been open for public recreational use and has never been subject to a tenancy.
- d) In 1985 the Land was mown twice pursuant to the Licence and the hay taken away and it should be presumed that the terms of the Licence were complied with.

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<sup>5</sup> For the purposes of my opinion I have assumed that the same point is taken as regards the Secretary of State's consent for the purpose of section 12 of the 1985 Act.



- e) It is alleged that it is possible that such annual licences had subsisted between LDC and Mr White since 1978.
- f) The Land need not have been a formal, well- manicured sports ground and it is submitted that mowing twice a year would have sufficed in allowing a variety of recreational uses to take place.
- g) The suggestion that the Land was fenced off until 1986 should be rejected.
- h) It is alleged that the Land was being maintained for LDC's purposes which was to make it available for public recreation. In this regard LDC places reliance on Mrs Vaisey's evidence that it was a requirement to keep the Land tidy for LDC.
- i) Use of the Land was "by right" having been provided and maintained as a recreation ground which local inhabitants have in fact used as such. LDC claims that, as a matter of fact, LDC's predecessor in title set aside the Land as a recreation ground and it and then subsequently LDC maintained and managed it as such pursuant to section 80 of the 1936 Act and section 12 of the 1985 Act.
- j) The presumption of regularity can, in the absence of evidence to the contrary, be relied upon to infer the relevant Ministerial consent was obtained for the exercise of those powers – that is the initial provision of the recreation ground and its subsequent maintenance and management.
- k) Accordingly, LDC alleges that the matter is indistinguishable from the *Barkas Case* and that the use by the public of the Land for recreation after 1946 was "by right" and not "as of right".
- l) Alternatively, LDC submits that the circumstances of the matter show that the use of the Land for recreation was a matter which was permitted by it and its predecessors and that they did not merely tolerate or acquiesce in such user. The acts LDC relies upon are the alleged setting aside, providing, managing and maintaining the Land as a recreation ground. These, LDC says, amount to positive acts which mean that user was by permission.

17. In respect of these further submissions from LDC, at this stage I note the following:

- a) Other than the Licence there is no evidence of any other licences, annual or otherwise, to cut and take hay from the land as is alleged at paragraph 2(e) of the submissions.
- b) There is no evidence that such mowing, for not more than twice a year, would have been sufficient and adequate to maintain the Land for recreational purposes as is alleged in paragraph 2(f) of the submissions. It is noted that such infrequent cutting is in sharp contrast to the regular maintenance required in respect of the adjacent playing field and the regular maintenance of the Land carried out by ECPC since at least 1990 onwards. In addition, it is noted that in order to take a crop of hay from the Land the vegetation would need to have been allowed to grow to some considerable length.
- c) There is no evidence provided that LDC, or its predecessor authority, as a matter of fact, set aside or provided the Land as a recreation ground. In respect of the assertion, that as a matter of fact, LDC and its predecessor authority subsequently maintained and managed the Land as a recreation ground, the only evidence which LDC has provided, allegedly in support of such assertions, is the Licence. Beyond this, the submissions appear to rely upon supposition and speculation and such matters of hearsay as a referred to in the statutory declaration of Gillian Marston.
- d) Other than as mentioned at (c) above, there is no evidence produced as regards the alleged exercise of the power under section 80 of the 1936 Act or section 12 of the 1985 Act.
- e) In respect of the alternative submission made by LDC, that use was by permission due to positive acts of the landowner, no alternative or additional evidence of the facts relied upon with regard to those acts is produced. In essence the submission relies on the same matters as the primary submission save that it is provided as an alternative argument if it is considered that the presumption of regularity cannot be applied and therefore it could not be inferred, for that reason only, that the power under either section 8 of the 1936 Act or Section 12 of the 1985 Act had been exercised.

18. Following these submissions, ECPC, made a final statement dated 26<sup>th</sup> August 2016 together with submitting a bundle of evidence of some 121 pages, some of which was new evidence. The submissions on that evidence are lengthy amounting

to 27 pages, have clearly involved a considerable degree of impressive historical research and I shall not attempt to summarise fully the arguments advanced herein; full reference should be had to those submissions. However, it appears to me that the thrust of those submissions is as follows:

- a) ECPC refer to the fact that it is common ground that the Land has been used by the public for recreation for at least the last 20 years.
- b) Evidence is produced which is relied upon to show that from its acquisition the Land was subject to various farming activities, including an alleged letting to a Mr Weller in 1950. That tenancy initially included the Land and the adjacent site of what is now the playing field and football pitch.
- c) In or around 1970, the current playing field/football pitch land was separated and set aside as recreation land let to ECPC. This was possibly as a result of a survey carried out in 1969, which concluded that there were no permanent recreation grounds in the Parish.
- d) After 1970, the tenancy of the Land transferred from Mr Weller to Mr Alger and it is alleged that this appears to have continued for some time until it is known, that the Licence arrangement was in place with Mr White. It is noted that the Licence makes no mention of section 80 of the 1936 Act or any desire of LDC to use and maintain the Land for public recreation.
- e) There is a consideration of the arrangements for holding the annual village fair on the Land from 2008 onwards. It was noted that until 2015, the arrangements were notified to LDC only for the purposes of insurance. In 2015, the first attempt was made by LDC to charge a rent for the hire of the Land for the fair. This was rejected by the ECPC and the fair went ahead in that year and in 2016, without permission from LDC.
- f) Detailed legal submissions are made in respect of the application of the *Barkas Case* and the relevance of the presumption of regularity. ECPC make the following points:
  - i) There is an initial burden on ECPC to show that use was “as of right”, but once there is prima facie evidence of this, the burden is then on LDC to show that use was “by right” is shifted to LDC to prove. The cases of *R (Mann) v Somerset CC [2012] EWHC B14 (Admin)* and *Lancashire CC v SSEFRA [2016] EWHC 1238 (Admin)* are relied upon.

ii) As regards the presumption of regularity, there needs to be some cogent evidence of an act that was done in purported exercise of a statutory power, for the presumption of regularity to attach to. The presumption cannot be used to show that the acts themselves were done; it only potentially overcomes an absence of evidence of an administrative process that would otherwise be required to give validity to those acts. There must however be evidence of the acts in exercise of the statutory power.

iii) There is no evidence of the exercise of the power under section 80 of the 1936 Act or section 12 of the 1985 Act. Moreover, the evidence produced by ECPC would suggest that the use of the Land by LDC was not in exercise of those powers, but used to raise revenue by letting and licensing for agricultural purposes.

iv) The *Barkas Case*, can be distinguished and does not apply and therefore user is “as of right” and not “by right”.

v) As regards the alternative submission by LDC, that is implied permission by reason of positive acts, it is noted that no further evidence is relied upon as to those acts. Accordingly LDC has failed to show that the use was permissive.

vi) Moreover, whilst not a matter specifically relied upon by LDC, the submissions of ECPC consider whether there is anything in the requirements of holding the village fairs which would be sufficient to show use was by permission. The conclusion is that there is not and the user was “as of right”. Alternatively that this one off use, even if by permission, would be de minimis evidence in the totality of user evidence and would not be sufficient to show that the overriding use was with permission and therefore “by right”.

19. LDC were invited to make further representations on those final submissions, particularly as it contained considerable new evidence by way of documentation and also by way of analysis of the documents and their relevance and application to the matters in dispute. LDC did not wish to make any further representations or challenge any of those final submissions, including the new evidence. In addition, neither LDC nor ECPC wanted to take up the offer of the Council to hold a non-statutory public inquiry to consider the matter and both LDC and ECPC accepted

that the matter should be determined on the written submissions and evidence which had been submitted.

#### Issues not in dispute

20. It appears from the submissions made by LDC and ECPC, that save for the issue of whether the public user was “by right” or “as of right”, it is common ground that all the qualifying criteria for registration under section 15(2) of the 2006 Act are satisfied. On this basis, in my view the other qualifying criteria are met as follows:

- a) The Land is land which is clearly defined within the meaning of the 2006 Act.
- b) The Land has been used for lawful sports and pastimes. This includes informal recreation but not walking of such a character as would give rise to a presumption of a dedication of a public right of way. In my view this criterion is clearly satisfied on the user evidence for the range of activities specified with a range of activities from sports to kite flying, picnicking, community celebrations and bird watching, for example. There is no challenge to this.
- c) The qualifying use must have been continuous throughout the relevant 20 year period. There is no challenge to the claim on this basis.
- d) The use needs to be by a significant number of inhabitants of a locality or of a neighbourhood within a locality. There is no challenge on the basis this is not met. I note that ECPC claim the locality as the parish of East Chiltington. In my view there is little doubt that the locality is sufficiently defined as a civil parish. The significance of user numbers is not challenged on that basis. However, even if it were considered that on the basis of this more extensive locality, the user numbers were not sufficient to amount to a significant number, then in my view they would be sufficient on the basis that the Hollycroft Estate is a specific neighbourhood within the locality. In my view, the Estate would amount to a neighbourhood within a locality for the purposes of section 15(2) of the 2006 Act.
- e) The use must be “as of right”, that is without, force, secrecy or permission. The only question in dispute is whether there was permission for the use as relied upon by LDC in opposition to the claim.

### The Issue in Dispute.

21. It flows from this that the only issue in dispute is whether the qualifying user was “by right” or “as of right”. In respect of this, LDC claims that it was “by right” for two reasons:

- a) The primary submission is that the recreational use of the Land was permitted by the LDC as a result of the exercise of statutory powers within section 80 of the 1936 Act or section 12 of the 1985 Act by LDC or its predecessor authority. As regards this primary submission, in my view the key issue to be determined is whether at any stage there has been a valid, de facto exercise of the powers relied upon;
- b) That LDC had carried out positive acts from which permission for such use could be lawfully inferred. In respect of this, the issue is what is the evidence of the positive acts relied upon and do they give rise to an inference of permission as opposed to mere acquiescence or tolerance of the use. I have noted above that LDC does not rely on anything else other than the matters it advances in support of its primary submission.

### Burden and standard of proof

22. In my view the onus of proof lies upon the applicant, ECPC to show that all the qualifying criteria have been *properly and strictly proved*<sup>6</sup>. The standard of proof is on the balance of probabilities.

23. It is however necessary to consider where the burden of proof lies in respect of showing that the use of the Land was “by right”, in particular, whether the burden is with LDC to show that the powers under section 80 of the 1936 Act and section 12 of the 1985 Act, had been exercised, or that there are positive acts from which to infer permission.

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<sup>6</sup> See *R v Suffolk CC ex p Steed* (1996) &75 P & CR 102 at page 111 per Pill LJ

24. The submissions made on behalf of ECPC are that on these issues, once there is prima facie evidence of user as of right the burden shifts to LDC to show that the use was by right rather than as of right. ECPC rely on the cases of *R (Mann) v Somerset CC [2012] EWHC B14 (Admin)* and *Lancashire CC v SSEFRA [2016] EWHC 1238 (Admin)*.

25. LDC has made no submissions in response to this legal point.

26. In my view, the burden of proof is upon ECPC to show, on a balance of probabilities, that the use was “as of right”, which is part of the qualifying criteria under section 15 of the 2006 Act. I note paragraph 24 of the judgment in the *Mann Case* as relied upon by ECPC, which suggests the shifting of the onus of proof as submitted by ECPC. However, at paragraph 61 of the judgment the matter is considered in this way:

*“For reasons given by the Inspector, the local inhabitants’ use of the land appeared to be ‘as of right’. This appearance shifted the evidential burden to the owner to raise a vitiating circumstance; in this case permission inferred from conduct. Thus it is the nature or characteristics of the owner’s conduct which must be examined to ascertain whether ultimately, the inhabitants’ use was ‘as of right’. That was the exercise which was undertaken by the inspector and which he answered in the owner’s favour.”*

27. In addition, in the *Lancashire Case*, the question of where the burden of proof lay was not in dispute, the landowner having accepted it was upon them. The case therefore did not decide the issue. I do note from the case though, that at paragraph 43, Ousley J considered that the Inspector’s judgment on the question of the relevant evidence as to whether the land was held for educational purposes, was that the evidence was “too weak” for the necessary conclusion to be drawn in the landowner’s favour. This, in my view, could be taken as considering that the landowner had failed to discharge an evidential burden rather than a strict legal burden of proof.

28. In my view, the burden of proof is with ECPC to show, on a balance of probabilities that the use was “as of right”. However, where there is prima facie evidence that this is the case there must be an evidential burden, as opposed to a

legal burden, on LDC to produce some clear, cogent and unequivocal evidence that the use was by permission whether through positive acts or by reason of the exercise of statutory powers. If that evidence is “too weak”, as in the *Lancashire Case*, it will not satisfy the evidential burden, however if it overcomes that burden, it will be for ECPC to show, on a balance of probabilities, why the user remained ‘as of right’ in the face of that evidence to the contrary. It is on this basis that I have considered the issue in dispute.

LDC’s primary submission - the recreational use of the Land was permitted by the LDC as a result of the exercise of statutory powers within section 80 of the 1936 Act or section 12 of the 1985 Act by LDC or its predecessor authority.

29. In respect of this submission, LDC relies upon the decision in the *Barkas Case*. The LDC’s primary submission is that but for evidence of relevant ministerial consent having been given, the facts of the present case are indistinguishable from that case. LDC alleges that the absence of evidence of consent can be rectified by reliance upon the presumption of regularity.

30. It is relevant to note a number of the Inspector’s findings in the *Barkas Case*, which were not disputed in the subsequent appeal court challenges, as follows:<sup>7</sup>

31. The relevant land was purchased by the local authority in 1951 but the conveyance did not specify the statutory power under which it entered the conveyance.<sup>8</sup>

32. In 1996, the local authority passed bylaws applicable to amenity areas held under section 12 of the 1985 Act. The bylaws applied to the relevant land. The effect of the bylaws and their application to the land were displayed on notice boards close to the entrances to the land.<sup>9</sup>

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<sup>7</sup> Page 203 at paragraph 2 of the judgment of Lord Neuberger.

<sup>8</sup> Paragraph 93 of the decision report.

<sup>9</sup> Para 96 of the report.



33. The land was maintained by the Council by cutting the grass regularly in the summer and the Council had marked out football pitches weekly on the land and then subsequently annually, as well as providing goal posts.<sup>10</sup>

34. On the basis of this combination of facts, the Inspector found that it was a reasonable inference that the land was set out and maintained as a recreation ground pursuant to section 80 of the 1936 Act.<sup>11</sup>

35. The absence of evidence of relevant Ministerial consent, one way or the other, was dealt with on the basis of the presumption of regularity.<sup>12</sup>

36. The de facto acts of maintenance on their own, of which there was evidence had been carried out, could not give rise to an implication of permission. It was only the additional acts, the making of the byelaws applicable to the land and the display notices concerning them, which gave rise to sufficient evidence that the use was by right.<sup>13</sup>

37. In my view, these factual findings are crucial to a proper understanding and subsequent application of the *Barkas Case*.

38. On the evidence in that case, the conclusion was that there had been an exercise of the discretionary power under section 12 of the 1985 Act. Accordingly the recreational use was by reason of the exercise of the discretionary statutory power and was “by right” of the exercise of that power.

39. However, in my view, in the circumstances of this case there is no such clear, cogent and unequivocal evidence that the discretionary power was ever exercised.

40. Does the presumption of regularity alter any of this?

In my view the presumption of regularity, as relied upon by LDC, cannot be used to overcome an absence of requisite, sufficient evidence, to overcome the evidential burden to demonstrate an exercise of the statutory powers. All the presumption does

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<sup>10</sup> Para 104 of the report.

<sup>11</sup> Para 122 of the report.

<sup>12</sup> Para 122.

<sup>13</sup> Para 119

is to overcome an absence of evidence of Ministerial consent to validate the exercise of the powers, if, and only if, there is de facto evidence that the powers were exercised. In my view the submissions made by ECPC are correct in this regard.

Is there sufficient evidence to support the primary submission of LDC, that is that the powers under section 80 of the 1936 Act and/or section 12 of the 1985 Act were exercised?

41. In my view there is not sufficient evidence to demonstrate this and discharge an evidential burden. There is nothing on the face of the conveyances in respect of the Land to conclude that specific powers in respect of the Land had been exercised. There is no evidence provided or suggested, to show when and how the Land was initially laid out and provided for public recreational use.

42. With regard to the ongoing maintenance of the Land, all that LDC can provide is the Licence, which it says demonstrates that LDC maintained the Land as a recreation ground. However, there is nothing on the face of the Licence to clearly show this. There is no mention of recreational use of the Land on the Licence. It is at best equivocal on the matter, although in my view, the wording of the Licence is more akin to supporting an agricultural purpose for the Land. It is in any event for one year only. The hearsay evidence of maintenance contained in the statutory declaration of Gillian Marston takes matters no further in my view as, apart from being hearsay, it is simply too imprecise to attach any sufficient weight to it. The remainder of the submissions by LDC, amount to speculation as to how the Land would have been maintained as noted in my paragraphs above

43. In short, in my view, the evidence relied upon by LDC, to discharge the evidential burden upon it is simply “too weak” and accordingly, the use would not have been “by right” by reason of the exercise of the statutory powers under section 80 of the 1936 Act, or section 12 of the 1985 Act, in respect of the Land.

44. However, even if it is considered that the evidence provided by LDC, is sufficient to discharge the evidential burden, in my view, the evidence and submissions of the ECPC is sufficient to show on a balance of probabilities that the powers had not been exercised in respect of the Land. There is, in my view, ample evidence to

demonstrate that the Land remained in agricultural use until 1990 and that neither before nor after then had the powers been exercised in respect of it.

45. Therefore in my opinion, the *Barkas Case* can and should be properly distinguished and in my opinion, the LDC's primary submission, in respect of the user being "by right" must fail.

LDC's alternative submission - that LDC had carried out positive acts from which permission for such use could be lawfully inferred.

46. LDC have made this submission in the alternative to its primary case that the use of the Land is by reason of the exercise of the powers under section 80 of the 1936 Act and section 12 of the 1985 Act.

47. However, LDC has expressly advanced the case on the same evidential and factual basis as its primary submission. The reason for the alternative case is that if it is considered that the presumption of regularity cannot be applied to the issue of evidence of Ministerial consent, then LDC claim that implied permission arises by reason of the same acts of maintenance, management and setting out of the Land as a recreation ground as it relied upon in respect of the primary submission. In advance of its case, LDC relies upon the obiter remarks of Lord Neuberger at paragraph 21 of the *Barkas Case*.

48. In respect of this submission, in my view the key issue is what is the evidence of the positive acts relied upon and do they give rise to an inference of permission as opposed to mere acquiescence or tolerance of the use.

49. I have already considered above that evidence provided by LDC is too weak and not sufficient to overcome the evidential burden in respect of the primary submission by LDC; it has to provide at least some cogent evidence of the positive acts. There is in my view, as considered above, no or no sufficient evidence that the Land was either initially laid out or identified for public recreation use by LDC or its predecessor authority, or that they subsequently managed and maintained it for that use thereafter.

50. Accordingly, in my view the situation is different to that in either the *Barkas Case*, or in *R (Beresford) v Sunderland City Council [2004] 1AC 889*, as in both those cases there was no dispute that the Council had carried out positive acts to provide and maintain the land for recreational use. Of course, in *Beresford*, it was considered that such acts could not give rise to an implied licence although the judgment was subsequently considered as not good in law by some of the obiter remarks within the *Barkas Case*.

51. By contrast, the situation in the present matter is akin to that in the case of *Oxfordshire County Council v Oxford City Council and another [2006] UKHL 25*, (“*The Trap Grounds Case*”), as relied upon by ECPC. In that case there was no evidence that the land had been laid out or identified in any way for public recreational use and it was confirmed that recreational use of the land by the public, involving the exercise of no statutory power, or statutory incompatibility, may therefore be “as of right”. The situation was expressly recognised in the *Barkas Case* as a situation whereby land in public ownership could be subject to modern village green rights.<sup>14</sup>

52. I also note that in the *Trap Grounds Case*, that the user was considered capable of being “as of right” notwithstanding a small element of permissive use which the Court regarded as de minimis.<sup>15</sup> Although LDC have not relied upon the evidence of the holding of the annual fair on the Land as being evidence of a permissive use, ECPC have considered the matter and submitted that if it is evidence of permission it is de minimis and should not prevented the user being “as of right”. In my view, I agree with the stance adopted by ECPC in that regard and would also consider that if that evidence is of permissive user then it is de minimis.

53. Accordingly, in my view, the ECPC have shown that the user is “as of right” rather than “by right”.

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<sup>14</sup> Paragraphs 66 and 76 of the judgment.

<sup>15</sup> Paragraph 13 of the judgment.

## Conclusions

54. Save for the issue of whether the public user was “by right” or “as of right”, it is common ground that all the qualifying criteria for registration under section 15(2) of the 2006 Act are satisfied.

55. In respect of the public recreational use, ECPC relies upon use after 1990. There is no dispute that such use occurred as a matter of fact for the relevant period of time. The only issue is whether such use was “as of right”.

56. For the use to be “as of right”, it must be without force, without secrecy and without permission.

57. There is no dispute that the use was without force and without secrecy. The only issue is whether it was without permission. LDC says that the use was with permission for two reasons:

i) that in respect of the Land, LDC and its predecessor authority had exercised their discretionary powers under section 80 of the 1936 Act and section 12 of the 1985 Act. Although there is no evidence of the relevant Ministerial consent for a valid exercise of those powers, LDC relies upon the presumption of regularity to overcome that evidential gap. Accordingly, LDC claims that the use of the Land for recreational purposes after the exercise of the statutory powers was “by right” and not “as of right”. There was permission to use the Land by reason of the statutory powers. LDC relies upon the decision in the *Barkas Case*.

ii) Alternatively, LDC submits that if it is considered that the presumption of regularity cannot be relied upon to establish a valid exercise of the statutory powers, it relies upon an alleged implied permission to use the Land for recreational use. In this regard, LDC alleges that it and its predecessor authority had not merely tolerated and acquiesced in that use, but that they had carried out positive acts to facilitate and permit that use. LDC does not advance any additional evidence as to what those acts are and it relies upon the same evidence and acts as it advances in respect of

its primary submission that the statutory powers were exercised. Accordingly, LDC alleges that by reason of an implied permission, the use of the Land was “by right”.

58. In my view the burden of proof is upon ECPC to show that the use of the Land was “as of right” and therefore without permission. The standard of proof is on a balance of probabilities. However, in my opinion, once ECPC have established a prima facie case of user evidence “as of right”, then there is an evidential burden upon LDC to show why that use was with permission.

59. In my view, such evidence as LDC has produced and relies upon is too weak and insufficient to discharge the evidential burden upon it. The conveyances by which the Land was purchased do not show that the specific statutory powers were being exercised; there is merely reference to the wider provisions of Part V of the 1936 Act. The Licence is for a one year period only, and contains no reference whatsoever to there being any recreational use of the Land. The purpose of the Licence is apparently, on the face of it, to permit the cutting of a grass or hay crop from the Land not more than twice per year. I note that cutting the vegetation on the Land not more than twice per year would leave substantial periods of time when it was left uncut and there is no evidence to show that such infrequent cutting would have been sufficient to be consistent with recreational use of the Land. There is no evidence that LDC maintained other recreational land on such an infrequent basis.

60. The evidence of the Licence is therefore at best equivocal on the point, although in my view it is more consistent with an agricultural use of the Land than as demonstrating a public recreational use, especially when considered with the additional evidence of contemporaneous agricultural use which ECPC have produced. LDC has produced no other evidence of any acts of maintenance or management of the Land for recreational purposes.

61. Alternatively, even if the evidence provided by LDC is considered sufficient to overcome the evidential burden upon LDC, in my view the evidence and submissions made by ECPC are sufficient to rebut that evidence and establish that on a balance of probabilities that it was more probable than not that the statutory powers under section 80 of the 1936 Act or section 12 of the 1985 Act had not been exercised. Accordingly there was no statutory permission for public use of the Land

for recreational purposes and such use of the Land after 1993, as relied upon by ECPC, was “as of right”.

62. The presumption of regularity relied upon by LDC can only overcome the absence of evidence of Ministerial consent in respect of there being a valid exercise of the statutory powers. It cannot, in my view, overcome the lack of evidence or sufficient evidence that the power was, as a matter of fact actually exercised. LDC would need to provide the evidence that the Land was actually provided and maintained by it and its predecessors, or otherwise show that the power was actually exercised and it cannot claim that the presumption of regularity can be assumed not only to show the relevant Ministerial consent was obtained but also to presume that merely because the Land was purportedly purchased under Part V of the 1936 Act, and used for public recreation, that therefore one of the specific discretionary powers under that Part of the Act was actually exercised.

63. In my view, the alternative submission made by LDC, that is that the public recreational user of the Land was by implied permission, similarly fails. LDC produces no additional evidence of what positive acts are relied upon to support this submission and for the reasons above, my view is that such evidence as it has produced is not sufficient to show that either LDC, or its predecessor authority, set the land out as a recreation ground, or took any positive steps of maintenance or management for those purposes of allowing the public to use it for recreational purposes.

64. Accordingly, in my view, the use of the Land for the relevant period, which it is accepted as a matter of fact occurred, was on a balance of probabilities, “as of right”. All of the other qualifying criteria of section 15(2) of the 2006 Act are not in dispute, and in any event in my view are satisfied on a balance of probabilities. Accordingly, in my view, the application to register the land should be confirmed.

If there are any other queries arising in this matter whether as a result of my advice or otherwise, then my Instructing Solicitor is very welcome to contact me.

Trevor Ward  
12 College Place  
Southampton  
SO15 2FE

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