

**Committee:** Commons & Village Green Registration Panel  
**Date:** 29 October 2013  
**By:** Assistant Director, Operations- Economy, Transport and Environment  
**Title:** Application for land adjacent to 12-17 Catsfield Close, St. Leonards on Sea to be registered as a town or village green  
**Applicant:** Stephen Bowles  
**Application No:** 1360  
**Contact Officer:** Chris Kingham, Tel. 01273 335556  
**Local Member:** Councillor Phil Scott

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**RECOMMENDATION : To reject the application of Mr. Stephen Bowles made pursuant to section 15 of the Commons Act 2006, to have land adjacent to 12-17 Catsfield Close, St. Leonards on Sea, registered as a town or village green.**

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## **1. PART A – DETAILS OF THE APPLICATION**

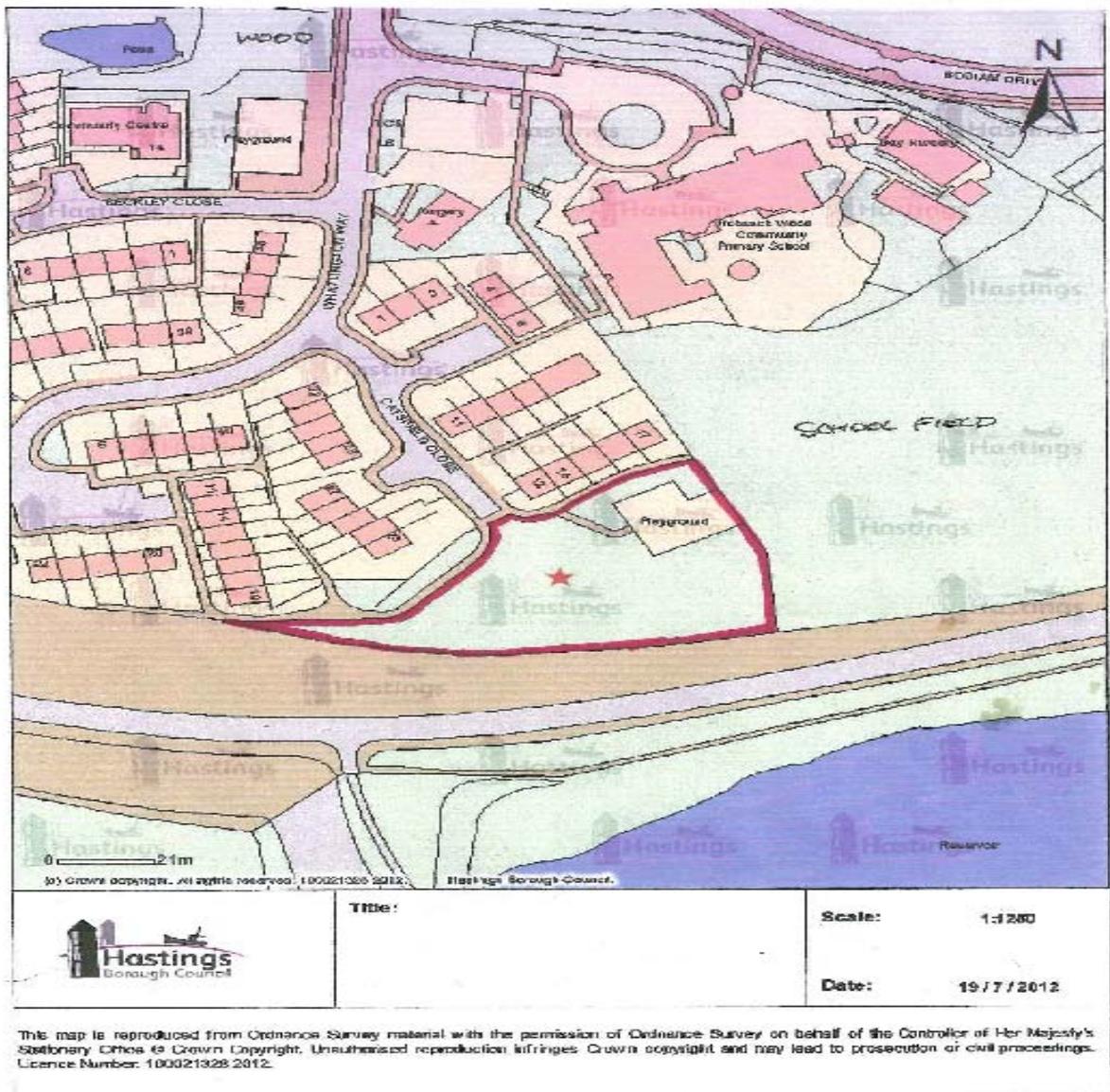
### **Receipt of a completed Application**

1. The County Council received the completed application (“the Application”) on 22 January 2013. The Application seeks the registration of the land by virtue of the operation of Section 15 (3) 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;
  - b) they ceased to do so before the time of the application but after the commencement of this section; and
  - c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).

The Application was originally accepted as completed on 4 September 2012, however was then discovered to be defective. This was primarily due to the Application being made under section 15(2) of the Commons Act 2006, and the statutory declaration being defective. Use had been brought into question 1 August 2012 when the Land was fenced off by the landowner. This meant the Application should have been made under section 15(3).

## **2. The Site**

2.1 The land, which is the subject of the Application (“the Land”), is roughly triangular in shape and is located south of the terminus of Catsfield Close and north of Queensway/Crowhurst Road. The Land is bordered by residential properties on its northern and western sides, a school field on its eastern side and a public highway on its southern side.



2.2 The Land has one owner, Connor Developments (UK) LLP, who owns the land under title number ESX 341961. The results from the Land Registry search undertaken on 5 September 2012 can be found in the file of evidence at appendix 4.

2.3 Members are referred to the plan and Application at appendix 1.

**3. Consultations and representations:**

3.1 The Application was advertised on site and in the Hastings Observer on 9 November 2012 (see appendix 2 and the photographs at appendix 6).

3.2 All interested parties were sent copies of the notice, and copies were made available to view by members of the public at County Hall, Lewes, and Hastings Borough Council offices in Hastings. These documents were held on deposit between 9 November 2012 and 21 December 2012 (copies of the correspondence sent out can be found at appendix 2).

3.3 It was decided it was not necessary to re-advertise the notices with regard to the amendment of the Application from being made under section 15(2) of the Commons Act 2006 to Section 15(3). In **Oxfordshire County Council v Oxford City Council**<sup>1</sup> it was decided that a registration authority could amend an application at their discretion, provided that such an amendment would not occasion unfairness to any objector. In this instance the landowner was notified of this amendment before they submitted their formal, substantive objection. Furthermore, the registration authority granted the objector an additional 14 days to submit a second objection, based on a 'specialist opinion'. Therefore it is considered that the objector was not disadvantaged by this amendment.

3.4 The Local Member, Councillor Phil Scott, was informed of the Application by way of letter dated 8 November 2012 (appendix 2).

3.5 This Application has received an objection from the landowner, Connor Developments (UK) LLP, which will be explored in depth in Part C of this report. These objections, and the applicant's responses, can be found at appendix 3.

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

#### **4. PART B – SUMMARY OF THE RELEVANT LAW**

##### **Statutory Criteria - the Commons Act 2006**

4.1 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.

4.2 The Application seeks the registration of the Land by virtue of the operation of Section 15 (3) 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, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
- b) they ceased to do so before the time of the application but after the commencement of this section; and
- c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).

4.3 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.

4.4 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*).

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<sup>1</sup> [2006] 2 AC 674.

4.5 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.

## 5. The Burden and Standard of Proof

5.1 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.

5.2 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>2</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.

5.3 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.

## 6. Relevant Case law on the Statutory Criteria

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

### i) Land:

6.2 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.

6.3 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>3</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 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>4</sup> It is also relevant to note that the Commons Act 2006 passed subsequently did not seek to further restrict the definition of a village green in that regard.

6.4 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

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<sup>2</sup> [2004] 1 AC 889.

<sup>3</sup> [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.

<sup>4</sup> *Ibid* at paragraph 39.

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>5</sup>

6.5 In the recent Court of Appeal case of **R (Newhaven Port and Properties Ltd) v East Sussex County Council**<sup>6</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:

6.6 It was made clear in **R. v Oxfordshire County Council ex parte Sunningwell Parish Council**<sup>7</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>8</sup>

6.7 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>9</sup>

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

6.8 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: **Hollins v Verney**<sup>10</sup>.

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

6.10 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>11</sup>

6.11 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>12</sup>

#### iv) Locality or Neighbourhood within a Locality:

6.12 “locality” must be a division of the County known to the law, such as a borough, parish or

<sup>5</sup> *Ibid* at paragraphs 71 to 83.

<sup>6</sup> [2013] EWCA Civ 276

<sup>7</sup> [2000] 1 AC 335 at 356F to 357E.

<sup>8</sup> J. Riddall, ‘Getting Greens Registered: A guide to law and procedure for town and village greens’ (2007), paragraph 43

<sup>9</sup> See Sullivan J. in *R. (Laing Homes Limited) v. Buckinghamshire County Council* [2004] 1 P & CR 573 at 598.

<sup>10</sup> (1884) 13 QBD 304.

<sup>11</sup> J. Riddall, paragraph 51

<sup>12</sup> [2010] UKSC 11 at paragraph 36.

manor: **MoD v Wiltshire CC**,<sup>13</sup> **R. (on the application of Cheltenham Builders Limited) v South Gloucestershire DC**,<sup>14</sup> and **R. (Laing Homes Limited) v Buckinghamshire CC**.<sup>15</sup> A locality cannot be created simply by drawing a line on a plan: **Cheltenham Builders** case.<sup>16</sup>

6.13 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>17</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>18</sup>

6.14 Neighbourhood may include one or more neighbourhoods, provided that they are neighbourhoods within a locality.<sup>19</sup>

#### v) Significant Number:

6.15 “Significant” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general used by the local community for lawful sports and pastimes, rather than occasional use by individuals as trespassers: **R. (McAlpine) v Staffordshire County Council**.<sup>20</sup>

#### vi) As of Right

6.16 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>21</sup> that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

6.17 “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>22</sup>

6.18 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>23</sup>

6.19 “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>24</sup> Tolerance does not imply consent.

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

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

#### a) Land

7.1 The Application has identified a sufficiently defined area of land for registration, as can be seen by the plan at paragraph 2.1 of this report.

<sup>13</sup> [1995] 4 All ER 931 at page 937b-e.

<sup>14</sup> [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.

<sup>15</sup> [2004] 1 P & CR 573 at paragraph 133.

<sup>16</sup> [2003] EWHC 2803 (Admin) at paragraphs 41 to 48.

<sup>17</sup> [2002] EWHC 76 (Admin).

<sup>18</sup> [2003] EWHC 2803 (Admin) at paragraph 85.

<sup>19</sup> *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438

<sup>20</sup> [2002] EWHC 76 (Admin) at 77.

<sup>21</sup> [2000] 1 AC 335.

<sup>22</sup> [2003] EWHC 2803 (Admin) at paragraph 91.

<sup>23</sup> J. Riddall, paragraph 29

<sup>24</sup> [2004] 1 AC 889.

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

7.2 The user evidence questionnaires (appendix 5) contained a question which attempts to illustrate the cohesiveness of the local community by asking the user to tick boxes as to what recognisable facilities are available to the inhabitants of the locality. A list of seven facilities is stated including school, community hall, church and shops. There is also a box inviting any other facilities that are available. Six of the eight of users completed this section-with school (six), sports facility (five) and community hall (five) being the most consistently selected.

7.3 The Hollington Ward, within the town of Hastings, is identified as the claimed locality. A Ward is capable of amounting to a locality. All eight of the users who have submitted evidence forms are resident in the Hollington Ward, and it is considered that, on the balance of probabilities, the Land is enjoyed by the inhabitants of a locality. The neighbourhood within this locality is demonstrated by the submission of user evidence forms from residents living in close proximity to the proposed village green. The fact all users live in Catsfield Close, and the sufficient degree of cohesiveness, means this could also be considered a suitable neighbourhood within a locality.

7.4 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>25</sup>

## c) Significant Number

7.5 As referred to in paragraph 6.15 of this report, a 'significant number' does not need to be considerable or substantial-but does need to be sufficient so as to indicate use of the land signifies use by a local community for lawful sports and pastimes. It is submitted that eight user evidence forms therefore could be deemed sufficient in certain circumstances. However in this instance, on the balance of probabilities, it is submitted that this would not amount to a significant number when considering the number of residents on the neighbouring roads who have not submitted user evidence. Furthermore, there is a suggestion that there are only seven user evidence forms that can be given full weight, as Mr Morgan's e-mail at appendix 6 withdraws support for the Application. However, he has not formally withdrawn his user evidence.

## d) Lawful sports and pastimes on the land

7.6 There is a question on the user evidence form which asks the user to list all the activities they have taken part in or seen taking place on the Land.

7.7 The three most frequent activities witnessed are: children playing (seven users), football (five users) and picnicking (three users). Other common activities participated in or witnessed included children's clubs and water games (slides etc).

7.8 In light of the **Sunningwell** case the activities referred to in paragraphs 6.6 and 6.7 are suitable to be considered as lawful sports and pastimes. On the balance of probabilities there is sufficient evidence to illustrate that lawful sport and pastimes have been enjoyed on the Land. Accordingly, this element of the test has been satisfied.

7.9 It should be noted that the applicant originally submitted photographs of children playing on the Land. However the father of the children concerned e-mailed asking for the photographs not to be used in support of this application (appendix 6).

## e) For a period of at least 20 years

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<sup>25</sup> *R v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council* [2000] 1 A.C. 335

7.10 One of the user evidence forms submitted records use of the Land for a period in excess of twenty years (Mr Bowles, 24 years). Whilst all eight user evidence forms indicate the Land to be enjoyed frequently (four of the users state weekly, four daily), 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>26</sup> The relevant twenty year period is 1992-2012 in this case, with the building work for the development of new housing bringing the status of the Land in to question on 1 August 2012. Of the eight user evidence forms we received, one covered this period in its entirety.

7.11 As well as the one user evidence form indicating twenty years or more use, there are a further three users who have recorded ten years or more use. Upon examination of the user evidence forms it is submitted that, on the balance of probabilities, use of the claimed land has not been enjoyed for a period of at least twenty years- this is simply as there is not enough evidence to satisfactorily demonstrate such use.

#### f) Have indulged as of right

7.12 Once it has been established that those who have used the Land are of a locality it must be asserted 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>27</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>28</sup>

7.13 The more recent decision of the Supreme Court in *Redcar*<sup>29</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>30</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

7.14 The parcel of land in question did not have any obstructions preventing access to it from members of the public and was in effect open land - thus it would be impossible to gain access via physical force. There is also no evidence to suggest the landowner had signposted its objection to use of the Land. Accordingly, use has not been by force and this part of the test has been satisfied.

#### (ii) Not in secrecy

7.15 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

7.16 The user evidence form specifically asks if permission was ever sought for activities on the Land. Five of the eight users state that they received permission to use the Land. Mr Bowles states that the previous landowners, 1066 Housing Association Ltd, gave permission for use of the Land. Furthermore, Ms Smithers comments on the fact that money was 'added to the rent' and for 'having to pay maintenance as being given permission to use it (*the Land*)'. Conversely, only three of the

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<sup>26</sup> *Ibid* at paragraph 52

<sup>27</sup> *R v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council* [2000] 1 A.C. 335

<sup>28</sup> *Ibid*

<sup>29</sup> *R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and Another* [2010] 2 A.C. 70

<sup>30</sup> *Ibid* at para. 107

users do not mention having permission to use the Land. Such consent and permission result in use of the Land being 'by right'.

7.17 As well as express permission, implied permission may be an issue in this Application.

**Beresford**<sup>31</sup> suggests, albeit *obiter*, that land which is owned by a local authority may be considered land held in trust for the benefit of the public, and their use would therefore be by right. However, the more recent case of **Malpass**<sup>32</sup> sought to tighten this guidance by ensuring the local authority would have to sufficiently evidence the purpose for which the land was acquired and held. Hastings Borough Council owned the Land until it was sold by them to 1066 Housing Association in 1996. The conveyance of the Land between Hastings Borough Council and 1066 Housing Association Ltd in 1996 has not been produced in evidence so it is not possible for officers to consider whether the issue of implied permission is relevant to use prior to 1996.

7.18 Upon consideration of the user evidence, on the balance of probabilities, use of the Land has not been 'as of right'. User evidence shows that the majority of the use has been based on prior permission being granted by previous landowners. This is sufficient to render use as 'by right', i.e. with permission of the landowner. Thus the statutory test fails.

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

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

7.20 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.

7.21 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. There have been extensive opportunities for people to make representations.

7.22 The cost implications and the further delay which would be introduced into the process in holding a public inquiry would also be considerable. Considering the ample opportunities both parties have had to make representations it is submitted that a public inquiry would not be necessary or in the public interest with this Committee being able to provide an objective and impartial view of all the evidence submitted.

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

## **8. Conclusion**

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

8.2 There is insufficient evidence to show that the local residents of the green area of land adjacent to 12-17 Catsfield Close, St Leonards on Sea have indulged in lawful sports and pastimes, as of right, for a period of twenty years, within two years of the cessation of use. Accordingly, section 15(3) of the Commons Act 2006 has not been satisfied. In particular, it is not possible to show that

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<sup>31</sup> [2004] 1 AC 889.

<sup>32</sup> H.M. The Queen (on the application of Stephen Malpass) v The County Council of Durham [2012] EWHC 1934 (Admin)

use has been as of right, or that a 'significant number' have used the Land. Furthermore, it is unable to satisfactorily show that use has been for a period of twenty years or more.

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

## **9. Recommendation**

9.1 It is recommended that the application to register the land adjacent to 12-17 Catsfield Close, St. Leonards on Sea as a town or village green be rejected and that the register of town and village greens held at East Sussex County Council not be amended.

Karl Taylor  
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Economy, Transport and Environment

Contact Officer: Chris Kingham (01273 335556)

Local Member: Councillor Phil Scott

## **Background Documents**

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

In addition, at Appendix 8, there are miscellaneous documents which do not fit easily into any of the above appendices. Furthermore, the landowner's documents in support of their objection are in a separate folder (also attached).