Agenda item: 6

Committee:	**Commons & Village Green Registration Panel**
Date:	**29 October 2013**
By:	**Assistant Director, Economy, Transport and Environment**
Title:	**Application for land at the corner of Harley Shute Road and Edinburgh Road, St Leonards on Sea, to be registered as a town or village green**
Applicant:	**Peter Jones**
Application No:	**1358**
Contact Officer:	**Chris Kingham, Tel. 01273 335556**
Local Member:	**Councillor Kim Forward**

Recommendation

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

DETAILS OF THE APPLICATION

1. Receipt of a completed Application

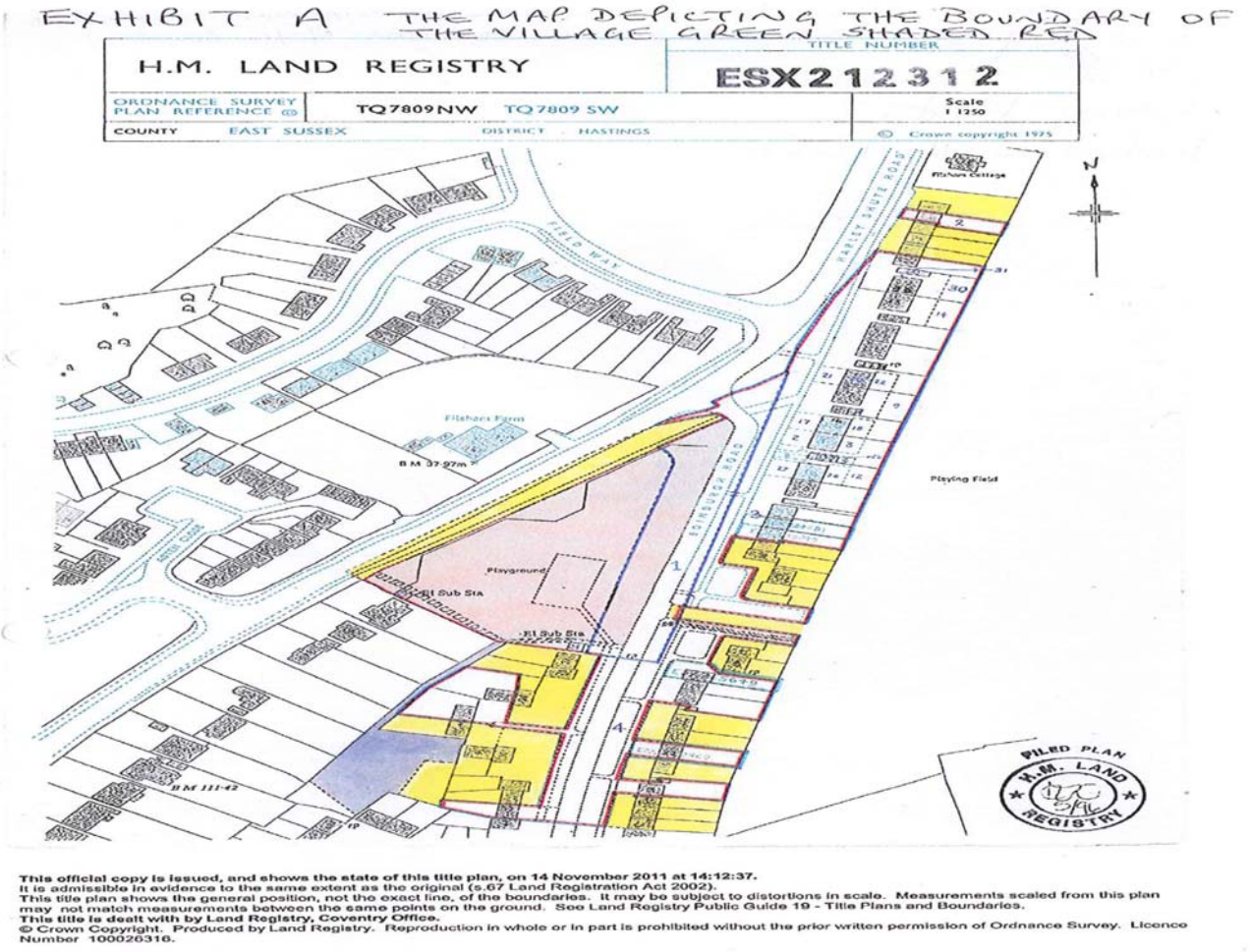
1.1 The County Council received the completed Application on 16 March 2012. The Application seeks to register the Land as a town or village green by virtue of the operation of Section 15 (2) of the Commons Act 2006. Under that provision, land is to be registered as a town or village green where:-

a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

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

2. The Site

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



2.2 The Land has one owner, Amicus Horizon Limited, who own the land under title number ESX 212312. The results from the Land Registry search undertaken on 2 May 2012 can be found in the file of evidence at appendix 4.

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 30 March 2012 (see appendix 2 and the photographs at appendix 6).

3.2 All interested parties, including Hastings Borough Council, were sent copies of the notice, and copies were made available to view by members of the public at County Hall, Lewes, and Hastings Borough Council offices in Hastings. These documents were held on deposit between 30 March 2012 and 11 May 2012 (copies of the correspondence sent out can be found at appendix 3).

3.3 The Local Member (at the time), Councillor Joy Waite, was informed of the Application by way of letter dated 20 March 2012 (appendix 3).

3.4 This Application has received one objection, from the landowner Amicus Horizon Limited. This will be explored in depth in Part C of this report.

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

SUMMARY OF THE RELEVANT LAW

4. 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 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.

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;
> such use has been as of right, i.e. without force, without secrecy, and without permission (*nec vi, nec clam, nec precario*).

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***[1] where, at paragraph 2, he noted as follows:-

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

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.

[1] [2004] 1 AC 889.

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

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 ordinary dictionary meaning of a "*green*" as being "*a piece of public or common grassy land*" which ought to be applied in constructing section 22(1) of the Commons Registration Act 1965, the predecessor to Section 15 of the 2006 Act, rather than land being registered that no one would recognise as a town or village green.[4]

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

ii) Lawful Sports and Pastimes:

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

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.[8]

---

[2] [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.
[3] *Ibid* at paragraph 39.
[4] *Ibid* at paragraphs 71 to 83.
[5] [2013] EWCA Civ 276
[6] [2000] 1 AC 335 at 356F to 357E.
[7] J. Riddall, 'Getting Greens Registered: A guide to law and procedure for town and village greens' (2007), paragraph 43
[8] See Sullivan J. in *R. (Laing Homes Limited) v. Buckinghamshire County Council* [2004] 1 P & CR 573 at 598.

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***[9].

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 this case initially it will be necessary to show use from 1992 – 2012. If there is any challenge to use within this period then the relevant twenty year period shall be altered to reflect the challenge.

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.'[10]

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***.[11]

iv) Locality or Neighbourhood within a Locality:

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

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***.[16] However, a neighbourhood cannot be any area drawn on a map. Instead, it must have a sufficient degree of cohesiveness: ***Cheltenham Builders*** case.[17]

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

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***.[19]

vi) As of Right

[9] (1884) 13 QBD 304.
[10] J. Riddall, paragraph 51
[11] [2010] UKSC 11 at paragraph 36.
[12] [1995] 4 All ER 931 at page 937b-e.
[13] [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.
[14] [2004] 1 P & CR 573 at paragraph 133.
[15] [2003] EWHC 2803 (Admin) at paragraphs 41 to 48.
[16] [2002] EWHC 76 (Admin).
[17] [2003] EWHC 2803 (Admin) at paragraph 85.
[18] *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438
[19] [2002] EWHC 76 (Admin) at 77.

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***[20] 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.[21]

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.[22]

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***.[23] Tolerance does not imply consent.

APPLICATION OF THE RELEVANT LAW TO THE EVIDENCE

7. Application of the Commons Act 2006 and Caselaw

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.

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 are stated including school, community hall, church and shops. There is also a box inviting the addition of information on any other facilities that are available. The vast majority of users completed this section and the findings are in the below table 1.

Table 1 Recognisable facilities available to inhabitants in the local community

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

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

7.4 The West St. Leonards Ward, within the town of Hastings, is identified as the claimed locality. A Ward is capable of amounting to a locality. 41 out of 42 users are resident in this Ward (the 42nd being the local councillor), and it is considered that, on the balance of probabilities, the Land is enjoyed by the inhabitants of a locality (appendix 1).

7.5 Furthermore, the applicant cites the central section of the West St Leonards Ward (appendix 1, exhibit B) as the specific neighbourhood within a locality. Whilst the area depicted between the

[20] [2000] 1 AC 335.
[21] [2003] EWHC 2803 (Admin) at paragraph 91.
[22] J. Riddall, paragraph 29
[23] [2004] 1 AC 889.

arbitrary red lines drawn by the applicant would perhaps have too high a population to consider 42 users as a 'significant number', examination of the user evidence shows that 41 users, excluding the local councillor, live within 1km of the Land, with the vast majority living within 500 metres (see appendix 5, exhibit A). The area highlighted by the red lines on the plan of West St Leonards Ward (appendix 1, exhibit B) places the Land in the centre, equidistant from each boundary by approximately 600 metres. However the vast majority of the residents live in the area between Asten Close and Edinburgh Road (39 of 42), an area of approximately 0.25 km^2.

7.6 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.

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

Lawful sports and pastimes on the land

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

Table 2 Activities participated in on the Land

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

The three most frequent activities witnessed are children playing (33 users), football (30 users) and dog walking (22 users). Other common activities participated in or witnessed included cycling and cricket.

7.9 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 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

7.10 All 42 of the user evidence forms submitted records use of the Land for a period in excess of twenty years - some of which demonstrate use in excess of fifty years. Whilst a considerable amount of user evidence states the Land to be enjoyed frequently (28 of the users state weekly use), there is not a requirement to show use occurred at such a rate, rather the land 'must have been used and available… when needed.'[25] The relevant twenty year period is 1992-2012, with this

[24] *R v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council* [2000] 1 A.C. 335
[25] *Ibid* at paragraph 52

Application bringing the status of the land in to question. Table 3 illustrates the specific findings regarding length of use, and table 4 regarding frequency.

Table 3 Length of use by users submitting evidence

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

Table 4 Frequency of Use

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

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

e) Have indulged as of right

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

> rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user[27]

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

(i) Not by force

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

(ii) Not in secrecy

7.13 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

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

---

[26] *R v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council* [2000] 1 A.C. 335
[27] *Ibid*
[28] *R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and Another* [2010] 2 A.C. 70
[29] *Ibid* at para. 107

Pre 1996

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

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

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

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

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

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

7.20 If the Land was acquired under s. 164 of the Act of 1875 it would appear appropriate to conclude that use was *by* right because the beneficial ownership has effectively passed to the public. Accordingly, the application would fail because it could not be shown that the public have indulged in use of the Land *as of* right.

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

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

---

[30] Lambeth overseers v London County Council [1897] AC 625
[31] Ibid at 630
[32] [1949] 1 KB 716
[33] Ibid at 726
[34] Sheffield Corporation v Tranter [1957] 1 WLR 843
[35] Ibid at 857
[36] Blake v Hendon Corporation [1962] 1 QB
[37] Ibid at 301
[38] S. 9(a) OSA 1906
[39] S. 9(b) OSA 1906

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

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

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

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

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

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

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

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

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

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

7.28 Hence, although that issue has not been definitively determined by the Courts, there is strong *obiter dicta* from the House of Lords, which is clearly highly persuasive authority albeit not binding, that land owned by a local authority for the very purposes of public recreation, and which is used for

[40] S. 10(a) OSA 1906
[41] [2004] 1 AC 889.
[42] At paragraph 29.
[43] At paragraph 30.
[44] At paragraph 30.
[45] At paragraph 52.
[46] At paragraph 87.

such purposes, is not used as of right by the public, but rather is used pursuant to the right the public have to use the land under the statutory trust or otherwise.

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

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

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

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

7.33 Applying those *obiter* statements to the Land, it is apparent that there is no indication as to the statutory power under which it was acquired by Hastings Borough Council in 1950. It is also unclear as to whether any enforceable trust was ever created. Nonetheless, the one specific purpose referred to in the 1950 Conveyance for its acquisition was '*that they will at all times hereafter keep and maintain the said land hereby conveyed as an open space and free from buildings or erections except such structures as may be incidental to the use of the land as a public space or park…'*

7.34 This suggests that the purpose for the Land's acquisition was to use it as a public space or park. No other potential purpose for its acquisition is referred to in the 1950 Conveyance. Moreover, it is of note that, as a matter of fact, the Land has been so used. It is laid out and maintained as a public recreation ground and it has been used as such by the local inhabitants for many years.

7.35 It is now important to turn to the case of **Malpass**[48], which was decided in the High Court in 2012. This case, to a certain extent, moved away from the so called 'Scott test' in **Beresford** by deciding that use of land was not 'by right' simply because it was owned by a local authority. In this case the original conveyance did not reference any statute, simply stating that the land was '*required by the Council for purposes for which they are authorised by statute to acquire land'*.[49] This was then supplemented by a Deed of Charter some 28 years later which stated the land was held as an Open Space for the benefit of the public. The court found the original deed did not go far enough in adequately stating under what power or authority the land was acquired or held, and therefore decided it was impossible for the later deed to *confirm* something which was obviously unclear, i.e. the purpose for which the land was acquired or held by the local authority.

7.36 This Application can be differentiated from that of **Malpass** on the basis that the original 1950 conveyance, although there is no reference to any statute, clearly states the purpose for which the Land was acquired (see paragraph 7.15). In paragraph 45 of the ruling in **Malpass**, Kaye J suggests that had the Inspector had the opportunity to have seen minutes which described the land in question as being '*held as public walks and pleasure grounds'*, then the Inspector may well have decided this was enough to decide that the land was acquired under the 1875 Act, and that use was by right - without having to rely on the later [flawed] deed at all. Therefore this confirms that it is not

[47] Barkas v North Yorkshire County Council and Scarborough Borough Council [2013] 1 WLR 1521
[48] H.M. The Queen (on the application of Stephen Malpass) v The County Council of Durham [2012] EWHC 1934 (Admin)
[49] At paragraph 14.

essential that the conveyance contain a statutory reference as to the power under which it is acquired, but to be able to provide clear evidence as to the reasoning. It is submitted the 1950 conveyance does this.

7.37 Given those circumstances, on the balance of probabilities it is concluded that the Land was acquired and was held by Hastings Borough Council, between 1950-1996, as a recreation ground or open space for the local inhabitants of St Leonards on Sea. Consequently, the local inhabitants had a right to use the Land; so have used it by right rather than 'as of right'. The statutory criteria for registration of the Land as a town or village green under s15(2), due to it not being possible to show a twenty year period of 'as of right' use, has therefore not been satisfied.

Post 1996

7.38 In addition, Schedule D of the Transfer from Hastings Borough Council to 1066 Housing Trust (appendix 3) contains the conditions which are imposed upon a tenant purchasing a property (regarding a right to buy arrangement). This includes the following:

'8. To contribute a fair share towards the cost of repairing and maintaining any joint or shared access ways and open spaces whether grassed or not together with their perimeter walls fences or hedges (if any) which have been provided for the use or benefit of the property and other premises in the vicinity such share to be assessed in the proportion which the property bears to the other premises benefitted or enjoying the use of the facilities and amenity aforementioned. In this Schedule the words 'open spaces' shall be interpreted to include forecourts parking areas and drying areas as well as areas of amenity and public recreation'.

7.39 It is submitted that this demonstrates the control the current landowner has over the land, and the ability to impose such conditions indicates use has been by right, rather than as of right. There is also the issue of the sign submitted as part of the landowner's objection. This sign warns of potential fines for dog fouling, and bears the Amicus Horizon motif. Whilst alone this would not be conclusive of control of the Land it is suggested that, since the sign must have been erected post 2007 (after the creation of Amicus Horizon), or at least amended after 2007, then the landowner has made some attempts to make public stipulations as to how the land is used (reference to a dog patrol etc) and subsequently there is an argument that the use would have been by right.

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

8. Considerations into the feasibility of holding a Public Inquiry

8.1 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.

8.2 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.

8.3 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.

8.4 The cost implications and further delay which would be introduced into the process in holding a public inquiry would also be considerable. Furthermore, as the land involved is not owned

by ESCC, and the issues are purely legal in nature, rather than factual, there would be little benefit to be obtained from holding a public inquiry.

8.5 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.

9. Conclusion

9.1 After careful consideration of all the evidence submitted to East Sussex County County 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.

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

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

10. Recommendation

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

Karl Taylor
Assistant Director
Economy, Transport and Environment

Contact Officer: Chris Kingham (01273 335556)

Local Member: Councillor Kim Forward

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