

Committee: Commons & Village Green Registration Panel

Date: 29 October 2013

By: Assistant Director, Economy, Transport and Environment

Title: Application for land at the junction of Ghyllside Avenue and Old Roar Road, Hastings to be registered as a town or village green

Applicant: James deHavilland

Application No: 1359

Contact Officer: Chris Kingham, Tel. 01273 335556

Local Member: Councillor Peter Pragnell

Recommendation : To accept the application of James deHavilland made pursuant to section 15 of the Commons Act 2006, to have land at the junction of Ghyllside Avenue and Old Roar Road, Hastings registered as a town or village green.

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

Receipt of a completed Application

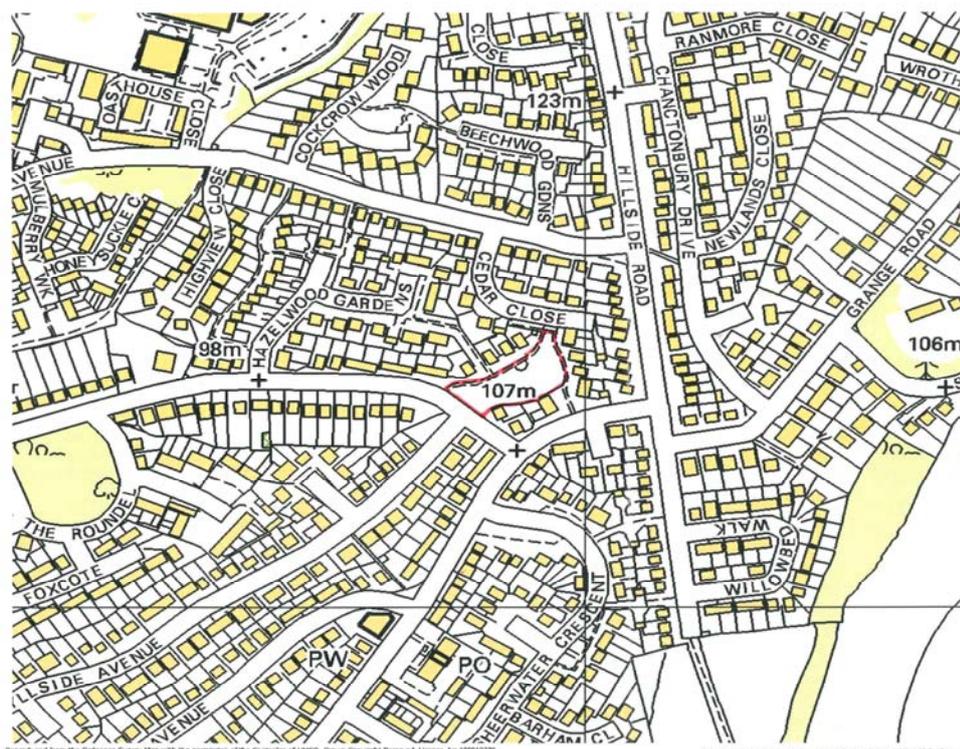
1.1 The County Council received the completed application (“the Application”) on 21 May 2012. The Application seeks the registration of the land by virtue of the operation of Section 15 (2) of the Commons Act 2006. Under that provision, land is to be registered as a town or village green where:-

a 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

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

2. **The Site**

2.1 The land, which is the subject of the Application (“the Land”), is roughly rectangular in shape and is located adjacent to and south of Cedar Close. The Land is bordered on three sides by residential properties and is at the junction of Ghyllside Avenue and Old Roar Road in Hastings.



The scaling of this drawing cannot be assured

Revision	Date	Drn	Ckd

NAME : JAMES SHAUILLAND
 DESIGNER : *[Signature]*
 DATE : 21.8.2012
 DOLLAR BEFORE ME :
Nick Baker
 SOLICITOR
 CLARE WILLMOT LLP

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Project
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Drawing Title
 Site Plan

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Exhibit 1

2.2 The Land has one owner, Hastings Borough Council, who owns the land under title number ESX 13146. The results from the Land Registry search undertaken on 24 May 2012 can be found in the file of evidence at appendix 4.

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 15 June 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 15 June 2012 and 27 July 2012 (copies of the correspondence sent out can be found at appendix 3).

3.3 The Local Member, Councillor Peter Pragnell, was informed of the Application by way of letter dated 6 June 2012 (appendix 3).

3.4 Hastings Borough Council were written to in their capacity of 'concerned authority' and also in their capacity as landowner- this was in the form of two separate letters both dated 6 June 2012. In addition, the residents in the closest proximity to the land in question were also written to on 6 June 2012 (appendix 3).

3.5 This Application has not received any objections.

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 (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*).

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

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

¹ [2004] 1 AC 889.

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**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

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

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

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 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.'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

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

⁹ (1884) 13 QBD 304.

¹⁰ J. Riddall, paragraph 51

¹¹ [2010] UKSC 11 at paragraph 36.

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

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

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

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

¹⁶ [2002] EWHC 76 (Admin).

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

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

¹⁹ [2002] EWHC 76 (Admin) at 77.

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*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.

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.

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. The vast majority of users completed this section-with school, church and shops being the most consistently selected.

7.3 The Conquest Ward, within the town of Hastings, is identified as the claimed locality. A Ward is capable of amounting to a locality. 35 out of 36 users are resident in Conquest Ward, and it is considered that, on the balance of probabilities, the Land is enjoyed by the inhabitants of a locality (appendix 1). 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.

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].²⁴

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

²⁰ [2000] 1 AC 335.

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

²² J. Riddall, paragraph 29

²³ [2004] 1 AC 889.

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

use by a local community for lawful sports and pastimes. It is submitted that 36 user evidence forms is sufficient in this instance, and indicates the local community use the Land for lawful sports and pastimes.

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 seen taking place on the Land. There are approximately fourteen listed activities including dog walking, horse riding, ball sports and carol singing.

7.7 The three most frequent activities witnessed are dog walking (23 users), school educational trips (26 users) and children playing (with parents, grandparents etc). Other common activities participated in or witnessed included walking and having picnics.

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.

e) For a period of at least 20 years

7.9 Thirteen of the user evidence forms submitted record 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 shows the Land to be enjoyed frequently (34 of the users state weekly use or more), there is not a requirement to show use occurred at such a rate, rather the land 'must have been used and available... when needed.'²⁵ The relevant twenty year period is 1992-2012, with this Application bringing the status of the Land in to question. Of the 36 user evidence forms we received, 13 covered this period in its entirety.

7.10 As well as the thirteen user evidence forms indicating twenty years or more use, there are a further fifteen 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 been enjoyed for a period of at least twenty years.

f) 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 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.'²⁶ It has taken this meaning because it is not reasonable for the owner to resist actions of user because;

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

7.12 The recent 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

²⁵ *Ibid* at paragraph 52

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

²⁷ *Ibid*

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

²⁹ *Ibid* at para. 107

7.13 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. There is also no evidence to suggest the landowner has 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

7.14 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 (due to not receiving a response from the landowner). Therefore this part of the test has also been satisfied.

(iii) Not with permission

7.15 The user evidence form 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.

7.16 Upon consideration of the user evidence, and in light of there being no objections or evidence to the contrary received, on the balance of probabilities use of the Land has been as of right.

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 There have been extensive opportunities for people to make representations. We have not received any objections to this application.

8.5 The cost implications and the further delay which would be introduced into the process in holding a public inquiry would also be considerable. Considering that the landowner does not dispute use (or indeed comment either way) and all of the statutory criteria have been satisfied, 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.

8.6 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 the Registration Authority it is submitted that, on the balance of probabilities, there is sufficient evidence to show that a significant number of the local residents of the Conquest Ward have indulged in lawful sports and pastimes, as of right, for a period of twenty years and they currently continue to do so. Accordingly, section 15(2) of the Commons Act has been satisfied.

10. Recommendation

10.1 It is recommended that the application to register the land at the junction of Ghyllside Avenue and Old Roar Road, Hastings as a town or village green be accepted and the register of town and village greens held at East Sussex County Council be amended accordingly.

Karl Taylor
Assistant Director
Economy, Transport and Environment

Contact Officer: Chris Kingham (01273 335556)

Local Member: Councillor Peter Pragnell

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