

Committee: Commons & Village Green Registration Panel

Date: 25 May 2011

By: Assistant Director, Legal and Democratic Services

Title: Application for land at Herbrand Walk Beach, Cooden, Bexhill-on-Sea to be registered as a town or village green

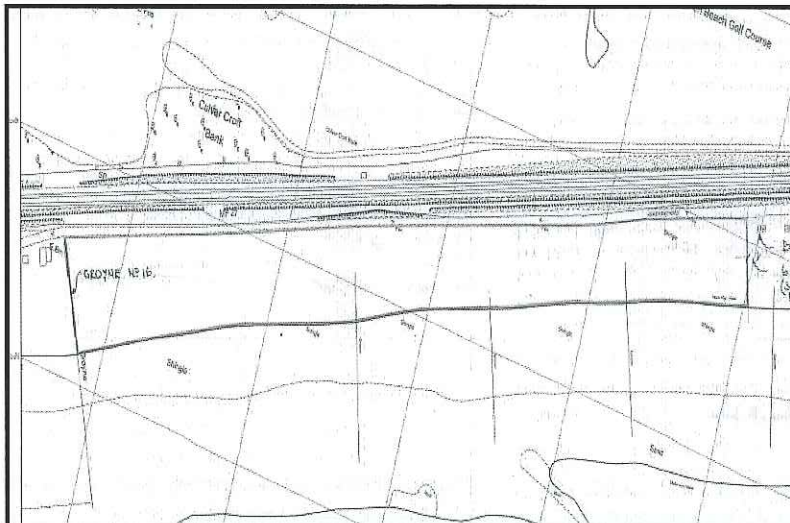
Purpose: To supplement the information given to the Commons and Village Green Registration Panel on 22 December 2010 by providing a detailed consideration of the wording of a sign on the application land.

Recommendation

To accept the application, pursuant to section 15 of the Commons Act 2006, of Herbrand Walk Beach Preservation Society to have land at Herbrand Walk Beach, Cooden, Bexhill-on-Sea registered as a town or village green.

1. The Site

- 1.1. The application land (below) is roughly rectangular in shape and is located adjacent to and south of Herbrand Walk, Cooden. The land subject to the application is bordered by Herbrand Walk Road to the north and the high water mark line to the south. The border in the west is groyne number 16 and in the east beach hut 38.



- 1.2. The land has three owners and a part is also unregistered. Mr R.S. Peddar owns the far western portion under title number ESX 223763. Mrs J.M. Thompson owns the adjoining plot to the east under title number ESX 223589. Mr S. Hall owns the land to the east of Mrs Thompson under title ESX 203966. This is less than half of the land subject to the application with the rest being unregistered. Mr S. Hall has taken out a caution against first registration; the title of this document is ESX 204930. A plan of land ownership is contained in the applicants bundle.
- 1.3. Members are referred to the plan and application at appendix 1.

- 1.4. A site inspection was conducted on 4 November 2010 by Chris Wilkinson. A set of photographs of the land is available at appendix 2.

2. The Application

- 2.1. East Sussex County Council ("the County Council") received the application on 14 May 2010. The application was made pursuant to Section 15(1) of Commons Act 2006 by Mr Stephen Atkinson-Jones ("the Applicant"), Secretary of Herbrand Walk Beach Preservation Society.

3. The Law

- 3.1. 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.
- 3.2. The Application seeks the registration of the Land by virtue of the operation of Section 15 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;
 - (b) they ceased to do so before the commencement of this section; and
 - (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).
- 3.3. 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.
- 3.4. 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;

The Burden and Standard of Proof

- 3.5. 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.
- 3.6. 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:-

¹ [2004] 1 AC 889.

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 met².

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

Statutory Criteria

- 3.8. Caselaw 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.

Land

- 3.9. 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.
- 3.10. However, it was stated by way of *obiter dictum* by the majority of the House of Lords in *Oxfordshire County Council v. Oxford City Council*³ 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.⁴ 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.
- 3.11. An alternative minority view was expressed 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.⁵

² (2003) UKHL 60 at paragraph 2

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

⁴ *Ibid* at paragraph 39.

⁵ See paragraphs 71 to 83.

Lawful Sports and Pastimes

- 3.12. 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.
- 3.13. However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way.⁷

Continuity and Sufficiency of Use over 20 Year Period

- 3.14. The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: *Hollins v. Verney*⁸.
- 3.15. 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*⁹.

Locality or Neighbourhood within a Locality

- 3.16. A “locality” must be a division of the County known to the law, such as a borough, parish or manor: *MoD v Wiltshire CC*¹⁰; *R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC*¹¹; and *R. (Laing Homes Limited) v. Buckinghamshire CC*¹². A locality cannot be created simply by drawing a line on a plan: *Cheltenham Builders case*¹³.
- 3.17. In contrast, a “neighbourhood” need not be a recognised administrative unit. A housing estate can be a neighbourhood: *R. (McAlpine) v. Staffordshire County Council*.¹⁴ However, a neighbourhood cannot be any area drawn on a map. Instead, it must have a sufficient degree of cohesiveness: *Cheltenham Builders case*.¹⁵

Significant Number

- 3.18. “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 informal recreation, rather than occasional use by individuals as trespassers: *R. (McAlpine) v. Staffordshire County Council*.¹⁶

⁶ [2000] 1 AC 335 at 356F to 357E.

⁷ See Sullivan J. in *R. (Laing Homes Limited) v. Buckinghamshire County Council* [2004] 1 P & CR 573 at 598.

⁸ (1884) 13 QBD 304.

⁹ [2010] UKSC 11 at paragraph 36.

¹⁰ [1995] 4 All ER 931 at page 937b-e.

¹¹ [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.

¹² [2004] 1 P & CR 573 at paragraph 133.

¹³ At paragraphs 41 to 48.

¹⁴ [2002] EWHC 76 (Admin).

¹⁵ At paragraph 85.

¹⁶ [2002] EWHC 76 (Admin) at 77.

As of Right

- 3.19. Use of land “as of right” is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in *R. v. Oxfordshire County Council ex parte Sunningwell Parish Council*¹⁷ that the issue does not turn on the subjective intention, knowledge or belief of users of the land.
- 3.20. “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*¹⁸.

4. Consultations and Representations

- 4.1. The application was advertised on site and in the Observer group newspapers on 4 June 2010. All interested parties and Rother District Council were sent copies of the notice and application. Copies were available to view by members of the public at County Hall, Lewes and Rother District Council offices in Bexhill. The Local Member, Councillor Gadd was informed of the application by way of letter dated 26 May 2010. The County Council have received correspondence from Rother District Council who informed them of an appeal against the refusal of a planning permission to develop this strip of land.

5. The merits of the Application

- 5.1. The Applicant asserts that the beach has become a village green on the basis that the land has been used by a significant number of inhabitants of a locality or neighbourhood within a locality for lawful sports and pastimes as of right for not less than twenty years, and that this use has been continuous up to May 2010.
- 5.2. In support of the application the Applicant has produced 79 Open Spaces Society (OSS) evidence questionnaires containing a total of 100 signatures. Further evidence disclosed was in the form of historic photographs, land registry documents, letters and a plan of the locality of Herbrand Walk Beach.
- 5.3. All documents provided by both the Applicant and Objector have been made available for inspection in the Members Room

6. Objection from landowners

- 6.1. The landowner information obtained from the land registry documents was used to send each landowner a copy of the application and evidence on 26 May 2010. The documents sent to Mr Peddar were returned on 23 June 2010 after the post office was unable to deliver them. Mrs Thompson did not respond. Mr Hall (“the Part-landowner”) did respond. In the Part-landowner’s response he submitted an email from Mr Peddar which gives “full authority to Steve Hall to act on [his] behalf in any matters of business relative to Cooden Beach.”
- 6.2. The Part-landowner submitted his response on 15 July 2010. He contests the application and submits that it does not satisfy the statutory criteria for the following reasons:

¹⁷ [2000] 1 AC 335.

¹⁸ [2004] 1 AC 889.

- a) The land has been in commercial use since February 1988 and is therefore not enjoyed only by local residents for recreational purposes.
- b) Use of the land has been with permission.
- c) Preventing Mr Hall from carrying out his lawful use of the site would breach his Human Rights (peaceful enjoyment of possessions¹⁹).

6.3. It is noted that the Part-landowner owns a segment of the application land roughly rectangular in shape (37.5x20metres) from the road verge to the beach slightly to the west of the centre of the application land.

6.4. The largest portion of the beach is unregistered, with no known landowner. There is a caution against first registration held by the Part-landowner for this piece of land. The unregistered plot is roughly rectangular in shape between the road verge and the high water mark. The unregistered plots dimensions are 187.5x62.5 metres. The plot widens as it nears the high water mark; the southern boundary is 242.5 metres long.

7. Committee Recommendation – 22 December 2010

7.1. The application, along with the case officer recommendation, was put to the Commons and Village Green Registration Panel on 22 December 2010. A copy of the report presented to the Panel is attached at appendix 3.

7.2. The Panel accepted the majority of the case officer's findings; the Applicant had proved the land had been used by a significant number of local inhabitants of a locality or neighbourhood within a locality for lawful sports and pastimes for a period of twenty years.

7.3. However, based on the information submitted to the Panel, they were unable to find that use had been as of right.

7.4. For use to be as of right it must be shown to be 'not by force, nor stealth, nor the licence of the owner.'²⁰ The Panel accepted use had not been by force or by stealth but, on the evidence before them were unable to reach a conclusion as to whether use was without permission of the owner. Permissive use was discussed between paragraphs 5.19 and 5.27 of the initial report.

7.5. Permission can take two forms; it can be expressed or implied. Expressed permission would be a clear act taken by the landowner to bring it to the attention of the users that their use is with permission. Implied permission would be other acts done by the landowner which encouraged the public to use the land.

7.6. The Panel's reasoning for deciding that use may have been with permission was because the Part-landowner has installed a sign stating,

Private Beach: vehicles may park here at owners risk between 0800 and 2100.
Outside these hours vehicles will be clamped.

7.7. The Part-landowner has also removed some shingle from part of his land to accommodate those wishing to park their cars on the beach.

¹⁹ Article 1 of the First Protocol of the European Convention on Human Rights

²⁰ *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 W.L.R. 160

8. Development of legal interpretation of permissive use

- 8.1. There have been several decisions by the courts which have elaborated on when use is found to be with permission and not with permission. Examination of these cases will be of assistance to illustrate if use of the Land has been with permission. The cases discussed are:

R v Oxfordshire County Council, ex parte Sunningwell Parish Council [1999] UKHL 28

R v City of Sunderland ex parte Beresford (2003) UKHL 60

R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2004] JPL 975

R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs and another [2007] UKHL 28

R (on the application of Lewis) v Redcar and Cleveland Borough Council [2008] EWHC 1813 (Admin)

R (on the application of Lewis) v Redcar and Cleveland Borough Council and another [2009] EWCA Civ 3

R (on the application of Lewis) v Redcar and Cleveland Borough Council and another [2010] UKSC 11

R (Oxfordshire and Buckinghamshire Mental Health NHS Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council [2010] EWHC 530 (Admin)

- 8.2. The case of *Redcar* is cited three times because permissive use was discussed by the High Court, the Court of Appeal and the Supreme Court. The citations should be treated as separate decisions of separate courts but on the same matter.
- 8.3. It is noted that the opinion of the High Court and the Court of Appeal in *Redcar* were overturned by the Supreme Court. However, part of the opinion of Sullivan J in the High Court can be read in line with the decision of the Supreme Court. The Supreme Court held that the land was capable of being registered as a village green because the landowner would have known the residents were asserting a right despite there being signs on the land and the residents showing civility towards the landowner.

***R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] UKHL 28**

- 8.4. This case concerned a large open space in the Parish of Sunningwell, Oxfordshire. The principal issues addressed in this case were whether use was as of right and what activities constituted lawful sports and pastimes.
- 8.5. When determining if use was as of right Lord Hoffmann stated that "the actual state of mind of the ...user is plainly irrelevant."²¹

Application of *Sunningwell* to Herbrand Walk

- 8.6. Accordingly, when previously considering this application the Panel did not consider whether each user *believed* they were using the land without permission (my emphasis added).

²¹ *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 W.L.R. 160

***R v City of Sunderland ex parte Beresford* (2003) UKHL 60**

8.7. In *Beresford* the landowner submitted that because they had mowed the grass and installed benches they had given implied permission for people to use the land. The House of Lords rejected this submission; use was as of right. It should be noted that the land in *Beresford* was local authority land, at Herbrand Walk the land is part unregistered and part registered in private ownership.

8.8. In *Beresford* Lord Bingham was of the opinion that use could not be with permission because;

If the land were registered as a town or village green, so enabling the public to resort to it in exercise of a legal right and without the need for any licence, one would expect the council to mow the grass and provide some facilities for those so resorting, thus encouraging public use of this valuable local amenity. It is hard to see how the self-same conduct can be treated as indicating that the public had no legal right to use the land and did so only by virtue of the council's licence.²²

8.9. Lord Scott was of the opinion that;

The positive encouragement to the public to enjoy the recreational facilities... constituted, in particular, by the provision of the benches, seems to me not to undermine but rather to reinforce the impression of members of the public that their use was as of right.²³

Application of *Beresford* to Herbrand Walk

8.10. Applying the legal principles to this application, where the Part-landowner has encouraged use of the land by removing shingle, such positive encouragement to use the land would serve to strengthen use being as of right.

***R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] EWHC 203 (Admin)**

8.11. This case concerned a notice expressly prohibiting entry onto the application land. The court held that entry in contravention of a notice was not without force and therefore use was as of right.

8.12. The opinion of Sullivan J, builds on the foundation laid in *Sunningwell* that the user's belief is irrelevant.

The question following their Lordships decision in *Sunningwell* must not be whether those using the land knew that their user was being objected to or had become contentious, but how the matter would have appeared to the owner of the land.²⁴

²² *R v City of Sunderland ex parte Beresford* (2003) UKHL 60 [at paragraph 7]

²³ *Ibid* at paragraph 50

²⁴ *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin) paragraph

Application of *Cheltenham Builders* to Herbrand Walk

- 8.13. The Part-landowner was aware of use of his land. The Part-landowner was also aware of it being difficult for cars near to the beach and also travellers were stopping on the beach. These two issues prompted the sign noted at paragraph 7.6 which states;

Private Beach: vehicles may park here at owners risk between 0800 and 2100.
Outside these hours vehicles will be clamped.

- 8.14. The wording of this sign confirms that the Part-landowner is aware of people using the land. However, the sign does not bring it to the attention of the user that they should not be using the land, or that their use is with permission, just that cars should not be parked on the land outside the stated hours.

***R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs and another* [2007] UKHL 28**

- 8.15. Whilst this case concerns an application to amend the Definitive Map to show a right of way previously not recorded, the question asked of the courts was whether "the nature of the evidence [is] sufficient to demonstrate that there was no intention to dedicate."²⁵ If it could be shown there was an intention to dedicate then it would be shown that the landowner had given his permission for the public to use the route.
- 8.16. This case essentially held that any challenge to the public's use of land must be obvious and overt, according to what the user would have reasonably understood the landowner's intention to be: the test is objective and not subjective²⁶.

Application of *Godmanchester* to Herbrand Walk

- 8.17. Whilst the sign in place on part of the application land states that the beach is private it does not develop what such private use entails. The local community continued to use the beach as they had done previously. The sign does not suggest that the public's use of the beach is with permission it merely informs them that the beach is under private ownership.
- 8.18. Upon application of this case, the sign installed by the Part-landowner would not be sufficient to show that use is with permission.

***R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2008] EWHC 1813 (Admin)**

- 8.19. This case was for an application to register a Village Green over land which was used as a golf course. At the non-statutory public inquiry the users gave evidence of their use and how they interacted with users of the golf course. All but one of the users deferred to the golfers use. There were also notices on the land stating;

Cleveland Golf Club. Warning, it is dangerous to trespass on the golf course²⁷

²⁵ *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs and another* [2007] UKHL 28, at paragraph 2

²⁶ *Ibid* at paragraph 32

²⁷ *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2008] EWHC 1813, paragraph 11

- 8.20. Sullivan J was of the opinion that a notice which told users they were trespassing did not tell them to stop trespassing "...would not be sufficient to make it clear to them that the defendant was not acquiescing in their recreational user of the land"²⁸.

Application of Redcar, in the High Court, to Herbrand Walk

- 8.21. The notice installed on the beach by the part-landowner states, "Private Beach". The notice does not go further to tell the user that their use is by right. Applying the opinion of Sullivan J, a user being told they are a trespasser "does not mean that those notices told them to stop trespassing."²⁹
- 8.22. Upon application of this decision to Herbrand Walk it would appear that the sign is not sufficient to show that use is by right rather than as of right.

***R (on the application of Lewis) v Redcar and Cleveland Borough Council and another* [2009] EWCA Civ 3**

- 8.23. The decision of Sullivan J was granted leave to appeal to the Court of Appeal. The Court of Appeal affirmed the decision of Sullivan J and granted leave to appeal to the Supreme Court.

***R (on the application of Lewis) v Redcar and Cleveland Borough Council and another* [2010] UKSC 11**

- 8.24. The Supreme Court held that the land in *Redcar* should be registered as a Village Green. Their Lordships considered how the matter would appear to the owner of the land. If the landowner saw people on the land they could have acted in a manner to stop use, by making them aware that use was with permission.

Application of Redcar, in the Supreme Court, to Herbrand Walk

- 8.25. The applicant has submitted the signatures of 100 people who have used the land of varying frequency for at least twenty years. Lord Walker was of the opinion that;

A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it.³⁰

- 8.26. With regard to this application the Part-landowner was aware of use and did not take action to stop it from maturing into an established right. Applying the opinion of Sullivan J (paragraph 8.20) the Part-landowner did not undertake sufficient acts to let the users know their use was with permission.

***R (Oxfordshire and Buckinghamshire Mental Health NHS Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin)**

- 8.27. As noted previously (paragraph 8.12) user by force is not confined to physical force. It includes use which is contentious. A landowner may render use contentious by, among other things, erecting signs or notices prohibiting use. At Herbrand Walk the part-landowner has erected a sign.

²⁸ *Ibid* at paragraph 19

²⁹ *Ibid* at paragraph 22

³⁰ *R (on the application of Lewis) v Redcar and Cleveland Borough Council and another* [2010] UKSC 11 paragraph 36

8.28. In the *Oxfordshire* case the Court were of the opinion that the fundamental question is what the notice conveyed to the user. The Court then went on to highlight five additional points that should be addressed when considering the details of a sign.

- (1) If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious³¹.
- (2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user³².
- (3) The nature and content of the notice, and its effect, must be examined in context³³.
- (4) The notice should be read in a common sense and not legalistic way³⁴.
- (5) If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the Court should consider whether anything more would be proportionate to the user in question... The aim is to let the reasonable user know that the owner objects to and contests his user... Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did³⁵.

Application of *Oxfordshire* to Herbrand Walk

8.29. Each of the above five points are addressed in relation to the sign installed by the Part-landowner. As noted at paragraph 7.6 the sign states;

Private Beach: vehicles may park here at owners risk between 0800 and 2100.
Outside these hours vehicles will be clamped.

- (1) The user was not aware of the owner objecting and contesting to use of his land. The notice informs the user that the land is private and that those who park on the land between 2100 and 0800 will be clamped. The notice does not concern those who access the land by some other mode of transport or access the land between 0800 and 2100.
- (2) The user's response to the notice was to carry on using the land as they had done before. It had no effect on their enjoyment of the land.
- (3) Looking at the context in which the sign was installed the part-landowner has stated that it was to combat the issue of travellers staying on the land. This is of no relevance to the land being enjoyed by the public as of right.
- (4) Reading the sign in a common sense way it clearly states the beach to be private. It does not state that the Part-landowner is permitting or not permitting use. The local population would continue to use the land knowing that the land is private but not knowing if they are using it with permission of the Part-landowner.

³¹ *R (Oxfordshire and Buckinghamshire Mental Health NHS Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) paragraph 22

³² *Ibid*

³³ *Ibid*

³⁴ *Ibid*

³⁵ *Ibid*

- (5) The Part-landowner, if he wanted to bring it to the attention of the users that use was with permission, could have easily stated such in the sign. His failure to notify those using this part of the beach that use was with permission suggests that the land has been enjoyed as of right.

8.30. Upon application of these five points to Herbrand Walk and the sign installed by the Part-landowner it appears that the sign is not sufficient to bring it to the attention of those using the beach that their use is with permission. Accordingly, use of the land has been as of right.

9. Comment on case law

- 9.1. The cases cited above provide a clear and progressive development of what constitutes permissive use. The Part-landowner has failed to demonstrate that the sign, installed on his piece of land in Summer 2009, effectively brought attention to the local community that their use of the beach was with permission and therefore by right.
- 9.2. Following the precedent of the above cases it can be stated that use of Herbrand Walk has been as of right.

10. Considerations into the feasibility of holding a Public Inquiry

- 10.1. 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 completed with an objection being received from Mr S. Hall, a part-landowner (paragraph 6.2).
- 10.2. 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.
- 10.3. 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. They were analysed in the initial report put before the Panel on 22 December 2010.
- 10.4. There have been extensive opportunities for people to make representations. The part-landowner has maintained that if, upon consideration of the evidence the Council were not minded to refuse the application, a public inquiry should be held.
- 10.5. This report was commissioned by the Town and Village Green Panel of 22 December 2010. It is hoped that it addresses the concerns held by the Panel on that date. The Panel were concerned that the sign installed by the Part-landowner in June 2009 may have resulted in use becoming by right and not as of right.
- 10.6. 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 Part-landowner does not dispute use and all of the statutory criteria have been satisfied, it is submitted that a public inquiry would not be necessary or in the interest of the public with this Panel being able to provide an objective and impartial view of all the evidence submitted.

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

11. Conclusion and Reason for the Recommendation

11.1. After being directed by the Panel on 22 December 2010 to provide additional information on whether or not the sign on the beach constituted sufficient notice by the owner to inform users that their use was by right it is considered that, on the balance of probabilities, the owner has not given sufficient notice. Accordingly, local residents of Herbrand Walk 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 2006 has been satisfied.

11.2. However, should the Panel be of the opinion that the Part-landowner has displayed sufficient notice to show that use has been by right then it is recommended that the land excluding the part-landowner's is registered as a village green.

12. Recommendation

12.1. Upon consideration of this report it is suggested that the application to register Herbrand Walk as a town or village green be accepted and the register of town and village greens held at the County Council be amended accordingly.

Philip Baker
Assistant Director
Legal and Democratic Services

Contact Officer: Chris Wilkinson
01273 335744

Local Member: Councillor Gadd

Senior Solicitor: Joanna Hauge (Mrs)

Background Documents

Appendix 1 – Application and Plan

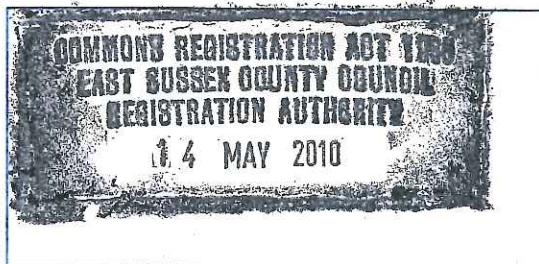
Appendix 2 – Photographs of site taken by Chris Wilkinson, 4 November 2010

Appendix 3 – Copy of the report presented to the Panel, 22 December 2010

Commons Act 2006: Section 15

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

Official stamp of registration authority
indicating valid date of receipt:



Application number: **1357**

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

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

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

1. Registration Authority

Note 1
Insert name of
registration
authority.

To the

East Sussex County Council, Legal Services Department,
County Hall,
St. Anne's Crescent, Lewes,
East Sussex BN7 1UE

Note 2

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

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

Note 3

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

2. Name and address of the applicant

Name:

On behalf of : Herbrand Walk Beach Preservation Society.

Full postal address:

Hill House	
2 Collington Grove	
Bexhill-on-Sea	
East Sussex	Postcode TN39 3UB

Telephone number:
(incl. national dialling code)

Fax number:
(incl. national dialling code)

E-mail address:

3. Name and address of solicitor, if any

Name:

Firm:

Full postal address:

	Post code

Telephone number:
(incl. national dialling code)

Fax number:
(incl. national dialling code)

E-mail address:

Note 4

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

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

4. Basis of application for registration and qualifying criteria

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

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

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

Section 15(2) applies: ☒

Section 15(3) applies: ☐

Section 15(4) applies: ☐

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

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

Note 5

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

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

Note 6

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

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

Name by which usually known:

Herbrand Walk Beach.

Location:

South of and adjacent to Herbrand Walk,
Cooden,
Bexhill-on-Sea, East Sussex TN39 4TX

Shown in colour on the map which is marked and attached to the statutory declaration: Exhibit No.1 Map A.

Common land register unit number (if relevant) *

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

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

Cooden, Little Common and West Bexhill generally, East Sussex,
as indicated on Exhibit No.2, Map B attached.

Tick here if map attached: ☒

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

Note 7

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

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

Cooden is a residential area located on the western boundary of Bexhill-on-Sea, East Sussex, some 4 kilometres from the main town centre. Herbrand Walk is a narrow road which runs west from Cooden towards Normans Bay and Pevensey Bay beyond.

At Cooden the road runs along the north edge of the beach, between the west boundary of beach hut plot No.38 and Groyne No.16, close to an existing fishing hut of block construction. Here the edge of the shingle foreshore directly abuts the edge of the road, with no intervening fence or upstand kerb. Double yellow lines are painted on both edges of the road surface. This section of the beach is known locally as Herbrand Walk Beach.

Although the foreshore has always been in private ownership, the entire beach has been freely used from time immemorial by the people of Cooden, Little Common and West Bexhill for recreation, with no record of formal or informal permission either being requested of or granted by the current owners. There are residents who have lived in the area for over 80 years who confirm that they played on the beach as children (refer witness statements attached). In view of the double yellow lines visitors' vehicles have always been parked freely on the edge of the beach, close to the edge of the road.

Significant numbers of local residents have enjoyed regular as of right access to the entire beach for more than 20 years under Section 15 (2) of the Commons Act, 2006 as witnessed by the 79 No. attached evidence questionnaires. These confirm continuous public usage for all the usual lawful beach recreation and leisure activities by a total of 100 No. people over a period extending from 1922 to 2010, excepting only the period 1939 to 1947 when the beach was fortified during World War II.

Given such long history of as of right use, and to protect and maintain such usage into the future, it is now considered appropriate to submit this formal application to register Herbrand Walk Beach as a Town Green.

Note 8

Please use a separate sheet if necessary.

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

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

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

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

Owners - Listed from West to East

Addresses.

- | | |
|--|--|
| 1. Ronald Sydney Peddar
Land Registry Title: ESX 223763 | 481 Bexhill Road
St Leonards-on-Sea
East Sussex |
| 2. Joy Margaret Thompson
Land Registry Title: ESX 223589 | 23a Hartfield Road
Bexhill-on-Sea
East Sussex TN39 3EA |
| 3. Steven Hall
Land Registry Title: ESX 203966
One Title Unregistered. | Ceylon House
2a Collington Avenue
Bexhill-on-Sea
East Sussex TN39 3QA |

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

Note 9

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

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

10. Supporting documentation

Note 10

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

Please use a separate sheet if necessary.

- Exhibit No.1 : Map A : Herbrand Walk Beach
- Exhibit No.2 : Map B : The Locality of Herbrand Walk Beach.
- 79 No. Witness Statements submitted by 100 No. residents who have used Herbrand Walk Beach for over 20 years, generally arranged in the order of signature of the reverse of Map A.

Note 11

If there are any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.

11. Any other information relating to the application

Steven Hall, owner of part of the Beach, submitted two planning applications in 2009 and 2010 for installing additional beach huts and fencing to the road frontage. Both applications were refused by the Planning Committee of Rother District Council on the grounds that "the beach lies outside of the Development Boundary of the Bexhill Local Plan." Local residents presented overwhelming written objections to both applications.

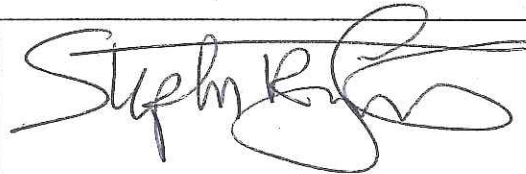
Note 12

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

Date:

13th May 2010

Signatures:



Hon SEC.

HERBRAND WALK BEACH PRESERVATION SOCIETY

REMINDER TO APPLICANT

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

Data Protection Act 1998

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

Statutory Declaration In Support

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

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

STEPHEN RICHARD ATKINSON JONES.

I.....¹ solemnly and sincerely declare as follows:—

² Delete and adapt
as necessary.

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

³ Insert name if
Applicable

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

3.a The map now produced as part of this declaration is the map referred to in part 5 of the application. Map A: Exhibit No. 1.

3.b The second map also produced as part of this declaration is the map referred to in part 6 of the application:
Map B: Exhibit No.2.

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

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

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

Cont/

⁴ Continued

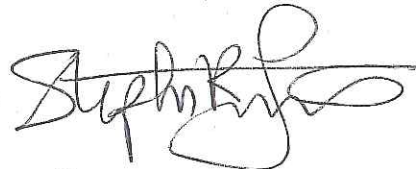
~~been received and are exhibited with this declaration; or
(iii) where no such consents are required, a declaration to that effect.~~

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

Declared by the said
Stephen Richard Atkinson Tones

at 56, Cooden Sea Road
Bexhill on Sea East Sussex

this 13th day of May 2010



Signature of Declarant

Before me *

Signature:


(ANN HOLMAN)

Address:

56 Cooden Sea Road
Bexhill on Sea East Sussex

GABY HARDWICKE
56 Cooden Sea Road
Little Common
Bexhill on Sea
East Sussex TN39 4SL

Qualification:

Solicitor

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

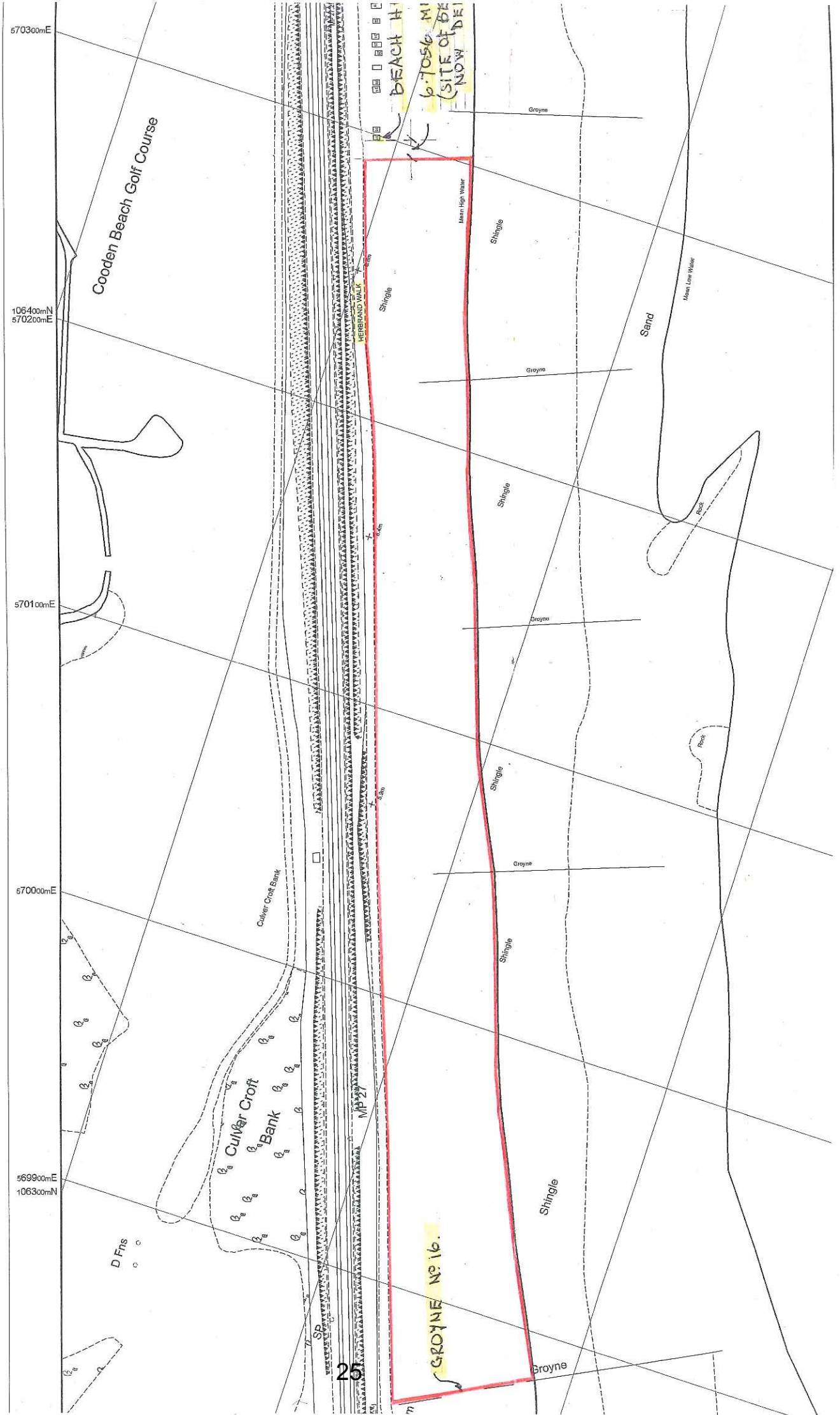
Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

REMINDER TO OFFICER TAKING DECLARATION:

Please initial all alterations and mark any map as an exhibit

This is the Exhibit I referred to in the statutory declaration
Stephen Richard Atkinson-Jones.

Atkinson & Jones
13th May 2010.



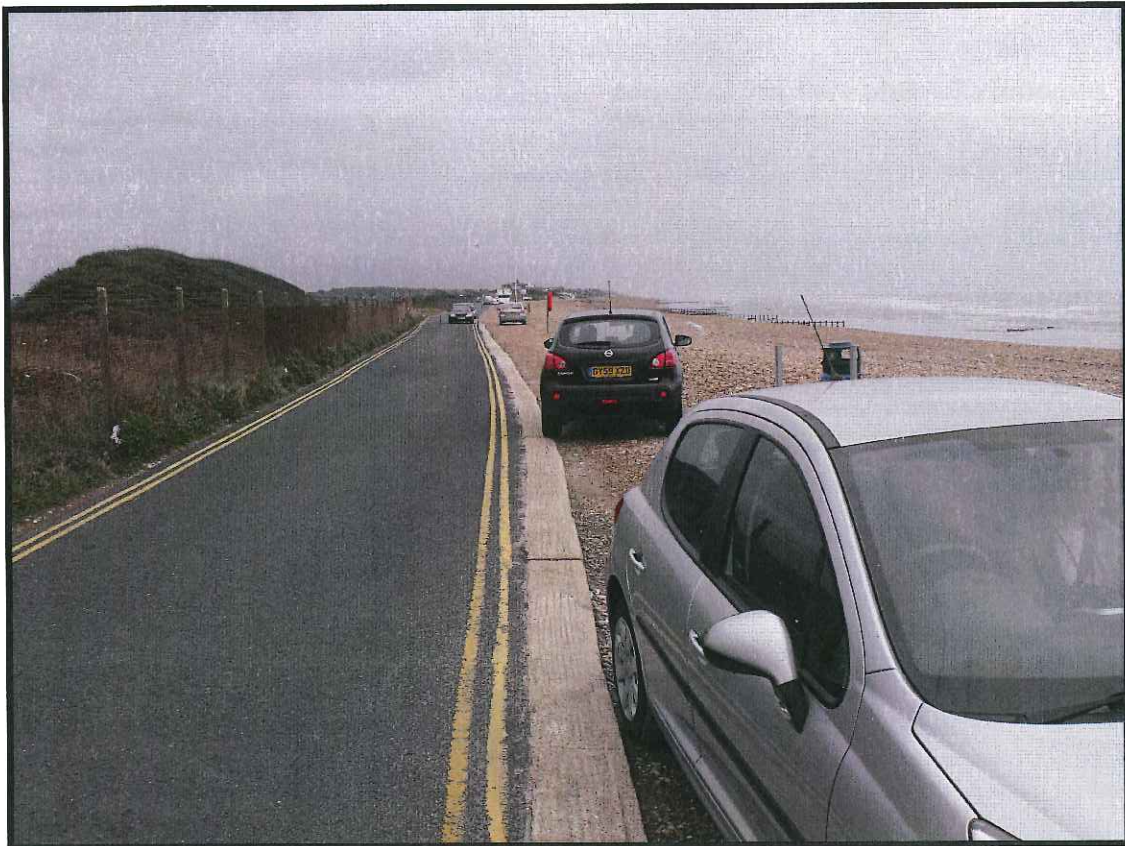
Appendix 2 – Site visit photographs



Looking east towards the application boundary.



Eastern boundary looking towards the shore.



The double yellow lines on each side of the road and the cars parking on the application land.



Bin on application land looking east from western boundary.



Sign on beach.



Sign on beach.



Sign on beach and view looking west.



Close up of sign in previous photograph.

Committee: Commons & Village Green Registration Panel

Date: 22 December 2010

By: Assistant Director, Legal and Democratic Services

Title: Application for land at Herbrand Walk Beach, Cooden, Bexhill-on-Sea to be registered as a town or village green

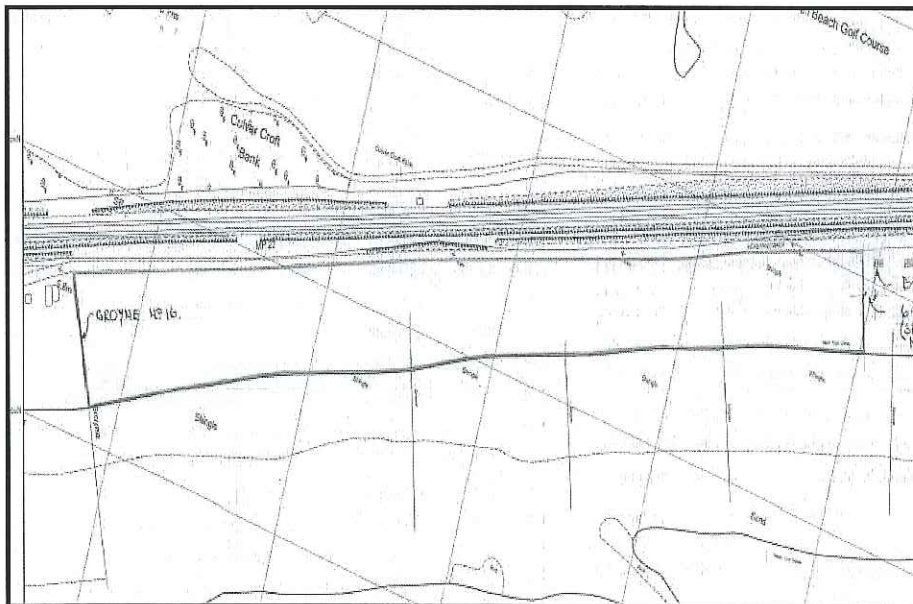
Purpose: To consider the application

Recommendation

To accept the application, pursuant to section 15 of the Commons Act 2006, of Herbrand Walk Beach Preservation Society to have land at Herbrand Walk Beach, Cooden, Bexhill-on-Sea registered as a town or village green.

The Site

1. The application land (below) is roughly rectangular in shape and is located adjacent to and south of Herbrand Walk, Cooden. The land subject to the application is bordered by Herbrand Walk Road to the north and the high water mark line to the south. The border in the west is groyne number 16 and in the east beach hut 38.



2. The land has three owners and a part is also unregistered. Mr R.S. Peddar owns the far western portion under title number ESX 223763. Mrs J.M. Thompson owns the adjoining plot to the east under title number ESX 223589. Mr S. Hall owns the land to the east of Mrs Thompson under title ESX 203966. This is less than half of the land subject to the application with the rest being unregistered. Mr S. Hall has taken out a caution against first registration; the title of this document is ESX 204930. A plan of land ownership is contained in the applicants bundle.
3. Members are referred to the plan and application at appendix 1 and 7.
4. A site inspection was conducted on 4 November 2010 by Chris Wilkinson. A set of photographs of the land is available at appendix 2.

The Application

5. East Sussex County Council (ESCC) received the application on 14 May 2010. The application was made pursuant to Section 15(1) of Commons Act 2006 by Mr Stephen Atkinson-Jones, Secretary of Herbrand Walk Beach Preservation Society.

The Law

6. The law is set out in section 15 Commons Act 2006 ('the Act'). A guide to the law is attached at appendix 3, although each element of the statutory test is addressed in this report. In short, the applicant must prove that the land has been used by a significant number of local inhabitants of a locality or neighbourhood within a locality for lawful sports and pastimes 'as of right' for a period of twenty years. The Commons (Registration of Town and Village Green)(Interim Arrangements)(England) Regulations 2007 apply to all applications made under the 2006 Act and govern how village green applications should be processed by Local Authorities.
7. The qualifying criteria to be applied is set out in Section 15(2) of the Act which states that the land must have been enjoyed in accordance with the statutory test detailed in paragraph 5 and the local inhabitants must continue to enjoy use of the land at the time of the application.

Consultations and Representations

8. The application was advertised on site and in the Observer group newspapers on 4 June 2010. All interested parties and Rother District Council were sent copies of the notice and application. Copies were available to view by members of the public at County Hall in, Lewes and Rother District Council offices in Bexhill. The Local Member, Councillor Gadd was informed of the application by way of letter dated 26 May 2010. ESCC have received correspondence from Rother District Council who informed them of an appeal against the refusal of a planning permission to develop this strip of land.

The merits of the Application

9. The applicant asserts that the beach has become a village green on the basis that the land has been used by a significant number of inhabitants of a locality or neighbourhood within a locality for lawful sports and pastimes as of right for not less than twenty years, and that this use has been continuous up to May 2010.
10. In support of the application the applicant has produced 79 Open Spaces Society (OSS) evidence questionnaires containing a total of 100 signatures. Further evidence disclosed was in the form of historic photographs, land registry documents, letters and a plan of the locality of Herbrand Walk Beach.

Objection from landowners

11. The landowner information obtained from the land registry documents was used to send each landowner a copy of the application and evidence on 26 May 2010. The documents sent to Mr Peddar were returned on 23 June 2010 after the post office was unable to deliver them. Mrs Thompson did not respond. In Mr Hall's response he submitted an email from Mr Peddar which gives "full authority to Steve Hall to act on [his] behalf in any matters of business relative to Cooden Beach."

12. Mr Hall submitted his response on 15 July 2010. He contests the application and submits that it does not satisfy the statutory criteria for the following reasons:

- a) The land has been in commercial use since February 1988 and is therefore not enjoyed only by local residents for recreational purposes.
- b) Use of the land has been with permission.
- c) Preventing Mr Hall from carrying out his lawful use of the site would breach his Human Rights (peaceful enjoyment of possessions¹).

Application of s.15(2)

Local inhabitants of any locality or neighbourhood within a locality

13. The land must be used by the inhabitants of a locality, or of any neighbourhood within a locality. A 'locality' would be for example a parish or other administrative area known to the law. According to Lord Denning 'so long as the locality is certain, that is enough.'² A neighbourhood is a smaller area but has been identified by case law as having 'a sufficient degree of cohesiveness.'³
14. At point 6 of the application the applicant is asked to identify the locality or neighbourhood to which the land relates. The applicant identifies Cooden, Little Common and West Bexhill generally. A plan was submitted (at appendix 4) highlighting the boundaries of this area. This area identified by the applicant is within the boundaries of Bexhill. Upon further examination the boundaries drawn by the applicant principally mark the boundary of the ward of St Mark's. Two additional wards of Kewhurst and Collington are also partially incorporated.
15. The user evidence questionnaires contained a question which demonstrates the cohesiveness of the local community by asking the user to tick boxes as to what recognisable facilities are available to the inhabitants of the locality. A list of twelve facilities are stated including school catchment area, community centre, place of worship and shops. There is also a box inviting the user to record any other facilities that are available.
16. The response of each user to this question was recorded and added to a graph (at appendix 5), their responses were also included in a table. Of the 79 user evidence forms submitted the top three responses were; Doctor's Surgery (78), local shops (77) and place of worship (77). Eight other facilities were recorded by over half of the user evidence forms.
17. The plan at appendix 1 also records the residence of many of those who completed a user evidence form. The plan is an Ordnance Survey map at a scale of 1:5,000. Upon inspection of this plan two educational facilities, three places of worship, a railway station, wood and golf course are within the locality.
18. Mr Hall, on the fourth page of his response, states that 'it is not correct to say that this is an open stretch of beach enjoyed only by local residents for recreation.' Whilst people may have come from outside of the locality to use the claimed land and local facilities all of those who have signed a user evidence form have also signed the back of the above plan (appendix 1) under the title: locality of the beach. Approximately, seventy residences were recorded on this plan.
19. The objector submits that it is incorrect to state the land has only been enjoyed by local residents because it has been in commercial use since February 1988. The applicant has responded to the contrary stating that it has never been used for commercial activities. They acknowledge the land was bought in 1988 by McDonald Fish Selling Ltd. but, according to a letter sent to the Bexhill Observer by McDonald, "the site [was]... surplus to that being used by my business." The applicant, in their response, also submits fourteen letters from residents confirming that they have not seen any commercial activity on the foreshore.

¹ Article 1 of the First Protocol of the European Convention on Human Rights

² *New Windsor Corporation v Mellor* [1975] 1 Ch 380

³ *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin)

20. 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].'⁴ The applicant has illustrated this by producing the plans at appendix 4 (paragraph 17)

21. On the balance of probabilities it is submitted that the locality marked by the applicant of being Cooden, Little Common and West Bexhill has the requisite qualities of fulfilling this part of the statutory test.

Have indulged as of right

22. 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.'⁵ 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 user⁶

23. The recent decision of the Supreme Court in *Redcar*⁷ further clarified the law with Lord Brown being of the opinion that there is 'no good reason to superimpose upon the conventional tripartite test'⁸ 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.

Not by force

24. With the exception of World War Two, when access to all beaches was prohibited, access has been possible along the entire length of the northern boundary. Regardless, this is outside of the relevant twenty year period.

25. Due to Herbrand Walk being a very narrow road, double yellow lines have been painted on both sides to ensure the free and easy passage of traffic. The objector has encouraged people to use this beach by making it possible for cars to park on the northern boundary of the beach by removing some of the shingle.

Not by stealth

26. The land has not been enjoyed under secrecy with the landowner being aware of use by the public. Mr Hall states that he has "no intention of excluding the public from this area of beach."

Not with permission

27. The user evidence questionnaire, at question 28, specifically asks if permission was ever sought for activities on the land. The user evidence forms consistently responded that no permission was ever obtained.

28. The objector, under the heading "as of right" in their response, submit that permission requires some positive act by the landowner. The objector submits that the previous owners of the land confirmed use had been with permission although there is no documentation to substantiate this.

⁴ *R v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council* [2000] 1 A.C. 335

⁵ *Ibid*

⁶ *Ibid*

⁷ *R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and Another* [2010] UKSC 11

⁸ *Ibid* at para. 107

29. The applicant, in their response, submits the opinion of Lord Hope in *Beresford*. He was of the opinion that;

On this area of the law it would be quite wrong, in my opinion, to treat a landowner's silent passive acquiescence in persons using his land as having the same effect as permission communicated to those persons. To do so would be to reward inactivity.⁹

30. The objector does not state they have acquiesced to use rather that use has been with permission. This permission has to be communicated to the users. The objector states that he has clearly marked out signs that the beach is in private ownership.
31. There is a sign on the beach that states "Private Beach" (photograph available at appendix 2). The sign also states that, 'vehicles may park here at owners risk between 0800 to 21.00. Outside these hours vehicles will be clamped.' The landowner states that this sign was erected around 1 June 2009 to prevent travellers from parking on the beach.
32. The objectors communication to the users that the beach is private is based upon the legal principle initially suggested by Patteson J in 1833;

If a man opens his land, so that the public pass over it continually, the public... would be entitled to pass over it... and if the party does not mean to dedicate it... but only to give a licence, he should do some act to show that he gives a licence only.¹⁰

33. Accordingly, the notice given by the landowner must be obvious and overt. Recently, in the rights of way case of *Godmanchester*¹¹ Lord Scott was of the opinion that overt acts should, 'demonstrate to the public that the landowner had no intention to dedicate.'¹² A sign merely stating private would not be an obvious and overt act by Mr Hall to demonstrate that he had no intention to dedicate.
34. The objector has removed some of the shingle to allow cars to park on part of the claimed land (paragraph 25). This could suggest that those who have parked their cars on the land would then be using the land under licence of the owner. However, this has not been brought to the users' attention and is restricted to those that have used a car to access the land.
35. Upon consideration of the user evidence and the response submitted by the objector it would appear, on the balance of probabilities that use has been as of right.

Lawful sports and pastimes on the land

36. The applicant must also demonstrate that the land has been used for lawful sports and pastimes. According to Lord Hoffmann this, 'is not two classes of activities but a single composite class'¹³ in order to cover all lawful activities enjoyed on the land, including the taking of air. These activities can vary depending on the time of year or 'according to changing tastes or wishes [of the user]'¹⁴
37. Question 23 of the OSS user evidence questionnaires ask the user to tick boxes for all the activities they have seen taking place on the land. There are eighteen listed activities including football, dog walking, picnicking and children playing. There is also a box inviting any other activities witnessed.
38. The three most frequent activities witnessed are dog walking (77), fishing (75) and children playing (75). There are a further five activities that have been witnessed by over half of those who completed questionnaires (drawing and painting, bird watching, picnics, kite flying and walking).

⁹ *R (Beresford) v City of Sunderland* [2003] UKHL 60 para. 78

¹⁰ *Trustees of the British Museum v Finnis* (1833) 5 C & P 460 at 465

¹¹ *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28

¹² *Ibid* at para.69

¹³ *Ibid* (n4)

¹⁴ J. Riddall, 'Getting Greens Registered: A guide to law and procedure for town and village greens' (2007) paragraph 43

39. There are ten activities witnessed by the users which occur on the water. The land subject to the application borders the high water mark. Therefore, these water activities cannot be taken into consideration when ascertaining if lawful sports and pastimes have occurred on the land.
40. Question 14 asks the user why they went onto the land and question 16 asks what activities you took part in. Some respond to question 16, with "same as question 14." This question asks the user to list activities, rather than tick boxes. This results in several different answers for the same activities. The graph at appendix 6 attempts to match the responses of this question to that of question 23 (see paragraph 37) where possible (for example, a response of walking with dog and children would be dog walking, walking and children playing).
41. The most common response to question 16 was swimming. However, as detailed in paragraph 39, activities that occur in the sea are outside of the application land. The next three most frequent responses are walking (27), picnicking (21) and recreation (16).
42. It is noted that there are a lot less responses to question 16 than there were to question 23 with 845 responses to question 23 and 222 to question 16. Seven people also recorded blackberrying but there are no blackberry bushes on the application land.
43. Despite the recorded use of activities outside of the application land 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.

For a period of at least 20 years

44. 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, initially it will be necessary to show use from 1990 – 2010. If there is any challenge to use within this period then the relevant twenty year period shall be altered to reflect the challenge.
45. 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.'¹⁵
46. Every user evidence form submitted records use of the land for a period of time well in excess of twenty years with U66 stating their use back to the 1920's. Whilst a considerable amount of user evidence states the land to be enjoyed frequently, sometimes daily (U1, U27, U28), there is no requirement to show use occurred at such a rate, rather the land 'must have been used and available... when needed.'¹⁶
47. U66 notes that her use was interrupted during World War Two. This was in accordance with the relevant defence of the realm legislation. Section 15(6) of the Commons Act 2006 states that,
- [when] determining the period of 20 years... there is to be disregarded any period during which access to the land was prohibited... by reason of any enactment.'¹⁷
48. The break in use experienced by U66 is the only one recorded by all 100 users and significantly pre-dates the relevant 20 year period.
49. 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.

¹⁵ *Ibid* (n14) at paragraph 51

¹⁶ *Ibid* (n14) paragraph 52

¹⁷ s.15(6) Commons Act 2006

Effect of Planning Application

50. Mr Hall has submitted information regarding an application to construct 28 wooden beach huts, 2 wooden toilet huts and 1 wooden lifeguard hut, including car parking, cycle parking, information signs, waste bins, dog waste bins and sleeper walling/shingle protection. The application number is HW/RR/10/0055.
51. The Planning Inspectorate heard an appeal to grant the planning application but this was dismissed in December 2010. The main reason for the application being dismissed was the impact the proposed development would have on the character and appearance of the locality.
52. Whilst it is an offence to interrupt the use and or enjoyment of a town or village green¹⁸ the planning application did not prejudice ESCC's investigations as they are being conducted independently of the planning application.

Human Rights Consideration

53. Mr Hall submits that allowing the town and village green application and rejecting his planning application would be inconsistent with his Convention Rights (incorporated into UK law by the Human Rights Act 1998) particularly article 1 of the first protocol;

[the right to] peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.¹⁹

Considerations into the feasibility of holding a Public Inquiry

54. 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 completed with an objection being received from Mr S. Hall, a part landowner (paragraphs 11 - 12).
55. 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.
56. 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.
57. There have been extensive opportunities for people to make representations. The objector has maintained that if, upon consideration of the evidence the Council were not minded to refuse the application, a public inquiry should be held.
58. 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 and all of the statutory criteria have been satisfied, it is submitted that a public inquiry would not be necessary or in the public's interest with this Committee being able to provide an objective and impartial view of all the evidence submitted.

¹⁸ s.23 Inclosure Act 1857

¹⁹ Article 1 of the First Protocol of the European Convention on Human Rights

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

Conclusion

60. After careful consideration of all the evidence submitted to ESCC it is submitted that, on the balance of probabilities, there is sufficient evidence to show that the local residents of Herbrand Walk 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 has been satisfied.
61. The objection received by ESCC does not counter the evidence to support the application. The objector suggests use has not been as of right because use has been with permission, however, upon analysis the landowner had not conducted an obvious and overt act sufficient to grant such permission.

Recommendation

62. Upon consideration of this report it is suggested that the application to register Herbrand Walk as a town or village green be accepted and the register of town and village greens held at ESCC be amended accordingly.

Philip Baker
Assistant Director
Legal and Democratic Services

Contact Officer: Chris Wilkinson
01273 335744

Local Member: Councillor Gadd

Senior Solicitor: Joanna Hauge (Mrs)

Background Documents

- Appendix 1 – Plan attached to the application
- Appendix 2 – Photographs of site taken by Chris Wilkinson, 4 November 2010
- Appendix 3 – Guide to Town and Village Green law
- Appendix 4 – A plan to show the boundaries of the locality
- Appendix 5 – A graph to show the facilities within the locality
- Appendix 6 – A graph to show the activities enjoyed on the application land
- Appendix 7 – Application
- Appendix 8 – Response of objector Mr S. Hall
- Appendix 9 – Response of applicant to the objector's submission

Bibliography

J. Riddall, 'Getting Greens Registered: A guide to law and procedure for town and village greens' (The Open Spaces Society, 2007)

Table of Cases

R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2003] EWHC 2803

New Windsor Corporation v Mellor [1975] 1 Ch 380

Oxfordshire County Council v Oxford City Council and another [2006] UKHL 25

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

R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and Another [2010] UKSC 11

R (Beresford) v City of Sunderland [2003] UKHL 60

R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28

Table of Statutes

Commons Act 1876

Inclosure Act 1857

Town and Country Planning Act 1990

Commons Act 2006

Other material

European Convention on Human Rights

