

Application to register land at Preston Parade at Whitstable as Common Land

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Wednesday 20th September 2023.

Recommendation: I recommend that the County Council agrees to the Applicant's request to withdraw the application.

Local Member: Mr. M. Dance (Whitstable West)

Unrestricted item

Introduction

1. The County Council has received an application to register land at Preston Parade at Whitstable as Common land under Paragraph 4 of Schedule 2 of the Commons Act 2006. The application has been made by the Open Spaces Society ("the Applicant") and was allocated the application number CAA22. Following exchanges of representations with the landowner/objector, the Applicant now agrees that the land subject to the application is not capable of registration as Common Land and has requested that the application be withdrawn.
2. The matter was briefly considered at a meeting of the full Regulation Committee on 24th January 2023. However, at that meeting, concerns were expressed regarding the withdrawal of the application and it was agreed that a decision on the matter should be deferred. The purpose of this report is therefore to provide further information regarding this matter so as to enable a decision to be reached.

Legislation

3. Under Paragraph 4 of Schedule 2 of the Commons Act 2006, anyone may apply to the County Council to register land as Common Land. The relevant legal tests are as follows:

(2) This paragraph applies to land which at the time of the application under sub-paragraph (1) is waste land of a manor and where, before the commencement of this paragraph-

(a) the land was provisionally registered as common land under section 4 of the 1965 Act;

(b) an objection was made in relation to the provisional registration; and

(c) the provisional registration was cancelled in the circumstances specified in sub-paragraph (3), (4) or (5).

(3) The circumstances in this sub-paragraph are that-

(a) the provisional registration was referred to a Commons Commissioner under section 5 of the 1965 Act;

(b) the Commissioner determined that, although the land had been waste land of a manor at some earlier time, it was not such land at the time of the determination because it had ceased to be connected with the manor; and

(c) for that reason only the Commissioner refused to confirm the provisional registration.

(4) The circumstances in this sub-paragraph are that-

(a) the provisional registration was referred to a Commons Commissioner under section 5 of the 1965 Act;

(b) the Commissioner determined that the land was not subject to rights of common and for that reason refused to confirm the provisional registration; and

(c) the Commissioner did not consider whether the land was waste land of a manor.

(5) The circumstances in this sub-paragraph are that the person on whose application the provisional registration was made requested or agreed to its cancellation (whether before or after its referral to a Commons Commissioner).

4. Thus, an application can only be made under this provision in cases where the land in question is considered to be ‘waste land of a manor’ and the land was provisionally registered as Common Land under the Commons Registration Act 1965 (i.e. the predecessor to the Commons Act 2006) and following objection(s) the provisional registration was cancelled because *either* the Commons Commissioner did not consider the land to be waste land of a manor *or* the application was withdrawn at the applicant’s request (before any decision was made).
5. The term ‘waste land of a manor’ is defined¹ as ‘the open, uncultivated and unoccupied lands parcel of the manor’. DEFRA’s view² is that ‘open’ means unenclosed, and occupation requires some form of physical occupation to the exclusion of others. ‘Of the manor’ means³ land that is or was formerly connected to the manor.
6. The process for considering such applications, set out in the Commons Registration (England) Regulations 2014, is that the County Council must advertise notice of the application and provide a six-week period during which objections can be made. Any objections received must then be forwarded to the applicant for comment.

Background

7. The area of land subject to this application (“the Application Site”) comprises a strip of land of approximately 9.3 acres (3.77 hectares) in size situated between the mean high water mark and the private street known as Preston Parade at Seasalter, near Whitstable. The land is roughly split in half by the promenade, with the northern half comprising a private beach and the southern half comprising a mainly grassed bank. A plan of the Application Site is attached at **Appendix A**.

¹ Attorney General v Hanmer (1858) 27 LJ Ch 837

² See paragraphs 7.3.12 onwards of DEFRA’s ‘Guidance to Commons Registration Authorities and the Planning Inspectorate’ (Version 2.0 December 2014)

³ Hampshire County Council and others v Milbur [1990] UKHL J0510-1 (known as the ‘Hazeley Heath’ case)

8. The land was previously provisionally registered as Common Land (with the reference CL100) following an application under the Commons Registration Act 1965 from local resident Mrs. A. Wilks on 24th December 1968. However, Mrs. Wilks subsequently requested withdrawal of her application (on 13th May 1971) and the provisional registration of the land was cancelled without referral to the Commons Commissioner (who would otherwise have determined disputed applications).

The current application

9. The current application sought to re-register the land as Common Land on the basis that various historic maps (e.g. the Seasalter Tithe Map of 1840) appeared to show the land as having been (historically) open and uncultivated land, and that it remained so today.
10. In response to the consultation, an objection was received from the Granville Cliff Estate Company Ltd. (the landowner) as well as from a number of residents of the estate. The objection, prepared by a solicitor on behalf of the estate, was made on the following grounds:
 - The Granville Cliff Estate Company Ltd. owns the common areas within the estate (including the private estate roads); it is run by shareholders (i.e. residents) and is concerned with the maintenance of the roads and general upkeep of the estate.
 - The land on which the estate was developed was originally a single parcel of land (acquired by conveyance dated 9th November 1875) and subsequently divided into building plots and estate roads. A conveyance dated 18th July 1900 relating to one of the plots contains a restrictive covenant (which also appears in conveyances relating to other plots on the estate) to the effect that “No building or other erection will be allowed on the land on the north side of ‘Preston Parade’ marked ‘cliff’ on the plan, and the same will be reserved as an open space for ever for the use of the Purchasers with others [i.e. other residents]”.
 - The Estate Company actively manages the Application Site and undertakes maintenance of the land. It has also previously enforced the restrictive covenant by removing a bench erected on the land.
 - A large number of notices are present on the estate indicating that it is private, such that anyone entering the land will be aware that it is private land. There is a sign where the footpath enters the land stating “the estate, grass bank and beach are private property” and another stating “access for residents, their visitors, service and emergency vehicles only”.
 - In light of the above, the land does not meet the criteria of being ‘open, uncultivated and unoccupied’. It is not ‘open’ because, although the estate cannot obstruct Public Footpath CW1, the signage makes clear that the estate is private and is intended to exclude the public to the benefit of the estate residents. The site is cultivated, in the sense that it is subject to regular maintenance. The site is also occupied by the residents of the estate, by virtue of the restrictive covenant.
11. As required, copies of all of the representations received were sent to the Applicant for comment. Having considered the representations received, and in particular the response from the landowner, the Applicant advised that:

“Our view at the time of the application was that the slope at Preston Parade was open, uncultivated and unoccupied. However, mindful of [the] landscape history and having studied the submissions made by the Granville Cliff Estate Company Ltd., and re-examined our research, we agree that the land is unlikely to be determined to be waste land of the manor and that the application is unlikely to be granted. In these circumstances we request the [County Council’s] agreement to withdraw the application”.

12. As is noted above, the matter was considered by the Regulation Committee at its meeting on 24th January 2024 and concerns were raised regarding the withdrawal of the application. The minutes of that meeting are available here: <https://democracy.kent.gov.uk/ieListDocuments.aspx?CId=140&Mid=9120>.
13. The concerns raised related to the lack of detail contained with the report and to the fact that (at the time of the meeting) a Public Space Protection Order (PSPO) was in the process of being prepared by Canterbury City Council that would apply to the land in question and which, it was suggested, could potentially result in conflict between public access arising as a result of the land being registered as Common Land and the rules of the PSPO. It was proposed that the matter should be held in abeyance until the PSPO had been rolled out (NB the PSPO came into force on 1st April 2023).

Discussion

14. There appears to be some confusion between the possible legal status of the land as Common Land and local debates regarding public access to the site. This application is not primarily concerned with the merits or otherwise of formalising public rights of access over the land but, rather, relates to whether the land was historically considered to be ‘waste land of the manor’. If that is the case, and all of the legal tests set out above are met, then the County Council would be under a legal obligation to register the land as Common Land.
15. The position on the ground is that access to the Application Site is already available along both Public Footpath CW1 that runs along the southern side of the site, and the England Coast Path National Trail that runs along the promenade (between the grass slopes and the beach). The knock-on effect of a successful application to register the land as Common Land would be to bring the whole of the land within the definition of ‘Open Access Land’ created under the Countryside and Rights of Way Act 2000, which provides a public right of way on foot. However, that is not the primary purpose of this application, which has been made by a national organisation (not by any local residents) seeking to preserve the historic status of the land.
16. In any event, the Application Site does not meet the required legal test of being ‘waste land of a manor’ (for the reasons set out in the objection) such that, regardless of the merits or otherwise of public access, the land cannot be registered as Common Land.
17. It is to be noted that there is nothing within the relevant legislation (either the Commons Act 2006 or the associated Regulations) that specifically deals with the issue of withdrawing an application, and therefore there is no absolute right for an

applicant to withdraw an application once it has been made. However, in a situation where the application has no prospect of success, and all parties agree that is the case, then it would seem perverse to insist that the application is pursued.

Conclusion

18. It is clear from the information available that the application does not meet the relevant test under Paragraph 4 of Schedule 2 of the Commons Act 2006 for registration as Common Land, on the basis that it is not considered to be 'waste land of a manor'.

19. The Applicant accepts that this is the case and, accordingly, there appears to be no reason not to accept the request for the application to be withdrawn.

Recommendation

20. I recommend that the County Council agrees to the Applicant's request to withdraw the application.

Accountable Officer:

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Appendices

APPENDIX A – Plan showing application site