

Application to register land known as Upper Castle Field at Tonbridge as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Tuesday 10th December 2024.

Recommendation: I recommend that the County Council informs the Applicant that the application to register the land known as Upper Castle Field at Tonbridge as a new Town or Village Green has been accepted (per the amended plan shown at Appendix D), and that the land subject to the application be formally registered as a Town or Village Green.

Local Members: Mr. M. Hood and Mr. P. Steptoe (Tonbridge)

Unrestricted item

Introduction

1. The County Council has received an application to register land known as Upper Castle Field at Tonbridge as a new Town or Village Green from Ms. J. Wyatt ("the Applicant"). The application, made on 9th July 2024, was allocated the application number VGA697.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014.
3. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Village Green where it can be shown that:
'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;
4. In addition to the above, the application must meet one of the following tests:
 - **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or
 - **Use of the land 'as of right' ended no more than one year prior to the date of application**¹, e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).
5. As a standard procedure set out in the 2014 Regulations, the County Council must publicise the application by way of a copy of the notice on the County Council's website and by placing copies of the notice on site to provide local people with the opportunity to comment on the application. Copies of that notice must also be served on any landowner(s) (where they can be reasonably identified) as well as the relevant local authorities. The publicity must state a period of at least six weeks during which objections and representations can be made.

¹Reduced from two years to one year for applications made after 1st October 2013, due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013.

The application site

6. The area of land subject to this application (“the Application Site”) consists of a grassed area of open space of approximately 1.1 acre (0.45 hectares) in size, known as Upper Castle Field and situated at The Slade in Tonbridge. Access to the site is via a gap in the fence along the frontage with The Slade (opposite Slade Primary School) and it is also possible to access the site via the entrance to the car park which forms an open boundary with the Application Site, as well as from the castle grounds to the south of the site.
7. The site is shown on the plan at **Appendix A** and photographs are attached at **Appendix B**.

The case

8. The application has been made on the grounds that the Application Site has been freely used by local residents for a variety of recreational activities, without challenge, and for a period in excess of twenty years.
9. Included in support of the application were 34 user evidence questionnaires from local residents, and an extract from a local history book referring to play equipment on the land in the 1930s. A summary of the evidence in support of the application is attached at **Appendix C**.
10. The application has been made under section 15(2) of the Commons Act – i.e. on the basis that use of the application site has continued ‘as of right’ until the date of the application – such that the relevant twenty-year period for the purposes of the application is July 2004 to July 2024.

Consultations

11. Consultations have been carried out as required and no objections have been received.
12. County Councillor Mr. M. Hood (who is also the local Borough Councillor) wrote in support of the application, on the basis that the site is a valuable open space which contributes to the amenity of the local area and is very well used by both local residents and pupils/parents of the nearby Slade Primary School for recreational activities.
13. County Councillor Mr. P. Steptoe also wrote in support of the application, noting that the green space provided by the Application Site is very important for the people of Tonbridge and its visitors, not only as a recreational area but also for the vital ‘lung’ provided by the trees and vegetation on the site.

Landowner

14. The land owned by the Tonbridge and Malling Borough Council (TMBC) under Land Registry Title number K891820.
15. TMBC has confirmed that it has no objection to the registration of this land as a Village Green.

Legal tests

16. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:

- (a) *Whether use of the land has been 'as of right'?*
- (b) *Whether use of the land has been for the purposes of lawful sports and pastimes?*
- (c) *Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?*
- (d) *Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than one year prior to the making of the application?*
- (e) *Whether use has taken place over period of twenty years or more?*

I shall now take each of these points and elaborate on them individually:

(a) Whether use of the land has been 'as of right'?

17. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the Sunningwell² case, it is considered that if a person uses the land for a required period of time without force, secrecy or permission ("*nec vi, nec clam, nec precario*"), and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired.

18. In this case, there is no evidence to indicate that use of the land has ever been challenged or restricted in any way; none of the users refer to any impediments to use and the nature of the site means that it would be very difficult to secure it against any public access. Nor has any evidence been provided by the landowning Borough Council as to the manner in which the Application Site is held by it, and for what purposes it is made available to the public³.

19. Therefore, the evidence available to the County Council indicates that the Application Site has been used 'as of right'.

(b) Whether use of the land has been for the purposes of lawful sports and pastimes?

20. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. The Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'⁴.

21. In this case, the evidence submitted in support of the application (summarised at **Appendix C**) indicates that local residents have engaged in various recreational activities on the land.

² R v. Oxfordshire County Council and another, Sunningwell Parish Council [1999] 3 All ER 385

³ Where land is made available to the public for recreational purposes, use will normally be 'by right' (by virtue of an implied or express permission)

⁴ R v Suffolk County Council, ex parte Steed [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in R v. Oxfordshire County Council, ex parte Sunningwell Parish Council [1999] 3 All ER 385

22. There are, however, two issues to note. Firstly, a number of the user evidence questionnaires refer to use of the Application Site as ‘access’ or a ‘cut through’ to the town or castle. This kind of use – which involves walking a defined, linear route to a destination outside of the Application Site – is attributable to a public rights of way type of use (as opposed to the exercise of a general right to recreate) and is therefore not ‘qualifying use’ for the purpose of considering the Village Green application⁵, such that it falls to be discounted. Notwithstanding, even disregarding the references at **Appendix C** to the use of the land as a short cut, there is ample evidence of other kinds of use that would amount to ‘lawful sports and pastimes’ – such as picnics, playing with children, socialising etc.
23. The second issue relates to the extent of the Application Site which has been imprecisely drafted on the original application plan. As can be noted from **Appendix A**, the original application plan includes section of the roadway comprising The Slade and also a strip of land (comprising eight parking spaces) along the northern edge of the car park. Evidently, those areas would, most of the time, have been unavailable for the purposes of informal recreational use. As such, it is proposed that the Application Site be amended⁶ to exclude those areas and, in the event that the application is successful, that the registration be effected in accordance with the plan at **Appendix D**.

(c) Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?

24. The right to use a Town or Village Green is restricted to the inhabitants of a locality, or of a neighbourhood within a locality, and it is therefore important to be able to define this area with a degree of accuracy so that the group of people to whom the recreational rights are attached can be identified.

Locality

25. The definition of locality for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the Cheltenham Builders⁷ case, it was considered that ‘...at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality... there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition’. The judge later went on to suggest that this might mean that locality should normally constitute ‘some legally recognised administrative division of the county’.
26. In cases where the locality is so large that it would be impossible to meet the ‘significant number’ test (see below), it will also necessary to identify a neighbourhood within the locality. The concept of a ‘neighbourhood’ is more flexible than that of a locality, and need not be a legally recognised administrative unit. On

⁵ See R (Laing Homes) v Buckinghamshire County Council [2003] 3 EGLR 70 at 79 per Sullivan J: ‘it is important to distinguish between use that would suggest to a reasonable landowner that the users believed they were exercising a public right of way to walk, with or without dogs... and use that would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of the fields’.

⁶ In Oxfordshire County Council v Oxford City Council [2006] UKHL 25, it was agreed (at paragraph 62) that “the registration authority is entitled, without any amendment of the application, to register only that part of the subject premises which the applicant has proved to have been used for the necessary period.”

⁷ R (Cheltenham Builders Ltd.) v South Gloucestershire District Council [2004] 1 EGLR 85 at 90

the subject of 'neighbourhood', the Courts have held that *'it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood... The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning'*⁸.

27. In this case, the Applicant has not specified a locality as such, instead relying upon a description of the land as 'Upper Castle Field'. Clearly this is not a qualifying locality for the purposes of Village Green registration in the terms described above.
28. However, a number of those that have completed user evidence questionnaires describe themselves as living within 'The Slade' area of Tonbridge town. Indeed, the 'Slade Area' is recognised as a sub-area of the Tonbridge Conservation Area and is described in the Tonbridge and Malling Borough Council's Conservation Area Appraisal⁹ as *'strongly cohesive, compact Victorian neighbourhood with a quiet residential character'* and a *'sense of place and self-contained community'*. The area is characterised by narrow streets comprising mainly Victorian terraced houses of a similar style, and has only two vehicular access points to/from the High Street. Historically, it was served by its own public house and also some corner shops (now converted to houses). Today, there is a Slade Area Residents Association, a Facebook community page, and the local primary school, known as Slade School, also bears a strong neighbourhood connection. Thus, the Slade area is clearly a recognised neighbourhood within the town of Tonbridge. The Slade conservation sub-area¹⁰ is shown edged in red on the plan at **Appendix E**.
29. Strictly speaking, the town of Tonbridge is not, of itself, a legally recognised administrative unit (it not being a civil parish in its own right). However, the neighbourhood and Application Site both sit within the wider Borough Council electoral ward known as Judd, which clearly is a qualifying locality.

Significant number

30. In addition to the above, the County Council also needs to be satisfied that the application site has been used by a 'significant number' of the residents of the locality. The word "significant" in this context does not mean considerable or substantial: *'a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number... what matters is that the number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers'*¹¹. Thus, what constitutes a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the application site.
31. In this case, a large number of the users of the land refer to daily use of it for recreational activities. Although, as can be seen from **Appendix E**, some of the users live outside of the Slade neighbourhood (such that their use must be discounted for the purposes of the Village Green application) the vast majority do

⁸ *ibid* at 92

⁹ <https://www.tmbc.gov.uk/downloads/download/82/tonbridge-conservation-area>

¹⁰ Boundaries shown are approximate, please consult TMBC's documents for precise CA boundaries

¹¹ *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

reside within the neighbourhood, and they are significant in number. The number of users, combined with the high frequency of use, would have been more than sufficient to bring to the attention of the landowner that the land was in general use by the local community. Indeed, acts of encouragement by the landowner (the provision of play equipment and maintenance of the land) would appear to confirm that this was the case.

32. Accordingly, it can be said that the Application Site has been used by a significant number of the residents of the neighbourhood known as The Slade, within the Borough Council electoral ward of Judd.

(d) Whether use of the land ‘as of right’ by the inhabitants has continued up until the date of application or, if not, ceased no more than one year prior to the making of the application?

33. The Commons Act 2006 requires use of the land to have taken place ‘as of right’ up until the date of application or, if such use has ceased prior to the making of the application, section 15(3) of the 2006 Act provides that an application must be made within two years from the date upon which use ‘as of right’ ceased.

34. In this case, the application is made under section 15(2) of the 2006 Act and there is no evidence that use of the Application Site for recreational purposes ceased prior to the making of the application. As such, this test is met.

(e) Whether use has taken place over a period of twenty years or more?

35. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. In this case, use ‘as of right’ did not cease prior to the making of the application in July 2024; the relevant twenty-year period (“the material period”) is calculated retrospectively from this date and is therefore 2004 to 2024.

36. The user evidence summarised at **Appendix C** demonstrates that there has been use of the Application Site both throughout, and well in excess of, the material period. Furthermore, a number of those users attest to use on a daily basis during the whole of the material period.

37. Therefore, it can be concluded that there has been use of the application site for a full period of twenty years.

Conclusion

38. Although this application is unopposed, the County Council must still be satisfied that all of the requisite legal tests have been met. Members will need to be mindful that it is ‘no trivial matter’ for a landowner to have land registered as a Village Green, such that the relevant legal tests must be ‘properly and strictly proved’. Thus, if one test fails, then the application as a whole must fail (regardless of the lack of opposition).

39. In this case, the evidence submitted in support of the application would appear to confirm that the application site has been used by local residents for a period of

over twenty years for the purposes of lawful sports and pastimes, such that the legal tests set out in section 15 of the Commons Act 2006 have been met.

40. However, as is noted above, the plan accompanying the application has not been accurately produced and requires amendment to reflect the area that was capable of being used for informal recreation during the material period. The amended plan, showing the area to be registered as a Village Green, is attached at **Appendix D**.

Financial implications

41. The determination of Village Green applications is a quasi-judicial function of the County Council and, accordingly, any financial implications can have no bearing whatsoever on the Member Panel's decision. However, Members should be aware that, whatever decision is reached, the only right of appeal open to the parties is an application to the High Court for Judicial Review, which potentially carries significant legal costs for all concerned.

Recommendation

42. I recommend that the County Council informs the Applicant that the application to register the land known as Upper Castle Field at Tonbridge as a new Town or Village Green has been accepted (per the amended plan shown at **Appendix D**), and that the land subject to the application be formally registered as a Town or Village Green.

Accountable Officer:

Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk

Case Officer:

Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

APPENDIX A – Plan showing application site

APPENDIX B – Photographs of the Application Site

APPENDIX C – Table summarising user evidence

APPENDIX D – Amended plan showing land to be registered

APPENDIX E – Plan showing neighbourhood