

Application to register land at Beacon Road in Herne Bay 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 Applicant be informed that the application to register the land at Beacon Road at Herne Bay as a Town or Village Green has not been accepted.

Local Member: Mr. D. Watkins (Herne Bay East)

Unrestricted item

Introduction

1. The County Council has received an application to register an area of land at Beacon Road in Herne Bay as a new Town or Village Green from the Save the Beacon Road Community Land Committee ("the Applicant"). The application, made on 26th February 2024, was allocated the application number VGA696.

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.

¹ Reduced 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 land subject to this application (“the Application Site”) comprises a parcel of land of approximately 2.8 acres (1.14 hectares) in size bounded on all sides by the rear gardens of properties in Beacon Road, Cecil Park, Canterbury Road and Beltinge Road. It was formerly used as a hockey and tennis club and, as such, includes a parking area, four tennis courts, several synthetic turf hockey pitches and a large club house.
7. The only official access to the Application Site is via an entrance on Beacon Road that is also wide enough to accommodate vehicular access.
8. The Application Site is shown on the plan at **Appendix A**.

The case

9. The application has been made on the basis that the Application Site has been used *‘for over 100 years as a public open space for use by the local community for leisure and recreational purposes without objection or permission from anybody and as of right, without force or secrecy and without payment of any kind’*.
10. Included with application were various photographs showing use of the Application Site for various activities and community events, seven letters of support from local residents and 31 questionnaires or statements setting out evidence of use of the Application Site for a number activities, including dog exercising, bike riding, ball games and community gatherings. The user evidence is summarised in the table at **Appendix B**.
11. 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 February 2004 to February 2024. The Applicant submits that the recent erection of a fence and locked gate at the main entrance to the Application Site *‘should be disregarded’* on the basis of it being illegal and that use of the site has, in any event, continued *‘via access from adjoining properties’*.

Consultations

12. Consultations have been carried out as required.
13. Twenty-four letters and emails from local residents in support of the application have been received.
14. District Councillor Mellish also wrote in support of the application, noting that until 2020 when the clubs were offered new facilities on the outskirts of the town, the site had been a prime sports and leisure facility for the local community for nearly 50 years. The land has since been sealed off with large steel padlocked gates, although some residents continue to access the land via gates from their gardens that back onto the site. If the land were to be registered as a Village Green, this would also assist in delivering Canterbury City Council’s plans to improve biodiversity in the district.

15. County Councillor Mr. Watkins responded to the consultation in neutral terms, stating that although there appeared to be a broad consensus amongst the local community that the land is not suitable for housing, there was equally a desire for it to be put to good use (either for sport or some other recreational purpose) but the works needed to achieve this might be prevented by Village Green status. Accordingly, whilst the principle of protecting the land from intensive development is sound, there is some concern that registration as a Village Green might have the unintended consequence of the land remaining abandoned and unused.

Landowners

16. The Application Site is registered to Canterbury City Council (“the City Council”) under title number K926545.

17. The City Council has opposed the application on the basis that:

- The evidence provided in support of the application is unreliable on the basis that the statements have been pre-drafted and are materially the same, with the exception of a few blanks;
- It is unlikely that large sections of the land could have been used for recreational activities since they comprise a car park, a club house and an embankment, as well as tennis courts that were intermittently locked;
- The Application Site was held under a lease by the Herne Bay Lawn Tennis Club and Hockey Club until 18th December 2020, at which point Heras fencing was erected across the only entrance to the site (replaced with a spike-topped palisade fence in April 2023), such that any use of the land after 18th December 2020 was contentious and/or could not have occurred in sufficiently high quantities to justify registration as a Village Green;
- In order to benefit from the one year period of grace specified in the legislation, the application would have had to be made before 18th December 2021 (but it was not and is therefore out of time);
- Any users who were also members of the tennis and hockey club would have been on the site by virtue of an implied or express permission (and their use would not therefore be ‘as of right’); and,
- It appears that the land was originally held under section 4 of the Physical Training and Recreation Act 1937, such that it is not capable of registration as a Village Green.

18. In support of the objection, the City Council provided a statement from their Head of Property and Regeneration, along with various appendices (including photographs of the fencing and copies of emails relating to access). The Head of Property and regeneration confirms, in that statement, that:

- The City Council purchased the site in 1938;
- The lease in respect of the Application Site granted exclusive possession of it to the Herne Bay Hockey and Lawn Tennis Club for use as a *‘private tennis, hockey and football ground and club pavilion and bar only or for such other games or recreations’*;
- The lease was surrendered on 18th December 2020 and works were undertaken to secure the site (by way of Heras fencing) on that day;
- Correspondence with an adjoining property owner resulted in a key being provided specifically and only for the purpose of property maintenance; and

- A locked palisade fence was erected at the entrance to the Application Site on 17th April 2023 in response to anti-social behaviour, vandalism and arson on the site.

Legal tests

19. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:
- Whether use of the land has been 'as of right'?*
 - Whether use of the land has been for the purposes of lawful sports and pastimes?*
 - Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?*
 - Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, has ceased no more than one year prior to the making of the application?*
 - 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'?

20. The statutory scheme in relation to Village Green applications is based upon the English law of prescription, whereby certain rights can be acquired on the basis of a presumed dedication by the landowner. This presumption of dedication arises primarily as a result of acquiescence (i.e. inaction by the landowner) and, as such, long use by the public is merely evidence from which a dedication can be inferred.
21. In order to infer a dedication, use must have been 'as of right'. This means that use must have taken place without force, without secrecy and without permission (*'nec vi, nec clam, nec precario'*). In this context, force refers not only to physical force, but to any use which is contentious or exercised under protest²: *"if, then, the inhabitants' use of the land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious"*³.
22. In this case, there is a question as to whether use of the Application Site has taken place 'as of right'.

Force

23. As is noted above, the City Council's position is that the only access to the Application Site was initially secured by way of locked Heras fencing on 18th December 2020 (following the surrender of the lease in respect of the site), and that security was bolstered by way of the erection of a locked, spike-topped palisade fence on 17th April 2023. Thus, it is suggested that any use of the

² *Dalton v Angus* (1881) 6 App Cas 740 (HL)

³ *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

Application Site after 18th December 2020 cannot have taken place 'as of right'. Photographs of the fencing are attached at **Appendix C** for reference.

24. The Applicant's submission is that the Heras fencing was '*assumed to be for the purpose of preventing cars*' and that it '*did not, however, stop the local community from continuing to use the application land as there was a clear gap at the end through which access could be obtained*'.
25. However, the difficulty with that submission is that Google Streetview images as far back as 2009⁴ confirm the existence of a metal five-bar gate at the entrance to the site (which remains in place today), such that if the City Council had merely wished to prevent vehicular access, it could have done so at considerably less effort and cost. The erection of the Heras fencing across the whole of the only access to the Application Site can only, in any reasonable sense, lead to the conclusion that the landowner was seeking to prevent all forms of access to the site at that time. The photograph of the Heras fencing at **Appendix C** certainly appears to show the fencing across the whole of the entrance to the Application Site on the date of its erection in December 2020, albeit that it is quite possible that it was forced open at some point subsequently (and that proposition is supported by the need to reinforce the fencing in April 2023).
26. However, this does not appear to have been the case immediately because, in support of its objection, the City Council has provided copies of email correspondence with a neighbouring property owner (adjoining the entrance to the Application Site) which confirms that all access to the Application Site was completely prohibited. In that correspondence, the neighbouring homeowner initially made a complaint (on 19th December 2020 – i.e. the day after the fence was installed) to the City Council in respect of '*a fence which blocks all access to the side and back of my house which is essential for maintenance*', and further correspondence (in July 2022) noted that the homeowner '*still cannot access the side and rear of our property*'. In August 2022, a key was provided to the homeowner by the City Council with a request that it only be used '*for providing access to service and maintain your own property*' and that the gate be immediately locked after use.
27. These are not, on the face of it, the actions of a landowner simply seeking to restrict parking, and the correspondence with the adjoining homeowner confirms that access to the site was not reasonably or sensibly possible for a period of at least 18 months following the erection of the Heras fence in December 2020. If, during that period (and afterwards), users were squeezing through a forced gap along the side of the Heras fence, that use would clearly have been contentious – i.e. in clear defiance of the landowner's desire to secure the site – and therefore not 'as of right'.
28. Accordingly, it is considered that any informal recreational use of the Application Site ceased to be 'as of right' from 18th December 2020.

⁴ [4 Beacon Rd - Google Maps](#)

Permission

29. The fact that the Application Site was subject to a lease to the Herne Bay Hockey and Lawn Tennis Club (“the HLTC”) during the relevant twenty-year period raises a question as to whether any use of the application site has been by virtue of an implied or express permission.
30. A number of those who have provided evidence in support of the application refer to membership of the HLTC, in which case their use of the Application Site, even for non-HLTC purposes, would arguably have been associated with (and in exercise of) that membership; the HLTC would simply not have turned away its own members from the Application Site since its members would have its permission to be there. Where use is by virtue of an existing permission, it is considered to be ‘by right’ and not ‘as of right’.
31. As such, use of the Application Site by any members of the HLTC would need to be discounted for the purposes of this application.

Secrecy

32. Finally, it is suggested by the Applicant that access to the Application Site continued following the erection of the more substantial palisade fence in April 2023, via the rear gates of properties that back onto the site, to the extent that a fun day was held on the site in September 2023 and an Easter egg hunt in 2024 (at which some 200 people attended).
33. In order for use to be considered ‘as of right’ it has to have taken place in an open manner that would have been brought to the attention of the landowner. In this case, the landowner, having erected substantial fencing to prevent access from the main entrance, would have no reason to suspect that informal recreational use of the site was continuing by other means – and particularly in a subversive manner using the rear gates of adjoining properties – so there is potentially an argument that this kind of use might be considered secretive.
34. In any event, use after the erection of the palisade fence in April 2023 (and likely well before) was undoubtedly against the landowner’s wishes, such that it cannot be considered qualifying use for the purposes of Village Green registration.

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

35. 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*’⁵.

⁵ *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

36. The summary of evidence of use by local residents at **Appendix B** shows the activities that are claimed to have taken place on the Application Site. The evidence refers to use of the site for a range of activities, including picnics, ball games, cycling, dog exercise and blackberry picking.
37. One of the criticisms made by the City Council of the user evidence is that it largely comprises a standardised format that requires the users only to complete the occasional blank. Whilst no doubt making it easier for local residents to contribute to the evidence-gathering process, the disadvantage of this method is that it makes it difficult to fully assess the quality of the evidence. For example, there is no information provided as to exactly which activities took place on what part of the site, the frequency of those activities, and the degree to which they (if at all) were associated with the use of the land by the HLTC⁶.
38. The City Council has also suggested that large parts of the Application Site would not have been available for informal recreational use (such as the car park, clubhouse, embankment and tennis courts). Whilst the Applicant accepts that the tennis courts and clubhouse were not used for recreational purposes, it is submitted that the large majority of the Application Site has been used for informal recreational purposes. Once again, the format of the user evidence makes it difficult to determine the precise nature and extent of the informal recreational use of the Application Site, and it is not possible to conclude either way on this point without further, more detailed evidence from the users.

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

39. 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.
40. 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 Builders*⁷ 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*'.
41. 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*

⁶ Some users refer to 'playing tennis' or 'hockey' and it is unclear as to whether they were doing so in an entirely informal manner or in conjunction with HLTC activities.

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

*the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers*⁸. 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.

42. In this case, the Applicant relies upon Canterbury City Council's Heron ward as the qualifying locality. **Appendix D** shows the area within which users of the Application Site reside.
43. There is no doubt that the electoral ward is a legally recognised administrative unit, and therefore a qualifying locality for the purposes of section 15 of the Commons Act 2006. However, the difficulty in this case is that the ward boundary runs along Beacon Road, such that the Application Site itself falls within Heron Ward, but the users living on the eastern side of Beacon Road fall within neighbouring Beltinge ward, and are therefore not 'the inhabitants of the locality' relied upon for the purposes of the application.
44. Strictly speaking, the evidence of those living outside of the 'locality' ought to be discounted when considering the 'significant number test', which amounts to roughly half of the user evidence in this case.
45. As well as the volume of users, another important factor in considering whether the evidence is sufficient to indicate that the land is in general use by the community is the frequency of use. So, for example, the evidence of a handful of users that recreate on the site daily is arguably more likely to demonstrate community use than that of a larger number of individuals that have each only used the site very occasionally during the material period. In the current case, the standard statements used to collect the evidence make no mention at all of the frequency of use by local residents, such that it is not possible to make a judgement in respect of how the matter might have appeared to the landowner.
46. As such, it is not possible to determine whether the Application Site has been used by a significant number of the residents of the 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?

47. 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 one year from the date upon which use 'as of right' ceased.
48. In this case, the application was originally made under section 15(2) of the 2006 Act (on the basis that use 'as of right' was continuing as at the date of the application on 16th February 2024), although the Applicant subsequently conceded that the erection of the palisade fence in April 2023 had the effect of preventing any form of access to the site, via the main entrance, from that date. Supposing that use had only ceased to be 'as of right' from April 2023, then the

⁸ *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

making of the application in February 2024 would have been within the one year period of grace provided by section 15(3) of the 2006 Act.

49. However, as is noted above, it is considered that use ceased to be 'as of right' from the date of the erection of the Heras fence on 18th December 2020, from which point any use of the Application Site became contentious. Since this is outside the period of grace provided by section 15(3), this test is not met.

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

50. 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. That twenty year period ("the material period") is calculated retrospectively from either the date of the application if use 'as of right' is continuing or, if not, from the date upon which use 'as of right' ceased.

51. In this case, it is considered that use 'as of right' ceased on 18th December 2020, so the material period in this case would be December 2000 to December 2020.

52. The user evidence submitted in support of the application (and summarised at **Appendix C**) indicates, on the face of it, that recreational use of the Application Site has taken place in excess of the required twenty-year period. However, for the reasons previously discussed, some of that use falls to be discounted on the basis of it having been by virtue of an implied permission in respect of those witnesses that were also members of the HLTC.

53. In any event, the material period is outside of the period of grace (such that the application must fail) and it is not necessary to consider this issue in more detail.

Conclusion

54. When making an application under section 15 of the Commons Act 2006, the burden of proof is on the applicant to demonstrate that, on a balance of probabilities, the legal tests have been met. As has been noted in the Courts⁹, 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'. Therefore, in order for the application to succeed, all five of the legal tests set out above must be met; if one test fails, then the application as whole falls to be rejected.

55. In this case, the evidence available indicates that the City Council took steps to secure the site by way of the erection of the Heras fencing across the entrance (to coincide with the surrender of the lease by the HLTC) on 18th December 2020. The effect of that action was to render any subsequent use of the site contentious – i.e. against the landowner's wishes – and, consequently, not 'as of right'.

56. Whilst, of itself, use of an application site ceasing to be 'as of right' prior to the making of an application under section 15 of the 2006 Act is not necessarily fatal, the timing is of critical importance; where use 'as of right' ceases more than one year prior to the making of the application – as is the case here – the application is bound to fail.

⁹ R v *Suffolk County Council ex p Steed* (1996) 75 P&CR 102 at 111

57. Notwithstanding, there are also concerns regarding the quality, nature and extent of the user evidence that cannot be resolved on the information currently available, and also a question as to what the qualifying locality should be. These are matters which may be surmountable given further consideration, but the finding that use of the Application Site ceased to be 'as of right' more than one year prior to the making of the application is simply not a matter that can be addressed in the Applicant's favour.

58. Accordingly, it is not considered that the Application Site meets the tests for registration as a Village Green as set out in section 15 of the Commons Act 2006.

Financial implications

59. 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.

60. If Members are not satisfied with the recommendation, the Panel may refer the matter to a Public Inquiry for further consideration of the evidence. However, that approach also carries significant costs to all parties and should only be adopted where it is considered that there are material conflicts within the evidence that are irreconcilable on paper.

Recommendation

61. I recommend that the Applicant be informed that the application to register the land at Beacon Road at Herne Bay as a Town or Village Green has not been accepted.

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Appendices

APPENDIX A – Plan showing the Application Site

APPENDIX B – Table summarising user evidence

APPENDIX C – Photographs of fencing erected in 2020 and 2023

APPENDIX D – Plan showing area within which users reside