

Application to register land adjacent to Barnes Car Park at Westbrook, near Margate as a new Town Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Tuesday 8th February 2011.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land adjacent to Barnes Car Park at Westbrook has been accepted, and that the land subject to the application be formally registered as a Town Green.

Local Member: Mr. R. Burgess

Unrestricted item

Introduction

1. The County Council has received an application to register land adjacent to Barnes Car Park at Westbrook as a new Town Green from local resident Mr. A. Sykes ("the Applicant"). The application, dated 2nd March 2009, was allocated the application number VGA611. A plan of the site is shown at **Appendix A** to this report and a copy of the application form is attached at **Appendix B**.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008.
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 two years prior to the date of application**, e.g. by way of the erection of fencing or a notice (section 15(3) of the Act); or
 - **Use of the land 'as of right' ended before 6th April 2007** and the application has been made within five years of the date the use 'as of right' ended (section 15(4) of the Act).
5. As a standard procedure set out in the regulations, the Applicant must notify the landowner of the application and the County Council must notify every local authority. The County Council must also publicise the application in a newspaper circulating in the local area and place a copy of the notice on the County Council's website. In addition, as a matter of best practice rather than legal requirement, the

County Council also places copies of the notice on site to provide local people with the opportunity to comment on the application. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

6. The area of land subject to this application (“the application site”) consists of an area of grassed open space of approximately one hectare (2.5 acres) in size situated at the base of the cliffs adjacent to the Westbrook Promenade. The site is bounded on its northern and western edges by the Westbrook Promenade, on its eastern edge by the Barnes Car Park and along its southern boundary by the cliff face. Access to the site is via the unfenced boundaries along the Westbrook Promenade and from Barnes Car Park.
7. The application site is shown in more detail on the plan at **Appendix A**.

The case

8. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities ‘as of right’ for more than 20 years.
9. Included in the application were 115 user evidence questionnaires from local residents demonstrating use of the application site for a range of recreational activities for a period dating back to the 1940s. A summary of the evidence in support of the application is attached at **Appendix C**.

Consultations

10. Consultations have been carried out as required and the following comments have been received.
11. Nine letters were received from local residents, although in the main these were concerned with the impact of future development proposals for the site rather than providing any specific evidence in relation to the Village Green application.

Landowner

12. The application site is owned by Thanet District Council and registered with the HM Land Registry under title number K902000. An objection to the application has been received from Mr. J. Thomson who is the Asset Manager at Thanet District Council.
13. The District Council states that the application to register the land as a Town or Village Green has come about because the application site was put on the Council’s 2008/2009 Asset Disposal list. Although the Council’s Cabinet has approved the site for disposal, it is not, at this stage, the Council’s intention to dispose of the freehold of the site.

14. The District Council is aware of the leisure use of the application site and does not seek to restrict public access or lawful use of the site. However, the Council claims that the site is not capable of registration as a new Town or Village Green because it is held by the Council specifically for the purposes of public recreation under powers contained in the Public Health Act 1875.

Legal tests

15. 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 meets one of the criteria set out in sections 15(3) or (4)?*
- (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'?*

16. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the Sunningwell¹ 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.

Powers under which the land is held

17. One of the key principles behind the concept of 'as of right' is that for a right to be acquired, the users must effectively begin as trespassers. If the users are not trespassers (i.e. they are there by virtue of an existing right or with the permission of the landowner), then their use is not 'as of right' and it will not count towards the acquisition of new rights. This point is particularly important where land is owned by a local authority and, as such, where the application site is held by a local authority, it is important to determine the powers under which that authority originally acquired and now holds the land in order to establish whether the use of the land by the local residents has been 'as of right'.

18. As noted above, it is the District Council's position that the application site is held under the Public Health Act 1875. Section 164 of this Act provides that '*any urban authority may purchase or take on lease, lay out, plant, improve and maintain lands for the purpose of being used as public walks or pleasure grounds...*'. It is the District Council's case that land which is held under this provision is not capable of registration as a Town or Village Green.

¹ *R v. Oxfordshire County Council and another, Sunningwell Parish Council [1999] 3 All ER 385*

19. There is strong judicial support for the proposition that land which is held by a local authority for the purposes of public recreation is the subject of a statutory trust, with members of the public being the beneficiaries of the trust. In *Beresford*², the House of Lords considered that “*where land is vested in a local authority on a statutory trust... inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers... the position would be the same if there were no statutory trust in the strictest sense, but land had been appropriated for the purpose of public recreation*”.
20. This means that, as beneficiaries of a public trust, those using the land are not considered to be trespassers; their use is in exercise of an existing right (whether or not they are aware of the existence of that right). Such use will therefore be ‘by right’ and not ‘as of right’. It is therefore essential to determine whether, in fact, the application site, is held by the District Council under such powers.

The 1923 Conveyance

21. In support of the assertion that the land is held under the Public Health Act 1875 (“the 1875 Act”), the District Council has provided a copy of the original Conveyance dated 1923 which provides for the transfer of land in the area (including the application site) from the original landowner to the then Corporation of Margate (predecessor of Thanet District Council).
22. However, the Conveyance is not explicit in setting out the powers under which the Corporation of Margate acquired the land and there is no direct reference to the 1875 Act. Nonetheless, there are oblique references to section 44 of the Public Health Acts Amendment Act 1890 (“the 1890 Act”) and section 71 of the Margate Corporation Act 1900 (“the 1900 Act”).
23. The map accompanying the Conveyance (copy attached at **Appendix D**) shows an area of land coloured green (which is referred to in the Conveyance as “the Green land”) and the foreshore to the north is shown white. Although the Conveyance transfers ownership of both the Green land and the foreshore to the Corporation of Margate, these two areas are treated very differently in terms of the provisions that apply. For example, in the Conveyance, the references to the 1890 Act and the 1900 Act (discussed above) apply only to the land shown coloured green.
24. The applicant’s case is that the application site actually relates to a piece of land below the cliffs, forming part of what was then foreshore, and which does not form part of the Green land on the map accompanying the Conveyance. The situation is somewhat confused by the fact that the geography of the area has changed considerably since the 1923 Conveyance due to the construction of the sea wall and the lower Promenade (circa 1930). The applicant asserts that the land consisting of the application site was created at the same time as the construction of the sea wall and the Promenade and therefore would not have been in existence at the time that the District Council asserts that it was acquired by its predecessor under the Public Health Act 1875. If the applicant is correct in this

² *R(Beresford) v Sunderland City Council* [2003] UKHL 60 at paragraph 87 per Lord Walker

assertion, then there is no definitive evidence, one way or the other, as to how the land is held by the District Council.

25. The District Council's position is that the land is already held for the purposes of public recreation. However, despite extensive research, the District Council been unable to find any further documentation to assist on the question of appropriation. Their records include a note to the effect that the land was acquired under the Public Health Act 1875, but no further information is provided (such as the section of the 1875 Act used or the actual date of appropriation).
26. By using electronic mapping technology to superimpose a modern base map onto the 1923 Conveyance map, it would appear that the applicant is correct in his assertion that the vast majority application site consists of what was then foreshore and not 'the Green land' referred to in the Conveyance (see plan at **Appendix E**). This means the Conveyance does not assist in determining the powers of appropriation used. The application site almost certainly, as the applicant suggests, came into existence as a result of the construction of the sea wall, at least seven years after the Conveyance was completed. If the land had been appropriated post-construction, one would expect to see Council minutes or formal records to this effect, but no such evidence has been located.
27. Even supposing that the above logic is wrong, the Conveyance alone is unclear in its intentions. The two references to statutes are conflicting; section 44 of the Public Health Acts Amendment Act 1890 applies to parks or pleasure grounds whilst section 71 of the Margate Corporation Act 1900 applies to recreation grounds. Furthermore, the powers referred to are powers of general management (e.g. to close the land for a period of days) rather than formal powers or acquisition or appropriation.

Actual use of the application site

28. Having established the view that the land is not held by the District Council under any specific power for the purposes of public recreation, it is important to consider whether the actual use of the application site has been 'as of right'.
29. In this case, it is clear that local residents have had unhindered access to the site within living memory and continue to do so. There is no evidence of any attempt to exclude recreational users. Some of the witnesses refer to the fact that there were occasions when they could not access the whole of the site, but this was due to informal camping (i.e. other recreational users) rather than any overt action by the landowner to prevent use.
30. Indeed, as stated above, the landowner is well aware of the recreational usage of the land and has, in the past, actively encouraged use of the application site by installing picnic tables and a bench. There is therefore no suggestion that the actual use of the application site has not been 'as of right'.

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

31. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. It is not necessary to demonstrate that

both sporting activities *and* pastimes have taken place since the phrase ‘lawful sports and pastimes’ has been interpreted by the Courts as being a single composite group rather than two separate classes of activities³.

32. 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.
33. In this case, the evidence demonstrates that the land has been used for a number of recreational activities. The summary of evidence of use by local residents at **Appendix C** shows the full range of activities claimed to have taken place. The majority of use consists of walking (with or without dogs), but there is also significant evidence of the use of the land for nature observation, playing with children or simply stopping to admire the view. In addition, several of the witnesses refer to observing use for camping (mentioned above), kite flying and ball games.
34. Reference is made by several witnesses to picnicking on the site, although it is not clear whether this has taken place throughout the material period. The evidence suggests that there were picnic tables installed on the site, but these were only there for a relatively short period. The 2003 aerial photograph at **Appendix F** shows the remains of concrete bases upon which picnic tables were once sited. It also shows the location of the bench on the application site, as well as a number of informal worn pathways created by recreational walkers and, coincidentally, what appears to be camping on the application site.

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

35. 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”

36. 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*⁵ 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*’.

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

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

⁵ *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

37. The Applicant specifies the locality at Part 6 of the application form as “Westbrook/Garlinge/Westgate”. This is not a legally recognised administrative unit and would not constitute a valid locality for the purposes of Town or Village Green registration.

38. However, when plotting the location of the users on a map it is clear that the vast majority reside in the District Council electoral ward of Westbrook. This is shown on the plan at **Appendix F**. An electoral ward is a legally recognised administrative unit for the purposes of Village Green registration⁶. It therefore seems appropriate that this should be the relevant locality.

“a significant number”

39. 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’*⁷. 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.

40. In this case, there appears to have been regular use of the land by a large number of local residents and this is evidenced by the large number of user evidence forms submitted in support of the application. The application is supported by 115 user evidence questionnaires from persons living in the locality, demonstrating use of the application site over a considerable period. This is a not an insignificant number and it is considered that the volume of use would have been sufficient to indicate that the land in question was in general use by the local community. Indeed, as stated above, the District Council has been well aware of the use of the land by local residents.

41. It should be noted that the fact that not all of the users live within the locality is not fatal to the application and the Courts have accepted that the legal test does not require the applicant to demonstrate use merely by the residents of the locality: *“provided that a significant number of the inhabitants of the locality or neighbourhood are among the users, it matters not that many or even most come from elsewhere”*⁸.

(d) Whether use of the land by the inhabitants is continuing up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?

42. 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, to fulfil one of the alternative criterion set out in sections 15(3) and 15(4) of the 2006 Act (as set out at paragraph 4 above).

⁶ *Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch)

⁷ *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

⁸ *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin)

43. In this case, use of the application site 'as of right' has continued unhindered until the date of the application. Therefore, this test is met.

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

44. 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 of the application site as of right is continuing and, as such, the relevant twenty-year period ("the material period") is calculated retrospectively from the date of the application, i.e. 1989 to 2009.

45. The user evidence summarised at **Appendix C** demonstrates that there has been use of the application site in excess of the last twenty years. Therefore, it can be concluded that there has been use of the application site for a full period of twenty years.

Conclusion

46. From close consideration of the evidence submitted, I have concluded that the legal tests concerning the registration of the land as a Town Green (as set out above) have been met.

Recommendation

47. I recommend that the County Council informs the applicant that the application to register the land adjacent to Barnes Car Park at Westbrook has been accepted, and that the land subject to the application be formally registered as a Town Green.

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The main file is available for viewing on request at the Environment and Waste Division, Environment and Regeneration Directorate, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

Background documents

APPENDIX A – Plan showing application site

APPENDIX B – Copy of application form

APPENDIX C – Table summarising user evidence

APPENDIX D – Extract of plan accompanying 1923 Conveyance

APPENDIX E – Modern base map overlaying 1923 Conveyance

APPENDIX F – Aerial photograph of the application site (dated 2003)

APPENDIX G – Plan showing the area within which users reside