

Application to register land known as the Sandgate escarpment in the parish of Sandgate as a new Village Green

A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Wednesday 21st November 2012.

Recommendation: I recommend that the applicant be informed that the application to register land known as the Sandgate escarpment in the parish of Sandgate as a Village Green has not been accepted.

Local Member: Mr. T. Prater

Unrestricted item

Introduction

1. The County Council has received an application to register land known as the Sandgate escarpment in the parish of Sandgate as a new Town or Village Green from local resident Mr. D. Cowell ("the applicant"). The application, made on 30th June 2011 was allocated the application number VGA636. 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 2008 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 consists of an area of woodland of approximately 14 acres (5.6 hectares) in size situated adjacent to Shorncliffe Camp (Sir John Moore Barracks) in the parish of Sandgate. It excludes Martello towers 6 and 7. The application site, as originally applied for, is shown on the plan at **Appendix A**.
7. During the processing of this application, it was noted that the application site included land falling within the ownership of the Ministry of Defence ("MOD") and that the applicant had not served the requisite notice on the MOD. Following this discovery, the applicant requested that his application be amended to exclude all MOD-owned land. It seems appropriate to allow this amendment on the basis that the land to be excluded is been capable of having been being used for recreational purposes during the relevant period by virtue of the fact that it has either been fenced off or is otherwise physically inaccessible for such purposes. The amended application site ("the application site") is therefore shown hatched on the plan attached at **Appendix C**.
8. Access to the land is via several recorded Public Footpaths that lead to and/or cross the application site (shown with bold dashed lines on the plan at **Appendix C**) as well as an unrecorded (but metalled) footpath abutting the site and running between Military Road and the road known as Undercliff. The boundary of the application site along Military Road is unfenced and access may also be possible (depending on the density of the vegetation) there.

The case

9. 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.
10. The applicant's evidence is that the application site has been openly used, without force, by a significant number of the people of Sandgate, as of right, for recreational purposes since military use of the Martello towers ceased in the mid-1800s.
11. Included in support of the application were 64 user evidence questionnaires, various maps and plans (including a plan showing the residences of the users), photographs showing the application site. A summary of the user evidence in support of the application is attached at **Appendix C**.

Consultations

12. Consultations have been carried out as required. In response, 13 letters of support were received from local residents, adding their own evidence of use to the weight of evidence already provided by the applicant. A further 25 'standard

form' letters (containing identical wording but not adding individual evidence) were also received in support of the application.

13. Shepway District Council wrote to confirm that the application did not involve any land within the Council's ownership, but did not express a view on the application.
14. A letter was also received from Sandgate Parish Council stating that at a recent Parish Council meeting, Parish Councillors had unanimously voted in support of the application.
15. In addition, the local County Member, Mr. T. Prater, wrote to express his support for the application and stated that the land has been used for recreational purposes for over 20 years 'as of right' and without challenge by the landowner. He added that there was strong and widespread support throughout the village community to see access to the area retained and enhanced.

Landowner

16. The application site is, in the main, owned by G. Forge Ltd. and is registered with HM Land Registry under title numbers K894616 (the main part of the site) and K868676 (the Martello towers and adjoining areas). Part of the application site, consisting of a disused reservoir, is unregistered and has no known landowner
17. An objection to the application has been received from John Bishop and Associates, acting on behalf of G. Forge Ltd. ("the landowner"). The objection has been made on the following grounds:
 - The application plan is incorrect as it includes MOD-owned land and the supporting documents offer little coherent support for the application; for example, the user evidence questionnaires are dated July and August 2010 and do not demonstrate that use has continued up until the date of the application.
 - Evidence of use provided in support of the application is insufficient to show that the land has been used by a significant number of the residents of the locality; the evidence of qualifying use represents less than 1% of the population of Sandgate.
 - Use has been restricted to the Public Footpaths that cross and abut the application site (and is therefore by right, not 'as of right'); the remainder of the land is generally inaccessible by virtue of dense vegetation or steep slopes, thereby limiting the scope for lawful sports and pastimes.
 - Parts of the land have been physically inaccessible during all or part of the material period; notably the reservoir to the west to Martello tower 7 and the allotments at the eastern end of the application site.
 - Prohibitive notices in existence on the application site (erected by the MOD) are sufficient to render use of it contentious.
 - Military byelaws covering the application site (The Shorncliffe and District Military Lands Byelaws 1976) provide a right of access for the public at large; use of the application site is therefore by virtue of an existing right of access and is not 'as of right'.

Legal tests

18. 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'?*

19. In order for land to be capable of registration as a new Village Green, recreational use of it must have taken place '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 protest¹: "*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*"².

20. In this case, the landowner contests the assertion that any recreational use of the application site has taken place 'as of right'. The landowner's case is that, for at least part of the relevant period (1991 to 2011), the land was the subject of military byelaws that expressly provided for members of the public to use the application site for recreational purposes. Additionally, use of the application site has generally been confined to the existing Public Footpaths (thereby also in exercise of an existing right) and any use beyond the footpaths has been contentious due to the existence of various prohibitive notices on the application site.

Byelaws

21. In support of the objection, the landowner has produced a copy of the Shorncliffe and District Military Lands Byelaws 1976. A copy of the byelaws is attached at **Appendix E**.

22. Section 2 of the byelaws, entitled 'use of lands by public' states "*the public are permitted to use all parts of the Military Lands not specially enclosed or the entry to which is not shown by notice as being prohibited or restricted... for the purposes of open-air recreation at all times when the Military Lands are not being used for military purposes for which they are appropriated*". The landowner's case is that the effect of these byelaws is to provide a right of access for the public to

¹ *Dalton v Angus* (1881) 6 App Cas 740 (HL)

² *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

engage in recreational activities on the land; use of the application site has therefore been permissive and is not 'as of right'.

23. The applicant's position is that, in order to be effective, the byelaws must have been brought to the attention of the users. In support of this, the applicant relies on a passage from the *Newhaven*³ case in which the judge approves a quote from the Inspector's report suggesting that the mere making of byelaws without any notice being erected informing the public of their existence does not amount to any regulation of the land. Hence, in the absence of any communication to the users of the land, the byelaws would not be sufficient to render use of the application site by licence.
24. It is possible to distinguish the facts in *Newhaven* from those in the present case because the byelaws considered in *Newhaven* were intended to prohibit certain activities whilst, in the present case, the byelaws, somewhat unusually, purport to confer a right of access. The situation here is more akin to the position where a Local Authority holds land specifically for the purposes of public recreation; access to that land is by virtue of an existing right and thus not 'as of right'.
25. However, there is wider issue to be considered regarding the validity of the byelaws which relates to the conditions attached to the statutory byelaw-making power. The byelaws are made in exercise of powers contained in the Military Lands Act 1892 ("the 1892 Act"). Section 17(1) of the 1892 Act states that, before making byelaws, the Secretary of State "*shall cause the proposed byelaws to be made known in the locality [providing an opportunity for objections to be made and considered]... and when any such byelaws are made, shall cause the boundaries of the area to which the byelaws apply to be marked, and the byelaws published, in such a manner as appears necessary to make them known to all persons in the locality*".
26. The byelaw-making power therefore provides a clear requirement that the byelaws be advertised locally, so as to make them known to all local residents. The landowner has not been able to provide any evidence to demonstrate that this has been the case and, in the absence of any such evidence, it is not possible to rely on the byelaws as having been duly made and, in consequence, conferring any right of access to the application site.

Footpath use

27. As noted above, access to the application site is via several Public Footpaths that cross and abut the site. The existing footpaths are a relatively new addition, having been formally recorded with the agreement of the landowner by way of a Public Path Creation Agreement in 1992 and having been provided in exchange for the closure of other paths (for security purposes) leading to the barracks.
28. There are also several defined tracks running through the woodland, which are not recorded Public Footpaths, but which are used in the same manner.
29. Recreational use that has the outward appearance of being in exercise of a Public Right of Way is not qualifying use for the purposes of Village Green registration. The issue was considered by the Courts in *Laing Homes*⁴, in which the judge said

³ *Newhaven Port and Properties Ltd v East Sussex County Council* [2012] EWHC 647 (Admin)

that: *'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'*.

30. In this case, the vast majority of the witness evidence refers to walking (with or without dogs). The physical nature and overgrown state of the application site, particularly between the two Martello towers, means that all but the most adventurous of users of this part of the application site are unlikely to have strayed far beyond the Public Footpath. It is more probable than not that the majority use is likely to have been associated with, and confined to, passage along the footpath, which itself was a local attraction due to the far reaching views from the top of the escarpment. Furthermore, some witnesses specifically refer to use of the land as a short cut to or from Sandgate High Street. Such use should be disregarded as it would be in exercise of an existing right and therefore not 'as of right'.
31. Similarly, the northern spur of the application site (to the west of the recreation ground) consists almost wholly of a defined route through heavy vegetation which, although not a recorded footpath, would give the outward appearance of a Public Rights of Way type use rather than a general right of recreation.

Notices

32. The landowner's objection refers to the existence of prohibitive notices on the application site. These notices are shown in the photographs at **Appendix F**.
33. Neither the landowner nor the users specify the locations of these notices on the application site but, those that are still in existence today are all located at the western end of the application site (to the west of Martello tower 7). In particular, there is a notice at the footpath entrance on the western boundary of the application site reading 'DANGER MILITARY RANGES KEEP TO THE PATH' and, inside the application site, there are various other notices, mainly to the northern edge of the footpath, reading 'MOD PROPERTY DANGER KEEP OUT'.
34. It is not clear when these notices were erected and the landowner is not able to confirm this, but the applicant suggests that they were in place in 1977. Surprisingly, only a small number of the users refer to the existence of these notices but they are clearly visible on the site itself and unequivocally express the former landowner's intention that public access be prohibited. Use in defiance of these notices, and away from the Public Footpath crossing this part of the application site, is clearly contentious and not 'as of right'.
35. As a result of these notices, use of the western end of the application site was clearly not 'as of right' and thus the area to the west of Martello tower 7 would not be capable of registration as a Village Green for this reason.

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

36. 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.
37. The summary of evidence of use by local residents at **Appendix C** shows the activities claimed to have taken place on the application site. The majority use of the application site has been for walking (with or without dogs), and indeed 17 of the witnesses refer to use of the application site only for walking. Other activities referred to include birdwatching, blackberrying, photography, and playing with children.
38. As noted above, any use of the Public Footpaths would be in exercise of an existing right. This includes walking, jogging and running. Other use, which is associated with the Public Footpaths, would consist of an extension of that right. So, for example, blackberrying, which took place (according to the applicant) mainly around Martello tower 6 is unlikely to have given the outward appearance to the landowner of being the assertion of a public right if it took place on or near the footpath. The same could be said for other activities, including photography and birdwatching.
39. There is, therefore, evidence of use of the application site for a range of recreational activities but it is difficult to differentiate on paper the degree to which use has taken place on or near the Public Footpaths. The overgrown state and physical nature of the application site suggests that many of the activities cited could and would have taken place on a Public Footpath or other linear route. This is certainly true of the area between the Martello towers and the northern spur on Military Road, although it is less clear whether this is the case in respect of the eastern part of the application site, particularly around the pill box which is less overgrown.

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

40. 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.
41. 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 Builders⁵ 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*

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

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*'.

42. In this case, the applicant has specified the locality as being 'Sandgate'. The parish of Sandgate is a legally recognised administrative unit and thus would constitute a qualifying locality. The plan at **Appendix G** shows that the overwhelming majority of users live within the parish of Sandgate.

"a significant number"

43. One of the objections raised by the landowner is that the land has not been used by a significant number of the residents of the locality and actual use amounts to less than 1% of the population of Sandgate.

44. However, the word "significant" in this context 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 the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers*'⁶. Thus, the test is a qualitative, not quantitative one, and what constitutes a 'significant number' will depend upon the individual circumstances of each case.

45. In this case, there are user evidence questionnaires from 64 people. Of these, 7 did not use the land at all during the relevant period or were not resident in the locality and a further 3 did not provide address details or confirm that they lived in the locality. This use must therefore be discounted, which leaves evidence of use from 54 individuals (representing 39 households), most of whom have used the application site on an at least weekly basis.

46. Of itself, this volume of frequent usage would be sufficient to indicate to a reasonable landowner that the land was in use by the general community. However, the degree to which such use is related to the exercise of Public Rights of Way is unclear and as such it is not possible to conclude whether the land has been used, for general recreational purposes, by a significant number of the residents of the locality.

(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)?

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, the application must have been made within two years from the date upon which use 'as of right' ceased.

48. In this case, there is no evidence to suggest that use of the application site has ceased. Access to the site remains available via the Public Footpaths, and the landowner has not taken any recent steps to attempt to restrict or prohibit recreational use (e.g. by erecting fences or notices).

⁶ *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

49. Use of the application site has therefore continued up until the date of the application (June 2011).

(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. The twenty-year period in this case is calculated retrospectively from the date of the application. As such, the relevant twenty-year period (“the material period”) in this case is 1991 to 2011.

51. The user evidence summarised at **Appendix C** appears to suggest that there has been use of the application site for a considerable period. However, closer inspection of the user evidence questionnaires shows that the vast majority of these were completed in the summer of 2010 and the application was not submitted until the summer of 2011. Whilst a short gap between the witnesses completing their questionnaires and the application being submitted is to be expected, in this case there is a gap of a whole year during which there is no evidence of use. It is of course quite possible (and even likely) that the pattern of use of the application site by individual witnesses has remained unchanged during this time, but no evidence has been submitted to that effect. This gap means that there is, in effect, only evidence of use for 19 years of the relevant twenty-year period.

52. In addition, certain parts of the application site would not have been capable of being used for recreational purposes during the relevant period. The reservoir adjacent to Martello tower 7 has been in place throughout the relevant period and would have been physically inaccessible during this time. There is also evidence that the allotments have been fenced off and used for cultivation for at least part of the relevant period. These areas were incapable of being used for lawful sports and pastime and are therefore not capable of being registered as a Village Green.

53. Thus, the evidence submitted in support of the application is not sufficient to demonstrate that use of the application site has taken place throughout the relevant twenty-year period across the whole of the land.

Conclusion

54. There is little doubt, from the evidence submitted in support of the application and the letters of support received in respect of it, that the application site is a well used and valued piece of land within the parish of Sandgate. However, there are a number of issues affecting the application site which, for various reasons, means that the application does not meet the legal tests. These can be summarised as follows:

- Use of the western end of the application site (beyond Martello tower 7) is in defiance of the clearly displayed prohibitive notices erected by the MOD; such use is contentious and cannot be ‘as of right’.
- The reservoir adjacent to Martello tower 7 is physically inaccessible and incapable of being used for lawful sports and pastimes. This has been the case throughout the relevant period.
- The strip of land between the Martello towers is densely covered with vegetation and access to it is largely restricted to walking along the Public

Footpath; such use is in exercise of an existing right and not 'as of right'.

- The area surrounding Martello tower 6 consists of a Public Footpath; such use is in exercise of an existing right (or is an activity that is associated with that right, such as blackberrying) and not 'as of right'.
- The area of land on the eastern boundary of the application site includes some allotments which would not have been available for recreational use during the relevant period. Other parts are heavily vegetated and inaccessible.
- The northern spur of the application, west of Military Road, consists of a single defined path through a heavily vegetated area; such use is consistent with a rights of way type use rather than a wider recreational use.
- There is evidence that the remaining area of land has been used by children on rope swings or playing in the pill box, but the area also includes a steep slope and some densely vegetated areas which limit the scope of other recreational activities on this area. The evidence provided on the user evidence forms is non-specific (as it relates to the whole of the application site) and, whilst there is some physical evidence of use, it is not clear that this area has specifically been used by a significant number of the local residents for recreational purposes.

55. There is a wider issue relating to the fact that there is a gap in the evidence of a year (at the very end of the relevant period). This is, in itself, a knock out blow to the application and, even if the applicant were to be provided with the opportunity to remedy this deficiency in the evidence, the application would still fail for the reasons provided above.

56. For these reasons, the application site does not meet the relevant legal tests and is not capable of registration as a Village Green, either in whole or in part.

Recommendation

57. I recommend that the applicant be informed that the application to register land known as the Sandgate escarpment in the parish of Sandgate as a Village Green has not been accepted.

Accountable Officer:

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Case Officer:

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The main file is available for viewing on request at the Countryside Access Service, Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

Background documents

APPENDIX A – Plan showing the application site (as originally applied for)

APPENDIX B – Copy of the application form

APPENDIX C – Plan showing the application site (as amended)

APPENDIX D – Summary of user evidence submitted in support of the application

APPENDIX E – Copy of byelaws relating to the application site

APPENDIX F – Photographs showing notices on the application site

APPENDIX G – Plan showing locality