

Application to register land at Woodland Road at Lyminge as a new Village Green

A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Tuesday 19th February 2013

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 29th November 2012, that the applicant be informed that the application to register land at Woodland Road at Lyminge has been accepted, and that the land be formally registered as a Village Green.

Local Members: Ms. S. Carey

Unrestricted item

Introduction

1. The County Council has received an application to register land at Woodlands Road at Lyminge as a new Town or Village Green from Mr. S. Huntley ("the applicant"). The application, made on 7th July 2010, was allocated the application number VGA628. A plan of the site is shown at **Appendix A** to this report.

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(1) of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Town or 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 is referred to in the associated documentation by several names, including 'church field' and 'the bumpy field'. For the purposes of this report, it is referred to only as "the application site".
7. The application site consists of an area of open and uncultivated land of approximately 1.4 hectares (3.6 acres) in size situated adjacent to the village hall at Woodland Road in the parish of Lyminge. It is situated on a reasonably steep incline and access to it is via various recorded Public Rights of Way which cross the site (Public Footpaths HE54 and HE56, and Bridleway HE55).
8. The application site, and the Public Rights of Way, are shown in more detail on the plan at **Appendix A**.

Previous resolution of the Regulation Committee Member Panel

9. As a result of the consultation, an objection to the application was received from Cripps Harries Hall LLP on behalf of the then landowner, the Tory Family Foundation ("the former landowner").
10. The matter was considered at a Regulation Committee Member Panel meeting on Tuesday 15th November 2011, where Members accepted the recommendation that the matter be referred to a non-statutory Public Inquiry for further consideration.
11. As a result of this decision, Officers instructed a lawyer experienced in this area of legislation, to hold a Public Inquiry, acting as an independent Inspector, and to report his findings back to the County Council.

The Public Inquiry

12. The Public Inquiry was scheduled to commence on Monday 1st October 2012 at Lyminge Methodist Church and continue, as necessary, until Friday 5th October 2012.
13. However, shortly prior to the commencement of the Inquiry, the County Council was advised by the landowner's representative that the application site had been gifted to Lyminge Parish Council, and that the Tory Family Foundation no longer wished to play an active part in the Inquiry. The Parish Council, as new landowner, was consulted and advised that it did not wish to take part in the Inquiry.
14. In light of this, the Inspector considered that it would not be necessary to hold a Public Inquiry and the Inquiry was therefore cancelled. The Inspector proceeded to prepare a report on the basis of all of the written evidence before him, including the evidence submitted by the former landowner in opposition to the application.
15. A copy of the Inspector's report, dated 29th November 2012, is attached for reference at **Appendix B**.

Legal tests and Inspector's findings

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 the inhabitants of a particular locality, or of 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 in accordance with the Inspector's findings.

(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 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 challenge such use in any way, then formal rights may be acquired.

18. In this case, there was no suggestion that the application site had been used in exercise of any force, whether physical or otherwise. The application site is easily accessible via the Public Rights of Way that cross the land and which provide permanent access through the fencing and hedging which form the physical exterior boundaries of the application site. Similarly, there is no evidence to suggest that there were any prohibitive notices on the land and that recreational use had taken place in defiance such notices.

19. The only issue which arose in this case was the extent to which any of the recreational activities had taken place with the landowners' permission. This will be relevant because, where specific permission to use land for recreational purposes has been granted, such use will be by invitation of the landowner and, as such, will not be qualifying use for the purposes of Village Green registration.

20. It was the former landowner's contention that permission had been granted during the relevant period for specific activities, including an annual bonfire and overflow car parking for the annual Lyminge Day. This was the only evidence of actual permission being granted by the former landowner in respect of the land. The Inspector's view² was that:

"use of the field for these activities cannot be relied upon in support of the application, and the applicant does not seek to do so. There is no evidence that whilst these activities were going on the public were otherwise excluded from the field or any part of it and for this reason I do not consider it can be said that the landowner has occasionally excluded

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

² See paragraph 9.3 of the Inspector's report dated 29th November 2012

members of the public from the land so as to make clear that the use of the land generally was by an implied permission”

21. The Inspector also considered the effect of the existence of the recorded Public Rights of Way crossing the application site. Whilst walking (with or without dogs) has been recognised as the kind of activity that is capable of giving rise to Village Green registration, it is important to differentiate between walking which is consistent with the assertion of a general right of recreation (i.e. wandering at will over a wide area) and walking which is akin to the exercise of a public right of pedestrian passage along a linear route (i.e. a public rights of way type user). The latter will not be qualifying use for the purposes of Village Green registration³.

22. In this regard, the Inspector said⁴:

“One of the significant issues in this matter has been to distinguish between use of the public rights of way, which cannot be relied upon to support the application, and other recreational walking, which can be relied upon. Most of the witnesses refer to walking in the field and many acknowledge the existence of public rights of way crossing it. Many of the witnesses do not specifically distinguish between walking using the public rights of way, and general recreational walking within the field. A number refer to walking from one specific destination to another, e.g. “walking from churchyard to village hall”. The public rights of way within the field provide natural and obvious routes between the road, church and village hall and I have assumed that when witnesses refer to walking between these places, or to using a route that continues beyond the application land, they are referring to use of the public rights of way.

...

... use of the public rights of way is not use as of right and I have ignored it for the purposes of the conclusions I am required to reach”

23. Overall, the Inspector concluded that informal recreational use of the application site had taken place ‘as of right’ during the relevant period.

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

24. 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 activities⁵.

25. 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*

³ *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70

⁴ See paragraphs 7.4 and 9.4 of the Inspector’s report dated 29th November 2012

⁵ *R v Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

*with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*⁶.

26. The Inspector considered the evidence and found that the application site had been used for a range of recreational activities. He said⁷:

“Although walking and dog walking are mentioned by the vast majority of the witnesses, there are a wide range of other activities referred to. Most of the witnesses refer to the field being used by local people for sledging and there are a number of photographs demonstrating that this has been a popular activity. There are many witnesses who describe children playing on the field and using it for cycling... Many of the user evidence forms refer to use for children playing or playing with children. In a number of cases use by successive generations is described.

Other activities which receive a number of mentions are mountain biking, firework displays, running, kite flying, picnics, blackberry and sloe picking and horse riding. A number of these activities are shown in video clips submitted in support of the application.”

27. The Inspector was therefore satisfied that the application site had been used 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?

28. 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.

29. 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 Builders⁸ 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’.

30. In this case, the applicant sought to rely on “the parish of Lyminge” as the qualifying locality. The former landowner, in his objection to the application, did not seek to challenge the proposition that the parish of Lyminge was capable of being a qualifying locality, and the Inspector was satisfied that it was an appropriate locality for the purposes of this case.

⁶ *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 and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 at 397

⁷ See paragraph 7.5 and 7.6 of the Inspector’s report dated 29th November 2012

⁸ *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

“a significant number”

31. 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’*⁹. Thus, the test is a qualitative, not quantitative one, and what constitutes a ‘significant number’ will depend upon the individual circumstances of each case.
32. The applicant’s case was that the land had been widely used by the residents of the parish for recreational purposes and that this was evidenced by the 85 user evidence questionnaires that had been submitted in support of the application. The former landowner’s position, on the other hand, was that general recreational use of the application site had been infrequent and low-level intensity in nature.
33. Having carefully considered all of the evidence, the Inspector concluded that¹⁰:
“I have no doubt that a significant number of the parishioners have made some use of the field, but that the use of some will be confined to use of the recorded public rights of way. I have taken no account of witnesses who claim only to have walked through the field...I am satisfied that [the remaining] evidence is sufficient to demonstrate, on a balance of probability, that the application site has been in general use by the local community for informal recreation. In reaching this conclusion I have not overlooked the [former landowner’s] evidence. I accept that there will have been many occasions when there was no-one using the field. I also accept that the physical condition of the field did not always show physical signs of use... I have also been mindful of the evidence that the field has been used for grazing rams. The landowner suggests this would have deterred use but there is evidence from various witnesses that the rams were actually an attraction. Taking all the evidence into account, and accepting the applicant’s evidence as unchallenged, I am satisfied that recreational use has been more than infrequent or sporadic”.
34. As such, the Inspector was satisfied that the application site had been used 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)?

35. 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).
36. In this case, the application was made in 2010 and there is no evidence to suggest that informal recreational use of the application site ceased to be ‘as of right’ (e.g. by some form of challenge to use or erection of fencing to restrict access) prior to that time.

⁹ *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

¹⁰ see paragraph 9.2 of the Inspector’s report dated 29th November 2012

37. The Inspector agreed that use of the application site did continue up until (and beyond) the date of the application.

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

38. 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. 1990 to 2010.

39. An issue was raised by the former landowner in respect of an archeological dig that took place on the application site in the summer of 2010. The suggestion was that this would have materially interrupted access to and recreational use of the application site. The Inspector noted that it was unclear, given that the application was made in July 2010 whether this event had taken place during the relevant period or after the application had been made. In any event, he was satisfied that although it would have prevented access to specific excavations, the evidence did not suggest that the recreational users had been excluded from the field as a result of the excavations¹¹.

40. Having considered the evidence, the Inspector found that the application site had been used for a full period of 20 years. He commented that¹²:

"Many of the witnesses state that their knowledge and use of the application land extends over considerably more than the twenty year period under consideration. All give evidence of use within the relevant period."

Inspector's conclusions

41. The Inspector's overall conclusion was that the application should succeed. He said¹³:

"Having assessed the evidence... and taking into account the consequences of the objection being withdrawn, I conclude that a significant number of the inhabitants of the Parish of Lyminge have indulged as of right in lawful sports and pastimes on the application land for a period of at least 20 years and continued to do so at the date of the application. Accordingly, I recommend that the Authority should register the application land as a new Village Green under the Commons Act 2006 s15".

Subsequent correspondence

42. On receipt, a copy of the Inspector's report was forwarded to the applicant, the former landowner and the Parish Council for their information and further comment.

43. The applicant wrote to express his support for the Inspector's findings and recommendation. He also provided clarification regarding the archaeological dig

¹¹ see paragraph 8.3.5 of the Inspector's report dated 29th November 2012

¹² see paragraph 7.7 of the Inspector's report dated 29th November 2012

¹³ see paragraph 10.1 of the Inspector's report dated 29th November 2012

(confirming that this had taken place outside of the relevant period) and noted that many inhabitants of the area had intended to attend the Inquiry to expand on their evidence of use of the application site. The applicant drew attention to Lyminge Parish Council's comments at the consultation stage, in which the Council expressed the view that the land had been used for recreational purposes for well over 20 years and that the application site fulfilled the criteria for registration as a Village Green. A copy of the applicant's comments is attached at **Appendix C**.

44. The Parish Council (as current landowner) did not have any comment to make in respect of the report.

45. The former landowner did not make any comments in respect of the report.

Conclusion

46. Having carefully considered the Inspector's analysis of the evidence (contained in his report) it would appear that the legal tests in relation to the registration of the land as a new Village Green have been met and, accordingly, the application site should be registered as a new Village Green.

Recommendation

47. I recommend, for the reasons set out in the Inspector's report dated 29th November 2012, that the applicant be informed that the application to register land at Woodland Road at Lyminge has been accepted, and that the land be formally registered as a Village Green.

Accountable Officer:

Mr. Mike Overbeke – Tel: 01622 221513 or Email: melanie.mcneir@kent.gov.uk

Case Officer:

Miss. Melanie McNeir – Tel: 01622 221511 or Email: melanie.mcneir@kent.gov.uk

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 application site

APPENDIX B – Copy of the Inspector's report dated 29th November 2012

APPENDIX C – Copy of applicant's comments on the Inspector's report

**APPENDIX A:
Plan showing the application site**



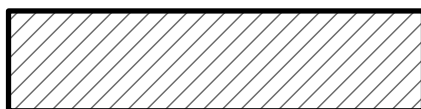
Public Rights of Way are shown for information only.
For information as to exact alignment and position of rights of way,
please refer to the Definitive Map of Public Rights of Way

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Scale 1:5000

**Land subject to Village Green application at
Woodland Road, Lyminge**



**IN THE MATTER OF AN APPLICATION TO REGISTER LAND
ON THE SOUTH WEST SIDE OF WOODLAND ROAD, LYMINGE, KENT
AS A NEW TOWN OR VILLAGE GREEN**

REPORT OF NIGEL FARTHING

29th November 2012

1. THE APPLICATION LAND

- 1.1 Lyminge is a village situated about 5 miles north-west of Folkestone, Kent. I cannot find that I have been told the population of the village.
- 1.2 The application land is an open and uncultivated field lying to the south west of the village and adjacent to the Church of St Mary and St Ethelburga. The northern section of the field is relatively flat but the remainder is steeply inclined. The whole field is rough grassland. I am told that the entire field is 1.4 hectares (3.6 acres) in size.
- 1.3 Access to the field is available from Woodland Road. The site is traversed by Bridleway HE55 and Footpaths HE54 and 56.
- 1.4 The application site and the public rights of way are shown on the plan at Appendix A taken from the report prepared for Kent County Council's Regulation Committee Member Panel.
- 1.5 Bridleway HE55 commences at Woodland Road running in a southerly direction outside the application site before entering the site from the village hall car park and continuing within the application site in a broadly south south westerly direction and joining with Public Footpath HE54 towards the southern end of the site and exiting through a kissing gate.
- 1.6 Footpath HE54 is recorded as entering the application site from the junction of Woodland Road and High Street. The route crosses to the eastern boundary of the application site proceeding in a southerly direction alongside the fence before joining with Bridleway HE55.
- 1.7 Footpath HE56 enters the site from St Mary and St Ethelburga's Church passing through a gate and crossing the field in a west south west direction linking with Bridleway HE55 on the western side of the application site.

1.8 I inspected the site on 30 March 2012 prior to the pre-inquiry meeting. The land consisted entirely of rough grassland with no signs of recent agricultural use or grazing. There were a number of well established tracks across the field. Some of the routes approximately correspond to the recorded public rights of way. There is, however, a significant track broadly on a north south alignment through the middle of the site which does not correspond with any of the recorded public routes. There are various other less defined tracks which could be the result of pedestrian or animal use.

1.9 The application site is enclosed by fencing or hedging and the boundaries are readily apparent.

2. THE APPLICATION

2.1 By an application in prescribed Form CA9 dated 5 July 2010 Mr Stephen Huntley applied to Kent County Council ("KCC") as the relevant Commons Registration Authority ("CRA") to register the field as a New Town or Village Green ("TVG").

2.2 The application was completed (so far as relevant) as follows:-

2.2.1 In answer to question 4 (Basis of application for registration and qualifying criteria) Mr Huntley stated that the application was made under Section 15(2) of the Commons Act 2006 ("CA2006").

2.2.2 In answer to question 6 (Locality or neighbourhood within a locality in respect of which the application is made) Mr Huntley answered "in the parish of Lyminge". No map was attached.

2.2.3 In answer to question 7 (Justification for application to register the land as TVG) Mr Huntley said, in effect, that the field has been used by parishioners for generations for various recreational activities.

2.3 The application was further supported by 85 completed user evidence questionnaires in a standard form apparently prepared by Kent County Council.

3. The Objection

3.1 One objection was received from Cripps Harries Hall, solicitors acting on behalf of the landowners, the trustees of the Tory Family Foundation. The objection was contained in a letter dated 8th April 2011. the chief grounds of objection can be summarised as follows:

- The locality or neighbourhood relied upon was not sufficiently identified

- Any use of the application land was not at a sufficient level of intensity to support registration.
- Use of the recorded public rights of way was not qualifying use for the purposes of registering the land as a new TVG
- Some use had been undertaken with the permission of the landowners.
- Any use had been interrupted by other uses of the field.

3.2 The objection was supported by witness statements of Amy Rogers and Peter Tory.

4. **Withdrawal of Objection**

4.1 A non-statutory Public Inquiry was scheduled to take place commencing 1st October. On 12th September I was told that the objector had agreed to gift the application land to the Parish Council and would not pursue the objection. On 17th September I received confirmation that the Parish Council did not wish to participate in an Inquiry and I agreed with the Registration Authority that it would be an unnecessary and unreasonable expense for the Inquiry to proceed. It has been agreed that I would review the written evidence and provide a report on that basis. Although the objection is not being pursued I have before me evidence provided by both the applicant and the objector and it is necessary for me to review this and to consider whether the statutory requirements for registration are met.

4.2 For the purpose of preparing this report I have had to consider what weight to attach to the evidence submitted in support of the withdrawn objection. I have concluded that the public interest is that I should seek to arrive at the right conclusion. Accordingly I cannot ignore the evidence submitted on behalf of the objector, but as that evidence has not been tested by cross-examination the weight that I can attach to it is limited.

4.3 It is equally true that the evidence submitted in support of the application has not been tested by cross-examination. However I understand that the witnesses were willing to attend the Inquiry and accordingly where there is a conflict between the evidence in support of the applicant and those in support of the objector I have preferred the applicant's evidence on the ground that, following the withdrawal of the objection, it is not challenged.

5. **The Law**

5.1 The current law is found in s. 15 of the Commons Act 2006 ("CA 2006"). This application relies on s. 15(2) the material provisions of which are:-

5.2 *This subsection applies where-*

5.3 (a) *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 ; and*

5.4 (b) *they continue to do so at the time of the application.*

5.5 The various elements of this provision have been considered by the courts with the following principles being established;-

.....a significant number.....

5.6 “Significant” does not mean considerable or substantial. The requirement is that the number of people using the land is sufficient to indicate that the land is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.

....of the inhabitants of any locality or neighbourhood within a locality.....

5.7 In this case the applicant relies upon the parish of Lyminge as the relevant locality. It is established that a parish is a sufficient administrative unit to comprise a locality for this purpose. Accordingly it is not necessary for me to consider the law relating to a “neighbourhood within a locality”

...have indulged as of right.....

5.8 This requirement mirrors the requirement for establishing a prescriptive easement or public right of way. It does not relate to the subjective intention of the user, but rather to the manner in which use is undertaken. The traditional explanation is that use must have been without force, secrecy or permission.

5.9 “Force” does not necessarily mean physical force; it will be sufficient if use is contentious and this would include climbing over a locked gate, or ignoring an appropriately worded sign.

5.10 “Permission” can be express or implied. Express permission can be given to anyone using the site by, for example, the erection of suitably worded notices in appropriate locations. Permission might also be given to particular individuals or groups, or for particular activities.

.....in lawful sports and pastimes.....

5.11 It is well established that the activities comprised within this requirement extend to all lawful informal recreational activities. Common examples are walking, with or without dogs, and children’s play. However pedestrian use of a defined linear route is use which would be referable to the use, or acquisition, of a right of way and thus cannot be relied upon in support of an application to register a TVG.

.....for a period of at least twenty years.....

5.12 In the case of an application under CA 2006 s.15(2) the relevant twenty year period is that immediately before, and expiring upon, the making of the application.

6. Procedure

6.1 The relevant procedure is contained in the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The most striking feature of these regulations is that they do not provide a coherent framework for the resolution of contested applications.

6.2 In accordance with the informal procedure which has been adopted by many authorities, the Registration Authority has, in this case, appointed me as an independent inspector to hold a non-statutory inquiry into the application and to advise the Authority whether or not the application should be accepted. For the reasons rehearsed above the planned inquiry has been cancelled and it has been agreed that I will provide this report on the basis of the written material provided by the applicant and the objector.

6.3 The applicant carries the burden of proof and is thus required to demonstrate, on a balance of probabilities that all the requirements for registration have been met.

7. The evidence for the applicant

7.1 The evidence for the applicant is contained in the two volumes of the applicant's Inquiry bundle. As it has been agreed that this matter will proceed on the basis of the written evidence alone I have not had the benefit of hearing the witnesses in person and their evidence has not been tested through cross-examination. For the purposes of this report I have, so far as possible, accepted the evidence as presented to me. Where there is a conflict in the evidence I have, as indicated earlier, preferred the evidence of the applicant whose witnesses were, I understand, willing to attend an inquiry and submit to cross-examination. I see little purpose in restating what is contained in each of the statements submitted in support of the application. Instead I will set out the essential elements of the applicant's case and identify the relevant evidence.

7.2 The application identifies the Parish of Lyminge as the relevant locality in respect of which the application is made. The applicant's bundle contains a plan identifying the parish boundary. Although the objector, in the initial objection letter, raised some issues about the identity of the locality or neighbourhood relied upon I do not consider this to be a contentious issue. I am satisfied that the Parish of Lyminge is a locality within the meaning of the CA 2006 s. 15

- 7.3 The applicant submits 34 written statements and 67 user evidence forms in support of the application. I accept that each of these witnesses has used the field, although I will consider below the nature of that use. I am required to be satisfied that use has been qualifying use and by a significant number of the inhabitants such as to signify that it is in general use by the community. I cannot find that I have been told the population of the parish of Lyminge but I have visited the village and have been provided with a map showing the layout.
- 7.4 The various statements and evidence forms detail a variety of activities undertaken on the field. One of the significant issues in this matter has been to distinguish between use of the public rights of way, which cannot be relied upon to support the application, and other recreational walking, which can be relied upon. Most of the witnesses refer to walking in the field and many acknowledge the existence of public rights of way crossing it. Many of the witnesses do not specifically distinguish between walking using the public rights of way, and general recreational walking within the field. A number refer to walking from one specific destination to another, e.g. "walking from churchyard to village hall". The public rights of way within the field provide natural and obvious routes between the road, church and village hall and I have assumed that when witnesses refer to walking between these places, or to using a route that continues beyond the application land, they are referring to use of the public rights of way. Many describe their use simply as "walking" or "dog walking" and in these instances it is not possible for me to be sure whether such use is confined to the public rights of way, or extends to other parts of the field. Some witnesses specifically state that they have not kept to the paths and, by way of example, Helen Burr states "*I have therefore never consciously kept to these identified paths*", David Hunt-Cooke says "*although I knew the public rights of way which crossed the field we would walk all over the field*", Mr and Mrs Kyte state "*Over all these years of use, we have never been refused access or told to stay on footpaths or bridleways*", Patricia Philip says "*We have never confined ourselves to footpaths*".
- 7.5 Although walking and dog walking are mentioned by the vast majority of the witnesses, there are a wide range of other activities referred to. Most of the witnesses refer to the field being used by local people for sledging and there are a number of photographs demonstrating that this has been a popular activity. There are many witnesses who describe children playing on the field and using it for cycling:- Judith Woodbridge refers to boys "*making a wonderful camp*" and "*a great cycle ramp*", Claire Norman describes "*playing games in the humps and bumps as it was great for hide and seek...*", Mallory Allfree says that her "*own two boys spent many happy times during their childhood there..*". Many of the user evidence forms refer to use for children playing or playing with children. In a number of cases use by successive generations is described.

- 7.6 Other activities which receive a number of mentions are mountain biking, firework displays, running, kite flying, picnics, blackberry and sloe picking and horse riding. A number of these activities are shown in video clips submitted in support of the application.
- 7.7 Many of the witnesses state that their knowledge and use of the application land extends over considerably more than the twenty year period under consideration. All give evidence of use within the relevant period.
- 7.8 Most witnesses state that they have neither sought nor been given permission to use the field for any of the activities they describe. A few acknowledge that permission was sought, and obtained, for the firework display and for car parking on the field on Lyminge Day.

8. **The evidence for the objector**

- 8.1 The evidence for the objector is contained in 8 statements to be found in the first of the two volumes of the objector's bundle.
- 8.2 Amy Rogers provides two statements the principal purpose of which is to produce correspondence and photographs. Substantive evidence for the land owning trust is given in the two statements of Peter Tory. Lydia Docherty exhibits various photographs of the site and provides a commentary on these. The remaining witnesses are local residents giving their views as to the extent of public use of the field.
- 8.3 The objector's evidence can be summarised as follows:-
- 8.3.1 Various activities have taken place on the application land with the permission of the landowner. These comprise an annual bonfire celebration, additional car parking for the annual Lyminge Day and for Lyminge Youth Action. The bonfire party and Lyminge Day have been regular annual events and the evidence shows that permission has been given since about 2002. The Youth Action day would appear to have only taken place in 2009.
- 8.3.2 Use of the field by the local community for tobogganing is acknowledged.
- 8.3.3 Use of the recorded public footpaths and bridleway is acknowledged, but wider use of the field for recreational activities is challenged. Photographs are provided which, it is said, show the field in a condition which is consistent with regular use of the defined tracks, but not any wider use. The photographs show that the steeply sloping southern end of the field is rough grassland which at certain times of year is quite long

and would not be suitable for conventional sports such as football. It is however far from inaccessible. The flatter northern section is also tussocky but does not contain the patches of nettles which are evident on the sloping section.

8.3.4 Within the relevant period the field has been used for grazing rams. It is not suggested that the field was fenced in such a way as to provide any physical obstacle to use; rather it is said that the presence of the rams “*would naturally deter people from entering the field*”

8.3.5 An archaeological dig took place in the summer of 2010. I note that the application for registration as a TVG was made on 7th July 2010 and it is not clear to me whether the dig took place before this, or later in the summer. Whilst I accept that the dig will have prevented access to the specific excavations, it is not suggested that the public were excluded from the field because of these activities.

8.3.6 That any informal recreational use has been infrequent or of low intensity.

8.3.7 There are many other facilities within the village for sporting and recreational use.

9. **Applying the law to the evidence**

The locality / neighbourhood requirement

9.1 I am satisfied that the Parish of Lyminge is an appropriate locality and that it has been sufficiently identified by the applicant.

The “significant number” requirement

9.2 The requirement is that a significant number of the inhabitants of the parish have used the application land in the required manner. I have no doubt that a significant number of the parishioners have made some use of the field, but that the use of some will be confined to use of the recorded public rights of way. I have taken no account of those witnesses who claim only to have walked through the field and who have not claimed to have carried out any other use, unless they have specifically stated that their use has not been confined to the public rights of way. Having made allowance for those users, I am left with the residual evidence of walking and dog walking together with the evidence of other recreational pursuits undertaken within the field. I am satisfied that this evidence is sufficient to demonstrate, on a balance of probability, that the application site has been in general use by the local community for informal recreation. In reaching this conclusion I have not overlooked the objector’s evidence. I accept that there will have been many occasions when

there was no-one using the field. I also accept that the physical condition of the field did not always show physical signs of use, although I take account of the fact that the photographs provided merely show the condition at one point in time and that the vegetation will have changed according to the season, and indeed according to use. I have also been mindful of the evidence that the field has been used for grazing rams. The landowner suggests this would have deterred use but there is evidence from various witnesses that the rams were actually an attraction. Taking all the evidence into account, and accepting the applicant's evidence as unchallenged I am satisfied that recreational use has been more than infrequent or sporadic.

The "as of right" requirement

9.3 There is no suggestion of any activities having been carried on secretly, or by force, whether physical or presumed in the sense of ignoring clear instructions not to use the land. It is necessary to consider the extent to which activities have been carried on with permission. There are two scenarios to consider. First where actual permission has been given by the landowner. The only evidence of this is in relation to the annual bonfire and the overflow car parking for Lyminge Day. Use of the field for these activities cannot be relied upon in support of the application, and the applicant does not seek to do so. There is no evidence that whilst these activities were going on the public were otherwise excluded from the field or any part of it and for this reason I do not consider it can be said that the landowner has occasionally excluded members of the public from the land so as to make clear that the use of the land generally was by an implied permission. Accordingly the recent decision in *R (Mann) v Somerset CC [2012] EWHC B14* can be distinguished.

9.4 The second scenario is where use is by virtue of some pre-existing right – in this case the public rights of way through the field. As I have previously indicated, use of the public rights of way is not use as of right and I have ignored it for the purposes of the conclusions I am required to reach.

Lawful sports and pastimes

9.5 I am satisfied that the various activities described by the applicants witnesses fall within the definition of lawful sports and pastimes as explained by Hoffmann LJ in *R v Oxfordshire CC ex parte Sunningwell Parish Council [2004] 1AC 889*.

For a period of at least 20 years

9.6 A more than sufficient number of the applicant's witnesses attest to use of the field for a period of well in excess of the required 20 years, and that the use was continuing up to the date of the application.

10. **Recommendation**

- 10.1 Having assessed the evidence on the basis outlined at the commencement of this report, and taking into account the consequences of the objection being withdrawn., I conclude that a significant number of the inhabitants of the Parish of Lyminge have indulged as of right in lawful sports and pastimes on the application land for a period of at least 20 years and continued to do so at the date of the application. Accordingly I recommend that the Authority should register the application land as a new Village Green under the Commons Act 2006 s. 15.

Nigel Farthing
29th November 2012
Birketts LLp
24 – 26 Museum Street
Ipswich
Suffolk
IP1 1HZ

**APPENDIX C:
Applicant's comments on the
Inspector's report**

Ms McNeir
Countryside Access Service
Invicta House
County Hall
Maidstone
Kent ME14 1XX

21st Dec 2012

Dear Ms McNeir

Re: Application to register land at Woodland Rd Lyminge as a Village Green

Thank you for forwarding the Inspector's report, and allowing me the opportunity to comment.

I am delighted that the Inspector recommends that the land should be registered as a new village green.

I can add a clarification to paragraph 8.3.5 of the Inspector's report, where the Inspector is unsure whether the archaeological dig of 2010 took place before or after my application. I wrote to yourselves on 13th May 2011 stating that my application preceded the archaeological digs. This can be independently verified by referring to the University of Reading's website where a report states that the dig began on 15th July 2010¹.

The panel may recall that on the site visit on 15th November 2011, we observed people using the field on horseback, by foot, on a bicycle and we even saw ladies painting watercolours.

Many inhabitants of the area were looking forward to expanding upon the submitted evidence statements (which included ~50 photographs and 5 videos) at the public inquiry, and I was also keen to highlight inaccuracies and inconsistencies in the objector's statements. However we were very happy to learn that the objector no longer owns the land, and that the Lyminge Parish Council is the new owner.

Lyminge Parish Council wrote to yourselves on 10th March 2011 regarding my application, and they stated that *"The area of land referred to in the application has undoubtedly been open for use by members of the public in Lyminge for well over 20 years.....Lyminge Parish Council believes that the area in question fulfils the criteria for registration as a village green."*

I know that a number of people in Lyminge are willing to work with the Parish Council to restore the land from its previous neglect and to manage it sympathetically for the benefit of all.

Thank you for your help in processing my application, and I look forward to hearing the outcome of the Member Panel's decision.

Yours Sincerely



Stephen Huntley

¹ An Archaeological Evaluation of Lyminge, For Pentland Homes Ltd, Thomas and Bray, http://www.reading.ac.uk/web/FILES/archaeology/Lyminge_Trial_trenches_2010.pdf