

Update from the Commons Registration Team

A report by the Head of Public Protection to Kent County Council's Regulation Committee on Friday 15th May 2015.

Recommendation:

I recommend that Members consider this report and note its content

Progress with Village Green applications

1. Members have requested that a summary of the current position of applications to register Town and Village Greens be provided at meetings of the Regulation Committee. A copy of the Schedule of Village Green applications is therefore attached at **Appendix A**.
2. Since the last Regulation Committee meeting, four applications to register new Village Greens have been considered at a meeting of the Regulation Committee Member Panel meetings held in early March, which resulted in the registration of four new Village Greens across the county.
3. In addition, a two-week Public Inquiry was held in February/March into the application to register land known as Chaucer Fields at the University of Kent site at Canterbury. The Inspector's report is awaited and the matter will be referred back to a meeting of the Member Panel for a final decision later in the year.
4. A Member Panel meeting is due to held on Tuesday 19th May, at which a further five cases will be considered.

Case law update

5. On 25th February 2015, the Supreme Court handed down its long-awaited judgement in the case of *R (Newhaven Port and Properties Ltd) v East Sussex County Council* [2015] UKSC 7, otherwise known as the 'Newhaven Beach' case. A full copy of the judgement is available at:
https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0102_Judgment.pdf
6. The case concerned an application by Newhaven Town Council to register an area of beach, known as West Beach at Newhaven, as a new Town or Village Green. The landowner, Newhaven Port and Properties Ltd, opposed the application but, following a Public Inquiry, the East Sussex County Council determined that the application site should be registered as a Village Green. The landowner successfully applied for a Judicial Review of the County Council's decision, with the High Court ruling in the landowner's favour, but that decision was overturned by the Court of Appeal and an appeal was made to the Supreme Court.
7. By the time the matter arrived at the Supreme Court, there were three key points to be considered:
 - (i) The nature of the public's rights over coastal beaches;
 - (ii) Whether Byelaws can give rise to an implied permission for public use; and
 - (iii) The issue of 'statutory incompatibility' – i.e. whether section 15 of the Commons Act 2006 can be interpreted so as to enable registration of land as a Village Green in cases where the registration would be incompatible with some other statutory function to which the land was to be put.
8. In regard to the first point, the Court noted that the state of the law regarding public rights over the foreshore (i.e. the area between the high water and low water mark) was

controversial and, whilst it was clear that there was normally 'a public right of navigation and of fishing in the sea and rights ancillary to it', it was much less obvious as to whether the public have a more general right of recreation on a beach. After reviewing the contrasting case law, the Court was reluctant, due to the very wide-ranging implications, to reach a definitive conclusion on the point (and indeed did not consider that it was necessary to do so for the purposes of the appeal).

9. The second point concerned the effect of byelaws in relation to Village Green applications. Normally, byelaws are used to seek to prohibit certain activities, but the question before the Court was whether a conditional ban on a particular activity could otherwise amount to an implied permission in regard to that activity. In the Newhaven case, the landowner argued that the existing byelaws which contained specific prohibitions on bathing in an identified area and on sports and games that impede the use of the harbour could both be read to imply that (a) bathing was permitted in all other areas and (b) recreational activities were permitted provided that they did not impede the use of the harbour. The Court agreed and, in doing so, found that recreational use of the beach had therefore taken place by virtue of an implied permission.
10. In respect of whether the byelaws needed to be displayed or otherwise brought to the attention of the public in order to be effective, the Court found that this was not so. It referred to the Supreme Court's decision in the Barkas¹ case (which concerned land that had been provided by a local authority specifically for the purposes of public recreation, thereby rendering use of the land 'by right' and not 'as of right') as authority for the proposition that it is not always necessary for the landowner to show that members of the public have had it drawn to their attention that their use of the land in question is by virtue of an implied permission.
11. The final point considered by the Court, which is very much a new issue insofar as Village Green law is concerned, was whether land is capable of registration as a Village Green if it is reasonably foreseeable that Village Green status would conflict with the future exercise of the landowner's statutory powers and obligations. The Court's view was that, where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use the land for defined statutory purposes, the Commons Act 2006 provisions do not enable the public to acquire by user rights that are incompatible with the continuing use of the land for those statutory purposes. As such, given the powers conveyed on the Port Authority to operate a working harbour, and the fact that Village Green status would make it an offence to develop the land or interrupt the use of it for recreational purposes, there was an obvious incompatibility in this case and, accordingly, the land was not capable of registration as a Village Green.
12. It should be noted that the Court was clear that ownership of land by a public body (such as a local authority) that may wish to develop the land in the future would not, of itself, be sufficient to create a statutory incompatibility. As such, the principle appears to have only limited applicability.

Recommendation

13. I RECOMMEND that Members consider this report and note its content.

Background documents:

Appendix A – Schedule of Village Green applications

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¹ *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31

**APPENDIX A:
Schedule of Village Green applications**

**Applications resolved by the Regulation Committee (Member Panel)
since last report (27th January 2015)**

Description	Parish	Member(s)	Outcome
Recreation Ground	Hildenborough	Mrs. V. Dagger	ACCEPTED and land registered as Village Green
Land at West Wood	Hildenborough	Mrs. V. Dagger	ACCEPTED and land registered as Village Green
Land known as the Old Putting Green	Ramsgate	Mr. A. Terry Ms. Z. Wiltshire	ACCEPTED and land registered as Village Green
Land adj to Shadoxhurst Village Green	Shadoxhurst	Mr. M. Angell	ACCEPTED and land registered as Village Green

Forthcoming Public Inquiries

Description	Parish	Member(s)	Details
None			

Outstanding applications to be resolved

Description	Parish	Member(s)	Status
The Downs	Herne Bay	Mr. N. Bond Mr. B. MacDowall	On hold
The Glebe Field	Goudhurst	Mr. A. King	To be referred to Member Panel on 19/05/15
Land at Coldblow Woods	Ripple	Mr. S. Manion	To be referred to Member Panel on 19/05/15
Chaucer Field (at the University of Kent campus)	Canterbury	Mr. G. Gibbens	Awaiting Inspector's report following Public Inquiry
Whitstable Beach	Whitstable	Mr. M. Harrison Mr. M. Dance	To be referred to Member Panel on 19/05/15
Land at Washford Farm	Kingsnorth	Mr. M. Angell	To be referred to Member Panel on 19/05/15
Land known as Marlowe Road Green	East Malling and Larkfield	Mrs. T. Dean	To be referred to Member Panel on 19/05/15