

Application to register land known as Hythe Green at Hythe as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on 27th February 2019.

Recommendation: I recommend that the applicant be informed that the application to register the land known as Hythe Green at Hythe as a Town or Village Green has not been accepted.

Local Member: Mr. M. Whybrow (Hythe West)

Unrestricted item

Introduction

1. The County Council has received an application to register land known as Hythe Green at Hythe as a new Town or Village Green from Mr. D. Plumstead ("the applicant") on behalf of the Shepway Environment and Community Network. The application made on 11th March 2016 was allocated the application number VGA667. 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 2014.
3. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Village Green where it can be shown that:
'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
4. In addition to the above, the application must meet one of the following tests:
 - **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or
 - **Use of the land 'as of right' ended no more than one year prior to the date of application**¹, e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).
5. As a standard procedure set out in the 2014 Regulations, the County Council must publicise the application by way of a copy of the notice on the County Council's website and by placing copies of the notice on site to provide local people with the opportunity to comment on the application. Copies of that notice must also be served on any landowner(s) (where they can be reasonably identified) as well as the relevant local authorities. The publicity must state a

¹ Reduced from two years to one year for applications made after 1st October 2013, due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013.

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, as the name suggests, of a recreation ground of 16.5 acres (6.7 hectares) in size situated immediately north of Hythe Bay Primary School, extending between its eastern boundary with St Leonard’s Road and its western boundary with St Nicholas Road in the town of Hythe. The land is an area of open space, fenced (partly by stone wall) around its perimeter with paths crossing through its centre installed by Hythe Town Council in the early 2000’s. It is predominantly grassed save for:
 - a. a fenced children’s play area to the north west;
 - b. a tarmacked area to the north which is used for public car parking (since 1966); and
 - c. an asphalt all-weather floodlit play area (installed in 2001) to the west.
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 recreational use of the land by local residents for a period in excess of twenty years.
9. Included were 44 user evidence questionnaires in support of the application. A summary of the user evidence submitted in support of the application is attached at **Appendix C**.

Consultations

10. Consultations have been carried out as required.
11. The local KCC member, Martin Whybrow, wholly supports the application and believes that the site meets the statutory requirement by virtue of having been used for in excess of twenty years by a significant number of inhabitants as of right in lawful sports and pastimes. Mr Whybrow further states he has lived in Hythe for more than twenty years and this land has been in continuous use, to the best of his knowledge, for all this time and for many decades before that.

Landowner

12. The application site is owned by the Hythe Town Council (“the Town Council”) and is registered with the Land Registry under title number K945878. The Town Council inherited local governance from Hythe Borough Council as part of Local Government reorganisation in 1972.
13. The Town Council has objected to the application for the reasons set out below.

Legal tests

14. 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, if not, has ceased no more than one year prior to the making of the application?*
 - (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'?*

15. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the *Sunningwell*² 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.
16. In this case, the application site forms part of an established recreation ground and, as such, there is no suggestion that any use of the land has been with force or in secrecy. However, in cases where land is owned by the local authority, it will be important to determine whether or not recreation use of the application site by the local inhabitants has been by virtue of any form of permission. Use which is in exercise of any permission (express or implied) will not be 'as of right'.
17. Local authorities have various powers to acquire and hold land for a number of different purposes to assist in the discharge of their statutory functions. For example, a local authority can acquire land specifically for the purposes of providing housing or constructing a new road. The mere fact that a local authority owns land therefore does not automatically mean that the local inhabitants are entitled to conduct informal recreation on it. However, local authorities do also have powers to acquire land for the purposes of public recreation, such as playing fields and parks. In those cases, the land is provided specifically for the purposes of public recreation.
18. In considering a Village Green application in relation to local authority owned land, it will therefore be important to identify the powers under which the land is held by the local authority: if the local authority already holds the land specifically for the purposes of public recreation, then use of the application site is generally considered to be by virtue of an existing permission and, hence, is not 'as of right'.
19. In this case The Town Council, as well as providing detailed reasoning for opposing the application, which is included within the main case file, has

² *R v. Oxfordshire County Council and another, Sunningwell Parish Council* [1999] 3 All ER 385

summarised its objection, as being made on the basis that users of the application site have not indulged in lawful sports and pastimes as of right but instead by right, by virtue of an historical covenant. Additionally, or alternatively, the Town Council considers that by hosting events (which it has detailed and described) on the application site and asserting a right to exclude the public from the land or parts thereof, it has interrupted user of the application site and evidenced an intention not to dedicate the application site for use as a Town or Village Green.

20. The application site was originally sea, then silted up and became beach. It has historically been owned by the Town Council and its predecessors (being known then as the Corporation). In 1853, plots of land adjoining the application site were sold to several private individuals. As part of that sale individuals were subject to a Covenant ensuring observation and compliance with conditions. One such condition stated *“The piece of land marked on the plan as Archery Arboretum cricket ground and Bowling Green is reserved by the Corporation for those purposes or for other similar uses for the amusement recreation or benefit of the public I perpetuity – the same will be forthwith enclosed..... No part of that piece of land is to be hereafter applied to building purposes”*
21. By further Deed dated 1862, this condition was strengthened by specific covenant.
22. Thus, it seems clear that the application site has been historically owned by the Town Council and both it and its predecessors have ensured recreational use by the public for that time. The application site continues to be provided by the Town Council as a recreation ground, and used as such by local residents, and there is nothing to suggest that it is no longer held by the Council for such purposes.
23. In *Beresford*³, the House of Lords considered the effect of local authority ownership on an application to register land as a Town or Village Green and Lord Walker said this: *“where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, 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”*.
24. More recently, in *Barkas*⁴, the High Court considered the effect of land that was laid out as a recreation ground by a local authority under section 80 of the Housing Act 1936. The judge held that the local authority had a power to provide a recreation ground and, if it did so, the public were legally entitled to use the land; it would be absurd to regard the public as trespassers on the recreation ground under those circumstances.
25. In this case, there is little doubt that the application site was originally acquired, and indeed continues to be held, by the Town Council specifically for the purposes of public recreation. Thirty-three of the witnesses attest to knowledge of a cast iron plaque erected in the northern boundary of the site which details the

³ *R(Beresford) v Sunderland City Council* [2003] UKHL 60 at paragraph 87

⁴ *R (Barkas) v North Yorkshire County Council* [2011] EWHC 3653 (Admin)

gift of the land by covenant in 1862 to the Town Council and the fact that by this gift the land is reserved for public recreation. Therefore, any recreational use of the land as has taken place has been 'by right' and not 'as of right'.

26. The fact also that the evidence presented shows the existence of relevant Byelaws is also strong evidence to support the fact the land has been held for the purposes of open space. In this respect, the Corporation of Hythe made specific Byelaws on the 18 April 1883 which were allowed (formalised) by the Local Government Board in May 1883; these Byelaws were made under Section 59 of the Hythe Improvements and Waterworks Act 1874 with respect to Public Pleasure Grounds of which grounds the green in question today forms part.

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

27. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. The Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'⁵.

28. The summary of evidence of use by local residents at **Appendix C** shows the activities claimed to have taken place on the application site. These include dog walking, playing with children, kite flying, ball games, cycling, picnics and jogging.

29. As such, it would appear that the land has been used for a range of recreational activities.

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

30. 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.

31. 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 Builders⁶ 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*'.

32. In this case, the applicant has stated on the application form the locality or neighbourhood relied upon in support of the application is South Ward, Hythe and

⁵ *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

⁶ *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

the applicant has attached a map to his application showing that area. A copy of this map is attached at **Appendix B**.

33. In light of the other issues arising in this case, it is not necessary to consider this point in detail, but it would not be unreasonable to assume that the relevant area in this case was the electoral South Ward of Hythe. An electoral Ward has been found acceptable in these circumstances and the majority of witnesses, who have submitted statements, appear to come from this area. In addition, the land is provided by the Town Council for its residents and all the user evidence questionnaires all come from residents of Hythe.

“a significant number”

34. 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, it is not a case of simply proving that 51% of the local population has used the application site; 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.

35. In this case, the evidence of use summarised at **Appendix C** indicates that the land has been in regular usage for recreational purposes. 35 of the users attest to having used the land on a daily basis, with several others (including those whose properties overlook the land) referring to having observed use by others on a daily basis. Statements such as *‘there was always someone else there when we visited’* appear on a number of occasions within the user evidence questionnaires and the general impression from the evidence as a whole is that the land has been used in a manner entirely consistent with its status as a recreation ground.

36. As such, there is little doubt that the land has been used by a significant number of the residents from within Hythe and/or the electoral Ward of South Hythe.

(d) Whether use of the land ‘as of right’ by the inhabitants has continued up until the date of application or, if not, ceased no more than one year prior to the making of the application?

37. The Commons Act 2006 requires use of the land to have taken place ‘as of right’ up until the date of application or, if such use has ceased prior to the making of the application, section 15(3) of the 2006 Act provides that an application must be made within one year from the date upon which use ‘as of right’ ceased.

38. In this case, the application is made under section 15(2) of the 2006 Act and there is no evidence that actual use of the application site for recreational purposes ceased prior to the making of the application. As such, this test is met.

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

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

39. 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 'as of right' did not cease prior to the making of the application in 2017; the relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 1996 to 2016.

40. The user evidence submitted in support of the application (and summarised at **Appendix C**) demonstrates that use of the application site has taken place in excess of the required twenty-year period. Accordingly, this test is also met.

Conclusion

41. In order for the application to succeed, all five of the legal tests set out above must be met; if one test fails, then the application as whole falls to be rejected.

42. There appears to be no dispute that the application site has been used for recreational purposes, without challenge, for a period in excess of twenty years continuing until (and beyond) the date of the application.

43. However, the crux of the matter is whether that use amounted to trespass by local residents (i.e. 'as of right') or whether it took place in exercise of an established right (i.e. 'by right'); the distinction between the two is critical to the success or otherwise of the Village Green application. In this case, the evidence very much suggests that the application site is under the ownership of Hythe Town Council and is reserved for the purpose of public open space. Deeds of 1853 and 1862 both refer to the land being reserved for public recreation and a relevant covenant (1862) was provided to ensure the provision of recreational use by the landowner. The current Registered Title shows that Hythe Town Council owns the land (although there is no current reference to the covenant within that document). The provision of Byelaws is further strong evidence to prove that the land has been held for the purpose of public open space as the byelaws would only be able to apply against and be enforceable in relation to the public open space land.

44. That being the case, regardless of whether any, or even all, of the other relevant tests are met, the fact that the application site appears to be held for the purposes of public recreation, both during the material period and for that matter for a very long time preceding that, presents a knock-out blow to the possibility of registering the land as a Village Green.

Recommendation

45. I recommend that the applicant be informed that the application to register the land known as Hythe Green as a Town or Village Green has not been accepted.

Accountable Officer:

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The main file is available for viewing on request at the PROW and 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 application form

APPENDIX C – Table summarising user evidence