

Application to register land at Bunyards Farm, Allington 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 Friday 15th September 2023.

Recommendation: I recommend that a Public Inquiry be held into the case to clarify the issues

Local Member: Mr. A. Kennedy

Unrestricted item

Introduction

1. The County Council has received an application ("the Application") to register an area of land at Bunyards Farm at Allington as a new Town or Village Green from Mr. C. Passmore, Mr. J. Willis, Mr. T. Wilkinson, Cllr. P. Harper, Mr. T. Walker and Mr. D. Edwards ("the Applicants"). The Application, made on 14th June 2021, was allocated the application number VGA687.

Procedure

2. The Application has been made under section 15 of the Commons Act 2006 ("the 2006 Act") and the Commons Registration (England) Regulations 2014 ("the 2014 Regulations").
3. Section 15 of the 2006 Act 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 period of at least six weeks during which objections and representations can be made.

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.

The application site

6. The land subject to the Application (“the Application Site”) consists of an area of land of approximately 37.5 acres (15 hectares), comprising formerly arable farmland, situated between Beaver Road at Allington and the Maidstone railway line.
7. There are no public rights of way crossing the Application Site, but the Applicant’s case is that access to it has been available from a number of points around the site.
8. It is to be noted that the Application Site shares its southern boundary with the administrative boundary between the boroughs of Tonbridge and Malling and Maidstone, albeit the site itself sits entirely within Tonbridge and Malling. Administratively, the site is situated within the parish of Aylesford (some distance away from the village of Aylesford itself), but geographically it adjoins to the residential area known as Allington (and indeed the use of the site has been almost exclusively by the residents of Allington).
9. The Application Site is shown in more detail on the plan at **Appendix A**. Photographs of the site are attached at **Appendix B**.
10. Members should be aware – for information only – that the entirety of the Application Site is the subject of a separate outline planning application for a large residential development (reference 22/00409/OEAO). That application is currently under consideration by the Tonbridge and Malling Borough Council (in its capacity as the Local Planning Authority). However, the planning application was submitted after the Village Green application, and has no bearing whatsoever upon the consideration of the Village Green application by the County Council.

The case

11. 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.
12. Included with the original application were 10 user evidence questionnaires from local residents setting out their use of the Application Site. A further 53 user evidence questionnaires in support of the application were subsequently provided by the Applicants. A summary of the user evidence submitted in support of the Application is attached at **Appendix C**.
13. The Application is made under section 15(2) of the 2006 Act (i.e. on the basis that recreational use of the Application Site has continued up until the date of the application) such that the relevant twenty-year period for the purposes of the Application is June 2001 to June 2021.
14. At the time of making the Application, the Applicants relied upon the “*Allington neighbourhood in the parish of Aylesford south of the railway line*” as the relevant ‘neighbourhood within a locality’ (as required by section 15 of the 2006 Act). However, an amendment was subsequently sought by the Applicants in this

regard, such that the “*Allington ward within the borough of Maidstone*” is now relied upon.

Consultations

15. Consultations have been carried out as required.

16. The Aylesford Parish Council wrote to express its full support for the application.

17. Mr. Andrew Kennedy (County Councillor for Malling North East), reported that, having spoken to local residents who have used the space for over 20 years, as well as Parish Councils and others about the application, he was convinced that there is a strong case to support the application. The nearby pub/restaurant is called ‘Poppy Fields’ in memory of the poppies that would cover this area, and it is an important green space in an overly developed area with poor infrastructure.

18. In addition, six messages of support were received from local residents.

Landowner

19. The entirety of the Application Site is registered to the Trustees of the Andrew Cheale Will Trust under Land Registry Title number K436532 (“the Landowners”). BDW Trading Ltd. have a legal interest in the land in the form of an option to purchase.

20. Objection to the Application has been received from DAC Beachcroft LLP on behalf of the Landowners and BDW Trading Ltd. (“the Objectors”) on the basis that the application fails to meet the requirements of section 15 of the 2006 Act for a number of reasons, and therefore should be refused on the following grounds:

- The application does not properly define the relevant neighbourhood/locality and is defective in this regard because it refers to administrative areas that lie within different districts;
- The Applicants have only submitted 10 user evidence questionnaires in support of the application and have therefore failed to demonstrate use of the application site by a ‘significant number’ of local residents;
- Throughout much of the relevant period, the application site was fenced and in active agricultural use (for the grazing of cattle, taking of a hay crop and grazing by horses) such that the land was securely fenced and any use of it has been in exercise of force;
- Since agricultural use ceased, the land has become overgrown to the extent of making it unsuitable for recreational purposes;

21. The objection is supported by three statutory declarations, from the Farm Manager (1998 to 2013), the former landowner’s son, and an agricultural contractor employed to undertake various activities at Bunyards Farm. The thrust of those declarations is that:

- The former Farm Manager states that, during the 1990s, the application site was used as a temporary holding facility for cattle and pigs for the Cheale Meats abattoir. This took place until 1998, from which time the land was used on an ad hoc basis for cattle grazing. In August 2003, approximately 25 to 30 cows were moved onto the land due to a grass fire at their previous location and they were there for approximately 4 weeks (during which time they were

visited daily for welfare checks) before being moved on. There was a fenced boundary along Beaver Road that was subject to frequent vandalism, and a secondary (inner) fence boundary that was kept secure to ensure the safety of the cattle (and their containment).

- The former landowner's son recalls that Bunyards Farm was acquired by the family in the 1970s as part of a wider network of farms involved in the breeding and sale or slaughter of cattle. His father was forced to give up farming in 2012 due to ill health and regular use of the land ceased from that time, after which it was used for the occasional grazing of horses. Between 2002 and 2006, this witness regularly drove along the boundary fence to tip/store horse manure; this provided a good opportunity to inspect the mainly post and barbed wire fence, which it was necessary to keep in good repair to prevent cattle straying. In 2014, the yard area and access road were sold for residential development; until this time it had not been possible to access the application site from this area because it was securely fenced.
- The agricultural contractor notes that he was employed by the former landowner on a daily basis to undertake field maintenance. In 2006, he took a hay crop from the land (which would not have been possible had use been as alleged by the Applicants) and in 2017 he applied heavy fertilizer and a thick mulch to the land (to control weeds) which would have lain on the surface for some time and been difficult and unpleasant to walk on.

Legal tests

22. 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'?

23. The statutory scheme in relation to Village Green applications is based upon the English law of prescription, whereby certain rights can be acquired on the basis of a presumed dedication by the landowner. This presumption of dedication arises as a result of acquiescence (i.e. inaction by the landowner) and, as such, long use by the public is merely evidence from which a dedication can be inferred.

24. In order to infer a dedication, use must have been '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 protest²: "*if, then,*

² *Dalton v Angus* (1881) 6 App Cas 740 (HL)

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"³. As such, if a landowner takes steps to indicate that he objects to informal use of his land (i.e. by disproving any acquiescence to the use), then that use will not be considered 'as of right'.

25. In this case, there is no suggestion that general recreational use of the application site took place secretly or in exercise of any specific permission granted by the landowner. However, the Objectors' submission is that use of the Application Site has been in exercise of force, and therefore not 'as of right'.
26. The Applicants' evidence is that it has been possible to access the Application Site from multiple points throughout the relevant period due to the poor maintenance of the fencing around the site. It is suggested that the landowner was clearly aware of public use of the application site because, by the Objectors' own acknowledgement, the fencing was frequently vandalised, and this supports the contention that local residents had unrestricted access to the Application Site.
27. However, the Objectors' position is that whilst the fencing was latterly not always kept in good repair, that was certainly not the case throughout the relevant period and the condition of the fencing only began to deteriorate after the land ceased to be used for the grazing of cattle from approximately 2012 (i.e. at least half way through the material period of 2001 to 2021). Until that time, the land was enclosed and fences were maintained when vandalised. Moreover, a 2009 Google Streetview image clearly shows an intact fence along Beaver Road at that time and any use of this 'access point' would therefore have been in exercise of force during the qualifying period.
28. It is to be noted that there is some suggestion from the Applicants that the cattle grazing took place on land to the north of the Application Site, close to the farm buildings where loading and unloading took place. The Objectors dispute this and contend that grazing took place over the whole of the Application Site and adjoining land. Indeed, one of the Applicants' own witnesses appears to confirm this, stating that "*farmer had cattle grazing on the land until the new Castor development commenced construction*" [NB the Castor Park development (situated to the north-east of the Application Site) was completed in late 2017]. Furthermore, aerial photography from the County Council's own records, attached at **Appendix D**, also appears to depict the presence of animals on the land in 2000 (one year prior to the start of the relevant period). On balance, therefore it appears probable that the Application Site was used for grazing during the material period.

Access to the application site from Beaver Road

29. Access to the application site from Beaver Road has been via a gap in the fence just to the south-west of the junction with Juniper Close. A Google Streetview image from August 2012⁴ shows this access point as a gap between a fairly

³ *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

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<https://www.google.com/maps/@51.2856003,0.4874027,3a,75y,256.04h,79.11t/data=!3m7!1e1!3m5!1sGXnAEQjSpCerVJhbb9qndA!2e0!5s20120801T000000!7i13312!8i6656?entry=ttu>

substantial chain-link fence and an adjacent post and barbed wire fence that is comparably more flimsy in appearance; the barbed wire is missing on one section of fence between two wooden posts and it appears from this image that it would have been possible for pedestrians to access the site at this point. However, the same Google Streetview image at this location dated April 2009 (mentioned above) shows several strands of barbed wire extending between the wooden posts, such that access is unlikely to have been readily available and, at the very least, a reasonable person approaching the land should have understood that the landowner was seeking to assert the boundaries of the land. A copy of the 2009 Google Streetview image is attached at **Appendix E**.

30. The Applicants' position is that, although this photograph purports to show the fence 'intact', it is clear that it would not have been sufficient to contain cattle, nor would it have been a barrier to access. However, the law does not require landowners to erect substantial fencing in order to keep the public out, and indeed this would be largely unachievable on agricultural land which often extends to hundreds of acres. Rather, the question is whether the landowner took any steps at any point during the relevant period to deter public access: where a landowner contests and attempts to interrupt such access, then he will not be acquiescing to recreational use. Indeed, as is noted above, for recreational use by local residents to qualify for the purposes of Village Green registration, it must have taken place in a 'peaceable and non-contentious' manner.
31. Further guidance on this particular issue is available in Gadsden and Cousins on Commons and Greens⁵ (the leading reference book on this area of law), which states that the erection of fencing is normally an indication that the landowner is attempting to prevent access, and that any person who crosses or breaks a fence is undertaking a forceful act that is not consistent with use being 'as of right'. It is suggested that "*subsequent users of the land, who may themselves have entered without direct force through a broken opening, will nevertheless also enter forcibly to the extent that they have knowledge that their entry is contested*".
32. In this case there is a very strong argument that the erection of barbed wire across a gap in the fence, at what appears to be waist height, ought to have been sufficient to indicate to anyone seeking access that such use was not being tolerated by the landowner. Indeed, a number of the Applicants' witnesses appear to accept that this was not a formal access to the land, noting: "*there was a wire fence that was continually broken down*", "*through the broken fence*", "*Beaver road broken fence*", and "*via gap in fence along Beaver Road... the fence was down every time I wanted access*". This is consistent with the recollections of one of the Objectors' witnesses who states that "*The Beaver Road boundary was always fenced but the fence was frequently vandalized and pulled down, it was usually the same part of the fence that was pulled down. I remember on numerous occasions having to pull the fence back up to maintain the boundary*".
33. The Applicants' submission is that "*residents were sometimes aware that there were remnants of a fence in places, but they took this as a boundary marker rather than something that was intended to restrict access to the public*". Aside from being an assumption in relation to the state of mind of the users, the

⁵ Cousins, E and Honey, R (2020) *Gadsden and Cousins on Commons and Greens* (3rd Ed.) Sweet and Maxwell (quote from paragraph 15.61)

Applicants' suggestion cannot be correct because it is clear that the action of stepping over 'remnants of fencing' cannot be considered 'peaceable and non-contentious'. That proposition might, potentially, be arguable had the position prevailed throughout the entirety of the relevant period, but in this case there is independent evidence available (in the 2009 Google Streetview image) to verify that the landowner made at least one documented attempt to secure the site during the relevant period.

34. Figures provided by the applicant suggest that 39 of the 63 users predominantly used the Beaver Road access point, with another 10 users relying on the Beaver Road access point in addition to another access point. It is considered that use of the land via this access point cannot be considered 'as of right', because it was facilitated as a result of repeated vandalism to the fencing and in obvious defiance of the landowner's attempt to secure the land. Accordingly, the use of the application site by these 39 witnesses is not considered to be qualifying use for the purposes of the Village Green application, and there is a question regarding the degree to which the use by the other 10 witnesses using the Beaver Road access point can be considered 'as of right'.

Access from other points

35. Unlike the Beaver Road access point (where a Google Streetview image is available), there is no independently verifiable evidence available in relation to the other alleged access points onto the Application Site.
36. The Applicants' case is that, in addition to Beaver Road, access to the Application Site was also available at various points via land (comprising pear orchards) to the south-west of the application site, and also from the north-eastern side of the application site (now the Godwin Road development). Those access points are shown on the plan at **Appendix F**. However, there also is some suggestion in the additional evidence provided by the Applicants' witnesses that some of these access points bore the remains of fencing, although it is not clear at what point in time these descriptions applied (i.e. whether the situation prevailed throughout the material period). For example, one witness describes the access point in the southern corner as "fence dilapidated chain link", whilst another notes that there was "trodden barbed wire" at the south-western gap, and a further witness recalls a "single strand barbed wire lying on ground" at the western access point (close to the railway line).
37. The Objectors' case is that the Applicant's evidence in relation to fencing appears to relate entirely to the period once use of the land for cattle grazing had ceased. During the period that the land was used for cattle grazing, the boundaries were securely fenced with cattle-proof fencing consisting of 3 or 4 strands of barbed wire (which is consistent with the references to barbed wire in the Applicants' evidence). It is not disputed that the fencing has been allowed to fall into disrepair following the cessation of use of the land for grazing in 2012, however this is during the latter part of the material period. One of the Objectors' witnesses, who refers to maintenance of fencing until 2013, does not recall any damage to the fence along the south-western boundary (in contrast to the Beaver Road access point which required frequent repair). The Objectors' position is that there was no access to the application site from the southern corner (close to Corben Close), or from Godwin Road (on the north-eastern side), until those developments were

completed during the latter part of the material period. The only access to the land in the vicinity of Goodwin Road prior to its development was via a farm access track, along which (according to the Objectors) there were locked gates and a 'private' notice.

38. After very careful and thorough consideration of the evidence provided by the parties, it has not been possible to reconcile the varying accounts and positions of the Applicants and the Objectors. Logic very much dictates that if, as the Objector suggests, the Application Site was used for grazing cattle (albeit on an ad hoc basis) until around 2012, then there would certainly have been periods - at least during the first half of the material period - when the land was securely fenced in its entirety. There is mention in the Applicants' evidence of cattle escaping on occasion, which suggests that the fencing did fail at times, but had the land not been secure during the times that the cattle were grazing then such escapes would have been a daily occurrence, which does not seem plausible. Moreover, during the periods of time when the Goodwin Road and Castor Park developments were in progress, those sites would necessarily have been securely fenced; none of the witnesses refer to this and it is unclear what the resultant impact was upon access to the application site.

39. Accordingly, there are a number of unanswered questions relating to access to the Application Site along the south-west and north-east boundaries. The conflict within the evidence provided by the parties, and the lack of independently verifiable evidence in relation to the other entrances, means that it is not possible to reach a definitive conclusion on whether the use of the Application Site made via access points other than Beaver Road can properly be considered 'as of right' throughout the material period (2001 to 2021).

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

40. 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*'⁶.

41. 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 overwhelming majority use of the Application Site has been for dog walking, but evidence questionnaires submitted in support of the application also refer to use of the site activities such as family walks, wildlife observation, fruit-picking, cycling and running.

42. The Objectors' position is that the overgrown nature of the site more latterly would necessarily have prevented some of the activities (e.g. running and cycling) from taking place, but this assertion is disputed by the Applicants.

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, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

43. In any application where walking is alleged to be the predominant recreational use of the application site, it will be important to be able to distinguish between use that involves wandering at will over a wide area and use that involves walking a defined linear route. The latter will generally be regarded as a 'rights of way type' use and, following the decision in the Laing Homes⁷ case, falls to be discounted. In that case, the judge said: *'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'*.
44. Indeed, the term 'walking' may connote a variety of different uses, not all of which (as noted above) may be qualifying use for the purposes of the Village Green application. Accordingly, it is not possible to conclude definitively on this point on the basis of the written evidence available.

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

45. 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.
46. 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'*.
47. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also be necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible than that of a locality, and need not be a legally recognised administrative unit. On the subject of 'neighbourhood', the Courts have held that *'it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood... The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning'*⁹.
48. In this case, the Application was originally made in reliance upon the "Allington neighbourhood in the parish of Aylesford south of the railway line". Following a submission from the Objectors that the locality relied upon was defective (because it referred to two different administrative areas that lie within different

⁷ *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70 at 79 per Sullivan J

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

⁹ *ibid* at 92

districts), the Applicants subsequently sought to amend the locality to rely upon the “Allington ward in the borough of Maidstone”.

49. The electoral ward of Allington is clearly a legally defined administrative unit and would therefore be a qualifying locality for the purposes of this application. The Objectors accept that the locality, as amended, has now been correctly identified.

“a significant number”

50. The County Council also needs to be satisfied that the Application Site has been used by a ‘significant number’ of the residents of the ‘neighbourhood within a locality’. 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’*¹⁰. Thus, what constitutes a ‘significant number’ will depend upon the local environment and will vary in each case depending upon the location of the application site.

51. In this case, the test in relation to ‘significant number’ needs to be viewed in the context of usage that was ‘as of right’ (because use that was not ‘as of right’ will not be qualifying use for the purposes of the Village Green application). As is noted above, a large proportion of the user evidence is considered to have taken place in a contentious manner, such that it is not ‘as of right’. As it has not been possible to reach a conclusion in respect of the degree to which access to the site took place ‘as of right’, this necessarily leaves a question as to whether the remaining qualifying use would have been sufficient to indicate to a reasonable landowner that the land was in general use by the community.

(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?

52. 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.

53. In this case, the Application is made under section 15(2) of the 2006 Act on the basis that use of the application site continued ‘as of right’ until the date of the application in 2021 (such that the relevant twenty-year period is 2001 to 2021).

54. Taking the witness questionnaires at face value, there is evidence of recreational use of the application site continuing until the date that the Application was made. However, as noted above, there is an unresolved question as to whether any access to the Application Site has taken place ‘as of right’, and the answer to that question is intrinsically linked to this particular test.

¹⁰ *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

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

55. 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 2021. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 2001 to 2021.
56. The user evidence submitted in support of the Application (and summarised at **Appendix C**) demonstrates that the recreational use is alleged to have taken place for a period in excess of twenty years. Of the 63 witnesses, one third claim to have used the Application Site for the full twenty-year period.
57. However, there is a question as to whether the land has been used in the requisite manner *throughout* the material period. As discussed previously, if the land was used for grazing cattle or horses (as is alleged by the Objectors) during any part of the material period, then any fencing secured for this purpose would necessarily have interrupted access to the Application Site (or parts of it).
58. There is also the matter of a hay crop referred to in the Objectors' evidence that is alleged to have been taken in 2006. The Objectors' suggestion is that if the land had been used as alleged, then the taking of a hay crop would not have been possible because the crop would have been trampled and ruined. However, the Applicants say that there is no evidence that the taking of the hay crop (or storing of bales) restricted access to the site or interfered with recreational use.

Conclusion

59. 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.
60. As is noted above, there is a serious dispute in this case as to the nature of the access to the Application Site. Although it seems clear that access to the application site via Beaver Road was contentious (and therefore not 'as of right'), there is insufficient evidence available regarding the other access points to the site and therefore the matter of whether access to the site as whole has been 'as of right' remains unresolved. Common sense dictates that, if the Application Site was used for grazing – even for only short periods during the relevant twenty-year period – then it seems probable that recreational use would inevitably have been interrupted (such that an application for Village Green status could not succeed). However, the Applicants dispute this and there does not appear to be any independently verifiable evidence available to resolve the questions of fencing and grazing. It would appear that the only way in which the application can be properly determined, is to consider in more detail the oral testimony of the relevant witnesses. This would also allow other issues, such as the impact of the hay crop, to be explored in further detail.
61. Indeed, in cases where there are conflicts in the evidence, there has been judicial support for the holding of a Public Inquiry: *'the registration authority has to consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case*

*where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration*¹¹.

62. Provision for holding a Public Inquiry is made in the 2014 Regulations; the process involves the County Council appointing an independent Inspector (normally a Barrister) to hear the relevant evidence both in support of and in opposition to the application, and report his/her findings back to the County Council. The final decision regarding the application nonetheless remains with the County Council in its capacity as the Commons Registration Authority.

63. Accordingly, it is considered that the most appropriate course of action in this case is for the matter to be referred to a Public Inquiry for further consideration of the outstanding issues.

Recommendation

64. I recommend that a Public Inquiry be held into the case to clarify the issues.

Accountable Officer:

Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk

Case Officer:

Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

APPENDIX A – Plan showing application site

APPENDIX B – Photographs of the application site

APPENDIX C – Summary of the user evidence

APPENDIX D – Aerial photograph of the application site dated 2000

APPENDIX E – Google Streetview image of Beaver Road access point from 2009

APPENDIX F – Plan showing alleged access points onto the application site

¹¹ *R (Whitney) v Commons Commissioners* [2004] EWCA Civ 951 at paragraph 66