



Report to: **Mike Eastwood**  
**Countryside Access Team Leader, for**  
**Approval of recommendation**

Date: **12 June 2017**

Title: **The Commons Act 2006**  
**Section 15 – new town and village greens**

**The Commons Registration (England)**  
**Regulations 2014**

**Application 2933**  
**0.59 hectares of land at Alverton Playing**  
**Field, Mount Misery, in the parish of**  
**Penzance**

Divisions Affected **Penzance Promenade**

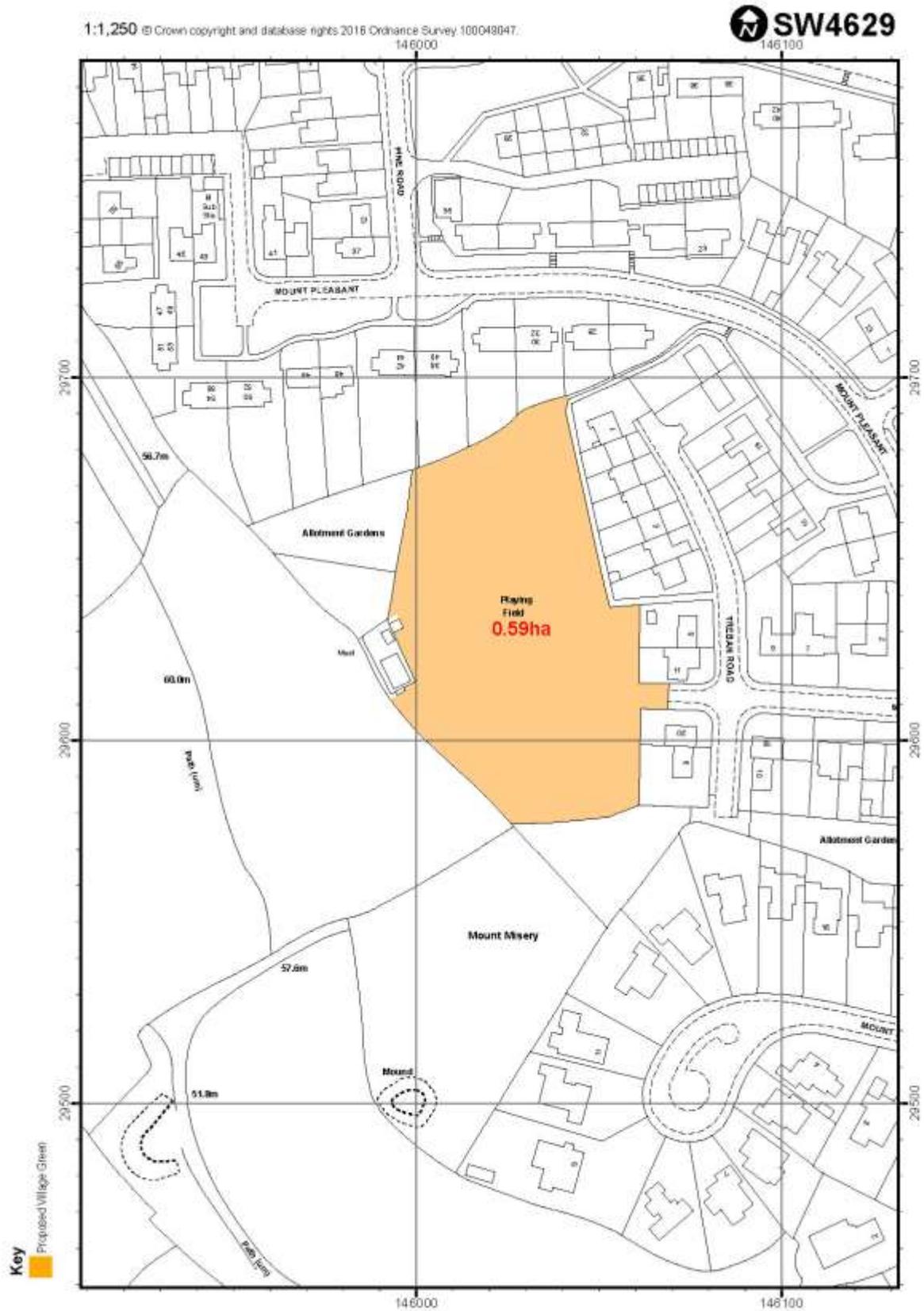
Author: **Martin Wright** Role: **Commons and Greens**  
**Registration Officer**

Contact: **Tel: 01872 224773 E-mail: [mwright@cornwall.gov.uk](mailto:mwright@cornwall.gov.uk)**

**Recommendation:**

To refuse to grant the application.

Application Map



## **Cornwall Council**

### **1. Introduction:**

Cornwall Council has a duty under Section 4 of the Commons Act 2006 to keep a register of common land and a register of town and village greens. Cornwall Council also has a duty under paragraph 26 of the Commons Registration (England) Regulations 2014 to determine applications to amend the registers of common land and town and village greens, unless the registration authority has an interest in the outcome of the application such that there is unlikely to be confidence in the authority's ability impartially to determine it.

Commons Registration Application No. 2933 was made by the Alverton Playing Field at Mount Misery Community Neighbourhood Forum seeking to register 0.59 hectares of land at Alverton Playing Field, Mount Misery, Penzance, as a town or village green under Section 15 of the Commons Act 2006.

This report examines the evidence for and against whether the application meets the legislative requirement for registration as a town or village green.

The report has been prepared to be presented to a delegated officer. The delegated decision is to consider whether to grant, refuse or refer the matter to an independent inspector to make a recommendation to grant or refuse the application.

### **2. Background and Corporate Objectives:**

The legislative background is for the applicant to show 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 twenty years, and have continued to do so at the time of the application, or have ceased to do so before the time of the application but the application is made within one year of the cessation.

### **3. Decision and Supporting Information (Including Options):**

The land is owned by Devon and Cornwall Housing Ltd and as such, all parties can be confident that the commons registration authority can impartially determine the application, and there is no need to refer the application to the Planning Inspectorate for determination, as would otherwise be the case.

The options available to the registration authority are to:

- i approve the application;
- ii reject the application; or

## **Cornwall Council**

iii refer the application to an independent inspector to recommend accepting or refusing the application.

It is recommended that the available evidence is sufficient for the Council to determine the application.

### **4. Contributions to Corporate Priorities:**

In determining the application the Council is performing its statutory duty set out in sections 6 to 17, 19 and 22 of the Commons Act 2006 to determine applications seeking to amend the registers of common land and of town and village greens.

### **5. Financial Implications and Budget:**

The process of determining whether the application is granted or refused is met from existing budgets.

### **6. Other Resourcing Implications:**

None.

### **7. Legal Implications:**

Cornwall Council has a statutory duty set out in paragraph 26 of the Commons Registration (England) Regulations 2014 to determine applications to amend the registers of common land and town and village greens.

### **8. Equality Impact Assessment:**

It is not considered that an Equality Impact Assessment is required or that there is likely to be any equality impact as a consequence of this decision.

### **9. Significant risks:**

Should the Council make a decision which is opposed there may be a risk of judicial review. These costs can be significant and can represent a financial risk to the Council, though this should not allow this information to influence the decision about whether the application should be accepted or refused, as the decision should be based on the evidence before it.

## **Cornwall Council**

### **10. Consultation including Overview and Scrutiny Committee and Local Member Representation:**

#### **10.1 Overview and Scrutiny Consultation/Comments:**

As this is a regulatory matter and not a matter of strategic importance the Environment Overview and Scrutiny Committee has not been consulted.

#### **10.2 Local Division Member Comments:**

Cllr Jim McKenna has been consulted. Whilst he would like to see the application succeed, he has asked that the Legal department of Cornwall Council confirms the recommendation for refusal on the 'by right' issue. This has been done.

#### **Appendices:**

None

#### **Background Papers:**

All papers relating to this application [No. 2933].

## **Cornwall Council**

### **11. BACKGROUND**

- 11.1 An Application was received on the 1st August 2016 from the Alverton Playing Field at Mount Misery Community Neighbourhood Forum for the registration of land as a town or village green under section 15 of the Commons Act 2006, for 0.59 hectares of land at the Alverton Playing Field, Mount Misery, Penzance in the County of Cornwall. The application form and map is shown as an appendix to this report.
- 11.2 Paragraph 16 of the Commons Registration Regulations 2014 requires an application to be made in accordance with, amongst other things, Schedule 4 of the Regulations. Section 9 of Schedule 4 of the Regulations refers to applications made under Section 15(1) of the 2006 Act.
- 11.3 The application is objected to by the owner of the land, Devon and Cornwall Housing Ltd (DCH).
- 11.4 The following describes where the application meets and does not meet the legislative requirements for registration as a town or village green. For an application to be successful it must meet all of the legislative requirements. Failure to meet one of the legislative requirements will result in the whole of the application being refused.

## **LEGISLATIVE REQUIREMENTS**

### **Section 15C of the Commons Act 2006**

#### **12 Registration of Greens - Exclusions**

**The right under section 15(1) to apply to register land as a town or village green ceases to apply if an event specified in the first column of the Table set out in Schedule 1A has occurred in relation to the land ("a trigger event").**

It is confirmed that both the Cornwall Council Planning Authority and the Planning Inspectorate were not aware of any such "trigger event" in place at the time the application was submitted, and therefore the application has not been rejected on these grounds.

### **Section 15(2) of the Commons Act 2006**

#### **13 The inhabitants of any locality, or of any neighbourhood within a locality**

The applicant states the locality or neighbourhood within a locality as being part of and adjoining the Alverton Estate, Alverton, Penzance.

The objector suggests the appropriate locality would be the polling district: Penzance Promenade.

The registration authority is of the view that the electoral ward of Penzance Promenade is a fair description of the locality.

#### **14 "A significant number"**

The application was supported by evidence questionnaires from 27 residents. Of these, four questionnaires are completed from people outside the locality described at paragraph 12 above. It is considered that the remaining 23 questionnaires represent a significant number of the inhabitants of the locality, rather than from a few individuals.

#### **15 Have indulged as of right**

Everyone completing an evidence questionnaire failed to confirm whether they were of the view that access to the land was 'as of right'.

The objector states that use of the Alverton playing field is 'by right' by virtue of section 80 of the Housing Act 1936. A Conveyance of the northern part of the application land dated 30<sup>th</sup> June 1948 shows that that part was purchased pursuant to Part V of the Housing Act 1936 by the

## Cornwall Council

Mayor, Aldermen and Burgesses of the Borough of Penzance, a predecessor of Penwith District Council, who transferred the land to DCH. A Conveyance of the southern part of the application land dated 1<sup>st</sup> November 1948 shows that that part was purchased pursuant to Part V of the Housing Act 1936 by the Mayor, Aldermen and Burgesses of the Borough of Penzance, and via the same process as above is now owned by DCH.

Defra's Guidance to commons registration authorities in processing new event applications, November 2015, states:

"land use cannot be 'as of right' if the users have a statutory or other legal right to use the land. Examples include ... Open Spaces Act 1906, section 10 ..."

Case Law – Vivian Chapman QC and Paul Wilmshurst of 9 Stone Buildings, in their publication 'Town and Village Greens, a practical handbook, 2<sup>nd</sup> edition 2014' states: "It has been held by the Supreme court in the *Barkas case* (May 2014) that where land has been lawfully allocated to the purpose of public recreation the public can be fairly said to have a right to go onto such land. It will not be available for registration as a green".

Section 80 of the Housing Act 1936 provides that the consent of the Minister has been obtained. A 1952 Alverton Estate plan entitled 'Borough of Penzance – Post war housing' carries the official stamp and signature of the Minister of Housing and Local Government, with the application land described as 'Recreation'.

Therefore it appears that any use of the land by a significant number of the inhabitants of the locality for lawful sports and pastimes on the land, has crucially been 'by right' and not 'as of right', and consequently the application fails to meet this requirement of the legislation.

### **16 In lawful sports and pastimes**

Residents have claimed to have used the land for a variety of sports and pastimes, including bird watching, blackberry picking, CN4C children's club activities, football, picnics, wildlife, yoga and walking with or without dogs.

### **17 On the land**

The above-mentioned sports and pastimes are confirmed to have taken place on the land the subject of the town and village green application.

### **18 For a period of at least twenty years; and continue to do so at the time of the application, or they ceased to do so before the time of the application but the application is made within one year of the cessation.**

The evidence questionnaires confirm that use continued up to the end of July 2016.

Whilst not all the evidence questionnaires cover the whole of the twenty year period, taken together they do.

**19 Representations**

The Penzance Town Council has written in support of the application.

**20 Method of Determining Application**

The Commons Regulations (England) Regulations 2014 states that:

*27(1) The determining authority must, in determining any application or proposal, take into account:*

*(d) any oral representations made by any person in accordance with paragraph (7)*

*27(6) Paragraph (7) applies in relation to any application which the determining authority decides to determine without holding a public inquiry or hearing in accordance with regulation 32.*

*27(7) the determining authority:*

*(a) May not refuse an application without first offering the applicant an opportunity to make oral representations; and*

*(b) May not grant or refuse an application without first offering any person (other than the applicant) for whom the grant or refusal would represent a determination of that person's civil rights an opportunity to make oral representations.*

**21 Oral Representations**

A hearing was held on 1<sup>st</sup> March 2017 at St. Johns Hall, Penzance. The applicant, Cllr Jim McKenna and representatives of Devon and Cornwall Housing Ltd attended. The commons registration authority explained the reasonings behind the draft decision, upon which this report is largely based, and agreed that input from the Legal Department would be obtained before a final determination of the application be issued.

**22 Legal Department**

The Legal department of Cornwall Council is satisfied that access to the application is by right, rather than as of right, for the reasons explained in paragraph 15 above.

**23 Conclusion**

For an application to succeed it must satisfy all of the legislative criteria for registration as a town or village green. An assessment of the evidence leads to the conclusion that access to the land has not been 'as of right' and therefore, the application should be refused.

**24 DECISION**

On the balance of probabilities the criteria for the registration of the application land as a town or village green have not been satisfied and the application is not granted.

Name: *Mike Eastwood*  
Title: Countryside Access Team Leader  
Date: 12 June 2017

**25 Supporting Information**

Application 2911

**26 Background Papers:**

The Commons Act 2006:  
<http://www.legislation.gov.uk/ukpga/2006/26/contents>

The Commons Registration (England) Regulations 2014:  
<http://www.legislation.gov.uk/uksi/2014/3038/contents/made>

Guidance to commons registration authorities and the Planning Inspectorate for the pioneer implementation (version 2.0, December 2014) (Defra)  
<https://www.gov.uk/common-land-management-protection-and-registering-to-use>

(Scroll down to heading: Pioneer documents including guidance and statutory instruments)