REGULATORY BOARD
MODIFICATION ORDER PANEL
DELEGATED REPORT

COMMONS REGISTRATION ACT 1965

APPLICATION FOR REGISTRATION OF A NEW TOWN OR VILLAGE GREEN AT COWLANDS CREEK, KEA, TRURO (APPLICATION 2701)

REPORT OF COUNTY SOLICITOR (REF: CT/17016)
CORNWALL COUNTY COUNCIL
COUNTY LEGAL SERVICES
COUNTY HALL
TRURO
CORNWALL
TR1 3AY

JANUARY 2009

List of documents

1 Application CR Form 30 date 14 December 2006

2 Objection from Guild of St James dated 05 October 2007

3 Objection from Guild of St James dated 19 October 2007

4 Statutory declaration by Timothy Cotton dated 18 May 2001

5 Aerial photographs dated
- 09 August 2005
- 25 July 1999
- 13 June 1996
- 20 May 1988

6 Evidence Questionnaires:
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1. The Application

On 14 December 2006 the Kea Parish Council (c/o Mrs G B Lewis, Clerk of the Council) applied to the Cornwall County Council to register land at Cowlands Creek as a new town or village green pursuant to section 13 of the Commons Registration Act 1965.

A plan accompanying the Parish Council's application form shows the boundaries of the application land. The application form states that the application land became a green on 14 December 2006 by "twenty years [+] use by a significant number of inhabitants of any locality or of any neighbourhood within the locality for indulgence in lawful sports and continue to do so".

The application was publicised and objections were received from Mr Charles Fowler on behalf of the Guild of St James, (the company that at the time was the registered proprietor (possessory title) of the land subject to the application) [docs 2, 3, and 4].

Notices were also posted on site in accordance with the requirements of the legislation.

2. The Land

The land claimed to have become a town or village green lies at the end of Cowlands Creek, adjacent to the C class road passing through Cowlands and opposite the property known as "Benallack". It comprises approximately 38 square metres (the area claimed does not include the foreshore) and the photographs submitted with the application show the area as grassed. The land is shown edged red on the Plan "A" attached to the the application [doc 1]. The area of land can also be seen on the various aerial photographs [doc 5].

Access to the land can be gained from the public highway. A low wall forms the majority of the boundary with the highway, there being a gap in that wall wide enough to provide access for vehicles.

Footpath number 12 runs down to the property known as Benallack but does not connect to the highway.

3. The User Evidence

It should be noted that the witnesses have not been interviewed. The information has been taken from their forms of evidence which have been signed by each witness that they certify to the best of their knowledge and belief that the facts stated are true.

The application is accompanied by 34 evidence forms [Doc 6]. The evidence given by each user can be summarised as follows (reference should be made to the complete forms)

<u>No 1. Mr P A Johnstone</u>

Resident at Old Kea, 2.5 miles from the application site.
Used land for fishing, purchase of fruit visiting local people.
Not challenged or sought or granted permission.

<u>No 2. Mrs Brenda Old</u>

Resident at Cowlands since 1989, metres from the application site.
Refers to footpath opposite quay.
Used land for meeting, feeding wildlife and family play.
States family were owners of the property Benallack, but quay was common land from 1937 to 1985.
Not challenged or sought or granted permission.

No 3. Stanley Graham Brown

Resident at Coombe, 0.75 miles from the application site.
Refers to path opposite quay.
Used land for picnic.
Not challenged or sought or granted permission.

No 4. Mrs C K Bailey

Resident at Coombe, 0.75 miles from the application site.
Used land for resting and enjoying the view.
Not challenged or sought or granted permission.

No 5. John Bailey

Resident at Coombe, 0.75 miles from the application site.
Claims use only until 1986, for repair etc of boat
Refers to access through gap from highway.
Not challenged or sought or granted permission.

No 6. Mrs M Pascoe

Resident at Coombe, 0.75 miles from the application site.
Used land for the view and wildlife.
Not challenged or sought or granted permission.

No 7. Mary Davies

Resident at Playing Place, 2 miles from the application site.
Used land for rest, the view and birdwatching.
Not challenged or sought or granted permission.

No 8. Mr Laurence Davies

Resident at Playing Place, 2 miles from the application site.
Used land for resting, the view and birdwatching.
Not challenged or sought or granted permission.

No 9. Mrs Moira Gunn

Resident at Cowlands Creek, metres from the application site.
Claims access through opening in roadside wall.
Used land for to sit and play with children.
Not challenged or sought or granted permission.

No 10. Andrew John Gunn

Resident at Cowlands Creek, metres from the application site.
Used land for access to creek and for playing with children.
Not challenged or sought or granted permission.

No 11. David Andrew Gunn

Resident in Birmingham since 2000. Address in Cowlands Creek to 2000 is metres from the application site. Resident at Cowlands Creek 4-6 weeks a year from 2000 to 2006.
Refers to no barrier from the public road.
Used land for access to creek and for "chilling" on the quay.
Not challenged or sought or granted permission.

No 12. John Paul Gunn

Resident in Surrey since 1998. Address in Cowlands Creek to 1998, metres from the application site. Resident at Cowlands Creek 2-4 weeks a year from 1998 to 2006.
Used land to access creek.
Not challenged or sought or granted permission.

No 13. Miss Claire Elizabeth Gunn

Resident at two addresses in Cowlands Creek during the relevant period, metres from the application site.
Refers to public footpath starting/ending opposite the quay.
Used land to admire the view, take photos, dive/swim and crabbing/fishing.
Claims access through the gap in the wall or from the creek.
Claims [owner] has not challenged use. Not sought or granted permission.
Photographs dated 2006 show no obstruction to use (save for stone wall).

No 14. Terence Randolph Gunn

Resident at two addresses in Cowlands Creek during the relevant period, metres from the application site.
Used land for mooring his boat.
Claims access from foreshore or across wall.
Not challenged or sought or granted permission.

No 15. Mrs Winifred Clarinda Gunn

Resident at two addresses in Cowlands Creek during the relevant period, metres from the application site.
Refers to public footpath coming onto the highway.
Used land to admire the view.
Claims access through a gap in (the County Council) stone wall. Refers to maintenance of the stone wall by the County Council.
Not challenged or sought or granted permission.

No 16. Lester Paul Gunn

Resident at Feock, 2 miles from application site.
Used land to launch boats and "general local amenity use".
Claims access through open entrance from road.
Not challenged or sought or granted permission.

No 17. Susan Farmer

Resident at Playing Place, 2 miles from application site.
Used land to look at the view and for family play.
Not challenged or sought or granted permission.

No 18. Paul Farmer

Resident at Playing Place, 2 miles from application site.
Used land to watch wildlife.
Claims access from foreshore and through gap in low wall.
Claims current owners of property have seen him use the quay and have not complained or commented.

No 19. Mavis Mansell

Resident at Playing Place, 2 miles from application site.
Claims use to 2000.
Used land for brownie picnics and for buying fruit.
Claims access by stepping through from road.
Not challenged or sought or granted permission.

No 20. Joan Humphries

Resident at Playing Place, 2 miles from application site.
Refers to footpath coming down to the quay.
Used land for painting, birdwatching, picnics, crabbing.
Claims access from foreshore, river and road.
Not challenged or sought or granted permission.

No 21. Robert William Humphries (Revd)

Resident at Playing Place, 2 miles from application site.
Used land for birdwatching, admiring the view, sketching and crabbing.
Claims access from foreshore and through gap in low wall.
Not challenged or sought or granted permission.

No 22. Mrs Mary Arundell Mayes

Resident at Feock Cowlands Creek, 40 metres from the application site.
Infrequent use to feed ducks and view river.
Claims access through wide gap in wall.
Not challenged or sought or granted permission.

No 23. Mrs Bam Goodeworth?

Resident at Cowlands Creek, 40 metres from the application site.
Used land for fishing and dogwalking.
Not challenged or sought or granted permission.

No 24. Dr Margaret Cogan

Resident at Penlewey, Feock since 1991, 0.5 miles from application site.

Claims use since 1991 for rest, enjoying the area, and birdwatching.
Not challenged or sought or granted permission.

No 25. Angela Currie

Resident at Feock, 1 mile from application site.
Used land to picnic, admire the view, and birdwatch.
Not challenged or sought or granted permission.

No 26. Beryl Mary Eddy

Resident at Feock since 1986, 2.5 miles from application site.
Used land as natural stopping place, to rest, sketch and picnic.
Refers to sitting on wall, though not clear whether reference to wall by roadside or quay wall.
Claims entire are subject to public access.
Claims access via wide opening to roadway or over small wall.
Never challenged or sought or granted permission.

No 27. Malcolm Eddy

Resident at Feock since 1986, 2.5 miles from application site.
Used land to rest, admire the view, and picnic.
Claims access through wide gap in wall.
Not challenged or sought or granted permission.

No 28. Diane Light

Resident at Goonpiper since 2001, 1.5 miles from application site.
Used land from 2001 to rest, admire the view, and birdwatching.
Refer to land being at the end of a public path.
Claims access to land is open.
Refers to building of new house, stating area all covered with building materials.
Not challenged or sought or granted permission.

No 29. Dudley George Light

Resident at Goonpiper since 2001, 1.5 miles from application site.
Used land from 2002 to admire the view, dog walking and birdwatching.
Refer to land being at the end of a public path.
Claims access from open gap from road.
Refers to building work on land, stating area was covered with building materials.
Not challenged or sought or granted permission.

No 30. Geoffrey Trebilcock

Resident at Feock, 1 mile from application site.
Used land up until 1997. Claimed use for play.
Not challenged or sought or granted permission.

No 31. Mrs Diana Wallis

Resident at Feock, 1.5 miles from application site.
Used land to enjoy the views and for birdwatching.
Not challenged or sought or granted permission.

No 32. Mrs Gloria Hill

Resident at Pulla Cross since 1986, 5 miles from application site.
Used land for birdwatching and dogwalking.
Not challenged or sought or granted permission.

No 33. Mr T I L Hill

Resident at Pulla Cross since 1986, 5 miles from application site.
Used land to enjoy the views and for birdwatching.
Not challenged or sought or granted permission.

No 34. D Truscott and family.

Resident in Truro since 1986, 5 miles from application site. Previously resident in Feock.
Used by family through the generations (over 100 years).
In accompanying letter claims used by community as well as the public at large.
Continued to use the quay since move in 1986.
Uses of land include birdwatching, painting, picnicking, fishing, family use.
Not challenged or sought or granted permission.

Evidence for the Landowner / Objector

The registered proprietor of the land (with possessory title) was, until 01 August 2008, the Guild of St James (Partnership) Limited under title number CL228199. The sole director, Mr Charles Fowler has submitted objections to the application.

The objections are set out at Docs 2 and 3.

The objector points out that the applicant claims usage since 1940, yet the Quay was not registered as a village green during the initial registration period expiring on 31 July 1970.

The objector believes that the quay is not a traditional village green, saying that it is of a small size and is not what would usually be described as a village green and that there are other quays held privately that would be more suitable as village greens.

The objector contests the claimed locality. He suggests the locality is solely the Parish of Kea and (by implication) hence only the evidence submitted by those witnesses living in the Parish of Kea should be considered.

The objector claims that the quay has not been used as of right. He acknowledges that the quay is not often enclosed or fenced such as to prevent access. He accepts that there has been some sporadic trespass, but considers this trespassing not to have carried the appearance of user as of right.

The objector refers to being challenged on several occasions when entering the quay himself in the late 1970s and 80s.

The objector refers to the Statutory declaration of Timothy Cotton (see below) [Doc 4].

The objector states that between 2005 and 2006 the quay was used for storing various items of building equipment and for approximately a 9 month period a klargester sewerage treatment plant. He states that during that period of time there were no complaints received from local residents about the use of the quay. He believes that this shows that the local residents deferred to his use of the quay and that their use was obstructed, interfered and interrupted.

The objector states that he has attempted to erect signs and barriers to entry but that these have been removed on each occasion.

The objector does not consider that there has been 20 years continuous user without interruption.

The objector submitted 10 photographs said to be taken in 2001. All of these photographs show the quay bounded on the side of the road by a low stone wall. Eight of the photographs show the majority of quay being enclosed by a chain link attached to small granite pillars. The vehicular entrance is obstructed by the same chain link. However, two of the photographs show the same granite pillars without the chain link fence, with one of those photographs showing the entrance to the quay obstructed by a chain link.

The objector commented on the submitted witness statements in a letter dated 19 October 2007. He claims that the locality or neighbourhood within a locality is not certain. He claims that the number of users in the claimed locality (Parish of Kea) is not significant. It is claimed that the witness statements completed by the residents of the Parish of Feock are not relevant as they are not inhabitants of the Parish of Keas or of any neighbourhood within the Parish of Kea.

The objector claims that the witness evidence is not sufficient to amount to sport and pastimes on the quay. He refers to the use as short-term and sporadic.

The objector states that none of the witness evidence acknowledges the disruption of user caused by the use of the quay during the building works on the nearby property of Benallack.

The objector states that there is no secondary evidence to support the claims in the witness evidence.

Other evidence

The objector produced a copy of a statutory declaration dated 18 May 2001 and made by Timothy Cotton, a former owner of 'Benallack' [Doc 4].

In the statutory declaration Mr Cotton states that he occupied the property from 1985. He states that since the Cottons made use of the quay it had been closed off from the road by a small barrier, for about 10 years made of wood and currently [2001] by a small plastic chain and further that no other person used the land regularly without his parents' permission. He states that his parents used the land to moor and store boats.

The County Council has aerial photographs of the site taken on 20/05/1988, 13/06/1996, 25/07/1999, 09/08/2005 [Doc 5].

Applicant's response to the objector's comments (summary – for full response see Doc 7)

The applicant considers that it is sensible to have some kind of barrier between the quay and the highway and reasserts that noone has ever been challenged entering the quay, nor sought permission to enter to the quay.

The applicant considers that the objector's use of the quay for the storage of building materials is immaterial and is sure that the residents would not have been so small minded as to challenge such use. The applicant recalls a time when CORMAC also used the quay to store plant etc.

The applicant considers that there are many other people who could state usage but are not contactable.

The Law

The old statute (The Commons Registration Act 1965 (the 'Act')) on village greens has recently been repealed and a new statute (The Commons Act 2006) has now come into force. However, the transitional provisions contained within Article 4 of the Commons Act 2006 (Commencement No.2, Transitional Provisions and Savings) (England) Order 2007 mean that this application should be considered as if the old legislation had not been repealed.

The Act provided for each registration authority to maintain a register of town or village greens within its registration area. There was a period expiring on 31st July 1970 for the registration of greens. By s1(2)(a) of the 1965 Act, no land which was capable of being registered as a green by the end of the original registration period "shall be deemed to be…a town or village green unless it is so registered".

The quay was not registered as a village green within the period expiring on 31 July 1970. Case law is clear that the effect of this period is that no new applications can be made on customary usage, but that new claims may be made on the basis of 20 years user (see below).

Section 13 of the Act provides for the amendment of that register where any land becomes a town or village green after the end of the original registration period.

Other than by allotment (not relevant in this case) land can only become a town or village green after the expiry of the original registration period by prescription, if it falls within s22(1A) of the Act:-

"…land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either (a) continue to do so, or (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

Regulations were made which came into force on 6 April 2007, but at the time of the application no such regulations had been made and therefore the application must be considered without reference to (b).

The Legal Issues

The main legal issues that have been decided by the courts are as follows:

What is a town or village green?

A town or village green is land which is subject to the right of local inhabitants to enjoy general recreational activities on it. Activities are not limited to those which have been historically enjoyed.

What is the effect of registration?

The effect of registration can be summarised as follows:

- The fact that land is registered as a green is conclusive evidence that it was a green as at the date of registration.
- The fact that land is not registered as a green is conclusive evidence that it is not a green
- The House of Lords held in **Oxfordshire County Council v Oxford City Council &anor (2006)** **(**the ***Trap Grounds*** case) that the fact that land is a registered green (a) gives local people recreational rights over the green and (b) subjects the land to the protective provisions of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876.

What is the meaning of the CRA 65 definition as amended by CROW 2000?

The meaning of the definition contained in the Commons Registration Act 1965 as amended by the Countryside and Rights of Way Act 2000 has been extensively considered by the courts.

Land…

The Act defines land as including land covered by water. There is no reason for the quay not to be considered 'land'.

Use for not less than 20 years

Period of use

The application is for land which falls under Section 22 subsection 1A of the Act and the use as of right must therefore be continuing up to the date of the application (para 44 and 69 of *Oxford County Council v Oxford City Council* [2006 WL 1333361] per Lord Hoffman.

Hence, the applicant must therefore prove continuous use by the public as of right for the period of twenty years prior to the date of the application, i.e. 15 Dec 1986 to 14 Dec 2006. Please see further the discussion on user as of right below.

Locality or neighbourhood within a locality.

Locality is a matter of fact for the registration authority[1]. The proposition of a locality by either the applicant or the objector may be of assistance, but is not determinative of the matter[2].

[1] See para 142, 143 *Laing*
[2] See para 143 *Laing*

A “locality” cannot be created by drawing a line on a map[3]. A “locality” must be some division of the county known to the law, such as a borough, parish or manor[4]. An ecclesiastical parish can be a “locality”[5] but it is doubtful whether an electoral ward can be a “locality”[6]. It will be seen that the courts have adopted a very narrow construction of “locality” which catches out many lay applicants for registration of new greens. It is, however, not necessary that the green is used exclusively by the inhabitants of the relevant locality. It is enough if it is used “predominantly” by them[7].

NOTE: The approximate location of each of the witnesses submitting an Evidence Questionnaire for the applicant is shown in document 8 (with parish boundary marked)

In *Edwards v Jenkins* [1896] 1 Ch 308, 3 parishes were held not to be a “locality” (para 11 *Oxford*), but in *New Windsor Corpn v Mellor* [1975] Ch 380 – Lord Denning disagreed, “so long as the locality is certain, that is enough” [8].

The term “neighbourhood within a locality” is discussed in *Oxford*[9] - "Any neighbourhood within a locality" is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries. I should say at this point that I cannot agree with Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975 that the neighbourhood must be wholly within a single locality. That would introduce the kind of technicality which the amendment was clearly intended to abolish. The fact that the word "locality" when it first appears in subsection (1A) must mean a single locality is no reason why the context of "neighbourhood within a locality" should not lead to the conclusion that it means "within a locality or localities". (obiter Lord Hoffman).

Hence although the “locality” must be singular a “neighbourhood within a locality” can be within localities (plural).

A “neighbourhood” need not be a recognised administrative unit. A housing estate can be a neighbourhood[10]. However a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness[11].

What is the “locality” and “neighbourhood within a locality” for this application?

The locality claimed in the application is “Cowlands Creek, Parish of Kea”. Your Officer does not consider that Cowlands Creek can amount to a locality as it is not a recognised administrative unit. As above, the locality referred to in the first part of subsection 1A must be a recognised administrative unit and cannot be created by drawing a line on a map.

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3 R (Cheltenham Builders Ltd) v South Glos. DC [2004] 1 EGLR 85 at paras 41-48

4 Ministry of Defence v Wiltshire CC [1995] 4 All ER 931 at p 937b-e, R (Cheltenham Builders Ltd) v South Glos. DC at paras 72-84 and see R (Laing Homes Ltd) v Buckinghamshire CC [2003] EWHC 1578 Admin at para. 133

5 R (Laing Homes) Ltd v Buckinghamshire CC, para 151

6 R (Laing Homes) Ltd v Buckinghamshire CC

7 Sunningwell at p. 358B

8 see para 11 *Oxford*

9 see para 27

10 R (McAlpine) v Staffordshire CC

11 R (Cheltenham Builders Ltd) v Sth Glos. CC at para. 85

To your Officer it seems perverse for the locality to be restricted to solely the Parish of Kea. To do so would, in effect, exclude the evidence of use by all those persons living south of the parish boundary, some of whom are actually residents of the hamlet of Cowlands and are only a matter of metres from the quay, but would include some persons living in the settlement of Saveock some 8km away (for illustrative purposes the furthest settlement in the parish has been selected). As a further illustration, if the locality were determined to be the Parish of Kea, the evidence of Mrs Mary Arundell Mayes (no.22) approximately 60 metres from the quay must be discounted, yet the evidence of Ms Joan Humphries of Penhalls Way, Playing Place (no.20) approximately 1.8km from the quay would be taken into account.

(Note: At its closest point the quay is only approx 6.5 metres from the parish boundary.)

It is claimed that the quay once formed part of the manor of Trelissick. The boundaries of a manor may form a "locality", however in this case, the application for the registration of a village green due to the 20 year rule, it is not considered that the use of a long unused manor boundary (which, in any case, is unknown to your Officer) is appropriate in these circumstances.

It is noted that at this location the ecclesiastical parishes mirror the parishes for local government purposes.

Your Officer therefore considers that the only sensible "locality" for the purposes of the first part of subsection 1A is the District of Carrick.

Your Officer notes that the case of *McAlpine* is authority for considering a housing estate may be a neighbourhood within a locality.

Your Officer considers that in the case of this application, the hamlet of Cowlands is the "neighbourhood within a locality".

Despite the various claims in the evidence questionnaires, your Officer doubts that any larger area can be considered to have the requisite degree of cohesiveness to form a neighbourhood within a locality for the purposes of subsection 1A.

NOTE: Your Officer has from this point onwards considered this application on the basis of the neighbourhood within the locality being Cowlands. Your Officer has not referred to the "locality" of the District of Carrick as it is not considered that the use of the "locality" as opposed to the "neighbourhood within a locality" makes any material difference in the final determination of this application.

Although consideration has been given to all of the Evidence Questionnaires, in terms of "lawful sports and pastimes" and "significant number", this application is determined only on the evidence contained in Questionnaires, nos 2, 9-15, 22 and 23, as these are the only applications within the "neighbourhood".

The two evidence forms submitted by persons resident in Pulla Cross (nos 32 and 33) are not considered to be made by persons inhabitant in the "neighbourhood within the locality" at any time during the 20 year period required.

For the same reason the evidence form (no 34) of Truro Vean, Truro has been discounted.

Lawful sports and pastimes…

Various activities are described by the evidence questionnaires of those persons within the "neighbourhood", including picnicking, playing and resting.

It is your Officer's opinion that the usage stated in some of the evidence forms can considered to be a lawful sport or pastime. Your Officer refers to the decision in the matter of the Foreshore on east bank of the River Ouse, Naburn, Selby District, North Yorks Ref no: 268/D/449 (p1312) i.e. that "idling by the river" may be a pastime.

Your Officer also recalls the case of *Ynys Mons* where a rock used to moor boats was held to be a village green. However, in this case it is not considered that the circumstances are analogous to those in *Ynys Mons*, here the mooring of boats is not claimed to have occurred over the full area of the application (although it is accepted that there may be evidence of use of part, it is not clear what that part is) and, in the context of the claimed use of part for mooring, the use of the remainder of the application land was for nothing more than access. Your Officer does not consider that the use of the land for the purposes of accessing the moored boats, or even accessing the creek, is a lawful sport or pastime in the context of an application for the registration of a village green. Therefore Evidence Questionnaires nos 11, 12 and 14 are not considered to further assist this application.

Significant number?

In *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council*[12] it was held that a "significant number" need not be considerable or substantial; it was a matter of impression for the decision maker, what mattered was "that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is a general use by the local community for informal recreation, rather than occasional use by individuals as trespassers".

There are considered to be 7 Evidence Questionnaires submitted by the inhabitants of the neighbourhood which detail use of the quay for lawful sports and pastimes. Of these, one is for a period ending in 1986 and another is for a period commencing in 1986 and continuing to the date of the application.

Your Officer is of the opinion that although the number of persons claiming use as a village green is not considerable (in effect, 6 persons), it does have the appearance of use by the local community (the hamlet) as opposed to the occasional use by individuals as trespassers and therefore **it is considered that the use of the land has been by a significant number of inhabitants of the neighbourhood within a locality.**

Your Officer notes that the Evidence Questionnaires suggest that the quay was used by many people from outside of the "neighbourhood" and that the use should be predominantly by the inhabitants[13]. Use predominantly by persons outside either the locality or the neighbourhood would tend to indicate that the use was not "as of right", but as trespass. However, your Officer is of the view that it is more likely that the use was predominantly by the residents of the neighbourhood than those outside.

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12 at para 71

13 *Sunningwell*

…as of right…

Use of land "as of right" means use without force, stealth or permission ("*nec vi nec clam nec precario*") and does not turn on the subjective beliefs of users. User "as of right" must be use which is not use pursuant to a legal right.

"Force" does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates, if it involves ignoring notices prohibiting entry, or if it is under protest.

"Permission" can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied, but permission cannot be implied from inaction or acts of encouragement by the landowner.

Recreational use of land which is used by the landowner for his own purposes is not as of right by the users unless it interrupts the landowner's use of the land in such a manner or to such an extent that the landowner should be aware that the recreational users were using it as of right. One needs to look at whether the landowners use is so 'low level' that it could co-exist with use of the land for lawful sports and pastimes, so that he would not consider that by making use of it he was preventing the local inhabitants from using the land as of right or whether the landowner would perceive that his use was inconsistent with its use by the local inhabitants for lawful sports and pastimes. This issue was considered in ***R (Laing homes Ltd) v Buckinghamshire county Council (2004)*** and the ***Trap Grounds*** case

In this case there is a low wall between the road and the quay. Your Officer does not consider that this wall is of sufficient size to mean that any use of the land, as claimed by the witnesses in the evidence questionnaires, was by force. The wall could be (and according to the various Evidence Questionnaires was) easily stepped over and did not provide any real obstacle in accessing the quay.

An area of land within the quay was (at least at some stage) fenced with what appears to be a plastic chain link fence. Again this was at a very low level and is not deemed to be such that any use of the quay was by force. Additionally, the chain link fenced area only covers part of the claimed village green.

There is also evidence (provided by the objector) that the gap in the low wall (the entrance to the land) had a chain link fence across it. It is considered by your Officer that this chain link was sufficient to prevent vehicular access (for the periods that it was present) but it is not considered that this was, at any time, sufficient to call into question the use of the area without force by pedestrians.

None of the evidence for the applicant makes any mention of the presence of any signs restricting (or permitting) access. The Objector states at para 4.3(h) of document 2 that there have been attempts to erect signs and barriers to entry to show that the quay was privately owned, but that these were removed. The objector does not provide any further detail about the date, position or nature of these signs and barriers.

Your Officer is satisfied that, generally, the use of the quay was without force, stealth or permission. However, please see below.

…for not less than 20 years…

Recreational use of land that is used by the landowner for his own purposes is not use as of right unless it interrupts the landowner's use of the land in such a manner or to such an extent that the landowner should be aware that the recreational users believed that they were exercising a public right.

At para 4.2 of doc 2 the objector states "I accept that there may have been some trivial or sporadic trespass…", and at para 4.4 "while works were carried out the recreational user ceased and deferred to the landowner's user and therefore cannot be 'as of right'".

The objector states at para 4.3(f) in doc 2 that in 2005-2006 the quay was used to hold building materials, and for approximately 9 months, a klargester sewerage treatment plant was also stored on the quay. It is not known whether the whole area of the quay was fenced off during the storage of the building materials and klargester but it is noted by your Officers that the klargester itself would not take up entire site (from promotional material it is estimated that the klargester could have been approximately 2m in diameter).

The vast majority of (all of) the Evidence Questionnaires (not just those considered for the purposes of "lawful sports and pastimes" and "significant number") do not refer to the usage of the quay for the storage of the building materials and the klargester, however, questionnaires nos 28 and 29 do refer to the presence of building materials and hence a prevention of the use of the quay.

In particular at question 36, "*Has any attempt ever been made by notice or fencing or by any other means to prevent or discourage the use being made of the Land by the Local inhabitants*", Witness 28 replies "*only by builders of new house*" and Witness 29 says "*only during building work*". In question 37, the witnesses are asked "*If yes*, [to Q.36] *give examples*", Witness 28 states "*It was all covered with building materials*" and Witness 29 says "*The area was covered with building materials*".

The County Council's aerial photograph taken on 09 August 2005 [Doc 5] appears to show the presence of a white van on the quay and also what appears to be a tall white cylindrical object on the quay. Considering the size and shape of the object it is considered that the object could possibly be the klargester referred to in the objector's evidence (or another similar shaped object e.g. a mortar hopper etc).

The use of land in a manner inconsistent with the exercise of claimed rights was considered in *Laing*. In that case Sullivan J stated[14] that "*the proper approach is not to examine the extent to which those using the land for recreational purposes were interrupted by the landowner's agricultural activities, but to ask whether those using the fields for recreational purposes were interrupting* [the licensee's] *agricultural use of the land in such a manner, or to such an extent, that* [the owner] *should have been aware that the recreational users believed that they were exercising a public right. If the starting point is, "how would the matter have appeared to* [the owner]*?" it would not be reasonable to expect* [the owner] *to resist the recreational use of their fields so long as such use did not interfere with their licensee*['s] *use of them, for taking an annual hay crop.*"

The use of the quay by those claiming rights would have interfered with the owners lawful use of the land during the period which building materials were stored, but the

[14] at para 82.

evidence suggests that in fact the owner prevented the witnesses' use of (at least part of) the land for a significant period (e.g. there would have been no use of the land on which the klargester was present for the (claimed) period of up to 9 months.

Your Officer considers that there is sufficient evidence that the use of the quay by the recreational users was not such that it interrupted the landowner's use of the land during the period when building materials and the klargester were stored on the quay and hence was not sufficient to amount to use of the quay as a village green as of right over the whole 20 year period preceding the date of the application.

Therefore it appears to your Officer that the landowner freely controlled and made use of the application land during the 20 year period in ways which were inconsistent with the existence of an unqualified right for local inhabitants to indulge in lawful sports and pastimes on the application land.

It is acknowledged that further information may be available from the planning permission documents, Building Regulations documents, and/or from the owner which will further clarify the time period of the use of the quay as above, but this further information is not considered necessary for the reasons set out below.

Therefore your Officer considers that, as a matter of fact, the quay was used for an unknown (but significant) period of time for the storage of building materials and further, that such use by the owner was sufficient to interfere with any claimed use 'as of right' by the witnesses.

Your Officer has gone on to consider whether a registration of part of the site may be considered. In the case of *Sunningwell* (confirmed in *Oxford*) the High Court ruled that an application for a new green could be amended to exclude part of the area for which registration had been applied, so long as the interests of the landowner, tenant or occupier of the land were not prejudiced. However, in this case it is not considered appropriate for the registration authority to amend the application. Although it is possible that use of a very small part of the quay could have continued during the period that building materials were stored, the registration authority has no knowledge as to what the amended boundary would be and it is not considered that such use of any smaller area has been proven on the balance of probabilities by the applicant.

Should there be a non-statutory public inquiry by an Independent Inspector in this case?

Your Officer has concluded that, on the balance of probabilities, the applicant has failed to prove user "as of right" throughout the requisite 20 year period. The applicant's own evidence confirms that use of the quay during the 20 year period was interrupted and hence it does not appear to your Officer that this is a case which warrants a non statutory public inquiry being held.

b) Procedure

Procedure on applications to register new greens is governed by **The Commons Registration (New Land) Regulations 1969.**

Who can apply?

Anyone can apply to register land as a new green, whether or not he/she is a local person or has used the land for recreation.

Application

Application is made by submitting to the registration authority a completed application form in Form 30. The form has not been updated to take account of the new definition.

Accompanying documents

Although the application form has to be verified by a statutory declaration by the applicant or his solicitor, there is no requirement that the application should be accompanied by any other evidence to substantiate the application. Instead, reg. 4 provides for the application to be accompanied by any relevant documents relating to the matter which the applicant may have in his possession or control or of which he has the right to production. In most cases, there are few, if any, of such documents as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years.

Evidence

The applicant is only required to produce evidence to support the application if the registration authority reasonably requires him to produce it under reg. 3(7)(d)(ii).

Preliminary consideration

After the application is submitted, the registration authority gives it preliminary consideration under reg. 5(7). The registration authority can reject the application at this stage, but not without giving the applicant an opportunity to put his application in order. This seems to be directed to cases:

- Where Form 30 has not been duly completed, or
- Where the application is bound to fail on its face, e.g. because it alleges less than 20 years use or where the supporting documents disprove the validity of the application

Publicity

If the application is not rejected on preliminary consideration, the registration authority proceeds under reg. 5(4) to publicise the application:

- By notifying the landowner and other people interested in the application land
- By publishing notices in the local area, and
- By erecting notices on the land if it is open, unenclosed and unoccupied.

Objectors

Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land.

Objection Statement

Any objector has to lodge a signed statement in objection. This should contain a statement of the facts relied upon in support of the objection. There is a time limit on service of objection statements. The time limit is stated in the publicity notices issued by the registration authority. However, the registration authority has a discretion to admit late objection statements.

Determination of application

The most striking feature of the regulations is that they provide no procedure for an oral hearing to resolve disputed evidence. The Commons Commissioners have no jurisdiction to deal with disputed applications to register new greens: ***R (Whitmey) v Commons Commissioners*** The regulations seem to assume that the registration authority can determine disputed applications to register new greens on paper. A practice has grown up, repeatedly approved by the courts, most recently by the House of Lords in the ***Trap Grounds*** case, whereby the registration authority appoints an independent legally qualified inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not. However there is no requirement for an inquiry to be held.

Procedural issues

A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new green. It is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be "properly and strictly proved". However, it is considered that this does not mean that the standard of proof is other than the usual flexible civil standard of proof on the balance of probabilities.
- **Defects in Form 30.** The House of Lords has held in the ***Trap Grounds*** case that an application is not to be defeated by drafting defects in the application form, e.g. where the wrong date has been inserted in Part 4, provided that there is no procedural unfairness to the objectors. The issue for the registration authority is whether or not the application land has become a new green
- **Part registration.** The House of Lords also held in the ***Trap Grounds*** case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green
- **Withdrawal of application.** Also in the ***Trap Grounds*** case, the Court of Appeal held that the applicant has no absolute right to withdraw his application unless the registration authority considers it reasonable to allow withdrawal. Despite the applicant's wish to withdraw, the registration authority may consider that it is in the public interest to determine the status of the land. The House of Lords did not dissent from this view

There is no power to award costs.

DETAILED CONSIDERATION OF THE APPLICATION

Findings of Fact

1. There is evidence of use by local inhabitants dating back more than the requisite 20 year period.

   The uses described by the witnesses fall within the definition of "lawful sports and pastimes".

   None of the users have ever been challenged.

   No-one has ever sought or been granted / refused permission.

2. The quay was used by the landowner within the 20 year period, to the exclusion of other persons for a period sufficient to interfere with any claimed use as of right.

Applying the Law to the facts

The applicant's case is that the area defined in the application form should be registered as village green as the whole area has been used in accordance with the statutory definition up to the date of the application.

Land

The application land is sufficiently clearly defined to satisfy the definition [doc 1].

Note: It is your Officer's opinion that the objector's comments that the quay is small in size; is not what would usually be described as a village green; and that there are other quays held privately that would be more suitable as village greens, are all irrelevant in the context of this application.

On which for not less than 20 years

The new regulations do not apply to this case as the application was made prior to 6 April 2007. The House of Lords held in the ***Trap Grounds*** case that the relevant 20 year period is the period ending with the date of the application for registration. In this case the relevant period therefore is 1986 to 2006. As above, your Officer is of the opinion that the use as of right has not continued for the required 20 year period, that period being interrupted by the use of the area by the landowner for the storage of building materials, to the exclusion of others.

… a significant number of the inhabitant of any locality or of any neighbourhood within a locality

The locality was defined by the Applicants in CR Form 30 [doc 1] as Cowlands Creek, Parish of Kea. In the map accompanying the application the applicant has outlined one area consisting of the Parish of Kea and another consisting of the Parish of Feock.

Your Officer considers that the hamlet of Cowlands is a 'neighbourhood within a locality' and also that the application land has been used for recreation by a significant number of the inhabitants of that neighbourhood.

It is considered that the use of the quay was predominantly by the inhabitants of the neighbourhood.

…have indulged in lawful sports and past times

There is clear evidence that the local inhabitants have used the application land, or some of it, for lawful sports and past times.

…as of right…

In the view of your officers the applicant has failed to prove 20 years unbroken user 'as of right' over the majority of the application land (see above)

…and continue to do so

The use of the application land has continued up to the application date.

Part Registration

Consideration needs to be given whether part only of the land the subject of the application can be registered rather than the whole of the land. There is a possibility that a small area of land subject to the application may have been available to use as of right during the storage of building materials, but your Officer has no evidence of this. Further, the aerial photograph of 09 August 2005 shows the vast majority of the land as being used for the building process (note that the foreshore – not part of this application is also visible).

Should a non-statutory public inquiry by an Independent Inspector in this case?

Your Officer has concluded that, on the balance of probabilities, the applicant has failed to prove user "as of right" throughout the requisite 20 year period. The applicant's own evidence confirms that use of the quay during the 20 year period was interrupted and hence it does not appear to your Officer that this is a case which warrants a non statutory public inquiry being held.

Conclusion

For the reasons set out above it is considered that the land does not fall within the statutory definition of a prescriptive green contained in section 22 of the Commons Registration Act 1965 (as amended). The application should therefore be rejected and the reasons to be given to the applicant by written notice should be "the reasons set out in the report of the County Solicitor of January 2009"

Post script

Following local opposition to the Guild of St James' claims over the quay an agreement was reached whereby the land was transferred to, and registered in the name of, the Kea Parish Council (as of 01 August 2008).

The Kea Parish Council wrote to the County Council asking it to withdraw the application for registration as a Village Green. However, the legislation does not explicitly permit the withdrawal of applications. DEFRA guidance advises the registration authority has discretion either to take no further action on the application, or to go ahead and determine the application you made, based on the evidence available. Your Officer is aware that there were numerous evidence questionnaires submitted in support of this application and therefore considers that it would be inequitable to permit the withdrawal of the application without canvassing all of these witnesses. Your Officer considers that there is no reason not to determine the application.

The Kea Parish Council has been invited to apply (as owner of the land) to have the land registered as a village green voluntarily under the provisions of section 15(8) of the Commons Act 2006 (whereby no proof is required as to use etc), but the Parish Council has thus far not accepted that invitation.