

APPENDIX A

PURPOSE/REASON (FOR INFORMATION)

1. The Isle of Wight Council is the Registration Authority for the purposes of the Commons Registration Act 1965 ("the 1965 Act") (Note: the 1965 Act is soon to be repealed by the Commons Act 2006, which requires commons registration authorities to continue to keep the register of town or village greens.) As Registration Authority, the Council is responsible for compiling and maintaining the Registers of Common Land and Town or Villages Greens and for any amendments to the Registers.
2. The purpose of this Appendix is to provide background information about village greens. It is also to provide a summary of the legal requirements for the registration of new village greens under the 1965 Act for Members' information and ease of reference when determining an application to register a new village green.

BACKGROUND

History of Village Greens

3. Village greens have their origins in the manorial system introduced by the Norman Conquest in 1066. Most village greens may at one time have formed part of open uncultivated and unoccupied land belonging to a manor or estate. Use of the land for sports and pastimes by local inhabitants was tolerated by the lord of the manor and over many years the local people could claim rights to use the land for recreation.
4. The traditional green was a communal area where people could gather to play games, dance and exercise and often served as a secure place where livestock could be gathered and safely grazed during times of unrest. Greens were also the location for services such as the village well or where justice was dispensed in the village stocks.
5. During the Second World War, many commons were ploughed up for agriculture and after the War growing ownership of cars and demand for housing brought pressure to bear on village greens. The increasing recreational needs of the public were recognised and a Royal Commission was established to look at any changes that could be introduced to balance the needs of the owners of the land and the enjoyment of the public. Some of the recommendations of the Commission were implemented by the Commons Registration Act 1965.

THE COMMONS REGISTRATION ACT 1965

6. Although village greens have been recognised in law for centuries, until the Commons Registration Act 1965 there was no statutory definition of the classes of land involved and no strict common law meaning. The 1965 Act for the first time provided a scheme for registration of town and village greens as a distinct category of land separate from commons.
7. Under the 1965 Act, the Council was appointed as the Registration Authority for the purposes of compiling and maintaining the registers of Common Land and Village Greens. The compiling of the registers depended upon interested parties making an application to register any eligible land. Anyone could make an application regardless of whether they had an interest in the land. The application was advertised and if no objections were received the registration automatically became final. Any applications the subject of unresolved objections or questions of ownership or rights were referred to the Commons Commissioner for decision.
8. The 1965 Act and regulations provided that village greens had to be registered within five years. The statutory deadline was 2 January 1970 and any existing town or village greens not registered by that date ceased to be a village green for registration purposes. However, Section 13 of the 1965 Act allowed for the amendment of the village green registers where any land became a village green after the initial registration period ended.

NEW VILLAGE GREENS

Definition

9. In Section 22 the 1965 Act, one of the definitions of a village green is land “on which the inhabitants of any locality have indulged in lawful sports and pastimes as of right for not less than twenty years”. As more than twenty years has elapsed since the registers closed in 1970, sufficient time has accrued to enable applications to be made for the registration of land as a new green on the basis of twenty years use for recreation by the local inhabitants. The twenty years would have to run from some point after the registers closed so that the earliest date on which the land could acquire village green status would be January 1990.

Procedure for registration

10. The procedure for registration is laid down in the Commons Registration (New Land) Regulations 1969. As with the original exercise, anyone can make an application to register any eligible land. However, unlike the original exercise it is left to the Council, as registration authority, to determine the application.

11. The application is made on a prescribed form and must be accompanied by a statutory declaration. The Council, once it is satisfied the application is in order, is under a duty to advertise it in the local newspaper and notify the landowner (if known) and any person known to have an interest in the land (ie tenant, lessee or occupier).
12. A period of six weeks is allowed for objections to be lodged. If any objections are received, the applicant is given the opportunity to comment on them. At the end of the consultation process, the evidence submitted for and against the application has to be considered and a decision taken on whether the application satisfies the statutory requirements for registration.

Land capable of registration

13. The popular view of a typical green is a small area of open land in the middle of a village where the children run around and where the village cricket team holds its matches. However, village greens do not need to be traditional picturesque areas. A town or village green depends on the rights exercisable over the land rather than its location. Thus, any land used by people from the locality for informal recreation can become a town or village green.
14. Such land can be derelict scrubland in a city centre, a brown field site or a field formerly used for grazing. When the 1965 Act was passed this land may not have qualified for registration but since 1970 the land may have become subject to the qualifying uses and may therefore now satisfy the requirements for registration.

Legal Requirements

15. For the application to succeed the applicant has to show that the land has been used by (1) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality (2) as of right (3) for lawful sports and pastimes (4) for at least 20 years.
16. This is a developing area of law. In addition to amendments to the definition of a village green there have been some recent court cases that have clarified the meaning of “local inhabitants”, “lawful sports and pastimes” and “as of right”. These judgments have significantly changed the criterion by which registration authorities determine applications for new village greens.

RELEVANT LEGISLATION AND PRECEDENTS

Countryside and Rights of Way Act 2000

17. Local inhabitants: Section 98 of the 2000 Act amended the definition of ‘a village green’. The definition, as amended, includes land on which “a *significant number of the inhabitants of any locality, or of any neighbourhood*

within a locality” have used it for recreation. This amendment gave a more flexible definition of local inhabitants so that now as long as a sufficient number of the people using the land came from in or around the residential area in which the land was situated, it was capable of registration.

Commons Act 2006

18. The aim of the Commons Act 2006 is to improve and modernise the law on the registration, management and protection of common land and town and village greens but currently only parts of the Act are in force. When fully in force, the Commons Act 2006 will repeal the whole of the *Commons Registration Act 1965*.
19. The Act requires commons registration authorities to continue to keep the register of town or village greens however this part of the Act is not yet in force. Until this provision is brought into force, new greens cannot be entered formally into the register of town and village greens under the Commons Act 2006. As an interim measure, the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 allow commons registration authorities to register land, which meets the (slightly amended) criteria in section 15 of the Commons Act, in the register of town and village greens maintained under the Commons Registration Act 1965.
20. Section 15 of the Commons Act 2006 states that anyone can apply to register land as a town or village green where: *“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”* AND one of the following applies:
 - The land continues to be used for that purpose at the time of the application to register
 - The use of the land for that purpose (or the use “as of right”) ceased before the application to register was made but after 6 April 2007. In such cases, the application must be made within two years of the cessation of use.
 - The use of the land for that purpose (or the use “as of right”) ceased before 6 April 2007. In such cases, the application must be made within five years of the cessation of use – this does not apply where: planning permission was granted in respect of the land before 23 June 2006; construction works were started before 23 June 2006 in accordance with the planning permission, either on the land or on any other land covered by the planning permission; and the land either has or will become permanently unusable for the purposes of lawful sports and

pastimes as a result of the works authorised by the planning permission being carried out.

This is the definition now in force.

21. Although the Commons Act 2006 repealed the previous definition of “town or village green” in section 22 of the Commons Registration Act 1965 (as amended by the Countryside and Rights of Way Act 2000) it is important to understand its provisions because they form the basis of section 15 of the CA 2006. Accordingly much of the case law on the interpretation of section 22 of the CRA 1965 may be relevant to the interpretation of section 15 of the CA 2006.

“Sunningwell” case (*Oxfordshire CC ex parte Sunningwell PC 1999*)

22. Local inhabitants: Provided there is sufficient evidence to show the use is predominantly by local inhabitants, the fact that the land is also used by some members of the public will not defeat the claim.
23. Lawful sports and pastimes: Activities do not need to be either organised or have a communal element. Modern activities such as dog walking, kite flying, solitary or family activities are sufficient to justify registration.
24. As of right: The applicant only needs to provide evidence that the land has been used without force without secrecy and without permission. It swept away the previous understanding of the law that for users to demonstrate they had indulged in lawful sports and pastimes “as of right” they also had to prove that they and only they (i.e. not the public at large) had the right to do so. Also, the fact that the owner knows of the use and does nothing to prevent it does not amount to permission. The toleration of use by the owner cannot prevent use as of right for the purposes of prescription.

“Sunderland” Case (*Beresford v City of Sunderland 2003*)

25. As of right: - implied permission – Whilst a landowner may conduct himself so as to make clear, even in the absence of any express statement, notice or record, that the inhabitants’ use of the land was pursuant to his permission, it was well established that a licence could not be implied from the mere inaction of a landowner with knowledge of the use to which his land was being put. The fact that the landowner had been willing for the land to be used as an area for informal sports and games, had provided some minimal facilities (e.g. seating) and had mowed grass (maintained area) could not be regarded as overt acts of communicating permission to enter (e.g. they do not amount to implied permission).

“Staffordshire” Case (*McAlpine Homes v Staffordshire CC 2002*)

26. Local inhabitants: “Significant number of inhabitants” in Section 22 of the 1965 Act, as amended, does not have to be a considerable number. It only has to be shown that the use is sufficient to indicate that it is in general used by the local community for informal recreation rather than occasional use by individuals as trespassers.

“Gloucestershire” Case (*Cheltenham Builders v South Gloucestershire Council 2003*)

27. Locality: A “locality” must be more than an arbitrary area delineated on a plan. There must be a “sufficient cohesive entity” that is capable of definition.

“Trap Grounds” Case (*Oxfordshire CC v Oxford City Council 2006*)

28. The land: If it becomes apparent that only part of the land qualifies for registration the registration authority may register the lesser area that satisfies the statutory requirements.

“Coatham Common” Case (*Lewis, R (on the application of) v Redcar and Cleveland Borough Council & others 2010*)

29. As of right: - competing activities – the exercise of rights by local inhabitants can co-exist with another use (in this case, despite sharing a common with golfers, the local inhabitants had been using it for at least 20 years “as of right”). Where two or more rights co-exist over the same land, there may be occasions when they cannot, practically, both be enjoyed at the same time. Deference to the landowners use of the land is not a bar to registration of a town or village green. As long as the use of the common was without force, secrecy or permission, then it would be “as of right” for the purpose of section 15 of the CA 2006. Any open space, which has been used by the local inhabitants for activities such as dog walking and playing with their children, may (if used for the requisite period of time) be the subject of a successful village green application.

“Leeds” Case (*Leeds Group Plc v Leeds City Council 2010*)

30. Neighbourhood within a locality: ‘Neighbourhood’ is an ordinary English word and had been drafted with deliberate imprecision. The 20-year period for an application by inhabitants of a ‘neighbourhood within a locality’ (introduced by the Countryside and Rights of Way Act 2000) has retrospective effect.

“Dorset” Case (*Betterment Properties (Weymouth) Ltd v Dorset County Council and another 2010*)

31. As of right: - Test for determining whether a user was contentious and not “as of right”: Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the

owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user.”

“North Yorkshire” Case (*R(Barkas) v North Yorkshire County Council and Scarborough Council 2011*)

32. As of right: Use by virtue of a legal right is not use “as of right”.

“East Sussex” Case (*R(Newhaven Port & Properties Ltd) v East Sussex County Council 2012*)

33. The land: The registration requirements for a town or village green under the Commons Act 2006 were not subject to an implied qualification that land should not be registered where it was reasonably foreseeable that the registration would be incompatible with the exercise by the landowner of its statutory functions. A tidal beach was capable of being registered as a town or village green.

EVIDENCE REQUIRED FOR REGISTRATION

34. The burden of proof lies with the person seeking the registration. He or she has to properly prove that the land satisfies all four parts of the criterion for registration as a village green namely that the land has been used by (1) a significant number of the inhabitants of any locality or neighbourhood; (2) for lawful sports and pastimes; (3) as of right; (4) for at least twenty years. If any one part cannot be satisfied then the application will fail.

Local inhabitants

35. The meaning of the words “local inhabitants” is not defined in the legislation. Following the Sunningwell case and the amendment in Section 98 of the CROW Act 2000, it is now a question of fact in each case as to the extent of the relevant locality (i.e. a housing estate could be acceptable). The applicant is required to show the recreational use of the land is predominantly, but not exclusively, by people who live in that locality. However, although use by persons other than local inhabitants will not prevent the recognitions of a right for local inhabitants, a right cannot be claimed for the public at large for the purposes of a village green.

Lawful sports and pastimes

36. The types of activity that would constitute “lawful sports and pastimes” include formal sports and organised events such as football, cricket, fetes and bonfires. In addition, informal modern activities such as walking the dog,

strolling, birdwatching, kite flying or just sitting and idling have now been accepted as being as relevant as the more traditional ones. However, it must be an activity that could properly be called a sport or pastime (i.e. walking along a path to get from a to b would not in itself amount to a sport or pastime). The applicant will need to provide evidence of an established pattern of recreational use and the use should not be trivial or sporadic.

As of right

37. For user to be as of right the applicant must show that the recreational use of the land by local people has been (a) without force, (b) without secrecy, and (c) without permission.
38. Without force: there must be unrestricted access for the entire twenty year period. If access is obtained by climbing over or breaking down fences and tolerated only in so far as the landowner could not prevent such access then the use is not as of right.
 - (a) Without secrecy: the use must not be exercised in secret but carried out openly. If the use takes place only at night under cover of darkness then the use is not as of right.
 - (b) Without permission: The use must be without the permission of the owner. If the owner merely does nothing to prevent the use of the land for recreational activities, even if he knows about the activities, his toleration would not be sufficient to imply he had given permission for such use.

At least twenty years

39. The use for lawful sports and pastimes must have occurred for at least twenty years. Any evidence that the use has been interrupted or the land has not been available for such use during the required twenty year period will destroy the claim.

EFFECT OF REGISTRATION

40. The purpose of the 1965 Act, amongst other things, was to give legal protection to the greens and safeguard them from development. Once registered, it was intended that the green would remain available for continued enjoyment by the inhabitants for recreational use. Registration does not in itself confer any recreational rights that did not exist prior to registration. The practical effect of registration is only to confirm the existence of such rights. Consequently, a registered village green is held in the same way as any other land and, although nothing should be done which would interfere with the lawful recreational activities of the local inhabitants, the owner is not required to maintain it in a suitable state for such activities. There is nothing to

prevent the owner from selling a green but a transfer of ownership does not affect any right to use it for recreation.

41. A registered green also enjoys the protection of two 19th Century Acts that prevent interference with or encroachment on village greens. The combined provisions of Section 12 of the Inclosure Act 1857 and Section 29 of the Commons Act 1876 make it an offence to undertake any activities that injure a green or interrupt its use as a place for exercise. However there is some ambiguity over whether Section 12 and 29 apply to new greens established after 1970 through 20 years use by local inhabitants. This matter has not been tested in the courts so to date there is no case law that has determined whether or not these new village greens will have the same level of protection as the ancient greens. In July 2011 the government department having general responsibility for the environment (DEFRA) published a consultation on the registration of new town or village greens. The aim of DEFRA'S proposals is to reduce the burden on commons registration authorities who are responsible for registering the town and village greens, and on landowners who are affected by such applications.

THE COUNCIL'S ROLE UNDER THE 2006 AND 1965 ACTS

42. The primary duty of the Council, as registration authority, is to maintain the registers and related maps of common land and village greens. When a property is sold, the buyer's solicitor can apply for a search to be made of the relevant register and the Council provides a certificate which confirms if the land is registered as common land or village green and what rights, if any, are registered.
43. The Council is also responsible for any amendments to the registers. Consequently, it is the Council's duty to receive, advertise and determine applications for amendments to the registers.
44. Once an application is received, unless it is defective, it appears the Council must pursue the full decision process even on those applications which, on examination of the evidence, do not appear to establish a reasonable prima facie case for registration.
45. No procedure has been laid down in either the 2006 or the 1965 Act or its subsequent regulations as to how the applications should be determined. This is left entirely to the registration authority. As many application are made with a view to preventing development and the Council is both registration authority and planning authority it is the view of the Open Spaces Society that such applications should be referred to a non-statutory public inquiry before an independent inspector (see also Human Rights Act 1998 paragraphs 48 to 51 below). However, an inspector can only make a recommendation, it is the

responsibility of the Council to decide whether the application is accepted or rejected.

46. If the application is accepted, the village green register is amended and the land entered in the register as a new village green. Any person aggrieved by the inclusion of any land by amendment to the register under section 13 of the 1965 Act has a right of appeal to the Chancery Division of the High Court. The High Court may quash or amend the registration if it deems just.
47. If the application is rejected, the applicant is informed of the reason for the rejection. There is no formal right of appeal against a refusal to amend the register but the applicant can seek a Judicial Review if he or she believes the decision to be wrong in law or procedurally improper.

HUMAN RIGHTS ACT 1998

48. A matter to be considered is whether the procedure for determination of the applications is compatible with the Articles of the European Convention for the purposes of the Human Rights Act 1998.
49. The Human Rights Act potentially impacts on a village green application in two ways
 - (a) Article 6: Fair hearings in determining civil rights

Council owned land: It could be questioned whether the applicants rights can be properly determined by the Council where it owns the land the subject of the application. The Council would be determining issues on its own land where it could have an interest in disposing of the land. Consequently given its dual role as registration authority and owner, the Council may appear not to be independent or impartial as required by Article 6.
 - (b) Article 1 of Protocol 1: Protection of Property

Privately owned land: The registration of privately owned land as village green is destructive of the value of the land to the owner (see effects of registration paragraph 32 and 33 above). This could be seen as a breach of the landowner's rights under Article 1 of Protocol 1 since it would deprive him of the value of his land.
50. The Council is discharging a statutory function and provided the proper procedure is followed and each application is determined on legal issues and evidence there would appear to be no violation of the Articles of the Convention for the following reasons
 - (a) Any decision taken by the Council is subject to the subsequent control of judicial review as regards the lawfulness and fairness of the decision

making process and this would constitute sufficient compliance with the convention; and

- (b) Primary legislation, namely the Commons Registration Act 1965, requires the Council to determine village green applications.

- 51. There is no express provision in the 1965 Act or 1969 Regulations for a public inquiry to be held automatically. The Council, as Registration Authority, has general discretion to hold a non-statutory public enquiry to hear the evidence, but ultimate decision to accept or reject the application remains with the Council.