COMMONS REGISTRATION ACT 1965

Reference No.37/D/18

In the Matter of Roeheath,
Chailey, East Sussex.

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.VG 39 in the Register of Town or Village Greens maintained by the former East Sussex County Council and is occasioned by Objection No.202 made by the County Council and noted in the Register on 14th August 1972.

I held a hearing for the purpose of inquiring into the dispute at Lewes on 19th and 21st November 1974. The hearing was attended by Mr J.P.E.Barrett, solicitor, on behalf of the Chailey Parish Council, the applicant for the registration, and by Mr W.J.P.Clements, solicitor, on behalf of the County Council.

The land comprised in the Register Unit is crossed by a footpath which is shown on the County Council's definitive revised map of public rights of way. The Objection relates solely to the site of this footpath: there is no dispute that the land as a whole is a town or village green, nor is there any dispute that there is a public right of way along the footpath.

While the definition of "common land" in section 22(1) of the Commons Registration Act 1965 excludes any land which forms part of a highway, there is no corresponding provision in the definition of "town or village green".

Mr Clements explained to me that the Objection was made in accordance with advice given to the County Council in a letter from the Ministry of Transport dated 2nd July 1969. In this letter a distinction is drawn between cases in which a footpath across a town or village green came into existence after the green and those in which the footpath was there before there was a green. It was suggested in the letter that in a case of the latter class the registration, if it were allowed to become final, would create new rights over the highway land which would interfere with the highway rights, and that failure to object might well be considered a neglect of the highway authority's duty under section 116(3) of the Highways Act 1959.

The first observation which this letter prompts is that registration of land as a town or village green under the Act of 1965 does not create new rights. Land can only be registered under that Act if there are already in existence rights which bring it within the statutory definition of "town or village green". What has to be determined for the purposes of this case is whether such rights exist - not whether it is desirable or undesirable that they should be brought into existence.

Mr Clements adduced evidence as to the history of the path in question from which he invited me to draw the inference that the path was there before

the land became a town or village green. The path has been in existence on its present site since 1825, when a pre-existing path was diverted by an order of Quarter Sessions. In the order the land comprised in the Register Unit is described simply as "the land called Row Heath", without any indication of its legal status. By the Inclosure Award made in 1842 under the Waningrove Inclosure Act of 1841 (4 & 5 Vict.,c.7 (private)) the land called Row Heath Common was allotted to the Churchwardens and Overseers of the Parish of Chailey as "public allotment" without any indication of the purposes for which the Churchwardens and Overseers were to hold it. There was no evidence as to the date at which the land would first have satisfied the definition of "town or village green". On this meagre evidence I should hesitate to find as a fact that it did not do so at the date of the Quarter Sessions order.

However, even if it is assumed in the County Council's favour that the path was there before the land became a town or village green, I do not consider that it follows as a matter of law that the site of the path cannot form part of the town or village green. Until modern legislation vested the soil of highways in highway authorities the existence of a public right of way across land did not deprive the owner of his estate in the land: he continued to hold it subject to allowing members of the public to pass and repass. There is, in my view, no reason why he should not confer on the inhabitants of the locality the right to use his land for lawful sports or pastimes subject to the right of the public to pass and repass. I can, therefore, see no reason why the whole of an area over which the inhabitants of the locality have such a right, including the site of the path, should not be registered as a town or village green under the Act of 1965.

On my expressing this view, Mr Clements said that the Objection was withdrawn, but since this is a point of general importance I have thought it right to state my view upon it.

For these reasons I confirm the registration.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.

Dated this 17th day of December 1974

Chief Commons Commissioner