



## AGENDA

### Kent County Council

## REGULATION COMMITTEE MEMBER PANEL

Wednesday, 12th November, 2008, at 2.00 pm  
Medway Room, Sessions House, County Hall, Maidstone

Ask for: **Andrew Tait**  
Telephone **01622 694342**

*Tea/Coffee will be available 15 minutes before the meeting*

### **UNRESTRICTED ITEMS**

*(During these items the meeting is likely to be open to the public)*

1. Membership  
Mr M J Harrison (Chairman), Mr A D Crowther (Vice-Chairman), Mr I S Chittenden, Mr J A Davies and Mr I T N Jones.
2. Declarations of Interest by Members for Items on the agenda
3. Application to add two public footpaths at Grasmere Pastures, Whitstable to the Definite Map of Public Rights of Way (Pages 1 - 30)
4. Application to register land known as Barton Playing Field, Canterbury as a new Town Green (Pages 31 - 118)

### **EXEMPT ITEMS**

*(At the time of preparing the agenda there were no exempt items. During any such items which may arise the meeting is likely NOT to be open to the public)*

Peter Sass  
Head of Democratic Services and Local Leadership  
(01622) 694002

**Tuesday, 4 November 2008**

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## **Application to add two Public Footpaths at Grasmere Pastures, Whitstable to the Definitive Map of Public Rights of Way**

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A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Wednesday 12<sup>th</sup> November 2008.

**Recommendation:** I recommend that the County Council makes a Definitive Map Modification Order to modify the Definitive Map of Public Rights of Way (and accompanying Statement) by adding two Public Footpaths over land known as Grasmere Pastures at Whitstable, as shown at Appendix A to this report.

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Local Members: Mr. M. Harrison and Mr. M. Dance

Unrestricted item

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### **Introduction**

1. The County Council has received an application from local resident Mrs. E. Watkins ("the applicant") for a Definitive Map Modification Order to modify the legal record of Public Rights of Way, known as the Definitive Map and Statement, by adding two Public Footpaths ("the claimed routes") over land known as Grasmere Pastures at Whitstable, as shown at **Appendix A** to this report.

### **Procedure**

2. The County Council is the 'surveying authority' for the purposes of public rights of way and is responsible for holding and keeping up to date a map showing all the recorded public rights of way in the county. This map is a legal document and is known as the Definitive Map of Public Rights of Way. Under section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), the County Council has a legal duty to keep the map under continuous review and to make such modifications to it as appear requisite in consequence of certain events.
3. Under section 53(5) of the 1981 Act, anyone may make an application to the County Council for a modification to be made to the Definitive Map and/or Statement. Such an application must be made in the form specified in the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 and might consist of a request to record a new Public Right of Way, to delete an existing Public Right of Way, to upgrade or downgrade the status of a route already shown on the map, or to amend any particulars contained within the statement accompanying the Definitive Map.
4. As a standard procedure set out in the Schedule 14 of the 1981 Act, the County Council has a duty to investigate the matters stated in the application, to consult with every local authority whose area includes the land to which the application relates and, as soon as practicable after determining the application, to give notice of the decision by serving a copy of it on the applicant and any known owners or occupiers of the land in question.
5. The Countryside Access Objectives and Policy document (dated July 2005) sets out the County Council's own priorities for keeping the Definitive Map and Statement up to date. The main priorities are:

- A. The investigation and determination of outstanding applications to modify the Definitive Map;
- B. The resolution of anomalies and mapping errors where essential for the effective management of the PROW network; and
- C. The publication of Definitive Maps and Statements for those areas excluded from the original Definitive Map.

Definitive Map modification cases will normally be investigated in order of receipt, except in any of the following circumstances, where a case may be investigated sooner:

- Where it satisfies one of the key principles set out in paragraph 11.1 of the Countryside Access Policy;
- Where the physical existence of the route on the ground is threatened by development; or
- Where investigation of a case would involve substantially the same evidence as a route currently under investigation or about to be investigated.

### **Applicant's submission**

6. The application has been made on the grounds that the paths concerned have been used 'as of right' over a period in excess of 20 years. In support of the application, the applicant submitted 61 user evidence forms demonstrating use of the claimed routes.

### **Description of claimed routes**

7. The claimed routes run across a field known locally as Grasmere Pastures which is situated in Whitstable and lies immediately adjacent to the Chestfield parish boundary. The field is bounded to the south by the rear of properties in Grasmere Road and to the west by the rear of properties in Richmond Road. To the east, the field is bounded by other fields (separated by vegetation) and the rear of properties in Laxton Way. To the north of Grasmere Pastures is a route known as 'Ridgeway' which is recorded on the County Council's Definitive Map of Public Rights of Way as Bridleway CW40. Beyond 'Ridgeway' lies the John Wilson Business Park and a large supermarket.
8. In this case, there are two claimed footpaths; the first, which shall be referred to as 'claimed path A' runs from Grasmere Road in a generally northerly direction for approximately 465 metres to a junction with Ridgeway, whilst the second, which shall be referred to as 'claimed path B' runs from Richmond Road in a generally easterly direction for approximately 335 metres to a junction with claimed path A. The claimed routes are shown on the plan at Appendix A.

### **Background information**

9. Members should be aware, for information only, that the land over which the claimed routes run, Grasmere Pastures, was the subject of a separate application made under the Commons Registration Act 1965 to register the land as a new Village Green on the basis of the recreational usage of the land by the local inhabitants for a period of over 20 years 'as of right'. The matter was considered by a Regulation Committee Member Panel meeting held on 30<sup>th</sup> April 2007 at which it was resolved to reject the application on the basis that those using the land for recreational purposes had 'deferred' to the landowner's agricultural activities on the land.



## Summary of mapping evidence

10. When dealing with applications to modify the Definitive Map, the County Council has a duty to investigate the matters stated in the application<sup>1</sup>. As a standard procedure which forms part of the investigative process, Officers will therefore research whether there is any evidence of the claimed route(s) having been identified on historic mapping (i.e. those maps that precede the publication of the first Definitive Map in 1952). For example, the depiction of a route on the First Edition Ordnance Survey maps (c1840) as a 'public road' can provide good supporting evidence of its status as a public right of way. Indeed, in some cases the mapping evidence is so strong that it is possible to conclude that a public right of way is reasonably alleged to subsist on mapping evidence alone; this is because there is a well established legal maxim which states '*once a highway, always a highway*'<sup>2</sup>.
11. In this case, there is no mapping evidence in support of the application and the historic maps consulted do not show any evidence of the existence of the claimed routes.

## Summary of documentary evidence

12. The Wildlife and Countryside Act 1981 requires that when investigating such applications, the County Council must consider 'all other relevant evidence available'. In this respect, I have considered the evidence which was put forward in the recent application to register the land at Grasmere Pastures as a new Village Green. Although this was an application concerning another area of legislation (the Commons Registration Act 1965), relevant evidence was provided during the course of the determination process in respect of the claimed footpath.
13. An objection to the Village Green application was lodged on behalf of the same objectors in the present case. Included within the objection bundle were witness statements from relevant parties and appropriate extracts are reproduced below:
- Mr. M. Lewer, director of O.W. Presland Ltd, states at paragraph 24 of his witness statement: '*Similarly, with walking, the site grew hay for part of the year, but like all farming land, it lay un-cultivated for part of the year. I knew that some local people used to walk on the path on the periphery of the site, with or without dog, and others used a track across the site [shown on an attached plan, roughly corresponding with claimed path A], as a shortcut. Walkers usually kept to the tracks on the periphery of the site and the track across the site...*'
  - Mr. P. Watkins, Strategic Land and Planning Manager of Kitewood Estates Ltd, states at paragraphs 2 and 3 of his statement: '*I visited the site in the 1990 – 1996 period on a number of occasions, at these visits I only saw people walking along paths on the periphery of the site, some with dogs... I visited the site on a number of occasions in the period 2000 – 2004 and only saw people walking the tracks on the periphery of the site and on [other tracks, including one roughly corresponding with claimed path A]*'.
  - Mr. K. Goldsmith, tenant of the site between 1984 and 2004, states at paragraphs 2 and 3 of his statement: '*during the time that I rented the site, the hay crop extended over all of the site and there were tracks on the perimeter of the site and one track which crossed the site [roughly corresponding with claimed path A]... in the autumn*

<sup>1</sup> Wildlife and Countryside Act 1981 – Schedule 14, paragraph 3(1)(a)

<sup>2</sup> From *Dawes v Hawkins* [1860] 8 CB (NS) 848, but note that an established highway may cease to be a highway if closed by statutory process (e.g. a Public Path Extinguishment Order)

*of 1989, I ploughed the field in its entirety, including the perimeter track. The only track that I left when I ploughed the field was [claimed path B]... After this process was complete, I reinstated the perimeter edging'. He adds, at paragraph 5 of his statement, 'during the period that the hay was growing, people who came onto the site kept to the tracks and did not disturb the hay.'*

14. I have also consulted the County Council's records for available aerial photographs of the site taken during the last 20 years. There are two aerial images available:
- The first, taken in **1999** (attached at **Appendix B**), clearly shows the existence of defined tracks, across and around the perimeter of the field. The claimed paths (A and B) are both clearly identifiable.
  - The next image, taken in **2003** (attached at **Appendix C**), is of particular interest as it actually shows the harvesting of the hay taking place with farming machinery and hay bales clearly visible. Despite the fact that the harvesting is in progress, it is still possible to see the tracks over the field which indicates that they were of a well-defined, well-used and near-permanent nature.

### **User evidence**

15. Included with the application were 61 user evidence forms. These forms demonstrate use of the claimed routes on foot over a long period, with the earliest use dating back to 1959. Of those 61 witnesses, over half (36) have used the claimed route(s) for over 20 years (as at the date of application) for purposes such as dog walking, recreational walking or access to shops and other facilities in Chestfield. Many of the witnesses have used the claimed route(s) on a daily basis and nearly all of the witnesses state that they had used the claimed route(s) freely and unchallenged until 2004 when fencing was erected across the path thereby preventing access. Some witnesses also recall two notices being erected at the same time as the fencing appeared, containing wording to the effect of 'private property - no trespassing', along 'Ridgeway' to the north of the site (although it is unclear as to the exact location of these notices and whether they were placed at the entrance of claimed path A onto Grasmere Pastures).
16. In addition to the user evidence forms submitted with the application, the applicant also identified a number of other people with evidence of use during the course of the investigation process. In total, 21 witnesses were interviewed (including the applicant) in order to gain a more detailed understanding of the history of the claimed routes and to ensure that there had been actual use of the claimed routes as public rights of way rather than general wandering at will over the wider area of Grasmere Pastures. In addition to the evidence provided in the user evidence forms, those interviewed confirmed that the route had always been clearly visible on the ground (having become well worn and defined through heavy usage) and that the route was in regular usage by other walkers.
17. The conclusion to be drawn from the user evidence (a summary of which is attached at **Appendix D**) is that there is a substantial body of user evidence from a large number of people which confirms use of the claimed routes over a period well in excess of 20 years.

## Consultations

18. Consultations have been carried out with local Councils (as required by the 1981 Act) and, in addition, local Councillors and the Ramblers' Association have been contacted for their views. Chestfield Parish Council has written in support of the application. No other responses have been received.

## Landowner

19. The land over which the claimed routes run is owned by O.W. Presland Ltd. In addition, Mr. N. Sands is a tenant of the land and Kitewood Estates have an option to purchase the land. Collectively, these three parties have lodged an objection to the application ("the objectors"). The objection contains a statement setting out the grounds of objection (attached at **Appendix E**) and is supported by witness statements from Mr. Michael Lewer CBE QC (director of O. W. Presland Ltd.) and Mr. Norman Sands (a tenant of the land since 2004).

20. The main substance of the objection is that *'the applicant has failed to identify the necessary period of 20 years by reference to any commencement or termination date, and has failed to demonstrate the use of the paths by the public as a right without any interruption'*. This is based on the following grounds:

- That a fence was erected around Grasmere Pastures by the tenant on 5<sup>th</sup> October 2004 and on 6<sup>th</sup> October 2005 a bund and trench were created around the boundary of the site. The fence, bund and trench have been breached and torn down in places and therefore the use of the paths was by force and not 'as of right'.
- That any use of the claimed paths would have been interrupted on an annual frequency since 1984 due to the taking of a hay crop and as such the applicant has not shown that the land has been used for a full period of 20 years.

## Legal tests

21. Section 56 of the Wildlife and Countryside Act 1981 provides that a Definitive Map and Statement shall be conclusive evidence of the routes shown and section 53 of the same Act also places a general duty on the County Council to keep the Definitive Map and Statement under continuous review and to make such modifications as appear requisite in consequence of certain 'events'. One such event, contained in section 53(3)(c)(i) refers to *'the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates...'*

22. In considering an application to add routes to the Definitive Map, it is also necessary to take into account section 31(1) of the Highways Act 1980 which states that *'where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it'*. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

23. Alternatively, a Public Right of Way may be established over a shorter period of time under Common Law. In the case of *Mann v. Brodie* (1885), Lord Blackburn considered that where the public had used a route “*for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of them belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was*”, i.e. the dedication of a way as a Public Right of Way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

## Analysis

24. As there is no substantive mapping or documentary evidence in support of the claim the case relies entirely upon the user evidence presented and the statutory principles set out in section 31(1) of the Highways Act 1980.

### *Date of Challenge*

25. The first step to identify the date upon which the right of the public to use the route was first brought into question (“the date of challenge”). There is no precise definition of what constitutes ‘bringing into question’ the public’s right to use a particular route, but in a recent House of Lords case known as *Godmanchester*<sup>3</sup>, Lord Hoffman quoted with approval the words of Lord Denning (in a previous case) who said this: ‘... *I think that, in order that the right of the public should have been ‘brought into question’, the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity to meeting it... whatever the public do, whether they oppose the landowner’s action or not, their right is ‘brought into question’ as soon as the landowner puts up a notice or in some way makes it clear to the public that he is challenging their right to use the way.*’.

26. In his statement, Mr. M. Lewer (the landowner) explains that, in 2000, his company (O. W. Presland Ltd) entered into an option agreement with Kitewood Estates Ltd (a developer) who were concerned to stop trespass onto the site and this led to the erection of fencing and notices together with the creation of trenches and a bund. However, this is at odds with the evidence of his tenant, Mr. N. Sands, who completed a grazing agreement for the land in 2004. He states: ‘*my intention is to use the land for grazing... clearly, in order to use the site for grazing, it had to be secured. Consequently, on 8<sup>th</sup> October 2004, I erected fencing on the site... [and] I also dug a ditch*’.

27. Despite this obvious conflict as to the purpose of the fencing (i.e. whether it was put there to keep the public out or to prevent the egress of grazing animals), it is clear from the evidence of the applicant that the effect of the fencing was to challenge the public’s right to use the land. It was also the evidence of Mr. Sands, that he had verbally challenged those entering Grasmere Pastures and placed ‘no trespassing’ signs on the newly erected fencing<sup>4</sup>.

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<sup>3</sup> *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28

<sup>4</sup> The witness statement of Mr. Sands reads: ‘*whilst the fence was being erected, I stopped everyone I saw attempting to come on to the site and told them that they were trespassing. I also asked for their names and*

28. Although it appears that the effect of the fencing and trench was short lived (insofar as some parts of the fencing were quickly broken down and makeshift bridges over the trenches were created) and that use of the land resumed without considerable delay, it is clear that the erection of the fencing was more than a mere temporary interruption to use, and constituted an overt action on behalf of the landowner intended to exclude the public from using the land that clearly brought the right of the public to use the claimed paths into question; indeed, it was the fencing which appears to have triggered the application to record the claimed routes.

29. I have therefore taken 2004 as the date of challenge and have considered very carefully the period 1984 to 2004 (the 'material period') in my investigation. Despite the objectors' assertion to the contrary, it should be noted that there is no requirement for the applicant to specify the date of challenge or material period upon which s/he relies; the County Council can consider evidence of use over *any* 20 year period<sup>5</sup>.

#### *Evidence of use 'as of right'*

30. In order to satisfy the provisions of section 31(1) of the Highways Act 1980, it is necessary to demonstrate that use of the claimed routes has been 'as of right', or without force, secrecy or permission<sup>6</sup>. Following interviews with a number of local people, it is clear that there has been regular use of the claimed routes on foot for a full period of 20 years between 1984 and 2004; this is illustrated in the user evidence table and interview summaries provided at Appendix D.

31. There is no evidence from any of the users that their use was by force, that it was secretive or that they had obtained permission to use the claimed routes. There is, however, evidence that the claimed routes were in regular usage and the existence of the claimed routes was common local knowledge. There are several instances where users were first told about the routes by the vendors of their properties when they first moved to the area and all of those interviewed stated that they had regularly witnessed use by others. This is evidenced by the defined tracks shown on the aerial photographs in 1999 and 2003.

32. The onus is on those denying the existence of the right of way to prove compulsion, secrecy of license<sup>7</sup>. Although fencing (and possibly notices) were erected in 2004, the objectors have not been able to produce evidence indicating that they attempted to exclude the public and/or had no intention to dedicate a public right of way prior to that time, despite the fact that O.W. Presland Ltd appears to have owned the land since 1959. It does not appear that there have been any challenges to use during the material period and indeed none of the witnesses recall any notices or obstructions to prevent their use of the path during the material period.

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*addresses, but none would supply those details. Every person that I requested to leave the site did so. At the same time as I had the fence erected, I erected 'no trespassing' signs'.*

<sup>5</sup> This is a subtly different situation to that of Village Green applications where the twenty-year period is normally (subject to certain limited exceptions) the twenty years immediately preceding the date of application.

<sup>6</sup> *R v Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 2 All ER 385

<sup>7</sup> *Jones v Bates* [1938] 2 All ER 237

### *Recreational use of the land*

33. There is another issue, related to 'as of right', which concerns the type of use of the claimed routes. As mentioned above, the land over which the claimed routes run was subject to a previous (unsuccessful) application to register the whole of the field as a Village Green on the basis of recreational usage. A public right of way is a right to pass and re-pass along a particular route from A to B and there is therefore a need to distinguish between this type of direct linear usage and any use of the route that was incidental to other activities which may have taken place on the land (i.e. kite flying, blackberry picking etc.).
34. A similar situation arose in a case known as *Dyfed*<sup>8</sup> in which an application to record a circular route around a lake as a Public Footpath was considered. In that case it was held that '*if... there had been use by the public of a footpath for pure walking (i.e. not merely ancillary to the recreational activities such as sunbathing, fishing and swimming), in my judgement such evidence was capable of founding a case of deemed dedication of the footpath whether or not such walking was itself purely recreational as opposed to walking for business purposes. There is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way*'.
35. At Grasmere Pastures, it is clear that some of the use of the claimed routes would have been ancillary to other recreational activities which took place on the land but that is not to say that if a person were walking their dog along a defined route, their use was not characteristic of someone exercising a public right of way along a defined route as opposed to a general right of recreation.
36. There is also strong evidence that a significant proportion of the use that did take place was not attributable to other those other recreational activities. Several of the witnesses refer to use of the route as access to shops (there is a Sainsburys and B&Q located on the nearby John Wilson Business Park) or to other facilities in the village of Chestfield, such as the Medical Centre or as a shortcut to visit friends. These are all legitimate uses that it would normally be expected to find a public right of way being used for.
37. As confirmed in recent case law, '*it is also well established that a highway should have a defined route...subject to such a clearly established usage, the route of a highway can and should be defined with some precision*'<sup>9</sup>. In this case, the evidence of the users and, in particular, the aerial photographs (which taken several years apart) clearly confirm that defined routes were walked over the field.

### *Interruptions to use*

38. It is the case of the objectors that use of the claimed paths did not continue 'without interruption' during the material period due to the use of the land for agricultural purposes. In his witness statement, Mr. Lewer (company director) provides a detailed account of the history of the land and its various uses. He explains that from 1984, the land has been farmed by tenants who would take a hay crop on an annual basis and, in 1989, the land was ploughed, harrowed and re-seeded.

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<sup>8</sup> *Dyfed County Council v Secretary of State for Wales* (1990) 59 P&CR 275

<sup>9</sup> *R. (on the application of Gloucestershire County Council) v Secretary of State for the Environment, Transport and the Regions and the Ramblers' Association* [2000]

39. Clearly, the agricultural use of the land would have led to temporary and relatively minor interruptions (in the context of 20 years) to use whilst such activities took place. Hence, the question to be considered is whether the agricultural use of the land sufficiently interrupted use of the claimed routes to the extent that the users of the claimed routes would have been aware that their use was being challenged.
40. In the *Fernlee Estates*<sup>10</sup> case, the issue of temporary interruptions caused by the intermittent dumping of building materials on a claimed bridleway was considered. The judge in that case held that interruptions of a temporary nature that were not placed with the intention of preventing use of the way did not constitute an interruption to use for the purposes of s31(1) of the Highways Act 1980; he concluded that an interruption '*must be some physical and actual interruption which prevents enjoyment of the way rather than merely acts which challenge the user while allowing it to go on*' and added '*a mere absence of continuity in the de facto user will not stop time running [as] there must be interference with the enjoyment of a right of passage*'. In support of this, he further stated '*the circumstances of and the intention with which the barring of the way takes place are relevant. For example, the blocking of a road by a broken down vehicle would not amount to a relevant interruption*'.
41. In the present case, the agricultural use of the land was a use which co-existed with the use of the claimed routes but it does not appear to have interfered with the walkers' use of the route, save for relatively short periods on a seasonal basis whilst agricultural operations and machinery occupied the land over which the claimed paths run. Any interruptions to use that did take place were as a result of the tenant's agricultural operations and not as a result of direct actions by the landowner to challenge public use of the land.

#### *Lack of intention to dedicate*

42. Mr. Lewer, in his statement, asserts that '*when this [the ploughing, harrowing and seeding of the land] took place, there could have been no doubt in the mind of anyone who tried to use the field in that period that the owner of the site, through his farmer, had no intention to dedicate any part of the site permanently to them as a footpath or otherwise.*'. It is the objector's case, therefore, that the agricultural use of the land was, in itself, sufficient to bring to the attention of the users that the landowner had no intention to dedicate the claimed routes as Public Footpaths.
43. The owner's lack of intention to dedicate was considered in some detail in the *Godmanchester* case. On this point, Lord Hoffman made the following comments: '*I think that upon the true construction of s 31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be... not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending... to 'disabuse [him]' of the notion that the way was a public highway*'. Lord Scott, in the same case, agreed and provided some practical examples: '*Acts blocking passage along the path by, for example, the padlocking of gates would be likely to be sufficient. Regular challenges to users of the path might suffice. But expressions of intention never disclosed or circulated privately would not, in my opinion, be 'sufficient'. The reason they would not is that they would do nothing to curb the public*

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<sup>10</sup> *Fernlee Estates Ltd v City and County of Swansea and another* [2001] All ER 237

*user of the path, or to disabuse users of the path of any belief that they had a right to use it, or to make clear to those users who did not care or give a thought to whether or not they had a right to use the path that they were trespassers’.*

44. The essence of *Godmanchester* was therefore to make it clear that overt and contemporaneous acts are required in order to show a lack of intention to dedicate and, in addition, that such acts must be communicated to users of the claimed routes so that they may reasonably understand the landowner’s intention. It is clear from the submission of the objectors in relation to the Village Green application that the landowner and his tenant were aware of the use of the tracks over the field; indeed, the tenant himself admits that he went so far as to leave claimed path B and reinstate the perimeter track when he ploughed the field in its entirety in 1989.
45. No evidence has been presented (either by the applicant or the objectors) to suggest that any acts were undertaken during the material period (until, of course, the erection of the fencing in 2004) to demonstrate a lack of intention to dedicate the claimed routes, either by wholly preventing or, at the very minimum, by challenging the use of the routes by walkers.

## **Conclusion**

46. In *Norton and Bagshaw*<sup>11</sup>, it was held that there is a distinct difference between the wording of section 53(3)(c)(i) and that in deciding whether a Public Right of Way exists, two tests must be applied; whether a right of way subsists (known as 'test A') and whether a right of way is reasonably alleged to subsist ('test B'). It was also held that for test B to be met, it is necessary to show whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a public right of way to exist. In *Emery*<sup>12</sup>, the Court of Appeal held that it was possible to make an Order provided that the lower test (test B) had been met, and that in cases where there was credible evidence of public use over a twenty-year period, it would be appropriate to make the Order.
47. Therefore, having carefully considered the evidence and for the reasons cited above, I consider that there is a credible body of user evidence to show that the claimed routes has been used for a period of twenty years and little evidence to show that the landowner had, prior to 2004, directly challenged this use or demonstrated a lack of intention to dedicate the claimed routes. I have thus concluded from my investigations that, on a balance of probabilities, a public right of way on foot is at least reasonably alleged to subsist along the routes claimed.

## **Recommendation**

48. I recommend that the County Council makes a Definitive Map Modification Order to modify the Definitive Map of Public Rights of Way (and accompanying Statement) by adding two Public Footpaths over land known as Grasmere Pastures at Whitstable, as shown at Appendix A to this report.

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<sup>11</sup> *R v. Secretary of State for the Environment ex parte Norton and Bagshaw* (1994) 68 P&CR 402

<sup>12</sup> *R v. Secretary of State for Wales ex parte Emery* [1998] 4 All ER 367



### ***Further details on procedure for information only***

49. The effect of the refusal of this application would simply be that the County Council would take no action to recording the claimed routes as Public Footpaths on the Definitive Map. However, the applicant would have a right of appeal against the County Council's decision to the Secretary of State and this may result in the County Council being directed to make a Definitive Map Modification Order.
50. The effect of accepting the recommendation would be for a Definitive Map Modification Order to be made to add the claimed routes to the Definitive Map of Public Rights of Way. This Order would then be subject to a formal public consultation and, if no objections are received to the Order, the County Council itself has the power to confirm the Order and modify the Definitive Map accordingly. However, in the event of objections being received would be sent to the Planning Inspectorate for determination, most likely by way of a local Public Inquiry.

Accountable Officer:

Dr. Linda Davies – Tel: 01622 221500 or Email: linda.davies@kent.gov.uk

Case Officer:

Miss. Melanie McNeir – Tel: 01622 221511 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the Environment and Waste Division, Environment and Regeneration Directorate, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

### **Background documents**

APPENDIX A – Plan showing claimed routes at Grasmere Pastures

APPENDIX B – Aerial photograph dated 1999

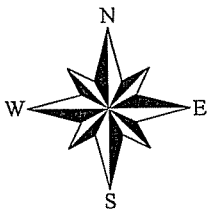
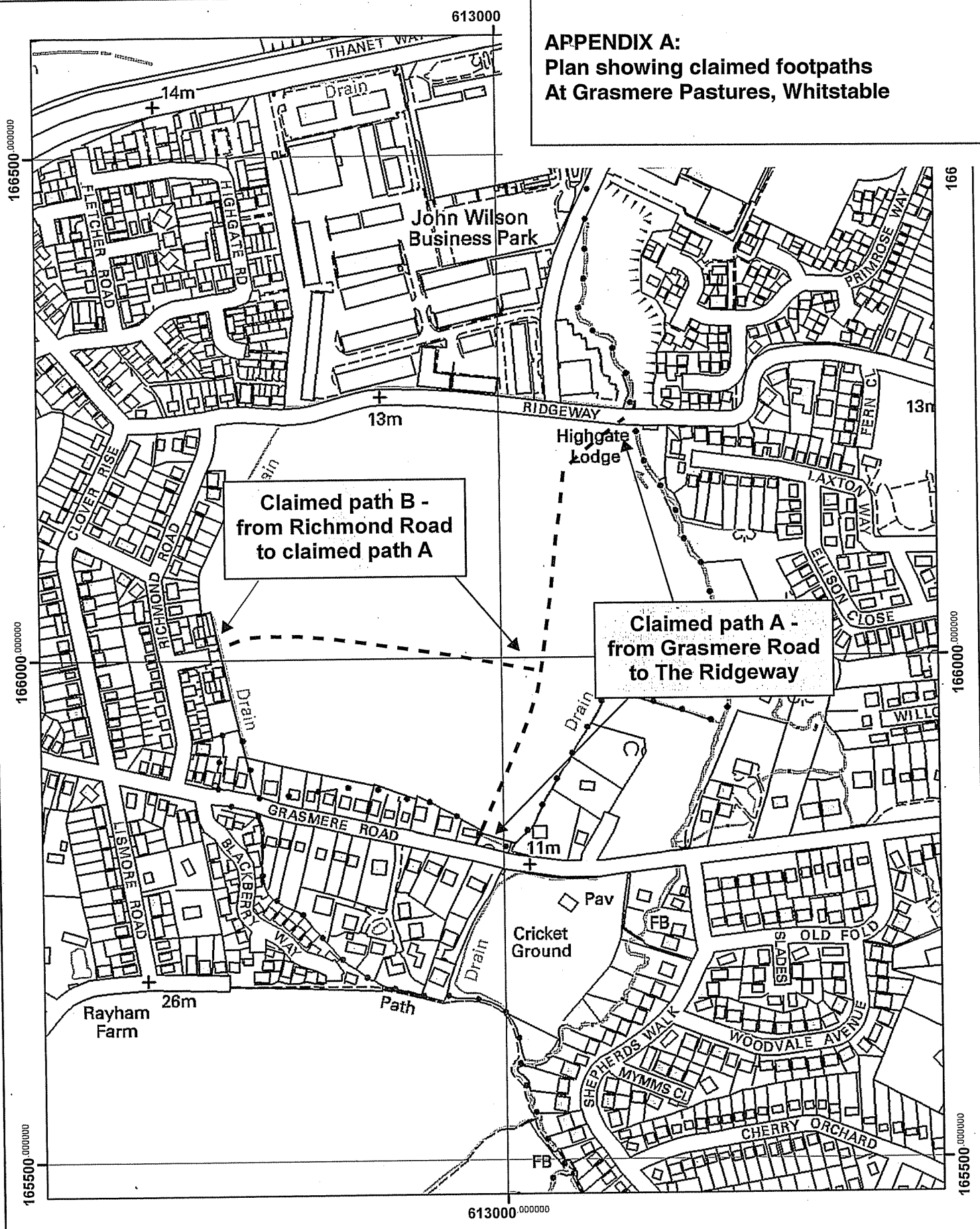
APPENDIX C – Aerial photograph dated 2003

APPENDIX D – Summary of user evidence

APPENDIX E – Objectors' statement

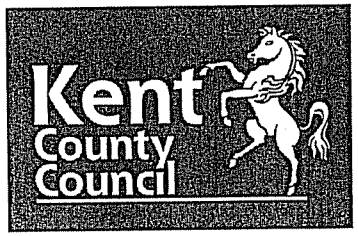
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**APPENDIX A:  
Plan showing claimed footpaths  
At Grasmere Pastures, Whitstable**



Scale 1:5000

Claimed footpaths at Grasmere Pastures, Whitstable  
(shown in bold dashed lines)



**APPENDIX B:**  
**Aerial photograph showing Grasmere**  
**Pastures dated 1999**

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612750 000000

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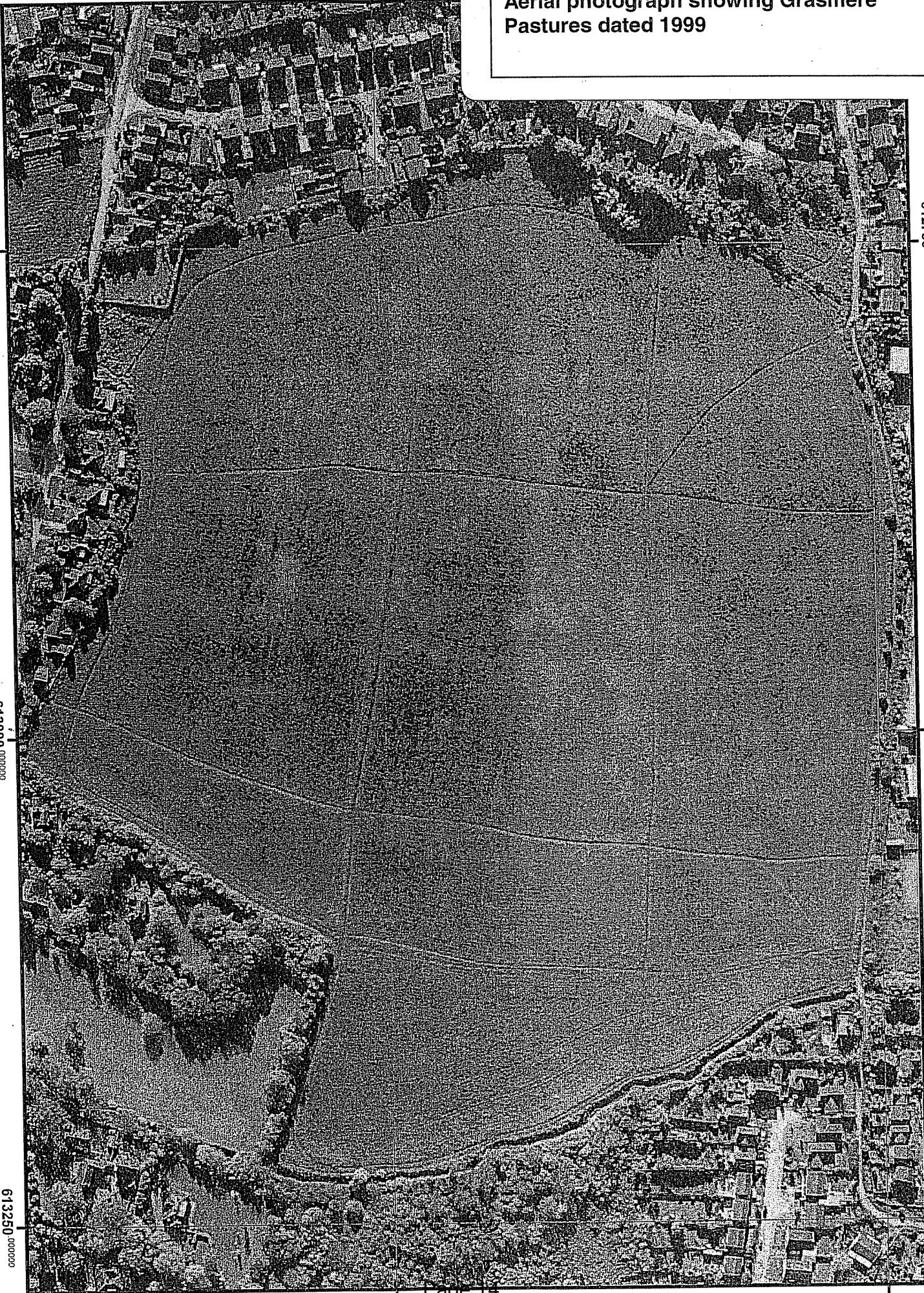
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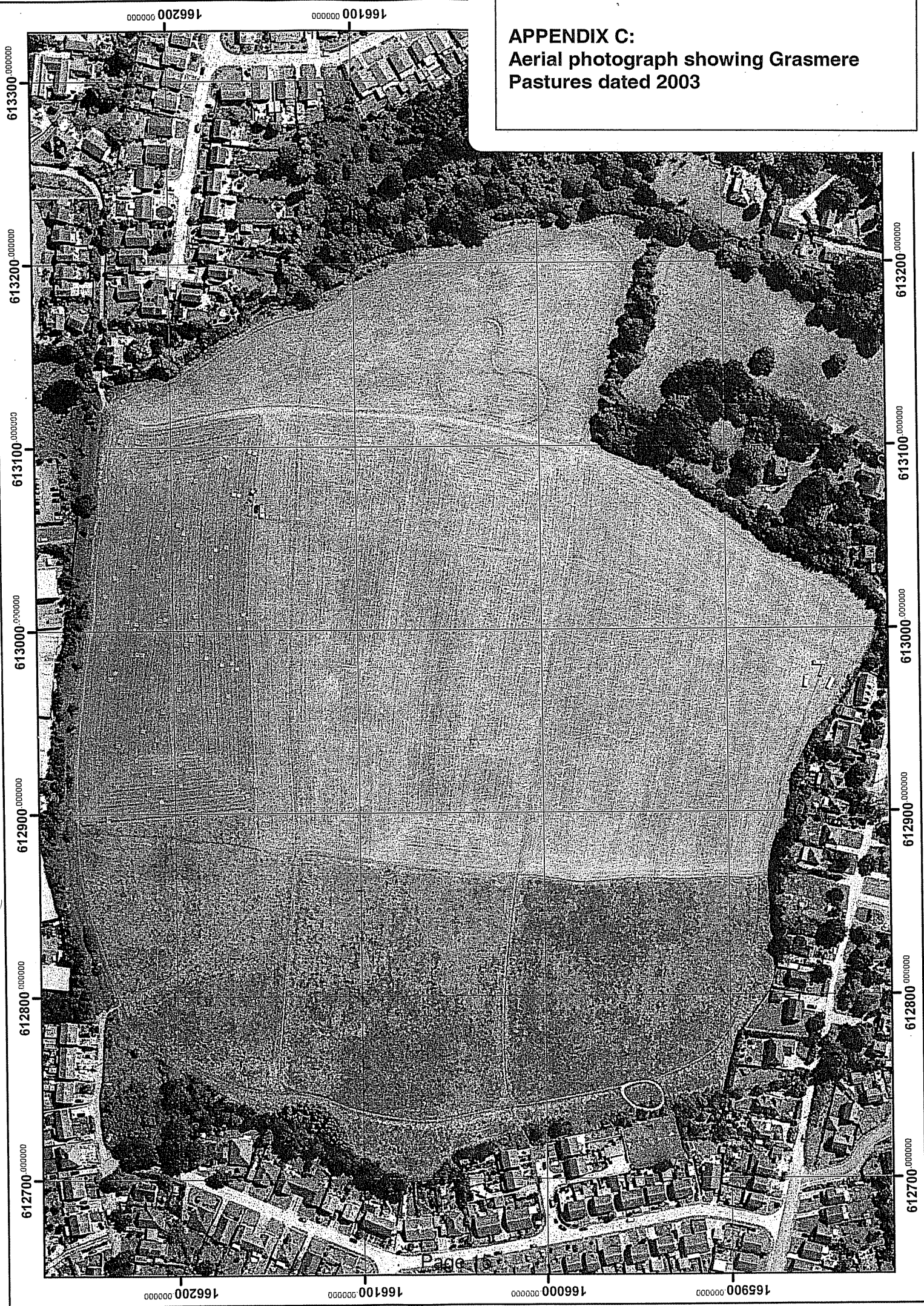
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**APPENDIX C:**  
Aerial photograph showing Grasmere  
Pastures dated 2003



**APPENDIX D:**  
**Table summarising user evidence**

USER	PATH(s) USED	PERIOD OF USE	NO. OF YEARS	FREQUENCY (on average)	MEANS OF USE	PURPOSE (e.g. walking to/from)	NOTICES	OBSTRUCTIONS/ CHALLENGES
*Mr. and Mrs. J. Abbey	A+B	1991 – 2008	(13)	Weekly (at weekends)	Foot	Access to shops (Sainsburys) and recreational walking	Sept 2004 – 'no trespassing' sign erected on Ridgeway at junction with Richmond Road	Trench dug in 2004
Mrs. Y. Ambrose	A	1984 – 2004	20	Daily or weekly	Foot	Walking and exercise		Never verbally challenged but fenced off in 2004
*Mrs. D. Appleton	A+B	1969 – 2008	(35)	Daily for dog walking, weekly to Sainsburys	Foot	Dog walking and access to Sainsburys	Notice on Ridgeway stating 'keep out – trespassers will be prosecuted' in 2004	Deterred from using route due to deep trenches and fencing in 2004
*Mrs. C. Baggs	A+B	1994 – 2008	(20)	Twice daily (morning and afternoon)	Foot	Dog walking, visiting friends in Grasmere Road	Notices at Ridgeway stating 'private land' – was a small notice that did not last long (2004)	Did not use field during Sept/Oct 2004 but fence was then broken and resumed use
Mr. P. Barker	A+B	1974 – 2004	30	Daily	Foot	Dog walking	None	None
Mr. J. Bayfield	A	1998 – 2004	6	Daily	Foot	Dog walking, access to Sainsburys and park at Chestfield		Blocked off 2004
Ms. P. Bloice	A+B	2000 – 2004	3	Daily	Foot or on horse	Dog walking & horse riding	None	None
Mr. P. Brewer	A	1980 – 2004	24	Not stated	Foot	Access to local shops, pub, cricket club and recreational walking		Fencing and barricades blocking access erected 2004
*Mrs. V. Brown	A+B	1988 – 2008	(16)	Twice weekly	Foot	Access to golf club, shops, the Barn and bus stop	None	Trenches and barbed wire (date uncertain)
Miss. L. Caddick	A+B	2001 – 2004	3	Weekly, then daily	Foot	Dog walking & exercise	None	None
Mr. P. Carter	B	1981 – 2004	23	Daily	Foot	Dog walking		
*Mr. and Mrs. Coombe	A+B	1988 – 2008	(16)	Weekly	Foot	Recreational walking, access to the Barn, visiting friends	None	Fencing and ditch in 2004, but did not stop use for very long

*Mrs. S. Corrigan	A	1980 – 2008	(24)	Weekly	Foot	Dog walking, access to Ridgeway to visit family in Chestfield	Notices erected stating private property in 2002	Fencing and trenches in 2002 and wire across exit onto Grasmere Road.
*Mr. and Mrs. R. Cove	A+B	1970 – 2008	(34)	Twice weekly	Foot	Visiting family in Chestfield, access to the Barn in Chestfield, walking for exercise	None	Trenches dug 2004
J. Cox	A	1960 – 2004	44	Occasionally	Foot	Exercise		
*Mrs. J. Cullen	A+B	1980 – 2004	(24)	Daily	Foot	Dog walking, access to Swalecliffe to visit Community Centre, B&Q, Sainsburys and Doctors Surgery	Notices erected by gate at Ridgeway in 2004	Fences and trenches in 2004
Mr. P. Cullen	B	1980 – 2004	24	Daily	Foot	Recreational walking and access to shops		Never challenged
Mr. T. Everitt	A+B	1992 – 2004	12	Daily	Foot	Dog walking	None	Barbed wire prevented access
Mr. and Mrs. Farrington	A	1977 - 2004	(27)	Weekly	Foot	Access to Swalecliffe and Sainsburys	2004 - Notice stating 'private, no trespassing' erected	2007 – trenches dug
Mr. P. Fillary	B	1982 – 2004	22	Daily	Foot	Dog walking, recreational walking, access between South Tankerton and Chestfield	'private, no trespassing' notice erected along Ridgeway in August 2004	
Mr. and Mrs. Flaskett	A	1985 – 2004	19	Daily	Foot	Dog walking	Notice in 2004	Barbed wire fencing erected 2004
Mrs. B. Fortune	A	1976 – 2004	28	Weekly	Foot	Access to church in Chestfield		Field fenced in 2004
Mrs. W. Fraser	A+B	1993-2004	11	Daily	Foot	Dog walking & take grandchildren to park	Sept 04 signs put up at Richmond Road entrance	Barbed wire fence erected
Mr. G. Gadd	A	1966 – 2004	38	Weekly then monthly	Foot	Dog walking	Notices erected 2004	

*Mr. and Mrs. R. Harnett	B	1978 – 2004	(26)	Intermittent, sometimes 2/3 times per week	Foot	Recreational walking, visiting friends in Old Fold	'private land, no trespassing' signs on Ridgeway and Richmond Road	Sept 2004 – fencing and trenches
Mr. D. Hiblen	B	1986 – 2004	18	Twice weekly	Foot	Access to retail/medical/other facilities	Land has been fenced	
Mr. A. Hiscock	A+B	2001 – 2004	3	Daily	Foot	Access to the Ridgeway from Grasmere Rd	None	Ridgeway access barbed wire, Grasmere Rd access barrier put up
Ms. C. Holness	A	1976 – 2004	28	Daily	Foot	Dog walking		Never challenged
Mr. and Mrs. House	B	1984 – 2004	20	Twice daily	Foot	Dog walking	Notices appeared stating private property, no trespassing.	Barriers erected 2004
Mrs. D. Hughes	B	1984 – 2004	20	Twice daily	Foot	Exercising horse, dog walking, shortcut to Sainsburys/B&Q/ bus stop/Medical Centre		Never challenged
*Mrs. L. Hutchins	A+B	2003-2004	(1)	Daily	Foot	Dog walking, access to Sainsburys, doctors surgery and rugby club	Erected in September 2004 with fencing	Challenged by tenant and told were trespassing in 2004 (but not on claimed path)
Mrs. G. Kentfish	A+B	2002 – 2004	5	Daily	Foot	Dog walking, access to shops	None	None
E. B. Leo	A	1962 – 1998	36	Thrice daily	Foot	Dog walking		Never challenged
*Mr. and Mrs. P. Lennard	A+B	1985 – 2008	(19)	Twice daily	Foot	Dog walking, visiting friends in Primrose Way, access to Sainsburys, station	None	Fencing and trenches at Ridgeway 2004 but quickly found a way around obstructions
Mrs. J. Loveridge	A	1944 – 2004	60	Daily	Foot	Dog walking, exercise		
Mrs. M. Lucke	B	1974 – 2004	30	Weekly	Foot	Dog walking		Never challenged



Mrs. S. Maclurkin	A	1963 – 2004	41	Daily	Foot	Access and recreation.	Notices stating private property in 2004	Barbed wire around field and earth mound - 2004
Mr. J. Maister	B	1978 – 2004	26	Daily	Foot	Dog walking and shortcut to Chestfield		Fenced off in 2004
Mr. C. Marchant	A	1986 – 2004	18	Daily	Foot.	Dog walking		Barbed wire erected and access obstructed in 2004
Mrs. S. Marchant	A	1986 – 2004	18	Daily	Foot	Dog walking		No challenged to use
Mr. T. Marchant	A+B	2002 – 2004	2	Monthly	Foot	Access to shops and Medical Centre		Entrance blocked at Richmond Rd end by mound of soil and stones
*Mrs. D. Molloy	A+B	2000 – 2008	(4)	Weekly	Foot	Taking grandchildren to visit play park on Chestfield Road and exercise	None	2006 – ditch dug around edge of field
Ms. L. O'Neill	A	1976 – 2004	28	Daily	Foot	Dog walking	2 'private property – no trespassing' notices erected along Ridgeway	
Mr. and Mrs. Owens	B	1986 – 2004	18	Daily	Foot	Dog walking and access to shops/workplace	Aug/Sept 2004 – new sign erected at gates on Richmond Road stating 'private, no property'	Gates at Richmond Road padlocked in 2004
Ms. C. Phillips	A+B	1971 – 2004	33	Weekly	Foot	Dog walking, exercise	Yes (no date)	Fence went up, piles of mud
Mr. R. Pike	B	1987 – 2004	17	2/3 times per day	Foot	Dog walking		
M J Post	A+B	1999 – 2004	5	Monthly	Foot	Access to shops	None	None
S. Powell	B	1984 – 2004	20	Occasional	Foot		Fencing in 2004	
K. V. Ralph	A	1983 – 2004	21	Daily	Foot	Dog walking	Notices erected 2004	Barbed wire fencing erected 2004

*Mrs. M. Relf	A+B	1979 – 2008	(25)	Daily	Foot	Access to village facilities at Chestfield (e.g. newsagents), Sainsburys, dog walking	None	Trenched dug approx. 2005 but only prevented use for a few days
Mr. A. Rhodes	A	1968 – 2004	36	Daily	Foot	Access to Chestfield, Sainsburys and dog walking		Fenced off, barbed wire and earth mounds in 2004
Mr. M. Sanders	B	1983 – 2004	21	Daily	Foot	Through route to Chestfield from South Tankerton.		Locked gates 2004
Mrs. C. Shannon	B	1968/9 – 2004	35	Daily	Foot, horse-back	Dog walking, horse riding, cut through to visit relatives	Never challenged	
Mr. J. Shannon	A+B	1977 – 2004	30	Weekly & then daily last 11 years	Foot	Short cut to Ridgeway for shopping & visiting relatives	None	Ditches dug (but he does not consider them a barrier)
Mr. G. Smith	A	1965 – 2004	39	3-4 times per day	Foot	Dog walking		
Mr. and Mrs. J. Spencer	A+B	1970 – 2004	(34)	Daily	Foot	Access to Chestfield, cricket club, shops and doctors surgery	None	Sept 2004 – fences erected. They were breached and trenched dug with large mounds of earth
Mr. R. Sprignall	A	1987 – 2004	17	Weekly	Foot	Exercise dogs, play with children		Fenced off in 2004
Mrs. C. Stevens	A	1983 – 2004	21	Weekly	Foot	Access to supermarket, doctors surgery and dog walking	Never challenged	Blocked at Grasmere Road end with rubbish
*Mr. L. Stevens	A	1983 – 2004	(21)	Weekly	Foot	Supermarket, doctors surgery, dog walking	Not on claimed route	Blocked with trenches and fencing
*Mr. J. Swain	A+B	1975 – 2008	(29)	Once a fortnight	Foot	Visit friends in Chesfield, access to the Barr, leisure walk	None	Trench and fencing approx. 2005
Mrs. L. Waking	A+B	1992 – 2004	12	Daily	Foot	Exercise, dog walking, & access to Chestfield	None	Sept 04 - barbed wire and trenches

*Ms. S. Wallace	A+B	1980 – 2008	(24)	Twice weekly	Foot	Access to golf club, the Barn and dog walking	None	Trenches and barbed wire (date uncertain)
*Mrs. E. Watkins	A+B	1998 -2008	(6)	Twice daily	Foot	Dog walking, access to Sainsburys, B&Q, doctors surgery, post office, the Barn		Trenches dug in approx 2005. Challenged by tenant in approx 2005
Miss. D. Webster	A	1959 – 2004	45	4-5 times per week	Foot	Access to Sainsburys and dog walking		Access blocked 2004
*Ms. M. Wickers	A+B	2000 – 2004	(7)	Daily	Foot	Dog walking, exercise, access to shops, rugby club, doctors surgery	Notices erected by gates on Ridgeway but did not look official so most people ignored them	Challenged by tenant in 2004, told land was private property (but not on claimed path)
Mr. N. Widdows	A+B	1999 – 2004	5	Monthly	Foot	Walking	None	Blocked off with barbed wire & earth
*Mr. and Mrs. J. Wiggins	A+B	1965 – 2008	(39)	Weekly	Foot	Walk to play park and the Barn in Chesfield, golf course and cricket club	None	Ditches dug (date not stated)
M. Wilkinson	A+B	2000 – 2004	7	Daily	Foot	Dog walking & cut through	None	None
Mrs. P. Willison	A+B	2001 – 2004	3	Twice daily	Foot	Dog walking & play with grandchildren	Sept 2004 - 2 signs along Ridgeway stating land was private	All access points were blocked with earth & fence went up
Mrs. V. Wilson	A	1980 – 2004	24	Twice daily	Foot	Dog walking		Never challenged

All users listed in the table provided user evidence forms that were submitted with the original application *except those shown in italics*. In total, 61 user evidence forms were submitted with the application and a further 9 witnesses were identified by the applicant during the investigation process.

Users marked with an \* were interviewed by a KCC Officer regarding their use of the land.

The original application was submitted in 2004 (which is also the 'date of challenge'), hence use of the land in the majority of cases is shown until 2004 (the year the forms were completed), however, it is likely that their use has continued beyond this date.

Those interviewed have continued to use the claimed routes until 2008 (the year they were interviewed) but the figure in the 'no. of years' column shows the number of years of use up until 2004 only and is shown in brackets. This is to ensure appropriate comparison with the other users who completed forms in 2004.

IN THE MATTER OF AN APPLICATION FOR M  
CONCERNING LAND AT GRASMERE PAS

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**STATEMENT OF OBJECTION**

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**1 Introduction**

- 1.1 This is the Statement of Objection of OW Presland Limited, Kitewood Estates Limited and Mr Norman Sands (*the Objectors*) to an application by Mrs. E. Watkins of 28 Richmond Road, Whitstable, Kent CT5 3HS (*the Applicant*) under section 53(2) of The Wildlife and Countryside Act 1981, to modify the Kent County Council Definitive Map and Statement made on 20 November 2004 (*the Application*).
- 1.2 There are two applications:
- a. Footpath A – running from Grasmere Road to Ridgeway across Grasmere Pasture;
  - b. Footpath B – running from Richmond Road to join Grasmere path to Ridgeway across Grasmere Pasture
- 1.3 It is noted that the witness statements submitted in support of the Application do not solely refer to Footpath A and Footpath B as described above and it is not clear whether the Applicant is seeking a modification of the Definitive Map so as to include the additional routes indicated, alternatively whether these have been drawn in error but were intended to reflect Footpath A and B as drawn by the Applicant. For the avoidance of doubt it is hereby confirmed that this Statement of Objection relates to all and any footpaths indicatively shown within the Application and supporting witness statements.
- 1.4 For ease of reference the alleged footpaths referred to in the Application are all shown on the Plan attached as Appendix 1

- 1.5 The first objector is the registered proprietor of Grasmere Pasture under Title No. K503254. The second objector has an option to purchase Grasmere Pasture and the third objector has a tenancy of Grasmere Pasture (herein referred to collectively as *the Objectors*).
- 1.6 The Objectors are represented by Sarah Taylor of Bevan Brittan LLP, Solicitors, of Fleet Place House, 2 Fleet Place, Holborn Viaduct, London EC4M 7RF to whom all correspondence and communications should be sent.
- 1.7 This Statement of Objection refers to documents and witness statements annexed hereto all of which shall be regarded as incorporated herein and form part of this objection within the meaning of the Commons Registration (New Land) Regulations 1969.

## 2 The Law

- 2.1 Without any admission as to the validity thereof the Application appears to rely on the paths being Public Rights of Way and proposes a modification to the Kent County Council Definitive Map and Statement under section 53 (2) of the Wildlife and Countryside Act 1981 (*the 1981 Act*).
- 2.2 Section 53(2) of the 1981 Act reads as follows:-

"(2) As regards every definitive map and statement, the surveying authority shall –

- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and
- (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

- (3) The events referred to in subsection (2) are as follows –
- (a) the coming into operation of any enactment or instrument, or any other event, whereby-
    - (i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;
    - (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or
    - (iii) a new right of way has been created over land in the area to which the map related, being a right of way such that the land over which the right subsists is a public path
  - (b) the expiration, in relation to any way in the area to which the map relates of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;
  - (c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-
    - (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies;
    - (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or
    - (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

2.3 The Applicant must therefore establish that the rights of way by way of footpath subsist or are reasonably alleged to subsist over Footpaths A and B across Grasmere Pasture in accordance with Section 53(3)(c)(1) of the 1981 Act.

2.4 Section 31 of the Highways Act 1980 (as amended) (*the 1980 Act*) provides:-

- (1) *Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*
- (2) *The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*
- (3) *Where the owner of the land over which any such way as aforesaid passes-*
- (a) *has erected in such a manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and*
  - (b) *has maintained the notice after the 1st January 1934, or any later date on which it was erected,*
- the notice, in absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway."*

2.5 The Application states that the alleged footpaths have become rights of way pursuant to Section 31 of the 1980 Act. This means that the Applicant must prove the following 3 limbs of the test provided by section 31 of the 1980 Act:

- (1) the date when the right of way has been brought into question;
- (2) that there has been use of a way by the public as of right;
- (3) use of the way has been enjoyed retrospectively for 20 years without interruption

### 3 Summary of the Objectors' objection

- 3.1 The Objectors contend that the Applicant has failed to identify the necessary period of 20 years by reference to any commencement or termination date, and has failed to demonstrate the use of the paths by the public as a right without any interruption.
- 3.2 The Objectors now show why the Application fails to satisfy the requirements in section 31 of 1980 Act.

### 4 Date when the right of way has been brought into Question

- 4.1 Evidence submitted in support of the Application for Footpath A refers to the blocking of the access and erection of a barbed wire fence in September 2004 as well as the erection of 'trespass signs' (see the witness statement of L E O'Neil). These notices are stated by the witness to include the statement 'Private Property No Trespassing'.
- 4.2 In relation to Footpath B the evidence submitted in support of the Application refers to the erection of a fence in September 2004.
- 4.3 It is therefore the case that the Applicant would need to establish 20 years continuous use of both Footpaths before September 2004.

### 5 Use of a way by public as of right

- 5.1 Lord Hoffmann in the decision of the House of Lords in R v. Oxfordshire County Council, ex parte Sunningwell Parish Council [1999] 3 All ER 385 clarified the reference to use of a way 'as of right' where he stated:

*"It became established that such user had to be, in the latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner... The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second because the owner would not have known of the user and in the third because he had consented to the user, but for a limited period."*  
([2000] 1 AC 335 at 350H-351B)



- 5.2 The presumption upon which the creation of a way by prescription is based is the combination of the fact of use coupled with acquiescence by the Landowner to this use. It is this that gives rise to a presumption that the Landowner intended to dedicate the use of the way to the public. The Applicant has to prove that the nature of the user was such that throughout the relevant period the owners of the land knew of the use of the way or ought to have known of such use and did nothing to stop it (see Lord Hoffman at p354 in the decision of the House of Lords in R v. Oxfordshire County Council, ex parte Sunningwell Parish Council).
- 5.3 Forcible user vitiates any claim to entitlement as of right. Forcible user includes not merely the violent exercise of user (e.g. the removal of an obstruction) but also any insistence upon a particular user in the face of continuing protest by the owner (see Newnham v Willison (1988) 56 P&CR 8 at 19).
- 5.4 A fence was erected around Grasmere Pasture by the Mr Sands on 5th October 2004. A year later, on 6th October 2005, a bund and trench was created on the boundary of the site. The fence, bund and trench have been breached and torn down in places. Any activities that are carried out by force are not nec vi, that is without force. If the local inhabitants continue to use the Footpaths across Grasmere Pasture by force, they do not do so as of right. The Objectors therefore contend that in the present case the local inhabitants did not pass through Footpath A and B "as of right".
- 5.5 The Objectors contend that there cannot be use of the land as public rights to way by way of footpath "as of right" and without interruptions in the circumstances of Grasmere Pasture having regard to the farming activities that have taken place over the years. The Objectors rely upon the witness statements annexed hereto at Appendix 3 of Norman Sands and Neil William Strand as to these farming activities. (It should be noted that these witness statements were prepared in connection with the Objectors' response to the Applicant's separate application seeking registration of Grasmere Pastures as a town or village green. The content of those two witness statements is however equally applicable to the application for modification of the Definitive Map.) As can be seen from these statements, Grasmere Pasture was put down to arable cropping until 1984 when peas and other crops were cultivated. Since 1984 an annual hay crop has been taken and every Spring the area is fertilised and sprayed. Witness statements in support of the Application

acknowledge that the land was leased as pasture (see the statement of Mr Dewis Hiblen):

- 5.6 Judicial interpretation on whether the use of land by public can be indulged "as of right", where the relevant land is also used for farming purposes, was given by Sullivan J. in R (Laing Homes Limited) v. Buckinghamshire County Council [2003] EWHC 1578; [2003] 3 PLR 60, where he was concerned with the use of some fields for taking an annual hay crop. He said (at paragraph 82) that:

*"Thus, 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 landowners' licensee's] agricultural use of the land in such manner, or to such an extent, that [the landowners] 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 landowners]' it would not be reasonable to expect [the landowners] to resist the recreational use of their field so long as such use did not interfere with their licensee's ... use of them, for taking an annual hay crop."*

- 5.7 It is quite clear from the evidence of the persons making statutory declarations and the answers to the questionnaires by the local residents, in support of the Application, that they recognise that the agricultural activities which have been repeated annually have always had priority over, and their use of the paths have been subject to, these agricultural activities. Further, the witness statements annexed hereto, and referred to above, also make clear that the agricultural activities have never been subject to the use of the alleged footpaths by public, rather the agricultural activities have always had priority. The Objectors therefore contend that the local inhabitants have never enjoyed the paths "as of right" without interruptions as against the Objectors' use of Grasmere Pasture. It is therefore quite plain that there has not been any use "as of right".

## **6 Enjoyed Retrospectively for 20 years Without Interruption**

- 6.1 The evidence presented must establish that those accessing the land used the exact line of the footpaths claimed for a period of 20 years and without interruption.

- 6.2. The Objectors contend that 20 years of use of the precise alignment of the footpaths claimed cannot and has not been demonstrated to have existed by the Applicant.
- 6.3 The Objectors contend that the use of the alleged footpaths has been interrupted on an annual frequency since 1984 in the fertilising and spraying of the land every spring, and in the harvesting every summer as the Applicants stayed out of the way of the agricultural machinery and allowed the process to take place without challenge. They did not assert they had a right of way by foot on the land and in doing so supported the notion that the Objector's use of land took priority over their use and interrupted their use. In particular in 1989 and thus within the 20 year period, there is contemporaneous evidence that the entire field, including the perimeter, was cropped, ploughed, harrowed and reseeded during the year and so would have prevented all access whilst the hay grew. This is inconsistent with any intention by the owner to dedicate a footpath.
- 6.4 A recent application by the Applicant to register Grasmere Pasture as village green was dismissed on the grounds that the field was agricultural land and had been actively used for this purpose.

## 7 Conclusion and other matters

- 7.1 The Objectors therefore contend that the requirements of a public right of way within the meaning of section 31 of the 1980 Act are not satisfied.
- 7.2 In conclusion the Objectors would state that
- (a) the use of the footpaths conflicts with the farming activities historically and currently conducted at Grasmere Pastures;
  - (b) the use of the footpaths by force of entry cannot be "as of right";
  - (c) Without prejudice to the contention at (b) above, the other requirement is not satisfied in any event. The Applicant has provided insufficient evidence to show uninterrupted use of the footpaths for 20 years commencing with the date when the way was first brought into question.

7.3 In the circumstances, the Applicant has not satisfied the three limb test contained in section 31 of the 1980 Act and therefore the Application should be refused.

**BEVAN BRITTAN LLP**

**29 AUGUST 2007**

## Application to register land known as Barton Playing Field at Canterbury as a new Town Green

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A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Wednesday 12<sup>th</sup> November 2008.

Recommendation: I recommend that the County Council endorses the advice received from Counsel that a non-statutory Public Inquiry be held into the case to clarify the issues.

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Local Members: Mr. M. Northey

Unrestricted item

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### Introduction

1. The County Council has received an application to register land known as Barton Playing Field as a new Town Green from local resident Dr. S. Bax ("the applicant"). The application, dated 8<sup>th</sup> May 2007, was allocated the application number 595. A plan of the site is shown at **Appendix A** to this report and a copy of the application form is attached at **Appendix B**.

### Procedure

2. The application has been made under section 15 of the Commons Act 2006 and regulation 3 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. These regulations came into force on the 6<sup>th</sup> April 2007.
3. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Town or Village Green where it can be shown that:
  - 'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
4. In addition to the above, the application must meet one of the following tests:
  - **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or
  - **Use of the land 'as of right' ended no more than two years prior to the date of application**, e.g. by way of the erection of fencing or a notice (section 15(3) of the Act); or
  - **Use of the land 'as of right' ended before 6<sup>th</sup> April 2007** and the application has been made within five years of the date the use 'as of right' ended (section 15(4) of the Act).
5. As a standard procedure set out in the regulations, the County Council must notify the owners of the land, every local authority and any other known interested persons. It must also publicise the application in a newspaper circulating in the local area and put up notices on site to publicise the application. The publicity must state a period of at least six weeks during which objections and representations can be made.

## The Case

6. The area of land subject to this application (“the application site”) consists of a large playing field situated in the St. Martin’s area of the city of Canterbury, which is known locally as Barton Playing Field. The application site forms a rectangular shape that is bounded on all sides by adopted highways known as Spring Lane, Pilgrims Road and Pilgrims Way (part of which is recorded on the Definitive Map of Public Rights of Way as Byway Open to all Traffic CC41).
7. The application has been made on the grounds that the application site has a long history as a space for public recreation which pre-dates the use of the site by the schools which began in 1960. The applicant asserts that there is extensive evidence of recreational use ‘as of right’ by local residents for a period well in excess of twenty years.
8. Included in the application were a detailed statement in support, 28 signed user evidence questionnaires and a CD-ROM containing audio recordings of the interviews along with a video of the field showing recreational use. A table summarising the evidence of use was also provided by the applicant and this is attached at **Appendix C**. Additionally, a further 14 signed user evidence questionnaires were submitted by the applicant prior to the commencement of work on the application.

## Consultation

9. Consultations have been carried out as required. A number of responses, both in support of and in objection to the application, have been received. These are summarised below.
10. A number of local residents (20 in total) wrote in support of the application, adding their evidence of use to that already provided by the applicant. The local County member, Mr. M. Northey, also wrote in support of the application on the grounds that the land has been used on a daily basis for a variety of purposes ‘as of right’ and there has always been a general belief locally that the land was for common use.
11. Objections to the application were received from the following:
  - Canterbury City Council objects on the grounds that Town Green status may severely impact upon any future improvements and enhancements to the site for the benefit and enjoyment of the children, public and wider community that it serves.
  - Eight local residents have written in objection to the application. These appear to have been written in response to the local distribution of a flyer entitled ‘save Barton field’ by the applicant. The gist of these letters is that the field has not been open for public use for many years and indeed was originally fenced off when the land was given to the schools in the 1960s. The fence has been broken down through acts of vandalism but was repaired on occasions. Local residents have only gained access to the land through damage to the fence and never has use been ‘as of right’. A smaller field nearby was widely used for recreational purposes for many years, but in recent times it has not been maintained, therefore making it unsuitable for informal sporting activities.
  - The local KCC Education Officer, Maggie Gregory, has objected to the application on the grounds that the land is private land designated as sports pitches for Barton

Court Grammar School and Chaucer Technology College. She adds that access to the site by local residents has not been unhindered for the last twenty years due to the existence of a fence and therefore any access that did occur was via acts of vandalism to the fence. She further adds that, in her view, if the land is registered as a Town Green, it is likely to become impossible, or at least very dangerous, for the schools to continue to use the sports pitches.

## **Landowners**

12. There has been some confusion regarding the ownership of the site, with the applicant asserting that the County Council was part-owner along with Barton Court Grammar School and Chaucer Technology College. The applicant had concerns that the County Council's alleged interest in the land would seriously impede the County Council's ability to make an impartial decision on the application.
13. However, inspection of Land Registry documentation along with modern base maps has revealed that the County Council, in fact, has no interest in the application site. It would appear that the land was originally owned by the County Council but was transferred to the schools when they acquired Grant Maintained status during the 1990s. No part of the playing field remained in KCC ownership, although the highways to the south and east (Pilgrims Way and Pilgrims Road) are owned by the County Council. Therefore, despite assertions to the contrary, the County Council has no current interest in the application site and the ownership is as shown on the plan attached at **Appendix D**.
14. The current landowners, Barton Court School and Chaucer Technology College, have both objected to the application. The schools are concerned that private land designated as school playing fields is being considered for Town Green status. Their objections are made on the grounds that use of the field by local residents has not been 'as of right' as force has been used to gain access by vandalising fencing which has been in place since the late 1960s. The schools assert that they use the fields on a weekly basis for school activities and for extra curricular activities beyond these hours and, as such, the claimed continuous use by the local residents is not a valid one. The illegal use of the field has led to children being injured by broken glass and metal drinks cans and PE staff have found needles on the field which is a serious cause for concern.
15. In addition, the schools argue that the legislation does not permit the type of dual or shared usage envisaged by the applicant; use as a Town or Village Green must be 'as of right' at all times and the legislation does not permit the sort of joint venture whereby the local residents use the land when the owner does not require it. In support of this, the schools state that the evidence shows that use has been mostly during school holidays and at weekends when there is no one in the school to prevent access and further add on a general point that the fact that the residents are aware that the land is a school playing field means that their use cannot have been 'as of right'.

## **Applicant's response to the objections**

16. The applicant has taken the opportunity to extend his arguments in two further detailed submissions. He argues that the objections are mainly misguided and entirely insubstantial, and the objectors have misunderstood many elements of the application.

In his view, the objectors make bold assertions and yet offer no evidence to support them, thereby painting a false picture of the situation. In addition, evidence given by some of the objectors shows a woeful ignorance of the schools and the local area.

17. The applicant then sets out in detail the requirements for registration of land as a Town Green and discusses each requirement in turn:

- **Significant number** – the applicant argues that despite assertions from an objector that use of the application site was by others from outside (i.e. it was by scattered individuals and in some cases by scattered groups) evidence from surveys and user evidence statements he has submitted show regular use by a large number of residents.
- **Locality and local people** – the applicant refutes the assertion by the objectors that the ecclesiastical parish of St Martins and St Pauls is unacceptable as a locality for the purposes of complying with registration. The statement by an objector that predominant use is by others from outside of the parish is also refuted on the basis that submitted evidence clearly upholds the fact that use is clearly shown by local residents not only living close to the site but from right across the parish.
- **Lawful sports and pastimes** – In this respect, the assertion made by the objectors that some of the activities listed in the application are outside the scope of ‘recreational’ activity is accepted by the applicant yet at the same time he takes the opportunity to reiterate that there are many other listed activities which do come very firmly within the legal definition. Furthermore, all of those activities had taken place over the requisite twenty year twenty year period.
- **Without permission** – The applicant is of the view that, despite assertions to the contrary from the objectors, there is no evidence to suggest that during the twenty year qualifying period that any one received permission to use the field. He further argues that the objectors have confused licence and acquiescence and submits that the school never gave permission (licence) but in effect acquiesced in the public use of the field thus promoting an impression that use was as of right. To add weight to this argument the applicant refers to adduced evidence that indicates that many of his witnesses were not in fact aware of who actually owned the land anyway and so therefore could not seek permission from anybody even, I assume, if they had wanted to. As further emphasis of this point further argument is given that even from the schools evidence there are statements indicating that no permission was granted and he cites relevant examples.
- **Without Force** – With regard to the question as to whether use was without force, the applicant argues this is perhaps the heart of the case. In defence against accusations from the objectors that the local residents only gained access to the site by breaking down and vandalising boundary fencing the applicant asserts there is no actual evidence to substantiate this. He further argues that there is authority in reference text to the fact that if persons enter a field through a gap created by others then those persons are not guilty of entering the field with force. He points out it is not important whether the field was fenced or not. What is important he argues is whether local people continue to use the field. He points out the field was not completely fenced. There were many gaps. Gates were left open or unlocked. There was no real evidence of the erection of visible and effective signs. Use was therefore without force.
- **Without secrecy** – The applicant argues that there is evidence from the objectors themselves which support their knowledge that the field was being used by local residents. He disputes the assertion by the objectors that use was at weekends only and thus in secret because school staff were not there to witness such use.



## Counsel's advice

18. Given the complexity and emotiveness of the matter, Counsel's advice on this issue has been sought. Counsel was of the view that, on the face of it, the application should be rejected on the grounds that the evidence presented by the applicant suggests that the majority of local users deferred to use of the application land by the schools. This issue was considered by the *Laing Homes*<sup>1</sup> case which dealt with the impact of agricultural activities in respect of applications to register land as a Town or Village Green and clarified that local inhabitants moving out of the way to enable the landowner to carry out such activities creates an interruption to the required twenty-year period of use. This is known as the 'deference issue' and, in essence, means that recreational user which defers to use by the landowner is not 'as of right' because it does not appear to the landowner to be the assertion of a right.
19. Regulation 6(3) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 states: *'the registration authority... shall not reject the application without giving the applicant a reasonable opportunity of dealing with the matters contained in the statements of [objection] and with any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application'*. As such, a letter was sent to the applicant informing him that there may be possible grounds for recommending to the Member Panel that the application should be rejected, and providing an opportunity for him to respond accordingly. A copy of this letter ("the regulation six letter"), which summarises the evidence received from Counsel, is attached at **Appendix E** for reference.

## Applicant's response to "regulation six" letter

20. A copy of the applicant's response is attached at **Appendix F**. In the main, the applicant offered new arguments in relation to the issue of deference and distinguishes the current application with the circumstances in the Laing Homes case. The applicant's view is that there was no deference in the current application because there is a significant difference in the circumstances in the present case compared to those that were relevant in the Laing Homes case.
21. In the present application, the applicant argues that the issues relating to deference do not, in his view, apply to this application. This is because the schools were fully aware of the use of the land by local residents and rather than either party 'deferring' to the other's use of the land, there has been shared use of the field between the schools and the residents. Furthermore, he argues there is no evidence that the landowners' use in practice actually conflicted with that of the local residents. The applicant also states that it was impossible for recreational users to defer since they did not know or acknowledge that anyone else owned the land or had any prior right to use the land; if they did not know who owned the land, they could not correctly be deferring.
22. In the applicant's view, the fact that the land concerned is also a school playing field is irrelevant as there is no legal impediment in law or practice to registering such land as a Town or Village Green and even if the land were to be so registered, the schools would, according to the applicant, have the legal right to continue to use the land as playing fields for their own purposes.

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<sup>1</sup> *R (Laing Homes Ltd) v. Buckinghamshire County Council (2003)*

23. The applicant also attempts to draw parallels between the present case and other, in his view, similar Village Green applications both in Kent and other parts of the country. It is not necessary for the purposes of this report to go into detail regarding these, save to say that the vast majority of Village Green applications are, by their very nature, complex and rely upon a very specific area of law. Indeed, the circumstances in each case are nearly always unique and hence each case must be treated on its own merits; despite the applicant's assertion to the contrary, there is no such thing as a 'straightforward' application to register land as a Town or Village Green.

### **Further advice from Counsel**

24. Following receipt of the applicant's comments in relation to the original advice from Counsel, and in response to a threat from the applicant of Judicial Review action in the event of the application being rejected, the County Council sought a second opinion from different, more senior Counsel.

25. Counsel's view was that since the application turns primarily on the issue of deference and the evidence of use is a matter of fact and degree (i.e. it concerns the inter-relationship between the landowner and the recreational users), it is necessary to establish the exact facts of the case before applying the relevant legislation. Counsel was also of the view that the evidence presented could not, under the circumstances, be taken at face value and requires cross-examination in order to obtain a better understanding of the patterns of use of the field by the various parties.

26. There is also a further issue in that a recent High Court case known as *Redcar*<sup>2</sup>, which related to an application to register part of a golf course as a Village Green and approved the principle set out in the Laing Homes case, is due to be heard in the Court of Appeal before the end of the year. Counsel's advice was that any decision in the current case should not be made until the outcome of the *Redcar* appeal is known.

### **Conclusion**

27. The issue of a school playing field being registered as a Town or Village Green is not one which has previously arisen in this county. Members of the panel, and indeed members of the public, may well be deeply concerned to see such an application being considered by the County Council. However, it is important to recognise that it is not for the County Council, in its quasi-judicial role as Registration Authority, to distinguish between those types of land that it is considered desirable to register and those which it is not; case law from the House of Lords has established that there is no identifiable 'type' of land that should be registered as a Town or Village Green. Instead, the County Council has no option but to be guided solely by the legal tests set out in the Commons Act 2006 (and associated case law).

28. In this case, it is considered that the question as to whether there was deference or not (as has been argued by the parties involved) cannot be resolved on paper and can only be properly examined by way of testing that evidence through the non-statutory Public Inquiry process. This practice has been approved by the courts, most recently in the *Whitney*<sup>3</sup> case in which Lord Justice Waller said this: '*the registration authority has to*

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<sup>2</sup> *R (Lewis) v Redcar and Cleveland Borough Council (2008)*

<sup>3</sup> *R (Whitney) v Commons Commissioners (2004)*

*consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration’.*

29. In my view, before any decision is taken, the County Council should heed Counsel’s advice to hold a non-statutory Public Inquiry to explore the issues further. The application is evidently very emotive locally and acceptance or rejection of this application will have a significant impact upon the future management of Barton Playing Field and it is important for all concerned that the true status of the application site be determined based upon all of the information available.

### **Recommendations**

30. I recommend that Members endorse the advice received from Counsel and that a non-statutory Public Inquiry be held into the case to clarify the issues.

Accountable Officer: Dr. Linda Davies – Tel: 01622 221500 or Email: linda.davies@kent.gov.uk Case Officer: Miss. Melanie McNeir – Tel: 01622 221628 or Email: melanie.mcneir@kent.gov.uk
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The main file is available for viewing on request at the Countryside Access Service, Environment and Waste, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.
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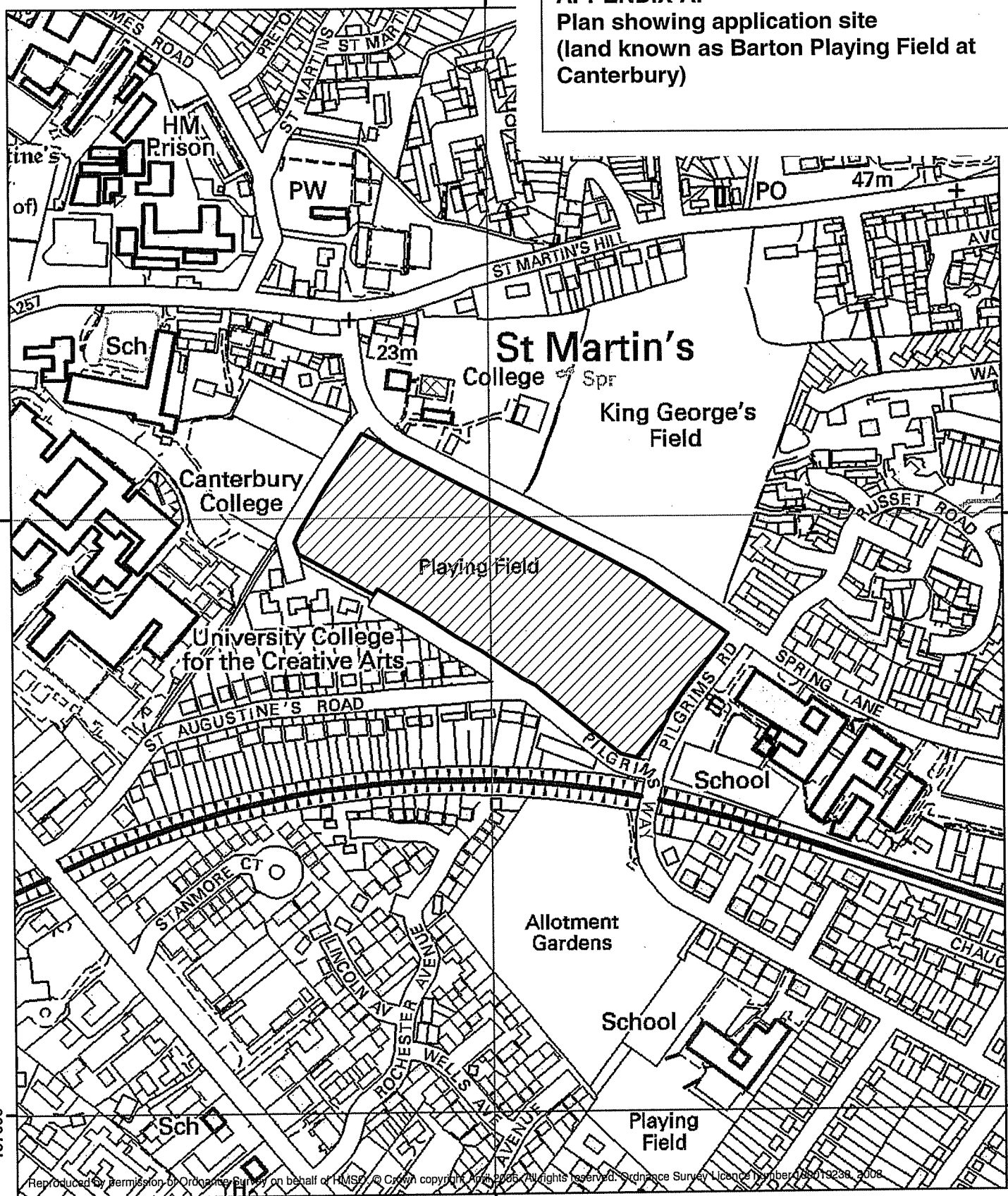
### **Background documents**

APPENDIX A – Plan showing application site  
APPENDIX B – Copy of application form  
APPENDIX C – Table summarising user evidence (supplied by applicant)  
APPENDIX D – Plan showing ownership of application site  
APPENDIX E – Copy of “regulation six” letter (dated 29/05/08)  
APPENDIX F – Applicant’s response to “regulation six” letter (dated 28/08/08)

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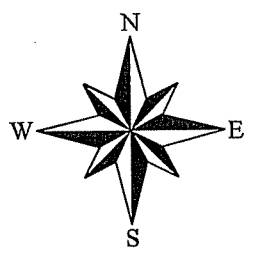
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**APPENDIX A:**  
Plan showing application site  
(land known as Barton Playing Field at  
Canterbury)



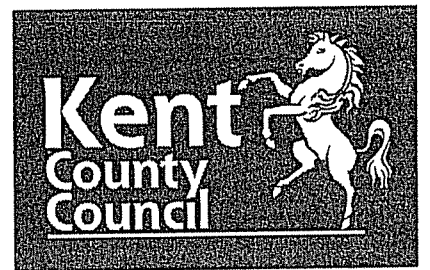
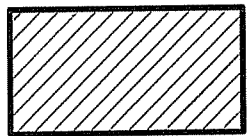
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Scale 1:4500

Land subject to  
Town Green  
application at  
Canterbury



**APPENDIX B:  
Copy of application form**

**Commons Act 2006: Section 15  
Application for the registrat  
Village Green**

Official stamp of registration authority  
indicating valid date of receipt:

COMMONS ACT 2006  
KENT COUNTY COUNCIL  
REGISTRATION AUTHORITY  
10 MAY 2007

Application number:

595

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

Applicants are advised to read the 'Guidance Notes for the completion of an Application for the Registration of land as a Town or Village Green' and to note the following:

- All applicants should complete questions 1–6 and 10–11.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete questions 7–8. Section 15(1) enables any person to apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete question 9.

**Note 1**

Insert name of  
registration  
authority.

**1: Registration Authority**

To the

KENT COUNTY COUNCIL

**Note 2**

If there is more than one applicant, list all names. Please use a separate sheet if necessary. State the full title of the organisation if a body corporate or unincorporate.

If question 3 is not completed all correspondence and notices will be sent to the first named applicant.

**Note 3**

This question should be completed if a solicitor is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here.

**2. Name and address of the applicant**

Name:

Full postal address:

Telephone number:   
(incl. national dialling code)

Fax number:   
(incl. national dialling code)

E-mail address:

**3. Name and address of solicitor, if any**

None

Name:

Firm:

Full postal address:

Telephone number:   
(incl. national dialling code)

Fax number:   
(incl. national dialling code)

E-mail address:

**Note 4**

For further advice on the criteria and qualifying dates for registration please see section 4 of the Guidance Notes.

\* Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.

**4. Basis of application for registration and qualifying criteria**

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5.

Application made under **section 15(8)**:

If the application is made under **section 15(1)** of the Act, please **tick one** of the following boxes to indicate which particular subsection and qualifying criterion applies to the case.

**Section 15(2)** applies:

**Section 15(3)** applies:

**Section 15(4)** applies:

If **section 15(3) or (4)** applies please indicate the date on which you consider that use as of right ended.

If **section 15(6)\*** applies please indicate the period of statutory closure (if any) which needs to be disregarded.



**5. Description and particulars of the area of land in respect of which application for registration is made**

Name by which usually known:

Barton playing field (historically the Cricket Meadows)

Location:

- Parish of St. Martin and St. Paul, Canterbury, Kent  
- South of Spring Lane, Canterbury, Kent  
- Land Registry numbers: K893228, K781439, K753636  
K104116

Shown in colour on the map which is marked and attached to the statutory declaration.

Common land register unit number (if relevant) \*

**Note 5**

The accompanying map must be at a scale of at least 1:2,500 and show the land by distinctive colouring to enable it to be clearly identified.

\* Only complete if the land is already registered as common land.

**Note 6**

It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village or street). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly.

**6. Locality or neighbourhood within a locality in respect of which the application is made**

Please show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked:

Parish of St. Martin and St. Paul, Canterbury

Tick here if map attached:

Exhibit B

**7. Justification for application to register the land as a town or village green**

**Note 7**

*Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.*

*This information is not needed if a landowner is applying to register the land as a green under section 15(8).*

The playing field to which this application relates was known historically as 'the Cricket Meadow' and has a long history as a space for public recreation and right of way. Indeed it was crossed for centuries by part of the historic Pilgrims Way, shown on maps as early as the 1600s.

In the 1960s it was given over to two schools as playing fields, but significant numbers of local residents continued to use it openly for recreation, and have done so ever since, with the acquiescence of the schools.

This application offers extensive evidence from many residents of over twenty years of recreational use of the field 'as of right'. The evidence comprises a survey of long-standing residents and some of more recent arrival, an observational survey of use of the field, and a user survey to identify where users live.

The application is supported by signed affidavits from 28 local residents, audio recordings of the interviews on a CD-Rom (which also includes a video of the field showing recreational use), and a full Supporting Statement showing how the field meets the requirements for Registration as a Town or village green.

Please see the Statement appended to this form, and related Exhibits as itemised in Section 10 below.

**Note 8**

Please use a separate sheet if necessary.

Where relevant include reference to title numbers in the register of title held by the Land Registry.

If no one has been identified in this section you should write "none"

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

**8. Name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green**

Owners:

1. Governing Body of Barton Court Grammar School, Longport, Canterbury, Kent, CT1 1PH
2. Governing Body of Chance Technology School, Spring Lane, Canterbury, Kent, CT1 1SU
3. Kent County Council, County Hall, Maidstone, Kent ME14 1XQ

**9. Voluntary registration – declarations of consent from 'relevant leaseholder', and of the proprietor of any 'relevant charge' over the land**

N/A

**Note 9**

List all such declarations that accompany the application. If none is required, write "none".

This information is not needed if an application is being made to register the land as a green under section 15(1).

**10. Supporting documentation**

**Note 10**

List all supporting documents and maps accompanying the application. If none, write "none"

Please use a separate sheet if necessary.

- Exhibit A: Map of the playing field
- Exhibit B: Map of the Parish
- Exhibit C: CD-Rom with video and with audio recordings of the interviews

**11. Any other information relating to the application**

**Note 11**

*If there are any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.*

—


**Note 12**

*The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or unincorporate.*

Date:

8/5/2007

Signatures:



**REMINDER TO APPLICANT**

You are advised to keep a copy of the application and all associated documentation. Applicants should be aware that signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence. The making of a false statement for the purposes of this application may render the maker liable to prosecution.

**Data Protection Act 1998**

*The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the registration authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public.*

## Statutory Declaration In Support

To be made by the applicant, or by one of the applicants, or by his or their solicitor, or, if the applicant is a body corporate or unincorporate, by its solicitor, or by the person who signed the application.

<sup>1</sup> Insert full name (and address if not given in the application form).

STEPHEN JAMES  
I.....BAK.....<sup>1</sup> solemnly and sincerely declare as follows:—

<sup>2</sup> Delete and adapt as necessary.

1.<sup>2</sup> I am ((the person (one of the persons) who (has) (have) signed the foregoing application)) ((the solicitor to (the applicant) (<sup>3</sup> one of the applicants))).

<sup>3</sup> Insert name if Applicable

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in part 5 of the application.

<sup>4</sup> Complete only in the case of voluntary registration (strike through if this is not relevant)

~~4.<sup>4</sup> I hereby apply under section 15(8) of the Commons Act 2006 to register as a green the land indicated on the map and that is in my ownership. I have provided the following necessary declarations of consent:~~

- ~~(i) a declaration of ownership of the land;~~
- ~~(ii) a declaration that all necessary consents from the relevant leaseholder or proprietor of any relevant charge over the land have~~

Contd

<sup>4</sup> Continued

~~been received and are exhibited with this declaration; or  
(iii) where no such consents are required, a declaration to that effect.~~

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act 1835.

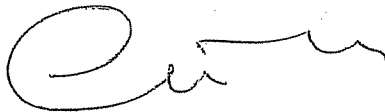
Declared by the said STEPHEN  
JAMES BAX )  
at 36 STATION ROAD WEST )  
CANTERBURY KENT CTZ 8AN )  
this EIGHTH day of MAY )  
2007 )



Signature of Declarant

Before me \*NICHOLAS  
FAIRWEATHER

Signature:



Address: 36 STATION ROAD WEST  
CANTERBURY KENT CTZ 8AN

Qualification: SOLICITOR.

---

\* The statutory declaration must be made before a justice of the peace, practising solicitor, commissioner for oaths or notary public.

Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

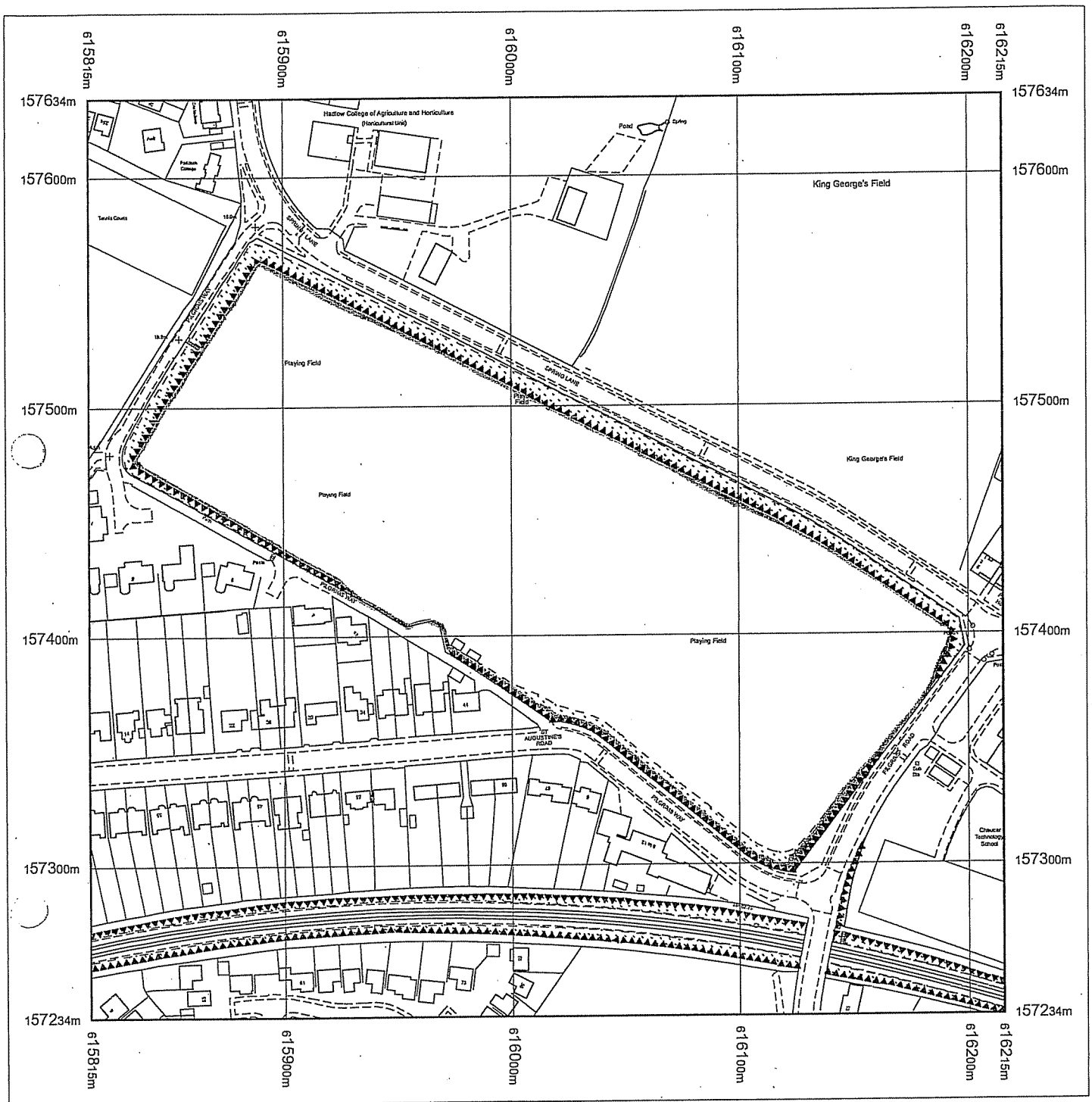
**REMINDER TO OFFICER TAKING DECLARATION:**

*Please initial all alterations and mark any map as an exhibit*

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A



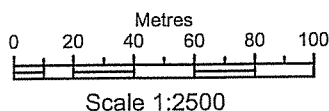
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The representation of a road, track or path is no evidence of a right of way.

The representation of features as lines is no evidence of a property boundary.



Supplied by: **Outlet User**  
 Serial number: 00066700  
 Centre coordinates: 616015 157434

Further information can be found on the OS Sitemap Information Leaflet or the Ordnance Survey web site:  
[www.ordnancesurvey.co.uk](http://www.ordnancesurvey.co.uk)

Playing field
St Augustine's Road
Canterbury
CT1 1XR

	Q1	Q2	Q3	Q4	Q5	Q6	Q7	Signed by
Surname(s) and name(s) of residents	Family who have used the field	Use of field	Years	Entry by force?	Use in secret?	Permission?	Summary	
1 Taylor, Roy & Christine de Caries	Respondents, plus daughter and granddaughter	walk, run play family ball games, informal cricket, rounders	1985 – 2007 continuously	“No, it’s always been open.”	“No, it’s a very open area.”	“No. and I’ve never seen anybody, or been told off. We’ve never been told off, and we’ve never heard of or seen anybody being told not to use it”	Yes – 22 years	Roy Taylor & Christine de Caries
2								
3 White, John and Gill	“Yes, very occasionally, our grandchildren”	Football and cricket	1995 - 2007	No	No	“No, there were no notices or signs, nobody appeared to be patrolling it or watching it...” [did anybody say... you need to leave the field?] “Never.”	“Yes, to the best of knowl we’ve it lawf yes”	John and
4								

**APPENDIX C:**  
**Table summarising user evidence**  
**(produced by the applicant in support of**  
**the application)**



	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
5	Dee, Peter and Gill Dee	4a Pilgrims Way, in Barton area more than 31 years	32 years	Selves and children. 3 children and 4 grandchildren plus friends	All sorts of sports. Football, flying kites, walking dogs, golf	1975 – present (2007)	No	No	No	Yes	Peter and Gill Dee
7	Moore, Peter and Maria	26 St. Augustine's Road	22 years	Yes, sons	Kicking a ball about, running, walking	1985 – present (2007)	No, "there was a door always open.. there have been lots of kind of permanent gaps"	"No, we thought we were following a tradition, I suppose"	Never. [Signs?] "I can't remember seeing any."	Yes	Peter and Maria Moore

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
9	Cooper, Mr J	43 Suffolk Road, Spring Lane Estate	21 years	Yes, me and the family	Football, family sports	1986 – to present (21 years)	No	No, it was open	No, no	Yes, 21 years	J Cooper
10	Garrard, Solihin and Sofiah	18 St. Augustine's Road	22 years	Yes, all 5 children	Sport, cricket, football, athletics, long jump, running, hockey	1985 – 2001 continuously "The fence was always broken, there was always access"	No	No	"No, nobody ever came up to us. There were signs at the other field, but not at this one."	Yes	Solihin and Sofiah Garrard

Barton playing field

	Q1	Q2	Q3	Q4	Q5	Q6	Q7	Signed by
	Family who have used the field	Use of field	Years	Entry by force?	Use in secret?	Permission?	Summary	
12	Family, 3 children	Football, cricket, tennis ball, sledging, snowball fights	1985 – 2005, without break.	No	No	"No, never saw signs"	Yes, absolutely	David and Jo Pick
13	Family, 3 children	Football, cricket, tennis ball, sledging, snowball fights	"An important amenity because there is so little else"	No	No	"No, never saw signs"	Yes, absolutely	David and Jo Pick
14	Family, 3 children	Football, cricket, bat games, aerobics, frisbee	1986 – present (2007). "We never were not able to get access to it."	No	No	No. Signs? "No, never a sign. Never."	Yes.	Malcolm Andrews, Peter Andrews, Kristin Wade
15	Family, 3 children	Football, cricket, bat games, aerobics, frisbee	1986 – present (2007). "We never were not able to get access to it."	No	No	No. Signs? "No, never a sign. Never."	Yes.	Malcolm Andrews, Peter Andrews, Kristin Wade
16	Family, 3 children	Football, cricket, bat games, aerobics, frisbee	1986 – present (2007). "We never were not able to get access to it."	No	No	No. Signs? "No, never a sign. Never."	Yes.	Malcolm Andrews, Peter Andrews, Kristin Wade

	Q1	Q2	Q3	Q4	Q5	Q6	Q7	Signed by
Surname(s) and name(s) of residents	Family who have used the field	Use of field	Years	Entry by force?	Use in secret?	Permissio n?	Summary	
17 Ely, (Betty) Audrey	Yes (son)	Football, with friends	1975 - 1985	No	No	No, not that I was aware of, no	Yes (son). "My husband was a governor of the Chaucer. We had quite a sort of ... amicable ... um.. um, you weren't afraid of, um, using it, because it was all part and parcel of the locality... he had a good relationship with the masters. " Any sign or notice since 1959?: "No". "I would always say there has been an entrance into that field in my experience, yes." Since 1987 until 1997 "there were breakages" in the fence	Stephen Bax on behalf of Mrs Ely ( as she is partially sighted)

	Q1	Q2	Q3	Q4	Q5	Q6	Q7	Signed by
	Family who have used the field	Use of field	Years	Entry by force?	Use in secret?	Permission?	Summary	
18	No							
19	Son, family	football, walking dogs. When we bought the house we were told that the "field was there, [there was an] understanding that it was usable, ... [previous owners] indicated that they used the field and so it was an attraction when buying the house"	7 months	No	No, broad daylight at the time others were using it	No, there's no indication, no notices	Agreed	George Jeffrey and Deborah Cruickshank
20	Over 38 years							
	31 St. Augustines Road							
	44 St. Augustines Road							

	Q1	Q2	Q3	Q4	Q5	Q6	Q7	Signed by
	Family who have used the field	Use of field	Years	Entry by force?	Use in secret ?	Permission?	Summary	
21	Yes, 6 in family plus lodgers and friends	Running, playing, rounders, cricket, kite flying, boomerang cycling, athletics, dog walking	Regularly, since 1984 until now 2007	"No. No need to. Doors were open" "The gates where the shed is, the tool shed and the large pile of grass cuttings, down Pilgrims Way were always open..." "You could always gain entry.. from this side"	No	Signs - "no, I've never seen, I've never seen signs". "When I moved here I was told.. that the headmaster lived locally and he actively encouraged people to use the field. ...use of the field was encouraged"	Yes, that's us!	Louise Hummerstone and Sam Samson
22	Hummerstone, Louise and Sam Samson					Permission: "No, not at all"		

	Q1	Q2	Q3	Q4	Q5	Q6	Q7					
Surname(s) and name(s) of residents	Family who have used the field	Use of field	Years	Entry by force?	Use in secret?	Penmission?	Signed by					
23	Winder, Lesley	4 Lambourne Walk, Spring Lane Estate	All my life	Yes, myself, daughter and friends	Sitting in field, running around, meeting, walking, having picnics, rounders	From late 1970s onwards	"No, never had to... because there's never been a proper fence around the field anyway, and there was always a gate open... there was never a padlock on a gate or anything, and so you could just walk in" Signs: "Never. There was no signs on the field. Nothing at all"	No	No	Yes	Winder, Lesley	
24	Walker, Hilda	54 Barton	Since 1967	Yes, all four children	Cricket, football, rounders, after school and weekends	"Right the way from 1970." "Up until ... 1983-4" "We used to play for the Flying Horse pub"	No	No, it was broad daylight. The coppers used to drive past	No	Yes	Walker, Hilda and (son) Gary	
25	and (son) Gary	Road, Barton Estate										

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permitted on?	Q7 Summary	Signed by
26	David Cogger	11 Cobham Close, Barton Estate	Since 1924, since 1978 in Barton Estate	Myself	Recalls walking across field in around 1930, on 'triangular path', and then in 1970's, and 1980's and later	Around 1930	N/a	N/a	N/a	N/a	David Cogger
27	Graham, Dorothy and Colin	26 Pilgrims Way, Barton Estate	Since 1976	No, except for walking across and dog walking. "Although I recognised it was a school playing field there seemed to be no restrictions" 'I do recall coming up those steps with the dog'		Since 1976	"Until the last few years the gate at the far end used to be open most of the time. I remember walking across with my grandson, across to Pilgrims Road or Pilgrims Way	No	No	No, but only for occasional dog walking	Graham, Dorothy and Colin



**Residents' witnessing of local use of the field**

	Q8 Surname(s) and name(s) of residents	Q8 Witnessed local residents at recreation?	Q8a Use of field	Q8b How many people?	Q8c Years	Q9 Entry by force?	Q10 Use in secret?	Q11 Permission?	Signed by
1	Taylor, Roy & Christine de Caries	"Yes, I think it's quite frequently used by people at weekends, particularly on Sundays."	"Usually just informal family ball games, cricket and things, summer... informal cricket, rounders, people walking their dogs...practising their golf shots ..."	"...in the summer as many as 20, 30 people use it at weekends, in the winter it's less used, but you do find football games at weekends, local residents and their friends"	Continuously from 1985, and increasingly	No	"No, it would be very difficult! You can't be secret about it there."	"I have never heard of that. And I've never seen anyone thrown off it."	Roy Taylor & Christine de Caries
2	White, John and Jill	"Yes, frequently."	Sports in general, mainly football, jogging, cricket	"at any one time up to a maximum of 20 people using it, ... probably 50 a week. At weekends teams come in"	1984 - present (2007), continuously	No	No	"No, none at all"	John and Jill White

	Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	Signed by	
	Witnessed local residents at recreation?	Use of field	How many people?	Years	Entry by force?	Use in secret?	Permission?		
5	Dee, Peter and Gill Dee	Yes	“All sorts – such a variety” ... “sometimes just meeting, chatting, football”	Summer week – “my guess would be 150”. Winter week – 75. [House overlooks the field directly] “just people who go on to use it for recreation”	1986 - now	No, it was never necessary to enter it by force. There was always an opening somewhere.	No	“At the beginning, as a courtesy we asked the headmaster, a friend, who lived on the road, and he said yes, no problem.”	Peter and Gill Dee
6	Moore, Peter and Maria Moore	“Yes, certainly”	Ball games, walking the dog, walking, weightlifting	Different people, sometimes quite a lot of people – perhaps 8 or 10	“As far as I remember, there has always been access to that field” (22 years)	No	No	No	Peter and Maria Moore

	Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	Signed by
	Witnessed local residents at recreation?	Use of field	How many people?	Years	Entry by force?	Use in secret?	Permission?	
9	Cooper, J "Yes, they're always over there. There's a gang up there now!"	Mainly football, and running	At the moment, 40 kids, playing football, ... cricket. Team sports, more in school holidays	1986 - present	"No, my special constable wouldn't allow that no!"	No	No	Mr J Cooper
10	Garrard, Solihin and Sofiah Yes	Football, cricket, golf, running, flying a kite, rounders	In winter a dozen kids a week. "In summer there's always something going on." A few days ago there was a decent cricket match going on "Say 18"	1985 onwards. The school ethos, on the Chaucer side, was more relaxed...	No	No	No	Solihin and Sofiah Garrard
11								

	Q8a	Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	Signed by
	<i>Surname(s) and name(s) of residents</i>	<i>Witnessed local residents at recreation?</i>	<i>Use of field</i>	<i>How many people?</i>	<i>Years</i>	<i>Entry by force?</i>	<i>Use in secret?</i>	<i>Permitted?</i>	
12	Pick, David	Yes. "There was a terrific cricket match the other day"	Cricket, football – "loads and loads of football, and a nice mix of ages" Jogging, walking the dogs, gymnastics, general uses	Winter – football a couple of times a week. "There's something going on every week" "It's very rarely ... in decent weather that there isn't somebody playing on the field" Summer: 10-12 children every time I go by.	1985 – present, continuously	No	No, not in the field	No	David and Jo Pick
13	Jo Pick								
14	Andrews, Malcolm,	"All the time, yes"	"mainly football... golf, walking dogs, jogging, batting games"	Winter week: "up to 10, at least" Spring or summer: 15? No many more! 20 to 30. Even more than that! I cycle along there every day. Every day you see a large-ish group now that the weather is fine"	From 1986 to present	"No, I never have" "No" "No."	No. "It'd be hard to!"	No	Malcolm Andrews, Peter Andrews, Kristin Wade
15	Peter Andrews,								
16	Kristin Wade								

	Q8a	Q8	Q8b	Q8c	Q9	Q10	Q11	Signed by
	Use of field	Witnessed local residents at recreation?	How many people?	Years	Entry by force?	Use in secret?	Permission?	
17	<p>Ball games, dog walking</p> <p>Used to have a whole week of organised summer holidays sport organised through local churches</p> <p>"We had a schoolmaster from the Chaucer who lived in Chaucer Cottage and he used to take his dogs outside there and exercise them".</p> <p>"It should be a local amenity".</p> <p>"You'd see [children] come up with a ball under their arm."</p>	<p>(partially sighted)</p> <p>I can hear them, but I wouldn't like to specify</p>	<p>About 10 a week in summer.</p> <p>In winter "not much activity".</p>	<p>"always been apparent". "I would say from the late 1970's" until now</p>	No	<p>That I wouldn't be able to tell</p>	No	<p>Stephen Bax on behalf of Mrs Ely ( as she is partially sighted) "That's Ok by me"</p>

	Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	Signed by
	<i>Witnessed residents at recreation?</i>	<i>Use of field</i>	<i>How many people?</i>	<i>Years</i>	<i>Entry by force?</i>	<i>Use in secret?</i>	<i>Permission?</i>	
18	Yes	Walking dogs, ball games, kicking balls around	Never huge numbers – about 20 in a typical summer week. In a winter week, fewer. “There’s always been a smattering of people there.”	From 1968	“My impression... was that the gaps were just the sort of gaps you always get in fences” “People went on it through various gaps in the fence.” “No, I never saw anybody pushing their way through.”	No	Signs: “Never saw ANY signposts of any sort at all, ever, that I’m aware of”. Permission: No	Doreen Laven
19-20	Absolutely, yes	Rounders, softball, community use, men, women and children, a group of families, dog walking, jogging, football (semi-organised and small groups), cricket, playing in sand, long jump, golf, remote controlled cars, mini motorbikes			“No, there’s no need to. There’s no fence around ...”	No. “everything I’ve seen is open and public	No	George Jeffrey and Deborah Cruickshank

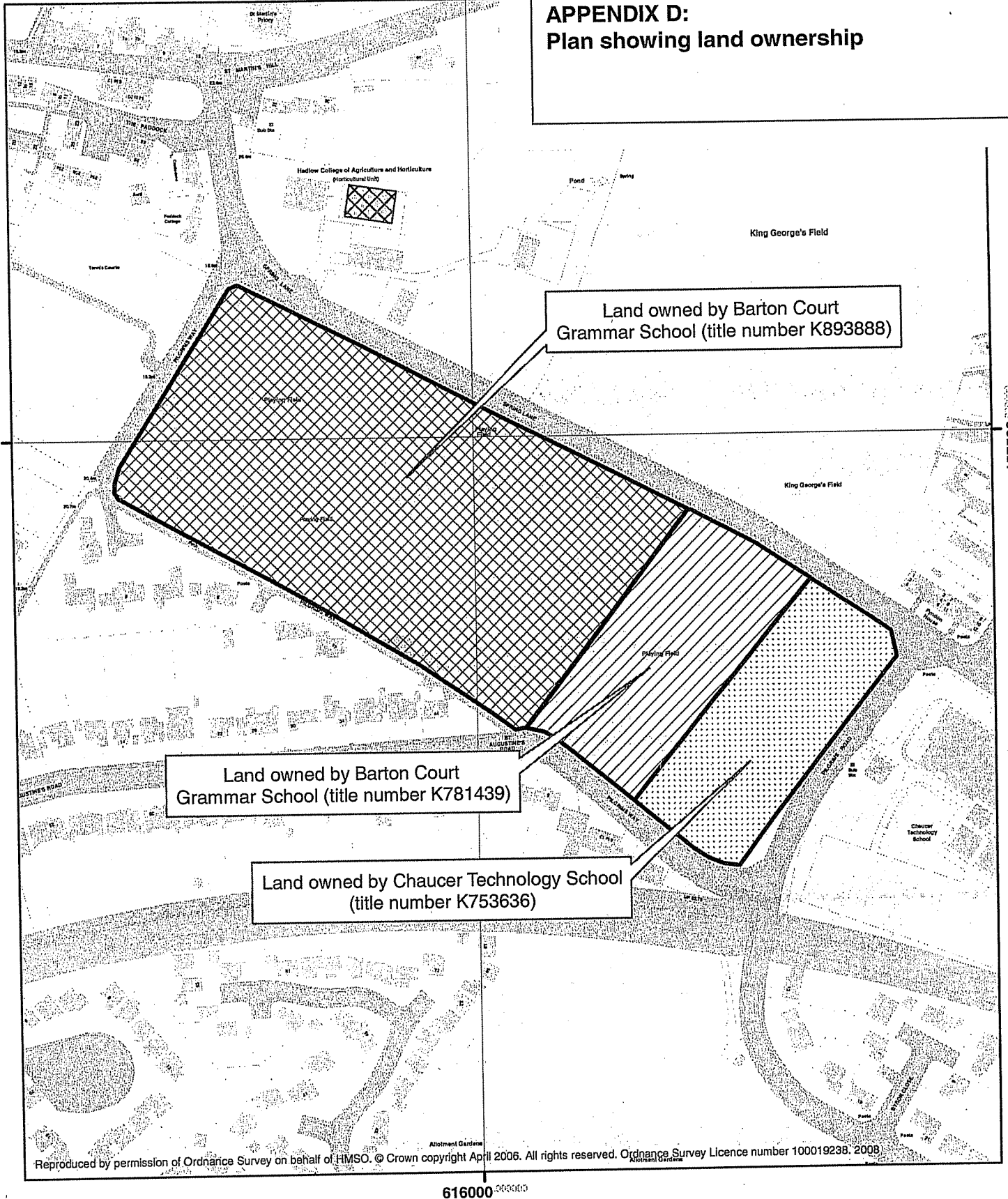
	Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	Signed by
	<i>Witnessed local residents at recreation?</i>	<i>Use of field</i>	<i>How many people?</i>	<i>Years</i>	<i>Entry by force?</i>	<i>Use in secret?</i>	<i>Permission?</i>	
21	Hummerstone, Louise and Sam Samson	“Frequently and regularly. There’s almost always someone on the field”	Football, regular matches, cricket, golf, dog walking, flying kites, just sitting enjoying the open space, people on motorbikes	“At least 2 or 3 maybe five a day..... that’s 20 ...” 30 people a week in winter... more than that. Summer – always people there. More people lurking about. 30 plus	Since 1984. More or less the same. We were encouraged to use it. 20 years ago there were a lot of young people. We would go up, often, in groups if twenty to play rounders. It’s been constant.	“No, I’ve never seen that”	No	No
22								Louise Hummers tone and Sam Samson

	Q8 <i>Surname &amp; Surname(s) and name(s) of residents</i>	Q8a <i>Use of field</i>	Q8b <i>How many people?</i>	Q8c <i>Years</i>	Q9 <i>Entry by force?</i>	Q10 <i>Use in secret?</i>	Q11 <i>Permission?</i>	Signed by
23	Lesley Winder	'Normal kids off the Estate and that going over for games of cricket and things like that... and games of football. I've seen games of Sunday football... for playing sports on....' Lots of sporty games. Snow games	Summer week: more than 20 a week Winter week: less, though more for snow games	Every year from the 1970's 'I've always seen people in the field [since the 1970's] "It's never been impossible to use it."	Never, no	No, never	No	Lesley Winder
24 25	Walker, Hilda and (son) Gary	Football, sporting activity, kites	Winter: More than 20 a week Summer: More than 20 "It's well used for sporting activities by, local people"	"From 1967 till now" "Never been a sign. No." "There was always holes, and the gate was never locked." The part was a hedgerow, not fencing. Always been access to it.	No	No "How could they enter secretly in a great big open space like that - how can you be secretive?"	No. The police have driven past and everything.	Walker, Hilda and (son) Gary

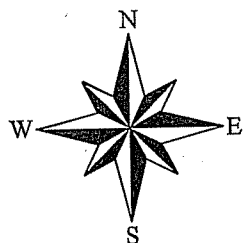


	Q8 <i>Witnessed residents at recreation?</i>	Q8a <i>Use of field</i>	Q8b <i>How many people?</i>	Q8c <i>Years</i>	Q9 <i>Entry by force?</i>	Q10 <i>Use in secret?</i>	Q11 <i>Permission?</i>	Signed by
26	Cogger, David Yes. [when] I used to walk that way to visit friends and go to church (St Pauls)	Football, cricket	Sometimes 'being a Sunday, it was all free enterprise... "not more than 10 at any one time	1970's, 1980's, and since then	"the fences were in terrible condition, it was only chain link fencing, there were gaps in it." "I didn't see any deliberate vandalism"	"They didn't seem to have guilt stamped all over them They all seemed perfectly at ease with themselves and the situation"	A sort of unwritten consent, but that was relating to the rising ground. [north of Spring Lane] [For this field] I'm not aware of anything. Signs: "Not as I recall, no."	Graham, Dorothy and Colin
27	Graham, Dorothy and Colin Oh, yes.	Football, children with adults, cricket, golf, sandpit jumping, walking dogs many times.	Spring: a dozen Winter: fewer than 12	Over the last 30 years, since 1976, until now.	Didn't see anyone.	Always in daylight, quite open	No. I'm not aware of anyone.	Graham, Dorothy and Colin
28								

**APPENDIX D:  
Plan showing land ownership**



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Scale 1:4500

**Plan showing ownership of application site -  
for illustrative purposes only  
(for exact boundaries refer to  
original title documents)**



**APPENDIX E:**  
**Copy of "regulation six" letter sent to**  
**applicant (dated 29/05/08)**

Dr. S. Bax  
37 St. Augustine's Road  
Canterbury  
Kent  
CT1 1XR

Environment and Waste  
Invicta House  
County Hall  
Maidstone  
Kent ME14 1XX  
DX 123694 MAIDSTONE 6  
Tel: 01622 221628  
Fax: 01622 221636

Direct Line: 01622 221628  
Ask for: Melanie McNeir  
Email: melanie.mcneir@kent.gov.uk  
Date: 29<sup>th</sup> May 2008  
Our Ref: PROW/MM/595  
Website: www.kent.gov.uk/countrysideaccess

Dear Dr. Bax,

**Commons Act 2006 – section 15**

**Application to register land known as Barton Playing Fields at Canterbury as a new Town or Village Green**

As required by Regulation 6 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, the County Council has been giving further consideration to your application (and the objections thereto) and has now had the opportunity to seek Counsel's advice on the matter.

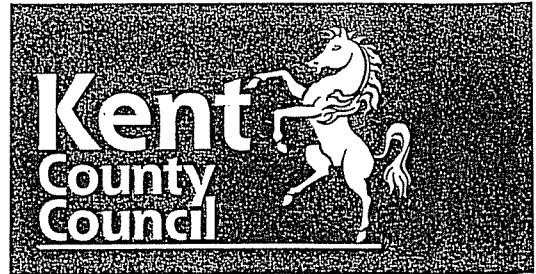
It is the County Council's duty as registration authority under Regulation 6(3) not to reject an application for the registration of land as a Town or Village Green without giving the applicant a reasonable opportunity of dealing with the matters contained in the objection statements, as well as "*any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application*".

I am writing to inform you that in light of the advice received from Counsel, there do appear to Officers to be matters affording possible grounds for recommending to the Regulation Committee Member Panel that your application be rejected, as follows:

The starting point is to consider the statutory protection afforded to Town and Village Greens which is contained within nineteenth century legislation. The Inclosure Act 1857 (section 12) makes it a criminal offence for any person to "*...wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive cattle or animal thereon, or wilfully lay manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation...*" (emphasis added in bold). In addition, the Commons Act 1876 (section 29) provides that "*an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance...*".

Linda Davies  
Divisional Director





In the present case, the use of the land as a school playing field by Barton Court School and Chaucer Technology College ("the landowners") would necessarily interrupt the use or enjoyment of the land as a place for exercise or recreation and, were the land to be registered as a Town or Village Green, such use of the land by the landowners is likely to be a contravention of section 12 of the Inclosure Act 1857. Furthermore, such use of the land by the landowners would not be with a view to the better enjoyment of the land as a Town or Village Green and therefore might also constitute an offence under section 29 of the Commons Act 1876.

The main authority in this respect is the case of *R (Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin) which concerned an application to register a piece of land as a Town or Village Green from which a hay crop had been taken during part of the material twenty-year period. A copy of the judgement is enclosed for your reference.

In relation to the effect of the nineteenth century legislation, Mr. Justice Sullivan said this: "*When enacting the definition of "town or village green" in section 22(1) of the [Commons Registration] Act, Parliament must be assumed to have been well aware of the restrictions that would be placed upon newly created village greens by the nineteenth-century legislation. Against that background, it would be surprising if Parliament had intended that a level of recreational use which was compatible with the use of the land for agricultural activities (such as taking a hay crop) should suffice for the purposes of section 22(1), since upon registration as a village green (if not after 20 years use) some, if not all, of those lawful agricultural activities would become unlawful by virtue of sections 12 and 29*".

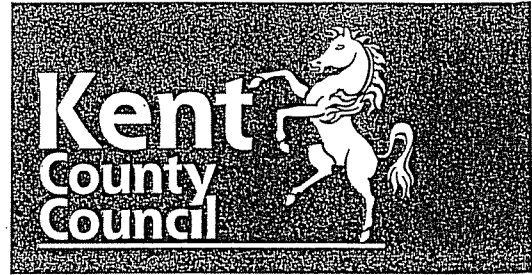
Turning to the matter of the concurrent use of the land by the local residents and the landowners, it was held in the same case (at paragraph 82) that the recreational use of land by local residents was not "as of right" unless it interrupted the landowner's activities in such a manner, or to such an extent, that the landowner should have been aware that the recreational users believed that they were exercising a right to be there; it would not be reasonable to expect a landowner to resist the recreational use of the land so long as such use did not interfere with the landowner's own use of his land.

It appears in this case that there may be a question regarding the continuity of recreational use of the land by local inhabitants during the material period, particularly when the fields were in use for school activities. Indeed, some of the local residents who have written in support refer to use 'during the summer holidays' and 'outside of school hours, especially during the summer months at weekends'. One resident also states 'I have always respected the school's priority use of the field and would not dream of walking my dog if any school activity was taking place'.

At paragraph 85 of the *Laing Homes* case, it was held that "if it was possible for the local inhabitants to establish the existence of a village green after 20-years use in such circumstances (because there had been virtually no interruption of their recreational activities) the landowner would then be prohibited by the nineteenth-century legislation [section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876] from continuing to use his land, on an occasional basis, for any purpose which would interrupt or interfere with the local inhabitants' recreational use. I do not believe that Parliament could have intended that such a user for sports and pastimes would be "as of right" for the purposes of section 22 [of the Commons Registration Act 1965 – now replaced by section 15 of the Commons Act

Linda Davies  
Divisional Director





2006]. It would not be "as of right" ... because the local inhabitants would have appeared to the landowner to be deferring to his right to use the land (even if he chose to do so for only a few days in the year) for his own purposes".

It is Counsel's view that the reasoning in the *Laing Homes* case applies equally to the land subject to the application in this particular case. The landowners' use of the land during the material period for the purposes of school playing fields was a use which conflicted with the use of the land as a place for informal recreation by the residents of the locality. The advice received from Counsel is therefore that, *prima facie* at least, use by local inhabitants (and others) of the land comprised in your application deferred to the primary use of the land by the landowners and hence was not "as of right" within the meaning of the definition of "town or village green" contained within the Commons Act 2006.

The County Council has also recently become aware (completely coincidentally and in relation to an entirely different matter) of an Inspector's report following a Public Inquiry relating to an application to register part of a golf course as a Village Green. It appears to the County Council that there may be parallels to be drawn between this case and your application. Whilst some of the legal points raised in the report have since been resolved by the House of Lords decision in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674, the issues in relation to concurrent use remain unchanged. A copy of the report is enclosed for your reference and your comments on this would be welcomed.

The County Council takes the view that a period of six weeks would allow you a reasonable opportunity to consider and investigate the above matters, take legal advice (if so desired), and produce any rebutting evidence which you may have. I would therefore be grateful if you would accordingly let me have your response to the points made above, and any additional evidence that you would like the County Council to take into account when it next considers your application, **no later than Friday 11<sup>th</sup> July 2008**.

If you find yourself unable to meet that deadline, please let me know at the earliest opportunity as it may be possible to offer you a short extension. If by 11<sup>th</sup> July 2008 the County Council has not received from you either your substantive response to this letter (or a written request for an extension of time to complete your response) the County Council will proceed to further consider your application (and the objections thereto) in accordance with Regulation 6 of the 1969 Regulations, on the basis of the information and documents which have been supplied to it by the parties.

I look forward to hearing from you in due course.

Yours sincerely,

Miss Melanie McNeir  
Public Rights of Way and Commons Registration Officer



Environment and Waste, Invicta House  
County Hall  
Maidstone Kent ME14 1XX

**APPENDIX F:  
Applicant's response to "regulation six"  
letter (dated 28/08/08)**

20 August 2008

Dear Ms. McNeir,

Thank you for your letter of 29<sup>th</sup> May 2008 relating to my Village Green application no. 595. I am most grateful to your legal team for setting out the possible objections so clearly, and offering me the opportunity to respond. On receipt of that letter I responded with a few points by email, and this now is my more detailed response to the possible obstacles your legal team carefully outlined. I also respond here to the Advice received from Ms. Lana Wood in July.

1. As you kindly recommended, I have consulted with legal advisers, one a specialist solicitor and the other an academic legal authority who specialises in Land Law and the law on Village Greens. I am pleased to report that they are both of the conclusion that for legal and evidential reasons none of the possible objections which you set out in your letter, or which Ms. Wood identifies, is in fact a material obstacle in law to registration of the land in question, owing to points of law and evidence which I discuss in the appendix below. I also consulted the Open Spaces Society on a number of points in my letter and they are in agreement with our interpretation, as I shall explain below in greater detail in the appendix to this letter.

2. We believe that once these points have been considered the next step could therefore be a recommendation to the Committee to approve our application. In my view this should not in fact be difficult, because your legal team and Ms. Wood have identified relatively few problems with the application. You thoughtfully notify me of the fact that that KCC has an obligation under Regulation 6(3) to tell me if there are any possible objections in any area to my application, and since you have not mentioned other aspects of the application, nor invited further comment on them, and have indicated to me that you think that further issues are unlikely to emerge, I am assuming that there will consequently be no obstacle or objection to the majority of them, as follows:

	<b>Significant issues (with page numbers in my original application)</b>	<b>Response from your legal team</b>
1.	'Significant number' – page 10	No objection registered or obstacle noted
2.	'Locality' and local people – page 12	No objection registered or obstacle noted

3.	Lawful sports and pastimes – page 14	No objection registered or obstacle noted
4.	‘as of right’ (page 15 et seq.)	<b><i>Points raised – discussed in appendix to this letter</i></b>
5.	without permission – page 18	No objection registered or obstacle noted
6.	without force – page 15	No objection registered or obstacle noted
7.	without secrecy – page 17	No objection registered or obstacle noted
8.	For at least twenty years - page 23	No objection registered or obstacle noted

3. In other words, I am pleased and grateful to see that your response is largely positive, since your legal team have apparently concluded that in every key area of my application there are no objections to be raised, with the sole exception being the issue of ‘as of right’.

4. In order efficiently to answer the points you raise in your letter and in Ms. Wood’s Advice, I have set them out as five questions or issues, as follows. My full discussion is in the appendix below, but I here set out a summary response for ease of reference:

Question	Response
1. Did the schools use the field in any way similar to the agricultural use in the <i>Laing</i> case (i.e. impeding residents’ use for long periods)?	<b>No.</b> In their evidence the schools report only normal sport and recreation. They refer to nothing remotely similar to extensive agricultural use, a golf club or anything similar. The residents (and the schools also) report no period when residents’ use was obstructed in any significant way for any regular period of time. (See section 3 below, page 14).
2. (By extension) Was the landowner ignorant of the implicit claim by local people to use the field?	<b>No.</b> There is ample evidence from the schools’ testimony itself that the schools knew all along of people using the field ‘as of right’ and implicitly claiming rights to it. (See section 4, page 18 below). However, they did nothing material about it.
3. Are playing fields excluded from possible Village Green registration? Would this fact then prove an obstacle to registration? If the land were registered as a Village Green, would the schools be inhibited from using the land for sports and recreation as they have done for 20 years and more? Would the schools’ rights be infringed?	<b>No.</b> Parliament specifically did <i>not</i> exclude playing fields from possible registration as Village Greens. On the contrary, they include them in their vision of such Greens. In the appendix below I quote Baroness Hale’s example in the Law Lords ‘Trap Grounds’ case which specifically includes mention of schools sharing Village Greens without impediment. I also cite government OFSTED inspection reports demonstrating that many schools around the country already share registered Village Greens for sports with no impediment or loss of educational quality. This is an unequivocal demonstration that there is no reason in law or in practice why the schools in this case cannot do the same if the land is registered as a Village Green. (See section 3, page 14 below). In addition, Lord Hoffman (also in <i>Trap Grounds</i> ) determined that a) the correct test is not that used in <i>Laing</i> , but how the land was actually used in the 20 year period, and b) that landowners’ human rights are not infringed by registration of a Village Green. Examples from around the country show no legal or practical impediment to schools using Greens for organised sports of any kind.
4. Do we need to consider the issue of ‘deferring’?	<b>No.</b> The reason for this is that in <i>Sunningwell</i> and <i>Laing</i> , and also in the recent High Court case of <i>Lewis</i> , it is clear that in law we



	<p>need to consider the matter from the point of view of the landowners. In this case (see 2 above) there is ample evidence from the landowners themselves that they knew about local people's use of the land and that they were thereby on notice of local people's claim of a right to use the land. They testify that their use was regularly interrupted by local people claiming a right over the land. In short, since the landowners knew about the claim by local users, and did nothing about it, the issue of deferring is therefore irrelevant.</p>
<p>5. Is there evidence that residents in sufficient numbers 'deferred' significantly to the schools' use of the land in a manner which renders their use not 'as of right'?</p>	<p>No. Given the point made above, I submit that the issue of deferring is not relevant in this case. However, if we accept for the sake of argument Ms. Wood's analysis, witnesses testify to using the field outside school hours, and she takes this as evidence of deferring. However, Justice Sullivan in the <i>Laing</i> High Court case specifically ruled that use of land outside normal working hours is normal Village green use and that it is unacceptable to require an applicant to provide evidence of use at particular times. As the use in this case was typical of normal Village Green use, so it cannot in law also be treated as evidence of deferring. Furthermore, we do not know if they also used the field within school hours.</p> <p>In addition (again using Ms. Wood's figures) 9 witnesses said that they used the field at all times, and most significantly (a point obscured in Ms. Wood's analysis) a further 31 witnesses made no mention of times of use at all. These witnesses are dismissed by Ms. Wood as 'equivocal' but we submit that it is unreasonable in law to ignore them, and that they should properly be taken into account. I submit that this means that for a total of 62 witnesses out of 64 (97%), there is no evidence in law of deferring.</p>

5. Each of these points is discussed in detail below. However, before we turn to it, I note that Ms. Wood in her Advice refers to the possibility of requesting further information on two other issues related to the question of 'as of right'. She says that:

[26.] "There are other issues between the parties which are relevant to the question of whether use of the land by local inhabitants was "as of right": **whether the land was fenced during the relevant period and whether local inhabitants using the application land were asked to leave when seen by P.E. staff from the schools**, or whether they were not. I do not consider those issues in this Advice. If the application is not rejected at this stage, the evidence on these issues will have to be tested by cross-examination of the witnesses for the Applicant and for the Objectors at a public inquiry. *[Emphasis added]*

In principle we have no objection to a public enquiry, as we feel that we have a strong case to present, but given the costs associated with that course of action I have attempted also to deal with these two issues in the appendix below, since I suggest that the evidence already offered is so convincing that it allows us to set aside these two possible issues without any public enquiry being necessary.

6. The next stage, I suspect, is for your legal team to have the chance to consider the issues again in the light of my advisers' and my comments below, and to consult again with Ms.



Wood or someone equally expert in this area. If, as my advisers believe, there is thereafter no further obstacle, I would then hope that you might be able to recommend to the Regulation Committee Member Panel that there are no legal grounds for my application to be rejected.

Once again I thank you all for your courtesy and efficiency in your correspondence with me, and I am most grateful for your time and effort. I would be happy to answer any queries you may have on any aspect of this letter or my application, but in the meantime, thank you for your time and attention.

Dr. Stephen Bax

encs. Appendices with detailed discussion of the suggestions raised by KCC and Ms. Wood

APPENDIX 1: Legal argument and evidence

**Town or Village Green application no 595, relating to the land known as Barton Field, Canterbury.**

**Response by the applicant, Dr. Stephen Bax, to the points raised by KCC's legal team in their letter of 29<sup>th</sup> May 2008**

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Ms. Melanie McNeir, Case Officer.

Dear Ms. McNeir,

Since some of the points which you mention revolve around the relationship between school sports facilities and Village Greens, it will be useful to start by looking at the legal nature and status of Village Greens in general before turning to look directly at each of the points you make in your letter.

## PREAMBLE

### Section 1: VILLAGE GREENS, SCHOOLS AND ORGANISED SPORTS

7. A starting point is the authoritative Law Lords judgement known as the *Trap Grounds case*<sup>1</sup> in which Baroness Hale of Richmond offers a convincing description of an actual Village Green. I have emphasised some key points in her speech:

“129. Town and village greens are not just picturesque reminders of a by-gone age. They are a very present amenity to the communities they serve. The village green in Scorton, in the North Riding of Yorkshire, is a perfect example. .... It is surrounded by the old village houses, including the former vicarage, the two remaining pubs, the shop, the village institute, and the 18th century building which was until recently the old grammar school. It was and is the centre of the community. Both villagers and grammar school boys played cricket there in the summer; archery contests were held there; a bonfire was built for Guy Fawkes' Day; the fair and other events of Scorton feast were held there every August; and all the villagers could walk and play games upon it. It is just the sort of place that the Royal Commission had in mind when it proposed the definition of a town or village green quoted by my noble and learned friend, Lord Hoffmann, in paragraph 14 of his opinion.” [emphasis added]

8. You suggest in your letter that schools and residents cannot share land which has Village Green status. Mr. Chris Wade, KCC's Principal Case Officer, in an email to me of 9<sup>th</sup> June, kindly elaborated on your team's thinking in this area:

I would add that I have also, personally, taken the opportunity, whilst seeking advice from two different Counsel on other village green matters, of raising informally the issue of whether there were any circumstances in which land held as a school playing field could be capable of registration as a village green. On both occasions, the Barristers concerned were of the view that this is unlikely to have been Parliament's intention in enacting village green registration legislation but the outcome would be dependent on the facts of each case.

My legal advisers are surprised by Mr. Wade's and his advisers' approach, since in our view there is no justification in law for excluding any type of land *a priori* from registration as a Village Green. I phoned the Open Spaces Society and it is their view also that there is no provision in statute for the sort of restriction which Mr. Wade's advisers suggest. We recall that among land registered as Village greens are a car park, and also “some rocks at Llanbadrig, Ynys Mon, which had been used by the inhabitants of the locality to moor boats while engaged in the pastime of boating” (Lord Hoffman, *Trap Grounds*, para 39). For this

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<sup>1</sup> *Judgments - Oxfordshire County Council (Respondents) v. Oxford City Council (Appellants) and another (Respondent) (2005) and others* HOUSE OF LORDS SESSION 2005-06 [2006] UKHL 25, on appeal from [2005] EWCA Civ 175, available at: <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060524/oxf-1.htm>

reason my advisers suggest that it is wrong in law to assume that *any* kind of land is likely to be excluded *a priori* from Village Green status, and that includes playing fields. This was clearly also the Law Lords' view in their extensive discussion of the nature of Village Greens in *Trap Grounds*.

9. Furthermore, Baroness Hale's own description of Village Greens in the Law Lords' judgement, cited above, shows this view to be manifestly mistaken, since she explicitly *includes* the shared use by a secondary school and local residents within her view of a Village Green. At Scorton the school did in fact use the Green for organised sports for many years together with residents' recreational use. According to the Baroness this vision of a Village Green "*is just the sort of place that the Royal Commission had in mind when it proposed the definition of a town or village green quoted by my noble and learned friend, Lord Hoffmann.*" None of the other Law Lords dissented from her description.

10. This shows that Parliament certainly did not think to exclude such shared use by schools and residents from its definition of Village Greens, contrary to your legal team's suggestion. The description offered by Baroness Hale shows, on the contrary, that Greens can perfectly well include harmonious shared use between a local secondary school and local residents, precisely because this has happened on typical Village Greens for centuries. We note that the Green in Scorton has been used for cricket, for archery contests, it has been closed for annual fairs (in fact lasting for four days), but most important for our purposes, it was shared amicably for sports and recreation by the school and residents together for decades.

11. This is the kind of vision we have for the land in Canterbury with which this application is concerned. More importantly, this kind of shared use has already happened in Canterbury for more than 20 years on the land in question, with both the schools and the residents using the field for sport and recreation. In other words, we have evidence that such sharing of the land is not only within Parliament's definition and conception of a village green, but has also been perfectly possible in practice here in Canterbury over the twenty year qualifying period set by Parliament.

12. Besides Baroness Hale's Law Lords definition of a Village Green shared by schools and residents, we can adduce many other examples of similar harmonious shared use of Village Greens by schools and local communities. This also serves to contradict the view set out in your letter and in Mr. Wade's email. The website for OFSTED, the official government inspection body for schools, offers for public view numerous official inspection reports which demonstrate that schools up and down the country share Village Greens for their

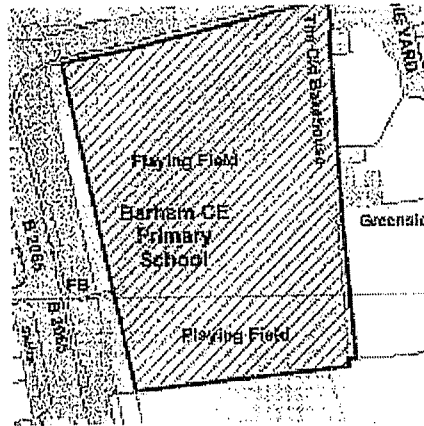
sports, and that they do so with no loss of educational effectiveness. Examples include the following:

Location	DEFRA Village Green registration number	Comments from OFSTED on the relevant schools (all of which passed their inspections)
Tetsworth Village Green, Tetsworth, Oxfordshire	registered Village Green no. 46085	<p>“Good use is made of the village hall, village green and local sports centre for school events and physical education sessions.”</p> <p>“The governors, headteacher and staff, like the parents, value highly the school’s well established traditions which sustain the school at the hub of village life. Most traditions are linked to key events throughout the year. Good examples are the school sports’ day on the village green...”</p>
Milburn, Cumbria	registered Village Green no. 63028	<p>“The school is sited on the village green, on which the pupils play.” (2006)</p> <p>“In good weather, the school makes use of the village green for games and athletics. (2001)</p>
Eppleby, N. Yorkshire	registered Village Green no. 42089	“the school makes use of the village green for sports”
Nether Heyford, Northamptonshire	registered Village Green no. 43051-6	“Staff are consistent in the way they interpret and apply the behaviour policy and children are confident as they choose what to do and move between the hall and supervised play on the village green outside”

This is a small sample of the many examples available, all of which demonstrate unequivocally that with proper management there is no problem in law, or in practice, about schools sharing Village Greens with residents and making use of Village Greens for organised sports, and doing so effectively and without educational disadvantage.

13. I was especially surprised by the idea expressed in your letter that schools cannot share Village Greens for sports with residents since I see from your KCC website that land at Barham in Kent, very near Canterbury, was granted Village Green status by your committee on 11<sup>th</sup> February of this year. The documentation on your website<sup>2</sup> shows that the land is known variously as the Green or as the Playing Field for Barham Primary School, as can be seen by the accompanying map of the land from your website, which I reproduce here:

<sup>2</sup> [http://www.kent.gov.uk/NR/rdonlyres/3EB939A2-9E92-4304-A215-F888FCA1D810/0/village\\_green\\_barham.pdf](http://www.kent.gov.uk/NR/rdonlyres/3EB939A2-9E92-4304-A215-F888FCA1D810/0/village_green_barham.pdf)



The primary school is in fact across the road, and when I telephoned them they informed me that although they have playing fields adjacent to their building, they also use this land regularly as playing fields, as the legend on the map in the application shows, and even for their sports day. Of course, the Barham case is different in various ways from the Canterbury one, (for example the land is owned by the parish council and not by the school), and it relates to a small village primary school, but since your Regulations Committee has registered this playing field as a Village Green, and the land will continue to be used as a school sports field, this again suggests that there can be no obstacle in principle to sharing between schools and residents, and therefore no obstacle to registering land which is already shared.

14. Perhaps organised school team sports such as football and cricket would be difficult on a Green? On the contrary, it is a part of the common idea of Village Greens (as Baroness Hale's account also makes clear) that they are normally used for organised sports such as cricket, football and even archery. Lord Hoffman in *Trap Grounds* makes mention of Greens used for horseracing, football, rounders and cricket (para 6). Indeed DEFRA's official memorandum on Village Greens laid before Parliament<sup>3</sup> and intended to act as guidance to local authorities, specifically allows for organised team sports, as well as *ad hoc* ones:

*Town and village greens originally developed under customary law as areas of land where local people indulged in lawful sports and pastimes and in so doing established recognised recreational rights. These rights typically included organised or ad-hoc games, picnics, fêtes and similar activities.*

<sup>3</sup> DEFRA: EXPLANATORY MEMORANDUM TO THE COMMONS (REGISTRATION OF TOWN OR VILLAGE GREENS) (INTERIM ARRANGEMENTS) ENGLAND) REGULATIONS 2007 No. 457

15. We can in fact find numerous examples of registered Village Greens being used for such formal organised sports. Frequently parts of a Green are even set aside for such sports, with no legal conflict. Here are some examples of Village Greens used in such ways:

	Location	DEFRA Village Green registration number	Type of activity (from websites related to each Green)
1.	Wrea Green, Lancashire	registered Village Green no. 33001	Cricket Club: "We play on the village green, complete with duck pond in one corner, and which is surrounded by the school, pub, church, and shop"
2.	Great Bentley, Colchester, Essex	registered Village Green no. 21068	"The Village has its own Football club and Cricket Club with their respective matches played on the green throughout the season." (and also a Carnival and numerous fairs).
3.	Wickham St Paul's, Essex	registered Village Green no. 21084	"Wickham St Paul's [Football club] also play on their village green."
4.	Bovingdon Hertfordshire;	registered Village Green no. 27086	"Bovingdon Cricket Club is located on the village green in Bovingdon. .... the Club has secured a long-term lease on the site. The Club fields three senior teams"
5.	Lyminge, Kent (Recreation Ground)	registered Village Green no. 32039	"Lyminge Community Football to be held at the Lyminge Recreation Ground.... 3 Wednesday Soccer Leagues are being staged at the Lyminge Recreation Ground
6.	Thornton Hough	Registered by the Local authority (no reg number)	"Today, the village green is the hub of village life, comprising a football pitch, cricket square and two tennis courts. A half timbered, thatched sports pavilion is rented out to football and cricket teams seasonally and <u>the local school regularly uses the village green for sporting activities.</u> "
7.	Ridgeway Grundy Park, Cheshire	Registered 2005	On plans to use land as a skatepark, despite a village green application: .."head of planning John Groves said by-laws were not a planning issue. Tennis courts and cricket nets had been held by the courts as being compatible with village green status and it was considered the skate facility could be viewed in this way.

16. These examples offer a number of salient points highly relevant to the current application. It can be seen, firstly, that official registered Village Greens can be used for a variety of organised sports with no conflict with residents' use, that they can be rented out, and even leased to organised teams (see examples 4 and 5). A school is again mentioned (example 6). Example 7 shows that they can be improved with the addition of new facilities; Ridgeway Grundy Park in Cheshire was registered as a Village Green in 2005 and after that a skatepark was built on it with no impediment. As Cheshire Council's Head of planning said in that regard, "Tennis courts and cricket nets had been held by the courts as being compatible with village green status and it was considered the skate facility could be viewed in this way." His view was accepted and the skatepark was duly built.

17. The suggestion in your letter and emails, therefore, that the schools in this case might be impeded in their future sporting uses of the field in question, and that therefore this might be grounds for rejecting my application, is therefore undermined by these examples of harmonious school use, as well as of extensive club and organised sporting use, on Village Greens up and down the country. These examples demonstrate conclusively that there is no legal or practical problem or impediment for a school to carry out all kinds of organised and team sports to a high educational standard on a registered Village Green.

In addition, they show that landowners, once a Green is registered, can without any obstacle improve the land by adding extra sporting facilities such as tennis courts, cricket nets, skateparks and so on, and can even rent them out to sports clubs. They demonstrate that even a full football or cricket league with numerous teams can be carried out on a Green with no lawful or practical impediment, and that even potentially dangerous sports such as archery can be practised on a Green, obviously with appropriate safeguards. The point is that, as Lord Hoffman noted in *Trap Grounds* [para 51]: “*There has to be give and take on both sides*”, and his point is highly significant. These examples show that this kind of cooperation is perfectly possible, indeed that it happens every day all over the country.

18. For these reasons I submit that the suggestion in your letter and emails that registering the land in this case as a Village Green would prevent the school from using the land in future for sports and recreation, and that this might therefore render my application unacceptable, is untenable in the light of numerous actual examples of registered Village Greens from around the country, and in the light of the Law Lords discussion in *Trap Grounds*. We will consider this in further detail below when we look at each part of your letter in turn.

## **Section 2: VANDALISM AND ANTISOCIAL BEHAVIOUR**

19. The objectors have brought forward evidence of vandalism and antisocial behaviour, so it is useful here to look at what this means for the application. To take one example, Mr Woods, a longstanding governor of Barton Court School, mentioned in one school document an unknown man whom he saw on the land in question, and who reportedly told him that he had been walking his dog on the land for years, that he had a right to do so, and did not intend to stop. Teachers also report people interrupting school sports, and others report apparent acts of vandalism to school property on the land.

20. We residents are as unhappy as the schools with vandalism and antisocial behaviour, particularly as we live nearby 24 hours a day, 365 days a year, unlike the school staff and many of the pupils! We will in future do everything we can to work with the schools against



it. However it is important to note that such behaviour has nothing to do with Village Green status, nor can it be taken into account in determining this application, for the following reasons:

1. We have no evidence at all that these people were local residents. The schools were not able to produce any evidence to suggest this. We therefore have no idea or evidence concerning who exactly they were or where they lived.
2. If someone is challenged by a landowner but continues to use the land, they may arguably thereafter be using 'with force' and not 'as of right'. However, as noted above, the landowners, despite ample opportunity to do so, did not produce any evidence that any of the people challenged did ever use the land again, since they had no idea who they were. The schools did not report them to the police and no offender was ever identified. No case of trespass ever even came to court, let alone to proof. No repeat offenders are reported in the school evidence, certainly none who can be identified as residents.
3. It is a commonplace in law that the crimes of one person should as far as possible not be used to affect the rights of another. In his authoritative guide to Administrative Law<sup>4</sup>, Wade categorises the scope of unreasonableness in law and includes as unreasonable 'penalising the innocent'. In this case I submit that it would be unfair and unreasonable to remove the rights of innocent local residents who used the field without force because of the alleged bad behaviour of unknown people. The fact is that there is no evidence that any *local resident* ever used the land by force, or was ever challenged on the land. Testimony from all the local residents who made statements and wrote letters demonstrates the truth of this. They were all specifically asked if they had ever been told not to use the land or asked to leave, and not one of them reported anything of the kind.
4. Parliament has established the test for registering a village green to include evidence of significant users from a locality 'as of right' without force, secrecy or permission. What Parliament did *not* do was insist also on other conditions such as that 'no vandalism or bad behaviour by persons unknown could ever have occurred on the land', or that 'nobody can have ever used the land in other ways'. I submit that it is incorrect in law to add conditions for my application which Parliament did not include, such as taking account of the alleged bad behaviour of unknown people.

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<sup>4</sup> H.W.R. Wade and C.F. Forsyth, Administrative Law, 7th and 9th edition, Oxford University Press, 2005.

21. This means, I submit, that so long as we can provide in the application sufficient evidence of proper user of the right kind under the guidelines set out by Parliament, then the alleged existence of any other users is irrelevant, especially as there is no evidence that any of them was a resident of the parish. We believe that we have done so, with evidence of hundreds of actual and observed users, residing all over the parish, over the whole qualifying period. Incidentally, the land in question is now fenced off, but the local Police have informed me personally at local Resident Association meetings that there are still regular acts of vandalism on the field. Graham Hadler, a local resident, himself recently called the police when he saw a fire had been started on the land. This demonstrates again that vandalism exists no matter whether the land is a Village Green or not, or is fenced off or not, and is not therefore relevant to the current application.

## 22. History of the Field

Before we turn to the details of your letter, it is useful to remind ourselves briefly of some of the history of the field. To start with, we recall that both schools have other extensive playing fields adjacent to their buildings, apart from this field. It should also be noted that because both schools have these other extensive playing fields, and that one of them is even now building a £20 million multisports centre, if this land were to be registered as a Village Green it would leave them at no disadvantage in terms of sports facilities.

This was the reason why from the 1960s until the time of my application in 2007, the field in question, between the two, was relatively unimportant to them. They did not need to use it much. In the 1970s and early 1980s, before the qualifying period, the headmaster encouraged locals to use it. Throughout the qualifying 20 year period the field was relatively ignored and neglected. This point was evidenced in my previous documentation, not only by lack of fencing, but for example by the fact that large chunks of the metal hut which is still on Ordnance survey maps, but which was burned down in the 1990s, remained on the field for all to see until 2008. This relative neglect and limited use of the field, and the accompanying relaxed attitude on the part of the schools, continued for decades, right through until 2007. Several of the residents testify to this. We recall the evidence of Lt Colonel John White in his letter of 10<sup>th</sup> February 2008:

*"My wife have lived here for 24 years, since 1984, and for the first 11 years I walked past the field four times nearly every day. I noticed that the schools made very little use of the field on school days, and never at weekends or during the long school holidays.... Following my retirement in 1995 we have both often passed the field and its use has continued to be as before....[until the new fence].... [Users] have never been told, or seen any signs, that the field is for the*

*exclusive use of the two schools, therefore naturally assuming that there was no objection to [their use]. The ownership of the field was never made apparent."*

The Garrard family say the same, reporting in their letter that "the field has been hugely underused by the two schools". This is a fair reflection of the situation. The evidence shows that the schools cared little about the field because they used their other land for sports, and so used it minimally and looked after it minimally, and did nothing to stop other people using it. As is clear from many residents' letters, one consequence of this was that no-one had any idea that the field was even owned by the schools, with almost all of us thinking it was public land perhaps belonging to a public body such as KCC. The relatively limited use and the absence of any signs contributed to this impression.

This explains why the schools seemed so relaxed about the field, and also explains why they did not put up signs, or take action against trespassers. They knew of the residents' use, but were not bothered about it because they had a lot of land attached to their buildings which was closer and easier to use. The result, I submit, was acquiescence in residents' use.

### **DISCUSSION OF THE POINTS IN YOUR LETTER**

With this background in mind, we will now turn to examine in more detail the points made in your letter.

#### **Section 3: VICTORIAN STATUTES AND LANDOWNERS' RIGHTS**

23. You start by discussing the 19<sup>th</sup> century legislation and its implications for Village Greens, leading to discussion of what is called the Laing Homes case<sup>5</sup>. Within this context you suggest that:

"In the present case, the use of the land as a school playing field by Barton Court School and Chaucer Technology College ("the landowners") would necessarily interrupt the use or enjoyment of the land as a place for exercise or recreation and, were the land to be registered as a Town or Village Green, such use of the land by the landowners is likely to be a contravention of section 12 of the Inclosure Act 1857. Furthermore, such use of the land by the landowners would not be with a view to the better enjoyment of the land as a Town or Village Green and therefore might also constitute an offence under section 29 of the Commons Act 1876."

24. In this you depend on the *Laing* case, but my advisers note that your reference to *Laing* fails to take proper account of Lord Hoffman's later discussion of this issue in the Law Lords

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<sup>5</sup> *R (Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578 (Admin)*

in *Trap Grounds* [op.cit, sections 51 and 52 and 57]. It is clear in law that Hoffman's discussion ruled against the Laing judgement in this respect. I refer you to a discussion offered by Philip Petchey QC, a recognised authority in this area, presented at the recent seminar entitled: "Village Greens: Law. Evidence and Handling the Public Inquiry" at the Chambers of Robin Purchas QC. Francis Taylor Building. The relevant section is reproduced below in Appendix 2. We note the disclaimer at the end of Mr Petchey's discussion, that it is not meant to be comprehensive legal advice, but it is nonetheless a useful authoritative summary of current thinking. In paragraph 3 Mr Petchey is dismissive of the case you propose regarding the ruling in Laing, saying that "we now know that it is wrong", and cites Lord Hoffman to explain why. In short, I submit that Mr. Petchey is correct in law and that it would be incorrect in law to reject my application on the grounds of the Victorian statutes in the ways you suggest.

25. In addition, in his judgement [*Trap Grounds* op.cit, sections 51 and 52] Lord Hoffman demonstrates by reference to *Fitch and Fitch*<sup>6</sup> that the landowner already has legal safeguards which allow him or her to continue to use the land in the ways which s/he used it prior to registration, without fear of disruption by outsiders. If, say, an aggressive intruder in future tried to disrupt a school match arguing that s/he had Village Green rights, then in Lord Hoffman's view the courts could use such precedents as *Fitch and Fitch* to protect the schools' rights. In short, Lord Hoffman's view in this section also goes against your suggestion that the schools would be unable to continue to pursue their normal sports activities if the land were a Village Green, so this suggestion cannot in law be prejudicial to my application. The schools could continue to use the field as they have for 20 years, with adequate legal protection for their right to do so.

26. A further reason why the suggestion in your letter is not tenable is the implied belief that the *Laing* case sets a sort of automatic precedent to be used in every future case. This is not what Justice Sullivan said in that judgement. He stressed that each case was to be considered on its own evidence (73. "I readily accept that the question is one of fact and degree in each case"), with the result that his judgement can be used to shed light on another case *only* if the evidence of the use of each piece of land in question is fully evaluated and analysed to test whether *in practice* residents' use of the field was disrupted. This your letter has unfortunately not done. You simply offered the precedent without adducing any evidence about this particular case.

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<sup>6</sup> *Fitch v Fitch* (1798) 2 Esp 543, as a sequel to *Fitch v Rawling* 2 H Bl 393

This is an important point because, as Justice Sullivan made clear, even agricultural use *per se* is not necessarily an obstacle to Village Green registration. For example grazing can be acceptable in some cases [para 67]. It is a matter of degree and evidence. In this current case there is simply nothing remotely comparable with the *Laing Homes* situation, with agricultural use of the field closing it off with large industrial machinery for days at a time, and therefore nothing to suggest that the parts of the *Laing Homes* case you refer to have any relevance here at all. They cannot therefore be prejudicial to my application.

27. In any case, I submit that it is a mistake to draw on the *Laing* case (in which there was significant disruptive agricultural activity closing the land for long periods, with the use of large industrial machines) or indeed to draw on the Redcar case which you also mention, (where there was an official golf club obvious to all) in order to make a comparison with a completely different kind of situation, namely the activities of normal school sports and recreation on land whose ownership status was not known to residents, who used it thinking it was public land, and who used it without any sort of disruption for twenty years. I submit that there is no legal basis for using the *Laing* case, which was essentially about agricultural use, as a precedent for such a markedly different situation. I submit that in fact the precedent in *Laing* can only properly be used in cases of haymaking and other crops, or at least in cases where there has been a significant annual or regular interruption in residents' use, which is not the case here.

In the Canterbury case there is no question of grazing, nor of haymaking, nor of any other kind of activity which closed the field for lengthy periods, except perhaps for occasional sports events such as are absolutely normal on any Village Green. If this sort of activity were allowed to hinder my application we would be in the ridiculous position of saying that normal sports and recreation cannot take place on the land owing to normal sports and recreation, which would surely be improper in law..

### **Consistency**

28. In my original application I drew attention to another TVG case in Kent, that of Heartenoak Playing Fields, Hawkhurst, which has certain parallels with this current application. There too, the *Laing* case was mentioned as a possible parallel, but your Divisional Director dismissed this in her report to your Regulation Committee on 30th November 2006, noting that none of the elements which had been significant in the *Laing* case were of any relevance to the Hawkhurst case, mainly because in *Laing* the case had been about a hay crop which had been taken for more than half of the 20 year period. In Hawkhurst none of this pertained.

I suggest that the same is true in this Canterbury case. I submit that if your legal team are to be consistent in their judgements, they will apply the same logic to this case as they did to the Heartenoak case, and determine that the elements of *Laing* to which you now refer simply do not pertain in the current case.

***Retrospective evidence versus prospective speculation***

29. For these reasons the suggestion in your letter in this regard is not, I submit, in any way substantive in law as an obstacle to my application. If we simply look at how Village Greens around the country are actually used, we see that there can be no possible impediment to these two schools in this case continuing with their normal sporting activities as they have done for twenty years without in any way 'interrupting' normal recreation.

In fact this evidence of actual shared use over 20 years is the most significant factor of all against your suggestion. After all, Parliament did not invite us to speculate on what a landowner *might do in future* on a Village Green. They asked us instead to look at the past twenty years and use that qualifying period as the basis for our judgement. The test was set to be *retrospective* in nature and not *prospective*. Indeed Lord Hoffman in *Trap Grounds* makes this very point, taking issue with Justice Sullivan's judgement and drawing careful attention to the importance of the 20 year *retrospective* qualifying rule. We can see this in the parts I have emphasised in Lord Hoffman's text quoted here:

57 ...“with respect to the judge [Justice Sullivan in *Laing*], I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 **if in practice they were not.**”

In other words Lord Hoffman (the higher of the two authorities, of course) disagrees with Justice Sullivan's mere speculation, and prefers to use as his test the actual facts about past use. He continues in the same vein:

“Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question **of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application.**”

Again, Lord Hoffman's point is that we should look at “*the requisite user by local inhabitants for upwards of 20 years before the date of the application*” as our sole criterion for adjudication, and not speculate about other hypothetical possibilities. He completes his point with reference to another case:

“I have a similar difficulty with paragraph 141 of the judgment of Judge Howarth in *Humphreys v Rochdale Metropolitan Borough Council* (unreported), 18 June 2004, in which he decided that acts of grazing and fertilising by the owner which, in his opinion, would have contravened the 1857 and 1876 Acts if the land had been a village green at the time, prevented the land from satisfying the section 22 definition.”

30. These may or may not be *obiter dicta*, and not central to the Law Lords’ judgement as a whole, but they are nonetheless telling, and eminently sensible, and should not be ignored. Mr Petchey relied on them in his opinion reproduced in Appendix 2, and in the recent High Court case of *Lewis v Redcar*<sup>7</sup> (which I shall refer to as *Lewis*) Mr Sullivan accepted this (para 31). The point is that if there is evidence *in practice* of user of the requisite kind, over the twenty year qualifying period set down by Parliament, this thereby in itself demonstrates that there is no inconsistency between the landowner’s use and the residents’ use. The *retrospective* analysis is sufficient, and indeed is what Parliament set down as the test. Therefore, as my legal advisers point out, it should not properly be replaced by any speculation as to *prospective* uses. This shows the error in your statement that: “*the use of the land as a school playing field by Barton Court School and Chaucer Technology College (“the landowners”) would necessarily interrupt the use or enjoyment of the land”*.”

I therefore submit that your suggestion that my application be rejected because of the issue regarding Victorian statutes should be set aside.

#### **Section 4: RESIDENTS’ USE AND LANDOWNERS’ USE**

32. Your second point is as follows. I have highlighted some key phrases:

“Turning to the matter of the concurrent use of the land by the local residents and the landowners, it was held in the same case (at paragraph 82) that the recreational use of land by local residents was not “as of right” unless it interrupted the landowner’s activities *in such a manner, or to such an extent, that the landowner should have been aware that the recreational users believed that they were exercising a right to be there*; it would not be reasonable to expect a landowner to resist the recreational use of the land so long as such use did not interfere with the landowner’s own use of his land.” *[emphasis added]*

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<sup>7</sup> R (*Lewis*) v Redcar and Cleveland Borough Council; [2008] WLR (D) 246

33. My advisers are clear that you here misconstrue Justice Sullivan's intentions. Indeed in a Village Green application at Croxley Green, Hertfordshire (to be considered in more detail below) Ms. Wood herself, as the Inspector in that case, seems also to disagree with your interpretation of this part of Justice Sullivan's judgement.

The point here in *Laing* is not the relatively superficial issue of 'interference' with the landowners' activities, so much as the fact that such interference *serves notice to the landowner* of the residents' implicit claims. My advisers point out that, as Justice Sullivan makes clear several times, the key issue is how the landowner *perceived* the land and its use. Citing Lord Hoffman, Justice Sullivan notes (para 78) that: "*Under English Law the focus is not upon how matters would have appeared to the person seeking to acquire the right by long usage, but upon "how the matter would have appeared to the owner of the land"*" Again in paragraph 82 Justice Sullivan notes that 'the starting point is, "*how would the matter have appeared to Laings?"*'. Furthermore this is a salient point in the recent Lewis case<sup>8</sup>, where Justice Sullivan again makes it clear that the key question is how would the matter have appeared to landowner. (para 41) The nub of the matter is therefore "*how would the matter have appeared to the schools?"*" and not interference *per se*.

34. This issue was certainly a crucial one in the *Laing* case because the landowners could perhaps argue that they did not know that residents were effectively claiming a right over the land through their pattern of use. However, this is quite different from the Canterbury case for the simple reason that there is substantial evidence here that the schools knew full well about residents' use of the field 'as of right' all along, even before the 20 year qualifying period. Some of the evidence can be summarised here:

- We have the testimony of numerous residents that the schools knew of and tolerated, and even encouraged residents' use well before the qualifying 20 year period.
- Louise Garland, a former governor of the Chaucer School, testifies in her letter that she used the land 'as of right' for recreation from the 1980's onwards, as did her children, and she then sat on the governing body for many years in the 1990s. It would be ludicrous for the governing body to claim that they were not aware that people were exercising use 'as of right' when one of their own number testifies that she herself, a local resident, had been doing so openly for many years.
- We have the evidence of Tanya Taylor from her days as a schoolgirl in the early 1990's that teachers saw people training on the land during school time and even

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<sup>8</sup> R (Lewis) v Redcar and Cleveland Borough Council; [2008] WLR (D) 246



praised their running, showing not only that their use interrupted the schools' use but that the schools were fully aware of such use and acquiesced in the runners' rights to use the land. This demonstrates unequivocally that the schools knew of the fact that local people were using the land 'as of right' yet did nothing material about it, acquiescing in its use.

- We have the head teacher of Chaucer school in the early 1990s openly acknowledging in a letter that some local people acted as if they had rights over the land. He said that he would set up signs, but although he might have done so on the main site, there is no evidence that he ever did so on the field in question. This shows incontrovertibly that the schools were 'on notice' that people were claiming rights, yet they did nothing material about it in the case of this field, thereby acquiescing. (It also shows again that this field was relatively neglected.)
- We see an official school document from Mr Woods, a longstanding governor of Barton Court School, informing a school committee in the early 1990s that he had met people on the land openly using it and claiming rights, such as the dog walker mentioned above, who said he had always walked there and would continue to do so. We do not know whether they were residents or not, so this is not evidence that residents used the land 'by force', but that is beside the point: it appeared to the schools that it was local people and that they were claiming rights over the land, yet there is no evidence that they took any effective action about it. (This is reminiscent again of the Heartenoak case, in which your Divisional Director determined that the landowners had failed to assert its rights, as landowner, over the land in question, or to give any of the local residents "cause to question their right to use the playing field.")
- We also have a number of residents (myself included) reporting use of the field even while the schools were using it, with no conflict, but simply 'as of right' quite openly. Again, the schools knew this was happening and acquiesced in it.
- A letter from Mr. March, a PE teacher at Barton Court for 17 years reports people coming onto the field during sports lessons and being 'reluctant to move'. There is no evidence that these were local residents, or that the same people ever came back, but this shows once again that the schools were served notice of people using the field as of right, and interrupting school use at the same time, but did nothing about it.
- Perhaps most telling is the evidence offered by Mr Sykes, Head of Faculty, in his letter. He has been teaching at Barton Court school for the full 20 years, and he reports that 'trespassers', as he calls them, use the field. His description is revealing:

“a day does not go by in the summer term when my colleagues and I do not suffer harassment, verbal abuse and physical threats from [sic] trespassers who seem to feel it is their ‘right’ to walk or cycle right through the middle of a P.E. lesson or exercise their dogs on the fields”

I do not condone rudeness or aggression, but it is important to note two things: firstly Mr Sykes does not say that these people are local residents and there is no evidence that they were. Secondly, whoever they were, these people were clearly interrupting the school’s use and thereby putting the school on notice that they were using the field ‘as of right’. Mr Sykes is quite explicit about this, reporting that they “seem to feel it is their ‘right’...”. He tells us also that this happens often – he has been here 20 years and he says this happens every day in the summer term – we note the use of the present tense to indicate that it has always happened, and is not new. He does not restrict his description to any one year, but is speaking generally. This considered written evidence makes it very clear, in addition to the other evidence cited above, that the school has always been on notice that people are using the field ‘as of right’ and yet they did nothing material about it.

35. In *Laing* and also in *Lewis* Justice Sullivan is at pains to say that the key issue is whether the local people ‘interrupted’ the landowner to the extent that the landowners must have known of the local people’s claim to rights over the land. All the evidence cited above, especially that from the schools themselves, makes it abundantly clear that the landowners were frequently interrupted in their use of the land by local people and that they took from this the understanding that those people were thereby claiming rights over the land. I have cited the evidence of Mr Sykes. He has been at the school throughout the 20 year period, and he is not a junior member of staff but the Head of Faculty. He tells us that in the summer the school’s use of the land is interrupted every day – ‘not a day goes by’ without interruption. He reports that these people “seem to feel it is their ‘right’ to walk or cycle right through the middle of a P.E. lesson or exercise their dogs on the fields”, and he thereby tells us two important things, a) that school activities were regularly interrupted, and b) that he takes this as an implicit claim that they are asserting their right to be there.

I submit that is powerful and conclusive evidence, along with the other evidence adduced above, that the landowners in this case were made fully aware, through the kind of interruption and claim to rights which Justice Sullivan considers significant, that local people were using the land in ways tantamount to a claim of rights. I submit that not only would a reasonable landlord draw this conclusion, but that the schools in this case *did in fact* draw

that conclusion, and tell us so in their own testimony. The schools were therefore on notice to do something about it if they wished to do so.

- It does not matter if these people were residents of the parish or not, since the point here is that no matter who they were, the landowners had been put on notice that their rights were being challenged, and furthermore the schools believed that it was local people who were making that claim.. It cannot therefore be claimed that the landowners in this case were not aware of these claims. However, they did not then respond as they could have done, by setting up notices or by other significant means, so as to challenge the rights of these local people. As your Divisional Director put it in the Heartenoak case, the landowners failed to give any of the local residents “cause to question their right to use the playing field.”

36. In short, as my advisers point out, whereas the landowners in the *Laing Homes* case might have argued that they had no idea that residents were using the land ‘as of right’, no such claim is credible in this current case. The evidence shows unequivocally that the landowners were all along, as you put it in your letter, “*aware that the recreational users believed that they were exercising a right to be there*”. They might not have accepted this right if they had been asked directly, but the point is that in practice they acquiesced in this use, and its associated claim to a right, by their failure to erect any signs at all and their failure to prevent access by repairing the fence adequately or at all, or to take any other notificatory action asserting their right. This demonstrates that the discussion of this particular aspect of *Laing* in your letter is significantly different from the current case, and does not have a bearing on it.

I submit that these facts, supported by explicit evidence, render the point from *Laing* inadmissible as an obstacle to my application.

### **Croxley Green**

37. A particularly relevant precedent in this area is the TVG application related to Croxley Green, Hertfordshire, in which the inspector was Ms. Wood herself<sup>9</sup>. This was not a High Court judgement, but it is nonetheless instructive. Since the Croxley Green case has close

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<sup>9</sup> Report: In the Matter of an Application to Register land at Croxley Green, Hertfordshire as a Town or Village Green, REPORT of Miss LANA WOOD 21 September 2007 , Hertfordshire County Council.

parallels with the Canterbury case in this aspect (though not in all), and echoes what I have argued above, it is worth quoting Ms. Wood's report on this particular matter at length:

**Other legal aspect of the "as of right" test**

In respect of the requirement of "as of right" in its wider context, reliance is placed by TfL/LUL [*one of the objectors*] on authorities [footnote here reads: *They rely in particular on Laing Homes in this context*] which suggest that use of the land by inhabitants has to be such that the landowner would be aware that users were asserting a right to use his land for sport and pastimes and that a landowner would appreciate the nature of the right being asserted.

The Applicants refer to the guidance given by Lord Hoffmann in *Oxfordshire* where he held that Sullivan J. was incorrect in *Laing Homes* that low-level agricultural operations by a landowner were inconsistent with an assertion of use as of right by local inhabitants. At para.57, Lord Hoffmann held as follows:

"... No doubt the use of land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so "as of right". But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes if they were not."

It follows therefore that where a landowner uses his land for his own purposes but this does not in fact interfere with the use made of land by local inhabitants, it is not correct to infer thereby that use by the local inhabitants was not as of right. [*emphasis added*]

LUL/TfL [*the objectors*] refer to the invasive survey of parts of their land in 1993 (see PR p.175). This is relied on as evidence that local inhabitants deferred to the landowners actions and rely in that context on the *Laing Homes* decision (see Mr Mynors submissions at para.64). This submission is wrong in fact and in law. [*emphasis added*]

So far as the facts are concerned, the evidence of A's witnesses is that they do not recall these short-lived operations or, if they did recall them, the operations did not interfere with their use of the land. Furthermore, those responsible for the survey (a) avoided disturbing the open area of land (see PR p.181 (1<sup>st</sup> para on page) and (b)

recorded user on the land while the operations were taking place (*ibid.*). There was therefore, in fact, no interruption giving rise to a conflict between local inhabitants and the actions of those instructed by the landowner. [emphasis added]

In law, the approach in *Laing Homes* must now be considered in light of Lord Hoffmann's guidance in *Oxfordshire*. If the invasive survey carried out by TfL/LUL was not in fact inconsistent with use by local inhabitants there is no reason in law why the activities should be regarded as inconsistent and therefore amount to evidence that use was not as of right. The surveys done in 1993 here are the equivalent in fact and law to the "low level agricultural activities" in *Laing Homes* which Lord Hoffmann held were not to be regarded as inconsistent with use as of right."

38. Ms. Wood recommended that the land (except for one part of it which for other reasons did not qualify) be registered as a Green, and indeed it was then registered. I would draw attention to one key part of her reasoning here:

"It follows therefore that where a landowner uses his land for his own purposes but this does not in fact interfere with the use made of land by local inhabitants it is not correct to infer thereby that use by the local inhabitants was not as of right ...." [emphasis added]

39. My advisers concur completely with Ms. Wood here that the issue is one of evidence, so that if we find that the landowners' use does not interfere with residents' use *in fact*, then it follows that it is incorrect to infer that use by the latter was not as of right. Ms. Wood is here arguing precisely as I did above (and as Mr Petchey did), also citing Lord Hoffman. In your letter there has been no attempt to address the evidence to see what the facts were – you treat this as a matter of simple principle. However, it is clear from the evidence (which we will consider further below) that the schools' use *in fact* did not interfere with residents' use in any way.

40. If we look into the Croxley Green judgement further, we note that Ms. Wood has usefully set out the tests which can be used in such cases, and the main one for our purposes is her number 7:

7. The test is not whether the landowner's conduct would be in breach of the Victorian statutes but whether the landowner's own use would prevent the landowner from regarding recreational user by local people from being "as of right" i.e. whether the landowner's use was so "low-level" that it could coexist.

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 it as of right, or whether the land owner would perceive that his use of the land was inconsistent with its use by the local inhabitants for lawful sports and pastimes.  
[emphasis added]

In general my advisers would agree with this, with one proviso. Ms. Wood refers to 'recreational user by local people' and 'local inhabitants' implying that this might refer specifically to local residents, but it is important to note that this goes beyond what Justice Sullivan and Lord Hoffman said. We note that Justice Sullivan said:

82. Thus, 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 Mr Pennington's agricultural use of the land in such a manner, or to such an extent, that Laings 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 Laings?" it would not be reasonable to expect Laings to resist the recreational use of their fields so long as such use did not interfere with their licensee, Mr Pennington's use of them, for taking an annual hay crop.

Lord Hoffman likewise refers to "persons using it for sports and pastimes". In other words, the landowner, the schools in this case, need not believe or know that the people using their land are local residents. Any recreational users can in effect give notice that they are claiming a right of use, no matter who they are or where they live.

With this proviso we can borrow Ms. Wood's test in the Croxley Green case to make these points:

- a) we are in this point considering recreational users in general, not local inhabitants specifically (since the landowner could not reasonably be expected to tell the difference)
- b) the key point is whether the landowners could have been expected to be aware of their claims of use
- c) the interruption does not need to be total: it needs to be only 'in such a manner, or to such an extent,' as to make the landowner aware of that claim.

With this in mind we can see that in our case the schools were aware of users' claims to use 'as of right' all along, with a teacher, a headmaster and a governor, for time periods covering the whole 20 year period, even referring to the recreational users as using the field as if they believed they had a right to use it. The school witnesses even use the word 'right' in their testimony, showing that they realised the claim was for more than casual use.

In summary, it is clear from the evidence that the landowners' use in Canterbury was of a kind which certainly could coexist with residents' use in the way which Ms. Wood describes for Croxley Green. As I noted in my preamble above, the schools were very relaxed about the field from the 1960s until around 2007, and because of their other extensive sports fields they did not use it as much as now they might claim. We recall the evidence from Lt Colonel White and the Garrards, cited above, that the schools have always used the field relatively little. It is also clear from extensive residents' testimony that they, and people they saw, used the land frequently for all kinds of recreation. This would seem to conform to the description offered by Ms. Wood in the Croxley case of a situation in which the two co-existed together amicably for more than twenty years. The schools might not agree with the word 'low-level use', but this is a matter of evidence – I submit that if their use was of a kind which did not interfere with the residents' use, as it clearly did not, then it was of a *low enough level* to fit into the required definition.

We can see the truth of this also in what the landowners did *not* do. We have already seen that the schools clearly knew all along of users using the land 'as of right', and now acknowledge that in their testimony, but in practice the school authorities were very relaxed about residents' use throughout that time. Despite the protestations which emerged after my application, we need to remind ourselves that:

1. There is no evidence of anyone being ejected from the land.
2. There is no evidence of the police ever being called, even once in twenty years, to deal with anyone on this land.
3. There is no evidence of any repeat offenders being identified.
4. There is no evidence of any resident being asked to leave the land. On the contrary, of the 60 or more witnesses not one reports this ever happening in twenty years.
5. The schools have produced no evidence of any formal procedures or policies for dealing with intruders on the field.
6. There is no actual evidence of a consistent programme of fencing and fence maintenance (e.g. letters, bills etc.).
7. There is no credible evidence of any signs or notices of any kind.

This must persuade any independent observer of the fact that there is clear evidence that the landowners were on notice and well aware of the implicit claim to rights. Ms. Wood in the Croxley Green case recommends that we consider whether “*the land owner would perceive that his use of the land was inconsistent with its use by the local inhabitants for lawful sports and pastimes*”. Surely if a landowner did seriously perceive this, then s/he would take some action at some point in the twenty years. The very lack of action in this case, over a 20 year period, is therefore most significant, and demonstrates that the landowners, even though they knew full well of the claim to a right to use the land, and had testified to regular interruptions, acquiesced in residents’ use.

In short, although of course it has many differences, the Croxley Green judgement allows us to apply the same reasoning in the current case, borrowing our main text from Ms. Wood’s findings as the Inspector, but adding in what is relevant to our circumstances, to give this conclusion:

If the [*school sport and games*] carried out by [*the schools*] [*were*] not in fact inconsistent with use by local inhabitants there is no reason in law why the activities should be regarded as inconsistent and therefore amount to evidence that use was not as of right. The [*school sports and other activities*] here are the equivalent in fact and law to the “low level agricultural activities” in **Laing Homes** which Lord Hoffmann held were not to be regarded as inconsistent with use as of right.

41. Since it is abundantly clear from the evidence that school activities were not in fact inconsistent with use by local inhabitants, since both continued throughout the 20 year period perfectly amicably, partly because of the relatively low level of school use, and despite the schools testifying to knowing of the competing claim to rights, I submit that in this case also that there is no reason in law to decide that user as not as of right, contrary to the suggestion in your letter.

#### **Section 5: DEFERRING**

42. The last main point in your letter concerns the way in which residents used the land in question, and asks whether they perhaps ‘deferred’ to the landowner. You offer the possibility that perhaps:



The landowners' use of the land during the material period for the purposes of school playing fields was a use which conflicted with the use of the land as a place for informal recreation by the residents of the locality.

The advice received from Counsel is therefore that, *prima facie* at least, use by local inhabitants (and others) of the land comprised in your application deferred to the primary use of the land by the landowners and hence was not "as of right" within the meaning of the definition of "town or village green" contained within the Commons Act 2006.

44. In the first place, as I have already noted, there is no evidence that the landowners' use in practice actually conflicted with the residents' use. The only (alleged) conflicts were with people whose identities we cannot know, and who cannot be germane to this case. Although it is clear that the schools knew about the use and the implicit and even explicit claim to rights that this signified, they seemed to accept this and did not take any substantial action, such as putting up signs, or taking legal action against the alleged intruders. The schools do not identify any local residents in their evidence. In addition, in all of the testimony from many legitimate residents of the parish there is no suggestion of conflict of these kinds. This means that your first point, that the landowners' use "was a use which conflicted with the use of the land as a place for informal recreation by the residents of the locality." was simply not true in fact. To borrow Lord Hoffman's word in the *Trap Grounds* case, there was "give and take" on both sides and both parties used it. The land in question is quite large, and this means that I could perfectly well be running with my son in our usual place, in the mid afternoon during school hours, while schoolchildren played cricket at the other end of the field. I did not defer to them, but continued as of right, in fact believing I had a right, and without challenge. In short, while a *prima facie* assumption might be that such harmonious shared use could not happen, the actual experience of the field over 20 years shows that in fact it can, because on the whole it did.

With regard to your other points, since your letter drew on Ms. Wood's advice, I shall address these questions by looking in detail at her Advice itself.

45. Ms. Wood has, in section 22 of her advice, usefully set out a procedure for considering the issues. If we look at point 6 of her procedure, we note that she says:

*"Recreational user which defers to agricultural user is not "as of right" because it does not have the appearance to the landowner of the assertion of a right." [emphasis added]*

In this Ms. Wood agrees with what we said above, citing Justice Sullivan in *Laing* and in *Lewis*, namely that the key factor to start with is “the appearance to the landowner”. However, Ms. Wood looked only at the evidence which supported my application. She says in section 27:

*I have considered only the applicant's evidence on the relevant point, as to do so avoids any necessity to resolve any conflict of evidence between the applicant's evidence and the objectors' evidence*

This is understandable, as it is an attempt to speed up the process. However, I suggest that it would be more suitable to start with the evidence offered by the objectors, including the evidence offered by the schools as summarised above, since from this we can see that the landowners were always on notice that other users were using the land ‘as of right’.

I have already submitted above that the landowners in this case knew, by their own admission, that local users were using the land, interrupting their own activities on a regular basis, and doing so in ways which suggested that they were claiming rights over the land. They have told us so clearly in their own testimony. This means that we do not need to investigate further any issues relating to deferring, since the issue of deferring is only relevant in law, I suggest, if there is no other evidence of what the landowners knew or did not know.

For these reason I submit that the remainder of the discussion about deferring is not relevant in law and can and should properly be discarded. However, in order to take account of Ms. Wood's discussion in full, in case it should become of relevance later, I will consider it here in more detail.

46. Firstly, I would say that we are very grateful to Ms. Wood for addressing the evidence in such detail, and with such consideration, since we feel that it is only right that local residents' views be taken into account as fully as possible. However, I respectfully suggest that there is scope for an even more comprehensive analysis, since not all the evidence presented has been fully taken into account in her discussion. To take just one example which springs to mind, she makes no mention in her discussion of the letter from Solihin and Sofiah Garrard of 11<sup>th</sup> February in which they say:

“teachers from both Barton Court and Chaucer schools seemed quite happy for the family to use the field even when they were taking games lessons at the same time”.

This is clear evidence that this family used the field at the same time as the schools, yet it features nowhere in Ms. Wood's analysis. For this reason we submit that there is scope for further analysis of the evidence, and we would reserve the right to carry out or request such an analysis if it would be beneficial in future.

47. My legal advisers have looked closely at Ms. Wood's analysis and opinion, and they note to start with that the position in law related to deferring is very unclear. Even Justice Sullivan himself admitted as much in paragraph 72 of the recent *Lewis* judgement, saying: "*It does seem to me that the ambit of the deference principle is something which is not determined*" and he accordingly allowed that case to go to appeal. I submit therefore that if it is decided, contrary to my submission above, that deferring is relevant to this case, then KCC should await the clarification which will result from that appeal before deciding on this application.

48. Nonetheless, my advisers also note that Ms. Wood's analysis seems not to take account of an important part of the *Laing* ruling. Ms. Wood says in conclusion:

*40. In my judgment the overwhelming majority of the evidence on behalf of the applicant which referred to times of use suggested use during out of school hours only.*

I will respectfully suggest below that this is not a correct reading of the evidence, but nonetheless she continues:

*The evidence suggests that the majority of local residents' use deferred to use of the application land by the schools. Recreational user which defers to use by the landowner is not user "as of right" because it does not have the appearance to the landowner of the assertion of a right.*

In short, Ms. Wood is treating evidence of use outside school hours as in itself evidence of deferring. My advisers consider, however, and I submit, that this fails to take account of a key ruling in *Laing*. The relevant paragraphs are as follows. Mr George, for the claimant is mentioned in paragraph 90:

*[90] Mr George submitted that in an application for registration of a village green under s.22(1) it had to be shown:*

*a) that the use was sufficiently frequent throughout the day, as opposed to frequent at certain times and infrequent at others*

However, Justice Sullivan comprehensively rejected this, as follows (emphasis added):

94. I do not accept the Claimant's proposition (a)(above). It is not suggested that it is supported by any authority, and it would appear to be an attempt to impose a more onerous test than that set out in the Ministry of Defence and Sunningwell cases (above). The Inspector realised that the level of use would vary, at different times of the day and on different days: "I have already acknowledged that some of the regular users had a tendency to go on the land in the early mornings, the evenings or at weekends, but this is by no means true of all users" (14.20).

95. I accept Mr Morgan's submission that since village green uses are, by their very nature, leisure related, it would be most surprising if there was a requirement that lawful sports and pastimes should be carried on sufficiently frequently throughout daylight hours at all times of the year. **Most recreational activities will, by their very nature, be enjoyed by the local inhabitants outside normal working hours, at the weekend and during the school holidays. Outdoor recreation is likely to be more frequent in the summer than in the winter. A similar pattern of use would have been expected on customary village greens. When the custom was first established working hours would have been much longer, and the time available for recreation on the village green correspondingly shorter.**

It is clear that this ruling makes it unacceptable in law to require an applicant to show user at particular times of day as opposed to other times of day. More specifically, Justice Sullivan rules (in the highlighted section) that typical village green use will take place outside of normal working hours, in the evenings and at weekends.

In her Advice I respectfully submit that Ms. Wood is doing what Mr George in *Laing* did, namely requiring evidence of use at particular times of day as opposed to others, whereas in fact the use she has identified in her analysis is classic village green use according to Justice Sullivan's ruling. As such I submit that it is contrary to Justice Sullivan's decision to treat such natural village green use as Ms. Wood has identified as deferring. To put it another way, it would not be reasonable for a landowner to view such use as deferring in itself, since it is only to be viewed, according to Justice Sullivan, as a natural pattern of village green use.

47. Having considered the legal reasons why I submit that Ms. Wood's analysis is not in fact a material obstacle to my application, I will turn to her analysis itself. In the discussion below



<p>residents out of school hours.” In her 12<sup>th</sup> February 2008 letter she referred to use by her children “during light summer evenings”. Thus although both these witnesses had referred to daily use in their questionnaires, in my judgment it was clear from their letters that the daily use referred to was outside school hours only.</p>		
<p>34. (40) Denise and (41) David Young referred to their family’s use of the land “along with other local residents ... outside of school hours, especially during the summer months at weekends.”( (47) Ashdown’s children’s use had been during the school summer holidays.( (33) Dance and his partner and friends used the playing field during “many out of school hours”.( (2) de Caires referred to use by many young people from the neighbourhood “at the weekends and during the school holidays”.( (46) Hadler states “In 1980 I started as a pupil at the Geoffrey Chaucer School (now Chaucer) and at this point first used the playing fields out of school hours due to new friends on the Barton Estate and in Querns Road.”( (43) Long reports “My children regularly played football and other sports after school and at weekends. The field was invaluable to us during holidays”.( (53) Huw Kyffin states: “I have lived in St Augustine’s Road since 1986 and have regularly used the field myself for recreation, as do many others in the area. I know that the field [is] used by two local schools – Chaucer Technology College and Barton Court School as a playing field, but there has always been access to the field and use is made of it during those times when the school is not using it.”</p>	<p>= 8. However, de Caires (2) is repeated, Long (43) is repeated so this is counted as 6</p>	
<p>35. Two letter-writers when expressing their opinion that the application land should remain available for use by the public, qualified this desire as referring to times when the land was not required for use by the schools. (27) and (28) Graham stated “We believe [the application land] should remain accessible to the public when it is not required exclusively for use by Barton Court and Chaucer Technology Schools” and (3) and (4) White stated “The schools only use the field for a few hours a week. It should be available at all other times to the public, like sports grounds elsewhere, e.g. Tonbridge.” In my judgment these wishes as to the future were likely to reflect what the letter-writers regarded as the status quo before the fence was erected.</p>	<p>4</p>	

<p>36. It is possible that the following two letter writers intended to suggest that use occurred during school hours: (46) Graham Hadler wrote "The field has been used harmoniously between the schools and residents for decades" and (51) Mrs Lesley Long stated "The field has for many years been open to local residents' families to use for recreation, particularly at weekends and during school holidays", although in my judgment their letters could also be read as referring only to use outside school hours.</p>	<p>= 2. However, Hadler is repeated, so this is counted as</p> <p style="text-align: center;">1</p>	
<p>37. The evidence of three witnesses suggests that those witnesses used the application land at the same time as it was being used by at least one of the schools. (58) Mrs Garland states that she used the application land before or at the very beginning of the relevant period, when she lived in nurses' accommodation in St Augustine's Road (1984-1987) to picnic and sunbathe, and reports that no-one told her that she should not be there, even the teachers when the school was using the land. Dr Bax, the applicant, states in his response to objections that he used the field whenever he went there whether or not the schools were using it, simply because the field is so large that one set of users does not disrupt other users. It is not clear in either case whether the witness used the land when it was being used by both of the schools, or whether the witness used one part of the field when one school was using the other. Certainly Dr Bax's evidence tends to suggest the latter. I also note that Dr Bax's evidence contained in his response to objections goes beyond the evidence contained in his statement in support of the application dated May 2007 (page 5) where he states that the land is "used for recreation outside school hours" and does not suggest that he has used the land at the same time as the schools. (62) Tanya Taylor is the only witness whose evidence seems to be inconsistent with the suggestion that her use deferred to use by the schools to any extent. She states: "Sometimes the schools used the field at the same time but there was never any conflict. I was pupil of both schools during the nineties and never heard any complaints about the state of the field or its use. In fact sometimes in P.E. lessons teachers used to point out passer-by's good running technique or athletic progress." NO - another letter also</p>		<p>= 3 (+ the Garrard family whom she does not mention) However, Ms. Wood did not mention the Garrards, so I will leave it as</p> <p style="text-align: center;">3</p>
<p>38. Two letter-writers specifically state that both they and other local residents deferred to the</p>	<p>= 2. However, Dee is repeated, so this is</p>	

<p>schools' use of the application land in their use of the land: (5) Peter Dee writes: "the local community has always recognised that the schools have priority in the use of the area and have never contested the exclusive needs for privacy when school sports activities are scheduled. ... My study window is within ten metres of the new fence... and it is possible to observe how well the local people have enjoyed using the playing field outside school hours. ... I have lived close to Barton Playing Field for 32 years and have always enjoyed free access in the evening, at weekends and during school holidays because there has always been a gate left unlocked until the last two months." (29) Tracey Filmer states: "The field has always been open to the public and is used for a variety of purposes after school hours, at weekends and in school holidays....I have always respected the school's priority use of the field and would not dream of walking my dog if any school activity was taking place. I know this respect is shown by other members of the community."</p>	<p><i>counted as</i></p> <p><b>1</b></p>	
<p><i>TOTALS:</i></p>	<p><b>24</b></p>	<p><b>9</b></p>
	<p>[Hence 33 unique witnesses in total are mentioned and analysed by Ms. Wood]</p>	
<p>39. The evidence of the other witnesses relied upon by the applicant was equivocal as to when the use took place.</p>	<p>This means that as there are 64 witnesses, that leaves 31 whose evidence is considered to be 'equivocal'</p>	<p>31 witnesses are down as 'equivocal'. But equivocal could mean 'I used the land when I wanted, with no regard to time'</p>
	<p><b>24 outside school hours</b></p>	<p><b>= 40 for whom there is no evidence at all that they restricted their use to outside school hours</b></p>

In summary, using Ms. Wood's own analysis there are 24 witnesses whom she considers to have said they used the field outside working hours. (I would disagree with her interpretation of these witnesses' statements, and would note that none of them ruled out *also* using the field within school hours. However, for the sake of argument let us persist with Ms. Wood's figures and analysis.) We should, I submit, include the 31 witnesses whom Ms. Wood describes as 'equivocal', as it would be unreasonable and analytically incorrect to leave them out completely, as that would give a 'false positive' in statistical terms. This means that of the 64 witnesses we have here, 24 say they use the field outside of school hours, but the overwhelming majority, 40 out of 64, (62.5%) make no such statement or indication.



This does not support the suggestion that the majority of users testify that they used the field outside of school hours. It certainly does not support any claim that the majority of users 'deferred' to the schools – there is no evidence for that claim. On the contrary, it shows that the majority of users (62.5%) do not testify that they used the field outside school hours, and therefore make no explicit or implicit admission of any sort of deferring.

Ms. Wood suggested that "*the overwhelming majority of the evidence on behalf of the applicant which referred to times of use suggested use during out of school hours only.*" [my emphasis]. However, I submit that a full analysis should look not only at evidence which 'referred to times of use' (and indeed I am confused as to why Ms. Wood restricted her analysis only to a part of the evidence), but it should look at *all* the evidence. If we do this we see that, contrary to the inference drawn by Ms. Wood, we must of necessity conclude that:

*"the overwhelming majority of the evidence on behalf of the applicant did not suggest use during out of school hours only. A minority of evidence suggested this (37.5%) but the clear majority of evidence (62.5) suggested no such thing."*

#### ***The legal meaning of deferring***

48. My advisers point out that the legal meaning of 'deferring' in these cases is still contentious. However, they note that it must be something more than using land in a way which is typical on actual Village Greens.

In the recent *Lewis* case, as we have noted above, Justice Sullivan himself said in paragraph 72 that: "*It does seem to me that the ambit of the deference principle is something which is not determined*" and he accordingly allowed the case to go to appeal. We submit that in that case Jeremy Pike QC was correct to state (para 63) that the interpretation of deference as presented in *Laing* and in *Lewis* is incorrect in law since it fails to take account of Lord Hoffman's statements in *Trap Grounds* relating to 'give and take'. We submit that in the current case there is no evidence of deferring of any kind, with the possible exception of 2 witnesses, and that it is incorrect in law to treat normal village green use outside of school hours, and other use such as is exhibited in this case, as deferring.

You kindly sent me the judgement related to the Redcar case. I submit that there are important differences between this current case and the Redcar case. Firstly, in the Redcar case the ownership of the land was known to local people, whereas in this case it was not.

Therefore I submit that any behaviour on their part could not have been owing to acknowledgement of any right, since they did not know or suspect any such right.

Secondly, in the Redcar case the inspector, Mr Chapman, found that the residents admitted in testimony that they knew of the Golf Club's existence and as a consequence when someone was playing they stopped accordingly – in other words they seemed to acknowledge *in their testimony* that the Golf Club activity had a prior right. The first important point is that Mr Chapman, the Inspector, tested that evidence in great detail, reporting that “[t]his issue was the subject of exhaustive evidence during the six day public enquiry”. He did not simply, at the start of the enquiry, take the *fact of stopping* to be the deciding factor. Instead the deciding factor for him was admission by residents in their testimony of their acceptance of the prior right of the golfers and the golf club. In that case, Mr Chapman, in the light of that testimony, was justified in deciding that they had deferred.

51. This current case is therefore manifestly different from the Redcar one in these crucial respects. Here in Canterbury, most residents did not even know that the schools owned the land in question. It will be recalled that in my *Response to Objectors* (January 2008) I cited written evidence from 16 residents showing that they did not know who owned the land, but thought it was public, and genuinely believed that they had a right to use it for recreation. A host of other residents could testify to the same – in fact I doubt if there is a single one, or even a single teacher in either school, who actually knows the full ownership status of the land even now. There were (and are still) no signs or other indications to suggest ownership, and we all know that the issue of ownership in this case is a muddy one.

This means that even if residents had changed their behaviour, for example by keeping out of the way during a school match (and there is in fact no evidence of this), this could not possibly be tantamount to deferring, since they did not know of or accept any prior right, and therefore could not defer to it. They would be acting merely through plain common sense, politeness or perhaps to avoid sudden physical pain.

52. In addition, as I have shown above the landowners in this case knew all along of local people's claim to rights over the land, but they did not take the necessary action to inform local people to the contrary.

### **Summary of the issue of deferring**

56. Let me here summarise my submissions regarding the issue of deferring. I submit the following:

- a) In this case the evidence is overwhelming, from the testimony of the schools themselves and others, that the landowners' use of the land was interrupted to the extent that they knew of local people's claim to rights to use the land.
- b) The fact that the people who interrupted are unknown is immaterial – the key thing is 'how it appeared to the landowners'. It is clear from their own testimony that it appeared to the landowners that local people were constantly, regularly, every year and every day in the summer, interrupting the landowners' use and doing so in a manner which suggested that the local people had a right to do so.
- c) For this reason the issue of deferring is irrelevant, since it was adduced in *Laing* and *Lewis* only for its relevance to how things appeared to the landowners. Since in this case we already know this, we need not seek further to look at possible deferring.
- d) In any case, I submit that, following *Laing*, it is an error in law to treat use which is predominantly outside of working hours as deferring, since the *Laing* ruling clearly accepts that such use is normal village green use. Such use, I respectfully submit, cannot also be considered as deferring.
- e) I submit that the analysis offered by Ms. Wood is admirably detailed, but it omits some important details and interprets testimony in ways which I would seek in future to revisit if this is needed.
- f) I submit that where we are seeking to establish what the majority or minority view was, it is correct in law to consider in our figures all the evidence and testimony, and not to exclude that which is allegedly 'equivocal'.
- g) I submit that if we do so, the majority of witnesses (62.5%) do not offer any evidence at all of using the field outside of school hours only, or of other acts of deferring. The minority who did state that they used it outside of school hours did not say that they exclusively used it at those times, and also they were using the field in normal village green fashion, and not deferring.
- h) I submit that it was impossible for residents in this case to defer, since they did not know or acknowledge that anyone else owned the land or had any prior right to use the land. If they did not know this then they could not correctly be deferring.

57. I submit therefore, that in terms of all the possible objections which you have been kind enough to bring to my attention, we can say three things:

- a) in all of the witness statements and other testimony, there is no substantive evidence to support any of them;

- b) there is considerable legal argument to suggest that none of them is tenable or relevant in law in regard to the current application;
- c) there is considerable evidence already offered by residents and the schools themselves to show that they are not sustainable in fact.

### **Fencing and PE staff**

58. Ms. Wood, in paragraph 26 of her Advice, raised the possibility of further investigating the two issues of a) the fencing and b) whether local inhabitants using the application land were asked to leave when seen by P.E. staff from the schools, so I will briefly comment on these issues:

59: *Fencing*: In my March submission (entitled Part 3, Final summary) I summarised the discussion over the fencing and suggested that there was no evidence that there was ever in the whole 20 year period fencing which prevented access, and that in any case there is substantial evidence that users accessed the field by means of open gates. I noted that Mr Slater, on behalf of the schools, conceded the fact that

*"It is true that fencing of itself does not necessarily indicate ownership or prohibition"*

Mr Slater tried to argue that there was complete fencing around the site all the time, contrary to the evidence of many witnesses. I would draw attention to a statement by Mr. R Sykes, whom we recall was a senior member of staff at Barton Court and had been there for twenty years. He said in his written submission:

*"Open access to the field has prevented Barton Court from being able to 'manage' the site effectively"*

This shows conclusively that the situation laid out in my previous evidence is accepted by the school staff – namely that the fields were openly accessible, as can be seen by his phrase 'open access', and his complaint about it. This again undermines Mr Slater's official stated position that *"two people who have long connections with the school are quite able to confirm that there was complete fencing"*. Mr Sykes has been intimately involved in the school day by day for twenty years (unlike Mr Slater, who is a governor) and to him the situation was one of 'open access', and not complete fencing.

I submit that given this written evidence concerning the fencing from the objectors themselves, along with the other evidence adduced in my previous submissions, there would be no benefit in reopening this issue, on paper or in a costly public hearing.

60. *PE staff and local residents*: Ms. Wood also considers that it might be useful to revisit the issues of “whether local inhabitants using the application land were asked to leave when seen by P.E. staff from the schools”. I am confused about this since in the testimony of 64 people not one witness testifies to being asked even once by PE staff or any other school staff to leave the field in the whole 20 year period. It may be that school staff told some people to leave but even if this is so we have no idea who these people were, and no evidence that they were local.

I submit that the evidence is strong that local residents were not told to leave the field by any school staff in the whole 20 year period. In my interviews I specifically asked the question, and every respondent said they had never been asked to leave the field.

I submit therefore that it would not be necessary to reopen this issue at public enquiry, since I do not see how any evidence could be so strong as to overcome the weight of 64 resident witnesses. Of course, as I said above, I am not averse to a public enquiry if KCC feel it would be useful. However, as things stand I submit that the evidence in favour of my application is so such that this case does not need any such further investigation.

61. For the reasons set out in this letter and appendices, therefore, I would request that your legal team, in consultation with Ms. Wood or someone of similar standing in this area, reconsider the possible objections put forward in your letter. If as I submit, my application has therefore met all legal requirements, I would then request that you recommend to the Regulation Committee Member Panel that there is no legal impediment to my application being approved, so we can move forward to registration.

#### **A vision for the future**

62. In my view this case is a surprisingly straightforward one in comparison with most of the many Town or Village Green applications I have come across. Here we have a piece of land which was bought with public money for public recreation in the 1940s. The Cricket Meadow, as it was called, was bought “for the purposes of public walks and pleasure grounds”, and although it was then given over to schools in the 1960s, it simply continued to be used by the public of parish for recreation and sport just as on any normal Village Green. It had, after all, been used in this way perhaps for hundreds of years. The schools, having their own sports fields, treated this land as surplus to requirements, and although they used it now and again, and they saw that others used it, and took no substantive action to prevent or challenge them, not even putting up signs nor seeking in any other substantive way to advertise their ownership or to prohibit or hinder access, or in any other way to assert their

rights and to oppose the rights of local people. For more than twenty years, then, many people in the parish community, in significant numbers, used the land amicably and to the mutual benefit and enjoyment of all, for lawful sport and recreation.

For me this is exactly the kind of case which Parliament had in mind when it set out its legislation on registering Village Greens. It is the kind of shared use which Kent County Council should surely encourage and promote. It has been shown that there is no impediment in law or in practice to registering school playing fields as a Village Green, and indeed if the land is registered the schools have a legal right to continue to use it for those purposes, and can take action against anyone who prevents them, as Lord Hoffman has made clear. It is furthermore the aim of local residents, both individually and through the local Residents Associations, to work with the schools to ensure not only shared use but also shared responsibility in all aspects of the field's maintenance and preservation as a place for organised and *ad hoc* sports and recreation.

For legal reasons, therefore, but also for the sake of community, for the sake of public health and welfare, I invite KCC to approve my application to make this land a Village Green and therefore safeguard it as a place for continuing sport and recreation for the whole community.

I would be pleased to offer any further information, evidence or discussion should that be needed. Meanwhile, thank you for your time and kind attention.

Dr. Stephen Bax

August 2008

**APPENDIX 2: Opinion of Philip Petchey QC to 2008 Seminar on Village Greens: Law, Evidence and Handling the Public Inquiry: Chambers of Robin Purchas QC. Francis Taylor Building**

DUAL USE OF LAND SOUGHT TO BE REGISTERED AS A TOWN OR VILLAGE GREEN

Philip Petchey

1. There were not wanting at the time people to say that the argument in *Laing*<sup>1</sup> and followed in *Humphreys v Rochdale MBC*<sup>2</sup> was back to front. Let me just begin by reminding you what that argument was:

65. Moreover, section 12 makes any act "to the interruption of the use or enjoyment [of a village green] as a place for exercise and recreation ... " a criminal offence. Whatever may be the position in relation to those customary rights which had been established by 1857, where haymaking and recreational use were able to coexist, no such rights can have been established after the enactment of section 12. If a village green is established, any other use involving acts which would interrupt its use for enjoyment and recreation are effectively prohibited. It is difficult to see how the various steps that are necessary to gather a hay crop (as opposed to mowing grass to keep it short and useable for recreational purposes) could be said not to amount to such an interruption.

66. Section 29 of the 1876 Act, to which the Inspector did not refer, makes any effective agricultural use of a village green more difficult. The erection of fencing ("inclosure"), or a shelter or water trough ("any erection") to facilitate the use of the land for grazing would be prohibited, as would ploughing and reseeded ("disturbance or interference ... with the soil"). The occupation of the soil for the purpose of taking a grass crop, involving the steps described by Mr Pennington (above), would not be "with a view to the better enjoyment of [the] village green", and would thus be deemed to be a public nuisance.

67. Mr George submitted that the words "without lawful authority" in section 12 were a recognition that pre-existing commoners' rights of grazing would continue, and were not an acknowledgement of the landowner's right to graze cattle on a village green. I agree with the Inspector (14.45) that section 12 permits the landowner (or his tenant or licensee) "to place his cattle on the green at least in any manner which is not incompatible with the village green rights". I further agree that

1. I.e R (*Laing Homes Limited*) v. *Buckinghamshire County Council* [2004] 1 P and CR 36.
2. Unreported, 18 June 2004, Judge Howarth.

*"the converse would be that [even after 1857] village green rights can be established in circumstances where there happens to be some lawful, and compatible, grazing ... ". Given the restrictions imposed by sections 12 and 29 (above) such grazing would have to be very low key indeed (as was the case in Sunningwell) in order to be lawful and compatible with the establishment of village green rights.*

*68. For the reasons set out above I do not agree with the Inspector's conclusion that village green rights can be established where land is being used for the growing and cutting, drying, baling etc of a hay crop. The Inspector refers at the end of para 14.45 to "hay cutting". The occupation of land for the purpose of "hay cutting" is not to be equated with grass cutting. The former is no different in principle to the harvesting of any other crop. Insofar as the latter is carried out "with a view to the better enjoyment of [the] village green" as such, it will not be a public nuisance under s.29, nor will it be a criminal offence under section 12. When enacting the definition of "town or village green" in section 22(1) of the Act, Parliament must be assumed to have been well aware of the restrictions that would be placed upon newly created village greens by the nineteenth-century legislation. Against that background, it would be surprising if Parliament had intended that a level of recreational use which was compatible with the use of the land for agricultural activities (such as taking a hay crop) should suffice for the purposes of section 22(1), since upon registration .. as a village green (if not after 20 years use) some, if not all, of those lawful agricultural activities would become lawful by virtue of sections 12 and 29. Moreover, the prospect of improving the land agriculturally, by fencing, or by ploughing or re-seeding, would be lost.*

2. So section 12 and section 29 are incompatible with use of land for agriculture as it was being practised at the time of the application (taking a hay crop). If the land had become a town or village green, those uses would have to stop. Therefore (essentially as a matter of law) because Laing had continued to take a hay crop at the time when the use relied upon was taking place, the use relied



upon could not be taken as suggesting to them that local people were asserting a public right<sup>3</sup>.

3. But if the argument is back to front, it is not demonstrably wrong on that account. However we now know that it is wrong. In the *Trap Grounds* case<sup>4</sup>,

Lord Hoffmann said:

*57. There is virtually no authority on the effect of the Victorian legislation. The 1857 Act seems to have been aimed at nuisances (bringing on animals or dumping rubbish) and the 1876 Act at encroachments by fencing off or building on the green. But I do not think that either Act was intended to prevent the owner from using the land consistently with the rights of the inhabitants under the principle discussed in *Fitch v Fitch* 2 Esp 543. This was accepted by Sullivan J in *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P&CR 573,588. In that case the land was used for "low level agricultural activities" such as taking a hay crop at the same time as it was being used by the inhabitants for sports and pastimes. No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing "as of right". But, with respect to the judge,*

***I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purpose of section 22 if in practice they were not.***

***Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application.***

*I have a similar difficulty with para 141 of the judgment of Judge Howarth in *Humphreys v Rochdale Metropolitan Borough Council* (unreported) 18 June 2004, in which he decided the acts of grazing*

3. Looking at the matter, as *Sunningwell* explained was appropriate, from the point of view of the landowner: see *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 at pp 353H-353G ..

4. Ie *Oxfordshire County Council v Oxford City Council and Robinson* [2006] 2 AC 674.

*and fertilising by the owner which, in his opinion, would have contravened the 1857 and 1876 Acts if the land had been a village green at the time, prevented the land from satisfying section 22 definition (emphasis supplied).*<sup>5</sup>

4. It is easier to understand the second highlighted sentence than the first. The point about the first sentence surely is that looked at with a narrow focus, sports and pastimes are entirely inconsistent with the taking of a hay crop - the children making dens in the long grass will get in the way of the hay cutting machines. Looked at with a broad focus, the two activities are entirely compatible - the hay cutting on the land involves 1 day out of 365 in a year. Similarly, as regards the cattle. One cannot play football on an area where there is a herd of cows grazing. But they will not be grazing there all the time. It's common sense, really.<sup>6</sup>

5. Look now at that part of Lord Hoffmann's judgment in the *Trap Grounds* case dealing with the rights that are established under section 10:

*50. In my view, the rational construction of section 10 is that land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner where it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the Sunningwell case [2000J 1 AC 335, 357A-C.*

5. At paragraph 57.

6. It is hard to avoid the feeling on reading *Laing* that in his judgment Sullivan J was trying very hard to find a way of holding that 38 acres of lightly used development land had not become a town or village green. Commonsense cuts two ways in this sort of context. If Sullivan J had striven less hard, he would have had to determine the human rights point. Who knows where that would have led. And perhaps Parliament would have been reluctant to enact the Commons Act 2006 if the registration of the land at Widmer End had been upheld.

51. This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides. *Fitch v Fitch* (J 797) 2 Esp 543 was a sequel to *Fitch v Rawling* 2 H Bl 393, in which the custom of playing cricket on land at Steeple Bumpstead had been established. The evidence was that the defendants had trampled the grass which the owner had mowed, thrown the hay about and mixed some of it with gravel. *Heath J* said at p544:

"The inhabitants have a right to take their amusement in a lawful way. It is supposed, because they have such a right, the plaintiff should not allow the grass to grow; there is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded ... "

52. The judge, at p545, asked the jury to decide "whether the defendant had entered the close in the fair exercise of a right, or in an improper way" and the jury found for the plaintiff.

6. Which brings us to playing fields. Take a large comprehensive school with limited money to pay for security where am and pm - out of school hours - people regularly walk their dogs on the playing field. They never come into conflict with the school's own use - the School uses the pitches every day.

7. Is this potentially a village green? Does it matter that the predominant use is the school's? In a case where use by local people does predominate, does that trump the school's use? Obviously while the land remains as a playing field the users can co-exist, but this will not be the case if there is a proposal to develop it for housing.

8. The short point is that following the *Trap Grounds* case I think that it is impossible to argue that any use that is significant (i.e. not de minimis) that is

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not village green use automatically defeats a village green application. Thereon in, it becomes more difficult. [...Turns to other matters]

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