AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Tuesday, 19th October, 2010, at 10.00 am
Eliot Room, Thanet District Council, Cecil Street, Margate

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

Conservative (4) Mr M J Harrison (Chairman), Mr A D Crowther (Vice-Chairman), Mr J A Davies, Mr R F Manning.

Liberal Democrat (1) Mr S J G Koowaree

2. Declarations of Interest for Items on the agenda for this meeting

3. Application to register land known as the Old Bowling Green at Montefiore Avenue, Ramsgate as a new Town Green. (Pages 1 - 12)

4. Other Items that the Chairman decides are Urgent

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

Monday, 11 October 2010

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Application to register land at Montefiore Avenue at Ramsgate as a new Town Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Tuesday 19th October 2010.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 29th May 2010, that the applicant be informed that the application to register the land at Montefiore Avenue at Ramsgate has not been accepted.

Local Members: Mr. B. Hayton and Mr. R. Bayford Unrestricted item

Introduction and background

1. The County Council has received an application to register land at Montefiore Avenue at Ramsgate as a new Town Green from local resident Mr. M. Matthews ("the applicant"). The application, dated 9th August 2007, was allocated the application number 596. A plan of the site is shown at **Appendix A** to this report.

Procedure

2. The application has been made under section 15(1) of the Commons Act 2006 and regulation 3 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. These regulations have, since 1st October 2008, been superseded by the Commons Registration (England) Regulations 2008 which apply only in relation to seven 'pilot implementation areas' in England (of which Kent is one). The legal tests and process for determining applications remain substantially the same.

3. Section 15(1) of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a 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 6th 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 place a copy of the notice on the County Council's website. In addition, as a matter of best practice rather than legal requirement, the County Council also places copies of the notice on site to provide local people with the opportunity to comment on the application. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

6. The area of land subject to this application ("the application site") is known locally as 'the old bowling green' and is situated adjacent to Montefiore Avenue at Ramsgate. The application site is an irregular shape that is best described by reference to the plan at **Appendix A**. It consists of a triangular shaped piece of land adjacent to the tennis courts and on the frontage of Montefiore Avenue and a roughly rectangular piece of land to the rear of the tennis courts which is known locally as 'the old putting green'.

7. A Public Footpath abuts the eastern edge of the application site (but does not form part of it) and is delineated by way of very old post and rail fencing which is in a severe state of disrepair. Access to the site is through the dilapidated fencing (which is non-existent in some sections) and via a large, well-established gap at Montefiore Avenue.

Previous resolution of the Regulation Committee Member Panel

8. The application site is owned by Thanet District Council and the District Council has objected to the application ("the objector").

9. The matter was considered at a Regulation Committee Member Panel meeting on Friday 6th February 2009, where Members accepted the recommendation that the matter be referred to a non-statutory Public Inquiry for further consideration.

10. As a result of this decision, Officers instructed Counsel experienced in this area of law to act as an independent Inspector. A non-statutory Public Inquiry took place at Albion House in Ramsgate commencing on Tuesday 2nd February 2010 and continued until Friday 5th February 2010, during which time the Inspector heard evidence from all interested parties. The Inquiry re-convened on Thursday 11th March 2010 to hear the closing submissions from both parties. The applicant appeared in person at the Inquiry whilst the objector was represented by Counsel.

11. The Inspector subsequently produced a detailed written report of her findings dated 29th May 2010. The Inspector's findings and conclusions are summarised below, but a full copy of the Inspector's report is available from the Case Officer on request.

Legal tests and Inspector's findings

12. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:
    a) *Whether use of the land has been 'as of right'?*
    b) *Whether use of the land has been for the purposes of lawful sports and pastimes?*

c) *Whether use has been by a significant number of the inhabitants of a particular locality or a neighbourhood within a locality?*
d) *Whether use has taken place over period of twenty years or more?*
e) *Whether use of the land by the inhabitants is continuing up until the date of application?*

I shall now take each of these points and elaborate on them individually in accordance with the Inspector's findings:

(a) Whether use of the land has been 'as of right'?

13. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the *Sunningwell*[1] *case*, it is considered that if a person uses the land for a required period of time without force, secrecy or permission (*nec vi, nec clam, nec precario*), and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired and further use becomes 'as of right'.

14. There is no suggestion that use of the application site has been with secrecy and this issue did not arise at the Public Inquiry. However, one of the reasons for referring the matter to a Public Inquiry was to clarify the situation with regards to the fencing on the land and to establish whether use of the land had, throughout the relevant period, been without force. At the Inquiry, the objectors also sought to advance an argument that use of the application site had been by virtue of the implied permission of the District Council on the basis that the land was already held by the District Council for recreational purposes.

Powers under which the land was acquired and held by the District Council

15. When considering a Village Green application involving land owned by a Local Authority, it is important to establish the power under which the land is held by the Local Authority. This may be relevant in determining whether the use of the land has been 'as of right'. If, for example, land has been acquired and is held by a Local Authority specifically for the purposes of public recreation, it is arguable that the public already have the right to use the land for recreational purposes and, as such, cannot acquire any further rights; this is because their use is 'by right' and not 'as of right'.

16. In this case, the documentary evidence presented at the Inquiry showed that the application site was acquired by the District Council in 1948. Whilst the documentation was silent as to the powers under which the land was acquired, correspondence with the Minster of Health indicated that the land was to be purchased for the purpose of a Recreation Ground.

17. The Inspector was satisfied that it could be inferred from the documentation that the land was purchased and held by the District Council under the statutory power contained in section 4 of the Physical Training and Recreation Act 1937 ("the 1937 Act"). This power enabled a local authority to acquire and manage lands for

[1] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

the purposes of gymnasiums, playing fields, camping sites or centres for the use of clubs, societies or organisations having athletic, social or educational objects.

18. Following the repeal of section 4 of the 1937 Act, the land was held under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act"). The 1976 Act provides that a Local Authority may provide such recreational facilities as it thinks fit, including outdoor facilities premises for the use of clubs.

19. The Inspector concludes on this point that:

> "Although the powers conferred by section 19 are wide enough to include a power to provide land for use by the public for general recreation on a free-to-use basis, there was no evidence in this case of any formal decision by the Council to allow the application land to be used by the public for general recreation... I am not therefore satisfied that the Council did decide to provide the application land for general recreation as suggested by [the objector]: rather, in my judgement, the Council's position was one of acquiescence to use by the local inhabitants."[2]

Fencing

20. Having established that use of the application site had not been with permission, the Inspector considered whether use of the application site had, at any time, been forcible. In particular, she heard evidence and had regard to the fencing that had been in place around the application site.

21. The main issue of contention was the existence and state of the fencing along the eastern boundary of the application site (as shown on the plan at **Appendix A**). Currently, there are concrete fence posts in place along the boundary and the remains of fencing along parts of the boundary.

22. The Inspector heard evidence that, at one time, there had been a chain link fence in place on the existing posts which extended along the whole of the eastern boundary of the application site. She states:

> "I am satisfied that there was a chain link fence along the eastern boundary of the triangular area and along the eastern boundary of the old putting green area in 1983. I am satisfied that the fence remained reasonably intact until at least September 1986. Thereafter, I am satisfied that the condition of the fence until about 1995, whilst not at all times good enough to provide an effective barrier to people, was sufficient to prevent access to the land by motor-mowers...
>
> There was evidence from both the Applicant's witnesses and the Objector's witnesses that, over the course of time, the condition of the chain link fencing along the eastern boundary of the application land deteriorated, so that it ceased to be an effective barrier. In my judgement if substantial sections of the fencing material had disappeared, so that a user of the land might assume that he was walking through an intended gap in the fence line onto the land, rather than over a dilapidated fence

[2] Paragraph 10.43 of the Inspector's report dated 29th May 2010

line, use of the land would not be by force by reason of the continuing existence of the remnants of the fence line but would be as of right. However, in my judgement, the chain link fence on the eastern boundary of the application land had not deteriorated to such a stage by the beginning of the application period. The fence continued to be repaired during the early part of the application period, and certainly into the early 1990s. Although users might well have been able to access the land relatively easily during this period, in my judgement a user observing the fence every day at this time would have realised that the Council was attempting to maintain the increasingly dilapidated fence line."[3]

23. The Inspector also considered the existence of a newer weld mesh fence which, according to the evidence, was erected along the eastern boundary of the application site in about 1997. The evidence regarding this fence was confused but the Inspector was able to conclude that the fence was short-lived and did not provide an effective barrier to access to the application site. She adds that, even if the weld mesh fence did create a complete barrier along the eastern boundary at the time of its erection, open access to the land would still have been freely available from a gap in the hedge at Montefiore Avenue.

Gap in the hedge at Montefiore Avenue

24. The Inspector heard evidence from various witnesses, both on behalf of the applicant and the objector, that in about 1995 a gap was created in the hedge on the frontage to Montefiore Avenue to allow improved access for grass-cutting purposes. The location of this gap is shown on the plan at **Appendix A**.

25. The Inspector states:

> "I am satisfied that it may have been possible to squeeze through between the eastern end of the hedge on the Montefiore Avenue frontage and the end of the fence on the eastern boundary of the land, and that people would have done so to retrieve tennis balls. However, I am satisfied that until 1995 it would have been obvious to a person using the gap that would have been created by such activity that they were taking advantage of damage caused by others. I do not accept the evidence of those witnesses on behalf of the Applicant who sought to give the impression that before 1995 there was a large gap, and prefer Mr Flint and Mrs Sackett's evidence of a gap that you had to squeeze through. It would have been obvious in my judgement that this was not an official entrance to the land."[4]

Inspector's conclusions regarding use 'as of right'

26. The Inspector concludes:

> "In my judgement in the early part of the relevant period, and up until about 1995, any access to the land by local residents was forcible. Access to the land before 1995 involved either squeezing between the end of a hedge and the fence on the Montefiore Avenue frontage, which in my

[3] Paragraphs 10.33 and 10.34 of the Inspector's report dated 29th May 2010
[4] Paragraph 10.29 of the Inspector's report dated 29th May 2010

judgement is entry by force, or crossing the fence line between the alleyway to the east of the application land and the old putting green. Although it is likely in my judgement that a user would have been able to access the land relatively easily through the fence line on the eastern boundary of the old putting green during this period, such a user, had he closely observed the state of the fence line at this time, would have understood that the places he used to pass were unintended holes in a dilapidated fence line, rather than an intended access to the application land. In my judgement a user who gains access to land through such a hole in a fence gains access forcibly. Further I was satisfied that the fence line continued to be repaired during the early part of the application period, into the early 1990s and infer that there must therefore have been days during the early part of the application period when it was complete, and any reasonable user would have understood that the landowner was seeking to resist his entry."[5]

27. For these reasons, the Inspector was not satisfied that use of the application site had been 'as of right' throughout the whole of the relevant period.

***(b) Whether use of the land has been for the purposes of lawful sports and pastimes*?**

28. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. It is not necessary to demonstrate that both sporting activities *and* pastimes have taken place since the phrase 'lawful sports and pastimes' has been interpreted by the Courts as being a single composite group rather than two separate classes of activities[6].

29. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. The Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[7].

30. In respect of the use of the land for lawful sports and pastimes, the Inspector found:

"There was no evidence of any substantial use of the triangular area of land to the east of the tennis courts for any lawful sports and pastimes. Many of the Applicant's witnesses did not claim to have used this land at all. No one claimed to have used this area alone. Some of the recreational users of the larger rectangular area to the north of the tennis courts used the triangular area as a means of access to walk to the larger area. This type of user is a right of way-type user, rather than a village green-type user. Others went onto it to retrieve tennis balls. The use of the triangular area to retrieve tennis balls is a use ancillary to the tennis courts, and is

[5] Paragraph 11.3 of the Inspector's report dated 29th May 2010
[6] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385
[7] *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 at 397

not in my judgement, use of the triangular area itself for lawful sports and pastimes.

...

There was evidence that the rectangular area forming the old putting green to the north of the tennis courts and the bowling club had been used for recreation, in the main dog walking. This part of the site was not well-used, many of the Applicant's witnesses cited the quietness of the site as a reason for using it, but it was used reasonably regularly by a number of unrelated users."[8]

31. The Inspector concluded that there was evidence of use of the rectangular part of the application site situated to the rear of the tennis courts for lawful sports and pastimes during the relevant twenty-year period such as to satisfy this element of the legal tests. However, the Inspector also concluded that there was insufficient evidence of use of the triangular area to the east of the tennis courts for lawful sports and pastimes, and that this part of the application site did not meet this element of the legal tests.

(c) Whether use has been by a significant number of local inhabitants of a particular locality or a neighbourhood within a locality?

32. The definition of locality for the purposes of a village green application has been the subject of much debate in the courts and there is still no definite rule to be applied. In the *Cheltenham Builders*[9] case, it was considered that *'…at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality… there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition*'. The judge later went on to suggest that this might mean that locality should normally constitute '*some legally recognised administrative division of the county*'.

33. Use of the application site must also have been by a significant number of local inhabitants. The word "significant" in this context does not mean considerable or substantial: '*a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number… what matters is that the number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers*'[10]. Thus, what is a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the application site.

34. At the Public Inquiry, the applicant sought to rely on the ecclesiastical parish of Holy Trinity, Ramsgate as the relevant locality. The objector accepted that this was a locality within the meaning of the statute. The Inspector also agreed that the ecclesiastical parish was capable of constituting a relevant locality for the purposes of the legal tests.

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[8] Paragraphs 10.14 and 10.16 of the Inspector's report dated 29th May 2010
[9] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[10] *R (Alfred McAlipne Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

35. However, the Inspector was not satisfied that the land had been used by a significant number of the residents of the locality. She found that the majority of the users came from the housing in the immediate vicinity of the application site and concluded that:

> "... it cannot sensibly be said that the users of the site came from the claimed locality as a whole or that a significant number of the inhabitants of the ecclesiastical parish used the application land."[11]

(d) Whether use has taken place over period of twenty years or more?

36. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years up until the date of application. In this case, the application was submitted in 2007 and therefore the relevant twenty-year period ("the material period") is 1987 to 2007.

37. The Inspector was not satisfied that the land had been used for a full period of twenty years. She concluded:

> "...in my judgement such user as there was at the beginning of the relevant period and into the early 1990s was use by force and not use as of right. I am not therefore satisfied that the Applicant has shown qualifying use of the application land for the relevant period, and consider that the application should fail on this ground"[12]

(e) *Whether use of the land by the inhabitants is continuing up until the date of application?*

38. Section 15(2) of the Commons Act 2006 requires that use of the application site continues up until the date of application.

39. The Inspector accepted that use of the application site had continued until the date of the application.

Subsequent correspondence

40. On receipt, the Inspector's report was forwarded to the Applicant and the Objector for their information and further comment.

41. The applicant made comments about the procedure for applying for Village Green status in general and, in particular, the difficulties that the process presents for lay applicants who do not always have the benefit of legal representation. The applicant also felt that some of the evidence that he presented was not accorded suitable recognition but he does not seek to challenge the Inspector's findings.

42. The objector had no comments to make on the Inspector's report.

[11] Paragraph 10.23 of the Inspector's report dated 29th May 2010
[12] Paragraph 11.16 of the Inspector's report dated 29th May 2010

Conclusion

43. Having carefully considered all of the evidence submitted in relation to this application, and having regard to the findings of the Inspector in her thorough and detailed report, it would appear that the application fails to meet the relevant tests in the following respects:
    i. Use of the application site has not been 'as of right' throughout the *whole* of the twenty-year period;
    ii. Use of the application site has not been by a significant number of the residents of the locality; and,
    iii. In relation to the triangular piece of land adjacent to the tennis courts, use has not consisted of lawful sports and pastimes.

44. Therefore, it can be concluded that the requirements of the Commons Act 2006 have not been met in this case.

Recommendation

45. I recommend, for the reasons set out in the Inspector's report dated 29th May 2010, that the applicant be informed that the application to register the land at Montefiore Avenue at Ramsgate has not been accepted.

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

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 application site

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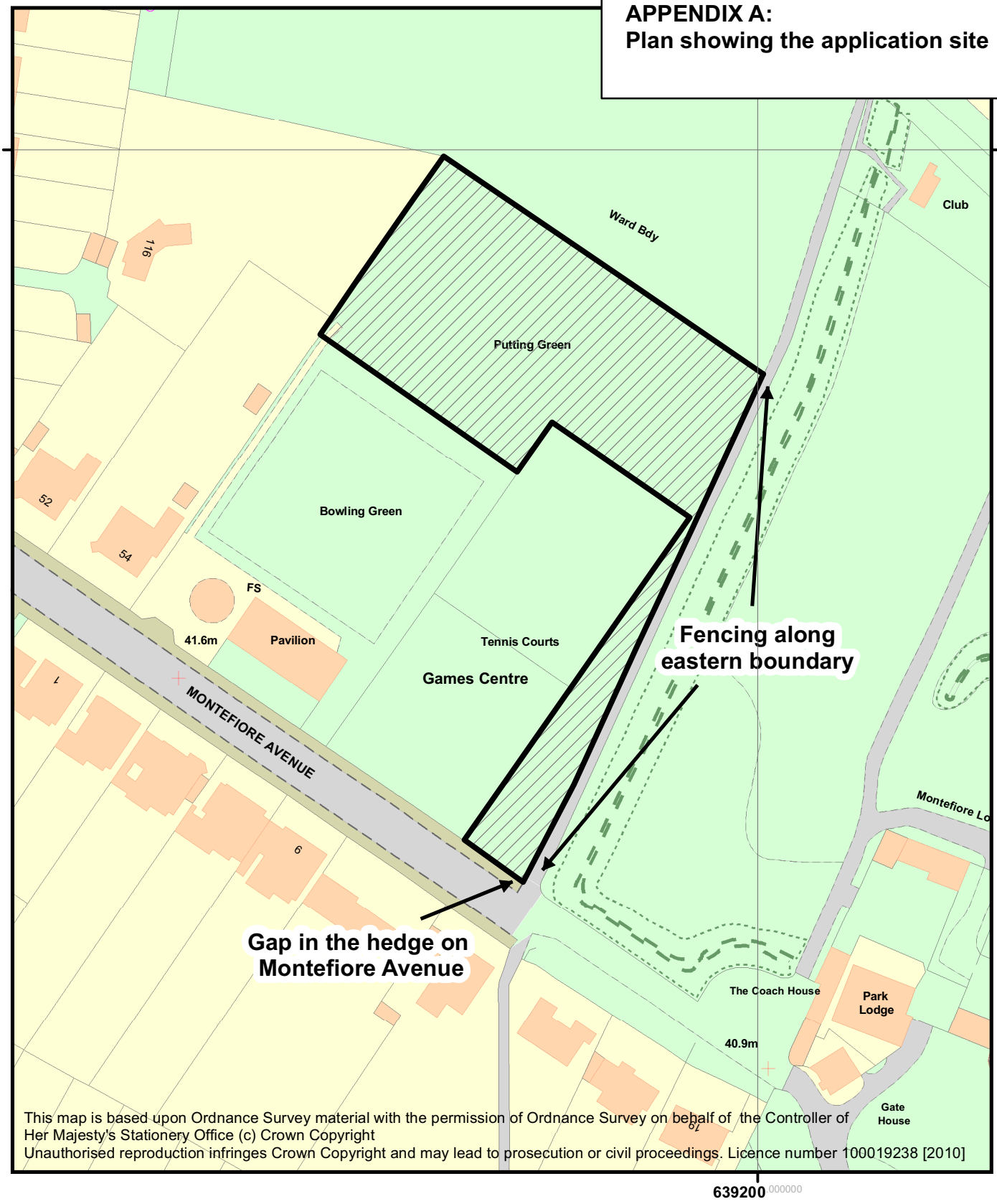
APPENDIX A:
Plan showing the application site



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Land subject to Village Green application at Montefiore Avenue, Ramsgate

Kent County Council

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