



AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Tuesday, 30th November, 2010, at 10.00 am
Canterbury City Council, Military Road,
Canterbury CT1 1YW

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

Tea/Coffee will be available 15 minutes before the meeting

Membership

Mr M J Harrison (Chairman), Mr A D Crowther (Vice-Chairman), Mr S J G Koowaree, Mr H J Craske and Mr R F Manning

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 H R Craske, Mr R F Manning.

Liberal Democrat (1) Mr S J G Koowaree.
2. Declarations of Interest by Members for items on the agenda.
3. Application to register land at Brickfields, Mill Lane in the parish of Bridge as a new Village Green (Pages 1 - 10)
4. Other items which 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, 22 November 2010

Application to register land known as Brickfields and the Water Meadow at Mill Lane at Bridge as a new Village Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Tuesday 30th November 2010.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 5th October 2010, that the applicant be informed that the application to register land known as Brickfields and the Water Meadow in the parish of Bridge has not been accepted.

Local Members: Mr. M. Northey

Unrestricted item

Introduction

1. The County Council has received an application to register land known as Brickfields and the Water Meadow in the parish of Bridge as a new Town or Village Green from local resident Mrs. E. Shirley ("the applicant"). The application, dated 16th December 2008, was allocated the application number VGA607. A plan of the site is shown at **Appendix A** to this report.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008.
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 Applicant must notify the landowner of the application and the County Council must notify every local authority. The County Council 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”) consists of fields of approximately 6.7 hectares (16.5 acres) situated to the south of Mill Lane in the parish of Bridge.
7. The site is crossed by two Public Footpaths (CB301 and CB302). Access to the site is also available via a set of steps leading up to a gap in the hedge at the western end of its frontage with Mill Lane, as well as two field gates situated on either side of the driveway to Brickfield Cottage.
8. The site is known locally as ‘the Water Meadow’ and ‘Brickfields’. Although there is no precise delineation between the two sections, broadly speaking the area to the west of Brickfield Cottage (consisting of grass paddocks) is known as ‘Brickfields’ and the area to the east of Brickfield Cottage (crossed by the footpaths and the river) is known as ‘the Water Meadow’.

Previous resolution of the Regulation Committee Member Panel

9. As a result of the consultation, objections to the application were received from Bridge Parish Council, local resident Mr. S. Lewis, the tenant farmer Mr. B. Mummery, Canterbury City Council (who own the Brickfields part of the application site) and Cantley Ltd (who own the Water Meadows part of the application site).
10. The matter was considered at a Regulation Committee Member Panel meeting on Tuesday 25th May 2010, where Members accepted the recommendation that the matter be referred to a non-statutory Public Inquiry for further consideration.
11. As a result of this decision, Officers instructed Counsel experienced in this area of law to act as an independent Inspector.

The Public Inquiry and the exclusion of the ‘Brickfields’ part of the site

12. In the previous report to the Regulation Committee Member Panel meeting, Officers expressed concern regarding the lack of evidence in relation to the Brickfields part of the application site¹. Following the meeting, the applicant contacted Officers stating that she had not been able to adduce any further evidence in respect of the Brickfields part of the application site. In light of this, she advised that she would not be presenting any evidence in respect of the Brickfields part of the application site at the Public Inquiry. As a result, Canterbury City Council agreed that it would not take an active part in the Inquiry, and the Inquiry considered evidence only in relation to the Water Meadow part of the application site.
13. The applicant also requested an amendment to the application in respect of a small section of land at Brickfield Cottage which formed part of the garden to that

¹ See paragraph 54 of the report by the Director of Environment and Waste to Kent County Council’s Regulation Committee Member Panel on Tuesday 25th May 2010

property and which was included as part of the application site in error. The Inspector agreed that it would be appropriate for the application to be amended in this way.

14. The Public Inquiry took place at the Guildhall in Canterbury commencing on Monday 6th September 2010 and continuing until Thursday 9th September 2010, during which time the Inspector heard evidence from all interested parties. The applicant appeared in person at the Inquiry whilst Cantley Ltd (“the main objector”) was represented by Counsel.
15. The Inspector subsequently produced a detailed written report of her findings dated 5th October 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

16. 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'?

17. The definition of the phrase ‘as of right’ has been considered by the House of Lords. Following the judgement in the *Sunningwell*² 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’.
18. There has never been any suggestion that the use of the Water Meadow has been with force or in secrecy. The fact that two Public Footpaths pass directly through the heart of the Water Meadow means that access to that part of the application site could not have been impeded in any way unless those paths had been fenced off, which has never been the case.
19. The Inspector did hear evidence of individual instances of permission being granted for specified events, such as a community tug-of-war over the river. However, she concludes:

² *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

“No permission was given for any other lawful sports and pastimes which took place on the land during the relevant period. I am satisfied that such lawful sports and pastimes as did take place on the land during the relevant period were enjoyed as of right, having been enjoyed without force, without secrecy and without permission.”³

20. Although the Inspector did not find any evidence to suggest that the use of the land for informal recreational activities had been with any force, secrecy or permission, she did express concerns regarding the type of use that was being asserted and, in particular, the use of the land for walking. This is discussed further below.

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

21. 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 activities⁴.

22. 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*’⁵.

23. Whilst walking (with or without dogs) has been recognised as the kind of activity that is capable of giving rise to Village Green registration, it is important to differentiate between walking which is consistent with the assertion of a general right of recreation (i.e. wandering over a wide area) and walking which is in exercise of an existing legal right recorded on a Definitive Map of Public Rights of Way (i.e. along a linear route). In cases where the application site is crossed by recorded Public Footpaths, and where walking is one of the main activities, it will be important to establish the degree to which walking has taken place away from the Public Footpaths. Walking along the Public Footpaths will be by right, because the public already have the right to use those routes.

24. The test to be applied in respect of the quality of the user was set out by the Supreme Court in the Redcar⁶ case: would it have appeared to a reasonable landowner that the inhabitants were asserting a right to use the land for the recreational activities in which they were indulging? This means that use which is trivial and sporadic (or indeed pursuant to an existing public right of way) will not have the outward appearance of the assertion of a general right of recreation.

³ Paragraph 14.2 of the Inspector’s report dated 5th October 2010

⁴ *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

⁵ *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

⁶ *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11

25. In respect of the use of the Water Meadow for lawful sports and pastimes, the Inspector found:

“By far the overwhelming majority of the activity on the application land was in my judgement referable to the exercise and occasional excessive exercise of the established rights of way which cross the land. In my judgement the evidence of dog walkers leaving the path to retrieve their dogs or balls, and the evidence of children playing on the bridge, in the river and on the fallen tree all fall into this category.

There was some use which was not reasonably explicable as referable to the existence of the public rights of way across the land: parts of the land which are not accessible from the rights of way were used on occasion for blackberry picking...

The fruit and nut gathering activities were the only activity which took place off the footpaths and substantially across the whole of the land... Those activities took place where the fruit and nuts were available, and, by their very nature, were seasonal and sporadic. Furthermore, the evidence did not suggest that these activities were indulged in by a significant number of the inhabitants. Only a few individuals ventured off the paths to pick fruit and nuts.

...

Standing back and looking at the evidence as a whole, I was not satisfied that it would have appeared in this case to a reasonable landowner that the inhabitants of the village of Bridge were asserting a right to use the whole of the application land for lawful sports and pastimes.”⁷

26. The Inspector concluded that the recreational activities which did take place on the Water Meadow (i.e. those which were not directly associated with the use of the Public Footpaths) were no more than trivial or sporadic and therefore insufficient to give rise to the assertion of a public right.

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

27. 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*⁸ 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’.

28. 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

⁷ Paragraphs 14.4, 14.5, 14.8 and 14.10 of the Inspector’s report dated 5th October 2010

⁸ *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

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'*⁹. 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.

29. At the Public Inquiry, the applicant sought to rely on the civil parish of Bridge as the relevant locality. The main objector accepted that this was a locality within the meaning of the statute. The Inspector also agreed that the civil parish of Bridge was capable of constituting a relevant locality for the purposes of the legal tests.

30. However, the Inspector was not satisfied that the Water Meadow had been used by a significant number of the residents of the locality. She concluded that:

"It was clear in my judgement that by far the most common use of the application land by the inhabitants of Bridge was for walking and dog walking over the established rights of way which cross the land. Such use as there was of the land as a whole for more general recreational activities, once this use was discounted, was use by a few individuals, and was insufficient in my judgement to signify to the landowner that his land was in general use by the local inhabitants."¹⁰

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

31. 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 2008 and therefore the relevant twenty-year period ("the material period") is 1988 to 2008.

32. The Inspector heard evidence that part of the Water Meadow (approximately 75% of the area to the west of the river) was obstructed for a period of approximately 4 months in 1999 – 2000 by reason of works carried out by the Environment Agency. However, the Inspector found no evidence to suggest that access to the remainder of the Water Meadow had been physically restricted in any way during the material period and such use as there was of the Water Meadow continued throughout the relevant period.

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

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

34. The Inspector accepted that use of the Water Meadow had continued until the date of the application.

⁹ *R (Alfred McAlipne Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

¹⁰ Paragraph 14.1 of the Inspector's report dated 5th October 2010

Subsequent correspondence

35. On receipt, the Inspector's report was forwarded to the applicant and the main objector for their information and further comment.
36. Neither the applicant nor the main objector had any comments to make on the content of the Inspector's report.

Conclusion

37. 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 for the reasons set out below.

The Water Meadow

38. One of the reasons for referring the matter to a Public Inquiry was to undertake a more detailed analysis of the user evidence submitted in support of the application, particularly in relation to the degree to which use of the application site was referable to the Public Footpaths crossing it. Having heard the oral testimonies of the witnesses at the Inquiry, the Inspector found that the vast majority of the use of the Water Meadow was referable, directly or indirectly, to the use of the Public Footpaths that cross the site. Such use was by right and not 'as of right', and would not have given the outward appearance of the assertion of a public right.
39. Whilst there is some evidence of use of the Water Meadow for nut and fruit gathering activities during the material period, such use was trivial and sporadic. The Inspector therefore concluded that she had not been satisfied that the Water Meadow has been used by a significant number of the inhabitants of the locality for lawful sports and pastimes.

Brickfields

40. The evidence submitted in support of the Brickfields part of the application site was weak. As stated above, the applicant has accepted this and decided not to pursue her application in respect of this part of the application site at the Public Inquiry.
41. The general impression presented by the evidence in support of the Brickfields site was that such use of that land as did take place was relatively infrequent and only increased in regularity once the land ceased to be used for grazing in 2006 (i.e. in the very latter part of the material period).
42. The City Council disputed that use of the Brickfields part of the application site had been 'as of right', stating that in some cases physical force had been used to gain entry. Indeed, there was some evidence of users climbing over locked gates¹¹ and

¹¹ Mr. Stephen Fawke's witness statement dated 14th January 2009, at paragraph 3: "*Brickfield can be accessed by clambering over a gate (or opening it, when unlocked)...*"

other evidence to suggest that there had previously been wire fencing where there is now a gap in the hedge along Mill Lane¹².

43. As such, it can be concluded that the Brickfields part of the site has not been used as of right by a significant number of the residents of the locality for a full period of twenty years.

Recommendation

44. I recommend, for the reasons set out in the Inspector's report dated 5th October 2010, that the applicant be informed that the application to register the land known as Brickfields and the Water Meadow in the parish of Bridge 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

¹² Mrs. Winifred Jarrett's witness statement dated 15th January 2009, at paragraph 2: "*there has always been a gap [along Mill Lane] since I have lived here [25 years] but it has become more obvious over the years. It used to be more hidden and there was a wire across it even though people would just clamber over it.*"

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APPENDIX A: Plan showing the application site

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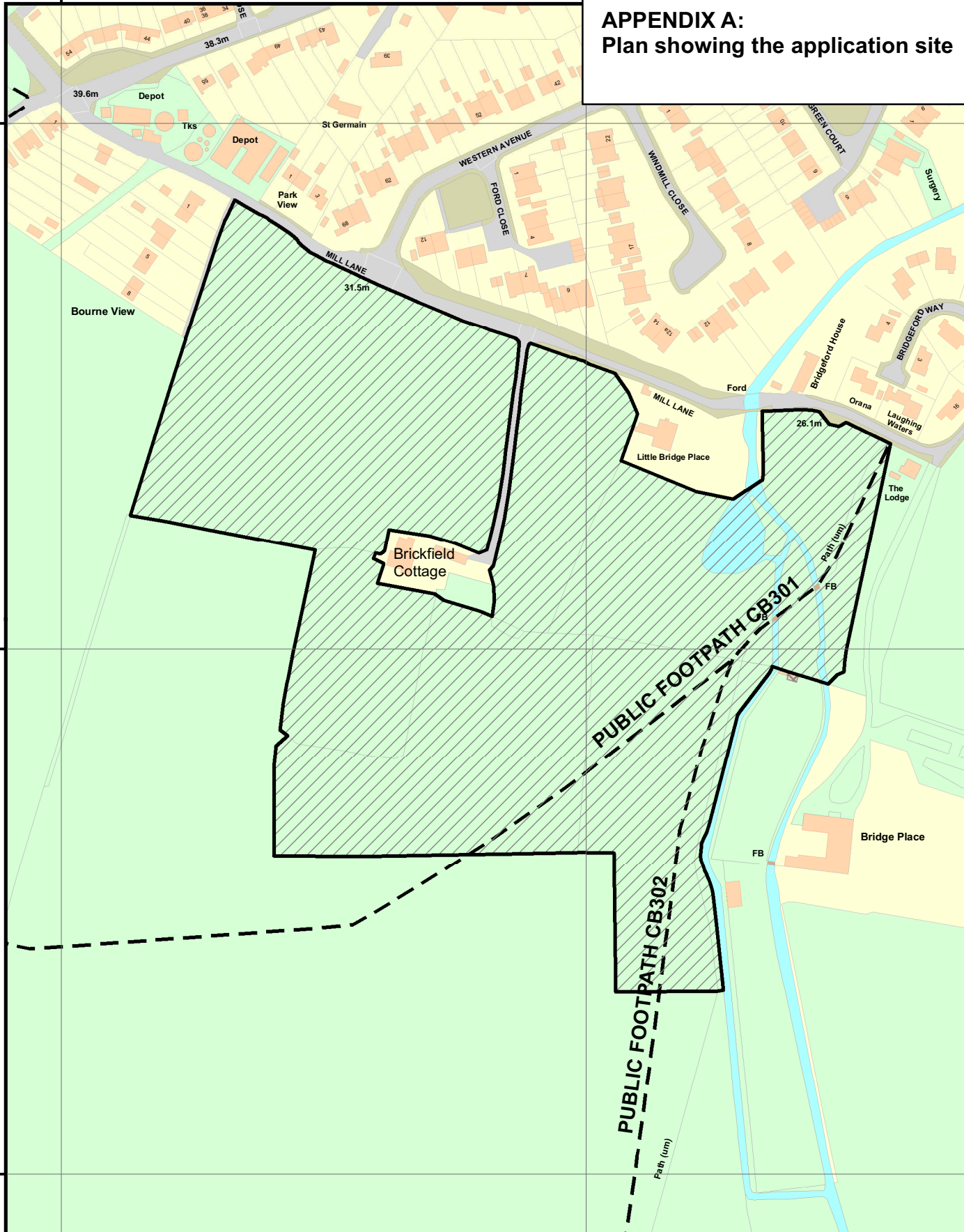
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Land subject to Village Green application
at Brickfields, Mill Lane, Bridge



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