



## AGENDA

### Kent County Council

## REGULATION COMMITTEE MEMBER PANEL

**Tuesday, 28th June, 2011, at 1.30 pm**  
**Council Chamber, Ashford Borough**  
**Council**

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 H J Craske, Mr T Gates  
Mr S J G Koowaree

### **UNRESTRICTED ITEMS**

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

1. Membership and Substitutes
2. Declarations of Interest by Members for items on the agenda
3. Application to register land known as Pilgrims Way, Canterbury as a new Village Green ( 1 - 18)
4. Application to register land at Princes Parade, Seabrook as a new Town Green ( 19 - 48)
5. Application to register land at Westwell Lane, Westwell as a new Town Green ( 49 - 64)
6. 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  
(01622) 694002

**Monday, 20 June 2011**



## Application to register land at Pilgrims Way in Canterbury as a new Town or Village Green

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A report by the Head of Countryside Access Service to Kent County Council's Regulation Committee Member Panel on Tuesday 28<sup>th</sup> June 2011.

**Recommendation: I recommend that the County Council informs the applicant that the application to register the land at Pilgrims Way in Canterbury as a new Town or Village Green has not been accepted.**

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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 at Pilgrims Way in the city of Canterbury as a new Town or Village Green from local resident Dr. S. Bax ("the Applicant"). The application, received on 8<sup>th</sup> September 2009, was allocated the application number VGA616. 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 the Commons Registration (England) Regulations 2008.
3. Section 15 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 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 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”) is situated at Pilgrims Way, opposite its junction with Byron Close and adjacent to the Pilgrims Way Primary School, in the Barton Estate area of the city of Canterbury. The site is approximately 0.36 hectares (0.9 acres) in size and comprises a grassed field. The site is fenced along all of its boundaries and access to it is via a strip of land from the footway of Pilgrims Way.
7. The application site is shown in more detail on the plan at **Appendix A**.

### **The case**

8. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities ‘as of right’ for more than 20 years.
9. Included in the application were 8 user evidence questionnaires from local residents. A summary of the evidence in support of the application is attached at **Appendix C**. Also included in the application was a detailed statement in support of the application, a copy of the relevant Land Registry title and a table summarising the evidence of use.

### **Consultations**

10. Consultations have been carried out as required. No responses have been received.

### **Landowner**

11. The application site is owned by Canterbury City Council (“the City Council”) and registered with the Land Registry as part of a larger landholding under title number K900760. The greater part of the landholding is the subject of a lease to the trustees of the Pilgrims Allotments Association and used as allotments. The remainder of the landholding, which forms the application site, is not subject to any such lease and not used as allotments.
12. The City Council explains that it has owned the application site since 1926. It was originally acquired for the purpose of allotments under section 5 of the Allotments Act 1925 and, although it is not now used as such, the land remains appropriated and held by the City Council for that purpose.
13. According to the City Council, the application site has been vacant for the last 20 years or so. No formal maintenance work has been undertaken on the site and, although there is a gate at the entrance to the site, there is evidence on the site itself (in the form of overgrown brambles) that it has not been closed for some

time. In 1997, permission was sought by local residents for a BMX track to be built on the application site but this was refused. In 2001, BMX jumps built by local youths were removed on health and safety grounds. In 2009, permission was sought by local residents for dog training classes; a licence was offered by the City Council but never taken up.

14. The City Council has objected to the application on the grounds that the land has not been used by a significant number of the residents of the locality for the purposes of lawful sports and pastimes over the required period. In support of its objection, the City Council has obtained statements from allotment holders on neighbouring land. These are summarised at **Appendix D** to this report. It has also produced photographs showing the overgrown nature of the site (taken in July 2010), a newspaper article referring to the refusal of permission for a BMX track and the correspondence relating to the permission sought for the BMX track.

### Legal tests

15. 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 inhabitants of a particular locality, or a neighbourhood within a locality?*
  - (d) *Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?*
  - (e) *Whether use has taken place over period of twenty years or more?*

I shall now take each of these points and elaborate on them individually:

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

16. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the *Sunningwell*<sup>1</sup> 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'.

17. In this case there is no suggestion that the use of the land by the recreational users has been with any force or in secrecy. Although there is a gate on the access track to the application site, it is agreed by both the Applicant and the City Council that this gate has never been shut.

18. The City Council's position is that use of the application site has not take place 'as of right' because permission has been sought from various local residents on several occasions (as set out at paragraph 13 above). This, in the City Council's

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<sup>1</sup> *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 (HL)

view, demonstrates that the local residents were well aware that they needed the permission of the City Council to use this land.

19. However, the Courts<sup>2</sup> have held that in determining whether or not use has been 'as of right', it is not necessary to consider whether or not the users believed that they had a legal right to use the land: '*user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not*'. Evidence as to the state of mind of the users is not part of the test of user 'as of right'.
20. Therefore, the City Council's evidence in relation to the refusal of permission serves only to confirm that the use of the application site did not take place on any permissive basis. As such, it can be concluded that recreational use of the application site has taken place 'as of right'.

***(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 activities<sup>3</sup>.
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*'<sup>4</sup>.
23. The evidence of use submitted in support of the application is summarised at **Appendix C**. It can be seen that the majority of the use is associated with dog walking (and/or training), but there is also evidence of use for other activities including ball games and kite flying.
24. Whilst there is therefore evidence that the application site has been used for lawful sports and pastimes, the evidence appears to be weak in relation to the amount of use that has taken place.
25. The test for the quality of the user has been set out recently by the Supreme Court in the Redcar<sup>5</sup> case: "*if the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right... the owner will be taken to have acquiesced in it*". This means that the applicant must demonstrate that there is an established pattern of use, and

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<sup>2</sup> *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 (HL)

<sup>3</sup> *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 (HL)

<sup>4</sup> *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

<sup>5</sup> *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC11 at paragraph 67 per Lord Hope

that such use was of such a manner as to indicate to the landowner that it consisted of the assertion of a public right; use which is trivial or sporadic will not carry the outward appearance of the assertion of a public right<sup>6</sup>.

26. In this case, one of the unfortunate flaws in the user evidence is that the questionnaires do not enquire as to the frequency of use of the application site. This is unhelpful in assessing the user evidence because it means that where a witness refers to use over a long period, such use could have taken place on a daily basis, or it could equally be limited to an annual visit. The only indications of the frequency of use in the questionnaires refer to use 'a few good times'<sup>7</sup> and 'occasionally'<sup>8</sup>.
27. Notwithstanding the difficulties in determining the frequency of use, it is clear from the evidence that the amount of use has been limited to only a small handful of local residents. As can be seen from the timeline at **Appendix C**, the evidence is that between 1993 and 1999 only two people used the application site; one of these people refers only to occasional use and, even on the generous supposition that the other person used the site on a daily basis, this level of use would not be sufficient to indicate that the land was in general use by the local community. The same situation arises between 2005 and 2007, which effectively means that for half of the relevant twenty-year period, the only evidence of use of the application site is by two people for an unknown frequency.
28. Therefore, it can be concluded that although the application site has been used for the purposes of lawful sports and pastimes, such use has been trivial and sporadic, and, accordingly, insufficient to amount to the assertion of a public right.

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

29. The right to use a Village Green is restricted to the inhabitants of a locality or of a neighbourhood within a locality and it is therefore important to be able to define this area with a degree of accuracy so that the group of people to whom the recreational rights are attached can be identified.
30. The definition of locality for the purposes of a Village Green application has been the subject of much debate in the Courts. In the *Cheltenham Builders*<sup>9</sup> 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*'.
31. In cases where the locality is so large that it would not be possible to demonstrate that a significant number of the residents of that locality had used the application site, it may also be necessary to identify a qualifying 'neighbourhood with a

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<sup>6</sup> *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 (HL)

<sup>7</sup> See user evidence questionnaire of Mr. and Mrs. N. Cross

<sup>8</sup> See user evidence questionnaire of Mr. J. Dobson

<sup>9</sup> *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at page 90

locality'. On the subject of neighbourhood, the Courts have held that *'it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood... The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning'*<sup>10</sup>.

32. At part 6 of the application form, the Applicant specifies the locality as 'Barton Estate'. Barton Estate is the name of the housing estate in which the application site is situated.

33. For the purposes of Village Green registration, the Barton Estate would not constitute a qualifying locality as it is not a legally recognised boundary. A qualifying locality in relation to this application would be, for example, the city of Canterbury, the Canterbury City Council electoral ward of Barton, or the ecclesiastical parish of St. Martins and St. Pauls.

34. However, the Barton Estate would qualify as a 'neighbourhood within a locality' for the purposes of section 15 of the Commons Act 2006. It is a cohesive and identifiable entity served by communal facilities, such as a post office, primary school and bus stop.

35. Therefore, it can be said that the use of the application site has been by the residents of an identifiable neighbourhood (the Barton Estate) within the wider locality of the city of Canterbury.

36. Having established a relevant 'neighbourhood within a locality', it is also necessary to consider whether the use of the application site has been by a significant number of the residents of that neighbourhood. 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'*<sup>11</sup>. 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.

37. The issue of whether the use of the application site has been by a significant number of local residents has already largely been dealt with above. The applicants position in this respect is that it is clear that the application site has been 'in extensive use for the required period'; the law does not, in his view, require intensive use of the application, merely evidence that it was in general use by the local community<sup>12</sup>.

38. However, having concluded that the evidence as a whole demonstrates only trivial and sporadic use of the application site, it follows that the recreational use

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<sup>10</sup> *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at page 92

<sup>11</sup> *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

<sup>12</sup> See applicant's response (dated 27<sup>th</sup> January 2011) to the City Council's objection



of the application site has not been sufficiently significant to demonstrate community use of the application site. Indeed, the nature of the location of the site in the centre of a heavily populated urban area means that one would expect to see far greater evidence of use. Therefore, it cannot be said that use of the application site has been by a significant number of the local residents.

***(d) Whether use of the land by the inhabitants is continuing up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?***

39. The Commons Act 2006 requires use of the application site to have taken place 'as of right' up until the date of application or, if such use has ceased prior to the making of the application, to fulfil one of the alternative criterion set out in sections 15(3) and 15(4) of the 2006 Act (as set out at paragraph 4 above).

40. There is no evidence that use of the application site has ceased, and no attempt has been made by the City Council to prevent such use. Therefore, it can be concluded that this test has been met.

***(e) Whether use has taken place over a period of twenty years or more?***

41. 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. The period of twenty years is calculated retrospectively either from the date of the application (in cases where use 'as of right' has not ceased) or from the date at which use of the application site 'as of right' ceased.

42. In this case, the application was made in 2009. As such, the relevant twenty-year period ("the material period") is 1989 to 2009.

43. In terms of the actual evidence of use, it matters not if only some (or even none) of the witnesses have used the application site for twenty years, provided that the evidence as a whole demonstrates that the land has been used by the local community for a full period of twenty years<sup>13</sup>. In this case, only one of the witnesses has used the application site during the whole of the material period, however, this evidence is supported by evidence of shorter period of use by other local residents.

44. Evaluating the evidence as a whole, it would appear that that the application site has been available for use throughout the material period, albeit that such recreational use as has taken place on the application site has been of a very limited nature.

**Conclusion**

45. From close consideration of the evidence submitted, it has been concluded that the legal tests concerning the registration of the land as a Village Green (as set out above) have not been met.

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<sup>13</sup> *Davis v Whitby* [1974] 1 All ER 806

## **Recommendation**

46. I recommend that the County Council informs the applicant that the application to register the land at Pilgrims Way in Canterbury as a new Town or Village Green has not been accepted.

Accountable Officer:

Mr. Mike Overbeke – Tel: 01622 221513 or Email: [mike.overbeke@kent.gov.uk](mailto:mike.overbeke@kent.gov.uk)

Case Officer:

Miss. Melanie McNeir – Tel: 01622 221511 or Email: [melanie.mcneir@kent.gov.uk](mailto: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**

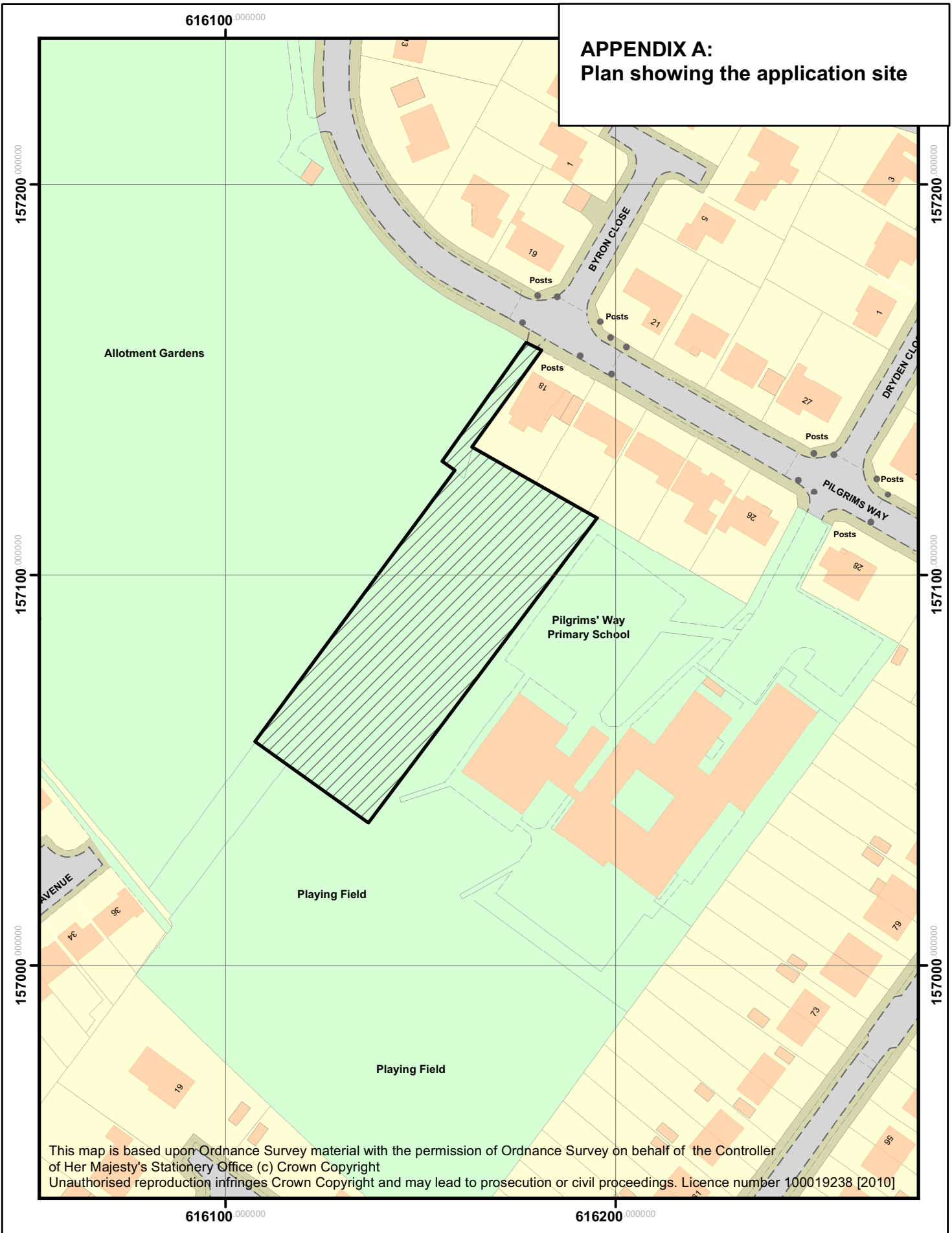
APPENDIX A – Plan showing application site

APPENDIX B – Copy of application form

APPENDIX C – Summary of user evidence in support of the application

APPENDIX D – Summary of objector's evidence

**APPENDIX A:  
Plan showing the application site**



Scale 1:1250

**Land subject to Town Green application at  
Pilgrims Way, Canterbury**



Page 9



FORM CA9

Commons Act 2006: section 15

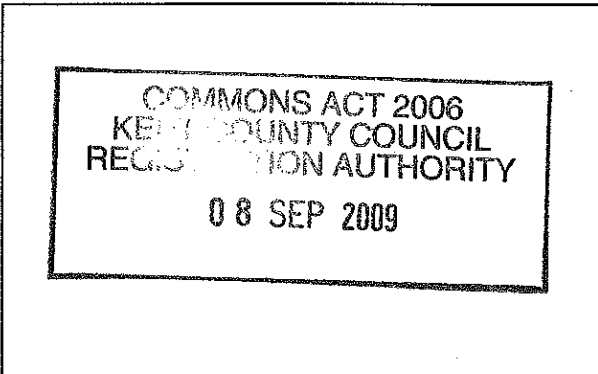
**Application for the registration of land  
as a new Town or Village Green**

APPENDIX B:  
Copy of the application form



*This section is for office use only*

Official stamp of the Registration Authority  
indicating date of receipt:



Application number:

VGA616

VG number allocated at registration  
(if application is successful):

**Note to applicants**

Applicants are advised to read the 'Part 1 of the Commons Act 2006 (changes to the commons registers): Guidance to applicants in the pilot implementation areas' and to note the following:

- All applicants should complete parts 1–6 and 10–12.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete parts 7 and 8. Any person can 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 part 9. Only the owner of the land can apply under section 15(8).
- There is no fee for applications under section 15.

**Note 1**

Insert name of Commons  
Registration Authority

**1. Commons Registration Authority**

To the:

Kent County Council  
County Hall,  
Maidstone, Kent  
ME14 1XX

**Note 2**

If there is more than one applicant, list all names. Use a separate sheet if necessary. State the full title of the organisation if the applicant is a body corporate or unincorporate. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email. If part 3 is not completed all correspondence and notices will be sent to the first named applicant.

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

Name: DR. STEPHEN BAX  
Full postal address: 37 ST. AUGUSTINE'S ROAD  
(incl. Postcode) CANTERBURY, KENT  
CT1 1XR  
Telephone number: 01227 785504  
(incl. national dialling code)  
Fax number: -  
(incl. national dialling code)  
E-mail address: bax.stephen@gmail.com

**Note 3**

This part should be completed if a representative, e.g. 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. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email.

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

Name: None  
Firm:  
Full postal address:  
(incl. Postcode)  
Telephone number:  
(incl. national dialling code)  
Fax number:  
(incl. national dialling code)  
E-mail address:

**Note 4**

For further details of the requirements of an application refer to Schedule 4, paragraph 9 to the Commons Registration (England) Regulations 2008.

**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 and why:

*\*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.*

If section 15(6)\* is being relied upon in determining the period of 20 years, indicate the period of statutory closure (if any) which needs to be disregarded:

**Note 5**

*This part is to identify the new green. The accompanying map must be at a scale of at least 1:2,500 and shows the land by means of distinctive colouring within an accurately identified boundary. State the Land Registry title number where known.*

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

Name by which usually known:

*Allotment Field*

Location:

*Barton Estate, Canterbury, Kent*

Common Land register unit number (only if the land is already registered Common Land):

Please tick the box to confirm that you have attached a map of the land (at a scale of at least 1:2,500):

*(Appendix 1 of Supporting document)*

**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). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly at a scale of 1:10,000.*

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

Indicate the locality (or neighbourhood within the locality) to which the claimed green relates by writing the administrative area or geographical area by name below and/or by attaching a map on which the area is clearly marked:

*Barton Estate (Murray Estate)*

Please tick here if a map is attached (at a scale of 1:10,000):

**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).

**7. Justification for application to register the land as a Town or Village Green**

The Allotment Field, which is the subject of this application for registration as a Town or Village Green, has been in use by a significant number of local residents of the locality of the Barton Estate for more than twenty five years. Their use has been 'without force, secrecy or permission', and has been fro a variety of recreational pursuits. Their use continues up to the time of the application.

The evidence adduced for this is in the form of responses to a User Survey referring to the actual use of the field by more than 20 people and the observed use by many more, over the requisite period of time. These survey responses are summarised in Appendix 2 of the attached submission, and copies of the actual responses can be found in Appendix 3.

I submit that the evidence that the field has been used in the way required by the Commons Act is therefore significant. However, I would be pleased to offer more evidence if that would be helpful.

**Note 8**

Use a separate sheet if necessary. 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, proprietor of any "relevant charge", tenant or occupier of any part of the land claimed to be a town or village green**

Canterbury City Council, Council Office,  
Milkway Road, Canterbury Kent.  
CT1 1YW  
(owner)

**Note 9**

List or enter in the form all such declarations that accompany the application. This can include any written declarations sent to the applicant (i.e. a letter), and also any such declarations made on the form itself.

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

**Note 10**

List all supporting consents, documents and maps accompanying the application. Evidence of ownership of the land must be included for voluntarily registration applications. There is no need to submit copies of documents issued by the Registration Authority or to which it was a party but they should still be listed. Use a separate sheet if necessary.

**10. Supporting documentation**

- Map of land (Appendix 1 of Supportive statement enclosed)
- Signed statements from residents referring to use of over 20 people over more than 20 years
- Full supportive statements

**Note 11**

List 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.

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

Please see supportive statement.



**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.*

**12. Signature**

Signature(s) of applicant(s):



Date:

6/9/2009

**REMINDER TO APPLICANT**

You are responsible for telling the truth in presenting the application and accompanying evidence. You may commit a criminal offence if you deliberately provide misleading or untrue evidence and if you do so you may be prosecuted. You are advised to keep a copy of the application and all associated documentation.

**Please send your completed application form to:**

**The Commons Registration Team  
Kent County Council  
Countryside Access Service  
Invicta House  
County Hall  
Maidstone  
Kent ME14 1XX**

***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 Commons 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.*

*A copy of this form and any accompanying documents may be disclosed upon receipt of a request for information under the Environmental Information Regulations 2004 and the Freedom of Information Act 2000.*

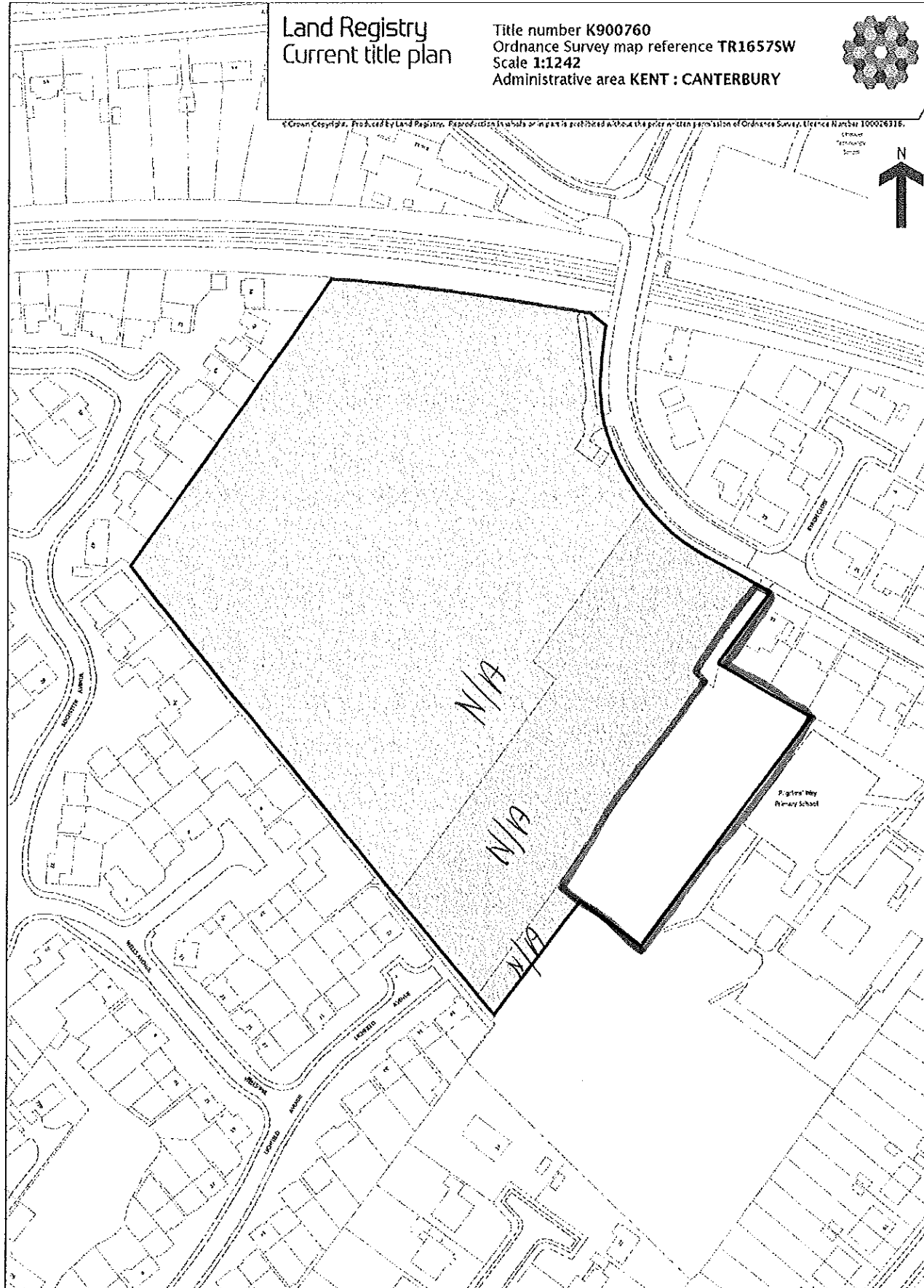
Land Registry  
Current title plan

Title number K900760  
Ordnance Survey map reference TR1657SW  
Scale 1:1242  
Administrative area KENT : CANTERBURY



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Ordnance Survey  
Scale



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**APPENDIX C:  
Summary of user evidence**

Table summarising evidence of use

Name	Period of use	Activities	Comments
Mr. and Mrs. N. Cross	2006 – 2009	Dog exercise and training	Used 'a good few times'
Mr. J. Dobson	Occasionally over last 20 years, continuously in 2003	Dog walking	Observed use by others for dog walking, football and cycling between 1999 and 2009
S. Dormer	2008 – present	Dog walking and training	Have seen other people on the land with dogs
Mrs. S. Hopkins	2000 – 2005	Dog walking	Observed use by children walking
D. Manklow	1988 – 2004	Dog walking	Observed children playing and riding bikes in groups of up to 8 or 9 in the 1990s
Mr. M. Sims	1971 – 1992	Football, cricket, walking, kite flying	Observed use by others between 1971 and 1985, 20+ people in semi-organised group
Mrs. P. Sims	1971 – 1990	Walking, ball games, kite flying, playing with children	Has seen use by 20-30 people, more during holidays. Gates to the site have never been shut and people have always been able to access it and walk freely on it.

In addition an evidence forms was submitted by **Mr. R. Clarke** who did not use the land for the purposes of lawful sports and pastimes, but had observed use by other (children playing and dog walkers) during the relevant period.

Timeline showing actual period of use by witnesses

	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	
CROSS																					
DOBSON																					
DORMER																					
HOPKINS																					
MANKLOW																					
M. SIMS																					
P. SIMS																					

**APPENDIX D:  
Summary of evidence submitted in  
objection to the application**

In support of its objection to this application, the City Council has submitted statements from the following people:

**Mr. L. Churchward** has lived opposite the entrance to the application site for over 30 years. He has had an allotment on the lower section of the neighbouring allotment gardens (overlooking the application site) continuously for over 30 years. Since about 2006, he has made almost daily visits to his allotment for varying periods. Mr. Churchward states that, from his own knowledge and observation, he has not been aware of any use of the field at all since about 2006. Prior to that time, the only use he observed was restricted to the occasional dog walking by 2-3 ladies (whose use has now ceased), someone from the school looking for a ball, a couple of boys smoking, local children using a BMX bike track for a period of about a year in 2001, and very occasional picking of blackberries in season. At the time of making his statement (2010), Mr. Churchward states that the site was overgrown with grass and brambles, with almost no sign of use.

**Mr. G. Skinner** has had an allotment plot on the neighbouring allotments continuously for over 60 years. Although his plot does not overlook the site, he has visited the allotment site most days since his retirement in the 1970s. Mr. Skinner believes that over the last 20 years, there has not been any significant use of the land other than occasional dog walking, local children using a BMX bike track in 2001 and very occasional blackberry picking. Since about 2006, he has not seen any use of the land at all.

**Mr. L. Littlefield** has had an allotment plot on the lower section of the neighbouring allotment gardens continuously for over 20 years. His plot is adjacent to the application site, with direct views onto the land itself and the access to it. He visits his allotment at evenings and weekends. Mr. Littlefield recalls seeing one lady walking her dog on the application site at one time, but this use has now ceased. He also saw a man and a youth trimming the brambles from the gateway in the summer of 2010. Mr. Littlefield states that he does not see anyone walking along the access track except for allotment holders, and has not seen anyone at all using the application site in the land 4-5 years. The grass is too overgrown for ball games and the site is not maintained so the grass stays long through the summer months. There is not evidence of use of the application site on the ground.

**Mr. P. Gardiner** has lived opposite the entrance to the application site since the late 1950s and has had an allotment plot on the lower section of the neighbouring allotment gardens (overlooking the application site) since this time. He makes regular visits to his allotments, spending about 12 hours per week there during the spring/summer/autumn and 2 hours in the winter. Mr. Gardiner states that there has not been any significant period when the site has been used for recreational purposes. Such use as there has been has been confined to a limited amount of dog walking (which ceased some years ago), a children's play area operated by the Council (in the 1970s) and, for a period of about one year in 2001, a bicycle scramble track used by local children. The application site is currently (2010) overgrown with waist high grass throughout. There is almost no sign of it having been trampled or disturbed. The entrance to the site is overgrown and shows no evidence of significant usage.

## Application to register land at Princes Parade at Seabrook as a new Town or Village Green

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A report by the Head of Countryside Access to Kent County Council's Regulation Committee Member Panel on Tuesday 28<sup>th</sup> June 2011.

**Recommendation: I recommend that the County Council informs the applicant that the application to register the land at Princes Parade at Seabrook as a new Town or Village Green has been not been accepted.**

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Local Members: Mr. C. Capon

Unrestricted item

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### Introduction

1. The County Council has received an application to register land at Princes Parade at Seabrook as a new Town or Village Green from local resident Mrs. D. Maskell ("the Applicant"). The application, made on 9<sup>th</sup> November 2009, was allocated the application number VGA620. 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 the Commons Registration (England) Regulations 2008.
3. Section 15 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 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 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 an area of scrubland of approximately 7.4 hectares (18.4 acres) in size situated between the Royal Military Canal and Princes Parade in the Seabrook area of the town of Hythe. The site itself is a roughly rectangular shape extending from the boundary with the Hythe Imperial Golf Club at the western end of the site (at Seabrook Lodge Bridge) up to and including the car park and playground at the eastern end of the site (where the Canal terminates). The application site is shown in more detail on the plan at **Appendix A**.
7. The northernmost edge of the application site abuts the canal towpath, which is recorded on the Definitive Map of Public Rights of Way as Bridleway HB83. The western edge of the site abuts a path between Seabrook Lodge Bridge and Princes Parade which is recorded in the County Council’s Highways Gazetteer as an ‘adopted path’ (i.e. a highway maintainable at the public expense over which the public have a right on foot). The path which crosses the site between Seaview Bridge and Princes Parade is also recorded as an ‘adopted path’.

### **The case**

8. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities ‘as of right’ for more than 20 years.
9. In support of the application, 57 user evidence questionnaires from local residents were provided, demonstrating use of the application site for a range of recreational activities for a period in excess of twenty years. A summary of the evidence in support of the application is attached at **Appendix C**.
10. Also included in the application were extracts of the Shepway District Local Plan Review (2006), various photographs, newspaper cuttings and book extracts referring to the site, as well as correspondence relating to the proposed development of the site for housing.

### **Consultations**

11. Consultations have been carried out as required. The following responses have been received.
12. Hythe Town Council has written to say that it neither supports nor objects to the application.
13. Nine letters of support were received from local residents confirming the use of the application site for recreational purposes.

## Landowner

14. The application site is owned by Shepway District Council and is registered with the HM Land Registry under title number K640682. The site was acquired by the District Council in 1974 as part of local government reorganisation, having previously been owned by the former Hythe Urban District Council.
15. The District Council has objected to the application on the following grounds:
- There has not been 20 years' continuous use of the application site;
  - There has not been use by a significant number of the local residents (except for the footpaths and the play area);
  - Use of the application site has not been 'as of right'
16. In support of its objection, the District Council has produced a lengthy submission which includes a detailed history of the application site and statutory declarations from a number of current and former employees setting out their individual knowledge and experience of the site. A summary of the information contained in the District Council's objection is attached at **Appendix D**.
17. The District Council's main concern is that throughout the last 30 years, parts of the application site have periodically been used by the Council for various different purposes which would have precluded public use of those parts of the application site at certain times. For example, for approximately 20 years from 1982, the western end of the application site was used for the storage of ground maintenance materials and the burning of waste materials; and the eastern end of the application site was, in 1985/86, used as an enclosed site compound for the Hythe Main Drainage Works programme.
18. The most significant interruption to recreational use of the application site came in 2002/03 when the majority of the application site was fenced to prevent public access during a project of major dredging works on the canal which required silt to be deposited on the application site itself. Further localised deposits of silt were also made in 2003, 2004 and 2007. The District Council's position is therefore that large parts of the application site were not, during the relevant period, capable of being used by the public for recreational purposes.

## Legal tests

19. 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 inhabitants of a particular locality, or a neighbourhood within a locality?*
  - (d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?*
  - (e) Whether use has taken place over period of twenty years or more?*

I shall now take each of these points and elaborate on them individually:

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

20. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the *Sunningwell*<sup>1</sup> 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.
21. In this case, there is no evidence that the use of the application site has been secretive. The District Council refers to the existence of fencing on the application site at various points during the relevant period (most notably in 2002/03), but does not attempt to suggest that any use of the application site has taken place by means of forced entry<sup>2</sup>. Although one witness refers to having to 'climb through undergrowth' to gain access<sup>3</sup>, there is no other evidence to suggest that any of the users gained access to the site by force.
22. There is evidence that notices were in place during the dredging operations, but these appear to have been erected in relation to safety requirements rather than a deliberate act by the landowner to rebut any acquiescence in the trespassory use of the land. If a notice is to have the effect of causing use 'as of right' to cease it must communicate to the user that the landowner is actually contesting the use of the land<sup>4</sup>. In this case, the notices read simply 'Danger. Deep Silt. Keep out.' and served to warn of a risk rather than to prohibitively exclude the public.

*Permission*

23. The District Council's position is that use of part of the application site, namely the play area and car park at the eastern end, has been as a result of an implied permission and not 'as of right'. The Council states that *'it is abundantly clear that these areas have been provided by the Council for use by the general public with the permission of the Council'*<sup>5</sup>.
24. It is well established that acts of encouragement by the landowner to use a particular site for recreational purposes do not have the effect of conferring an implied permission on the user. In *Beresford*<sup>6</sup>, which concerned a Council-owned sports field, it was held that *'the provision of benches for the public and the mowing of the grass were... not indicative of a precatory permission but of a public authority, mindful of its public responsibilities and function, desirous of providing recreational facilities to the inhabitants of the locality... The positive encouragement to the public to enjoy the recreational facilities of the Sports Arena, constituted, in particular, by the provision of benches, seems to me not to undermine but rather to reinforce the impression of members of the public that their use was as of right'*.

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<sup>1</sup> *R v. Oxfordshire County Council and another, Sunningwell Parish Council* [1999] 3 All ER 385

<sup>2</sup> The fencing is however relevant to the question of whether use of the application site has taken place for a full period of twenty years, but this is addressed separately later on in this report

<sup>3</sup> See evidence questionnaire of Mr. and Mrs. Barker

<sup>4</sup> *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) at paragraph 22 per Waksman J

<sup>5</sup> See paragraph 12 of the District Council's Statement of Objection

<sup>6</sup> *R (Beresford) v Sunderland City Council* [2003] UKHL 60 at paragraphs 49 and 50 per Lord Scott



25. As such, in the present case, the provision of play equipment and parking facilities at the eastern end of the application site was not, of itself, sufficient to confer any form of implied permission on the users. Permission must normally be communicated to the user, but in the absence of evidence of any overt communication of permission to enter this part of the application site, it cannot be asserted that the recreational use has taken place on a permissive basis.

*Use of existing Public Rights of Way*

26. Recreational use which has the outward appearance of being in exercise of an existing Public Right of Way is not qualifying use for the purposes of Village Green registration. The issue was considered by the Courts in *Laing Homes*<sup>7</sup>, in which the judge said that: *'it is important to distinguish between use that would suggest to a reasonable landowner that the users believed they were exercising a public right of way to walk, with or without dogs... and use that would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of the fields'*.

27. In this case, there are several recorded Public Rights of Way on or abutting the application site. These are shown on the plan at **Appendix A**. The surfaced towpath which runs between the northern boundary of the application site and the Royal Military Canal is recorded as a Bridleway with the reference HB83. A Bridleway provides the public with a right of way on foot, on horseback or leading a horse, or on a bicycle. At the western boundary of the application site, there is a surfaced path which connects Seabrook Lodge Bridge with Princes Parade, and crossing the centre of the application site there is a further surfaced path which connects Seaview Bridge with Princes Parade. These two paths are both recorded in the Highways Gazetteer as 'adopted paths' which are publicly maintainable by Kent Highway Services. The public therefore have a right of passage on foot over these two routes.

28. The vast majority of the user evidence refers to walking. It is difficult on paper to differentiate between general recreational walking which involves wandering over a wide area, and walking which involves walking along a defined route between specific points. During the 1980s, the site was mown several times a year and would have been accessible for recreational walking; indeed, the fact that travellers settled on the site in the late 1980s supports this view. One of the Objectors witnesses<sup>8</sup> recalls that at one point a worn track used by dog walkers appeared on the site, which suggests that the site was regularly used for this purpose at that time.

29. However, given the overgrown state of the land and the instability caused by the silt deposits in the latter part of the relevant twenty year period (i.e. after 2002), it seems more likely that walking (and jogging) took place on the surfaced paths, possibly as part of a circular route around the application site, rather than general wandering over the site itself. Similarly, it is difficult to see how cycling could have taken place anywhere other than on the surfaced paths which surround and cross the application site during this period.

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<sup>7</sup> *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70 at 79 per Sullivan J.

<sup>8</sup> See statement of Mr. Christopher McCreedy included in the Council's objection

30. Walking and cycling on the Bridleway would have been in exercise of an existing Public Right of Way, whilst cycling on the adopted paths (which provide a right of way on foot only) would have constituted an offence under the Highways Act 1835<sup>9</sup> and would not be a lawful activity. The fact that some of the users refer to having used the site for walking on a daily basis throughout the 20 year period without reference to the substantial fencing erected in 2002 is at least suggestive that such use was confined to the paths.
31. Therefore, it is likely that at least some of the use of the application site for walking, jogging and cycling, certainly in the latter part of the relevant period, was not use that can be described as being 'as of right'. In any event, in light of the recommendation and the other issues raised in this report, it is not necessary to conclude definitively on this point.

*General conclusion on use 'as of right'*

32. Therefore, from the evidence available, it is possible to conclude that such use of the application site as did take place during the relevant twenty year period has, on the whole, been 'as of right'. The question of whether recreational use took place throughout the relevant period is addressed later in this report.

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

33. 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<sup>10</sup>.
34. 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*'<sup>11</sup>.
35. In this case, the evidence demonstrates that the land has been used for a number of recreational activities. The summary of evidence of use by local residents at **Appendix C** shows the full range of activities claimed to have taken place. The majority of use has been for walking (with or without dogs), but reference is also made in the user evidence to activities such as jogging, cycling, photography and bird watching.
36. There is therefore evidence that the land has been used for a variety of recreational purposes. Whilst it is debatable as to whether some of the use has been in exercise of the existing public rights of way, it is clear that some of the activities mentioned (e.g. fishing, feeding ducks) are unquestionably referable to the use of the canal and/or towpath, which do not form part of the application site.

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<sup>9</sup> Section 72.

<sup>10</sup> *R v. Oxfordshire County Council and another, Sunningwell Parish Council* [1999] 3 All ER 385

<sup>11</sup> *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, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

One witness also refers to playing golf<sup>12</sup> but this would be referable to the use of the Hythe Imperial golf course situated on adjacent land that is not subject to this application. These latter activities are to be disregarded in assessing the evidence of the use of the application site as a whole.

37. Overall, it can be concluded that the site has been used for the purposes of lawful sports and pastimes.

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

38. The definition of locality for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the *Cheltenham Builders*<sup>13</sup> 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’.

39. 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’<sup>14</sup>. Thus, what constitutes a ‘significant number’ will depend upon the local environment and will vary in each case depending upon the location of the application site.

*The ‘locality’*

40. The Applicant specifies the locality at Part 6 of the application form as the “East ward of Hythe Town Council administrative area”. Recent case law<sup>15</sup> has confirmed that an electoral ward is capable of being a relevant locality for the purposes of Village Green registration.

41. The plan at **Appendix E** shows where the users of the application site live in relation to the site itself. It can be seen that the majority of the users live within the East ward and therefore it seems appropriate that this should be the relevant ‘locality’ in this case.

*‘significant number’*

42. In this case, the application is supported by evidence from 57 users living in the locality.

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<sup>12</sup> See evidence questionnaire of Mr. R. Trice

<sup>13</sup> *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

<sup>14</sup> *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

<sup>15</sup> *Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch)

43. The District Council states that use of the majority of the application site<sup>16</sup> has not been by a significant number of local residents. Since July 2009 (four months prior to the application being made), the District Council has made daily inspections of the application site and these have revealed that there has not been significant use of the application site. Such use as has taken place has been, according to these inspections, confined to the footpaths and the designated play area. Although the inspections only began four months prior to the application being made, the District Council considers them to be a representative indication of the use of the land on the basis that there does not appear to have been any major change in the pattern of use asserted by the local residents.
44. The applicant challenges the validity of the inspections on the basis that there is insufficient information regarding the duration or extent of the inspections. For example, in the summer of 2009, only three visits were undertaken in the evening when most dog walkers would be out. She adds, correctly, that any information gathered after the date of the application is not directly relevant to considering whether the application site has been used in the requisite manner during the relevant twenty-year period.
45. It is clear that the pattern of use has varied according to the availability of different parts of the application site for recreational use. Prior to the dredging operations in 2002, the site was mown at least annually and the maintenance of the site made it more capable of being used for recreational purposes. Since the dredging operations have taken place, the site has become overgrown and less capable of use for leisure activities.
46. The evidence is that when the site was available for use, it was used by local residents on a regular basis. Whilst the recent survey of use by the District Council suggests substantially less use, this cannot be taken as a representative sample of use throughout the 20 year period given the obvious changes in the nature and character of the land.
47. In considering whether use has been by a significant number of local residents, the test to be applied is a qualitative rather than quantitative one; it is concerned with establishing whether a reasonable landowner would have been aware of public use of the land. The mowing of the grass and the later erection of the fencing in relation to the dredging operations (to ensure public safety) are actions which suggest that the District Council was aware, certainly during the early part of the relevant period, of the public use of the land.
48. As a whole, it can be concluded that the application site has been used by a significant number of the residents of a defined locality.

***(d) Whether use of the land by the inhabitants is continuing up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?***

49. The Commons Act 2006 requires use of the land to have taken place 'as of right' up until the date of application or, if such use has ceased prior to the making of

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<sup>16</sup> i.e. excluding the footpaths and the play area

the application, to fulfil one of the alternative criterion set out in sections 15(3) and 15(4) of the 2006 Act (as set out at paragraph 4 above).

50. In this case, the application was made in 2009. There is no evidence of any specific challenge to recreational use at the time that the application was made, although the earlier erection of the fencing during 2002 did have the effect of causing the use of the majority of the application site to cease temporarily at that time. This is dealt with in more detail in the next section.

***(e) Whether use has taken place over a period of twenty years or more?***

51. 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. In this case, use of the application site 'as of right' is continuing and, as such, the relevant twenty-year period ("the material period") is calculated retrospectively from the date of the application, i.e. 1989 to 2009.

52. The District Council's position is that use has not taken place for a full period of twenty years. At various times, parts of the application site have been put to alternative uses, thereby precluding public access. In particular, the secure 5ft high fencing which enclosed the majority of the application site in 2002/03 to allow canal dredging works to take place would have prevented any access to those areas. Furthermore, the deposit of silt on this part of the application site would have made the site wet and unstable and, consequently, the site would have remained inaccessible to recreational users for a considerable period thereafter.

53. The applicant does not dispute that part of the application site was temporarily fenced off during the dredging of the canal. However, this was, in the applicant's view, to enable the District Council to meet its obligations under health and safety legislation and not in an attempt to deliberately preclude the public from using the site for recreational purposes. No permanent fencing has been erected around the application site and parts of the site remained open throughout the dredging operations. The applicant also refutes the District Council's claims that the site remained wet and unstable, since the Council would not have removed the fencing had there been a significant safety risk.

*The fenced area*

54. The area fenced off during the 2002/03 dredging operations ("the fenced area") is shown on the plan at **Appendix F**. The fenced area constitutes approximately 86% of the application site. According to the District Council's records, the fencing was erected in approximately October 2002 and remained in place until early October 2003.

55. A number of documentary sources exist to support the contention that the fencing did have the effect of precluding the public from this area. For example, the fencing is visible on aerial photographs taken during the dredging operations (see **Appendix G**), it is also referred to in both the method statement and the dredging contract prepared in relation to the works, and photographs taken on the ground show the fencing in place. Furthermore, a Planning Inspector's report in relation to a Public Inquiry held into the Shepway District Local Plan Review (which took

place between June and December 2003) described the application site as 'somewhat untidy and is not open space to which the public have access'.

56. The effect of the dredging works is also well documented within the user evidence. At least 13 of the 57 witnesses specifically stated on their evidence forms that they had been deterred from using the application site during (and in some cases after) the dredging operations took place. Others refer to their use being restricted by overgrown vegetation, which has presumably been caused through a lack of usage of the land since those operations.

#### *The eastern end of the application site*

57. The eastern end of the application site consists of a play area and a parking area which were constructed in 2002. Prior to that time, this area was occupied by a site compound (between 1993 and 1996) in relation to a major coastal protection scheme, during which time it was inaccessible to the public.

58. The Council accepts that the play area is used by the public and it would appear that recreation use in the latter part of the relevant period has been concentrated in this part of the site. One witness states 'we are now restricted to using the land by the climbing frame/play park for picnics etc... the land is too overgrown to use all of the land indicated'<sup>17</sup>.

59. However, recreational users would, by necessity, have been excluded from this part of the land both during the time that it housed the compound in the mid-1990s and again in 2002 when the car park and play area were constructed. Therefore, it would not have been available for recreational use for the full twenty year period.

#### *The remainder of the application site*

60. Excluding the fenced area and the eastern end of the application site, this leaves only the formal paths and the grass verges abutting those paths. Any use of the application site which is referable to the use of a recorded right of way is not use which is 'as of right'. It is a user which is exercise of an existing right, from which further rights cannot be acquired. These areas would therefore not be capable of registration as a Village Green.

## **Conclusions**

61. It is clear from the evidence that the application site has been available for public use for a considerable period; indeed, some of the witnesses have known the site for over 60 years. However, as stated above, the relevant period with which the County Council is concerned in relation to this application is 1989 to 2009, and it has been demonstrated that for part of this period (in 2002), the majority of the application site was not available for recreational use by virtue of the dredging operations that took place thereon. Other parts of the application site have also been fenced off and unavailable for recreation use during the relevant period.

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<sup>17</sup> See user evidence questionnaire of Mr. C. Doherty

62. The tests in relation to the registration of land as a Town or Village Green require uninterrupted evidence of use over a full twenty-year period. Whilst the legislation does make provision for certain interruptions that were the subject of a formal enactment (e.g. closure due to foot and mouth) to be disregarded, there is no evidence of any such formal statutory closure in this case.
63. In order to qualify for registration as a Town or Village Green, all of the relevant legal tests must be met. As noted above, the part of the application site that was subject to the dredging operations has failed to meet at least one of the tests and, as such, it would not be capable registrable as a Town or Village Green.
64. The case is complicated by the fact that not all of the application site was fenced off in 2002, leaving open the question of whether the County Council could register a lesser area than that applied for. The County Council is not bound to consider the application site as a single entity and does have the power to register a lesser area where appropriate<sup>18</sup>. Careful consideration has been given to this possibility, however, as noted above, the remaining areas would not (for varying reasons) be capable of registration as a Town or Village Green.
65. On a procedural note, the applicant has requested that this matter be dealt with by way of a Public Inquiry. Although Registration Authorities are not, under the relevant Regulations<sup>19</sup>, required to hold a Public Inquiry, it has in recent times become a useful practice to do so in cases which turn on disputed issues of fact. The Courts have endorsed this approach and refer to the need for such an Inquiry in any case where there is a 'serious dispute'<sup>20</sup>.
66. However, in this case there is no such dispute to warrant a Public Inquiry being held: both the applicant and the objector's witnesses refer to the existence of the fencing during dredging operations, and the applicant acknowledges that there was a period during which a large part of the site was fenced off. Any dispute as to the existence of the fencing is clarified by the photographs supplied by the objector. It is therefore not considered that a Public Inquiry is appropriate in this case.
67. From close consideration of the evidence submitted, it has been concluded that the legal tests concerning the registration of the land as a Town or Village Green (as set out above) have not been met.

## **Recommendation**

68. I recommend that the County Council informs the applicant that the application to register the land at Princes Parade at Seabrook as a new Town or Village Green has been not been accepted.

Accountable Officer: Mr. Mike Overbeke – Tel: 01622 221513 or Email: mike.overbeke@kent.gov.uk Case Officer:
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<sup>18</sup> See *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25. There is no rule that the lesser area must be substantially the same as the area originally applied for.

<sup>19</sup> Commons Registration (England) Regulations 2008

<sup>20</sup> See *R(Whitney) v Commons Commissioners* [2004] EWCA Civ 951 at paragraph 66 per Waller LJ

Miss. Melanie McNeir – Tel: 01622 221628 or Email: melanie.mcneir@kent.gov.uk

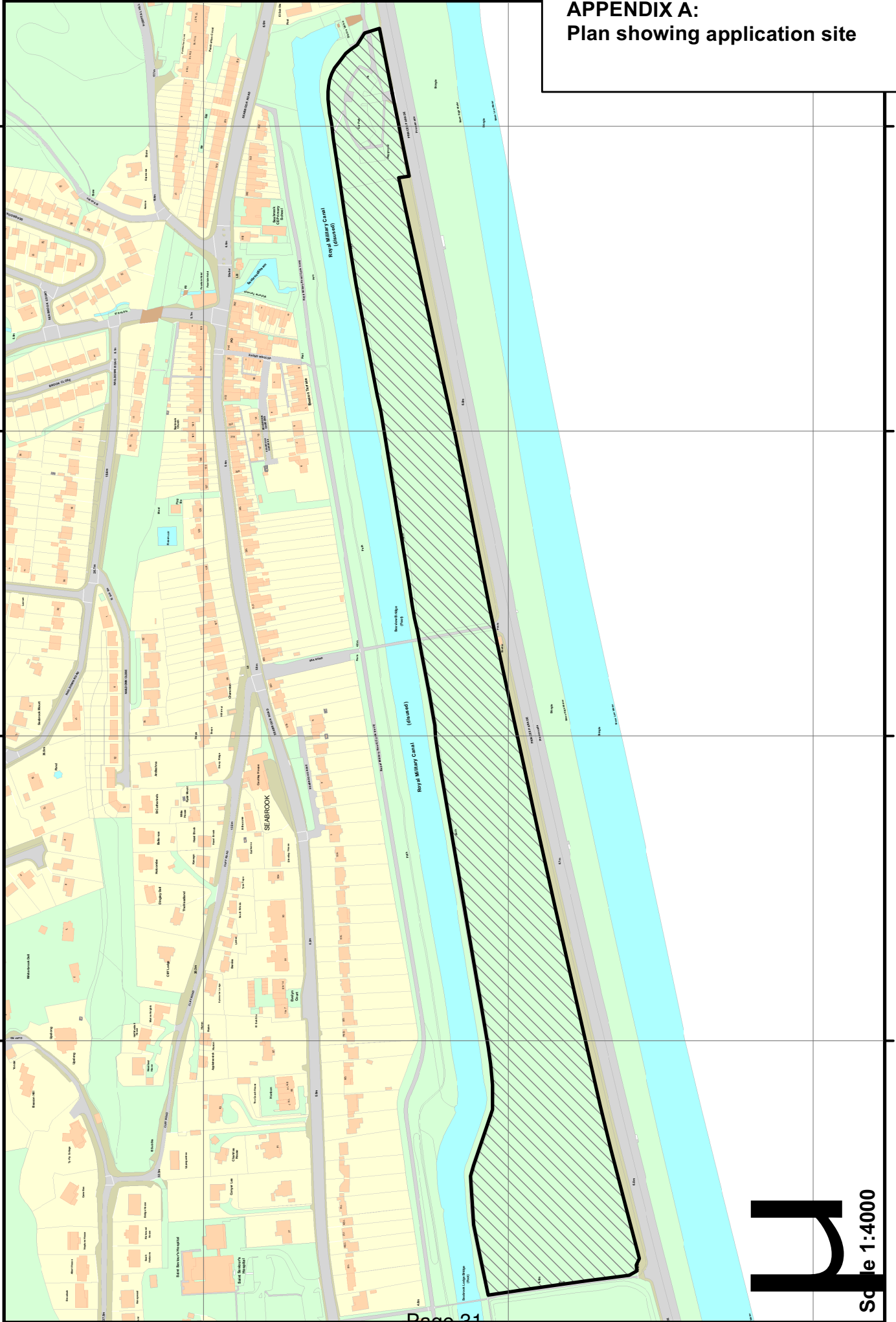
The main file is available for viewing on request at the Countryside Access Service, Invicta House, County Hall, Maidstone, Kent ME14 1XX. Please contact the case officer for further details.

### **Background documents**

- APPENDIX A – Plan showing application site
- APPENDIX B – Copy of application form
- APPENDIX C – Table summarising user evidence
- APPENDIX D – Summary of objection
- APPENDIX E – Plan showing the locality
- APPENDIX F – Plan showing 2002/03 fencing
- APPENDIX G – Aerial photographs of the application site



**APPENDIX A:  
Plan showing application site**

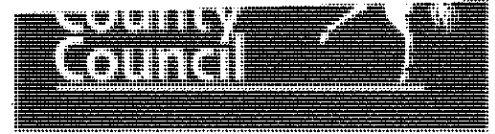


**U**  
Scale 1:4000

Commons Act 2006: section 15

Application for the registration of land as a new Town or Village Green

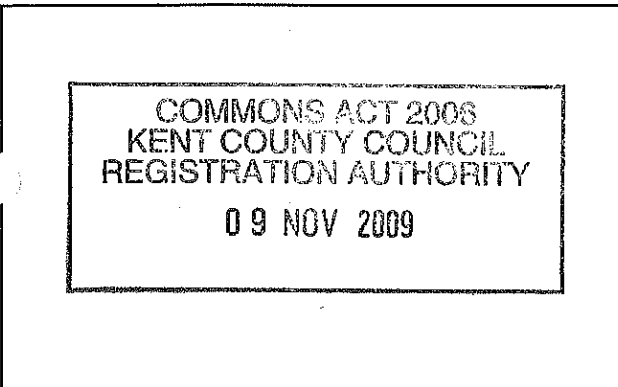
APPENDIX B:  
Copy of the application form



*This section is for office use only*

Official stamp of the Registration Authority indicating date of receipt:

Application number:



VG1620

VG number allocated at registration (if application is successful):

[Empty box for VG number]

Note to applicants

Applicants are advised to read the 'Part 1 of the Commons Act 2006 (changes to the commons registers): Guidance to applicants in the pilot implementation areas' and to note the following:

- All applicants should complete parts 1-6 and 10-12.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete parts 7 and 8. Any person can 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 part 9. Only the owner of the land can apply under section 15(8).
- There is no fee for applications under section 15.

**Note 1**  
*Insert name of Commons  
Registration Authority*

**1. Commons Registration Authority**

To the: KENT COUNTY COUNCIL  
2ND FLOOR  
INVICTA HOUSE  
COUNTY HALL  
MAIDSTONE  
KENT ME14 1XX

If section 15(3) or (4) applies, please indicate the date on which you consider that use 'as of right' ended and why:

N/A

*\*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.*

If section 15(6)\* is being relied upon in determining the period of 20 years, indicate the period of statutory closure (if any) which needs to be disregarded:

N/A

**Note 5**

*This part is to identify the new green. The accompanying map must be at a scale of at least 1:2,500 and shows the land by means of distinctive colouring within an accurately identified boundary. State the Land Registry title number where known.*

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

Name by which usually known: PRINCES PARADE

Location: LAND LYING BETWEEN THE ROYAL MILITARY CANAL TO THE NORTH AND PRINCES PARADE ROAD TO THE SOUTH. FROM BATTERY POINT EAST TO SEABROOK LODGE BRIDGE TO WEST.  
Common Land register unit number (only if the land is already registered Common Land):

Please tick the box to confirm that you have attached a map of the land (at a scale of at least 1:2,500):

**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). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly at a scale of 1:10,000.*

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

Indicate the locality (or neighbourhood within the locality) to which the claimed green relates by writing the administrative area or geographical area by name below and/or by attaching a map on which the area is clearly marked:

LAND LYING WITHIN EAST WARD OF HYTHE TOWN COUNCIL ADMINISTRATIVE AREA - SHEPWAY DISTRICT COUNCIL.

Please tick here if a map is attached (at a scale of 1:10,000):

**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).

**7. Justification for application to register the land as a Town or Village Green**

PLEASE SEE ATTACHED  
STATEMENT.

**Note 8**

Use a separate sheet if necessary. 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, proprietor of any "relevant charge", tenant or occupier of any part of the land claimed to be a town or village green**

SHEPWAY DISTRICT COUNCIL  
CIVIC CENTRE  
CASTLE HILL AVENUE  
FOLKESTONE, KENT.  
CT20 2QY

### Paragraph 7 - Justification for Application

The land which is proposed as a Town or Village Green has been as open space area from time immemorial. The application area includes the land to the North of the Hythe Imperial Hotel the Imperial Golf Course and the land eastward to Battery Point.

It has always been available for public use without permission and without force has been used for Lawful Sports and Pastimes without hindrance, without permission and without force for a much longer period than twenty years . The uses have included: part used for Seabrook School's Sports Field before the Second World War, kite flying , regular games (see below), horse riding, dog walking, picnics, bird watching, cycling, organised walking trips by ramblers, casual walking, running, angling use of the bank access to the canal for canoeing.

The current designation for the area is for leisure and recreation (LR9) and tourism (TM8).

There are no signs anywhere to indicate any restriction to any access.

The area is bounded by the Royal Military Canal which is an Ancient Monument- to the north and the Princes Parade roadway to the south. It has Public Rights of Way from Seabrook Road to princes Parade running across from north to south at every bridge across the canal - see map.

Its modern history starts in 1887 when part of it (from Seabrook Battery Point to Seaview Bridge ) was used as a recreation ground by Seabrook Primary School - see O/S Map extract 1947.

A photograph taken in 1906 shows the area open and unfenced.

Again the enclosed photograph dated 1937 shows the area to be unfenced and open.

During the Second World War mines were buried in it.

The land in question (excludes the golf course and the area to the north of the Hythe Imperial Hotel) came into the control of Shepway District Council when it was formed in 1974. Before this it was owned by Hythe Borough Council who acquired it by gift and purchase in 1933. There was an agreement within the purchase contract that stated that the land was to be left as open space. A loan was raised from the ecclesiastical commission for the sum of £7, 120 for the purchase. The loan was granted for the sole purpose "for public walks and pleasure grounds" but this was never implemented. Instead between 1947 and 1960 it was used as an open rubbish tip.

**Since then it has been left in its present state and openness apart from a period when part of it was used for laying out spoil from the dredging of the Canal.**

**The towing path which is now a bridleway was used by horses for towing during the construction of the Royal Military Canal in the early part of the 19<sup>th</sup> century. The towing path can be seen on the plan.**

**The enclosed copies of the original photographs show that the land was not fenced in the early part of the twentieth century.**

**Note 9**

List or enter in the form all such declarations that accompany the application. This can include any written declarations sent to the applicant (i.e. a letter), and also any such declarations made on the form itself.

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

**Note 10**

List all supporting consents, documents and maps accompanying the application. Evidence of ownership of the land must be included for voluntarily registration applications. There is no need to submit copies of documents issued by the Registration Authority or to which it was a party but they should still be listed. Use a separate sheet if necessary.

**10. Supporting documentation**

MAP 1:2500

**Note 11**

List 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.

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

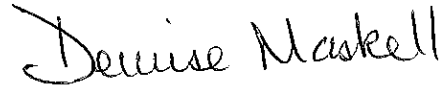
SHEPWAY DISTRICT COUNCIL TRIED ON TWO PREVIOUS OCCASIONS TO DEVELOPE THIS SITE. IN 1987 THEY WANTED TO BREACH THE SEA WALL AND BUILD A MARINA WITH HOTELS ETC. IN 2003 THEY WANTED TO BUILD FLATS ABOVE SHOPS DIRECTLY ONTO THE PROMENADE AS THE METHANE LEVEL WAS TOO HIGH FOR HOUSES AND RE-ROUTE PRINCES PARADE ROAD ACROSS THE SITE. BOTH TIMES IN WENT TO PUBLIC ENQUIRY AND THE INSPECTOR FOUND ON BOTH ACCOUNTS THIS LAND SHOULD ONLY BE USED FOR LEISURE AND RECREATION, ONE OF THE REASONS GIVEN ~~IS~~ IS THE DEFICIENCY OF OPEN SPACE IN SEABROOK. SOME DOCUMENTATION IS ENCLOSED.

**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.

**12. Signature**

Signature(s) of applicant(s):



Date:

9/10/2009

**REMINDER TO APPLICANT**

You are responsible for telling the truth in presenting the application and accompanying evidence. You may commit a criminal offence if you deliberately provide misleading or untrue evidence and if you do so you may be prosecuted. You are advised to keep a copy of the application and all associated documentation.

**Please send your completed application form to:**

**The Commons Registration Team  
Kent County Council  
Countryside Access Service  
Invicta House  
County Hall  
Maidstone  
Kent ME14 1XX**

**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 Commons 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.

A copy of this form and any accompanying documents may be disclosed upon receipt of a request for information under the Environmental Information Regulations 2004 and the Freedom of Information Act 2000.



**Note 2**

If there is more than one applicant, list all names. Use a separate sheet if necessary. State the full title of the organisation if the applicant is a body corporate or unincorporate. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email. If part 3 is not completed all correspondence and notices will be sent to the first named applicant.

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

Name: MRS. DENISE MASKELL

Full postal address: 2 WOODLANDS DRIVE  
(incl. Postcode) SEABROOK, HYTHE  
KENT

Telephone number: 01303-239159  
(incl. national dialling code)

Fax number: 01303-239159  
(incl. national dialling code)

E-mail address: dealan.maskell@ntlworld.com

**Note 3**

This part should be completed if a representative, e.g. 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. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email.

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

Name:

Firm:

Full postal address:  
(incl. Postcode)

Telephone number:  
(incl. national dialling code)

Fax number:  
(incl. national dialling code)

E-mail address:

**Note 4**

For further details of the requirements of an application refer to Schedule 4, paragraph 9 to the Commons Registration (England) Regulations 2008.

**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:

**APPENDIX C:  
Summary of user evidence submitted  
in support of the application**

Name	Period of use	Frequency	Activities	Other comments
Mrs. C. ARTHUR	1995 – present	Daily	Walking and cycling	
Mr. and Mrs. D. BARKER	2006 – present	Weekly	Bird watching, photography, dog walking, nature observation	'climbed through undergrowth' to gain access
Mr. D. BARLOW	1968 – present	Daily	Walking	
Mr. R. BARLOW	1968 – present	2-3 times per week	Walking	
Mrs. V. BARLOW	1968 – present	2-3 times per week	Dog walking	
Mrs. Y. BEAZLEY-LONG	1987 – present	Daily	Walking, bird watching, dog walking	
Mrs. S. BILL	1986 – present	Weekly	Jogging, walking with children, cycling	
Mr. J. BIRCH	1972 – present	Daily/weekly	Dog walking, bird watching, enjoying countryside	Deterred from using the site 'when canal was dredged'
Mrs. S. BIRCH	1970 – present	Weekly	Walking, exercising dogs, fishing, bird watching, photography	
Miss. M. BROWN	Not stated	Not stated	Not stated	Prohibitive notices appeared 'when canal sludge was put on top of soil'
Mrs. D. CLARKE	1998 – present	Occasionally	Walking, enjoying the views	
Mr. L. CLARKE	1982 – present	Daily	Walking, nature watching	
Mrs. M. CLARKE	1982 – present	Daily	Recreational walking, dog walking	
Mrs. V. COLLINS	1950 – present	Not stated	Walking, watching wildlife, enjoying sea view	
Mr. L. DAY	2004 – present	Daily	Walking	
Mr. C. DOHERTY	2004 – present	Daily	Regular user of the land since 1979 (when living outside of the locality). 'we are now restricted to using the land by the climbing frame/play park for picnics etc... the land is too overgrown to use all of the land indicated'.	
Mr. G. EARLAND	2007 – present	Weekly	Exercise, observing wildlife, photography	
Mrs. R. ERICSON	1981 – present	Daily	Walking	'part of the land has been allowed to get overgrown for many years'.
Mrs. J. GORE	1978 – present	Occasionally to 1992, then weekly	Walking, picnicking	
Mrs. G. HALLETT	1989 – 2009	Occasionally	Walking	
Mrs. J. HARRIS	1955 – present	Often	Dog walking and playing as a child	
Mrs. A. HAWKINS	1987 – present	Daily	Walking, canoeing, taking children to play area, mushrooming	'land was filled with canal dredge so areas were made unusable'
Mr. B. HAWKINS	1987 – present	Daily	Dog walking, bird watching, playing with grandson	'canal dredged and area obstructed'
Mr. D. HAY	1985 – present	Weekly	Dog walking, walking	

Mrs. N. HILL	1986 – present	Weekly	Walking, cycling	
Mr. P. HOPKINS	1965 – present	Weekly	Nature observation	
Ms. D. HOWAN and Ms. W. DAVIES	2003 – present	Daily	Walking, dog walking	
Mr. W. LEYTON	1998 – present	Several days per week	Walking, dog walking, bird watching	
Mr. J. LITTLEMORE	1978 – present	Every other day	Walking, cycling	See others using the land 'every time I visit'
Mr. A. MASKELL	1988 – present	Several times per week	Dog walking	'some fencing in 2002/2003 for silt from canal'
Mrs. D. MASKELL	1988 – present	Daily	Walking, dog walking, cycling	Prohibitive notices 'for six months between Nov 2002 and April 2003 while spoil from the dredging of the canal was spread on some of the site'
F. T. MOORE	1935 – ?	Daily	Dog walking	Deterred from using the land 'at one time when it was used as a rubbish dump'
Mr. J. MORTIMER	1982 – present	Daily	Walking	
Mrs. L. MORTIMER	1982 – present	Daily	Walking	
Ms. J. MURRAY	2005 – present	Daily	Walking, dog walking, picnics, feeding ducks, bird watching	
33				
Mr. A. McNAUGHTON	1995 – present	Not stated	Walking, cycling	
Mrs. J. NOLAN	1997 – present	3 times weekly	Walking, cycling, drawing/painting scenes of canal	
Mr. D. NOWERS	1957 – ?	Most days	Dog walking	Used until 'land became unusable following and during canal dredging'
Mrs. M. NOWERS	1957 – ?	Weekly	Walking	Used until 'land used for depositing dredging from the canal'. 'when first completed dredging deposit was deep and soft, therefore unsafe. Now overgrown and unsightly'.
Mr. R. PERRIES	2003 – present	Daily	Walking	
Mr. M. PRENTICE	1979 – present	Daily	Jogging, walking	Use deterred 'when the land was being used as a dump for cleaning the canal some years ago'
Mr. R. PROFITT	1980 – present	Weekly, sometimes daily	Walking, cycling, dog walking, wildlife photography, bird watching	'always people there when I use it'
Mrs. R. PROFITT	1959 – present	Often	Dog walking, playing as a child	
Mr. M. ST CLARE	2000 – present	Daily	Walking, jogging, picnicking, bird watching, kite flying, football, badminton	
Mr. G. SMERDON	2008 – present	Daily	Fishing, bird watching, walking	Lived outside of locality prior to 2008 but regular visitor. Land 'in constant use by others'
Mrs. S. SMERDON	2008 – present	Daily	Walking, relaxation, bird watching, socialising	Lived outside of locality prior to 2008 but regular visitor.
Mr. M. STREATFIELD	2003 – present	Weekly, often daily	Walking and nature observation	
Mrs. C. SMITH	1973 –	Daily	Dog walking	

	present			
Mrs. B. THORNE	Not stated	Several times per week	Walking	Has known the land for over 80 years
Mr. R. TRICE	1949 – present	Daily	Golf, walking	
Miss. V. TROTMAN	2006 – present	Weekly	Photography, wildlife watching	
Mrs. S. TUPPER	1972 – present	Weekly/daily	Walking, cycling, nature observation	
Mrs. C. WALKER	1987 – present	Often	Dog walking	
Mr. and Mrs. WEST	1972 – present	Weekly	Dog walking, walking	Deterred from using 'when the Council dredged the canal and the silt was put on the land – 2007?'
Mrs. L. WHYBROW	1995 – present	At least weekly	Walking, cycling	'some of the land was inaccessible during and after the dredging of the canal some years ago but it was still possible to walk on parts of it'
Mr. G. WILLISHER	1964 – present	Occasionally	Walking	
Mrs. C. WRIGHT	1989 – 2009	Daily	Walking	Deterred from using 'only when dredging the canal, twice in my time living in Seabrook'

**APPENDIX D:  
Summary of documents submitted in  
support of the objection**

The substance of the objection to the application by Shepway District Council is summarised at paragraphs 16 to 18 of the report. Below is a summary of the evidence submitted in support of the objection.

**Visual character assessment dated 19<sup>th</sup> October 2010**

This assessment, which includes a photographic survey comprising 75 photographs, serves to demonstrate the varying degree of accessibility on the application site. It asserts that there is no evidence of recent or regular access to the site, except along Seaview path, and concludes that large parts of the application site are generally inaccessible, or accessible with difficulty, due to vegetation.

**Statutory Declarations from current and former employees of the Council**

Andy Bateman: previously employed by the Council as an engineer on a major coastal protection scheme and was based at a compound on the eastern end of the application site (where the car park and play area currently stands) between 1993 and 1996. During this time, the area occupied by the compound was inaccessible to the public.

Christopher McCreedy: has worked for the Council since 1982, in various roles all involving management responsibility for the application site. Made fortnightly inspections of the site during 1982 and 1994, with monthly inspections since 1994. Recalls that in 1982, site was fairly flat with the western end being used for the storage of materials and as a burning yard. The rest of the site was mown on a frequency of 3-4 times per year and consisted of a rough grass sward. Was aware of use by dog walkers and a worn track appeared at one point. During the late 1980s, the site became occupied by travellers for a period of about 3 months. Once the travellers left, a trench and bund was created to prevent any vehicular access. This also made it difficult for pedestrians to access the site. In 1992, subsidence occurred on the site which resulted in the mowing regime to be reduced to twice a year. In 1993/4, further subsidence occurred and the mowing all but ceased. There was no activity on the site, other than localised grass cutting along the edges of the site, from the late 1990s until 2002. In 2002/3, a large dredging operation took place on the site to remove a vast amount of silt from the Royal Military Canal, with the silt being deposited on the site. The site was fenced off and there was no public access to it, other than the Seaview Bridge footpath and the tow path. Since the dredging works were completed in 2003, there has been minimal, if any, access to the site. The fencing remained in place until at least October 2003. Since the silting deposits, the site has become heavily overgrown and, for the most part, either virtually or completely impregnable by foot.

Don Prebble: previously employed by the Council as Project Supervisor on the dredging contract for the Military Canal. Was based on site and oversaw day-to-day operations. The fencing of the site (with the exception of the Seaview Bridge footpath and the eastern end of the site which was fenced off for the construction of a play area, picnic area and car park) was put in place between 14<sup>th</sup> and 21<sup>st</sup> October 2002. Signs were also placed on the fencing warning the public there was no access to the site. The result of the fencing was that there was no access to the site at all. Wrote to a member of the public in July 2003 telling them that the fence would be removed in September or October 2003. No record of the date when the fencing was formally removed.

John Ridley: worked under contract to the Council in 1983/84, 2003/04 and 2007 clearing silt from the Canal and local streams. The silt was deposited on the application site (the section to the east of Sea View bridge). Access to the site was via a locked barrier.

Kate Hayes: employed by the Council in a role which involves the management of the Royal Military Canal. Part of the role includes supervising and inspecting weed treatments which have taken place three times per year (during summer months) for the last 6 years. Has never witnessed any use of the site by the public; due to the overgrown nature of the site and uneven surface, it is not accessible to the public. In 2002, a car park, play area and picnic site were constructed and installed by the Council. During the construction, the area was fenced and closed off to the public for most of 2002. The construction took place at the same time as a substantial dredging operation that prevented public access to the remainder of the site. This is evident from aerial photographs taken at the time which show the fencing in place.

Lucy Sharp: employed by the Council as a Project Engineer. Has reviewed all of the files held by the Council in relation to the 2002 dredging works and attached various documents to her statutory declaration (including letters, reports, aerial photographs and site diary extracts). A photograph held on the file dated 15<sup>th</sup> October 2003 shows that at least some of the fencing had been removed by that date.

Peter Shaw: employed by the Council as an Asset Engineer. Was involved with arranging the deposition of silt on the site in 2003/04 and 2007. On both occasions entry to the land was via a locked barrier on the site.

Piran Cooper: employed by the Council as Planning Policy Officer. Has reviewed the Planning Inspector's report for the Local Plan Review 2006 for references to the application site and the files held by the Council's Planning Policy team. The Inspector's report refers to the site being 'somewhat untidy and not open space to which the public have access'. The file also contains several photographs of the site (dated 2002) which show the stock proof fencing and warning signs in place.

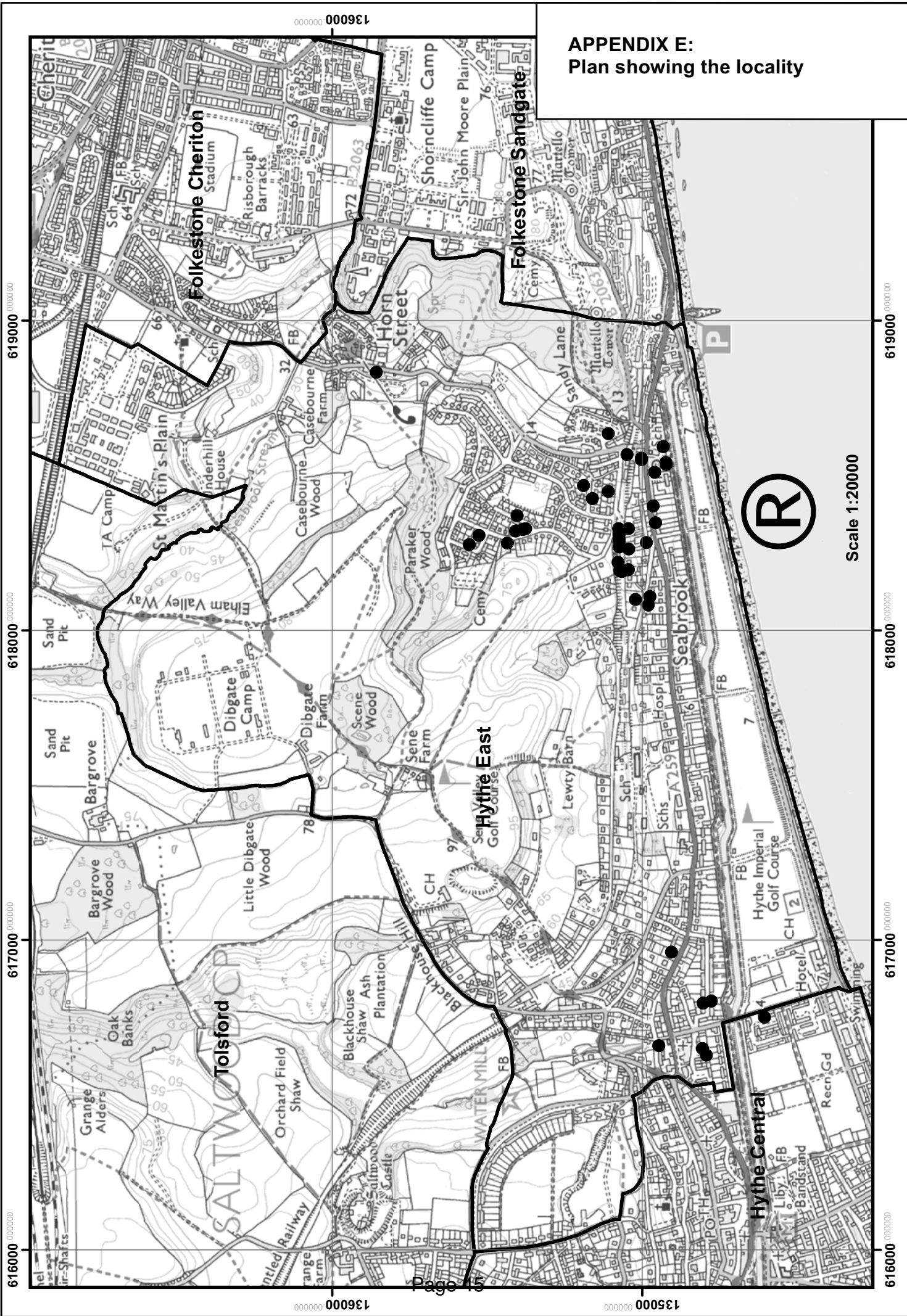
Stephen Holley: employed by the Council as Property Manager. Confirms the Council's ownership of the application site under part of Land Registry title number K640682. The Council's Property Team have, since 20<sup>th</sup> July 2009, been carrying out daily site inspections to record any use of the site by the general public. The inspections have generally taken place seven days per week between 7am and 6pm. Tables summarising the inspections (covering the period 20<sup>th</sup> July 2009 until 31<sup>st</sup> October 2010) are attached to the statutory declaration. Apart from one instance, the Property Team has not witnessed any public presence on the site away from the footpath or tow path.

Steve Carr: previously employed by the Council between 1993 and 1996 working on the coastal protection scheme along with Andrew Bateman (see above). Was based at a temporary site compound situated on the site between 1994 and 1996. Can confirm that the information provided by Andrew Bateman is correct.

### **Plan showing alternative open space provision in the area**

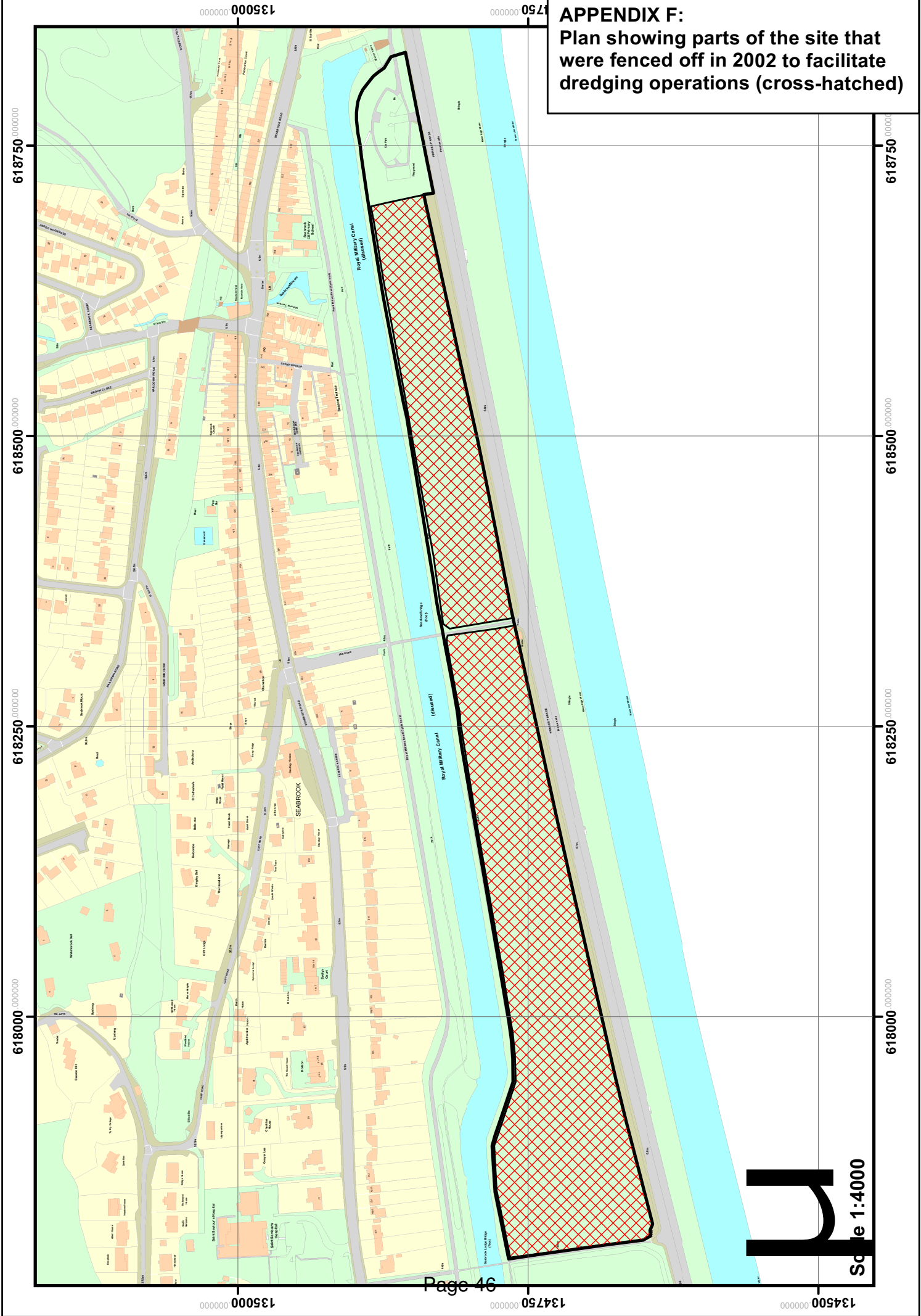
This plan serves to demonstrate that the application site sits within an area which is already well served by public open space, which includes the canal and towpaths, the beach and promenade and various other open spaces and recreation grounds (at South Road, Eversley Road, Hospital Hill and Eaton Lands).

**APPENDIX E:  
Plan showing the locality**



Scale 1:20000

**APPENDIX F:**  
**Plan showing parts of the site that were fenced off in 2002 to facilitate dredging operations (cross-hatched)**



**U**  
**Scale 1:4000**



**APPENDIX G:  
Aerial photograph of the application  
site (approx 2002)**



This aerial photograph was provided by the District Council as part of their objection statement. It is undated, but the Council states that it can be dated by reference to the dredging operations that took place in 2002-03.

The approximate boundary of the application site is shown in a bold red line on the colour version of this appendix. A colour copy of the original photograph will be available at the meeting.

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## Application to register land at Westwell Lane in the parish of Westwell as a new Village Green

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A report by the Head of Countryside Access Service to Kent County Council's Regulation Committee Member Panel on Tuesday 28<sup>th</sup> June 2011.

**Recommendation: I recommend that the County Council informs the applicant that the application to register the land at Westwell Lane at Westwell as a new Village Green has been accepted, and that the land subject to the application be formally registered as a Village Green.**

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Local Members: Mr. R. King

Unrestricted item

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### Introduction

1. The County Council has received an application to register land at Westwell Lane in the parish of Westwell as a new Village Green from Westwell Parish Council ("the Applicant"). The application, made on 25<sup>th</sup> March 2010, was allocated the application number VGA625. 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 the Commons Registration (England) Regulations 2008.
3. Section 15 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 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 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 a strip of land of approximately 0.17 hectares (0.4 acres) in size situated on the northern side of Westwell Lane, adjacent to the recreation ground, in the centre of the village of Westwell. The site is shown on the plan at **Appendix A**.
7. The application site consists of a grass verge interspersed with several trees and bordered along its northern edge by a hedge. The site is open and unfenced along its southern edge and access to it is via Westwell Lane.

### **The case**

8. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities ‘as of right’ for more than 20 years.
9. In support of the application, 11 user evidence questionnaires from local residents were provided, demonstrating use of the application site for a range of recreational activities for a period in excess of twenty years. A summary of the evidence in support of the application is attached at **Appendix C**.

### **Consultations**

10. Consultations have been carried out as required. No responses have been received.

### **Landowner**

11. There is no known landowner in relation to this site.
12. As stated above, under the current Regulations, the duty to inform the landowner of the application rests with the applicant. However, the Regulations also specify that that duty does not apply where the landowner cannot be reasonably identified<sup>1</sup>.
13. A search with the Land Registry has revealed that the land is not registered. Local enquiries through the Parish Council have been unable to identify the landowner. No landowner has come forward in response to notices being placed on site advertising the application.

### **Legal tests**

14. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:

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<sup>1</sup> Regulation 22(3) of the Commons Registration (England) Regulations 2008

- (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 inhabitants of a particular locality, or a neighbourhood within a locality?*
- (d) *Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?*
- (e) *Whether use has taken place over period of twenty years or more?*

I shall now take each of these points and elaborate on them individually:

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

15. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the Sunningwell<sup>2</sup> 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.

16. In this case, there is no evidence to indicate that use of the application site has been in any way with force, in secrecy or undertaken on a permissive basis.

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

17. 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<sup>3</sup>.

18. 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*'<sup>4</sup>.

19. In this case, the evidence demonstrates that the land has been used for recreational activities. The summary of evidence of use by local residents at **Appendix C** shows the activities claimed to have taken place.

20. The evidence of use submitted in support of the application refers predominantly to walking. There is also reference to dog exercise and 'childrens activities'.

21. One of the witnesses refers to the use of the land only for parking<sup>5</sup>. Parking is not a lawful sport or pastime and would not be a qualifying activity for the purposes of

<sup>2</sup> *R v. Oxfordshire County Council and another, Sunningwell Parish Council [1999] 3 All ER 385*

<sup>3</sup> *R v. Oxfordshire County Council and another, Sunningwell Parish Council [1999] 3 All ER 385*

<sup>4</sup> *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, ex parte Sunningwell Parish Council [1999] 3 All ER 385*

<sup>5</sup> See user evidence questionnaire of Mr. J. Gibb

Village Green registration. Indeed, the parking of cars is likely to become an unlawful activity should the application to register the land as a Village Green be successful. This use should therefore be disregarded in considering whether the land has been used for lawful sports and pastimes.

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

22. The definition of locality for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the *Cheltenham Builders*<sup>6</sup> 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’.

23. 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’<sup>7</sup>. Thus, what constitutes a ‘significant number’ will depend upon the local environment and will vary in each case depending upon the location of the application site.

*The ‘locality’*

24. The Applicant specifies the locality at Part 6 of the application form as ‘Westwell’, but does not specify whether this refers to the village itself or the administrative parish.

25. The administrative parish of Westwell is a legally recognised locality with defined boundaries. As the application has been made by the Parish Council and the evidence of use is provided by residents of the parish, it would seem appropriate that Westwell should be the qualifying locality for the purposes of this application.

*‘significant number’*

26. In this case, the application is supported by 11 evidence questionnaires, although three of these do not refer to any use for lawful sports and pastimes (see Appendix c). Disregarding the non-qualifying use, this leaves evidence of use from 8 local residents.

27. Although geographically large, the parish of Westwell is predominantly rural in nature, and has a relatively small population. The village itself comprises only some 60 properties.

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<sup>6</sup> *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

<sup>7</sup> *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

28. Considered in isolation, evidence of use from eight people would seem to be a small number. However, as stated above, the evidence of use is to be considered in the context of the neighbouring environment and, in a small village such as Westwell, evidence of use by eight people may well be sufficient to demonstrate that the land has been in general use by the community.
29. This contention is supported by the frequency of use (five of the witnesses refer to daily or weekly use) and by the fact that the people providing evidence of use are well spread across the village (rather than simply being the residents of one street).
30. Therefore, on balance, it can be concluded that the application site has been used by a significant number of the residents of a defined locality.

***(d) Whether use of the land by the inhabitants is continuing up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?***

31. The Commons Act 2006 requires use of the land to have taken place ‘as of right’ up until the date of application or, if such use has ceased prior to the making of the application, to fulfil one of the alternative criterion set out in sections 15(3) and 15(4) of the 2006 Act (as set out at paragraph 4 above).
32. In this case, the application was made in 2010. Given the open nature of the application site and the ease of access onto it, there is no evidence to suggest that use has not continued until (and beyond) the date of the application.

***(e) Whether use has taken place over a period of twenty years or more?***

33. 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. In this case, use of the application site ‘as of right’ is continuing and, as such, the relevant twenty-year period (“the material period”) is calculated retrospectively from the date of the application, i.e. 1989 to 2009.
34. The user evidence summarised at **Appendix C** demonstrates that there has been use of the application site in excess of the last twenty years. Therefore, it can be concluded that there has been use of the application site for a full period of twenty years.

**Conclusion**

35. Although this application is unopposed, it is still necessary for the County Council to be satisfied that all of the requisite legal tests have been met. In this case, the evidence demonstrates that the application site has been used by local residents for a period of over 20 years for the purposes of lawful sports and pastimes.
36. From close consideration of the evidence submitted, it can therefore be concluded that the legal tests concerning the registration of the land as a Village Green (as set out above) have been met.

## **Recommendation**

37. I recommend that the County Council informs the applicant that the application to register the land at Westwell Lane at Westwell as a new Village Green has been accepted, and that the land subject to the application be formally registered as a Village Green.

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 application site

APPENDIX B – Copy of application form

APPENDIX C – Table summarising user evidence

APPENDIX D – Plan showing the locality



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# APPENDIX A: Plan showing the application site

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Land subject to Village Green application at  
Westwell Lane in Westwell (near Ashford)

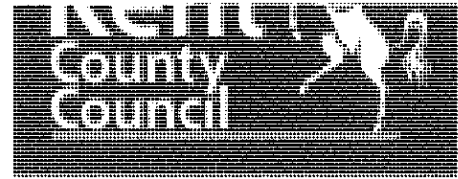


FORM CA9

APPENDIX B:  
Copy of the application form

Commons Act 2006: section 15

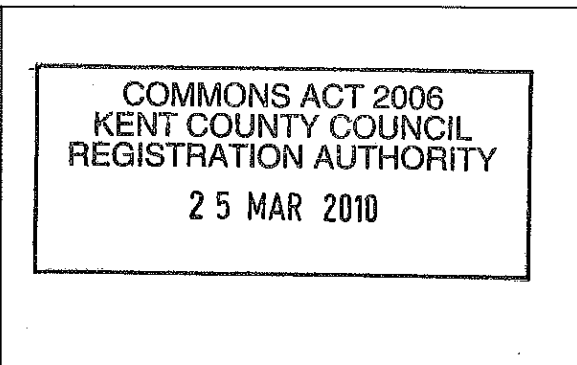
**Application for the registration of land  
as a new Town or Village Green**



***This section is for office use only***

Official stamp of the Registration Authority  
indicating date of receipt:

Application number:



VQA625

VG number allocated at registration  
(if application is successful):

[Empty box for VG number]

**Note to applicants**

Applicants are advised to read the 'Part 1 of the Commons Act 2006 (changes to the commons registers): Guidance to applicants in the pilot implementation areas' and to note the following:

- All applicants should complete parts 1–6 and 10–12.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete parts 7 and 8. Any person can 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 part 9. Only the owner of the land can apply under section 15(8).
- There is no fee for applications under section 15.

**Note 1**  
*Insert name of Commons  
Registration Authority*

**1. Commons Registration Authority**

To the: KENT COUNTY COUNCIL

**Note 2**

If there is more than one applicant, list all names. Use a separate sheet if necessary. State the full title of the organisation if the applicant is a body corporate or unincorporate. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email. If part 3 is not completed all correspondence and notices will be sent to the first named applicant.

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

Name: THE PARISH COUNCIL OF WESTWELL

Full postal address:  
(incl. Postcode) ASHFORD  
KENT

Telephone number:  
(incl. national dialling code)

Fax number:  
(incl. national dialling code)

E-mail address:

**Note 3**

This part should be completed if a representative, e.g. 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. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email.

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

Name: MICHAEL J. THORNELOE

Firm: THORNELOE & CO SOLICITORS

Full postal address:  
(incl. Postcode) 22 HIGH STREET  
LENHAM  
MAIDSTONE  
KENT ME14 2QD

Telephone number:  
(incl. national dialling code) 01622 859416

Fax number:  
(incl. national dialling code) 01622 859406

E-mail address:

**Note 4**

For further details of the requirements of an application refer to Schedule 4, paragraph 9 to the Commons Registration (England) Regulations 2008.

**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:



**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).

**7. Justification for application to register the land as a Town or Village Green**

USE OF THE LAND SINCE TIME  
IMMEMORIAL FOR THE GENERAL  
PURPOSES OF WESTWELL INCLUDING  
SPORTS PASTIME AND GENERAL  
RECREATION

**Note 8**

Use a separate sheet if necessary. 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, proprietor of any "relevant charge", tenant or occupier of any part of the land claimed to be a town or village green**

NONE

<p><b>Note 9</b>  <i>List or enter in the form all such declarations that accompany the application. This can include any written declarations sent to the applicant (i.e. a letter), and also any such declarations made on the form itself.</i></p>	<p><b>9. Voluntary registration – declarations of consent from any relevant leaseholder of, and of the proprietor of any relevant charge over, the land</b></p> <p>N/A</p>
<p><b>Note 10</b>  <i>List all supporting consents, documents and maps accompanying the application. Evidence of ownership of the land must be included for voluntarily registration applications. There is no need to submit copies of documents issued by the Registration Authority or to which it was a party but they should still be listed. Use a separate sheet if necessary.</i></p>	<p><b>10. Supporting documentation</b></p> <p>STATEMENTS OF RESIDENTS</p>
<p><b>Note 11</b>  <i>List 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.</i></p>	<p><b>11. Any other information relating to the application</b></p>

**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.*

**12. Signature**

Signature(s) of applicant(s):

*Randy Bletcher (Councillor)*  
*Susan Wood CLERK TO THE COUNCIL*

Date:

*15th October 2010*

**REMINDER TO APPLICANT**

You are responsible for telling the truth in presenting the application and accompanying evidence. You may commit a criminal offence if you deliberately provide misleading or untrue evidence and if you do so you may be prosecuted. You are advised to keep a copy of the application and all associated documentation.

**Please send your completed application form to:**

**The Commons Registration Team  
Kent County Council  
Countryside Access Service  
Invicta House  
County Hall  
Maidstone  
Kent ME14 1XX**

***Data Protection Act 1998***

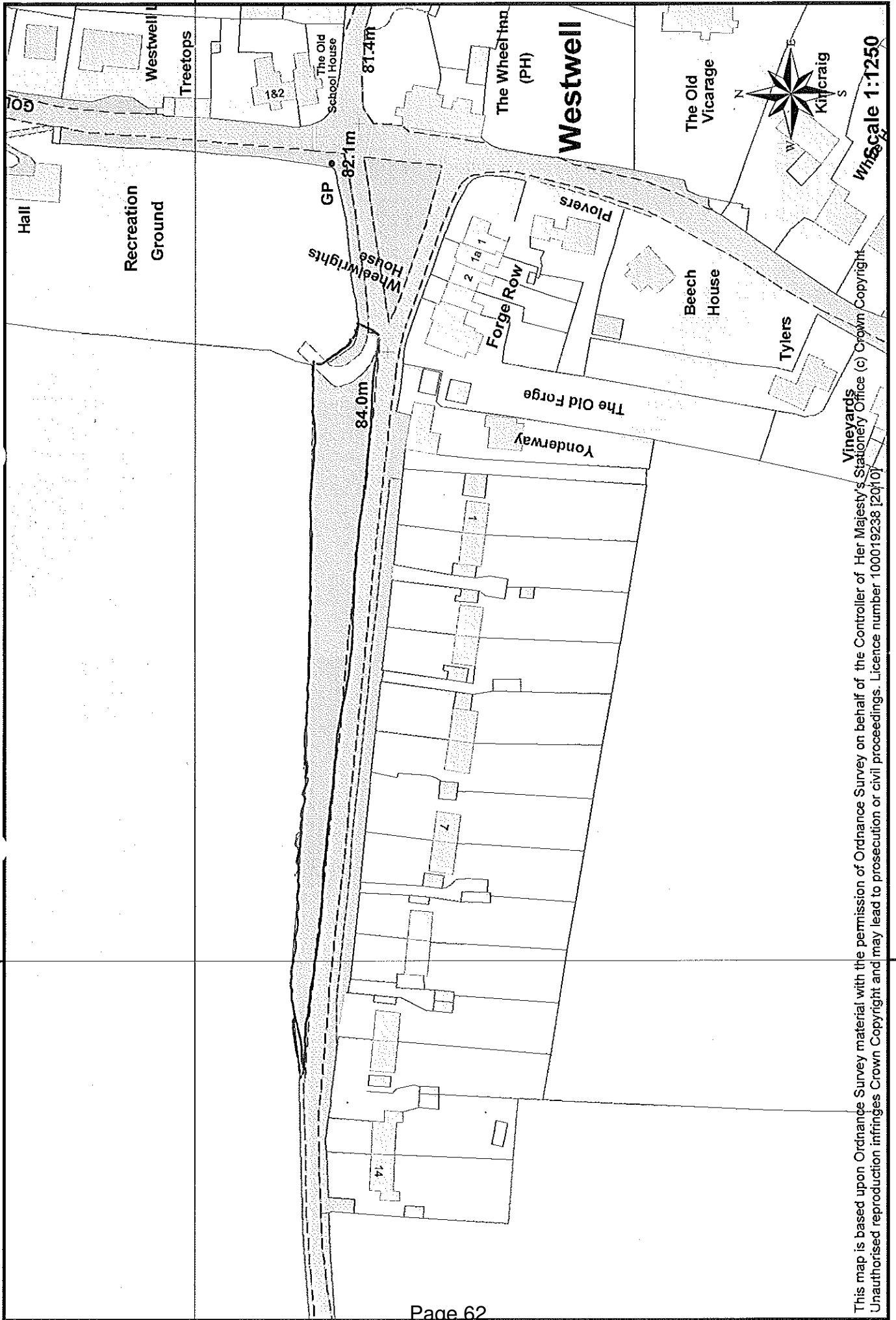
*The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the Commons Registration Authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies,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

*A copy of this form and any accompanying documents may be disclosed upon receipt of a request for information under the Environmental Information Regulations 2004 and the Freedom of Information Act 2000.*

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Vineyards Stationery Office (c) Crown Copyright  
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 Unauthorised reproduction infringes Crown Copyright and may lead to prosecution or civil proceedings. Licence number 100019238 [2010]  
 Westwell  
 Scale 1:1250



**APPENDIX C:  
Table summarising evidence of use**

<b>Name</b>	<b>Period of use</b>	<b>Frequency</b>	<b>Activities</b>
Mr. R. Bellwood	Not stated	Occasionally	Walking
Mr. and Mrs. J. Booty	1984 – present	Occasionally	Walking
Mrs. B. Chapman	1948 – present	Daily	Walking
Mrs. I. Clifton	1954 – present	Daily	Walking
Mr. A. Hollis	1964 – present	Daily	Dog exercise
Mrs. S. Pier	1991 – present	Occasionally	Dog walking
Mr. M. Thorneloe	1978 – present	Weekly	Walking
Mr. R. Wilford	2005 – present	Weekly	Children's activities, dog walking

In addition evidence forms were submitted by the following people who did not use the land for the purposes of lawful sports and pastimes:

**Mr. J. Gibb:** Has known the land since 1999 and used it on a weekly basis for car parking.

**Mr. and Mrs. D. Hooper:** Have known the land since 1981 but never used it for lawful sports or pastimes. Only used to gain access to recreation ground and observed use of it by others for car parking.

**Mr. and Mrs. K. Oliver:** Have known the land since 1972 but never used it for lawful sports or pastimes. Observed use of it by others for car parking.

**APPENDIX D:  
Plan showing the locality**



**M**  
Scale 1:4000

**Land subject to Village Green application at  
Westwell Lane in Westwell (near Ashford)**

**Page 64**

