AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Tuesday, 17th December, 2013, at 2.30 pm
Council Chamber, Sessions House, County Hall, Maidstone

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

Tea/Coffee will be available 15 minutes before the meeting

Membership

Mr M J Harrison (Chairman), Mr S C Manion (Vice-Chairman), Mr C W Caller and Mrs V J Dagger

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 at Cockreed Lane in New Romney as a new Town or Village Green (Pages 3 - 12)
4. Other items which the Chairman decides are Urgent

EXEMPT ITEMS

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

Peter Sass
Head of Democratic Services
(01622) 694002

Monday, 9 December 2013

Application to register land at Cockreed Lane at New Romney as a new Town or Village Green

A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Tuesday 17th December 2013.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 30th August 2013, that the applicant be informed that the application to register land at Cockreed Lane at New Romney has not been accepted.

Local Members: Mr. D. Baker Unrestricted item

Introduction

1. The County Council has received an application to register land at Cockreed Lane at New Romney as a new Town or Village Green from a group of local residents led by Mrs. A. Jeffery ("the applicant"). The application, made on 27th October 2011, was allocated reference number VGA638. A plan of the site is shown at **Appendix A** to this report.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008.

3. Section 15 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**[1], e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

5. As a standard procedure set out in the 2008 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

[1] Note that from 1st October 2013, the period of grace is reduced from two years to one year (due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013). This only applies to applications received after that date and does not affect any existing applications.

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 field of approximately 13.6 acres (5.5 hectares) in size situated at the junction of Cockreed Lane and Rolfe Lane on the northern fringe of the town of New Romney. It is crossed by a Public Footpath (HM124) and, until the erection of fencing in 2009, access to it was also available from the adjoining roads known as Cockreed Lane and Rolfe Lane. A plan showing the application site is attached at **Appendix A**.

7. The application site is owned by Mr. and Mrs. B. Frith ("the landowners") and is registered with the Land Registry under title numbers K303180 and K306229.

Previous resolution of the Regulation Committee Member Panel

8. As a result of the consultation, an objection to the application was received, initially from the landowners and supplemented by a further submission from Iceni Projects (acting on behalf of the landowners).

9. The matter was considered at a Regulation Committee Member Panel meeting on Tuesday 19th February 2013, at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration.

10. As a result of this decision, Officers instructed a Barrister experienced in this area of legislation to hold a Public Inquiry, acting as an independent Inspector, and to report his findings back to the County Council.

The Public Inquiry

11. A pre-Inquiry meeting, for the purpose of determining the matters to be addressed and the procedure to be followed at the Inquiry, was held in New Romney on Wednesday 15th May 2013. Written directions to all parties confirming the format of the Inquiry and procedure for the submission of evidence were circulated shortly thereafter.

12. The Public Inquiry took place at the Assembly Rooms, Church Approach, New Romney commencing on Monday 15th July 2013 and continuing until Friday 19th July 2013, during which time the Inspector heard evidence from all interested parties and undertook an accompanied site visit.

13. The Inspector subsequently produced a detailed written report of his findings dated 30th August 2013. The Inspector's findings and conclusions are summarised below, but a full copy of the Inspector's report is available from the Case Officer on request.

Legal tests and Inspector's findings

14. 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 of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than two years prior to the making of the application?
(d) 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 in accordance with the Inspector's findings.

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

15. In order to qualify for registration as a Village Green, recreational use of the application site must have taken place 'as of right'. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*').

16. In this case, there was no suggestion that recreational use of the application site had taken place in a secretive manner. However, the Inspector considered whether any use of the application site had taken place by force or with permission.

Use by force

17. There was no suggestion in this case that any use of the application site had taken place in exercise of physical force (e.g. breaking down barriers to gain entry); the application site has, throughout the relevant period, been freely accessible from the Public Footpath which crosses the application site.

18. However, force in this context is not limited to physical force but applies to any use which is contentious or exercised under protest[2]: this might include circumstances where the landowner verbally challenges users or erects prohibitively worded notices.

19. The Inspector accepted the landowner's evidence that he erected signs commanding users to keep to the Public Footpath at four locations around the application site in 1992 and again in 2000. However, he did not consider that these notices were sufficient to render use forcible and his conclusion[3] on this point was that:

> "*firstly, I note that both in 1992 and 2000 the Land was not fenced, and so access on to it was available from any number of places along Rolfe Lane and Cockreed Lane. Thus persons accessing the Land need not have seen the signs when they were erected. Secondly, I note that even on the Objector's own case, the signs remained in situ for no more than 2 weeks, and possibly as little as 24hrs. In these circumstances, and given that only two batches of signs were prepared and erected during the Relevant Period, I find it very possible that the overwhelming majority of those using the Land during that period would not have seen any of the signs, and thus the prohibition would not have been communicated to them. All of those who gave evidence to the Inquiry in support of the Application*

[2] *Dalton v Angus* (1881) 6 App Cas 740 (HL)
[3] See paragraph 208 of the Inspector's report dated 30th August 2013

confirmed that they had not seen any such signs, and I have no reason to disbelieve them".

20. In respect of the alleged challenges to use, the Inspector was not satisfied that these had been sufficient to render use 'by force' because the challenges involved only a very small number a people and there was no evidence that any of the applicant's witnesses were challenged in this way.

Use by permission

21. The Inspector heard evidence that some of the recreational use of the application site had taken place with the landowner's permission. Notably, he had granted permission to specific individuals for dog walking on the application site, and he had also granted permission to employees of the neighbouring potato company to play football on the land.

22. However, the Inspector's view was that, even discounting use of the land by those to whom specific permission had been granted, there still remains a considerable volume of evidence of use that was not so permitted. On balance, he found[4] that that "*the majority of the user of the land for recreation was not permissive, and that only a very limited extent of the user was carried on with permission*".

Use 'by right'

23. Use which is pursuant to an existing right will generally be 'by right' and not 'as of right' and this is particularly relevant in relation to the Public Footpath which crosses the application site. The Inspector's view[5] in respect of the Public Footpath was that it was:

"evident in many of the aerial photographs, and appears from the evidence of the Applicant's witnesses to have been heavily used. No user of the RoW for activities which could lawfully be undertaken on that route should, in my view, be regarded as having been undertaken as of right. This would include any use for dog-walking. Further, it also seems to me that various other activities which took place in the vicinity of the RoW, should be disregarded on the basis that they too were attributable to the existing right. This, it seems to me, is the consequence of the decision in DPP v Jones (1999) 2 AC 240, wherein the House of Lords determined that activities such as sketching, singing carols, children playing and people picnicking were perfectly common activities on a right of way, that there was a right to undertake such activities on a right of way, and that such activities were perfectly lawful so long as they did not obstruct the route in question".

24. Activities associated with the use of the Public Footpath would therefore have been undertaken 'by right' and would not have been qualifying use for the purposes of Village Green registration. The Inspector's conclusion on this issue was that a considerable amount of the user evidence falls to be disregarded on this basis.

[4] See paragraph 215 of the Inspector's report dated 30th August 2013
[5] See paragraph 217 of the Inspector's report dated 30th August 2013

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

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

26. In this case, the Inspector was satisfied that the application site had been used for the purposes of lawful sports and pastimes to varying degrees. He noted[7] that:

> "*I heard extensive evidence from people who claimed to have engaged in walking with dogs, as well as more limited evidence relating to other activities such as horse-riding, cycling, children's play and flying kites. There were even references to people engaging in rarer pastimes, such as using metal-detectors and flying radio controlled aeroplanes, albeit that these had been witnessed/engaged more as 'one-off' events*".

27. The Inspector noted that the landowner's witnesses had not observed recreational activities taking place on the application site but concluded that this did not mean that such activities had not taken place. Overall, the Inspector had no reason to doubt the general thrust of the applicant's evidence and was satisfied that the application site had been used for lawful sports and pastimes.

28. However, the Inspector raised concerns regarding the nature of the evidence, particularly during the early part of the relevant period when the application site was used for the growing of crops. Much of this evidence involved 'linear use' in the form of walking or riding along defined routes across and around the application site. This is significant because such use will generally be considered to be a public rights of way type of use (i.e. the assertion of a linear right) rather than a general right to recreate across the whole of the land.

29. The Inspector's view[8] on this issue was:

> *"I consider that a very considerable portion of the user which is asserted was linear in nature. This includes most notably the use of the perimeter path for walking, dog-walking or horse-riding, or else the carrying on of those activities on other linear routes. Indeed, many witnesses spoke expressly of having to keep to linear routes at certain times of the year, owing to the vegetation covering the Land… I consider that this user – where it does not form part of a wider picture of use that entails more generally comprehensive coverage of an application site – should not be regarded as contributing towards the case for registration, but instead pointing towards the potential establishment of a right of way".*

30. Overall, the Inspector concluded that once linear use is stripped out, this leaves a body of qualifying user that does not demonstrate the requisite degree of intensity. In other words, whilst there was evidence of use of the application site for lawful sports and pastimes, such use was not sufficient to give rise to a right of recreation.

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[6] *R v Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385
[7] See paragraph 193 of the Inspector's report dated 30th August 2013
[8] See paragraphs 228 and 229 of the Inspector's report dated 30th August 2013

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

31. The right to use a Town or 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.

32. 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[9] case, it was considered that *'…at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality… there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition*'. The judge later went on to suggest that this might mean that locality should normally constitute '*some legally recognised administrative division of the county*'.

33. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible than that of a locality, and need not be a legally recognised administrative unit. 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*'[10].

34. In this case, the applicant amended the application (at the pre-Inquiry meeting) to rely on a neighbourhood situated to the north and northwest of the High Street in New Romney within the locality of the Town Ward of New Romney Town Council. The landowner did not dispute the fact that the proposed locality was a qualifying locality for the purposes of Village Green registration, but did dispute the validity of the neighbourhood upon which the applicant sought to rely.

35. The Inspector heard much evidence on this subject at the Inquiry, but ultimately concluded that he was not satisfied that the neighbourhood possessed the sufficient degree of cohesiveness. He said[11]:

> *"I note that none of the Objector's witnesses recognised the Neighbourhood as comprising an area distinct from the remainder of New Romney. Secondly however, and perhaps more importantly, I note that there was significant disagreement amongst the Applicant's own witnesses upon the point. In particular, Cllr Gould appeared quite clear that in her view, New Romney comprised a 'single neighbourhood'. She did not agree that the area to the north of the High Street was distinct from that to the south. Others who disputed where the boundary of the Neighbourhood was drawn included Mr Roberts, who felt that certain properties located to the south of the High Street should also be included, having regard to their age and character. Having walked the area myself, I confess that I too do not see that a*

[9] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[10] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at page 92
[11] See paragraph 237 of the Inspector's report dated 30th August 2013

distinction can readily be drawn between properties in the vicinity of the church and the Inquiry venue, and those to the north of the High Street. In addition, other witnesses indicated that they regarded their neighbourhood as comprising something other than that claimed by the Applicant".

36. The Inspector concluded that the neighbourhood as defined by the applicant was not sufficient to meet the requirements of the Commons Act 2006.

"a significant number"

37. The word "significant" in this context does not mean considerable or substantial: '*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*'[12]. Thus, the test is a qualitative, not quantitative one, and what constitutes a 'significant number' will depend upon the individual circumstances of each case.

38. Having concluded that the neighbourhood relied upon by the applicant was not a qualifying neighbourhood, the Inspector did not expressly go on in his report to consider the issue of whether use had been by a 'significant number' of the residents from the applicant's chosen neighbourhood.

39. However, it is clear from his conclusions elsewhere that he was satisfied that the application site was used to a not insignificant degree for the purposes of engaging in recreational activities, albeit that the nature of that use was not sufficient to give rise to a right of general recreation across the whole of the land (because it was confined either to linear routes or the Public Footpath).

(d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than two years prior to the making of the application?

40. 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, section 15(3) of the 2006 Act provides that an application must be made within two years from the date upon which use 'as of right' ceased.

41. In this case, it was common ground that the application site was fenced (by the landowner) along its boundary with Rolfe Lane and Cockreed Lane in November or December of 2009, although it was not possible to establish the precise date. Although access to the application site was still possible by way of the Public Footpath after that time, the fencing had served as a challenge to general recreational use and had had the effect of deterring some of the recreational users from coming onto the land. As such, the applicant confirmed at the outset of the inquiry that the period relied upon ceased in 2009.

42. The application was made in October 2011, within the two year period of grace.

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

43. In order to qualify for registration, it must be shown that the land in question has

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

been used for a full period of twenty years. In this case, use of the application site ceased to be 'as of right' in 2009 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.

44. In this case, there was an issue as to whether recreational use of the application site took place during the early part of the material period and, more specifically, between 1989 and 1992. The landowner's evidence was recreational use could not have taken place during this period due to the planting of crops on the application site.

45. The Inspector noted[13] that:

> *"I am satisfied that the Land was cropped successively for Oil Seed Rape, Wheat and Barley in the years 1989/90, 1990/91 and 1991/92. The farming records submitted by the Objector, which were prepared contemporaneously, are powerful evidence in this respect. The accuracy of those records is substantiated by the aerial photographs dated 1990 and 1992 provided by Mr Young, as well as by the oral evidence of the Objector and others of the Objector's witnesses such as Messrs Balcomb. Furthermore, I note that a number of the Applicant's own witnesses remembered Rape, Wheat and Barley having been planted at around this time, or else confirmed that at the very least such crops may have been planted as the Objector contended".*

46. The Inspector was assured in this regard by the fact that virtually all of the applicant's witnesses had accepted that they would not have walked through the land, other than on the Public Footpath, if it had been cropped (so as not to cause damage the crop). He concluded that during the period 1989 to 1992, recreational use consisted either of walking along the Public Footpath (and any associated use) or using a linear route along the perimeter of the application site. As discussed above, such use would not be qualifying use for the purposes of Village Green application.

47. Therefore, the application site does not appear to have been used in the requisite manner throughout the relevant twenty year period.

Inspector's conclusions

48. The Inspector's overall conclusion was that the applicant had failed to demonstrate that all of the requisite legal tests had been met and the land was not capable of registration as a Village Green. He said[14]:

> *"I conclude that the Applicant has failed to demonstrate: (i) that the Land was used with sufficient intensity during the Relevant Period; (ii) that use of the Land was undertaken by the inhabitants of a qualifying neighbourhood which possessed the necessary degree of cohesiveness for the purposes of the 2006 Act; and (iii) that the Land was not used as a town or village green during the period 1989 – 1992, at which time it was in intensive agricultural use".*

49. Accordingly, his advice to the County Council was that the application should be rejected.

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[13] See paragraph 243 of the Inspector's report dated 30th August 2013

[14] see paragraph 10.1 of the Inspector's report dated 29th November 2012

Subsequent correspondence

50. On receipt, the Inspectors' report was forwarded to the applicant and to the landowners for their information and further comment.

51. The applicant highlighted a number of issues from the Inspector's report and urged the County Council to reject the Inspector's conclusions. In particular, the applicant reiterated the fact that none of the users of the land had every seen any of the notices relied upon by the landowner, drew attention to the Inspector's acknowledgement that some of the evidence given by the landowner's witnesses had been overstated or was of limited assistance. The applicant also noted the Inspector's acceptance that the majority of the recreational use was not permissive and that the requisite type of activities as would justify registration had taken place on the application site. The applicant does not accept the Inspector's finding that the Public Footpath was heavily used and asserts that some witnesses did in fact make reference to using the land when crops were growing on it.

52. The landowners did not make any comments in respect of the report.

Conclusion

53. Having carefully considered the Inspector's analysis of the evidence (contained in his report) and the applicant's comments in respect of the report, it would appear that the legal tests in relation to the registration of the land as a new Village Green have not been met and, accordingly, the application should be rejected.

Recommendation

54. I recommend, for the reasons set out in the Inspector's report dated 30th August 2013, that the applicant be informed that the application to register land at Cockreed Lane in New Romney has not been accepted.

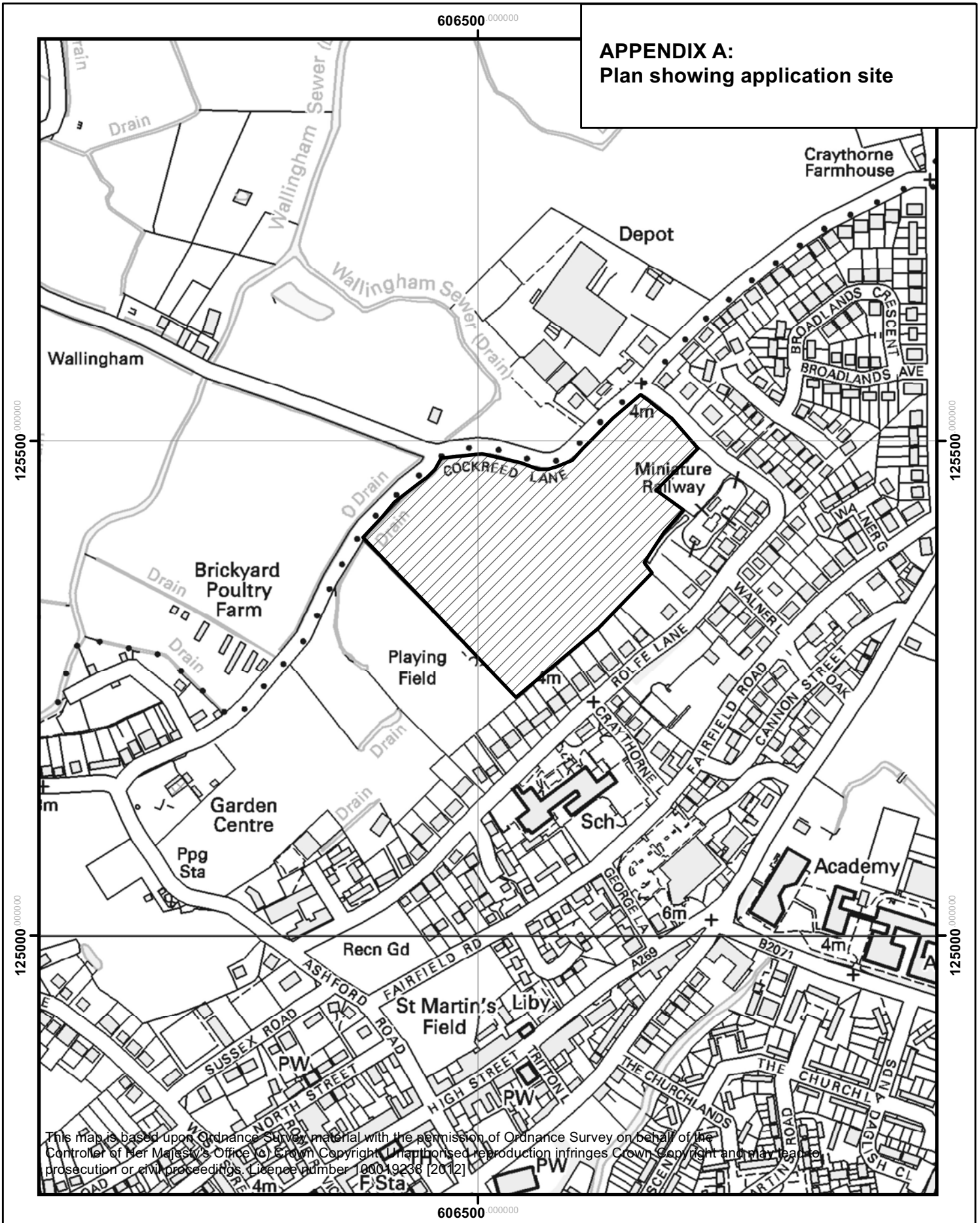
Accountable Officer:
Mr. Mike Overbeke – Tel: 01622 221513 or Email: melanie.mcneir@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 01622 221511 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the PROW and Access Service, Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

Background documents

APPENDIX A – Plan showing application site

APPENDIX A:
Plan showing application site



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Land subject to Village Green application at Cockreed Lane, New Romney

Kent County Council