AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Tuesday, 19th May, 2015, at 10.30 am
Council Chamber, Sessions House, County Hall, Maidstone

Ask for: **Andrew Tait**
Telephone **03000 416749**

Tea/Coffee will be available 15 minutes before the meeting

Membership

Mr M J Harrison (Chairman), Mr S C Manion (Vice-Chairman), Mrs V J Dagger, Mr A D Crowther and Mr T A Maddison

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 The Glebe at Goudhurst as a Village Green (Pages 3 - 20)
4. Application to register land known as Whitstable Beach as a Village Green (Pages 21 - 40)
5. Application to register land at Langley Drive at Kingsnorth as a Village Green (Pages 41 - 66)
6. Application to register land known as Marlowe Road Green at Larkfield as a Village Green (Pages 67 - 82)
7. Application to register land known as Coldblow Woods and Sports Ground at Ripple as a Village Green (Pages 83 - 100)
8. 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
03000 416647

Monday, 11 May 2015

Application to register land known as Glebe Field at Goudhurst as a new Town or Village Green

A report by the Head of Public Protection to Kent County Council's Regulation Committee Member Panel on Tuesday 19th May 2015.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 25th September 2014, that the applicant be informed that the application to register land known as Glebe Field at Goudhurst has been accepted, and that the land subject to the application be registered as a Village Green.

Local Members: Mr. A. King Unrestricted item

Introduction

1. The County Council has received an application to register land known as Glebe Field at Goudhurst as a new Town or Village Green from local resident Mr. E. Bates ("the applicant"). The application, made on 18th November 2011, was allocated reference number VGA639. 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[1].

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**[2], 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

[1] Note that the 2008 Regulations have now been replaced by the Commons Registration (England) Regulations 2014 ("the 2014 Regulations") and the application falls to be determined under the 2014 Regulations.

[2] Note that from 1st October 2013, the period of grace was 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.

website. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

6. The area of land subject to this application ("the application site") is known locally as Glebe Field and consists of an area of grass of approximately 2.5 acres (1 hectare) in size situated at the junction of Church Road and Back Lane in the parish of Goudhurst. There are no recorded public rights of way crossing the application site, although a surfaced path way was constructed in 1998 to provide a safe route for school children between the village centre and the local primary school. The application site is shown in more detail on the plan at **Appendix A**.

7. The application site is owned by the Canterbury Diocesan Board of Finance ("the landowner") and, between 1966 and 2010, it was leased to the County Council as a playing field in connection with the local primary school.

Previous resolution of the Regulation Committee Member Panel

8. During the consultation period, one objection to the application was received from the landowner. That objection was made primarily on the basis that permission had been granted for certain events to take place on the field (such as village fetes) and that it was unclear as to whether some of the recreational use had been ancillary to the main purpose of walking along the surfaced path provided in 1998.

9. The matter was considered at a Regulation Committee Member Panel meeting on 24th September 2013, at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration. A copy of the minutes of that meeting is attached for reference at **Appendix B**.

10. As a result of this decision, Officers instructed a Barrister experienced in this area of law to hold a Public Inquiry, acting as an independent Inspector, and to report her 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 at County Hall on Monday 27th January 2014. 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 Vine, High Street, Goudhurst commencing on Monday 2nd June 2014 and continuing until Thursday 5th June 2014. The Inspector heard evidence from all interested parties, and she also undertook an accompanied site visit on the final day of the Inquiry.

13. At the Public Inquiry, the applicant represented himself, with assistance from two other local residents, and the landowner was represented by Mr. Vivian Chapman QC of Counsel.

14. The Inspector subsequently produced a detailed written report dated 25th September 2014 ("the Inspector's report"). Her findings and conclusions are summarised below.

Legal tests and Inspector's findings

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, if not, ceased no more than two years prior to the making of the application?
    (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 in accordance with the Inspector's findings.

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

16. In order to qualify for registration as a Village Green, recreational use of the application site must have taken place 'as of right' through the period of use relied upon. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*'). As explained by Lord Hoffman in the Sunningwell[3] case:

> *"the unifying element in these three vitiating circumstances… was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period".*

17. In this case, there was no suggestion that any informal recreational use of the application site had taken place in a secretive manner. However, at the Inquiry the landowner contended that informal recreational use of the application site had taken place both by force and with permission during the relevant period.

Use by force

18. It was common ground between the parties that, until at least 2002, there had been a five bar gate at the vehicular entrance to the application site from Church Road (although there was a dispute as to whether it was open or locked), and that there had always been some sort of pedestrian access between the application site and the Church Rooms (adjacent to the southern boundary of the site). Furthermore, it was agreed that, when the path was constructed around the western and northern sides of the application in 1998, unlocked gates were provided at either end giving access to Back Lane and Church Road (close to its junction with Maypole Lane).

[3] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 at 391

19. However, part of the landowner's case was that other pedestrian entrances in place throughout the relevant period were no more than holes in the hedge, and such use was considered to be in exercise of force to gain entry, and not 'as of right'.

20. In this regard, whilst the Inspector agreed that at least one entrance to the application site had been created by virtue of users squeezing through the hedge (as opposed to being a formal entrance that had been created by the landowner), there was no evidence that the landowner had made any attempt to repair those holes, or otherwise prohibit access through them, and, over time, they became established so as to give the appearance of being formal entrances to the application site. She found[4]: "*as a matter of fact on the basis of all the evidence that by the beginning of the relevant period in 1991, they had the appearance of being deliberate and accessible entrances with accompanying worn pathways, and possibly gates*", and went on to cite examples of witnesses who had used the entrances quite comfortably with pushchairs and large dogs.

21. The Inspector's conclusion on whether use had taken place by force[5] was:

> *"although those who break through a hedge do so by force, those who follow but who themselves use no force to break the hedge and have no knowledge of the original damage are capable of doing so 'as of right'. Unless the landowner takes steps to repair or reinstate the hedge, then after 20 years (provided that other elements of the statutory test are met) this will qualify the user to be 'as of right'".*

Use by permission

22. Two points were argued by the landowner before the Inspector on the issue of whether use of the application site had taken place with permission.

23. The first point was that, until 2010, the County Council had held a leasehold interest in the land (in its capacity as the Local Education Authority) and that, in 1998, it had constructed a path facilitating and encouraging use of the application site. Thus, the application site had, in effect, been in public ownership during the majority of the relevant period, and any use of it was by virtue of the Local Education Authority's power to allow use of the application site for recreational purposes.

24. The argument advanced by the landowner in this regard relied upon the decision of the Supreme Court in the Barkas[6] case, in which it was considered that, where land is held by a local authority and provided specifically for the purpose of public recreation, any recreational use of it that is made by the public cannot be regarded as being 'as of right' because members of the public already have the right to use the land.

25. The statutory provision relied upon by the landowner in this case is section 507A of the Education Act 1996, which requires the Local Education Authority to ensure that school premises include adequate facilities for recreation and social and physical training for children, and provides a power to the authority to establish, maintain and manage (amongst other things) playing fields.

[4] Paragraph 202 of the Inspector's report
[5] Paragraph 203 of the Inspector's report
[6] *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31

26. The Inspector noted that the duty under the Education Act 1996 did not extend to providing any facilities for people other than schoolchildren and there was no power to provide playing fields for the general public:

> "*in my opinion, there is no power conveyed by the statute to allow local authorities to make playing fields available to persons other than those receiving primary or secondary education. Such would in any event be inconsistent with the statutory duty to secure the facilities for primary and secondary education to which the power is subordinate. That is not to say that in some cases schools may choose to allow the public to recreate on their playing fields, but that action would be a private matter and not pursuant to the statutory power*"[7].

27. The Inspector further noted that her interpretation of the statutory power (as set out above) was entirely consistent with the fact that the leases between the landowner and the Local Education Authority included a clause whereby the lessee was '*not to use the said premises or any part thereof for any purpose other than a playing field for primary school children*'. Accordingly, the Inspector concluded that the principle in Barkas does not apply in this case.

28. The second point raised by the landowner related to the holding of the village fete on the application site, the circumstances of which, in the landowner's view, amounted to an implied permission to use the land for informal recreation.

29. It was undisputed at the Inquiry that every summer during the relevant period, a summer fete had been held on the application site. The Inspector found, as a matter of fact, that it was the clear and publicised policy of the fete committee[8] that people had to buy a programme to enter the fete, but that that policy was not rigorously enforced. Although an advert in the 1994 parish magasine referred to the fete being held 'by kind permission of the head teacher' (of the local primary school), the head teacher strongly disputed that he had ever been asked for any such permission, and there was no other evidence that his permission had been sought.

30. The landowner's case is that, until 2010, the County Council (as tenant of the land) authorised, through its head teacher, the periodic closure of the application site in order to hold the village fete, entry to which was on payment of a fee. As such, there was an implied permission to use the application land at times when it was not closed for the fete.

31. In support of this argument, the landowner relied upon the judgement in the Mann[9] case, which concerned an area of grassland, part of which was used 'occasionally' for the holding of a beer festival and fun fair. During these times, an entrance fee was charged to enter the affected part of the land, although public access to the remainder was not denied. The Court found that[10] '*the critical point was that the owner had unequivocally exercised his right to exclude and did not have to do more that [he] did to bring it home to the reasonable local inhabitant that this right was being exercised and that the use by the local inhabitants was pursuant to*

[7] Paragraph 217 of the Inspector's report
[8] The fete committee was a group made up of representatives of the Parochial Church Council, the Parent Teacher Association, the scouts and the village hall, and all proceeds from the fete went to those organisations
[9] *R (Mann) v Somerset County Council* [2012] EWHC B14 (Admin)
[10] at paragraph 77 per Judge Owen QC

permission'. Thus, it was held that occasional exclusion from part of the land was sufficient to communicate to users that their use of the whole land at other times was with the landowner's implied permission.

32. The Inspector found that, whilst the head teacher was entrusted by the Local Education Authority with the control and management of school premises (including the application site), there is no evidence that the head teacher specifically authorised the principle of holding the fete on the application site, or the practice of charging for entry. Furthermore, whilst it was in the interests of the fete committee to require a programme to be purchased on entry to the fete (in order to maximise proceeds for local causes), the committee had no recourse to enforce that policy (for example by removing a member of the public that refused to pay) and had no powers at all in relation to the application site; indeed, the fete was not organised either by the landowner or the lessee, or on their behalf.

33. As such, the Inspector concluded that the principle arising from the Mann case did not apply during the relevant period and made the following analogy[11]:

> *"I consider that the fete committee were simply acting (albeit in a formal and publicised way) in the same capacity as any other local inhabitant using the application land for recreational activities. The fact that they did so on their own terms is neither here nor there. From the landowner's perspective, they were all trespassers who could be prohibited or licensed. An analogy might be drawn with a group of children playing a game of football on the application land. They have written in the village diary that they will be using the application land between 2-4pm. However, another group of children arrive to play at 3pm without having booked in the diary. Who can complain? Neither have any right to be there. The school is not authorising either of them to use the application land, and neither is the school prohibiting either. The fact that the first group may have 'booked' the application land in the village diary may mean that as a matter of courtesy their use should take priority, but they have no priority over the second group in law".*

34. It is to be noted that the situation did change after the lease was surrendered in 2010 and, early in 2011, the fete committee sought, and obtained, the landowner's permission to hold the June 2011 fete. Given that the June 2011 fete was held with the express permission of the landowner, use ceased to be 'as of right' as at the date of that fete.

35. The implications of this are considered below but, for the purposes of whether the 'as of right' test is met, the Inspector's conclusion was that use of the application site did take place 'as of right' until the June 2011 fete.

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

36. Lawful sports and pastimes can be commonplace activities and 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*

[11] Paragraph 230 of the Inspector's report

modern life, the kind of informal recreation which may be the main function of a village green'[12].

37. Furthermore, it is not necessary to demonstrate that both sporting activities *and* pastimes have taken place and the phrase 'sports and pastimes' has been interpreted by the Courts as being a single composite group rather than two separate classes of activities[13]. In any event, the activities must be 'lawful' in the sense that they must not amount to a criminal offence[14].

38. At the Inquiry, the Inspector heard evidence from a large number of witnesses regarding a range of recreational activities that had taken place on the application site. The activities cited (as well as those set out in the written evidence), included dog walking, jogging, playing with children at attending community events (such as the village fete).

39. Additionally, the head teacher of the local primary school (which had the use of the land under the terms of the leases) confirmed that he was aware that the land was being used by local residents for lawful sports and pastimes, both before and after the installation of the path and whilst school activities were taking place.

40. Therefore, the Inspector was satisfied that the application site had 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?

41. 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.

"locality"

42. The definition of locality for the purposes of a Town or Village Green application has been considered by the Courts. In the Cheltenham Builders[15] 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*'.

43. In this case, the applicant chose to rely on the locality of 'Goudhurst parish' which, as was accepted by the landowner at the start of the Inquiry, is a legally recognised administrative unit and therefore capable of constituting a qualifying locality.

[12] *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
[13] *R v Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385
[14] *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 Admin)
[15] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

"a significant number"

44. 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*'[16]. Thus, the test is a qualitative, not quantitative one, and what constitutes a 'significant number' will depend upon the individual circumstances of each case.

45. As is noted above, one of the objections initially raised by the landowner was the fact that use of the application site increased substantially following the construction of the path along the northern and western edges of the application site in 1998 and use of the application site prior to that time had not been by a significant number of local residents.

46. In this regard, the Inspector noted that there were an unusual number of witnesses in this case that were able to speak for the whole of the relevant period, and at the Inquiry she had heard first hand evidence of recreational use of the application site prior to 1998 from seven witnesses, whose use often included their families. Ultimately, her view was that[17]:

> "*whilst I accept that the level of use of the application land may well have increased after the construction of the gravel path, the impression I have is very much that this has been a key piece of land in general use by the community of Goudhurst at least since Kent County Council leased the field for the school* [in 1966]*, and possibly before…"*.

47. Overall, the Inspector was satisfied that use of the application site throughout the relevant period was sufficiently significant to give the appearance that the land was in general use by the community of Goudhurst and that a village green right was being asserted.

(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?

48. 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 provided (at the time that this application was made) that an application must be made within two years from the date upon which use 'as of right' ceased.

49. In this case, the application was originally made under section 15(2) of the Act on the basis that recreational use of the application site continued to take place 'as of right' up until the date of the application in November 2011. However, at the start of the Inquiry, the applicant sought an amendment to the application, so as to rely instead on section 15(3) of the Act, on the basis that the fete committee had sought and obtained (as discussed earlier in this report) the landowner's permission for the 2011 summer fete to be held on the application site. As such, it was contended that use of the application site may have ceased to be 'as of right' prior to the making of the application.

[16] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[17] Paragraph 197 of the Inspector's report

50. The landowner confirmed that no prejudice would be caused by such an amendment and, in the absence of any other reason why the applicant ought not to be allowed to amend the application, the Inspector recommended that the amendment should be accepted[18].

51. Accordingly, despite the Inspector's finding that use of the application site ceased to be 'as of right' from June 2011, given that the Village Green application was submitted on 18th November 2011, the application was clearly made well within the prescribed two year period of grace[19]. This test is therefore met.

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

52. 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 relevant twenty-year period is calculated retrospectively either from the date upon which use ceased to be 'as of right' or, where informal recreational use is continuing, from the date of the application.

53. As is noted above, it is considered that use of the application site ceased to be 'as of right' as at the date of the June 2011 fete. The relevant twenty year period ("the material period") is therefore June 1991 to early June 2011.

54. The user evidence presented in support of the application shows the application site has been used for recreational purposes well in excess of the required twenty year period. Indeed, the Inspector's impression from the evidence given at the Inquiry (as set out above) was that the application site has been a key piece of recreational land for the local community since at least the mid-1960s.

Inspector's overall conclusion

55. The Inspector concluded overall that[20]:

> *"the applicant has proved that a significant number of the inhabitants of Goudhurst have indulged as of right in lawful sports and pastimes on the application land for a period of at least twenty years with that period ceasing within two years of the date of the application (i.e. after 17th November 2009). Subject to consideration of the implications of the Supreme Court judgement in Newhaven, I recommend that the registration authority register the land as a new town or village green".*

56. However, one of the issues argued before the Inspector at the Inquiry was that the statutory power under which the land was held by the landowner prevented the registration of the land as a Village Green, on the basis that the registration would be incompatible with the statutory purposes for which the land was held. This argument derived from the Newhaven[21] case which, at the time of receipt of the Inspector's report, was the subject of an appeal to the Supreme Court. Given that the appeal was due to be heard within a relatively short period, the Inspector's

[18] Paragraph 234 of the Inspector's report

[19] The Inspector added that, even if it were to be considered that use ceased to be 'as of right' from the date upon which permission for the 2011 fete was originally sought – i.e. January 2011 – this is still within the two year period of grace and does not change the outcome of the application (see paragraph 235 of the Inspector's report)

[20] Paragraphs 486 and 487 of the Inspector's report

[21] *R (Newhaven Port and Properties Ltd) v East Sussex County Council* [2015] UKSC 7

advice (on this occasion) was that the County Council ought to await the Supreme Court's judgement before taking any final decision in respect of the current case.

The Newhaven judgement and its application in the current case

57. The Newhaven case concerned an application by the Newhaven Town Council to register land known as West Beach at Newhaven as a Town or Village Green. An objection by the landowner, Newhaven Port and Properties Ltd., had led to a Public Inquiry, following which East Sussex County Council resolved the register the land as a Town or Village Green. By the time the case reached the Supreme Court, there were only three main issues to be considered, only one of which – the 'statutory incompatibility' point – is relevant to the situation at Goudhurst.

58. The statutory incompatibility point is concerned with whether section 15 of the Commons Act 2006 can be interpreted so as to enable the registration of land as a Town or Village Green in circumstances where that registration would be incompatible with some other statutory function to which the land was to be put. The Supreme Court concluded that "*where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use the land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes*". Accordingly, the appeal was allowed (meaning that West Beach was not a Town or Village Green).

59. In this case, the landowner's position is that the application site is vested in and held by the landowner for the benefit of the Diocesan Stipends Fund under powers contained in the Endowments and Glebe Measure 1976 ("the 1976 Measure"). It is submitted that, as Village Green status would severely restrict the future use to which the land could be put, this would prejudice the execution of the landowner's duties under the 1976 Measure. For example, registration of the land as a Village Green would prevent any future development of it, which in turn would make it impossible to maximise the value of the application site for the Diocesan Stipends Fund.

60. The applicant, on the other hand, has submitted that there is no incompatibility which would prevent the land being registered as a Village Green, and argues instead that in comparison with the positive statutory obligations and duties of the Port Authority in Newhaven, the 1976 Measure amounts to little more than a statutory declaration of trust. He also notes that the Supreme Court made it clear that ownership of land by a public body, such as a local authority which has powers to develop the land in the future should it wish to do so, is not of itself sufficient to create a statutory incompatibility.

61. On 9th April 2015, after having carefully considered the parties' comments on the Newhaven case, the Inspector provided a supplementary report giving her views on the applicability (or otherwise) of the Newhaven judgement on the current case.

62. She considered that village green status would not be incompatible with the statutory duty in the 1976 Measure, which could still be fulfilled post-registration as the duty is not dependent (as it was in Newhaven) on the land being free from constraint to any potential future development. She noted that[22]:

[22] Paragraph 9 of the Inspector's supplementary report dated 9th April 2015

"[the landowner's] argument is dependent on the registration authority interpreting s. 19 of the 1976 Measure as imposing a statutory duty on the Diocese to maximise the value of the property at all costs, and in particular by developing the land. I do not consider there is any such duty implied… The Measure provides only that the land must be held for the benefit of the Fund. I interpret that to mean that any financial profit received must be put towards that Fund.

…

In any event, village green registration would not completely prohibit income generation for the benefit of the Fund".

63. As such, she concluded that the Newhaven judgement was distinguishable from the current case and her previous recommendation that the application site be registered as a village green still applies.

Conclusion

64. Having carefully considered the Inspector's analysis of the evidence (contained in her reports), it would appear that the legal tests in relation to the registration of the application site as a new Town or Village Green have been met and, accordingly, the application should be accepted and the land to which it relates registered as a Village Green.

Recommendation

65. I recommend, for the reasons set out in the Inspector's report dated 25th September 2014, that the applicant be informed that the application to register land known as Glebe Field at Goudhurst has been accepted, and that the land subject to the application be registered as a Village Green.

Accountable Officer: Mr. Mike Overbeke – Tel: 03000 413427 or Email: mike.overbeke@kent.gov.uk Case Officer: Ms. Melanie McNeir – Tel: 03000 413421 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.

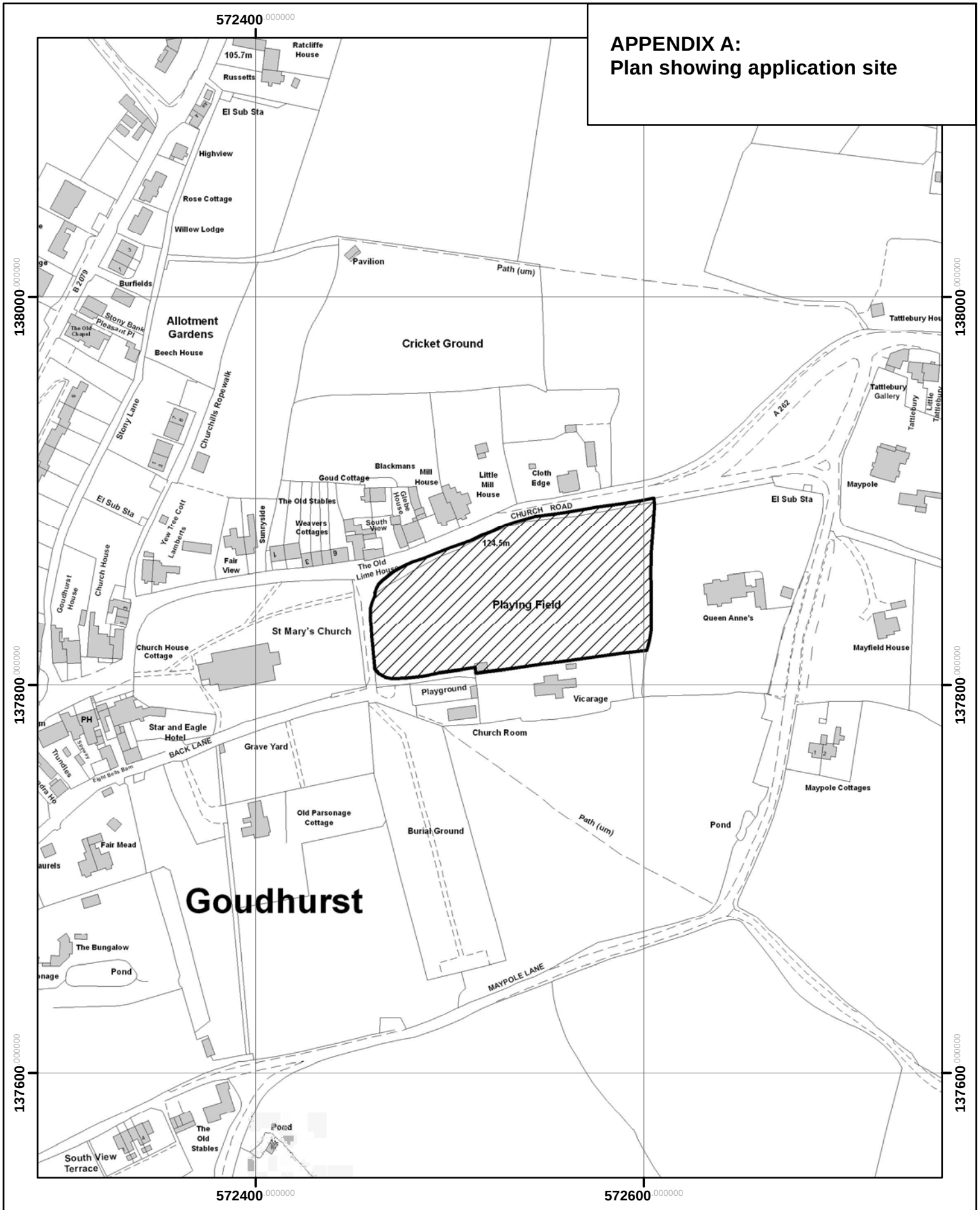
Appendices

APPENDIX A – Plan showing application site
APPENDIX B – Minutes from the meeting of the Regulation Committee Member Panel on 24th September 2013.

Background documents

Inspector's report dated 25th September 2014
Inspector's supplementary report dated 9th April 2015

APPENDIX A:
Plan showing application site



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Land subject to Village Green application at The Glebe at Goudhurst

Page 14

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REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Palmer Room, Langton Green Village Hall, Winstone Scott Avenue, Langton Green, Tunbridge Wells TN3 0JJ on Tuesday, 24 September 2013.

PRESENT: Mr M J Harrison (Chairman), Mr S C Manion (Vice-Chairman), Mr M Baldock, Mrs V J Dagger and Mr T A Maddison

IN ATTENDANCE: Ms M McNeir (Public Rights Of Way and Commons Registration Officer) and Mr A Tait (Democratic Services Officer)

UNRESTRICTED ITEMS

12. Application to register land known as Glebe Field in the parish of Goudhurst as a new Town or Village Green
(Item 4)

(1) The Panel Members visited the application site before the meeting. This visit was attended by Mr E Bates (applicant) a representative from Goudhurst PC and four members of the public. The applicant drew the Panel's attention to the pathway which had been constructed when the new primary school was opened and used by local people to avoid the main road. He pointed out the parking on the land which occurred when church events were taking place and the chain on the vehicular entry point which prevented local residents using the land for parking. A local resident also pointed out the informal entry point adjacent to the Church Rooms, which was used by a number of people to gain access to the site.

(2) The Chairman informed the Panel that the Local Member, Mr A J King had sent his apologies owing to a clash with other Council business. He had asked to be kept informed of the progress of the application.

(3) The Commons Registration Officer began her presentation by saying that the application had been made by Mr E Bates under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008. The application had been accompanied by 112 user evidence forms and other evidence (including a statement detailing the history and use of the site, a copy of the leases between Kent County Council and the Canterbury Diocesan Board of Finance, notes of a meeting between the Parish Council and the landowner regarding the future of the site, photographic evidence of organised activity taking place on the land in question and a programme from the 1997 fete).

(4) The Commons Registration Officer went on to set out the case put forward by the applicant. This was that the site was had been used for generations on a daily basis by a significant number of local people. Although Goudhurst and Kilndown Primary School had a lease which allowed its pupils to play sport on the field, local residents had continued to use the site for their own recreation whilst ensuring that this use did not interfere with school use.

(5) The Commons Registration Officer then described the responses from consultees. Tunbridge Wells BC (Planning and Development) had stated that the field had been used for recreational purposes, although it could not confirm whether this use had been by a significant number of inhabitants of the locality or of a neighbourhood within a locality. A local resident, Mr P Glyde had written in support of the application, saying that the land was in regular use for dog walking, socialising and football. He had also drawn attention to the well-attended fetes and shows which took place during the summer months.

(6) The Commons Registration Officer continued by saying that the site was owned by the Canterbury Diocesan Board of Finance who had leased it to Kent County Council as a school playing field between the years 1966 and 2010. The Landowner had permitted the County Council to construct a footpath in 1998 and to install two gates at either end of the pathway.

(7) An objection had been received from Graham Boulden and Co, acting on behalf of the landowner. The first ground for objection had been that the application was invalid as the application plan included land not owned by the landowner. The Commons Registration Officer said that this was not a factor that could, in itself, invalidate an application. Equally, the fact that the applicant had only moved into Goudhurst in 1996 (after the qualifying period had begun) did not prevent him from claiming Village Green status for the land in question.

(8) Graham Boulden and Co's other grounds for objection were that permission had been granted for use of the field, which signified that use had been "by right" rather than as of right; that some of the recreational use had been ancillary to the main purpose of walking along the footpath; and that part of the land was used for parking in connection with the church. They had also drawn attention to the *Newhaven Port and Properties Ltd v. East Sussex County Council* case where it had been ruled that registration as a Village Green could not take place where it would be inconsistent with the statutory purpose for which the land was held. The Commons Registration Officer advised that this decision had been overturned in the subsequent Court of Appeal judgement in the same case.

(9) The Commons Registration Officer moved on to consideration of the individual tests for registration to take place. The first of these was whether use of the land had been "as of right". She said that use had clearly not been by force or stealth. The question of whether or not the land had been used with permission was disputed by the two parties involved. The landowner had provided a copy of a flyer advertising the 1994 village fete. This had included the statements "*by kind permission of the head teacher*" and "*entry by programme*." The landowner contended that these statements demonstrated that the head teacher was entrusted by the landowner with control over the application site and that the public would consequently understood that their attendance at the fete was by virtue of his consent on behalf of the landowner.

(10) The applicant's contention was that the lease between the landowner and the County Council specifically restricted use to primary school children. Therefore, the head teacher would not have been in a position to grant permission on behalf of the landowner. His permission would only have been sought to ensure that the fete would not conflict with any school activities. The applicant had also stressed that the

landowner had not been aware that formal activities were taking place on the application site.

(11) The Commons Registration Officer moved on to consider the views of both parties on the implications of the *R Mann v Somerset County Council* case where the Court had found that occasional exclusion from part of the land had been sufficient to communicate to users that their use of the whole land at other times was with the landowner's implied permission.

(12) The landowner contended that entry to the fete was generally by programme, which effectively amounted to a fee being charged. This contention was supported by the local vicar, who had stated that the programmes had been sold in local shops and that the three entrances to the fetes were manned so that those who did not have a programme would be invited to purchase one in order to gain access to the field. In the landowner's view, the circumstances were similar in all pertinent aspects to those in the *Mann* case, preventing the applicant from being able to prove that use had been "as of right" for the period on question.

(13) The Commons Registration Officer said that the applicant's contention was that this case was different to the *Mann* case in that access to the site was not secured and that even though the fetes regularly took up a lot of space, there was still plenty of opportunity for anyone else to use the rest of the land for other recreational activities whilst they were taking place. The applicant also disputed that the sale of programmes was a means of controlling admission. They were, in reality, a means of raising funds towards the cost of the fete.

(14) The Commons Registration Officer concluded this aspect of the application by saying that there was a conflict of fact as to the position when the site was used for fetes and other organised events, making it impossible at this stage to conclude whether use of the site had been "as of right".

(15) The Commons Registration Officer then briefly turned to the other tests. She said that it was clear from the evidence that use of the land had been for lawful sports and pastimes by a significant number of inhabitants of the parish of Goudhurst up to the date of application in 2011. This use had taken place throughout the required period of 1991 to 2011 and, in fact, for a lengthy period before that date.

(16) The Commons Registration Officer summed up by saying that as there was a conflict of fact in relation to the annual fete, the best mechanism for determining whether the "as of right" test had been met was to hold a non-statutory public inquiry. She therefore recommended accordingly.

(17) Mr E Bates (applicant) said that the report had concluded that four of the five requirements for land to be registered as a Village Green had been met but that there was a conflict of fact as to what the position was on days when the application site had been used for fetes and other organised events. The report had therefore been unable to reach a conclusion on whether use of the land in question had been "as of right." The report had accepted that "as of right" use had taken place but was not sure whether this had been the case for the annual village fete. He therefore proposed to deal with this single question.

(18) Mr Bates said that the fetes were organised by a committee made up of representatives from the local Scout group, the Parish Hall committee, the local school Parent Teachers Association (PTA) and the Parochial Church Council (PCC). The chairmanship was rotated between the organisations on a rota basis each year and profits divided between the four.

(19) Mr Bates said he wished to stress that all four organisations were made up of worthy volunteers from the local community and were distinct from, for example, staff members of the local school or church, from which they enjoyed independence and a certain distance.

(20) Mr Bates then referred to the case of *R (Mann) v Somerset* saying that the difference was that in *Mann* the land owner had exercised his right to restrict access, whereas the annual fete on the Glebe Field Glebe was an event which the landowner had confirmed had taken place without his knowledge. A letter dated 1st February 2011, from the Diocese of Canterbury had confirmed (as set out in Appendix 4 of the application) *"that the Diocese was unaware that use was being made of the field by the Parish and by the Fete Committee."* Mr Bates asked whether it could be made any clearer that this use had been unauthorised.

(21) Mr Bates continued by saying that the fete committee always confirmed the date of the fete with the head teacher of the school at an early stage in order to avoid the obvious embarrassment and inconvenience of a clash of events. However, under the restrictive terms of the lease of the field, the head teacher was not in any way able to grant *permission* for use on behalf of his school, KCC or the Diocese of Canterbury.

(22) Mr Bates summed up this point by saying that the fete would always go ahead and that fete committee merely wished to collaborate with the school over the date. The head teacher had never refused permission and any such refusal would in any case not have been accepted by the fete committee. There had therefore never been a manifest act of exclusion.

(23) Mr Bates then said that residents were encouraged to buy fete programmes from local shops in advance or on the day to help raise funds. On the day of the fete, volunteers with buckets and a supply of programmes were at some entrances for some of the time. The site remained "porous" as other entry points remained vacant and that there was no attempt to "lock down". Many people were waved in, regardless of their possession of a programme, whilst whole families sharing a single programme were welcomed.

(24) Mr Bates said that he had consulted current and former organisers of the fete and that it was clear that showing or purchasing a programme had never been a prerequisite to entry to the fete. This was because not all entry points were covered by stewards or because the stewards were giving the benefit of the doubt to anyone who said they had left their programme at home or would buy one later. Tea, coffee and cake were sold in the Church Rooms, and the lavatories were only available on site. Foot traffic between the field and the Church Rooms was considerable and not managed.

(25) Mr Bates referred to his own experience, saying that he had forgotten to buy a programme for this year's event. He had not been challenged at any point despite

coming and going many times on foot and by car while helping on stalls. He said he knew of at least one other parish councillor who had similarly not been challenged when he had also forgotten to buy a programme.

(26) Mr Bates then said that there was no restriction to access or use of that part of the land which was not actually occupied by the paraphernalia associated with the fete, and that residents who wished to do so were able to continue their sports and pastimes as of right. Those visitors not intending to join in the fete tended to become involved by, for example, listening to live music, stopping for a drink or taking the opportunity to throw a wet sponge at their teacher or scout master held in the stocks. All this "*as of right"* use was to be applauded as it had been organised by the community for the community.

(27) Mr Bates concluded his presentation by saying that he hoped that he had helped the committee to better understand that the organisation and management of the fete as an activity "*as of right*", and that it would therefore confirm the established legal right of access as a Village Green.

(28) The Chairman asked Mr Bates to comment on a letter from Rev Hornsby, the former Vicar. This letter stated that the sale of programmes represented fees for admission. Mr Bates replied that he had not previously seen the letter, but that he did not agree with its content. He added that Rev Hornsby had never actually sat on the fete organising committee.

(29) Mrs B Stafford (supporter) said that she had manned the Parish Council stand at the fete held in 2010. A small child had been reported missing and a search for her had taken place all over the field. There had been concern that she might easily have left the field because two of the entry points had not been manned. Fortunately, she had eventually been found, safe and well. However, this story demonstrated that Mr Bates was right when he said that access to the site could easily take place unchallenged during the fetes.

(30) Mr R Bushrod said that he had been a local resident since 1983. He had served as a Church Warden. He said that he could confirm that there had not been any attempts to restrict access during church fetes and that the Collectors were always instructed not to do so. He then referred to the phrase "by kind permission of the Headteacher" which appeared on the 1994 village fete flyer from 1994 (Appendix D). He said that this was simply an example of village politeness which was not intended (or understood) literally.

(31) Mr G Boulden (Graham Boulden and Co) spoke on behalf of the landowner. He said that he did not agree with Mr Bates' description of the access arrangements as "porous". The site had become more regulated after 1996 when the footpath had been constructed.

(32) Mr Boulden then referred to the fete flyer (Appendix D) noting that it contained the words "Entry by Programme." This, he said would clearly convey to the average person that a right to refuse permission to enter the land would be in effect on the day of the fete.

(33) Mr Boulden also said that use of the footpath did not qualify as a lawful sport and pastime and that a non-statutory public inquiry would afford an opportunity to

build up a more complete picture of the amount of lawful sports and pastimes that had actually taken place. He also asked the Panel to agree that the incident involving the small child mentioned by Mrs Stafford should be understood as a single incident rather than a representative event.

(34) During discussion of this item, Mr Baldock said that he believed that the fact that Canterbury Diocese had been unaware that the land in question was being used for fetes and other organised events indicated that use of the land had been as of right.

(35) Mr T A Maddison moved, seconded by Mr S C Manion that the recommendation of the Head of Regulatory Services be agreed.

Carried 4 votes to 1

(36) RESOLVED that a non-statutory Public Inquiry be held into the case to clarify the issues.

13. Application to register land at Showfields in Tunbridge Wells as a new Town or Village Green
(Item 6)

(1) The Panel Members visited the application site before the meeting. This visit was attended by Mr R Fitzpatrick (applicant).

(2) The Chairman informed the Panel that the Local Member, Mr J E Scholes had sent his apologies owing to a clash with other County Council business. He had indicated his agreement with the contents of the report.

(3) The Commons Registration Officer tabled aerial photographs of the application site and then explained that the application had been made by Mr R Fitzpatrick under section of the Commons Act 2006 and the Commons Registration (England) Regulations 2008. The application had been accompanied by 38 user evidence forms.

(4) The Commons Registration Officer then said that Cllr C Woodward from Tunbridge Wells BC had replied on behalf of himself, Cllr Mrs B Cobbold and Mr J E Scholes to advise that they were happy to support the application whilst having concerns that Village Green status might prevent redevelopment of community facilities from taking place. Tunbridge Wells BC Planning had stated that it had no objection as Village Green status would not conflict with the designation of the site in the Local Plan as a “neighbourhood centre” and “important local space.”

(5) The Commons Registration Officer then reported that an objection had been received from Mr Colin Lissenden on behalf of the Town and Country Housing Group on the grounds that part of the site was within its ownership. The objection had also stated that the application would severely affect any future regeneration plans and deter future investment to improve the land in the best interests of the local community.

(6) The Commons Registration Officer went on to inform the Panel that the applicant had requested a number of amendments to be made to the application.

Application to register land known as Whitstable Beach as a new Town or Village Green

A report by the Head of Public Protection to Kent County Council's Regulation Committee Member Panel on Tuesday 19th May 2015.

Recommendation: I recommend that a Public Inquiry be held into the case to clarify the issues.

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

Introduction

1. The County Council has received an application to register land known as Whitstable Beach in the town of Whitstable as a new Town or Village Green from Mr. P. McNally on behalf of the Whitstable Beach Campaign ("the applicant"). The application, made on 30th September 2013, was allocated reference number VGA658. A plan of the site ("the application site") is shown at **Appendix A** to this report.

Background

2. Members should be aware that land forming the majority of the current application site has already been the subject of a previous application submitted to the County Council under section 13 of the Commons Registration Act 1965. That application ("the 1999 application") was submitted on 14th December 1999 by local resident Mrs. A. Wilks and was made on the basis that the application site had become a Town or Village Green by virtue of its use by local people for lawful sports and pastimes for a period in excess of 20 years.

3. Following a Public Inquiry held in August 2001, the 1999 application was rejected by the County Council (at a meeting of the Regulation Committee Member Panel held on 1st March 2002) on the basis that:
   i. The application site included a significant area of land that only became available for public use after the execution of sea defence works in 1988/1989;
   ii. Use of the application site was not 'as of right' after April 1993 [that being the date upon which a letter ("the April 1993 letter") from the landowner was published in the local newspaper stating that the Whitstable Oyster Fishery Company had always "*encouraged people to use the beach*" and that "*dog-owners are welcome to use the beach*" provided they clear up any mess]; and
   iii. Use of the application site was not predominantly by the residents of the locality relied upon (i.e. Harbour Ward).

4. The first and third reasons for the rejection of the 1999 application are unlikely to be relevant in the current case because the 1988/1989 sea defence works which had the effect of enlarging the beach took place well before the twenty-year period relied upon in the current case, and because it is no longer necessary to demonstrate that use of

the application site has been predominantly by the residents of the neighbourhood or locality[1] (as opposed to the public at large).

5. There is, however, a dispute between the applicant and the objector as to whether the issue of the April 1993 letter remains relevant in respect of the current application and this is considered in further detail below.

Procedure

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

7. Section 15(1) of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Town or Village Green where it can be shown that:

   'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

8. 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**[3], e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

9. 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 under the 2008 Regulations, the County Council also placed 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

10. It should be noted that the area of land originally applied for was larger than that shown on the plan at **Appendix A**, in that it extended beyond the southern boundary of the land shown on the plan. However, following consultation with Canterbury City Council in its capacity as the local planning authority, it transpired that the southern section of the original application site had been subject of planning permission for the construction of new timber groynes and an increase in level of the beach (reference

[1] See *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin)

[2] Note that the 2008 Regulations have now been replaced by the Commons Registration (England) Regulations 2014 ("the 2014 Regulations") and the application falls to be determined under the 2014 Regulations.

[3] Note that from 1st October 2013, the period of grace was 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 applications received before that date.

CA/04/01797/WHI), thereby constituting a 'trigger event' for the purposes of Schedule 1A to the Commons Act 2006. As no corresponding 'terminating event' had taken place on the land, it was concluded that the right to apply in respect of the southernmost section of the original application site had been excluded, and the applicant was notified to that effect.

11. The application site covers an area of approximately 6.7 acres consisting of a shingle beach situated in the town of Whitstable. The application site includes the area between the sea wall and the high water mark, and extends from a groyne adjacent to the property known as 'The Ness' on the road known as 'Sea Wall' (in the north) to an area of beach to the west of the road known as 'West Beach' (just south of 'Daniels Court'). Two small areas of land are excluded from the application site, namely an area of beach to the west of the Royal Native Oyster Stores Restaurant and another area of beach around the Old Neptune Public House.

The case

12. 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.

13. In support of the application, the applicants have provided various plans showing the application site, as well as a total of 386 user evidence questionnaires[4]. The applicants also rely (as noted at part 11 of the application form) on the evidence of use of the beach that was submitted in respect of the 1999 application.

Consultations

14. Consultations have been carried out as required and no adverse comments, other than those from the landowners as set out below, have been received.

Landowners

15. The vast majority of the application site is owned by the Whitstable Oyster Fishery Company ("the landowner") and is registered with the Land Registry under title number K781262. A small section of the application site north of Terrys Lane is owned by Canterbury City Council ("the City Council") and registered with the Land Registry under title number K781174. The City Council also has a leasehold interest in a piece of the foreshore lying to the north-west of Island Wall (title number K696903).

<u>The Whitstable Oyster Fishery Company</u>

16. An objection to the current application (under cover of a letter dated 29th May 2014) has been received from the landowner's solicitor, Mr. G. Crofton-Martin of Furley Page Solicitors. The original objection was supplemented by way of a further submission from the landowner dated 4th December 2014.

[4]163 evidence questionnaires were provided with the application form on 30th September 2013, a further 216 questionnaires were provided by cover of a letter of 16th February 2014 and a further 7 were submitted by cover of letter dated 20th March 2014.

17. The landowner's grounds of objection can be summarised as follows:
    - Many parts of the application site have been physically unavailable for recreational use during at least part of the relevant 20 year period by virtue of the fact that they have been built upon, enclosed or otherwise closed off (e.g. to allow filming);
    - It is denied that any recreational use of the application site by local people has taken place 'as of right', because any use of the application site following publication of the April 1993 letter was permissive in nature;
    - The Inspector's finding of fact on the above point in respect of the 1999 application, which was accepted by KCC, gives rise to an issue estoppel point which precludes the County Council from reversing its finding on this point;
    - The locality relied upon is not a qualifying one since the 'town of Whitstable' is not an administrative district, nor an area with legally significant boundaries, and it ceased to become a local government area in 1974;
    - The fact that the landowner successfully opposed the 1999 application demonstrates that any subsequent use of the beach for recreational activities was not 'as of right';
    - Since 1999, the landowner has erected numerous signs on the application site which would have brought to that attention of users the fact that the land was private property and any recreational use was with the permission of the landowner; and
    - The Whitstable Oyster Fishery Company is created by statute and unlimited access to the beach by local people for recreational purposes would be incompatible with the statutory functions of the Company.

18. In support of the objection, the landowner has provided written opinions from Counsel as well as a number of documents, including plans showing areas of the beach that, from time to time have been inaccessible to the public (e.g. due to sea defence works), publicity surrounding the 1999 application, as well as photos and plans showing signage on the application site.

Canterbury City Council

19. A second objection to the application (by way of a statement dated 22nd May 2014) has been received from the City Council.

20. The City Council's objection is made on the basis that a previous application for the registration of Whitstable Beach as a Town or Village Green has already been refused and the applicant in the current case has not been able to demonstrate why the facts and legal framework have changed such that a different conclusion might now be reached on the matter. As such, the City Council's position is that the County Council is entitled to apply the principle of issue estoppel to the current application.

21. The City Council further adds that registration of the application site as a Town or Village Green would impede its ability to undertake coastal protection works in accordance with powers available to it under section 4 of the Coast Protection Act 1949. In this regard, the City Council relies upon the Supreme Court's recent judgement in the Newhaven[5] case.

[5] *R (Newhaven Port and Properties Ltd.) v East Sussex County Council* [2015] UKSC 7

Legal tests

22. 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 the criteria set out in section 15(3)?
    (e) Whether use has taken place over period of twenty years or more?

Discussion

23. There can be no dispute that the town of Whitstable has well-known reputation for its beachfront setting and the beach itself has been, for many years, a popular attraction for both local people and those coming from further afield. Indeed, the applicant's case is that the application site has been in regular usage by local people for a wide range of recreational activities for a period well in excess of twenty years, and such use was continuing as at the date of the application in September 2013 (thereby making the relevant twenty-year period 1993 to 2013). The large number of user evidence questionnaires submitted with the application, on the face of it, would appear to support this proposition and suggest that recreational use of the application site has taken place by a significant number of local people on a more than trivial or sporadic basis.

24. However, the land can only be registered as a Village Green if each and every one of the legal tests set out above is met. In this case, there are a number of issues, as raised by the landowner, which cast some doubt as to whether such use has been of a sufficient nature and quality so as to make the land capable of registration as a Town or Village Green under the 2006 Act. The main issues in this case (but not all of them) are set out below.

    <u>'As of right'</u>

25. One of the legal tests (as set out at paragraph 22) requires that 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*'). In this context, force refers not only to physical force, but to any use which is contentious or exercised under protest[6]: "*if, then, the inhabitants' use of the land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious*"[7].

26. As is noted above, one of the reasons for the rejection of the 1999 application was that the Inspector conducting the Public Inquiry into that application had concluded that use of the application site had not taken place 'as of right' because, in April 1993, a letter from the landowner was published in the local newspaper stating that the Whitstable Oyster Fishery Company had always "*encouraged people to use the beach*" and that "*dog-owners are welcome to use the beach*" provided they clear up

[6] *Dalton v Angus* (1881) 6 App Cas 740 (HL)
[7] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

any mess. This conclusion was reached on the basis that '*a reader of the newspaper would have realised that if he wished, he was permitted to use the beach*'.

27. The applicant's position is that the publication of the April 1993 letter pre-dated the commencement (in September 1993) of the relevant twenty-year period relied upon in the current application. Furthermore, it is said that the Inspector conducting the Public Inquiry into the 1999 application did not have the benefit of the decision of the House of Lords in the Beresford[8] case (in which it was held that permission must be communicated and revocable), and indeed a subsequent application to record a Public Footpath across the beach was successful, the Inspector in that case finding that the April 1993 letter amounted merely to toleration rather than express permission. Even if the April 1993 letter were to be considered sufficient to amount to an effective permission, it is not at all clear that it was sufficiently communicated to all of the inhabitants of the locality and, even if it was, it still falls to be determined whether the communication of that permission, prior to the commencement of the twenty year period, is sufficient to render all subsequent use permissive.

28. The landowner contends that the effect of the letter was plainly to convey a general permission to use the application site and, although the April 1993 letter was published prior to the commencement of the relevant twenty-year period, it had continuing effect following its publication, on the basis that it would be wrong to consider that the permission conveyed within the letter expired as soon as it was written.

29. There are also a number of other issues in dispute, and unresolved, with regard to whether use of the application site in this case has taken place 'as of right'. In particular, whether the landowner's objection to the 1999 application was sufficient to render any subsequent use of the application contentious (and therefore not 'as of right') and the effect of various notices that have been erected on the application site by the landowner.

Neighbourhood and/or locality

30. Another one of the legal tests set out in the 2006 Act requires that use of the application site has taken place by a significant number of the residents of a particular neighbourhood, or a neighbourhood within a locality. It is generally accepted that a locality (in this context) must be a legally recognised administrative unit[9]. 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].

31. At part 6 of the application form, the applicant originally specified the locality relied upon as being the town of Whitstable. Subsequently, the applicant sought an amendment so as to rely on four alternative localities/neighbourhoods as follows:
    - The locality of the town of Whitstable;

[8] *R v City of Sunderland ex parte Beresford* [2003] UKHL 60
[9] See *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[10] *ibid* at 92

- The locality of the ecclesiastical parish of Whitstable;
- The locality of the Canterbury City Council electoral ward of 'Harbour Ward'; and
- The neighbourhood within the boundaries of Harbour Ward within the locality of the town or ecclesiastical parish of Whitstable.

32. The landowner's position on this is that the applicant has no absolute right to unilaterally amend the application and, in this case, the proposed amendment is likely to result in unfairness to the landowner. The landowner adds that, whilst it is accepted that an ecclesiastical parish and an electoral ward are both capable of constituting a qualifying locality, the applicants have not provided any evidence to demonstrate that the ecclesiastical parish has existed with substantially the same boundaries throughout the 20 year period, or that the electoral ward relied upon comprises either a 'community of interest' or possesses the necessary degree of cohesiveness to amount to a qualifying neighbourhood.

33. The applicant's case is that, on the contrary, there is no unfairness to the landowner as the reliance on alternative localities is unlikely to involve significant additional research on the part of the landowner as the burden of proof is on the applicant to demonstrate that the test has been met. Rather, substantive prejudice would be caused to the applicant if no amendment were to be allowed and the applicant were to be restricted to a single locality (because the application could fail simply by virtue of the applicant having chosen to rely on the wrong locality).

The Newhaven case

34. The Newhaven case concerned a Village Green application made in respect of a tidal beach owned by Newhaven Port and Properties Ltd. but that had been used for recreational purposes by local residents for a period in excess of twenty years. The case was recently considered by the Supreme Court, which concluded that the land in question was not capable of registration as a Village Green on the basis that the Commons Act 2006 provisions do not enable the public to acquire by user rights that are incompatible with the continuing use of land that has been acquired for defined statutory purposes (also known as the 'statutory incompatibility' issue).

35. In this case, the landowner's position is that registration of the application site as a Village Green would give rise to a statutory incompatibility. The current Whitstable Oyster Fishery Company ("the Company") was created (following various previous incarnations dating back to the 1500s) by the Whitstable Oyster Fishery Company Act 1896 and it is submitted that the statutory objects and powers of the Company are to run the oyster fishery which it owns. In this regard, the Company wishes to increase the efficiency of its operations by investing in new infrastructure which will require the erection of small structures on part(s) of the beach. However, if Village Green status is granted for the application site, it would not be possible to do this and the registration of the land would therefore be incompatible with the statutory purposes for which the land is held by the Company.

36. The City Council has made similar representations, although its concerns relate to the Council's ability to undertake coastal protection works as part of its powers under the Coast Protection Act 1949. Those works may, from time to time, involve the occupation of substantial parts of the beach as well as the installation of new structures (e.g. groynes) and/or the large-scale movement of shingle. The works can,

in some cases, be quite radical in nature but they are essential to prevent flooding as much of the town lies below sea level. The City Council's position is that, should Village Green status be granted, this will create an obvious incompatibility because such works would inevitably be unlawful (by virtue of the Victorian statutes that protect Village Greens) and it also would give local residents who happened to disagree with the works the ability to apply for an injunction to prevent them from taking place altogether.

37. The applicant's position in this regard is that no statutory incompatibility arises; the Newhaven case was concerned with the landowner's future use of the land and not to an outside body that might wish to exercise statutory powers with regard to the land. Furthermore, whether or not the statutory regimes relied upon are incompatible is a case specific matter of statutory construction and therefore the decision in the Newhaven case is of no assistance in determining whether any statutory incompatibility arises in the current case.

Res judicata

38. Finally, there is an overarching legal question as to whether the County Council is able to consider the application at all, given that a previous application for what is predominantly the same area of land has already been considered and rejected by the County Council (albeit some thirteen years ago).

39. Under normal circumstances, the County Council would not entertain repeated applications for the same site, on the common law ground of *res judicata*. *Res judicata* means, literally, '*a matter [already] judged*' and is a legal principle that, in general terms, either prevents the re-litigation of an identical issue that has already determined by a Court or tribunal (known as 'cause of action estoppel') or prevents a litigant from raising an issue that has already been decided in a previous case between the same parties (known as 'issue estoppel').

40. The landowner's view on this matter (which is supported by the City Council) is that issue estoppel applies in this case and precludes the matter of Village Green status for the application site from being reconsidered. In this case, it was determined in the disposal of the 1999 application that the April 1993 letter resulted in use of the beach after that date not being 'as of right'; that determination was reached following full evidence and argument at a public hearing and the applicant is therefore precluded from seeking to re-open that issue for the purposes of the current application. Furthermore, none of the new evidence submitted addresses the legal effect of the April 1993 letter and there has been no statutory change in so far as the requirement for use to be 'as of right' is concerned.

41. The applicant's position is that they do not consider that the doctrine of *res judicata* applies in this case. Their position is that the current application is substantially different to the 1999 application in that it relies upon a different locality, includes evidence from a far wider range of local residents and is based upon a different twenty-year period. It is also submitted that issue estoppel applies only in proceedings which involve the same parties (which is not the case here). Furthermore, circumstances and case law have evolved considerably since the previous application, meaning that the previous reasons for rejecting the application are no longer relevant.

Counsel's advice

42. In light of the very complex factual and legal issues in this particular case, advice has been sought from Counsel as to how best to proceed with this matter. In particular, Counsel was asked to advise whether, in light of the comments made by the landowner, the application ought to be rejected without further consideration, or whether the matter ought to be referred to a Public Inquiry for further consideration. A copy of the advice received is attached for reference at **Appendix B**.

43. In summary, Counsel's advice is that, in her view, there is no clear cut basis upon which the application could properly be rejected without convening a Public Inquiry to investigate the facts and appraise the legal arguments. It is not considered that the 'knock-out blows' relied upon by the landowner would justify rejecting the application on paper consideration, nor is it considered that the issues raised in the Newhaven case afford grounds to defeat the application (on the information currently available).

44. Indeed, as set out in the advice, the issue of whether the doctrine of *res judicata* applies to Village Green applications and, if so, how, are both complex and unresolved as a matter of judicial authority, and the arguments raised by the landowner do not make it plain and obvious that issue estoppel presents a knock-out blow to the application. It would appear that a full exchange of oral submissions is required before the County Council can reach a sound conclusion on this point.

45. With regard to the opposition to the 1999 application, Counsel notes that the landowner seeks to rely on the proposition that use was both permissive (as a result of the April 1993 letter) and contentious (as a result of the opposition to the 1999 application), but it is difficult to see how the use could be both permissive and against the landowner's wishes. This issue is clearly fact-sensitive and can only be answered in the context of further examination of all relevant evidence.

46. Counsel further notes, in relation to the Newhaven case, that the issues raised by the landowner and City Council with regard to potential statutory incompatibility are legally complex and potentially fact-dependent. Submissions regarding questions of construction of the specific statutes on which the landowner and the City Council seek to rely, as well as the hearing of oral evidence, will be required to establish whether there is, as a matter of fact, an incompatibility.

47. As such, Counsel's opinion is that the matter should be referred to a Public Inquiry.

Conclusion

48. As has been noted above, there is clearly a serious dispute in this case both in terms of the factual matters and the legal issues. It does not appear, on the basis of the information currently available, that this is a matter which can (or indeed should) properly be determined purely on the basis of the written submissions; more detailed oral evidence is required on the factual issues and oral submissions on the complex legal issues would also assist in reaching a firm conclusion on how the application should be determined.

49. In cases which are particularly emotive or where the application turns on disputed issues of fact, it has become commonplace for Registration Authorities to conduct a Public Inquiry into the application; there is no legal requirement to do so, but provision

for such Inquiries is made in the 2014 Regulations. The holding of a Public Inquiry involves the County Council appointing an independent Inspector to hear the relevant evidence both in support of and in opposition to the application, and report his/her findings back to the County Council. The final decision regarding the application nonetheless remains with the County Council in its capacity as the Commons Registration Authority.

50. Such an approach has received positive approval by the Courts, most notably in the Whitmey[11] case in which Waller LJ said this: '*the registration authority has to consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration*'.

51. It is important to remember, as was famously quoted by the Judge in another High Court case[12], that '*it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green... [the relevant legal tests] must be 'properly and strictly proved'*. This means that it is of paramount importance for a Registration Authority to ensure that, before taking a decision, it has all of the relevant facts available upon which to base a sound decision. It should be recalled that the only means of appeal against the Registration Authority's decision is by way of a Judicial Review in the High Court.

52. Therefore, for the reasons given above, and having regard to the advice received from Counsel, it would appear that the most appropriate course of action in this case would be for this matter to be referred to a Public Inquiry for further consideration.

Recommendation

53. I recommend that a Public Inquiry be held into the case to clarify the issues.

Accountable Officer:
Mr. Mike Overbeke – Tel: 03000 413427 or Email: mike.overbeke@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

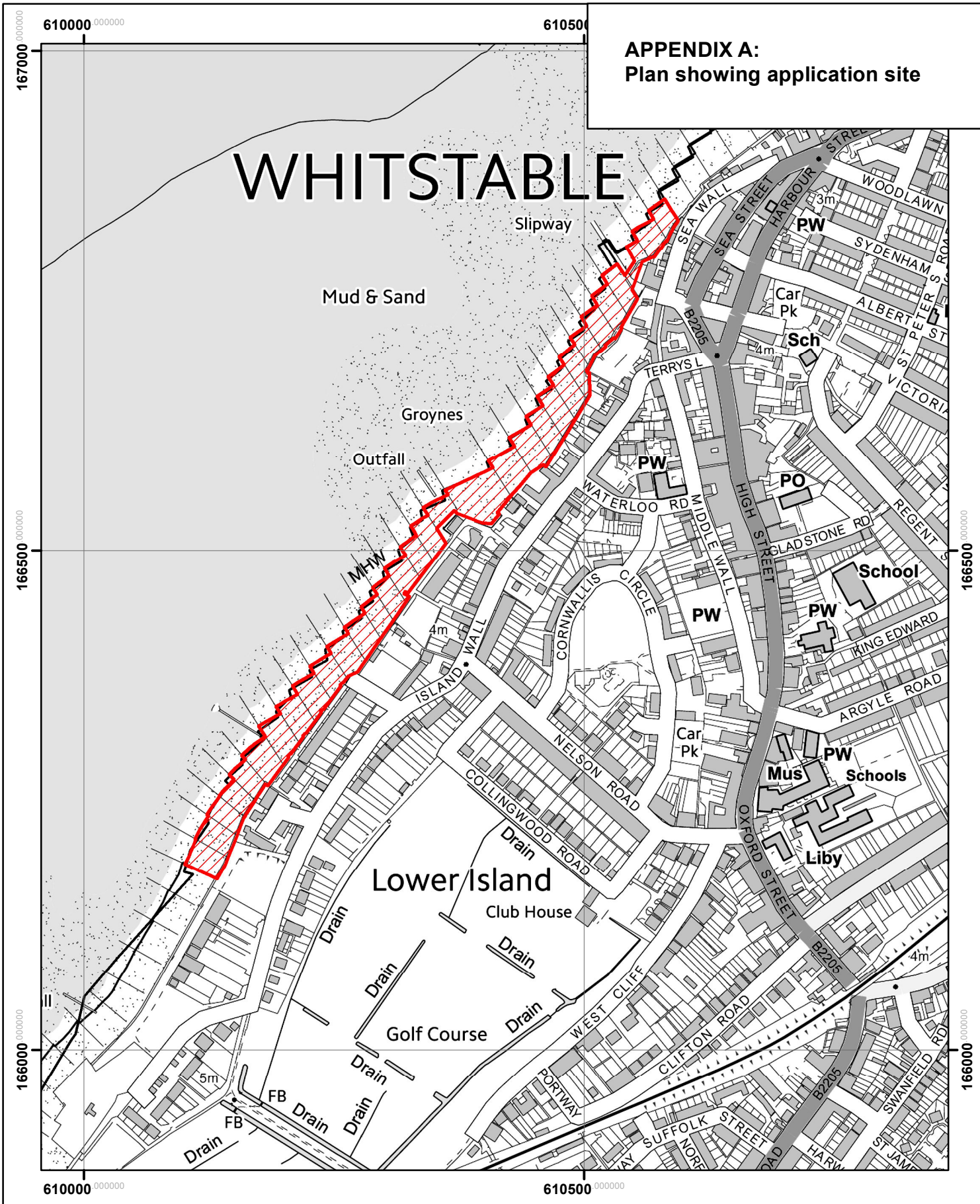
The main file is available for viewing on request at the PROW and Access Service, Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

Background documents

APPENDIX A – Plan showing the application site
APPENDIX B – Advice from Counsel dated 24th April 2015

[11] *R (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951 at paragraph 66
[12] *R v Suffolk County Council, ex parte Steed* [1997] 1EGLR 131 at 134

APPENDIX A:
Plan showing application site



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Land subject to Village Green application at Whitstable Beach in Whitstable

Kent County Council
kent.gov.uk

APPENDIX B:
Counsel's advice dated 15/04/15

IN THE MATTER OF APPLICATION NO. VGA658
FOR THE REGISTRATION AS A NEW TOWN OR VILLAGE GREEN
OF LAND KNOWN AS WHITSTABLE BEACH

ADVICE

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1. I am asked to advise Kent County Council as commons registration authority ("the Registration Authority") whether this application ought properly to be referred to a public inquiry for further consideration, or could be rejected on the papers so far submitted (subject, of course, to complying with its obligation first to offer the applicant an opportunity to make oral representations, and taking any such representations into account before coming to a final decision).

2. The short answer is that - without in any way prejudging the merits of the parties' respective cases - I do not consider there to be a clear-cut basis upon which the application could properly be rejected without convening an inquiry to investigate the facts and appraising the parties' legal arguments in the light of the evidence adduced. It is unnecessary for me to set out the history of the matter, or summarise the parties' contentions, with which Instructing Solicitor is familiar; and my reasons for reaching that conclusion can be quite shortly stated, although I will elaborate on them if and insofar as that would be of assistance to the Registration Authority.

3. The major landowner, the Whitstable Oyster Fishery Company ("the Company"), has submitted that it has two "knock-out blows" either of which would justify rejecting the application on paper consideration:

    (i) the finding on the 1999 TVG application that recreational use of the application land was not "as of right" after April 1993, as having given rise to an issue estoppel according to the doctrine of res judicata;

(ii) its successful opposition to the 1999 TVG application.[1]

Canterbury City Council has made submissions to similar effect.[2]

4. As to the first of those points, the questions whether the doctrine of res judicata applies at all to town/village green registration applications, and if so how it applies, are both complex and unresolved as a matter of judicial authority. Where applicable, it of course precludes the parties from disputing the correctness of a decision, except on appeal (cause of action estoppel), and may also prevent the parties from re-litigating in proceedings on a different cause of action "*some question of fact or law that was necessarily decided as part of* [the decision's] *legal foundation*"[3] (issue estoppel). The criteria for its applicability include requirements that the decision be "*judicial in the relevant sense*", be final and on the merits, and have been pronounced by a tribunal with jurisdiction over the parties and the subject matter.[4]

5. Assuming in the objectors' favour that the doctrine is in principle applicable, they have not addressed the implications of the difference between the parties to the 1999 and present applications. The former was made by the late Mrs Anne Wilks, on behalf of the Whitstable Society.[5] The present application was made by Mr Paul McNally, on behalf of the Whitstable Beach Campaign. According to Mr McNally's summary statement in support of the present application, that organisation was only formed in 2002 (i.e. after the disposition of the 1999 application) and "*works in partnership with other local organisations including … the Whitstable Society*" (which implies that they are two separate bodies, albeit ones that co-operate with one another).

6. A judgment binds strangers only if it is a "judgment in rem". Assuming in favour of the objectors that the relevant provisions of the Commons Registration Act 1965 and the Commons Registration (New Land) Regulations 1969 together conferred on

[1] Paragraph [33] of its Further Representations dated 4 December 2014.
[2] Paragraph 3 of its Objection Statement dated 22 May 2014 (and its Further Representations dated 16 April 2015).
[3] In the words of the leading textbook on the subject, Spencer Bower & Handley, *Res Judicata* (4th ed), paragraph 1.06.
[4] See e.g. *R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] 2 AC 146.
[5] According to paragraph 1 of Mr Petchey's Report.

commons registration authorities jurisdiction to determine whether land was or was not registrable as a new town or village green pursuant to those provisions with the intention that their adjudications upon that issue should bind the world at large, such as to operate in rem,[6] what follows? In the words of Jowitt's Dictionary of English Law, 2nd ed (1977), quoted with apparent approval by Lord Mance in *Pattni v Ali*:[7]

> "*A judgment in rem is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication.*"

So no one could now be heard to say that Whitstable Beach qualified for registration as a new town or village green under the 1965 Act and 1969 Regulations as at the date of Mrs Wilks's application.

7. However:

> "*a judgment in rem is conclusive as to the status of the person or thing but, except in prize cases, is not conclusive in rem as to the grounds of the decision*."

See Spencer Bower & Handley, *Res Judicata* (4th ed), paragraph 10.04, and the cases there cited. In the most recent of those cases, *Burden v Ainsworth*,[8] it was held that while an order of the New South Wales Licensing Court granting a poker machine dealer's licence to Mr Ainsworth's company operated in rem, the finding on which it was based that Mr Ainsworth was a fit and proper person to be interested in or associated with the holder of such a licence did not, and could be contested in defamation proceedings:

[6] See e.g. *Wakefield Cpn v Cooke* [1904] AC 31, *Pattni v Ali* [2007] 2 AC 85.
[7] Paragraph 21.
[8] [2004] NSWCA 3, (2004) 59 NSWLR 506.

"*The only relevant order the Licensing Court made on 25 June 2001 was that granting a poker machine dealer's licence to Ainsworth Game Technology [Pty Ltd]. The finding as to the fitness of the respondent that it made in the course of its judgment was not an order of the court. Only the order of the court constitutes a judgment in rem. The finding does not.*"

8. On that footing, strangers to the 1999 application would not be precluded from disputing any of the grounds on which Mr Petchey recommended rejection of that application, as adopted by the Registration Authority, including the "as of right" ground. The question of status raised on the present application is an entirely different one: did the application land qualify for registration under section 15(2) of the Commons Act 2006 as at the date of that application (30 September 2013)? The criteria for registrability have been substantially changed since 1999 and the user periods (albeit overlapping) are not the same. Accordingly, as the objectors accept, it is the principle of issue estoppel (not cause of action estoppel) on which they rely; and on the above footing, that does not affect strangers to the 1999 application.

9. Even if there is an answer to that point which I have overlooked on this preliminary consideration, there is *prima facie* another difficulty for the objectors, as follows. Mr Petchey gave three reasons for rejecting the 1999 application all of which were, as I understand it, adopted by the Registration Authority:

    (i) the application included a substantial area which had not been available for lawful sports and pastimes for the whole 20 year period, and the Registration Authority had no power to accept an application in part;[9]

    (ii) use after April 1993 was not "as of right";[10]

    (iii) use had not been predominantly by the inhabitants of Harbour Ward (as the relevant locality), as required by section 22 of the 1965 Act in its original form.[11]

[9] Report paragraphs 76, 80, 142(7).
[10] Report paragraphs 119, 142(10).

Where a court finds on alternative grounds in favour of the successful party:

> "*Those findings do not create issue estoppels because the defendant could not effectively appeal against any of them separately, and if one was upheld the appeal would fail. There is a cause of action estoppel but no issue estoppel because no single finding could be 'legally indispensable to the conclusion' or 'the essential foundation or groundwork of the judgment, decree or order' as Dixon J said in Blair v Curran.*"

See Spencer Bower & Handley, *Res Judicata* (4th ed), paragraph 8.25.

10. In short, I do not consider it to be plain and obvious that this application should be rejected on estoppel grounds. If that line of argument is to be pursued by the objectors then there will need to be a full exchange of oral submissions on the subject, with potentially copious citation of judicial authority.[12]

11. Leaving estoppel aside, the underlying question of mixed fact and law (whether Mr Green's April 1993 letter to the *Whitstable Times* did amount to an effective grant of permission) falls to be reconsidered in the light of subsequent caselaw (including the *Beresford*, *Barkas* and *Newhaven* cases)[13] and also of its factual matrix (perhaps informed, for example, by evidence as to the content of the reader's letter to which it was a reply, the circulation of the newspaper, or other contemporaneous conduct of the Company vis à vis use of the beach by local people/the public generally).

12. With regard to the second claimed "knock-out blow", that too is not an issue which I consider capable of resolution without full evidential material. The structure of section

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[11] Report paragraphs 131, 142(11).

[12] The applicant has, of course, advanced additional arguments for the non -applicability of issue estoppel in the present circumstances: see paragraph 80 of his Reply to Objections dated 29 July 2014 and paragraphs 26-27 of his Reply to the Company's Further Representations dated 17 April 2015.

[13] *R(Beresford) v Sunderland City Council* [2004] 1 AC 889; *R(Barkas) v North Yorkshire County Council* [2014] UKSC 31, [2014] 2 WLR 1360; *R(Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7; [2015] 2 WLR 601.

15(4) of the Commons Act 2006 (which is materially indistinguishable from section 15(2)) was analysed by Lord Hope DPSC[14] as follows:

> "*The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word 'lawful' indicates that they must not be such as will be likely to cause injury or damage to the owner's property: see Fitch v Fitch (1797) 2 Esp 543. And they must have been doing so 'as of right': that is to say, openly and in the manner that a person rightfully entitled would have used it. 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 (see R (Beresford) v Sunderland City Council [2004] 1 AC 889, paras 6, 77), the owner will be taken to have acquiesced in it - unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way - either because it has not been asked, or because it has been answered against the owner - that is an end of the matter. There is no third question.*"

13. Paragraph [18] of the Company's initial Representations dated 29 May 2014 does not identify which particular one of the "three vitiating circumstances" (*vi*, *clam*, and *precario*) is claimed to apply by virtue of its successful opposition to the 1999 application (nor does the City Council's Objection Statement). The invocation of the *Cheltenham Builders* case implies "*vi*" (in the sense of contentiousness).[15] However, it would appear to be the Company's case that during the currency of and/or after the 1999 application use was *precario* (including by virtue of the April 1993 *Whitstable Times* letter and/or signs erected in 2001 and/or periodic closures).[16] It is difficult to see how use could be simultaneously *precario* and *vi.* It seems to me that the question whether the Company's conduct of the 1999 application (including the way in which it presented its case at the public inquiry) had the effect of rendering user on the ground *vi, precario,* or neither can only be answered in the context of all relevant evidence

[14] In *R(Lewis) v Redcar & Cleveland Borough Council* [2010] 2 AC 70, paragraph 67.
[15] See [2004] JPL 975 at paragraphs 62-71.
[16] See Representations paragraphs [19]-[23] for the latter two categories.

relating to the period between the making and the refusal of the 1999 application, looked at in the round. Morgan J's rejection in *Betterment Properties (Weymouth) Ltd v Dorset County Council*[17] on the facts of that case of the proposition that the landowner's objection to, and registration authority's refusal of, an earlier application had rendered user on the ground contentious indicates that opposition to a previous application does not *ipso facto* doom a later application to failure; the question is fact-sensitive.[18]

14. In their respective Further Representations dated 16 April 2015, the objectors have submitted that the recent decision of the Supreme Court in the *Newhaven* case affords additional grounds to defeat the application. They do not, however, submit that any of those grounds is a "knock-out blow" such as to justify its summary rejection on paper consideration: rightly so, in my opinion, for the issues they raise - while seriously arguable - are legally complex and potentially fact-dependent.

15. In *Newhaven*, the first of the three issues considered by the Supreme Court[19] was whether use of the application site had not been "as of right" on the ground that it was part of the foreshore and the public had an implied licence to use the foreshore for recreational purposes. Lord Neuberger and Lord Hodge (with whom Lady Hale and Lord Sumption agreed) explained that the proposition that there was a rebuttable presumption that public use of the foreshore was by permission of the owner had been rejected by Ouseley J at first instance and by the majority of the Court of Appeal (Richards and McFarlane LJJ), albeit accepted by Lewison LJ.[20] They went on to discuss three possibilities: (i) that members of the public have a right to use the foreshore for recreation; (ii) that there is a rebuttable presumption of implied permission for public recreation; (iii) that members of the public using the foreshore for recreation are trespassers and their use is "as of right".[21] However, they concluded that since the appeal could be allowed on other grounds, "*this Court ought not to determine*" the question which of those three possibilities was correct in circumstances where no

[17] [2010] EWHC 3045 (Ch), paragraphs 130-140.
[18] It is fair to say that Morgan J also doubted the correctness of Sullivan J's conclusion on the point in *Cheltenham Builders* : paragraph 139.
[19] As defined in paragraph 24.
[20] Paragraph 27.
[21] Paragraphs 29-49.

party was arguing for the correctness of the first, and "*we proceed on the assumption that the majority of the Court of Appeal and Ouseley J were correct*."[22] Lord Carnwath agreed that it was unnecessary to reach a conclusion on that ground, but discussed the alternative possibilities at considerable length and said that he saw "*no difficulty in drawing the obvious inference, in the absence of evidence to the contrary, that* [public use of beaches], *if not in exercise of a public right, is at least impliedly permitted by the owners.*"[23]

16. The City Council is advocating the first possibility, i.e. a general common law right to use the foreshore. The Company advocates the second. *Prima facie*, the Registration Authority is bound to follow the majority judgments of the Court of Appeal in favour of the third possibility. However, it seems that the objectors may seek to rely on the factual distinction between *Newhaven* and this application in as much as it relates to land which is above mean high water mark and not technically part of the foreshore to justify a different conclusion. In any event, the Supreme Court's dicta fall to be taken into account in evaluating the evidence and submissions going to the Company's contention that there was implied (if not express) permission to use this particular beach (irrespective of whether there is or is not a presumption affecting beaches generally).

17. One of the two grounds on which the Supreme Court allowed the landowner's appeal in the *Newhaven* case was that section 15 of the 2006 Act does not apply to land which has been acquired by a statutory undertaker and is held for statutory purposes that are inconsistent with registration as a town or village green.[24] The Company as landowner relies directly on the decision, contending that there is incompatibility between its statutory objects and powers[25] and registration as a green. The City Council relies on the decision by analogy, contending that its scope could be extended to cover incompatibility between registration and statutory functions that might be exercised by it in its capacity as coast protection authority under the Coast Protection Act 1949 (albeit not the landowner). Apart from the preliminary legal question whether such an extension would be consistent with *Newhaven*, both objectors' arguments will involve

[22] Paragraphs 50-51.
[23] Paragraphs 105-135.
[24] Paragraph 93.
[25] As conferred by the Whitstable Oyster Fishery Company Acts of 1793 and 1896.

questions of construction of the specific statutes on which they rely and the leading of evidence to establish the potential for incompatibility in fact.

18. If Instructing Solicitor has any queries about the above or requires any further assistance, she will please let me know.

Ross Crail
12 New Square
Lincoln's Inn

24 April 2015

Application to register land at Langney Drive at Kingsnorth as a new Town or Village Green

A report by the Head of Public Protection to Kent County Council's Regulation Committee Member Panel on Tuesday 19th May 2015.

Recommendation: I recommend that the applicant be informed that the application to register land at Langney Drive at Kingsnorth has not been accepted.

Local Member: Mr. M. Angell Unrestricted item

Introduction

1. The County Council has received an application to register land at Langney Drive at Kingsnorth as a new Town or Village Green from the Kingsnorth Parish Council ("the applicant"). The application, made on 2nd December 2014, was allocated reference number VGA662. 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 ("the 2006 Act") and the Commons Registration (England) Regulations 2014 ("the 2014 Regulations").

3. Section 15 of the 2006 Act enables any person to apply to a Commons Registration Authority to register land as a Town or Village Green where it can be shown that:

   'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

4. In addition to the above, the application must meet one of the following tests:

   • **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or

   • **Use of the land 'as of right' ended no more than one year 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 2014 Regulations, the landowner of the application site must be notified as well as every local authority in the area. The County Council must also publicise the application by way of a notice on the County Council's website as well as notices on the application site itself. The publicity must state a period of at least six weeks during which objections and representations can be made.

[1] Note that from 1st October 2013, the period of grace was reduced from two years to one year (due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013).

The application site

6. The area of land subject to this application ("the application site") consists of an area land of approximately 2.1 acres (0.86 hectare) in size comprising the eastern portion of an area of woodland known as Joy Wood and an adjacent piece of grassed open space situated at Langney Drive in the parish of Kingsnorth. Access to the application site is gained by way of the footway forming part of Langney Drive (which abuts the unfenced southern boundary of the site) and a footpath which runs to the rear of properties in Collingbourne Close and Bargates Close.

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 over 20 years. The applicant notes that the application site is well used by the community and provides much needed space for children to play.

9. Included with the application form were a statement in support, plans showing the application site and neighbourhood, 14 user evidence questionnaires and a summary table of the user evidence (a copy of which is attached at **Appendix C**).

10. The applicant's case is that the application site has been well used for recreational activities by residents of Washford Farm (and the neighbouring area) since the construction of the housing estate in 1979.

Consultations

11. Consultations have been carried out as required.

12. County Member Mr. M. Angell wrote to express his support for the application.

13. One local resident also wrote in support of the application (but did not elaborate on the reasons or offer any evidence in support).

Landowner

14. The application site is wholly owned by Ashford Borough Council ("the Borough Council") and registered at the Land Registry under title numbers K334314 and K617613.

15. The Borough Council has objected to the application on the basis that the land was acquired and is held by it under powers that enable the Council to make land available for public recreation and, as such, use of the application site has been 'by right' and not 'as of right'.

Legal tests

16. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:
    (a) Whether use of the land has been 'as of right'?
    (b) Whether use of the land has been for the purposes of lawful sports and pastimes?
    (c) Whether use has been by a significant number of 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, if not, ceased no more than one year prior to the making of the application?
    (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'?

17. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the Sunningwell[2] case, it is considered that if a person uses the land for a required period of time without force, secrecy or permission ("*nec vi, nec clam, nec precario"*), and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired.

18. In this case, there is no evidence that any use of the application site has taken place in secrecy or in exercise of any force. However, the application site is owned by the local Borough Council and, in cases where land is owned by the local authority, it will be important to determine whether or not recreation use of the application site by the local inhabitants has been by virtue of any form of permission. Use which is in exercise of any permission (express or implied) will not be 'as of right'.

19. Local authorities have various powers to acquire and hold land for a number of different purposes to assist in the discharge of their statutory functions. The mere fact that a local authority owns land therefore does not automatically mean that the local inhabitants are entitled to conduct informal recreation on it. However, if a particular piece of land has been acquired and is provided by the local authority specifically for the purposes of public recreation, then use of the application site is generally considered to be by virtue of an existing (implied) permission and, hence, is not 'as of right'.

20. The issue was recently considered by the Supreme Court in Barkas[3] case, which concerned a playing field that had been acquired by the local authority specifically for the purpose of public recreation. In that case, Lord Neuberger, delivering the leading judgement, concluded that, in cases where land was held by a local authority specifically for the purposes of public recreation[4],:

    "…it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore use the land 'by right'

[2] *R v. Oxfordshire County Council and another, Sunningwell Parish Council [1999] 3 All ER 385*
[3] *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31
[4] At paragraphs 21 and 24 of the judgement

and not as trespassers, so that no question of user 'as of right' can arise. In Sunningwell at pp 352H-353A, Lord Hoffman indicated that whether user was 'as of right' should be judged by "how the matter would have appeared to the owner of the land", a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the field was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.

…

I agree with Lord Carnwarth that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land 'as of right' simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different to that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights".

21. In this case, the Borough Council contends that part of the application site was acquired by one of the Council's predecessors (the West Ashford Rural District Council) in October 1969 under the Physical Training and Recreation Act 1937. Section 4 of that Act provided that a local authority may acquire, lay out and maintain lands for various purposes, including for playing fields. This provision was subsequently repealed and replaced by section 19 of the Local Government (Miscellaneous Provisions) Act 1976, which provides that a local authority may provide 'such recreational facilities as it thinks fit'.

22. The remaining section of the application site was acquired (along with other land nearby) in 1986 by transfer from the development company responsible for building the Washford Farm estate and is described in the transfer as 'donated open spaces at Washford Farm Estate, Ashford'. The Borough Council contends that this section is held under the Open Spaces Act 1906, section 9 of which gives power to a local authority to acquire and maintain land as open space.

23. As such, the Borough Council's position is that any recreational use of the application site has taken place 'by right' and not 'as of right'. In support of this position, the Borough Council has provided a copy of the Land Registry title referring to one part of the land and the transfer document relating to the other section. These are appended at **Appendix D**.

24. Having considered the Borough Council's submissions, the Parish Council now accepts that use of the application site has not taken place 'as of right', and this test is therefore not met (see letter at **Appendix E**)

(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. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. The Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[5].

26. The summary of evidence of use by local residents at **Appendix C** shows the range of activities claimed to have taken place on the application site, which include dog walking, playing with children and jogging. Many of these activities have taken place on a regular basis.

27. Accordingly, there is evidence that the application site has been used for the purposes of lawful sports and pastimes (which is entirely consistent with its provision by the Borough Council as a public open space).

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

28. 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.

29. 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[6] 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*'.

30. In this case, the applicant has specified the relevant locality (at part 6 of the application form) as being the Washford Farm Ward of Kingsnorth Parish Council. This being a legally recognised administrative unit, it would be capable of constituting a qualifying locality for the purposes of Village Green registration.

[5] *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in R *v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385
[6] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

"a significant number"

31. 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*'[7]. Thus, it is not a case of simply proving that 51% of the local population has used the application site; 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.

32. It is to be noted that all but one of the users live in the same residential close, comprising a total of 38 properties and making up only a very small geographical area of the Washford Farm Ward as a whole. Whilst there is no requirement for users to be spread evenly across the whole of the locality relied upon by the applicant, it is unlikely (at the other end of the scale) that use from the residents of a single street (comprising only a very small part of the locality) will be sufficient to demonstrate that use of the application site has taken place by the community as a whole.

33. As such, it is unlikely that this test has been met (although it light of the conclusions in regard to the 'as of right' test, it is unnecessary to reach a definitive conclusion on this point).

(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 one year prior to the making of the application?

34. 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 one year from the date upon which use 'as of right' ceased.

35. In this case, the application is made under section 15(2) of the 2006 Act and there is no evidence that actual use of the application site for recreational purposes ceased prior to the making of the application. As such, this test is met.

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

36. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. In this case, use 'as of right' did not cease prior to the making of the application in 2014. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 1994 to 2014.

37. In this case, the user evidence summarised at **Appendix C** shows that the majority of the users have used the application site for the full period of twenty years. Therefore, this test appears to have been met.

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

Conclusion

38. This case turns primarily on the issue of whether use of the application site has taken place 'as of right'. As has been demonstrated by the Borough Council (as landowner), and accepted by the applicant, use of the application site has been by virtue of the fact that it has been provided specifically for the purposes of public recreation by the landowning local authority. The law is clear that, under such circumstances, a Village Green application cannot succeed.

39. Accordingly, for the reasons set out in this report and from close consideration of the evidence submitted, it would therefore appear that the legal tests concerning the registration of the land as a Village Green (as set out above) have not been met.

Recommendation

40. I recommend that the applicant be informed that the application to register land at Langney Drive at Kingsnorth has not been accepted.

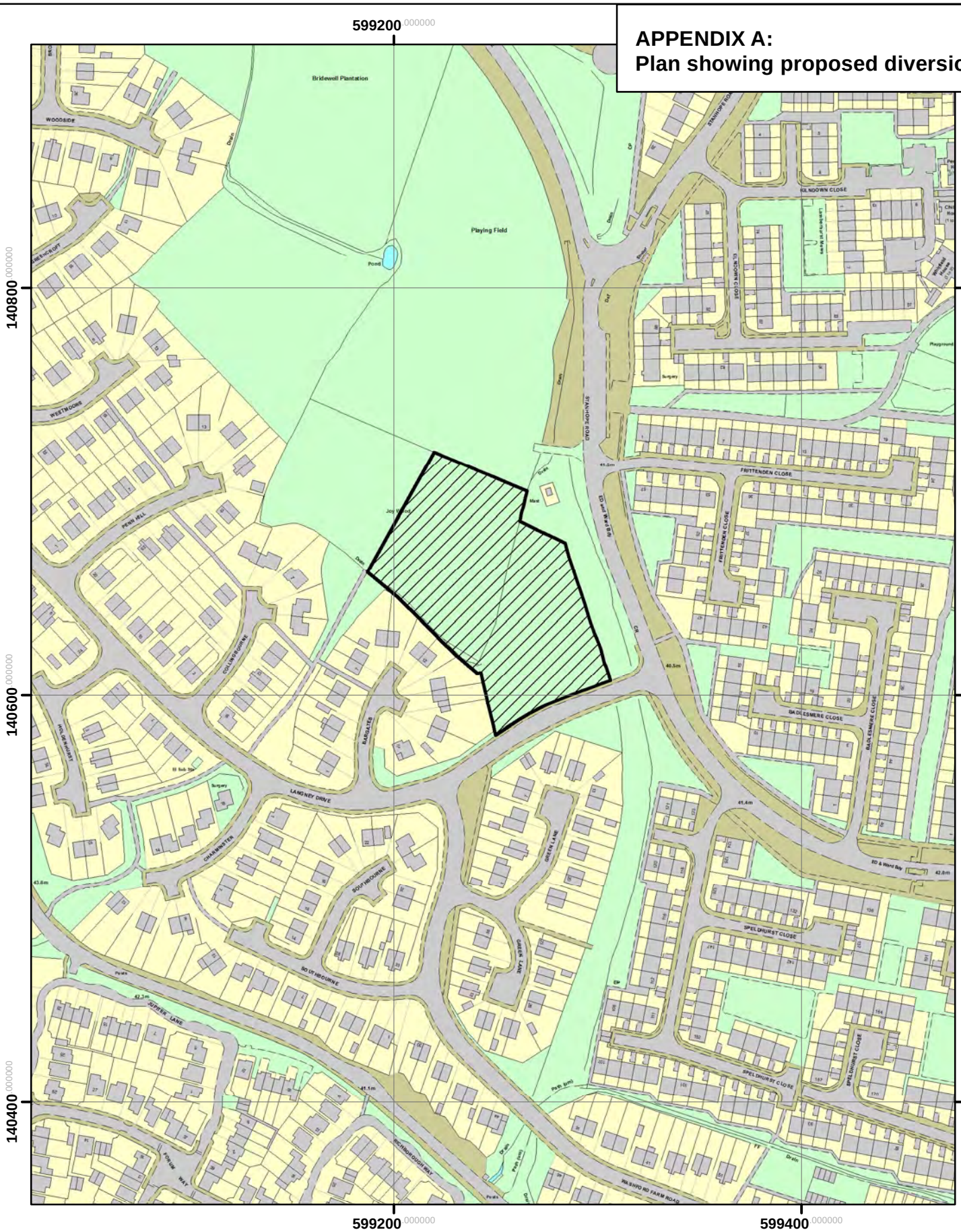
Accountable Officer:
Mr. Mike Overbeke – Tel: 03000 413427 or Email: mike.overbeke@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

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 land subject to application
APPENDIX B – Copy of application form
APPENDIX C – Table summarising user evidence
APPENDIX D – Copies of the Land Registry title and transfer document
APPENDIX E – Letter from the applicant dated 15/04/15

APPENDIX A:
Plan showing proposed diversion



Land subject to Village Green application at Washford Farm, Kingsnorth

Scale 1:2500

APPENDIX B:
Copy of the application form

FORM CA9

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:

VGA662

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

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: KINGSNORTH PARISH COUNCIL Full postal address: (incl. Postcode) PARISH OFFICE KINGSNORTH RECREATION CENTRE FIELD VIEW ASHFORD KENT TN23 3NZ Telephone number: (incl. national dialling code) 01233 502969 Fax number: (incl. national dialling code) E-mail address: KINGSNORTH-CLERK@BTCONNECT.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: ☐

	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: JOYS WOOD Location: LONGNEY DRIVE WORSHFORD FARM KINGSNORTH ASHFORD 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): ☑
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: WORSHFORD FARM WARD KINGSNORTH PARISH 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** THERE IS A LACK OF OPEN SPACE THAT THE RESIDENTS OF WASHFORD FARM HAVE FOR COMMUNITY USE. THIS AREA OF OPEN SPACE IS LOCAL USED BY THE COMMUNITY AND PROVIDES MUCH NEEDED SPACE FOR CHILDREN TO PLAY
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** ASHFORD BOROUGH COUNCIL CIVIC CENTRE TANNERY LANE ASHFORD KENT TN23 1PL

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** N/A
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** ① STATEMENT IN SUPPORT OF APPLICATION TO REGISTER THIS LAND AS A VILLAGE GREEN ② MAP TO SCALE OF 1:2500 SHOWING AREA OF LAND OUTLINED IN RED ③ MAP TO SCALE OF 1:10000 WITH BOUNDARY OF WORSHFORD FARM WARD WITHIN KINGSNORTH PARISH COUNCIL WITH AREA OF LAND HATCHED IN RED ④ SUMMARY OF RESULTS FROM 'EVIDENCE OF USE' SURVEYS CARRIED OUT ⑤ 'EVIDENCE OF USE' SURVEYS WITH MAPS ATTACHED COMPLETED BY RESIDENTS ⑥ THREE PICTURES TAKEN FROM GOOGLE SHOWING VARIOUS VIEWS OF THE LAND WHICH IS THE SUBJECT OF THIS APPLICATION.
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**

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):

[redacted]

25/11/2014

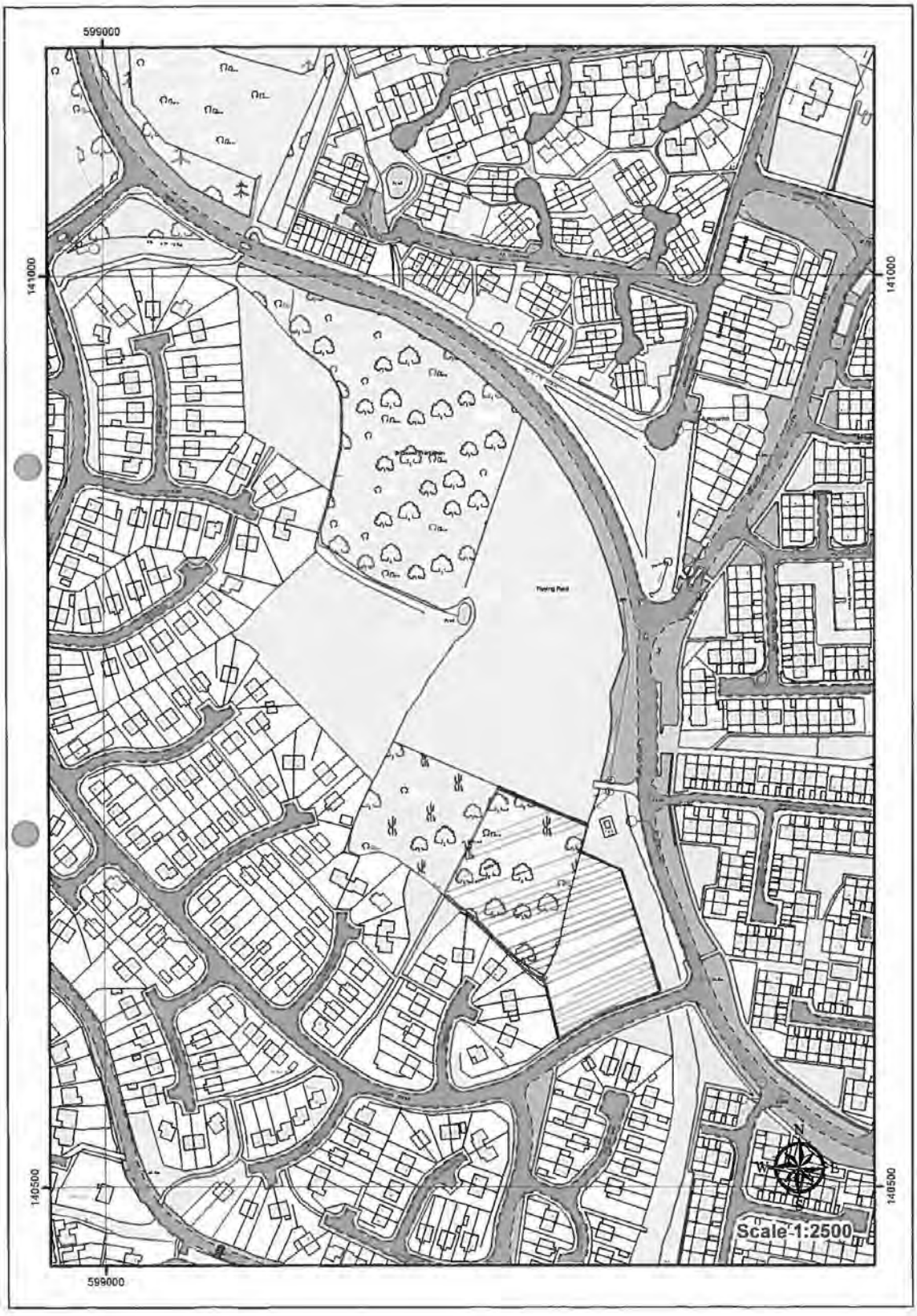
REMINDER TO APPLICANT
You are responsible for telling the truth in presenting the application and accompanying evidence. You may commit a criminal offence if you deliberately provide misleading or untrue evidence and if you do so you may be prosecuted. You are advised to keep a copy of the application 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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(3)

This statement is submitted in support of the application to register a small area of land on Washford Farm, Kingsnorth, Ashford, Kent as a Village Green.

This area of land is situated at the bottom of Langney Drive at the junction with Stanhope Road. We enclose maps and photographs of the area to illustrate its exact location. This area of green space is fronted by Langney Drive and has a PROW to one side. To the rear is an area known as Joys Wood. The rear gardens of properties in Bargates form the other boundary. The area is approximately 200 metres at its maximum length with a maximum depth of 150 metres. As it is an irregular shape it is difficult to measure in order to determine the exact size. Within this application we would also seek to include the area known as Joys Wood as we believe that this was left by Tilbury, the developer of the estate, for the enjoyment of the residents. It is currently not formally maintained and therefore cannot be used to its full potential by the residents as we would wish.

This area of open space has been used by residents of Washford Farm and the neighbouring area since 1979 for lawful pastimes, sport and other social activities. When Washford Farm was first built in 1979 this area of land was fenced and horses were grazed on it but soon after this the horses were moved and the fencing removed. The area has remained an open space that people have used 'as of right' ever since.

While there are no amenities such as a children's play park the area is still well used. Dog walkers can regularly be seen here and they can also access Joys Wood and the areas beyond to exercise their pets. Children and families use the area to play football and other games. There is access through Joys Wood to the playing field at Knoll Lane for more organised sports so it provides a safe access to this facility without the necessity to cross Stanhope Road twice from Washford Farm to get to the more formal playing field.

This application is being made with a view to protecting this area of land for use by the current and future residents of Washford Farm and the surrounding neighbourhood. While there are other open spaces in this area for people to use we feel that safe access to these, especially for children, is a barrier to their use by this community.

We believe that with this application and the attached Statements of Use from residents regarding use of the land we have met the relevant criteria

to apply to have this land registered as a Village Green.

APPENDIX C:
Summary of user evidence

Name	Address	Period of Use	Activities	How Often Used	Challenges To Use /Other Comments
Karina Wood	[redacted]	25 years	Walking	Daily	No challenges noted. Other people seen walking dogs and children playing.
Joanne Brown		19 years	Dog walking and playing with children	Weekly	Land use curtailed when travellers access nearby playing field. Other people seen using the land daily.
Mrs E. Gillespie		35 years	Dog walking and ball games with children	Daily but now occasionally	People seen walking dogs and noticed others playing ball games. Problem with travellers also noted.
Mrs K. Conley		19 years	Dog walking and now for exercise or playing with grandchildren	Daily but now weekly	People seen walking dogs and children playing. Also family picnics.
Mr P. Randall		3 years	Dog walking and taking child out on bike	Monthly	People walking dogs and children playing.
Mr & Mrs Luery		35 years	Playing with children and grandchild	Weekly but now occasionally	Used for dog walking, children playing, family picnics and fireworks.
Joe Annandale		24 years	Walking and jogging	Weekly	Temporary polling station put on land. Dog walking. Horses grazed on area in the 1980's.
Mrs Crudgington		25 years	Walking for leisure	Weekly but now occasionally	Daily use by people walking dogs. Children playing ball games.
Mr & Mrs Appleton		33 years	Dog walking	Daily	Dog walking, people playing football and picnics all noticed. Traveller incursion also noted.
William Marshall		30 years	Walking for leisure	Weekly	People seen walking dogs and children

					playing.
Mrs Ruth Towler	[redacted]	7 1/2 years	Walking	Occasionally	Dog walking on a daily basis and people letting off fireworks.
Mr & Mrs Harris		12 years	Walking	Occasionally	Children playing football. Problem with travellers also noted.
Margaret Harrison		27 years	Dog walking	Occasionally	Daily use by people walking dogs, children playing and informal games of football
Tim McNaught		26 years	Football, rounders, children's games, picnics and walking	Monthly	Children playing football and rounders. Resident has concerns over any possibility of future development on land if Village Green not granted.

APPENDIX D:
Copies of the Land Registry title and transfer document

OFFICE COPY

ISSUED BY THE TUNBRIDGE WELLS DISTRICT LAND REGISTRY

H.M. LAND REGISTRY

Edition 1 opened 11.11.1969

TITLE NUMBER K334314

This register consists of 2 pages

A. PROPERTY REGISTER

containing the description of the registered land and the estate comprised in the Title

ADMINISTRATIVE AREA (County, County Borough, etc.): KENT

PARISH OR PLACE: GREAT CHART WITH SINGEHURST

The Freehold land shown and edged with red on the plan of the above Title filed at the Registry registered on 4 November 1969 being land at Bridewell Plantation.

B. PROPRIETORSHIP REGISTER

stating nature of the Title, name, address and description of the proprietor of the land and any entries affecting the right of disposal thereof

TITLE ABSOLUTE

Entry number	Proprietor, etc.	Remarks
1.	WEST ASHFORD RURAL DISTRICT COUNCIL of 2 Elwick Road, Ashford, Kent registered on 11 November 1969. NOTE:-The transfer to the proprietor contains a purchasers' personal covenant. (Copy of covenant in Land Certificate).	Price paid £240
2.	RESTRICTION registered on 11 November 1969:-Except under an order of the registrar no disposition by the proprietor of the land is to be registered unless made in accordance with the Physical Training and Recreation Act 1937 or some other Act or authority.	
3.	Proprietor now known as Ashford Borough Council and its address is Civic Centre, Tannery Lane, Ashford, Kent TN23 1PL.	19.9.1986

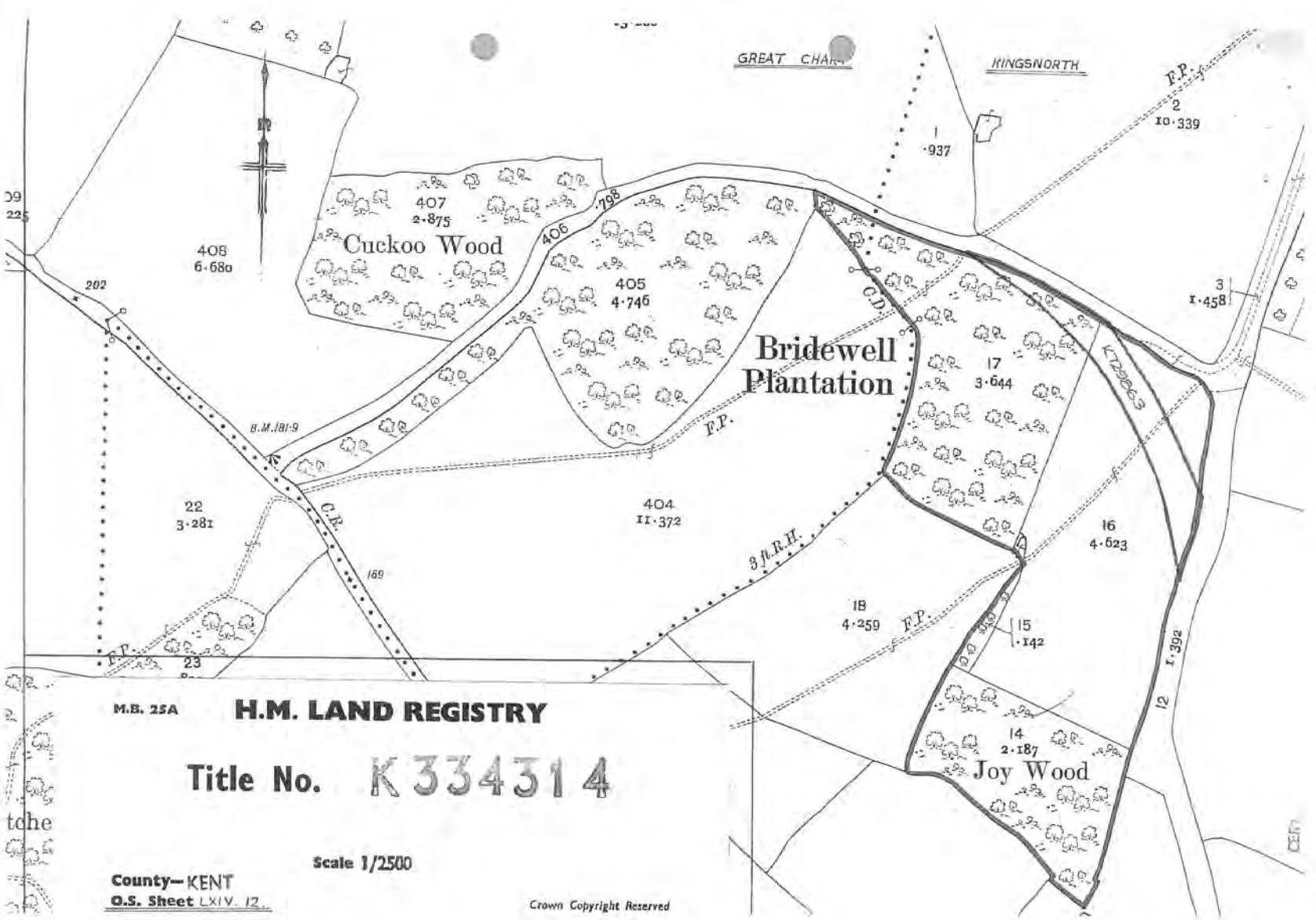
Any entries struck through in red are no longer subsisting

Margin — Binding — TITLE NUMBER

Register Model III

ISSUED BY THE TUNBRIDGE WELLS DISTRICT LAND REGISTRY SHOWING THE SUBSISTING ENTRIES ON THE REGISTER ON 7 April 1992

UNDER S.113 OF THE 1925 ACT THIS COPY IS ADMISSIBLE IN EVIDENCE TO THE SAME EXTENT AS THE ORIGINAL


GREAT CHART
KINGSNORTH
F.P.
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1
·937
407
2·875
Cuckoo Wood
408
6·680
406
·798
405
4·746
Bridewell
Plantation
17
3·644
3
1·458
C.D.
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202
B.M.181·9
F.P.
22
3·281
404
11·372
C.R.
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4·623
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4·259
F.P.
15
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1·392
12
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F.P.
14
2·187
Joy Wood
M.B. 25A
H.M. LAND REGISTRY
Title No. K 334314
Scale 1/2500
County—KENT
O.S. Sheet LXIV. 12.
Crown Copyright Reserved

I hereby certify this to be a true copy of the original

Chief Executive & Secretary
Ashford Borough Council

Form 20
(Freehold or Leasehold)

H.M. Land Registry Land Registration Acts, 1925 to 1971

Stamp pursuant to section 28 of the Finance Act, 1931, to be impressed here.	*When the transfer attracts Inland Revenue duty, the stamps should be impressed here before lodging the transfer for registration.*

TRANSFER OF PART
NOT IMPOSING FRESH RESTRICTIVE COVENANTS*
(Rule 98 or 115, Land Registration Rules, 1925)

*Use form 43 when fresh restrictive covenants are imposed.

The Title number allotted to the land transferred will on registration be officially entered opposite:	

Oyez Publishing Limited, Oyez House, 237 Long Lane, London SE1 4PU, a subsidiary of The Solicitors' Law Stationery Society, Limited.

January, 1974

County, County borough or London borough: KENT - KINGSNORTH

Title number: K378254 and K316407

Property: land at Great Chart and Kingsnorth and on the north side of the road leading from Great Chart to Kingsnorth

Date: Fourth November 19 86

In consideration of one peppercorn

~~pounds~~ ~~xxxx~~)

(1) Strike out if not required. (1) *the receipt whereof is hereby acknowledged*

(2) Insert in BLOCK LETTERS, full name, postal address and description of the proprietor of the land. (2) Tilbury Homes Limited of Tilbury House Rusper Road Horsham West Sussex RH12 4BB

(3) If desired or otherwise as the case may be (see rules 76 and 77). (3) *as beneficial owner* hereby transfers to:

(4) Insert in BLOCK LETTERS, full name, postal address and description of the transferee for entry on the register.

(4) ASHFORD BOROUGH COUNCIL
CIVIC CENTRE
TANNERY LANE
ASHFORD
KENT

(5) For notes as to plan see page 4. the land shown and edged with red on the (5) plan bound up within and known as donated open spaces at Washford Farm Estate, Ashford being part of the land comprised in the title above mentioned

OVER

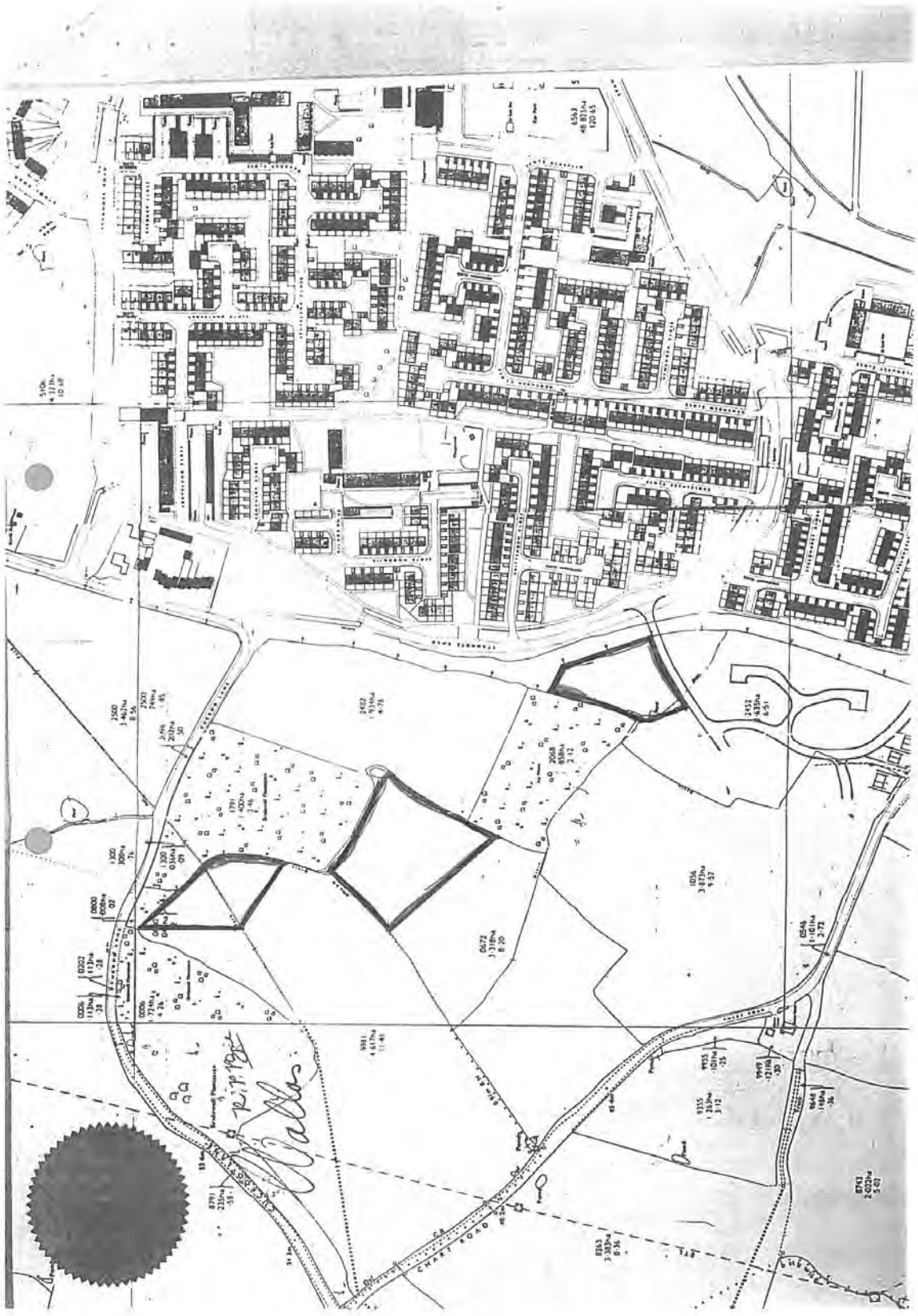
CHART ROAD

If space is not sufficient, additional sheets may be used, provided they are securely sewn hereto; the execution and attestation should in that case be added at the end.

(1) If a certificate of value for the purposes of the Stamp Act, 1891, and amending Acts is not required, this paragraph should be deleted.

(1) *It is hereby certified that the transaction hereby effected does not form part of a larger transaction or series of transactions in respect of which the amount or value or aggregate amount or value of the consideration exceeds £* 30 000

(2) For use when the transferor is a company or corporation.

(2) *The common seal of* TILBURY HOMES LIMITED

was hereunto affixed in the presence of

(3) Or other officer authorised by the articles of association, charter, etc. (See Note).

K P Payne (3) ~~Director~~ Authorised Signatory

(3) ~~Secretary~~ Authorised Signatory

(4) For use by transferor(s) other than a company or corporation.

(4) Signed, sealed and delivered by the said ..... Seal

in the presence of

Name .....

Address .....

Description or occupation .....

(4) Signed, sealed and delivered by the said ..... Seal

in the presence of

Name .....

Address .....

Description or occupation .....

Note: In the case of a company or corporation, unless the transfer has been executed in accordance with section 74 (1) of the Law of Property Act, 1925, it should be accompanied by a certificate signed by the secretary or solicitor of the company or corporation that the transfer has been duly executed in accordance with the company's articles of association or the corporation's statute, charter, etc.

3

[OVER

APPENDIX E:
Letter from applicant dated 15/04/15

Kingsnorth Parish Council

Kingsnorth Recreation Centre
Field View, Ashford, Kent, TN23 3NZ
Tel: 01233 502969
Email. Kingsnorth.clerk@btconnect.com

Ms Melanie McNeir,
Public Rights of Way and Commons Registration Officer
Public Rights of Way and Access Service
Kent County Council
Invicta House
County Hall ,Maidstone
Kent ME14 1XX

Your ref PROW/MM/VGA62
15th April 2015

Dear Ms McNeir,

Commons Act 2006- section 15
Application to register land at Washford Farm, Kingsnorth as a Village Green.

In response to your letter of 20th March 2015 regarding the above application, Kingsnorth Parish Council have further investigated the ownership of the land involved and whether the local residents have for the past twenty years been using the land “by right” or “as of right”.

Ashford Borough Council holds the land under statutory trusts for use as open public space under the Local Government (Miscellaneous Provisions) Act 1976 and local residents therefore use the open space of which it forms part, “by right” and not “as of right”.

In view of the above we therefore wish to withdraw our application to register the land in Joys Wood and Langney Green as a village green.

Yours Sincerely

Len Bunn
Parish Clerk
Kingsnorth Parish Council
Kingsnorth Recreation Centre
Field View
Kingsnorth
Ashford
Kent TN23 3NZ
Tel: 01233 502969
Email: kingsnorth.clerk@btconnect.com
Web: www.kingsnorthparishcouncil.co.uk

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Application to register land known as Marlowe Road Green at Larkfield 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 19th May 2015.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land known as Marlowe Road Green at Larkfield has been accepted, and that the land subject to the application be formally registered as a Town or Village Green.

Local Member: Mrs. T. Dean Unrestricted item

Introduction

1. The County Council has received an application to register a piece of land known as Marlow Road Green at Larkfield as a new Town or Village Green from the East Malling and Larkfield Parish Council ("the applicant"). The application, made on 16th February 2015, was allocated the application number VGA664. 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. Traditionally, Town and Village Greens have derived from customary law and until recently it was only possible to register land as a new Town or Village Green where certain qualifying criteria were met: i.e. where it could be shown that the land in question had been used 'as of right' for recreational purposes by the local residents for a period of at least 20 years.

3. However, a new provision has been introduced by the Commons Act 2006 which enables the owner of any land to apply to voluntarily register the land as a new Village Green without having to meet the qualifying criteria. Section 15 states:

   "(8) The owner of any land may apply to the Commons Registration Authority to register the land as a town or village green.

   (9) An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land."

4. Land which is voluntarily registered as a Town or Village Green under section 15(8) of the Commons Act 2006 enjoys the same level of statutory protection as that of all other registered greens and local people will have a guaranteed right to use the land for informal recreational purposes in perpetuity. This means that once the land is registered it cannot be removed from the formal Register of Town or Village Greens (other than by statutory process) and must be kept free of development or other encroachments.

5. In determining the application, the County Council must consider very carefully the relevant legal tests. In the present case, it must be satisfied that the applicant is the owner of the land and that any necessary consents have been obtained (e.g. from a tenant or the owner of a relevant charge). Provided that these tests are met, then the County Council is under a duty to grant the application and register the land as a Town or Village Green.

The Case

Description of the land

6. The area of land subject to this application ("the application site") consists of an area of land of land approximately 0.95 acres (0.38 hectares) in size, known locally as Marlowe Road Green, that is situated to the rear of properties in Marlowe Road, Betjeman Close and Masefield Road in the parish of East Malling and Larkfield.

7. A plan of the application site is attached at **Appendix A**.

Notice of Application

8. As required by the regulations, Notice of the application was published on the County Council's website. The local County Member was also informed of the application.

9. No responses to the consultation have been received.

Ownership of the land

10. A Land Registry search has been undertaken which confirms that the application site is wholly owned by the applicant under title number TT27609. A copy of the Register of Title is attached at **Appendix C**.

11. There are no other interested parties (e.g. leaseholders or owners of relevant charges) named on the Register of Title.

The 'locality'

12. DEFRA's view is that once land is registered as a Town or Village Green, only the residents of the locality have the legal right to use the land for the purposes of lawful sports and pastimes. It is therefore necessary to identify the locality in which the users of the land reside.

13. A locality for these purposes normally consists of a recognised administrative area (e.g. civil parish or electoral ward) or a cohesive entity (such as a village or housing estate).

14. In this case, the application has been made by the local Parish Council. As noted above, a civil parish is a qualifying locality for the purposes of Village Green

registration and, as such, it seems appropriate that the relevant locality in this case should be the civil parish of East Malling and Larkfield.

Conclusion

15. As stated at paragraph 3 above, the relevant criteria for the voluntary registration of land as a new Town or Village Green under section 15(8) of the Commons Act 2006 requires only that the County Council is satisfied that the land is owned by the applicant. There is no need for the applicant to demonstrate use of the land 'as of right' for the purposes of lawful sports and pastimes over a particular period.

16. It can be concluded that all the necessary criteria concerning the voluntary registration of the land as a Village Green have been met.

Recommendations

17. I recommend that the County Council informs the applicant that the application to register the application to register the land known as Marlowe Road Green at Larkfield has been accepted, and that the land subject to the application be formally registered as a Town or Village Green.

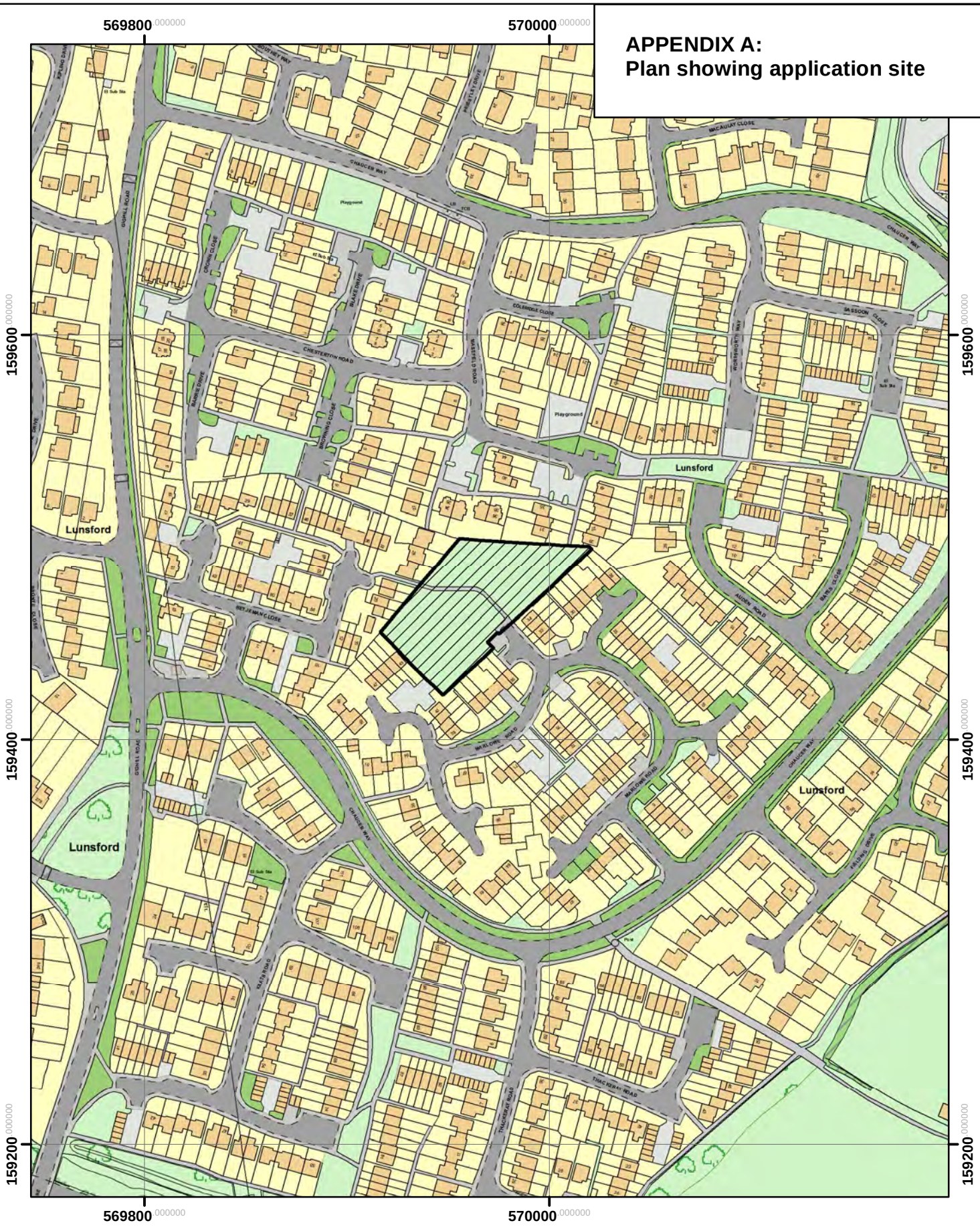
Accountable Officer:
Mr. Mike Overbeke – Tel: 03000 413427 or Email: mike.overbeke@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the PROW and Access Service based at 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 – Copy of the Register of Title from Land Registry

APPENDIX A:
Plan showing application site



N
W E
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Scale 1:2500

Land subject to Village Green application known as Marlowe Road Green in the parish of East Malling and Larkfield

Kent County Council
kent.gov.uk

FORM CA9

Commons Act 2006: section 15

Application for the registration of a town or village green

This section is for office use only

Official stamp

COMMONS ACT 2006
KENT COUNTY COUNCIL
REGISTRATION AUTHORITY
16 FEB 2015

Application number

VGA664

VG number allocated at registration

Applicants are advised to read 'Part 1 of the Commons Act 2006: Guidance to applicants' and to note:

- All applicants should complete boxes 1–6 and 10–12.
- Applicants applying for registration under section 15(1) of the Commons Act 2006 should, in addition, complete boxes 7 and 8. Any person can apply to register land as a green where the criteria for registration in section 15(2) or 15(3) apply; (NB 15(4) is obsolete).
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete box 9. Only the owner of the land can apply under section 15(8).
- There is no application fee.

Note 1
Insert name of commons registration authority.

1. Commons Registration Authority

To the:

Kent County Council
(Commons Registration Team)

Tick the box to confirm that you have enclosed the appropriate fee for this application: ☐

Note 2
If there is more than one applicant, list all their names and addresses in full. Use a separate sheet if necessary. State the full title of the organisation if the applicant is a body corporate or an unincorporated association. 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 box 3 is not completed all correspondence and notices will be sent to the first named applicant.

2. Name and address of the applicant

Name: EAST MALLING & LARKFIELD PARISH COUNCIL

Postal address:

PARISH OFFICE
CHURCH FARM
198, NEW HYTHE LANE, LARKFIELD
AYLESFORD

Postcode ME20 6ST

Telephone number: 01732 844546

Fax number: 01732 ~~847858~~ 875857

E-mail address: office@emandplc.co.uk

Note 3
This box 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, the representative may receive communications from the registration authority or other persons (e.g. objectors) via email.

3. Name and address of representative, if any

Name: N/A.

Firm:

Postal address:

Postcode

Telephone number:

Fax number:

E-mail address:

Note 4
For further details of the requirements of an application refer to Schedule 4, paragraph 9 or 10 to the Commons Registration (England) Regulations 2014. Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.

4. Basis of application for registration and qualifying criteria

If you are the landowner and are seeking voluntarily to register your land tick the following box and move to box 5: ☑

If the application is made under section 15(1) of the Act, 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: ☐

If section 15(3) applies indicate the date on which you consider that use as of right ended:

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 box is to identify the new green. The accompanying Ordnance map must be at a scale of at least 1:2,500, or 1:10,560 if the land is wholly or predominantly moorland, and show the land by means of distinctive colouring within an accurately identified boundary. State the Land Registry title number where if known.

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

Name by which the land usually known:

MARLOWE ROAD GREEN.

Location:

MARLOWE ROAD, LARKFIELD, AYESFORD

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

—

Tick the box to confirm that you have attached an Ordnance map of the land: ☑

Note 6
It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village). If this is not possible an Ordnance map should be provided on which a locality or neighbourhood is marked clearly at a scale of 1:10,560.

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

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

East Malling & Larkfield parish.

Tick here if a map is attached: ☐

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

Landowner application - see Title No TT 27609.

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

N/A.

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 (e.g. 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

1. Copy Land Registry entries
2. Copy Map (land edged red)

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

None

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 an unincorporated association.

12. Signature

Date: 11th February 2015.

Signatures: K Seeman.

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.

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 or the Freedom of Information Act 2000.

Land Registry

Official copy of register of title

Title number TT27609 Edition date 18.08.2014

- This official copy shows the entries in the register of title on 8 January 2015 at 15:57:39.
- This date must be quoted as the "search from date" in any official search application based on this copy.
- The date at the beginning of an entry is the date on which the entry was made in the register.
- Issued on 8 January 2015.
- Under s.67 of the Land Registration Act 2002, this copy is admissible in evidence to the same extent as the original.
- For information about the register of title see Land Registry website www.landregistry.gov.uk or Land Registry Public Guide *1 - A guide to the information we keep and how you can obtain it.*
- This title is dealt with by Land Registry Nottingham Office.

A: Property register

This register describes the land and estate comprised in the title.

KENT : TONBRIDGE AND MALLING

1 The Freehold land shown edged with red on the plan of the above title filed at the Registry and being Public Open Space Marlowe Road, Larkfield, Aylesford.

2 The Transfer dated 15 May 1975 referred to in the Charges Register contains the following provision:-

"IT IS HEREBY AGREED AND DECLARED that the Transferees shall not by implication prescription or otherwise become entitled to any right of light or air which would restrict or interfere with the free use of the Estate by the Transferors for building or for other purposes"

3 (18.08.2014) The Transfer dated 13 August 2014 referred to in the Charges Register contains a provision relating to the passing and creation of easements as therein mentioned.

B: Proprietorship register

This register specifies the class of title and identifies the owner. It contains any entries that affect the right of disposal.

Title absolute

1 (18.08.2014) PROPRIETOR: EAST MALLING & LARKFIELD PARISH COUNCIL of Council Offices, Larkfield Village Hall, New Hythe Lane, Larkfield, Aylesford ME20 6PU.

2 (18.08.2014) The value stated as at 18 August 2014 was £200,000.

B: Proprietorship register continued

3 (18.08.2014) RESTRICTION: No transfer or lease of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction is to be registered without a certificate signed by a conveyancer that the provisions of clause 12.3c of the Transfer dated 13 August 2014 referred to in the Charges Register have been complied with or that they do not apply to this disposition.

4 (18.08.2014) The Transfer to the proprietor contains a covenant to comply with the covenants referred to in the Charges Register and of indemnity in respect thereof.

C: Charges register

This register contains any charges and other matters that affect the land.

1 The is subject to rights of support and rights of entry for the purpose of inspecting cleaning maintaining repairing and renewing the window and external walls of dwellinghouses or garages which abut the boundaries of the land in this title.

2 The land is subject to rights to use the drains, sewers and other conduits therein or thereunder and ancillary rights of entry.

3 The footpaths included in the title are subject to rights of way.

4 A Wayleave Consent dated 10 June 1958 made between (1) William James Thomson (Grantor) and (2) South Eastern Electricity Board (Board) contains the following agreement:-

HEREBY CONSENT AND AGREE to the placing laying erecting and also to the maintaining repairing and replacing by the South Eastern Electricity Board (hereinafter called "the Board") of the works described in the Second Schedule hereto across the said premises and also to the entry by the Board from time to time upon the said premises by their servants agents contractors and work people for the purpose of inspecting maintaining repairing and replacing or removing the works or any of them

THE SECOND SCHEDULE hereinbefore referred to

One or more overhead electric lines (including such poles struts and stays as may be required for supporting them, and any ancillary apparatus in the position shown on the said plan by a continuous red line (the proposed situations of any poles being shown by circles and of any struts and stays being shown by a letter T)

One or more underground electric lines and any requisite ancillary apparatus in the position shown on the said plan by a red dotted line.

NOTE: The position of the red lines referred to is shown as a blue broken line on the title plan, so far as it affects the land in this title. No red dotted line was shown on the plan to the agreement lodged for registration.

5 A Transfer of the land in this title and other land dated 15 May 1975 made between (1) Roger Malcolm Developments Limited and (2) The Kent County Council contains the following covenants:-

"FOR the benefit of the remainder of the land comprised in the above mentioned title (which is hereinafter referred to as "the Estate") and any and every part thereof the Transferees covenant for themselves and their

C: Charges register continued

successors in title to perform and observe the covenants contained in the Third Schedule hereto

THE THIRD SCHEDULE

Restrictions and Obligations to be Observed

and Performed by the Transferees

(a) Not to use the School Site for any purpose other than for educational purposes under the Education Acts 1944-1971 or any modification or re-enactment thereof

(b) Not to erect any building on nor use the Public Open Space Land for any other purpose except as provided for under the Open Spaces Act 1906

(c) No noisome noxious or offensive trade or business shall be carried on upon the land transferred or any part thereof and nothing shall be done or suffered thereon which might create a nuisance or annoyance or be offensive or objectionable to the Transferors or to the owners or occupiers of any land forming part of the Estate but not so as unreasonably to prevent its use as permitted in paragraph (a) and (b) above"

NOTE: The land in this title forms part of the School site referred. The Public Open Space referred to is not included in the title

6 The land is subject to the following rights reserved by the Transfer dated 15 May 1975 referred to above:-

"EXCEPT AND RESERVING the easements and rights set out in the Second Schedule hereto

IN the ..... Second Schedules hereto the meaning of "future drains sewers electricity cables gas pipes or other connecting media" is limited to those coming into existence within eighty years of the date of this Transfer

.....

THE SECOND SCHEDULE

Rights and easements reserved to the

Transferors

(a) The right to lay beneath the land transferred drain sewers electricity cables gas pipes or other connecting media causing as little disturbance as possible and making good any damage resulting from the exercise of this right

(b) The right to use the existing and any future drains sewers electricity cables gas pipes or other connecting media belonging to or serving the land transferred which also serve or are required for the purpose of serving any other part of the Estate

(c) The right to enter upon any part of the land transferred in order to connect into inspect test repair or renew the existing and any future drains sewers electricity cables gas pipes or other connecting media provided that Transferors shall

(i) give reasonable notice to the Transferees of their intention to

C: Charges register continued

exercise this right (ii) cause as little disturbance as possible and (iii) make good any damage resulting from the exercise of this right"

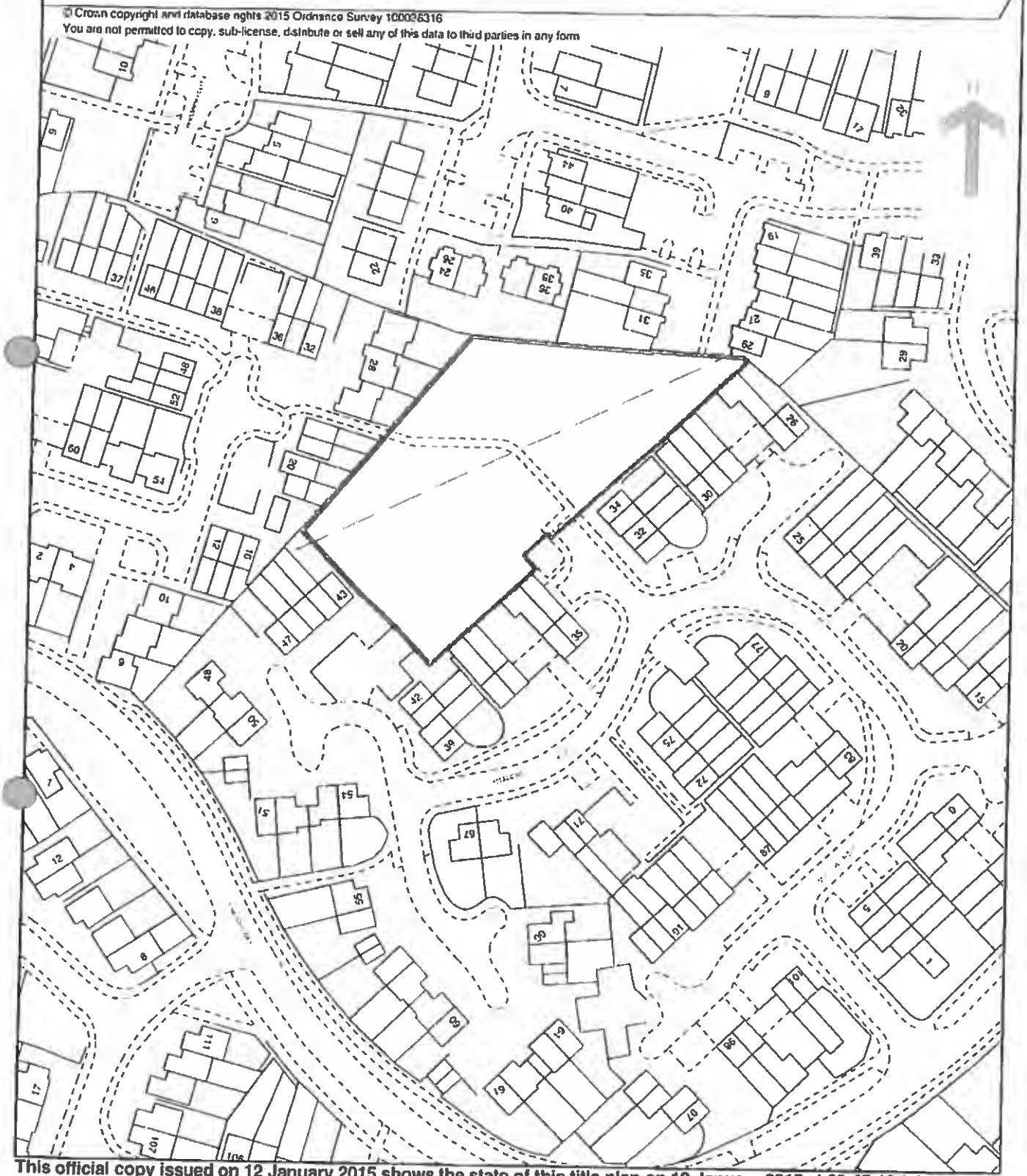
7 (18.08.2014) A Transfer of the land in this title dated 13 August 2014 made between (1) Bellwinch Homes Limited and (2) East Malling & Larkfield Parish Council contains restrictive covenants.

NOTE: Copy filed.

End of register

Land Registry
Official copy of title plan

Title number **TT27609**
Ordnance Survey map reference **TQ6959SE**
Scale **1:1250**
Administrative area **Kent: Tonbridge and Malling**



This official copy issued on 12 January 2015 shows the state of this title plan on 12 January 2015 at 09:45:12. It is admissible in evidence to the same extent as the original (s.67 Land Registration Act 2002).
This title plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale.
Measurements scaled from this plan may not match measurements between the same points on the ground.
This title is dealt with by Land Registry, Nottingham Office.

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Application to register land known as Coldblow Woods and Sports Ground at Ripple as a new Town or Village Green

A report by the Head of Public Protection to Kent County Council's Regulation Committee Member Panel on Tuesday 19th May 2015.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 30th March 2015, that the applicant be informed that the application to register land known as Coldblow Woods and Sports Ground at Ripple has not been accepted.

Local Member: Mr. S. Manion Unrestricted item

Introduction

1. The County Council has received an application to register land known as Coldblow Woods and Sports Ground at Ripple as a new Town or Village Green from local resident Mr. R. Chatfield ("the applicant"). The application, made on 27th November 2012, was allocated reference number VGA652. 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[1].

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**[2], 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

[1] Note that the 2008 Regulations have now been replaced by the Commons Registration (England) Regulations 2014 ("the 2014 Regulations") and the application falls to be determined under the 2014 Regulations.

[2] Note that from 1st October 2013, the period of grace was reduced from two years to one year (due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013), but this only applies to applications received after that date.

website. 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 woodland and an area of grassland (formerly used as a sports field) of approximately 23 acres (9.3 hectare) in size, that is situated to the east of Coldblow Road, between its junction with Ripple Road and the Coldblow railway crossing, in the parish of Ripple, near Deal. There are no recorded Public Rights of Way over the application site, although Footpaths and a Bridleway run along three sides of the application site. The application site is shown in more detail on the plan at **Appendix A**.

7. The woodland swathe comprising the northern section of the application site is owned by Ledger Farms Ltd., whilst the southern half of the application site (consisting of both the sports field and its woodland edge) is owned by TG Claymore (UK) Ltd (hereinafter collectively referred to as "the landowners").

Previous resolution of the Regulation Committee Member Panel

8. The consultation period generated a considerable volume of responses in relation to the application, with over 100 letters and email in support as well as a petition containing over 1700 signatures requesting that the land be preserved as a 'wildlife haven/village green'.

9. However, the landowners submitted a joint objection to the application which was made on the basis that (amongst other things) any informal recreational use of the application site had been contentious and forcible, intermittent and sporadic, not by a significant number of the residents of the locality, and interrupted by the occupation of the land by travellers in 1999/2000.

10. The matter was considered at a Regulation Committee Member Panel meeting on 26th November 2013, at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration. A copy of the minutes of that meeting is attached for reference at **Appendix B**.

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

The Public Inquiry

12. 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 at Deal Town Hall on 17th March 2014. Written directions to all parties confirming the format of the Inquiry and procedure for the submission of evidence were circulated shortly thereafter.

13. The Public Inquiry took place at Deal Town Hall commencing on Monday 9th June 2014 and continuing until Friday 13th June 2014, during which time the Inspector heard a considerable amount of evidence from witnesses both in support of and in opposition to the application. The Inspector also returned to the area on 30th June 2014 to undertake an accompanied site visit with representatives of both parties.

14. At the Public Inquiry, the applicant was represented by members of the Kent Law Clinic as well as (then) pupil barrister Ms. Rachel Jones, and the landowner was represented by Ms. Morag Ellis QC of Counsel.

15. The Inspector subsequently produced a detailed written report dated 24th October 2014 which, following comments received from the parties, was revised and reissued as a final version on 30th March 2015 ("the Inspector's report"). Her findings and conclusions are summarised below.

Legal tests and Inspector's findings

16. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:
    (a) Whether use of the land has been 'as of right'?
    (b) Whether use of the land has been for the purposes of lawful sports and pastimes?
    (c) Whether use has been by a significant number of 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, if not, ceased no more than two years prior to the making of the application?
    (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 in accordance with the Inspector's findings.

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

17. In order to qualify for registration as a Village Green, recreational use of the application site must have taken place 'as of right' through the period of use relied upon. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*'). As explained by Lord Hoffman in the Sunningwell[3] case:

> *"the unifying element in these three vitiating circumstances… was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period".*

18. The main issue in this case, in respect of the 'as of right' test, was whether use of the application site had taken place in exercise of force[4]. It will be noted that force, in this context, refers not only to physical force, but to any use which is contentious or exercised under protest[5]: "*if, then, the inhabitants' use of the land is to give rise*

[3] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 at 391
[4] The Inspector also considered whether any of the recreational use had been secretive in nature (following representations by the landowner in respect of 'hide and seek' games) but did not consider this to be the case – see paragraph 220 of the Inspector's report. Nor did she consider that any of the use had been permissive in nature – see paragraph 218 of the Inspector's report.
[5] *Dalton v Angus* (1881) 6 App Cas 740 (HL)

to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious"[6].

19. The Inquiry heard evidence from the previous landowner[7], that he had made some attempts to repair fencing around the southern part of the application site following his purchase of the land in 1992 but, as a result of repeated vandalism, he gave up several years later. However, at no point did he make any attempt to prevent access to the site through the woodland. He also stated that, in late 2011, he had instructed a friend to erect six notices around the woodland asking member of the public to report to him any instances of felling/damaging trees, removing wood, shooting, riding motorbikes, lighting fires, camping or dumping rubbish without the landowner's permission.

20. In this regard, the Inspector found[8] that, whilst some attempts had been made by the previous landowner to fence the site and put up notices, those attempts were, in her view, 'feeble' and insufficient to indicate that the landowner was doing everything consistent with his means and proportionate to the user to discourage, or altogether prevent, recreational use of the application site Furthermore, no attempt was ever made to secure the main pedestrian access to the southern part of the application site (in the woodland). Her view that the previous landowner's efforts were directed primarily at preventing vehicular trespass, but had little (if any) effect on walkers and others recreating on the application site, and were insufficient to communicate to those users that the landowner was opposing such use.

21. Overall, the Inspector did not consider that the applicant had failed to demonstrate that recreational use of the application site had taken place 'as of right[9].

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

22. Lawful sports and pastimes can be commonplace activities and 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*'[10].

23. The evidence submitted in support of the application suggests that the application site has been used for a wide range of recreational activities. At the Inquiry, the Inspector heard evidence of the application site being used for activities, including walking, running, playing with children and blackberrying.

24. However, the landowners submitted that a number of the activities relied upon by the applicant were not capable of constituting 'lawful sports and pastimes' and ought therefore to be disregarded. In particular, the landowners pointed in particular towards parties with loud music (where that music was sufficiently loud to constitute

[6] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger
[7] Summarised at paragraphs 144 to 151 of the Inspector's report
[8] Paragraphs 215, 216 and 217 of the Inspector's report
[9] Paragraph 221 of the Inspector's report
[10] *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

a ‘rave-style’ event), driving onto the land (an offence under section 34 of the Road Traffic Act 1988 without the lawful authority of the landowner) or any activity facilitated by driving onto the land, activities undertaken in the course of employment (because they are not ‘pastimes’), ‘air-soft’ games (which could cause someone to fear for their safety and therefore potentially an offence) and any blackberrying or foraging that was for commercial gain (which would be an offence under section 4(3) of the Theft Act 1968).

25. The Inspector agreed that certain activities (such as driving on the land or work-related activities) should be disregarded by virtue of the fact that they could not be considered ‘lawful sports and pastimes’. In respect of blackberrying, the Inspector found that, although those who gave oral evidence at the Inquiry made clear that the fruit was picked for personal use, she could not be sure that the same applied in respect of the written evidence[11]: “*this might seem an unusual submission to make given how common fruit picking/foraging are relied on as a lawful pastime in village green applications, without more. However, I am of the view that it is technically correct if one applies a strict burden on the applicant. I therefore discount evidence of fruit picking and foraging, unless the applicant has expressly stated that it was not for commercial purposes*”.

26. However, she refused to accept that all of the activities cited by the landowners as having to be disregarded ought to be so. Her impression of the social gatherings on the land (relied upon as evidence of use) was they were not unlawful and, in respect of any activity facilitated by driving onto the land, she considered that whilst someone might be prosecuted for driving onto the land, any activities which followed would not be unlawful[12]: “*it is inconceivable they would be similarly be prosecuted for flying a kite or having a picnic etc., having brought the equipment in their car*”. In respect of the ‘air-soft’ games, the Inspector did not consider that these in any way reached the threshold of unlawful violence that would cause a person to fear for their personal safety.

27. As such, the Inspector accepted that, generally speaking, lawful sports and pastimes had taken place on the application site to some degree. However, for the reasons discussed below, she was required to consider in more detail the issue of people walking on the application site.

Rights of way type use

28. As is noted above, walking has been cited as one of the activities said to have taken place, and reference has been made, both in the written evidence submitted in support of the application and as part of the oral evidence given at the Inquiry, to the existence of various paths and tracks on the application site. In cases where public rights of way cross or abut the application site, or where use involves walking along a defined track, it will be important to be able to distinguish between use that involves wandering at will over a wide area and use that involves walking a defined linear route from A to B. The latter will generally be regarded as a ‘rights of way type’ use and, following the decision in the Laing Homes[13] case, falls to be discounted. In that case, the judge said: ‘*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*

[11] See paragraph 176 (h) of the Inspector’s report
[12] See paragraph 176 (c) of the Inspector’s report
[13] *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70 at 79 per Sullivan J

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'. If the position is ambiguous, then the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the village green right)[14].

29. At the Inquiry, the landowners submitted that the vast majority of the recreational activities undertaken on the application site had taken place on the defined paths and tracks and, as such, all references to walking (with or without dogs), jogging, cycling and horse riding ought to be discounted unless the applicant was able to show that such activities had specifically taken place off any paths or tracks.

30. In analysing this use, the Inspector identified three separate categories of path[15]:
    (a) a defined path running through the woodland along the inside boundary of the northern and eastern edges of the application site;
    (b) other more informal paths leading off of the main path within the woodland; and
    (c) the tracks visible on aerial photographs on the sports field part of the application site.

31. In respect of the first category, the Inspector agreed with the evidence of some of the witnesses that the principal path in the woodland had all of the characteristics of a public right of way: "*it is clearly defined, could be marked on a map, having a clear beginning, end and route. Use of this path, whether to access other land, the field in [the southern half of the application site], or generally, would in my view bring home to a landowner the assertion of a public right of way, and not a village green right. I therefore consider it appropriate to discount evidence of use of [this] path*".

32. However, in respect of the second category, the Inspector considered that these smaller paths would not appear to a landowner to be characteristic of public rights of way: *"[they] have not specific defined route or routes through the woodland that could be plotted on a plan, or any such exercise would be extremely difficult in my view. They have been created as a natural consequence of people navigating the easiest way through the dense tree cover… thus the nature of the use of these subsidiary paths is akin to non-linear recreation rather than use of a path running from a theoretical A to B"*.

33. Similarly, in respect of the third category, the Inspector did not consider that use of the tracks visible on aerial photographs showing the sports field could be discounted: "*given the terrain, the fact that these tracks do not go anywhere other than circumnavigate the application land (even if some people may have walked elsewhere in addition), and the nature of the activities that took place on the meadow, the applicant has shown that there is no ambiguity and a reasonable landowner should have viewed these tracks on the field as leading to the acquisition of a village green right*".

34. The Inspector's view, therefore, was that use of the principal path running through the woodland consisted of a 'rights of way' type of use that would not be qualifying use for the purposes of Village Green registration and ought to be discounted. However, in principle, the remaining use could be considered qualifying use for the

[14] Oxfordshire County Council v Oxfordshire City Council and Robinson (2004) Ch 253 at [102]
[15] See paragraph 180 of the Inspector's report

purposes of Village Green registration (subject to it being sufficient in nature and extent, which is discussed further below).

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

35. 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.

"locality"

36. The definition of locality for the purposes of a Town or Village Green application has been considered by the Courts. In the Cheltenham Builders[16] 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*'.

37. In this case, the applicant originally specified the locality in his application form as being 'the parish of Ripple, adjacent to the parish of Walmer and close to the parishes of Deal and Mill Hill'. However, on further consideration the applicant subsequently requested an amendment to this locality and chose to rely upon the ecclesiastical parish of Walmer as the qualifying locality in support of the application.

38. In the Laing Homes[17] case, it was accepted that: *"ecclesiastical parishes are entities known to the law; they have defined boundaries and, since they have frequently been used in the past as qualifying localities for customary village greens, it is difficult to see on what basis parliament could have intended that they should not be so used for the purpose of establishing the existence of new class C village greens".*

39. There can be no dispute that the ecclesiastical parish of Walmer is a legally recognised administrative unit and is therefore a qualifying locality for the purposes of Village Green registration.

"a significant number"

40. 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*'[18]. Thus, the test is a qualitative, not quantitative one, and what constitutes a 'significant number' will depend upon the individual circumstances of each case.

[16] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[17] at 83 per Sullivan J
[18] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

41. Although a considerable amount of evidence of use had been presented in support of the application, the landowners submitted that there had been a substantial dip in the number of local inhabitants using the land for part of the relevant period due to the occupation of the land by travellers.

42. The Inquiry heard evidence[19] that, in the late 1990s, the previous landowner had permitted a very small number of 'new age travellers' to reside, with vehicles, on the southern section of the application site; there was no dispute that these travellers were friendly, did not engage in anti-social behaviour, and did not deter recreational use of that part of the application site.

43. However, in 1999, other travellers moved onto the application site without the (then) landowner's permission. A letter dated April 1999 from the Parish Council suggests that, at that time, there were 8 or 9 caravans stationed on site, although there is a dispute as to the precise number during the period of occupation. There is evidence, during 1999, of anti-social behaviour associated with the encampment and records of complaints made to the Parish Council regarding the 'appalling state of the woods and adjacent fields at Coldblow' (which included abandoned and burnt out cars, illegal; raves, scrambler bikes, human waste and household rubbish). The situation resulted in Dover District Council issuing notices to the landowner requiring clean-up of the land and prohibiting the stationing of caravans on it. Contemporaneous newspaper articles and correspondence describe the application site as 'a rubbish tip' and suggest that people had stopped going to the area. Records indicate that, by August 2000, there were no longer any travellers on the application site, although there were significant quantities of household, builders and garden waste. Invoices produced by the landowners relating to the clear-up operation in 2001 show that some 38 flattened cars were later removed from the application site and a 'ditch and bund' were constructed on the northern and western sides of the field.

44. The Inspector found[20], generally speaking, that those using the application site during the time of the traveller encampment kept a wide berth, not only of the field area of the southern part of the application site (on which vehicles were stationed) but also of the woodland generally (to avoid the rubbish). She further noted that many people appear to have avoided the application site entirely and accepted the landowners' submission that the presence of the travellers, and the associated waste, would have had a disruptive and discouraging effect upon the use of the application site by local people for recreational activities, such that the pattern of use undoubtedly changed. In this regard, she concluded[21] that:

> "*in my view, there was an inevitable dip in the number of people using the application land during the 1999/2000 traveller encampment, or successive encampments, and subsequent resulting mess lasting until summer 2001. This is supported by the fact that only two of the applicant's witnesses recalled the construction operation of the 'ditch and bund' at the end of the clean-up… suggesting that user was not particularly extensive at the end of the worst period of environmental problems [on the southern part of the application site]. Therefore, when considering the amount of user evidence of the application land in general, I am of the view that caution should be applied to the numbers using the woodland (as well as the field part of [the application site] if it is necessary to consider it) during that 1999 – 2000*

[19] Summarised at paragraphs 15 onwards of the Inspector's report
[20] See paragraph 193 of the Inspector's report
[21] See paragraph 194 of the Inspector's report

period as a result of the general unpleasantness of [the southern part of the application site] at the time".

45. Having concluded that the use of the field part of the southern section of the application site had been interrupted by the traveller encampment in 1999/2000 (see below), and that use of the defined path running through the woodland was more akin to the establishment of a public right of way (as set out above), the only potentially 'as of right' user left to consider, in the Inspector's view, was use of the woodland which took place off the main path. Following an analysis of the evidence of use, she found little, if any, use of the subsidiary paths during the traveller encampment in 1999/2000:

> *"I am bound to say that my impression is that there was a distinct change in the nature and frequency of user during the part of the relevant period when the traveller encampment (or successive encampments) that began around summer 1999 and ended with eviction in around summer 2000 was on the field [on the southern part of the application site] in respect of the use of the application land as a whole (including [the northern section]). Whilst I accept that a few resilient users persisted to use the woodland (off paths)… and even the field… instances of this are very sporadic (and any use during this time was far more likely, in my view, to have taken the form of use of the main path in the woodland). I have not seen sufficient evidence from the applicant to indicate general use of the woodland, off the main path, by the community during this time such that it could be said to be by a 'significant number' of local inhabitants and clear to a reasonable landowner that a TVG right was being asserted… All of the witnesses [with one exception] concurred that the 1999/2000 [travellers] were hostile, or at least sufficiently intimidating so that a wide berth was desirable… The only activities that took place off the main path in the woodland were child-focussed activities, which were unlikely to be compatible with potentially hostile neighbours with untethered fierce dogs. This supports my view that these activities were no more than sporadic and de minimus during the period 1999 – 2000".*

46. As such, the Inspector's conclusion on this point was that use of the application site had not been by a 'significant number' of the residents of the locality throughout the relevant period (due to the effect on use of the traveller encampment in 1999/2000) and that the application should fail in respect of the whole of the land on this basis.

(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?

47. 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 provided (at the time that this application was made) that an application must be made within two years from the date upon which use 'as of right' ceased.

48. In this case, the application was made under section 15(3) of the 2006 Act, on the basis that use of the application site had ceased to be 'as of right' prior to the making of the application. The applicant's position was that use had ceased to be 'as of right' on the northern section of the application site in late October 2012 when a walker was challenged and the landowner erected posts and a bund in an

attempt to inhibit access to the site. In respect of the southern section of the application site, the applicant suggested that use had ceased to be 'as of right' on 27th August 2012 when barbed wire was erected across the access points and 'no trespassing' notices were erected.

49. The Inspector took the view[22] that:

> *"as a matter of literal statutory construction, it is not permissible within a single application to register a unit of 'land' to rely on different dates for the cessation of 'as of right' use in respect of different parts of that land. If 'as of right' use is accepted to have ceased in respect of part of the land, then it has ceased in respect of the whole of the land. I therefore consider that the application is bound to proceed under s15(3) on the basis of the accepted cessation of 'as of right' use for [the southern half of the application site] when TG Claymore erected barb wire and signs on 27th August 2012. This was ultimately agreed by the parties by the close of the Inquiry. The relevant period is therefore 27th August 1992 to 27th August 2012".*

50. Since the application was made on 27th November 2012 (i.e. within 2 years from the date upon which 'as of right' use ceased) this test is met.

(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. The relevant twenty-year period is calculated retrospectively either from the date upon which use ceased to be 'as of right' or, where informal recreational use is continuing, from the date of the application.

52. As is noted above, it is considered that use of the application site as a whole ceased to be 'as of right' from 27th August 2012 and the relevant twenty-year period ("the relevant period") is therefore August 1992 to August 2012.

53. The landowners' position is that use of the application site did not take place throughout the relevant period, recreational use of the application site by local inhabitants during that time having been interrupted by the presence of the traveller encampment on the southern part of the application site during 1999/2000 (as described above).

54. Whilst there is no express requirement within the 2006 Act for recreational use to have taken place 'without interruption' throughout the relevant period, a physical disruption to the continuing use of land for such activities is generally considered to be sufficient to cause time to cease to run for the purposes of an application to register the land as a Village Green. In order for there to be an interruption to use, '*…there must be a physical ouster of local inhabitants from the land and the disruption must be inconsistent with the continued use of the land as a village green'*[23].

55. The Inspector was satisfied that the encampment was of a sufficient duration potentially to interrupt the recreational use of the application site, but went on to

[22] See paragraph 32 of the Inspector's report

[23] *Taylor v Betterment Properties (Weymouth) Ltd. and Dorset County Council* [2012] EWCA Civ 250 at [71] per Patten LJ

consider whether the nature of the interruption was such as to cause a material exclusion of the public. She found[24]:

> *"it is clear that local inhabitants would have been physically unable to use those parts of [the southern section of the application site] upon which the vehicles themselves were stationed. Within this, I would also include the areas between the caravans… However, apart from the vehicles and the spaces between them, there was nothing physically stopping people from using other areas [of the application site]. Many may have avoided the area entirely due to the hostility of the travellers and the rubbish, but I do not consider that the behaviour choice of local inhabitants is properly seen in the context of interruption. In light of my opinion as to the requirement for physical exclusion, I find that use of [the southern section of the application site] was interrupted for a period of at least a year in those (undefined) areas where the caravans themselves were stationed (and of course the numbers and positioning of the caravans changed during that period). In all other respects, I do not consider that the travellers caused a material exclusion of the public…"*.

56. As such, the Inspector found that the occupation of the field/meadow part of the southern section of the application site by the traveller encampment had resulted in a material interruption to the recreational use of that part of the application site by local inhabitants.

Inspector's overall conclusion

57. The Inspector's overall conclusion was that the application should fail in full on the grounds that[25]:

> *"the applicant has failed to show that:*
> *(a) Qualifying use was by a significant number of local inhabitants throughout the relevant period because the number was not significant between summer 1999 – summer 2000 during the traveller encampment;*
> *(b) Qualifying use was sufficient to assert a town or village green right between summer 1999 – summer 2000;*
> *[and]*
> *in relation to the field part [of the southern section of the application site] only, the objectors have shown that:*
> *(c) Qualifying use was interrupted during the period summer 1999 – summer 2000 during the traveller encampment".*

58. She adds[26] that:

> *"My conclusions… must be seen in the context of my finding that user of the main path which runs through the woodland… would bring home to a landowner the assertion of a public right of way, and not a village green right".*

Conclusion

59. The Inspector has suggested[27] that, if the County Council were to disagree with her assessment in respect of any part of the application site, it would be open to the County Council, if it so desired, to effect registration of a small part of the

[24] Paragraph 190 of the Inspector's report
[25] Paragraph 223 of the Inspector's report
[26] Paragraph 224 of the Inspector's report
[27] Paragraph 222 of the Inspector's report

application site. However, in light of the Inspector's conclusions that, as a matter of fact, much of the use of the woodland part of the application site was attributable to walking on a defined path (i.e. a 'rights of way' type use), the recreational use of the field area was materially interrupted by its occupation by travellers, and use of the site as a whole was not by a significant number of local people during the period 1999/2000, it is difficult to see how any part of the application site (even it if were possible to identify a defined area to which none of these issues applied) could be registrable.

60. The Inspector also notes[28] the applicant's suggestion (made in respect of her report as originally published) that prejudice arose from the applicant being asked to reduce the number of witnesses called at the Inquiry. Whilst noting that, if the County Council were minded to do so, it might be possible to arrange a supplementary day to hear evidence dealing specifically with the 1999/2000 period, the Inspector confirmed that she was satisfied both that no prejudice had been caused (no suggestion of this was made at the Inquiry itself) and she had sufficiently understood the general picture of the different levels of use throughout the relevant period. Indeed, it is easy, in hindsight, to suggest that a different outcome might be obtained if further evidence were to be sought but there is no guarantee that such evidence would stand up to the scrutiny of cross examination. More importantly, there is also a very real danger that any further evidence in this matter might well be influenced by the findings already set out in the Inspector's detailed report, thereby potentially resulting in a distorted image of the situation. The Inspector heard oral evidence from some twenty witnesses in support of the application, in addition to the large volume of written evidence, and it is therefore considered that the applicant was given sufficient opportunity to present his case and hence it is not necessary (or appropriate) to hear any further oral evidence.

61. Having carefully considered all of the relevant evidence and having regard to the Inspector's analysis of that evidence (contained in her report), it would appear that the legal tests in relation to the registration of the application site as a new Town or Village Green have not been met.

Recommendation

62. I recommend, for the reasons set out in the Inspector's report dated 30th March 2015, that the applicant be informed that the application to register land known as Coldblow Woods and Sports Ground at Ripple has not been accepted.

Accountable Officer:
Mr. Mike Overbeke – Tel: 03000 413427 or Email: mike.overbeke@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 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.

Appendices

APPENDIX A – Plan showing application site

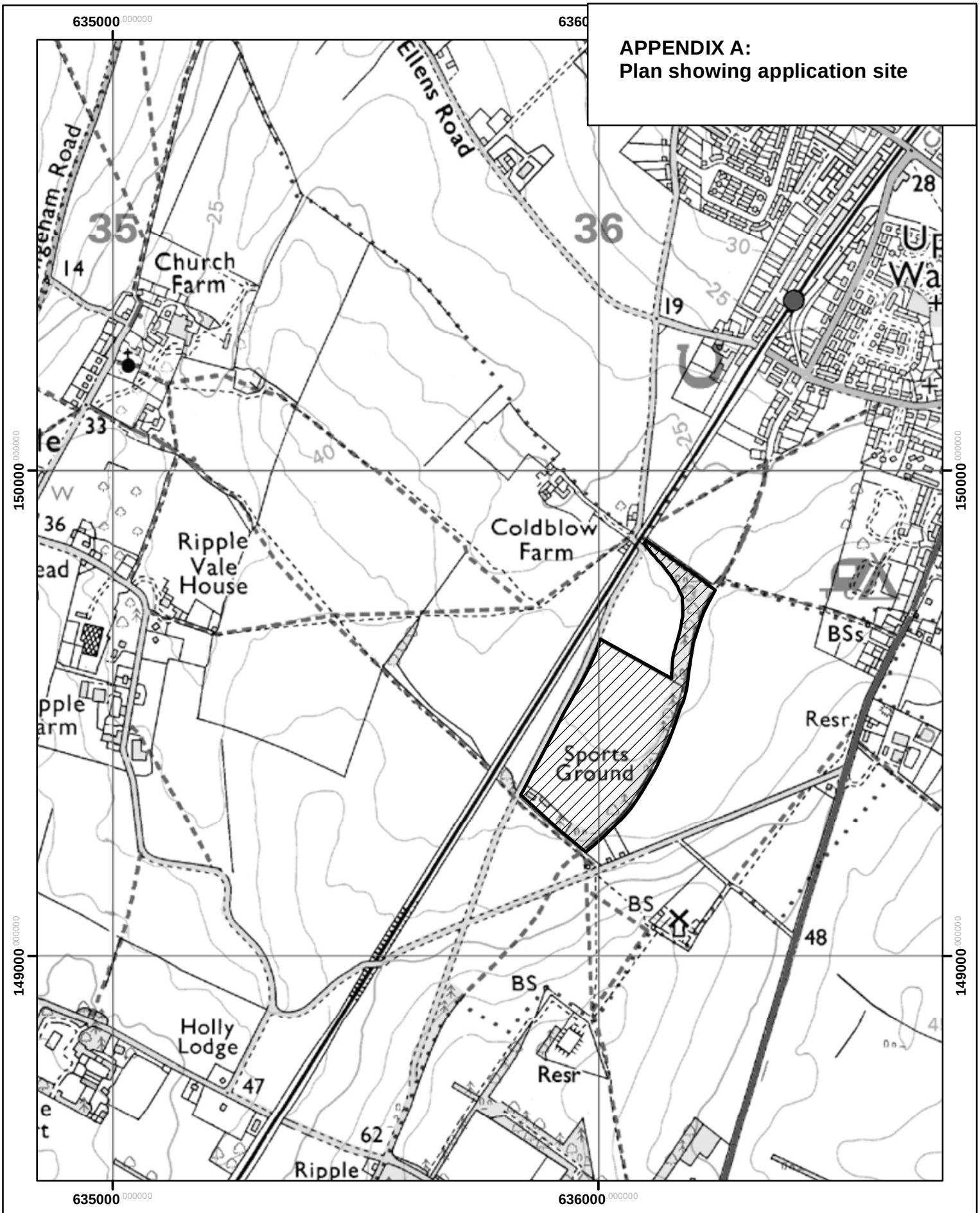
[28] Paragraph 226 of the Inspector's report (postscript)

APPENDIX B – Minutes from the meeting of the Regulation Committee Member Panel on 24th September 2013.

Background documents

Inspector's final report dated 30th March 2015

APPENDIX A:
Plan showing application site



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Land subject to Village Green application at Coldblow Woods at Ripple

Page 96

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REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Ripple Village Hall, Pommeus Road, Ripple CT14 8JA on Tuesday, 26 November 2013.

PRESENT: Mr M J Harrison (Chairman), Mr S C Manion (Vice-Chairman), Mr M Baldock and Mr C W Caller

IN ATTENDANCE: Ms M McNeir (Public Rights Of Way and Commons Registration Officer) and Mr A Tait (Democratic Services Officer)

UNRESTRICTED ITEMS

19. Application to register land known as Coldblow Woods in the parish of Ripple as a new Town or Village Green
(Item 3)

(1) Members of the Panel visited the application site before the meeting. This visit was attended by Mr R Chatfield (applicant), the landowner, Mr N Fielding (with Rhodri Price-Lewis QC and Ms J Laver - Fuller Long Planning Consultants) and some 20 members of the public.

(2) The Commons Registration Officer began her presentation by saying that the application had been made by Mr R Chatfield under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008. The application had been accompanied by 124 user evidence forms and other evidence (including Land Registry searches, a detailed history and use of the site, photographs showing various activities taking place on the site and a letter from Ringwould Cricket Club). A further 202 user evidence forms had subsequently been submitted.

(3) The Commons Registration Officer went on to set out the case put forward by the applicant. This was that the site consisted of two plots of land. The northern section had been owned by the MoD until it was sold to Ledger Farms in the 1970s. The southern section had also been owned by the MoD until being sold to a local family in 1992. The current owner of the southern section, TG Claymore had erected barbed wire and taken other action to restrict access in August 2012. Up to this point, the applicants claimed that residents had enjoyed unrestricted access and use of the site for more than 30 years.

(4) The Commons Registration Officer then described the responses from consultees. Ripple PC had indicated that it neither supported nor opposed the application. Deal TC has written in support, stating that the local population had made continued use of the land for lawful sports and pastimes for many years and that this activity had remained unchallenged until very recently. A petition containing over 1700 signatures in support of the application had also been received (although this was of little value as evidence of use). The Local Member, Mr S C Manion had given a neutral response. There had also been over 100 e.mails and letters of support as well as a letter of objection from a member of the public.

(5) The Commons Registration Officer continued by saying that the landowners were represented by Fuller Long Planning Consultants who had objected to the application on the grounds that informal use of the site had been sporadic and insufficient to notify a reasonable landowner that a public right was being asserted; that there had been a break in the twenty year period of use in 1999/2000 when the land had been occupied by travellers; that the alleged use had only been attested by some 2% of the local population, which was not a significant number; that use of the land had been by stealth to a significant degree; and that any use had been contentious and therefore by force as the landowners had done everything that was reasonably possible to stop unauthorised use through fencing, signage and challenges.

(6) The landowners' objections had been supported by six statutory declarations. The Commons Registration Officer summarised this evidence which was that the southern section had been owned by the MoD until it was sold to Mr Luckhurst in November 1992, three months into the material period. Whilst in the ownership of the MoD the land had been securely fenced with locked gates and "No Admittance" signs along the boundary. The land had actually been advertised as "fenced" for the purposes of the auction when Mr Luckhurst had purchased it. From 1993, openings had started to appear in the fencing and chains and padlocks had been stolen. Replacement fencing and padlocks had been provided up to 1996 when Dover DC had issued a direction prohibiting fencing of the land. The land had then been occupied by travellers in 1999/2000 which would have provided a disincentive to informal recreation.

(7) The statutory declarations had also given evidence in respect of the northern section of the land. This was that Mr Ledger, the landowner had made regular visits to the area. He had become aware of the use of the woodland and had attempted to discourage use by spreading slurry in the woodland on numerous occasions and by closing gaps in fencing and erecting earth banks. This was because he had been concerned about possible damage to crops on the adjacent field (which he also owned).

(8) The Commons Registration Officer moved on to consideration of the individual tests for registration to take place. The first of these was whether use of the land had been "as of right". She said that the landowners' position and supporting evidence was that the land had been securely fenced in the early 1990s with no public access being permitted. After acquiring the land, the landowners had attempted to prevent use by erecting fences, spreading slurry, using tree trunks and earth banks to bar access and by challenging people who used the land. Dover DC had prohibited fencing on the land in 1996. This had led to anti-social behaviour and the occupation of the site by travellers in 1999. In the early 21st century, a ditch and bund had been constructed to restrict access. The landowners' contention was therefore that they had taken every reasonable step to deter access to the site but that their efforts had been met with vandalism.

(9) The Commons Registration Officer then said that the applicant's evidence differed in many ways from that of the landowners. He said that the site was bordered on all sides by public rights of way or by Coldblow Road, and that this had led to a significant number of residents entering the land through an easy access. Furthermore, there was a lack of fencing between the northern and southern sections

of the land, permitting people to pass unobstructed between them. There had never been any fencing around the northern plot, whilst the chain link fencing around the southern section had been broken down or had fallen down well before the MoD had vacated the land in 1992. Access had been free and easy until late 2012 when barbed wire and earth ramparts had been erected by the owner of the southern section.

(10) The applicant had provided two pieces of evidence to support his contention of general usage. An aerial photograph dated 2008 showed well-defined tracks across the whole grassland area, whist the Dover DC "Statement of Reasons" of 1996 (which prohibited the erection of fencing) described the land as "*mainly neglected grassland and, apparently used by the general public informally*."

(11) The applicant had also refuted the landowners' evidence of challenges to use having been made. He stated that the gap described by the applicant had only been barricaded to prevent access and damage to crops. This had not prevented access to or within the woodland. He also stated that although slurry had been spread on the adjacent field, this had not happened in the woodland and that it would not have been possible for a tractor or slurry tanker to access it.

(12) The applicant had also commented on the landowners' contention that the land had been secured by fencing and notices during the period when it was MoD property. He noted that the landowners' witnesses had provided various versions of the alleged wording on the signs and considered it unlikely that they would have been maintained after the MoD had ceased to actively use the site in the late 1970s. A number of user evidence questionnaires had referred to notices on the site but none of them had forbidden entry. Meanwhile, contemporaneous evidence from the 1990s strongly suggested that the fencing had not been at all secure during this period. It seemed highly improbable to him that the fencing could have deteriorated during the period 1992 to 1996 when Dover DC's Statement of Reasons had described the state of the land as "neglected."

(13) The Commons Registration Officer concluded her analysis of the "as of right" test by explaining that when a serious conflict of factual evidence of this nature occurred, the officers did not have the powers to undertake any further investigation themselves. It was therefore not possible at this stage to conclude whether use of the site had taken place "as of right."

(14) The Commons Registration Officer turned to the question of whether use of the land had been for the purposes of lawful sports and pastimes. She said that although some of the use had been associated with the public right of way, there was sufficient evidence for her to conclude that, due to the range of recreational activities, this test appeared to have been met.

(15) The next test was whether use had been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality. The Commons Registration Officer said that this test had been met because the administrative parish of Walmer was a qualifying locality and the volume of evidence submitted strongly suggested that the land was in general use by the local community during the relevant period.

(16) The Commons Registration Officer briefly explained that the application had been made in November 2012 which was well within the period when use had been challenged in August of that year by prohibitive notices and the erection of barbed wire fencing. The application had therefore been made within the two year grace period set out in the Commons Registration Act. The land had also been in use for longer than the required period of 20 years. This meant that the final two tests had been met, subject to the question of whether this use had been "as of right."

(17) The Commons Registration Officer concluded her presentation by saying that the ability of the land to be registered as a Village Green hinged on the question of whether the use of the site had been "as of right." The most effective way of establishing the answer to this question was through the mechanism of a Public Inquiry, enabling the evidence to be tested by an independent Inspector who would produce a report on his or her findings to the Registration Authority. She therefore recommended accordingly.

(18) Mr Baldock asked whether the Panel was entitled to register part of the land. He suggested that the Panel could decide to register the northern section. The Commons Registration Officer replied that it was open to the Panel to register only part of the application site, but she considered that there was a sufficient level of confusion in respect of the entire application site to make a Public Inquiry into the application as a whole the safest option.

(19) The Chairman asked whether, in the light of the recommendation, any of the parties wished to address the Panel. The applicant, Mr Chatfield said that he did not wish to speak beyond confirming that the records he would be relying on were held by Dover DC.

(20) Rhodri Price-Lewis QC addressed the Panel on behalf of the landowners. He said that he did not believe that the applicant had been able to prove his contention that use of the land had been "as of right." The existence of signs and fencing demonstrated that use had been contentious and therefore by force. This was underlined by the acceptance by all parties that signs had been broken down over time. He then referred to the three months at the beginning of the twenty year period in 1992 when the land had been owned by the MoD. He said that when Mr Ledger had participated in the auction, he had been informed in writing that the land was fenced. He added that he did not accept that a significant number of residents of the locality of Walmer had used the site.

(21) On being put to the vote, the recommendations of the Head of Regulatory Services were carried unanimously.

(22) RESOLVED that a Public Inquiry be held into the case to clarify the outstanding issues.