



AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Tuesday, 3rd December, 2019, at 2.00 pm Ask for: **Andrew Tait**
Council Chamber, Sessions House, County Telephone **03000 416749**
Hall, Maidstone

Tea/Coffee will be available 15 minutes before the meeting

Membership

Mr A H T Bowles (Chairman), Mr S C Manion (Vice-Chairman), Mr P M Harman,
Mr J M Ozog and Mr R A Pascoe

UNRESTRICTED ITEMS

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

1. Substitutes
2. Declarations of Interest by Members for items on the agenda
3. Application to register land known as Hospital Field at Brabourne as a new Town or Village Green (Pages 3 - 14)
4. Application to divert part of Public Footpath WC108 and create an additional Public Footpath at Cranbrook (Pages 15 - 26)
5. Application to register land known as Hillminster Green at Minster-in-Thamet as a new Town or Village Green (Pages 27 - 36)
6. Application to register land known as Kingsmead Recreation Ground at Canterbury as a new Town or Village Green (Pages 37 - 42)
7. Application to register land known as Whimbrel Green at Larkfield as a new Town or Village Green (Pages 43 - 48)
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)

**Benjamin Watts
General Counsel**

Monday, 25 November 2019

Application to register land known as Hospital Field at Brabourne as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Tuesday 3rd December 2019.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 22nd July 2019, that the applicant be informed that the application to register the land known as Hospital Field at Brabourne as a new Village Green has not been accepted.

Local Member: Ms. C. Bell (Ashford Rural East)

Unrestricted item

Introduction

1. The County Council has received an application to register land known as Hospital Field at Brabourne as a new Town or Village Green from the Brabourne Parish Council ("the applicant"). The application, made on 1st February 2016, was allocated the application number VGA669. A plan of the site is attached 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 2014.
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 one year prior to the date of application**, 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 County Council must publicise the application by way of a copy of the notice on the County Council's website and by placing copies of the notice on site to provide local people with the opportunity to comment on the application. Copies of that notice must also be served on any landowner(s) (where they can be reasonably identified) as well as the relevant local authorities. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

6. The piece of land subject to this application (“the application site”) comprises an arable field of approximately 24 acres (9.7 hectares) in size situated to the north of properties in Mountbatten Way and extending between Lees Road and Canterbury Road. Access to the application site is via three Public Footpaths; two which diagonally cross the site and a third which runs along its southern boundary (to the rear of the properties in Mountbatten Way).
7. The application site is shown in more detail on the plan at **Appendix A**.
8. The vast majority of the application site registered with the Land Registry (under title number TT40521) to Mr. R. Johnson and Ms. C. Johnson (“the landowners”). A small slither of land in the south-western corner (abutting Lees Road) is registered under title number K414908 to the Kent County Council; the County Council’s Property Team has been consulted but no response has been received.

Previous resolution of the Regulation Committee Member Panel

9. During the consultation period, an objection to the application was received from Gladman Developments Ltd. (“the objector”), which has a promotion agreement with the landowners and has previously made an application for planning permission to develop the land for residential development.
10. The objection, which was accompanied by 13 witness statements, was made on the basis that:
 - the neighbourhood relied upon was not a qualifying one for the purposes of section 15 of the 2006 Act;
 - the use relied upon was predominantly referable to the Public Footpaths on the application site and insufficient to indicate that the land was in general use by the community;
 - the land was not available for recreational use for long periods due to the presence of crops; and
 - any wider recreational use (away from the paths) was either challenged or with permission.
11. The matter was considered at a Regulation Committee Member Panel meeting on 28th March 2018¹, at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration.
12. 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

13. The Public Inquiry took place at Penstock Hall Farm at Brabourne from 18th to 21st February 2018, during which time the Inspector heard evidence from witnesses

¹ The minutes of that meeting are available at:

<https://democracy.kent.gov.uk/ieListDocuments.aspx?CId=182&MId=8037&Ver=4>

both in support of and in opposition to the application. The Inspector also undertook an accompanied site visit with representatives of both parties.

14. Following the Inquiry, the Inspector produced a written report dated 22nd July 2019 (“the Inspector’s report”) setting out her findings and conclusions. These 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, has 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'?

16. The statutory scheme in relation to Village Green applications is based upon the English law of prescription, whereby certain rights can be acquired on the basis of a presumed dedication by the landowner. This presumption of dedication arises primarily as a result of acquiescence (i.e. inaction by the landowner) and, as such, long use by the public is merely evidence from which a dedication can be inferred.

17. In order to infer a dedication, use must have been ‘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 protest²: *“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”*³.

18. There was no suggestion in this case that any recreational use of the application site had taken place secretly or in exercise of any physical force; indeed, as can be seen from the plan at **Appendix A**, the application site is criss-crossed by Public Footpaths such that it would be difficult for a landowner to erect any form of barrier to prevent entry.

19. It was suggested by the objector that some of the activities relied upon by the applicant had been challenged by the tenant farmer (i.e. horse-riding) or had

² *Dalton v Angus* (1881) 6 App Cas 740 (HL)

³ *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

taken place with the permission of a previous tenant farmer (i.e. metal-detecting). The Inspector found that the metal-detecting had, in any event, taken place by persons from outside the claimed neighbourhood and that although some equestrian use had been challenged, this was without any real effect and insufficient to render all horse-riding by force⁴.

20. Given that horse-riding did not feature heavily in the applicant's evidence, and there was no other evidence of challenge to recreational use, the objectors were not able to persuade the Inspector that use of the application site had not taken place 'as of right'.

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

21. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. 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.

22. In this case, when considering the nature of the recreational use is important to have regard to the physical state of the application site itself during the relevant twenty-year period (1996 to 2016).

23. In her findings of fact⁶, the Inspector noted that the application site had been in arable production (for crops including wheat, barley and rapeseed) throughout the material period. Although the tenant farmer's records (produced at the Inquiry) only went back as far as 2005, the Inspector was satisfied that the general pattern of agricultural use would have been similar prior to that period. She noted that part of the application site, described as the 'bottom wedge', appears to have been difficult to cultivate (due to the presence of former clay pits) and crops only began to be grown on that part of the application in 2013 (albeit that the crop substantially failed in that year).

24. Clearly, in the years where the field was left fallow (2006, 2010 and 2012 according to the farm records), it has been possible for the whole of the application site to be used for recreational purposes and access to it has been facilitated by the Public Footpaths. The Inspector accepted that people would naturally have used a piece of land such as this for walking and dog walking, with or without sticking to the line of the Public Footpaths⁷.

25. During the years where there had been a crop on all or part of the land, the Inspector described the position as follows⁸:

"... there will be certain times of the year where the same position would apply as above (that is, as if there is no crop) i.e. between Harvest in late

⁴ Paragraph 156 of the Inspector's report

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 Paragraph 125 of the Inspector's report

⁷ Paragraph 126 of the Inspector's report

⁸ Paragraph 127 of the Inspector's report

summer and the time when the next year's crop starts growing. Depending on the crop, this may be only a matter of a few weeks or a few months. There will be other times when a crop is growing but is still low enough to the ground to walk over. During these times, a small minority of people may have walked on the growing crop but the majority of local people respected the crops and did not walk on them. They would stick to the public footpaths (which had been sprayed and marked out) or occasionally go up and down the tramlines made by the tractors. The opportunity to carry out activities other than walking and dog walking would be limited. Again, depending on how fast growing and thick the particular crop was, this stage could last several months. However, some thick crops, such as rape, would be too big to walk in much sooner. Finally, there would be times in the from late spring into the summer when it would be physically impossible to go anywhere on the land other than on the public footpaths or, in the case of a very intrepid person, along the tramlines. But, even the tramlines would be very difficult to get down in the case of the particularly thick crops. I find the idea of people accessing bare patches of ground to play ball games via a tramline rather far-fetched. If this did happen, it would be very much the exception rather than a regular activity. During these times, the use of the land off the public footpaths would be extremely limited, if indeed there was any use at all."

26. The applicant's position with regard to the evidence of use was there was a significant amount of recreational use of the application site, with evidence presented not only of walking (with or without dogs) but also of a range of other activities including children playing, ball sports, kite flying, fruit picking and picnicking. The location of the land in close proximity to Brabourne Lees and the ease of access to it made it attractive for such use, and it was unsurprising that people would wander off the Public Footpaths given that they were invisible for considerable part of the year (especially the cross-field paths).

27. The objector submitted, on the other hand, that certain aspects of the applicant's evidence had been exaggerated and each of the witnesses had a strong interest in advocating the application. It was not the case, according to the objector, that recreational use had been frequent or that the degree of crop failure was such that extensive recreational use took place throughout the year. Agricultural use was certainly not 'low-level' (and not akin to the taking of a single hay crop, for example) and any use which had taken place away from the Public Footpaths was not at such a level to suggest to a reasonable landowner that a general right to recreate was being asserted. It was noted by the objector that the applicant's case was unsupported by a single photograph of anyone using the application site.

28. The Inspector concluded, on this issue, that⁹:

"In my view, a significant number of local inhabitants have used the application land off the footpaths principally for walking and dog walking (and, on occasion, for other activities such as ball games, blackberry picking, picnics etc.) during parts of each year for the relevant 20 year period, and in some years when the land has been fallow, throughout the

⁹ Paragraph 149 of the Inspector's report

year. Even taking into account a certain degree of temptation to exaggerate in order to support a case and the somewhat curious lack of photographic evidence of use, this must be apparent.”

29. The Inspector was therefore satisfied that the application site had been used for lawful sports and pastimes, although such use was very much dependent upon the agricultural state of the land.

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

30. 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.

31. 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*¹⁰ 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’.

32. In cases where the locality is so large that it would be impossible to meet the ‘significant number’ test (see below), it will also be necessary to identify a neighbourhood within the locality. The concept of a ‘neighbourhood’ is more flexible than that of a locality, and need not be a legally recognised administrative unit. On the subject of ‘neighbourhood’, the Courts have held that ‘it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood... The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word “neighbourhood” would be stripped of any real meaning’¹¹.

33. In this case, the applicant sought to rely upon the neighbourhood of ‘Brabourne Lees’ situated within the localities of the civil parishes of Brabourne and Smeeth.

34. There was no dispute at the Inquiry that the civil parishes of Brabourne and Smeeth were capable of constituting qualifying localities for the purposes of Village Green registration; however, the objector took issue with the applicant’s reliance upon ‘Brabourne Lees’ as a qualifying neighbourhood (although did not mount a positive case that it was *not* such a neighbourhood).

35. On this point, the Inspector had no hesitation in accepting Brabourne Lees as a neighbourhood, it, in her view, clearly having the requisite degree of cohesiveness. She said¹²:

¹⁰ *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

¹¹ *ibid* at 92

¹² Para 138 of the Inspector’s report

“The existence of natural boundaries or distinct boundaries is only one indicator of a ‘neighbourhood’, and the absence of such characteristics does not prevent an area from being a neighbourhood. Brabourne Lees is clearly a village with its own distinct identity. It has a number of local facilities and a well-established community. Local people clearly understand that Brabourne Lees corresponds to a particular area which is distinct from Brabourne and Smeeth”.

36. Accordingly, the Inspector was satisfied that recreational use had taken place by the residents of a neighbourhood (namely Brabourne Lees) within the localities of the civil parishes of Brabourne and Smeeth.

“a significant number”

37. 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’*¹³. 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.

38. In this regard, the Inspector found that¹⁴:

“the fact that the use of the land by the local community was apparent to [the tenant farmer] indicates that there were a sufficient number of people using it for numbers to be ‘significant’. My conclusions are a matter of impression having heard the oral evidence and read the written evidence. There is no absolute numbers test for ‘significant number’.”

39. However, her conclusion on this point was, once again, closely linked to the agricultural use of the land and whether the land would have been capable of such ‘significant’ recreational use *throughout* the twenty-year period (discussed further below).

(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?

40. The Commons Act 2006 requires use of the land to have taken place ‘as of right’ up until the date of application or, if such use has ceased prior to the making of the application, section 15(3) of the 2006 Act provides that an application must be made within one year from the date upon which use ‘as of right’ ceased.

41. In this case, the application was made under section 15(2) of the 2006 Act on the basis that use of the application site had not ceased at the time of making the application on 1st February 2019.

¹³ *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

¹⁴ Paragraph 149 of the Inspector’s report

42. There is no evidence to suggest that recreational use of the application site had ceased prior to the making of the application and, as such, it is considered that recreational use of the application site (subject to the comments above on the nature of that use) did continue, as required under section 15(2), until the date of the application.

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

43. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. In this case, use 'as of right' continued until the date of the application – i.e. 1st February 2016. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 1st February 1996 to 1st February 2016.

44. As discussed above, the agricultural use of the application site is relevant and the Inspector summarised the position as follows¹⁵:

"Local people have respected the crops and have not damaged them. When crops have been growing, it would be very difficult, if not impossible, to carry out activities such as ball games, and lawful sports and pastimes were restricted to walking and dog walking. These activities must have, in my view, predominantly taken place on the public footpaths. [The tenant farmer] accepted that he had seen people in tramlines, but I cannot believe that this was a frequent occurrence. As a matter of impression, the use of the land (off the footpaths) for lawful sports and pastimes when a crop was growing was, at best, trivial or sporadic. I simply do not find it credible, even taking the Applicant's evidence at its highest, that there was any real use of Hospital Field off the public footpaths when a crop of growing, which could be high and thick in the case of a crop such as oil seed rape. Of course, there would still have been people using the land at these times, but they would have been on the public footpaths. Even if there was some use of the tramlines and areas of failed crop, these only constitute a very small percentage of the total area of the Field and thus use would be sporadic in the spatial as well as temporal sense."

45. The Inspector went on to explain that, in her view, an arable field in active agricultural cultivation was unlikely to ever be capable of registration as a Village Green because such use would necessarily, not only by virtue of the physical growing of the crops but also the associated agricultural activities, render any recreational use of the land no more than trivial and sporadic during those periods on a near-annual basis; the only times during which arable land in active agricultural cultivation might be capable of accommodating recreational use would be when it is fallow, where a crop has substantially failed or when there is no visible evidence of crops in the ground.

46. Accordingly, the Inspector was not able to conclude that the application site had been used *throughout* the relevant twenty-year period.

¹⁵ Paragraph 150 of the Inspector's report

Inspector's conclusion

47. The Inspector's overall conclusion¹⁶ was that the application should fail because the applicant had failed to demonstrate that "there has been qualifying user by a 'significant number' of local inhabitants throughout the relevant period and that a TVG right was being asserted throughout the relevant period".
48. Her recommendation to the County Council was that the application ought therefore to be rejected.

Subsequent correspondence

49. On receipt, the Inspector's report was forwarded to the applicant and to the objector for their information and further comment.
50. In response, the objector noted that the Inspector's report was '*comprehensive and correct and that all of the points now raised by the applicant were considered and rejected with detailed reasons given by the Inspector and that the applicant has provided no cogent reason for KCC to depart from the recommendation*'.
51. The applicant welcomed the Inspector's findings in respect of the elements of the legal tests which, in the Inspector's view, were met. However, the applicant did not agree with her findings in respect of the degree to which the agricultural use of the application site interfered with the recreational use of it. The applicant's position is that the evidence points to a constant pattern of use throughout the year, with agricultural and recreational use co-existing such that recreational use (for example, along the 'tramlines' created by tractors) remained at a significant level even when the crops were tall.
52. The applicant further submitted that, were the Panel minded to agree with the Inspector (i.e. that agricultural use of the application site had resulted in restricted recreational use), consideration ought to be given to registering a lesser area of land on the southern part of the application site, known as the 'bottom wedge', which had not been in active agricultural production until 2013 (albeit that the crop substantially failed in that year).

Conclusion

53. It is clear that the crux of this case concerns the sufficiency and continuity of recreational use, which falls to be considered in the context of the agricultural activities that also took place on the application site.
54. There is no dispute (and indeed it is confirmed by aerial photographs) that the application site has been in active use for agricultural purposes throughout the twenty-year period. Whilst there may have been times where part (or parts) of the application site were available for recreational use whilst the land was in agricultural production (e.g. bare patches where crops failed or the 'bottom wedge' which was predominantly un-cropped), the agricultural use was such that there were times when the land as a whole was necessarily unavailable for recreational use (other than on the Public Footpaths).

¹⁶ Paragraph 157 of the Inspectors' report

55. It is relevant that, on the evidence presented, agricultural use of the land was by no means 'low level'; had the land been used for the taking of a single annual hay crop (for example), there *may* have been scope for uninterrupted recreational use but in this case the land was used for much more intensive purposes - including crops of wheat, barley and rapeseed. There was no evidence of any substantial damage to the crops and, indeed, any use which resulted in damage to the crop would most likely have amounted to an offence (and thus not be capable of constituting a lawful sport or pastime) in any event.
56. The applicant suggested that there had been use of the 'tramlines' created by tractors, but the Inspector's overall impression was that when crops were high such use would not have been a major or predominant use of the application site, but rather an isolated occurrence¹⁷. In the case of thick crops, the tramlines would have been difficult to access and recreational use would have been restricted predominantly, if not almost entirely, to the Public Footpaths.
57. Having heard the evidence, the Inspector was satisfied that recreational use during the time that crops were being grown on the application site was trivial and sporadic, and certainly insufficient to give rise to a general right to recreate over the whole of the land. Indeed, a substantial part of the Inspector's report is concerned with the inter-relationship between agricultural and recreational use of the application site; it is a matter that she considered in some detail and her conclusions would appear to be sound in this respect.
58. In respect of the applicant's point that the County Council should consider registering a lesser area (were the Panel minded to reject the application), it is clear the Inspector considered this as part of her findings and her conclusions in respect of the land apply equally to the so-called 'bottom wedge'. Whilst this 'bottom wedge' was used for cultivation only from 2013 (and the 2013 crop substantially failed), the 2014 aerial photograph shows the wheat crop and this part of the application site was used again in 2015 for a barley crop and again in 2016 for a rapeseed crop. Thus, for the very latter part of the material period, the same position applied in respect of the necessarily restricted recreational use of the land.
59. Overall, it is considered that the Inspector's approach is correct in every respect and, accordingly, that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met, such that the land subject to the application (shown at **Appendix A**) should not be registered as a new Village Green.

Recommendation

60. I recommend, for the reasons set out in the Inspector's report dated 22nd July 2019, that the applicant be informed that the application to register the land known as Hospital Field at Brabourne as a new Village Green has not been accepted.

¹⁷ Paragraph 48 of the Inspector's report

Accountable Officer:
Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

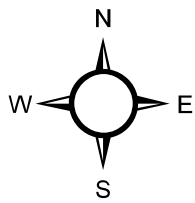
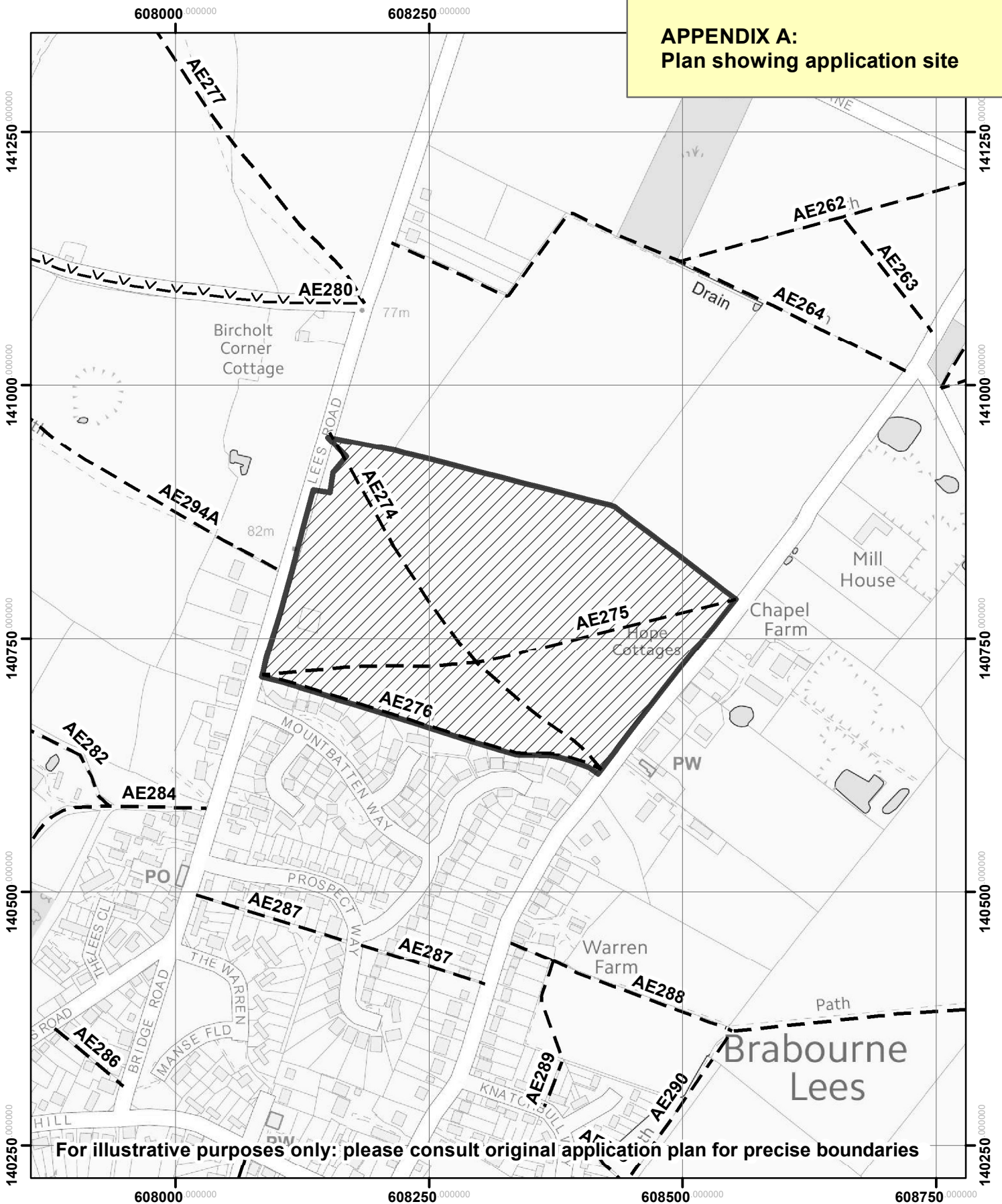
APPENDIX A – Plan showing the application site

Background documents

Inspector's report dated 22nd July 2019

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.

**APPENDIX A:
Plan showing application site**



Scale 1:5000

**Land subject to Village Green
application, known as
Hospital Field, at Brabourne**



**Application to divert part of Public Footpath WC108
and create an additional Public Footpath at Cranbrook**

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Monday 3rd December 2019.

Recommendation:

I recommend that the County Council

- (a) makes a Public Path Diversion Order to divert part of Public Footpath WC108 at Cranbrook;**
 - (b) makes a Public Path Creation Order to create a new length of Public Footpath in the vicinity of Great Swifts Manor at Cranbrook; and**
 - (c) in the event of objections to the Order(s), the matter be referred to the Planning Inspectorate with the County Council retaining a neutral stance in respect of any proceedings thereafter.**
-

Local Member: Mr. S. Holden (Cranbrook)

Unrestricted item

Introduction

1. The County Council has received an application ("the application") to divert part of Public Footpath WC108 from the owners of Great Swifts Manor at Cranbrook ("the applicants"). As part of the proposal, the applicants have also offered to create an additional length of path around the edge of an adjoining field to benefit users of the existing PROW network. The proposals are shown on the plans at **Appendix A** (proposed diversion of Public Footpath WC108) and **Appendix B** (proposed creation of new route).
2. The applicants have applied for the diversion on the basis that it is in their interests to move the path for several reasons:
 - To increase safety as the current route runs down a busy driveway with a considerable number of visitors and delivery vans throughout the day. A magnetic counter installed at the gate recorded between 50-80 vehicles daily or between 300-500 vehicles per week. The applicants have also had incidents where children and dogs have been close to a serious accident.
 - The Footpath runs across land fronting the property where the applicant's children and dog play. The diversion would provide better security in this respect. The proposed diversion would also improve the security of the property.
 - The field over which the footpath passes is grown to hay and having a footpath crossing and bisecting this field is potentially dangerous when farm machinery is operated in the vicinity. The applicant's tenant has stated he is not willing to take a hay cut from this area of the Estate as the path is used by the public to exercise dogs who foul the grass. Dog excrement contaminates the machinery used to cut the grass and the hay crop that is produced. Contaminated hay poses a real risk as an animal feed and is of no value. Cleaning contaminated machinery is unpleasant and can also pose a health risk.
 - Although there is currently a separate gate provided adjacent to the main gates, walkers frequently attempt to gain access through the electronically

controlled main gate which has resulted in damage to the motor and expensive replacements.

Policy

3. The Countryside Access Improvement Plan (CAIP) Operational Management Document (dated 2013) sets out the County Council's priorities for keeping the Definitive Map and Statement up to date. The main priorities in respect of Public Path Change Orders are:

Public Path Change Orders will normally be processed in the order in which applications are received, except in any of the following circumstances where an Order may be processed sooner:

- Where an Order would satisfy one or more of the key principles set out in paragraph 11.1 of the Countryside Access Policy,
- Where an application has been made to the County Council in its capacity as Planning Authority
- Where the processing of an Order could save significant costs incurred in other Rights of Way functions.

4. The County Council will consider whether the following criteria are satisfied before promoting a Public Path Change Order. Irrespective of the following, the statutory reasons (as set out within the Legal Tests section) for changing Public Rights of Way must apply.

I. The status of the route must not be in dispute at the time of the application, unless the Public Path Order is being implemented concurrently with an application under Section 53 of the Wildlife and Countryside Act 1981.

II. The applicant must agree to meet the County Council's costs of promoting the Order and bringing the new path into a fit condition for public use (as set out within section 3 of the Policy).

III. The applicant must also agree to defray any compensation which may become payable as a result of the proposal.

IV. The definitive line should, where it is considered by the County Council to be reasonably practicable be open, clear and safe to use.

5. However, nothing in this policy is intended to prevent the County Council promoting a Public Path Change Order in any case where it considers it appropriate in all the circumstances to do so.

Legal Tests

6. Legislation relating to the diversion of a public path is contained within section 119 of the Highways Act 1980 ("the 1980 Act") and the procedure is set out in Schedule 6 of the 1980 Act.
7. The Council may make an Order to divert a public path if it is satisfied that it is expedient to do so, either in the interests of the owner, lessee or occupier of the land crossed by the path or way in question, or that it is expedient in the interests of the public. There are other issues:

(ii) If the end of the path is not on another highway it cannot be diverted. So, for example, a path to a specific point on the seashore cannot be moved to a different point on the seashore. If the path does end on a highway, it may be diverted only to a point which is on the same or connected highway and which is substantially as convenient to the public.

(iv) The second major constraint is the Order may not be confirmed either by the Council in the absence of objections or the Secretary of State when objections have been received unless it is satisfied the route will be substantially as convenient to the public as a result of the diversion, and that confirmation of the Order is expedient having regard to the effect of the diversion on public enjoyment of the route as a whole.

8. Legislation relating to the creation of a Public Footpath by Order is contained within Section 26 of the 1980 Act which provides that:

(1) Where it appears to a local authority that there is a need for a public path over land in their area and are satisfied that, having regard to-

(a) The extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area; and

(b) The effect which the creation of the path or way would have on the rights of persons interested in the land, account being taken of the provisions as to compensation

it is expedient that the path or way should be created, the authority may... create a public path over the land.

Consultations

9. Consultations have been carried out and the following responses were received:

County Member

10. County Member Mr. S. Holden was consulted but no comments were received other than the fact he was aware of the application which was to be discussed further by the Parish Council and that he expected to hear more.

Tunbridge Wells Borough Council

11. The Council was informed the Borough Council does not support diversions of public rights of way especially in the High Weald as this is contrary to Landscape and AONB Management Plan objectives unless there are compelling reasons of safety and/or security or a satisfactory alternative of equal or greater value can be provided. Neither appear to apply in this case and consequently the proposal is not supported. The Council received no response to the proposed additional route.

Cranbrook Parish Council

12. The Parish Council initially responded fully supporting the proposal on the basis that the new path would be equally as accessible as the existing.

13. However, the Parish Council has seen fit to reconsider the matter and whilst supporting the additional length of path now objects to the proposed diversion on the following grounds:

- The proposed route is approximately 400 metres longer than the original;
- The current line of WC108 is well used and pivotal in picking up the path to the neighbouring village of Sissinghurst;
- The applicant's claim to the taking of a hay crop is inaccurate;
- Historical evidence exists of this ancient path being used for at least 250 years;
- Important views of Cranbrook would be lost; and
- In the context of the emerging NDP and the draft Local Plan there could be potential large developments at Wisley necessitating the provision of footpaths providing cohesion between settlements.

The County Council's policy is that the objection by the Parish Council is to be regarded as 'substantive' and as such any decision has to be taken by Members and not an Officer with similar authority delegated to him/her.

User Groups

14. The Ramblers, Open Spaces Society and the British Horse Society were consulted.

15. The local Ramblers' representative has responded to the consultation and noted that the reasons for the landowner wanting to re-route this path were, in his opinion, very inaccurate. He further stated:

- This PROW has been in place for many years;
- The path runs parallel to the drive and crosses at a point with excellent visibility - it is not a busy driveway and he does not believe there have been near accidents;
- The path is nowhere near the house so there is no significant security aspect;
- The perceived danger of farm machinery is wildly exaggerated;
- The driveway gate is electric, but the footpath does not use this (there is a separate gate) and he cannot believe for one minute that a walker has damaged it; and
- These are fabrications on the part of the owner who purchased the land with the PROW and now wishes to change it.

16. The Ramblers' representative has also engendered a response from a local resident who states that:

- She would like to reiterate the Ramblers' views;
- She has used the path frequently since 2001 and almost weekly between 2001 and 2009;
- She very rarely met any other person whilst using this path;
- The path does not take the public anywhere near the house; and
- She had never seen damage to the footpath or the gate.

17. It is interesting to note her statement that she rarely met any other person whilst using this path which conflicts with the statement by the Parish Council that the route is well used.

18.No response was received from the British Horse Society or the Open Spaces Society.

Utilities Companies

19.No objections were received from the utilities companies.

High Weald AONB Unit

20.The High Weald AONB Unit responded stating Kent County Council has a statutory duty to have regard to the purpose of conserving and enhancing the natural beauty of the High Weald AONB. This duty includes the determination of applications for the diversions of PROW. In this respect, Objective R1 of the Management Plan states an objective of maintaining the basic pattern and features of routeways. The Current alignment of WC108 is of historic importance serving not only Great Swifts but historically Moat Farm (now gone). It was used for the local movement of people stock and farm vehicles over 250 years between the farms, green and common and for access around Swifts Park. The diversion would therefore be damaging to the High Weald AONB and impact upon public enjoyment of the route by those who appreciate walking in the footsteps of their ancestors. The High Weald AONB unit therefore objects to the diversion of this footpath. Several historical maps were submitted in support.

Area Public Rights of Way Officer

21.The West Kent Area Public Rights of Way Manager initially voiced concerns which were placed before the applicant. He also sought assurances concerning any new works on the proposed path. In consequence of this, and the other comments articulated above from those voicing similar concerns, the applicant amended his proposal and agreed to the required works. The applicant also offered an additional length of path to further improve the local network. In consequence, the Area Manager states that, with the dedication of the additional path and his suggested amendment to the diversion, he would not raise any objection to the proposal.

The proposed diversion of part of Public Footpath WC108

22.In dealing with the application to divert a public right of way, consideration must be given to the following criteria of section 119 of the Highways Act 1980:

- a) Whether it is expedient in the interests of the owner of the land or the public that the right of way in question should be diverted;
- b) Whether the point of termination of the path will be substantially as convenient to the public given that it is proposed to be diverted to another point on the same or a connecting highway;
- c) Whether the right of way will not be substantially less convenient to the public;
- d) The effect that the diversion would have on public enjoyment of the path as a whole;
- e) The effect on other land served by the existing right of way; and
- f) The effect of any new public right of way created by the order would have on land over which the right is so created, and any land held with it.

The above criteria and the conclusions upon them are considered individually below.

(a) Whether it is expedient in the interests of the owner of the land or the public that part of the footpath in question should be diverted.

23. The applicant has, in addition to his original application, amplified his reasoning following comments received at the consultation stage. In the main these are summarised at paragraph 2 above.

24. It is suggested by the Parish Council and the Ramblers' representative that the initial grounds for diversion submitted by the applicants were weak. It is accepted that, whilst not all of the grounds advanced by the applicants would individually be considered sufficient to divert the footpath, the applicants nonetheless, on balance, do provide convincing argument, and reflect concerns of security and privacy that have been raised in the past by previous owners.

25. One of the original reasons given in support of the application is the damage to the driveway gate. On the basis of current case law alone, where the Courts have held that it is not acceptable for a landowner to lock a gate for his own purpose and provide a separate gate alongside to accommodate the footpath, the applicant has a case. Currently (and indeed for some time), the public have entered the grounds of Great Swifts through a gate placed some metres away from the legally defined line of the path which passes through the main vehicular gates. The Parish Statement prepared by the Cranbrook Parish Council in the 1950s describes the route as running 'onto to drive to Great Swifts, and thence on to Main Road by Lodge Gate'. Today, the Lodge gates, are worked by electricity and are an integral part of the security of this large property. Were the County Council to implement the correct letter of the law and insist the path is open on the correct line there is no doubt this would present the applicant with problems of security. The Gate design would need to be amended and the electrics disabled. The applicant has already submitted evidence of damage/repair where users had attempted to push their way through the main gates in ignorance of the fact, they were electrically operated. It would appear therefore that the applicants have genuine concerns in this respect such that it is in their interest to divert the path.

26. The diversion will improve security and privacy; it may not be as great as that received by other applicants from somewhat smaller properties, but it is none the less an improvement.

27. Having carefully considered the grounds for the diversion, it would appear that it is in the landowner's interest for the path to be diverted and this test is therefore met. The point raised by the Parish Council that there could be further large developments in the Wisley Area tends to support the applicant on the basis of increased future usage of this path.

(b) Whether the point of termination of the paths will be substantially as convenient to the public given that it is proposed to be diverted to another point on the same or a connecting highway;

28. The path is to be diverted to reconnect with the same highway at the same points as presently exist. Accordingly, the points of termination will therefore remain equally as convenient.

(c) Whether the right of way will not be substantially less convenient to the public;

29. The new route will not be substantially less convenient to the public. This is an amenity path where most of the use would be for recreational purposes (as opposed to, for example, a route to school or other local facilities). The diversion may increase the distance that some users would have to travel but may equally reduce this for others, dependant of course on their ultimate destination. In any event, any increase would be minimal given the context of the recreational use.

30. The proposed diversion will initially traverse an open area of grassland and then the proposed creation to the south of WC103 will follow a broad and mown grassed surface with a width of two metres. The headland path is a route currently enjoyed by the public on an informal basis and the Order will formalise the current informal arrangement. The convenience of the public in using this new route will not be in any way jeopardised and this is illustrated by the plan attached at **Appendix C** which shows the surrounding rights of way network.

(d) The effect that the diversion would have on public enjoyment of the path as a whole;

31. The proposed diversion is not any less enjoyable to use, in terms of its physical nature, than the current route.

32. It has been suggested by the objectors that the proposal would result in the loss of an historic route. However, this cannot be in any way said to be a route of any intrinsic or specialist historic interest. It is, like most paths in Kent, old. It is not “a walk-through time” which encourages use of this route and unlikely that most, or if indeed any, users of this route would be remotely aware of any historic significance, let alone be specifically attracted to the route for this reason. Despite assertions to the contrary, these routes are not pickled in aspic nor inscribed in tablets of stone; instead they have been providing the public - albeit over many years - with a means to navigate the County. Even with the proposed diversion, the path will continue to do just that for the current and future users.

33. As such, it is not considered that the proposed diversion will have any negative impact upon the public enjoyment of the path as a whole.

(e) The effect on other land served by the existing public right of way;

34. There will be no detrimental effect on other land served by the existing path.

(f) The effect of any new public right of way created by the order would have on land over which the right is so created, and any land held with it.

35. The new route created by the Order will have no impact on other land served by the right of way.

The proposed creation of a new Public Footpath

36. In an effort to address some of the issues raised by the objectors, the applicants have offered to dedicate a further length of path which, taken together with the proposed diversion, would be advantageous to the public by improving access to the local network of Public Rights of Way. However, quite rightly, the applicants have informed the County Council that this offer of an additional length of path is conditional upon the successful outcome of his Diversion Order application.
37. The Area PROW Manager is in total agreement with the additional length of path and the improvement/benefit it would bring. The matter could be dealt with by way of an Agreement under Section 25 of the 1980 Act but, in my view, it would be more properly dealt with under section 26 of the 1980 Act by the making of a formal Public Path Creation Order. The County Council received no objection to this proposal.
38. As set out at paragraph 7 above, the County Council may make a Public Path Creation Order where it is considered necessary to do so, having regard to both the extent that the new length of path would add to the convenience of path users and also the effect the new path would have on persons with an interest in the land.
39. In this case, it is clear that the proposed new path would add to the convenience and enjoyment of path users as well as providing a useful addition to the local rights of way network.

Further considerations

40. In addition to the tests set out in section 119 of the Highways Act 1980, the County Council must also have regard to the following issues when considering an application to divert a public right of way.
41. Under section 29 of the Highways Act 1980, the County Council has a duty to have regard to the needs of agriculture (including the breeding and keeping of horses), forestry and the desirability of conserving flora, fauna and geological and physiographical features. In this case, there is no adverse effect caused by the diversion of the path with the landowner, as set out above, stating positive advantages.
42. Section 40 of the Natural Environment and Rural Communities Act 2006 requires that every public authority must have regard “*so far as is consistent with the proper exercise of [its] functions, to the purpose of conserving biodiversity*”. In this case, there is no adverse effect caused by the diversion of the path.
43. Where the affected land forms part of an Area of Outstanding Natural Beauty (AONB), section 85 of the Countryside and Rights of Way Act 2000 requires that the County Council shall have regard to “*the purpose of conserving and enhancing the natural beauty*” of the AONB. In this case the land does form part of the High Weald AONB, but the High Weald Joint Advisory Committee objections have been taken into account and given due regard. It is not considered that the proposal will affect the conservation or natural beauty of the AONB.

44. Under section 17 of the Crime and Disorder Act 1998, the County Council has a duty to exercise its functions “*with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area*”. In this case, the proposed diversion would provide positive benefits to the landowner in this respect.

45. Finally, the County Council is subject to the public sector duty regarding socio-economic inequalities set out in section 1 of the Equalities Act 2010. An assessment in this regard has been undertaken and there will be no adverse impact on the use of the affected path as a result of the diversion.

Conclusion

46. It is considered, having regard to all of the relevant considerations, that the legal tests are met in all respects and that a Public Path Diversion Order should be made in respect of Public Footpath WC108, as per the applicants’ request. In addition, it is proposed that Public Path Creation Order be made to give effect to the additional route offered by the applicants.

Recommendations

47. I recommend that the County Council

- (a) makes a Public Path Diversion Order to divert part of Public Footpath WC108 at Cranbrook;
- (b) makes a Public Path Creation Order to create a new length of Public Footpath in the vicinity of Great Swifts Manor at Cranbrook; and
- (c) in the event of objections to the Order(s), the matter be referred to the Planning Inspectorate with the County Council retaining a neutral stance in respect of any proceedings thereafter.

Appendices:

Appendix A – Plan showing the proposed diversion of Public Footpath WC108

Appendix B – Plan showing the proposed creation of a new length of path

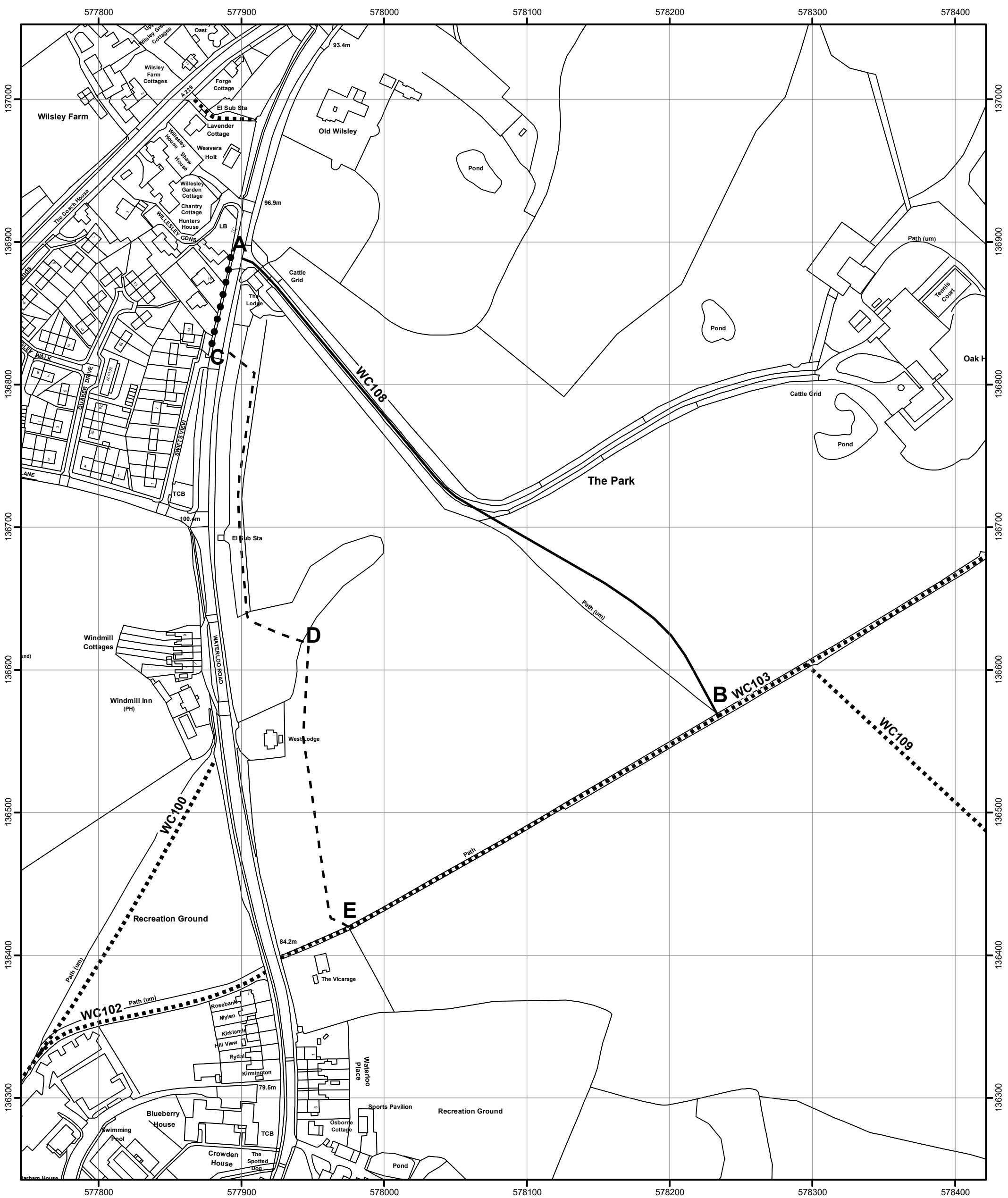
Appendix C – Plan showing the wider PROW network

Background Documents:

Case file in respect of the proposed diversion of Public Footpath WC108 and creation of new path at Cranbrook

Contact Officer:

Chris Wade 03000 413475



Key

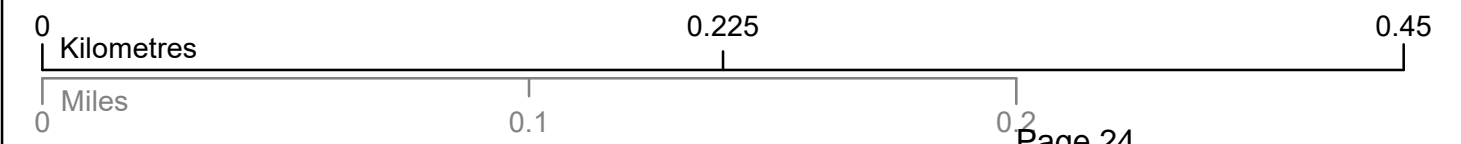
	Route to be diverted
	New Length of route
	Unaffected Routes
	Existing highway being used as part of this diversion

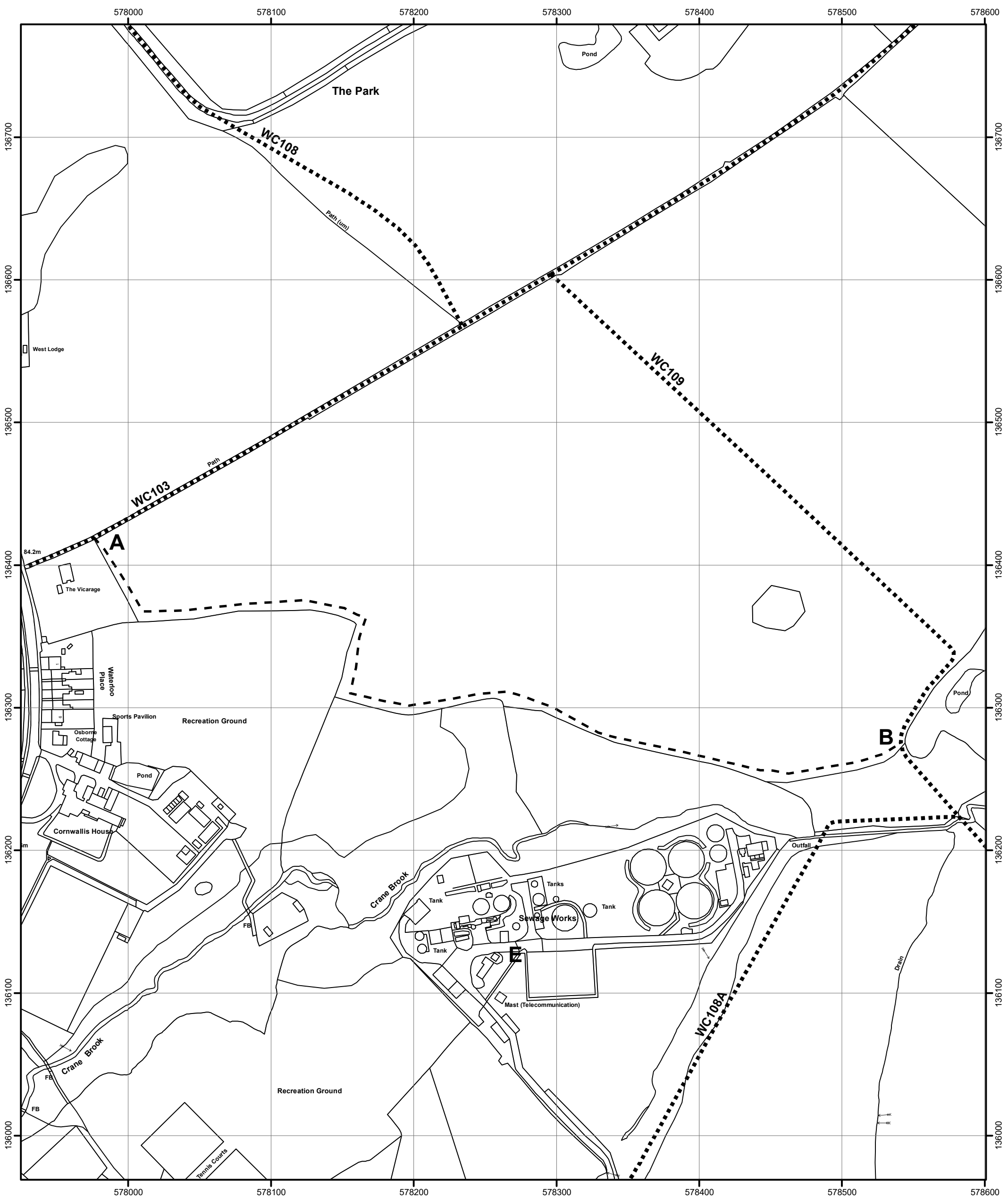
Highways Act 1980
Kent County Council
Public Footpath WC108, Cranbrook)
Public Path Diversion & Definitive Map and Statement
Modification Order 2019
 Produced by the KCC Public Rights of Way and Access Service.
 © Crown Copyright and database right 2013.
 Ordnance Survey 100019238

Created by:	WJB
Checked by:	CW
Reference:	WC108

N

1:2,500





Key

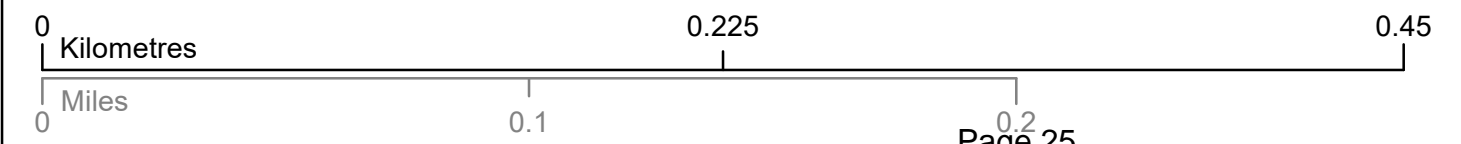
	Route to be diverted
	New Length of route
	Unaffected Routes
	Existing highway being used as part of this diversion

Highways Act 1980
Kent County Council
Public Footpath WC108, Cranbrook)
Public Path Creation & Definitive Map and Statement
Modification Order 2019
 Produced by the KCC Public Rights of Way and Access Service.
 © Crown Copyright and database right 2013.
 Ordnance Survey 100019238

Created by:	WJB
Checked by:	CW
Reference:	WC108

N

 1:2,500





- Footpath
- Bridleway
- Restricted Byway
- Byway Open to All Traffic
- Point path number or status changes
- Boundary of area covered by 1:2500 scale Network Map
- Area covered by 1:2500 scale Network Map

**EXTRACT OF THE WORKING COPY OF THE
DEFINITIVE MAP OF PUBLIC RIGHTS OF WAY
FOR THE COUNTY OF KENT**

© Crown Copyright and database right 2013. Ordnance Survey 100019238

**FOR REFERENCE ONLY – NO FURTHER COPIES
MAY BE MADE**

Unauthorised reproduction infringes Crown Copyright
and may lead to prosecution or civil proceedings.

Produced by the KCC Public Rights of Way and Access Service

Created by:

WJB

Checked by:

CW

Issue Date:

13/11/2019

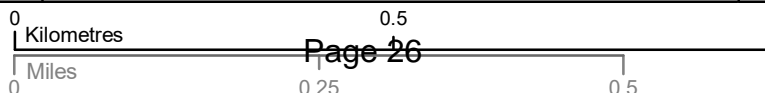
Reference:

WC108Def

N



1:10,000



Application to register land known as Hillminster Green at Minster-in-Thanel as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Tuesday 3rd December 2019.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land known as Hillminster Green at Minster-in-Thanel as a new Village Green has been accepted, and that the land subject to the application be formally registered as a Village Green.

Local Members: Ms. E. Dawson and Ms. E. Hurst

Unrestricted item

Introduction

1. The County Council has received an application to register land known as Hillminster Green at Minster-in-Thanel as a new Village Green from the Minster Parish Council ("the applicant"). The application, made on 11th October 2017, was allocated the application number VGA675. 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 2014.
 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 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 County Council must publicise the application by way of a copy of the notice on the County Council's website and by placing copies of the notice on site to provide local people with the opportunity to comment on the application. Copies of that notice must also be served on any landowner(s) (where they can be reasonably identified) as well as the relevant local authorities. The publicity must state a period of at least six weeks during which objections and representations can be made.
-

The application site

6. The area of land subject to this application (“the application site”) consists of a grass area of open space of approximately 0.19 acres (0.076 hectares) in size situated at the junction of Hill House Drive and Burgess Close in the village of Minster in Thanet. Access to the site is unrestricted via the footway of Hill House Drive on the western side of the application site.
7. The site is shown on the plan at **Appendix A**.

The case

8. The application has been made on the grounds that the application site has been freely used by local residents for a variety of recreational activities, without challenge, and for a period in excess of twenty years.
9. Provided in support of the application were 25 user evidence questionnaires from local residents, a supporting statement by the applicant as well as various maps showing the application site. A summary of the evidence in support of the application is attached at **Appendix B**.

Consultations

10. Consultations have been carried out as required and no objections have been received.
11. One email response has been received from a local resident in support of the application.

Landowner

12. At the time of the submission of the application, the application site was owned by Sunley Estates PLC and registered with the Land Registry under title number K666461. The registered landowner was contacted but no response was received.
13. During the processing of the application, on 6th September 2018, the ownership of the land was transferred to the local Parish Council (also the applicant for Village Green status).
14. It is to be noted that this change of ownership has no bearing on the Village Green application; had the ownership been transferred prior to the submission of the Village Green application, the applicant would have been advised to submit a voluntary dedication application under section 15(8) of the Commons Act 2006 which would have avoided the need to produce evidence of use. However, provided that the evidential tests set out in section 15(2) of the 2006 Act are met, the fact that the applicant is now also the landowner presents no bar to the registration of the land as a Village Green under this latter section.

Legal tests

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

- (a) *Whether use of the land has been 'as of right'?*
- (b) *Whether use of the land has been for the purposes of lawful sports and pastimes?*
- (c) *Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?*
- (d) *Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, 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'?

16. 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.
17. In this case, there is no evidence to indicate that use of the application site has been in any way in exercise of force, in secrecy or undertaken on a permissive basis. None of the witnesses refer to any hindrance to informal recreational use of the application site and there is no evidence on the ground (e.g. old fencing) to suggest that access to the application site has ever been restricted in any way.
18. Therefore, in the absence of evidence of any challenges to recreational use of the application site, such use would appear to have taken place 'as of right'.

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

19. 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*'³.
20. In this case, the evidence submitted in support of the application (summarised at **Appendix B**) indicates that local residents have engaged in various recreational activities on the land.
21. In particular, the majority of witnesses refer to the use of the application site on a daily basis by local children for ball games and general play. This is due to the fact that the application site is located away from main roads and offers a safe place for children to play away from the dangers of vehicular traffic. The evidence also suggests that the application site has been an area for neighbourhood socialising or

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

³ *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

occasionally for informal community events, such as cake sales and organised activities.

22. The nature of the application site and its location within a housing estate both support the applicant's evidence that it has been used for the activities cited above. As such, it would appear that the application site has been used for lawful sports and pastimes.

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

23. 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*⁴ 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'*.
24. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also be necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible than that of a locality, and need not be a legally recognised administrative unit. On the subject of 'neighbourhood', the Courts have held that *'it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood... The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning'*⁵.

The 'neighbourhood within a locality'

25. In this case, the applicant specifies the locality (on the application form) as "Hillhouse Drive, Minster-in-Thamet, CT12 4BE within the civil parish of Minster".
26. Hill House Drive, relied upon by the applicant is merely a road name and clearly not, of itself, a legally recognised administrative unit; however, the civil parish of Minster-in-Thamet would be a qualifying locality for the purposes of the Village Green application.
27. The application site itself is situated within a housing estate comprising 4 roads and approximately 90 properties, all accessed via Hill House Drive. The properties are similar in both age (mid-1990s) and character, and appear to have been built largely as part of the same development, known locally as 'Hillminster'. In that respect, it would appear to be a sufficiently cohesive and identifiable community within the wider parish of Minster.

⁴ *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

⁵ *ibid* at 92

28. Of the 25 user evidence statements submitted in support of the application, all but 3 are from residents of the Hillminster development which indicates that the land is almost predominantly used by the residents of the Hillminster community, rather than people living within the wider parish.
29. As such, it can be concluded that use of the application site in this case has been by the residents of the neighbourhood of 'Hillminster' within the locality of the parish of Minster-in -Thanet.

Significant number

30. The County Council also needs to be satisfied that the application site has been used by a 'significant number' of the residents of the locality. 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*'⁶. Thus, what constitutes a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the application site.
31. In this case, the applicant has provided evidence of use from 25 witnesses. A large number of those who completed evidence questionnaires, in addition to their own evidence of use, referred to having observed use of the application site by others on a daily basis.
32. As noted above, the image presented of the application site by the user evidence is one of a community focal point that is used on a daily basis, particularly by local children. As such, it would have been obvious to a reasonable landowner that the application site was in general use by local residents.
33. Therefore, it can be concluded that the application site has been used by a significant number of the residents of the Parish of Minster.

(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 two years from the date upon which use 'as of right' ceased.
35. In this case, the application was made on 11th October 2017. Given the open nature of the application site and the ease of access onto it, there is no evidence to suggest that use has not continued until (and beyond) the date of the application.

⁶ R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council [2002] EWHC 76 at paragraph 71

(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 of the application site 'as of right' is continuing and, as such, the relevant twenty-year period ("the material period") is calculated retrospectively from the date of the application, i.e. 1997 to 2017.
37. The user evidence summarised at **Appendix B** demonstrates that there has been use of the application site throughout the last twenty years, with 11 users (out of the 25 in total) covering the full twenty years.
38. Therefore, it can be concluded that there has been use of the application site for a full period of twenty years.

Conclusion

39. Although this application is unopposed, the County Council must still be satisfied that all of the requisite legal tests have been met.
40. In this case, the evidence submitted in support of the application would appear to confirm that the application site has been used by local residents for a period of over twenty years for the purposes of lawful sports and pastimes, such that the legal tests set out in section 15 of the Commons Act 2006 have been met.

Recommendation

41. I recommend that the County Council informs the applicant that the application to register the land known as Hillminster Green at Minster-in-Thamet as a new Village Green has been accepted, and that the land subject to the application be formally registered as a Village Green.

Accountable Officer: Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk Case Officer: Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

APPENDIX A – Plan showing application site
APPENDIX B – Table summarising user evidence

Background documents

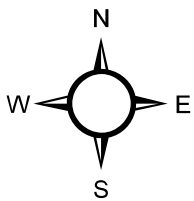
The main file is available for viewing on request at the offices of the PROW and Access Service at Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

**APPENDIX A:
Plan showing application site**



For illustrative purposes only: please consult original application plan for precise boundaries

631250 000000



Scale 1:1250

**Land subject to Village Green
application at Hill House Drive
in Minster-in-Thantet**



Page 33



Name	Period of use	Frequency of use	Type of use	Access	Comments
ANDREWS, I & K	2010-present	Occasionally	Play games inc. football & socialize with neighbours	Open access from Burgess Close	Never been challenged using the land or prevented from doing so; seen local residents playing & pick-nicing
BAILEY, T	2012-2017	Most days	Children playing with friends, socializing with neighbours, community activities ie. Halloween, charity cake sales	From Burgess Close	Seen children playing sports & bike riding. Community base for Halloween & games in summer. Never challenged or prevented from using land
BUCKLEY K & D	1995 – present	Daily	Safe play space for children	(Not said)	Seen others playing / walking /exercise dogs . No notice, fencing or challenge or prevention from use
BURGESS, O.	1995-2017	Whenever wanted / now twice a week	Dog Walking, playing with grandchildren	From both sides	Given permission by Sunleys. Seen other local children playing, community cake sales for charity, bike riding, rounders
CHAPMAN Mr & Mrs R	1994-present	Not stated	Walking, talking with neighbours	Not stated	Never challenged or prevented from use, seen kids playing football, rounders, cricket, dog walking, picnics
EDWARDS, T	2008-2017	Not stated	Not stated	Not stated	No gates/stiles. Seen others bike riding, children playing, sports
ETHERINGTON Mr & Mrs T	1995-2017	Weekly or fortnightly	Play with grandchildren, family football, climbing tree	Not stated	No gates/stiles, never prevented from using. Seen other children playing & sports, dog walking, Salvation Army carol singing
GEOGHEGAN, M & C	1998-2017	Occasionally	Walking in summer, family socializing	Not stated	Others playing, walking, sports, community gatherings
HARDING, D & W	2002-2017	Daily	Walking dog, meeting neighbours. Small summer community fete, children play if not old enough to go to Rec	Walk over road (Burgess close)	Other children playing, picnics, sport, community events. Not challenged or prevented
HOCKEY, D	1998-2017	Once a week	Exercise and safe play area for young children	Not stated	Not challenged or prevented from use. Children playing football & cricket, dog walking, built snowmen in winter
HUGHES S & J	1993-2017	Regularly when children young, now occasionally	Ball games with children, safe for young children & family time. Community Games by locals. Now for own exercise and socializing	Walk from Burgess Close	Not challenged or prevented from use. Other children playing, rounders, football, cricket. Local events for community
HYDE, D	2016-2017	Daily	Children play – football, skipping. Charity cake sale	From junction of Hill House Drive & Burgess Close	No challenge or prevented from use. Local children and families play there, dog walking
MILLs, D	2009-2017	Once a month	Play with grandchildren, own recreation	Not stated	No challenge or prevented from use. Local children play, walking

MALAMIS, D	2006-2017	2-3 times per week, now 1-2	Children playing when younger and to meet up with other local families	Not stated	No challenge or prevented from use. Children playing, picnics, walking
MARSHALL	2005-present	Daily	Dog walking, family playing	From Hill House Drive	Local children playing, walking, picnics when weather good
MILNES, K	2007-present	Daily	Children play safely with friends, can be seen from home. Dog walking	Lives next to land	No challenge or prevented from use. Local young children play here as Rec is along main road and not safe on their own, Dog walking
PADFIELD, K & M	2006-2017	Daily	Childrens play area	Not stated	Local children playing games, dog walking. Not challenged
PORTANIER, B & J	1992-2017	Weekly	Play with children and then granddaughter	Not stated	Local use – children & games. Street parties
PORTANIER, L TAYLOR, C	1992 – present	Weekly or daily	Play with child, relax, meet neighbours, dog exercise	Not stated	Not challenged or use prevented .Others playing football, childrens games, picnics, community celebrations for royal weddings, cake sales, snowmen building in winter
RAMUS, A	Not stated	No personal use of land	N/A	Not stated	Local children use for play
SEALE, P & C	2000 - 2017	Regular family visits	Childrens games, grandchildrens vists – safe play area	Not stated	Not challenged or use prevented. Mainly safe area for young children to play
SELF. K & ALMOND, J	1995 – present	2-3 times per week	Play with grandchildren & family; maintain trees; general safe area to play and be outside	From Burgess Close	Not challenged or use prevented. Local children games, picnics, dog walking; charity cake sales, summer activities organized by local parents for families
SHERRINGTON, L	2000 – 2017	Daily	Played with children and walking	Not stated	Children playing games, sports, dog walking, bike riding
SIMPKIN, T	2004 – present	Weekly, daily in summer	Children meet friends and play, Football, lego, cycling. Socialise with neighbours	Not stated	Not challenged or use prevented. Children playing, team games, picnics, kite flying. Local families use it
TOMCZAK, MR & MRS	1996 – 2017	2/3 times per week	Green space to enjoy close to home	From Burgess Close	Not challenged or use prevented. Local children playing and enjoying themselves on bikes, scooters ed. Local children playing and enjoying themselves on bikes, scooters

This page is intentionally left blank

Application to register land known as Kingsmead Field at Canterbury as a new Town or Village Green

A report by the PROW and Access Service Manager to Kent County Council's Regulation Committee Member Panel on Tuesday 3rd December 2019.

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

Local Member: Mr. G. Gibbens (Canterbury City North) Unrestricted item

Introduction

1. The County Council has received an application to register a piece of land known as Kingsmead Field at Canterbury as a new Town or Village Green from the Canterbury City Council ("the applicant"). The application, made on 1st February 2019, was allocated the application number VGA679. A plan of the site is shown at **Appendix A** to this report.
2. Members may recall a previous application to register a larger area of land incorporating the current application site as a Village Green which was made under section 15(2) – i.e. on the basis of user evidence. This previous application was rejected at a meeting of the Member Panel on 29th July 2014 on the grounds that the recreational use of the land had not taken place 'as of right'. This decision has no bearing on the current application and reference is made to it for information only.

Procedure

3. 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.
4. 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."
5. 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.

6. 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

7. The area of land subject to this application (“the application site”) consists of an area of grassed open space of approximately 3 acres (1.2 hectares) in size known locally as Kingsmead Field. The site is situated on the north-eastern side of Kingsmead Road and is accessed either via the footway of Kingsmead Road (which abuts the south-western side of the site) or via a point on Stonebridge Road on the north-eastern corner of the application site.
8. A plan of the application site is attached at **Appendix A**, with photographs of it at **Appendix B**.

Notice of Application

9. As required by the regulations, Notice of the application was published on the County Council’s website.
10. The local County Member was also informed of the application, and confirmed that local residents were very happy with the proposed registration of the land as a Village Green.
11. No other responses to the consultation have been received.

Ownership of the land

12. A Land Registry search has been undertaken which confirms that the application site is wholly owned by the applicant under title number K809686.
13. There are no other interested parties (e.g. leaseholders or owners of relevant charges) named on the Register of Title in respect of the application site¹.

The ‘locality’

14. 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.

¹ The title refers to two leases but these relate to land which does not form part of the Village Green application.

15. 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).
16. In this case, the application has been made by the local City Council. In cases where land falls outside of a civil parish (as is the case here), the local electoral ward would normally be considered the relevant locality for the purposes of Village Green registration. In the current case, the land is sited on the ward boundary between St. Stephens and Northgate and the applicant has specified, on the application form, that the Northgate ward is to be used for the purposes of the application.
17. The Northgate electoral ward, being a legally recognised administrative unit, is therefore a qualifying locality for the purposes of this application.

Conclusion

18. 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.
19. It can be concluded that all the necessary criteria concerning the voluntary registration of the land as a Village Green have been met.

Recommendations

20. I recommend that the County Council informs the applicant that the application to register the land known as Kingsmead Field at Canterbury has been accepted, and that the land subject to the application be formally registered as a Town or Village Green.

Accountable Officer: Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk Case Officer: Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

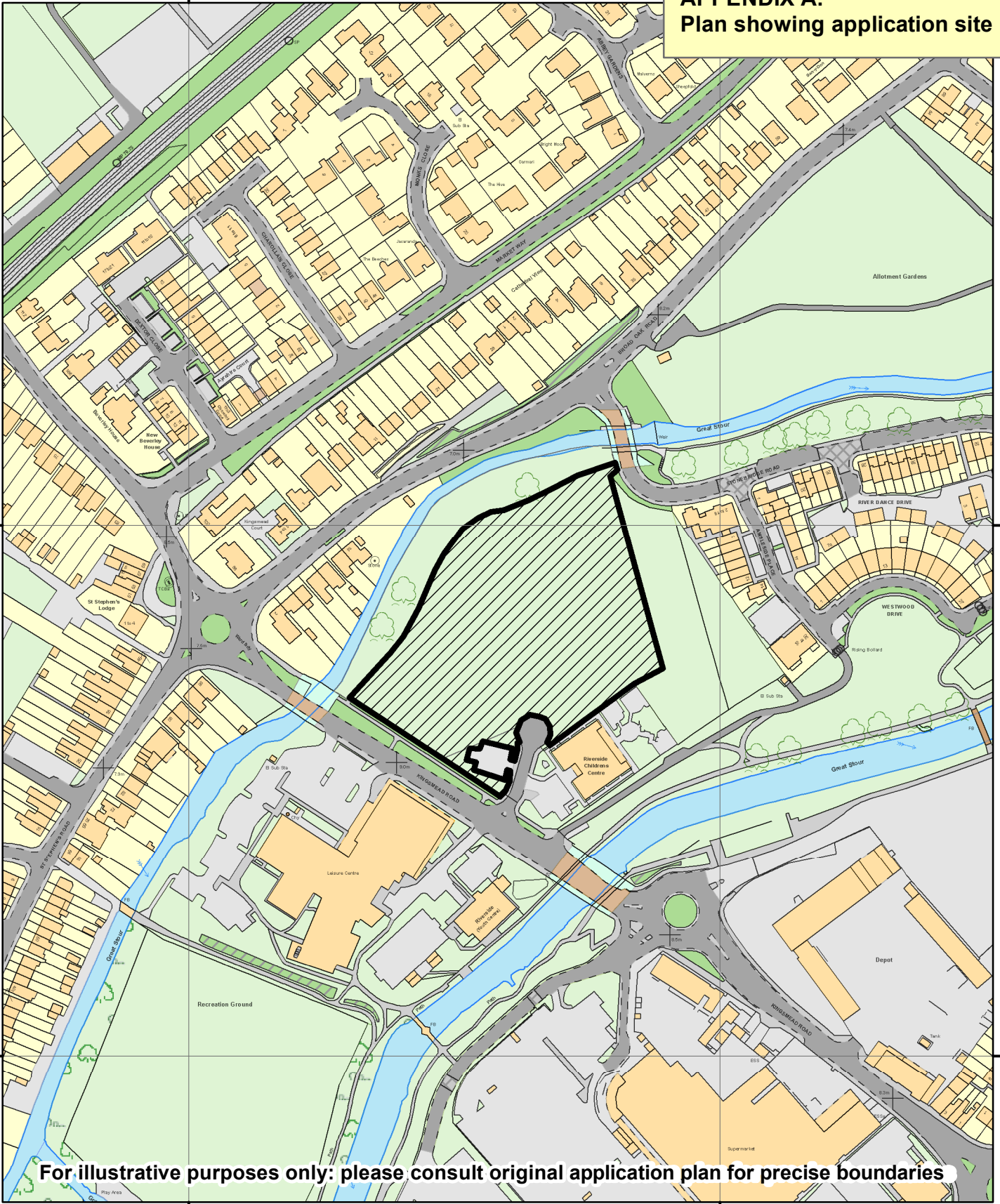
Appendices

APPENDIX A – Plan showing application site
APPENDIX B – Photographs of the application site

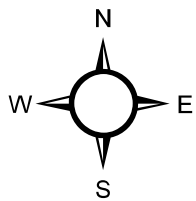
Background documents

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.

**APPENDIX A:
Plan showing application site**

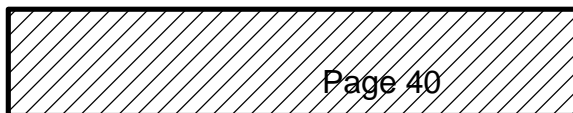


For illustrative purposes only: please consult original application plan for precise boundaries



Scale 1:2500

**Land subject to Village Green
application, known as Kingsmead
Recreation Ground, at Canterbury**



Page 40



**APPENDIX B:
Photographs of the application site**





Application to register land known as Whimbrel Green at Larkfield as a new Town or Village Green

A report by the PROW and Access Service Manager to Kent County Council's Regulation Committee Member Panel on Tuesday 3rd December 2019.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land known as Whimbrel 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 MBE (Malling Central)

Unrestricted item

Introduction

1. The County Council has received an application to register a piece of land known as Whimbrel Green at Larkfield as a new Town or Village Green from the East Malling and Larkfield Parish Council ("the applicant"). The application, made on 28th September 2018, was allocated the application number VGA678. A plan of the site is shown at **Appendix A** to this report.

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, mainly laid to grass, approximately 0.5 acres (0.2 hectares) in size, known locally as Whimbrel Green, that is situated on the western side of Plover Road (between property numbers 47 and 49) at Larkfield. Access to the application site is via the open frontage onto the footway of Plover Road and also via a taracadam path which crosses the application site and connects Plover Road with Public Footpath MR570.
7. A plan of the application site is attached at **Appendix A**, with photographs of it at **Appendix B**.

Notice of Application

8. As required by the regulations, Notice of the application was published on the County Council’s website.
9. The local County Member, Mrs. T. Dean, was also informed of the application and wrote to confirm her support for it.
10. No other responses to the consultation have been received.

Ownership of the land

11. A Land Registry search has been undertaken which confirms that the application site is wholly owned by the applicant under title number K4988875.
12. There are no other interested parties (e.g. leaseholders or owners of relevant charges) named on the Register of Title.

The ‘locality’

13. 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.
14. 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).

15. 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

16. 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.

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

Recommendations

18. I recommend that the County Council informs the applicant that the application to register the land known as Whimbrel 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. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk

Case Officer:

Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

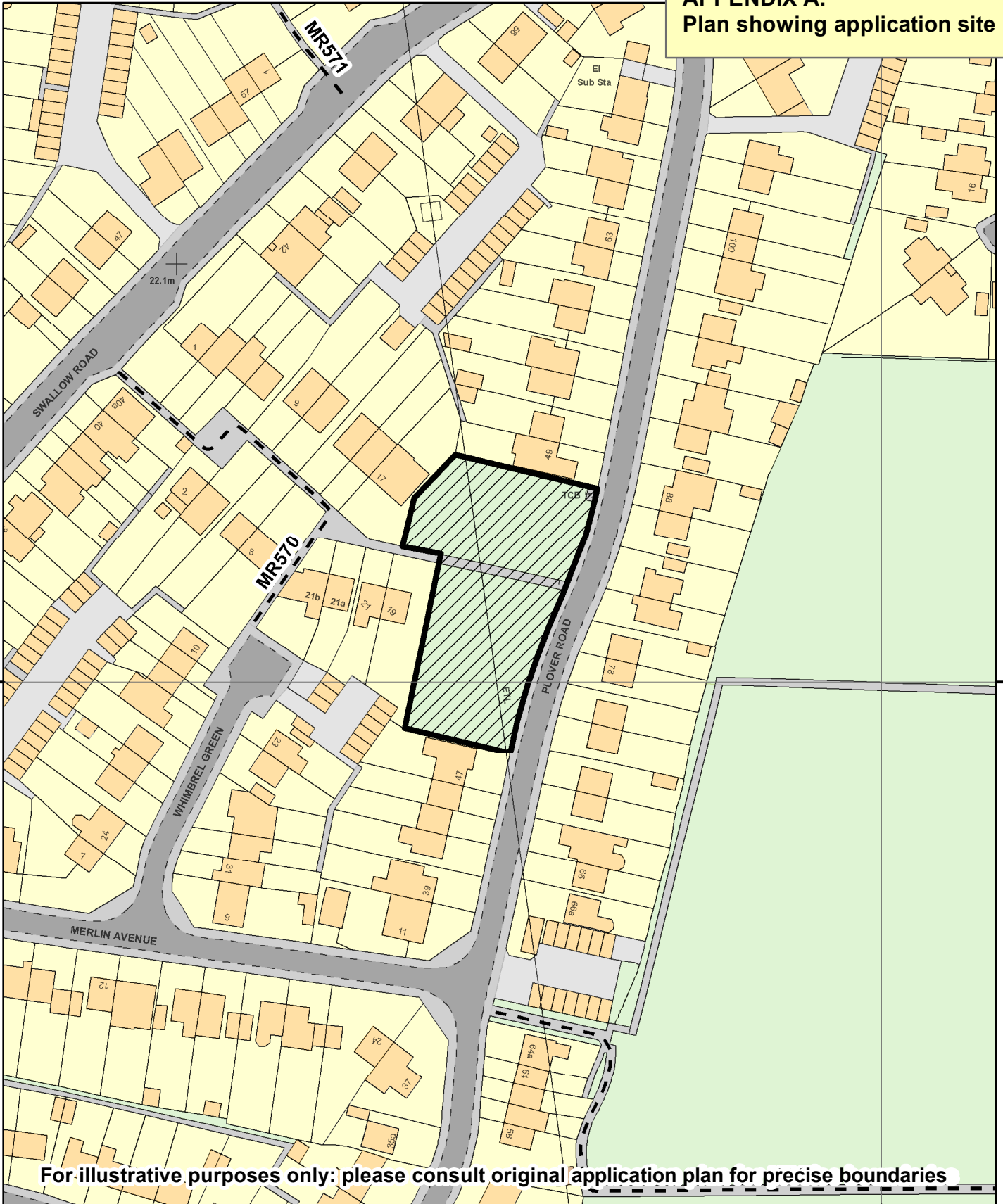
APPENDIX A – Plan showing application site

APPENDIX B – Photographs of the application site

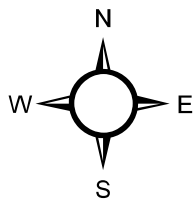
Background documents

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.

**APPENDIX A:
Plan showing application site**



570000



Scale 1:1250

**Land subject to Village Green
application, known as Whimbrel Green,
at Plover Road, Larkfield**



Page 46



**APPENDIX B:
Photographs of the application site**



