AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Monday, 22nd April, 2024, at 2.00 pm
Darent Room, Sessions House, County Hall, Maidstone

Ask for: **Hayley Savage**
Telephone **03000 414286**

Membership

Mr S C Manion (Chairman), Mr M Baldock, Miss S J Carey, Mr P Cole and Mrs L Parfitt-Reid

UNRESTRICTED ITEMS

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

1. Membership and substitutes

2. Declarations of interest for items on the agenda

3. Application to register land known as Two Fields at Westbere as a new Town or Village Green (Pages 1 - 16)

4. Other items which the Chairman decides are urgent

EXEMPT ITEMS

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

Benjamin Watts
General Counsel

Friday, 12 April 2024

Please note that any background documents referred to in the accompanying papers maybe inspected by arrangement with the officer responsible for preparing the relevant report.

Application to register land known as Two Fields at Westbere 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 Monday 22nd April 2024.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 15th September 2023, that the Applicant be informed that the application to register the land known as Two Fields at Westbere as a new Village Green has not been accepted.

Local Member: Mr. A. Marsh (Herne village and Sturry) Unrestricted item

Introduction

1. The County Council has received an application to register land known as Two Fields at Westbere, near Canterbury, as a new Town or Village Green from the Two Fields Action Group ("the Applicant").

2. The application has been made under section 15 of the Commons Act 2006, which 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;

3. The application was initially supported by 70 user evidence questionnaires, which were subsequently supplemented by a further 18 user questionnaires. The application was made under section 15(2) of the Commons Act – i.e. on the basis that use of the Application Site has continued 'as of right' until the date of the application – such that the relevant twenty-year period for the purposes of the application is November 1999 to November 2019.

The Application Site

4. The land subject to this application ("the Application Site") is situated on the Westbere/Sturry parish boundary, south of Staines Hill and Westbere Lane, and consists of a large area of approximately 37 acres (15 hectares) comprising mixed woodland (some of which has been cleared) as well as more open areas of grassland and scrub.

5. Access to the Application Site is via Public Footpath CB91 which, for the most part, runs alongside the railway line abutting the southern edge of the Application Site and connects Westbere Lane with Fairview Gardens.

6. The Application Site is shown in more detail on the plan at **Appendix A** and the aerial photograph (dated 2009) at **Appendix B**.

Background

7. The ownership of the Application Site is sub-divided into five strips of varying width that are registered with the Land Registry to four different landowners.

8. The western half (approximately) of the Application Site is registered to Bellway Homes Ltd. under title number TT60980. Adjacent to the land owned by Bellway Homes Ltd. is a narrow strip of land registered under Land Registry title number K779440 to Mr. S. Saadat. A further adjoining narrow strip of land, registered under title number TT65696, is owned by Westbere Green Space Protection Ltd. The area of land comprising (approximately) the eastern half of the Application Site is registered to Mr. S. Mahallati under title numbers K779400 and K786421.

9. All landowners have been contacted, although (despite various attempts) it has not been possible to trace Mr. Saadat.

10. Westbere Green Space Protection Ltd has confirmed its support for the application.

11. However, objections to the application have been received from Bellway Homes Ltd. ("the First Objector") and on behalf of Mr. Mahallati ("the Second Objector"). Those objections have been made on the basis, inter alia, that:
    - The use of the Application Site has not been by a sufficient number to give rise to a general appearance that the land was available for community use, or by the inhabitants of a single locality, or neighbourhood within a locality;
    - Use of the Application Site has not been 'as of right' due to the erection of prohibitive notices on parts of the site in 2018 and 2020, and verbal challenges by the landowner;
    - The vast majority of the use relied upon consists of walking and such use falls to be discounted on the basis that it is akin to a right of way usage rather than a general right to recreate;
    - That use of the Application Site ceased to be 'as of right' more than one year prior to the submission of the application, such that the tests under sections 15(2) and 15(3) of the Commons Act 2006 are not met.

12. Members will also recall that the application was the subject of a dispute as to whether the Application Site was affected by one of the development-related 'trigger events' set out in Schedule 1A of the Commons Act 2006 (which would prevent the County Council from considering the application)[1]. The issue was ultimately resolved, following the judgement of the High Court in R (Bellway Homes Ltd.) v Kent County Council[2], in which the Court determined that the County Council should proceed with the consideration of the application.

[1] That dispute related to the interpretation of the wording of Policy OS6 in Canterbury City Council's Local Plan (which relates to the Application Site) and whether that policy could be read so as to identify the land for potential development.
[2] [2022] EWHC 2593 (Admin). Judgement available online here: https://knyvet.bailii.org/ew/cases/EWHC/Admin/2022/2593.html

Previous resolution of the Regulation Committee Member Panel

13. The matter was previously considered at a Regulation Committee Member Panel meeting on 2nd December 2021[3], at which Members accepted the recommendation that the matter be referred to a Public Inquiry.

14. Following the High Court's decision in respect of the 'trigger events' matter referred to above, Officers instructed a Barrister ("the Inspector") experienced in this area of law to hold a Public Inquiry and to report his findings back to the County Council. A Public Inquiry took place over three days in June 2023 at which the Inspector heard evidence from witnesses both in support of and in opposition to the application. Both the Applicant and the First Objector appeared at the Inquiry, but the Second Objector did not attend[4] and no other landowners were represented as a separate party at the Inquiry.

15. The Inspector published his report ("the Inspector's report") on 15th September 2023, and his findings are discussed below.

Legal tests and Inspector's findings

16. In dealing with an application to register a new Town or Village Green, the County Council must consider the following criteria:
    (a) Whether use of the land has been 'as of right'?
    (b) Whether use of the land has been for the purposes of lawful sports and pastimes?
    (c) Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?
    (d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, 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'?

17. In order to qualify for registration as a Village Green, recreational use of the Application Site needs to have taken place 'as of right' throughout the relevant twenty year period. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*').

18. In this case, there was no suggestion that access to the Application Site had taken place in a secretive manner, by virtue of any specific permission, or that access to the site had been impeded by any physical restrictions (e.g. fencing or locked gates). However, there was some discussion at the Inquiry as to the presence of prohibitive notices on the Application Site, which is relevant to the question of whether use of it has been 'by force'. This is because, for the purposes of the 'as of right' test, the concept of 'force' is not limited solely to

[3] The minutes of that meeting are available at: Agenda for Regulation Committee Member Panel on Thursday, 2nd December, 2021, 10.00 am (kent.gov.uk)
[4] Following the Inquiry, the Second Objector advised that he was unable to attend due to ill health and made further written submissions to which the Inspector has had regard in preparing his report.

physical force, but instead applies to any use which is contentious or exercised under protest[5]: "*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*"[6]. As such, if a landowner takes steps to indicate that he objects to informal use of his land, then that use will not be considered 'as of right'.

19. Although there was some indication by the Second Objector that signs and fencing had been erected on the eastern part of the Application Site during 2020, the Inspector found[7] no evidence of the presence of any signs or fences/gates to prevent access to the eastern part of the Application Site during the material period (i.e. 1999 to 2019).

20. However, the Second Objector's case is that prohibitive notices reading "This land is PRIVATE PROPERTY. The routes are not public rights of way. Any access is granted only by permission of the landowner" were erected on the western half of the Application Site (i.e. the section owned by Bellway Homes Ltd.) in October 2018 and September 2019. The Inspector accepted[8], that these notices had been erected at the main access points to that part of the Application Site, and these would have been '*seen by all (or at least the substantial majority)*' of those accessing the land at that time. He also noted[9] that: "*The wording is not ambiguous. The land covered was "Private Property" and the reference to "any" access is not to be understood as limited to the "routes" but to the land generally. The fact that the signs were only in situ for a short period does not undermine their efficacy*".

21. Accordingly, the Inspector's view was that any use of the western part of the Application Site after the erection of the prohibitive notices in October 2018 would not have been 'as of right'.

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

22. The term 'lawful sports and pastimes' comprises (for the purpose of Village Green registration) a composite class that can include commonplace activities such as 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. Indeed, the Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[10].

23. However, in cases where the use comprises predominantly of walking, it will be necessary to differentiate between use that involves wandering at will over a wide

[5] Dalton v Angus (1881) 6 App Cas 740 (HL)
[6] R (Lewis) v Redcar and Cleveland Borough Council [2010] UKSC 11 at paragraph 92 per Lord Rodger
[7] Paragraph 206 of the Inspector's report
[8] Paragraphs 207 to 210 of the Inspector's report
[9] Paragraph 208 of the Inspector's report
[10] R v Suffolk County Council, ex parte Steed [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in R v. Oxfordshire County Council, ex parte Sunningwell Parish Council [1999] 3 All ER 385

area and use that involves walking a defined linear route from A to B. The latter will generally be regarded as a 'rights of way type' use and, following the decision in the Laing Homes[11] case, falls to be discounted. In that case, the judge said: '*it is important to distinguish between use that would suggest to a reasonable landowner that the users believed they were exercising a public right of way to walk, with or without dogs... and use that would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of the fields*'.

24. In this regard, the Inspector considered that the nature of the recreational use of the Application Site was the central question in this application and he agreed[12] that "*it is clear and accepted that there has been extensive use of defined and well-trodden paths over each part of the Land for many years predominantly for walking and dog walking, but also for "rambling", jogging, cycling and horse-riding*". However, he noted[13] that the legal question to be addressed was whether the use was attributable to the use of a right of way (or putative right of way) or whether it was attributable to the use of the land as a whole as a town or village green: "*if land is used for generally meandering or roaming not limited to use of defined routes that will be unlikely to be attributable to use as a right of way and will more readily be attributable to use as a TVG [town or village green]*". Ultimately, the position is to be judged from the point of view of a reasonable landowner.

25. The Inspector's findings in relation to the nature of the use of the Application Site were[14] that:

> *"The evidence as a whole permits of only one answer as to the nature of the user. It overwhelmingly demonstrates that throughout the statutory period and even more so in the latter half of it, a vast majority of the use made of the Land was by walkers, dog walkers, ramblers, joggers, cyclists and horse riders whose use was overwhelmingly confined to the Main Paths. Those Main Paths were, for the most part, heavily hemmed in by dense vegetation and it was not practical or in many situations physically possible for people other than a few more adventurous individuals to access a substantial majority of the Land for most of the statutory period. Very few people chose to leave the Main Paths for lawful sports and pastimes and there was no clear outward manifestation from 2008 at the latest of any significant such use of the Land generally or any significant part of it. The use of the Land would have appeared to a reasonable landowner as being the user of public rights of way and other Main Paths as such for recreational (normally circular) walks through otherwise inaccessible and unused land.*
>
> *Intermittently, a relatively small number of people did meander off the Main Paths and roam across the Land more generally but: (1) such user was not, in respect of any part of the Land, by a significant number of inhabitants of either "locality" (or of both localities combined); (2) even the*

[11] R (Laing Homes) v Buckinghamshire County Council [2003] 3 EGLR 70 at 79 per Sullivan J
[12] Paragraph 39 of the Inspector's report
[13] Paragraphs 40 and 43 of the Inspector's report
[14] Paragraphs 192 and 193 of the Inspector's report

routes of the most adventurous off the Main Paths were generally heavily constrained from at least 2008 across almost all of the Land; and (3) there was extremely limited scope for lawful sports and pastimes off the Main Paths except in some very small areas adjacent to the Main Paths. I accept that some individuals did leave the Main Paths to access blackberry picking some distance off them; that some adventurous individuals positively chose to walk through the heavily vegetated areas to explore, train dogs and search for wildlife and that children and families sometimes played in the wooded areas although the latter was predominantly in the early years of the period but fundamentally, the use of the Land from 2008 at the latest would have appeared to the landowner as confined to use of the Main Paths as paths principally for walking and ancillary activities and there was nothing to indicate a general wider user by a significant proportion of the inhabitants of any locality or at all."

26. The Inspector's conclusion[15] in respect of the nature of the use was therefore that the overwhelming majority of use was focussed on walking and associated activities. In his view, all the 'physical, documentary and photographic evidence' supports the contention that this use would have been 'overwhelmingly focussed' on the main paths; there was very limited evidence of other use and even those who engaged in that use 'recognised that they were the exception'. He also[16] considered significant the lack of any picnics, sports, games or other activity on the land for the vast majority of the period, and noted that even those witnesses who spoke of generalised user 'were clear as to the limited extent of such user'.

27. Accordingly, the Inspector did not consider that the recreational use of the Application Site was of a nature that would be capable of giving rise to the registration of the land as a Village Green.

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

28. The right to use a Town or Village Green is restricted to the inhabitants of a locality, or of a neighbourhood within a locality, and it is therefore important to be able to define this area with a degree of accuracy so that the group of people to whom the recreational rights are attached can be identified.

29. The definition of 'locality' for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the Cheltenham Builders[17] 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*'.

[15] Paragraph 197
[16] Paragraph 203
[17] R (Cheltenham Builders Ltd.) v South Gloucestershire District Council [2004] 1 EGLR 85 at 90

30. 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 that 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*'[18].

The locality

31. In this case, the application was originally made on the basis of "the parishes of Westbere and Sturry". Prior to the Inquiry, and in response to submissions made by the First Objector, the Applicant confirmed that the reference to 'Sturry' was intended to mean the neighbourhood of 'Fairview Gardens' (i.e. the residential estate immediately to the west of the Application Site) within the locality of Sturry.

32. The First Objector submitted that the application must fail on the basis that the statutory construction of section 15 of the Commons Act 2006 (and subsequent case law) does not permit an Applicant to rely on more than one 'locality'. However, the Inspector did not consider that this issue, of itself, would be sufficient to invalidate the application[19] and there was no evidence of any prejudice being caused by the Applicant seeking to register the land as a Village Green on the basis of alternate localities.

33. The Inspector was satisfied[20] that both the parish of Westbere and the neighbourhood of Fairview Gardens in the parish of Sturry, individually, would be qualifying localities for the purposes of registration. There is no requirement for user to come predominantly from one locality, and either would be sufficient (if all of the other legal tests were met) in terms of meeting the legal test in this regard. In light of his other conclusions, the Inspector did not consider this issue in detail, but nonetheless he could not see any reason for rejecting the application on the basis of the locality test.

"a significant number"

34. 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*'[21]. 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.

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[18] ibid at 92
[19] Paragraph 64 of the Inspector's report
[20] Paragraph 188 of the Inspector's report
[21] R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council [2002] EWHC 76 at paragraph 71

35. In this regard, the Inspector was of the view[22] that there could be little doubt (given the relatively low populations of the areas relied upon) that the land had been used – *in some way* – by a significant number of the residents of Westbere parish and/or by a significant number of the residents of the Fairview Gardens neighbourhood.

36. However, this conclusion could only be reached '*if, but only if, one includes user of the main paths*'[23]. Such use (for the reasons discussed above) was not qualifying user for the purposes of the Village Green application and therefore, discounting use of the main paths, there was very little other evidence of use. As the Inspector put it[24]: '*off path use was the relatively rare exception*'.

37. Thus, the sufficiency test has to be viewed in light of the volume of qualifying recreational use, which, in this case, is very low. As such, the Inspector considered[25] that "*a conscientious landowner viewing the Land at any time during the statutory period would not have understood that there was any significant wider usage of the Land beyond the use of the Main Paths as such and would not have been aware of anything other than 'occasional use by individuals…' [quoting from the McAlpine Homes case referred to above] off those Main Paths*".

(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?

38. 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.

39. In this case, the application was originally made on reliance upon section 15(2) of the 2006 Act – i.e. on the basis that use of the Application Site had not ceased at the time of making the application (on 7th November 2019).

40. Following the First Objector's submissions that prohibitive notices were erected on the western part of the Application Site in October 2018, the Inspector was asked by the Applicant to also consider whether the requirements of section 15(3) might be met in respect of the application (i.e. on the basis that use 'as of right' ceased no more than one year prior to the making of the application).

41. As is noted above, the Inspector found that 'private property' signs erected on the western part of the Application Site in October 2018 were effective in rendering the use of that part of the Application Site contentious, such that use did not continue 'as of right' up until the date of the application in November 2019. He also concluded[26] that the period of grace set out in section 15(3) did not assist, since the notices were erected on site more than one year prior to the making of the Village Green application.

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[22] Paragraphs 190 and 191 of the Inspector's report
[23] Paragraph 189 of the Inspector's report
[24] Paragraph 194 of the Inspector's report
[25] Paragraph 197 of the Inspector's report
[26] Paragraph 211 of the Inspector's report

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

42. 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, the relevant twenty-year period ("the material period") is to be calculated retrospectively from the date of the application, and is therefore 7th November 1999 to 7th November 2019.

43. The Inspector accepted[27] that there had been extensive use of the land (subject to the comments above as to the nature of that use) 'for many years' and a number of the witnesses attested to use of the Application Site throughout the relevant twenty-year period.

44. In respect of the western part of the Application Site, the Inspector found[28] that any user which did meet the statutory requirement was, from 2018, not 'as of right', such that the statutory period was interrupted.

45. Therefore, although on the face of it there appeared to have been ongoing use of the eastern part of the Application Site throughout the material period, the same could not be said for the western part where use became contentious during the latter part of the material period.

The Inspector's conclusion

46. Having carefully considered the evidence, the Inspector's conclusion[29] was as follows:

> *"The evidence demonstrates that the overwhelming preponderance of use of the Land by inhabitants of the claimed localities was on the main, clearly defined footpaths and a statutory footpath on the Land. That user is attributable to exercise of highway rights or putative highway rights across those defined routes and not use of the whole Land generally for lawful sports and pastimes. The evidence demonstrates that a small number of individuals used other parts of the Land more generally for roaming and for other activities. However: (1) this use was limited in frequency and intensity; (2) the number of individuals engaged in such use was not significant; and (3) this user was itself heavily constrained by the nature of the Land. The result is that there were no significant outward manifestations of such use with the result that a reasonable landowner would not have considered that there was any general user of the whole of the Land during the statutory period for lawful sports and pastimes or any assertion of any right to such user but instead that the user was attributable to the use of the defined paths as such.*
>
> *I therefore recommend that the Application for the whole Land be refused on this point. This is not, to my mind, a remotely marginal case. Indeed, all the evidence seems to me to point in the same direction. Even those witnesses who attest to the widest use of the Land generally, accept that*

[27] Paragraph 39 of the Inspector's report
[28] Paragraph 210 of the Inspector's report
[29] Paragraphs 3 and 4 of the Inspector's report

their use was unusual, exceptional or limited and not reflective of how the land was generally used. Even they tended to predominantly use the main paths."

Subsequent correspondence

47. On receipt, the Inspector's report was circulated to the Applicant and the landowners[30] for their comments.

48. The First Objector wrote in full support of the Inspector's conclusions and invited the County Council to reject the application in accordance with the Inspector's recommendation.

49. The Applicant was disappointed that the Inspector did not find in favour of registration of the land as a Village Green. Whilst not accepting the Inspector's findings in relation to the notices on the western part of the land (on the basis that the correspondence relating to those signs was in practice widely understood by users as having an entirely different meaning from what is said to be its legal meaning), the Applicant does not intend to pursue this point.

50. However, the Applicant rejects the Inspector's finding that use of the Application Site was primarily confined to defined paths (i.e. a rights of way type of user) and was not of the site as a whole. It is suggested that this finding is wrong and that the eastern part of the Application Site is capable of registration as a Village Green on the basis that there are substantial differences compared to the western part (in terms of physical terrain and landowner management), such that it cannot be viewed in the same light.

51. There were no prohibitive notices on the eastern part of the Application Site during the relevant period and the land was largely neglected by the relevant landowners, who rarely visited; the only reliable evidence to the Inquiry in respect of this part of the Application Site is that given by the Applicant's witnesses.

52. The aerial photography considered at the Inquiry is unreliable insofar as the eastern part of the site is concerned because the trees are of a species providing more canopy, thereby masking the presence of paths and open areas beneath them. In addition, the Inspector gave insufficient weight to the extent to which there are paths that come and go on the land, and also to the fact that the vegetation on the eastern part of the land dies back on a seasonal basis, making it much more accessible during certain parts of the year. He also failed to distinguish between a path used as a route and one reflecting consistent use of the land itself.

53. The Applicant's submission, therefore, is that it would be open to the County Council - and consistent with the evidence presented to the Inquiry – to register the eastern half of the Application Site as a Village Green.

54. The Westbere Parish Council has also (outside of the formal process) expressed its support for the Applicants position[31], but did not make any substantive new submissions regarding the Inspector's report.

[30] With the exception of Mr. Saadat, whose whereabouts are unknown

Discussion

55. Although it is open to the County Council to consider registration of a smaller area than that applied for[32], it is not considered appropriate in this case.

56. Despite the Applicant's criticisms, the Inspector is very clear in his report that, in recommending rejection of the whole Application Site, "*This is not, to my mind, a remotely marginal case. Indeed, all the evidence seems to me to point in the same direction"*[33]. He also states, elsewhere in the report[34], that "*the Application for **all the land** must fail on the basis the evidence does not demonstrate the requisite user*" (emphasis added in bold).

57. On a fair reading of the report as a whole, it is evident that the Inspector did distinguish between the eastern and western parts of the Application Site. He notes at paragraph 59 of the report that it is open to him to consider a lesser area for registration – and indeed has done so – but that "*it is not possible on the evidence to identify any particular area where the statutory test is met*". He also sets out a detailed analysis of the condition of the eastern half at paragraph 199 of the report, where he specifically addresses the issue of registering a lesser area – "*I have considered whether there are any exceptions to the overall position*" – and concludes that "*I cannot therefore identify any sub-area of the Eastern Land which meets the statutory tests*".

58. In addition to the aerial photography, the Inspector also had regard[35] to ground level photographs taken during winter months which showed the eastern part of the site in 2001 '*dominated by tufts of long grass*' where '*the land either side of the [main] path does not appear to be readily usable for sports and recreation*' and, in 2003, showing that '*the grassed area is not realistically capable of any use and there is no indication of any informal paths through it*'.

59. The Inspector was also clearly mindful, in reaching his conclusions, of the need to carefully distinguish between use of the main paths and use of the wider Application Site (and focus on the latter)[36], of the need to avoid over-reliance upon the aerial photography (in terms of density of vegetation on the ground and the presence of informal paths)[37], and also that his experience of the site during his visits was not necessarily representative of the Application Site during the material period[38].

60. It is to be noted that the Inspector has had sight of the Applicant's comments and has confirmed that these do not change his view regarding the recommendations made in his report.

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[31] By way of email dated 18th January 2024 circulated to all members of the Regulation Committee
[32] Following the decision in Oxfordshire County Council v Oxford City Council [2006] UKHL 25 in which Lord Hoffman said "*the registration authority is entitled… to register only that part of the subject premises which the applicant has proved to have been used for the necessary period*."
[33] Paragraph 4
[34] Paragraph 204
[35] Paragraph 83
[36] At paragraph 114
[37] At paragraph 77
[38] At paragraph 176

Conclusion

61. In this case, although it is clear that there has been recreational use of the land by the local residents over a considerable period, it would appear that the nature of that use has been more akin to a 'public rights of way' type of use, rather than the community as a whole exercising a general right to recreate over a wider area (as would be the case for a Village Green). The Inspector – who had the benefit of hearing first-hand the evidence of the witnesses at the Public Inquiry – is clear that the Application Site (either in part or as a whole) does not meet the relevant legal tests for registration as a Village Green.

62. The Officer's view is that the parties' evidence and submissions have been carefully examined by the Inspector, and the matter has been thoroughly scrutinised. It is considered that the Inspector's report accurately represents both the evidence and submissions made, and the law as it currently stands.

63. Accordingly, it is considered 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.

64. It is to be noted that, if Members were to approve the recommendation set out below, and the Applicant remained aggrieved, it is open to the Applicant to apply for a Judicial Review of the decision in the High Court.

Recommendation

65. I recommend, for the reasons set out in the Inspector's report dated 15th September 2023, that the applicant be informed that the application to register the land known as Two Fields at Westbere as a new Village Green has not been accepted.

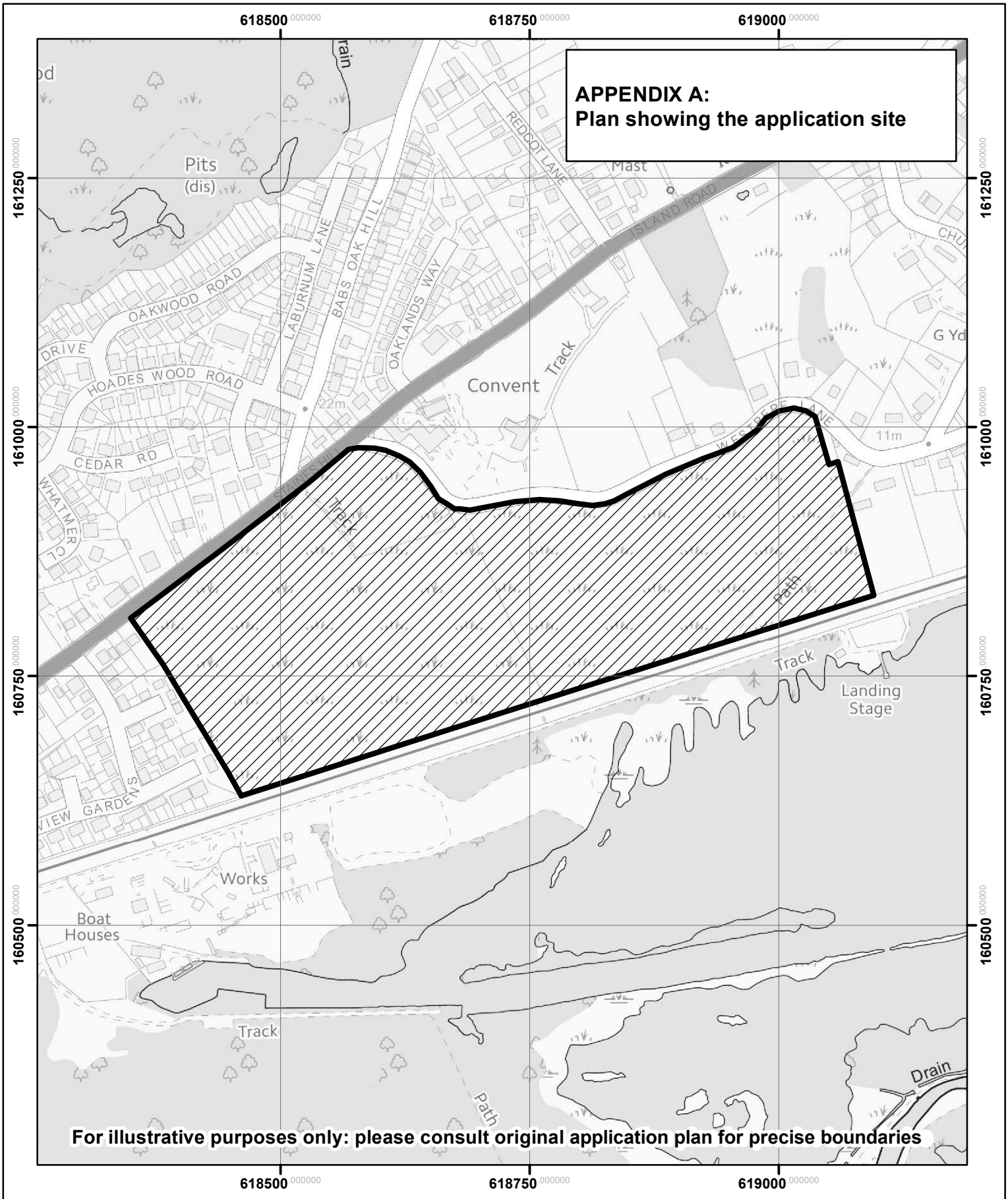
Accountable Officer:
Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

APPENDIX A – Plan showing Application Site
APPENDIX B – Aerial photograph dated 2009

Background documents

Inspector's report dated 15th September 2023
Applicant's comments on the Inspector's report dated 16th October 2023



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Land subject to Village Green application, known as Two Fields, in the parish of Westbere (nr. Canterbury)

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