# Application to register land as a new Village Green at Bybrook Road, Kennington, Ashford, Kent

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Tuesday 27th April 2010.

Recommendation: I recommend, for the reasons stated in the Inspector's report dated 25th February 2010, that the applicant be informed that the application to register the land at Bybrook Road, Kennington, Ashford has been accepted, and that the land subject to the application be formally registered as a Village Green.

Local Member: Mrs. Elizabeth Tweed — Unrestricted item

## Introduction and background

1. The County Council has received an application to register land at Beecholme Drive, Ashford as a new Village Green from local resident Mrs. P. Boorman ("the applicant"). The application, dated 15th February 2008, was allocated the application number VGA599. A plan of the site is shown at **Appendix A** to this report.

## Procedure

2. The application has been made under section 15(1) of the Commons Act 2006 and regulation 3 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. These regulations have, since 1st October 2008, been superseded by the Commons Registration (England) Regulations 2008 which apply only in relation to seven 'pilot implementation areas' in England (of which Kent is one). The legal tests and process for determining applications remain substantially the same.

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

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

4. In addition to the above, the application must meet one of the following tests:
   - **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or
   - **Use of the land 'as of right' ended no more than two years prior to the date of application**, e.g. by way of the erection of fencing or a notice (section 15(3) of the Act); or
   - **Use of the land 'as of right' ended before 6th April 2007** and the application has been made within five years of the date the use 'as of right' ended (section 15(4) of the Act).

5. As a standard procedure set out in the regulations, the County Council must notify the owners of the land, every local authority and any other known interested persons. It must also publicise the application in a newspaper circulating in the local area and place a copy of the notice on the County Council's website. In addition, as a matter of best practice rather than legal requirement, the County Council also places copies of the notice on site to provide local people with the opportunity to comment on the application. The publicity must state a period of at least six weeks during which objections and representations can be made.

**The application site**

6. The area of land subject to this application ("the application site") is situated in the Bybrook area of the Town of Ashford. It is a roughly L shaped site that is bounded along its longest side to the north west by Beecholme Drive, to the north east by Grasmere Road and on the remaining sides by the rear of properties in Bybrook Road and Beecholme Drive, as shown on the plan at **Appendix A**

**Previous resolution of the Regulation Committee Member Panel**

7. In response to the application, an objection was received from the landowner, Ashford Borough Council ("the objector") primarily on the grounds that the application site was considered by the Borough Council to be open space falling within the definition contained in Section 20 of the Open Spaces Act 1906; i.e. *"land, whether inclosed or not, on which there are no buildings…and the whole or remainder of which is laid out as a garden or is used for the purposes of recreation…"*. It was therefore the Borough Council's contention that the application site is held under a statutory trust for public recreation thus rendering use of the land by the local residents 'by right' (because, in the Borough Council's view, they have the right to use it by virtue of it being held as open space) and not 'as of right'.

8. The matter was considered at a Regulation Committee Member Panel meeting on Friday 7th August 2009, where Members accepted the recommendation that the matter be referred to a non-statutory Public Inquiry for further consideration.

9. As a result of this decision, Officers instructed Counsel experienced in this area of law to act as an independent Inspector. A non-statutory Public Inquiry took place at Kennington United Reformed and Methodist Church, Ulley Road, Kennington on Monday 22nd February 2010, during which time the Inspector heard evidence from interested parties.

10. The Inspector subsequently produced a detailed written report of her findings dated 25th February 2010 which is attached at **Appendix B**.

**Legal tests and Inspector's findings**

11. 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 the inhabitants of a particular locality, neighbourhood or a neighbourhood within a locality?*
d) *Whether use has taken place over period of twenty years or more?*
e) *Whether use of the land by the inhabitants is continuing up until the date of application?*

I shall now take each of these points and elaborate on them individually in accordance with the Inspector's findings:

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

12. The definition of the phrase 'as of right' has been considered in recent High Court case law. Following the judgement in the Sunningwell[1] *case*, it is now considered that if a person uses the land for a required period of time without force, secrecy or permission (*nec vi, nec clam, nec precario*), and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired and further use becomes 'as of right'.

13. Whilst there was no evidence to suggest that use had been with force or in secrecy, there was some debate at the Inquiry as to whether the use had been without permission.

14. An issue arose as to whether the use of the land by tenants of the neighbouring Council-owned housing could be regarded as being by virtue of an implied permission on the basis that part of the rent paid by housing tenants is used to fund the maintenance of the application site. However, the Borough Council confirmed at the Inquiry that the Council tenants living in the vicinity of the application site do not have a specific right to use the land as amenity land. The Inspector also found that there was no evidence (for example, in the form of minutes or resolutions of the Council) that the Council had specifically made the application site available for recreational use, nor was there any evidence that the Council took any steps to restrict the use of the land to those who were Council tenants or to exclude other, non-Council tenants, living nearby.

15. The Borough Council's initial objection to the application was made on the basis that it should be inferred that the land is held as public open space under the Open Spaces Act 1906. In the absence of any documentary evidence to demonstrate that the land had been formally appropriated under the 1906 Act, the Inspector concluded that the land was held as housing land (see paragraphs 12.6 and 12.7 of her report). Therefore there was no public statutory trust which would prevent the use of the land from being 'as of right'.

16. The Inspector therefore concluded (at paragraph 12.14 of her report) that use of the site had been 'as of right' throughout the relevant period.

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

17. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. Legal principle does not require that

[1] *R v. Oxfordshire County Council, ex p. Sunningwell Parish Council (2001)*

recreational activities of this nature be limited to certain ancient pastimes (such as maypole dancing); indeed, '*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*'[2].

18. The Inspector concludes that there was evidence of use of the application site (detailed at paragraphs 11.1 to 11.7 in her report) over the whole of the relevant period for a range of activities including football, dog walking, playing with children and other games.

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

19. The definition of locality for the purposes of a village green application has been the subject of much debate in the courts and there is still no definite rule to be applied. In the Cheltenham Builders[3] 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*'.

20. At the Inquiry, the applicant stated that the locality upon which she was relying was the two electoral wards of Bockhanger and Bybrook. The Borough Council did not seek to challenge or dispute that these electoral wards could constitute a locality. The Inspector therefore concludes (at paragraph 10.3 of her report) that the relevant locality is the electoral wards of Bockhanger and Bybrook.

21. Where the locality is large, it will also be necessary to identify a 'neighbourhood' within the locality. On the subject of neighbourhood, the Courts have held that '*it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood… The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning*'[4].

22. The applicant produced a plan showing the neighbourhood upon which she was relying at the Inquiry. This is attached at **Appendix C**. The Borough Council did not challenge the claimed neighbourhood at the Inquiry and as such the Inspector concluded (at paragraph 10.9 of her report) that the neighbourhood as shown on the plan at Appendix C should be regarded as the qualifying neighbourhood.

23. Finally, use must have been by a significant number of local inhabitants. 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*

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[2] *R v Suffolk County Council ex parte Steed* (1995) 70 P&CR 487 at page 503
[3] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at page 90
[4] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at page 92

*the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers*'[5]. Thus, what is a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the application site.

24. Here the Inspector concluded (at paragraph 11.8 of her report) that the whole of the application site has been used by a significant number of local inhabitants, sufficient to indicate to a reasonable landowner that the whole of the site was in use by local inhabitants generally for informal recreation.

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

25. 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 up until the date of application. In this case, the application was submitted in 2008 and therefore the relevant twenty-year period ("the material period") is 1988 to 2008.

26. The Inspector accepted the applicant's evidence that the land had been used for a period of at least 20 years.

**(e) *Whether use of the land by the inhabitants is continuing up until the date of application?***

27. Section 15(2) of the Commons Act 2006 requires that use of the application site continues up until the date of application.

28. The Inspector accepted that the use of the application land had continued until the date of the application.

**Comments on the Inspector's report from the applicant and objector**

29. On receipt, the Inspector's report was forwarded to the applicant and the main objector for their information and further comment.

30. The applicant had no further comments to make.

31. However, the Borough Council has taken the opportunity to make further submissions. The majority of the submission repeats issues raised during the Inquiry and already taken account of by the Inspector in her report. The Borough Council also raises the issue of another decision made by the Inspector following a similar Inquiry in another Local Authority area. Having carefully considered these submissions, it is not considered that they have any substantive impact upon the Inspector's recommendation.

**Conclusions**

32. Having heard the evidence presented by both parties at the non-statutory Public Inquiry and having considered the Inspector's thorough and detailed analysis of the evidence (contained within her report), I conclude that the requirements of the Commons Act 2006 have been met in this case and that the County Council

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

should therefore register the land subject to the application as a new Village Green.

**Recommendation**

33. I recommend, for the reasons stated in the Inspector's report dated 25th February 2010, that the applicant be informed that the application to register the land at Bybrook Road, Kennington, Ashford has been accepted, and that the land subject to the application be formally registered as a Village Green.

Accountable Officer:
Dr. Linda Davies – Tel: 01622 221500 or Email: linda.davies@kent.gov.uk
Case Officer:
Mr. Chris Wade – Tel: 01622 221511 or Email: chris.wade@kent.gov.uk

The main file is available for viewing on request at the Environment and Waste Division, Environment and Regeneration Directorate, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

**Background documents**

APPENDIX A – Plan showing application site
APPENDIX B – Copy of the Inspector's report
APPENDIX C – Copy of applicant's plan showing the neighbourhood

## APPENDIX A:
## Plan showing application site

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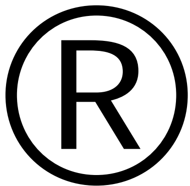
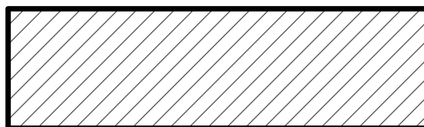
601400.000000
144600.000000
144500.000000
144400.000000

Rivendell
Twin Oaks
Posts
COPPERFIELD CLOSE
BEECHOLME DRIVE
El Sub Sta
Play Area
Ward Bdy
Bockhanger Hall Community Centre
49.5m
48.9m
BYBROOK ROAD
230 to 250
208 to 228
186 to 206
164 to 184
142 to 162
120 to 140



Scale 1:1250

**Land subject to Village Green application at Beecholme Drive, Bybrook, near Ashford**



**APPENDIX B:**
**Copy of Inspector's report**

**In the Matter of**

**an Application to Register land**

**at Bybrook Road, Kennington, Ashford, Kent**

**as a Town or Village Green**

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# REPORT OF THE INSPECTOR

**Miss LANA WOOD**

**25 February 2010**

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**Kent County Council**

**County Hall**

**Maidstone**

**Kent**

**ME14 1XX**


**Ref: Chris Wade/ Melanie McNeir**

**In the Matter of**

**an Application to Register land**

**at Bybrook Road, Kennington, Ashford, Kent**

**as a Town or Village Green**

**REPORT**

**of Miss LANA WOOD**

**25 February 2010**

## 1. The Application

1.1. On 14th March 2008 Kent County Council, as Registration Authority, received an application dated 15th February 2008 from Mrs Patricia Boorman of 106 Bybrook Road, Kennington, Ashford, Kent TN24 9JF to register land at the corner of Beecholme Drive and Grasmere Road, Kennington, Ashford, Kent as a town or village green pursuant to section 15 of the Commons Act 2006. The application was in Form 44, as required by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 and was verified by a statutory declaration of Mrs Boorman, in the prescribed form.

1.2. The particular subsection and qualifying criterion relied upon were those in section 15(2) of the 2006 Act. Mrs Boorman did not rely on section 15(6). The locality or neighbourhood in respect of which the application was made was described as Bybrook Ward and Bockhanger. The justification for the application was that the land had been used for well over 20 years without objection from the owner, Ashford District Council, but was now believed to be under threat of being developed. The site is only 0.47 acres. Bybrook and Bockhanger is considered to be deprived with regard to open space, having less than half the optimum amount of open space. 19 homes could be built, taking up all the land, leaving no space for play. The applicant supported the idea of homes being built, but not at the expense of using the last green area where the young could have a multi use games area placed.

1.3. A map was appended to the application on which the application land was outlined in green highlighter pen[1]. A second map showed the location of the application land on a page extracted from a road atlas of the area. A third map headed "Area Plan – Bybrook Road" showed the blocks of flats and

[1] A11

maisonettes on Bybrook Road coloured orange, and the parking areas (coloured white) and the grassed areas (coloured green) around them.

1.4. The application was duly publicised.

The Objection

1.5. A letter of objection dated 16th January 2009 was received from the Head of Legal and Democratic Services of Ashford Borough Council ("the Council"), on behalf of the Council. The Council stated that it was the owner of the application land. The grounds of objection were (in summary):

(1) The application land was acquired for housing purposes and had been used as amenity land. However, in proposing to dispose of part of the land, the Council had considered that the land was open space, and accordingly that it was necessary to advertise the proposed disposal. Accordingly, the Council asserted, the land was held under a statutory trust for the enjoyment of local people, and any use by local people was not "as of right" as required by section 15 of the Commons Act 2006, but was permissive.
(2) The Council enclosed a series of photographs taken between 2005 and 2008, which it stated did not reveal any use of the land, although the Council accepted that the land was used by local residents as a short cut.

1.6. The Council requested that, if the Registration Authority was minded to accede to the application, a non-statutory public inquiry should be held.

## 2. The Public Inquiry

2.1. I was instructed by Kent County Council, as Registration Authority, to hold a non-statutory public inquiry into the application and to report in writing with my recommendation as to whether the Registration Authority ought to accept or reject the application. I held a pre-inquiry meeting at which I gave directions for preparation for the inquiry in Ashford on 1st December 2009. I held the public inquiry at Kennington United Church, at the corner of Ulley Road and Faversham Road, Kennington, Ashford, Kent on Monday 22nd February 2010. An evening session was advertised to enable those whose work commitments meant they could not attend during the day to attend and give evidence. No-one notified the Registration Authority of their intention to attend the evening session and accordingly the evening session was not held.

2.2. The Applicant, Mrs Boorman, appeared in person. The Objector was represented by Miss Sarah Foster, a solicitor.

2.3. I am grateful to Mr Christopher Wade and Miss Melanie McNeir, officers of the Registration Authority, who made the arrangements for the inquiry, and provided me with their customarily efficient and cheerful support and administrative assistance during the inquiry.

## 3. The Applicant's evidence

3.1. I heard oral evidence from six witnesses on behalf of the applicant, including the applicant herself. The local Kent County Councillor, Mrs Tweed, also appeared and gave evidence in support of the application. In addition the applicant relied on the evidence contained in witness statements and letters signed by 11 further witnesses. The evidence of those who provided written statements but did not give oral evidence has not been tested by cross-examination, and therefore carries less weight than the evidence of those who have given oral evidence, but I must nevertheless take it into account. The applicant also relied on letters supporting the application from the following individuals and organisations: Christine Woolgar, a governor at a local school[2], Kennington Community Forum (Chair: Mrs Boorman)[3] and the Ashford District Committee of CPRE Kent[4].

### Oral evidence on behalf of the Applicant

Mrs Patricia Boorman
106 Bybrook Road

3.2. Mrs Boorman is the applicant. She provided an evidence questionnaire dated 15th February 2008[5] and a witness statement dated 10th February 2010[6]. In her evidence questionnaire Mrs Boorman stated that she had known the land from 1969 to date. For the first years it was fields. She had used it from 1988 to date to walk on it, to cross to the other part of the estate, two days a week. Her family use the land for walking or for taking their little one to the play area. Young people had played football on the land for over 20 years. There had been 5th November bonfires and fireworks on the land. For the 7 years to 2008 there had also been a play area for the young on part of it. She had participated in getting the play area installed. She had seen children playing, football, bonfire parties, cycling, walking, dog walking, children in the play area and people sitting on the bench for the elderly on the land. Members of and workers for Ashford Borough Council had seen her on the land. She never sought nor was granted permission for activities on the land and had never been prevented from using it.

3.3. In her witness statement Mrs Boorman stated that she has lived at her present address for 40 years and from 1987 onwards has taken her nephews and nieces and her partner's grandchildren to play on the land. She had seen children and older youths and men playing football on the land. Youths had taken their own goal onto the land, which they took down when they finished. She had seen people walking their dogs on the land, or just crossing the area. She had seen people building a bonfire for 5th November and having fireworks. In oral evidence Mrs Boorman added that one year she had had to ring the Council and ask for the residue to be removed. She had also seen people building snowmen and young people throwing snowballs. She had seen some children

[2] A92
[3] A94
[4] A96
[5] A16
[6] A15

riding their bikes. There is also a seat on the land which had been requested for the elderly en route from the post office and shops to Gerlach House. She believed that the land needed to be preserved as a green for future families, especially those with no gardens.

3.4. In a document headed "Written Submission by Applicant" Mrs Boorman stated that she disagreed with the Council on two factual issues: firstly, Ms Lonsdale's report to the Ashford Borough Council Executive Committee dated 18th October 2007 had stated that the land was poor grade open space, which housing managers reported was regularly used for dumping rubbish and occasionally abandoned cars, but Mrs Boorman said that this was totally untrue, and had never been the case. Secondly, Mrs Boorman pointed out that the Council's photographs were mostly taken from the scaffolding, during working hours, when the children or youth were at school or college. Mrs Boorman also drew my attention to Councillor Paul Clokie (the leader of Ashford Borough Council)'s comments recorded in the minutes of the Kennington Community Forum meeting held on 27th January 2009[7], that the land was smaller than he recalled, and that there would not be an opportunity to include any green space should the proposed build go ahead, and that he noted that the area had been used for football as claimed in the application for registration of the land as a town or village green.

3.5. Mrs Boorman wrote a letter dated 29th January 2009[8] in response to the Council's objection in which she commented on the map showing other green spaces in the vicinity of the application land produced by the Council[9].

3.6. In response to my questions Mrs Boorman confirmed that the photographs on A21, A22 and A23 were all taken on the same day in March 2008. Those photographs show a group of about 9 teenagers playing football on the application land between the playground and the electricity station. There also appears to be a smaller group with another ball to the north of the electricity station. In one of the photographs a boy pushing a bike is visible by the corner of the playground. The photograph dated 25th January 2009 shows 4 teenage boys playing football on the application land. They are using a goal net which is set up near the frontage to Beecholme Drive approximately opposite the end of Copperfield Drive. Mrs Boorman said that this was the net which she had referred to in her written evidence. The two photographs dated 11th May 2008 on A24, Mrs Boorman said, were taken on the same day. They appear to show a group of three boys kicking a ball about near the block containing 186 to 206 Bybrook Road, and four other people, including two smaller boys, on the part of the application land near the block containing 164 to 184 Bybrook Road. Mrs Boorman said that she was not sure when the photographs on A26 were taken, but she thought they would have been taken in 2008. Those photographs do not show anyone on the application land. She thought that the photograph of the bench on A27 would have been taken in about February 2008. That photograph does not show anyone on the land. The photographs at A118 and

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[7] A98
[8] A116
[9] A115 and O26

following of the applicant's bundle are Ashford Borough Council's photographs.

3.7. In cross-examination Mrs Boorman was asked to identify the area to the west of Grasmere Road shown blank on A13: she said it was a piece of grass opposite the bungalows. As far as she was aware there was nothing on it. She did not accept that there was a children's play area or teen shelter there. She was next asked about the area behind the school on Rylands Road. She said that there is a small children's play area and a larger one for older children there. She was asked where the people come from who would use that: she said Rylands Road and further over, the other side of the school. She was asked next about the area next to Gerlach house. She said that there is a green space there and a small play area and a teen shelter which was put there by Ashford Borough Council with no consultation. She agreed that the play area next to Gerlach House is one that might be used by children, but said it is not often used, because the police had had problems with mini motorbikes up there. The people who used that play area she thought might come from Nine Acres. She was asked whether people coming from the area which she had coloured as the claimed neighbourhood might use those areas. She said maybe, but they wanted the application land for the children in her area, because they did not want to cross Bybrook Road. She was asked then whether one would expect that the application land would be quite heavily used if the people in the neighbourhood were using that in preference to other areas. She said there were quite a few people who use the land.

3.8. Mrs Boorman was asked about her statement that there was never any rubbish or abandoned vehicles on the site and was referred to the notes of the meeting of the Bybrook Block Project held on 23rd February 2007, appended to Giles Holloway's statement at O59, and the bullet point "Barry dealing with abandoned scooter". She said that the note did not say where the scooter was, and that it was within the block area, rather than on the application land itself. The scooter was outside one of the blocks, attached to a post.

3.9. Mrs Boorman was asked about her answer at 19a of her evidence questionnaire and whether the 7 years she referred to related to the play area or the bonfire. She said that it related to the play area. The bonfire was an annual event, on and off, not every year. She did not organise it, it was the teenagers who organised it.

3.10. Mrs Boorman agreed that the application land is often used as a cut through for people to go from one area to another.

3.11. I asked Mrs Boorman about the process by which the playground came to be situated on the land. The Planning for Real project was a public consultation exercise during which children were invited to say where they would like play areas. As a result of that Ashford Borough Council decided to locate the children's play area on the application land.

<u>Mrs Patricia Lednor</u>
103 Beecholme Drive

3.12. Mrs Lednor lives in one of the houses in the row (105-99) running perpendicular to Beecholme Drive.

3.13. Mrs Lednor provided a letter dated 6th February 2010[10]. She did not complete an evidence questionnaire. Mrs Lednor said that she was opposed to houses being built on the application land, as she uses it to take her grandsons to play football and games. In the good weather men and young lads play football. They also use it on their bikes. Mrs Lednor said that she had had to complain about the lads playing football outside her house and number 101, on the square grass area. The football destroys plants and the balls hit the doors and windows of the properties. The boys have now stopped playing there, but she is concerned that if the application land is developed they will return. She is also concerned that the proposed development will mean more cars parked in the street, and that the street is not able to cope with that.

3.14. In oral evidence Mrs Lednor explained that the area outside her house is enclosed by houses on three sides, and garages on the fourth, so when children play football there, they know they can kick the ball as hard as they like and it will not go out of that area. She commented that all the parks in the area are on slanted land, in particular the one on Rylands Road, and that the application land is the only piece of flat grass there is.

3.15. In cross-examination Mrs Lednor confirmed that she is a council tenant. She has lived at her present address since 1983. She was not asked any further questions.

Mrs Evelyn Morrison
188 Byebrook Road

3.16. Mrs Morrison provided a letter dated 25th January 2010[11] in which she stated that she has lived at her present address for 15 years. Her flat is on the ground floor and faces the application land. She has never had any problems with children or grown ups. She used to take her dog, knitting or books and a chair and watch the children playing on the land until she was persuaded to play with them. She had also sat and watched grownups play football. When they were younger they had a proper club. She had played rounders and tennis with a pretend net on the land. When it is nice and dry and warm the land is full of children. She played snowballs when it snowed. The older boys have now bought their own goal post, which they take home every night. There used to be a brick wall just outside her living room window on which at times there were children young and old either just sitting and talking, or walking along and jumping off it. She said that never in all the years she had lived at her present address had there ever been burnt out cars or excess rubbish on the land. The only time afire had been lit was 5th November for bonfire night, and it had been supervised.

3.17. Mrs Morrison also completed an evidence questionnaire in which she stated that she had known the land from 1986 to date and had used it for the same

[10] A38
[11] A40

period. She gained access to the land by walking onto it, and went onto it to cross to friends and socially. She used the land daily. She took part in the following activities: walking, watching football and snowballing in the winter. She has seen biking, tennis and football, children playing, rounders, dog walking, team games, cricket, bird watching and people walking on the land. Bonfire night activities take place on the land seasonally. She knew that the land was owned by Ashford Borough Council and thought that she had been seen on the land by the Council. Nothing had been said. She had never sought nor been granted permission to go onto the land. No attempt had been made to discourage the use being made of the land by local inhabitants.

3.18. In oral evidence Mrs Morrison said that her bathroom, bedroom and living room face the application land. There were 15 children on the land on Sunday 21st February 2010. The day the motorbike was found Mrs Morrison was doing a walkabout with a couple of other people including Mrs Boorman. It was nowhere near the application land.

3.19. The bonfire was supervised, she was not sure whether by older boys or by grown ups. A couple of times it had got out of control, and fire engines had been called, but otherwise it had been fine. If the ball hits the wall, the children apologise. She said Mrs Boorman had worked hard on the application and she hoped that the land would be preserved.

3.20. In cross-examination Mrs Morrison confirmed that the block in which her flat is contained is on the southern corner of Grasmere Road and Bybrook Road. She is a council tenant, and has been since she was 21. She is currently in her 16th year of being where she is now. She was not asked any further questions.

Mrs Valerie Evans
140 Beecholme Drive

3.21. Mrs Evans provided a letter dated 3rd February 2010 in which she stated that she had lived in Beecholme Drive for the last 8 years. When she had a dog she used to walk it on the land, as many other dog walkers do. The boys used to play football on the land, and even brought along their own goal. She thought that since the discussions and press coverage about the land, the boys had thought that they could not use it. She thought it would be a shame to build on the land. Mrs Evans did not complete an evidence questionnaire.

3.22. In oral evidence Mrs Evans said that the bigger boys now play over by the library, where the council have put a goal and a teenage shelter, so the younger ones cannot go over there. A lot of the younger ones use the land to run around on.

3.23. Mrs Evans was asked in cross-examination to clarify where the older children play: she said it is by the community centre and library. She was asked from where they came. She said all around by her, and in the flats. Mrs Evans lives in a bungalow, one of three in a row behind one of the blocks of flats. She is a council tenant and has lived at her present address for 8 years, just going into her ninth year now. She was not asked any further questions.

Mrs Michelle Goodwin
5 Riding Hill

3.24. Mrs Goodwin provided a witness statement in the form of a letter dated 8th February 2010[12]. She also provided an evidence questionnaire dated 5th April 2008[13] and wrote a letter to Kent County Council in support of the application dated 6th January 2009[14].

3.25. In her letters Mrs Goodwin stated that she was very much in favour of the application land being made officially into a town green. She had lived in the area for over 35 years, and for 16 years of that time had had a view over the application land. Her elder son, James, used the land for many years to play football with his friends. For a while Mrs Goodwin and James lived in the maisonettes directly on the application land. This was when James was 8. The land was his only place to play safely and socialise with his friends. When they moved to a house two streets away, James continued to play on the land with his friends, riding bikes and playing football. Her younger son, Toby, now uses the land to play with his friends, just as his older brother did. Children play football on the land, and local people walk their dogs there. The teenagers have football matches on the land on a regular basis, often carrying nets across from their gardens. She had seen youngsters learning to ride bicycles on the land. The land had been part of many people's "growing up years".

3.26. In her evidence questionnaire Mrs Goodwin stated that she had known the land and used it since 1993. She had lived at the following addresses when she used the land: 202 Bybrook Road, and 23 Rectory Way. She used the land during the summer months and took part in football and Frisbee. Her immediate family used the land for football, bike riding and socialising. Bonfire parties had taken place on the land yearly for more than 20 years. She had seen the following activities taking place on the land: children playing, rounders, dog walking, team games, football, cricket, picnicking, kite flying, people walking, bonfire parties and bicycle riding. She knew that the land was owned by Ashford Borough Council, and believed that the Council had seen her on the land. Nothing had been said. She had never sought permission for activities on the land nor been prevented from using the land. No attempt had been made to discourage the use being made of the land by local inhabitants.

3.27. In oral evidence Mrs Goodwin was asked to clarify where she had lived during what periods. She lived at 202 Bybrook Road from when her son was 8 and he is now 22, so from 14 years ago, from about 1996. A few years after that she moved to Rectory Way, and then she moved to Riding Hill 9 years ago. From when she was 8 she lived in Hurst Road with her parents, and she moved from there to the Bybrook Road maisonette. Mrs Goodwin is 42. She and her son lived with her parents from when he was born until when he was 8. She was not sure why she said she had known the land since 1993 in her evidence questionnaire, because she had known it since she was a child, because she used to walk to school, on the footpath at the side of the land. She had no

[12] A29
[13] A33
[14] A31

specific memory of using the land as a child. She had no idea why she had written 1993 as the date from which she had known and used the land in her evidence questionnaire. Mrs Goodwin was a council tenant at Bybrook Road and Rectory Way, and left council accommodation to buy 5 Riding Hill privately.

3.28. I am satisfied that Mrs Goodwin has known the land since well before 1993. She had no recollection of using the land herself as a child. I am satisfied that she and her children have used the land since at least 1996. It is possible that her use of the land with her son started when her son was of an age to take him to the playground there and that that is why she wrote 1993 in her evidence questionnaire.

Mr William T Clark
40 Larch Walk

3.29. Mr Clark wrote a letter dated 27th December 2008 in support of the application. He did not complete an evidence questionnaire. Mr Clark was not on the list of people whom the applicant expected to give oral evidence, but he attended the inquiry and indicated that he wished to give oral evidence. Ms Foster did not object to his being called. I permitted him to be called, after having given Ms Foster an opportunity to re-read his letter and consider what questions in cross-examination she wished to ask of him.

3.30. In his letter Mr Clark stated that he has lived at his present address for 30 years, and was able to confirm that the application land had always been used as a recreation area for local residents and their children. He was concerned that the Registration Authority might have been informed that the application land had been used for dumping and said that this was not true. He had only seen the area being used by children for playing games and other outdoor activities. He was in favour of the land being registered as a green.

3.31. In oral evidence Mr Clark confirmed that his house is outside the claimed neighbourhood. He is not a council tenant. He was asked how he knows the land. He passed it on his way to work, and on his way to town, by car. At weekends when they used to walk in the area, they often came past it. He had seen it in use for the past 30 years, although he had not used it himself. Mr Clark was asked whether he was aware of the other areas of open space referred to at the inquiry. He said this was the only piece of land for the flats, and that for smaller children, their parents wanted to be able to look out of the window and see them. The application land was the area that those people would use, those who lived closer to the other spaces would use them.

Councillor Elizabeth Tweed
46 High Street, Charing

3.32. Mrs Tweed is the County Councillor for Ashford Central, which ward includes the application land. She attended the inquiry and indicated that she wished to give oral evidence. Ms Foster did not object, and, after having given Ms Foster an opportunity to read the statement Mrs Tweed wished to make, I permitted Mrs Tweed to be called.

3.33. Mrs Tweed provided a written statement in support of the application. She stated that she had been familiar with the area for 25 years, and had been the local Member since 2005. She had never seen burned out vehicles dumped on the application land. Although there is other open space available locally, it is unsuitable for games or for people to congregate, because, in the instance of the area on Rylands Road, the ground slopes. The elderly residents had made it clear that they would not want to attract people to the area more actively, and objected when it was proposed that the youth shelter be moved there. The youth shelter by Gerlach House has been placed there in breach of Home Office guidelines which stated that there should be a "drive-by" opportunity for discreet policing, especially for the safety of the youth, who could otherwise be attacked in a shelter which is too tucked away. The residents of the flats like to know that their children are within view. They regularly play on the application land. Mrs Tweed had witnessed this over the years.

3.34. Since Bockhanger Library has been open one evening a week for youngsters to use the Wii fitness machine (Mrs Tweed explained in oral evidence that this has only started in recent months), that facility has been oversubscribed. The youngsters have nowhere to go. Mrs Tweed said that young people had turned out in force to the local community group meeting and the Youth Advisory Group meeting in Bockhanger to plead for somewhere to kick a ball around. They want to keep this space. Mrs Tweed commented that compared to Stanhope, this area has little or no provision. Both are deprived areas, but more is invested, and there are more facilities, in Stanhope. Mrs Tweed said that as a local Member, her biggest problem has been making sure youngsters have somewhere to play where they can be seen, for their own well-being, as well as that of local residents.

3.35. Older folks enjoy dog walking on the application land, and just enjoy a bit of green, especially those with no garden.

3.36. In oral evidence Mrs Tweed added that the maintenance of the land is paid for by council tenants out of their council tax, part of which goes towards the maintenance of the land in question.

3.37. In cross-examination Mrs Tweed was asked how far Charing is from the application land. She said that Charing is about 8 miles away. She moved to Charing in 2007, from Kennington, where she had lived between 1984 and 2007. She is a governor of Phoenix School, and visits the area regularly. She agreed that she had earlier said that she thought that the application land fell within Bockhanger Ward. She said that the boundary is indeterminate at that point. She remembers the councillor for Bockhanger dealing with correspondence relating to Grasmere Road, but also had remembered that the councillor for Bybrook had visited the flats.

3.38. Mrs Tweed was shown a map produced by the Council which showed that the application land falls within Bybrook, and that the claimed neighbourhood falls partly within Bockhanger and partly within Bybrook wards. She did not dispute that the map was correct.

**Written evidence on behalf of the Applicant**

Mrs Carole Cole
30 Larch Walk

3.39. Mrs Cole provided a letter dated 5th February 2010[15]. Her present address is outside the claimed neighbourhood. She stated that she had lived in the area for the past 30 years. During this time the application land had always been used by young people for football, cricket and other recreational activities. It is also used as a general meeting point for people walking and exercising their dogs.

Ms Pauline Colvin
36 Copperfield Close

3.40. Ms Colvin provided an evidence questionnaire dated 13th February 2008. She gave her present address as her address when she used the land. Her address is within the claimed neighbourhood. She had known and used the land from 1971 to date. She played with the children on the land and walked over it. She used it because it is close to where she lives. She used it every day to walk across, and in winter, when it snows, to build snowmen with her daughter. She watches the children playing football. Firework night and football take place seasonally on the land. She has seen the following activities on the land: children playing, rounders, dog walking, team games, football, picnicking, barbecues, kite flying, people walking, bonfire parties and bicycle riding. She knew that Ashford Borough Council owned the land. She thought the Council had seen her on the land. Nothing had been said. She never sought nor was granted permission to go onto the land. She had not been prevented from using the land. No attempt had been made to discourage the use being made of the land by local inhabitants.

Mr Dean Colvin
36 Copperfield Close

3.41. Mr Colvin provided an evidence questionnaire dated 13th February 2008. He gave his present address as his address when he used the land. His address is within the claimed neighbourhood. He had known and used the land from 1995 to date. He played football on the land and used it for his remote controlled cars. He used the land because there is nowhere else to go and it is at the back of his house. He uses it every day in summer, and in the winter when it snows. He takes part in football and run-outs. His immediate family uses the land to play. Bonfire and fireworks and football take place on the land. He plays in the park at the edge with his little sister. People use the land to have barbecues. He has seen the following activities on the land: children playing, rounders, dog walking, team games, football, picnicking, kite flying, people walking, bonfire parties and bicycle riding. He stated that he knew who owned the land, but did not specify whom. He thought the owner had seen him on the land. Nothing had been said. He never sought nor was granted permission to go onto the land. He had not been prevented from using the land. No attempt had been made to discourage the use being made of the land by local inhabitants.

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[15] A47

Mr Howard Dear
164 Bybrook Road

3.42. Mr Dear completed an evidence questionnaire dated 7th March 2008[16] in which he stated that he had known the land from 2003 to 2008 and had seen it being used during the same period. He uses the land to walk across it now and again. He has seen others, including the local youth football club playing football on it and games. He had also seen children playing, dog walking, team games, community celebrations, fetes, cricket, people walking, bonfire parties and bicycle riding taking place on the land. He knew that Ashford Borough Council was the owner of the land, but did not know whether the Council had seen him on the land. In reply to the question "was permission ever sought by you for activities on the land", he wrote "yes", then crossed it out and wrote "no". In reply to the question if so, from whom and when, he wrote area manager. Again, in reply to the question "did anyone ever give you permission to go onto the land", he wrote "yes", then crossed it out and wrote "no". He stated that he had never been prevented from using the land. No attempt had been made to discourage the use being made of the land by local inhabitants.

3.43. Use of the land to walk across it is not use for lawful sports and pastimes. Mr Dear does not claim to have made any use of the land himself for lawful sports and pastimes, but I accept his evidence that he has seen others using the land for lawful sports and pastimes since 2003.

Mr and Mrs P Hoover
105 Beecholme Drive

3.44. Mr and Mrs Hoover provided an evidence questionnaire dated 2nd June 2008[17], signed by only one of them. They live within the claimed neighbourhood. They had known the land from 1960 to 2008 and seen it used from the 1960s to 2008. They gained access to the land by walking across it, and went onto it to get to the shops, and with the grandchildren to play on it. They used the land every day. Their immediate family use the land for playing football and walking the dog. They had seen the following activities on the land: children playing, dog walking, team games, football, picnicking, people walking, bonfire parties and bicycle riding. They knew that the land was owned by Ashford Borough Council, and thought that the Council had seen them on the land. Nothing was said. They never sought nor were granted permission to go onto the land. They had not been prevented from using the land. No attempt had been made to discourage the use being made of the land by local inhabitants.

Mr Terry Lacey
158 Grasmere Road

3.45. Mr Lacey provided an email dated 27th January 2010 in which he stated that he and his wife strongly opposed building on the application land and supported the town green application. Mr Lacey lives at the southern end of Grasmere Road, inside the claimed neighbourhood. He had walked his dog on the land since she was born 13 years ago. He saw many other dog owners doing the

[16] A59
[17] A64

same. He regularly saw young children and teenagers playing cricket and football on the land.

Miss C L Oram
35 Beaver Lane

3.46. Miss Oram provided a letter dated 9th February 2010[18] in which she stated that she used to live at 110 Bybrook Road with her son and dogs for 5 years, and used the application land almost daily throughout that period. Her son used to play in the park and on the grass. She used to walk her dogs on the land most days, twice a day. She often saw other people playing there or walking their dogs. She opposed the proposed development. Miss Oram also provided an evidence questionnaire dated 3rd June 2008[19] in which she gave her then address as 110 Bybrook Road. She stated that she had known and used the land from April 2004 to date to walk her dog and take her son to play football and to the park. She used the land every day. Her immediate family used the land for dog walking, walking, football, play area and picnic area. Fireworks took place seasonally on the land. She had seen the following activities on the land: children playing, dog walking, team games, football, picnicking, kite flying, people walking, bonfire parties and bicycle riding. She did not know who the owner or occupier of the land was. She had never sought nor been granted permission to use the land, or been prevented from using the land. No attempt had been made to discourage the use of the land by local inhabitants.

Ms Annette Pearce
30 Copperfield Close

3.47. Ms Pearce provided an undated statement[20] in which she stated that she lived in Kennington for 6 months in 1979, and walked home past the application land. She always saw a game of football being played on the land. She moved to Kennington permanently in 1981 and brought her children up there. She took her children over to the application land, let them play ball and meet other children. When they were old enough to play on their own, they played on the application land. Her son used the land right up through his teens, together with all the other boys of his age. She asked that the land should be made into a park.

Mr Peter Pearce
30 Copperfield Close

3.48. Mr Pearce provided an undated statement[21] in which he stated that as a child, growing up in Nine Acres, he had used the field in Cemetery Lane to play games. That area had been used to enlarge the cemetery. In his opinion the children need the playing area in Beecholme Drive. He used to take his own children to the land to play ball games with them.

Mrs Diana M. S. Peswani
118 Bybrook Road

[18] A70
[19] A71
[20] A76
[21] A77

3.49. Mrs Peswani provided a written statement dated 4th February 2010[22] in which she stated that she had lived with her twin daughters at her present address since September 1996, when her daughters were 4 years old. The twins are now 17. Particularly when they were young, they would regularly walk across the application land. The twins have played on the land, accompanied by Mrs Peswani. The twins have taken younger children to play there. As a family, the Peswanis took part in the Bybrook and Bockhanger Community Group walkabouts over many years. The route would often include walking across the application land.

3.50. Mrs Peshwani's kitchen window looks over the application land. She has seen local people using the land, including: in warm dry weather, men and boys playing football every day, even putting a goalpost in place. She had seen young grandfathers, their son and grandsons all playing football together. Every November, without fail, a bonfire is built on the land which is lit on 5th November. It usually continues to be added to and re-lit for about a week, until all the Guy Fawkes celebrations are over. In January 2010, a huge snowman was built on the land. In the summer, young mothers who have no gardens get together to hire a bouncy castle, and create a seaside theme park with a paddling pool and picnics, allowing the children to play together, and the mothers to sit and chat. An enormous number of local residents walk and run their dogs over and in the application land. The Council has provided a dog-pooh bin, which is used. Access to the application land has always been open. People have never been told they should not use it. In Mrs Peswani's opinion the land is a very important part of community life.

3.51. Mrs Peswani also completed an evidence questionnaire dated 8th June 2008[23]. She stated that she had known and used the land from 1996 to date for leisure walks or to gain access to neighbouring areas, and to accompany friends' young children to play and on estate walkabouts with Ashford Borough Council. She used the land on a regular basis, dependent on weather conditions, often several times per week. Her twin daughters used the land for the same activities. In response to the question whether she knew of any community activities which take place on the land, she listed regular community football games (daily, in good weather) organised by local residents, walking, especially estate walkabouts, and bouncy castles, organised by local mothers. She listed as activities she had seen taking place on the land: children playing, dog walking, team games, football, picnicking, people walking, bonfire parties, bicycle riding, bouncy castle and sometimes paddling pools. She knew that Ashford Borough Council owned the land, and stated that the Council had seen her on the land as she regularly participated in estate walkabouts. The discussions had been about investigating the improvements required to the estate and the progress of improvements and assessing any damage or problems on the estate. She had never sought permission to use the land, and said that it was not necessary, as the land is completely open and there are no barriers to entry. She had never been prevented from using the

[22] A78
[23] A82

land. She said that, as a local resident, she had been actively encouraged to use the land for walking as part of the local estate walkabouts.

<u>Mrs M Relf</u>
108 Bybrook Road

3.52. Mrs Relf provided an evidence questionnaire dated 4th June 2008[24] in which she stated that she had known and used the land from 1998 to date to play with her children, about twice weekly. Her son rides his bike and plays ball on the land. Bonfire celebrations take place on the land. She had seen the following activities on the land: children playing, rounders, dog walking, football, picnicking, kite flying, people walking, bonfire parties and bicycle riding. She stated that she knew who the owner and occupier of the land were, but did not know whether they had seen her on the land. She had never sought nor been granted permission to use the land, or been prevented from using the land. No attempt had been made to discourage the use of the land by local inhabitants.

**Documentary evidence provided by the applicant**

3.53. The applicant included a number of documents in her bundle, some of which were mentioned during the course of oral evidence. A number of the documents within the applicant's bundle originated from the objector. I have re-read all of the applicant's documents, whether specifically mentioned in this report or not.

**The Petition**

3.54. The applicant sought signatures on a petition which read as following:

"Commons Act 2006 – section 15
Application to register a new Town or Village Green and Beecholme Drive, Bybrook, Ashford (parcel of land at the junction of Beecholme Drive and Grasmere Road)

- We the undersigned very much value this open space, which has been used for informal recreation for over 20 years. This open green space has been an invaluable asset to the community in many ways, for example as a children's play area.
- We recognise that this part of Kennington has significant deprivation with regard to open space provision.
- We request that this open space be designated as a Town/Village Green, to ensure current and future generations have the same benefits that we have enjoyed."

3.55. The petition was signed by 350 individuals.

## 4. The Objector's evidence

4.1. I heard oral evidence from three witnesses on behalf of the objector.

[24] A87

Mrs Tracey Kerly

Ashford Borough Council, Civic Centre, Tannery Lane, Ashford

4.2. Mrs Kerly provided a written statement 11th February 2010[25]. Mrs Kerley is Ashford Borough Council's Head of Housing. She is responsible for the running and operation of the landlord function to the Council's housing stock of 5050 homes, the delivery of services to applicants seeking housing, dealing with those who are homeless, working closely with providers of new affordable housing to meet the shortfall in provision, building new affordable rented homes on housing assets, assisting the private sector in obtaining access to grants for home improvements and adaptations and working with private sector landlords to improve the condition of their stock.

4.3. Mrs Kerly set out in detail the Council's housing ambitions and targets, and explained the background to the decision to regenerate the Bybrook Road flats, and to seek to develop part of the application land.

4.4. In oral evidence Mrs Kerley explained that both Stanhope, on the southern side of Ashford, and Kennington have large council estates on them. The council is in the process of updating its housing needs survey. The survey is currently in draft, but estimates that the council needs approximately 650 affordable homes a year to meet its housing needs. Mrs Kerley said that the council thought that the proposed development would make the area left safer for children, as the remaining open space would be surrounded by housing.

4.5. In oral evidence Mrs Kerly was asked to clarify how much of the application land will be taken up by the development, and how much would be left. She said that the area which the Council proposes to develop is the frontage to Beecholme Drive, so that the rear boundary of the developed area will be a line from the corner of 3 Beecholme Drive to the corner of the application land on Grasmere Road. The play area and surrounding green space will remain undeveloped.

4.6. The grass cutting is funded by the housing revenue account. Anyone who uses the land who is not a tenant is using it by choice. It is not council tax which pays for the grass cutting. The housing revenue account is ring fenced, and is not cross-subsidised by the general fund, or vice versa. The land is housing amenity land. When purchased it would have been intended to be used predominantly by council tenants, because the area is predominantly a council estate, but with the right to buy, ownership of the estate has changed. The land was bought with the intention of development. Mrs Kerly said that this is an opportunity to continue with the work, and finish the development.

4.7. The land is a council-owned asset, which is an open space area with no real value in terms of providing anything functional to the community. The council is seeking to use an under-utilised asset to fulfil its functions by providing affordable housing. The competition she described in her statement was about providing something which met the needs of the community.

[25] O105

4.8. In cross-examination Mrs Kerly was asked about the use of the housing revenue account money to look at whether it would be beneficial to amalgamate the tenant services with 5 other councils' tenant services. She said that was a legitimate use of the money.

4.9. Mrs Kerly was asked about the provision of parking for the proposed development. She said that the proposals were still subject to consultation, and had not yet been the subject of a planning application. The details are changing and parking and traffic are planning and highways issues. She said the same in response to a question about the proposed access.

4.10. Although Mrs Kerly provided useful background information, none of her evidence was directly relevant to the issues before the inquiry.

Mr Giles Holloway
Ashford Borough Council, Civic Centre, Tannery Lane, Ashford

4.11. Mr Holloway provided a written statement dated 10th February 2010[26]. Mr Holloway is employed by Ashford Borough Council as a Building Surveyor. He is part of the team which is responsible for the planned maintenance of the authority's housing stock, including refurbishment and environmental projects, regeneration schemes, and delivering new build sites as part of the Homes and Communities Agency's Kick-Start programme.

4.12. Mr Holloway set out the variety of methods that his team uses to encourage participation by tenants and the local community in its projects and gave details of the consultation that had taken place in relation to the proposal to regenerate the Beecholme Drive site and to develop part of the application land. In oral evidence Mr Holloway stated that the application for planning permission application referred to in his statement that had been made by the Council in September 2006 was for the cladding of the blocks and the landscaping, not for the proposed development.

4.13. Mr Holloway provided a chronology of the development by the Council in the vicinity of the application land and illustrated this chronology with a map at O35. After private development of Bybrook Road and Tadworth Road, development has continued progressively, from Canterbury Road, north and east, to join with Faversham Road. The Council had carried out the following development. Nine Acres (mainly system built concrete construction terraced houses but including some flats) was built in 1965. In tandem with that development, Bybrook Road was developed by extending the road beyond its former turning head and building predominantly terraced housing facing the road or fed from walks onto it, and the flat and maisonette blocks in Bybrook Road, two of which face onto the application site. A row of bungalows were added to the Bybrook site in 1975. The Council acquired further land in 1972, and in 1981 the Beecholme Drive development was extended from Grasmere Road round to the bungalows. The houses on Beecholme Drive, Rectory Way and Gerlach House were constructed in 1981. Mardol Road, Mr Holloway stated, appeared to have been developed a year later, in 1982. In 1985

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[26] O27

Copperfield Close and Old Ash Close, an infill development to the west of Vicarage Lane and Grosvenor Hall were constructed. In the early 1980s, Grasmere Road was extended northwards, and housing was constructed along it, by a private developer.

4.14. The Council constructed a total of 787 units on these five council house development sites. 365 units remain in Council ownership. The remainder have been purchased under the Right to Buy or transferred to a housing association.

4.15. Mr Holloway described the site: he stated that as the area had been developed, the site was left of grass and became part of the space surrounding the low rise blocks in Bybrook Road. The site is a grassed area with very few features. There are some trees, but these are on the perimeter. A bench has been located on the north eastern perimeter of the site, looking onto the road. There is an electrical sub-station on the south western perimeter.

4.16. Mr Holloway stated that there are a number of problems with the site: it has become a cut-across for those living in Nine Acres, Rectory Way and Beecholme Drive seeking to access the shops and community centre, bus stop and primary school. He stated that the desire lines were so many that no clear tracks had appeared. This had reduced the privacy of the residents of the low rise blocks. Secondly, the site has a rubbish problem: a considerable amount of rubbish is dumped by people, in the knowledge that Housing Services will remove it in an effort to keep the area tidy. The rubbish appears near the residential blocks and in the open spaces, including furniture, old appliances, or bagged household rubbish. Mr Holloway stated that the Council's Environmental Service is often asked to clear rubbish as it appears. The area is poorly drained and generally becomes waterlogged in the autumn and winter. He said that in his opinion this made the claim about sports being played on the site surprising. The site is sterile in terms of biodiversity.

4.17. Mr Holloway set out the proposal for development of part of the application site, and the reasons behind the decision to seek to develop the site.

4.18. Mr Holloway stated that Council tenants, ex-Council tenants and others had, over the years, sought the Council's permission to undertake various projects and activities on the application site and on other pieces of amenity land in the area. In his opinion the land had been provided for Council tenants for their use by right. He gave as examples of projects on other pieces of amenity land: the Jubilee garden between 98-118 and 120-140 Bybrook Road, where tenants, including Mrs Boorman, had sought the Council's consent to construct a fenced garden; the toddler area between 120-140 and 142-162 Bybrook Road, where Mrs Boorman had raised some money, and requested a space for a small play area for younger users; and the allotment behind 98-118 Bybrook Road. On the application land itself the Council had been approached through the Planning for Real exercise to offer an area of land on the application site for play facilities. In 2001 the Council consulted, and the play area was completed by 2003. The Council paid for the facility. Mr Holloway stated that there had been a request in 2008 to move the MUGA from the old Community School

site to the application land, but this was not supported by the Council's Housing Service or by the Police Architectural section. Finally Mr Holloway stated that there had been a request to hold a demonstration against the proposed development of the application site on the application site. He said that this request was made at the time the original village green application was made. Permission had been refused by the Council.

4.19. In oral evidence Mr Holloway was asked to describe other open spaces in the vicinity of the application land. He said that there is an open grassed area at the top of Grasmere Road, in the middle of the private development. There is a play area to one side of Gerlach House, on one side of Rectory Way, with a green area, and play equipment. He has not seen the teen shelter referred to by other witnesses himself. He would expect people from Nine Acres and Rectory Road to use that area. There is also a green area off Rylands Road, at the back of the school, with two play areas. He would expect those in Rylands Road and to the north to use that area. There is also a teen shelter and a metal goal at the community centre on Bybrook Road.

4.20. The reference to a request for the MUGA to be moved to the application site was to a request by Councillor Tweed and possibly also by Mrs Boorman, to relocate the MUGA which had been lost from the Community School site to the application site. He thought that the request had been a reaction to the proposed development. It was a request to locate play facilities on the area.

4.21. He remembered the request for the demonstration coming in, but did not document it. He did not receive the request himself. He was not sure whether it was before or after the application was made. He certainly knew that the application was to be made or had been made at the time he heard about the request.

4.22. I asked Mr Holloway about the Bybrook and Bockhanger community group. He said that the Bybrook and Bockhanger community group was set up by the tenant liason officer. It meets at Gerlach house on a monthly basis. He had been on the group's walkabout on one occasion. It had covered Beecholme Drive and parts of Nine Acres. He was not sure what area the community group covered. He thought it covered the residents from Copperfield as well. He thought attendance at its meetings was open to all. He had only attended the group's meetings to make presentations in connection with this project and because he wanted to contact as many local groups in the area as possible.

4.23. In cross-examination Mrs Boorman asked Mr Holloway where the rubbish was which he referred to in his statement: he said that when he spoke of the site he meant the 10 blocks and the area behind. He agreed that it might be that the rubbish was between the blocks and around the blocks, rather than on the application land itself; all he knew was that environmental services attended the site as a whole to remove rubbish.

4.24. Mr Holloway has been employed by the Council since 2000, and moved to Housing Services in 2002. He agreed that the garages had fallen into disrepair before they were demolished. He did not know about the drying areas, as they

were before his time. He had removed two sets of pram sheds, one to provide the allotment area, and said that they were dilapidated when they were removed.

4.25. In relation to the MUGA, it was put to Mr Holloway that the proposal was that funding might be available for a purpose built MUGA on the application site. Mr Holloway was not sure when in 2008 the suggestion that the MUGA should be re-sited had been made. It was put to him that it had been early in 2007 that the MUGA at Phoenix School had been pulled down. He said he must have got the information from somewhere and maybe 2008 related to the date of one of the meetings concerning the proposal.

4.26. It was put to Mr Holloway that no request had been made by the community forum to hold a demonstration against the proposed development. He said he had not documented it, but knew that a call had been received from someone.

Mrs Sue Smith
Ashford Borough Council, Civic Centre, Tannery Lane, Ashford

4.27. Mrs Smith provided a written statement dated 9th February 2010. Mrs Smith is a Fellow of the Institute of Legal Executives, and is employed by Ashford Borough Council as a Property Lawyer, in which capacity she has access to the Council's legal files and deed packets relating to the application land.

4.28. Mrs Smith set out the history of the Council's acquisition of the application land. The application land was acquired in two parts. Both parcels were acquired for the purpose of housing. The eastern part of the application land immediately to the rear of the blocks of flats and maisonettes was acquired in 1962 together with the land on which the blocks were built and other land. The blocks were built by the end of 1965 and the area outside the blocks was left as amenity land for the use of Council tenants.

4.29. The larger, western, part of the application site was acquired in 1972, together with other land. At the time the blocks of flats and maisonettes in Bybrook Road were built, it was farmland. It was physically separated from the remainder of the application land by a field boundary. Mrs Smith thought that it was likely that the fencing of the electricity sub-station followed the line of the field boundary. This part of the application land did not, therefore, form part of the amenity land adjoining the blocks at the time they were built. The houses to the south of Beecholme Drive, including Mardol Road, were built on the land acquired in 1972 in 1981. The houses to the north of Beecholme Drive, including Copperfield Close and Old Ash Close were built in 1985.

4.30. Mrs Smith stated that the maintenance cost of the application land had always been met by the Housing Revenue Account, which meant that the maintenance of the land was paid for by tenants from their rent payments. Over time, some of the properties had been sold under the right to buy, but the land had continued to be maintained and paid for by the Council as a benefit to the tenants, ex-tenants, and in some cases, private owners.

4.31. Mrs Smith also produced aerial photographs of the application land dated 2000, 2003, 2005/2006 and 2008. The play area is not visible on the 2000 photograph. In the 2003 photograph the play area has been constructed. In the 2005/2006 photograph there is a parked vehicle on the application land at the rear of 160 Beecholme Drive. No people are visible on the land on any of the photographs.

4.32. Mrs Smith stated that the play area was constructed by the Council at some time between 2001 and 2003. It was constructed in part on an area which had been surfaced for parking. That part of the play area which was formerly part of the car park, she suggested, should not be registered as a village green, as it was previously used for parking cars. Furthermore, the play area is, and has always been, fenced off from the remainder of the application land.

4.33. Mrs Smith referred to the definition of "open space" in section 20 of the Open Spaces Act 1906, and stated that whilst the land was originally purchased for the purpose of housing and intended as amenity land for Council tenants, it is the Council's policy that any land adjoining a housing development becomes, by virtue of its use and occupation, open space within the definition in section 20 of the 1906 Act. Accordingly any disposal of small areas of such land is advertised within the local press, as required by section 123(2A) of the Local Government Act 1972, in order that the land can be freed from the statutory trust imposed by section 10 of the 1906 Act. She appended various advertisements which the Council had placed, together with plans showing the areas concerned, as examples of this policy being followed. She said that the report to the Council's Executive dated 18th October 2007 further evidenced this point.

4.34. Mrs Smith said that she did not believe that the application land was registrable under the Commons Act 2006 as a town or village green, as it is housing amenity land treated as public open space, and therefore is used by right.

4.35. In oral evidence I asked Mrs Smith about the Council's policy and where evidence of that policy could be found. She said that the policy is not a written policy. There is no formal policy and no formal appropriation of such land to open space purposes. The Council advertises all disposals of land which is open space, whatever statutory power it is held under. Housing amenity land is treated as being open space, so an advertisement is required.

4.36. Mrs Smith produced a map showing the ward boundaries in the vicinity of the application land. There are 1,989 registered electors on the electoral role in the Bybrook Ward. There are 1,824 registered electors in the Bockhanger Ward.

4.37. In cross-examination it was put to Mrs Smith that the car park was not suitable for use before the play area was built, and therefore it was not correct to say that it would not have been possible to play there because there would be cars parked there. Mrs Smith said she would not have known about that.

4.38. Mrs Smith was asked why it was necessary to apply to the Secretary of State under section 25. She said that it was intended to provide assistance to a registered social landlord, by transferring the land at nil value, and because the land was a council asset, an application was necessary. It was not to do with it being open space.

**Documentary evidence provided by the Objector**

4.39. Mr Holloway and Mrs Smith appended a number of documents to their witness statements, some of which were mentioned during the course of oral evidence. I have re-read all of the objector's documents, whether specifically mentioned in this report or not.

4.40. The report to the Executive dated 18th October 2007 concerning the proposed disposal of part of the application land recommended that the Executive should agreed the disposal of the land to Hyde Housing Association at nil consideration subject to:

- Obtaining the necessary consents under section 32 of the Housing Act and section 25 of the Local Government Act 1988 from the Secretary of State for disposal of housing land at less than market value;
- Consideration and resolution of any objections received under the Open Spaces Act 1906;
- The grant of planning permission;
- Such other terms and conditions as the Head of Legal and Democratic Services considers necessary to protect the Council's interests.

4.41. The Officer report stated that the land the subject of the proposed disposal was "currently poor grade open space. It is a grassed area, which Housing Managers report is regularly used for dumping rubbish and occasionally abandoned cars."

5. **Members of the public**

5.1. One member of the public attended the inquiry on Monday 22nd February 2010, and indicated that he wished to speak.

Mr Ray Crompton
20 Copperfield Close

5.2. Mr Crompton said that he moved into his present address in November 2008. The entrance to Copperfield Close is directly opposite the application site. During the time he has lived at his present address he has exercised his dog at least twice a day. His routine entails him passing the land on every occasion. In addition he passes the site by car every time he leaves and returns to his home, which he does at least twice a day on average. As a result he considers that he has been very aware of people on or using the application land over the past two years or so. He has witnessed use of the land by children during the summer months only. The land is not used for the rest of the year by the children for soccer or other activities, as it is unsuitable for use due to waterlogging. The cold weather periods contribute to the unsuitability of the

land for leisure use. Mr Crompton said that he did not dispute that the land had been used during part of each of the past few years, but said that it had certainly not been used continuously throughout each of the past two years. The land next to the library is used by the children when the application land is unsuitable. Mr Crompton said that the site by the library is covered by CCTV.

5.3. Mrs Boorman put to Mr Crompton that the CCTV is not moveable, and sometimes does not work. He said it does cover the football site, and it should be possible to see when children were playing there, and when they were playing there they would not be playing on the application land.

5.4. Miss Foster did not wish to ask Mr Crompton any questions.

5.5. Mr Crompton's knowledge of the land post-dates the application, and therefore his evidence does not relate to the relevant period.

## 6. Submissions on behalf of the Objector

6.1. Miss Foster submitted written opening submissions[27]. She submitted that the application land should not be registered as a town or village green because use of the land had not been as of right, but by right. The land is held as housing land and used by tenants and ex-tenants as amenity land. It is maintained by the Council from the Housing Revenue Account, which is a ring-fenced account. In this way the upkeep of the land is paid for from council housing rents. The land is used with the Council's permission, and the people using it have an entitlement to use it. The Council treats its housing amenity land as public open space. It is held both as open space and as amenity land, and in both cases is used by right. She stated that the Council would submit detailed closing submissions on the law on this point.

6.2. Miss Foster stated that the Council took no issue on most of the claimed uses of the land. It did not accept that there had been an annual bonfire on the land: had it known of such an event it would have prevented it on safety grounds. The Council asserted that tenants had made specific requests of the Council for certain uses, which supported the Council's claim that the land had been used by permission. The Council accepted that uses such as dog walking and children playing constituted lawful sports and pastimes in accordance with the Act.

6.3. In relation to the question of whether there was a significant number of inhabitants, Miss Foster submitted that the applicant was required to identify a group from a locality or localities, and to prove that there is a sufficiently cohesive entity (a distinct and identifiable community) from some legally recognised administrative division. Miss Foster stated that that application site falls into the two wards of Bybrook and Bockhanger, which at the last census had a combined population of 5,100. She said that the Registration Authority had also found that the land is situated within the ecclesiastical parish of St Mary's Kennington, but said that there was no evidence at all from

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[27] O153

parishioners. She said that the Council would argue that the land was used overwhelmingly by Council tenants and ex-Council tenants, and that there is no locality or neighbourhood with any particular community. The users are tenants and ex-tenants, not any particular community.

6.4. Miss Foster said that the applicant had produced statements from four people who claimed to have used the land for more than 20 years. She accepted that "significant" in the Act did not mean an absolute number, but submitted that 4 people from a potential 5,100 in an urban area was not significant on any view.

6.5. Miss Foster submitted that in the absence of those who signed the petition attending the inquiry and giving evidence, the petition should be given very little weight, as the evidence it contained was untested.

6.6. Miss Foster submitted that the applicant must show that use was ongoing 20 years back from the application, that is from before 15th February 1988. She submitted that there was only evidence from 4 people to support the whole period of claimed use.

6.7. Miss Foster submitted that the application was clearly simply about stopping the proposed housing development on part of the application site. She submitted that the potential implications for councils and other social housing providers across the country of losing housing amenity land to town and village greens were very serious. Their ability to manage, change, modernise and improve housing land would be undermined.

6.8. Miss Foster also provided a copy of a written Advice of Mr Philip Petchey of Counsel which she relied upon as setting out the legal argument in relation to her as of right point. Mr Petchey set out the factual background to the application: that the land is owned by the Council and held as housing land, and serves as amenity land for a development of low rise blocks. It is laid to grass and is available to those living nearby for recreation purposes. There is a fenced off play area for children as part of the land. Maintenance is paid for out of the Housing Revenue Account. Mr Petchey stated that the short question on which he was asked to advise was whether, as a matter of law the land is registrable as a town or village green on the basis of 20 years use *as of right* [his emphasis] for recreational purposes. Mr Petchey advised that there is support for the proposition that land held by local authorities as public open space under the Open Spaces Act 1906 or section 164 of the Public Health Act is not registrable as a town or village green in the speech of Lord Bingham in the *Beresford* case[28]. He has always advised that such land is not registrable and has not come across the advice of any practioners in the field to the contrary. The position relating to land held under statutes other than the Open Spaces Act and the Public Health Act is, Mr Petchey advised, less straightforward. There is no clear authority from the courts. Mr Petchey noted Lord Walker's comments in *Beresford* in the context of an application to register land held as development land by a public authority but made available as public open space. Lord Walker thought that the concept of a town or

[28] [2004] 1 AC 889

village green had been stretched "close to, or even beyond, the limits which Parliament is likely to have intended"[29]. Mr Petchey advised that in his opinion it was likely that a court would be hostile to arguments that land made available as public open space under appropriate powers is registrable as a town or village green.

6.9. Mr Petchey considered the position of land held under the Open Spaces Act, the Public Health Act and the section 4 of the Physical Training and Recreation Act 1937 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976. In his opinion there is a distinction to be drawn between different categories of land held under section 4 of the Physical Training and Recreation Act 1937 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976: so the question is what is the actual purpose for which the land is held under the Act and for which it has been made available for use by local people, so that if, for instance, the land was provided as a municipal golf course for the use of which payment was required, use by local people for other lawful sports and pastimes would be as of right, but if the land was made available as a playing field and had been available for free and unrestricted use by members of the public, the use by local people would be by right, rather than as of right. He commented that he had not seen advice by counsel experienced in the law relating to town and village greens addressed to a registration authority to the effect that a playing field provided under section 4 or section 19 which has been available for free and unrestricted use should be registered as a town or village green. If such advice does exist, he would disagree with it.

6.10. Mr Petchey turned next to consider sections 12 and 13 of the Housing Act 1985. He concluded that the power under section 13 was to lay out open space and not to lay out public open space. Mr Petchey said that there is a difference between open space held under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 which would be maintained out of the local authority's general fund and intended for general recreational use on the one hand and open space held under the Housing Acts which would be maintained out of the ring-fenced housing revenue account and arguably available only to council tenants on the other. In his opinion if land is provided and maintained by a local authority as open space, intended for recreational use and paid for by Council tenants, then those Council tenants must have some kind of right to go onto that land, which in Mr Petchey's opinion is not a weaker right than the right of citizens to use a municipal park. He suggested that it may be a contractual right, for instance if the tenants' tenancy agreements state that they have an entitlement to use amenity land. He commented that, in the absence of a corresponding right to use the land, he could not see how the housing authority was entitled to charge in respect of maintaining such land. He said that although one might think that the matter was capable of resolution by a conclusion that, whatever the precise nature of the rights of the tenants, they could not be trespassers, and accordingly are licensees. However this analysis would not be consistent with the *Beresford* case: it is hard to think that the users of the open space in *Beresford* were

[29] paragraph 92 of his speech.

trespassers, and Lord Scott (who took a somewhat different approach to the other members of the Committee) was clear that they were not.[30]

6.11. Mr Petchey said that in his opinion the difference between land laid out as a park under section 164 of the Public Health Act 1875 on the one hand and land laid out as a playing field under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 or as recreational open space under section 12 of the Housing Act 1985 on the other is that the Public Health Act power makes provision only for land to be laid out as land which is available for general recreational use. The Local Government (Miscellaneous Provisions) Act power and the Housing Act power make provision for land to be laid out for restricted recreational use (in the case of the 1976 Act) or for use which may not be recreational at all (in the case of the 1985 Act). Mr Petchey said that, if in fact the land had been made available for general recreational use (or for use by housing tenants) this in his view was not a legally significant difference.

6.12. Mr Petchey said that two things needed to be noted. Firstly, in *Beresford*, the House of Lords viewed the matters relied upon in that case as demonstrating the existence of an implied licence as being equivocal[31]. In the context of this application the Council is not seeking to demonstrate an implied licence but something similar – that from the circumstances the land has been made available under the statute for recreational use. Mr Petchey said that it would be open to the decision maker to decide as a matter of fact that he could not tell whether or not the land had been made available for recreational use. He suggested that the resolutions and minutes of the local authority may be particularly pertinent in this context (such material would arguably not have been relevant in the context of the implied licence argument).

6.13. Secondly, Mr Petchey observed that the land will have been used by the tenants of the local authority but also, no doubt, to some extent by others. Even though the tenants' use was not *as of right*, the use by other people may have been. He said that it may be that the extent of any such use is limited and therefore that no issue in fact arises, but non-tenant use does open up the debate. He said that he would prefer to advise further in the light of an understanding of the facts.

6.14. In conclusion Mr Petchey advised that land held under the Housing Acts and made available to tenants as recreational open space is not registrable as a town or village green subject to

- it being demonstrated in the light of all the facts that such land **has** been made available to tenants as recreational open space; and
- consideration of use by non-tenants.

[30] At paragraph 48 of his speech.
[31] paragraphs 7, 60 and 85

6.15. Mr Petchey said that at root, the difficulties go back to the tensions in *Beresford* between the recognition that land may be made available pursuant to a statutory right and the apparent acceptance that qualifying use of land may not necessarily be by way of trespass.

6.16. Miss Foster made oral closing submissions on behalf of the Objector. She stated that the test to be applied was that set out in section 15(2) of the Commons Act 2006. The relevant period began on 15th February 1988. The land should not be registered for the following reasons. Firstly, there is question as to whether it was used by right or as of right. Because the land is housing land and open space it is not registrable as a green. The Council accepts that there has been no formal appropriation of the land to open space purposes. However it is the policy of the council to assume that housing amenity land is open space for the purposes of advertisement under section 123A of the Local Government Act 1972.

6.17. Secondly, the land is housing amenity land. Councils have a power to provide amenity land under the Housing Acts. It is intended to be used by tenants. Mr Clarke and Mr Crompton were the only witnesses who were not council tenants or ex-council tenants. Mrs Goodwin, although now a private owner of a privately developed house, was formerly a council tenant of a council property. The land is maintained with money from the housing revenue account. This gives the council the right to demand the money and the tenants to use the land. The council tenants' rent is paid into the same account as the money to maintain it comes out of. Miss Foster accepted that this point did not deal with everyone. It does not deal with the private owners who use the land and have no right to do so. It does not deal with the right to buy owners who use the land, because they do not have a right pursuant to their leases to use the land.

6.18. Thirdly there is the permission point: the tenants asked for permission to hold a demonstration and to put a MUGA on the land. There is significant consultation with the tenants as to what happens to the land. All of that evidence shows the link between the tenants and their right to use the land. I asked Miss Foster how, if the tenants had a right to use the land, the council was entitled to take away that right by building on part of the land. She said that it was not a legal right, but was an entitlement of sorts.

6.19. The Council does not dispute the sorts of activities that the witnesses have said take place on the land take place, and that those activities are lawful sports and pastimes, although the Council suggests that it is a low level use, partly as a result of the evidence, and also by implication from the number of people there. There was evidence that the older children used the area next to the library: people in this area did use other play areas in the vicinity.

6.20. On the question of locality, the locality is the Bockhanger and Bybrook Ward, with over 3800 registered electors (not population). The Council accepts that the wards are a locality, but says that the evidence that is legally significant comes from only 3 people. Mrs Boorman has given evidence of use for 20 years plus, Mrs Ledner, 20 years, Mrs Ledman 15 years, Mrs Goodwin put 16

years on her evidence questionnaire, but claimed 36 years from living further away from the site. Miss Foster submitted I should only take into account the 16 years stated by Mrs Goodwin on her evidence questionnaire. Mrs Evans gave evidence of 8 years' use. Mr Clark lives outside the neighbourhood, and does not use the site himself. Miss Foster said I should not take into account the written evidence in support of the application. I should not give it any weight. The purpose of the hearing is to hear the evidence and test it. The evidence of those who did not attend the inquiry has not been tested. The direct oral evidence of only three people should be regarded as insufficient: three people is not a significant number.

6.21. The application is clearly about stopping the proposed housing development. Some of the evidence has been about planning matters, and I should not take that into account.

6.22. Miss Foster submitted in conclusion that the applicant had not made out her case for registration and that I should recommend against registration.

## 7. **Closing submissions on behalf of the Applicant**

7.1. Mrs Boorman made oral closing submissions in support of the application. She stated that the reason people asked for permission for items to be on the land is out of courtesy to the council, and not by way of application to the housing department.

7.2. Development will only increase the number of children needing somewhere to play, in an area where the council has agreed that the area is an area of deprivation with regard to open space provision. No-one has ever complained about people walking across the land to the shops or community centre. All wish to see the open space continue. The area is one where people move on, especially young people who have used the area over the last 20 or more years. They are not able to attend. There are 16 witnesses altogether, not all of whom have been able to attend, and over 300 who signed a petition in support of the application (some of whom signed forms or letters as well). Mrs Boorman said that not everyone who objects to a planning application turns up at the hearing, but their views are still counted, and asked me to take the views of witnesses who had given written evidence only into account.

## 8. **The Law**

8.1. The application is made under section 15(2) of the Commons Act 2006. The Commons Act 2006 received Royal Assent on 19th July 2006. Section 15 of the Act was brought into force on 6th April 2007 by the Commons Act (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007[32]. Section 15 provides (as relevant):

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[32] SI 456/2007

"(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where—

(a) 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; and

(b) they continue to do so at the time of the application.

…

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied—

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right"."

8.2. Many of the words and phrases used in section 15 of the Commons Act 2006 are identical to the words and phrases used in its predecessor, section 22 of the Commons Registration Act 1965. The decided cases on what those words meant in the 1965 Act remain authoritative when considering the meaning of the same words in the 2006 Act.

**A significant number of the inhabitants …**

8.3. "Significant" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers[33].

**… of any locality……**

8.4. A "locality" cannot be created by drawing a line on a map[34]. A "locality" must be some division of the county known to the law, such as a borough, parish or

[33] R (McAlpine) v Staffordshire CC [2002] EWHC 76 (Admin) at para. 77
[34] R (Cheltenham Builders Ltd) v South Glos, DC [2004] 1 EGLR 85 at paras 41-48

manor[35]. An ecclesiastical parish can be a "locality"[36] but it is doubtful whether an electoral ward can be a "locality"[37].

**...or of any neighbourhood within a locality…**

8.5. A "neighbourhood" need not be a recognised administrative unit. A housing estate can be a neighbourhood[38]. A neighbourhood need not lie wholly within a single locality[39]. It was said in *R (Cheltenham Builders Ltd) v South Gloucestershire County Council*[40] that a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness[41]:

> "a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a locality… I do not accept the Defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority have 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. If parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."

8.6. In my judgment there must also be some degree of fit between the claimed locality or neighbourhood, and the users of the application land.

**…have indulged as of right…**

8.7. Use of land "as of right" means use without force, stealth or permission ("*nec vi, nec clam, nec precario*") and does not turn on the subjective beliefs of users[42]. User "as of right" must be use as a trespasser and not use pursuant to a legal right[43].

8.8. In the case of *R v. City of Sunderland ex part Beresford*[44], the House of Lords considered the meaning of the phrase "as of right". It was accepted that the words "as of right" imported the absence of any of the three characteristics of compulsion, secrecy or licence – nec vi, nec claim, nec precario.[45] The appeal turned on the question of whether the inhabitants' use of the land had been by

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[35] Ministry of Defence v Wiltshire CC [1995] 4 All ER 931 at p 937b-e, R (Cheltenham Builders Ltd) v South Glos. DC at paras 72-84 and see R (Laing Homes Ltd) v Buckinghamshire CC [2003] 3 EGLR 69 at para. 133

[36] R (Laing Homes) Ltd v Buckinghamshire CC

[37] R (Laing Homes) Ltd v Buckinghamshire CC

[38] R (McAlpine) v Staffordshire CC

[39] Oxfordshire County Council v. Oxford City Council ("the Trap Grounds case") [2006] UKHL 25, para. 27 disapproving R (Cheltenham Builders Ltd) v South Glos. CC at para. 88

[40] [2004] 1 EGLR 85

[41] at para 85

[42] R v Oxfordshire CC ex p Sunningwell PC

[43] R (Beresford) v Sunderland CC paras 3, 9 & 30

[44] Ibid.

[45] Para 16, taken from the headnote in *Jones v. Bates* [1938] 2 All ER 237, and described by Lord Hoffman in *R v. Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335, as summarising the holding on this point in entirely orthodox terms.

virtue of the implied licence of the council. The parties were invited to make written submissions on the question of whether the inhabitants had indulged in lawful sports and pastimes for the qualifying period of 20 years not "as of right" but pursuant to a statutory right to do so.[46] In my judgment, it can be inferred from the fact that the House of Lords invited submissions on the point, that, where it is established that the local inhabitants do enjoy a statutory right to use the land for lawful sports and pastimes, this will preclude a finding that their user has been use "as of right", so the statutory test for registration as a town or village green will not capable of being satisfied in relation to that land.

8.9. On the facts in *Beresford*, the House of Lords was not satisfied that any statutory right existed which conferred on the local inhabitants a legal right to use the land for indulgence in lawful sports and pastimes.[47] Counsel for the council disclaimed reliance on section 21 of the New Towns Act 1981 and the question of whether that section might confer a statutory right was not therefore open for determination by the House of Lords, although it appears that Lord Scott, at least, had the point been argued, might have been persuaded that that section did confer such a right.[48]

8.10. It was accepted by both parties that, had the council acquired the application land under the Open Spaces Act 1906, the local inhabitants' use of the land for recreation would have been use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(1) of the Commons Registration Act 1965.[49]

8.11. Counsel for the council accepted that the appellant applicant was correct in contending on the facts that the application land had not been acquired under the Open Spaces Act 1906, and that therefore section 10 did not apply. The question of whether the land had been acquired under the Open Spaces Act 1906 was therefore not open for decision by the House of Lords[50]. However, it appears that, had it been, Lord Scott (at least) might have been persuaded that it was not necessary in order to prove that land had been acquired under the Act for reference to the Act itself to be expressly stated either in the deed of transfer or in some council minute relating to the acquisition. Lord Scott commented:

> "*Attorney-General v Poole Corporation* [1938] Ch 23 is interesting on this point. The open space land in question had been conveyed to Poole Corporation:
>
> > 'in fee simple to the intent that the same may for ever hereafter be preserved and used as a pleasure or recreation ground for the public use.'

[46] Para 9.
[47] Ibid.
[48] Para 26.
[49] Para 30.
[50] Ibid and paragraph 88.

> "There was no express reference in the conveyance to the 1906 Act, but the Court of Appeal thought it plain that the Act applied. Indeed, counsel on both sides argued the case on the footing that that was so: see Sir Wilfrid Greene MR, at p30. It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation, and if the land had not been purchased for some other inconsistent use and the local authority had had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply: cf counsel's argument in Poole Corporation, at p27."

8.12. Lord Scott in paragraph 52 of his speech stated that although the point had not been argued before the House of Lords, he thought that there were strong arguments for contending that where "open space" land was within the ownership of a principal council, even if the Open Spaces Act 1906 was not applicable, the statutory scheme under the Local Government Act 1972 excluded the operation of section 22(1) of the Commons Registration Act 1965:

> "For these reasons, I would, on the basis upon which the case has been argued before your lordships, allow the appeal. I am, however, for reasons that will have appeared, uneasy about this conclusion. Where open space land comes into the ownership of a "principal council", I think there are strong arguments for contending that the statutory scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or section 21(1) of the New Towns Act 1981 are applicable, excludes the operation of section 22(1) of the Commons Registration Act 1965. But these arguments have not been addressed to your lordships. I think also, as at present advised, that the power of disposal of open space land given to principal councils by section 123 of the 1972 Act will trump any town or village green status of the land whether or not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion."

8.13. None of the other Law Lords expressed an opinion on these points. Lord Bingham gave his own reasons, and stated that he agreed with Lords Scott, Rodger and Walker. Lord Hutton agreed with Lords Walker, Bingham and Rodger. Lord Rodger gave his own reasons and agreed with Lords Bingham and Walker. Lord Walker gave his own reasons and agreed with Lords Bingham and Rodger.

**… in lawful sports and pastimes…**

8.14. The words "lawful sports and pastimes" form a composite expression which includes informal recreation such as walking, with or without dogs, and

children's play[51]. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way[52].

**…on the land…**

8.15. Section 5 defines the land to which Part I of the Commons Act 2006 applies: all land in England and Wales, subject to exceptions, none of which is relevant here. "Land" is further defined by section 61 as including land covered by water.

**…for a period of at least 20 years and they continue to do so at the time of the application.**

8.16. It was held in the *Trap Grounds* case[53] that the relevant 20 year period under section 22(1)(a) was the 20 years immediately before the date of the application (not the date of registration). The relevant 20 year period in relation to this application is therefore 14th March 1988 to 13th March 2008.

**Procedure**

8.17. Kent County Council is a pilot authority, and the procedure on applications to register new greens in Kent has therefore since 1st October 2008 been governed by The Commons Registration (England) Regulations 2008.

## 9. <u>The Land</u>

9.1. The land the subject of the application must be defined with sufficient certainty for the Registration Authority to be able to ascertain the land to which the application relates.

9.2. The line on the application plan around the application land was not complete, in that its two ends did not meet. The plan provided pursuant to my directions was on a map at scale 1:10,000, and, having regard to the size of the application land, was not sufficiently accurate. At the outset of the inquiry I asked Mrs Boorman to colour in red the land which she intended to be the subject of the application, on the map at A11. The area she coloured included the children's playground and part of the grassed area to the rear of 164-168 and 186-190 Bybrook Road, and excluded the electricity sub-station.

9.3. It was common ground at the inquiry that the application to have the land registered as a town or village green had been prompted by the Council's proposal to dispose of part of the application land (that part fronting Beecholme Drive) to Hyde Housing Association, subject to planning, to enable the development of 19 environmentally sustainable homes. The area the subject of the proposed disposal was 0.47 acres in area. Perhaps inevitably as a

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[51] R v Oxfordshire CC ex p. Sunningwell PC [2000] 1 AC 335 at pp 356F-357E
[52] Oxfordshire CC v Oxford CC [2004] Ch 253 at paras 96-105
[53] [2006] UKHL 25, [2006] 2 AC 674, at para 44.

result, some of the evidence at the inquiry related to the merits of this proposal. The desirability or undesirability of the development scheme is not relevant to the outcome of this application.

9.4. I visited the site unaccompanied on a number of occasions before and during the inquiry. I asked the parties whether they wished me to carry out an accompanied site visit at the end of the inquiry. They did not. I asked the parties whether there were any particular features they wished me to note. There were none.

9.5. The application land was acquired by Ashford Borough Council's statutory predecessor in two separate parcels, and is held under two title numbers. The area immediately behind the blocks was acquired by a Conveyance dated 17th August 1962 and made between (1) The Grosvenor (Ashford) Limited and (2) the Urban District Council of Ashford[54]. That area is registered under Title Number K163751[55]. The area fronting onto Beecholme Drive was acquired by a Conveyance dated 16th February 1972 and made between (1) Trinity College Cambridge and (2) the Urban District Council of Ashford. That area is registered under Title Number K375322[56].

9.6. The 1962 Conveyance is silent as to the powers under which the Council acquired the land conveyed. The 1972 conveyance recites that the conveyance was pursuant to the Housing Act 1957. The Council accepted at the inquiry and asserted in its objection letter that it holds the land under its housing powers.

9.7. The application land is a relatively small grassed area to the rear of two blocks of flats and maisonettes on Bybrook Road, numbers 164-184 and numbers 186-206, of roughly a boomerang shape. Although the application states that the area is 0.47 acres, in fact this is the area of the part of the land of which the Council proposed to dispose. The whole of the application land is somewhat larger, but is probably less than one acre in area.

9.8. The north-western boundary of the application land is formed by the pavement to Beecholme Drive, and its north-eastern boundary by the pavement to the Grasmere Road. There are short wooden posts around these sides of the application site to prevent vehicles driving onto it. Its south-western boundary is formed in part by the side wall and side boundary fence of 3 Beecholme Drive, and in part by the rear fences of numbers 160-150 Beechome Drive. In the south eastern corner of the land there is an equipped play area, and the southern boundary is formed in part by the fencing around the play area. That line is extended to form the remainder of the southern boundary from the end of the fencing to the rear fence of number 150. The eastern boundary is formed at the southern end by the eastern boundary of the play area, then by a line going from the north eastern corner of the play area, around the tree (and including the tree within the application land) to the eastern corner of the fencing of an electricity sub-station, along the fencing of the electricity sub-

[54] O112
[55] O121
[56] O129

station, and then from the northern corner of the fencing of the electricity sub-station along the rear boundary of the parking area across the grassed area, but excluding the two large trees to the rear of 186-206 Bybrook Road, to meet the pavement of Grasmere Road. There is a stand of trees to the north of the electricity sub-station and two or three other individual trees further north than the stand of trees. There are no other significant trees or shrubs on the application land.

9.9. The play area has a fence around it, with an open gap at its north eastern corner to allow access. There is a sign on the fence which reads:

> "Welcome to Bybrook Road Play Area
> - This play area is intended for use by children up to the age of 12.
> - All children should be accompanied by an adult whilst using this play area.
> - In the event of an accident, or to report damage or a hazard, please telephone:-…..
> - Please use this play area without causing a nuisance and with respect for the equipment."

9.10. At the bottom of the sign are three symbols, red circles with a line through them, showing a picture of a dog, a person depositing litter and a cyclist and rollerskater respectively.

9.11. The Council produced no evidence as to how long this sign had been present and did not seek to say that it had regulated use of the play area through the presence of the sign, so as to make use of that area permissive.

9.12. There is a sign on the side wall of 1 Beecholme Drive, facing onto the application site which reads "NO BALL GAMES By order of ASHFORD BOROUGH COUNCIL". The Council produced no evidence about this sign at all. There is no evidence from which I can reach a conclusion as to how long this sign had been in place. The Council did not seek to say that it had regulated use of the land through the presence of the sign on a wall facing the land.

9.13. I am satisfied that the land is sufficiently defined to constitute land for the purposes of the 2006 Act. I append a copy of the applicant's plan to this Report.

## 10. <u>The claimed locality and neighbourhood within a locality</u>

10.1. The neighbourhood or locality claimed in the application form was Bybrook Ward and Bockhanger. By my directions I required the applicant to include in the bundle she produced for the inquiry a map on which were identified the locality and any neighbourhood within a locality on which she relied. In response, the applicant provided a map[57] on which the following roads (or parts of them) were coloured red: Rectory Way, Mardol Road, Beecholme

[57] A13

Drive, Old Ash Close, Bockhanger Lane, Copperfield Close, Bybrook Road, Grasmere Road, Briar Close, Larch Walk, Belmont Road. An area to the east of Bybrook Road and to the south of Belmont Road was enclosed within a red line. An area to the south of Beecholme Drive, the east of Rectory Way and the west of Nine Acres was enclosed within another red line. A line was also drawn to the north west of Bybrook Road and the south of Crofton Close, to approximately the same level as the line running to the north along Bybrook Road, but these two lines were not joined. The applicant also produced a map with 17 green dots on it[58], described in the index to her bundle as showing where people live.

<u>Locality</u>

10.2. At the outset of the inquiry, I asked the applicant to define the locality to which her application related. She stated that the application land falls within the Bockhanger Ward, and that that was the locality upon which she relied. Ms Foster for Ashford Borough Council indicated that she would wish to check factually whether it was correct that the land fell within Bockhanger Ward, but subject to that point, that she would not seek to argue that an electoral ward was not a locality within the statute. During the course of the inquiry the Council helpfully produced a map showing the ward boundaries in the vicinity of the application land. The application land falls wholly within Bybrook ward, but is right on the western edge of that ward. The claimed neighbourhood falls partly within Bybrook ward and partly within Bockhanger ward. The applicant stated, following receipt of the map, that the claimed locality was Bybrook ward and Bockhanger ward.

10.3. I recommend that the Registration Authority should accept the applicant's case that the qualifying locality to which this application relates is the electoral wards of Bybrook and Bockhanger.

<u>Neighbourhood</u>

10.4. At the outset of the inquiry I asked the applicant to clarify the neighbourhood to which her application related by colouring the area she defined as the neighbourhood on a copy of A13. She said that the area was known as Bockhanger. The Objector did not challenge the applicant's evidence that this area was a neighbourhood during the course of the inquiry, for instance by cross-examining the applicant's witnesses on this point, or by providing evidence of its own as to whether or not the claimed neighbourhood was in fact a neighbourhood.

10.5. The claimed neighbourhood includes the properties comprising the council development along Bybrook Road on the land acquired by the 1962 Conveyance and the properties comprising the council development along Beecholme Drive and Mardol Road on the land acquired by the 1972 Conveyance. The plan appended to Mr Holloway's statement showing the chronology of Council housing stock and land development[59] suggests that the area acquired by the 1972 Conveyance was developed in two parts: the

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[58] A14
[59] O35

bungalows on Beecholme Drive in 1975, and the remainder of the land acquired by the 1972 Conveyance in 1981, together with Gerlach House and the properties on Rectory Way. Gerlach House and the properties on Rectory Way were not included within the claimed neighbourhood. However it appears likely from an examination of the Ordnance Survey base map used for the Title plans for the land acquired by the 1962[60] and 1972[61] Conveyances, contrary to the evidence contained in Mr Holloway's plan, that Beecholme Drive and Mardol Road were developed before Rectory Way. The properties on Beecholme Drive and Mardol Road are shown as complete on the Title plan, whereas Rectory Way is not shown. Further the Title plan shows that Beecholme Drive had not, at the time the survey underlying the base map was carried out, been extended beyond the turning head at the junction with Mardol Road. The objector did not challenge the applicant to explain why Gerlach House and the properties on Rectory Way were not included in the claimed neighbourhood, but it may be that this provides some explanation as to why the applicant did not feel that those properties were integrated into the claimed neighbourhood.

10.6. The other area of council housing which was not included within the claimed neighbourhood was the properties on Nine Acres. The plan appended to Mr Holloway's statement showing the chronology of Council housing stock and land development[62] suggested that these properties were developed in 1965. In his statement he stated that the Nine Acres development was built in tandem with the Bybrook Road development. Again, the applicant was not challenged as to why these properties were not included. The Nine Acres development runs along pair of cul de sacs off Bybrook Road. It has a separate feel. It may be that this is the reason that the Applicant has not included the properties in Nine Acres in the claimed neighbourhood.

10.7. The area identified by the applicant also includes the properties comprising the council development on land to the north west of the land acquired by the 1972 Conveyance along Old Ash Close and Copperfield Close. The plan appended to Mr Holloway's statement showing the chronology of Council housing stock and land development[63] suggests that this area was developed in 1985.

10.8. The claimed neighbourhood also includes various properties to the north of the Old Ash Close and Copperfield Close development, including the following named properties, all of which appear to be accessed off Bockhanger Lane: Twin Oaks, Rivendell, Red House, The White House, The Cottage, Ashlea House and Forstal House, and the properties on the south side of Riding Hill, a private housing development (numbers 5-10 inclusive). It is not immediately obvious that these properties would form part of the same neighbourhood as the council and ex-council housing. The objector did not challenge the applicant to explain why these properties were included within the claimed neighbourhood. Having regard to the map at A14 showing the addresses of the applicant's witnesses, I think that it is possible that these properties were

[60] O121
[61] O129
[62] O35
[63] O35

included because the applicant wished to include Mrs Goodwin's house in the claimed neighbourhood. However, as the applicant was not asked about this I have not had the opportunity to hear her response and therefore cannot form a conclusion one way or another.

10.9. I recommend that the Registration Authority should accept the applicant's unchallenged assertion that the area she identified on A13 is a qualifying neighbourhood. I append a copy of that map to this Report.

## 11. Evidence of use

Use of the site

11.1. There was a substantial amount of evidence to support the applicant's claim that the application land was well used by local inhabitants for recreation. Three unrelated witnesses including the applicant gave oral evidence that they and their families had used the land and seen others using it for the whole of the relevant 20 year period (Boorman, Lednor, Morrison). Two unrelated witnesses gave oral evidence that they had used the land with their families for part of the relevant period, since respectively 2002 (Evans) and at least 1996 (Goodwin) and seen others using it for that period. Of the witnesses that gave oral evidence of their own use, 4 were Council tenants, and one lived in a house on a private development. All lived within the claimed neighbourhood. Two further witnesses gave oral evidence that they had seen the land being used by local residents for the whole of the relevant period (Clark and Tweed).

11.2. The oral evidence was supported by written evidence submitted on behalf of the applicant. Three witnesses claimed to have used the application land themselves for the whole of the relevant period (P Colvin, Hoover, Pearce). Four others claimed to have used the application land for a period in excess of 10 years (D Colvin, Lacey, Peswani, Rolf). One other witness had used the land since 2004 (Oram). All of those witnesses lived within the claimed neighbourhood. The Title plans[64] provided by the Council only relate to part of its landholding in the area. In the case of the plan relating to Title number K163751, the legend at the top shows that it was produced on 12th August 2008 and shows the state of the title plan on that date. It is therefore not up to date. The plan relating to Title number K375322 does not have a date on it, and I do not know how recent an edition it is. The Title plans do show some properties which have been removed from the title, presumably under the right to buy scheme. From the Title plans provided, it is apparent that Mr and Mrs Hoover's property is now privately owned. The following witnesses who gave written evidence only of their own use live in properties which are council owned or formerly council owned, but which were still owned by the Council when the Title plans were produced: Oram, Peswani, Relf. The following witnesses live in properties which are either Council owned or ex-Council owned, but which are not on either of the Title plans produced: Colvin (x2), Pearce. Mr Lacey lives in a house which was privately developed but which is within the claimed neighbourhood.

[64] O121 and O129

11.3. In my judgment the petition is of very little evidential value on the issues which have to be resolved in order for this application to be determined, because it asks individuals to sign up to a multi-part composite statement without giving them the opportunity to amend any part of it. However, I do consider that a signature on the petition can properly be regarded as a general expression of support for the application, and that the number of signatures on the petition provides a degree of support to the other evidence before the inquiry of use to the effect that the application land was in general use by the local community for recreation for the relevant period.

11.4. The objector relied on the statement of the author of the document headed "Ashford Housing Contextual Information Beecholme Drive – Green space"[65]:

> "There is very little activity on [the application land]. The youth in the area prefer the area around the library where the games equipment has been provided. The area does get boggy and unless it is mid to late spring to summer and ground conditions are dry, activity across the site is pedestrian traffic crossing from Beecholme Drive to Bybrook Road (note around the library the ground is more compacted and the area drains better – making it more of an all weather surface. Staff who have worked for the Housing Department for many years can only recall seeing ball games being played a couple of times. Please note that, although people walk across the site, there are not established dirt tracks."

11.5. There was little other evidence from the objector to support this contention. Mr Holloway commented that the poor drainage of the site which leads to the site becoming waterlogged in the autumn and winter made the claim about sports being played on the land surprising, but did not give any evidence as to his own personal observations of the site. The objector did not call any of its longstanding Housing Department staff to give evidence at the inquiry.

11.6. Some challenge was made to the evidence of the applicant's witnesses as to use, in that some of the witnesses were asked about the other areas available for recreation in the vicinity, but all the applicant's witnesses remained firm in their evidence that the land was well-used.

11.7. As a matter of commonsense a flat grassed area such as the application land in the middle of a housing estate is likely to be used by the children and youths from that estate for recreation, at least in the summer months. The play area installed on the site is likely to attract younger users and their carers. In these respects the applicant's evidence of use seemed entirely probable. There was no suggestion that the nature of the area had changed over the relevant period. Although there was less evidence of use at the beginning of the period than in the later part of the period, in my judgment this is to be expected, and there was sufficient evidence to conclude on the balance of probabilities that the land was in use in the same way throughout the whole of the relevant period.

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[65] A113 and O24

Is the number of users "significant" within the meaning of the statute?

11.8. In my judgment despite the small number of witnesses who came to the inquiry to give oral evidence in support of the application, there was evidence of use by a sufficient number of unrelated individuals to indicate to the Council that its land was in use generally by local inhabitants for informal recreation, rather than occasional use by individuals as trespassers. I recommend that the Registration Authority should find that there is evidence of use by a significant number of local residents, as required by section 15 of the 2006 Act.

Dumping of rubbish on the application land

11.9. There was little evidence before the inquiry to support the statement contained in Ms Lonsdale's report to the Executive dated 18th October 2007[66] that Housing Managers reported that the land which the Council proposed to dispose of (part of the application land) was regularly used for dumping rubbish and occasionally abandoned cars. Several witnesses on behalf of the applicant expressed surprise at this statement, and said that it did not accord with their knowledge of the application land. Neither the author of the report nor the Housing Managers referred to in the report attended the inquiry to give evidence, so the applicant was unable to test this statement by cross-examination. The evidence of the applicant's witnesses was that the rubbish dumping and abandoned vehicles tended to be in the immediate vicinity of the blocks. The document sent with the objection letter and headed "Ashford Housing Contextual Information Beecholme Drive – Green space" [67], which appeared to have been provided by the applicant's housing department, supported the applicant's witnesses' evidence that it was the area around the residential blocks and the spaces in between which were the problem.

11.10. In any event as it was not suggested to the applicant's witnesses that the land was rendered unsuitable for use by local residents as a result of the dumping of rubbish and abandoned cars on it, or that residents were unlikely to use the land because of the rubbish on it, it does not seem to me that the question of whether or not the land was regularly used for dumping rubbish and occasionally abandoned cars is relevant to the issues which the Registration Authority has to determine.

12. **Use as of right?**

Rights of the Council tenants to use the land

12.1. Miss Foster confirmed, on instructions, that the Council tenants of the properties in the vicinity of the application land do not have a right in their tenancy agreement to use the application land as amenity land. Similarly, where former Council properties have been purchased under the Right to Buy scheme, the leases of the flats and transfers of the houses do not contain any right to use the application land as amenity land.

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[66] A106

[67] A113 and O24

12.2. In my judgment the fact that council rents are paid into the same account from which the maintenance of the land is funded does not give rise to any implied right in the tenants to use the land. I asked whether the rents paid by the tenants of for instance the flats and maisonettes in the blocks are held separately and the funding for the maintenance of the land taken from those monies, or whether the rents paid into the Account by those tenants could fund the maintenance of any piece of amenity land on a Council owned housing estate. Mrs Kerly confirmed, through Miss Foster, that the Council does not hold the payments from different groups of tenants separately, so the rents paid by the tenants of the Bybrook Road blocks could be funding the improvement or maintenance of land on the Stanhope estate. Logically therefore if such a right did exist by reason of the ring-fencing of the Housing Revenue Account, it would be a right for all Ashford Borough Council's tenants to recreate on any land owned by Ashford for the purposes of housing and used as housing amenity land.

12.3. In my judgment Mr Petchey's comment that in the absence of a right in the Council's tenants to use the open space laid out under the power in section 13, he could not see how the housing authority was entitled to charge in respect of maintaining the land is erroneous: the Council's Housing Revenue Account pays for the services that tenants receive but also covers other items such as the cost of borrowing for the original build of the council's properties and for building improvements, and, as confirmed by Mrs Kerly, in the instance of Ashford Borough Council, the cost of investigating whether it would be beneficial to merge the landlord service with other neighbouring local authorities[68]. Further, the Housing Revenue Account pays for all open space, whether designed or used for recreation or not.

12.4. Finally on the facts of this case, it is clear that the larger western part of the application land was not made available for recreational use by the Council when the blocks on Bybrook Road were built, as it was not at that time owned by the Council. There was no evidence, in the form of resolutions or minutes of the authority, that the Council had decided to make the whole of the application land available for recreational use, and if so, to whom.

12.5. Even if I am wrong in my conclusion that the ring-fencing of Council rental income in the Housing Revenue Account alone cannot give rise to an inference that the Council's tenants have an implied licence to use the application land, there was evidence of use of the application land by others who were not Council tenants. There was no evidence that the Council took any steps to restrict the use of the land to those who were Council tenants, and to exclude those who lived in properties which were formerly Council-owned or those who lived on the private estate adjacent to the application land (by contrast, for instance, with the notices which seek to control parking in the parking spaces adjacent to the blocks on Bybrook Road by limiting the permission to park to residents only). Miss Foster accepted that if I were to accept her argument that

[68] http://www.direct.gov.uk/en/HomeAndCommunity/SocialHousingAndCareHomes/CouncilRentAndOtherCharges/DG_10029760

the Council tenants had an implied licence to use the land, it dealt only with those users who were Council tenants and not with other users.

Was the land held on a statutory trust under section 10 of the Open Spaces Act 1906?

12.6. The fact that the Council (as do many local authorities) has a practice that where it is proposing to dispose of open space land it advertises that proposed disposal in accordance with section 123(2A) of the Local Government Act 1972 does not mean that the land the subject of the proposed disposal and advertisement is necessarily held for open space purposes or that it is subject to a statutory trust. The application land was held for housing purposes. There was no appropriation of the application land to be held for open space purposes under the Open Spaces Act 1906.

12.7. "Open space" is defined in section 270(1) of the Local Government Act 1972, by reference to section 336(1) of the Town and Country Planning Act 1990, as "any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground". Land may fall within that definition, because it is *used* for the purposes of public recreation without its being *held* for the purposes of public recreation, and being the subject of a statutory trust. Many authorities in my experience advertise land which physically is an open space, whether or not there is any evidence of use for the purposes of public recreation. The mere fact of advertisement, without more, does not prove a statutory trust which would give rise to a public right to use the land, and prevent the use of the land being "as of right".

Implied licence

12.8. It does not seem to me that the fact that the application land was made available for local residents to use for recreation gives rise to an implied licence in this case any more than it did in the *Beresford* case. The acts of the Council in this case have been equivalent to those of the local authority in *Beresford* which mowed the grass and provided benches around the Sports Arena the subject of the application in that case. Here the Council was clearly willing for local inhabitants to use the land. It encouraged the local inhabitants to use the land by providing the children's play equipment and the bench for people to sit on. Those activities were not indicative of a revocable permission granted by the Council, but were the actions of a public authority, mindful of its public responsibilities and functions, which wished to care for the appearance of the amenity land around its rented properties and to provide recreational facilities for its tenants and for the other inhabitants who lived in the locality of its rented properties. There is nothing in my judgment about the facts of this case which distinguishes it from the *Beresford* case and from which a licence to use the land granted by the Council to local inhabitants can be inferred.

Events held and activities carried out by permission on the land

12.9. I am satisfied that the Council's decision to locate the playground which is presently on the south eastern corner of the application site came about as a result of an expressed preference by local consultees for that site through the Planning for Real exercise undertaken by the Council. However, I think that it

is inaccurate to characterise the result of such a consultation exercise as a request for permission to site a playground on the application land.

12.10. I am satisfied that, at some time in 2007 or 2008, Mrs Tweed and Mrs Boorman suggested to the Council that the application land could be used to re-site the MUGA that had been lost when the Community School site was redeveloped. I do not think that this suggestion/request can be characterised as a request for permission to enjoy lawful sports and pastimes on the land.

12.11. I am satisfied that at some time, an unidentified local resident made a request to the Council for permission to hold an event in opposition to the proposed development of part of the application land on the application land. The person who made the request was not the applicant nor any of the witnesses who appeared on behalf of the applicant at the inquiry. Mr Holloway's recollection that there had been a request to hold an event on the land was supported by the document headed "Ashford Housing Contextual Information Beecholme Drive – Green space"[69]. Under the heading "Record of Events on the Site" the author wrote:

> "We do not have a record of any events on this strip of land. We have not received any requests to hold an event on this strip of land. The only exception was close to the time of one of the development consultation meetings last year. This would probably coincide with the submission of the current application."

12.12. However, neither the author of this document nor Mr Holloway was able to state clearly when the request was received. I am not satisfied on the balance of probabilities that the request was made during the qualifying period, that is, before the application to register the land as a town or village green was made. Even had I been so satisfied, the evidence of a single request by a single individual whose identity is not recorded does not in my view support the Council's case that there was a pattern of behaviour amongst local residents of seeking permission for activities on the application land.

12.13. There was no other evidence of the local residents seeking the Council's permission to carry out lawful sports and pastimes on the application land.

12.14. I recommend that the Registration Authority should conclude that the use made of the application land by local residents was use as of right, as required by section 15 of the 2006 Act.

## 13. Applying the law to the facts

**A significant number of the inhabitants …**

13.1. In my judgment the applicant has shown that the application land is used by a sufficient number of people to indicate that the land is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.

[69] A113 and O24

**… of any locality…**

13.2. The claimed localities are the two electoral wards of Bybrook and Bockhanger. I am satisfied that these wards are localities within the meaning of the Act.

**...or of any neighbourhood within a locality…**

13.3. The claimed neighbourhood is the area coloured green on the appended map and known as Bockhanger. I am satisfied that the claimed neighbourhood is a neighbourhood within the meaning of the Act.

**…have indulged as of right…**

13.4. I was not persuaded by the Objector's argument that the local inhabitants' use of the land was permissive. In my judgment the local inhabitants used the land as of right, as required by the Act.

**… in lawful sports and pastimes…**

13.5. There was evidence that the land was used for a number of lawful sports and pastimes, including football, dog walking, using the play area, toddlers' games and other play.

**…on the land…**

13.6. The application land was sufficiently clearly defined. I append a map showing the land the subject of the application.

**…for a period of at least 20 years and they continue to do so at the time of the application.**

13.7. I accept the applicant's evidence that the land has been used by local inhabitants for informal recreation throughout the relevant period and recommend that the Registration Authority should so find.

## 14. <u>Conclusion</u>

14.1. I conclude that the applicant has succeeded in satisfying the statutory test for registration, and recommend that the Registration Authority should accede to the application. I recommend that the Registration Authority should specify that the reasons for its decision are "the reasons set out in the Inspector's Report dated 25 February 2010".

LANA WOOD
9 Stone Buildings
Lincoln's Inn
25 February 2010

# APPENDIX C: PLAN SHOWING RELEVANT NEIGHBOURHOOD