

Application to register land known as King George Playing Field at Hawkhurst as a new Village Green

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 that the County Council endorses the advice received from Counsel and that the applicant be informed that the application to register the land known as the King George Playing Field at Hawkhurst as a new Town or Village Green has not been accepted.

Local Member: Mr. R. Manning

Unrestricted item

Introduction

1. The County Council has received an application to register land known as King George Playing Field at Hawkhurst as a new Town or Village Green from local residents Mrs. J. Wood, Mr. D. Buckle and Mr. R. Sheath ("the Applicants"). The application, dated 24th November 2008, was allocated the application number VGA605. A plan of the site is shown at **Appendix A** to this report.
2. The application was duly advertised and an objection was received¹ from Hawkhurst Parish Council ("the Parish Council"). The objection was made on the basis that use of the application site has been 'by right' and not 'as of right'.

Previous resolution of the Regulation Committee Member Panel

3. The matter was considered at a Regulation Committee Member Panel meeting on Friday 19th February 2010. A copy of the Officer's report setting out the facts of the case is attached at **Appendix B**.
4. Several days prior to the meeting, following the circulation of the Officer's report, a letter was received from Mr. C. Maile, of Planning Sanity, acting on behalf of the applicants. The letter raised new issues and points of law regarding the status of the land as a Charitable Trust which had not been considered during the previous exchange of representations.
5. During the meeting, Members raised concerns regarding the uncertainty surrounding the manner in which Hawkhurst Parish Council held the land and the effect of the Charitable Trust on the issue of whether the use of the application site for recreational purposes by the local residents had been 'as of right'.
6. After some debate, it was not considered possible to reach a firm conclusion and it was resolved that consideration of the application be deferred to enable further legal advice to be sought on the new issues raised by the applicants.

¹ A number of standard form letters of objection were also received.

Background

7. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Village Green where it can be shown that:
'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
8. In this case, it appears to be common ground that that the application site has been available for use for a period of at least 20 years and that it has been used for lawful sports and pastimes.
9. However, in order to meet the tests for registration, the applicant must be able to demonstrate that such use of the application site has been 'as of right'. For use to have been 'as of right', it must have taken place without force, without secrecy and without permission² (*nec vi, nec clam, nec precario*).
10. There is no evidence to suggest that use of the application site by the local residents for recreational purposes has been with force or in secrecy. Although it is the Parish Council's case that the vehicular access gates to the car park on the application site are regularly locked after hours, access to the site is available at any time via the stile and two pedestrian gates situated along the frontage with the public highway.
11. However, there is an issue with regard to the third limb of the 'as of right' definition regarding whether use has been without permission. The land is the subject of a Charitable Trust and, in order to establish whether use has been 'as of right', it has been necessary to determine not only the existence and exact provisions of the trust but also the legal consequences of the land being held under a Charitable Trust.
12. It was on this third element of the 'as of right' definition that Members requested further legal advice be sought.

Counsel's advice

13. Following the meeting, Hawkhurst Parish Council was contacted regarding the provision of further documentation to clarify the status of the land. On receipt, this new information, along with all the other documentation supplied by both parties in respect of this case, was forwarded to Counsel for advice.

Is there a valid Charitable Trust?

14. The first matter to be considered by Counsel was to determine whether or not the land was the subject of a valid Charitable Trust.
15. The land was acquired by Hawkhurst Parish Council by way of a Conveyance dated 3rd June 1935 (attached at **Appendix C**). In determining whether the effect of this document was to create a Charitable Trust, it is necessary to consider the intention of the document and the language used within it.

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

16. The Conveyance states 'it is intended that the said land shall be dedicated to the use of the Public solely for the purposes of recreation' (third paragraph). It is clear that the intention behind the document is for the land to be used by the public for recreational purposes. Clearly, the public is not a legal entity in whom ownership of the land can be vested. The Parish Council, on the other hand, is a legal entity that has the power to acquire land (under the Local Government Act 1894, reference to which is made in the Conveyance). Therefore, the land has been transferred to the Parish Council on the understanding that it is held for public use – i.e. it is held 'on trust' for the public.
17. The language of the document also provides further clues. The reference to 'the donor as settlor' (at the bottom of page 1 of the Conveyance) demonstrates that the intention of the document is to create a trust. A 'settlor' is a legal term for a person who settles property on trust for the benefit of beneficiaries.
18. The fact that the 1935 Conveyance can be said to create a trust is entirely consistent with the land being dedicated within 3 years of the document as a King George Playing Field. Furthermore, there are numerous references in the user evidence questionnaires submitted in support of the application to the land being 'held in trust for Hawkhurst by King George Playing Fields'. This would appear to confirm that the existence of the trust is well-known locally.
19. There is strong authority that gifts for recreational purposes are to be regarded as being charitable. In a case known as *Re Hadden*³, the judge held that he was 'bound to hold... that the provision of means for public recreation is a charitable object'.
20. Therefore, on a balance of probabilities, it can be concluded that the land is held by the Parish Council on a Charitable Trust.

What is the effect of the Charitable Trust?

21. Having answered the first question in the affirmative, Counsel then considered what the effect of the Charitable Trust is on the application to register the land as a new Village Green. Mr. Maile, on behalf of the applicants, submits that the land is capable of registration as a new Village Green regardless of whether or not it is held on a Charitable Trust.
22. Whilst this may be the case in circumstances where land is held on trust for a specific purposes (e.g. for use by the members of a specific club or organisation or for a particular, narrowly-defined purpose), Counsel was of the view that where land is held on trust for public recreation generally, Village Green rights cannot be acquired.
23. At this point, Counsel referred to the Trust Deed which created the King George's Field Foundation dated 3rd November 1936 (attached at **Appendix D**). The object of the Foundation was to 'promote and assist in the establishment throughout the United Kingdom of Playing Fields for the use and enjoyment of the people...'. The term 'Playing Field' is defined in the trust document as 'any open space use for the purpose of outdoor games sports and pastimes'.

³ [1932] 1 Ch 133 at 142 per Clauson, J

24. The reference to 'sports and pastimes' in the Trust Deed sits squarely within the definition of the type of use that can give rise to Village Green rights under section 15 of the Commons Act 2006.
25. As was noted at paragraph 36 of the report to the Regulation Committee Member Panel meeting on 19th February 2010 (at **Appendix B**), the fundamental principle behind the concept of 'as of right' is that, in order to acquire rights, those using the land must start off as trespassers. The acquisition of rights cannot occur if those using the land for recreational purposes already have a right to do so. This is because those using the land are not trespassers; they are there in exercise of an existing right to use the land. As such their use is 'by right' and not 'as of right'.
26. This was confirmed by Lord Walker in a case known as *Beresford*⁴, who said that: "*where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers... **the position would be the same if there were no statutory trust in the strictest sense, but land had been appropriated for the purpose of public recreation***" (emphasis added in bold).
27. Whilst *Beresford* referred to land which had been appropriated for public use under the Open Spaces Act 1906, the principle remains the same, as confirmed by the highlighted section of Lord Walker's passage above.
28. Counsel was therefore of the view that, due to the existence of the Charitable Trust, use of the land was not 'as of right' and therefore the land was not capable for registration as a Village Green.

Conclusion

29. In light of the advice received from Counsel, the conclusion is that the use of the application site by the local residents for recreation has taken place 'by right' (by virtue of the existence of the Charitable Trust) and not 'as of right'.
30. Since this key legal test in relation to the registration of the land as a new Town or Village Green has not been met, it is not possible for the land to be registered as such.

Recommendation

31. I recommend that the County Council endorses the advice received from Counsel and that the applicant be informed that the application to register the land known as the King George Playing Field at Hawkhurst as a new Town or Village Green has not been accepted

⁴ *R(Beresford) v Sunderland City Council* [2003] UKHL 60 at [87]

Accountable Officer:

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

Background documents

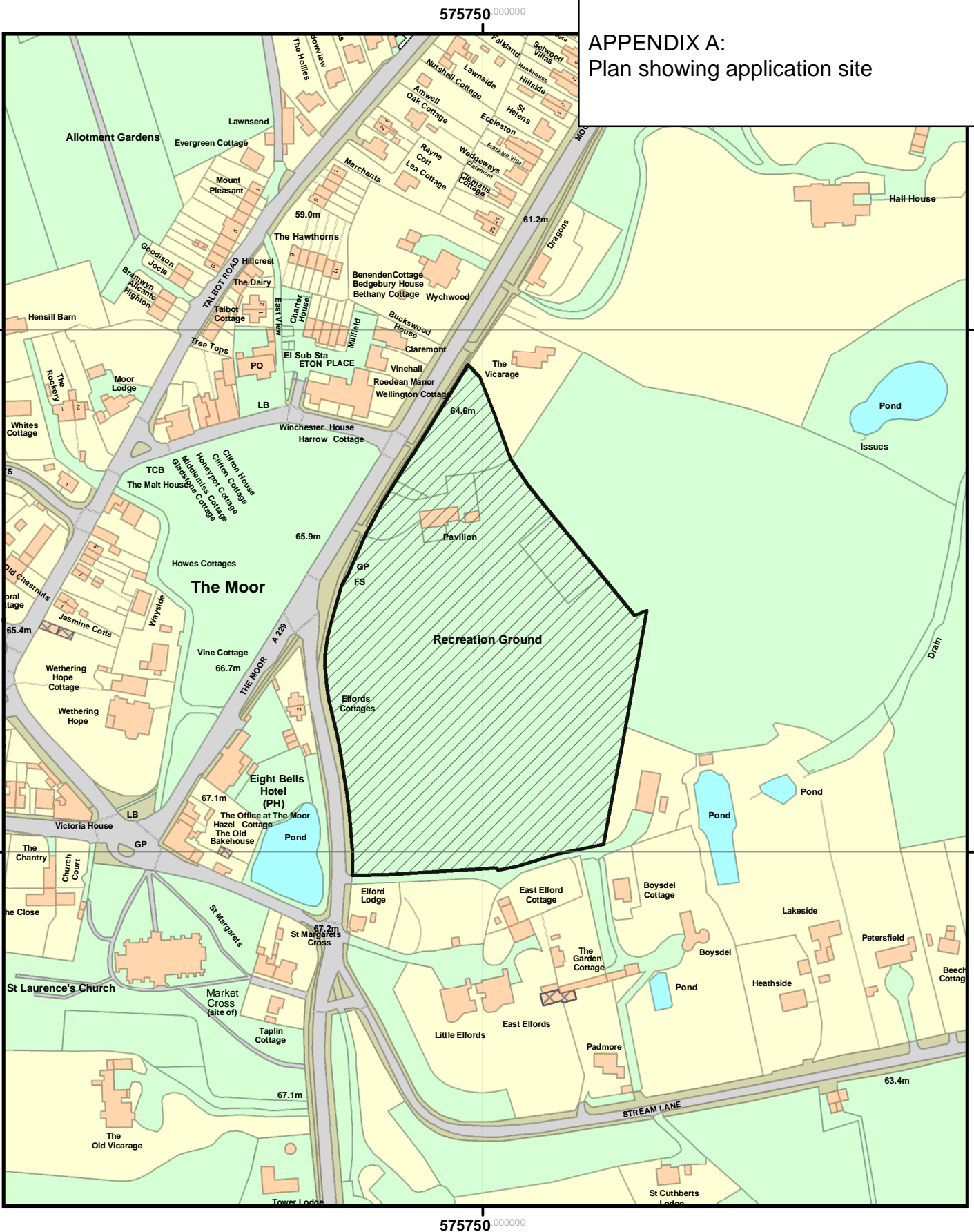
APPENDIX A – Plan showing application site

APPENDIX B – Copy of the Officer's report presented to the Regulation Committee Member Panel meeting of 19th February 2010

APPENDIX C – Copy of the Conveyance dated 3rd June 1935

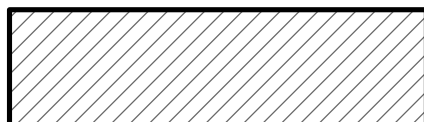
APPENDIX D – Copy of Trust Deed establishing the King George's Field Foundation dated 3rd November 1936

APPENDIX A:
Plan showing application site



Scale 1:2500

Application to register land known as
King George Playing Field in the parish
of Hawkhurst as a new Village Green



Application to register land known as King George Playing Field at Hawkhurst as a new Village Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Friday 19th February 2010.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land known as King George Playing Field at Hawkhurst has not been accepted.

Local Members: Mr. R. Manning

Unrestricted item

Introduction

1. The County Council has received an application to register land known as King George Playing Field at Hawkhurst as a new Town or Village Green from local residents Mrs. J. Wood, Mr. D. Buckle and Mr. R. Sheath ("the Applicants"). The application, dated 24th November 2008, was allocated the application number VGA605. A plan of the site is shown at **Appendix A** to this report and a copy of the application form is attached at **Appendix B**.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and Commons Registration (England) Regulations 2008.
3. Section 15(1) of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Town or Village Green where it can be shown that:
'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
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 Applicant must notify the landowner of the application and the County Council must notify every local authority. The County Council must also publicise the application in a newspaper circulating in the local area and place a copy of the notice on the County Council's website. In addition, as a matter of best practice rather than legal requirement, the County Council also places copies of the notice on site to provide local people with

the opportunity to comment on the application. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

6. The area of land subject to this application (“the application site”) consists of a recreation ground of approximately 2.5 hectares (6 acres) in size situated adjacent to Moor Hill (A229) and Hastings Road (B2244) in The Moor area of the village of Hawkhurst. The application site consists of a grassed open space (incorporating tennis courts, a play area and a pavilion).
7. The perimeter of the application site is fenced and access to the site is via two pedestrian gates and a stile along the boundary with the footway of Moor Hill and via the vehicular entrance to the car park (also from Moor Hill).
8. Members should be aware that the application site has been the subject of a planning application to Tunbridge Wells Borough Council for the demolition of the existing Sports Pavillion and the erection of a new community centre as well as separate storage outbuildings, a car park and an outdoor playground. Planning permission for the scheme was granted on 15th May 2009.
9. The granting of planning permission has no effect upon the Village Green application and it is not within the County Council’s remit to consider the impact of the proposed development or the desirability of registering the land as a new Village Green. The County Council, in its capacity as the Commons Registration Authority, is restricted solely to whether the strict legal tests set out in section 15 of the Commons Act 2006 have been met. This is purely a matter of evidence.

The case

10. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities ‘as of right’ for more than 20 years.
11. Included in the application were 19 user evidence questionnaires from local residents asserting that the application site has been available for free and uninhibited use for lawful sports and pastimes over the last twenty years and beyond. A summary of the user evidence is attached at **Appendix C**.
12. Also included within the application were photographs showing Hawkhurst United Football club on the land between 1935 and 1982.

Consultations

13. Consultations have been carried out as required.
14. In response to the consultation, 20 ‘standard format’ letters of objection have been received from local residents. These letters, identically worded, set out the history of the acquisition of the site and object on the grounds that the site has been actively managed and strictly controlled by the Parish Council and use of it has not been ‘as of right’.

15. It is, however, difficult to place any great deal of weight to these letters since they provide a shared view in response to an emotive issue rather than provide any actual evidence in rebuttal to the application. The letters appear to have been produced and circulated by the Parish Council and thus the words used and views expressed are perhaps aligned more to an agreement with those of the Parish Council rather than the individual thoughts of those objecting. In considering the consultation responses, it is always the substantive content of the objections received that is relevant, and not their number.

Landowner

16. The application site is managed by Hawkhurst Parish Council (“the Parish Council”).

17. The application site was acquired by the Parish Council by way of a Conveyance dated 3rd June 1935. The Conveyance refers to the land having been acquired under the provisions of the Local Government Act 1894 and stipulates that the land *‘is required by the Council for the purpose or purposes of a Recreation Ground and it is intended that the said land shall be dedicated to the use of the Public solely for the purpose of recreation’*. A copy of the conveyance is attached at **Appendix D**.

18. On 29th April 1938, the application site was the subject of a declaration of trust which provided that it *‘shall be preserved in perpetuity as a Memorial to His late Majesty King George V under the provisions of the King George’s Fields Foundation and shall henceforth be known as “King George’s Field”*.

19. The King George’s Fields Foundation was set up shortly after the death of King George V in 1936 with the aim *‘to promote and to assist in the establishment throughout the United Kingdom of Great Britain and Northern Ireland of playing fields for the use and enjoyment of the people’*. The Foundation was established as a Charity and funds were raised, initially by way of a National Appeal, to facilitate the acquisition, construction and equipment of land for recreational use. In 1965, the Foundation was dissolved and responsibility transferred to the National Playing Fields Association (now known as Fields in Trust).

20. Today, the application site is a registered Charity (no. 1085101) and the land is vested in the Members of Hawkhurst Parish Council as the Trustee of the Charity.

21. The Parish Council has objected to the application on the basis that use of the application site has been by virtue of the conditions of the charitable trust and the 1935 conveyance (which specifically provide for the use of the land for recreational purposes) and therefore not ‘as of right’.

Legal tests

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

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

- (d) *Whether use has taken place over period of twenty years or more?*
(e) *Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?*

I shall now take each of these points and elaborate on them individually:

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

23. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the *Sunningwell*¹ case, it is considered that if a person uses the land for a required period of time without force, secrecy or permission (*nec vi, nec clam, nec precario*), and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired and further use becomes 'as of right'.
24. In this case, there is no evidence of any of the users ever having been verbally challenged or physically prevented from gaining access to the land. Nor is there any evidence that use of the land has been with secrecy. Although the site is fenced around its perimeter and the vehicular access gate to the site is locked overnight, access to the site is easily achievable through the pedestrian gates and the stile along Moor Hill.
25. The key issue in this case concerns the third limb of the 'as of right' concept: permission. Permission in this context can take various forms. It can be express or implied, and it may or may not be communicated to the recreational users of the land.

Express permission: the Notice

26. In support of their objection, the Parish Council refers to a notice displayed on the site which reads: '*King George V Playing Field, The Moor. This recreation area is the property of the King George V Playing Field Trust who give consent for the lawful use of the land for recreational purposes. The Trustees are Members of Hawkhurst Parish Council.*' The inference is that this notice confers a form of express permission to use the site. A photograph of the notice is attached at **Appendix E**.
27. However, this notice is dated November 2008. The application for Village Green status was made on 24th November 2008. Therefore, it is possible that there may have been a period of a few days or weeks during which the notice was in situ prior to the application being made. In any event, the notice has little impact upon whether use has been 'as of right'; it is now well-established that in order to be effective, permission must not only be communicated, but it must also be revocable².

¹ *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

² *R(Beresford) v Sunderland City Council* [2003] UKHL 60

Implied permission: statutory acquisition of the land

28. Particularly in cases where the application site is owned by a local authority, it is important to determine the powers under which the site was acquired in order to determine whether the use of the land by the local residents has been by virtue of an implied permission.
29. As stated above, the land was acquired by the Parish Council in exercise of its powers under the Local Government Act 1894 ("the 1894 Act"). Section 8(1)(b) of the 1894 Act enabled Parish Councils '*to provide or acquire land... for a recreation ground and for public walks*'. Section 8(1)(d) of the same Act conferred on Parish Councils a power '*to exercise with respect to any recreation ground, village green, open space, or public walk, which is for the time being under their control... such powers as may be exercised by an urban authority under section 164 of the Public Health Act 1875... in relation to recreation grounds or public walks, and sections 183 to 186 of the Public Health Act 1875 shall apply accordingly as if the Parish Council were a local authority within the meaning of those sections...*'.
30. Section 164 of the Public Health Act of 1875 ("the 1875 Act") provided 'urban authorities' with a power to '*purchase or take on lease, lay out, plant, improve and maintain lands for the purpose of being used as public walks or pleasure grounds...*'. It did not apply to Parish Councils at the time that Hawkhurst Parish Council acquired the application site in 1935.
31. However, in the Local Government Act 1972 ("the 1972 Act") the provisions of the 1894 Act (under which the Parish Council acquired the application site) were repealed. At the same time, the provisions of the 1875 Act (previously only applicable to 'urban authorities') were extended and became directly applicable to Parish Councils. It is therefore considered that land which was acquired and held as a public walk or recreation ground under section 8(1)(b) of the 1894 Act was thereafter (i.e. on the coming into effect of the 1972 Act on 1st April 1974) held under and for the purposes of section 164 of the 1875 Act.

The effect of section 164 of the Public Health Act 1875

32. The specific issue of the effect of this provision on an application to register land as a Town or Village Green has never been before the Courts. There is, however, judicial support for the proposition that land held under section 164 of the Public Health Act 1875 is the subject of a statutory trust, with members of the public being the beneficiaries of the trust.
33. In *Hall v Beckenham Corporation*³, the land concerned was held under the 1875 Act and the judge found in that case that "*as far as the local authority is concerned, if the land is purchased under their statutory powers, it is dedicated to the use of the public for the purpose of a park*"⁴. He added later in his judgement "*I think that the Beckenham Corporation are the trustees and the guardians of the park...*"⁵.

³ *Hall v Beckenham Corporation* [1949] 1 All ER 423

⁴ *Hall v Beckenham Corporation* [1949] 1 All ER 423 at 426

⁵ *Hall v Beckenham Corporation* [1949] 1 All ER 423 at 427

34. In *Blake v Hendon*⁶, it was considered that “*the purpose of section 164 of the Act of 1875 is to provide the public with public walks and pleasure grounds. The public are not a legal entity and cannot be vested with the legal ownership of the walks and pleasure grounds which they are to enjoy. But if they could be given the beneficial ownership, that is what they should have...*”.
35. More recently, the House of Lords has considered the effect of a similar provision (namely the Open Spaces Act 1906) on an application to register land as a Town or Village Green. In *Beresford*⁷, Lord Walker said this: “*where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers... the position would be the same if there were no statutory trust in the strictest sense, but land had been appropriated for the purpose of public recreation*”.
36. The fundamental principle behind the concept of ‘as of right’ is that, in order to acquire rights, those using the land must start off as trespassers. The acquisition of rights cannot occur if those using the land for recreational purposes already have a right to do so. Therefore, if land is held by a local authority specifically for the purposes of recreation, those using the land are not trespassers – they are already there ‘by right’. Since they do not start off as trespassers, their use cannot be ‘as of right’ and thus they cannot acquire a new right.
37. Therefore, it can be concluded that use of the application site by the local residents has been in exercise of an existing right created by virtue of a public statutory trust and as such was not ‘as of right’.

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

38. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. It is not necessary to demonstrate that both sporting activities *and* pastimes have taken place since the phrase ‘lawful sports and pastimes’ has been interpreted by the Courts as being a single composite group rather than two separate classes of activities⁸.
39. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. The Courts have held that ‘*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*’⁹.
40. In this case, the evidence demonstrates that the land has been used for a wide range of recreational activities, including walking (with and without dogs), ball games, picnics, playing with children, running and watching other sports activities.

⁶ *Blake (Valuation Officer) v Hendon Corporation* [1961] 3 All ER 601 at 607

⁷ *R(Beresford) v Sunderland City Council* [2003] UKHL 60 at paragraph 87

⁸ *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

⁹ *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

The table summarising evidence of use by local residents at **Appendix C** shows the full range of activities claimed to have taken place.

41. It should be noted that some of the activities cited in the user evidence questionnaires may be the subject of an implied form of permission. For example, some witnesses refer to taking part in formal games of football or cricket, or attending village fetes. Such activities are likely to have taken place by licence from the Parish Council (and, probably, on payment of a fee). Therefore, such use would be attributable to some form of formal authorization rather than informal recreational use 'as of right'. However, given the recommendation in this case, it is not necessary to conclude definitively on this point.

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

42. The definition of locality for the purposes of a Town or 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*¹⁰ case, it was considered that '*...at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality... there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition*'. The judge later went on to suggest that this might mean that locality should normally constitute '*some legally recognised administrative division of the county*'.

43. In this case, the applicant states that the relevant locality is 'The Moor, Hawkhurst'. The Moor is that part of Hawkhurst village which, broadly speaking, lies to the south of the main centre of the village of Hawkhurst, and is centred on the A229 (Moor Hill) and B2244 (Hastings Road) crossroads. It is not a legally recognised administrative area of the county, but could well satisfy the definition of a neighbourhood within the wider locality of the parish of Hawkhurst.

44. However, given that the land was originally acquired by the Hawkhurst Parish Council and is managed by the Parish Council on behalf of the inhabitants of the whole village, it seems appropriate, particularly if the land is used for community (i.e. village-wide) activities, that the relevant locality is the administrative parish of Hawkhurst.

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

45. 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. Where there has been no challenge to the use of the land and use 'as of right' is continuing, then the twenty-year period is to be calculated retrospectively from the date that the application was made.

46. In this case, the application was made in November 2008. Therefore, the relevant twenty-year period ("the material period") is 1988 to 2008.

47. Of the 19 user evidence questionnaires submitted in support of the application, all but one documents use of the application site throughout the material period. In the

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

majority of cases, use of the field has taken place for over 40 years, with one witness referring to use as far back as 1935.

48. Therefore, it can be concluded that use of the land has taken place over a period of over twenty years.

(e) Whether use of the land by the inhabitants is continuing up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?

49. The Commons Act 2006 requires use of the land to have taken place 'as of right' up until the date of application or, if such use has ceased prior to the making of the application, to fulfil one of the alternative criterion set out in sections 15(3) and 15(4) of the 2006 Act (as set out at paragraph 4 above).

50. In this case, there is no suggestion from the evidence submitted both in support of and in objection to the application that the use of the land by the local residents for the purposes of informal recreation has ceased prior to the making of the application. As discussed above, the Notice erected by the Parish Council has little impact upon use of the land 'as of right'.

51. Therefore, it appears that use of the land 'as of right' has continued up until the date of application and as such it is not necessary to consider the other tests set out in sections 15(3) and 15(4) of the Act.

Conclusion

52. It is clear from the evidence submitted in support of the application that the application site has been used by a significant number of the residents of the locality for the purposes of lawful sports and pastimes over a considerable period. However, as discussed above, it would appear that such use has been in exercise of the public statutory trust created by the Public Health Act 1875; it has been 'by right' and not 'as of right'.

53. It is therefore concluded that the legal tests concerning the registration of the land as a Town or Village Green (as set out above) have not been met.

Recommendations

54. I recommend that the County Council informs the applicant that the application to register the land known as King George Playing Field at Hawkhurst has not been accepted.

Accountable Officer:

Dr. Linda Davies – Tel: 01622 221500 or Email: linda.davies@kent.gov.uk

Case Officer:

Miss. Melanie McNeir – Tel: 01622 221511 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the Countryside Access Service, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

Background documents

APPENDIX A – Plan showing application site

APPENDIX B – Copy of application form

APPENDIX C – Table summarising user evidence

APPENDIX D – Copy of conveyance dated 3rd June 1935

APPENDIX E – Notice displayed in Sports Pavillion on the application site



This Conveyance

is made the ¹⁹³⁵ *third*
day of *June* One thousand

nine hundred and Thirty-five B E T W E E N MELVILLE JOSEPH HARDCASTLE
of Hatcham House, Hawkhurst in the County of Kent Gentleman (hereinafter
called "the Donor") of the one part and THE PARISH COUNCIL OF HAWKHURST +
in the said County of Kent (hereinafter called "the Council") of the +++
other part.

W H E R E A S the Council has Authority under the Local Government Act +
One thousand eight hundred and Ninety-four to acquire land for the purpose
or purposes of a Recreation Ground.

AND WHEREAS the land hereinafter assured is required by the Council for
the purpose or purposes of a Recreation Ground and it is intended that ++
the said land shall be dedicated to the use of the Public solely for the
purpose of recreation.

AND WHEREAS under or by virtue of the Mortmain and Charitable Uses Act +
Amendment Act One thousand eight hundred and Ninety-two the Council may +
acquire the land hereinafter assured without licence in mortmain and +++
without the necessity of complying with the provisions of Parts I and II
of the Mortmain and Charitable Uses Act One thousand eight hundred and ++
Eighty-eight.

AND WHEREAS the Donor is seised in fee simple in possession free from ++
incumbrances of the land and hereditaments hereinafter described but +++
subject to the easements stipulations and restrictions hereinafter +++++
mentioned and is desirous freely and absolutely of conveying to the +++++
Council the land hereinafter assured for the purpose or purposes afore- +
said.

N O W THIS DEED W I T N E S S E T H as follows: -

1. THE DONOR as Settlor hereby freely and voluntarily and without +++++
valuable consideration conveys unto the Council ALL THAT piece or parcel
of land situate at The Moor and part of Elford's, Hawkhurst in the said +
County of Kent containing Six acres or thereabouts and being parts of ++
Fields Numbers 1042 and 1042A and for the purpose of identification only
delineated and edged Pink on the plan attached hereto TOGETHER with the
benefit of a covenant contained in a Conveyance dated the Twenty-eighth
day of April One thousand nine hundred and Thirty-one and made between +

1395

George Ticehurst of the one part and Sophia Hope Gorham of the other +++
part whereby the said George Ticehurst covenanted not to build or erect
anything whatsoever on the land edged Green on the said plan TO HOLD the
same unto the Council in fee simple for the purpose or purposes of a +++
within Section Sixty-nine of the Public Health Act 1925
Recreation Ground/Subject nevertheless to -

(i) a right of passage of soil and water through the existing drains +
from Elford's Lodge and the two Cottages and Pond on the opposite side of
the road and from all other property (if any) as at present enjoyed.

(ii) the stipulations and restrictions contained in the First Schedule
to the said Conveyance dated the Twenty-eighth day of April One thousand
nine hundred and Thirty-one.

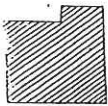
2. THE Council hereby for itself and its assigns covenants with the +++
Donor ..

(a) That no buildings of any type or description shall at any time
hereafter be erected on the said piece of land or any part thereof ++++
except such buildings as shall be suitable for the purpose of the +++++
Recreation Ground and that no advertisements of any kind whatsoever ++++
shall be displayed on the said piece of land or on any part thereof or +
on any building or erection thereon.

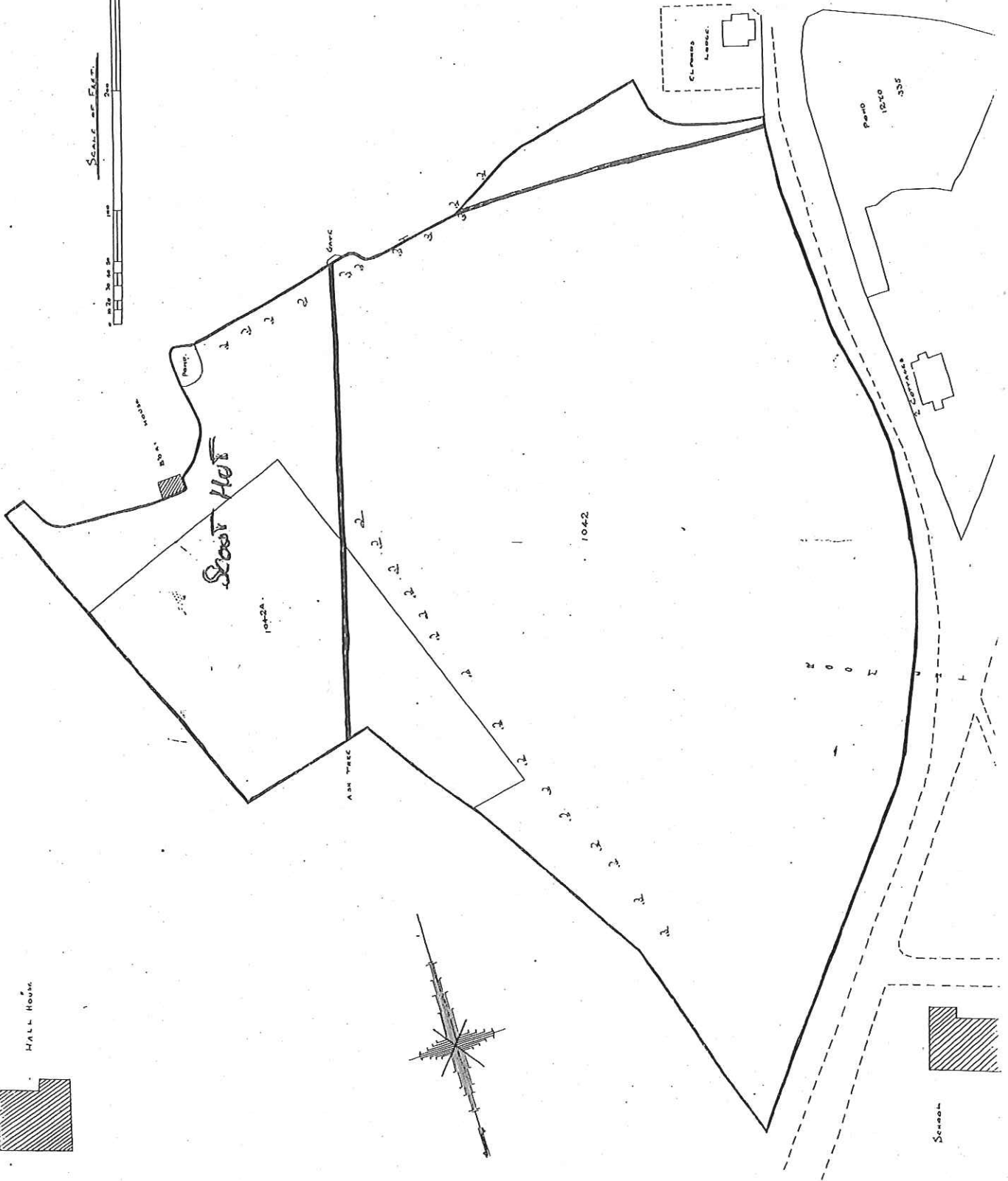
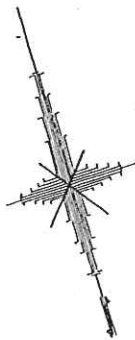
(b) That they will not at any time hereafter permit or allow games
or sports of any sort or kind whatsoever to be played or held on the +++
said piece of land or any part thereof on Sundays or Good Fridays.

(c) At all times hereafter to duly observe and perform the restric-
tions and stipulations contained in the said Conveyance dated the +++++
Twenty-eighth day of April One thousand nine hundred and Thirty-one so +
far as the same are still subsisting and capable of taking effect and to
indemnify the Donor and his estate and effects from and against any +++
breach or non-observance thereof.

inf I N W I T N E S S whereof the ^{Donor} ~~Vendor~~ has hereunto set his
hand and seal and *Jesse William Santis* the Chairman presiding at
a Meeting of the said Parish Council and *Maria Alexandra Clayton Jones*
and *William Morley* two other members of the said Parish
Council have at the said Meeting for and on behalf of the said Parish +
Council set their hands and seals the day and year first +++



HALL ROOM



111

before written.

SIGNED SEALED AND DELIVERED)
by the before-named Melville)
Joseph Hardcastle in the ++)
presence of: -)

with Transhipment Unit
1. Ballyard, Temple Bldg.
London, W.C.2.

Banks Agents.

SIGNED SEALED AND DELIVERED at)
a Meeting of the said Parish +)
Council held on the *third*)
day of *June* 1935, by the)
above-named *Jesse Williams, Carter*)
the Chairman presiding at the)
said Meeting and the above- ++)
named *Marion Alexander, Clayton Jones*)
and *William Morley (Chairman)*)
members of the said Council in)
the presence of: -)

M. Hardcastle

J. Williams

M. Clayton Jones

William Morley

J. H. Duncanson

Clerk to the said Parish Council.



Dated 3rd November 1936

KING GEORGE'S FIELDS FOUNDATION

Trust Deed

HALSEY, LIGHTLY & HEMSLEY,

32 St. James's Place,

London. S.W.1.

This Deed is made the third day of November one thousand nine hundred and thirty-six BETWEEN THE RIGHT HONOURABLE SIR PERCY VINCENT Baronet THE LORD MAYOR OF LONDON (hereinafter referred to as "the Lord Mayor") of the one part and FIELD-MARSHAL THE RIGHT HONOURABLE SIR FREDERICK RUDOLPH LAMBART EARL OF CAVAN, K.P., THE RIGHT HONOURABLE HUGH PATTISON BARON MACMILLAN, P.C., and the said SIR PERCY VINCENT Baronet (in his personal capacity) of the other part.

WHEREAS:-

(A) The Lord Mayor with the approval of His Most Excellent Majesty King Edward VIII put forward an appeal to the country at large for the collection of a substantial sum to perpetuate the memory of the late lamented and well beloved Sovereign His Majesty King George V to be known as the King George National Memorial Fund.

(B) The Lord Mayor mindful of the deep interest taken by His late Majesty in the physical welfare of his subjects has with the approval of His Majesty the King determined that part and in any case not less than a moiety of the moneys and other property contributed to the King George National Memorial Fund in response to the said appeal shall be devoted to the furtherance of the separate and distinct object hereinafter specified and shall be vested in Trustees for that purpose.

(C) The Lord Mayor has accordingly determined (i) that a Fund to be known as "King George's Fields Foundation" shall be constituted and established and that each of them the Lord Mayor of London for the time being and the Governor of the Bank of England for the time being shall if willing to act be ex-officio a trustee of the said fund and has appointed the said Earl of Cavan, Baron Macmillan and himself (in his private capacity) to be the first

appointed Trustees of the said Fund and they have agreed so to act and (ii) that the said Fund shall be administered by a Council (hereinafter called "the Administrative Council") in accordance with the provisions hereinafter contained and has appointed the persons hereinafter mentioned to act as the first Members of the Administrative Council.

NOW THIS DEED WITNESSETH and IT IS HEREBY AGREED AND DECLARED as follows:-

1. IN this Deed unless the context otherwise requires the following expressions have the meanings hereinafter assigned to them respectively:-

"The Lord Mayor" means the Lord Mayor of London for the time being and-

"The Governor of the Bank" means the Governor for the time being of the Bank of England.

"The Trustees" means the Trustees or Trustee for the time being of the Fund.

"The Fund" means the Fund to be known as "King George's Fields Foundation" and shall consist of the portion of the contributions to the King George National Memorial Fund which shall be devoted to the object hereinafter specified and of all other money investments and property which may at any time be contributed for the purposes of the Trust whether the same shall be expressed to be given to the Trustees or to the Fund or to the Lord Mayor and the moneys investments and other property for the time being representing the same.

"The Secretary" means the Secretary for the time being of the Fund.

“Institution” includes club organisation association and any body of persons whether incorporated or not.

“The United Kingdom” means Great Britain and Northern Ireland.

“Playing Field” means any open space used for the purpose of outdoor games sports and pastimes.

“Prescribed” means prescribed by rules and regulations of the Administrative Council made under the power contained in the First Schedule hereto.

“Person” includes a Corporation.

“Trust Corporation” has the same meaning as in the Trustee Act 1925.

The singular includes the plural and vice versa.

The masculine includes the feminine and vice versa.

OBJECT.

2. THE object of the Trust is to promote and to assist in the establishment throughout the United Kingdom of Playing Fields for the use and enjoyment of the people every such Playing Field to be styled “King George's Field” and to be distinguished by Heraldic Panels or other appropriate tablet Medallion or inscription commemorative of His late Majesty and of a design approved by the Administrative Council.

THE TRUSTEES.

3. EACH of them the Lord Mayor and the Governor of the Bank shall if willing to act be *ex-officio* a Trustee of the Fund. In addition there shall be not less than three appointed Trustees. The first appointed Trustees of the Fund shall be the said Earl of Cavan, the said Baron Macmillan and the said Sir Percy Vincent (in his private capacity). The power of appointing a new Trustee to fill any vacancy among the appointed Trustees shall be vested in the Trustees including a refusing or retiring Trustee if willing to act in such appointment.

4. (1) THE Trustees shall either permit any investments for the time being forming part of the Fund to remain as invested so long as the Trustees shall think fit or shall at their absolute discretion sell call in or convert into money all or any of the said investments and shall at the like discretion invest the money thereby arising and also any other money in the hands of the Trustees requiring investment in any of the investments mentioned in the Third Schedule hereto with power at the like discretion to vary investments or place the same on deposit with a bank or banks approved by the Trustees.

(2) Every contribution addition or accretion to the Fund shall be deemed applicable both as to capital and income thereof for the general purposes of the Trust.

(3) The receipt of the Treasurer for the time being of the Fund or any one or more of the Trustees shall be a sufficient discharge for any contribution to the Fund.

5. ALL property for the time being subject to the Trust shall be placed and stand and be held in the names or under the control of the Trustees shall make such arrangements as they may think expedient for the safe custody of all deeds securities certificates warrants deposit receipts or other evidences of title in relation to the property aforesaid.

6. THE Trustees shall in the first place pay out of the Fund all costs charges and expenses properly incurred of or incidental to the preparation and execution of these presents and the administration of the trusts thereof and subject thereto the Trustees shall stand possessed of the capital and income of the Fund in trust to pay transfer or otherwise deal with the same in such manner as the Administrative Council shall from time to time in manner hereinafter mentioned direct and any payment or transfer may be directed to be made either to the Administrative Council (as the Administrative Trustees of the Charity intended to be hereby created) or to any other person to the intent that the same shall be applied for the object of the Trust and the joint receipt or acknowledgement of the Secretary and a member of the Administrative Council shall be a full and complete discharge to the Trustees for any money or investments paid or transferred to or by the direction of the Administrative Council and from all liability to see to the application thereof.

7. ANY direction by the Administrative Council to the Trustees under this Deed shall be given by Resolution passed at a meeting of the Administrative Council and any documents purporting to be a true copy of such Resolution and to be certified under the hands of two persons described therein as the Chairman presiding at such meeting and the Secretary respectively or as Members of the Administrative Council present at such meeting shall be sufficient authority to the Trustees to act upon the Resolution of which such document purports to be a true copy without proof that such Resolution was duly passed or that the said document is in fact a true copy thereof or that the persons by whom such document purports to be certified were in fact correctly described.

8. (1) THE Trustees shall cause proper accounts to be kept of the Fund and of all payments made thereout setting forth particulars of all investments and sales of investments and other property.

(2) The Accounts of the Fund shall be made up to the thirty first day of October in every year and the Trustees shall within three months after the completion of each year prepare a Balance Sheet or Statement showing the true position of the Fund in their hands as on the date thereof. Such Accounts and Balance Sheet or Statement (which shall include a list of the investments of the Fund) shall be audited annually by an Auditor appointed by the Trustees who shall have access to all books papers records and accounts of or connected with the Fund (including Certificates and other evidences of title in the custody of or under the control of the Trustees) and shall be entitled to such further information as he may require. The Auditor shall report to the Trustees in writing upon the result of his audit.

9. For the purpose of avoiding delay in the sale or purchase of investments owing to the number of Trustees the Trustees may transfer any investments or to cause any investments to be made in the name of a Trust Corporation or in the name of two or more nominees approved by the Lord Mayor for the purpose of holding investments subject to the Trust.

PROVIDED THAT the Trust Corporation or such nominees shall hold the investments so transferred as nominees of the Trustees and shall deal with the same as the Trustees shall from time to time direct.

10. (1) THE Trustees shall not be responsible for any loss which may result from acting on the advice of any Counsel Solicitor Surveyor Land Agent Actuary Cashier Accountant or other expert but the advice shall operate to protect the Trustees in like manner as if whatever was done or left undone in pursuance thereof had been directed or authorised under an Order of a Court of competent jurisdiction.

(2) In the professed execution of the trusts and powers hereof or of any statutory power a Trustee shall not be liable for any loss to any property from time to time subject to the Trust arising by reason of any improper investment made in good faith or for the negligence or fraud of any Agent employed by the Trustees although the employment of such Agent was not strictly necessary or expedient or by reason of any mistake or omission made in good faith by the Trustees or by reason of any matter or thing except wilful and individual fraud or wrongdoing on the part of the Trustee who is sought to be made liable.

THE SECRETARY.

11. (1) THE Secretary shall perform the duties and exercise the powers from time to time assigned or vested in him by the Administrative Council.
- (2) The Administrative Council may from time to time appoint a temporary substitute for the Secretary who shall for the purposes of this Deed be deemed to be the Secretary.

ADMINISTRATIVE COUNCIL.

12. THE Fund shall be administered by the Administrative Council for the object hereinbefore specified and for all purposes connected with the administration of the Fund it shall be lawful for the Administrative Council to do the several acts and things to exercise the several powers and authorities and to take the several proceedings set out in the First Schedule hereto.

13. (1) THE Administrative Council shall consist of the Chairman the Treasurer and six other members. The first members of the Administrative Council shall be the persons whose names are set out in the Second Schedule hereto.

In the absence from any meeting of the Chairman the Treasurer shall preside and in the absence of both the Chairman and the Treasurer the members present shall appoint a Chairman for the purpose of the meeting.

(2) A member of the Administrative Council may at any time resign membership by writing delivered or sent by post to the Secretary.

(3) On a vacancy occurring in the office of Chairman or Treasurer his successor shall be appointed by the Administrative Council from among their members.

(4) The power of nominating a new member on the occurrence of a vacancy by death or resignation or retirement shall be vested in the Lord Mayor after consultation with the Administrative Council.

(5) The proceedings of the Administrative Council or any Committee thereof shall not be invalidated by any vacancy among the members thereof or any failure to give notice of any meeting to any person.

(6) Minutes of the proceedings at every meeting of the Administrative Council or any Committee thereof shall be kept in a book and shall be signed by the Chairman of the meeting and when so signed shall be conclusive evidence of what was done at the meeting.

14. THE Administrative Council shall cause proper accounts to be kept of all moneys received by them and of the application thereof. Such accounts shall be audited annually by an Auditor appointed by the Administrative Council who shall have access to all their books and accounts and shall report to the Administrative Council in writing upon the result of his audit.

15. THE Trust may not be varied or added to at any time or times hereafter except by an Order of the High Court of Justice or of the Charity Commissioners on the application of the Administrative Council or of His Majesty's Attorney General.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

THE FIRST SCHEDULE ABOVE REFERRED TO.

(1) TO take such steps as may seem to them desirable for the appointment of a Patron of the Foundation and if a Patron is appointed to vest in him such rights and powers as may be thought fit including power for the Patron for the time being to nominate his successor or delegate to the Administrative Council the power to do so.

(2) FROM time to time to make vary and alter general rules and regulations with regard to all or any of the following matters:-

- (i) The manner of the administration of the Fund.
- (ii) The meetings of the Administrative Council the mode of convening the same the distinction between ordinary and special business the conduct of business the quorum necessary to constitute a meeting the method of voting the majority requisite for the passing of resolutions of a special or extraordinary nature and the power of a majority to bind the minority.
- (iii) The duties to be performed by any Committee.
- (iv) The application to committees of all or any of the Rules and Regulations made under sub-paragraph (ii) with regard to the Administrative Council with such variations as may be thought fit.
- (v) The serving of notices.
- (vi) Any other matters as to which general Rules and Regulations may be necessary or desirable and for which express provision is not made by this Deed.

PROVIDED that no such Rules and Regulations shall be inconsistent with the object of the Trust as set forth in Clause 2 of this Deed.

(3) To make arrangements for carrying out the objects of the Trust in co-operation with any Corporation County or other Council or with any Authority or Institution now or hereafter constituted upon such conditions as the Administrative Council shall determine.

(4) To appoint Committees out of their own body for dealing with or managing any special branch of the business or operations of the Trust or to act locally for the general purposes of the Trust or for any special purpose (either with or without power to any such Committee to co-opt persons who may or may not be members of the Administrative Council) and to delegate powers and duties to such Committees but so that the acts and proceedings of such Committees shall be subject to confirmation by the Administrative Council.

(5) To give directions for the payment or transfer to the Administrative Council or to such persons as the Administrative Council shall direct of such portions of the Fund or the income thereof as the Administrative Council shall deem necessary.

(6) To appoint and determine any appointment of the Secretary and such salaried officers and servants as may be required for the administration of the Fund and to fix the remuneration of any person so appointed and to prescribe his duties.

(7) To authorise the payment of the reasonable and proper travelling expenses and out of pocket expenses of any members of the Administrative Council or of any Committee incurred in attending the meetings of the Administrative Council or of such Committee or in carrying out any duties that may be assigned to him.

(8) To provide for the payment of the expenses of the administration of the Fund.

(9) To do all such other lawful things as are incidental or conducive to the attainment of the object of the Trust.

THE SECOND SCHEDULE ABOVE REFERRED TO
(Names of the first Chairman, Treasurer and other
Members of the Administrative Council).

The Right Honourable Clement Attlee, MP (Chairman)

Sir Campbell Stuart, KBE (Treasurer)

His Grace the Duke of Buccleuch, K.T., G.C.V.O.

The Right Honourable the Viscount Dawson of Penn, G.C.V.O.

Major the Honourable Edward Cadogan, C.B.

Sir Ernest Benn, Baronet, C.B.E.

Sir Howard Button

Benjamin Seebohm Rowntree Esquire, C.H.

THE THIRD SCHEDULE ABOVE REFERRED TO.
AUTHORISED INVESTMENTS.

- (A) Any of the stocks funds or securities authorised by law for the investment of Trust Funds (except real securities in Ireland) or any of the stocks funds bonds or securities of or guaranteed by the Government of the United Kingdom or India or any British Dominion which expression shall mean any Dominion, Commonwealth, Union, Colony or Dependency (except the Irish Free State) forming part of the British Empire.
- (B) The stocks bonds mortgages or other securities of any municipal corporation county or district Council or local or harbour or dock authority or other public body in the United Kingdom.

SIGNED SEALED AND DELIVERED

By THE RIGHT HONOURABLE SIR PERCY

PERCY VINCENT

L.S.

VINCENT Baronet in the presence of

W.J. HALSEY

Solicitor,

32, St. James's Place, Westminster

SIGNED SEALED AND DELIVERED

By FIELD MARSHAL THE RIGHT HONORABLE

CAVAN

L.S.

SIR FREDERICK RUDOLPH LAMBART EARL OF

CAVAN K.P. in the presence of

W.J. HALSEY

SIGNED SEALED AND DELIVERED

by THE RIGHT HONOURABLE HUGH PATTISON

MACMILLAN

L.S.

BARON MACMILLAN P.C. in the presence of

W.W. WALDRON

Westminster House, Millbank,

London, S.W.1,

Bank Manager