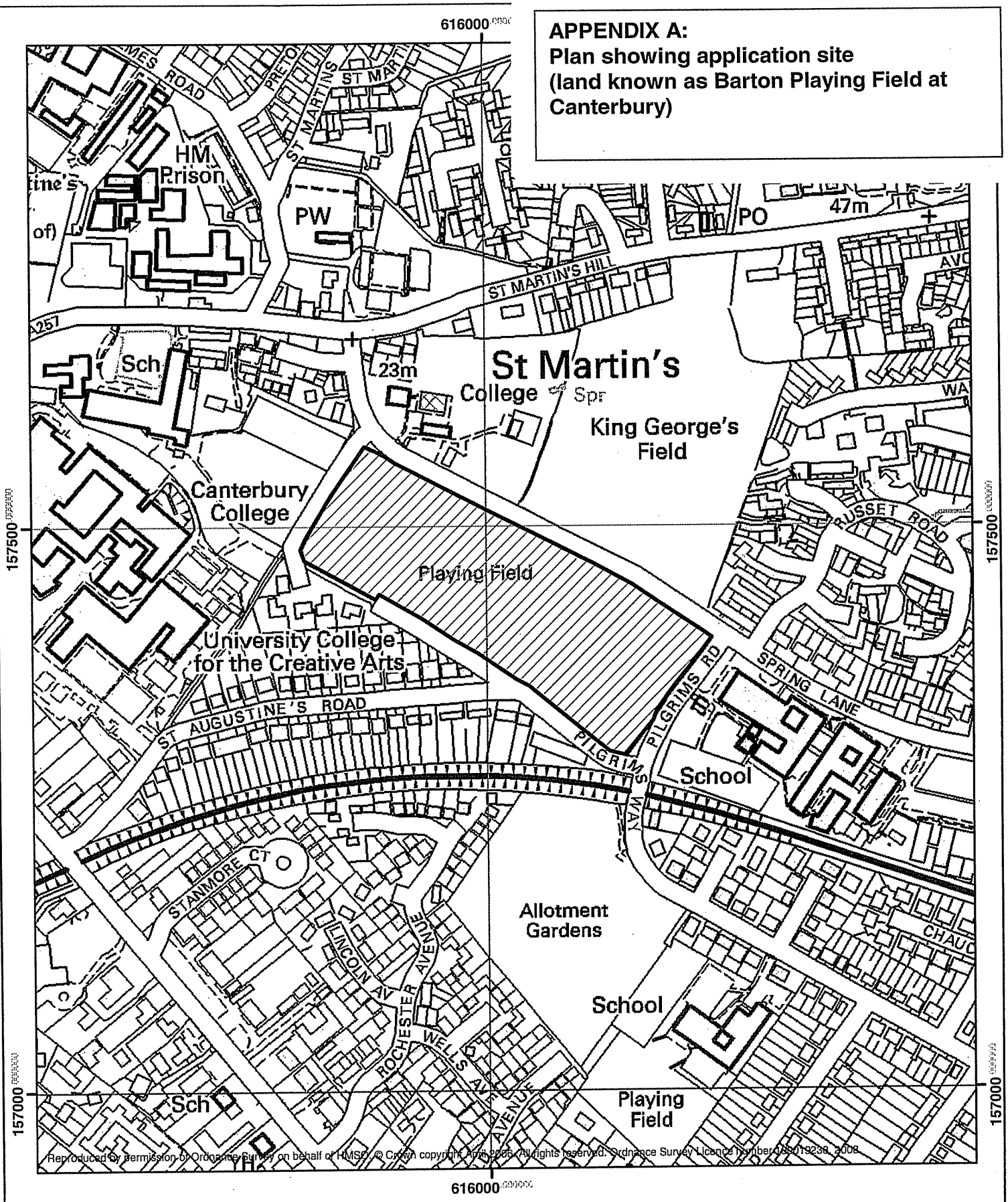
APPENDIX A:
Plan showing application site (land known as Barton Playing Field at Canterbury)



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Land subject to Town Green application at Canterbury

Kent County Council

APPENDIX B:
Copy of application form

Commons Act 2006: Section 15

Application for the registrat Village Green

Official stamp of registration authority indicating valid date of receipt:

COMMONS ACT 2006
KENT COUNTY COUNCIL
REGISTRATION AUTHORITY
10 MAY 2007

Application number: 595

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

Applicants are advised to read the 'Guidance Notes for the completion of an Application for the Registration of land as a Town or Village Green' and to note the following:

- All applicants should complete questions 1–6 and 10–11.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete questions 7–8. Section 15(1) enables any person to apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete question 9.

1. Registration Authority

Note 1
Insert name of registration authority.

To the

KENT COUNTY COUNCIL

Note 2
If there is more than one applicant, list all names. Please use a separate sheet if necessary. State the full title of the organisation if a body corporate or unincorporate.

If question 3 is not completed all correspondence and notices will be sent to the first named applicant.

2. Name and address of the applicant

Name: STEPHEN BAX

Full postal address:

37 SAINT AUGUSTINE'S ROAD
CANTERBURY, KENT

Postcode CT1 1XR

Telephone number:
(incl. national dialling code) 01227 785504

Fax number:
(incl. national dialling code) —

E-mail address: s.bax@canterbury.ac.uk

3. Name and address of solicitor, if any

None

Note 3
This question should be completed if a solicitor is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here.

Name:

Firm:

Full postal address:

Post code

Telephone number:
(incl. national dialling code)

Fax number:
(incl. national dialling code)

E-mail address:

Note 4
For further advice on the criteria and qualifying dates for registration please see section 4 of the Guidance Notes.

4. Basis of application for registration and qualifying criteria

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5.

Application made under **section 15(8)**: ☐

If the application is made under **section 15(1)** of the Act, please **tick one** of the following boxes to indicate which particular subsection and qualifying criterion applies to the case.

Section 15(2) applies: ☑

** Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.*

Section 15(3) applies: ☐

Section 15(4) applies: ☐

If **section 15(3) or (4)** applies please indicate the date on which you consider that use as of right ended.

If **section 15(6)*** applies please indicate the period of statutory closure (if any) which needs to be disregarded.

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

Note 5
The accompanying map must be at a scale of at least 1:2,500 and show the land by distinctive colouring to enable to it to be clearly identified.

Name by which usually known:

Barton playing field (historically the Cricket Meadow)

Location:

- Parish of St. Martin and St. Paul, Canterbury, Kent
- South of Spring Lane, Canterbury, Kent
- Land Registry numbers: K893888, K781439, K753636 K104116

** Only complete if the land is already registered as common land.*

Shown in colour on the map which is marked and attached to the statutory declaration.

Common land register unit number (if relevant) *

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

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

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

Parish of St. Martin and St. Paul, Canterbury

Tick here if map attached: ☑ Exhibit B

7. Justification for application to register the land as a town or village green

Note 7
Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

The playing field to which this application relates was known historically as 'the Cricket Meadow' and has a long history as a space for public recreation and right of way. Indeed it was crossed for centuries by part of the historic Pilgrims Way, shown on maps as early as the 1600s.

In the 1960s it was given over to two schools as playing fields, but significant numbers of local residents continued to use it openly for recreation, and have done so ever since, with the acquiescence of the schools.

This application offers extensive evidence from many residents of over twenty years of recreational use of the field 'as of right'. The evidence comprises a survey of long-standing residents and some of more recent arrival, an observational survey of use of the field, and a user survey to identify where users live.

The application is supported by signed affidavits from 28 local residents, audio recordings of the interviews on a CD-Rom (which also includes a video of the field showing recreational use), and a full Supporting Statement showing how the field meets the requirements for Registration as a Town or village green.

Please see the Statement appended to this form, and related Exhibits as itemised in Section 10 below.

Note 8
Please use a separate sheet if necessary.

Where relevant include reference to title numbers in the register of title held by the Land Registry.

If no one has been identified in this section you should write "none"

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

8. Name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green

Owners:
1. Governing Body of Barton Court Grammar School, Longport, Canterbury, Kent, CT1 1PH
2. Governing Body of Chaucer Technology School, Spring Lane, Canterbury, Kent, CT1 1SH
3. Kent County Council, County Hall, Maidstone, Kent ME14 1XQ

9. Voluntary registration – declarations of consent from 'relevant leaseholder', and of the proprietor of any 'relevant charge' over the land

Note 9
List all such declarations that accompany the application. If none is required, write "none".

This information is not needed if an application is being made to register the land as a green under section 15(1).

N/a

10. Supporting documentation

Note 10
List all supporting documents and maps accompanying the application. If none, write "none"

Please use a separate sheet if necessary.

Exhibit A: Map of the playing field
Exhibit B: Map of the Parish
Exhibit C: CD-Rom with video and with audio recordings of the interviews

11. Any other information relating to the application

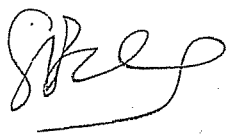
Note 11
If there are any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.

—

Note 12
The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or unincorporate.

Date: 8/5/2007

Signatures:



REMINDER TO APPLICANT

You are advised to keep a copy of the application and all associated documentation. Applicants should be aware that signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence. The making of a false statement for the purposes of this application may render the maker liable to prosecution.

Data Protection Act 1998

The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the registration authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public.

Statutory Declaration In Support

To be made by the applicant, or by one of the applicants, or by his or their solicitor, or, if the applicant is a body corporate or unincorporate, by its solicitor, or by the person who signed the application.

[1] *Insert full name (and address if not given in the application form).*

I STEPHEN JAMES BAK[1] solemnly and sincerely declare as follows:—

[2] *Delete and adapt as necessary.*

[3] *Insert name if Applicable*

1.[2] I am ((the person (~~one of the persons~~) who (has) (~~have~~) signed the foregoing application)) ((~~the solicitor to (the applicant~~) ([3] ~~one of the applicants)~~).

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in part 5 of the application.

[4] *Complete only in the case of voluntary registration (strike through if this is not relevant)*

4.[4] ~~I hereby apply under section 15(8) of the Commons Act 2006~~ to register as a green the land indicated ~~on the map and that is~~ in my ownership ~~I have provided the following necessary declarations~~ of consent:

~~(i) a declaration of ownership of the land;~~
~~(ii) a declaration that all necessary consents from the relevant~~ leaseholder ~~or proprietor of any relevant charge over the land have~~

Cont/

4 *Continued*

~~been received and are exhibited with this declaration~~; or
(iii) ~~where no such consents are required, a declaration to that effect.~~

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared by the said STEPHEN JAMES BAX

at 36 STATION ROAD WEST CANTERBURY KENT CT2 8AN

this EIGHTH day of MAY 2007

Signature of Declarant

Before me *NICHOLAS FAIRWEATHER

Signature:

Address: 36 STATION ROAD WEST CANTERBURY KENT CT2 8AN

Qualification: SOLICITOR.

---

* **The statutory declaration must be made before a justice of the peace, practising solicitor, commissioner for oaths or notary public.**

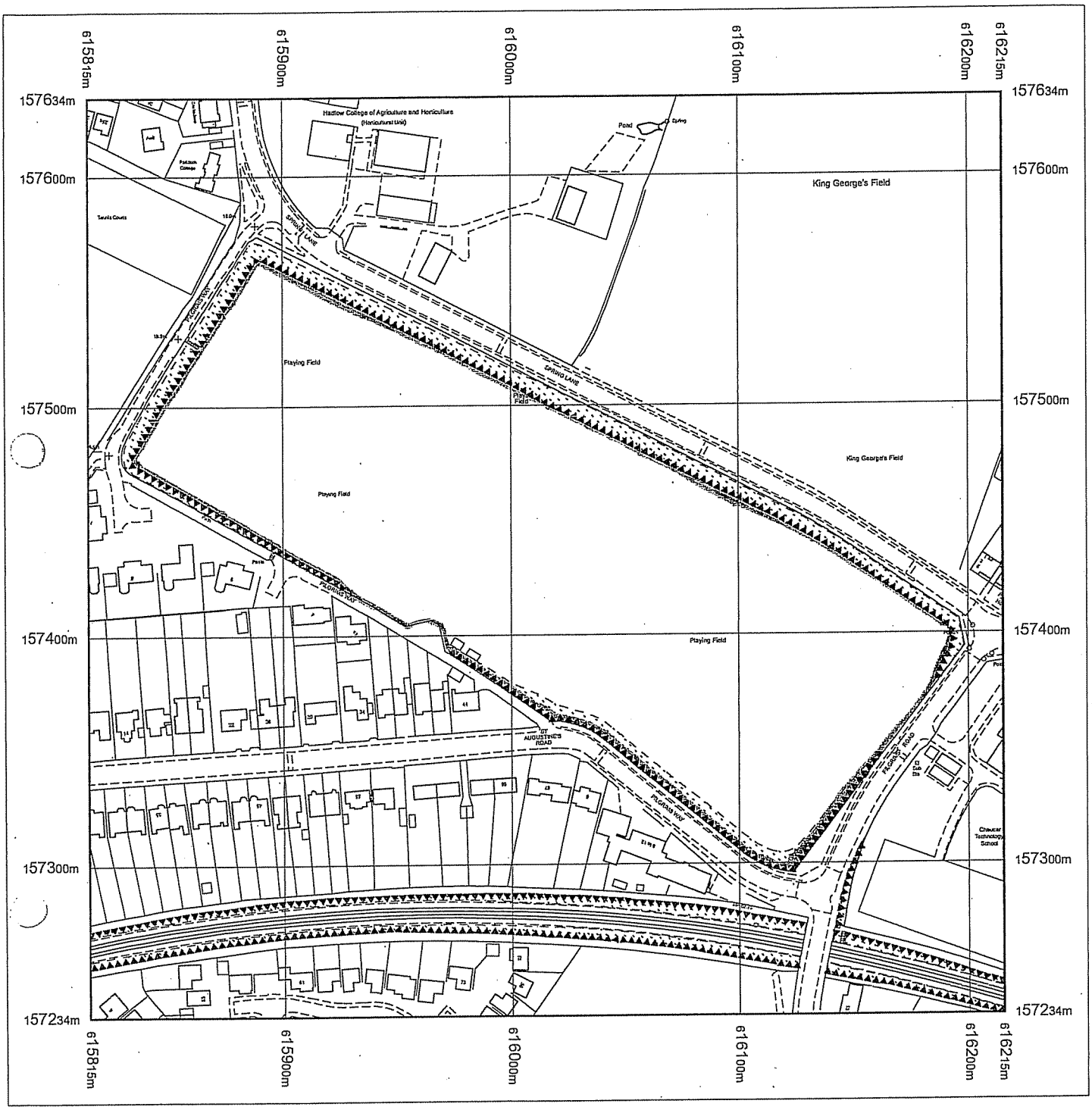
Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

REMINDER TO OFFICER TAKING DECLARATION:

Please initial all alterations and mark any map as an exhibit

A

OS Sitemap™



Metres
0 20 40 60 80 100

Scale 1:2500

Supplied by: **Outlet User**
Serial number: 00066700
Centre coordinates: 616015 157434

Further information can be found on the OS Sitemap Information leaflet or the Ordnance Survey web site: www.ordnancesurvey.co.uk

Playing field

St Augustine's Road

Canterbury

CT1 1XR

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
1 2	Taylor, Roy & Christine de Caries	59 St. Augustine's Road	22 years	Respondents, plus daughter and granddaughter	walk, run play family ball games, informal cricket, rounders	1985 – 2007 continu-ously	"No, it's always been open."	"No, it's a very open area."	"No.. and I've never seen anybody, or been told off. We've never been told off, and we've never heard of or seen anybody being told not to use it"	Yes – 22 years	Roy Taylor & Christine de Caries
3 4	White, John and Gill	30 St. Augustine's Road	23 years	"Yes, very occasionally, our grandchildren"	Football and cricket	1995 - 2007	No	No	"No, there were no notices or signs, nobody appeared to be patrolling it or watching it…" [did anybody say… you need to leave the field?] "Never."	"Yes, to the best of knowl we've it lawf yes"	John and

APPENDIX C: Table summarising user evidence (produced by the applicant in support of the application)

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
5 6	Dee, Peter and Gill Dee	4a Pilgrims Way, in Barton area more than 31 years	32 years	Selves and children. 3 children and 4 grandchildren plus friends	All sorts of sports. Football, flying kites, walking dogs, golf	1975 – present (2007)	No	No	No	Yes	Peter and Gill Dee
7 8	Moore, Peter and Maria	26 St. Augustine's Road	22 years	Yes, sons	Kicking a ball about, running, walking	1985 – present (2007)	No, "there was a door always open.. there have been lots of kind of permanent gaps"	"No, we thought we were following a tradition, I suppose"	Never. [Signs?] "I can't remember seeing any."	Yes	Peter and Maria Moore

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
9	Cooper, Mr J	43 Suffolk Road, Spring Lane Estate	21 years	Yes, me and the family	Football, family sports	1986 – to present (21 years)	No	No, it was open	No, no	Yes, 21 years	J Cooper
10 11	Garrard, Solihin and Sofiah	18 St. Augustine's Road	22 years	Yes, all 5 children	Sport, cricket, football, athletics, long jump, running, hockey	1985 – 2001 continuously "The fence was always broken, there was always access"	No	No	"No, nobody ever came up to us. There were signs at the other field, but not at this one."	Yes	Solihin and Sofiah Garrard

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
12 13	Pick, David Jo Pick	5 St. Augustine's Road, for 25 years	22 years	Family , 3 children	Football, cricket, tennis ball, sledging, snowball fights	1985 – 2005, without break. "An important amenity because there is so little else"	No	No	"No, never saw signs"	Yes, absolutely	David and Jo Pick
14 15 16	Andrews, Malcolm, Peter Andrews, Kristin Wade (living in road since 1980)	51 St Augustine's Road	27 years	Yes, "we've all used it". Five of us, and also grandchildren.	Football, cricket, bat games, aerobics, frisbee	1986 – present (2007). "We never were not able to get access to it."	No	No	No. Signs? "No, never a sign. Never."	Yes.	Malcolm Andrews, Peter Andrews, Kristin Wade

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
17	Ely, (Betty) Audrey	65 St. Augustines Road	48 years	Yes (son)	Football, with friends	1975 - 1985	No	No	No, not that I was aware of, no	Yes (son). "My husband was a governor of the Chaucer. We had quite a sort of … amicable … un.. um, you weren't afraid of, um, using it, because it was all part and parcel of the locality… he had a good relationship with the masters. " Any sign or notice since 1959?: "No". "I would always say there has been an entrance into that field in my experience, yes." Since 1987 until 1997 "there were breakages" in the fence	Stephen Bax on behalf of Mrs Ely (as she is partially sighted)

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
18	Laven, Doreen	31 St. Augustines Road	Over 38 years	No	-	-	-	-	-	-	-
19 20	Jeffrey, George and Deborah Cruickshank	44 St. Augustines Road	7 months – house overlooks the field	Son, family	football, walking dogs. When we bought the house we were told that the "field was there, [there was an] understanding that it was usable, …[previous owners] indicated that they used the field and so it was an attraction when buying the house"	7 months	No	No, broad daylight at the time others were using it	No, there's no indication, no notices	Agreed	George Jeffrey and Deborah Cruickshank

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
21 22	Hummerstone, Louise and Sam Samson	35 St. Augustines Road	25 years (Louise) and 23 years (Sam)	Yes, 6 in family plus lodgers and friends	Running, playing, rounders, cricket, kite flying, boomerang cycling, athletics, dog walking	Regularly, since 1984 until now 2007	"No. No need to. Doors were open" "The gates where the shed is, the tool shed and the large pile of grass cuttings, down Pilgrims Way were always open…"" "You could always gain entry.. from this side"	No	Signs – "no, I've never seen, I've never seen signs". "When I moved here I was told.. that the headmaster lived locally and he actively encouraged people to use the field. …use of the field was encouraged" Permission: "No, not at all"	Yes, that's us!	Louise Hummerstone and Sam Samson

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
23	Winder, Lesley	4 Lambourne Walk, Spring Lane Estate	All my life	Yes, myself, daughter and friends	Sitting in field, running around, meeting, walking, having picnics, rounders	From late 1970s onwards	"No, never had to… because there's never been a proper fence around the field anyway, and there was always a gate open… there was never a padlock on a gate or anything, and so you could just walk in" Signs: "Never. There was no signs on the field. Nothing at all"	No	No	Yes	Winder, Lesley
24 25	Walker, Hilda and (son) Gary	54 Barton Road, Barton Estate	Since 1967	Yes, all four children	Cricket, football, rounders, after school and weekends	"Right the way from 1970." "Up until … 1983-4" "We used to play for the Flying Horse pub"	No	No, it was broad daylight. The coppers used to drive past	No	Yes	Walker, Hilda and (son) Gary

	Surname(s) and name(s) of residents	Address	Length of residence in the parish	Q1 Family who have used the field	Q2 Use of field	Q3 Years	Q4 Entry by force?	Q5 Use in secret?	Q6 Permission?	Q7 Summary	Signed by
26	David Cogger	11 Cobham Close, Barton Estate	Since 1924, since 1978 in Barton Estate	Myself	Recalls walking across field in around 1930, on 'triangular path', and then in 1970's, and 1980's and later	Around 1930	N/a	N/a	N/a	N/a	David Cogger
27 28	Graham, Dorothy and Colin	26 Pilgrims Way, Barton Estate	Since 1976	No, except for walking across and dog walking. "Although I recognised it was a school playing field there seemed to be no restrictions" 'I do recall coming up those steps with the dog'		Since 1976	"Until the last few years the gate at the far end used to be open most of the time. I remember walking across with my grandson, across to Pilgrims Road or Pilgrims Way	No	No	No, but only for occasional dog walking	Graham, Dorothy and Colin

Residents' witnessing of local use of the field

		Q8	*Q8a*	*Q8b*	*Q8c*	*Q9*	*Q10*	*Q11*	
	Surname(s) and name(s) of residents	*Witnessed local residents at recreation?*	*Use of field*	*How many people?*	*Years*	*Entry by force?*	*Use in secret?*	*Permission?*	*Signed by*
1 2	Taylor, Roy & Christine de Caries	"Yes, I think it's quite frequently used by people at weekends, particularly on Sundays."	"Usually just informal family ball games, cricket and things, summer… informal cricket, rounders, people walking their dogs…practising their golf shots …"	"…in the summer as many as 20, 30 people use it at weekends, in the winter it's less used, but you do find football games at weekends, local residents and their friends"	Continuously from 1985, and increasingly	No	"No, it would be very difficult! You can't be secret about it there."	"I have never heard of that. And I've never seen anyone thrown off it."	Roy Taylor & Christine de Caries
3 4	White, John and Jill	"Yes, frequently."	Sports in general, mainly football, jogging, cricket	"at any one time up to a maximum of 20 people using it, … probably 50 a week. At weekends teams come in"	1984 – present (2007), continuously	No	No	"No, none at all"	John and Jill White

		Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	
	Surname(s) and name(s) of residents	*Witnessed local residents at recreation?*	*Use of field*	*How many people?*	*Years*	*Entry by force?*	*Use in secret?*	*Permission?*	*Signed by*
5 6	Dee, Peter and Gill Dee	Yes	"All sorts – such a variety"… "sometimes just meeting, chatting, football"	Summer week – "my guess would be 150". Winter week – 75. [House overlooks the field directly] "just people who go on to use it for recreation"	1986 - now	No, it was never necessary to enter it by force. There was always an opening somewhere.	No	"At the beginning, as a courtesy we asked the headmaster, a friend, who lived on the road, and he said yes, no problem."	Peter and Gill Dee
7 8	Moore, Peter and Maria Moore	"Yes, certainly"	Ball games, walking the dog, walking, weightlifting	Different people, sometimes quite a lot of people – perhaps 8 or 10	"As far as I remember, there has always been access to that field" (22 years)	No	No	No	Peter and Maria Moore

		Q8	*Q8a*	*Q8b*	*Q8c*	*Q9*	*Q10*	*Q11*	
	Surname(s) and name(s) of residents	*Witnessed local residents at recreation?*	*Use of field*	*How many people?*	*Years*	*Entry by force?*	*Use in secret?*	*Permission?*	*Signed by*
9	Cooper, J	"Yes, they're always over there. There's a gang up there now!"	Mainly football, and running	At the moment, 40 kids, playing football, … cricket. Team sports, more in school holidays	1986 - present	"No, my special constable wouldn't allow that no!"	No	No	Mr J Cooper
10 11	Garrard, Solihin and Sofiah	Yes	Football, cricket, golf, running, flying a kite, rounders	In winter a dozen kids a week. "In summer there's always something going on." A few days ago there was a decent cricket match going on" "Say 18"	1985 onwards. The school ethos, on the Chaucer side, was more relaxed…	No	No	No	Solihin and Sofiah Garrard

	Surname(s) and name(s) of residents	*Q8 Witnessed local residents at recreation?*	*Q8a Use of field*	*Q8b How many people?*	*Q8c Years*	*Q9 Entry by force?*	*Q10 Use in secret?*	*Q11 Permission?*	*Signed by*
12 13	Pick, David Jo Pick	Yes. "There was a terrific cricket match the other day"	Cricket, football – "loads and loads of football, and a nice mix of ages" Jogging, walking the dog, gymnastics, general uses	Winter – football a couple of times a week. "There's something going on every week" "It's very rarely … in decent weather that there isn't somebody playing on the field" Summer: 10-12 children every time I go by.	1985 – present, continuously	No	No, not in the field	No	David and Jo Pick
14 15 16	Andrews, Malcolm, Peter Andrews, Kristin Wade	"All the time, yes"	"mainly football… golf, walking dogs, jogging, batting games"	Winter week: "up to 10, at least" Spring or summer: 15? No many more! 20 to 30. Even more than that! I cycle along there every day. Every day you see a large-ish group now that the weather is fine"	From 1986 to present	"No, I never have" "No" "No."	No. "It'd be hard to!"	No	Malcolm Andrews, Peter Andrews, Kristin Wade

	Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	
	Surname(s) and name(s) of residents	*Witnessed local residents at recreation?*	*Use of field*	*How many people?*	*Years*	*Entry by force?*	*Use in secret?*	*Permission?*	*Signed by*
17	Ely, (Betty) Audrey	(partially sighted) I can hear them, but I wouldn't like to specify	Ball games, dog walking Used to have a whole week of organised summer holidays sport organised through local churches "We had a schoolmaster from the Chaucer who lived in Chaucer Cottage and he used to take his dogs outside there and exercise them". "It should be a local amenity". "You'd see [children] come up with a ball under their arm."	About 10 a week in summer. In winter "not much activity".	"always been apparent". "I would say from the late 1970's" until now	No	That I wouldn't be able to tell	No	Stephen Bax on behalf of Mrs Ely (as she is partially sighted) "That's Ok by me"

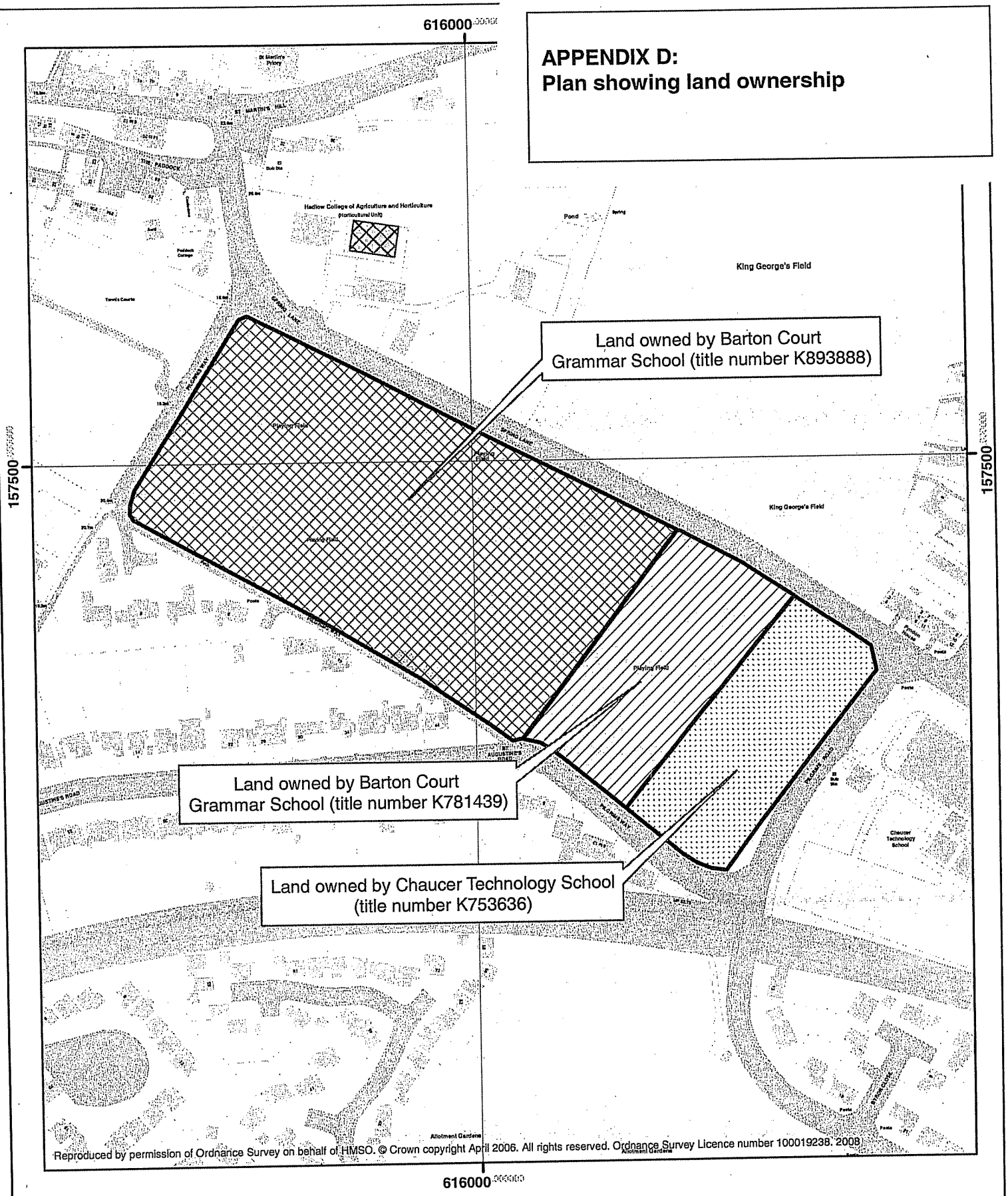
		Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	
	Surname & Surname(s) and name(s) of residents	*Witnessed residents at recreation?*	*Use of field*	*How many people?*	*Years*	*Entry by force?*	*Use in secret?*	*Permission?*	*Signed by*
18	Laven, Doreen	Yes	Walking dogs, ball games, kicking balls around	Never huge numbers – about 20 in a typical summer week. In a winter week, fewer. "There's always been a smattering of people there.	From 1968	"My impression. … was that the gaps were just the sort of gaps you always get in fences" "People went on it through various gaps in the fence." "No, I never saw anybody pushing their way through."	No	Signs: "Never saw ANY signposts of any sort at all, ever, that I'm aware of". Permission: No	Doreen Laven
19 20	Jeffrey, George & Deborah Cruickshank	Absolutely, yes	Rounders, softball, community use, men, women and children, a group of families, dog walking, jogging, football (semi-organised and small groups), cricket, playing in sand, long jump, golf, remote controlled cars, mini motorbikes			"No, there's no need to. There's no fence around …"	No. "everything I've seen is open and public	No	George Jeffrey and Deborah Cruickshank

		Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	
	Surname(s) and name(s) of residents	*Witnessed local residents at recreation?*	*Use of field*	*How many people?*	*Years*	*Entry by force?*	*Use in secret?*	*Permission?*	*Signed by*
21 22	Hummerstone, Louise and Sam Samson	"Frequently and regularly. There's almost always someone on the field"	Football, regular matches, cricket, golf, dog walking, flying kites, just sitting enjoying the open space, people on motorbikes	"At least 2 or 3 maybe five a day….. that's 20 …" 30 people a week in winter… more than that. Summer – always people there. More people lurking about. 30 plus	Since 1984. More or less the same. We were encouraged to use it. 20 years ago there were a lot of young people. We would go up, often, in groups if twenty to play rounders. It's been constant.	"No, I've never seen that"	No	No	Louise Hummerstone and Sam Samson

		Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	
	Surname & Surname(s) and name(s) of residents	*Witnessed residents at recreation?*	*Use of field*	*How many people?*	*Years*	*Entry by force?*	*Use in secret?*	*Permission?*	*Signed by*
23	Lesley Winder	Yes, lots, e.g. kids in Spring lane Estate	'Normal kids off the Estate and that going over for games of cricket and things like that… and games of football. I've seen games of Sunday football… for playing sports on…." Lots of sporty games. Snow games	Summer week: more than 20 a week Winter week: less, though more for snow games	Every year from the 1970's "I've always seen people in the field [since the 1970's" "It's never been impossible to use it."	Never, no	No, never	No	Lesley Winder
24 25	Walker, Hilda and (son) Gary	"Yes, there's always people using it"	Football, sporting activity, kites	Winter: More than 20 a week Summer: More than 20 "It's well used for sporting activities by, local people"	"From 1967 till now" "Never been a sign. No." "There was always holes, and the gate was never locked." The part was a hedgerow, not fencing. Always been access to it.	No	No "How could they enter secretively in a great big open space like that – how can you be secretive?"	No. The police have driven past and everything.	Walker, Hilda and (son) Gary

		Q8	Q8a	Q8b	Q8c	Q9	Q10	Q11	
	Surname & Surname(s) and name(s) of residents	*Witnessed residents at recreation?*	*Use of field*	*How many people?*	*Years*	*Entry by force?*	*Use in secret?*	*Permission?*	*Signed by*
26	Cogger, David	Yes. [when] I used to walk that way to visit friends and go to church (St Pauls)	Football, cricket	Sometimes 'being a Sunday, it was all free enterprise… "not more than 10 at any one time	1970's, 1980's, and since then	"the fences were in terrible condition, it was only chain link fencing, there were gaps in it." "I didn't see any deliberate vandalism"	"They didn't seem to have guilt stamped all over them They all seemed perfectly at ease with themselves and the situation"	A sort of unwritten consent, but that was relating to the rising ground. [north of Spring Lane] [For this field] I'm not aware of anything. Signs: "Not as I recall, no."	
27 28	Graham, Dorothy and Colin	Oh, yes.	Football, children with adults, cricket, golf, sandpit jumping, walking dogs many times.	Spring: a dozen Winter: fewer than 12	Over the last 30 years, since 1976, until now.	Didn't see anyone.	Always in daylight, quite open	No. I'm not aware of anyone.	Graham, Dorothy and Colin

APPENDIX D:
Plan showing land ownership



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Plan showing ownership of application site - for illustrative purposes only (for exact boundaries refer to original title documents)

Kent County Council

APPENDIX E:
Copy of "regulation six" letter sent to applicant (dated 29/05/08)

Dr. S. Bax
37 St. Augustine's Road
Canterbury
Kent
CT1 1XR

Environment and Waste
Invicta House
County Hall
Maidstone
Kent ME14 1XX
DX 123694 MAIDSTONE 6
Tel: 01622 221628
Fax: 01622 221636
Direct Line: 01622 221628
Ask for: Melanie McNeir
Email: melanie.mcneir@kent.gov.uk
Date: 29th May 2008
Our Ref: PROW/ /MM/595
Website www.kent.gov.uk/countrysideaccess

Dear Dr. Bax,

Commons Act 2006 – section 15
Application to register land known as Barton Playing Fields at Canterbury as a new Town or Village Green

As required by Regulation 6 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, the County Council has been giving further consideration to your application (and the objections thereto) and has now had the opportunity to seek Counsel's advice on the matter.

It is the County Council's duty as registration authority under Regulation 6(3) not to reject an application for the registration of land as a Town or Village Green without giving the applicant a reasonable opportunity of dealing with the matters contained in the objection statements, as well as "*any other matter in relation to the application which appears to the a uthority to afford possible grounds for rejecting the application*".

I am writing to inform you that in light of the advice received from Counsel, there do appear to Officers to be matters affording possible grounds for recommending to the Regulation Committee Member Panel that your application be rejected, as follows:

The starting point is to consider the statutory protection afforded to Town and Village Greens which is contained within nineteenth century legislation. The Inclosure Act 1857 (section 12) makes it a criminal offence for any person to "*...wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive cattle or animal thereon, or wilfully lay manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land,* ***or to the interruption of the use or enjoyment thereof as a place for exercise and recreation...*** " (emphasis added in bold). In addition, the Commons Act 1876 (section 29) provides that "*an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance...*".

Linda Davies
Divisional Director

INVESTOR IN PEOPLE

In the present case, the use of the land as a school playing field by Barton Court School and Chaucer Technology College ("the landowners") would necessarily interrupt the use or enjoyment of the land as a place for exercise or recreation and, were the land to be registered as a Town or Village Green, such use of the land by the landowners is likely to be a contravention of section 12 of the Inclosure Act 1857. Furthermore, such use of the land by the landowners would not be with a view to the better enjoyment of the land as a Town or Village Green and therefore might also constitute an offence under section 29 of the Commons Act 1876.

The main authority in this respect is the case of *R (Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578 (Admin)* which concerned an application to register a piece of land as a Town or Village Green from which a hay crop had been taken during part of the material twenty-year period. A copy of the judgement is enclosed for your reference.

In relation to the effect of the nineteenth century legislation, Mr. Justice Sullivan said this: "*When enacting the definition of "town or village green" in section 22(1) of the [Commons Registration] Act, Parliament must be assumed to have been well aware of the restrictions that would be placed upon newly created village greens by the nineteenth-century legislation. Against that background, it would be surprising if Parliament had intended that a level of recreational use which was compatible with the use of the land for agricultural activities (such as taking a hay crop) should suffice for the purposes of section 22(1), since upon registration as a village green (if not after 20 years use) some, if not all, of those lawful agricultural activities would become unlawful by virtue of sections 12 and 29*".

Turning to the matter of the concurrent use of the land by the local residents and the landowners, it was held in the same case (at paragraph 82) that the recreational use of land by local residents was not "as of right" unless it interrupted the landowner's activities in such a manner, or to such an extent, that the landowner should have been aware that the recreational users believed that they were exercising a right to be there; it would not be reasonable to expect a landowner to resist the recreational use of the land so long as such use did not interfere with the landowner's own use of his land.

It appears in this case that there may be a question regarding the continuity of recreational use of the land by local inhabitants during the material period, particularly when the fields were in use for school activities. Indeed, some of the local residents who have written in support refer to use '*during the summer holidays*' and '*outside of school hours, especially during the summer months at weekends*'. One resident also states '*I have always respected the school's priority use of the field and would not dream of walking my dog if any school activity was taking place*'.

At paragraph 85 of the *Laing Homes* case, it was held that "*if it was possible for the local inhabitants to establish the existence of a village green after 20-years use in such circumstances (because there had been virtually no interruption of their recreational activities) the landowner would then be prohibited by the nineteenth-century legislation [section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876] from continuing to use his land, on an occasional basis, for any purpose which would interrupt or interfere with the local inhabitants' recreational use. I do not believe that Parliament could have intended that such a user for sports and pastimes would be "as of right" for the purposes of section 22 [of the Commons Registration Act 1965 – now replaced by section 15 of the Commons Act*

Linda Davies
Divisional Director

2006]. It would not be "as of right"... because the local inhabitants would have appeared to the landowner to be deferring to his right to use the land (even if he chose to do so for only a few days in the year) for his own purposes".

It is Counsel's view that the reasoning in the *Laing Homes* case applies equally to the land subject to the application in this particular case. The landowners' use of the land during the material period for the purposes of school playing fields was a use which conflicted with the use of the land as a place for informal recreation by the residents of the locality. The advice received from Counsel is therefore that, *prima facie* at least, use by local inhabitants (and others) of the land comprised in your application deferred to the primary use of the land by the landowners and hence was not "as of right" within the meaning of the definition of "town or village green" contained within the Commons Act 2006.

The County Council has also recently become aware (completely coincidentally and in relation to an entirely different matter) of an Inspector's report following a Public Inquiry relating to an application to register part of a golf course as a Village Green. It appears to the County Council that there may be parallels to be drawn between this case and your application. Whilst some of the legal points raised in the report have since been resolved by the House of Lords decision in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674, the issues in relation to concurrent use remain unchanged. A copy of the report is enclosed for your reference and your comments on this would be welcomed.

The County Council takes the view that a period of six weeks would allow you a reasonable opportunity to consider and investigate the above matters, take legal advice (if so desired), and produce any rebutting evidence which you may have. I would therefore be grateful if you would accordingly let me have your response to the points made above, and any additional evidence that you would like the County Council to take into account when it next considers your application, **no later than Friday 11th July 2008**.

If you find yourself unable to meet that deadline, please let me know at the earliest opportunity as it may be possible to offer you a short extension. If by 11th July 2008 the County Council has not received from you either your substantive response to this letter (or a written request for an extension of time to complete your response) the County Council will proceed to further consider your application (and the objections thereto) in accordance with Regulation 6 of the 1969 Regulations, on the basis of the information and documents which have been supplied to it by the parties.

I look forward to hearing from you in due course.

Yours sincerely,

Miss Melanie McNeir
Public Rights of Way and Commons Registration Officer

Linda Davies
Divisional Director

INVESTOR IN PEOPLE

Village Green application no. 595.

APPENDIX F:
Applicant's response to "regulation six" letter (dated 28/08/08)

Environment and Waste, Invicta House
County Hall
Maidstone Kent ME14 1XX

28 August 2008

Dear Ms. McNeir,

Thank you for your letter of 29th May 2008 relating to my Village Green application no. 595. I am most grateful to your legal team for setting out the possible objections so clearly, and offering me the opportunity to respond. On receipt of that letter I responded with a few points by email, and this now is my more detailed response to the possible obstacles your legal team carefully outlined. I also respond here to the Advice received from Ms. Lana Wood in July.

1. As you kindly recommended, I have consulted with legal advisers, one a specialist solicitor and the other an academic legal authority who specialises in Land Law and the law on Village Greens. I am pleased to report that they are both of the conclusion that for legal and evidential reasons none of the possible objections which you set out in your letter, or which Ms. Wood identifies, is in fact a material obstacle in law to registration of the land in question, owing to points of law and evidence which I discuss in the appendix below. I also consulted the Open Spaces Society on a number of points in my letter and they are in agreement with our interpretation, as I shall explain below in greater detail in the appendix to this letter.

2. We believe that once these points have been considered the next step could therefore be a recommendation to the Committee to approve our application. In my view this should not in fact be difficult, because your legal team and Ms. Wood have identified relatively few problems with the application. You thoughtfully notify me of the fact that that KCC has an obligation under Regulation 6(3) to tell me if there are any possible objections in any area to my application, and since you have not mentioned other aspects of the application, nor invited further comment on them, and have indicated to me that you think that further issues are unlikely to emerge, I am assuming that there will consequently be no obstacle or objection to the majority of them, as follows:

	Significant issues (with page numbers in my original application)	**Response from your legal team**
1.	'Significant number' – page 10	No objection registered or obstacle noted
2.	'Locality' and local people – page 12	No objection registered or obstacle noted

3.	Lawful sports and pastimes – page 14	No objection registered or obstacle noted
4.	'as of right' (page 15 et seq.)	***Points raised – discussed in appendix to this letter***
5.	without permission – page 18	No objection registered or obstacle noted
6.	without force – page 15	No objection registered or obstacle noted
7.	without secrecy – page 17	No objection registered or obstacle noted
8.	For at least twenty years - page 23	No objection registered or obstacle noted

3. In other words, I am pleased and grateful to see that your response is largely positive, since your legal team have apparently concluded that in every key area of my application there are no objections to be raised, with the sole exception being the issue of 'as of right'.

4. In order efficiently to answer the points you raise in your letter and in Ms. Wood's Advice, I have set them out as five questions or issues, as follows. My full discussion is in the appendix below, but I here set out a summary response for ease of reference:

Question	Response
1. Did the schools use the field in any way similar to the agricultural use in the *Laing* case (i.e. impeding residents' use for long periods)?	**No.** In their evidence the schools report only normal sport and recreation. They refer to nothing remotely similar to extensive agricultural use, a golf club or anything similar. The residents (and the schools also) report no period when residents' use was obstructed in any significant way for any regular period of time. (See section 3 below, page 14).
2. (By extension) Was the landowner ignorant of the implicit claim by local people to use the field?	**No.** There is ample evidence from the schools' testimony itself that the schools knew all along of people using the field 'as of right' and implicitly claiming rights to it. (See section 4, page 18 below). However, they did nothing material about it.
3. Are playing fields excluded from possible Village Green registration? Would this fact then prove an obstacle to registration? If the land were registered as a Village Green, would the schools be inhibited from using the land for sports and recreation as they have done for 20 years and more? Would the schools' rights be infringed?	**No.** Parliament specifically did *not* exclude playing fields from possible registration as Village Greens. On the contrary, they include them in their vision of such Greens. In the appendix below I quote Baroness Hale's example in the Law Lords 'Trap Grounds' case which specifically includes mention of schools sharing Village Greens without impediment. I also cite government OFSTED inspection reports demonstrating that many schools around the country already share registered Village Greens for sports with no impediment or loss of educational quality. This is an unequivocal demonstration that there is no reason in law or in practice why the schools in this case cannot do the same if the land is registered as a Village Green. (See section 3, page 14 below). In addition, Lord Hoffman (also in *Trap Grounds*) determined that a) the correct test is not that used in *Laing*, but how the land was actually used in the 20 year period, and b) that landowners' human rights are not infringed by registration of a Village Green. Examples from around the country show no legal or practical impediment to schools using Greens for organised sports of any kind.
4. Do we need to consider the issue of 'deferring'?	**No.** The reason for this is that in *Sunningwell* and *Laing*, and also in the recent High Court case of *Lewis*, it is clear that in law we

	need to consider the matter from the point of view of the landowners. In this case (see 2 above) there is ample evidence from the landowners themselves that they knew about local people's use of the land and that they were thereby on notice of local people's claim of a right to use the land. They testify that their use was regularly interrupted by local people claiming a right over the land. In short, since the landowners knew about the claim by local users, and did nothing about it, the issue of deferring is therefore irrelevant.
5. Is there evidence that residents in sufficient numbers 'deferred' significantly to the schools' use of the land in a manner which renders their use not 'as of right'?	**No**. Given the point made above, I submit that the issue of deferring is not relevant in this case. However, if we accept for the sake of argument Ms. Wood's analysis, witnesses testify to using the field outside school hours, and she takes this as evidence of deferring. However, Justice Sullivan in the *Laing* High Court case specifically ruled that use of land outside normal working hours is normal Village green use and that it is unacceptable to require an applicant to provide evidence of use at particular times. As the use in this case was typical of normal Village Green use, so it cannot in law also be treated as evidence of deferring. Furthermore, we do not know if they also used the field within school hours. In addition (again using Ms. Wood's figures) 9 witnesses said that they used the field at all times, and most significantly (a point obscured in Ms. Wood's analysis) a further 31 witnesses made no mention of times of use at all. These witnesses are dismissed by Ms. Wood as 'equivocal' but we submit that it is unreasonable in law to ignore them, and that they should properly be taken into account. I submit that this means that for a total of **62** witnesses out of **64** *(97%)*, there is no evidence in law of deferring.

5. Each of these points is discussed in detail below. However, before we turn to it, I note that Ms. Wood in her Advice refers to the possibility of requesting further information on two other issues related to the question of 'as of right'. She says that:

> [26.] "There are other issues between the parties which are relevant to the question of whether use of the land by local inhabitants was "as of right": **whether the land was fenced during the relevant period** and **whether local inhabitants using the application land were asked to leave when seen by P.E. staff from the schools**, or whether they were not. I do not consider those issues in this Advice. If the application is not rejected at this stage, the evidence on these issues will have to be tested by cross-examination of the witnesses for the Applicant and for the Objectors at a public inquiry. *[Emphasis added]*

In principle we have no objection to a public enquiry, as we feel that we have a strong case to present, but given the costs associated with that course of action I have attempted also to deal with these two issues in the appendix below, since I suggest that the evidence already offered is so convincing that it allows us to set aside these two possible issues without any public enquiry being necessary.

6. The next stage, I suspect, is for your legal team to have the chance to consider the issues again in the light of my advisers' and my comments below, and to consult again with Ms.

Wood or someone equally expert in this area. If, as my advisers believe, there is thereafter no further obstacle, I would then hope that you might be able to recommend to the Regulation Committee Member Panel that there are no legal grounds for my application to be rejected.

Once again I thank you all for your courtesy and efficiency in your correspondence with me, and I am most grateful for your time and effort. I would be happy to answer any queries you may have on any aspect of this letter or my application, but in the meantime, thank you for your time and attention.

Dr. Stephen Bax

encs. Appendices with detailed discussion of the suggestions raised by KCC and Ms.Wood

APPENDIX 1: Legal argument and evidence

Town or Village Green application no 595, relating to the land known as Barton Field, Canterbury.

Response by the applicant, Dr. Stephen Bax, to the points raised by KCC's legal team in their letter of 29th May 2008

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Ms. Melanie McNeir, Case Officer.

Dear Ms. McNeir,

Since some of the points which you mention revolve around the relationship between school sports facilities and Village Greens, it will be useful to start by looking at the legal nature and status of Village Greens in general before turning to look directly at each of the points you make in your letter.

PREAMBLE

Section 1: VILLAGE GREENS, SCHOOLS AND ORGANISED SPORTS

7. A starting point is the authoritative Law Lords judgement known as the *Trap Grounds case*[1] in which Baroness Hale of Richmond offers a convincing description of an actual Village Green. I have emphasised some key points in her speech:

> "129. Town and village greens are not just picturesque reminders of a by-gone age. They are a very present amenity to the communities they serve. The village green in Scorton, in the North Riding of Yorkshire, is a perfect example. ..... It is surrounded by the old village houses, including the former vicarage, the two remaining pubs, the shop, the village institute, and the 18th century building which was until recently the old grammar school. It was and is the centre of the community. *Both villagers and grammar school boys played cricket there in the summer; archery contests were held there; a bonfire was built for Guy Fawkes' Day; the fair and other events of Scorton feast were held there every August; and all the villagers could walk and play games upon it.* It is just the sort of place that the Royal Commission had in mind when it proposed the definition of a town or village green quoted by my noble and learned friend, Lord Hoffmann, in paragraph 14 of his opinion." *[emphasis added]*

8. You suggest in your letter that schools and residents cannot share land which has Village Green status. Mr. Chris Wade, KCC's Principal Case Officer, in an email to me of 9th June, kindly elaborated on your team's thinking in this area:

> I would add that I have also, personally, taken the opportunity, whilst seeking advice from two different Counsel on other village green matters, of raising informally the issue of whether there were any circumstances in which land held as a school playing field could be capable of registration as a village green. On both occasions, the Barristers concerned were of the view that this is unlikely to have been Parliament's intention in enacting village green registration legislation but the outcome would be dependent on the facts of each case.

My legal advisers are surprised by Mr. Wade's and his advisers' approach, since in our view there is no justification in law for excluding any type of land *a priori* from registration as a Village Green. I phoned the Open Spaces Society and it is their view also that there is no provision in statue for the sort of restriction which Mr. Wade's advisers suggest. We recall that among land registered as Village greens are a car park, and also "some rocks at Llanbadrig, Ynys Mon, which had been used by the inhabitants of the locality to moor boats while engaged in the pastime of boating" (Lord Hoffman, Trap Grounds, para 39). For this

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[1] *Judgments - Oxfordshire County Council (Respondents) v. Oxford City Council (Appellants) and another (Respondent) (2005) and others* HOUSE OF LORDS SESSION 2005-06 [2006] UKHL 25, on appeal from[2005] EWCA Civ 175, available at:
http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060524/oxf-1.htm

reason my advisers suggest that it is wrong in law to assume that *any* kind of land is likely to be excluded *a priori* from Village Green status, and that includes playing fields. This was clearly also the Law Lords' view in their extensive discussion of the nature of Village Greens in *Trap Grounds*.

9. Furthermore, Baroness Hale's own description of Village Greens in the Law Lords' judgement, cited above, shows this view to be manifestly mistaken, since she explicitly *includes* the shared use by a secondary school and local residents within her view of a Village Green. At Scorton the school did in fact use the Green for organised sports for many years together with residents' recreational use. According to the Baroness this vision of a Village Green *"is just the sort of place that the Royal Commission had in mind when it proposed the definition of a town or village green quoted by my noble and learned friend, Lord Hoffmann."* None of the other Law Lords dissented from her description.

10. This shows that Parliament certainly did not think to exclude such shared use by schools and residents from its definition of Village Greens, contrary to your legal team's suggestion. The description offered by Baroness Hale shows, on the contrary, that Greens can perfectly well include harmonious shared use between a local secondary school and local residents, precisely because this has happened on typical Village Greens for centuries. We note that the Green in Scorton has been used for cricket, for archery contests, it has been closed for annual fairs (in fact lasting for four days), but most important for our purposes, it was shared amicably for sports and recreation by the school and residents together for decades.

11. This is the kind of vision we have for the land in Canterbury with which this application is concerned. More importantly, this kind of shared use has already happened in Canterbury for more than 20 years on the land in question, with both the schools and the residents using the field for sport and recreation. In other words, we have evidence that such sharing of the land is not only within Parliament's definition and conception of a village green, but has also been perfectly possible in practice here in Canterbury over the twenty year qualifying period set by Parliament.

12. Besides Baroness Hale's Law Lords definition of a Village Green shared by schools and residents, we can adduce many other examples of similar harmonious shared use of Village Greens by schools and local communities. This also serves to contradict the view set out in your letter and in Mr. Wade's email. The website for OFSTED, the official government inspection body for schools, offers for public view numerous official inspection reports which demonstrate that schools up and down the country share Village Greens for their

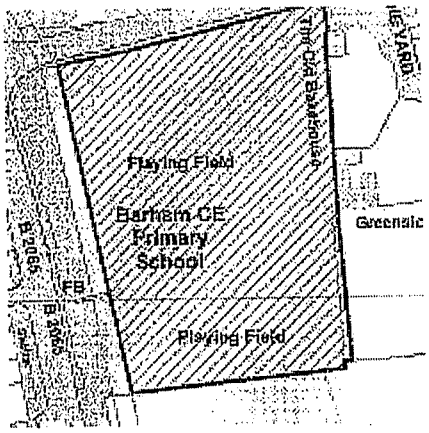
sports, and that they do so with no loss of educational effectiveness. Examples include the following:

Location	DEFRA Village Green registration number	Comments from OFSTED on the relevant schools (all of which passed their inspections)
Tetsworth Village Green, Tetsworth, Oxfordshire	registered Village Green no. 46085	"Good use is made of the village hall, village green and local sports centre for school events and physical education sessions." "The governors, headteacher and staff, like the parents, value highly the school's well established traditions which sustain the school at the hub of village life. Most traditions are linked to key events throughout the year. Good examples are the school sports' day on the village green…"
Milburn, Cumbria	registered Village Green no. 63028	"The school is sited on the village green, on which the pupils play." (2006) "In good weather, the school makes use of the village green for games and athletics. (2001)
Eppleby, N. Yorkshire	registered Village Green no. 42089	"the school makes use of the village green for sports"
Nether Heyford, Northamptonshire	registered Village Green no. 43051-6	"Staff are consistent in the way they interpret and apply the behaviour policy and children are confident as they choose what to do and move between the hall and supervised play on the village green outside"

This is a small sample of the many examples available, all of which demonstrate unequivocally that with proper management there is no problem in law, or in practice, about schools sharing Village Greens with residents and making use of Village Greens for organised sports, and doing so effectively and without educational disadvantage.

13. I was especially surprised by the idea expressed in your letter that schools cannot share Village Greens for sports with residents since I see from your KCC website that land at Barham in Kent, very near Canterbury, was granted Village Green status by your committee on 11th February of this year. The documentation on your website[2] shows that the land is known variously as the Green or as the Playing Field for Barham Primary School, as can be seen by the accompanying map of the land from your website, which I reproduce here:

[2] http://www.kent.gov.uk/NR/rdonlyres/3EB939A2-9E92-4304-A215-F888FCA1D810/0/village_green_barham.pdf



The primary school is in fact across the road, and when I telephoned them they informed me that although they have playing fields adjacent to their building, they also use this land regularly as playing fields, as the legend on the map in the application shows, and even for their sports day. Of course, the Barham case is different in various ways from the Canterbury one, (for example the land is owned by the parish council and not by the school), and it relates to a small village primary school, but since your Regulations Committee has registered this playing field as a Village Green, and the land will continue to be used as a school sports field, this again suggests that there can be no obstacle in principle to sharing between schools and residents, and therefore no obstacle to registering land which is already shared.

14. Perhaps organised school team sports such as football and cricket would be difficult on a Green? On the contrary, it is a part of the common idea of Village Greens (as Baroness Hale's account also makes clear) that they are normally used for organised sports such as cricket, football and even archery. Lord Hoffman in Trap Grounds makes mention of Greens used for horseracing, football, rounders and cricket (para 6). Indeed DEFRA's official memorandum on Village Greens laid before Parliament[3] and intended to act as guidance to local authorities, specifically allows for organised team sports, as well as *ad hoc* ones:

> *Town and village greens originally developed under customary law as areas of land where local people indulged in lawful sports and pastimes and in so doing established recognised recreational rights. These rights typically included organised or ad-hoc games, picnics, fêtes and similar activities.*

[3] DEFRA: EXPLANATORY MEMORANDUM TO THE COMMONS (REGISTRATION OF TOWN OR VILLAGE GREENS) (INTERIM ARRANGEMENTS) ENGLAND) REGULATIONS 2007 No. 457

15. We can in fact find numerous examples of registered Village Greens being used for such formal organised sports. Frequently parts of a Green are even set aside for such sports, with no legal conflict. Here are some examples of Village Greens used in such ways:

	Location	DEFRA Village Green registration number	Type of activity (from websites related to each Green)
1.	Wrea Green, Lancashire	registered Village Green no. 33001	Cricket Club: "We play on the village green, complete with duck pond in one corner, and which is surrounded by the school, pub, church, and shop"
2.	Great Bentley, Colchester, Essex	registered Village Green no. 21068	"The Village has its own Football club and Cricket Club with their respective matches played on the green throughout the season." (and also a Carnival and numerous fairs).
3.	Wickham St Paul's, Essex	registered Village Green no. 21084	"Wickham St Paul's [Football club] also play on their village green."
4.	Bovingdon Hertfordshire;	registered Village Green no. 27086	"Bovingdon Cricket Club is located on the village green in Bovingdon. .... the Club has secured a long-term lease on the site. The Club fields three senior teams"
5.	Lyminge, Kent (Recreation Ground)	registered Village Green no. 32039	"Lyminge Community Football to be held at the Lyminge Recreation Ground.... 3 Wednesday Soccer Leagues are being staged at the Lyminge Recreation Ground
6.	Thornton Hough	Registered by the Local authority (no reg number)	"Today, the village green is the hub of village life, comprising a football pitch, cricket square and two tennis courts. A half timbered, thatched sports pavilion is rented out to football and cricket teams seasonally and the local school regularly uses the village green for sporting activities."
7.	Ridgeway Grundy Park, Cheshire	Registered 2005	On plans to use land as a skatepark, despite a village green application: .."head of planning John Groves said by-laws were not a planning issue. Tennis courts and cricket nets had been held by the courts as being compatible with village green status and it was considered the skate facility could be viewed in this way.

16. These examples offer a number of salient points highly relevant to the current application. It can be seen, firstly, that official registered Village Greens can be used for a variety of organised sports with no conflict with residents' use, that they can be rented out, and even leased to organised teams (see examples 4 and 5). A school is again mentioned (example 6). Example 7 shows that they can be improved with the addition of new facilities; Ridgeway Grundy Park in Cheshire was registered as a Village Green in 2005 and after that a skatepark was built on it with no impediment. As Cheshire Council's Head of planning said in that regard, *"Tennis courts and cricket nets had been held by the courts as being compatible with village green status and it was considered the skate facility could be viewed in this way."* His view was accepted and the skatepark was duly built.

17. The suggestion in your letter and emails, therefore, that the schools in this case might be impeded in their future sporting uses of the field in question, and that therefore this might be grounds for rejecting my application, is therefore undermined by these examples of harmonious school use, as well as of extensive club and organised sporting use, on Village Greens up and down the country. These examples demonstrate conclusively that there is no legal or practical problem or impediment for a school to carry out all kinds of organised and team sports to a high educational standard on a registered Village Green.

In addition, they show that landowners, once a Green is registered, can without any obstacle improve the land by adding extra sporting facilities such as tennis courts, cricket nets, skateparks and so on, and can even rent them out to sports clubs. They demonstrate that even a full football or cricket league with numerous teams can be carried out on a Green with no lawful or practical impediment, and that even potentially dangerous sports such as archery can be practised on a Green, obviously with appropriate safeguards. The point is that, as Lord Hoffman noted in Trap Grounds [para 51]: "*There has to be give and take on both sides*", and his point is highly significant. These examples show that this kind of cooperation is perfectly possible, indeed that it happens every day all over the country.

18. For these reasons I submit that the suggestion in your letter and emails that registering the land in this case as a Village Green would prevent the school from using the land in future for sports and recreation, and that this might therefore render my application unacceptable, is untenable in the light of numerous actual examples of registered Village Greens from around the country, and in the light of the Law Lords discussion in *Trap Grounds*. We will consider this in further detail below when we look at each part of your letter in turn.

Section 2: VANDALISM AND ANTISOCIAL BEHAVIOUR

19. The objectors have brought forward evidence of vandalism and antisocial behaviour, so it is useful here to look at what this means for the application. To take one example, Mr Woods, a longstanding governor of Barton Court School, mentioned in one school document an unknown man whom he saw on the land in question, and who reportedly told him that he had been walking his dog on the land for years, that he had a right to do so, and did not intend to stop. Teachers also report people interrupting school sports, and others report apparent acts of vandalism to school property on the land.

20. We residents are as unhappy as the schools with vandalism and antisocial behaviour, particularly as we live nearby 24 hours a day, 365 days a year, unlike the school staff and many of the pupils! We will in future do everything we can to work with the schools against

it. However it is important to note that such behaviour has nothing to do with Village Green status, nor can it be taken into account in determining this application, for the following reasons:

1. We have no evidence at all that these people were local residents. The schools were not able to produce any evidence to suggest this. We therefore have no idea or evidence concerning who exactly they were or where they lived.
2. If someone is challenged by a landowner but continues to use the land, they may arguably thereafter be using 'with force' and not 'as of right'. However, as noted above, the landowners, despite ample opportunity to do so, did not produce any evidence that any of the people challenged did ever use the land again, since they had no idea who they were. The schools did not report them to the police and no offender was ever identified. No case of trespass ever even came to court, let alone to proof. No repeat offenders are reported in the school evidence, certainly none who can be identified as residents.
3. It is a commonplace in law that the crimes of one person should as far as possible not be used to affect the rights of another. In his authoritative guide to Administrative Law[4], Wade categories the scope of unreasonableness in law and includes as unreasonable 'penalising the innocent'. In this case I submit that it would be unfair and unreasonable to remove the rights of innocent local residents who used the field without force because of the alleged bad behaviour of unknown people. The fact is that there is no evidence that any *local resident* ever used the land by force, or was ever challenged on the land. Testimony from all the local residents who made statements and wrote letters demonstrates the truth of this. They were all specifically asked if they had ever been told not to use the land or asked to leave, and not one of them reported anything of the kind.
4. Parliament has established the test for registering a village green to include evidence of significant users from a locality 'as of right' without force, secrecy or permission. What Parliament did *not* do was insist also on other conditions such as that 'no vandalism or bad behaviour by persons unknown could ever have occurred on the land', or that 'nobody can have ever used the land in other ways'. I submit that it is incorrect in law to add conditions for my application which Parliament did not include, such as taking account of the alleged bad behaviour of unknown people.

[4] H.W.R. Wade and C.F. Forsyth, Administrative Law, 7th and 9th edition, Oxford University Press, 2005.

21. This means, I submit, that so long as we can provide in the application sufficient evidence of proper user of the right kind under the guidelines set out by Parliament, then the alleged existence of any other users is irrelevant, especially as there is no evidence that any of them was a resident of the parish. We believe that we have done so, with evidence of hundreds of actual and observed users, residing all over the parish, over the whole qualifying period. Incidentally, the land in question is now fenced off, but the local Police have informed me personally at local Resident Association meetings that there are still regular acts of vandalism on the field. Graham Hadler, a local resident, himself recently called the police when he saw a fire had been started on the land. This demonstrates again that vandalism exists no matter whether the land is a Village Green or not, or is fenced off or not, and is not therefore relevant to the current application.

22. History of the Field

Before we turn to the details of your letter, it is useful to remind ourselves briefly of some of the history of the field. To start with, we recall that both schools have other extensive playing fields adjacent to their buildings, apart from this field. It should also be noted that because both schools have these other extensive playing fields, and that one of them is even now building a £20 million multisports centre, if this land were to be registered as a Village Green it would leave them at no disadvantage in terms of sports facilities.

This was the reason why from the 1960s until the time of my application in 2007, the field in question, between the two, was relatively unimportant to them. They did not need to use it much. In the 1970s and early 1980s, before the qualifying period, the headmaster encouraged locals to use it. Throughout the qualifying 20 year period the field was relatively ignored and neglected. This point was evidenced in my previous documentation, not only by lack of fencing, but for example by the fact that large chunks of the metal hut which is still on Ordnance survey maps, but which was burned down in the 1990s, remained on the field for all to see until 2008. This relative neglect and limited use of the field, and the accompanying relaxed attitude on the part of the schools, continued for decades, right through until 2007. Several of the residents testify to this. We recall the evidence of Lt Colonel John White in his letter of 10th February 2008:

> *"My wife have lived here for 24 years, since 1984, and for the first 11 years I walked past the field four times nearly every day. I noticed that the schools made very little use of the field on school days, and never at weekends or during the long school holidays.... Following my retirement in 1995 we have both often passed the field and its use has continued to be as before....[until the new fence].... [Users] have never been told, or seen any signs, that the field is for the*

> *exclusive use of the two schools, therefore naturally assuming that there was no objection to [their use]. The ownership of the field was never made apparent."*

The Garrard family say the same, reporting in their letter that "the field has been hugely underused by the two schools". This is a fair reflection of the situation. The evidence shows that the schools cared little about the field because they used their other land for sports, and so used it minimally and looked after it minimally, and did nothing to stop other people using it. As is clear from many residents' letters, one consequence of this was that no-one had any idea that the field was even owned by the schools, with almost all of us thinking it was public land perhaps belonging to a public body such as KCC. The relatively limited use and the absence of any signs contributed to this impression.

This explains why the schools seemed so relaxed about the field, and also explains why they did not put up signs, or take action against trespassers. They knew of the residents' use, but were not bothered about it because they had a lot of land attached to their buildings which was closer and easier to use. The result, I submit, was acquiescence in residents' use.

DISCUSSION OF THE POINTS IN YOUR LETTER

With this background in mind, we will now turn to examine in more detail the points made in your letter.

Section 3: VICTORIAN STATUTES AND LANDOWNERS' RIGHTS

23. You start by discussing the 19th century legislation and its implications for Village Greens, leading to discussion of what is called the Laing Homes case[5]. Within this context you suggest that:

> "In the present case, the use of the land as a school playing field by Barton Court School and Chaucer Technology College ("the landowners") would necessarily interrupt the use or enjoyment of the land as a place for exercise or recreation and, were the land to be registered as a Town or Village Green, such use of the land by the landowners is likely to be a contravention of section 12 of the Inclosure Act 1857. Furthermore, such use of the land by the landowners would not be with a view to the better enjoyment of the land as a Town or Village Green and therefore might also constitute an offence under section 29 of the Commons Act 1876."

24. In this you depend on the *Laing* case, but my advisers note that your reference to *Laing* fails to take proper account of Lord Hoffman's later discussion of this issue in the Law Lords

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[5] *R (Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578 (Admin)*

in *Trap Grounds* [op.cit, sections 51 and 52 and 57]. It is clear in law that Hoffman's discussion ruled against the Laing judgement in this respect. I refer you to a discussion offered by Philip Petchey QC, a recognised authority in this area, presented at the recent seminar entitled: "Village Greens: Law. Evidence and Handling the Public Inquiry" at the Chambers of Robin Purchas QC. Francis Taylor Building. The relevant section is reproduced below in Appendix 2. We note the disclaimer at the end of Mr Petchey's discussion, that it is not meant to be comprehensive legal advice, but it is nonetheless a useful authoritative summary of current thinking. In paragraph 3 Mr Petchey is dismissive of the case you propose regarding the ruling in Laing, saying that "we now know that it is wrong", and cites Lord Hoffman to explain why. In short, I submit that Mr. Petchey is correct in law and that it would be incorrect in law to reject my application on the grounds of the Victorian statutes in the ways you suggest.

25. In addition, in his judgement [*Trap Grounds* op.cit, sections 51 and 52] Lord Hoffman demonstrates by reference to Fitch and Fitch[6] that the landowner already has legal safeguards which allow him or her to continue to use the land in the ways which s/he used it prior to registration, without fear of disruption by outsiders. If, say, an aggressive intruder in future tried to disrupt a school match arguing that s/he had Village Green rights, then in Lord Hoffman's view the courts could use such precedents as Fitch and Fitch to protect the schools' rights. In short, Lord Hoffman's view in this section also goes against your suggestion that the schools would be unable to continue to pursue their normal sports activities if the land were a Village Green, so this suggestion cannot in law be prejudicial to my application. The schools could continue to use the field as they have for 20 years, with adequate legal protection for their right to do so.

26. A further reason why the suggestion in your letter is not tenable is the implied belief that the *Laing* case sets a sort of automatic precedent to be used in every future case. This is not what Justice Sullivan said in that judgement. He stressed that each case was to be considered on its own evidence (73. "I readily accept that the question is one of fact and degree in each case"), with the result that his judgement can be used to shed light on another case *only* if the evidence of the use of each piece of land in question is fully evaluated and analysed to test whether *in practice* residents' use of the field was disrupted. This your letter has unfortunately not done. You simply offered the precedent without adducing any evidence about this particular case.

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[6] *Fitch v Fitch* (1798) 2 Esp 543 , as a sequel to *Fitch v Rawling* 2 H Bl 393

This is an important point because, as Justice Sullivan made clear, even agricultural use *per se* is not necessarily an obstacle to Village Green registration. For example grazing can be acceptable in some cases [para 67]. It is a matter of degree and evidence. In this current case there is simply nothing remotely comparable with the *Laing Homes* situation, with agricultural use of the field closing it off with large industrial machinery for days at a time, and therefore nothing to suggest that the parts of the *Laing Homes* case you refer to have any relevance here at all. They cannot therefore be prejudicial to my application.

27. In any case, I submit that it is a mistake to draw on the *Laing* case (in which there was significant disruptive agricultural activity closing the land for long periods, with the use of large industrial machines) or indeed to draw on the Redcar case which you also mention, (where there was an official golf club obvious to all) in order to make a comparison with a completely different kind of situation, namely the activities of normal school sports and recreation on land whose ownership status was not known to residents, who used it thinking it was public land, and who used it without any sort of disruption for twenty years. I submit that there is no legal basis for using the Laing case, which was essentially about agricultural use, as a precedent for such a markedly different situation. I submit that in fact the precedent in Laing can only properly be used in cases of haymaking and other crops, or at least in cases where there has been a significant annual or regular interruption in residents' use, which is not the case here.

In the Canterbury case there is no question of grazing, nor of haymaking, nor of any other kind of activity which closed the field for lengthy periods, except perhaps for occasional sports events such as are absolutely normal on any Village Green. If this sort of activity were allowed to hinder my application we would be in the ridiculous position of saying that normal sports and recreation cannot take place on the land owing to normal sports and recreation, which would surely be improper in law..

Consistency

28. In my original application I drew attention to another TVG case in Kent, that of Heartenoak Playing Fields, Hawkhurst, which has certain parallels with this current application. There too, the *Laing* case was mentioned as a possible parallel, but your Divisional Director dismissed this in her report to your Regulation Committee on 30th November 2006, noting that none of the elements which had been significant in the *Laing* case were of any relevance to the Hawkhurst case, mainly because in *Laing* the case had been about a hay crop which had been taken for more than half of the 20 year period. In Hawkhurst none of this pertained.

I suggest that the same is true in this Canterbury case. I submit that if your legal team are to be consistent in their judgements, they will apply the same logic to this case as they did to the Heartenoak case, and determine that the elements of *Laing* to which you now refer simply do not pertain in the current case.

***Retro*spective evidence versus *pro*spective speculation**

29. For these reasons the suggestion in your letter in this regard is not, I submit, in any way substantive in law as an obstacle to my application. If we simply look at how Village Greens around the country are actually used, we see that there can be no possible impediment to these two schools in this case continuing with their normal sporting activities as they have done for twenty years without in any way 'interrupting' normal recreation.

In fact this evidence of actual shared use over 20 years is the most significant factor of all against your suggestion. After all, Parliament did not invite us to speculate on what a landowner *might do in future* on a Village Green. They asked us instead to look at the past twenty years and use that qualifying period as the basis for our judgement. The test was set to be *retro*spective in nature and not *pro*spective. Indeed Lord Hoffman in Trap Grounds makes this very point, taking issue with Justice Sullivan's judgement and drawing careful attention to the importance of the 20 year *retrospective* qualifying rule. We can see this in the parts I have emphasised in Lord Hoffman's text quoted here:

> 57 ..."with respect to the judge [Justice Sullivan in *Laing*], I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 **if in practice they were not**."

In other words Lord Hoffman (the higher of the two authorities, of course) disagrees with Justice Sullivan's mere speculation, and prefers to use as his test the actual facts about past use. He continues in the same vein:

> "Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question **of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application**. "

Again, Lord Hoffman's point is that we should look at *"the requisite user by local inhabitants for upwards of 20 years before the date of the application"* as our sole criterion for adjudication, and not speculate about other hypothetical possibilities. He completes his point with reference to another case:

> "I have a similar difficulty with paragraph 141 of the judgment of Judge Howarth in Humphreys v Rochdale Metropolitan Borough Council (unreported), 18 June 2004, in which he decided that acts of grazing and fertilising by the owner which, in his opinion, would have contravened the 1857 and 1876 Acts if the land had been a village green at the time, prevented the land from satisfying the section 22 definition."

30. These may or may not be *obiter dicta*, and not central to the Law Lords' judgement as a whole, but they are nonetheless telling, and eminently sensible, and should not be ignored. Mr Petchey relied on them in his opinion reproduces in Appendix 2, and in the recent High Court case of Lewis v Redcar[7] (which I shall refer to as *Lewis*) Mr Sullivan accepted this (para 31). The point is that if there is evidence *in practice* of user of the requisite kind, over the twenty year qualifying period set down by Parliament, this thereby in itself demonstrates that there is no inconsistency between the landowner's use and the residents' use. The *retrospective* analysis is sufficient, and indeed is what Parliament set down as the test. Therefore, as my legal advisers point out, it should not properly be replaced by any speculation as to *prospective* uses. This shows the error in your statement that: *"the use of the land as a school playing field by Barton Court School and Chaucer Technology College ("the landowners") would necessarily interrupt the use or enjoyment of the land".*

I therefore submit that your suggestion that my application be rejected because of the issue regarding Victorian statutes should be set aside.

Section 4: RESIDENTS' USE AND LANDOWNERS' USE

32. Your second point is as follows. I have highlighted some key phrases:

> "Turning to the matter of the concurrent use of the land by the local residents and the landowners, it was held in the same case (at paragraph 82) that the recreational use of land by local residents was not "as of right" unless it interrupted the landowner's activities *in such a manner, or to such an extent, that the landowner should have been aware that the recreational users believed that they were exercising a right to be there*; it would not be reasonable to expect a landowner to resist the recreational use of the land so long as such use did not interfere with the landowner's own use of his land." *[emphasis added]*

[7] R (Lewis) v Redcar and Cleveland Borough Council; [2008] WLR (D) 246

33. My advisers are clear that you here misconstrue Justice Sullivan's intentions. Indeed in a Village Green application at Croxley Green, Hertfordshire (to be considered in more detail below) Ms. Wood herself, as the Inspector in that case, seems also to disagree with your interpretation of this part of Justice Sullivan's judgement.

The point here in *Laing* is not the relatively superficial issue of 'interference' with the landowners' activities, so much as the fact that such interference *serves notice to the landowner* of the residents' implicit claims. My advisers point out that, as Justice Sullivan makes clear several times, the key issue is how the landowner *perceived* the land and its use. Citing Lord Hoffman, Justice Sullivan notes (para 78) that: "*Under English Law the focus is not upon how matters would have appeared to the person seeking to acquire the right by long usage, but upon "how the matter would have appeared to the owner of the land"* Again in paragraph 82 Justice Sullivan notes that 'the starting point is, *"how would the matter have appeared to Laings?"*'. Furthermore this is a salient point in the recent Lewis case[8], where Justice Sullivan again makes it clear that the key question is how would the matter have appeared to landowner. (para 41) The nub of the matter is therefore "*"how would the matter have appeared to the schools?*" and not interference *per se.*

34. This issue was certainly a crucial one in the *Laing* case because the landowners could perhaps argue that they did not know that residents were effectively claiming a right over the land through their pattern of use. However, this is quite different from the Canterbury case for the simple reason that there is substantial evidence here that the schools knew full well about residents' use of the field 'as of right' all along, even before the 20 year qualifying period. Some of the evidence can be summarised here:

- We have the testimony of numerous residents that the schools knew of and tolerated, and even encouraged residents' use well before the qualifying 20 year period.
- Louise Garland, a former governor of the Chaucer School, testifies in her letter that she used the land 'as of right' for recreation from the 1980's onwards, as did her children, and she then sat on the governing body for many years in the 1990s. It would be ludicrous for the governing body to claim that they were not aware that people were exercising use 'as of right' when one of their own number testifies that she herself, a local resident, had been doing so openly for many years.
- We have the evidence of Tanya Taylor from her days as a schoolgirl in the early 1990's that teachers saw people training on the land during school time and even

8 R (Lewis) v Redcar and Cleveland Borough Council; [2008] WLR (D) 246

praised their running, showing not only that their use interrupted the schools' use but that the schools were fully aware of such use and acquiesced in the runners' rights to use the land. This demonstrates unequivocally that the schools knew of the fact that local people were using the land 'as of right' yet did nothing material about it, acquiescing in its use.

- We have the head teacher of Chaucer school in the early 1990s openly acknowledging in a letter that some local people acted as if they had rights over the land. He said that he would set up signs, but although he might have done so on the main site, there is no evidence that he ever did so on the field in question. This shows incontrovertibly that the schools were 'on notice' that people were claiming rights, yet they did nothing material about it in the case of this field, thereby acquiescing. (It also shows again that this field was relatively neglected.)
- We see an official school document from Mr Woods, a longstanding governor of Barton Court School, informing a school committee in the early 1990s that he had met people on the land openly using it and claiming rights, such as the dog walker mentioned above, who said he had always walked there and would continue to do so. We do not know whether they were residents or not, so this is not evidence that residents used the land 'by force', but that is beside the point: it appeared to the schools that it was local people and that they were claiming rights over the land, yet there is no evidence that they took any effective action about it. (This is reminiscent again of the Heartenoak case, in which your Divisional Director determined that the landowners had failed to assert its rights, as landowner, over the land in question, or to give any of the local residents "cause to question their right to use the playing field.")
- We also have a number of residents (myself included) reporting use of the field even while the schools were using it, with no conflict, but simply 'as of right' quite openly. Again, the schools knew this was happening and acquiesced in it.
- A letter from Mr. March, a PE teacher at Barton Court for 17 years reports people coming onto the field during sports lessons and being 'reluctant to move'. There is no evidence that these were local residents, or that the same people ever came back, but this shows once again that the schools were served notice of people using the field as of right, and interrupting school use at the same time, but did nothing about it.
- Perhaps most telling is the evidence offered by Mr Sykes, Head of Faculty, in his letter. He has been teaching at Barton Court school for the full 20 years, and he reports that 'trespassers', as he calls them, use the field. His description is revealing:

> "a day does not go by in the summer term when my colleagues and I do not suffer harassment, verbal abuse and physical threats form [sic] trespassers who seem to feel it is their 'right' to walk or cycle right through the middle of a P.E. lesson or exercise their dogs on the fields"

I do not condone rudeness or aggression, but it is important to note two things: firstly Mr Sykes does not say that these people are local residents and there is no evidence that they were. Secondly, whoever they were, these people were clearly interrupting the school's use and thereby putting the school on notice that they were using the field 'as of right'. Mr Sykes is quite explicit about this, reporting that they "seem to feel it is their 'right'...". He tells us also that this happens often – he has been here 20 years and he says this happens every day in the summer term – we note the use of the present tense to indicate that it has always happened, and is not new. He does not restrict his description to any one year, but is speaking generally. This considered written evidence makes it very clear, in addition to the other evidence cited above, that the school has always been on notice that people are using the field 'as of right' and yet they did nothing material about it.

35. In *Laing* and also in *Lewis* Justice Sullivan is at pains to say that the key issue is whether the local people 'interrupted' the landowner to the extent that the landowners must have known of the local people's claim to rights over the land. All the evidence cited above, especially that from the schools themselves, makes it abundantly clear that the landowners were frequently interrupted in their use of the land by local people and that they took from this the understanding that those people were thereby claiming rights over the land. I have cited the evidence of Mr Sykes. He has been at the school throughout the 20 year period, and he is not a junior member of staff but the Head of Faculty. He tells us that in the summer the school's use of the land is interrupted every day – 'not a day goes by' without interruption. He reports that the se people *"seem to feel it is their 'right' to walk or cycle right through the middle of a P.E. lesson or exercise their dogs on the fields"*, and he thereby tells us two important things, a) that school activities were regularly interrupted, and b) that he takes this as an implicit claim that they are asserting their right to be there.

I submit that is powerful and conclusive evidence, along with the other evidence adduced above, that the landowners in this case were made fully aware, through the kind of interruption and claim to rights which Justice Sullivan considers significant, that local people were using the land in ways tantamount to a claim of rights. I submit that not only would a reasonable landlord draw this conclusion, but that the schools in this case *did in fact* draw

that conclusion, and tell us so in their own testimony. The schools were therefore on notice to do something about it if they wished to do so.

- It does not matter if these people were residents of the parish or not, since the point here is that no matter who they were, the landowners had been put on notice that their rights were being challenged, and furthermore the schools believed that it was local people who were making that claim.. It cannot therefore be claimed that the landowners in this case were not aware of these claims. However, they did not then respond as they could have done, by setting up notices or by other significant means, so as to challenge the rights of these local people. As your Divisional Director put it in the Heartenoak case, the landowners failed to give any of the local residents "cause to question their right to use the playing field."

36. In short, as my advisers point out, whereas the landowners in the *Laing Homes* case might have argued that they had no idea that residents were using the land 'as of right', no such claim is credible in this current case. The evidence shows unequivocally that the landowners were all along, as you put it in your letter, *"aware that the recreational users believed that they were exercising a right to be there"*. They might not have accepted this right if they had been asked directly, but the point is that in practice they acquiesced in this use, and its associated claim to a right, by their failure to erect any signs at all and their failure to prevent access by repairing the fence adequately or at all, or to take any other notificatory action asserting their right. This demonstrates that the discussion of this particular aspect of *Laing* in your letter is significantly different from the current case, and does not have a bearing on it.

I submit that these facts, supported by explicit evidence, render the point from *Laing* inadmissible as an obstacle to my application.

Croxley Green

37. A particularly relevant precedent in this area is the TVG application related to Croxley Green, Hertfordshire, in which the inspector was Ms. Wood herself[9]. This was not a High Court judgement, but it is nonetheless instructive. Since the Croxley Green case has close

[9] Report: In the Matter of an Application to Register land at Croxley Green, Hertfordshire as a Town or Village Green, REPORT of Miss LANA WOOD 21 September 2007 , Hertfordshire County Council.

parallels with the Canterbury case in this aspect (though not in all), and echoes what I have argued above, it is worth quoting Ms. Wood's report on this particular matter at length:

> **Other legal aspect of the "as of right" test**
> In respect of the requirement of "as of right" in its wider context, reliance is placed by TfL/LUL [*one of the objectors*] on authorities [footnote here reads: *They rely in particular on* ***Laing Homes*** *in this context*] which suggest that use of the land by inhabitants has to be such that the landowner would be aware that users were asserting a right to use his land for sport and pastimes and that a landowner would appreciate the nature of the right being asserted.
>
> The Applicants refer to the guidance given by Lord Hoffmann in ***Oxfordshire*** where he held that Sullivan J. was incorrect in ***Laing Homes*** that low-level agricultural operations by a landowner were inconsistent with an assertion of use as of right by local inhabitants. At para.57, Lord Hoffmann held as follows:
>
> "... No doubt the use of land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so "as of right". But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes if they were not."
>
> It follows therefore that where a landowner uses his land for his own purposes but this does not in fact interfere with the use made of land by local inhabitants, it is not correct to infer thereby that use by the local inhabitants was not as of right. *[emphasis added]*
>
> LUL/TfL [*the objectors*] refer to the invasive survey of parts of their land in 1993 (see PR p.175). This is relied on as evidence that local inhabitants deferred to the landowners actions and rely in that context on the ***Laing Homes*** decision (see Mr Mynors submissions at para.64). **This submission is wrong in fact and in law.** *[emphasis added]*
>
> So far as the facts are concerned, the evidence of A's witnesses is that they do not recall these short-lived operations or, if they did recall them, the operations did not interfere with their use of the land. Furthermore, those responsible for the survey (a) avoided disturbing the open area of land (see PR p.181 (1st para on page) and (b)

recorded user on the land while the operations were taking place (*ibid.*). There was therefore, in fact, no interruption giving rise to a conflict between local inhabitants and the actions of those instructed by the landowner. *[emphasis added]*

In law, the approach in ***Laing Homes*** must now be considered in light of Lord Hoffmann's guidance in *Oxfordshire*. If the invasive survey carried out by TfL/LUL was not in fact inconsistent with use by local inhabitants there is no reason in law why the activities should be regarded as inconsistent and therefore amount to evidence that use was not as of right. The surveys done in 1993 here are the equivalent in fact and law to the "low level agricultural activities" in ***Laing Homes*** which Lord Hoffmann held were not to be regarded as inconsistent with use as of right."

38. Ms. Wood recommended that the land (except for one part of it which for other reasons did not qualify) be registered as a Green, and indeed it was then registered. I would draw attention to one key part of her reasoning here:

"It follows therefore that where a landowner uses his land for his own purposes but this does not in fact interfere with the use made of land by local inhabitants it is not correct to infer thereby that use by the local inhabitants was not as of right ...." *[emphasis added]*

39. My advisers concur completely with Ms. Wood here that the issue is one of evidence, so that if we find that the landowners' use does not interfere with residents' use *in fact*, then it follows that it is incorrect to infer that use by the latter was not as of right. Ms. Wood is here arguing precisely as I did above (and as Mr Petchey did), also citing Lord Hoffman. In your letter there has been no attempt to address the evidence to see what the facts were – you treat this as a matter of simple principle. However, it is clear from the evidence (which we will consider further below) that the schools' use *in fact* did not interfere with residents' use in any way.

40. If we look into the Croxley Green judgement further, we note that Ms. Wood has usefully set out the tests which can be used in such cases, and the main one for our purposes is her number 7:

7. The test is not whether the landowner's conduct would be in breach of the Victorian statutes but whether the landowner's own use would prevent the landowner from regarding recreational user by local people from being "as of right" i.e. *whether the landowner's use was so "low-level" that it could coexist*

> *with use of the land for lawful sports and pastimes, so that he would not consider that by making use of it he was preventing the local inhabitants from using it as of right, or whether the land owner would perceive that his use of the land was inconsistent with its use by the local inhabitants for lawful sports and pastimes.* *[emphasis added]*

In general my advisers would agree with this, with one proviso. Ms. Wood refers to 'recreational user by local people' and 'local inhabitants' implying that this might refer specifically to local residents, but it is important to note that this goes beyond what Justice Sullivan and Lord Hoffman said. We note that Justice Sullivan said:

> 82. Thus, the proper approach is not to examine the extent to which *those using the land for recreational purposes* were interrupted by the landowner's agricultural activities, but to ask whether *those using the fields for recreational purposes* were interrupting Mr Pennington's agricultural use of the land in such a manner, or to such an extent, that Laings should have been aware that *the recreational users* believed that they were exercising a public right. If the starting point is, "how would the matter have appeared to Laings?" it would not be reasonable to expect Laings to resist the recreational use of their fields so long as such use did not interfere with their licensee, Mr Pennington's use of them, for taking an annual hay crop.

Lord Hoffman likewise refers to "persons using it for sports and pastimes". In other words, the landowner, the schools in this case, need not believe or know that the people using their land are local residents. Any recreational users can in effect give notice that they are claiming a right of use, no matter who they are or where they live.

With this proviso we can borrow Ms. Wood's test in the Croxley Green case to make these points:.

a) we are in this point considering recreational users in general, not local inhabitants specifically (since the landowner could not reasonably be expected to tell the difference)
b) the key point is whether the landowners could have been expected to be aware of their claims of use
c) the interruption does not need to be total: it needs to be only 'in such a manner, or to such an extent,' as to make the landowner aware of that claim.

With this in mind we can see that in our case the schools were aware of users' claims to use 'as of right' all along, with a teacher, a headmaster and a governor, for time periods covering the whole 20 year period, even referring to the recreational users as using the field as if they believed they had a right to use it. The school witnesses even use the word 'right' in their testimony, showing that they realised the claim was for more than casual use.

In summary, it is clear from the evidence that the landowners' use in Canterbury was of a kind which certainly could coexist with residents' use in the way which Ms. Wood describes for Croxley Green. As I noted in my preamble above, the schools were very relaxed about the field from the 1960s until around 2007, and because of their other extensive sports fields they did not use it as much as now they might claim. We recall the evidence from Lt Colonel White and the Garrards, cited above, that the schools have always used the field relatively little. It is also clear from extensive residents' testimony that they, and people they saw, used the land frequently for all kinds of recreation. This would seem to conform to the description offered by Ms. Wood in the Croxley case of a situation in which the two co-existed together amicably for more than twenty years. The schools might not agree with the word 'low-level use', but this is a matter of evidence – I submit that if their use was of a kind which did not interfere with the residents' use, as it clearly did not, then it was of a *low enough level* to fit into the required definition.

We can see the truth of this also in what the landowners did *not* do. We have already seen that the schools clearly knew all along of users using the land 'as of right', and now acknowledge that in their testimony, but in practice the school authorities were very relaxed about residents' use throughout that time. Despite the protestations which emerged after my application, we need to remind ourselves that:

1. There is no evidence of anyone being ejected from the land.
2. There is no evidence of the police ever being called, even once in twenty years, to deal with anyone on this land.
3. There is no evidence of any repeat offenders being identified.
4. There is no evidence of any resident being asked to leave the land. On the contrary, of the 60 or more witnesses not one reports this ever happening in twenty years.
5. The schools have produced no evidence of any formal procedures or policies for dealing with intruders on the field.
6. There is no actual evidence of a consistent programme of fencing and fence maintenance (e.g. letters, bills etc.).
7. There is no credible evidence of any signs or notices of any kind.

This must persuade any independent observer of the fact that there is clear evidence that the landowners were on notice and well aware of the implicit claim to rights. Ms. Wood in the Croxley Green case recommends that we consider whether "*the land owner would perceive that his use of the land was inconsistent with its use by the local inhabitants for lawful sports and pastimes*". Surely if a landowner did seriously perceive this, then s/he would take some action at some point in the twenty years. The very lack of action in this case, over a 20 year period, is therefore most significant, and demonstrates that the landowners, even though they knew full well of the claim to a right to use the land, and had testified to regular interruptions, acquiesced in residents' use.

In short, although of course it has many differences, the Croxley Green judgement allows us to apply the same reasoning in the current case, borrowing our main text from Ms. Wood's findings as the Inspector, but adding in what is relevant to our circumstances, to give this conclusion:

> If the *[school sport and games]* carried out by *[the schools] [were]* not in fact inconsistent with use by local inhabitants there is no reason in law why the activities should be regarded as inconsistent and therefore amount to evidence that use was not as of right. The *[school sports and other activities]* here are the equivalent in fact and law to the "low level agricultural activities" in **Laing Homes** which Lord Hoffmann held were not to be regarded as inconsistent with use as of right.

41. Since it is abundantly clear from the evidence that school activities were not in fact inconsistent with use by local inhabitants, since both continued throughout the 20 year period perfectly amicably, partly because of the relatively low level of school use, and despite the schools testifying to knowing of the competing claim to rights, I submit that in this case also that there is no reason in law to decide that user as not as of right, contrary to the suggestion in your letter.

Section 5: DEFERRING

42. The last main point in your letter concerns the way in which residents used the land in question, and asks whether they perhaps 'deferred' to the landowner. You offer the possibility that perhaps:

The landowners' use of the land during the material period for the purposes of school playing fields was a use which conflicted with the use of the land as a place for informal recreation by the residents of the locality.

The advice received from Counsel is therefore that, *prima facie* at least, use by local inhabitants (and others) of the land comprised in your application deferred to the primary use of the land by the landowners and hence was not "as of right" within the meaning of the definition of "town or village green" contained within the Commons Act 2006.

44. In the first place, as I have already noted, there is no evidence that the landowners' use in practice actually conflicted with the residents' use. The only (alleged) conflicts were with people whose identities we cannot know, and who cannot be germane to this case. Although it is clear that the schools knew about the use and the implicit and even explicit claim to rights that this signified, they seemed to accept this and did not take any substantial action, such as putting up signs, or taking legal action against the alleged intruders. The schools do not identify any local residents in their evidence. In addition, in all of the testimony from many legitimate residents of the parish there is no suggestion of conflict of these kinds. This means that your first point, that the landowners' use "was a use which conflicted with the use of the land as a place for informal recreation by the residents of the locality." was simply not true in fact. To borrow Lord Hoffman's word in the Trap Grounds case, there was "give and take" on both sides and both parties used it. The land in question is quite large, and this means that I could perfectly well be running with my son in our usual place, in the mid afternoon during school hours, while schoolchildren played cricket at the other end of the field. I did not defer to them, but continued as of right, in fact believing I had a right, and without challenge. In short, while a *prima facie* assumption might be that such harmonious shared use could not happen, the actual experience of the field over 20 years shows that in fact it can, because on the whole it did.

With regard to your other points, since your letter drew on Ms. Wood's advice, I shall address these questions by looking in detail at her Advice itself.

45. Ms. Wood has, in section 22 of her advice, usefully set out a procedure for considering the issues. If we look at point 6 of her procedure, we note that she says:

> *"Recreational user which defers to agricultural user is not "as of right" **because it does not have the appearance to the landowner of the assertion of a right.**" [emphasis added]*

In this Ms. Wood agrees with what we said above, citing Justice Sullivan in *Laing* and in *Lewis*, namely that the key factor to start with is "the appearance to the landowner". However, Ms. Wood looked only at the evidence which supported my application. She says in section 27:

> *I have considered only the applicant's evidence on the relevant point, as to do so avoids any necessity to resolve any conflict of evidence between the applicant's evidence and the objectors' evidence*

This is understandable, as it is an attempt to speed up the process. However, I suggest that it would be more suitable to start with the evidence offered by the objectors, including the evidence offered by the schools as summarised above, since from this we can see that the landowners were always on notice that other users were using the land 'as of right'.

I have already submitted above that the landowners in this case knew, by their own admission, that local users were using the land, interrupting their own activities on a regular basis, and doing so in ways which suggested that they were claiming rights over the land. They have told us so clearly in their own testimony. This means that we do not need to investigate further any issues relating to deferring, since the issue of deferring is only relevant in law, I suggest, if there is no other evidence of what the landowners knew or did not know.

For these reason I submit that the remainder of the discussion about deferring is not relevant in law and can and should properly be discarded. However, in order to take account of Ms. Wood's discussion in full, in case it should become of relevance later, I will consider it here in more detail.

46. Firstly, I would say that we are very grateful to Ms. Wood for addressing the evidence in such detail, and with such consideration, since we feel that it is only right that local residents' views be taken into account as fully as possible. However, I respectfully suggest that there is scope for an even more comprehensive analysis, since not all the evidence presented has been fully taken into account in her discussion. To take just one example which springs to mind, she makes no mention in her discussion of the letter from Solihin and Sofiah Garrard of 11th February in which they say:

> "teachers from both Barton Court and Chaucer schools seemed quite happy for the family to use the field even when they were taking games lessons at the same time".

This is clear evidence that this family used the field at the same time as the schools, yet it features nowhere in Ms. Wood's analysis. For this reason we submit that there is scope for further analysis of the evidence, and we would reserve the right to carry out or request such an analysis if it would be beneficial in future.

47. My legal advisers have looked closely at Ms. Wood's analysis and opinion, and they note to start with that the position in law related to deferring is very unclear. Even Justice Sullivan himself admitted as much in paragraph 72 of the recent *Lewis* judgement, saying: *"It does seem to me that the ambit of the deference principle is something which is not determined"* and he accordingly allowed that case to go to appeal. I submit therefore that if it is decided, contrary to my submission above, that deferring is relevant to this case, then KCC should await the clarification which will result from that appeal before deciding on this application.

48. Nonetheless, my advisers also note that Ms. Wood's analysis seems not to take account of an important part of the *Laing* ruling. Ms. Wood says in conclusion:

> *40. In my judgment the overwhelming majority of the evidence on behalf of the applicant which referred to times of use suggested use during out of school hours only.*

I will respectfully suggest below that this is not a correct reading of the evidence, but nonetheless she continues:

> *The evidence suggests that the majority of local residents' use deferred to use of the application land by the schools. Recreational user which defers to use by the landowner is not user "as of right" because it does not have the appearance to the landowner of the assertion of a right.*

In short, Ms. Wood is treating *evidence of use outside school hours* as in itself *evidence of deferring*. My advisers consider, however, and I submit, that this fails to take account of a key ruling in Laing. The relevant paragraphs are as follows. Mr George, for the claimant is mentioned in paragraph 90:

> *[90] Mr George submitted that in an application for registration of a village green under s.22(1) it had to be shown:*
>
> *a) that the use was sufficiently frequent throughout the day, as opposed to frequent at certain times and infrequent at others*

However, Justice Sullivan comprehensively rejected this, as follows (emphasis added):

> *94. I do not accept the Claimant's proposition (a)(above). It is not suggested that it is supported by any authority, and it would appear to be an attempt to impose a more onerous test than that set out in the Ministry of Defence and Sunningwell cases (above). The Inspector realised that the level of use would vary, at different times of the day and on different days: "I have already acknowledged that some of the regular users had a tendency to go on the land in the early mornings, the evenings or at weekends, but this is by no means true of all users" (14.20).*
>
> *95. I accept Mr Morgan's submission that since village green uses are, by their very nature, leisure related, it would be most surprising if there was a requirement that lawful sports and pastimes should be carried on sufficiently frequently throughout daylight hours at all times of the year.* ***Most recreational activities will, by their very nature, be enjoyed by the local inhabitants outside normal working hours, at the weekend and during the school holidays. Outdoor recreation is likely to be more frequent in the summer than in the winter. A similar pattern of use would have been expected on customary village greens.*** *When the custom was first established working hours would have been much longer, and the time available for recreation on the village green correspondingly shorter.*

It is clear that this ruling makes in unacceptable in law to require an applicant to show user at particular times of day as opposed to other times of day. More specifically, Justice Sullivan rules (in the highlighted section) that typical village green use will take place outside of normal working hours, in the evenings and at weekends.

In her Advice I respectfully submit that Ms. Wood is doing what Mr George in *Laing* did, namely requiring evidence of use at particular times of day as opposed to others, whereas in fact the use she has identified in her analysis is classic village green use according the Justice Sullivan's ruling. As such I submit that it is contrary to Justice Sullivan's decision to treat such natural village green use as Ms. Wood has identified as deferring. To put it another way, it would not be reasonable for a landowner to view such use as deferring in itself, since it is only to be viewed, according to Justice Sullivan, as a natural pattern of village green use.

47. Having considered the legal reasons why I submit that Ms. Wood's analysis is not in fact a material obstacle to my application, I will turn to her analysis itself. In the discussion below

I would reserve the right to question her interpretation of many of the witnesses' intentions at a later stage, should it be necessary, but for the sake of argument I will take Ms. Wood's analysis entirely at face value and consider her analysis and figures exactly as she has presented them. I would only point out a few minor errors, as follows:

1. Ms. Wood offers 62 numbered witnesses in her table. However, she has two witnesses both numbered 56, Swindley and Bothwell. If this is corrected, and my own name added, the total should be **64**.
2. In her analysis a number of witnesses are repeated, giving the impression that there are more voices in support of the point she is making than in fact there are. For example, De Caires and Long are cited in both her sections 31 and 34, Hadler is counted in both sections 34 and 36, Dee is counted in sections 31 and 38. I submit that it is more balanced and fair to count each witness *only once* to give a true picture of the balance of evidence.

For this reason I have revised the analysis only in these two ways, and I have then counted the witnesses, following Ms. Wood's analysis for the sake of argument. Here is the analysis quoted directly from Ms. Wood's Advice (column 1) with my count in columns 2 and 3:

Ms. Wood's text	My count: WITNESSES WHO REFER TO USE OUTSIDE OF SCHOOL HOURS	WITNESSES WHO DO NOT REFER TO USE NECESSARILY OUTSIDE SCHOOL HOURS ONLY
31. The following witnesses referred to use at weekends only: (1) Taylor and (2) De Caires; (5) and (6) Dee; (9) Cooper; (26) Cogger; (43) and (44) Long. The following witnesses referred to their own use (before the relevant period) having taken place after school and at the weekends: (24) and (25) Walker.	**8** **2**	
32. The following witnesses in their questionnaires or interviews suggested daily use without specifying whether that use was during or after school hours: (12) and (13) Pick; (14) and (15) Andrews and (16) Wade ("all the time"); (21) Hummerstone and (22) Samson; (31) Beryl Wilson.		**6** *(excludes Wilson and Wade, owing to discussion in para 33)*
33. In her letter (16) Wade clarified that her family's use had taken place after school and in the weekends and holidays. (31) Beryl Wilson in her November 2007 letter stated "I personally like to hear young people playing football or cricket during the summer evenings." and expressed her hope "that you will make this area accessible to the local	**2**	

residents out of school hours." In her 12th February 2008 letter she referred to use by her children "during light summer evenings". Thus although both these witnesses had referred to daily use in their questionnaires, in my judgment it was clear from their letters that the daily use referred to was outside school hours only.		
34. (40) Denise and (41) David Young referred to their family's use of the land "along with other local residents … outside of school hours, especially during the summer months at weekends."((47) Ashdown's children's use had been during the school summer holidays.((33) Dance and his partner and friends used the playing field during "many out of school hours".((2) de Caires referred to use by many young people from the neighbourhood "at the weekends and during the school holidays".((46) Hadler states "In 1980 I started as a pupil at the Geoffrey Chaucer School (now Chaucer) and at this point first used the playing fields out of school hours due to new friends on the Barton Estate and in Querns Road."((43) Long reports "My children regularly played football and other sports after school and at weekends. The field was invaluable to us during holidays".((53) Huw Kyffin states: "I have lived in St Augustine's Road since 1986 and have regularly used the field myself for recreation, as do many others in the area. I know that the field [is] used by two local schools – Chaucer Technology College and Barton Court School as a playing field, but there has always been access to the field and use is made of it during those times when the school is not using it."	*= 8. However, de Caires (2) is repeated, Long (43) is repeated so this is counted as* **6**	
35. Two letter-writers when expressing their opinion that the application land should remain available for use by the public, qualified this desire as referring to times when the land was not required for use by the schools. (27) and (28) Graham stated "We believe [the application land] should remain accessible to the public when it is not required exclusively for use by Barton Court and Chaucer Technology Schools" and (3) and (4) White stated "The schools only use the field for a few hours a week. It should be available at all other times to the public, like sports grounds elsewhere, e.g. Tonbridge." In my judgment these wishes as to the future were likely to reflect what the letter-writers regarded as the status quo before the fence was erected.	**4**	

36. It is possible that the following two letter writers intended to suggest that use occurred during school hours: (46) Graham Hadler wrote "The field has been used harmoniously between the schools and residents for decades" and (51) Mrs Lesley Long stated "The field has for many years been open to local residents' families to use for recreation, particularly at weekends and during school holidays", although in my judgment their letters could also be read as referring only to use outside school hours.	= 2. *However, Hadler is repeated, so this is counted as* **1**	
37. The evidence of three witnesses suggests that those witnesses used the application land at the same time as it was being used by at least one of the schools. (58) Mrs Garland states that she used the application land before or at the very beginning of the relevant period, when she lived in nurses' accommodation in St Augustine's Road (1984-1987) to picnic and sunbathe, and reports that no-one told her that she should not be there, even the teachers when the school was using the land. Dr Bax, the applicant, states in his response to objections that he used the field whenever he went there whether or not the schools were using it, simply because the field is so large that one set of users does not disrupt other users. It is not clear in either case whether the witness used the land when it was being used by both of the schools, or whether the witness used one part of the field when one school was using the other. Certainly Dr Bax's evidence tends to suggest the latter. I also note that Dr Bax's evidence contained in his response to objections goes beyond the evidence contained in his statement in support of the application dated May 2007 (page 5) where he states that the land is "used for recreation outside school hours" and does not suggest that he has used the land at the same time as the schools. (62) Tanya Taylor is the only witness whose evidence seems to be inconsistent with the suggestion that her use deferred to use by the schools to any extent. She states: "Sometimes the schools used the field at the same time but there was never any conflict. I was pupil of both schools during the nineties and never heard any complaints about the state of the field or its use. In fact sometimes in P.E. lessons teachers used to point out passer-by's good running technique or athletic progress." NO – another letter also		= 3 (+ the Garrard family whom she does not mention) However, Ms. Wood did not mention the Garrards, so I will leave it as **3**
38. Two letter-writers specifically state that both they and other local residents deferred to the	= 2. *However, Dee is repeated, so this is*	

schools' use of the application land in their use of the land: (5) Peter Dee writes: "the local community has always recognised that the schools have priority in the use of the area and have never contested the exclusive needs for privacy when school sports activities are scheduled. … My study window is within ten metres of the new fence… and it is possible to observe how well the local people have enjoyed using the playing field outside school hours. … I have lived close to Barton Playing Field for 32 years and have always enjoyed free access in the evening, at weekends and during school holidays because there has always been a gate left unlocked until the last two months." (29) Tracey Filmer states: "The field has always been open to the public and is used for a variety of purposes after school hours, at weekends and in school holidays….I have always respected the school's priority use of the field and would not dream of walking my dog if any school activity was taking place. I know this respect is shown by other members of the community."	*counted as* **1**	
TOTALS:	**24**	**9**
	[Hence 33 unique witnesses in total are mentioned and analysed by Ms. Wood]	
39. The evidence of the other witnesses relied upon by the applicant was equivocal as to when the use took place.	This means that as there are 64 witnesses, that leaves 31 whose evidence is considered to be 'equivocal'	31 witnesses are down as 'equivocal'. But equivocal could mean *'I used the land when I wanted, with no regard to time'*
	24 outside school hours	**= 40 for whom there is *no evidence* at all that they restricted their use to outside school hours**

In summary, using Ms. Wood's own analysis there are 24 witnesses whom she considers to have said they used the field outside working hours. (I would disagree with her interpretation of these witnesses' statements, and would note that none of them ruled out *also* using the field within school hours. However, for the sake of argument let us persist with Ms. Wood's figures and analysis.) We should, I submit, include the 31 witnesses whom Ms. Wood describes as 'equivocal', as it would be unreasonable and analytically incorrect to leave them out completely, as that would give a 'false positive' in statistical terms. This means that of the 64 witnesses we have here, 24 say they use the field outside of school hours, but the overwhelming majority, 40 out of 64, (62.5%.) make no such statement or indication.

This does not support the suggestion that the majority of users testify that they used the field outside of school hours. It certainly does not support any claim that the majority of users 'deferred' to the schools – there is no evidence for that claim. On the contrary, it shows that the majority of users (62.5%) do not testify that they used the field outside school hours, and therefore make no explicit or implicit admission of any sort of deferring.

Ms. Wood suggested that *"the overwhelming majority of the evidence on behalf of the applicant which referred to times of use suggested use during out of school hours only." [my emphasis]*. However, I submit that a full analysis should look not only at evidence which 'referred to times of use' (and indeed I am confused as to why Ms. Wood restricted her analysis only to a part of the evidence), but it should look at *all* the evidence. If we do this we see that, contrary to the inference drawn by Ms. Wood, we must of necessity conclude that:

"the overwhelming majority of the evidence on behalf of the applicant did not suggest use during out of school hours only. A minority of evidence suggested this (37.5%) but the clear majority of evidence (62.5) suggested no such thing."

The legal meaning of deferring

48. My advisers point out that the legal meaning of 'deferring' in these cases is still contentious. However, they note that it must be something more than using land in a way which is typical on actual Village Greens.

In the recent *Lewis* case, as we have noted above, Justice Sullivan himself said in paragraph 72 that: *"It does seem to me that the ambit of the deference principle is something which is not determined"* and he accordingly allowed the case to go to appeal. We submit that in that case Jeremy Pike QC was correct to state (para 63) that the interpretation of deference as presented in *Laing* and in *Lewis* is incorrect in law since it fails to take account of Lord Hoffman's statements in Trap Grounds relating to 'give and take'. We submit that in the current case there is no evidence of deferring of any kind, with the possible exception of 2 witnesses, and that it is incorrect in law to treat normal village green use outside of school hours, and other use such as is exhibited in this case, as deferring.

You kindly sent me the judgement related to the Recdar case. I submit that there are important difference between this current case and the Redcar case. Firstly, in the Redcar case the ownership of the land was known to local people, whereas in this case it was not.

Therefore I submit that any behaviour on their part could not have been owing to acknowledgement of any right, since they did not know or suspect any such right.

Secondly, in the Redcar case the inspector, Mr Chapman, found that the residents admitted in testimony that they knew of the Golf Club's existence and as a consequence when someone was playing they stopped accordingly – in other words they seemed to acknowledge *in their testimony* that the Golf Club activity had a prior right. The first important point is that Mr Chapman, the Inspector, tested that evidence in great detail, reporting that "[t]his issue was the subject of exhaustive evidence during the six day public enquiry". He did not simply, at the start of the enquiry, take the *fact of stopping* to be the deciding factor. Instead the deciding factor for him was admission by residents in their testimony of their acceptance of the prior right of the golfers and the golf club. In that case, Mr Chapman, in the light of that testimony, was justified in deciding that they had deferred.

51. This current case is therefore manifestly different from the Redcar one in these crucial respects. Here in Canterbury, most residents did not even know that the schools owned the land in question. It will be recalled that in my *Response to Objectors* (January 2008) I cited written evidence from 16 residents showing that they did not know who owned the land, but thought it was public, and genuinely believed that they had a right to use it for recreation. A host of other residents could testify to the same – in fact I doubt if there is a single one, or even a single teacher in either school, who actually knows the full ownership status of the land even now. There were (and are still) no signs or other indications to suggest ownership, and we all know that the issue of ownership in this case is a muddy one.

This means that even if residents had changed their behaviour, for example by keeping out of the way during a school match (and there is in fact no evidence of this), this could not possibly be tantamount to deferring, since they did not know of or accept any prior right, and therefore could not defer to it. They would be acting merely through plain common sense, politeness or perhaps to avoid sudden physical pain.

52. In addition, as I have shown above the landowners in this case knew all along of local people's claim to rights over the land, but they did not take the necessary action to inform local people to the contrary.

Summary of the issue of deferring

56. Let me here summarise my submissions regarding the issue of deferring. I submit the following:

a) In this case the evidence is overwhelming, from the testimony of the schools themselves and others, that the landowners' use of the land was interrupted to the extent that they knew of local people's claim to rights to use the land.

b) The fact that the people who interrupted are unknown is immaterial – the key thing is 'how it appeared to the landowners'. It is clear from their own testimony that it appeared to the landowners that local people were constantly, regularly, every year and every day in the summer, interrupting the landowners' use and doing so in a manner which suggested that the local people had a right to do so.

c) For this reason the issue of deferring is irrelevant, since it was adduced in *Laing* and *Lewis* only for its relevance to how things appeared to the landowners. Since in this case we already know this, we need not seek further to look at possible deferring.

d) In any case, I submit that, following *Laing*, it is an error in law to treat use which is predominantly outside of working hours as deferring, since the *Laing* ruling clearly accepts that such use is normal village green use. Such use, I respectfully submit, cannot also be considered as deferring.

e) I submit that the analysis offered by Ms. Wood is admirably detailed, but it omits some important details and interprets testimony in ways which I would seek in future to revisit if this is needed.

f) I submit that where we are seeking to establish what the majority or minority view was, it is correct in law to consider in our figures all the evidence and testimony, and not to exclude that which is allegedly 'equivocal'.

g) I submit that if we do so, the majority of witnesses (62.5%) do not offer any evidence at all of using the field outside of school hours only, or of other acts of deferring. The minority who did state that they used it outside of school hours did not say that they exclusively used it at those times, and also they were using the field in normal village green fashion, and not deferring.

h) I submit that it was impossible for residents in this case to defer, since they did not know or acknowledge that anyone else owned the land or had any prior right to use the land. If they did not know this then they could not correctly be deferring.

57. I submit therefore, that in terms of all the possible objections which you have been kind enough to bring to my attention, we can say three things:

a) in all of the witness statements and other testimony, there is no substantive evidence to support any of them;

b) there is considerable legal argument to suggest that none of them is tenable or relevant in law in regard to the current application;
c) there is considerable evidence already offered by residents and the schools themselves to show that they are not sustainable in fact.

Fencing and PE staff

58. Ms. Wood, in paragraph 26 of her Advice, raised the possibility of further investigating the two issues of a) the fencing and b) whether local inhabitants using the application land were asked to leave when seen by P.E. staff from the schools, so I will briefly comment on these issues:

59: *Fencing:* In my March submission (entitled Part 3, Final summary) I summarised the discussion over the fencing and suggested that there was no evidence that there was ever in the whole 20 year period fencing which prevented access, and that in any case there is substantial evidence that users accessed the field by means of open gates. I noted that Mr Slater, on behalf of the schools. conceded the fact that

"It is true that fencing of itself does not necessarily indicate ownership or prohibition"

Mr Slater tried to argue that there was complete fencing around the site all the time, contrary to the evidence of many witnesses. I would draw attention to a statement by Mr. R Sykes, whom we recall was a senior member of staff at Barton Court and had been there for twenty years. He said in his written submission:

> *"Open access to the field has prevented Barton Court from being able to 'manage' the site effectively"*

This shows conclusively that the situation laid out in my previous evidence is accepted by the school staff – namely that the fields were openly accessible, as can be seen by his phrase 'open access', and his complaint about it. This again undermines Mr Slater's official stated position that *"two people who have long connections with the school are quite able to confirm that there was complete fencing"*. Mr Sykes has been intimately involved in the school day by day for twenty years (unlike Mr Slater, who is a governor) and to him the situation was one of 'open access', and not complete fencing.

I submit that given this written evidence concerning the fencing from the objectors themselves, along with the other evidence adduced in my previous submissions, there would be no benefit in reopening this issue, on paper or in a costly public hearing.

60. *PE staff and local residents:* Ms. Wood also considers that it might be useful to revisit the issues of "whether local inhabitants using the application land were asked to leave when seen by P.E. staff from the schools". I am confused about this since in the testimony of 64 people not one witness testifies to being asked even once by PE staff or any other school staff to leave the field in the whole 20 year period. It may be that school staff told some people to leave but even if this is so we have no idea who these people were, and no evidence that they were local.

I submit that the evidence is strong that local residents were not told to leave the field by any school staff in the whole 20 year period. In my interviews I specifically asked the question, and every respondent said they had never been asked to leave the field.

I submit therefore that it would not be necessary to reopen this issue at public enquiry, since I do not see how any evidence could be so strong as to overcome the weight of 64 resident witnesses. Of course, as I said above, I am not averse to a public enquiry if KCC feel it would be useful. However, as things stand I submit that the evidence in favour of my application is so such that this case does not need any such further investigation.

61. For the reasons set out in this letter and appendices, therefore, I would request that your legal team, in consultation with Ms. Wood or someone of similar standing in this area, reconsider the possible objections put forward in your letter. If as I submit, my application has therefore met all legal requirements, I would then request that you recommend to the Regulation Committee Member Panel that there is no legal impediment to my application being approved, so we can move forward to registration.

A vision for the future

62. In my view this case is a surprisingly straightforward one in comparison with most of the many Town or Village Green applications I have come across. Here we have a piece of land which was bought with public money for public recreation in the 1940s. The Cricket Meadow, as it was called, was bought "for the purposes of public walks and pleasure grounds", and although it was then given over to schools in the 1960s, it simply continued to be used by the public of parish for recreation and sport just as on any normal Village Green. It had, after all, been used in this way perhaps for hundreds of years. The schools, having their own sports fields, treated this land as surplus to requirements, and although they used it now and again, and they saw that others used it, and took no substantive action to prevent or challenge them, not even putting up signs nor seeking in any other substantive way to advertise their ownership or to prohibit or hinder access, or in any other way to assert their

rights and to oppose the rights of local people. For more than twenty years, then, many people in the parish community, in significant numbers, used the land amicably and to the mutual benefit and enjoyment of all, for lawful sport and recreation.

For me this is exactly the kind of case which Parliament had in mind when it set out its legislation on registering Village Greens. It is the kind of shared use which Kent County Council should surely encourage and promote. It has been shown that there is no impediment in law or in practice to registering school playing fields as a Village Green, and indeed if the land is registered the schools have a legal right to continue to use it for those purposes, and can take action against anyone who prevents them, as Lord Hoffman has made clear. It is furthermore the aim of local residents, both individually and through the local Residents Associations, to work with the schools to ensure not only shared use but also shared responsibility in all aspects of the field's maintenance and preservation as a place for organised and *ad hoc* sports and recreation.

For legal reasons, therefore, but also for the sake of community, for the sake of public health and welfare, I invite KCC to approve my application to make this land a Village Green and therefore safeguard it as a place for continuing sport and recreation for the whole community.

I would be pleased to offer any further information, evidence or discussion should that be needed. Meanwhile, thank you for your time and kind attention.

Dr. Stephen Bax
August 2008

APPENDIX 2: Opinion of Philip Petchey QC to 2008 Seminar on Village Greens: Law, Evidence and Handling the Public Inquiry: *Chambers of Robin Purchas QC. Francis Taylor Building*

DUAL USE OF LAND SOUGHT TO BE REGISTERED AS A TOWN OR VILLAGE GREEN

Philip Petchey

1. There were not wanting at the time people to say that the argument in *Laing*[1] and followed in *Humphreys* v *Rochdale MBC*[2] was back to front. Let me just begin by reminding you what that argument was:

65. Moreover, section 12 *makes any act "to the interruption of the use or enjoyment [of a village green] as a place for exercise and recreation ... " a criminal offence. Whatever may be the position in relation to those customary rights which had been established by* 1857, *where haymaking and recreational use were able to coexist, no such rights can have been established after the enactment of section* 12. *If a village green is established, any other use involving acts which would interrupt its use for enjoyment and recreation are effectively prohibited It is difficult to see how the various steps that are necessary to gather a hay crop (as opposed to mowing grass to keep it short and useable for recreational purposes) could be said not to amount to such an interruption.*
66. Section 29 *of the* 1876 *Act, to which the Inspector did not refer, makes any effective agricultural use of a village green more difficult. The erection of fencing ("inclosure "), or a shelter or water trough ("any erection ") to facilitate the use of the land for grazing would be prohibited, as would ploughing and reseeding("disturbance or interference ... with the soil"). The occupation of the soil for the purpose of taking a grass crop, involving the steps described by Mr Pennington (above), would not be "with a view to the better enjoyment of [the] village green", and would thus be deemed to be a public nuisance.*
67. Mr George submitted that the words "without lawful authority" in section 12 *were a recognition that pre-existing commoners' rights of grazing would continue, and were not an acknowledgement of the landowner's right to graze cattle on a village green. I agree with the Inspector (14.45) that section* 12 *permits the landowner (or his tenant or licensee) "to place his cattle on the green at least in any manner which is not incompatible with the village green rights". I further agree that*

1. I.e *R (Laing Homes Limited)* v. *Buckinghamshire County Council* [2004] 1 P and CR 36.
2. 2. Unreported, 18 June 2004, Judge Howarth.

"the converse would be that [even after 1857*) village green rights can be established in circumstances where there happens to be some lawful, and compatible, grazing ... ". Given the restrictions imposed by sections* 12 *and* 29 *(above) such grazing would have to be very low key indeed (as was the case in Sunningwell) in order to be lawful and compatible with the establishment of village green rights.*
68. For the reasons set out above I do not agree with the Inspector's conclusion that village green rights can be established where land is being used for the growing and cutting, drying, baling etc of a hay crop. The Inspector refers at the end of para 14.45 to "hay cutting". The occupation of land for the purpose of "hay cutting" is not to be equated with grass cutting. The former is no different in principle to the harvesting of any other crop. Insofar as the latter is carried out "with a view to the better enjoyment of [the) village green" as such, it will not be a public nuisance under s.29, nor will it be a criminal offence under section 12. When enacting the definition of "town or village green" in section 22(1) *of the Act, Parliament must be assumed to have been well aware of the restrictions that would be placed upon newly created village greens by the nineteenth-century legislation. Against that background, it would be surprising if Parliament had intended that a level of recreational use which was compatible with the use of the land for agricultural activities (such as taking a hay crop) should suffice for the purposes of section* 22(1), *since upon registration .. as a village green (if not after 20 years use) some, if not all, of those lawful agricultural activities would become lawful by virtue of sections* 12 *and* 29. *Moreover, the prospect of improving the land agriculturally, by fencing, or by ploughing or re-seeding, would be lost.*

2. So section 12 and section 29 are incompatible with use of land for agriculture as it was being practised at the time of the application (taking a hay crop). If the land had become a town or village green, those uses would have to stop. Therefore (essentially as a matter of law) because Laing had continued to take a hay crop at the time when the use relied upon was taking place, the use relied

upon could not be taken as suggesting to them that local people were asserting a public right[3].

3. But if the argument is back to front, it is not demonstrably wrong on that account. However we now know that it is wrong. In the *Trap Grounds* case[4], Lord Hoffmann said:

57. There is virtually no authority on the effect of the Victorian legislation. The 1857 *Act seems to have been aimed at nuisances (bringing on animals or dumping rubbish) and the* 1876 *Act at encroachments by fencing off or building on the green. But I do not think that either Act was intended to prevent the owner from using the land consistently with the rights of the inhabitants under the principle discussed in* Fitch v Fitch 2 *Esp* 543. *This was accepted by Sullivan J in* R (Laing Homes Ltd) v Buckinghamshire County Council *[2004J* 1 *P&CR* 573,588. *In that case the land was used for "low level agricultural activities" such as taking a hay crop at the same time as it was being used by the inhabitants for sports and pastimes. No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing "as of right". But, with respect to the judge,*

I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purpose of section 22 if in practice they were not.

Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application.

I have a similar difficult with para 141 *of the judgment of Judge Howarth in* Humphreys v Rochdale Metropolitan Borough Council *(unreported)* 18 *June 2004, in which he decided the acts of grazing*

3. Looking a the matter, as *Sunningwell* explained was appropriate, from the point of view of the landowner: see *R* v *Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] I AC 335 at pp 353H-353G ..

4. Ie *Oxfordshire County Council* v *Oxford City Council and Robinson* [2006] 2 AC 674.

and fertilising by the owner which, in his opinion, would have contravened the 1857 *and* 1876 *Acts if the land had been a village green at the time, prevented the land from satisfying section 22 definition (emphasis supplied).* [5]

4. It is easier to understand the second highlighted sentence than the first. The point about the first sentence surely is that looked at with a narrow focus, sports and pastimes are entirely inconsistent with the taking of a hay crop - the children making dens in the long grass will get in the way of the hay cutting machines. Looked at with a broad focus, the two activities are entirely compatible - the hay cutting on the land involves 1 day out of 365 in a year. Similarly, as regards the cattle. One cannot play football on an area where there is a herd of cows grazing. But they will not be grazing there all the time. It's common sense, really. [6]

5. Look now at that part of Lord Hoffinann's judgment in the *Trap Grounds* case dealing with the rights that are established under section 10:

50. In my view, the rational construction of section 10 is that land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner where it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the Sunningwell *case [2000J* 1 *AC* 335, *357A-C.*

5. At paragraph 57.

6. It is hard to avoid the feeling on reading *Laing* that in his judgment Sullivan J was trying very hard to find a way of holding that 38 acres of lightly used development land had not become a town or village green. Commonsense cuts two ways in this sort of context. If Sullivan J had striven less hard, he would have had to determine the human rights point. Who knows where that would have led. And perhaps Parliament would have been reluctant to enact the Commons Act 2006 if the registration of the land at Widmer End had been upheld.

> *51. This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides.* Fitch v Fitch *(J* 797) 2 *Esp 543 was a sequel to* Fitch v Rawling 2 *H BI* 393, *in which the custom of playing cricket on land at Steeple Bumpstead had been established. The evidence was that the defendants had trampled the grass which the owner had mowed. thrown the hay about and mixed some of it with gravel. Heath J said at p544:*
> *"The inhabitants have aright to take their amusement in a lawful way. It is supposed, because they have such a right, the plaintiff should not allow the grass to grow; there is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleased ... "*
> *52. The judge, at p545, asked the jury to decide "whether the defendant had entered the close in the fair exercise of a right, or in an improper way" and the jury found for the plaintiff.*

6. Which brings us to playing fields. Take a large comprehensive school with limited money to pay for security where am and pm - out of school hours - people regularly walk their dogs on the playing field. They never come into conflict with the school's own use - the School uses the pitches every day.

7. Is this potentially a village green? Does it matter that the predominant use is the school's? In a case where use by local people does predominate, does that trump the school's use? Obviously while the land remains as a playing field the users can co-exist, but this will not be the case if there is a proposal to develop it for housing.

8. The short point is that following the *Trap Grounds* case I think that it is impossible to argue that any use that is significant (i.e. not de minimis) that is

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not village green use automatically defeats a village green application. Thereon in, it becomes more difficult. *[.....Turns to other matters]*

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