

## Land known as The Booth Playing Field at Harrietsham

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A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Tuesday 20<sup>th</sup> March 2012.

**Recommendation: I recommend that the County Council takes no further action in relation to this matter.**

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Local Member: Mrs. J. Whittle

Unrestricted item

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### Introduction

1. On 13<sup>th</sup> August 2001, the County Council received an application under section 13 of the Commons Registration Act 1965 from local resident Mr. David Pegg, on behalf of the Friends of the Booth Playing Field, ("the applicant") to register land known as the Booth Playing Field ("the application site") in the parish of Harrietsham as a new Village Green. The application site is shown on the plan attached at **Appendix A** to this report.
2. An objection to the application was received from the Booth and Baldwin Charity ("the landowner") and a Public Inquiry was held in April 2003. Following the Inquiry, the Inspector published his report recommending registration of the application site, with the exception of an area used as tennis courts, as a Village Green. That recommendation was endorsed by the County Council's Regulation Committee Member Panel at a meeting held on 20<sup>th</sup> May 2004 and, accordingly, the requisite entry was made on the Register of Town or Village Greens (as unit number VG238).

### The High Court challenge

3. Subsequently, in December 2004, the County Council was informed by the Treasury Solicitor of an appeal, on behalf of the landowners, against the County Council's decision to register the land as a Village Green. The appeal was made on the basis that use had not taken place 'as of right' because recreational users had deferred to the regular use of the application site by the local Cricket Club during cricket season.
4. Members will recall that, prior to the recent decision of the Supreme Court in the *Redcar*<sup>1</sup> case, it had previously been the case that where recreational users adjusted their behaviour to fit in with the landowner's primary use of the land (for example, staying out of the way when a hay crop was being taken), such behaviour would be considered as 'deference' rather than the assertion of a right. Note, however, that the law has changed since the *Redcar* decision and this is no longer the case.
5. Having carefully considered the grounds of appeal, the County Council accepted that parts of the application site, comprising the cricket field and the tennis courts, were not capable of registration as a Village Green. However, the situation with

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<sup>1</sup> *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11

regard to the remaining parts of the application site, notably a children's playground and the rough area of grass around the cricket field, was far less clear.

6. At the subsequent High Court hearing (on 24<sup>th</sup> January 2006), an Order was made ("the Order") requiring the deletion of the land registered as VG238 from the County Council's Register of Town or Village Greens. A copy of the Order is attached for reference at **Appendix B** and a copy of the amended Register is attached at **Appendix C**. It was also agreed between the parties at the time of the hearing that, whilst it was not appropriate for the cricket field and tennis courts to be registered as a Village Green, the question of the registration of the remaining areas should be remitted back to the County Council for reconsideration at a further Public Inquiry.

### **Further action by the County Council**

7. Arrangements were therefore made for a second Public Inquiry, but it never took place because there followed, in the intervening period, two High Court decisions (in cases known as *Betterment*<sup>2</sup> and *High Peak*<sup>3</sup>) which cast doubt on the County Council's ability to reconsider the matter.
8. At the time that the Order was made, the anticipated effect of the Order was understood by the parties as being to quash the County Council's decision to register the land, with the matter being referred back to the County Council for reconsideration. Following the decisions in *Betterment* and *High Peak*, it would appear that the Court did not have the power to refer the matter back to the County Council for reconsideration at a further Inquiry. Furthermore, the formal Order issued by the High Court is worded such that it makes no reference to, and imposes no requirement upon, any further consideration of this matter by the County Council.
9. This has left the County Council in a difficult position because although it was the intention of the parties for this matter to be reconsidered at a further Public Inquiry, it would appear that the County Council has no ability to give effect to this intention on the basis of the Order as it currently stands.
10. As a result of these developments, the Inspector that had been appointed to hold the second Public Inquiry advised that, in his view, it was not appropriate for a second Public Inquiry to be held and further advice should be sought as to how the County Council should proceed.
11. The parties have been consulted regarding this turn of events. The applicant's position is that the Order should be set aside and the Village Green registration, as it existed prior to the Order, should remain. However, the landowner takes the view that it would not be appropriate for the High Court Order to be set aside on the basis that this would produce an unfair result and, in any event, only small parts of the application site would be capable of registration.

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<sup>2</sup> *Betterment Properties (Weymouth) Ltd. v Dorset County Council* [2007] EWHC 365 (Ch)

<sup>3</sup> *High Peak Borough Council v Derbyshire County Council and Budd* [2007] EWHC Ch 31

## Current options for resolution

12. Counsel's advice has been sought as to how the County Council should proceed in relation to this matter. Counsel has carefully considered the matter and identified three possible options for resolution, which are set out in more detail below.

### Option one: Reconsider the application as originally intended

13. The first option would be for the County Council to proceed as originally planned – i.e. to arrange a second Public Inquiry to reconsider the application in respect of Areas C and D. Area B was rejected at the first Public Inquiry and it was subsequently agreed between the parties that Area A should not have been registered as a Village Green.

14. Although this would appear to be the fairest solution, because it would give effect to what the parties intended at the time of the Order, Counsel strongly discouraged this course of action. Indeed, following the decisions in *Betterment* and *High Peak*, the Inspector himself was equally reticent to progress the matter in this manner.

15. In Counsel's view, if the County Council were to proceed as originally intended, it would have to justify its position, in any subsequent legal proceedings (e.g. a Judicial Review of the second determination), that it had the power to reconsider the application. It is not at all clear that the County Council has any such power available to it and, in fact, the decisions in *Betterment* and *High Peak* suggest otherwise. Furthermore, on the face of it, the Order only requires the deletion of the registration; reconsideration of the application was, in effect, a private arrangement between the parties which did not form part of the Order.

16. Therefore, Counsel advised that this course of action was not recommended.

### Option two: Apply to the High Court to have the Order set aside

17. The second available option would be for the County Council to apply to the High Court to have the Order set aside. The effect of this would be to overturn the Court's decision so as to return to the position before the Order was made (i.e. the land would be registered as a Village Green with the exception of Area B), but a formal decision would still need to be made by the Court on the validity of the registration.

18. Applying for the Order to be set aside would, in the short term, be a logical approach, but the practical implication would be that the County Council would find itself in the position of having to defend the registration and actively support the application (i.e. fulfil the role of the applicant) because the applicant was not a formal party to the original proceedings. Counsel's view was that it would not be appropriate for the County Council to prejudice its impartiality in dealing with Village Green applications by doing this and that it would set a dangerous precedent.

19. Counsel advised that the County Council is under no legal obligation to apply for the Order to be set aside and, unless the County Council is prepared to actively

support the registration, then there is little point in applying to have the Order set aside.

### Option three: Take no further action

20. The final option which Counsel considered would be available to the County Council is simply to take no further action in the matter.
21. The justification for this is that, as noted above, the County Council does not appear to have any power to reconsider the application. Similarly, it is under no positive duty to take any further action to have the Order set aside and, if the County Council were to take such action, it would be placing itself in a very difficult situation in relation to preserving its impartiality.
22. If the applicant wishes to pursue the matter, there are alternative options available to him: either he can judicially review the County Council's decision to take no further action (in which case he would need to justify the position that the County Council ought to have reconsidered the application or applied for the Order to be set aside), or he can himself apply to the High Court for the Order to be set aside<sup>4</sup>.
23. Taking no further action is, in Counsel's view, the most equitable solution to the situation because it accurately reflects the wording of the Court Order (if not the intention) and, if the applicant remains dissatisfied with the County Council's decision, there are remedies available to him.

### **Conclusion**

24. It is very unfortunate that, by virtue of subsequent changes in case law, the County Council has found itself in a difficult position in relation to this case. There is no clear or obvious solution to the situation and, in deciding how to proceed the County Council has very carefully had to take into account not only the interests of the applicant and the landowner, but also the risks to the County Council associated with any further decision.
25. There is general agreement that the first option (reconsidering the application as originally intended) is not a practicable solution: the Inspector responsible for arranging the second Inquiry and both Barristers involved in providing subsequent advice all agree that this course of action is to be strongly discouraged.
26. The decision to be made by the County Council is therefore whether to apply to the High Court to have the Order set aside or whether to simply take no further action. Both of these options entail a varying degree of risk to the County Council: on the one hand, a decision to do nothing may well lead to Judicial Review proceedings by the applicant, whilst a decision to apply for the Order to be set aside is likely to be strongly opposed by the landowner.
27. Applying to the High Court to have the Order set aside would be a higher risk option as the County Council would not only have to demonstrate that it is

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<sup>4</sup> The Civil Procedure Rules (rule 40.9) provide that a person who is not a party to proceedings but who is directly affected by an Order may apply to have that Order set aside or varied.

appropriate for the Order to be set aside (and it is not clear that this is the case) but it would also have to present the case on the part of the applicant, thereby prejudicing its impartiality as Commons Registration Authority. The County Council is under no duty to take such a risk.

28. Counsel's advice to the County Council is that, on balance, the most preferable option is to take no further action. It should be noted that a decision to do nothing will not necessarily bring the matter to a conclusion because the applicant may well decide to take advantage of one of the remedies available to him. Such a decision would, however, be a step closer to bringing the matter to a close and an improvement in the current situation whereby the matter is effectively held in limbo.

29. For the reasons set out above, it is considered that the County Council should heed Counsels' advice and resolve to take no further action in relation to this matter.

### **Recommendation**

30. I recommend that the County Council takes no further action in relation to this matter.

Accountable Officer: Mr. Mike Overbeke – Tel: 01622 221568 or Email: <a href="mailto:mike.overbeke@kent.gov.uk">mike.overbeke@kent.gov.uk</a> Case Officer: Miss. Melanie McNeir – Tel: 01622 221511 or Email: <a href="mailto:melanie.mcneir@kent.gov.uk">melanie.mcneir@kent.gov.uk</a>
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The main file is available for viewing on request at the Countryside Access Service, Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.
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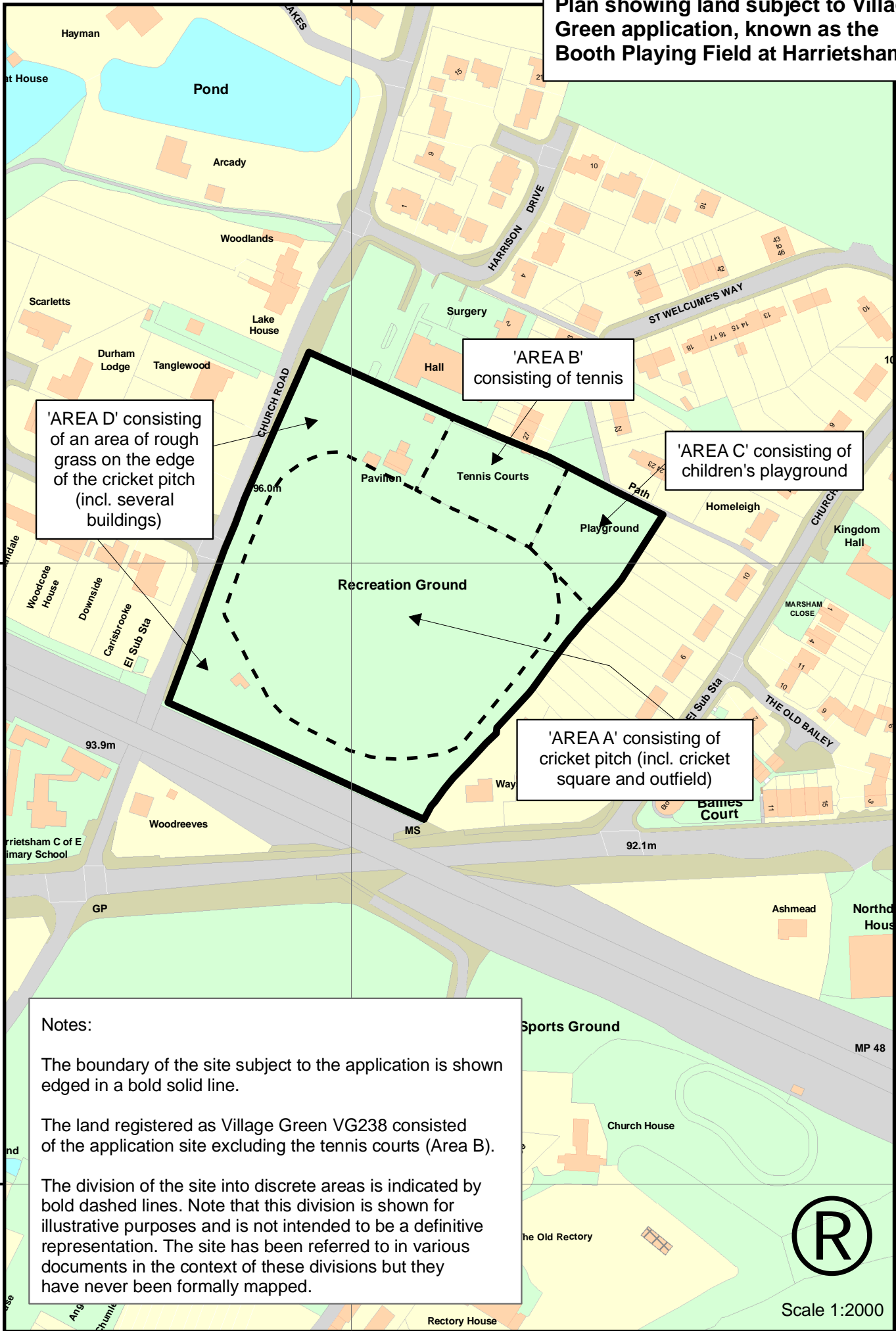
### **Background documents**

APPENDIX A – Plan showing land subject to Village Green application

APPENDIX B – Copy of the High Court Order

APPENDIX C – Copy of the amended registration for VG238

**APPENDIX A:**  
**Plan showing land subject to Village Green application, known as the Booth Playing Field at Harrietsham**



'AREA D' consisting of an area of rough grass on the edge of the cricket pitch (incl. several buildings)

'AREA B' consisting of tennis

'AREA C' consisting of children's playground

'AREA A' consisting of cricket pitch (incl. cricket square and outfield)

**Notes:**

The boundary of the site subject to the application is shown edged in a bold solid line.

The land registered as Village Green VG238 consisted of the application site excluding the tennis courts (Area B).

The division of the site into discrete areas is indicated by bold dashed lines. Note that this division is shown for illustrative purposes and is not intended to be a definitive representation. The site has been referred to in various documents in the context of these divisions but they have never been formally mapped.



Scale 1:2000

IN THE HIGH COURT OF JUSTICE

CLAIM NO. HC 04C03840

CHANCERY DIVISION

BEFORE THE HONOURABLE MR JUSTICE LIGHTMAN

BETWEEN

HER MAJESTY'S ATTORNEY GENERAL

Claimant

-and-

KENT COUNTY COUNCIL

First Defendant

-and-

PHILIP ROBERTS

Second Defendant

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ORDER

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UPON hearing counsel for the Claimant and the First Defendant, and the Second Defendant being present in the Court, and upon reading the letter of Mr Peter Walsh dated 25 January 2006, a copy of which is annexed hereto:

IT IS HEREBY ORDERED that the Register of Town and Village Greens maintained by Kent County Council be amended by the deletion of Register unit 238 (a piece of land known as the Booth Playing Field in the Parish of Harrietsham).

*M. Nathan*

Signed for the Claimant

*Philip Peter*

Signed for the First Defendant

*P. Roberts*

Signed by the Second Defendant



# Register of TOWN OR VILLAGE GREENS

LAND SECTION—Sheet No.

COMMONS REGISTRATION ACT 1965  
KENT COUNTY COUNCIL  
REGISTRATION AUTHORITY  
13 AUG 2007

Register unit No. V 6 23 8  
Edition No.

See Overleaf  
for Notes

No. and date of entry	Description of the land, reference to the register map, registration particulars etc.
1. 13/08/01	A piece of land known as The Booth Playing Field, in the Parish of Harrietsham and Borough of Maidstone, as marked with a green verge line inside the boundary on sheet 82, and shown edged red on inset map, number 1, of the Register map, and distinguished by the number of this register unit. Registered pursuant to Application number 583 made by Mr David Henry Legg of 16 Mercer Drive, Harrietsham, Kent ME17 1AY on behalf of Friends of The Booth Playing Field. Registration under section 13 of the Act.
2. 20/05/04	The Registration entry above became void on 20 May 2004.
3. 28/01/06	The Registration entry above was deleted on 25 <sup>th</sup> January 2006 by Order of Mr Justice Light in the High Court (Chancery Division) pursuant to claim no. HC04FC03840

APPENDIX C:  
Copy of the amended registration for  
VG238



# Register of

*TOWN OF VILLAGE GREENS*

COMMONS REGISTRATION ACT 1965  
KENT COUNTY COUNCIL  
REGISTRATION AUTHORITY  
13 AUG 2001

Register unit No. *UG 238*  
Edition No.

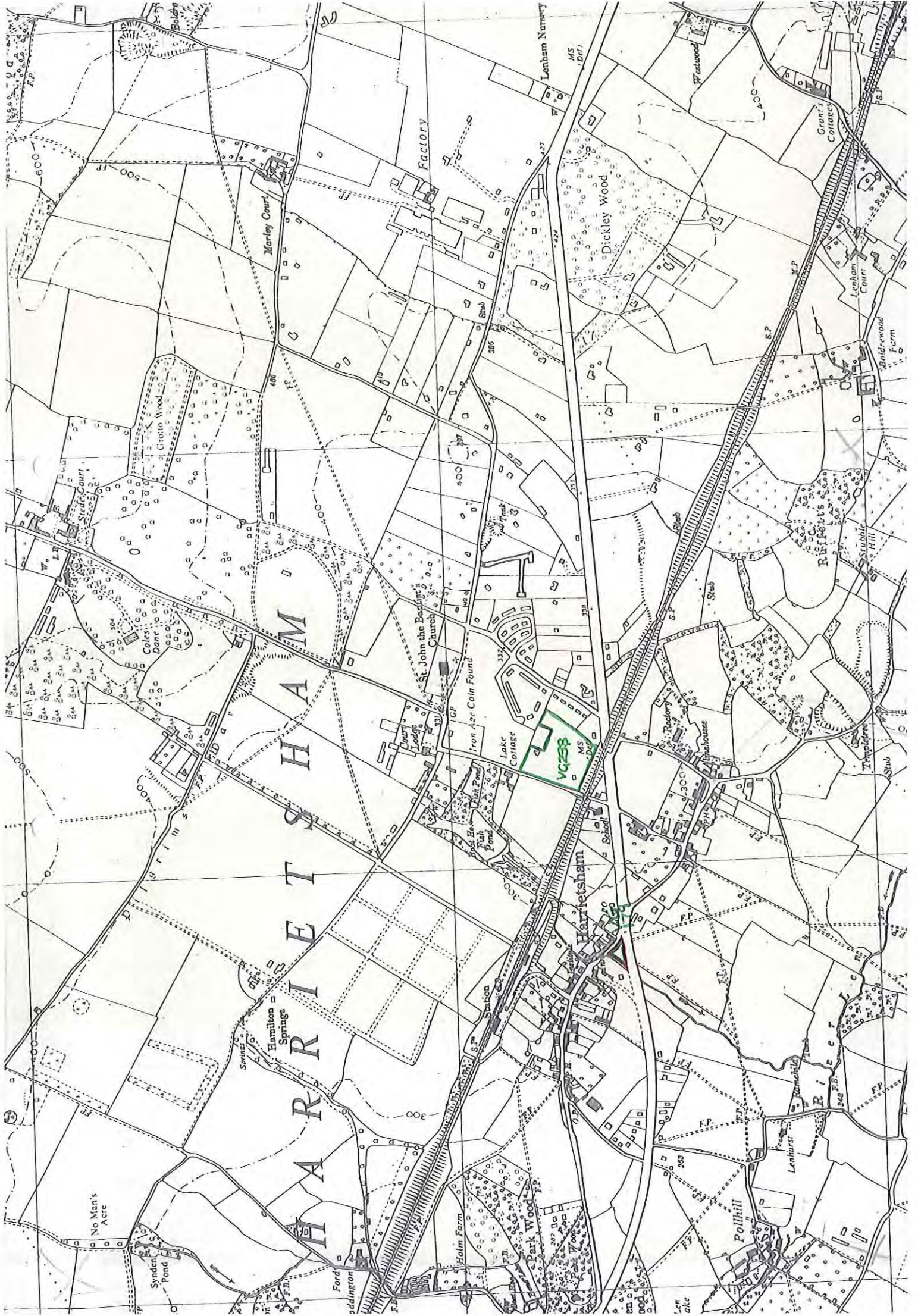
NOTE: This section contains the registration of every person registered under the Act as owner of any of the land described in the land section of this register unit. It does not contain any registration in respect of land of which the freehold is registered under the Land Registration Acts 1925 and 1936, but the absence from this section of a registration in respect of any land described in the land section does not necessarily indicate that the freehold of that land is registered under those Acts.

See Overleaf  
for Notes

OWNERSHIP SECTION—Sheet No.

1 No. and date of entry	2 No. and date of application	3 Name and Address of person registered as owner	4 Particulars of the land to which the registration applies
1. <i>13/08/01</i>		<i>The Charity Trustees, The Booth and Baldwin Trust.</i>	





HARRIETTS HAM

Factory

Marley Court

Leham Nursery

Dickley Wood

Grants Cottages

Leham Court

Goldwood Farm

St. John the Baptist's Church

St. John the Baptist's Church

Colts Lane

Dane Lane

St. John the Baptist's Church

Iron Age Coin Found

Lake Cottage

VCSSB

Harrietts Ham

Hamilton Springs

No Man's Acre

Synden Pond

Ford

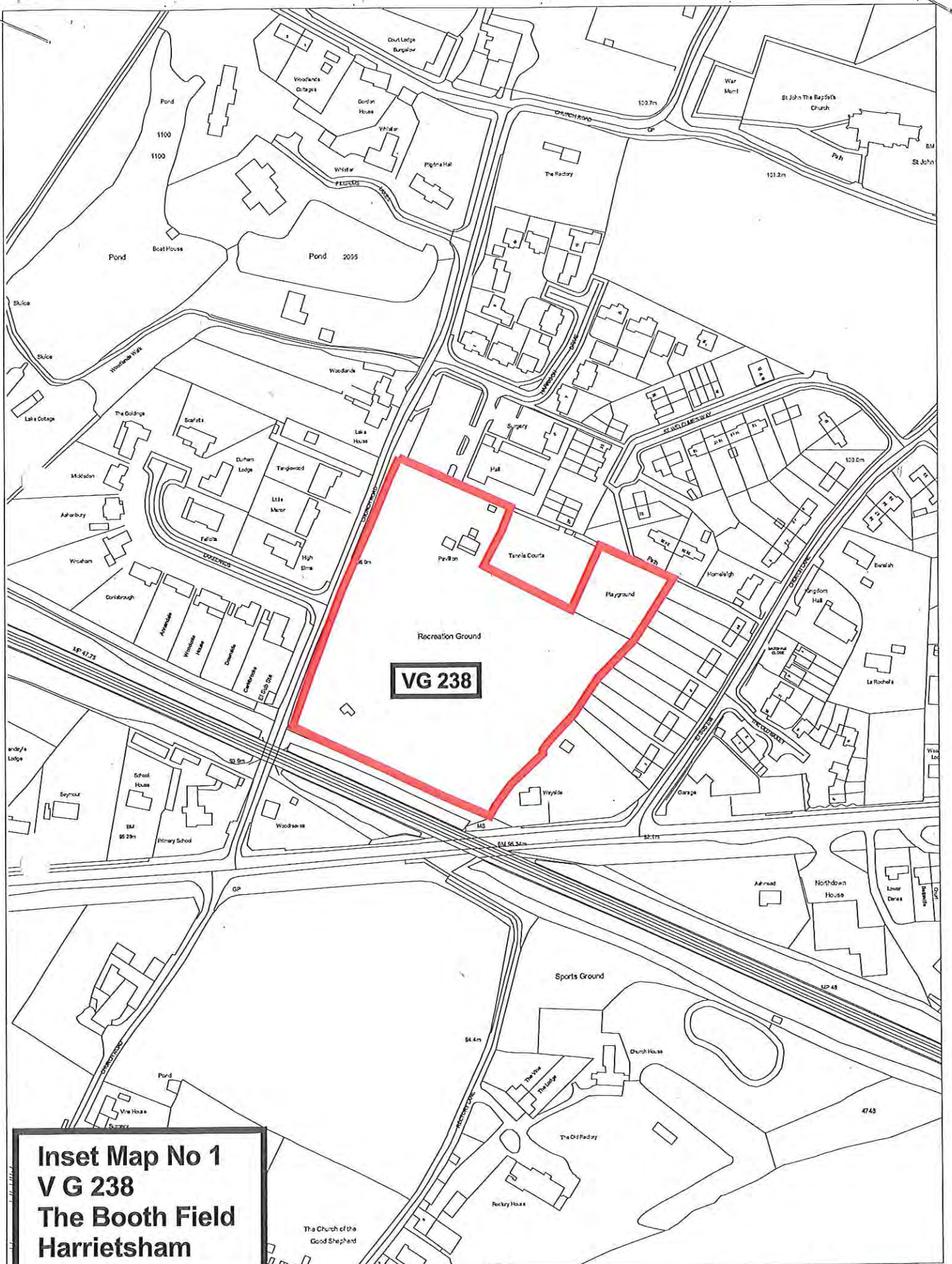
Volm Farm

Park Wood

Pollhill

Lehurst





**VG 238**

Recreation Ground

Playground

**Inset Map No 1  
V G 238  
The Booth Field  
Harrietsham**

1:2500



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