Application to register land at Broadstairs Cricket Ground and surrounding woodland as a new Town or Village Green

A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Monday 16th April 2012.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 4th January 2012, that the applicant be informed that the application to register land at Broadstairs Cricket Ground and surrounding woodland has:

(a) been accepted in relation to the Cricket Ground (as shown on the plan at Appendix D to the report); and

(b) been rejected in respect of the remainder of the application site.

Local Members: Mr. R. Bayford and Mr. B. Hayton Unrestricted item

Introduction

1. The County Council has received an application to register land at Broadstairs Cricket Ground and surrounding woodland at Broadstairs as a new Town or Village Green from local resident Mr. T. Herron ("the applicant"). Although the application was originally received on 20th August 2007, the supporting evidence was not received until February 2010 and formal work did not commence on the application until that time. A plan of the site is shown at **Appendix A** to this report.

Procedure

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 These Regulations have, since 1st October 2008, been superseded by the Commons Registration (England) Regulations 2008 which apply in relation to seven 'pilot implementation areas' only in England (of which Kent is one).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

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

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

4. In addition to the above, the application must meet one of the following tests:

   • **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or

   • **Use of the land 'as of right' ended no more than two years prior to the date of application**, e.g. by way of the erection of fencing or a notice (section 15(3) of the Act); or

• **Use of the land 'as of right' ended before 6th April 2007**and the application has been made within five years of the date the use 'as of right' ended (section 15(4) of the Act).

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

The application site

6. The area of land subject to this application ("the application site") is situated at Park Avenue, on the boundary between the towns of Broadstairs and Ramsgate. It is an irregular shape, which is best described by reference to the plan at **Appendix A**, and consists of a cricket ground (including a large cricket pavilion) and surrounding woodlands which total approximately 3.6 hectares (9 acres) in size.

7. Access to the unfenced parts of the application site is easily gained via the footways of Park Avenue, Grange Way and Park Gate. The fencing has also been penetrated in places to create unofficial access. The application site is crossed by a Public Footpath (TB48) which runs along its south-eastern fringe.

8. Ownership of the application site is split between eight different landowners, as shown on the plan at **Appendix B**. The area owned by Thanet District Council is leased to Broadstairs Cricket Club on a 100-year lease.

Previous resolution of the Regulation Committee Member Panel

9. As a result of the consultation, objections to the application were received from three of the affected landowners (Mr. and Mrs. Brazil, Probeport Ltd., and Greatex Investment Company Ltd.) as well as local resident Mr. P. Robinson. Representations in respect of the application were also made by Broadstairs Cricket Club and Mr. and Mrs. Kenyon.

10. The matter was considered at a Regulation Committee Member Panel meeting on Tuesday 8th February 2011, where Members accepted the recommendation that the matter be referred to a non-statutory Public Inquiry for further consideration.

11. As a result of this decision, Officers instructed Counsel experienced in this area of law to hold a Public Inquiry, acting as an independent Inspector, and to report her findings back to the County Council.

The Public Inquiry

12. The Public Inquiry took place at the Broadstairs campus of Canterbury Christ Church University, commencing on Monday 12th September 2011 and continuing

until Wednesday 14th September 2011, during which time the Inspector heard evidence from all interested parties.

13. The Inspector subsequently produced a detailed written report of her findings dated 4th January 2012. The report itself runs to over 200 pages and a full copy is available from the Case Officer on request. An extract from the Inspector's report, setting out her evaluation of the evidence and the conclusions that she has drawn from the evidence, is attached for reference at **Appendix C**. The Inspector's findings are also summarised below.

Legal tests and Inspector's findings

14. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:
    a) *Whether use of the land has been 'as of right'?*
    b) *Whether use of the land has been for the purposes of lawful sports and pastimes?*
    c) *Whether use has been by a significant number of the inhabitants of a particular locality or a neighbourhood within a locality?*
    d) *Whether use has taken place over period of twenty years or more?*
    e) *Whether use of the land by the inhabitants is continuing up until the date of application?*

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

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

15. The statutory scheme in relation to Village Green applications is based upon the English law of prescription, whereby certain rights can be acquired on the basis of a presumed dedication by the landowner. This presumption of dedication arises primarily as a result of acquiescence (i.e. inaction by the landowner) and, as such, long use by the public is merely evidence from which a dedication can be inferred. The essential principle is that if a landowner allows an activity to take place on his land for a certain period of time, and does nothing to prevent or deter such use, then it is possible that a legal right might arise in favour of the person undertaking the activity.

16. In order for such a right to arise, the use of the land must have been 'as of right'. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*')[1]. In this case, there is no suggestion that any recreational use of the application site has taken place subversively, but there was some debate prior to the Inquiry in relation to whether use had been with force and a suggestion at the Inquiry that use may have taken place with permission.

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

Without force

17. In this context, force refers not only to physical force, but to any use which is contentious or exercised under protest[2]: "*if, then, the inhabitants' use of the land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious*"[3].

18. One of the reasons for referring the matter to a Public Inquiry was to overcome disagreement between the parties regarding the alleged fencing on the application site and its effect on recreational usage. The Inspector heard a great deal of evidence in relation to fencing and concluded that:

> *"With the exception of the DS Developments' land, I am not satisfied that any part of the application land was fenced during the relevant period in such a way as to make use of it, in spite of the fencing, use by force...*
>
> *Although I was satisfied that the Cricket Club land was fenced on its western side and along the northern side of the unmade track to the pavilion for part of the relevant period, there was no evidence to suggest that the Cricket Club land was ever fenced off completely, so that access to that land would have been restricted. There was at all times access from the end of the unmade track onto the Cricket Club"[4].*

19. At the Inquiry, the Inspector heard evidence that the owner of the lands registered to the Greatex Investment Company had removed childrens' dens and rope swings from that land. She considered that this action was effective to make that use contentious and therefore not as of right[5].

20. Mr. and Mrs. Kenyon had also raised the issue, in their original objection, of a 'private road' notice erected at the junction of the private road known as The Cricketers with Park Avenue. The Inspector considered the effect of this notice. She was not satisfied that the notice had been in place prior to the application being made (i.e. during the relevant twenty-year period) and, in any event, she considered that the notice would not have been sufficient to render use of the roadway for lawful sports and pastimes contentious[6].

Without permission

21. The issue of whether use had taken place by permission was raised in relation to the land owned by Thanet District Council and leased to the Broadstairs Cricket Club. One of the clauses in the lease requires the Cricket Club:

> *"to permit such access by the general public to the surrounds of the cricket field and the wooded area to the east of the existing Building for the purposes of recreation as is reasonable and not to take any steps whether by way of legal proceedings or otherwise to prevent any member of the general public from having such access without the prior written consent of the Landlord such consent not to be unreasonably withheld"*.

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[2] *Dalton v Angus* (1881) 6 App Cas 740 (HL)
[3] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger
[4] Paragraph 16.77 and 16.78 of the Inspector's report dated 4th January 2012
[5] Paragraph 17.4 of the Inspector's report dated 4th January 2012
[6] Paragraph 16.98 of the Inspector's report dated 4th January 2012

22. It was argued at the Inquiry that this obligation meant that use of the Cricket Club land had been permissive, and not as of right. The Inspector did not concur with this view and, in her judgement, the clause was not sufficient to negate use of the application site being 'as of right' for the following reasons:

> *"firstly, as a matter of construction in my judgement, the clause does not require the Club to give access to the cricket field itself... Secondly, permission in order to be effective has to be communicated. The mere fact that the Club was required by its Lease to permit access is not an effective communication of that permission to users... Thirdly, the Cricket Club was required to permit 'such access... as is reasonable' to [the cricket field surrounds and woodland]. The Club had the right to regulate access: the question is whether in fact it did regulate the access"*[7].

Conclusion regarding use 'as of right'

23. With the exception of the land owned by the Greatex Investment Company, the Inspector found that such use as did take place of the application site, was 'as of right'.

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

24. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. It is not necessary to demonstrate that both sporting activities *and* pastimes have taken place since the phrase 'lawful sports and pastimes' has been interpreted by the Courts as being a single composite group rather than two separate classes of activities[8].

25. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. The Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[9].

26. Whilst walking (with or without dogs) has been recognised as the kind of activity that is capable of giving rise to Village Green registration, it is important to differentiate between walking which is consistent with the assertion of a general right of recreation (i.e. wandering at will over a wide area) and walking which is akin to the exercise of a public right of passage along a linear route (i.e. a public rights of way type user). The latter will not be qualifying use for the purposes of Village Green registration[10].

27. In this case, the Inspector found that the different character of the various parts of the application site and the varying usage made of the different areas requires that the evidence of use in relation to each part of the application site be considered

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[7] Paragraph 16.100 of the Inspector's report dated 4th January 2012

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

[9] *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 at 397

[10] *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70

separately. This is done here by reference to the land ownership plan at **Appendix B**.

28. The Inspector concluded that there had been little evidence of recreational use of the Kent County Council land, beyond use of the existing Public Footpath[11], and that there was equally insufficient use of the DS Developments Land to suggest that it was being used for recreational purposes[12].

29. In respect of the land owned by the Greatex Investment Company (forming the south-eastern limb of the application site), the Inspector found that the only use that the overwhelming majority of adult users had made of that land was use of the existing Public Footpath crossing the land. There had been some use of the land by children playing with bikes and rope swings attached to the trees for part of the relevant period, and there was evidence that children had built dens on the land and used it for treasure huts and hide and seek. However, the Inspector concluded that such use would not have appeared to a reasonable landowner to amount to the assertion of a right and, as is noted above, the landowner's actions in regularly clearing the dens and removing the ropes were sufficient to render such use contentious[13].

30. The situation in respect of the land owned by Probeport Ltd. and Mr. and Mrs. Brazil (forming the south western limb of the application site), in the Inspector's view, was that although there was some evidence of limited use by adults walking across the land and sporadic use by children using the land for den building, there was insufficient credible evidence to show that this land was in general recreational use by the local residents[14]. Indeed, the Inspector found that during the latter part of the relevant period, the Probeport land had become overgrown and was not attractive for recreation, and the land owned by Mr. and Mrs. Brazil had also become overgrown and mis-managed[15].

31. In relation to the trackway leading to the Cricket Pavilion (now the Private Road known as The Cricketers), there was evidence that this had been used for the purposes of walking, but the Inspector concluded that such use was more in the nature of a rights of way type use than in the nature of a village green type use[16].

32. In respect of the use of the Thanet District Council land (leased to the Cricket Club) for lawful sports and pastimes, the Inspector found:

> *"I am satisfied that local people made general recreational use of the Cricket Club woodland and the cricket pitch surrounds for activities including dog walking, picnicking, cycling, den building and hide and seek and watching cricket. I am satisfied that the cricket pitch itself was used for activities such as dog walking, kite flying and playing ball games when not in use for organised sport...*

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[11] Paragraph 16.90 of the Inspector's report dated 4th January 2012
[12] Paragraph 16.91 of the Inpsector's report dated 4th January 2012
[13] Paragraphs 16.88 and 16.89 of the Inspector's report dated 4th January 2012
[14] Paragraph 16.97 of the Inspector's report dated 4th January 2012
[15] Paragraphs 16.80 and 16.81 of the Inspector's report dated 4th January 2012
[16] Paragraph 16.88 of the Inspector's report dated 4th January 2012

In my judgment it is clear that the Cricket Club tolerated responsible use of the Cricket Club land by local people for lawful sports and pastimes. Those who behaved unlawfully or were suspected of being likely to behave unlawfully were asked to leave. Those whose activities were likely to damage the playing field, such as golfers, cyclists and footballers, were asked to desist from their activities.

However, the overwhelming majority of local inhabitants enjoyed lawful sports and pastimes on the Cricket Club land which were not likely to cause any damage to the land. They respected games in progress by avoiding the cricket field, often stopping to watch the match. Although members and officers of the Club would have seen such individuals in the surrounds to the cricket field, outside the boundary, and would have known that they were not players or supporters, they were not asked to leave"[17].

33. The Inspector therefore concluded that although there was insufficient evidence of use the site as a whole for the purposes of lawful sports and pastimes, there was evidence that the Cricket Club land had been used for a variety of activities, including dog walking, picknicking, cycling, den building, hide and seek, watching cricket, kite flying and ball games.

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

34. It is now well established that a qualifying locality for the purposes of Village Green registration must be a legally recognised administrative unit. In the *Cheltenham Builders*[18] case, it was considered that '*…at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality… there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition*'.

35. In cases where the locality is large, it will also be necessary to identify whether there is a qualifying 'neighbourhood within a locality'. A neighbourhood is a much more fluid concept: '*it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood... The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning*'[19]. It should be noted that the neighbourhood relied upon may fall within one or more localities and, similarly, there may be more than one qualifying neighbourhood within the relevant locality or localities[20].

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[17] Paragraphs 16.92, 16.93 and 16.94 of the Inspector's report dated 4th January 2012
[18] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[19] R (Cheltenham Builders Ltd. v South Gloucestershire District Council [2004] 1 EGLR 85 at page 92
[20] *Adamson v Paddico (267) Ltd and Kirklees Metropolitan Borough Council and others* [2012] EWCA Civ 262

Neighbourhood within a locality

36. At the Public Inquiry, the applicant sought to rely on Park Avenue as being the qualifying neighbourhood, with the former District Council electoral ward of Upton as the qualifying locality.

37. The Inspector was of the view that the housing within Park Avenue and the residential cul-de-sacs leading off from Park Avenue did have a sufficient degree of cohesiveness and a recognisable identity such as to qualify as a neighbourhood within the meaning of the statute. She added:

> *"In my judgement, the single vehicular access to the roads within the claimed neighbourhood lends a quality of cohesion so that, although all the homes within the area were not developed at the same time as a single estate, it has an estate-like quality. The claimed neighbourhood is built around the cricket ground, and it is that facility which gives the area a unifying quality"*[21].

38. However, the Inspector was not convinced with regard to the locality specified by the applicant. As a result of boundary changes in 2002, the former Upton ward became largely subsumed into the current electoral ward of Viking. She considered that there was insufficient evidence to show that the former electoral ward of Upton had a sufficient identify such as to survive as a recognisable locality following the boundary changes. This part of the locality test, in the Inspector's view, had not been satisfied by the applicant.

39. Despite the applicant's failure to identify a qualifying locality during the course of the Inquiry, the Inspector's advice was that the applicant should be afforded a further opportunity to deal with the locality issue. It would be futile to reject the application on a technicality and to insist on a fresh application (with the associated delays and costs that this would impose on all of the parties), if this point could be dealt with as part of the current application.

40. The Inspector's advice in relation to the locality issue was therefore that:

> *"it would be contrary to the intention of the legislature in introducing the neighbourhood test to recommend that this application should fail, in spite of the fact that the neighbourhood aspect of the test is met, because the applicant has failed to understand the technical requirements of the locality aspect of the test. In my judgement although the applicant has failed to amend his application to date, having been given a number of opportunities to do so, it would nevertheless be fair to the applicant and not oppressive or unfair to the objectors to allow the applicant one final opportunity to amend his application"*[22].

Significant number

41. Having established the relevant locality, or neighbourhood within a locality, it is then necessary to consider whether there has been recreational use of the application site by a significant number of the inhabitants of the relevant locality or neighbourhood within a locality. The word "significant" in this context does not

[21] Paragraph 16.104 of the Inspector's report dated 4th January 2012
[22] Paragraph 16.106 of the Inspector's report dated 4th January 2012

mean considerable or substantial: '*a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number… what matters is that the number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers*'[23]. Thus, what is a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the application site.

42. The Inspector was not satisfied that use of large parts of the application site, particularly the woodland areas, had been by a significant number of the local inhabitants for general recreational purposes (as opposed to linear rights of way type use, excessive use of the existing footpath or sporadic use of the woodland by children for the purposes of building dens) throughout the relevant period.

43. However, the Inspector was satisfied, in relation to the Cricket Club land only, that the number of recreational users was sufficient to indicate to a reasonable landowner that the land had been in general use by the local community rather than individuals as trespassers. She said:

> *"I am satisfied that local people made general recreational use of the Cricket Club woodland and the cricket pitch surrounds for activities including dog walking, picknicking, cycling, den building and hide and seek and watching cricket. I am satisfied that the cricket pitch itself was used for activities such as dog walking, kite flying and playing ball games when not in use for organised sport"*[24]*.*

44. Therefore, although the Inspector was satisfied that Park Avenue was a qualifying neighbourhood, she expressed her doubts that the former Upon ward would constitute a qualifying locality. In relation to whether recreational use had been enjoyed by a significant number of the local residents, the Inspector considered that such use had been concentrated within the Cricket Club land and woodland, but that there had not been qualifying use of the remainder of the application site by a significant number of the residents of the qualifying neighbourhood.

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

45. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years up until the date of application. In this case, the application was originally submitted in 2007 and therefore the relevant twenty-year period ("the material period") is 1987 to 2007.

46. As noted above, the Inspector was not satisfied that the whole of the application site had been used in the requisite manner throughout the relevant twenty year period. The Inspector was, however, satisfied that the Cricket Club land had been used 'as of right' for lawful sports and pastimes throughout the relevant period.

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

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[23] *R (Alfred McAlipne Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[24] Paragraph 17.14 of the Inspector's report dated 4th January 2012

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

48. The Inspector accepted that such recreational use of the application site as had taken place (i.e. use of the Cricket Club land), had continued until the date of the application.

Inspector's conclusions

49. The Inspector's overall conclusion was that the application as a whole should fail but, subject to the applicant being able to identify a qualifying locality, the Cricket Club land had been used in a manner that was consistent with the relevant legal tests. She said:

> "*I conclude that as it stands as present, the application does not succeed in whole or in part. Had a qualifying locality been identified, I would have recommended that the application should be accepted in part, and that the Cricket Club land should be registered as a town or village green. I recommend that the Registration Authority should permit the applicant, if he so wishes, to identify an alternative qualifying locality or localities within which his claimed neighbourhood falls, and to amend the application accordingly*"[25].

50. The Inspector's advice to the County Council was therefore that it should not proceed to determine the application until the applicant had been afforded the opportunity to amend his application in respect of the qualifying locality.

Subsequent correspondence

51. On receipt, the Inspector's report was forwarded to the applicant and the other parties to the Inquiry for their information and further comment. In addition, and as per the Inspector's advice, the applicant was invited to identify a new locality within which the neighbourhood of Park Avenue is located.

52. The applicant responded to the effect that he now wished to amend his qualifying locality to the town of Broadstairs, this being an identifiable area with clearly defined and recognisable boundaries.

53. The applicant also made comments regarding some of the Inspector's conclusions. Whilst agreeing that he had failed to satisfy the Inspector that the relevant tests had been met in relation to the south-western limb of the application site (the parcels of land owned by Mr. and Mrs. Brazil and Probeport Ltd), the applicant did not agree that it was correct to exclude other parts of the application site from the registration. In particular, the applicant considered that the roadway known as The Cricketers should be included in the registration on that basis that it formed one of the main entrances to the application site and, until it was recently surfaced, it was indistinguishable from the main cricket ground. In relation to the land owned by the Greatex Investment Company, the applicant did not accept the Inspector's findings that the majority of recreational use of this land was related to the Public Footpath and expressed concern that recreational use by children playing in that area

[25] Paragraph 18.1 of the Inspector's report dated 4th January 2012

appears to have been disregarded despite the evidence from residents that such use was extensive and frequent.

54. Broadstairs Cricket Club wrote to reiterate its objection to the registration of the land as a Town Green. The Club confirmed that it had never attempted to prohibit activities such as dog walking, but said that it had challenged activities that were damaging to the surface of the cricket pitch (such as golf). The Club also added that the cricket square had always been roped off when not in use for cricket in order to deter people walking and playing on it.

55. Clark Holt Solicitors, acting on behalf of Broadstairs Cricket Club, did not offer any comment in respect of the Inspector's report, but did seek to challenge the amended locality relied upon by the applicant and expressed concern that too much leniency had been afforded to the applicant. In support of the objection to the amended locality, a legal opinion was provided from Counsel representing the Cricket Club and other objectors at the Public Inquiry. The essence of that legal opinion is that the applicant has failed to demonstrate that a significant number of the residents of both the neighbourhood and the locality have used the applications site. In Counsel's view, it is insufficient to show that the numbers using the land are significant judged by reference to the qualifying neighbourhood and that number must also be significant judged by reference to the claimed locality.

Further advice

56. In light of the comments received from the parties, copies of the correspondence were forwarded to the Inspector for her further consideration.

57. The Inspector's advice in relation to the locality issue was that the County Council should allow the applicant to amend his application to change the locality within which the claimed neighbourhood falls. Furthermore, she was satisfied that the town of Broadstairs was a qualifying locality for the purposes of Town Green registration and did not consider that any further evidence was required in support of the applicant's case that Broadstairs is a locality.

58. The Inspector also considered the argument advanced by the objectors that it would be necessary to apply the 'significant number test' to the locality as well as to the neighbourhood (so that it would be necessary to show that a significant number of the residents of both the qualifying neighbourhood and the qualifying locality had used the land for recreational purposes). The Inspector did not agree that this was the correct approach; in her judgement, the question of significance falls to be judged only by reference to the claimed neighbourhood.

59. In respect of the Cricket Club's comments the Inspector responded that:

> "*I do not understand the Club's recent submission as being a request that the square should be excluded from registration, rather, it is a request that the whole of the pitch should not be registered. There is no evidence to support the exclusion of any particular area from registration: there is no evidence, even in the recent submission, to identify the particular area concerned. The Cricket Club did not suggest at the inquiry that the cricket square ought to be treated differently to any other part of the cricket ground. The Club had the opportunity to call evidence in relation to this point at the*

inquiry and did not call evidence to identify any particular area or to call evidence which showed that the area roped off was (1) the same area throughout the relevant period and (2) was continuously roped off during the relevant period (which would have been essential if it was to be excluded). On the evidence that was before the inquiry, that the pitch was used during the winter for rugby matches by East Court School and/or Wellesley House School... it seems unlikely that the square was roped off continuously, and more likely that it was roped off in preparation for and during the cricket season only".

60. In the Inspector's view, therefore, the legal tests for the registration of part of the application site (as shown at **Appendix D**) have been met.

Conclusion

61. Having carefully considered the Inspector's thorough and detailed analysis of the evidence (contained in her report), as well as her subsequent advice, it would appear that the legal tests in relation to the registration of the land as a new Town Green have been met, but only in relation to part of the application site, as identified at **Appendix D** to this report. The remaining parts of the application site are not capable of registration as a new Town Green and the application in relation to those parts of the application site should be rejected.

Recommendation

62. I recommend, for the reasons set out in the Inspector's report dated 4th January 2012, that the applicant be informed that the application to register land at Broadstairs Cricket Ground and surrounding woodland has:
    (a) been accepted in relation to the Cricket Ground (as shown on the plan at **Appendix D** to the report); and
    (b) been rejected in respect of the remainder of the application site.

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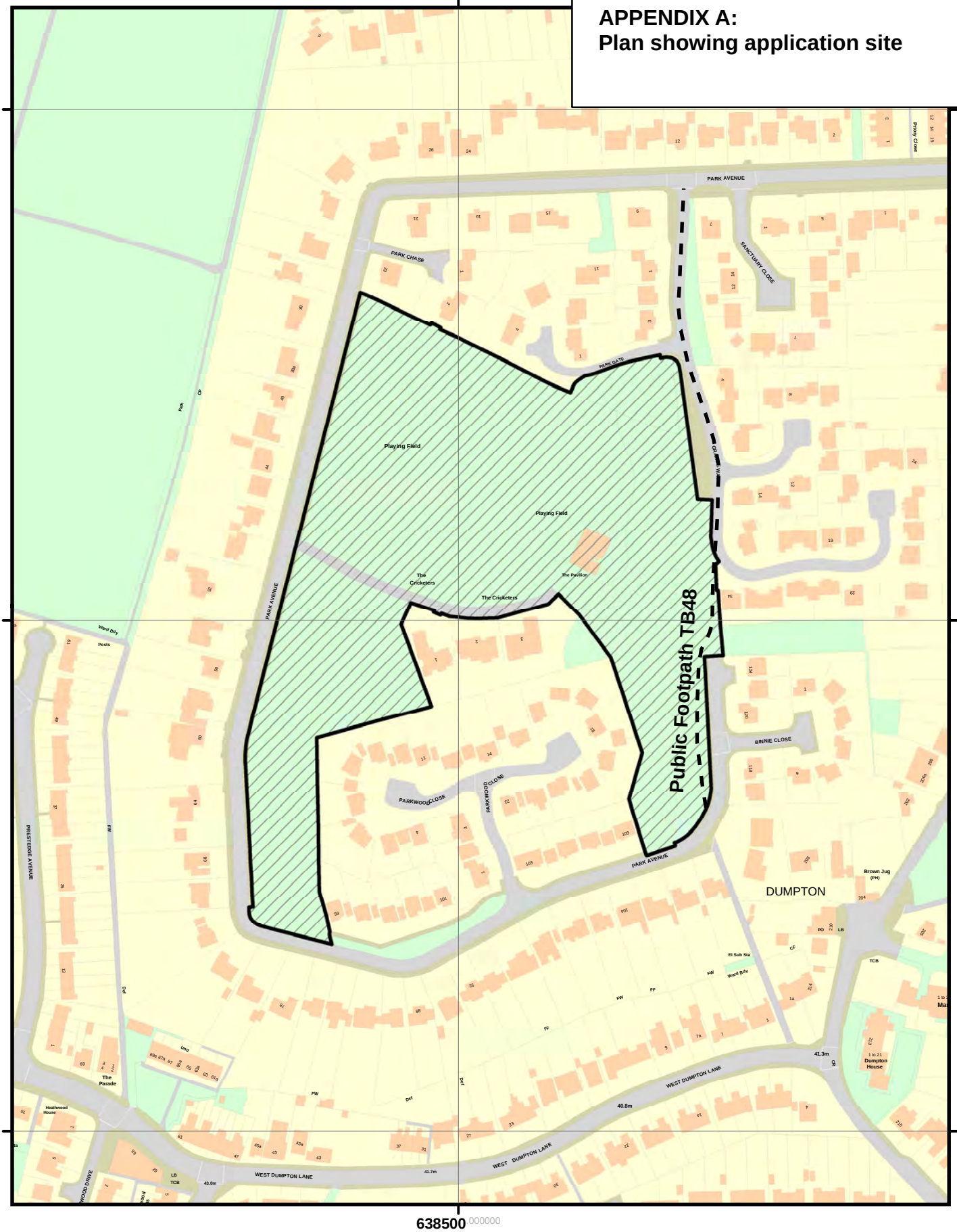
The main file is available for viewing on request at the Countryside Access Service, Regulatory Services, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

Background documents

APPENDIX A – Plan showing application site
APPENDIX B – Plan showing ownership of the application site
APPENDIX C – Extract from the Inspector's report dated 4th January 2012
APPENDIX D – Plan showing land to be registered as a Town Green

APPENDIX A:
Plan showing application site

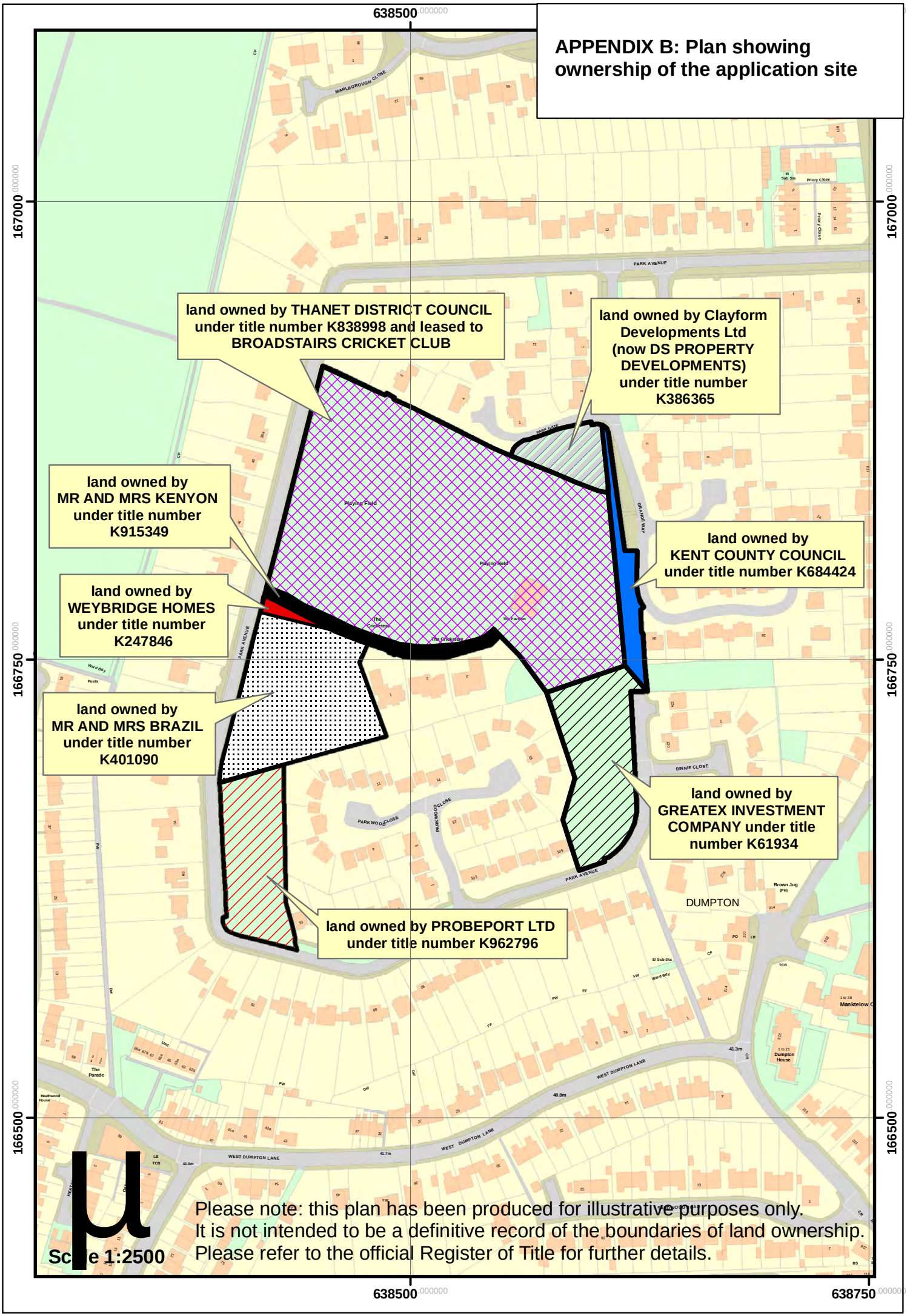


Land subject to Village Green application at Broadstairs Cricket Ground

Scale 1:2500

Kent County Council

APPENDIX B: Plan showing ownership of the application site



Please note: this plan has been produced for illustrative purposes only.
It is not intended to be a definitive record of the boundaries of land ownership.
Please refer to the official Register of Title for further details.

APPENDIX C:

Extract from the Inspector's report dated 4th January 2012

1. Findings of fact

The ownership history of the application land

1.1. The whole of the application land, with the exception of the Kent County Council land, and together with other land, was the subject of a conveyance dated 25th March 1931 and made between (1) Frederick William Hardman (as vendor) and (2) Maud Elizabeth Rebecca Harfoot (as purchaser) which contained a covenant by the purchaser with the vendor as follows:

"The Purchaser hereby covenants with the Vendor that she the Purchaser and her representatives to the intent that the land thereby conveyed should be kept an open space for ever will not at any time hereafter erect or permit to be erected any building or buildings thereon except shelters pavilions clubhouses or erections of a like nature for use in connection with any games or recreations that may be permitted thereon or for the use of the members of any club or clubs having for their primary object the furnishing of facilities for their members for out of door games or recreations".

1.2. The land subject to the covenant included the land on which various housing developments have subsequently been built, including 93-109 (odd numbers) Park Avenue, Parkwood Close, and The Cricketers. There was no suggestion that any release of the covenant had been obtained in relation to those developments, or that any enforcement action had been taken, and I accept as likely Mr Benn's evidence that Greatex was able to obtain indemnity insurance from Eagle Star in respect of this covenant at a nominal premium, because it was regarded as virtually unenforceable.

1.3. It seems from the entries at Land Registry that the land the subject of the 1931 conveyance was sold off at various times into separate ownerships. Greatex's title to the Greatex land, the Probeport land and the land on which 93-109 (odd numbers) Park Avenue and Parkwood Close was later built was opened on 23rd July 1958 and Greatex was registered as proprietor on the same date. The Probeport land was registered under a separate title number on 30th December 2009, following the 21st December 2009 transfer of that land by Greatex to Probeport.

1.4. Mr and Mrs Brazil's land, the freehold title to the Cricket Club land, the title to Weybridge Homes' land and the title to Mr and Mrs Kenyon's land were all originally within Title Number K247846, which was opened on 29th June 1965. It seems likely from the entries on the register and from the facts contained in the decision letter on a 1982 planning appeal that the freehold interest in the Cricket Club land, Mr and Mrs Kenyon's land and Weybridge Homes' land were all owned by Wellesley House and St Peter's Court Educational Trust Limited ("the School") from at least 1982 until 2002, when the land was sold off into separate ownerships by the School. The Cricket Club land was the subject of a transfer dated 9th April 2002 and made between (1) the School and (2) Thanet District Council. Weybridge Homes' land was the subject of a transfer dated 13th September 2002 and made between (1) the School and (2) Chaucer Homes Limited. Mr and Mrs Kenyon's land was also the subject of a transfer dated 13th September 2002 and made between (1) the School and (2) Chaucer Homes Limited. It seems likely that these transfers were one and the same.

1.5. Mr and Mrs Brazil's land was the subject of a transfer dated 26th September 2002, by which they acquired title. The parties to the transfer are not specified on the register, but I accept Mrs Brazil's evidence that they acquired the land from Murphy & Sons Limited, having successfully bid for it at auction on 8th June 1998. I therefore conclude that the Brazil land was in separate ownership from the remainder of the land within Title Number K247846 from at least 1998.

1.6. The title to DS Developments' land was opened on 15th September 1972, as was Kent County Council's title to its land.

The Tree Protection Orders affecting the application site

1.7. I am satisfied that the trees on most of the application site have been protected either by the 1985 TPO or by the 1956 TPO during the whole of the relevant period. Although no copy of the confirmation of the 1985 TPO was provided by the Objectors, and it was clear from the copy of Mr Benn's letter dated 4th July 1985[1] that there were objections to the provisional order, it was implicit in Mr Vahid's evidence that a number of applications were made in relation to the Oak adjacent to 109 Park Avenue that it must have been confirmed. The parts of the application land which are not subject to the TPOs are Kent County Council's land and a small triangle of land belonging to Greatex in the north eastern corner of the Greatex land.

Planning history: development in the vicinity of the application land and planning conditions potentially affecting the Probeport and Greatex lands

1.8. Numbers 93-109 (odd numbers) Park Avenue were developed under planning permission TH/75/570B granted on 15th September 1978. The houses in Parkwood Close were developed under planning permission TH/75/570C granted on an illegible date in 1980, as varied by permission TH/83/0570, to provide for an additional dwelling house and re-alignment of the estate, granted on 6th September 1983. Planning permission TH/83/0570 was subject to conditions including the following three conditions:

(1) A condition imposing a requirement that the landscaping and tree planting scheme shown on drawing No PP/PAB/01A and relating to the individual plots shown on the approved drawing should be carried out before the dwellings on those plots were first occupied unless otherwise agreed in writing by the local planning authority;
(2) A condition imposing a requirement that the landscaping and tree planting scheme shown on drawing No PP/PAB/01A and relating to land situated at the western end of the site should be carried out within four months of the date of the permission, or such other time as might be agreed in writing by the local planning authority;
(3) A condition imposing a requirement that the landscaping of the area to the east of the housing development should be carried out in accordance with a scheme of landscaping to be agreed with the Local Planning Authority within four months of the date of the permission, and thereafter the scheme should be implemented within two months or such other time as may be agreed in writing.

1.9. The grounds for imposing these three conditions were "in the interests of the visual amenity". Enforcement action was taken in relation to these conditions. It seems from the decision letter dated 2nd July 1985 which dealt with combined appeals against an enforcement notice and against a refusal of permission, that that condition (2) should have related to the land at the eastern end of the site (the Greatex land), and condition 3 to the land to the west of the housing development (the Probeport land) and that the enforcement notice had been drafted with the correct wording. Although Mr Elvidge suggested that it would in consequence have been doubtful that the conditions could have been enforced, this mistake did not form part of the grounds of the appeal against the enforcement notice, and I conclude that it was understood and accepted by all parties and by the Inspector that condition (2) related to the Greatex land and condition (3) to the Probeport land.

1.10. It appears from the decision letter that Greatex's grounds of appeal related only to the complaints of breaches of conditions (1) and (3) above. The section 36 appeal against refusal of permission was in relation to an application for planning permission to erect a single-storey dwelling on the Probeport land. The Inspector commented that the landscaping scheme for the Greatex land was contained within the plan submitted in connection with the application for planning permission, and that he had observed on his site visit that substantial planting of that land had been undertaken. He dismissed the appeal against the enforcement notice

[1] O1/Appendix C

and the appeal against refusal of permission in relation to the Probeport land, saying that there was no evidence to suggest that a reasonable landscaping scheme could not be agreed with the council. He considered that the provisions were appropriate to maintaining a suitable level of tree cover as part of the wide landscape appearance, and also to provide a suitable setting for the new housing and assimilate the development into these surroundings and that, whereas the requirement for replanting under the TPO affecting the land arising out of the felling of 88 trees protected by that order could have been divorced from the landscaping for the development itself, no issue was made of that point, and the conditions imposed were reasonable. The Inspector also dismissed the section 36 appeal.

1.11. I am satisfied that the land to which conditions numbered (2) and (3) above related were, respectively, the Greatex and Probeport lands. I am satisfied that the enforcement notice related to both the Greatex and Probeport lands, as well as to various individual plots in Parkwood Close. I do not accept Mr Herron's submission that the Greatex land and Probeport land were amenity land, available for use by local residents for amenity purposes. Those conditions were imposed, not so that the land affected could be used as amenity land, but in the interests of visual amenity: i.e. the purpose of imposing the conditions was to make those areas more pleasant to look at, rather than available for use. I am also satisfied that some replanting of the Greatex land had been undertaken by the time of the Inspector's site visit on 29th April 1985.

1.12. I note Mr Herron's concession in cross-examination that had the Probeport land been being used by the public at the time of the 1985 appeal, this would have been a material consideration, and it should have been mentioned in the Council's evidence and was not. I infer from this that there was no significant use of the Probeport land by the public at this time.

1.13. I reject Mr Benn's evidence that no replanting was undertaken on the Probeport land as unlikely in the light of all the other evidence before the inquiry. In my judgment it is inherently unlikely that the Council, having taken enforcement action to ensure that the Probeport and Greatex lands were landscaped, would not have ensured that those works were carried out. The Council's continuing interest in ensuring that the works the subject of the enforcement notice were carried out is in my judgment demonstrated by the fact that Mr Vahid took photographs of the re-planting of the Greatex land in progress on 19th December 1985. Having regard to the contemporaneous evidence provided by the aerial photographs, I consider that it is more likely than not that the landscaping works required by the 1983 permission, the subject of the 1984 enforcement notice and the 1985 appeal, were carried out.

<u>Planning history: the grant of planning permission for the development of The Cricketers and the section 106 agreement under which the Cricket Club land was transferred to Thanet District Council</u>

1.14. A number of applications were made by the School for planning permission for residential development. Mr Elvidge's evidence was that there were two applications in the late 1970s/early 1980s, an application for 4 houses made on 5th November 1980 which was refused on appeal in 1982, an application for 23 houses made on 29th April 1986 and refused on 11th September 1986, an application for 7 houses made on 19th December 1986 and refused on 12th July 1987 and refused on appeal on 26th July 1988, two applications for 3 and 5 houses made on 7th and 18th January 1988 respectively and refused on 25th February 1988 and two applications made for 3 houses and for a new pavilion made on 29th February 2000 and 3rd March 2000 respectively both of which were granted on 9th April 2002.

1.15. I reject Mr Herron's suggestion that the comment of the Inspector on the 1982 appeal against the refusal of Wellesley House School's application for planning permission to build 4 houses to the south of the cricket ground that "the cricket ground remains as open space in private ownership with some measure of public access" can support other evidence that local inhabitants enjoyed access to the woodland surrounding the cricket ground or to the cricket ground itself for informal recreation. In my judgment, taking this sentence in context, it is quite clear that the Inspector intended to refer to the access to the cricket ground which was

enjoyed by the public attending festival matches and possibly also to the access enjoyed by members of the public attending the ground as playing members of or visitors to Broadstairs Cricket Club, rather than to any wider public access. This comment followed the Inspector's summary of the impending development in the vicinity of the application site, to the north and east of the cricket ground, and the Park Avenue/Parkwood Close development, all of which was (as was the application site) on land which, in the 1958 statutory town map, was allocated for public open space, and his comment that it was agreed by all parties that the public acquisition of the land allocated for open space purposes was unlikely to occur. It was in my judgment a reference back to the applicant/appellant's submission that the steps that it would be able to take to improve the management of the woodland and to fence the ground would lead to upgrading of amenity in the area, because the public would continue to have access to the ground for festival matches from time to time in addition to normal club fixtures.

1.16. In my judgment it is also clear from that the fact that the Inspector did not refer to there being any public access to the woodland included within the appeal site (to the south of the cricket ground) that there was no evidence before him at the inquiry that any access to the woodland was enjoyed by the public. Mr Herron accepted that the fact that the woodland was in public use at the time might well have been a material factor on the appeal. This seems to me to be correct. Had there been evidence that part of the woodland which formed part of the proposed development site been in public use, one would have expected that to be mentioned. I think it is right to infer, although Mr Herron rejected this when it was put to him in cross-examination, that it is likely that Mr Herron, as the Council's expert witness, would have mentioned that the public enjoyed access to that part of the woodland which formed part of the proposed development site if in fact this was the case at the time. I infer that the woodland comprising part of the proposed development site was not in fact in use by the public for recreation at the time of this appeal.

1.17. Had the public enjoyed access to the larger area of woodland on the south and east sides of the application site which was not to be affected by the proposed development, but which the applicant said the granting of permission would enable him to better manage, that too would have been relevant to the applicant's submission that the grant of planning permission would enable the applicant to carry out works which would improve the amenity in the area. I accept the interpretation of this part of the decision letter contended for by Mr Elvidge: that there were partial barriers to public access to the cricket ground and that there was no evidence that the woodland afforded the same measure of access. I do not think that Mr Herron would necessarily have mentioned the fact that the public had access to this part of the woodland in his evidence, even if this was in fact the case at the time, because to do so would have supported the applicant's submission that the granting of permission would be of benefit to the amenity in the area. In my judgment the lack of any reference to evidence of public use of this area in the decision letter is neutral.

1.18. I was not provided with a copy of the applications for planning permission made in 2000 for development of 1-3 The Cricketers and the new pavilion, or with a copy of the planning permission granted on 9th April 2002, or with a copy of the section 106 agreement dated 9th April 2002 which Mr Elvidge stated was signed in connection with the grant of planning permission for The Cricketers and the new pavilion. Mr Herron's evidence was that it was a 1988 application which led to the grant of planning permission for development of The Cricketers in 2000, because the legal agreement took a considerable time to finalise.

1.19. The inquiry was provided with extracts from the Council's minutes in connection with the proposed grant of a lease to the Cricket Club, following a transfer of the freehold of the cricket ground to the Council which were supplied. If the evidence contained in Mr Elvidge's written statement was correct, there would be no reason for the Council to have been discussing this matter in 1990: his evidence was that there was no undetermined application for planning permission for residential development outstanding in 1990. However, I note from the printout provided by Mr Elvidge at O1/219 that there was an application in 1988 reference TH/88/316 for permission for 3 houses, in respect of which the print out records there is no decision on card. It seems likely to me that it was this application which was the subject of the 1990 discussions.

1.20. I was not provided with the 1990 minutes referred to in the 1990 reports which were provided recording the Council's decision to accept a conveyance of the field and to lease it to the Cricket Club in connection with the then proposed grant of planning permission.

1.21. Mr Herron relied on the words contained in the report of the Chief Solicitor to the Committee as supporting the applicant's case that the application land had been in recreational use as of right in 1990. The Chief Solicitor reported that "[i]t is also felt that it would be desirable for the public to be afforded a degree of access, particularly to the woodland area, for the purposes of informal recreation, as has been the case in the past." In my judgment these words cannot bear the weight which the applicant seeks to put on them for a number of reasons. Firstly, the source of the information that the public had been afforded a degree of access to the cricket club land, and in particular to the woodland area, for the purposes of informal recreation in the past is not identified. Secondly, the wording used in the report does not suggest that such access as there had been was to the whole of the application land: it relates specifically to the land the subject of the proposed lease, and in particular to the woodland area. When comparing that wording with the wording which eventually found its way into the 2002 lease, in clause 5.16.2, by which the Club agreed to permit such access by the general public for the purposes of recreation to the surrounds of the cricket field and the wooded area to the east of the existing pavilion as was reasonable, it seems to me that, at its highest, the evidence suggests that the public had, in the past, been afforded a degree of access to the surrounds of the cricket field and the woodland area within the area proposed to be leased to the cricket club in 1990. Finally, it is not clear from the wording that such access as the public had had in the past had been access as of right, in fact the words used suggest a permissive use "the public had been afforded a degree of access", and limited use only "a degree of access".

1.22. Mr Herron accepted in cross-examination that the 2000 application for planning permission for 3 houses which Mr Elvidge referred to had been made and that the objections, copies of which were produced by the objectors, were objections to the 2000 application. In the light of this concession, I do not accept Mr Herron's evidence that it was the 1988 application which led to the grant of permission in 2000 or 2002. There is no evidence to support Mr Herron's suggestion that the 1988 application was granted in 2000 or that the agreement which led to the title to the Cricket Club land being transferred to the Council in 2002 was the same agreement as the proposed section 52 planning agreement referred to in the 1990 material. I prefer Mr Elvidge's evidence, supported by the print out, that the 2002 permission related to the 2000 application. I note from the print out that the application for permission to erect the new pavilion was granted on 8th December 2000, rather than on 9th April 2002, the latter date being the date of grant of permission for the development of 1-3 The Cricketers.

1.23. I conclude therefore that it would not be appropriate to draw any inferences from the 1990 material as to the intention of the Council in 2002. I am satisfied that the 1990 material relates to a different and earlier planning application than that which led to the 2002 grant of permission and section 106 agreement.

1.24. It is apparent from the aerial photograph that work on 1 The Cricketers had begun by August 2003, and the sites for 2 and 3 The Cricketers had been cleared by that date, but the construction works had not yet begun. Numbers 1 and 3 were complete by 2007, and 2 was in the course of construction. All three were completed by 2009.

Evaluating the Applicant's witness evidence

1.25. Many of the witnesses who gave evidence in support of the application were firmly opposed to the future development of the application land, and saw the village green registration as a way of protecting the land from the possibility of future development. I considered carefully whether this desire had influenced the evidence which was given.

General comments

1.26. I was concerned that much of the evidence in support of the application was likely to have been tainted by the witness's desire to ensure that the application site would be protected from future development. This is often a concern in village green applications, but was a particular concern here, having regard to the planning history of the land, and to the terms of the letter that was sent out by Mr Herron seeking support for the application[2]. Mr Herron wrote (as particularly relevant):

"Obviously the land owners will be writing to the council to refute that the public have had use of this land for recreational purposes, as they, or at least some of them, want ultimately to see development for houses.

It is very important that if you too feel strongly that this should not happen that you write to KCC to express your support for the granting of village or town green status.

If the land is found by KCC to have been used, without interference from the land owner, for recreational use by the general public for 20 years or more, then the council can designate the land, thereby preventing it being built on."

1.27. In my judgment these passages in the letter might have led witnesses who were opposed to development to overstate their evidence in the hope of persuading the Registration Authority to register the land and thereby prevent future development. Mr Pett, for instance, when giving oral evidence, accepted that the picture of use painted in the letter of support signed by his wife on his behalf was inaccurate.

1.28. Further, the evidence in this case was also skewed, in my judgment, by applicant's understandable desire to rebut Greatex's case that such use as there had been of the Greatex land had been use of the public footpath and by the desire of local residents to prevent the development of the Probeport land in particular. I consider that it is likely that the information and suggestions given by Mr Herron at a meeting he held at the cricket club, following the Registration Authority's decision to refer the application to a public inquiry, led those who provided statements to concentrate on their activities on land other than the cricket club land, and on activities away from the public footpath through the Greatex land, giving the impression that their typical use was use of areas other than the public footpath, whereas in fact their typical use was use of the footpath, and other use was exceptional.

1.29. Only a very small proportion of those providing evidence gave oral evidence. The possible explanations as to why more people had not been willing to come to give oral evidence at the inquiry were not explored in cross-examination with Mr Herron. I am not prepared, in the light of the large number of written statements and questionnaires to draw any adverse inferences.

1.30. However, I do accept Mr Morshead's submission that the way in which the evidence was prepared tended towards exaggeration and towards a levelling off and up of uses and made it impossible to understand the pattern of use over the years. Where witnesses gave written evidence only, it was frequently difficult to distinguish between activities which had taken place on the land as of right, as required by the statutory test for registration, and other activities which were permissive. It seemed to me likely that much of the reported activity, such as playing in and watching cricket matches, drinking in the club house, and attending functions, such as barbecues and discos held by the cricket club, had taken place by licence of the cricket club. Some activity, for example, watching school sports days and rugby matches, must have been by licence of the cricket club's licensees. The position was less clear in relation to other activities, for example, playing cricket, or picnicking. These activities might have been connected with the cricket club's matches or they might not have been.

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[2] O1/278

1.31. Where witnesses gave written evidence only, they were often unclear as to the period to which their evidence related. It was not therefore possible to tell whether the use they claimed fell within the relevant period.

1.32. It was also frequently difficult, where witnesses gave written only, to be sure to which parts of the application land their evidence related. Some activities were clearly not suited to some locations: for instance, kite flying would not have been possible in the woodland areas and den-building would not have been possible on the cricket field, but the area where other activities was not inherently obvious. Further, where activities were capable of enjoyment in woodland areas, it was not possible in many instances to tell whereabouts in the woodland those activities were enjoyed. None of the witnesses who provided evidence questionnaires or letters only drew any distinction at all as to which parts of the application land they had used for which purposes. Some witnesses who provided written statements specified that they had used particular areas of the land for particular activities, but many witnesses made a general assertion that they had used the cricket ground and surrounding woodland.

1.33. It was clear from the clarification of evidence of those giving oral evidence obtained by cross-examination, that those witnesses who in their written evidence had made a general assertion that they had used the woodland surrounding the cricket ground, would not necessarily have used all parts of the woodland: some of the witnesses who gave oral evidence had made such a general assertion in their written evidence, but accepted in oral evidence that their activities did not extend to the whole of the application land (e.g. Dr Wynn Jones, and Mr Benedict, and also, on the basis of my findings, Mr Pett). It is not possible to be sure in relation to each of the witnesses who gave written evidence only, whether or not they used any particular part of the woodland, unless they made specific mention of the areas which they did claim to have used.

1.34. I prepared a table analysing which areas the witnesses who lived within the claimed neighbourhood and who provided written witness statements claimed to have used to assist me in analysing the evidence. I did not include the evidence of those who did not live within the claimed neighbourhood as to their use in this analysis. Where more than one witness from a single household provided a written statement I noted the number of witnesses from that household who provided evidence by the family name. The use of this table will have resulted in over-reporting of activity during the relevant period, as it is clear from the narrative in the statements that some at least of the reported use fell outside the relevant period, but it provided a useful feel for the preponderance of the evidence. 3 of the households (out of 52) claimed to have used only the cricket ground. 25 of the households claimed to have used the cricket ground and surrounding woodland, or the application land, without being any more specific as to which areas they had used. 46 households mentioned using the cricket ground specifically. 18 out of 52 households mentioned specifically that they had used the Greatex land, 13 specified that they had used the Brazil land, 17 that they had used the Probeport land, 8 that they had used DS Developments' land, 10 that they had used Kent County Council's land and 7 that they had used The Cricketers. None mentioned using the Weybridge Homes land specifically.

1.35. The memories of many of the applicant's witnesses and of the applicant himself were flawed in relation to the question of whether any part of the application land was fenced. Very few of the applicant's witnesses recollected the fencing on the western side of the cricket ground, on its frontage with Park Avenue, and returning to run along the northern side of the unmade track to the pavilion. I am satisfied that that fencing was erected during the relevant period and remained in place for a number of years. Mr Herron, Mr Wiltshire and Mr Randolph did not remember the fence. Dr Jones and Mr Benedict, although they stated that they remembered a fence in that position in reply to questions in cross-examination, had not mentioned the fence in their written evidence. Only Mr Pett mentioned the fence in his written statement. Of those witnesses who gave written evidence only, only Mrs Allen, Mrs Brierley, Mr Coates, Dr Herron, Mrs Pett, Mr and Mrs Wilson (who also mentioned the fencing between the DS Properties land and the Grange Way footpath) mentioned the fencing on the western side of the cricket ground (i.e. witnesses from 6 out of 52 households). Given this level of failure to mention the cricket ground fencing, I could give no weight to the general assertion of many witnesses

that there were no fences on the application land, when considering the more difficult question of whether there was any fencing on the northern boundary of the Brazil land. Further, the witnesses' failure to remember the cricket club fencing led me to doubt the reliability of their recollection as a whole.

Particular comments in relation to each of the witnesses who gave oral evidence in support of the application

1.36. Mr Herron did not remember the fencing along the Park Avenue side of the cricket ground, although, quite properly, he did concede in the light of the evidence produced by the objectors that there had been fencing in that position during the qualifying period. Mr Herron asserted in his statement that the sign on The Cricketers did not indicate that the road was private and should not be used. His failure to mention that the sign had previously included the wording mentioned by Mr and Mrs Kenyon showed either that his recollection of the sign was poor, which tends to suggest that his recollection on other matters was also likely to be poor, or that he deliberately failed to state that his memory that the sign had previously had "private road" wording on it, in addition to the wording he mentioned in his statement. On balance, I think that the failure was a failure of memory. Taking these matters together, I come to the conclusion that Mr Herron's recollection of the state of the land over the whole of the relevant period was unlikely to be particularly accurate.

1.37. Mr Herron did not always acknowledge or was not aware of the limits of his recollection or knowledge. His evidence in relation to the successive local plans was more confident than it should have been, and he had to concede that his recollection was wrong in a number of respects.

1.38. I accept Mr Herron's evidence that his use of the application land with his own children, particularly for treasure hunts, extended to the whole of the application land, insofar as it was accessible. That use ceased in 1995. Although Mr Herron gave general evidence that he had seen other children using the application land in the same way as his own children had done after 1995, he did not mention any particular use which he observed on any area of the land, other than bike riding and rope swinging in and over the dips area. In the light of the other evidence before the inquiry, I do not accept Mr Herron's evidence that for the remainder of the relevant period he used the land for dog walking, in a circular route, and that his route took him through the Brazil and Probeport land. I note that Mr Herron, in his 2003 letter to Mr Brown of Thanet District Council enquiring about the possibility of obtaining planning permission for development of the Brazil land, written in his capacity as a self-employed planning consultant acting for Mr and Mrs Brazil, although he pointed out factors which would tend to mitigate against a grant of planning permission, such as the fact that the site is part of one of the last woodland areas in Thanet, did not suggest that the site was a valuable recreational amenity for local residents. In my judgment he would have done so, had he been regularly using this land at the time.

1.39. Mr Wiltshire appeared to me to be an honest witness. Mr Wiltshire had not been into the Probeport and Brazil land since the early 1990s. I accept his evidence that until the early 1990s, when his children were small, although the main area in which they played was the woodland on the eastern part of the Cricket Club land and the Greatex land, he also went into the Brazil and Probeport land with them maybe once or twice a month, and at that time there was a path going right through. Since the early 1990s he has used the Greatex land and the Cricket Club land for dog walking and the Cricket Club land for watching cricket. I accept his evidence that he had continued to see the Cricket Club land and the Greatex land being used for dog walking and children's play, including, on the Greatex land, hide and seek and building dens. I also accept his evidence that children used to ride their bikes up and down the dips until they were filled in and that there were rope swings on the trees over the dips from time to time, again until the dips were filled in.

1.40. Mr Randolph had not noticed that there was fencing along the Park Avenue side of the cricket ground. He suggested that he had not noticed the fencing because he did not come that way, but it seems to me that anyone using the cricket ground regularly for recreation would have noticed the erection of a new fence by the Cricket Club in about 1995. Mr Randolph's evidence was that he went through from the cricket ground to the Brazil land. Such a route would have taken him alongside the line of fencing where it extended along the

northern side of the unmade track leading to the cricket pavilion. I therefore conclude that his recollection of the application land over the relevant period was not very reliable.

1.41. It seemed to me that Mr Randolph's desire to protect the application land against development, and his anger at the cutting down of the trees on the Probeport land in December 2009, had led him to exaggerate his evidence in some respects. It seemed to me very unlikely, having regard to the record of price paid for the Probeport land noted at Land Registry of £40,000, that a workman clearing the land in December 2009 would have told Mr Randolph that the purchaser had paid £600,000 for it. Mr Randolph claimed in his witness statement to have enjoyed a greater variety of activities on the application land than he did in his evidence questionnaire, and I conclude that the additional activities, kite flying and picnicking, were enjoyed rarely, if at all. I do accept his evidence that he had played ball games with his children and grandchildren on the cricket green, and that he has walked through the woodland on the application land. No other witness suggested that children rode bikes through the Brazil land, as Mr Randolph did in re-examination, and I reject his evidence of this activity. My doubts about this aspect of his evidence lead me to conclude that his evidence as to the activities he had seen in the last 10-15 years on the Brazil and Probeport land was likely to be exaggerated and unreliable, but even so, I note that he stated that the activities he reported took place mainly on the Brazil land rather than on the Probeport land. I conclude from this that in fact he saw no activities at all on the Probeport land.

1.42. In my judgment, in giving oral evidence Dr Jones was careful not to overstate his evidence. He acknowledged the limitations of his own knowledge, for instance, that he only knew where his children had been playing when he was with them, and that when they were older he could only guess as to where they had played. He did not claim to have used the Probeport or Brazil land recently, or other than exceptionally. I accept Dr Jones' oral evidence as reliable. Dr Jones could not remember a continuous line of fencing along the Park Avenue edge of the cricket ground. He frankly accepted that it was possible that there had been such a fence and he had forgotten about it.

1.43. The disparity between Dr Jones' oral evidence and the generality of the wording used in his written statement serves in my judgment to highlight the inherent unreliability of evidence which is not subject to cross-examination. I do not think that this discrepancy was in any way the result of Dr Jones in any deliberately seeking to mislead or to overstate his evidence. It would have appeared from a fair reading of Dr Jones' written statement that he and his family had used the whole of the application land, including all of the woodland on the Probeport, Brazil and Greatex lands for hide and seek, bike riding and general exercise, whereas in fact, Dr Jones' oral evidence was that the bike riding and exercise enjoyed by his children had been, in the main, on the cricket pitch, and that the woodland activities would have been in the Cricket Club and Kent County Council woodland. He was not sure that his children had even gone as far south as the dips.

1.44. I have considered carefully what weight I should attach to Dr Jones' evidence that his was able to gain access to the Brazil land after the Great Storm in reaching a conclusion on the issue of whether there was a fence on the northern boundary of the Brazil land. Given his acknowledgment as to the fallibility of his memory in relation to the fence along the Park Avenue edge of the cricket ground, and given that he was not able to assert positively that there was no fence along the northern boundary of the Brazil land, merely that he was able to gain access to the land without crossing a fence, I think that little weight can be attached to this evidence one way or the other. Mr Adamson suggested that the tree Dr Jones reported having gone to see was in fact on the land on which 1-3 The Cricketers was later built. This point was not put to Dr Jones and he did not have the opportunity to respond to it. However, there was no evidence at all to suggest that there had ever been a fence on the eastern boundary of the Brazil land, and it is entirely possible that Dr Jones may have gained access to the Brazil land via that boundary, without having to cross any fence which did exist on the northern boundary of the Brazil land, had there been such a fence. Therefore, although I accept Dr Jones' evidence that he did not have to climb a fence in order to gain access to the Brazil land on that occasion, I find it of little assistance in enabling me to reach a conclusion as to whether in 1987 there was a fence on the northern boundary of the Brazil land.

1.45. It seemed to me that Mr Benedict overstated his evidence in reply to questions in cross-examination in relation to the Brazil and Probeport land. He did not claim to have used the Brazil or Probeport lands himself. He claimed that his children regularly used the Brazil and Probeport land. This was not consistent with his written evidence, in which he had stated that they had used the Greatex land to play, and mentioned one specific period only when they used the Brazil and Probeport land in connection with Mr Benedict's daughter's wildlife project, in about 2004. In re-examination, he only claimed that his children "may" have used the Probeport land. Further, his suggestion that his children used the Brazil and Probeport lands regularly was inconsistent with his evidence that he would find them, when he went to call them in for tea, on the Greatex land. I prefer his written evidence and his evidence in re-examination, and reject his suggestion in cross-examination that the children made any regular use of the Brazil and Probeport lands.

1.46. I accept Mr Benedict's evidence that the Brazil and Probeport lands were overgrown and unsuitable for use with bicycles when his children were using other parts of the application land for play (which I infer from their ages was in the 2000s). I have considered carefully his evidence that he could not have gone from his house to the cricket pitch via the Brazil and Probeport lands because the growth on the land was too dense, that there was no path through there and that although children might sneak in to play there, there was no way through and that everyone in the area would know that. I set out my conclusion in relation to the conflict between this aspect of his evidence and Mr Herron and Mr Randolph's evidence below.

1.47. In my judgment Mr Ali was an honest witness who did not in any way seek to tailor his evidence to improve the chances of the application succeeding. I accept his evidence that he used the cricket ground as a child to ride his bike and for kite flying, playing Frisbee, aerobie and to use his boomerang. He continues to use the cricket ground to fly a big kite with his brother and to play Frisbee, and to play with his nephews. I accept his evidence that he used the woodland throughout the application land, including the woodland to the east of the cricket ground, the Greatex land and the Brazil and Probeport lands for adventurous play as a child, between about 1984-1993, with his use of the Brazil and Probeport lands being greater in the earlier part of that period. He used the dips area in particular for bike riding and play with ropes. He used both the cricket ground and the Greatex land with his radio controlled car, and continued that use after he was 18 in 1998. I accept his description of the state of the Brazil and Probeport land as likely to be accurate: a private area which was difficult to get to with a lot of stinging nettles and brambles.

1.48. Although Mr Ali, unlike many of the other witnesses, remembered that there was fencing on the application land, and described a situation where fences came and went over the years all over the area, his recollection as to whether fencing existed along a particular line was not good, because if he found a fence in his way, as a child, he climbed over it.

1.49. I was satisfied that Mr Pett had walked his dog around the cricket pitch and through the Greatex land during the relevant period, and that he had watched cricket on the Cricket Club land

1.50. I was not satisfied that Mr Pett was frank in his evidence in relation to the Brazil and Probeport land. The impression I gained was that he was not prepared to tell a direct untruth, but was content, through leaving things unsaid, to give an erroneous impression about his use of the land. I noted that he did not answer the direct question "did you walk your dog through the Brazil and Probeport land" with a yes or no answer, preferring instead to assert that that land was accessible, although he subsequently agreed that it was "accessible if you are determined". He also asserted that he had seen people carrying garden waste onto the land and said that there were certain areas where it was possible to get onto the land, mentioning in particular an opening opposite his house. However, in my judgment it was clear from his statement that the last time he had been on the Brazil/Probeport land before the fences were erected was about two years prior to giving evidence, and then for a particular purpose (to look for items stolen from his brother's car), that he was not a regular user of that area during the relevant period. His failure to say this clearly in my judgment resulted from his desire not to undermine the applicant's case. In spite of his desire to support the applicant's case, his

evidence did not support the evidence of Mr Herron and Mr Randolph on the question of whether there was a path through the Brazil/Probeport land from the Cricket Club land to Park Avenue: he said that he could not be definite that people went onto the Probeport land from Park Avenue.

1.51. The evidence of Mr Benedict that there was no path through the Brazil and Probeport land in particular, but also the general tenor of Mr Ali's evidence as to the condition of those areas, was in direct contradiction to the evidence of Mr Herron and Mr Randolph's evidence that they used a path through the Brazil and Probeport land from the cricket ground to Park Avenue. Mr Pett did not support Mr Herron and Mr Randolph's evidence that there was a path through the Brazil and Probeport land, despite the fact that he was a dog walker who claimed to have used the woodland surrounding the cricket ground for dog walking. Mr Benedict and Mr Ali's evidence was consistent with the evidence of various witnesses who gave evidence on behalf of the Objectors. Whereas a conflict between the Objectors' witnesses' evidence and all of the Applicants' witnesses' evidence as to the condition of the land might possibly have been explained by the fact that the Objectors' witnesses went to the land less frequently than the Applicants' witnesses, and then for specific purposes, and not for recreation, an internal conflict between different witnesses giving evidence on behalf of the Applicant on this point is not capable of such an explanation: all the witnesses who supported the application claimed to have used such parts of the woodland as was available and suitable for recreation, for recreation.

1.52. I bear in mind in considering how to resolve this conflict the fact that Mr Benedict, although he did not claim to have used the Brazil and Probeport lands himself for recreation, hadthe opportunity to observe those areas when his daughter was using them in connection with her wildlife project. I also bear in mind the proximity of his house to the Probeport land, between the Probeport land and Parkwood Close and to the west of Parkwood Close. It seems to me that, had there been a path through the Brazil and Probeport land leading to Park Avenue, it is overwhelmingly likely that he would have observed it. I therefore prefer Mr Benedict's evidence, and reject Mr Herron and Mr Randolph's evidence that there was a path through the Brazil and Probeport land from the Cricket Club land to Park Avenue throughout the relevant period.

Evaluation of the evidence of the witnesses who gave evidence in opposition to the application

1.53. I was not satisfied that Mr Adamson's recollection of the fencing present on the application land was wholly accurate. Mr Adamson's detailed drawing of the historic fencing on the application site did not include any reference to the fencing on the northern side of the unmade track to the cricket pavilion, which, by reference to other evidence before the inquiry, I am satisfied was present in that position between about 1995 and at least May 1999. His drawing showed the fencing along the Park Avenue frontage of the cricket ground ending at the point where The Cricketers leaves Park Avenue.

1.54. Mr Adamson's recollection was that there were no saplings on the Probeport land in 1990 when he started working for Thanet District Council. This evidence is inconsistent with Mr Young's evidence in relation to the 1994 photograph, and also with the evidence of Mrs Brierley and Mrs Hames, both of whom remembered trees being planted on the Probeport land. I reject Mr Adamson's evidence. I am not satisfied that Mr Adamson's recollection is accurate on this point either.

1.55. I have considered carefully what weight I should attach to Mr Adamson's apparently vivid recollection that he had to climb a fence to gain access onto the Brazil land which ran along the northern boundary of that land. His evidence was that that fencing was there from 1990 when he first started working for Thanet until about 1995 or 1996, when it started to disappear, and it finally disappeared when the building works for The Cricketers were taking place.

1.56. As a matter of common sense, there would seem to be no point in fencing the northern boundary of the land, if the eastern boundary with the woodland on which 1-3 The Cricketers was later built was left unfenced. There was no evidence at all to suggest that the eastern boundary was ever fenced. I note that

neither Mr Brazil senior nor Mr Brazil junior mentioned that they remembered that there was a fence along the northern boundary of the Brazil land. I would have expected Mr Brazil senior, in particular, to have remembered such a line of fencing, had it existed, given that it would, on Mr Adamson's evidence have been present when he purchased the land at auction. On balance, I think that it is unlikely that Mr Adamson's recollection on this point was accurate either, and I find that there was no fencing on the northern boundary of the Brazil land.

1.57. Mr Vahid's recollection was clearly flawed in a number of respects. His description of the condition of the Probeport land was not supported by the aerial photographs: his evidence was that the Probeport land was, like the Brazil land, very dense throughout the period of his employment with Thanet District Council (1979-2010), whereas the aerial photographs show that there were areas of grass on this land as late as 1994. His evidence that the fencing on the western boundary of the cricket ground along Park Avenue extended to the south of the track to the cricket pavilion was unsupported by any other evidence. His written evidence that that fence continued in existence until at least 2010 was changed in oral evidence to about 5 years before the inquiry (i.e. 2006), but the continuing existence of this fencing beyond about 2001 was unsupported by any other evidence. I reject his evidence on these points. Further, his evidence that he had asked the owners to cut back the vegetation on the northern boundary of the Brazil land to prevent it overhanging the track to the pavilion from Park Avenue in my judgment was unlikely to be accurate, given the gap between the trees on the Brazil land and that track visible in the aerial photographs.

1.58. Having regard to the condition of the Brazil land on the occasion of my site visit, and to the fact that there was no evidence that any work had been done to that area since March 2010, I reject Mr Vahid's evidence that that area was for practical purposes impenetrable, and prefer the evidence of other witnesses that there were gaps underneath the tree canopy in much of this area.

1.59. Taking in account my findings as to the accuracy of Mr Vahid's recollection on these points, I approached Mr Vahid's evidence on the question of whether there was any fencing on the northern boundary of the Brazil land with caution. His written evidence was that he remembered there being a fence along the northern boundary of the Brazil land until at least March 2010. In oral evidence he said that the fence was there in the early 1990s. Having regard to the other evidence before the inquiry, I reject that evidence.

1.60. Mr Keens' recollection that the Probeport land was densely overgrown scrubland during the whole of the period when he knew it was, in my judgment, by reference to other evidence before the inquiry which I preferred, inaccurate. I prefer the evidence of Mr Young and Mrs Brierley and Mrs Hames that the land was re-planted during the period after Mr Keens had become associated with it in the late 1980s. I conclude that Mr Keens' recollections of the land date from a more recent period.

1.61. I was not satisfied that Mr Keens' evidence in relation to the rope swings on the Greatex land was entirely straightforward. I found it hard to reconcile his evidence that there was only one rope swing with his evidence that one was up there longer than others. Mr Benn's evidence, which I prefer on this point, was that he and Mr Keens cut down a number of rope swings. Although Mr Keens' evidence was that he had never seen the edge of the Probeport land looking as clear as it did in the Google street car image, he was, on the evidence, the person who was responsible for ensuring that the land was maintained, and I think it highly unlikely that he had not seen the land looking like this. It seems to me that his denial highlighted the fact that his memory had changed over time, so that the growth on the land had become denser in recollection that it was in reality at the time.

1.62. Mr Benn struck me as an honest witness, although in my judgment his recollection was imperfect in some respects. His recollection of the Probeport land as densely overgrown scrubland from 1977 until the time it was cleared in December 2009 was, in my judgment, and by reference to other evidence before the inquiry which I preferred, inaccurate. It was clear from Mr Benn's evidence in relation to the re-planting of the Greatex land that he was largely reliant on the documentary evidence contained in Greatex's correspondence files for his

evidence that that land had been re-planted, rather than on his own independent recollection. Mr Benn said that the relevant correspondence (which was not included in Greatex's bundle) was from a firm called Harrisons, employed by Mr Hooker. I infer that the re-planting on the Greatex land was carried out by contractors employed by Mr Hooker. It seemed likely from Mr Benn's evidence that any replanting of the Probeport land would also have been undertaken by Mr Hooker. I do not consider that the absence of any similar correspondence in the file in relation to the Probeport land alone can carry much weight, as against the evidence of Mr Young and Mrs Brierley and Mrs Hames, which I prefer. Mr Benn's evidence was that he did not wish to be a dog in the manger. He said that he was looking for "trouble", not for dog walkers just taking a dog through the land. I infer from these statements that he would not have objected and did not object to anyone enjoying lawful recreational activities on the Greatex land, so long as he did not perceive their activities as creating a potential occupier's liability insurance risk.

1.63. Mr Philpott has voluntarily given a substantial amount of his own time and resources to the Cricket Club, and has acted to safeguard the Club's property from potential and actual threats from those he perceived to be undesirable. He was clearly worried about the effect that registration of the application land might have on the Club's continuing use of the ground, and keen that the application should not succeed. To a certain extent this led him, in my judgment, to underplay the tolerance the Club has extended to local people enjoying recreation on the Cricket Club land in his written evidence and evidence in chief. It was clear from the tenor of his evidence in reply to questions in cross-examination, and from the distinction he drew between those who loitered or looked undesirable and those who were what he described as "ordinary members of the public", that he and other club officials had not objected to people carrying out lawful activities on the cricket ground surrounds or in the woodland or even to dog walking on the cricket ground itself, so long as there was no concern that their activities would damage the pitch. I was satisfied that one individual had been asked to stop practising golf on the pitch, and that if he saw people playing football or cycling on the pitch, he had asked them not to do so.

1.64. Mrs Brazil was, as she acknowledged, only able to give a limited amount of direct evidence, because she had only once been onto the land she and her husband owned, in February 2011, after the end of the relevant period. I accept her evidence where she had direct knowledge of the matters concerned.

1.65. Mr Brazil junior was frank about the limitations of his memory, and I was satisfied that he did not suggest he remembered things when in fact he did not. In particular, I note that he did not claim to remember a fence along the northern boundary of the Brazil land, but clearly said he would not have been able to remember whether or not there was a fence there in 2002. I accept his evidence that there was fencing along the Park Avenue boundary of the Brazil land. I accept his evidence that he had not seen any visible path through the Brazil land to the Probeport land on the occasions he visited the land, in 1998 and a couple of times after completion of the purchase in 2002. I accept his evidence (supported by Mrs Brazil's evidence) that he had removed a tree house on the Brazil land, near the Park Avenue frontage.

1.66. Mr Brazil senior's evidence was not subject to testing by cross-examination and necessarily carries less weight than the evidence of those witnesses whose evidence was so tested. His evidence supported Mr Brazil junior's evidence and was consistent with that evidence. I accept his evidence that from when he inspected the land in 1998 he did not see any established paths suggesting regular or repeated use of the plot.

1.67. Much of Mr Elvidge's evidence was formal, setting out the planning history of the application land, and was helpful and in my judgment accurate. I have not set out his comments on the user evidence, as those formed the subject of submissions by counsel.

1.68. Mr Young clearly had a high degree of expertise in the analysis of aerial photography and I was satisfied that he had presented the results of his analysis faithfully. There were some respects in which I thought Mr Young's evidence was helpful and likely to be reliable. I was satisfied that his evidence in relation to the re-

planting of the Probeport land and the Greatex land was likely to be accurate. I was unable however to attach much weight to Mr Young's evidence on the question of whether or not there were paths through the Probeport and Greatex lands. I am satisfied on the basis of all the other evidence before the inquiry that there was at all material times a strong south-north path through the Greatex land. The fact that Mr Young was unable to identify this path on several of the aerial photographs (1999, 2003 and 2007) has led me to conclude that had there been a similar path on the Probeport land, he would not have been able to see that path either.

Fencing

1.69. I am satisfied that there was a fence along the western boundary of the cricket ground, running along Park Avenue between about 1994 and about 2000. There was a substantial amount of evidence, both from the applicant's witnesses and from witnesses who opposed the application, that there was a fence along the western boundary of the cricket ground with Park Avenue during part of the relevant period. I accept Mr Philpott's evidence that, when erected, the fencing along the Park Avenue frontage formed a complete line, without gaps between the north eastern corner of the cricket ground, and the northern side of the unmade track to the cricket pavilion.

1.70. I am satisfied that the fence along the western boundary of the cricket ground turned to return in an east-west direction along the northern side of the unmade track to the cricket pavilion for about 25 metres.

1.71. Drawing No 9010/EX/01[3], which is titled "Record of Survey" and dated May 1999, drawn in connection with the 2000 applications for planning permission for the development of 1-3 The Cricketers and the new pavilion, shows a wood close board fence and a chain link fence running in a south west to north east direction, along what appears to be the boundary between the rear fences of the Parkwood Close development and the land to the north, the subject of the 2000 application. It also shows a post and wire fence running along the northern side of an unmade track leading towards the pavilion, giving way as it continues eastwards to a line of posts along the northern side of the track. This survey does not show any fence along the northern or eastern boundaries of the Brazil land.

1.72. This drawing supports the oral evidence of Mr Philpott and the expert evidence of Mr Young that there was a fence along the northern side of the unmade track to the cricket pavilion and I accept that evidence.

1.73. I am not satisfied, on the balance of probabilities, that there was a fence along the northern boundary of the Brazil land during the relevant period. I am satisfied that there was a fence on the western, Park Avenue, boundary of that land. There was no evidence to suggest that there was a complete line of fencing at any time during the relevant period on the boundary between the Brazil land and the Probeport land.

1.74. There was no evidence to show that the southern or western boundaries of the Probeport land were fenced at any time during the relevant period.

1.75. DS Developments' land was fenced with a recognisable barrier on its eastern boundary during the relevant period.

1.76. Although I am satisfied that there was a fence between the Kent County Council land and the Cricket Club land, there was no evidence to suggest that that fence stretched at any time during the relevant period across the dips area. There was no evidence to show that the southern or eastern boundaries of the Kent County Council land were fenced. I conclude that that area was freely accessible without force.

What was the combined effect of the fences which did exist?

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[3] O1/232

1.77. With the exception of the DS Developments' land, I am not satisfied that any part of the application land was fenced during the relevant period in such a way as to make use of it, in spite of the fencing, use by force. There was no evidence that the Greatex land was fenced during the relevant period. There was no evidence that the Probeport land was fenced during the relevant period. There was no evidence to suggest that the Brazil land was fenced on its eastern boundary. It seems inherently unlikely that any sensible landowner would have erected a fence running along the northern boundary of the Brazil land and stopping at the north eastern corner of that land. There was no evidence to suggest that access to the Brazil land would not have been freely available until at least 2000 from the woodland area on which 1-3 The Cricketers was later built. I accept Mr Herron's evidence that the woodland north of Parkwood Close on which 1-3 The Cricketers was later built would have appeared indistinguishable from the Greatex land and the Cricket Club land to the east and the Brazil land to the west.

1.78. Although I was satisfied that the Cricket Club land was fenced on its western side and along the northern side of the unmade track to the pavilion for part of the relevant period, there was no evidence to suggest that the Cricket Club land was ever fenced off completely, so that access to that land would have been restricted. There was at all times access from the end of the unmade track onto the Cricket Club. There was no evidence to suggest that the line of fencing which might have existed on the boundary between Kent County Council's land and the Cricket Club land continued across the dips area, or to show that the boundary between the Cricket Club land and Greatex's land was fenced. I am satisfied that access to the Cricket Club land was freely available from the Greatex land throughout the relevant period.

Conclusions as to the state of the land during the relevant period

1.79. I am satisfied that the landscaping schemes required in connection with the grant of planning permission for the Parkwood Close development were implemented, and that, as a result, trees were planted on the Greatex land during 1985 and trees were planted on the Probeport land at the end of 1985 or shortly thereafter. I prefer the evidence of Mr Young, the aerial photography expert, supported by the evidence of Mrs Brierley and Mrs Hames, to the evidence of Mr Benn in relation to the question of whether trees were planted on the Probeport land. I am satisfied that the condition of the Greatex and Probeport land has changed substantially over the relevant period, beginning in August 1987, as those trees have grown.

1.80. In my judgment the western part of the Probeport land was accessible at the beginning of the relevant period and for several years into the relevant period. However, in the later years of the relevant period, the land was, by reason of the density of growth on the plot, not attractive for recreation.

1.81. The changes in the Brazil land over the same period were less dramatic, and resulted not from re-planting, but from the steady growth of the trees and shrubs which were already on the land at the beginning of the relevant period. In my judgment there were during the relevant period gaps under the canopy between which a person could have walked, but I am satisfied that it was not possible to cross the boundary between the Brazil land and the Probeport land during later part of the relevant period. In my judgment Mr Herron's own description of that land in 2003, contained in his letter to Mr Brown of Thanet District Council enquiring about the possibility of obtaining planning permission for development of the Brazil land, and written in his capacity as a self-employed planning consultant acting for Mr and Mrs Brazil, as "overgrown and mis-managed" was a reasonably accurate description of the Brazil land at the time the letter was written.

1.82. The Greatex land was subject to extensive re-planting just before the beginning of the relevant period, and, like the Probeport land, must have changed substantially over the relevant period.

1.83. People who claim to have used the application land throughout the relevant period tend to project backwards in time their more recent memories of the land, and fail to recollect changes in the condition of the land over time. It does not surprise me that so few people who claimed to have used the land over the relevant

period remembered these changes: this is entirely consistent with my experience in dealing with other applications.

Conclusions as to the use made of the land during the relevant period

1.84. The applicant has not satisfied me that the application land should be treated as one single area. There are important distinctions to be made in terms of the different character of different parts of the application land and the different use of different areas. It is right in my judgment to consider the evidence of use in relation to each part of the application land separately.

1.85. I am satisfied that local people made extensive use of a route which roughly followed the line of the public footpath through the Greatex, Cricket Club and Kent County Council land. I am also satisfied that local people made extensive use of a path which branched off the public footpath and led to the area behind the cricket pavilion, and then eastwards to Park Avenue.

1.86. The route of the east-west path from the area behind the cricket pavilion to Park Avenue changed over the period. Before the re-building of the pavilion, the route followed the unmade track which led from Park Avenue to the cricket pavilion. Following the building of 1-3 The Cricketers the route followed the access road to those properties and the roadway to the car parking area behind the pavilion. That roadway was initially unmade, but was surfaced in about 2007.

1.87. Many local people extended their walk by adding one or more circuits of the cricket pitch. This was particularly popular with dog walkers. All of these routes were also used extensively by children on bicycles.

1.88. I am satisfied that the only use that the overwhelming majority of adult users of the Greatex land made of that land during the relevant period was use or excessive use of the linear footpath through the land. Childrenmade extensive use of the dips area which crossed between the Greatex land and the Kent County Council land for play, particularly with bikes and also using rope swings from time to time attached to the trees, until the dips was partially filled in about 2003 by the builders of 1 The Cricketers. However, there was little evidence to suggest that the dips area continued to be used once the dips were filled.

1.89. Although the dips area was the focus of children's play, I am satisfied that there was some additional more general use of the Greatex land during the relevant period for other children's activities such as den building, hide and seek and treasure hunts. Although this use arguably went beyond excessive use of the footpath, nevertheless, to the eyes of a reasonable landowner, as those participating were children, in my judgment these activities would not have appeared to be an assertion of a right by local inhabitants. In any event, in my judgment, by clearing the dens and ropes that were left in the area regularly, the landowner acted proportionately in relation to any potential assertion of a right, making it clear that such use was not tolerated, and thereby rendered the use contentious.

1.90. There was little evidence of recreational use of the Kent County Council land beyond use of the footpath. I am not satisfied that a reasonable landowner of that land would have considered that local people were asserting a right to use his land for recreation.

1.91. Similarly, there was little evidence of recreational use of DS Developments' land specifically, and I am not satisfied that a reasonable landowner of that land would have understood that a right to use his land for recreation was being asserted.

1.92. I am satisfied that local people made general recreational use of the Cricket Club woodland and the cricket pitch surrounds for activities including dog walking, picnicking, cycling, den building and hide and seek and watching cricket. I am satisfied that the cricket pitch itself was used for activities such as dog walking, kite flying and playing ball games when not in use for organised sport. However, it was absolutely clear from Mr

Philpott's evidence in relation to his experiences elsewhere, that such use as there has been of the cricket pitch by dog walkers has been entirely responsible, so that there have been no fouling issues.

1.93. In my judgment it is clear that the Cricket Club tolerated responsible use of the Cricket Club land by local people for lawful sports and pastimes. Those who behaved unlawfully or were suspected of being likely to behave unlawfully were asked to leave. Those whose activities were likely to damage the playing field, such as golfers, cyclists and footballers, were asked to desist from their activities.

1.94. However, the overwhelming majority of local inhabitants enjoyed lawful sports and pastimes on the Cricket Club land which were not likely to cause any damage to the land. They respected games in progress by avoiding the cricket field, often stopping to watch the match. Although members and officers of the Club would have seen such individuals in the surrounds to the cricket field, outside the boundary, and would have known that they were not players or supporters, they were not asked to leave. Responsible activity on the pitch itself (avoiding the square which was roped off) was not challenged when there was not a match in play. In my judgment such activity was tolerated by the Club.

1.95. In *Lewis* the Supreme Court envisaged that where use which had been tolerated by a landowner in co-existence with his own use of the land gave rise to a right in local people to use land for recreation, that right would continue to co-exist with the continuing use by the landowner of his land, with give and take on both sides. In my judgment the use made of the Cricket Club land by dog walkers has emphatically not given rise to a right to walk dogs on that area without picking up faeces, and the give and take envisaged by the Supreme Court in *Lewis* would entitle the Cricket Club to exclude from the land, if it were to be registered as a town and village green, anyone who failed to act responsibly in relation to their pet.

1.96. I am satisfied that there was at one time a meandering path through the trees from Park Avenue to the boundary between the Brazil land and the Weybridge Homes land, but I am not satisfied that it survived or continued to be used for the whole of the relevant period. I am satisfied that some use was made of this path during part of the relevant period for dog walking by adults. However, in my judgment the use that there was of this path was use more in the nature of a right of way type use, than a village green type use.

1.97. In my judgment there was insufficient credible evidence to show that the Brazil and Probeport lands were in general recreational use by local residents throughout the whole of the relevant period. Use by adults was, in my judgment, limited to use for walking through (a right of way or excessive use of a right of way type user), and even this use had ceased before the end of the relevant period. I am satisfied that there was some use of the Brazil and Probeport lands by adventurous children for activities such as den building, but I am not satisfied that this use was anything other than sporadic, or that it persisted throughout the whole of the relevant period. Those who did use the Brazil and Probeport lands, such as Mr Ali, tended to emphasise its private nature (Mr Ali did not remember seeing other children playing there), or, such as Mr Benedict's daughter carrying out her wildlife project, to make use of it for purposes for which it would not have been suitable, had it been in regular use for recreation by others. I accept Mr Morshead's submission that such use by children would have been seen by a landowner as mischief, rather than as the assertion of a right by local inhabitants to enjoy recreation on the land. My impression on the evidence is supported by the fact that these areas were not included as open space on the successive local plans, and by the fact that the objections to the application for planning permission in relation to 1-3 The Cricketers did not mention recreational use of the site as a reason for refusal.

1.98. I am not satisfied that the sign erected on the Cricketers roadway was present during the relevant period. Mr and Mrs Kenyon's evidence was merely that it was erected in 2008. The application was made in August 2008. Mr Herron's evidence, which I accept, is that the sign was erected after the application had been submitted to the Registration Authority. In any event, in my judgment the sign would not have been effective to render use by local people of the roadway for lawful sports and pastimes contentious, and there was no

evidence at all to suggest that pedestrians or cyclists using the road were challenged verbally or otherwise. In my judgment use of this roadway by local people was use as of right, and was not use by force in defiance of the notice, but that use was more in the nature of a right of way type use than in the nature of a village green type use.

Was use of the Cricket Club land by local inhabitants use as of right?

1.99. By clause 5.16.2 of the Lease of the Cricket Club land the Cricket Club covenanted:

To permit such access by the general public to the surrounds of the cricket field and to the wooded area to the east of the existing Building for the purposes of recreation as is reasonable and not to take any steps whether by way of legal proceedings or otherwise to prevent any member of the general public from having such access without the prior written consent of the Landlord such consent not to be unreasonably withheld

1.100. The Cricket Club contended that this obligation meant that such use as there had been of the Cricket Club land was permissive and not as of right. That submission is flawed in a number of respects: firstly, as a matter of construction in my judgment, the clause does not require the Club to give access to the cricket field itself. Any negativing effect on the as of right requirement by reason of this clause can therefore only relate to the surrounds of the cricket field and the wooded area to the east of the pavilion existing in 2002. Secondly, permission in order to be effective has to be communicated. The mere fact that the Club was required by its Lease to permit access is not an effective communication of that permission to users. There was no evidence to suggest that the Club expressly communicated to local inhabitants a permission to make use of the cricket field surrounds and woodland. Thirdly, the Cricket Club was required to permit "such access…as is reasonable" to those areas. The Club had the right to regulate access: the question is whether in fact it did regulate the access. Had the Club erected notices granting local inhabitants permission to use the cricket field surrounds and woodland for the period of its lease then arguably any use of those areas by the public would have been impliedly permissive. However, permission cannot arise merely because of the terms of the lease: it must be communicated by the outward acts of the Club.

1.101. The issue of implied permission was not raised by the Cricket Club, but I have considered carefully whether the acts of the Cricket Club in seeking to control activity on the pitch which was likely to damage the pitch, such as golf practice or football, gave rise to an implied licence to enjoy other activities. In my judgment the conduct of the Club was equivocal: it would not have been clear to a reasonable user that by seeking to control potentially damaging activities, it was impliedly licensing others. In my judgment the correct inference is that the other activities were tolerated.

1.102. I am not satisfied that Thanet District Council acquired the freehold title to the Cricket Club land under section 19 of the Local Government (Miscellaneous Provisions) Act 1976, as submitted on behalf of the Cricket Club. I was not provided with any minutes relating to the Council's decision to accept a transfer of the Cricket Club land to it in 2002, or with any minutes relating to the Council's decision to grant the 2002 lease to the Cricket Club. I was not provided with a copy of the transfer dated 9th April 2002 referred to in the register. For the reasons set out above, I am not satisfied that the 1990 minutes are of assistance in determining the Council's intention in 2002. The Council had a number of different statutory powers available to it under which it might have acquired the land. There was no positive evidence as to which particular statutory power of acquisition the Council utilised when accepting the transfer of the Cricket Club land to it by the School on 9th April 2002.

Locality/neighbourhood

1.103. I was satisfied that the housing in Park Avenue and the residential cul-de-sacs leading off that road had a sufficiently recognisable identity and cohesive quality to qualify as a neighbourhood within the meaning of the statute. As is common in these applications, most of those who completed an evidence questionnaire failed to understand the neighbourhood/locality question and did not offer any evidence as to within what

neighbourhood or locality they lived. However, a number of witnesses did support the applicant's evidence that Park Avenue is a neighbourhood by identifying their neighbourhood as the Park Avenue area.

1.104. I accept Mr Morshead's submission that a requirement of cohesiveness survives. In my judgment the single vehicular access to the roads within the claimed neighbourhood lends a quality of cohesion to the area so that, although all the homes within the area were not developed at the same time as a single estate, it has an estate-like quality. The claimed neighbourhood is built around the cricket ground, and it is that facility which gives the area a unifying quality. I do not accept Mr Morshead's submission that to say in this case that it is the application land itself which lends a unifying quality to the neighbourhood is to allow the argument to pull itself up by its own bootstraps: the cricket ground was present before most if not all of the housing, and the housing has been developed around it and designed with the objective of preserving the setting of and visual amenity provided by the cricket ground. The cricket ground provides both a geographical landmark for the area and a focus for the housing around it.

1.105. However, there was insufficient evidence to show that the electoral ward of Upton had a sufficient identity, independent of its identity as an electoral ward, to survive as a recognisable locality, following the change in ward boundaries and the creation of the new Viking Ward. I am not therefore satisfied that the electoral ward of Upton is a qualifying locality within the meaning of the statute.

1.106. In my opinion it would be contrary to the intention of the legislature in introducing the neighbourhood test to recommend that this application should fail, in spite of the fact that the neighbourhood aspect of the test is met, because the applicant has failed to understand the technical requirements of the locality aspect of the test. In my judgment although the applicant has failed to amend his application to date, having been given a number of opportunities to do so, it would nevertheless be fair to the applicant and not oppressive or unfair to the objectors to allow the applicant one final opportunity to amend his application.

2. **Applying the law to the facts**

A significant number of the inhabitants of any locality or of any neighbourhood within a locality…
2.1. I was satisfied that the area identified by the applicant is a neighbourhood within the meaning of section 15.

2.2. However I was not satisfied that the electoral ward of Upton is a qualifying locality. I recommend that the application should not be rejected at this stage on this basis: in my judgment the applicant should be given one final opportunity to amend this aspect of his application, if he wishes to do so, to specify an alternative potentially qualifying locality or localities. Those who have made representations in relation to the application should be given the opportunity to make representations in relation to the amended locality or localities. I will be pleased to advise further on the application as amended, if required to do so.

…have indulged as of right…
2.3. I was satisfied that such use as was proved to have been made of the application land, with the exception of the use of the Greatex land (as to which see below), was use as of right. I was not satisfied that the Cricket Club land had been used "of right" rather than "as of right".

2.4. I was satisfied that the landowner of the Greatex and Probeport lands had removed den building material and the ropes tied to trees to form rope swings across the dips area on the Greatex land from the Greatex land regularly. In my judgment this action was proportionate to the use being made of the Greatex land by children for play, and was effective to make that use contentious and therefore not as of right.

…in lawful sports and pastimes…

2.5. I was not satisfied that it would have appeared in this case to a reasonable landowner that the inhabitants of the claimed neighbourhood were asserting a right to use substantially the whole of the application land for lawful sports and pastimes. I therefore considered the evidence in relation to each part of the application land separately.

2.6. I was satisfied that the only use that the overwhelming majority of adult users of the Greatex land made of that land during the relevant period was use or excessive use of the linear footpath through the land. Once use and excessive use of the footpath was excluded, I was not satisfied that such use as remained would have had the appearance of the assertion of a right asserted by a significant number of local inhabitants to use that area for recreation.

2.7. I was satisfied that children made extensive use of the dips area which crossed between the Greatex land and the Kent County Council land for play, but I was not satisfied that the dips area continued to be used once the dips were filled in, in about 2001.

2.8. Although I was satisfied that there was some additional more general use of the Greatex land during the relevant period for other children's activities such as den building, in my judgment this use was contentious.

2.9. There was little evidence of recreational use of the Kent County Council land beyond use of the footpath. I am not satisfied that a reasonable landowner of that land would have considered that local people were asserting a right to use his land for recreation.

2.10. Similarly, there was little evidence of recreational use of DS Developments' land specifically, and I was not satisfied that a reasonable landowner of that land would have understood that a right to use his land for recreation was being asserted.

2.11. I was not satisfied that the Brazil and Probeport lands were in general recreational use by local residents throughout the whole of the relevant period. I was not satisfied that any path through Brazil land and the Probeport land which existed at the beginning of the relevant period continued to be used for the whole of the relevant period. In any event in my judgment any use that there was of this path would have been regarded by a landowner as use more in the nature of a right of way type use, than a village green type use.

2.12. I was satisfied that there was some use of the Brazil and Probeport lands by adventurous children for activities such as den building, but I am not satisfied that this use was anything other than sporadic, or that it persisted throughout the whole of the relevant period. In my judgment such activity would not have been regarded by a reasonable landowner as the assertion of a right by local inhabitants to enjoy recreation on the land.

2.13. In my judgment the use of The Cricketers roadway was more in the nature of a right of way type use than in the nature of a village green type use.

2.14. I was satisfied that the number of people using the Cricket Club land from within the claimed neighbourhood for lawful sports and pastimes was sufficient to signify to a reasonable landowner that the land was in general use by local inhabitants for recreation, and not merely in use by individuals as trespassers. I am satisfied that local people made general recreational use of the Cricket Club woodland and the cricket pitch surrounds for activities including dog walking, picnicking, cycling, den building and hide and seek and watching cricket. I am satisfied that the cricket pitch itself was used for activities such as dog walking, kite flying and playing ball games when not in use for organised sport.

2.15. In my judgment the use made of the Cricket Club land by dog walkers has emphatically not given rise to a right to walk dogs on that area without picking up faeces, and the give and take envisaged by the

Supreme Court in *Lewis* would entitle the Cricket Club to exclude from the land, if it were to be registered as a town and village green, anyone who failed to act responsibly in relation to their pet.

…on the land…

2.16. The application land is land within the definition provided by the statute and has been sufficiently clearly defined.

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

2.17. The relevant period in relation to this application is 21st August 1987 to 20th August 2008. I was not satisfied that the whole of the application land had been used as of right for lawful sports and pastimes throughout this period. I was however satisfied that the Cricket Club land had been so used for the whole of the relevant period.

3. Conclusion and Recommendation

3.1. I conclude that as it stands as present, the application does not succeed in whole or in part. Had a qualifying locality been identified, I would have recommended that the application should be accepted in part, and that the Cricket Club land should be registered as a town or village green. I recommend that the Registration Authority should permit the applicant, if he so wishes, to identify an alternative qualifying locality or localities within which his claimed neighbourhood falls, and to amend the application accordingly. The applicant should be given a maximum period of one month to amend his application and to provide any supporting evidence on which he wishes to rely in relation to that amendment. Those who have made representations in relation to the application should, if an amendment is made, be given the opportunity to make representations in relation to the amended locality or localities. I will be pleased to advise further on the application as amended, if required to do so.

3.2. I recommend that the Registration Authority should not proceed to determine the application until either the time afforded to the applicant for amending his application has expired and no amendment has been made, or until it has considered any amended case advanced by the applicant in relation to locality.

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4th January 2012

APPENDIX D: Plan showing land to be registered as a Town Green