

Application to register land at Duncan Down at Whitstable as a new Village Green

A report by the Head of Countryside Access Service to Kent County Council's Regulation Committee Member Panel on Tuesday 11th September 2012.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land at Duncan Down at Whitstable as a new Village Green has been accepted, and that the land subject to the application be formally registered as a Village Green.

Local Members: Mr. M. Harrison and Mr. M. Dance

Unrestricted item

Introduction

1. The County Council has received an application to register land at Duncan Down in Whitstable as a new Village Green from Mr. A. Clark on behalf of the Friends of Duncan Down ("the applicant"). The application, made on 1st September 2011, was allocated the application number VGA637. A plan of the site is shown at **Appendix A** to this report and a copy of the application form is attached at **Appendix B**.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008.
3. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Village Green where it can be shown that:
'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
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).

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. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

5. The area of land subject to this application (“the application site”) consists of an area of woodland of approximately 0.05 hectares (0.14 acres) in size which is situated to the north-east of South View Farm and in the vicinity of Benacre Road at Whitstable.
6. Access to the application site is via a footbridge crossing the brook which was installed by the Friends of Duncan Down in 2010 following requests from local residents. Prior to that time, access to the application site was gained via stepping stones (i.e. lumps of concrete or logs) across the brook.
7. The application site forms part of a wider area known as Duncan Down and immediately abuts existing Village Greens VG232 and VG240, as shown on the plan at **Appendix A**.

The case

8. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities ‘as of right’ for more than 20 years.
9. In support of the application, 42 user evidence questionnaires from local residents were provided, demonstrating use of the application site for a range of recreational activities for a period in excess of twenty years. A summary of the evidence in support of the application is attached at **Appendix C**.

Consultations

10. Consultations have been carried out as required. No responses have been received.

Landowner

11. A search with the Land Registry has revealed that the land is not registered to any known landowner.
12. As stated above, under the current Regulations, the duty to inform the landowner of the application rests with the applicant. However, the Regulations also specify that that duty does not apply where the landowner cannot be reasonably identified¹.

Legal tests

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

¹ Regulation 22(3) of the Commons Registration (England) Regulations 2008

- (a) *Whether use of the land has been 'as of right'?*
- (b) *Whether use of the land has been for the purposes of lawful sports and pastimes?*
- (c) *Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?*
- (d) *Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or meets one of the criteria set out in sections 15(3) or (4)?*
- (e) *Whether use has taken place over period of twenty years or more?*

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

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

14. The definition of the phrase 'as of right' has been considered by the House of Lords. Following the judgement in the *Sunningwell*² case, it is considered that if a person uses the land for a required period of time without force, secrecy or permission ("*nec vi, nec clam, nec precario*"), and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired.

15. In this case, there is no evidence to indicate that use of the application site has been in any way with force, in secrecy or undertaken on a permissive basis.

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

16. 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 activities³.

17. 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*⁴.

18. In this case, the evidence demonstrates that the land has been used for recreational activities. The summary of evidence of use by local residents at **Appendix C** shows the activities claimed to have taken place.

19. The evidence of use submitted in support of the application refers predominantly to walking (with or without dogs), but there is also reference to use of the application site for the purposes of wildlife observation, nature study, photography and playing with children.

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

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

⁴ *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, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

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

20. The definition of locality for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the *Cheltenham Builders*⁵ case, it was considered that ‘...at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality... there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition’. The judge later went on to suggest that this might mean that locality should normally constitute ‘some legally recognised administrative division of the county’.
21. The word “significant” in this context does not mean considerable or substantial: ‘a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number... what matters is that the number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers’⁶. Thus, what constitutes a ‘significant number’ will depend upon the local environment and will vary in each case depending upon the location of the application site.

The ‘locality’

22. The Applicant specifies the locality at Part 6 of the application form as ‘Gorrell Ward, Whitstable’.
23. The Canterbury City Council electoral ward of Gorrell is a legally recognised locality with defined boundaries and would therefore constitute a qualifying locality for the purposes of this application.

‘significant number’

24. In this case, the application is supported by evidence questionnaires from 42 local residents, although six of these do not live within the qualifying locality. Even disregarding the non-qualifying use, this leaves evidence of use of the application site from 36 local residents. The user evidence demonstrates very regular usage of the application site, with the vast majority of recreational users using the land on an at least weekly basis. Furthermore, most report seeing other people using the land on a regular basis.
25. The evidence of use submitted in support of the application suggests that the application site is in very frequent use by local residents and it would therefore have been obvious to any landowner (had there been one) that the land was in regular usage by the local community.
26. As such, it can be concluded that the application site has been used by a significant number of the residents of a defined locality.

⁵ *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90

⁶ *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

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

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

28. In this case, there is no evidence of any challenge to recreational use of the application site and such use has continued up to (and indeed beyond) the date of the application in September 2011.

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

29. 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. In this case, use of the application site 'as of right' is continuing and, as such, the relevant twenty-year period ("the material period") is calculated retrospectively from the date of the application, i.e. 1991 to 2011.

30. The user evidence summarised at **Appendix C** demonstrates that there has been use of the application site in excess of the last twenty years. Therefore, it can be concluded that there has been use of the application site for a full period of twenty years.

Conclusion

31. Although this application is unopposed, it is still necessary for the County Council to consider the application on its merits and to be satisfied that all of the requisite legal tests have been met. Indeed, DEFRA's guidance states that *'an application should be granted only if it is made in accordance with the criteria in the legislation, and the absence of opposition to its being granted must not be taken as suggestive that those criteria are met and need not be considered'*⁷.

32. In this case, the user evidence set out at **Appendix C** demonstrates (for the reasons set out above) that the application site has been used by local residents without challenge for recreational purposes for a period in excess of 20 years. It can therefore be concluded that the legal tests concerning the registration of the land as a Village Green have been met.

Recommendation

33. I recommend that the County Council informs the applicant that the application to register the land at Duncan Down at Whitstable as a new Village Green has been accepted, and that the land subject to the application be formally registered as a Village Green.

Accountable Officer: Mr. Mike Overbeke – Tel: 01622 221513 or Email: mike.overbeke@kent.gov.uk

⁷ See section 7.17 of DEFRA's 'Guidance to commons registration authorities and PINS for the pioneer implementation' (Version 1.43, September 2011)

Case Officer:

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

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

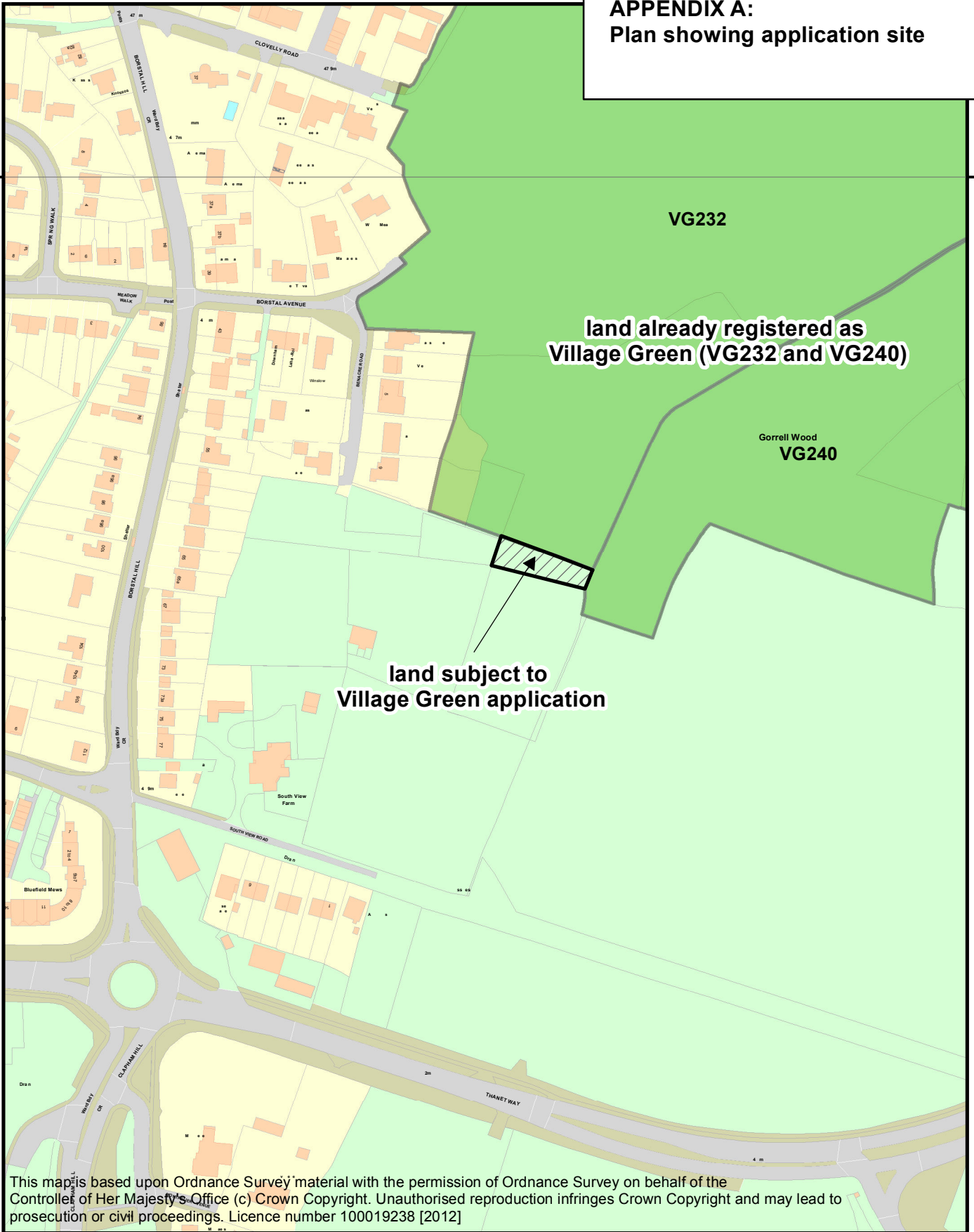
Background documents

APPENDIX A – Plan showing application site

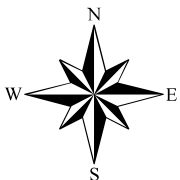
APPENDIX B – Copy of application form

APPENDIX C – Table summarising user evidence

**APPENDIX A:
Plan showing application site**

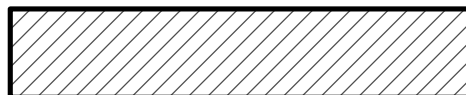


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Scale 1:2500

**Land subject to Village Green application
at Duncan Down, Whitstable**

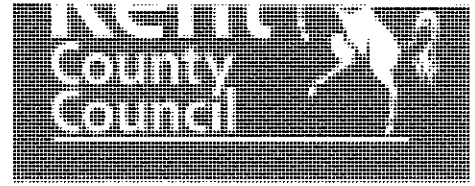


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APPENDIX B:
Copy of the application form

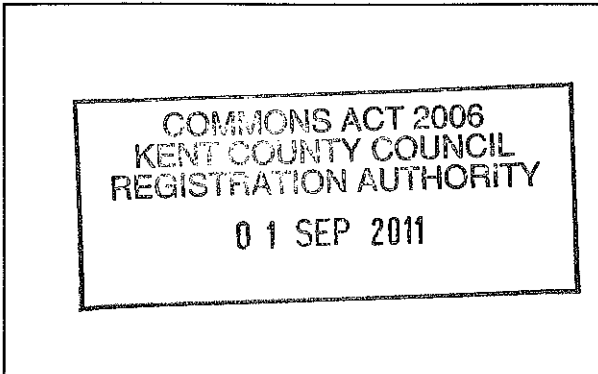
Commons Act 2006: section 15

**Application for the registration of land
as a new Town or Village Green**



This section is for office use only

Official stamp of the Registration Authority
indicating date of receipt:



Application number:

V9A637

VG number allocated at registration
(if application is successful):

[Empty box for VG number]

Note to applicants

Applicants are advised to read the 'Part 1 of the Commons Act 2006 (changes to the commons registers): Guidance to applicants in the pilot implementation areas' and to note the following:

- All applicants should complete parts 1–6 and 10–12.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete parts 7 and 8. Any person can apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete part 9. Only the owner of the land can apply under section 15(8).
- There is no fee for applications under section 15.

Note 1
Insert name of Commons
Registration Authority

1. Commons Registration Authority

To the: *Kent County Council*
Public Rights of Way Officer - Definition Team
Invicta House
County Hall
MADSTONE
ME14 1XX

Note 2

If there is more than one applicant, list all names. Use a separate sheet if necessary. State the full title of the organisation if the applicant is a body corporate or unincorporate. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email. If part 3 is not completed all correspondence and notices will be sent to the first named applicant.

2. Name and address of the applicant

Name: Ashley John CLARK
Secretary to the Friends of Duncan Down

Full postal address:
(incl. Postcode)

Telephone number:
(incl. national dialling code)

Fax number:
(incl. national dialling code)

E-mail address:

Note 3

This part should be completed if a representative, e.g. a solicitor, is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email.

3. Name and address of representative, if any

Name:

Firm:

Full postal address:
(incl. Postcode)

Telephone number:
(incl. national dialling code)

Fax number:
(incl. national dialling code)

E-mail address:

Note 4

For further details of the requirements of an application refer to Schedule 4, paragraph 9 to the Commons Registration (England) Regulations 2008.

4. Basis of application for registration and qualifying criteria

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5. Application made under section 15(8):

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

Section 15(2) applies:

Section 15(3) applies:

Section 15(4) applies:

If section 15(3) or (4) applies, please indicate the date on which you consider that use 'as of right' ended and why:

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

If section 15(6)* is being relied upon in determining the period of 20 years, indicate the period of statutory closure (if any) which needs to be disregarded:

Note 5

This part is to identify the new green. The accompanying map must be at a scale of at least 1:2,500 and shows the land by means of distinctive colouring within an accurately identified boundary. State the Land Registry title number where known.

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

Name by which usually known: *Part of Duncan Down / Gorrell Wood, Whitstable*

Location: *Unregistered land to the south east of Benacre Road, Whitstable lying to the south of a line marked "drain" and to the north of K 714859*

Common Land register unit number (only if the land is already registered Common Land):

Please tick the box to confirm that you have attached a map of the land (at a scale of at least 1:2,500):

Note 6

It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly at a scale of 1:10,000.

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

Indicate the locality (or neighbourhood within the locality) to which the claimed green relates by writing the administrative area or geographical area by name below and/or by attaching a map on which the area is clearly marked:

Gorrell Ward, Whitstable

Please tick here if a map is attached (at a scale of 1:10,000):

Note 7

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

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

7. Justification for application to register the land as a Town or Village Green

Evidence of some 42 witnesses (there are more) that demonstrate that they and others representing a significant number of the inhabitants of the locality have indulged in lawful sports and pastimes on the land for a period in excess of 20 years as of right.

See attached statement, witness forms and exhibits as listed.

Note 8

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

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

The land is unregistered

Note 9

List or enter in the form all such declarations that accompany the application. This can include any written declarations sent to the applicant (i.e. a letter), and also any such declarations made on the form itself.

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

N/A

Note 10

List all supporting consents, documents and maps accompanying the application. Evidence of ownership of the land must be included for voluntarily registration applications. There is no need to submit copies of documents issued by the Registration Authority or to which it was a party but they should still be listed. Use a separate sheet if necessary.

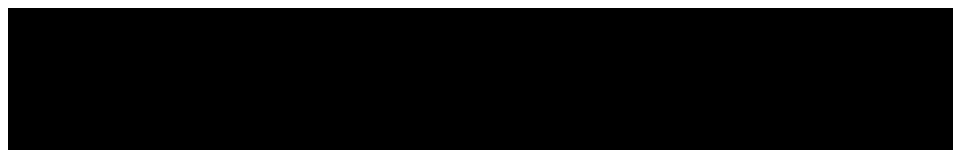
10. Supporting documentation

See attached list of witnesses and exhibits

Note 11

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

11. Any other information relating to the application



claims to have an interest in the land. He has produced no evidence of this but he is related to the registered owners of plot(s) TITLE NO K 714859 notwithstanding that the owners named therein have not resided at the addresses given for many years. A check on 25th July 2011 revealed that these details had still not been updated.

Note 12

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

12. Signature

Signature(s) of applicant(s):

Date:


*15th September 2011***REMINDER TO APPLICANT**

You are responsible for telling the truth in presenting the application and accompanying evidence. You may commit a criminal offence if you deliberately provide misleading or untrue evidence and if you do so you may be prosecuted. You are advised to keep a copy of the application and all associated documentation.

Please send your completed application form to:

**The Commons Registration Team
Kent County Council
Countryside Access Service
Invicta House
County Hall
Maidstone
Kent ME14 1XX**

Data Protection Act 1998

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

A copy of this form and any accompanying documents may be disclosed upon receipt of a request for information under the Environmental Information Regulations 2004 and the Freedom of Information Act 2000.

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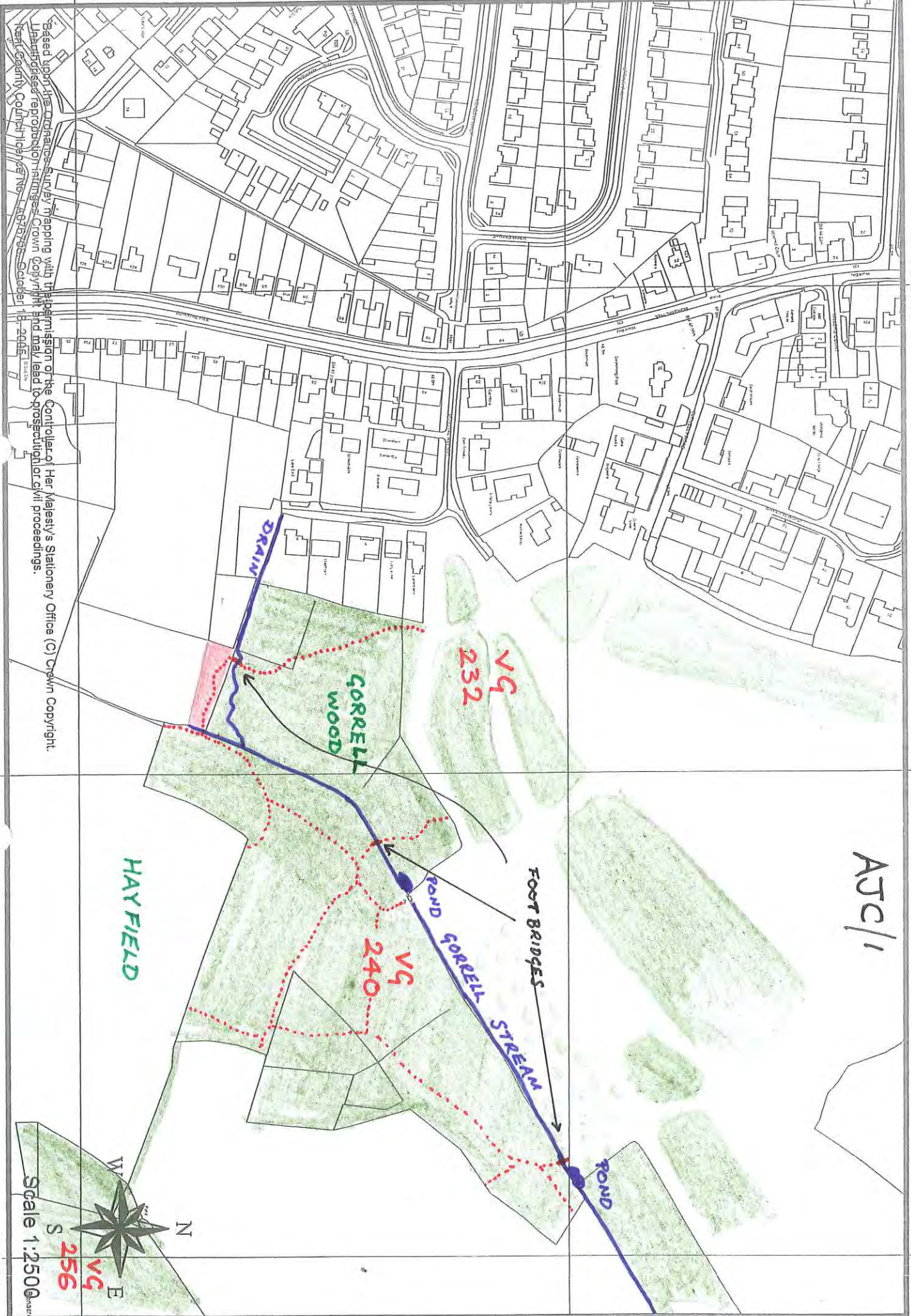
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Kent County Council 10/10/05 18/05/05



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APPENDIX C:
Table summarising evidence of use

Name	Period of use	Frequency of use	Type of use	Comments
Mr. G. BROWN	2006 – present	1/2 times per week	Dog walking	See others using the land for walking 'most times that I use it'.
Ms. J. BROWNING	1980 – present	Daily	Walking, bird watching, playing with children	Often see others using the land.
Mr. A. CLARK	1960 – present	Regularly	Dog walking, nature study, access to other parts of the Down, playing games as a child	Used the land periodically until 1997, then weekly until 2004, now daily. See others using the land, or going to it, on most days.
Ms. C. CLARK	1963 – present	Daily	Dog walking, childhood play	Lived away from the area 1977 – 1998. See people on the land on most days, most are regular users.
Mr. M. CLARK	2004 – present	2/3 times per week	Dog walking	See other local people using the land on most occasions.
Mr. B. CLARK	1975 – present	Monthly	Playing with children	Seen local dog walkers using the land on a regular basis over 40 years.
Ms. M. CLARK	1975 – present	Monthly	Dog walking, playing with children	Seen others using the land on a regular basis.
Mrs. F. CORNISH	1999 – present	Daily	Dog walking, litter picking	Frequently see others using the land
Mr. R. CORNISH	1999 – present	Weekly	Walking	Frequently see others using the land
Mrs. D. CROFT	1990 – present	Weekly	Dog walking	Often see others using the land
Mr. S. CROFT	1990 – present	Weekly	Dog walking	Often see others using the land
Mr. C. EDWARDS	1967 – present	Daily	Dog walking	See others using the land for dog walking every day
Mrs. D. ELLIS	1981 – present	3/4 times per week	Dog walking	Quite often see others using the land
Mr. J. ELLIS	1981 – present	3/4 times per week	Dog walking, bird watching	Often see others using the land
Ms. H. HANDFORD	2009 – present	Most days	Dog walking	Frequently see use by others
Ms. D. JOHNSTONE	1999 – present	1/2 times per month	Walking	Have seen a few other people using the land
Ms. K. LEE	1991 – present	Daily	Dog walking	Regularly see others using the land, mostly local people
Mrs. M. LERIGO	1964 – present	Not stated	Dog walking, bird watching	Frequently seen use by others. Have always regarded the land as part of Duncan Down.
Mr. V. LERIGO	1964 – present	Occasionally	Walking, photography	
Ms. K. MAGEE	2005 – present	Daily	Walking	See other people walking their dogs on the land on a daily basis
Mrs. C. MASTERS	1980 – present	Weekly	Walking	Frequently see others walking dogs
Mr. P. MASTERS	1980 – present	Twice weekly	Recreation and dog walking	Often see others using the land
Mr. S. NORCOTT	1995 – present	Fortnightly	Recreation and dog walking	Occasionally see others using the land
Mrs. J.	1992 –	Weekly	Dog walking and	See others using the land on a

NORCOTT	present		playing with children	weekly basis
Mr. C. OLSEN	2002 – present	Weekly	Walking	Occasionally see others using the land for dog walking
Mr. R. PARKER	2006 – present	1/2 times per day	Dog walking	Used the land between 1984 and 2006 when not resident in area
Mrs. P. PARKER	1961 – present	Twice daily since 2006	Nature study, walks	Did not use the land between 1976 – 1986. frequently see dog walkers on the land.
Mr. M. PEARCE	1983 – 2011	4 days per week	Dog walking	Have seen others using the land 'most times I have used it'
Mrs. S. PERCIVAL	1990 – 2005	Daily	Dog walking	Saw others dog walking on a regular basis, some recognized as living locally
Mr. C. PHILLIPS	1996 – present	2/3 times per week	Dog walking	See others using the land on every visit
Mr. S. PHILLIPS	1989 – present	Daily	Dog walking, nature walks	See others using the land for dog walking on a daily basis
Mrs. S. PHILLIPS	1989 – present	Daily	Dog walking	See others using the land for dog walking on a daily basis
Mrs. M. PIZZOTTI	1980 – present	Monthly	Dog walking	
Mrs. C. SNELLGROVE	1970s – present	Daily	Dog walking	See others using the land most days for dog walking
Mr. S. SNELLGROVE	1996 – present	Weekends	Dog walking	
Mr. A. STEWARD	2005 – present	Most days	Cycling, dog walking	See use by others for dog walking quite regularly
Mrs. S. STEWARD	2005 – 2011	Daily	Dog walking, children walking	See use by others on a daily basis. Always treated this area as part of Duncan Down
Mrs. M. TAYLOR	1970 – present	Weekly	Dog walking	Frequently seen use by others
Mr. C. WALLACE	1971 – present	Daily	Dog walking	See use by others for dog walking virtually daily
Mr. B. WEBB	1984 – present	4/5 times per week	Dog walking and wildlife observation	
Mrs. G. WEBB	1984 – present	daily	Dog walking, keeping fit, wildlife observation, meeting people, educating grandson	See use by others every day
Ms. C. WISE	1979 – present	daily	Dog walking	See use by others for walking every day