Application to register land at Ursuline Drive at Westgate-on-Sea as a new Village Green

A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Tuesday 3rd June 2014.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 25th March 2014, that the applicant be informed that the application to register land at Ursuline Drive at Westgate-on-Sea has been accepted, and that the land shown at Appendix A to this report is registered as a Village Green.

Local Members: Mr. J. Elenor Unrestricted item

Introduction

1. The County Council has received an application to register land at Ursuline Drive at Westgate-on-Sea as a new Town or Village Green from local resident Mr. G. Rickett ("the applicant"). The application, made on 28th November 2011, was allocated reference number VGA641. 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 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**[1], e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

5. As a standard procedure set out in the 2008 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

[1] Note that from 1st October 2013, the period of grace was reduced from two years to one year (due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013). This only applies to applications received after that date and does not affect any existing applications.

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

The application site

6. The area of land subject to this application ("the application site") consists of a rectangular-shaped field, consisting of rough grass and a wooded perimeter, of approximately 2.4 acres (0.9 hectares) in size situated to the rear of property numbers 1 to 21 Ursuline Drive at Westgate-on-Sea. Access to the application site is via a Public Footpath with abuts the western boundary of the application site. A plan showing the application site is attached at **Appendix A**.

7. The application site is owned by the Dane Court Grammar and King Ethelbert School Trust.

Previous resolution of the Regulation Committee Member Panel

8. In response to the consultation, an objection to the application was received from Winckworth Sherwood LLP, solicitors acting on behalf of the school trust ("the objector").

9. The matter was considered at a meeting of the Regulation Committee Member Panel on Tuesday 26th February 2013, at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration. A copy of the minutes of that meeting are attached for reference at **Appendix B**.

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

The Public Inquiry

11. A pre-Inquiry meeting, for the purpose of determining the matters to be addressed and the procedure to be followed at the Inquiry, was held at the Birchington Village Centre on Wednesday 21st August 2013. Written directions to all parties confirming the format of the Inquiry and the procedure for the submission of evidence were circulated shortly thereafter.

12. The Public Inquiry took place at the The Swan at Westgate-on-Sea, commencing on Monday 18th November 2013 and continuing until Friday 22nd November. On the last day of the Inquiry, the Inspector conducted an accompanied visit to the application site.

13. At the Public Inquiry, the applicant was represented by students from the Kent Law Clinic and the objector was represented by Mr. Alexander Booth of Counsel.

14. The Inspector subsequently produced a written report dated 25th March 2014 ("the Inspector's report") setting out her findings and conclusions. These are summarised below.

Legal tests and Inspector's findings

15. 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 of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than two years prior to the making of the application?
    (d) 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 in accordance with the Inspector's findings.

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

16. 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.

17. In order to infer a dedication, use 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*'). As explained by Lord Hoffman in the Sunningwell[2] case:

> *"the unifying element in these three vitiating circumstances… was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period".*

18. In this case, the objector did not dispute that informal recreational use of the application site had taken place 'as of right'[3]. Indeed, there was no evidence before the Inspector that such use had taken place on a permissive basis, and she was satisfied that the objector had been well aware of the recreational use of the application site, such that steps could have been taken to resist it (i.e. use was not secretive). There was equally no evidence that there had ever been any physical barriers to entry onto the application site and, whilst there was some suggestion that users might have been verbally challenged by members of staff, the objector was unable to point to any named individuals who had been told to leave the land.

19. As such, informal recreational use of the application site took place 'as of right'.

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[2] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 3 All ER 385 at 391

[3] Paragraph 203 of the Inspector's report

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

20. Lawful sports and pastimes can be commonplace activities and 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].

21. Furthermore, it is not necessary to demonstrate that both sporting activities *and* pastimes have taken place and the phrase 'sports and pastimes' has been interpreted by the Courts as being a single composite group rather than two separate classes of activities[5]. In any event, the activities must be 'lawful' in the sense that they must not amount to a criminal offence[6].

22. During the course of the inquiry, the Inspector heard evidence from the applicant's witnesses of the use of the application site for a range of recreational activities. These included walking (with or without dogs), running, photography, playing with children, blackberrying and nature observation.

23. One of the issues identified by the Inspector to be addressed at the Inquiry was whether the nature of the recreational activities taking place on the application site was of a sufficient quality to give rise to a public right. In other words, was the use of the application site sufficient to indicate to a reasonable landowner that lawful sports and pastimes were taking place on the application site.

24. One of the issues raised by the objector was that informal recreational use of the application site was concentrated around the perimeter and was therefore more consistent with a 'rights of way' type of use (which is not qualifying use for the purposes of a Village Green application). Having considered the evidence, the Inspector did not agree with this submission[7]:

> *"It is inevitable that some users of the application land will stick to a worn track if the remainder of the terrain is difficult to walk on, particularly the elderly and physically impaired... However, there does not appear to have been a worn track, at least not one of such prominence [as currently exists], during the relevant period when the grass was regularly mown as can be seen in photographs… Thus even if some or most dog walkers were taking a circular route in order to maximise the length of their walk around the application land, I consider that such recreational walking (with a dog most likely off a lead and balls being thrown or children accompanying) would not have appeared to a reasonable landowner to have been referable to any particular route characteristic of an established footpath, and would rather have been referable to the context of use of the application land as a whole".*

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

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

[6] *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 Admin)

[7] Page 50 of the Inspector's report

25. The Inspector was therefore satisfied that the recreational activities taking place on the application site were of a sufficient nature and intensity to give rise to Village Green rights.

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

26. The right to use a Town or Village Green is restricted to the inhabitants of a locality, or of a neighbourhood within a locality, and it is therefore important to be able to define this area with a degree of accuracy so that the group of people to whom the recreational rights are attached can be identified.

"locality"

27. The definition of locality for the purposes of a Town or Village Green application has been considered by the Courts. In the Cheltenham Builders[8] 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*'.

28. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible than that of a locality, and need not be a legally recognised administrative unit. On the subject of 'neighbourhood', the Courts have held that '*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*'[9].

29. In this case, the applicant initially specified the neighbourhood (on the original application form) by reference to a map showing an area of housing in the immediate vicinity of the application site. The application was subsequently amended, prior to the Inquiry, to rely on a neighbourhood termed 'the Linksfield Estate' within the locality of the ecclesiastical parish of St. Saviours, Westgate-on-Sea.

30. It was confirmed in the Laing Homes[10] case that an ecclesiastical parish is capable of constituting a qualifying locality for the purposes of Village Green registration and the objector did not dispute that the locality relied upon by the applicant was a qualifying one[11]. However, there was a dispute at the Inquiry as to whether the neighbourhood selected by the applicant possessed the necessary characteristics and sufficient degree of cohesiveness required to satisfy the statutory test.

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[8] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[9] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 92
[10] *R* (*on the application of Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin)
[11] Paragraph 9 of the Inspector's report

31. The Inspector considered various issues including the geographical nature of the claimed neighbourhood, its historical development and the availability of community facilities[12]. She said that[13]:

> *"on an objective view, I have no doubts that the claimed neighbourhood would satisfy the common meaning of the word and has sufficiently defined boundaries, a sufficient degree of cohesiveness and distinct identity, and a 'heart' in the form of local shops".*

32. There was some concern that the neighbourhood lacked a particular name and that the 'Linksfield Estate' was a historical reference rather than a name by which local residents currently refer to the area. However, the Inspector did not consider that this was in any way a bar to the registration of the land as a Village Green and concluded that[14]:

> *"taking all of the factors into account: the natural and built boundaries, the facilities, the socio-economic and architectural character of the area, and the 'gut feeling' of the residents, I consider that the applicant has proved that the amended area is a recognisable 'neighbourhood'. I do not consider that it matters that it does not have a commonly-used name, particularly since it can meaningfully be described by reference to its historical name of the 'Linksfield Estate'. I remind myself of the words of Lord Hoffman in Oxfordshire that the word 'neighbourhood' was drafted with deliberate imprecision and to abolish technicalities. To require all residents to be ad idem as to what their neighbourhood is, particularly in an urban area, would, in my view, amount to an unwarranted technicality and is not what Parliament intended".*

33. The Inspector also considered submissions presented by the objector that there was a need for recreational users to be spread evenly throughout the claimed neighbourhood. She rejected any suggestion that this was a necessary part of the statutory test and, in any event, felt that when taking all of the evidence into account, whilst it was natural for there to be a greater concentration of users living closest to the application site, the applicant had nonetheless still been able to provide evidence from users throughout the neighbourhood[15].

34. Overall, the Inspector was therefore satisfied that the application site had been used by the residents of a defined neighbourhood within the ecclesiastical parish of St. Saviours, Westgate-on-sea.

"a significant number"

35. The word "significant" in this context does not mean considerable or substantial: '*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*'[16]. Thus, the test is a qualitative, not quantitative one, and what constitutes a 'significant number' will depend upon the individual circumstances of each case.

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[12] Paragraphs 214, 215 and 216 of the Inspector's report
[13] Paragraph 215 of the Inspector's report
[14] Paragraph 219 of the Inspector's report
[15] Paragraph 224 of the Inspector's report
[16] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

36. In relation to the 'significant number' test, the Inspector's attention was focused on whether the informal recreational use of the application site had been undertaken by a significant number of local residents *throughout* the relevant period. In doing so, she found that there was no indication that there was at any point during the material period a block of time when informal recreational use of the site was non-existent[17].

37. She also gave careful consideration to the objector's submission that the applicant had failed to demonstrate any significant use of the application site during the early part of the relevant period (1991 to 1993). As a matter of impression, the Inspector was satisfied on the basis of the evidence before her that the application site had been used by a significant number of local residents during the early part of, and throughout, the relevant period. She said[18]:

> *"it is no surprise… that there was less evidence of use for [recreational activities] for the period 1991 – 1993 before me than later on in the relevant period, but I consider this is a consequence of the passage of time rather than because the applicant cannot establish any material degree of qualifying user then, as the objector suggests. On the contrary, there was evidence capable of being tested at the inquiry in respect of four named individuals and at least two children… There is no 'absolute numbers' test for significance and I am of the view that the applicant has discharged the burden of proof of showing that the application land was in general use by the community throughout the relevant period. This is supported by the written user evidence and the spread of users over the neighbourhood… which suggests that use was by people from around the neighbourhood, rather than from a very small handful of houses immediately adjoining the site at that time".*

38. The Inspector was therefore satisfied that the application site was used by a significant number of local residents throughout the material period.

(d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than two years prior to the making of the application?

39. 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, section 15(3) of the 2006 Act provides that an application must be made within two years from the date upon which use 'as of right' ceased.

40. In this case, the application was made under section 15(2) of the Act on the basis that informal recreational use of the application site by local residents was continuing as at the date of the application.

41. No evidence was presented to the Inquiry to suggest that this had not been the case. This test is therefore met.

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[17] Paragraph 193 of the Inspector's report
[18] Paragraph 198 of the Inspector's report

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

42. 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. The relevant twenty-year period is calculated retrospectively either from the date upon which use ceased to be 'as of right' or, where informal recreational use is continuing, from the date of the application.

43. In this case, the application was made in November 2011 and the relevant twenty-year period is therefore 1991 to 2011 ("the material period"). As is noted above, the Inspector was satisfied that the application site had been used by a significant number of local residents throughout the material period.

44. However, the objector argued that, at regular times during the material period, informal recreational users of the land were excluded from it as a result of school activities. As noted by the Inspector[19]:

> *"The objector's argument is essentially that any user carried on during a school lesson was potentially subject to being challenged if the teacher were in the right place at the time to do so. I do not consider that this amounts, however, to stopping the period of time running for the accrual of village green rights. For that to happen, the exclusion must be 'complete' in the words of Betterment e.g. by locking a gate or positioning someone at the entrance to a piece of land prohibiting the public entry for a material period of time. None of the 'interruptions' relied on by the school could have ever been complete because none of the teachers were in a position to prevent entry to the application land or even to properly man the whole of it. There was thus no general 'physical ouster of the public', as described in Betterment, and no interrupting of the twenty year period"*

45. The Inspector added that none of the alleged interruptions could be described as substantive interruptions to use because the application site was used only infrequently, and on a decreasing basis, for school activities during the material period[20]. She was therefore satisfied that the application site had been used by local residents for informal recreation throughout the material period.

Inspector's conclusions

46. The Inspector concluded that, in her view, the applicant had demonstrated that all of the requisite legal tests in respect of the registration of the land as a new Village Green had been met. She said[21]:

> *"in my opinion, the applicant has proved that a significant number of the inhabitants of the neighbourhood termed the 'Linksfield Estate' within the ecclesiastical parish of St. Saviours, Westgate on Sea, have indulged as of right in lawful sports and pastimes on the application land for a period of at least twenty years and continued to do so as of 27th November 2011."*

47. Accordingly, her recommendation to the County Council was that the application ought to be accepted and the application site registered as a new Village Green.

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[19] Paragraph 206 of the Inspector's report
[20] Paragraph 207 of the Inspector's report
[21] Paragraph 226 of the Inspector's report

Subsequent correspondence

48. On receipt, the Inspector's report was forwarded to the applicant and to the objector for their information and further comment.

49. The applicant did not submit any comments in respect of the report.

50. The objector raised a number of concerns regarding the Inspector's approach to her assessment of the evidence and suggested that, ultimately, the Inspector had erred in law in reaching her overall conclusions. A full copy of the response is attached at **Appendix C**, but the main points are:
    - If the land is registered as a Village Green, the school will no longer be able to use the land for school activities as it will not be possible to ensure child safety given that it will not be possible to control who comes onto the land;
    - The school would be happy to work with the applicant with a view to negotiating with the local community for the provision of access to the land on a permissive basis;
    - The Inspector has adopted an unfair and unreasonable approach to the evidence by attaching limited weight to the objector's witnesses whilst accepting without material question the evidence of the applicant's witnesses (who have a strong interest in the outcome of the case and an openly stated desire to prevent any future development of the land);
    - On a fair and objective assessment of the evidence, the majority of use of the application site consisted of walking around the perimeter and would have had the appearance of a rights of way type of use rather than a general right to recreate over the whole of the land;
    - There was no evidence before the Inquiry to justify the conclusion that the 'Linksfield Estate' is a neighbourhood and even the applicant's own witnesses could not reach agreement on this point;
    - The Inspector was wrong to reject the submission made by the objector that there should be a 'spread' of users across the claimed neighbourhood; and
    - The Inspector's approach is not even-handed and her conclusions on the evidence are so unreasonable as to mean that, were the land to be registered as a Village Green, that decision will be open to Judicial Review.

Conclusion

51. Much has been made by the objector, both at the Public Inquiry and in its subsequent response to the Inspector's report, of the possible impact of Village Green registration and the fact that the school would effectively be deprived of a valuable asset. As Members will be aware, when the considering a Village Green application, the County Council is bound strictly by the legal tests set out in section 15 of the 2006 Act and the law simply does not allow the County Council to take into account any other factors in reaching its decision; to do so would be unlawful and improper.

52. The objector also suggests that it would be happy to arrange local community access to the land on a permissive basis. In this regard, it is noted that the Village Green application was made in November 2011 and the objector has thus had ample opportunity to seek an alternative compromise. Again, particularly at this late stage in the process, this is not something that the County Council is able to consider in reaching its decision on this matter.

53. In respect of the objector's comments regarding the Inspector's approach to the evidence, it is considered that the Inspector was perfectly entitled to reach her own conclusions regarding the credibility of each of the witnesses based on the accuracy and reliability of their evidence. She expressed doubts regarding some of the objector's witnesses' written evidence (based on the conflicts with their oral evidence), but accepted that a number of the objectors witnesses were reliable in their oral evidence[22]. She equally expressed concerns regarding some of the applicant's witnesses[23] and it is therefore not correct to suggest that she merely accepted the applicant's witness evidence without question. Clearly, both parties' witnesses were (to some degree) motivated by their own aims in attending the Inquiry to give evidence, but the only person directly involved in the process without any particular interest in the outcome, and therefore the capacity to be completely objective, was the Inspector.

54. Despite what is said by the objector, the Inspector did give careful consideration to the issue of 'right of way type use'[24]. In doing so, she noted that informal recreational use was not confined to a particular track and, in fact, there was a network of tracks running through the woodland, created as a result of recreational users wandering at will throughout the area. There was no evidence before the Inspector that users had confined themselves to a single track and the objector was not able to identify any specific route used by walkers that could be plotted on a map.

55. With regard to the objector's criticisms of the neighbourhood relied upon by the applicant, this is clearly a subjective issue since the legislation is (perhaps deliberately) imprecise in this regard. The objector's assertion that there was no evidence at the Inquiry to justify the conclusion that the 'Linksfield Estate' was a neighbourhood is slightly exaggerated; whilst there was disagreement amongst witnesses as to the precise boundaries, the Inspector did hear evidence regarding the historical development, geographical nature and community facilities available within the claimed neighbourhood. In any event, there can be no dispute that the western and southern boundaries of the neighbourhood are distinct (as they form the outer peripheries of the town) and the northern boundary is equally well defined by the presence of a dual carriageway. Only the eastern boundary is arguably unclear, but the Inspector was nonetheless satisfied that there was a sufficient sense of separation to delineate a boundary between neighbourhoods.

56. Despite the objector's submissions to the contrary, there is no legal requirement for there to be a 'spread' of users across the claimed neighbourhood[25]. Nonetheless, the Inspector was satisfied that recreational use of the application site was by people from around the neighbourhood rather than from a handful of houses closest to the application site.

57. Having carefully reviewed the Inspector's analysis of the evidence (contained in her report), the Officer's view is that it represents an accurate and impartial summary of

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[22] See paragraphs 118, 124, 129, 134, 142, 157, 164 and 162
[23] See paragraphs 51, 66 and 79 of the Inspector's report
[24] See pages 48 to 51 of the Inspector's report
[25] See *Paddico (267) Ltd v Kirklees MDC* [2011] EWHC 1606 (Ch) at [106(i)] in which Vos J said that he "*was not impressed with [the] suggestion that the distribution of residents was inadequately spread*" and added that it was not surprising that the majority of users lived closest to the application site with a scattering of users further away as "*that is precisely what one would expect and would not, in my judgement, be an appropriate reason for rejecting registration*".

the evidence given at the Inquiry and the Inspector's application of that evidence to the relevant legal tests is both considered and reasonable. Accordingly, it would appear that the legal tests in relation to the registration of the land as a new Town or Village Green have been met and the land subject to the application (shown at **Appendix A**) should be registered as a new Village Green.

Recommendation

58. I recommend, for the reasons set out in the Inspector's report dated 25th March 2014, that the applicant be informed that the application to register land at Ursuline Drive at Westgate-on-Sea has been accepted, and that the land shown at **Appendix A** to this report is registered as a Village Green.

Accountable Officer:
Mr. Mike Overbeke – Tel: 01622 221513 or Email: melanie.mcneir@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 01622 221511 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the PROW and Access Service, Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

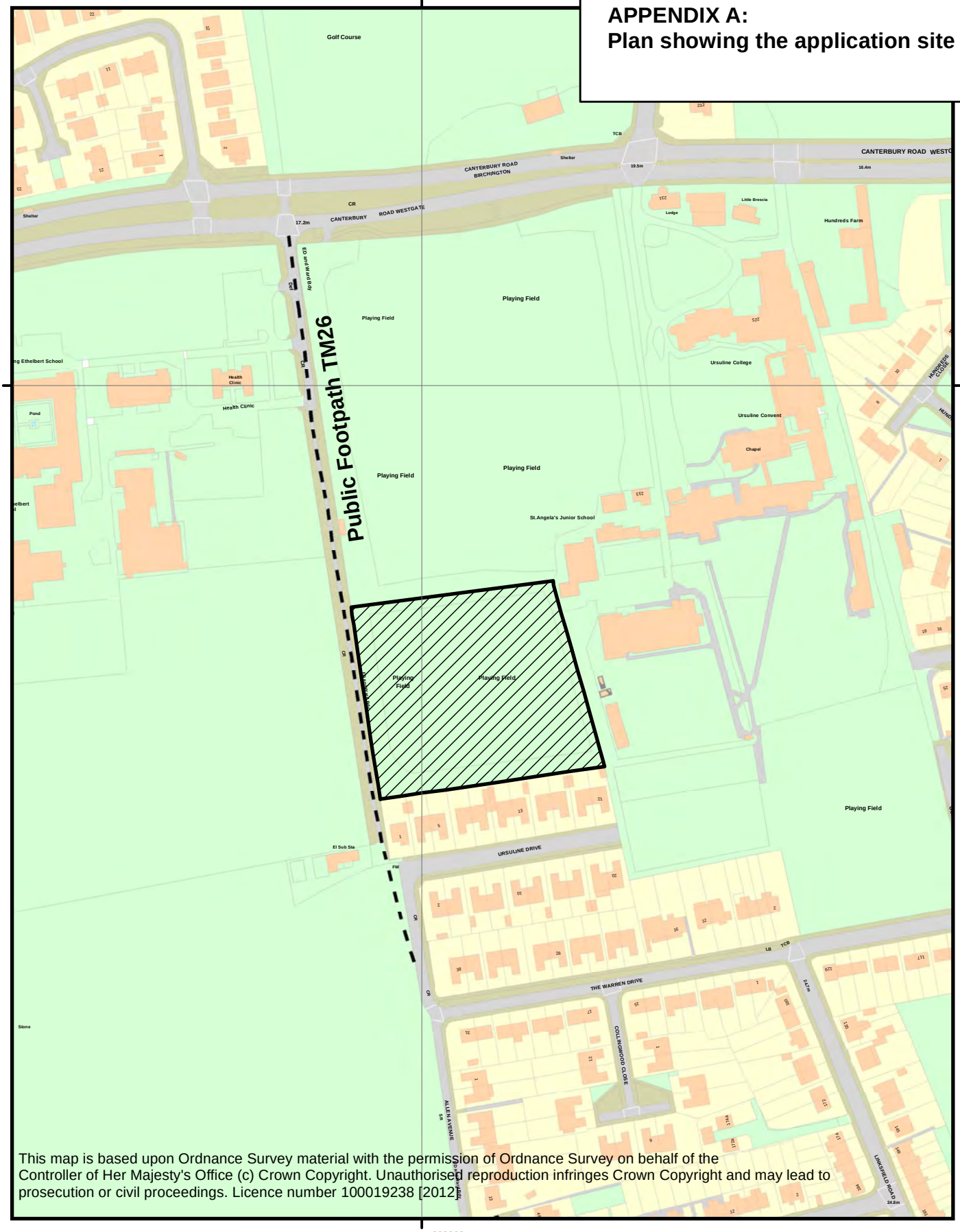
Appendices

APPENDIX A – Plan showing application site
APPENDIX B – Minutes from the meeting of the Regulation Committee Member Panel on 15th November 2011
APPENDIX C – Copy of the objector's response to the Inspector's report

Background documents

Inspector's report dated 25th March 2014

APPENDIX A:
Plan showing the application site



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Land subject to Village Green application at Ursuline Drive, Westgate-on-Sea

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the The Large Hall, Swalecliffe and Community Association, 19 St John's Road, Herne Bay CT5 2QU on Tuesday, 26 February 2013.

PRESENT: Mr M J Harrison (Chairman), Mr R A Pascoe (Vice-Chairman), Mr H J Craske and Mr R J Lees

IN ATTENDANCE: Mr C Wade (Countryside Access Principal Case Officer), Ms M McNeir (Public Rights Of Way and Commons Registration Officer) and Mr A Tait (Democratic Services Officer)

UNRESTRICTED ITEMS

7. Application to register land at Ursuline Drive at Westgate as a new Village Green

(Item 3)

(1) The Panel Members visited the application site before the meeting. This visit was attended by Mr Graham Rickett (applicant) Mr Tony Skykes (Westgate Residents Association), Mr Tom King (Local Borough Councillor) and Mr R G Burgess (Local Member).

(2) The Commons Registration Officer introduced the application which had been made under Section 15 of the Commons Act 2006 by Mr G Rickett. The application had been accompanied by 71 user evidence questionnaires, a petition containing 177 signatures and a letter of support from the Westgate and Westbrook Residents Association. During the consultation period, Thanet DC had raised no objection, whilst the local District Councillor had written to express her full support for the application.

(3) The Commons Registration Officer then said that the landowner was the Dane Court Grammar and King Ethelbert School Trust. Their solicitors (Winckworth Sherwood LLP) had written on their behalf to object to the application. Their grounds for objection were that the use of the site had not been “as of right” because verbal challenges had been made by the landowner; that such use had been insufficient to indicate to a reasonable landowner that a continuous right was being asserted; that the evidence provided was “skeletal and deficient”; that the overgrown state of the site supported the contention that use of the site had been minimal; and that the neighbourhood identified by the applicant was insufficiently cohesive to qualify as such. The solicitors had also suggested that the application should be referred to a Public Inquiry before a decision was made.

(4) The Commons Registration Officer then went on to consider the legal tests. The first of these was whether use of the land had been “as of right.” She said that there was a conflict of evidence in that the supporters of the application had given no indication of having been challenged and that there had been no prohibitive notices or other restriction to use of the site during (and beyond) the period in question. The

landowner, on the other hand, contended that use of the land by students would have been by implied licence; that a number of events had been given specific permission; and that verbal challenges had been made to dog walkers. Three members of staff had provided statements to this effect.

(5) The Commons Registration Officer gave her view that the evidence as a whole suggested that use had taken place "as of right" but that further investigation would be needed on the question of verbal challenges before an informed conclusion could be reached.

(6) The second test was whether use of the land had been for lawful sports and pastimes. The user evidence suggested that the land had been used for a wide range of recreational activities. The landowner, however, contended that use had been skeletal and deficient and that it was not clear whether such use as had been attested had actually taken place on the site itself (as opposed to the wider area).

(7) The landowner had suggested that the overgrown nature of the site indicated that use must have been limited. The applicant's response was that the long grass referred to by the landowner had occurred during the wet summer of 2012 (outside the period in question).

(8) The Commons Registration Officer said that there was a clear conflict in evidence, giving rise to two different versions of events. As such, it would require further investigation.

(9) The Commons Registration Officer then turned to the test of whether use had been by a significant number of inhabitants of a particular locality or neighbourhood within a locality. She said that the applicant had identified an area of housing in the vicinity of Ursuline Drive as a neighbourhood within the locality of Westgate-on-Sea Ward. The landowner had challenged this on the grounds that the area in question lacked the cohesiveness and collective facilities necessary for it to be described as a neighbourhood. This aspect of the test would need to be further tested as it could not be resolved based on the paper evidence.

(10) The Commons Registration Officer said that it was also impossible to come to an informed conclusion as to whether a significant number of people had used the land. The applicant had provided 71 user evidence forms, whilst the landowner contended that there had only be occasional use. The differences in recollection could only be resolved by further testing the evidence.

(11) The Commons Registration Officer then said that use had clearly taken place up to the date of the application. It had also taken place over a period of twenty years (although this had to be taken in the light of the landowner's comments.)

(12) The Commons Registration Officer concluded her presentation by saying that in the light of the numerous conflicts of evidence, her recommendation was that there should be a non-statutory public inquiry in order that the issues could be clarified.

(13) In response to questions from Mr Pascoe, the Commons Registration Officer said that although the neighbourhood claimed by the applicant was a small area, there was no case law setting a lower limit on the size that a neighbourhood had to

be. The footpath that went around the land in question was not recorded as a Public Right of Way.

(14) Mr Graham Rickett (landowner) provided the Panel with a document which addressed the question of neighbourhood. He then addressed the objections to the application made by the landowner (summarised in paragraph 16 of the report). He said that although the landowner's solicitors had provided evidence of verbal challenges to dog walkers, these statements had not actually specified which field these had been issued on. From some of the descriptions given, he considered that the most likely venue for these challenges had been the Pavilion Field rather than the application site itself.

(15) Mr Rickett then said that the existence of 71 user evidence forms, together with the statements contained within them adequately demonstrated that there had been sufficient use to indicate to a reasonable landowner that local residents were asserting a continuous right. The evidence given was, in his view, far greater than "skeletal and deficient" and the statement made by the landowner about the overgrown state of the site was not relevant because it related only to the year 2012 which was outside the application period.

(16) Mr Rickett went on to say that the landowner was wrong to rely on the implied licence for students, as their circumstances were completely different from the public who were claiming to have used the land "as of right."

(17) Mr Rickett referred to both the *Beresford* and the *Barkas v North Yorkshire County Council* cases which, he said, had established that informal recreation on land owned by a local authority could not be considered as use "by right."

(18) Mr Rickett then said that the landowner's representations about the overgrown nature of the site were contradicted by photographs of the site taken in October 2011, showing the site with the grass having been cut. He said that the School always cut the grass and had continued to do so until the wet summer of 2012.

(19) Mr Rickett said that the reason he had put forward the area of housing in the vicinity of Ursuline Drive was because he had been advised to do so by KCC and also because it was a Neighbourhood Area which contained a pub, hardware store, fish and chip shop, Chinese takeaway. It also had a shared general space, which taken together with the local shops ensured that it was a cohesive unit.

(20) Mr Rickett said that the report quoted the judgement in the *R v Suffolk County Council, ex parte Steed* case. This judgement had been widely criticised as being "judge-made law." *The Commons Registration Officer explained that, although the judgement had been overturned, the particular quotation that appeared in paragraph 49 was still commonly quoted to demonstrate the need for the legal testes to be "properly and strictly proved."*

(21) Mr Rickett concluded his presentation by saying that he believed that the Panel had sufficient evidence to agree the registration. This would be beneficial to both the School and the community. The local residents would share the costs of upkeep and would always defer to School use. The area was full of natural beauty, which was the reason that the application enjoyed the support of Thanet DC, Westgate and Westbrook Residents Association, the Kent Wildlife Trust, the Thanet

Countryside Trust as well as the local residents both through the 71 user evidence questionnaires and the 177 signature petition.

(22) The Countryside Access Principal Case Officer clarified that the land would continue in the School's ownership if registration took place. However, it would not be able to take any action on its land to disrupt its use by local people for lawful sports and pastimes.

(23) Mr Tony Sykes (Westgate and Westbrook Residents Association) said that the Residents Association fully supported the application and would consider it to be a great loss if the land were to be developed. He considered that an unnecessary cost would be incurred if the County Council decided to refer this matter to a Public Inquiry. English Nature recommended that there should be 2 hectares of open space per 1,000 head of population. This part of Thanet had half that amount.

(24) Mr Tom King (Thanet District Councillor) said that Westgate was the second most deprived area in the County. In addition, the 2010 National Health reports showed Thanet faced with 50 deprivation indicators. Registration of the land as a Village Green would be of great benefit as an aid to inclusiveness. The land was used for picnicking and had always been well kept up until the wet summer of 2012.

(25) The Commons Registration Officer confirmed in response to a question from Mr Craske that the case of need for a Village Green was not one which the Panel was legally entitled to consider.

(26) Ms Collette McCormack (Winckworth Sherwood LLP) said that the lack of objection to the application from Thanet DC was due to the fact that it was within the Green Wedge. The District Council would therefore have no objection on planning grounds. It could not, though, be surmised that the District agreed with the legal case for registration. She added that if land was held under statute for certain purposes, it must follow that use by the public must be "by right" rather than "as of right." The land in question had a hardstanding and had also been the subject of lettings during the school holidays for such activities as police dog training. No charge had been made for these lettings. She concluded by saying that the application should be refused as it was clear that the required tests had not been met.

(27) Mr Luxmore (Executive Head Teacher) said that of the land were registered as a Village Green he would not be able to allow the pupils to use it. If this happened, the School would still need to maintain it. In effect, this would lead to the children paying for the upkeep of a Village green with no benefit to them. He added that people had been ejected from the land on occasions such as Sports Days.

(28) The Commons Registration Officer commented that the effects of registration were not a matter that the Panel could take into account in reaching its decision. She considered that there was a conflict of evidence and that the landowner's claim to have asserted his right to the land by ejecting people on occasions was not supported by any evidence at this stage. A Public Inquiry was the only way of testing the evidence provided by all parties.

(29) Members of the Panel commented that the evidence provided by each party was disputed by the other, and that there was no possibility of coming to a safe conclusion at this point. The only tests that had clearly been met were that the land

had been used for twenty years up to the date of the application. The question of whether the land had been used as of right for lawful sports and pastimes by a significant number of residents of a neighbourhood within a locality could not be definitively answered.

(30) On being put to the vote, the recommendations of the Head of Regulatory Services were carried unanimously.

(31) RESOLVED that a non-statutory Public Inquiry be held into the case to clarify the issues.

8. Application to register land known as Grasmere Pastures at Whitstable as a new Village Green
(Item 4)

(1) The Panel visited the application site before the meeting. This visit was attended by Mr Paul Watkins (landowner) and Mr Michael Lewer (Objector).

(2) The Chairman informed the Panel that he was the Local Member for the site in question. He had not discussed the Grasmere pastures issue with the applicant Mrs Watkins. Nor had he given any help or advice to any supporter of the application. He was therefore free to approach its determination objectively and impartially. He asked whether anyone present had any objection to him chairing the meeting for this item. As no one did raise any objection, the meeting continued with Mr Harrison in the Chair.

(3) The Commons Registration Officer introduced the application which had been made under Section 15 of the Commons Act 2006. The land in question was owned by OW Prestland Ltd (represented by Mr Watkins). This company was, in turn owned by Kitewood Estates (represented by Mr Michael Lewer.)

(4) The Commons Registration Officer continued by saying that the application had been considered by a Panel in February 2011 and that the decision had been taken to refer the case to a non-statutory Public Inquiry. The Inspector had produced a 350 page report in November 2012.

(5) The Commons Registration Officer went on to summarise the Inspector's findings. She had firstly considered the question of whether use had been "as of right." She had heard a great deal of evidence in relation to the taking of the annual hay crop and had concluded that (whilst the landowner had tolerated public use outside the growing season between May and September each year) use by the public during the growing season had largely been confined to the footpaths and their perimeters. Such usage had been discounted by the Inspector for the purposes of considering whether the applicant had been able to demonstrate sufficient qualifying use.

(6) The Inspector had also considered a considerable amount of evidence in respect of fencing, notices and mounds dug around the perimeter. Even though the small area in the north west corner had been excluded from the application, the Inspector had concluded that a locked gate had been erected at this potential entrance. She had also found that two "Private Property No Trespassing" notices had been put up in September 2004 at the earliest. She had accepted that the fencing

APPENDIX C:
Objector's response to Inspector's report

Application to Register Part of the Dane Court Grammar and King Ethelbert School Trust King Ethelbert School Playing Fields as a Town and Village Green

1. These representations are made on behalf of Dane Court Grammar and King Ethelbert School Trust King Ethelbert School (***the School)*** as an objector to the application to register part of the School's property as a town or village green (***TVG***). They are submitted in the context of the public inquiry (***the Inquiry***) that was held in November 2013, and the Inspector's report which was sent to the School on 26 March 2014.

2. The School has considered the Inspector's report and has a number of concerns, not least the weight that the Inspector has seen fit to give to the applicant's witnesses at the Inquiry over and above those of the School, including a former head teacher. More importantly we consider that the Inspector has erred in law in reaching her decision.

3. By way of background, the Committee will note that the application relates to part of the School's playing fields and should the application be registered the School will no longer be allowed to utilise this much needed facility. As was explained at the Inquiry, if the playing fields are registered as a TVG, then the School will remain owner of the fields and therefore have the ongoing maintenance costs whilst having no control over who it can allow on the playing fields (since a TVG must allow open access).

4. This means that the School will not be able to use this area of land for School activities, since given that it will have no control over who comes on to the land, it will not be able to ensure child safety. To be clear, all those working with children in the School have to be CRB checked and it would not be possible to do this if the School had no control over this area of land (***the Application Site***).

5. Before dealing with the points in issue it became clear at the Inquiry in November 2013 that the basis for the TVG application was to prevent development or any proposed development on the Application Site. <u>The School wish to make it clear that there are no development plans (nor have there been any development plans other than leisure changing facilities or leisure activities for the School) on the Application Site</u>.

6. The School is very much a stakeholder in the local community and would be happy to work with the applicant with a view to allowing access for the community onto the Application Site. However this would need to be as a permissive right as opposed to registering the site as a TVG.

The Inspector's report

7. As the Committee will be aware, there are a number of different criteria which an applicant must satisfy if land is properly to be registered as TVG. The School has very grave concerns as to how the Inspector has conducted her assessment in respect of certain aspects of these criteria.

8. **Lawful Sports and Pastimes**

Evidence of User

8.1 The Inspector has not adopted a reasonable approach to the evidence given regarding user of the land for sports and pastimes. Indeed, her approach is so partisan that it cannot be regarded as fair.

8.2 In this context, the School notes that notwithstanding the very many inconsistencies and omissions in the evidence of the applicant's witnesses, the Inspector never once makes an adverse finding as to their credibility/honesty, even though those witnesses clearly had an interest in the outcome of the case. Indeed, it was an accepted fact at the Inquiry that the Application to register the land as a TVG had been made due to a fear of the Application Site being developed.

8.3 However, when considering the evidence given in support of the Council's case the Inspector adopted a different approach. When there was a perceived inconsistency/omission – as in the case of Ms Jones – the Inspector concluded that the witness was exaggerating and not telling the truth.

8.4 By way of example of the uneven scrutiny given to the evidence, we note the Inspector attaches very little weight to the evidence given by the School's witnesses regarding the use of the Application Site by the School or its licensees for lessons/classes/activities during the 20 year period. However, the Inspector does not suggest that the Application Site was not used by School as it claimed.

8.5 Yet none of the applicant's witnesses admitted to having seen the School or its licencees having made use of the Land. This is a matter which ought to have caused the Inspector serious pause, and caused her to doubt the credibility/reliability of the applicant's witnesses. However, she does not appear to be in any way concerned that none of the applicant's witnesses admitted having seen use of the Application Site by the School.

8.6 The Inspector has adopted the approach that where a witness has a connection to the School then that evidence should carry less weight. However, no equivalent reservation is adopted in respect of the evidence of witnesses who have a connection to the Application. It should be noted that a number of teachers (including teachers still working at the School but also a number that had retired) gave evidence at the Inquiry and we are surprised at the limited weight the Inspector has attached to these statements.

8.7 We do not understand how or why the Inspector would attach such limited weight to witnesses of the stature of the Executive Head Teacher and National Leader of Education Mr Paul Luxmoore and his staff, whilst being so ready to accept without any material question the oral evidence of the applicant's witnesses.

Use as a Right of Way

8.8 A further point where we disagree with the Inspector's approach is in her consideration of whether the actions of those accessing the field for dog walking might be perceived as relating not to a TVG activity, but to a public right such as a public right of way.

8.9 In this context, the majority of the applicant's witnesses spoke of walking around the perimeter of the Application Site – either on tracks within the wooded area or on a track around the edge of the grass.

8.10 Whilst the Inspector accepts that there are clear paths around the perimeter of the Application Site, she still concludes that *"I consider that such recreational walking (...) would have not appeared to a reasonable landowner to have been preferable to any particular route characteristic of an established footpath".* She takes this view notwithstanding that the clear weight of evidence relating to walking (whether with or without dogs), related to 'perimeter' walking as opposed to general use of the Application Site.

8.11 On a fair, objective assessment of the evidence, the use of the Application Site for such 'perimeter' walking would – in the circumstances of the case – insofar as it suggested anything to a landowner, have suggested that local people were exercising a right of way, and not a right to use the Application Site as TVG.

9. **Neighbourhood**

9.1 Turning to the issue of neighbourhood the Inspector acknowledges at paragraph 2.11 that the claimed neighbourhood was not identified as a relevant neighbourhood in the application form.

9.2 In fact, there is no evidence before the Inquiry to justify the conclusion that this is a neighbourhood. As the Inspector accepts at paragraph 2.16 there is no name for the supposed neighbourhood. This is further compounded by the fact that, as the Inspector accepts, a number of the witnesses supporting the applicant identified different neighbourhood boundaries to those which the applicant chose. In fact, the majority of the applicant's witnesses disagreed with the applicant regarding the boundaries of their neighbourhood.

9.3 Perhaps most damningly, the Inspector accepted that the claimed neighbourhood was a 'neighbourhood' for the purposes of the statute, even though the applicant accepted that it was not the area he had originally thought was his neighbourhood, and that he had only chosen the boundary of the claimed neighbourhood following his discussions with a local historian who didn't even live in the neighbourhood, and who had never even visited much of it.

9.4 The School in its closing at the Inquiry made this point very clearly that there was no one defined or agreed neighbourhood. The applicant appeared confused, in that he had

changed the neighbourhood boundary at least twice and a number of the witnesses who were supporting his application did not agree with his view. However the Inspector appears to have largely ignored these considerations. Instead, she based her conclusion on the fact that whilst there was no defined neighbourhood there were *"no more individuals in support of any alternative neighbourhoods...Thus the applicant's proposed neighbourhood received more subjective support than any other".* This is a wrong test to apply. One does not look at the applicant's evidence and the witnesses in support and look to see which of the numerous neighbourhoods put forward has the most support within that small group of applicants. The issue is whether the applicant has established a neighbourhood. This was clearly not the case here as it was not even supported by his own witnesses.

9.5 A further notable consideration is that the Inspector gave very little weight to the written evidence that had been submitted by the School regarding the issue of neighbourhood, observing *"given the very marked discrepancies between the objectors written evidence and the oral evidence of the witnesses throughout, I give these witness statements limited weight".* However the Inspector does not explain this point, and her analysis is inconsistent given that she appears entirely content to ignore the many discrepancies between the applicant and his witnesses regarding the issue of neighbourhood. It is regrettable that in respect of this issue also, the Inspector failed to adopt a fair and even-handed approach.

9.6 The onus is on the applicant to discharge the burden of proof in every aspect of the Application, and it is clear from the evidence that the neighbourhood test has not been met. The Inspector's approach to the evidence was irrational and wrong in law. The reference to Lord Hoffman's comments in Oxfordshire in no way justifies her treatment of the issue.

9.7 Further, not only was the Inspector wrong to accept the applicant's definition of neighbourhood, she was wrong to reject the submission made by the School that there should be a spread of those supporters throughout the neighbourhood (as opposed to users being limited to one or two roads very close to the Application Site).

9.8 The School referred to the decision of the Behrens J in *Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch) and the decision of the Court of Appeal in *Leeds Group Plc v Leeds City Council* [2011] EWCA Civ 1447 at the Inquiry. The Inspector in her report refers to the decision in *Paddico (267) Ltd v Kirklees MDC* [2011] EWHC 1606 for her conclusion that "*there is no 'doctrine of spread' to examine*", and that such doctrine is "*not...good law*". The Inspector is simply wrong in this regard. She has misunderstood *Paddico*, and her analysis is flawed.

9.9 As regards the Inspector's assertion that there is a spread of users through the claimed neighbourhood, this assertion does not hold water. In order to justify her conclusion the Inspector has had to rely on evidence questionnaires of witnesses who did not give

evidence at the Inquiry, and who the School did not have the chance to cross-examine. Quite simply, the Inspector's conclusion is not justified.

10. Conclusion

10.1 We recommend in the strongest terms that the Council does not accept the Inspector's recommendation to register the Application Site.

10.2 The Inspector's approach in her report is not even-handed. Where there are discrepancies with the applicant's evidence the Inspector appears to overlook this despite the fact that the onus of proof for this application is firmly on the applicant. Her conclusions on the evidence, in various respects, are so unreasonable as to mean that were the Committee to register the Application Site in reliance on the Inspector's report, that decision will be open to judicial review.

10.3 Similarly, we consider that the Inspector has erred in law in her interpretation of neighbourhood and spread, so that if the Committee chooses to recommend the registration, that decision will also be open to judicial review on that basis.

10.4 This is not a route the School wish to pursue, particularly as it would be amenable to meeting with the applicant and members of the local community to negotiate access to the site on a permissive right.

10.5 Alternatively, if the applicant wishes to pursue the Application, the Council should hold a new public inquiry, to be conducted by a different Inspector. This new inspector should be one who has a suitable level of experience, and who has the legal expertise sufficient to cope with a case of this complexity.

10.6 As previously stated the registration of these playing fields would deprive the School of its leisure facilities whilst at the same time leaving it continuing to incur the cost of maintenance. The School would once again like it noted by the Committee that there is not and has never been a plan for development on these playing fields that is the subject of the TVG application other than leisure facilities for the School.

10.7 We ask that the Committee does not register the School playing fields as a TVG, and does not deprive the School and future pupils of the School of a valuable green asset.