Application to register land known as the Cricket Field at Marden 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 Tuesday 3rd June 2014.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 28th March 2014, that the applicant be informed that the application to register land known as the Cricket Field at Marden has not been accepted.

Local Members: Mrs. P. Stockell Unrestricted item

Introduction

1. The County Council has received an application to register land known as the Cricket Field at Marden as a new Town or Village Green from local resident Mr. T. Simmons ("the applicant"). The application, made on 23rd November 2011, was allocated reference number VGA640. 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, as the name suggests, of a cricket field of approximately 3.7 acres (1.5 hectares) in size situated at the junction of Stanley Road and Albion Road in the parish of Marden. The application site excludes the pavilion and its immediate surrounds, the tennis courts and other outbuildings on the site. A plan showing the application site is attached at **Appendix A**.

7. Throughout the relevant period, the application site has been owned by Mr. R. Day and leased to the Marden Hockey and Cricket Club ("the Club").

Previous resolution of the Regulation Committee Member Panel

8. In response to the consultation, an objection was received from solicitors acting on behalf of both Mr. Day and the Club. A number of representations were also received from local residents both in support of and in opposition to the application.

9. The matter was considered at a meeting of the Regulation Committee Member Panel on Tuesday 5th March 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 is 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 Marden Memorial Hall on Wednesday 21st August 2013. Written directions to all parties confirming the format of the Inquiry and procedure for the submission of evidence were circulated shortly thereafter.

12. The Public Inquiry took place at the clubhouse of the Marden Cricket and Hockey Club commencing on Monday 11th November 2013 and continuing until Friday 15th November and resuming for closing submissions and the formal site visit on 11th December 2013.

13. At the Public Inquiry, the applicant was represented by Mr. Ned Westaway of Counsel and the objectors were represented by Ms. Morag Ellis QC of Counsel.

14. The Inspector subsequently produced a written report dated 28th 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 Inspector did not consider that any informal recreational use of the application site had taken place in a secretive manner and she was satisfied that the objectors were fully aware that local inhabitants were making use of the application site for recreational purposes throughout the material period.

19. Nor did the Inspector consider that use of the application site had taken place in exercise of force (whether physical force or otherwise). In response to the objector's submission that informal recreational use of the application site had taken place in defiance of 'private ground' notices and locked gates, she said[3]:

> *"I do not, however, consider that the signs and fencing on the application land during the relevant period render any wider use of the application site vi [with force]. Although it was clear that the application land is private, as I have set out in my conclusions of fact, the land was at all times freely accessible by one means or another and there was no indication that*

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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 202 of the Inspector's report

trespassing was prohibited. [The Club Chairman] accepted that the signs had been 'beefed up' since the village green application and I do not consider that the landowner was doing everything consistent with his means and proportionate to the use to render use vi…".

20. There was, however, as issue as to whether use of the application site had been in exercise of any form of some form of permission (express or implied). The Inspector dismissed the suggestion that members of the Marden Cricket and Hockey Club were using the application site by reference to some form of implied permission arising from their membership of the Club, stating that[4]:

    "I have seen no terms of membership and certainly nothing to indicate that members [of the club] have a contractual right to use the application land at any time for their own informal activities".

    As such, she did not consider that it was appropriate to distinguish between informal recreation carried out by members of the Club and non-members.

21. The Inspector considered whether any permission could be implied by other means. She noted that whilst the granting of permission normally requires some form of 'overt act', the requirement for an 'overt act' does not necessarily mean that permission can only be communicated expressly. She referred to the comments made in the Beresford[5] case that '*…a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission*'.

22. Applying the case law to her findings of fact in respect of the evidence, she considered that[6]:

    "In my opinion, as I have set out in my conclusions on the evidence, [the Club] were not inactive landowners, passively standing by while local inhabitants meanwhile asserted a right to use the application land as a village green. They actively engaged with the local inhabitant users of their land in a number of different ways… They also very regularly exercised control over the use that was made of the application land. No one was allowed to cause damage to the sporting facilities whether by means of illegal activities (e.g. vandalism) or lawful ones (e.g. football or riding bikes on the square…) which were kept to a very high standard by the groundsmen. Further, [the Club] (and their licensees in the form of people who paid for the facilities) regularly occupied the application land for organised sports which local people were welcome to watch, but they were excluded from the area of play while the landowner used it for his own purposes.

    …

    It appears that [the Club] made quite clear to the local community at large (as well as the sportsmen and women and their families and friends) that anyone who wanted to come onto the application land to support their local teams during matches was welcome… [recreational activities] carried on during that time would be incidental to the implied invitation to residents and others to come and watch. This may not always have been express… but it was, in my view, certainly implied through the circumstances (in particular, that there was a match on and lots of people watching).

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[4] Paragraph 186 of the Inspector's report
[5] *R v City of Sunderland ex parte Beresford* [2003] UKHL 60
[6] Paragraphs 194 and 196 of the Inspector's report

Similarly, [the Club] encouraged parents and families to stay on the application land while their children were taking part in organised sport".

23. Therefore, although the Inspector was satisfied that informal general recreational use of the application site had taken place without force and without secrecy, she found that the degree of control exercised by the landowner in permitting informal recreational use was such that permission to use the land could be implied. As such, she was not satisfied that use of the application site had taken place 'as of right' throughout the relevant period.

(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 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*'[7].

25. 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[8]. In any event, the activities must be 'lawful' in the sense that they must not amount to a criminal offence[9].

26. The objectors agreed that the activities undertaken on the application site were capable of constituting lawful sports and pastimes[10], and there was no dispute at the Inquiry that the application site had been used for such activities.

27. Having heard the applicant's evidence, the Inspector was satisfied that 'many people' had used the application site for lawful sports and pastimes throughout the relevant period[11]. She noted in particular that all witnesses admitted that nobody had ever engaged in informal recreational activities on the central cricket square and, insofar as dog walking and recreational walking was concerned, this would generally take place around the perimeter of the application site. In addition, other activities such as children playing, riding bikes and snow games would have taken place at various locations around the application site, including on the outfield (but not the cricket square)[12].

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[7] *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

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

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

[10] Paragraph 25 of the Inspector's report

[11] Paragraph 171 of the Inspector's report

[12] Paragraph 172 and 173 of the Inspector's report

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

28. 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.

29. The definition of locality for the purposes of a Town or Village Green application has been considered by the Courts. In the Cheltenham Builders[13] 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*'.

30. 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*'[14].

31. In this case, the applicant originally described the locality (on the application form) as being 'within the boundaries of Stanley Road TN12 9EL, Albion Road TN12 9EB'. At the pre-inquiry meeting, the applicant sought to amend the application by instead relying upon the neighbourhood of Marden village within the locality of Marden parish.

32. The objectors agreed that the village of Marden constitutes a qualifying neighbourhood within the locality of the parish of Marden[15] and this issue was not in dispute at the inquiry.

"a significant number"

33. 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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[13] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[14] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 92
[15] Paragraph 25 of the Inspector's report
[16] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

34. In respect of the user evidence, the Inspector found that, at face value, it appeared that informal recreational use of the application site was undertaken by a significant number of the residents of the locality[17]. However, she stressed that[18]:

> *"my view as to whether a significant number of local inhabitants have used the application land for [informal recreation] cannot necessarily regard all user as qualifying use for the purposes of the statutory definition, and in particular it is necessary to temper any conclusion in respect of 'significant number' in accordance with the degree to which user was carried out 'as of right'".*

35. Having found that much of the evidence of informal recreational use was not 'as of right' (as set out above), she went on to conclude that[19]:

> *"I have seen no evidence of 'general community use' of the application land which is 'as of right'. As the objectors submit, if there were use by a significant number of local inhabitants, it would be inconsistent with the high quality condition of the application land over the years and can be contrasted with publicly accessible [nearby] open spaces such as Southons Field and, to an extent, with the George Holiday Field. Had there been sustained 'as of right' user (rather than the particular licensed user by those known to [the Club] and trusted by them), it would have caused serious problems for [the Club] who would have acted to preserve the quality of their sporting asset. As a matter of impression, most of these 'residual users' would be dog walkers who would stick to the perimeter of the application land. They would thus not be using the application land in a comprehensive manner which further supports the trivial and sporadic nature of their use".*

36. Overall, the Inspector considered that the applicant had failed to demonstrate that the application site consisted of 'as of right' use by the local community generally rather than occasional use by a few individuals.

(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?

37. 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.

38. In this case, there was no specific challenge to use and informal recreational use continued 'as of right' (subject to the comments made above) up until the date of the application.

39. The application was therefore correctly made under section 15(2) of the Act.

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

40. In order to qualify for registration, it must be shown that the land in question has

[17] Paragraph 186 of the Inspector's report
[18] Paragraph 187 of the Inspector's report
[19] Paragraph 208 of the Inspector's report

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.

41. In this case, the application was made on the basis that informal recreational use of the application site continued until the date of the application. As the application was made in 2011, the relevant twenty-year period was therefore 1991 to 2011.

42. The objectors argued that the use of the application site for cricket matches necessarily resulted in the majority of the site being unavailable for informal recreation on a regular basis, so as to constitute a material interruption to such use. However, the Inspector heard evidence that during matches local people were positively encouraged by the Club to come onto the application site to spectate. Although this encouragement to spectate was indicative of an implied permission for local residents to use the land (see above), she did not consider that it was compatible with the idea of a complete exclusion of the public from the land for material period of time such that time stops for the purposes of a Village Green application[20].

43. Therefore, subject to the Inspector's conclusions in respect of the sufficiency of use (above), such 'as of right' use as did take place was not interrupted and continued throughout the material period.

Inspector's conclusions

44. The Inspector found that the applicant had failed to demonstrate that all of the requisite legal tests had been met and, as such, no part of the application site was capable of registration as a Village Green.

45. Her overall conclusion was that[21]:

> *"the application should fail in full for the reason that the applicant has failed to show that:*
>
> *(a) The vast majority of the use of the application land by local inhabitants of the village of Marden for lawful sports and pastimes during the relevant period was carried out 'as of right'; and*
>
> *(b) Any residual 'as of right' user was carried out by a significant number of local inhabitants and was not too trivial or sporadic to carry the appearance of the assertion of a public right."*

46. Accordingly, her advice to the County Council was the application should be rejected.

Subsequent correspondence

47. On receipt, the Inspectors' report was forwarded to the applicant and to the landowners for their information and further comment.

48. The objectors noted the contents of the Inspectors' report but did not express any particular comments in relation to it.

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[20] Paragraph 186 of the Inspector's report
[21] Paragraph 212 of the Inspector's report

49. The applicant responded (see copy of letter attached at **Appendix C**) to express disagreement with the Inspector's conclusions and suggested that she had underestimated the qualifying use of which she had heard direct evidence at the Inquiry. In particular:
    - The Inspector concluded that some kind of implied permission had been extended to local inhabitants that were in some way associated with the Club, despite the fact that there was no evidence of anything other than an unwritten 'general understanding';
    - That it is only possible for permission to be implied if it is communicated so that it has an impact on the use of the land by the local inhabitants but the 'general understanding' did not have any such impact, on the evidence, in this case;
    - The Inspector failed to address the significance of the installation of the dog litter bin by the local Council which implied a general acceptance of dog walkers on the land by the Club; and
    - The Inspector failed to consider the possibility of the partial registration of the land, particularly the smaller areas to the east and west of the cricket outfield.

50. As such, the applicant urged the County Council not to accept the Inspector's recommendation to reject the application, but instead to register the land as a Village Green on the basis of the considerable local use that the Inspector found had taken place.

Conclusion

51. The key issue that arises in this case is whether use of the application site for informal recreation by the local inhabitants has taken place 'as of right'. As is noted above, the rationale behind 'as of right' is acquiescence on the part of landowner, and the starting point is therefore how the matter would have appeared to the owner of the land. The inspector concluded, on the basis of the evidence before the Inquiry, that the Club had not been inactive landowners and, through its various actions, had successfully communicated, in the form of a 'general understanding', an implied permission to use the land. There is no requirement for permission to be express or in a written format (e.g. as a formal policy or in the form of a notice on the land) and, as confirmed in the Beresford[22] case, it is necessary to consider all of the surrounding circumstances. The Inspector considered these surrounding circumstances in depth in her report[23] and was satisfied that the Club had established sufficiently that local inhabitants known to the Club could use the application site provided that they were respectful and their use could be terminated if circumstances changed.

52. As far as the presence of the dog litter bin is concerned, the Inspector refers briefly in her analysis to the fact that dog fouling was not a problem on the application site[24] but she did not need to consider the implications of the installation of the dog litter bin because this was an action on the part of the Council and not the Club. There was no evidence before her at the Inquiry that the dog litter bin had been installed in response to a significant problem or at the Club's specific request.

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[22] *R v City of Sunderland ex parte Beresford* [2003] UKHL 60
[23] See paragraphs 192 to 200 of the Inspector's report
[24] See paragraph 199 of the Inspector's report

53. In respect of the partial registration of the land, the Inspector concluded that application should fail in respect of the whole of the application site and it was therefore not necessary for her to consider the appropriateness of registering only part of the application site[25].

54. Having carefully considered the Inspector's analysis of the evidence (contained in her report) and taking into account the comments made by the application, it does not appear the Inspector has erred in her recommendation and the Officer's view is that the County Council should proceed in accordance with her advice.

55. As such, it would appear that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met and, accordingly, the application should be rejected.

Recommendation

56. I recommend, for the reasons set out in the Inspector's report dated 28th March 2014, that the applicant be informed that the application to register land known as the Cricket Field at Marden has not been accepted.

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

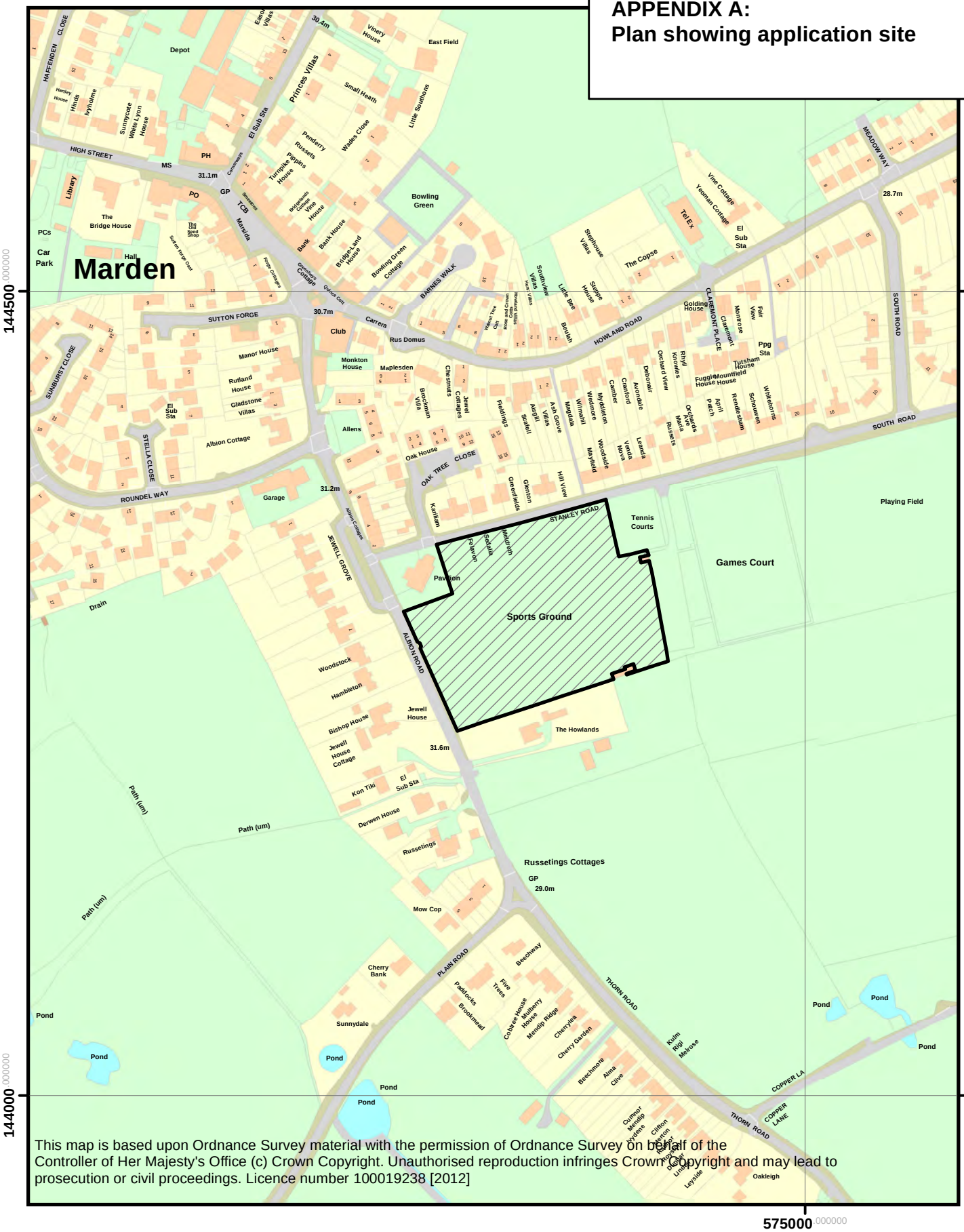
APPENDIX A – Plan showing application site
APPENDIX B – Minutes from the meeting of the Regulation Committee Member Panel on 5th March 2013
APPENDIX C – Copy of the applicant's response to the Inspector's report

Background documents

Inspectors' report dated 28th March 2014

[25] See paragraph 211 of the Inspector's report

APPENDIX A:
Plan showing application site



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Land subject to Village Green application known as the Cricket Field at Marden

Kent County Council

KENT COUNTY COUNCIL

REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Staplehurst Village Centre, High Street, Staplehurst TN12 0BJ on Tuesday, 5 March 2013.

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

ALSO PRESENT: Mrs P A V Stockell and Mr J N Wedgbury

IN ATTENDANCE: Ms M McNeir (Public Rights Of Way and Commons Registration Officer) and Mr A Tait (Democratic Services Officer)

UNRESTRICTED ITEMS

9. Application to register land known as The Cricket Field at Marden as a new Village Green
(Item 3)

(1) Members of the Panel visited the site before the meeting. This visit was attended by the applicant, Mr Trevor Simmons, Mr Roger Day (landowner), Mr Frank Tipples and Mr Steven Wickham (Marden Hockey and Cricket Club) and Mrs P A V Stockell (Local Member.)

(2) The Commons Registration Officer introduced the application which had been made by Mr Trevor Simmons under section 15 of the Commons Act 2006. The application had been accompanied by 30 user evidence forms and had received written support from the Marden History Group and the Marden Society as well as from 19 local residents. Marden PC also supported the application. Letters of objection had been received from 11 local residents.

(3) The Commons Registration Officer went on to say that the landowner was Mr Roger Day who had leased it to the Marden Hockey and Cricket Club. An objection had been received from Bircham Dyson Bell LLP on behalf of the landowner and the Club. Their grounds for objection were that the user evidence only revealed trivial and sporadic recreational use; that use had been “by right” rather “as of right” as many people had been guests of the Club and a significant number of the claimed recreational activities were the same as those undertaken by it; that the relevant locality had not been sufficiently defined and use had not been by a significant number of the residents; that the land had been fenced, with access to it being regulated by stiles and gateways which had been locked when not in use, with private notices visible; and that there was evidence that informal recreational users had been challenged.

(4) The Common Registration Officer moved on to consider the individual legal tests. The first of these was whether use of the land had been “as of right.” She said that it was clear that use had not been by physical force or stealth. However, the question of whether use had been challenged remained to be resolved as it was not

clear whether the site had ever been entirely secured to prevent public access. The Panel Members had seen the "Private Ground" notice that morning. It was, however, unclear whether this notice had always been there or had been sufficiently prominent to constitute a clear challenge to access by the public.

(5) A further issue was whether the claimed recreational use was by implied permission. It was possible that if members of the Club were using the site for recreational activity, then the landowner would not have needed to challenge them, as it would have given the impression of an extension of Club membership activity rather than as the assertion of a public right.

(6) The Commons Registration Officer said that the uncertainties described could only be resolved through further and more detailed examination of the evidence.

(7) The second question was whether use of the land had been for lawful sports and pastimes. The Commons Registration Officer said that the user evidence suggested that there had been a range of recreational activities, including dog walking, jogging, playing with children and ball games. It was, however, not possible on the basis of the questionnaires to distinguish between informal and formal cricket. This was an important distinction as any member of the Club who was playing cricket would be doing so "by right" and could therefore not be considered for the purposes of establishing whether lawful sports and pastimes had taken place "as of right." It was also unclear whether tennis activities had taken place on the application site itself or on the neighbouring tennis courts.

(8) The Commons Registration Officer then turned to the question of whether use had been by a significant number of inhabitants of a particular locality or a neighbourhood within a locality. The applicant had specified that the locality was within the boundaries of Stanley Road and Albion Road. The landowner had argued that this was not a sufficiently defined locality. However, there was no reason why the parish of Marden would not suffice as a qualifying locality.

(9) The Commons Registration Officer explained that the term "significant number" meant that the number of people using the site had to be sufficient to indicate to the landowner that the land was in general use by the community for informal recreation. She added that it was not, at this stage, possible to reach a safe conclusion on this point as further evidence would need to be sought to establish the amount of use that was related to the Club and how much was entirely independent of it.

(10) The Commons Registration Officer then said that use of the application site had continued up to the date of the application in 2011 and that the user evidence forms suggested that the land in question had been used for the required 20 year period.

(11) The Commons Registration Officer concluded her presentation by saying that she considered that the most appropriate way forward would be to hold a Public Inquiry in order to clarify the issues that currently remained unclear. This would enable the Panel to reach an informed decision as to whether the land in question was capable of registration as a Village Green.

(12) Mr Trevor Simmons, the applicant said that he believed that the land had been used "as of right." A Public Inquiry would be able to establish that a significant majority of the use had been for informal recreation as opposed to official cricket.

(13) Mr Simmons went on to say that he accepted that he had misunderstood the legislation when he had identified the land between Stanley Road and Albion Road as the "locality." He referred the Panel to Appendix C of the report and said that the user evidence forms had been completed by people from the whole of Marden Parish, which he therefore agreed was the actual qualifying locality.

(14) Mr David McFarland said that he represented the Marden History Group and Heritage Centre, located in the village library. The purpose of this organisation was to seek, preserve, research, inspire interest in and transmit the history of the parish of Marden. He also, on this occasion, represented the Marden Society whose purpose was to protect the character of the village of Marden.

(15) Mr McFarland said that the organisations he represented agreed with, and supported the applicant's submission for the reasons set out in their letters of 9 and 14 July 2012. These letters referred to 637 petitioners who wished to protect the cricket field, and the erection in July 2012 of notices forbidding access to the site by non-members of the Cricket and Hockey Club.

(16) Mr McFarland then said that he wished to put the application into the wider context of the village predicament and its responses. He quoted an extract from a comment that his organisations had posted in the village as shown below.

"The loss of a village cricket ground on which the game has been played for generations, with its attendant civilized sounds of willow on leather and polite applause, the loss of the home of the famous Marden Russets and of the green where children have played "as of right" and been entertained at times, could be seen as a significant loss of Marden's heritage and of a community asset.

This is a sad prospect for villagers and for their children who, in more recent years, have joined the club alongside those from other areas, and can walk safely to play and spectate by right.

Ordained new housing to sustain the village could be located on already identified sites that may well be less intrusive or disruptive, and certainly less destructive of part of the village's heritage."

(17) Mr McFarland then said that construction of a number of new houses in the village caused real concern to the many and delight to the few. He believed that most people accepted that some new housing and new people could help the life and economy of what he described as a splendid working village. The burning question was where these developments would actually take place. Many potential sites had been ordained for new homes.

(18) The Parish Council had organised two open days during the previous weekend for villagers to look at the proposed Neighbourhood Plan. One particular exercise during this open day had encouraged villagers to place a green spot on sites where they would prefer development and red spots where not. There had not been enough space on the map to accommodate all the red spots directed at the Cricket & Hockey club ground, including the cricket field. These had, in fact outnumbered those placed elsewhere on the map.

(19) The Chairman explained that the points made by Mr McFarland could not be considered by the Panel. It could only consider whether the required legal tests had been met and could not take factors such as desirability or possible development proposals into account.

(20) Mr Frank Tipples said that he had been the Chairman of the Marden Hockey and Cricket Club until 2012. The majority of those entering the site had always done so through the gate in Stanley Road. They would therefore have seen the sign on the clubhouse, which had been erected in the 1960s. He believed that anyone who had entered the ground to watch the Club playing cricket was doing so with implied permission. He added that challenges had been made on a number of occasions as health and safety problems would have arisen if dog walkers allowed their pets to run free on the land.

(21) Mr Roger Day (landowner) said that the sign on the clubhouse had first been put up in 1962. The ground had always been secure and fenced. The stiles had been installed in order that people could retrieve the ball after it had been knocked out of the ground.

(22) Mr Day then said that the Marden Hockey and Cricket Club was a private members' club which paid to play. Money was also raised through parents paying for their youngsters to learn and practice the game. Members of the public were encouraged to watch the cricket on match days.

(23) Mr Day said that claims in the user evidence forms that people had used the ground for blackberry picking and making snowmen should be understood in the context that they would be politely asked to leave whenever they had been seen doing so. There had been instances of vandalism and hooliganism on the land which had led to this approach being adopted.

(24) Mr Day replied to a question from the Chairman by saying that there was no financial agreement between himself and the Club.

(25) Mr Davies noted that the locality had been identified as between the boundaries of Stanley Road and Albion Road and that the applicant himself agreed that this was a mistake. He asked whether this meant that the application should be automatically rejected. The Commons registration Officer replied that this was not the case and that it would be one of the issues that could be considered further at an Inquiry.

(26) Mr Pascoe asked whether the status of fee paying members of the Club had an impact on their ability to be considered as "inhabitants of a particular locality" for the purposes of Village Green registration. The Commons Registration Officer confirmed that use by fee paying members could not be considered, as their use of the site was "by right."

(27) Mr H J Craske said that he was completely discounting all development planning considerations. He considered that the application could not be determined until the question had been resolved as to how much use of the land had been "by right" and how much had been "as of right."

(28) Mrs P A V Stockell (Local Member) said that she supported the recommendations as a Public Inquiry would enable the people of Marden to have a proper opportunity to give their views and evidence. It would also ensure that the right decision was made. This would be in the best interests of the people of Marden where (regrettably) the application had led to a division of opinion.

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

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

10. Application to register land known as Rammell Field at Cranbrook as a new Village Green
(Item 4)

(1) The Panel Members visited the application site before the meeting. This visit was attended by Mr Howard Cox (the applicant) and by some 60 members of the public.

(2) The Commons Registration Officer introduced the application which had initially been made by Mr John Davis in March 2011 under section 15 of the Commons Act 2006. Mr Davis had subsequently passed responsibility for the application to Mr H Cox.

(3) The Commons Registration Officer then said that the application had been accompanied by 69 user evidence forms, a number of supporting photographs and 27 letters of support. A petition containing over 1000 signatures had also been received. This petition had been submitted with its stated aim being "in aid of our protest against the building of houses on Rammell Field in Cranbrook, Kent." This was not a consideration that the Panel was entitled to take into account as it could only consider evidence relating to the legal tests set out in the 2006 Act.

(4) The Commons Registration Officer then said that the land was owned by the Trustees of Cranbrook School. It had been acquired in 1922 by an association known as "The Old Cranbrookians Association" to provide a memorial for those who had attended the School and had fallen in the First World War. The Governors of Cranbrook School had agreed to take the conveyance of this field and had formed the Trust in order to (amongst other things) exercise management over it.

(5) The landowner had objected to the application on the grounds that use of the field had not been "as of right" for a continuous period of 20 years up to the date of application; that use by the public had been with permission (or else by force); and that the applicant had failed to correctly specify a "locality" or "neighbourhood within a locality." In support of these objections, the landowner had provided a letter (dated 2011) from the former School Bursar; a letter (dated 1999) from the landowner's planning consultant to Tunbridge Wells BC; letters sent to neighbouring landowners in 1999 and 2005; and copies of letters and invoices relating to the hire of the application site for formal events.

(6) The Commons Registration Officer moved on to consideration of the legal tests. All of these tests had to be met in order for registration to take place. The first

APPENDIX C:
Applicant's response to the Inspector's report

Hall.

Ms M McNeir
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MAIDSTONE
ME14 1XX

ALSO BY EMAIL TO: melanie.mcneir@kent.gov.uk

6 May 2014
Our ref: RFJ/ELP/HE50551.000001

Dear Melanie

Application to register land known as the Cricket Field Marden as a village green under s.15 of the Commons Registration Act 2006

I write further to your letter of 31 March 2014 inviting comments on the Inspector's report on my client's application to register the above land as a town or village green.

The Inspector has recommended that the application be rejected. I am mindful of the need to avoid repeating the submissions and evidence made on behalf of my client at the inquiry, however I would urge the Council not to accept that recommendation, but instead to register the land (or at least part of the land) as a village green on the basis of the considerable local use that the Inspector found had taken place.

The Inspector correctly concluded (at para.179) that at all times during the 20 year period "it has been possible to access the application land freely and openly". She concluded that taken on face value the use of the Cricket Field by local inhabitants (whether or not they were also members) outside of formal organised sports "was certainly at its lowest more than trivial and sporadic throughout the relevant period and carried out by a significant number of inhabitants" (para.186): she later described there as having occurred "a large amount of LSP" (para.202).

The test under s.15(2) of the Commons Act 2006 is whether a significant number of inhabitants have engaged in lawful sports and pastimes over 20 years "as of right"– apart from this last criterion, the Inspector concluded that the test was satisfied.

Unfortunately, however, she went onto conclude that the use of all but two of the witnesses whose evidence she heard was permissive in nature (i.e. *precario*) and so not "as of right".

In so concluding she erred, for the reasons set out below. These are headline points only. The applicant relies upon the evidence and arguments presented at the inquiry.

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Use as of right

First, having found there was significant use, the burden of showing that use was not "as of right" fell to the landowner (see *Mann v Somerset CC* CO/3885/2011 at paras.24 and 61). The Inspector's approach placed the burden largely or entirely on the applicant to prove, say, that an implied permission of some sort had not been communicated to them. This was both wrong and unreasonable.

Secondly, she concluded that some kind of "implied permission" had been extended to local inhabitants who were members, social members (i.e. parents), ex-members, or the family of members despite the fact:

(a) There was no evidence of anything other than an unwritten "general understanding" even among club members;

(b) Any such "general understanding" was not sufficient as a matter of law or common sense to base findings of an entitlement on the part of local inhabitants to use the land informally (so not "as of right") (see para.176); and

(c) Many of the applicant's witnesses who were or had been club members did not understand their use of the Cricket Field to have anything to do with their membership of the club. There was oral and written evidence to this effect before the Inspector, who did not properly engage with it: see eg Mr Lowther's statement at para.7, Ms Ferguson-Gow at para.7, Mr McArragher at para.3, Mrs Holland at para.9; Mrs Lerwill at para.13, Mr Bird at para.9 and Ms McArragher at para.2. So, for example, Mr McArragher said that while his son was a member of the hockey club, "I never felt that our use of the Cricket Field was connected to his membership of the hockey club."

It is only possible for permission to be implied if it is communicated so that it has an impact on the local inhabitants concerned – see eg per Lord Walker in *R (Beresford) v Sunderland CC* [2004] 1 AC 889 at para.75 ("overt act which is intended to be understood, and is understood, as permission to do something ...") and *Mann v Somerset CC* at para.71 ("such conduct will be expected to have an impact on the public"). On the evidence before the Inspector, the "general understanding" relied upon did not have such an impact.

Thirdly, the Inspector placed undue reliance on "express permissions", when the permissions given to Ms Cowley, Mr Bird and Mr Etheridge related only to use of the bonfire and in Mrs Cowley's case, the clubhouse, both of which are entirely different from regular use of Cricket Field land for sports and pastimes (such as dog walking or informal recreation). Insofar as permission was said to have been given to Mr McArragher's wife by "a committee member", this was a single instance about which there are no details and which predates the relevant period. This all tends to demonstrate the lack of actions overt or otherwise on which a general permission to use the land could be implied rather than anything else.

Fourthly, the Inspector failed to address the implications for her analysis of the local authority dog litter bin being placed on the land from the late 1990s to 2012. This is a significant point, as the dog litter bin indicated general acceptance of dog walkers on the land – inconsistent with just giving permission to a few 'known faces'.

By adopting the above approach, the Inspector underestimated the qualifying use of which she had heard direct evidence, restricting this to a residual category with Mrs Day and Mrs Watt. Further, she wrongly refused to infer any additional "as of right" use by local inhabitants seen using the land by others (paras.205-206).

Partial registration

Finally and on a separate point, given her conclusion on the cricket outfield, the Inspector failed to consider the strips of land to east and west of the outfield for registration, despite a case being made for registration of these areas in the alternative to the entire application site, on the basis of evidence of ball games and bike riding by local inhabitants taking place in particular in these areas (see applicant's closing submissions at para.15: Mrs Boardman, para.27: Mrs Leaper, para.28: Mr Etheridge and Mrs Holland).

Typographical errors

I have already informed you about the slip in the conclusion at para.213(4) of the original report, where the recommendation appeared to be that the application should succeed! There are some other minor errors in the wording of the report, as follows:

- Para.35 line 1 first word is incomprehensible;
- Para.36 line 3 "while" instead of "wile"; and
- Para.97 line 6 "batch of questionnaires" instead of "bath of questionnaires".

I mention these typographical errors out of courtesy, none of them are critical to the sense of the report so that it would need to be amended or reissued for that reason.

Conclusion

For the reasons above, the evidence before the Council is of considerable local use over the whole period. My client does not accept that use has been shown not to be "as of right", the application site should accordingly be registered as a town or village green because it complies with the statutory criteria. My client urges the Council to reject the Inspector's recommendation.

Yours sincerely

F Jackson

Freddie Jackson
Associate