Application to register land known as Glebe Field at Goudhurst as a new Town or Village Green

A report by the Head of Public Protection to Kent County Council's Regulation Committee Member Panel on Tuesday 19th May 2015.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 25th September 2014, that the applicant be informed that the application to register land known as Glebe Field at Goudhurst has been accepted, and that the land subject to the application be registered as a Village Green.

Local Members: Mr. A. King Unrestricted item

Introduction

1. The County Council has received an application to register land known as Glebe Field at Goudhurst as a new Town or Village Green from local resident Mr. E. Bates ("the applicant"). The application, made on 18th November 2011, was allocated reference number VGA639. 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[1].

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**[2], 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

[1] Note that the 2008 Regulations have now been replaced by the Commons Registration (England) Regulations 2014 ("the 2014 Regulations") and the application falls to be determined under the 2014 Regulations.

[2] 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.

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

The application site

6. The area of land subject to this application ("the application site") is known locally as Glebe Field and consists of an area of grass of approximately 2.5 acres (1 hectare) in size situated at the junction of Church Road and Back Lane in the parish of Goudhurst. There are no recorded public rights of way crossing the application site, although a surfaced path way was constructed in 1998 to provide a safe route for school children between the village centre and the local primary school. The application site is shown in more detail on the plan at **Appendix A**.

7. The application site is owned by the Canterbury Diocesan Board of Finance ("the landowner") and, between 1966 and 2010, it was leased to the County Council as a playing field in connection with the local primary school.

Previous resolution of the Regulation Committee Member Panel

8. During the consultation period, one objection to the application was received from the landowner. That objection was made primarily on the basis that permission had been granted for certain events to take place on the field (such as village fetes) and that it was unclear as to whether some of the recreational use had been ancillary to the main purpose of walking along the surfaced path provided in 1998.

9. The matter was considered at a Regulation Committee Member Panel meeting on 24th September 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 law 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 County Hall on Monday 27th January 2014. 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 Vine, High Street, Goudhurst commencing on Monday 2nd June 2014 and continuing until Thursday 5th June 2014. The Inspector heard evidence from all interested parties, and she also undertook an accompanied site visit on the final day of the Inquiry.

13. At the Public Inquiry, the applicant represented himself, with assistance from two other local residents, and the landowner was represented by Mr. Vivian Chapman QC of Counsel.

14. The Inspector subsequently produced a detailed written report dated 25th September 2014 ("the Inspector's report"). Her findings and conclusions 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 has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?
    (d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than two years prior to the making of the application?
    (e) Whether use has taken place over period of twenty years or more?

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

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

16. In order to qualify for registration as a Village Green, recreational use of the application site must have taken place 'as of right' through the period of use relied upon. 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[3] 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".*

17. In this case, there was no suggestion that any informal recreational use of the application site had taken place in a secretive manner. However, at the Inquiry the landowner contended that informal recreational use of the application site had taken place both by force and with permission during the relevant period.

    Use by force

18. It was common ground between the parties that, until at least 2002, there had been a five bar gate at the vehicular entrance to the application site from Church Road (although there was a dispute as to whether it was open or locked), and that there had always been some sort of pedestrian access between the application site and the Church Rooms (adjacent to the southern boundary of the site). Furthermore, it was agreed that, when the path was constructed around the western and northern sides of the application in 1998, unlocked gates were provided at either end giving access to Back Lane and Church Road (close to its junction with Maypole Lane).

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

19. However, part of the landowner's case was that other pedestrian entrances in place throughout the relevant period were no more than holes in the hedge, and such use was considered to be in exercise of force to gain entry, and not 'as of right'.

20. In this regard, whilst the Inspector agreed that at least one entrance to the application site had been created by virtue of users squeezing through the hedge (as opposed to being a formal entrance that had been created by the landowner), there was no evidence that the landowner had made any attempt to repair those holes, or otherwise prohibit access through them, and, over time, they became established so as to give the appearance of being formal entrances to the application site. She found[4]: "*as a matter of fact on the basis of all the evidence that by the beginning of the relevant period in 1991, they had the appearance of being deliberate and accessible entrances with accompanying worn pathways, and possibly gates*", and went on to cite examples of witnesses who had used the entrances quite comfortably with pushchairs and large dogs.

21. The Inspector's conclusion on whether use had taken place by force[5] was:

> *"although those who break through a hedge do so by force, those who follow but who themselves use no force to break the hedge and have no knowledge of the original damage are capable of doing so 'as of right'. Unless the landowner takes steps to repair or reinstate the hedge, then after 20 years (provided that other elements of the statutory test are met) this will qualify the user to be 'as of right'".*

Use by permission

22. Two points were argued by the landowner before the Inspector on the issue of whether use of the application site had taken place with permission.

23. The first point was that, until 2010, the County Council had held a leasehold interest in the land (in its capacity as the Local Education Authority) and that, in 1998, it had constructed a path facilitating and encouraging use of the application site. Thus, the application site had, in effect, been in public ownership during the majority of the relevant period, and any use of it was by virtue of the Local Education Authority's power to allow use of the application site for recreational purposes.

24. The argument advanced by the landowner in this regard relied upon the decision of the Supreme Court in the Barkas[6] case, in which it was considered that, where land is held by a local authority and provided specifically for the purpose of public recreation, any recreational use of it that is made by the public cannot be regarded as being 'as of right' because members of the public already have the right to use the land.

25. The statutory provision relied upon by the landowner in this case is section 507A of the Education Act 1996, which requires the Local Education Authority to ensure that school premises include adequate facilities for recreation and social and physical training for children, and provides a power to the authority to establish, maintain and manage (amongst other things) playing fields.

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[4] Paragraph 202 of the Inspector's report
[5] Paragraph 203 of the Inspector's report
[6] *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31

26. The Inspector noted that the duty under the Education Act 1996 did not extend to providing any facilities for people other than schoolchildren and there was no power to provide playing fields for the general public:

> "*in my opinion, there is no power conveyed by the statute to allow local authorities to make playing fields available to persons other than those receiving primary or secondary education. Such would in any event be inconsistent with the statutory duty to secure the facilities for primary and secondary education to which the power is subordinate. That is not to say that in some cases schools may choose to allow the public to recreate on their playing fields, but that action would be a private matter and not pursuant to the statutory power*"[7].

27. The Inspector further noted that her interpretation of the statutory power (as set out above) was entirely consistent with the fact that the leases between the landowner and the Local Education Authority included a clause whereby the lessee was '*not to use the said premises or any part thereof for any purpose other than a playing field for primary school children*'. Accordingly, the Inspector concluded that the principle in Barkas does not apply in this case.

28. The second point raised by the landowner related to the holding of the village fete on the application site, the circumstances of which, in the landowner's view, amounted to an implied permission to use the land for informal recreation.

29. It was undisputed at the Inquiry that every summer during the relevant period, a summer fete had been held on the application site. The Inspector found, as a matter of fact, that it was the clear and publicised policy of the fete committee[8] that people had to buy a programme to enter the fete, but that that policy was not rigorously enforced. Although an advert in the 1994 parish magasine referred to the fete being held 'by kind permission of the head teacher' (of the local primary school), the head teacher strongly disputed that he had ever been asked for any such permission, and there was no other evidence that his permission had been sought.

30. The landowner's case is that, until 2010, the County Council (as tenant of the land) authorised, through its head teacher, the periodic closure of the application site in order to hold the village fete, entry to which was on payment of a fee. As such, there was an implied permission to use the application land at times when it was not closed for the fete.

31. In support of this argument, the landowner relied upon the judgement in the Mann[9] case, which concerned an area of grassland, part of which was used 'occasionally' for the holding of a beer festival and fun fair. During these times, an entrance fee was charged to enter the affected part of the land, although public access to the remainder was not denied. The Court found that[10] '*the critical point was that the owner had unequivocally exercised his right to exclude and did not have to do more that [he] did to bring it home to the reasonable local inhabitant that this right was being exercised and that the use by the local inhabitants was pursuant to*

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[7] Paragraph 217 of the Inspector's report

[8] The fete committee was a group made up of representatives of the Parochial Church Council, the Parent Teacher Association, the scouts and the village hall, and all proceeds from the fete went to those organisations

[9] *R (Mann) v Somerset County Council* [2012] EWHC B14 (Admin)

[10] at paragraph 77 per Judge Owen QC

permission'. Thus, it was held that occasional exclusion from part of the land was sufficient to communicate to users that their use of the whole land at other times was with the landowner's implied permission.

32. The Inspector found that, whilst the head teacher was entrusted by the Local Education Authority with the control and management of school premises (including the application site), there is no evidence that the head teacher specifically authorised the principle of holding the fete on the application site, or the practice of charging for entry. Furthermore, whilst it was in the interests of the fete committee to require a programme to be purchased on entry to the fete (in order to maximise proceeds for local causes), the committee had no recourse to enforce that policy (for example by removing a member of the public that refused to pay) and had no powers at all in relation to the application site; indeed, the fete was not organised either by the landowner or the lessee, or on their behalf.

33. As such, the Inspector concluded that the principle arising from the Mann case did not apply during the relevant period and made the following analogy[11]:

> *"I consider that the fete committee were simply acting (albeit in a formal and publicised way) in the same capacity as any other local inhabitant using the application land for recreational activities. The fact that they did so on their own terms is neither here nor there. From the landowner's perspective, they were all trespassers who could be prohibited or licensed. An analogy might be drawn with a group of children playing a game of football on the application land. They have written in the village diary that they will be using the application land between 2-4pm. However, another group of children arrive to play at 3pm without having booked in the diary. Who can complain? Neither have any right to be there. The school is not authorising either of them to use the application land, and neither is the school prohibiting either. The fact that the first group may have 'booked' the application land in the village diary may mean that as a matter of courtesy their use should take priority, but they have no priority over the second group in law".*

34. It is to be noted that the situation did change after the lease was surrendered in 2010 and, early in 2011, the fete committee sought, and obtained, the landowner's permission to hold the June 2011 fete. Given that the June 2011 fete was held with the express permission of the landowner, use ceased to be 'as of right' as at the date of that fete.

35. The implications of this are considered below but, for the purposes of whether the 'as of right' test is met, the Inspector's conclusion was that use of the application site did take place 'as of right' until the June 2011 fete.

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

36. 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*

[11] Paragraph 230 of the Inspector's report

modern life, the kind of informal recreation which may be the main function of a village green'[12].

37. 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[13]. In any event, the activities must be 'lawful' in the sense that they must not amount to a criminal offence[14].

38. At the Inquiry, the Inspector heard evidence from a large number of witnesses regarding a range of recreational activities that had taken place on the application site. The activities cited (as well as those set out in the written evidence), included dog walking, jogging, playing with children at attending community events (such as the village fete).

39. Additionally, the head teacher of the local primary school (which had the use of the land under the terms of the leases) confirmed that he was aware that the land was being used by local residents for lawful sports and pastimes, both before and after the installation of the path and whilst school activities were taking place.

40. Therefore, the Inspector was satisfied that the application site had been used for the purposes of lawful sports and pastimes.

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

41. 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"

42. The definition of locality for the purposes of a Town or Village Green application has been considered by the Courts. In the Cheltenham Builders[15] 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*'.

43. In this case, the applicant chose to rely on the locality of 'Goudhurst parish' which, as was accepted by the landowner at the start of the Inquiry, is a legally recognised administrative unit and therefore capable of constituting a qualifying locality.

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[12] *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

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

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

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

"a significant number"

44. 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.

45. As is noted above, one of the objections initially raised by the landowner was the fact that use of the application site increased substantially following the construction of the path along the northern and western edges of the application site in 1998 and use of the application site prior to that time had not been by a significant number of local residents.

46. In this regard, the Inspector noted that there were an unusual number of witnesses in this case that were able to speak for the whole of the relevant period, and at the Inquiry she had heard first hand evidence of recreational use of the application site prior to 1998 from seven witnesses, whose use often included their families. Ultimately, her view was that[17]:

> "*whilst I accept that the level of use of the application land may well have increased after the construction of the gravel path, the impression I have is very much that this has been a key piece of land in general use by the community of Goudhurst at least since Kent County Council leased the field for the school* [in 1966]*, and possibly before…"*.

47. Overall, the Inspector was satisfied that use of the application site throughout the relevant period was sufficiently significant to give the appearance that the land was in general use by the community of Goudhurst and that a village green right was being asserted.

(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?

48. 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 provided (at the time that this application was made) that an application must be made within two years from the date upon which use 'as of right' ceased.

49. In this case, the application was originally made under section 15(2) of the Act on the basis that recreational use of the application site continued to take place 'as of right' up until the date of the application in November 2011. However, at the start of the Inquiry, the applicant sought an amendment to the application, so as to rely instead on section 15(3) of the Act, on the basis that the fete committee had sought and obtained (as discussed earlier in this report) the landowner's permission for the 2011 summer fete to be held on the application site. As such, it was contended that use of the application site may have ceased to be 'as of right' prior to the making of the application.

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

[17] Paragraph 197 of the Inspector's report

50. The landowner confirmed that no prejudice would be caused by such an amendment and, in the absence of any other reason why the applicant ought not to be allowed to amend the application, the Inspector recommended that the amendment should be accepted[18].

51. Accordingly, despite the Inspector's finding that use of the application site ceased to be 'as of right' from June 2011, given that the Village Green application was submitted on 18th November 2011, the application was clearly made well within the prescribed two year period of grace[19]. This test is therefore met.

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

52. 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.

53. As is noted above, it is considered that use of the application site ceased to be 'as of right' as at the date of the June 2011 fete. The relevant twenty year period ("the material period") is therefore June 1991 to early June 2011.

54. The user evidence presented in support of the application shows the application site has been used for recreational purposes well in excess of the required twenty year period. Indeed, the Inspector's impression from the evidence given at the Inquiry (as set out above) was that the application site has been a key piece of recreational land for the local community since at least the mid-1960s.

Inspector's overall conclusion

55. The Inspector concluded overall that[20]:

> *"the applicant has proved that a significant number of the inhabitants of Goudhurst have indulged as of right in lawful sports and pastimes on the application land for a period of at least twenty years with that period ceasing within two years of the date of the application (i.e. after 17th November 2009). Subject to consideration of the implications of the Supreme Court judgement in Newhaven, I recommend that the registration authority register the land as a new town or village green".*

56. However, one of the issues argued before the Inspector at the Inquiry was that the statutory power under which the land was held by the landowner prevented the registration of the land as a Village Green, on the basis that the registration would be incompatible with the statutory purposes for which the land was held. This argument derived from the Newhaven[21] case which, at the time of receipt of the Inspector's report, was the subject of an appeal to the Supreme Court. Given that the appeal was due to be heard within a relatively short period, the Inspector's

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[18] Paragraph 234 of the Inspector's report

[19] The Inspector added that, even if it were to be considered that use ceased to be 'as of right' from the date upon which permission for the 2011 fete was originally sought – i.e. January 2011 – this is still within the two year period of grace and does not change the outcome of the application (see paragraph 235 of the Inspector's report)

[20] Paragraphs 486 and 487 of the Inspector's report

[21] *R (Newhaven Port and Properties Ltd) v East Sussex County Council* [2015] UKSC 7

advice (on this occasion) was that the County Council ought to await the Supreme Court's judgement before taking any final decision in respect of the current case.

The Newhaven judgement and its application in the current case

57. The Newhaven case concerned an application by the Newhaven Town Council to register land known as West Beach at Newhaven as a Town or Village Green. An objection by the landowner, Newhaven Port and Properties Ltd., had led to a Public Inquiry, following which East Sussex County Council resolved the register the land as a Town or Village Green. By the time the case reached the Supreme Court, there were only three main issues to be considered, only one of which – the 'statutory incompatibility' point – is relevant to the situation at Goudhurst.

58. The statutory incompatibility point is concerned with whether section 15 of the Commons Act 2006 can be interpreted so as to enable the registration of land as a Town or Village Green in circumstances where that registration would be incompatible with some other statutory function to which the land was to be put. The Supreme Court concluded that "*where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use the land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes*". Accordingly, the appeal was allowed (meaning that West Beach was not a Town or Village Green).

59. In this case, the landowner's position is that the application site is vested in and held by the landowner for the benefit of the Diocesan Stipends Fund under powers contained in the Endowments and Glebe Measure 1976 ("the 1976 Measure"). It is submitted that, as Village Green status would severely restrict the future use to which the land could be put, this would prejudice the execution of the landowner's duties under the 1976 Measure. For example, registration of the land as a Village Green would prevent any future development of it, which in turn would make it impossible to maximise the value of the application site for the Diocesan Stipends Fund.

60. The applicant, on the other hand, has submitted that there is no incompatibility which would prevent the land being registered as a Village Green, and argues instead that in comparison with the positive statutory obligations and duties of the Port Authority in Newhaven, the 1976 Measure amounts to little more than a statutory declaration of trust. He also notes that the Supreme Court made it clear that ownership of land by a public body, such as a local authority which has powers to develop the land in the future should it wish to do so, is not of itself sufficient to create a statutory incompatibility.

61. On 9th April 2015, after having carefully considered the parties' comments on the Newhaven case, the Inspector provided a supplementary report giving her views on the applicability (or otherwise) of the Newhaven judgement on the current case.

62. She considered that village green status would not be incompatible with the statutory duty in the 1976 Measure, which could still be fulfilled post-registration as the duty is not dependent (as it was in Newhaven) on the land being free from constraint to any potential future development. She noted that[22]:

[22] Paragraph 9 of the Inspector's supplementary report dated 9th April 2015

"[the landowner's] argument is dependent on the registration authority interpreting s. 19 of the 1976 Measure as imposing a statutory duty on the Diocese to maximise the value of the property at all costs, and in particular by developing the land. I do not consider there is any such duty implied… The Measure provides only that the land must be held for the benefit of the Fund. I interpret that to mean that any financial profit received must be put towards that Fund.

…

In any event, village green registration would not completely prohibit income generation for the benefit of the Fund".

63. As such, she concluded that the Newhaven judgement was distinguishable from the current case and her previous recommendation that the application site be registered as a village green still applies.

Conclusion

64. Having carefully considered the Inspector's analysis of the evidence (contained in her reports), it would appear that the legal tests in relation to the registration of the application site as a new Town or Village Green have been met and, accordingly, the application should be accepted and the land to which it relates registered as a Village Green.

Recommendation

65. I recommend, for the reasons set out in the Inspector's report dated 25th September 2014, that the applicant be informed that the application to register land known as Glebe Field at Goudhurst has been accepted, and that the land subject to the application be registered as a Village Green.

Accountable Officer:
Mr. Mike Overbeke – Tel: 03000 413427 or Email: mike.overbeke@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 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.

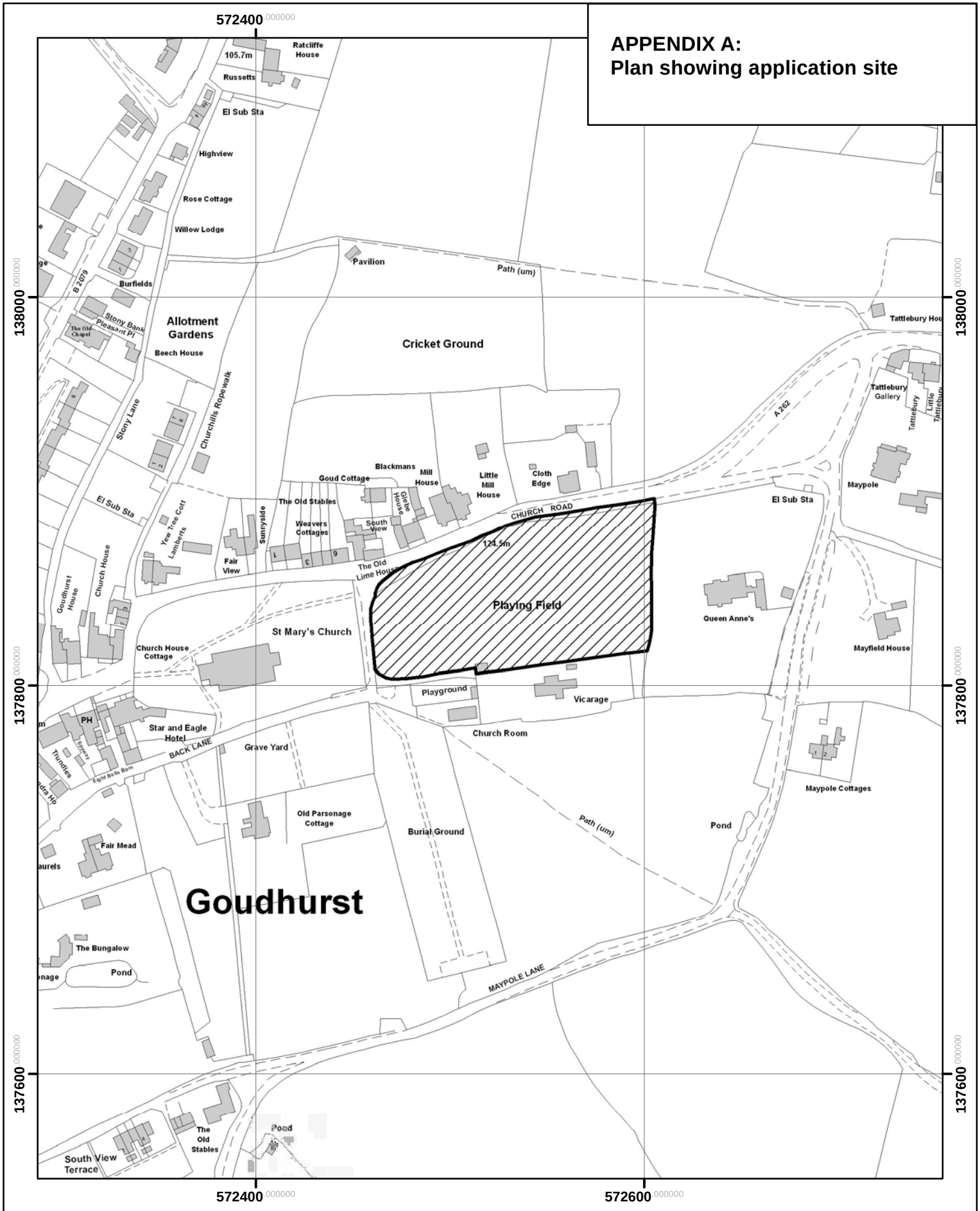
Appendices

APPENDIX A – Plan showing application site
APPENDIX B – Minutes from the meeting of the Regulation Committee Member Panel on 24th September 2013.

Background documents

Inspector's report dated 25th September 2014
Inspector's supplementary report dated 9th April 2015

APPENDIX A:
Plan showing application site



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Land subject to Village Green application at The Glebe at Goudhurst

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REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Palmer Room, Langton Green Village Hall, Winstone Scott Avenue, Langton Green, Tunbridge Wells TN3 0JJ on Tuesday, 24 September 2013.

PRESENT: Mr M J Harrison (Chairman), Mr S C Manion (Vice-Chairman), Mr M Baldock, Mrs V J Dagger and Mr T A Maddison

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

UNRESTRICTED ITEMS

12. Application to register land known as Glebe Field in the parish of Goudhurst as a new Town or Village Green
(Item 4)

(1) The Panel Members visited the application site before the meeting. This visit was attended by Mr E Bates (applicant) a representative from Goudhurst PC and four members of the public. The applicant drew the Panel's attention to the pathway which had been constructed when the new primary school was opened and used by local people to avoid the main road. He pointed out the parking on the land which occurred when church events were taking place and the chain on the vehicular entry point which prevented local residents using the land for parking. A local resident also pointed out the informal entry point adjacent to the Church Rooms, which was used by a number of people to gain access to the site.

(2) The Chairman informed the Panel that the Local Member, Mr A J King had sent his apologies owing to a clash with other Council business. He had asked to be kept informed of the progress of the application.

(3) The Commons Registration Officer began her presentation by saying that the application had been made by Mr E Bates under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008. The application had been accompanied by 112 user evidence forms and other evidence (including a statement detailing the history and use of the site, a copy of the leases between Kent County Council and the Canterbury Diocesan Board of Finance, notes of a meeting between the Parish Council and the landowner regarding the future of the site, photographic evidence of organised activity taking place on the land in question and a programme from the 1997 fete).

(4) The Commons Registration Officer went on to set out the case put forward by the applicant. This was that the site was had been used for generations on a daily basis by a significant number of local people. Although Goudhurst and Kilndown Primary School had a lease which allowed its pupils to play sport on the field, local residents had continued to use the site for their own recreation whilst ensuring that this use did not interfere with school use.

(5) The Commons Registration Officer then described the responses from consultees. Tunbridge Wells BC (Planning and Development) had stated that the field had been used for recreational purposes, although it could not confirm whether this use had been by a significant number of inhabitants of the locality or of a neighbourhood within a locality. A local resident, Mr P Glyde had written in support of the application, saying that the land was in regular use for dog walking, socialising and football. He had also drawn attention to the well-attended fetes and shows which took place during the summer months.

(6) The Commons Registration Officer continued by saying that the site was owned by the Canterbury Diocesan Board of Finance who had leased it to Kent County Council as a school playing field between the years 1966 and 2010. The Landowner had permitted the County Council to construct a footpath in 1998 and to install two gates at either end of the pathway.

(7) An objection had been received from Graham Boulden and Co, acting on behalf of the landowner. The first ground for objection had been that the application was invalid as the application plan included land not owned by the landowner. The Commons Registration Officer said that this was not a factor that could, in itself, invalidate an application. Equally, the fact that the applicant had only moved into Goudhurst in 1996 (after the qualifying period had begun) did not prevent him from claiming Village Green status for the land in question.

(8) Graham Boulden and Co's other grounds for objection were that permission had been granted for use of the field, which signified that use had been "by right" rather than as of right; that some of the recreational use had been ancillary to the main purpose of walking along the footpath; and that part of the land was used for parking in connection with the church. They had also drawn attention to the *Newhaven Port and Properties Ltd v. East Sussex County Council* case where it had been ruled that registration as a Village Green could not take place where it would be inconsistent with the statutory purpose for which the land was held. The Commons Registration Officer advised that this decision had been overturned in the subsequent Court of Appeal judgement in the same case.

(9) The Commons Registration Officer moved on to consideration of the individual tests for registration to take place. The first of these was whether use of the land had been "as of right". She said that use had clearly not been by force or stealth. The question of whether or not the land had been used with permission was disputed by the two parties involved. The landowner had provided a copy of a flyer advertising the 1994 village fete. This had included the statements "*by kind permission of the head teacher*" and "*entry by programme*." The landowner contended that these statements demonstrated that the head teacher was entrusted by the landowner with control over the application site and that the public would consequently understood that their attendance at the fete was by virtue of his consent on behalf of the landowner.

(10) The applicant's contention was that the lease between the landowner and the County Council specifically restricted use to primary school children. Therefore, the head teacher would not have been in a position to grant permission on behalf of the landowner. His permission would only have been sought to ensure that the fete would not conflict with any school activities. The applicant had also stressed that the

landowner had not been aware that formal activities were taking place on the application site.

(11) The Commons Registration Officer moved on to consider the views of both parties on the implications of the *R Mann v Somerset County Council* case where the Court had found that occasional exclusion from part of the land had been sufficient to communicate to users that their use of the whole land at other times was with the landowner's implied permission.

(12) The landowner contended that entry to the fete was generally by programme, which effectively amounted to a fee being charged. This contention was supported by the local vicar, who had stated that the programmes had been sold in local shops and that the three entrances to the fetes were manned so that those who did not have a programme would be invited to purchase one in order to gain access to the field. In the landowner's view, the circumstances were similar in all pertinent aspects to those in the *Mann* case, preventing the applicant from being able to prove that use had been "as of right" for the period on question.

(13) The Commons Registration Officer said that the applicant's contention was that this case was different to the *Mann* case in that access to the site was not secured and that even though the fetes regularly took up a lot of space, there was still plenty of opportunity for anyone else to use the rest of the land for other recreational activities whilst they were taking place. The applicant also disputed that the sale of programmes was a means of controlling admission. They were, in reality, a means of raising funds towards the cost of the fete.

(14) The Commons Registration Officer concluded this aspect of the application by saying that there was a conflict of fact as to the position when the site was used for fetes and other organised events, making it impossible at this stage to conclude whether use of the site had been "as of right".

(15) The Commons Registration Officer then briefly turned to the other tests. She said that it was clear from the evidence that use of the land had been for lawful sports and pastimes by a significant number of inhabitants of the parish of Goudhurst up to the date of application in 2011. This use had taken place throughout the required period of 1991 to 2011 and, in fact, for a lengthy period before that date.

(16) The Commons Registration Officer summed up by saying that as there was a conflict of fact in relation to the annual fete, the best mechanism for determining whether the "as of right" test had been met was to hold a non-statutory public inquiry. She therefore recommended accordingly.

(17) Mr E Bates (applicant) said that the report had concluded that four of the five requirements for land to be registered as a Village Green had been met but that there was a conflict of fact as to what the position was on days when the application site had been used for fetes and other organised events. The report had therefore been unable to reach a conclusion on whether use of the land in question had been "as of right." The report had accepted that "as of right" use had taken place but was not sure whether this had been the case for the annual village fete. He therefore proposed to deal with this single question.

(18) Mr Bates said that the fetes were organised by a committee made up of representatives from the local Scout group, the Parish Hall committee, the local school Parent Teachers Association (PTA) and the Parochial Church Council (PCC). The chairmanship was rotated between the organisations on a rota basis each year and profits divided between the four.

(19) Mr Bates said he wished to stress that all four organisations were made up of worthy volunteers from the local community and were distinct from, for example, staff members of the local school or church, from which they enjoyed independence and a certain distance.

(20) Mr Bates then referred to the case of *R (Mann) v Somerset* saying that the difference was that in *Mann* the land owner had exercised his right to restrict access, whereas the annual fete on the Glebe Field Glebe was an event which the landowner had confirmed had taken place without his knowledge. A letter dated 1st February 2011, from the Diocese of Canterbury had confirmed (as set out in Appendix 4 of the application) *"that the Diocese was unaware that use was being made of the field by the Parish and by the Fete Committee."* Mr Bates asked whether it could be made any clearer that this use had been unauthorised.

(21) Mr Bates continued by saying that the fete committee always confirmed the date of the fete with the head teacher of the school at an early stage in order to avoid the obvious embarrassment and inconvenience of a clash of events. However, under the restrictive terms of the lease of the field, the head teacher was not in any way able to grant *permission* for use on behalf of his school, KCC or the Diocese of Canterbury.

(22) Mr Bates summed up this point by saying that the fete would always go ahead and that fete committee merely wished to collaborate with the school over the date. The head teacher had never refused permission and any such refusal would in any case not have been accepted by the fete committee. There had therefore never been a manifest act of exclusion.

(23) Mr Bates then said that residents were encouraged to buy fete programmes from local shops in advance or on the day to help raise funds. On the day of the fete, volunteers with buckets and a supply of programmes were at some entrances for some of the time. The site remained "porous" as other entry points remained vacant and that there was no attempt to "lock down". Many people were waved in, regardless of their possession of a programme, whilst whole families sharing a single programme were welcomed.

(24) Mr Bates said that he had consulted current and former organisers of the fete and that it was clear that showing or purchasing a programme had never been a prerequisite to entry to the fete. This was because not all entry points were covered by stewards or because the stewards were giving the benefit of the doubt to anyone who said they had left their programme at home or would buy one later. Tea, coffee and cake were sold in the Church Rooms, and the lavatories were only available on site. Foot traffic between the field and the Church Rooms was considerable and not managed.

(25) Mr Bates referred to his own experience, saying that he had forgotten to buy a programme for this year's event. He had not been challenged at any point despite

coming and going many times on foot and by car while helping on stalls. He said he knew of at least one other parish councillor who had similarly not been challenged when he had also forgotten to buy a programme.

(26) Mr Bates then said that there was no restriction to access or use of that part of the land which was not actually occupied by the paraphernalia associated with the fete, and that residents who wished to do so were able to continue their sports and pastimes as of right. Those visitors not intending to join in the fete tended to become involved by, for example, listening to live music, stopping for a drink or taking the opportunity to throw a wet sponge at their teacher or scout master held in the stocks. All this "*as of right"* use was to be applauded as it had been organised by the community for the community.

(27) Mr Bates concluded his presentation by saying that he hoped that he had helped the committee to better understand that the organisation and management of the fete as an activity "*as of right*", and that it would therefore confirm the established legal right of access as a Village Green.

(28) The Chairman asked Mr Bates to comment on a letter from Rev Hornsby, the former Vicar. This letter stated that the sale of programmes represented fees for admission. Mr Bates replied that he had not previously seen the letter, but that he did not agree with its content. He added that Rev Hornsby had never actually sat on the fete organising committee.

(29) Mrs B Stafford (supporter) said that she had manned the Parish Council stand at the fete held in 2010. A small child had been reported missing and a search for her had taken place all over the field. There had been concern that she might easily have left the field because two of the entry points had not been manned. Fortunately, she had eventually been found, safe and well. However, this story demonstrated that Mr Bates was right when he said that access to the site could easily take place unchallenged during the fetes.

(30) Mr R Bushrod said that he had been a local resident since 1983. He had served as a Church Warden. He said that he could confirm that there had not been any attempts to restrict access during church fetes and that the Collectors were always instructed not to do so. He then referred to the phrase "by kind permission of the Headteacher" which appeared on the 1994 village fete flyer from 1994 (Appendix D). He said that this was simply an example of village politeness which was not intended (or understood) literally.

(31) Mr G Boulden (Graham Boulden and Co) spoke on behalf of the landowner. He said that he did not agree with Mr Bates' description of the access arrangements as "porous". The site had become more regulated after 1996 when the footpath had been constructed.

(32) Mr Boulden then referred to the fete flyer (Appendix D) noting that it contained the words "Entry by Programme." This, he said would clearly convey to the average person that a right to refuse permission to enter the land would be in effect on the day of the fete.

(33) Mr Boulden also said that use of the footpath did not qualify as a lawful sport and pastime and that a non-statutory public inquiry would afford an opportunity to

build up a more complete picture of the amount of lawful sports and pastimes that had actually taken place. He also asked the Panel to agree that the incident involving the small child mentioned by Mrs Stafford should be understood as a single incident rather than a representative event.

(34) During discussion of this item, Mr Baldock said that he believed that the fact that Canterbury Diocese had been unaware that the land in question was being used for fetes and other organised events indicated that use of the land had been as of right.

(35) Mr T A Maddison moved, seconded by Mr S C Manion that the recommendation of the Head of Regulatory Services be agreed.

Carried 4 votes to 1

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

13. Application to register land at Showfields in Tunbridge Wells as a new Town or Village Green
(Item 6)

(1) The Panel Members visited the application site before the meeting. This visit was attended by Mr R Fitzpatrick (applicant).

(2) The Chairman informed the Panel that the Local Member, Mr J E Scholes had sent his apologies owing to a clash with other County Council business. He had indicated his agreement with the contents of the report.

(3) The Commons Registration Officer tabled aerial photographs of the application site and then explained that the application had been made by Mr R Fitzpatrick under section of the Commons Act 2006 and the Commons Registration (England) Regulations 2008. The application had been accompanied by 38 user evidence forms.

(4) The Commons Registration Officer then said that Cllr C Woodward from Tunbridge Wells BC had replied on behalf of himself, Cllr Mrs B Cobbold and Mr J E Scholes to advise that they were happy to support the application whilst having concerns that Village Green status might prevent redevelopment of community facilities from taking place. Tunbridge Wells BC Planning had stated that it had no objection as Village Green status would not conflict with the designation of the site in the Local Plan as a “neighbourhood centre” and “important local space.”

(5) The Commons Registration Officer then reported that an objection had been received from Mr Colin Lissenden on behalf of the Town and Country Housing Group on the grounds that part of the site was within its ownership. The objection had also stated that the application would severely affect any future regeneration plans and deter future investment to improve the land in the best interests of the local community.

(6) The Commons Registration Officer went on to inform the Panel that the applicant had requested a number of amendments to be made to the application.