Application to register land known as 'The Market Square' at Aylesham as a new Town or Village Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Monday 14th December 2009.

Recommendation: I recommend that the County Council endorses the advice received from Counsel and that the applicant be informed that the application to register the land known as 'The Market Square' at Aylesham as a new Town or Village Green has not been accepted.

Local Members: Mr. S. Manion Unrestricted item

Introduction

1. The County Council has received an application to register land known as 'The Market Square' at Aylesham as a new Village Green from local resident Mrs. E. Madden ("the applicant"). The application, dated 27th November 2007, was allocated the application number 598. A plan of the application site is shown at **Appendix A** to this report.

2. The application was duly advertised and one objection was received from the landowner, Dover District Council ("the District Council"). The objection was made on the following grounds:
   - Any activities which have taken place on the land have been with the express or implied permission of the landowner by virtue of a series of short-term leases granted to the Parish Council since at least the mid-1970s. Such use has therefore not been 'as of right' and is incapable of giving rise to any rights.
   - The land is held in the housing portfolio and the public have been permitted to use it by way of licence with byelaws having been made to regulate use of the application site.
   - The user evidence is unclear and not sufficient to show that the relevant legal tests have been met.

Previous resolution of the Regulation Committee Member Panel

3. The matter was considered at a Regulation Committee Member Panel meeting on Friday 6th February 2009. A copy of the Officer's report setting out the facts of the case is attached at **Appendix B**.

4. During that meeting, whilst accepting the other aspects of the Officer's report, Members raised concerns regarding the effect of the leases between Aylesham Parish Council and Dover District Council. The effect of the leases was central to one of the key legal tests in considering such applications, namely the issue of whether the use of the application site for recreational purposes by the local residents had been 'as of right'.

5. After some debate, it was not considered possible to reach a firm conclusion and it was resolved that consideration of the application be deferred to enable further legal advice to be sought.

Background

6. 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;

7. The applicant must therefore be able to demonstrate, amongst other things, that the use of the application site has been 'as of right'. For use to have been 'as of right', it must have taken place without force, without secrecy and without permission[1] (*nec vi, nec clam, nec precario*).

8. In this case, there is no evidence to suggest that use of the application site by the local residents for recreational purposes has been with force or in secrecy. The site is easily accessed via the Public Footpath that crosses it, and there is no evidence of the use of the site by the local residents being challenged in any way (e.g. by the erection of fencing or notices). The site forms a focal point at the heart of the village, overlooked by many buildings, and it would therefore be difficult to regard the use of it by the local residents as furtive.

9. However, there is an issue with regard to the third limb of the definition regarding whether use has been without permission. During the relevant twenty-year period[2], there have been a number of short-term leases between Dover District Council and Aylesham Parish Council which provide for the land to be used specifically (and only) for 'recreational and amenity purposes'. A copy of the most recent lease, dated 1998, is attached for reference at **Appendix C** (the relevant clause is 4.7).

10. It was on this third element of the 'as of right' definition that Members requested further legal advice be sought.

Counsel's advice

11. A copy of the advice received from Counsel is attached at **Appendix D**. In brief, Counsel was of the view that the existence of the leases rendered any use of the land by local residents for informal recreation 'by right' and not 'as of right'.

12. In support of this view, Counsel relied upon the decision of the High Court in *Ind Coope*[3]. That case concerned a piece of land owned by a brewery which was surplus to their requirements and which was licensed to the local District Council as a Children's playground and open area. Following an application from a local resident, the land was registered as a new Village Green. The judge held that the land had been wrongly registered as such, stating that *"...if there is an express licence for the use of the land, then the land is used pursuant to that licence. There can be no question of a right being established... I find it impossible to form the view that the public, in some way or other, were capable of acquiring additional rights over and above the rights that*

---

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

[2] The relevant twenty-year period is calculated retrospectively from the date of the application; in this case, it is 1987 to 2007.

[3] *R v Hereford and Worcester City Council ex parte Ind Coope (Oxford and West) Ltd.* (unreported)

the local District Council possessed pursuant to the licence to make the land available for the purposes for which it was used...".

13. When considering whether use of the application site has been 'as of right', it is also important to consider the matter from the landowner's perspective and, more particularly, "*how the matter would have appeared to the owner of the land*"[4]. On this point, Counsel considered that if a landowner consents to the use of his land for recreational purposes, he would have no reason to challenge or resist such use, and it would not be reasonable to expect him to do so. Under these circumstances, by not challenging or resisting the use of the land by the local residents, it cannot be said that the landowner is somehow tolerating the use 'as of right' and simply allowing Village Green rights to be acquired.

14. The final point made by Counsel concerns the statutory powers under which the Parish Council were acting when they took on the lease of the application site. As the Parish Council is a local authority, it must have been acting in exercise of statutory powers and, on taking on the lease of the application site for recreational purposes, it must have been exercising one of the statutory powers enabling it to acquire land for that purpose.

15. The first lease (dated 1972) refers to the application site being leased 'for use as an open space land', which implied that the statutory power used by the Parish Council in taking on the lease derived from the Open Spaces Act 1906 ("the 1906 Act"). There has been judicial support for the notion that land which is held by a local authority in exercise of powers afforded by the 1906 Act is held on an express statutory trust for public enjoyment as an open space. In *Beresford*[5], it was held that "*where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers...*". The suggestion is therefore that use of the land which is held by a local authority under a public statutory trust is 'by right' and not 'as of right' since the use of the land is no more than the use to which the public is entitled (in their capacity as beneficiaries of the trust).

Conclusion

16. In light of the advice received from Counsel, the conclusion is that the use of the application site by the local residents for informal recreation has taken place 'by right' and not 'as of right'.

17. Since this key legal test in relation to the registration of the land as a new Town or Village Green has not been met, it is not possible for the land to be registered as such.

Recommendation

18. I recommend that the County Council endorses the advice received from Counsel and that the applicant be informed that the application to register the land known as 'The Market Square' at Aylesham as a new Town or Village Green has not been accepted.

---

[4] *R v. Oxfordshire County Council and another, ex parte Sunningwell Parish Council [1999] 3 All ER 385*
[5] *R(Beresford) v Sunderland City Council* [2003] UKHL 60 at paragraph 87

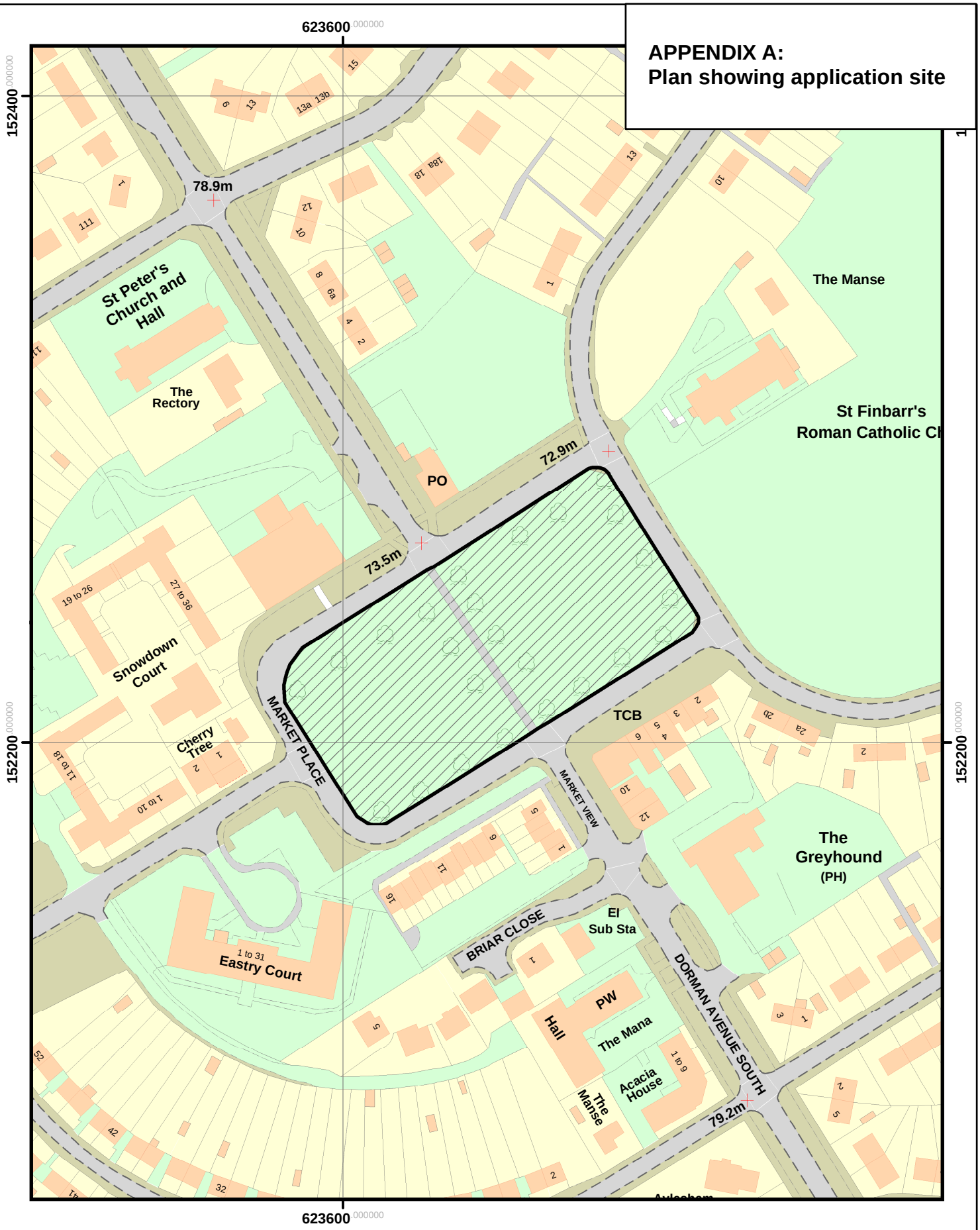
Accountable Officer:
Dr. Linda Davies – Tel: 01622 221500 or Email: linda.davies@kent.gov.uk
Case Officer:
Mr. Chris Wade – Tel: 01622 221511 or Email: chris.wade@kent.gov.uk

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

Background documents

APPENDIX A – Plan showing application site
APPENDIX B – Copy of the Officer's report presented to the Regulation Committee Member Panel meeting of 6th February 2009.
APPENDIX C – Copy of lease agreement dated 1998 relating to the application site
APPENDIX D – Copy of Counsel's advice

APPENDIX A:
Plan showing application site



Scale 1:1250

Land subject to Village Green application at Market Square, Aylesham

Kent County Council

APPENDIX B:
Copy of the Officer's report presented to the Regulation Committee Member Panel meeting of 6th February 2009

Application to register land known as 'The Market Square' at Aylesham as a new Village Green

A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Friday 6th February 2009.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land known as 'The Market Square' at Aylesham as a new Village Green has not been accepted.

Local Members: Mrs. E. Rowbotham Unrestricted item

Introduction

1. The County Council has received an application to register land known as 'The Market Square' at Aylesham as a new Village Green from local resident Mrs. E. Madden ("the applicant"). The application, dated 27th November 2007, was allocated the application number 598. A plan of the site is shown at **Appendix A** to this report and a copy of the application form is attached at **Appendix B**.

Procedure

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

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

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

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

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

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

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

5. As a standard procedure set out in the regulations, the County Council must notify the owners of the land, every local authority and any other known interested persons. It must also publicise the application in a newspaper circulating in the local area and put up notices on site to publicise the application. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

6. The area of land subject to this application ("the application site") is known locally as 'the Market Square' and consists of a rectangular area of grassed open space that is surrounded on all sides by a road known as Market Square and situated in the centre of the village of Aylesham.

The case

7. The application has been made on the grounds that the application site has become a village green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities 'as of right' for well in excess of 20 years.

8. Included in the application were 10 user evidence questionnaires from local residents asserting that the application site has been available for free and uninhibited use for lawful sports and pastimes over the last twenty years and beyond. A summary of this user evidence is attached at **Appendix C**.

9. In addition, a number of photographs dating back to 1947 were submitted in support of the application (demonstrating the historical use of the land by the people of Aylesham) as well as several newspaper cuttings from the 1950s which refer to the application site as 'the village green'.

10. Fifteen letters of support, many from longstanding residents of the village, were also included with the application. These letters confirm use of the land by local residents for a range of recreational activities over a long period.

Consultations

11. Consultations have been carried out as required and the following comments have been received.

12. Aylesham Parish Council has written in support of the application on the basis that registration of the land would protect the green for future generations to use.

13. Cllr. Keen also wrote in support of the application. She explains that the application has been made to preserve the green space in perpetuity because local residents have recently had to fight to save the land from being turned into a car park. Cllr. Keen is of the view that the application site has been the centrepiece of the historic village form many years and it is essential to preserve it as a public open space.

14. One local resident also wrote in support of the application. In his view, the application for village green status must be granted on the basis that the application site has been in public use for over 70 years.

Landowner

15. The application site is owned by Dover District Council. Mr. G. Mandry (Principal Solicitor) has objected to the application on behalf of the District Council.

16. The objection is made on the following grounds:
    - Any activities which have taken place on the land have been with the express or implied permission of the landowner by virtue of a series of short-term leases granted to the Parish Council since at least the mid-1970s. Such use has therefore not been 'as of right' and is incapable of giving rise to any rights.
    - The land is held in the housing portfolio and the public have been permitted to use it by way of licence with byelaws having been made to regulate use of the application site.
    - The user evidence is unclear and not sufficient to show that the relevant legal tests have been met.

17. In support of the objection, the District Council has supplied copies of leases dating back to 1977 as well as associated correspondence.

Legal tests

18. In dealing with an application to register a new 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, neighbourhood or a neighbourhood within a locality?
    (d) Whether use has taken place over period of twenty years or more?
    (e) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or meets one of the criteria set out in sections 15(3) or 15(4)?

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

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

19. The definition of the phrase 'as of right' has been considered in recent High Court case law. Following the judgement in the *Sunningwell*[1] *case*, it is now considered that if a person uses the land for a required period of time without force, secrecy or permission (*nec vi, nec clam, nec precario*), and the landowner does not stop him or advertise the fact that he has no right to be there, then rights are acquired and further use becomes 'as of right'.

[1] *R v. Oxfordshire County Council, ex p. Sunningwell Parish Council* [1999] 3 WLR 160

20. In this case, there is no evidence that use of the application site has been with force or in secrecy. Although there are hedges bordering the site, there is a Public Footpath crossing the centre of the site and access via four designated points. None of the witnesses refer to any specific fences or barriers to prevent access. In fact, the District and Parish Councils have actively promoted use of the land by entering into formal leases for the purpose of public recreation.

21. However, there is a central issue concerning whether or not permission (in any form) was ever granted to local residents for the use of the land. Permission (in the context of a Village Green application) can take four forms:
    (i) *Express permission which is communicated to users* – for example a notice posted on site expressly permitting use of it for recreational purposes or other express permission being given by words or in writing.
    (ii) *Express permission which is not communicated to users* – for example in circumstances where there existed an express licence between landowner and local authority making the land available as recreational open space.
    (iii) *No express permission but overt actions taken by the landowner* – for example, where the owner takes sufficient positive and unequivocal steps to inform the users that use is impliedly permitted and may in due course be terminated.
    (iv) *No express permission and not communicated to the public* – for example, where land is held by a public authority under certain statutory powers for the provision of land for public recreation.

22. In the case of Market Square, the Parish Council has entered into a series of short leases with the landowner (the District Council) since at least the 1970s. The relevant 20 year period for the purposes of the Village Green application is 1987 to 2007. This period is covered by four separate five-year leases dated 1983, 1989, 1992 and 1998. In each lease, there is a clause which restricts the use of the land to 'recreational and amenity purposes'. A copy of the 1998 lease is attached for reference at **Appendix D** (the relevant clause is 4.7).

23. The use of the land for recreational purposes by the local residents has therefore been by virtue of the relevant clause in the lease granted to the Parish Council by the District Council (as landowner). Although the existence of the lease has not been communicated to users, this nonetheless amounts to an express permission and falls within the second category of permission listed at paragraph 21 above.

24. Since the effect of the lease is to grant permission to the local Parish Council to make the land available to the local residents for recreational purposes, this is sufficient to render use of the application site by the local inhabitants '*by right*' and not '*as of right*'. Therefore, it is not possible to conclude that 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?

25. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. 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; solitary and informal kinds of recreation are equally as valid.

26. In this case, the evidence demonstrates that a number of recreational activities have taken place on the land, including nature-watching and playing with children. The table summarising evidence of use by local residents at Appendix C shows the full range of activities claimed to have taken place.

27. However, several of the user evidence forms refer to use of the land '*to cross the village*' or as a thoroughfare to reach village shops. Such use would be consistent with the use of a Public Right of Way and the exercise of existing rights associated with the recorded Public Footpath running across the centre of the site but would not be sufficient to give rise to general rights of recreation for Village Green usage.

28. It is unclear from the user evidence submitted on paper as to what percentage of use has been attributable to local residents exercising a linear right of passage on foot (i.e. associated with the Public Footpath) and what percentage has been use associated with a general right of recreation (i.e. as a Village Green). There is also reference amongst the user evidence to attending fetes, boot fairs and other community events. Such formal events are likely to have been arranged with the permission of the Parish Council and therefore attendance at these events would have been by implied permission and could not give rise to Village Green rights.

29. Therefore, although it is clear that the application site has been used by local residents generally, on the evidence available it has not been possible to conclude that the application site has been used for the types of activities that would give rise to Village Green rights.

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

30. The definition of locality for the purposes of a village green application has been the subject of much debate in the courts and there is still no definite rule to be applied. In the Cheltenham Builders[2] 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*'.

31. In this case, the applicant has specified the locality at Part 6 of the application form as being 'Aylesham Market Square and surrounding shops and houses' and has helpfully marked on the plan accompanying the application the addresses of those having provided user evidence.

32. As stated above, the locality for the purposes of Village Green registration should be some recognised administrative unit; the definition of locality requires a degree of precision and it is not sufficient to simply specify a collection of roads or a local

[2] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* (2003) EWHC 2803

community that is not formally recognised. Although the user evidence demonstrates use of the application site from those whose homes are situated immediately opposite the land, there is also evidence from people living further afield within the village. This is consistent with the Parish Council leasing the land for 'recreational and amenity purposes' for the benefit of the village residents as a whole and not simply those living in the immediate proximity. I therefore consider that the correct locality is the administrative parish of Aylesham.

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

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

34. From the user evidence submitted, there appears to have been use of the land over a considerable period dating back far beyond 1987, and in some cases as far back as the 1930s. There is little doubt from the evidence presented (including the old photographs and newspaper cuttings) that the application site has been a focal point for the village and used as an open space for a considerable period. In addition, all of the users state in their questionnaires that they have witnessed other people using the land for a range of recreational activities.

35. Therefore, the application site has been used for a period of over 20 years.

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

36. The Commons Act 2006 introduces a number of transitional arrangements regarding the actual use of the land in relation to the making of the application to register it as a Village Green. These are set out at paragraph 4 above.

37. In this case, use of the applications site has not ceased, nor is there any suggestion of any interruption to use prior to the making of the application. Therefore, it appears that use of the land has continued up until the date of application and as such it is not necessary to consider the other tests set out in sections 15(3) and 15(4) of the Act.

Conclusion

38. In order for the application site to be registered as a Village Green, the Registration Authority has to be satisfied that each and every one of the legal tests set out above is met. It is not sufficient that merely some of the tests have been met or that the land has always been considered locally to have the attributes of a Village Green.

39. In this case there are several problems which lead to the conclusion that the necessary tests have not been met. The most significant of these is that use of the land is not considered to have been 'as of right' during the material period due to the existence of the lease between the Parish Council and the landowner which makes express provision for the use of the land for recreational purposes.

40. Even if further user evidence were produced to support the application (and overcome the deficiencies with regard to the type and quantity of use), the existence of the leases would, by itself, present a 'knock-out blow' to the application. Therefore, it would appear that the relevant legal tests cannot be met and the land is not capable of registration as a Village Green under section 15(1) of the Commons Act 2006.

Recommendations

41. I therefore recommend that the County Council informs the applicant that the application to register the land known as 'The Market Square' at Aylesham as a new Village Green has not been accepted.

Accountable Officer:
Dr. Linda Davies – Tel: 01622 221500 or Email: linda.davies@kent.gov.uk
Case Officer:
Miss. Melanie McNeir – Tel: 01622 221511 or Email: melanie.mcneir@kent.gov.uk

The main file is available for viewing on request at the Environment and Waste Division, Environment and Regeneration Directorate, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

Background documents

APPENDIX A – Plan showing application site
APPENDIX B – Copy of application form
APPENDIX C – Table summarising user evidence
APPENDIX D – Copy of 1998 lease relating to the application site

APPENDIX C: .
Copy of lease agreement

DATED 14 July 1998

DOVER DISTRICT COUNCIL

- and -

THE PARISH COUNCIL OF AYLESHAM

L E A S E

- of -

Market Square Aylesham
in the County of Kent

J.W. Horne BA
Solicitor, Head of Legal Services
Dover District Council
White Cliffs Business Park
Dover
Kent
CT16 3PJ

LDOC\AYLEPC-L

LEASE dated 14 July 1998 between

(1) The Landlords: **DOVER DISTRICT COUNCIL** of White Cliffs Business Park Dover Kent CT16 3PJ and whoever for the time being owns the interest in the property which gives the right to possession of it when this Lease ends

(2) The Tenants: **THE PARISH COUNCIL OF AYLESHAM** and whoever for the time being is entitled to the property under this Lease:-

1. IN this Lease:

1.1 A reference to an Act of Parliament refers to that Act as it applies at the date of this Lease and any later amendment or re-enactment of it from time to time in force

1.2 A right given to the Landlords to enter the property extends to anyone the Landlords authorise or allow to enter and includes the right to bring workmen and appliances onto the property for the stated purpose

1.3 AUTHORITY given to enter the property after giving notice extends in case of emergency to entry after giving less notice than specified or without giving any notice

1.4 WHENEVER there is more than one tenant all their obligations can be enforced against all of the tenants jointly and against each individually

1.5 ANY agreement or obligation on the part of the Tenants not to do any act or thing (however expressed) shall be construed as including an agreement or obligation on the part of the Tenants not to allow or suffer that act or thing to be done or to take place

1.6 ANY obligation to pay money refers to a sum exclusive of value added tax ("VAT") and any VAT chargeable on it is payable in addition

1.7 THE Plan is the plan attached to this Lease

2. IN exchange for the obligations undertaken by the Tenants:

2.1 THE Landlords let the property described below ("the property") to the Tenants for five years starting on 19 September 1998 and ending on 18 September 2003 ("lease period") on the Tenants agreeing to pay rent calculated in accordance with the First Schedule

2.2 THE property is the two plots of land situate at the Market Square Aylesham Kent as shown edged red and marked Plot 1 and Plot 2 on the plan

3. THE property is let subject to the rights contained in the Second Schedule

4. THE Tenants agree with the Landlords:-

4.1 TO pay the rent by equal quarterly instalments in advance on the 19th day of March June September and December in each year of the lease period

4.2 NOT to reduce any payment of rent by making any deduction from it or by setting any sum off against it

4.3 TO pay promptly to the authorities to whom they are due all rates taxes and outgoings (if any) relating to the property including any which are imposed after the date of this Lease (even if of a novel nature)

4.4 TO allow the Landlords to enter the property at any time to inspect the state of it

4.5 TO allow anyone who reasonably needs access in order to exercise the rights contained in the Second Schedule

4.6 (a) In this clause "to deal with" means to assign, sublet, mortgage, charge, part with possession of or share

(b) Not to deal with the whole property nor with any part of it separately from the rest

4.7 TO use the property only for recreational and amenity purposes ("the use allowed")

4.8 TO keep the property clean and tidy at all times and for this purpose only to use grass cutting and cultivation machinery on the property

4.9 NOT unnecessarily to fell cut down or destroy any trees on any part of the property

4.10 TO maintain and manage the trees on the property to the requirements of the Landlords

4.11 NOT to remove any soil or mineral from the property without the Landlords' consent

4.12 NOT unless the Landlords give consent in writing to build anything on the property

4.13 NOT to hold an auction sale on the property

4.14 TO comply with the terms of any Act of Parliament regulation licence or registration authorising or regulating how the property is used

4.15 TO do everything necessary to obtain continue and renew any licence or registration required by law for using the property for the use allowed

4.16 IN respect of Clauses 4.14 and 4.15 at all times to keep the Landlords indemnified against all claims demands and liability in respect thereof

4.17 TO use the property only for the use allowed

4.18 TO allow the Landlords on giving at least seven days notice to enter the property to inspect the state of it

4.19 TO give the Landlords promptly a copy of any notice received concerning the property and at their expense to comply with the requirements of the notice as it affects the property

4.20 IF the Landlords give the Tenants notice of any failure to do repairs or works of maintenance required by this Lease to start the work within two months (or immediately in case of emergency) and to proceed with it diligently

4.21 TO insure for not less than Two Million Pounds against liability in respect of personal injury to or the death of any person and damage to real and personal property arising out of the Tenants occupation and use of the property under a policy which satisfied the conditions set out in Clause 4.22

4.22 THE conditions with which an insurance policy must comply are:-

(a) the insured persons shall be the Tenants and the interest of the Landlords shall be noted on the policy

(b) the policy is issued by a reputable insurance office or at Lloyds

4.23 TO show the Landlords on demand the insurance policy required to be maintained by Clause 4.21 together with the receipt for the last premium and every endorsement varying the terms of the policy. Additionally to deliver up to the Landlords at the start of this Lease and each year on the anniversary date of this Lease a copy of such insurance policy receipts and demands

4.24 TO indemnify the Landlords against any expenses, liabilities, claims, demands, proceedings and costs in respect of:-

(a) personal injury to or the death of any person

(b) damage to any real or personal property

(c) any nuisance

resulting from anything done or omitted to be done on the property and wherever the injury damage or nuisance is suffered except to the extent

that the same is due to any act or neglect or omission of the Landlords or of any person for whom the Landlords are responsible

4.25 IN this clause "the Planning Acts" means the Town and Country Planning Act 1990 and the Planning (Listed Buildings and Conservation Areas) Act 1990 and the rules, regulations and orders which are either made under them or are continued by the Planning (Consequential Provisions) Act 1990, as they apply from time to time

4.25.1 to comply with the Planning Acts as they affect the property

4.25.2 not to carry out any development of the property which requires permission

4.25.3 if the Landlords require and at the Landlords' expense to join the Landlords in making representations about any proposed development on the property or neighbouring property

4.25.4 to allow the Landlords to enter the property to comply with any lawful requirement under the Planning Acts, even if that restricts the enjoyment of the property

4.26 TO pay the Landlords' costs incurred as a result of the Tenants applying for the Landlords' consent or approval whether or not it is granted

4.27 NOT to use the property or any part of it for any of the following:- activities which are dangerous offensive noxious illegal or immoral or which are or may become a nuisance or annoyance to the Landlords or to the Owner or Occupier of any neighbouring property

4.28 TO pay all expenses (including solicitors and surveyors fees) which the Landlords incur in preparing and serving

4.28.1 a notice under Section 146 of the Law of Property Act 1925, even if forfeiture is avoided without a Court Order

4.28.2 a schedule of dilapidation recording failure to give up possession of the property in the appropriate state of repair when this Lease ends

4.29 THAT whenever rent or other sums payable by the Tenants to the Landlords remain unpaid after they are due for payment then such rent or other sums shall bear interest at the rate of four per centum per annum above the base lending rate from time to time of National Westminster Bank plc from the date on which such payments are due until paid and the amount of such interest shall be deemed to be part of the rent reserved and recoverable as rent in arrear

4.30 TO yield up the property at the determination of the lease period (however it ends) in the condition required by this Lease

4.31 TO pay the Landlords' legal costs and expenses incurred in preparing and granting this Lease including stamp duty charged on the Counterpart of this Lease

5. THE Landlords agree with the Tenants:-

5.1 SO long as the Tenants do not contravene any term of this Lease to allow the Tenants to possess and use the property without interference from the Landlords anyone who derives title from or any Trustees for the Landlords

6. THE parties agree:-

6.1 THE Landlords are entitled to forfeit this Lease by entering any part of the property whenever the Tenants

6.1.1 are twenty one days late in paying rent even if it was not formally demanded

6.1.2 have not complied with any obligation in this Lease

6.1.3 when a company: it or one of them goes into liquidation, unless that is solely for the purposes of amalgamation or reconstruction when solvent, an administrative receiver of it is appointed or an administration order is made in respect of it

6.1.4 when one or more individuals is are or one is adjudicated bankrupt or an interim receiver is appointed of the Tenant Tenants or one of them

6.2 THE Landlords will continue to maintain only those parts of the property which are so maintained at the date of this Lease future maintenance due to further planting to be carried out by the Tenants

6.3 THE forfeiture of this Lease does not cancel any outstanding obligation which the Tenants owe the Landlords

6.4 NOTHING contained in this Lease affects the powers of the Landlords as Local Authority or Planning Authority or relieves the Tenants from the necessity to obtain all consents and approvals that may from time to time be required from the Landlords as Local Authority or Planning Authority and no consent or approval given by the Landlords in that capacity shall relieve the Tenants from any necessity to obtain any consents or approvals from the Landlords as Landlords which may from time to time be required under this Lease

6.5 THE rules as to the service of notices in Section 196 of the Law of Property Act 1925 apply to any notice to be given under this Lease

7. IT is hereby certified there is no Agreement for lease to which this Lease gives effect

IN WITNESS whereof the parties have executed this Lease as their deed

THE FIRST SCHEDULE

(Determination of Rent)

Throughout the lease period the yearly rent will be £150.00

THE SECOND SCHEDULE

(Rights to which the property is let subject)

1. As to Plot 1

   A Deed of Grant dated 13 March 1985 made between Dover District Council (1) The Folkestone and District Water Company ("the Company") (2) being an easement in perpetuity for the Company its successors in title and its and their respective servants and licensees at any time or times thereafter to construct place lay and at all times thereafter to use inspect maintain cleanse repair replace relay conduct and manage a main water pipe the approximate position of which is shown by a green line of the plan attached to this Lease

2. As to Plot 2

   A Wayleave Consent dated 21 June 1955 made between Eastry Rural District Council (1) The South Eastern Electricity Board ("the Board") (2) consenting to the Board placing or laying one or more underground electric lines and any necessary ancillary apparatus along a route the approximate position of which is shown by a black line on the plan attached to this Lease and also to the entry by the Board from time to time by their servants agents contractors and workpeople for the purpose of inspecting maintaining repairing and replacing or removing the works or any of them

THE COMMON SEAL of **DOVER**)
)
DISTRICT COUNCIL was hereunto) 12.2.13
)
affixed in the presence of:)

R. C. Bawditch

Authorised Chief Officer

SIGNED AS A DEED on behalf)
)
of The Parish Council of)
)
Aylesham named above by its)
)
Chairman **PERCY THOMAS WILSON**)
)
in the presence of:)

P. J. Wilson

NAME:

ADDRESS:

DESCRIPTION OR OCCUPATION:

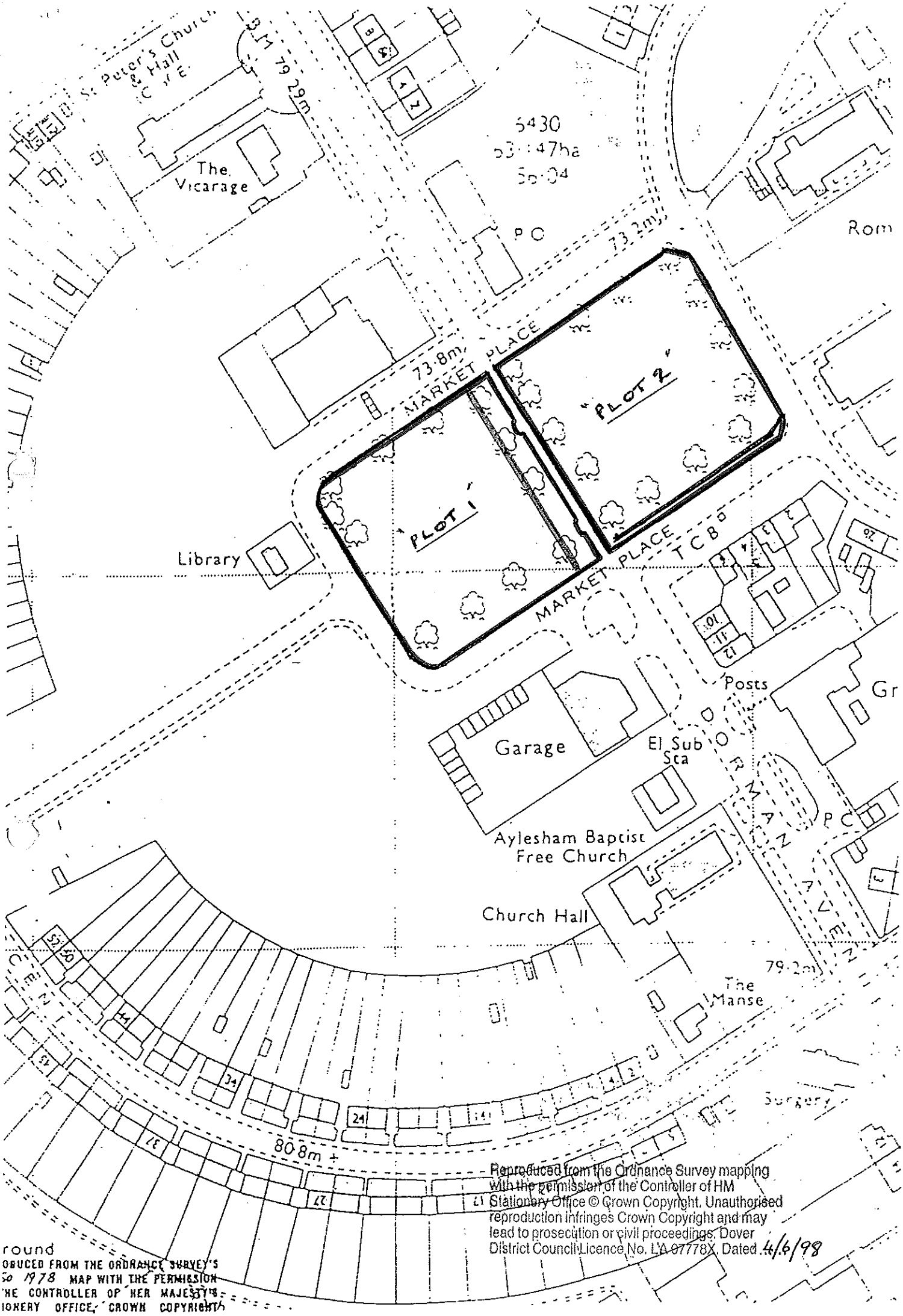
SIGNED AS A DEED on behalf)
)
of The Parish Council of)
)
Aylesham named above by its)
)
Clerk **ERIC BUCKLE**)
)
in the presence of:)

Eric Buckle

NAME: William Olivers

ADDRESS: 61 Milnes Crescent Aylesham

DESCRIPTION OR OCCUPATION: Support Worker



APPENDIX D:
Copy of Counsel's advice

IN THE MATTER OF AN APPLICATION FOR THE REGISTRATION AS A TOWN OR VILLAGE GREEN OF LAND AT MARKET SQUARE, AYLESHAM

OPINION

---

1. I am asked to advise Kent County Council ("the Registration Authority") in its capacity as commons registration authority for the purposes of the Commons Act 2006 ("the 2006 Act") with regard to the application for registration as a town or village green of the above-mentioned land ("the Application Land") made by Mrs Elizabeth Madden ("the Applicant") on 30 November 2007 ("the Application").

2. The Application was made in reliance on section 15(2) of the 2006 Act, which provides for registration as a town or village green of land on which a significant number of the inhabitants of a locality, or neighbourhood within a locality, have indulged as of right in lawful sports and pastimes for a period of at least 20 years, and continue to do so at the time of the application for registration.

3. The freehold owner of the Application Land, Dover District Council ("the District Council"), objected to the Application, principally on the ground that since September 1977, the land had been let by it to Aylesham Parish Council ("the Parish Council") on a series of short-term leases incorporating a user clause restricted to purposes of recreation and amenity. The legal consequence, according to the District Council's objection letter dated 3 September 2008, was that any use of the Application Land for lawful sports and pastimes by inhabitants of Aylesham had been permissive, and so incapable of satisfying the requirement in section 15(2) of the 2006 Act that use have been "as of right". The author of the 6 February 2009 Report to the Registration Authority's Regulation Committee Member Panel concurred with that view of the matter (at paragraphs 22-24), and recommended rejection of the Application. For the reasons which follow, so do I.

4. There is, so far as I can see, no factual dispute about the leasing of the Application Land to the Parish Council, and indeed the District Council has produced copies of leases dated respectively 19 September 1977, 23 March 1983, 23 February 1989, 14 October 1992 and 14 July 1998 (which I shall refer to collectively as "the District Council leases"). Each lease was granted for a term of 5 years, at a low rent payable quarterly in advance, and contained a forfeiture clause[1] entitling the District Council to re-enter the Application Land if the Parish Council failed to comply with any obligation in the lease. Among those obligations were covenants by the Parish Council to use the Application Land only for "recreational purposes"[2] or "recreational and amenity purposes."[3] In the later leases, the Parish Council expressly agreed not to allow or suffer the Application Land to be used for any other purpose.[4]

5. It was confirmed by the House of Lords in *R v Oxfordshire County Council, ex p. Sunningwell Parish Council* [2000] 1 AC 335 (*Sunningwell*) that use is not "as of right" for the purposes of the town/village green registration legislation[5] unless it is *nec vi, nec clam, nec precario* (without force, secrecy, or permission). Use pursuant to an express licence is permissive (*precario*). In principle, a licence may also be implied from overt acts of the landowner, if he "*so conducts 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*": *R(Beresford) v Sunderland City Council* [2004] 1 AC 889 (*Beresford*), per Lord Bingham, at paragraph 5. Lords Hutton, Scott, Rodger, and Walker all agreed (paragraphs 11, 43, 59, 83).

6. The closest analogy in town/village green caselaw to the situation in this case is that under consideration by Brooke J in *R v Hereford and Worcester County Council ex p. Ind Coope (Oxford and West) Ltd* (CO/1461/93) (unreported) (*Ind Coope*). That was an application for judicial review of a decision of the defendant authority to register

---

[1] Clauses 4(a) of the 1977 lease, 8(a) of the 1983 lease, (4)(a) of the 1989 lease, 6.1 of the 1992 lease, and 6.1 of the 1998 lease.

[2] Clause 2(d) of the 1977 lease.

[3] Clauses 6(d) of the 1983 lease, (2)(d) of the 1989 lease, 4.7 of the 1992 lease, and 4.7 and 4.17 of the 1998 lease.

[4] Clause 1.5 of each of the 1992 and 1998 leases.

[5] The legislation in force at all times material to *Sunningwell* and to the other cases discussed in this Opinion was the Commons Registration Act 1965, sections 13 and 22. However, it makes no difference for present purposes because the requirement for "as of right" user in section 15 of the 2006 Act derives directly from the section 22 definition of "town or village green" (in its original and amended forms).

land belonging to the applicant brewery as a town or village green. The brewery had intended to build a public house on the land, but there was insufficient residential development in the area. In 1964 the Bromsgrove District Council approached the brewery and asked if they could use the land as a children's playground and open area. By an exchange of letters, the brewery licensed the land to the district council for those purposes. The letters provided for a 6 month notice period, and for the district council to leave the land in tidy condition. No charge was made. In 1992, outline planning permission for residential development was granted, leading to the application for registration as a green. Statutory declarations showed that over the years the land had been used as a sports field and a recreation ground, and for pastimes such as dog walking, model aircraft flying, sledging, and bird watching. The defendant's panel resolved to accept the application on the basis that users had never sought or been required to seek permission to use the land and there had never been any attempts to interfere with, prevent or challenge their use. It found that although the local inhabitants might have been aware of the existence of the licence or the brewery's ownership, "*consent was never given to them to use the land, nor did they need to seek consent to use it. The local inhabitants believed they were using the land freely and that use was never challenged.*"

7. Counsel for the brewery submitted that, at all material times, recreational user of the land in question had been pursuant to an express licence granted to the local authority, being a statutory body which had power to make land available for the enjoyment of the public along the lines on which the public had clearly enjoyed the land. Brooke J agreed, holding that the panel had erred in law:-

> ... "*if there is an express licence for the use of the land, then the land is used pursuant to that licence. There can be no question of a right being established, adverse to the landowner, apart from the rights he may be granting under the licence. I find it quite impossible to form the view that the public, in some way or other, were capable of acquiring additional rights over and above the rights that the local District Council possessed pursuant to the licence to make the land available for the purposes for which it was used* ...

I am quite satisfied that it was simply not open to [the panel], as a matter of law, to find that the use of the land had been 'as of right' against the landowners within the meaning of section 22 of the Commons Registration Act 1965."

8. Brooke J accordingly did not consider it to be necessary for the *precario* argument to run that the local inhabitants should have known about the brewery's interest in the land, or the licence, or that they should have been told they had permission to use the land. It is true to say that his consideration of the issue preceded *Sunningwell* and *Beresford* by some years, and he did not have the benefit of the guidance given in those cases by the House of Lords. There are passages in *Beresford* that can be read as saying that permission must be communicated to users, by words or overt conduct, if their use is not to count as "as of right". Lord Walker in particular referred, at paragraph 75, to a need for "*communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass...*" and said at paragraph 79 *"it would be quite wrong ... to treat a landowner's silent passive acquiescence in persons using his land as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct) to those persons.*" However, I do not consider that *Ind Coope* has been overruled by *Beresford.* It was cited in argument in the House of Lords, but not even mentioned (let alone disapproved) in any of the speeches. The obvious inference is that none of the Law Lords thought it relevant to the issue they had to decide, or affected by the outcome of their deliberations. It is clearly distinguishable on the facts, because there was no express licence agreement in *Beresford ("It was not suggested that the council had expressly licensed the inhabitants' use of the land, either in writing or orally*": paragraph 4). *Beresford* was exclusively concerned with the circumstances in which a licence could be implied (if any), and the distinction between those situations and mere acquiescence. The contrast emphasised throughout the speeches is between "mere inaction" or "passive inactivity" on the part of the landowner, and "a positive act" by him. See e.g. paragraphs 6-7, 59, 79. A landowner who enters into a licence agreement for public recreational user of his land is clearly in the "active" category, whosoever the other party to the agreement may be. He is not a mere observer of the use, but its instigator.

9. Nor can I see any inconsistency between *Ind Coope* and the approach to "as of right" taken by Lord Hoffmann in *Sunningwell*. At p.351 he said that the unifying element in the three vitiating circumstances (*vi, clam,* and *precario*) 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.*" (emphasis added).

Elsewhere in *Sunningwell* (e.g. at pp.352-353) Lord Hoffmann reiterated the importance of "*how the matter would have appeared to the owner of the land.*" The *ratio decidendi* of the case was that it was unnecessary for users to have had a subjective belief in the existence of a right to do what they were doing, because what *they* thought was neither here nor there.

10. A landowner who consented for a limited period (either a fixed term, or pending the giving of notice) to his land being used for public recreational purposes would be astonished to find, on determination of the licence after 20 years, that the land had become registrable as a village green by virtue of having been put to the very use to which he had consented for the limited duration of the licence. He would have had no reason to resist the use of the land in accordance with its terms, and it would not have been reasonable to expect him to do so. In my opinion, a court would be as likely today as in 1994 (when Brooke J decided *Ind Coope*) to categorise the use in such a case as referable to the express permission granted by the licence, even if individual users had no personal knowledge of the transaction. What distinguishes an implied licence, I think, is that communication to users is a necessary condition of there being such a licence at all; it is what creates the licence. An express licence, on the other hand, may exist quite independently of communication to the actual users - as in *Ind Coope*. Provided that there is a factual causal connection between the licence and the use, and the use derives from the licence, I think that a court would consider that sufficient to render the use *precario*. A landowner who grants a licence for a one-off community event such as a fair does not have to communicate with any - let alone all - of the individuals who attend in order for their user to be *precario.* He only has to

communicate with the event organiser, and need not concern himself with arrangements between the organiser and third parties.

11. A similar approach to Brooke J's was adopted by Sullivan J (as he then was) in *R v Secretary of State for the Environment, ex p. Billson* [1999] QB 374. He there held that public user of tracks across a common which was subject to rights of air and exercise by virtue of a revocable deed under section 193(2) of the Law of Property Act 1925 was not as of right for the purposes of bridleway claims under section 31 of the Highways Act 1980, notwithstanding that neither the public nor the current landowner had any inkling of the deed:

> *"... it is necessary to establish that the use of the way was in fact enjoyed without force, secrecy or permission... if the landowner establishes that ... use was in fact with permission, that will defeat the claim ..."* (p. 393D-F: emphasis added).

> *"... the users of the tracks on Ranmore Common were doing what they were permitted to do under section 193 by virtue of the deed, and no more. Their enjoyment of the ways was by licence and not as of right, even though they genuinely believed that it was as of right..."* (p.394B).

A narrower analysis might have been applied, namely that the users had a statutory right to use the land for recreation (i.e. under section 193), rather than permission. That would have been consistent with *Beresford,* where - at paragraph 9 - Lord Bingham said that indulgence in sports and pastimes pursuant to a statutory right was inconsistent with use as of right. But the judge focused instead on the root of the recreational use - the revocable deed - and gave expression to a broader proposition; ignorance of an actual permission is just as irrelevant as ignorance of a statutory right. Although *Billson* preceded *Sunningwell,* and Sullivan J was compelled to follow the pre-*Sunningwell* law as laid down in *R v Suffolk County Council, ex p. Steed* (1996) 75 P&CR 102, with its (erroneous) insistence on users having a reasonable belief in the existence of a right, that proposition seems to me to survive and be consistent with *Sunningwell,* for the reason given above. What is important is how the matter appears

to the reasonable landowner. Like *Ind Coope, ex p. Billson* was cited in argument in *Beresford,* without disapproval or comment from their Lordships.

12. Does it make any difference if a landowner uses the vehicle of a lease, rather than a licence, to make land for which he himself has no immediate use available for a limited period for public recreation? As a matter of policy, there is no reason to penalise him, and every reason to encourage others to follow his public-spirited example. As a matter of common sense, he - just as much as the grantor of a licence - will have a reasonable expectation of recovering possession at the end of the term without finding that the land has become registrable as a green. As a matter of law, the distinction is that a lessor parts with possession of the leased land to the lessee and (subject to any rights reserved by the lease) puts it out of his power to control what goes on there. But where a lease contains a covenant not just consenting to, but positively requiring, use of the land for recreation, backed up by a power of forfeiture in the event of its being put to any other use, I do not see any difficulty in characterising that permitted use as *precario* from the perspective of a reasonable landowner.

13. Where (as will typically be the case) the lessee is a local authority, there will in any event be another reason for regarding the use as not as of right. The authority is a creature of statute, acting in exercise of statutory powers. If it takes a lease of land for the purpose of public recreation, for it to be acting *intra vires* it must be exercising one of the powers which enables it to acquire or appropriate land for that purpose (such as section 164 of the Public Health Act 1875, or section 9 of the Open Spaces Act 1906). And in that event, on the basis of strong *obiter dicta* in *Beresford* (especially of Lord Walker at paragraphs 86-87), recreational use will not be as of right. Land held under the 1906 Act is held on an express statutory trust for public enjoyment as an open space (section 10). Caselaw has assimilated land held under section 164 of the 1875 Act: see in particular *Hall v Beckenham Cpn* [1949] 1 KB 716 and *Blake (Valuation Officer) v Hendon Cpn* [1962] 1 QB 283, and for legislative confirmation of that approach, see sections 122(2B) and 123(2B) of the Local Government Act 1972.

14. In this case it has been suggested by the Clerk to Aylesham Parish Council (in her representations to the Panel hearing on 6 February 2009) that:

> *"It would seem possible to argue that the lease solely concerns ... the use which the Parish Council may make of the land for recreational and amenity purposes. This may be argued to have been envisaged by the lessor to include such Parish purposes as village fetes, or flower shows, or gymkhana, or celebration of festivals and anniversaries and/or any other Parish Council organised events having similar purposes. ...The use made of the land by local inhabitants has been without any authority or arrangement or agreement provided by or with the Parish Council. Indeed had the Parish Council made any such arrangement it would have been outside the strict terms of the lease which is specifically limited to Parish Council use. In that sense therefore the local inhabitants' use has been entirely contrary to the terms of the lease ...[and] entirely trespassory..."*

15. I do not consider that to be a plausible interpretation of the user clauses in the District Council leases, for the following reasons. First, it is improbable that the Parish Council would have leased an area of open land at the very heart of Aylesham to hold in reserve for occasional formal events, rather than for the everyday enjoyment of the inhabitants of the Parish. Secondly the words "recreational [and amenity] purposes" are quite wide enough to cover use of the land as an open space or a public walk or pleasure ground. Thirdly, if the evidence is to be believed, that is consistent with how the Application Land was used at the date of each of the District Council leases and had been used for many years before 1977. The leases, like any other contractual documents, are to be interpreted in the light of the factual matrix. A reasonable person, having all the background knowledge available to the parties on each renewal, would have understood them to be using the language in the user clauses[6] as authorising the continuation of the current and long-standing use of the land, not as repeatedly re-imposing a restriction of which no one took any notice.

16. Fourthly, and of particular significance in my view, the memorandum of agreement dated 10 November 1972 between the District Council's predecessor authority, Eastry Rural District Council, and the Parish Council, read as follows:

[6] See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 for the principles of interpretation.

"The Rural District Council of Eastry in the County of Kent agree to let to the Aylesham Parish Council for a period of two years from 1st April 1972 for use as an open space land in the Parish of Aylesham known as The Market Square containing 1.82 acres or thereabouts and indicated on the plan annexed hereto and thereon coloured pink paying for the whole of the said land the yearly rent of ONE POUND payable in arrear."

To my mind, that is very powerful evidence that in 1972 the Parish Council leased the land for general public enjoyment under the 1906 Act; and there is no reason to suppose, in the absence of evidence to the contrary, that subsequent renewals were for any different purpose.

17. Accordingly, I do not think that informal recreation of the kinds mentioned in the evidence questionnaires lodged in support of the Application fell outside the scope of the user clauses in the District Council leases, objectively construed; and furthermore, on the available evidence, I think it probable that the land was held by the Parish Council on a statutory trust for public enjoyment under section 10 of the Open Spaces Act 1906. In those circumstances, use of the Application Land for lawful sports and pastimes would not have been as of right.

18. If Instructing Solicitor has any queries about the above, or would like me to consider the matter further in the light of additional information or representations from the parties, he should not hesitate to let me know.

New Square Chambers
12 New Square
Lincoln's Inn
6 November 2009