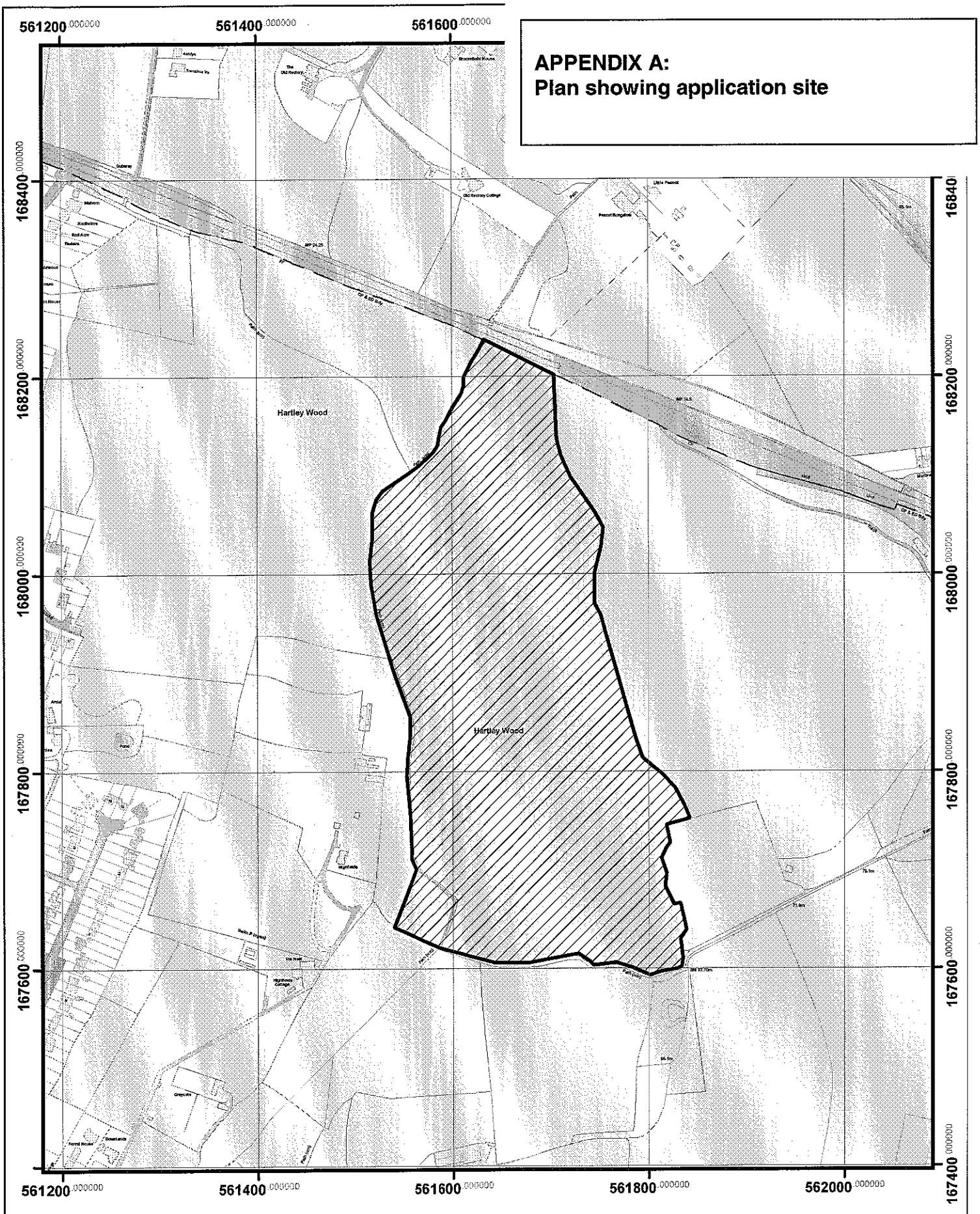
APPENDIX A:
Plan showing application site



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Land subject to Village Green application at Hartley Woods

Kent County Council

APPENDIX B:
Copy of the report (excluding appendices) presented to Regulation Panel on 27.11.07

Application to register land at Hartley Woods, Hartley

A report by the Divisional Director of Environment and Waste to the Kent County Council Regulation Committee on 29th November 2007.

Recommendation: I recommend that the applicant be notified that the application to register the land at Hartley Woods, Hartley has been accepted and that the land subject to the application be formally registered as a Village Green.

Local Members: Mr. D. Brazier — Unrestricted item

Introduction

1. The County Council has received an application to register land at Hartley Woods, Hartley (nr. Longfield) as a new Village Green from the Hartley Parish Council ("the applicant"). The application, received on 18th April 2005, was allocated the application number 585. A plan of the application site is shown on Appendix A to this report and a copy of the application form is attached at Appendix B.

Procedure

2. This application to register land as a new Village Green is made under section 13 of the Commons Registration Act 1965 and regulation 3 of the Common Registration (New Land) Regulations 1969. These regulations came into force on the 3rd January 1970, and regulation 3 enables the making of an application where, in accordance with section 22 of the 1965 Act, after the 2nd January 1970 any land becomes a Town or Village Green.

3. For the purpose of registration, section 22 of the 1965 Act (as amended by section 98 of the Countryside and Rights of Way Act 2000) defines a Village Green as:

   'land on which for not less that twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either:

   (a) continue to do so, or

   (b) *have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions'.*

4. 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 the press and put up a site notice. The publicity must state a period of at least six weeks during which objections and representations can be made.

The Case

5. The area of land subject to this application ("the application site") consists of a large area of woodland situated to the east of the village of Hartley. The application site is bounded on its northern edge by the railway line, on its eastern edge by the now disused former Longfield refuse depot (which lies adjacent to Hartley Bottom Road) and on the remaining sides by fields and woodland. There is a Public Footpath (SD215) which running along the eastern edge of the application site.

6. Access to the site is via Public Footpath SD295 from Gorse Wood Road or via Public Footpath SD296 from Manor Lane. There is also a well-trodden track leading to the site from Beechlands Close, although this is not a recorded Public Right of Way. This network of footpaths (shown at Appendix C) allows local residents easy and direct access into the site.

7. The application is made on the grounds that local residents have used the land for lawful sports and pastimes, and have done so without permission and without challenge for a continuous period of at least 20 years. In support of the application, the Parish Council submitted six sworn affidavits from local residents as well as a further 13 user evidence questionnaires.

Objections

8. Consultations have been carried out and notices advertising the application have been placed on site and in the local newspaper, as required by the Act. Following this consultation, several letters of support have been received from local Councillors and residents. However, one objection has been received from Hepher Dixon Ltd who act on behalf of the landowners, Southwark Council ("the objector").

9. The objection has been made on the grounds that the site has not been generally accessible over the entire twenty year period and that local residents have been prevented from entering the land by the erection of fencing around the site, thereby making any entry 'by force' and therefore not 'as of right': the objector asserts that "*clearly fences have been erected in the last 20 years and attempts have been made to break through those fences*". In addition, the objector states that the application site lies adjacent to other land owned by Southwark Council which has been used for the same activities identified in the application yet which is not included and challenges the fact that the application only includes 19 local residents, which only represents a tiny proportion of the population of the village.

10. Members should be aware that following the receipt of the objection from the objector and the subsequent exchange of comment from both parties, the applicant requested (in June 2006) that the investigation of the case was put on hold to provide the opportunity for the applicant and the objector to enter into negotiations with regard to the future use of the land. It has not been possible for the parties to reach agreement and therefore (in April 2007) the applicant asked the County Council to resume its investigation into the matter, but requested that

the application site be modified to exclude the eastern spur of land running adjacent to Public Footpath SD217 and out towards Hartley Bottom Road. In light of the recent *Oxfordshire* judgement, in which Lord Hoffman held the view that 'it would be pointless to insist upon a fresh application (with a new application date) if no prejudice would be caused by an amendment', the County Council has acceded to this request and therefore the area to be considered is that as shown hatched on the map at Appendix A.

Legal tests

11. 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 by the inhabitants is continuing up until the date of application?

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

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

12. The definition of the phrase 'as of right' has been considered in recent High Court case law. Following the judgement in *Sunningwell*[1], 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'.

13. In this case, there is nothing to suggest that use has taken place subversively, or that any formal permission has been granted to the local residents for such usage during the 20 year period preceding the application (1985 to 2005); indeed, from the user evidence submitted with the application, there is no mention of any challenge to use during this time and none of the witnesses recall any barriers, prohibitive notices or fencing to deter use.

14. Although vague mention is made by the objectors of fencing having been in place during the material 20 year period and subsequently broken down, there is nothing to suggest that use has been with force and none of the witnesses sttest to this being the case. Although one witness recalls fencing on the land in the 1970s and another makes mention of being challenged during the 1960s, neither of these incidents fall within the 20 year material period.

15. Even if the perimeter of the site had been securely fenced (and this does not appear to have been the case), then the Public Footpaths which cross and abut

[1] *R v. Oxfordshire County Council, ex p. Sunningwell Parish Council (2001)*

the site would have enabled unfettered access to the site itself at all times. The only way in which access to this site could have been prevented, is for the Public Footpaths (particularly SD215) to have been securely fenced on both sides of the route (thereby preventing people from wandering off the main path); this appears never to have been the case and as such it is not possible to place a great deal of weight upon the objector's statement with regard to fencing.

16. Furthermore, it is important to note that use of this land has actually been encouraged as a result of the publication of a leaflet by the landowner. This leaflet (copy included at Appendix D) includes general information about Hartley Woods as well as a nature trail for visitors to follow. Although the leaflet is undated, mention is made of campsite bookings 'from summer 1984 onwards' and therefore it can be taken that this document was probably published immediately prior to the material period and was almost certainly available during the early part of the material period.

17. I therefore consider that, in the absence of any evidence to the contrary, use of the land must have been 'as of right'.

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

18. 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.

19. In this case, the evidence suggests that the majority of use of the land has been for recreational walking or dog walking, but witnesses also claim to have used the land for other recreational activities such as picnicking and bird-watching. Included at Appendix E is a table summarising evidence of use by local residents.

20. The fact that the main use of the application site has been for dog walking is not inconsistent with village green rights being acquired. Indeed, in the *Sunningwell* case, Lord Hoffman agreed with a previous judgement in another case in which it had been held that '*dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green*'.

21. The application site consists of woodland with a network of informal pathways worn through the undergrowth. The fact that recorded Public Footpaths cross the land means that there may be some use attributable to Public Right of Way but the network of lesser tracks leading off the main footpath and meandering through the site gives substance to the local residents evidence of wandering around the site.

22. Clearly, the fact that the majority of the site consists of woodland would have limited certain types of usage or activity which are commonly associated with Village Greens (e.g. kite-flying, playing informal cricket etc). However, the character of the land is irrelevant: although the application site may not appear to

fit the traditional image of a village green, this is not something which can be taken into account in determining this case. Apart from the criteria set out in the Commons Registration Act 1965, there is no legal authority on the character of land capable of qualifying for registration as a Village Green. Indeed, this was one of the points confirmed by the House of Lords in the recent *Oxfordshire* case.

23. Another relevant issue discussed in the *Oxfordshire* case (which concerned an area of land in Oxford known as the Trap Grounds that consisted of a three-acre reed-bed and three acres of scrubland, grassland, and woodland, lying between a canal and a railway line) was whether *all* of the land had to have been capable of use by the local residents in exercising lawful sports and pastimes.

24. In that case, by reason of impenetrable growth, only 25% of the land was accessible for walkers. Lightman J said that '*there is no mathematical test to be applied to decide whether the inaccessibility of part of the land precludes the whole being a Green. The existence of inaccessible areas e.g. ponds does not preclude an area being held to be a Green... overgrown and inaccessible areas may be essential habitat for birds and wildlife, which are attractions for bird watchers and others.*' Lord Hoffman, in the same case, also added '*If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flowerbeds, borders and shrubberies on which the public may not walk*'.

25. It is a well-established principle of this area of law that the Registration Authority need not be satisfied that every square foot of the land has been used for the purposes of lawful sports and pastimes and, if necessary, the Registration Authority may register a lesser area than that applied for. However, in this case I am satisfied that the land, as a whole, has been used for the activities described in this report and, given the lack of distinct or discernable boundaries between the Public Footpaths and the myriad of informal paths which crisscross the land (which are further evidence of use), it would not be appropriate in this particular case to attempt to make assumptions regarding which sections of the land over which the users had engaged in their lawful sports and pastimes; indeed, the nature of site means that the land should be treated as a whole.

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

26. The Countryside and Rights of Way Act 2000 ("the CROW Act") inserted a new section dealing with locality into section 22 of the 1965 Act. It should now be shown that the use made of the land has been and continues to be by inhabitants of any locality, or of a neighbourhood within a locality. The use need not be exclusively by local inhabitants, but they should be the significant number.

27. Included in Appendix F is a plan showing the locality from which the users of the land originate. The application form identifies the locality as being the parish of

Hartley. This has not been challenged by the objector and I am satisfied that the locality consists of a defined geographical area and recognisable community.

28. In terms of the number of users, the objector has queried the fact that there are only 19 user evidence forms submitted with the application and considers that this does not constitute the 'significant number' of local inhabitants required for the legal tests to be met.

29. This issue was considered in more depth in the *McAlpine Homes*[2] case, in which it was held that significant did not necessarily mean considerable or substantial: Sullivan J stated that what matters is that the number of users has to be sufficient to indicate that "*their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers*".

30. In this case, there is evidence of use by at least 22 witnesses and responses to the initial consultation (from Sevenoaks District Council and local Councillors) confirms that the land is in far wider use by local residents. I consider that the fact that many witnesses appear to have been using the land on a regular basis – in some cases several times per day – amounts to far more than simply occasional use by trespassers. The user evidence submitted by the applicant shows consistent use of the land over a very long period and this is substantiated by the physical evidence of the informal paths on the ground.

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

31. The application site appears to have been used by local residents over a considerable length of time; evidence of use appears to date back as far as 1954, with the majority of people having used the application site since at least the early 1970s. As the date of the application is July 2005 (and there is no suggestion that use had been challenged at any time prior to the application being submitted in 2005) I have taken the relevant twenty-year period as being 1985 to 2005.

32. All of the 22 witnesses have used the land for the *full* twenty-year period; nine have used the application site for over 40 years. The frequency of use is also high, with the majority of users stating that they use the application site on at least one occasion per week. I am therefore satisfied that use has taken place over a period of more than twenty years.

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

33. The recent amendment made by the CROW Act 2000 required that use of the claimed green continues up until the date of registration 'as of right'. However, this was recently overturned in the House of Lords case known as the *Trap Grounds*[3] case, in which it was held that use need only continue up until the date of application and not registration.

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[2] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council (2002)*
[3] *Oxfordshire County Council v Oxford City Council and Catherine Mary Robinson (2006)*

34. As stated above, use of the application site has continued without challenge until the date of application and indeed beyond.

Conclusions

35. Careful consideration has been given to all of the available evidence. There appears to be significant evidence of use over a long period, which includes not only the 20 year period prior to the application but also stretches as far back as the 1950s. There is nothing to suggest that use has not been 'as of right' and no evidence to this effect has been produced by the landowner despite several opportunities being provided to facilitate this. Under the circumstances, I conclude that the land has been used for lawful sports and pastimes for an appropriate period by residents of the locality and as such has become a Village Green by virtue of such use.

Recommendations

36. I therefore recommend that the applicant be notified that the application to register the land at Hartley Woods, Hartley has been accepted and that the land subject to the application be formally registered as a Village Green.

Accountable Officer: Linda Davies - 01622 221500 - linda.davies@kent.gov.uk

Background documents: The main file is available for inspection at the Environment and Waste Division, Environment and Regeneration Directorate, Invicta House, County Hall, Maidstone. Please contact Mr. Chris Wade on 01622 221511.

Background documents

APPENDIX A – Plan showing application site
APPENDIX B – Copy of application form
APPENDIX C – Copy extract of the Definitive Map of Public Rights of Way
APPENDIX D – Leaflet entitled 'Hartley Wood'
APPENDIX E – Table summarising user evidence
APPENDIX F – Plan showing the locality