Application to register land known as Hospital Field at Brabourne as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Tuesday 3rd December 2019.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 22nd July 2019, that the applicant be informed that the application to register the land known as Hospital Field at Brabourne as a new Village Green has not been accepted.

Local Member: Ms. C. Bell (Ashford Rural East) Unrestricted item

Introduction

1. The County Council has received an application to register land known as Hospital Field at Brabourne as a new Town or Village Green from the Brabourne Parish Council ("the applicant"). The application, made on 1st February 2016, was allocated the application number VGA669. A plan of the site is attached 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 2014.

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 one year prior to the date of application**, 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 2014 Regulations, the County Council must publicise the application by way of a copy of the notice on the County Council's website and by placing copies of the notice on site to provide local people with the opportunity to comment on the application. Copies of that notice must also be served on any landowner(s) (where they can be reasonably identified) as well as the relevant local authorities. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

6. The piece of land subject to this application ("the application site") comprises an arable field of approximately 24 acres (9.7 hectares) in size situated to the north of properties in Mountbatten Way and extending between Lees Road and Canterbury Road. Access to the application site is via three Public Footpaths; two which diagonally cross the site and a third which runs along its southern boundary (to the rear of the properties in Mountbatten Way).

7. The application site is shown in more detail on the plan at **Appendix A**.

8. The vast majority of the application site registered with the Land Registry (under title number TT40521) to Mr. R. Johnson and Ms. C. Johnson ("the landowners"). A small slither of land in the south-western corner (abutting Lees Road) is registered under title number K414908 to the Kent County Council; the County Council's Property Team has been consulted but no response has been received.

Previous resolution of the Regulation Committee Member Panel

9. During the consultation period, an objection to the application was received from Gladman Developments Ltd. ("the objector"), which has a promotion agreement with the landowners and has previously made an application for planning permission to develop the land for residential development.

10. The objection, which was accompanied by 13 witness statements, was made on the basis that:
    - the neighbourhood relied upon was not a qualifying one for the purposes of section 15 of the 2006 Act;
    - the use relied upon was predominantly referable to the Public Footpaths on the application site and insufficient to indicate that the land was in general use by the community;
    - the land was not available for recreational use for long periods due to the presence of crops; and
    - any wider recreational use (away from the paths) was either challenged or with permission.

11. The matter was considered at a Regulation Committee Member Panel meeting on 28th March 2018[1], at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration.

12. 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

13. The Public Inquiry took place at Penstock Hall Farm at Brabourne from 18th to 21st February 2018, during which time the Inspector heard evidence from witnesses

[1] The minutes of that meeting are available at: https://democracy.kent.gov.uk/ieListDocuments.aspx?CId=182&MId=8037&Ver=4

both in support of and in opposition to the application. The Inspector also undertook an accompanied site visit with representatives of both parties.

14. Following the Inquiry, the Inspector produced a written report dated 22nd July 2019 ("the Inspector's report") setting out her findings and conclusions. These are summarised below.

Legal tests and Inspector's findings

15. In dealing with an application to register a new Town or Village Green, the County Council must consider the following criteria:
    (a) Whether use of the land has been 'as of right'?
    (b) Whether use of the land has been for the purposes of lawful sports and pastimes?
    (c) Whether use 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, has ceased no more than one year 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:

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

16. The statutory scheme in relation to Village Green applications is based upon the English law of prescription, whereby certain rights can be acquired on the basis of a presumed dedication by the landowner. This presumption of dedication arises primarily as a result of acquiescence (i.e. inaction by the landowner) and, as such, long use by the public is merely evidence from which a dedication can be inferred.

17. In order to infer a dedication, use must have been 'as of right'. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*'). In this context, force refers not only to physical force, but to any use which is contentious or exercised under protest[2]: "*if, then, the inhabitants' use of the land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious*"[3].

18. There was no suggestion in this case that any recreational use of the application site had taken place secretively or in exercise of any physical force; indeed, as can be seen from the plan at **Appendix A**, the application site is criss-crossed by Public Footpaths such that it would be difficult for a landowner to erect any form of barrier to prevent entry.

19. It was suggested by the objector that some of the activities relied upon by the applicant had been challenged by the tenant farmer (i.e. horse-riding) or had

[2] *Dalton v Angus* (1881) 6 App Cas 740 (HL)
[3] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

taken place with the permission of a previous tenant farmer (i.e. metal-detecting). The Inspector found that the metal-detecting had, in any event, taken place by persons from outside the claimed neighbourhood and that although some equestrian use had been challenged, this was without any real effect and insufficient to render all horse-riding by force[4].

20. Given that horse-riding did not feature heavily in the applicant's evidence, and there was no other evidence of challenge to recreational use, the objectors were not able to persuade the Inspector that use of the application site had not taken place 'as of right'.

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

21. 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. The Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[5].

22. In this case, when considering the nature of the recreational use is important to have regard to the physical state of the application site itself during the relevant twenty-year period (1996 to 2016).

23. In her findings of fact[6], the Inspector noted that the application site had been in arable production (for crops including wheat, barley and rapeseed) throughout the material period. Although the tenant farmer's records (produced at the Inquiry) only went back as far as 2005, the Inspector was satisfied that the general pattern of agricultural use would have been similar prior to that period. She noted that part of the application site, described as the 'bottom wedge', appears to have been difficult to cultivate (due to the presence of former clay pits) and crops only began to be grown on that part of the application in 2013 (albeit that the crop substantially failed in that year).

24. Clearly, in the years where the field was left fallow (2006, 2010 and 2012 according to the farm records), it has been possible for the whole of the application site to be used for recreational purposes and access to it has been facilitated by the Public Footaths. The Inspector accepted that people would naturally have used a piece of land such as this for walking and dog walking, with or without sticking to the line of the Public Footpaths[7].

25. During the years where there had been a crop on all or part of the land, the Inspector described the position as follows[8]:

    "… there will be certain times of the year where the same position would apply as above (that is, as if there is no crop) i.e. between Harvest in late

---

[4] Paragraph 156 of the Inspector's report
[5] *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, ex parte Sunningwell Parish Council* [1999] 3 All ER 385
[6] Paragraph 125 of the Inspector's report
[7] Paragraph 126 of the Inspector's report
[8] Paragraph 127 of the Inspector's report

summer and the time when the next year's crop starts growing. Depending on the crop, this may be only a matter of a few weeks or a few months. There will be other times when a crop is growing but is still low enough to the ground to walk over. During these times, a small minority of people may have walked on the growing crop but the majority of local people respected the crops and did not walk on them. They would stick to the public footpaths (which had been sprayed and marked out) or occasionally go up and down the tramlines made by the tractors. The opportunity to carry out activities other than walking and dog walking would be limited. Again, depending on how fast growing and thick the particular crop was, this stage could last several months. However, some thick crops, such as rape, would be too big to walk in much sooner. Finally, there would be times in the from late spring into the summer when it would be physically impossible to go anywhere on the land other than on the public footpaths or, in the case of a very intrepid person, along the tramlines. But, even the tramlines would be very difficult to get down in the case of the particularly thick crops. I find the idea of people accessing bare patches of ground to play ball games via a tramline rather far-fetched. If this did happen, it would be very much the exception rather than a regular activity. During these times, the use of the land off the public footpaths would be extremely limited, if indeed there was any use at all."

26. The applicant's position with regard to the evidence of use was there was a significant amount of recreational use of the application site, with evidence presented not only of walking (with or without dogs) but also of a range of other activities including children playing, ball sports, kite flying, fruit picking and picnicking. The location of the land in close proximity to Brabourne Lees and the ease of access to it made it attractive for such use, and it was unsurprising that people would wander off the Public Footpaths given that they were invisible for considerable part of the year (especially the cross-field paths).

27. The objector submitted, on the other hand, that certain aspects of the applicant's evidence had been exaggerated and each of the witnesses had a strong interest in advocating the application. It was not the case, according to the objector, that recreational use had been frequent or that the degree of crop failure was such that extensive recreational use took place throughout the year. Agricultural use was certainly not 'low-level' (and not akin to the taking of a single hay crop, for example) and any use which had taken place away from the Public Footpaths was not at such a level to suggest to a reasonable landowner that a general right to recreate was being asserted. It was noted by the objector that the applicant's case was unsupported by a single photograph of anyone using the application site.

28. The Inspector concluded, on this issue, that[9]:

"In my view, a significant number of local inhabitants have used the application land off the footpaths principally for walking and dog walking (and, on occasion, for other activities such as ball games, blackberry picking, picnics etc.) during parts of each year for the relevant 20 year period, and in some years when the land has been fallow, throughout the

[9] Paragraph 149 of the Inspector's report

year. Even taking into account a certain degree of temptation to exaggerate in order to support a case and the somewhat curious lack of photographic evidence of use, this must be apparent."

29. The Inspector was therefore satisfied that the application site had been used for lawful sports and pastimes, although such use was very much dependent upon the agricultural state of the land.

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

30. 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.

31. The definition of 'locality' for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the Cheltenham Builders[10] 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*'.

32. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also be necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible that that of a locality, and need not be a legally recognised administrative unit. On the subject of 'neighbourhood', the Courts have held that '*it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood… The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning*'[11].

33. In this case, the applicant sought to rely upon the neighbourhood of 'Brabourne Lees' situated within the localities of the civil parishes of Brabourne and Smeeth.

34. There was no dispute at the Inquiry that the civil parishes of Brabourne and Smeeth were capable of constituting qualifying localities for the purposes of Village Green registration; however, the objector took issue with the applicant's reliance upon 'Brabourne Lees' as a qualifying neighbourhood (although did not mount a positive case that it was *not* such a neighbourhood).

35. On this point, the Inspector had no hesitation in accepting Brabourne Lees as a neighbourhood, it, in her view, clearly having the requisite degree of cohesiveness. She said[12]:

---

[10] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[11] ibid at 92
[12] Para 138 of the Inspector's report

"The existence of natural boundaries or distinct boundaries is only one indicator of a 'neighbourhood', and the absence of such characteristics does not prevent an area from being a neighbourhood. Brabourne Lees is clearly a village with its own distinct identity. It has a number of local facilities and a well-establish community. Local people clearly understand that Brabourne Lees corresponds to a particular area which is distinct from Brabourne and Smeeth".

36. Accordingly, the Inspector was satisfied that recreational use had taken place by the residents of a neighbourhood (namely Brabourne Lees) within the localities of the civil parishes of Brabourne and Smeeth.

"a significant number"

37. The word "significant" in this context does not mean considerable or substantial: '*a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number… 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*'[13]. Thus, it is not a case of simply proving that 51% of the local population has used the application site; what constitutes a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the application site.

38. In this regard, the Inspector found that[14]:
"the fact that the use of the land by the local community was apparent to [the tenant farmer] indicates that there were a sufficient number of people using it for numbers to be 'significant'. My conclusions are a matter of impression having heard the oral evidence and read the written evidence. There is no absolute numbers test for 'significant number'."

39. However, her conclusion on this point was, once again, closely linked to the agricultural use of the land and whether the land would have been capable of such 'significant' recreational use *throughout* the twenty-year period (discussed further below).

(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 one year prior to the making of the application?

40. The Commons Act 2006 requires use of the land to have taken place 'as of right' up until the date of application or, if such use has ceased prior to the making of the application, section 15(3) of the 2006 Act provides that an application must be made within one year from the date upon which use 'as of right' ceased.

41. In this case, the application was made under section 15(2) of the 2006 Act on the basis that use of the application site had not ceased at the time of making the application on 1st February 2019.

---

[13] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[14] Paragraph 149 of the Inspector's report

42. There is no evidence to suggest that recreational use of the application site had ceased prior to the making of the application and, as such, it is considered that recreational use of the application site (subject to the comments above on the nature of that use) did continue, as required under section 15(2), until the date of the application.

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

43. 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. In this case, use 'as of right' continued until the date of the application – i.e. 1st February 2016. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 1st February 1996 to 1st February 2016.

44. As discussed above, the agricultural use of the application site is relevant and the Inspector summarised the position as follows[15]:

> *"Local people have respected the crops and have not damaged them. When crops have been growing, it would be very difficult, if not impossible, to carry out activities such as ball games, and lawful sports and pastimes were restricted to walking and dog walking. These activities must have, in my view, predominantly taken place on the public footpaths. [The tenant farmer] accepted that he had seen people in tramlines, but I cannot believe that this was a frequent occurrence. As a matter of impression, the use of the land (off the footpaths) for lawful sports and pastimes when a crop was growing was, at best, trivial or sporadic. I simply do not find it credible, even taking the Applicant's evidence at its highest, that there was any real use of Hospital Field off the public footpaths when a crop of growing, which could be high and thick in the case of a crop such as oil seed rape. Of course, there would still have been people using the land at these times, but they would have been on the public footpaths. Even if there was some use of the tramlines and areas of failed crop, these only constitute a very small percentage of the total area of the Field and thus use would be sporadic in the spatial as well as temporal sense."*

45. The Inspector went on to explain that, in her view, an arable field in active agricultural cultivation was unlikely to ever be capable of registration as a Village Green because such use would necessarily, not only by virtue of the physical growing of the crops but also the associated agricultural activities, render any recreational use of the land no more than trivial and sporadic during those periods on a near-annual basis; the only times during which arable land in active agricultural cultivation might be capable of accommodating recreational use would be when it is fallow, where a crop has substantially failed or when there is no visible evidence of crops in the ground.

46. Accordingly, the Inspector was not able to conclude that the application site had been used *throughout* the relevant twenty-year period.

---

[15] Paragraph 150 of the Inspector's report

Inspector's conclusion

47. The Inspector's overall conclusion[16] was that the application should fail because the applicant had failed to demonstrate that "there has been qualifying user by a 'significant number' of local inhabitants throughout the relevant period and that a TVG right was being asserted throughout the relevant period".

48. Her recommendation to the County Council was that the application ought therefore to be rejected.

Subsequent correspondence

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

50. In response, the objector noted that the Inspector's report was '*comprehensive and correct and that all of the points now raised by the applicant were considered and rejected with detailed reasons given by the Inspector and that the applicant has provided no cogent reason for KCC to depart from the recommendation*'.

51. The applicant welcomed the Inspector's findings in respect of the elements of the legal tests which, in the Inspector's view, were met. However, the applicant did not agree with her findings in respect of the degree to which the agricultural use of the application site interfered with the recreational use of it. The applicant's position is that the evidence points to a constant pattern of use throughout the year, with agricultural and recreational use co-existing such that recreational use (for example, along the 'tramlines' created by tractors) remained at a significant level even when the crops were tall.

52. The applicant further submitted that, were the Panel minded to agree with the Inspector (i.e. that agricultural use of the application site had resulted in restricted recreational use), consideration ought to be given to registering a lesser area of land on the southern part of the application site, known as the 'bottom wedge', which had not been in active agricultural production until 2013 (albeit that the crop substantially failed in that year).

Conclusion

53. It is clear that the crux of this case concerns the sufficiency and continuity of recreational use, which falls to be considered in the context of the agricultural activities that also took place on the application site.

54. There is no dispute (and indeed it is confirmed by aerial photographs) that the application site has been in active use for agricultural purposes throughout the twenty-year period. Whilst there may have been times where part (or parts) of the application site were available for recreational use whilst the land was in agricultural production (e.g. bare patches where crops failed or the 'bottom wedge' which was predominantly un-cropped), the agricultural use was such that there were times when the land as a whole was necessarily unavailable for recreational use (other than on the Public Footpaths).

[16] Paragraph 157 of the Inspectors' report

55. It is relevant that, on the evidence presented, agricultural use of the land was by no means 'low level'; had the land been used for the taking of a single annual hay crop (for example), there *may* have been scope for uninterrupted recreational use but in this case the land was used for much more intensive purposes - including crops of wheat, barley and rapeseed. There was no evidence of any substantial damage to the crops and, indeed, any use which resulted in damage to the crop would most likely have amounted to an offence (and thus not be capable of constituting a lawful sport or pastime) in any event.

56. The applicant suggested that there had been use of the 'tramlines' created by tractors, but the Inspector's overall impression was that when crops were high such use would not have been a major or predominant use of the application site, but rather an isolated occurrence[17]. In the case of thick crops, the tramlines would have been difficult to access and recreational use would have been restricted predominantly, if not almost entirely, to the Public Footpaths.

57. Having heard the evidence, the Inspector was satisfied that recreational use during the time that crops were being grown on the application site was trivial and sporadic, and certainly insufficient to give rise to a general right to recreate over the whole of the land. Indeed, a substantial part of the Inspector's report is concerned with the inter-relationship between agricultural and recreational use of the application site; it is a matter that she considered in some detail and her conclusions would appear to be sound in this respect.

58. In respect of the applicant's point that the County Council should consider registering a lesser area (were the Panel minded to reject the application), it is clear the Inspector considered this as part of her findings and her conclusions in respect of the land apply equally to the so-called 'bottom wedge'. Whilst this 'bottom wedge' was used for cultivation only from 2013 (and the 2013 crop substantially failed), the 2014 aerial photograph shows the wheat crop and this part of the application site was used again in 2015 for a barley crop and again in 2016 for a rapeseed crop. Thus, for the very latter part of the material period, the same position applied in respect of the necessarily restricted recreational use of the land.

59. Overall, it is considered that the Inspector's approach is correct in every respect and, accordingly, that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met, such that the land subject to the application (shown at **Appendix A**) should not be registered as a new Village Green.

Recommendation

60. I recommend, for the reasons set out in the Inspector's report dated 22nd July 2019, that the applicant be informed that the application to register the land known as Hospital Field at Brabourne as a new Village Green has not been accepted.

[17] Paragraph 48 of the Inspector's report

Accountable Officer:
Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

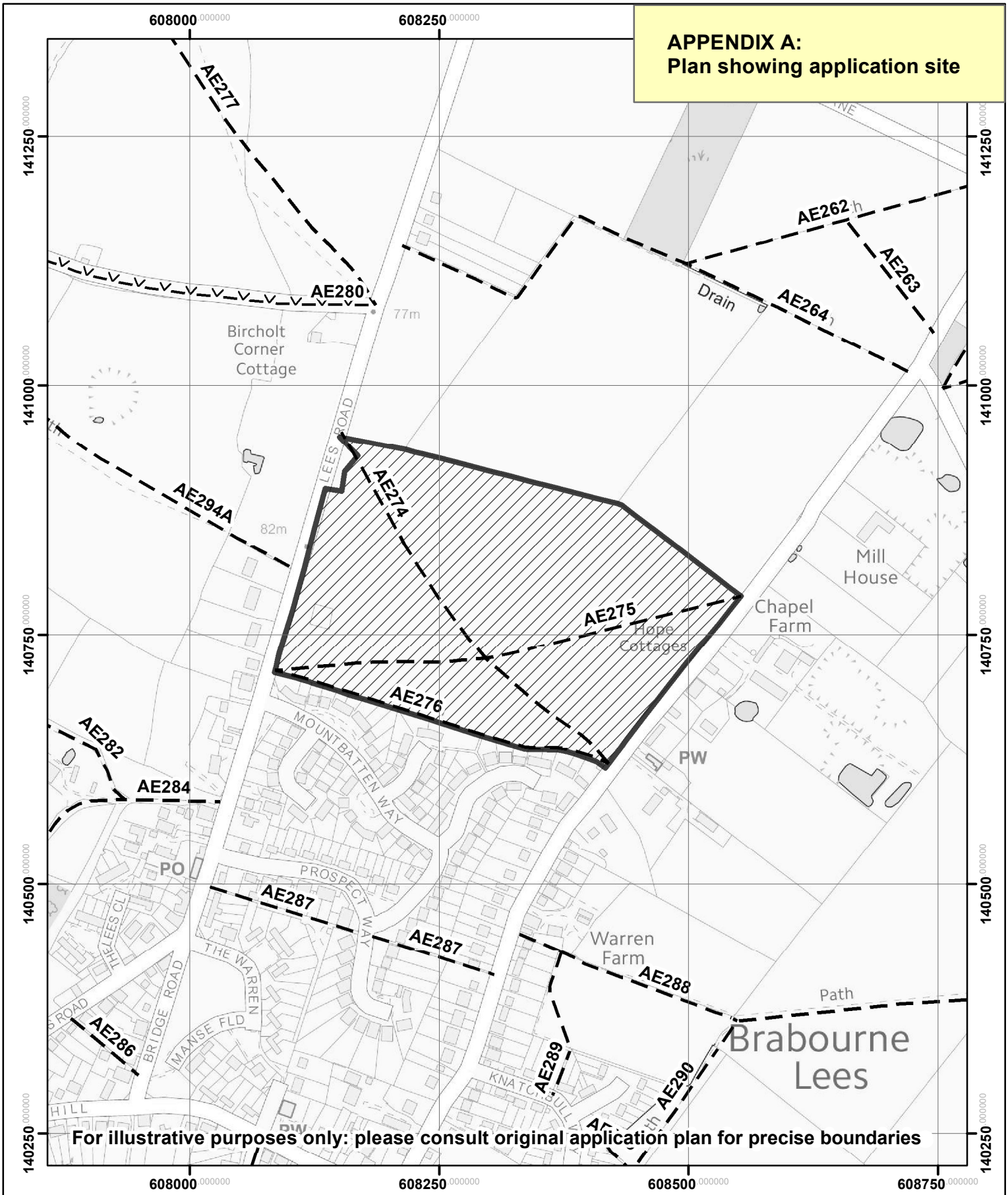
APPENDIX A – Plan showing the application site

Background documents

Inspector's report dated 22nd July 2019

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.

APPENDIX A:
Plan showing application site



For illustrative purposes only: please consult original application plan for precise boundaries

N
W E
S

Scale 1:5000

Land subject to Village Green application, known as Hospital Field, at Brabourne

Kent County Council
kent.gov.uk