AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Tuesday, 18th June, 2019, at 10.30 am
Bobbing Village Hall, Sheppey Way,
Bobbing, Sittingbourne ME9 8PL

Ask for: **Andrew Tait**
Telephone **03000 416749**

Tea/Coffee will be available 15 minutes before the meeting

Membership

Mr A H T Bowles (Chairman), Mr S C Manion (Vice-Chairman), Mr M A C Balfour, Mr I S Chittenden and Mr J M Ozog

UNRESTRICTED ITEMS

(During these items the meeting is likely to be open to the public)

1. Membership

2. Declarations of Interest by Members for items on the agenda

3. Application to register land at Cryalls Lane at Sittingbourne as a new Town or Village Green (Pages 3 - 18)

4. Application to register land at Grove Park Avenue in the parish of Borden as a new Town or illage Green (Pages 19 - 30)

5. Application to voluntarily register land at Spires Ash at Headcorn as a new Town or Village Green (Pages 31 - 48)

6. Other items which the Chairman decides are Urgent

EXEMPT ITEMS

(At the time of preparing the agenda there were no exempt items. During any such items which may arise the meeting is likely NOT to be open to the public)

Benjamin Watts
General Counsel

Monday, 10 June 2019

Application to register land at Cryalls Lane at Sittingbourne 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 18th June 2019.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 27th November 2018, that the applicant be informed that the application to register land at Cryalls Lane at Sittingbourne has not been accepted.

Local Member: Mr. M. Whiting (Swale West) Unrestricted item

Introduction

1. The County Council has received an application to register land at Cryalls Lane at Sittingbourne as a new Town or Village Green from local resident Mr. M. Baldock ("the applicant"). The application, made on 30th October 2015, was allocated the application number VGA666. 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 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**[1], e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

5. As a standard procedure set out in the 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

[1] Reduced from two years to one year for applications made after 1st October 2013, due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013.

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 situated on the western side of Cryalls Lane, opposite its junction with Brisbane Avenue, at Sittingbourne. It comprises a former cherry tree orchard of approximately 9.1 acres (3.7 hectares), accessed via an opening opposite Brisbane Avenue. There are no recorded Public Rights of Way crossing or abutting the application site, although the site is crossed by a number of worn (informal) paths.

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

8. The majority of the application site registered with the Land Registry (under title number K492436) to Ward Homes Ltd. (now part of BDW Trading Ltd.). A parcel of land in the north-eastern corner of the application site is registered to South Eastern Power Networks PLC under title number TT7600.

Previous resolution of the Regulation Committee Member Panel

9. During the consultation period, both landowners made representations in opposition to the application.

10. Ward Homes Ltd. ("the main objector") submitted that use of the application site had not taken place 'as of right' due to the existence of notices and physical obstructions on the application site, that much of the evidence relied upon was akin to 'rights of way' type of usage (i.e. walking linear routes), that much of the evidence of use came from those living outside of the claimed neighbourhood and that the number of witnesses is insufficient to conclude that use has been by a 'significant number' of local residents.

11. South Eastern Power Networks ("SEPN") objected to the application on the basis that a small section of the application site was the subject of planning consent (for an extension to the existing electricity sub-station situated on the north-western edge of the application site). It was contended, and subsequently accepted by the applicant, that the effect of that consent was to suspend the right to apply for Village Green status for that section of land.

12. The matter was considered at a Regulation Committee Member Panel meeting on 23rd October 2017[2], at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration.

13. 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.

[2] The minutes of that meeting are available at: https://democracy.kent.gov.uk/ieListDocuments.aspx?CId=182&MId=7810&Ver=4

The Public Inquiry

14. The Public Inquiry took place at the UKP Leisure Club at Sittingbourne on 19th to 21st June 2018, during which time the Inspector heard evidence from witnesses both in support of and in opposition to the application. The Inspector also undertook an accompanied site visit with representatives of both parties.

15. It is to be noted that at the pre-Inquiry meeting, the applicant agreed to amend the boundaries of the application site so as to exclude an area in the north-eastern part of the site owned by SEPN and subject to planning permission (referred to above) as well as excluding a further strip of land within the ownership of Ward Homes Ltd. that is subject to rights to lay electric cables. Although, following this amendment, SEPN no longer had any ownership interest in the application site (as amended), the company maintained an active role in the Inquiry on the basis of other rights held by it in respect of the land owned by Ward Homes Ltd. (including the presence of underground cables and a right of access to the land for the inspection of overhead cables).

16. Following the Inquiry, the Inspector produced a written report dated 27th November 2018 ("the Inspector's report") setting out her findings and conclusions. These are summarised below.

Legal tests and Inspector's findings

17. 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'?

18. 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.

19. 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[3]: "*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*"[4].

20. There was no suggestion in this case that any recreational use of the application site had taken place secretively. Although there was initially a suggestion by the main objector that, in around 2004, a ditch had been dug along the boundary with Cryalls Lane to prevent access to the site (and that any access thereafter was in exercise of force), it was conceded at the Inquiry that the ditch had been dug primarily to prevent vehicular access and pedestrian access was apparently still possible by way of earth bridges. There was no other suggestion that use had taken place in exercise of force. However, there was a question as to whether use of the application site had taken place by virtue of permission granted by the landowner.

21. The main objector's evidence was that notices had been placed on site stating that the land was owned or managed by Ward Homes and any use of it was with the consent of the owner. It was suggested that notices to this effect had been erected by an employee of the main objector on the Cryalls Lane frontage of the application site in 2003 and again (by another employee) in 2006; photographs had apparently been taken, although it was not possible for the main objector to produce copies of those photographs at the Inquiry[5]. There also appears to have been a lack of clarity as to the precise wording and locations of the alleged notices.

22. Despite the main objector's assertion to the contrary, the Inspector accepted that none of the local inhabitants had ever seen any signs on the application site, nor in fact had two of the objector's witnesses. Indeed, she expressed concerns regarding a number of discrepancies in the main objector's evidence on this issue and said[6]:

> *"I simply cannot reconcile [that] evidence with the clear and unanimous position of everyone else at the inquiry (and in written evidence) who had never seen any signs at any point and also the documentary photographic evidence from November 2008 and May 2009".*

23. Accordingly, the Inspector concluded that the main objector had failed to establish that permissive notices had been erected on the application site and she was satisfied that recreational use had therefore taken place 'as of right'[7].

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

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[3] *Dalton v Angus* (1881) 6 App Cas 740 (HL)

[4] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

[5] there was some suggestion they may have been destroyed in an office flood which occurred in December 2015 (although this was some 8 months after the main objector's initial objection to the application)

[6] Paragaph 117 of the Inspector's report. See also paragraphs 118 to 123 for a more detailed analysis of the discrepancies

[7] Paragraph 147 of the Inspector's report

24. 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*'[8].

25. Although the Inspector heard evidence that activities such as jogging, children's ball games and fruit picking had taken place on the land, she found that by far the predominant use of the land during the relevant period was for walking (especially dog walking); indeed, a some of the witnesses were not able to recall any other activities taking place on the application site.

26. In cases where the claimed usage consists largely of walking along defined tracks, it will be important to distinguish between use that involves wandering at will over a wide area and use that involves walking a defined linear route from A to B. The latter will generally be regarded as a 'rights of way type' use and, following the decision in the Laing Homes[9] case, falls to be discounted. In that case, the judge said: '*it is important to distinguish between use that would suggest to a reasonable landowner that the users believed they were exercising a public right of way to walk, with or without dogs... and use that would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of the fields*'. If the position is ambiguous, then the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the village green right)[10].

27. In the current case, the physical condition of the land is relevant. The former cherry orchard that stood on the land appears to have been bulldozed by the previous landowners some time in the 1980s. By the start of the relevant twenty-year period for the purposes of the Village Green application (i.e. 1995), after many years of neglect, the Inspector found that the land was overgrown with strong vegetation (especially brambles) but nonetheless accessible by way of mud paths. In early 2004, the land was cleared and the ditch along Cryalls Lane was dug. There has been no formal clearing of vegetation since that time and aerial photographs indicate that the land has become increasingly overgrown over time, although they do consistently show a clear and well-defined perimeter path around the site as well as two east-west worn paths.

28. The Inspector summarises her findings of fact on the nature of the recreational use as follows[11]:
    - *"Walking and dog walking have always been by far the most predominant activities that have taken place on the land;*
    - *The majority of those using the land for walking and dog walking would have used throughout the relevant period the main circular path around the land and the two east-west paths which cross the land. These paths have remained consistent throughout the relevant period.*

[8] *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
[9] *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70 at 79 per Sullivan J
[10] Oxfordshire County Council v Oxfordshire City Council and Robinson (2004) Ch 253 at [102]
[11] Paragraph 130 of the Inspector's report

- *People may well have strayed off these paths to look at something of interest or to congregate and chat with fellow walkers but these activities were incidental to their path use.*
- *A minority of people may also have used subsidiary paths which are less well defined and have come and gone during the relevant period. However, by the end of the relevant period the land was already sufficiently overgrown that the only use of it could be via the main circular and east-west paths.*
- *Other activities such as children playing off-path have been trivial and sporadic and have not occurred throughout the relevant period – for example, they are unlikely to have occurred for the year following the clearing of the land by Ward Homes in 2004 when the land was extremely muddy and also would not have occurred when the land was very overgrown at the end of the relevant period".*

29. The Inspector considers the relevant case law in detail at paragraphs 132 to 139, noting that whilst it is not necessary for every square foot of the land needs to have been walked on, it will be important that a reasonable landowner observing the use is able to deduce that a Village Green right is being asserted (as opposed to a less onerous public right of way).

30. The Inspector considered that two separate categories of path existed on the application site; firstly, the 'main' circular and east-west paths that have been consistent throughout the material period and well used by walkers and, secondly, a number of informal paths that have come and gone with the seasons and changing condition of the land. She considered that use of the first category of path ought to be discounted, such use clearly giving the outward impression of being a 'public rights of way' type of use. However, the same could not be said of the second category of path and the question was therefore whether the use of the second category of path, along with other recreational activities, was sufficient to indicate that the land was being used by a significant number of the local inhabitants throughout the relevant period.

31. As such, the Inspector concluded that[12]:

> *"In my view, whatever the position may have been at the start of the relevant period when the land was much more accessible generally, by the tail end of the relevant period the land was sufficiently overgrown that it was physically impossible to do anything but use the main paths and thus there was no – or practically no – residual use to consider. I also find that there must have been an inevitable dip in recreational activities after the major clearing in early 2004 when the field was extremely muddy and not suitable for cycling, or children's games etc. Furthermore, such activities naturally only took place when children were of a certain age (indeed, the rugby 'place making' spoken of only took place in light of the World Cup in 2003). It is therefore difficult to be certain about periods of time (this is further exacerbated in the case of the written evidence which has not been tested at the inquiry).*
>
> *It is clear to me that walking and dog walking were by far the most extensive uses of the application land… and any other activities were*

[12] Paragraphs 140 to 142 of the Inspector's report

very sporadic. Walking and dog walking must have been predominantly limited to the main paths for at least the end part of the relevant period (as they are today) due to topography and therefore I find that the applicant has failed to establish town and village green use of the land throughout the relevant period.

However, even if I am wrong about the condition of the land in 2005, I do not consider that residual use of the minor paths and other recreational activities were of a sufficient continuance and of a sufficient intensity to bring home to a reasonable observer, and in particular the landowner, that lawful sports and pastimes of some sort were taking place throughout the period which were attributable to the acquisition of a TVG right."

32. Overall, she did not consider that the evidence of use presented was sufficient to assert that the application site was in regular use by the local community for lawful sports and pastimes throughout the relevant period.

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

33. 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.

34. 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[13] case, it was considered that *'…at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality… there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition*'. The judge later went on to suggest that this might mean that locality should normally constitute '*some legally recognised administrative division of the county*'.

35. 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*'[14].

36. In this case, the applicant sought to rely upon the neighbourhood of the housing estate known as the 'New Zealand Estate' situated within the locality of the ecclesiastical parish of Borden.

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[13] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[14] ibid at page 92

37. There was no dispute at the Inquiry that the ecclesiastical parish of Borden was capable of constituting a qualifying locality for the purposes of Village Green registration.

38. With regard to 'neighbourhood', the Inspector made the following observations[15]:

> *"The New Zealand Estate was built as a single housing estate and pre-dates the neighbouring 'Australia Estate'. I walked around the estate and the Australia Estate during my site visit and was able to observe that they have different housing styles and characters. The New Zealand Estate is not only identifiable by its New Zealand place names but also has a predominance of bungalows. I accept that a lot of those who moved in when the New Zealand Estate was built have stayed and thus there is now an older community and a strong one where residents look after each other. I also accept that an estate agent or a taxi driver would identify the 'New Zealand Estate' as a distinct geographical area with clear boundaries (e.g. there is a single access road into the Estate off Borden Lane). The New Zealand Estate has been since 2001 within the Parish of Borden, whereas the Australia Estate is unparished".*

39. She later went on to conclude[16] that - by virtue of its consistent style and date of housing, clear boundaries and themed street names - the New Zealand Estate was a cohesive and clearly identifiable neighbourhood that was distinct from its neighbouring areas; it was clearly not, in her view, an area that had simply been cobbled together for the purposes of the Village Green application. As such, she was satisfied that the statutory test is met in respect of the neighbourhood and locality elements.

"a significant number"

40. 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*'[17]. 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.

41. In this regard, the Inspector found that[18]:

> *"Whilst I accept that a few resilient users of the land have ventured off the main paths – even potentially when it has been very overgrown – I do not consider that these isolated examples indicate general use of the application land by the community throughout the relevant period such that it could be said to be by a 'significant number' of local inhabitants. My view is that the activities which were not referable to the main paths*

[15] Para 124 of the Inspector's report
[16] Para 155 and 156 of the Inspector's report
[17] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[18] Paragraphs 144 and 145 of the Inspector's report

were sporadic and de minimis especially at the tail end of the relevant period. 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'.

Accordingly, given the lack of sufficient evidence of use of the application land beyond walking and dog walking and activities incidental to that on the main circular and east-west paths, I conclude that the applicant has failed to discharge the burden of proof of showing user by a 'significant number' of local inhabitants throughout the relevant period and has, further, failed to show that a TVG right was being asserted throughout the relevant period. I therefore recommend that the application should fail on this basis".

(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?

42. 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.

43. In this case, the application is made under section 15(3) of the 2006 Act on the basis that use of the application site ceased on 31st July 2015. This is the date upon which the main objector made written submissions in opposition to a previous Village Green application in respect of the same site[19]. It is considered that these submissions constituted a challenge to recreational use of the site and, as such, use ceased to be 'as of right' as of that date.

44. The date of the current application is 30th October 2015 and therefore it was made within one year from the date upon which recreational use ceased to be 'as of right' (as required by the Act).

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

45. 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' ceased on 31st July 2015. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 31st July 1995 to 31st July 2015.

46. The Inspector heard evidence from a number of witnesses at the Inquiry, several of whom had used the application site in excess of the twenty-year period. However, as noted above, she did not consider that use had taken place with the requisite sufficiency, particularly during the latter part of the material period.

[19] A previous application in respect of the same site was received on 31st March 2015, but was not taken forward due to it being affected by a 'trigger event' in Schedule 1A of the Commons Act 2006.

Statutory Incompatibility

47. In addition to the legal tests set out above, the Inspector also considered submissions that had been made to her at the Inquiry on the issue of 'statutory incompatibility'. In R (Newhaven Port and Properties Ltd.) v East Sussex County Council[20], the Supreme Court held that, regardless of the legal tests set out in section 15 of the Commons Act 2006, in cases where land is held for statutory purposes that are inconsistent with its registration as a Village Green, it is not capable of registration as such. The application site in that particular case formed part of the operational land of the port of Newhaven.

48. In the current case, SEPN made representations that registration as a Village Green would impede its ability as a Licenced Electricity Distribution Network Operator to undertake works on the application site (such as digging or other maintenance operations to access the underground or overhead cables) that might be required so as to comply with its duty to maintain the safety, efficiency, reliability and security of the electricity network. Such works would most likely contravene the provisions contained in section 12 of the Inclosure Act 1857 (which make it an offence to undertake any act which causes 'injury' to a green or interferes with recreational use) and section 29 of the Commons Act 1876 (which render disturbance of the soil a public nuisance). There is currently no specific authority as to whether the digging up of a Village Green in exercise of a different statutory duty (to maintain power cables in this case) would create an offence under these Victorian statutes.

49. The Inspector did not consider that the position here was comparable to that in the Newhaven case. She explained[21] that in Newhaven, the Port Authority had a very specific set of duties that would be clearly impeded by the registration of its land as a Village Green and the Court was satisfied that there was a 'clear incompatibility' between the use of the land as a working harbour and its registration as a Village Green.

50. She concluded[22]:

> *"I do not consider that SEPN's duties are anywhere near as "clearly impeded" by registration of the land as a village green as the Port Authority's were. As I have said, the likelihood of the land needing to be 'injured' is infrequent and it is not clear if this would necessary be a breach of the Victorian statutes in any event. I consider that SEPN could carry out its duties to OFGEM post-registration on a day-to-day basis with only a theoretical risk of prosecution were it to have to cause temporary damage to the land itself or impede public recreation (albeit this would be a rare occurrence and has not, as far as SEPN is aware, occurred in the last 40 years). I also note that, unlike in Newhaven, SEPN does not hold the land for a statutory purpose. It merely has the benefit of certain rights in the form of easements and wayleaves. Such rights could be terminated by the landowner at any time, in any event.*

[20] [2015] UKSC 7
[21] Paragraph 163 of the Inspector's report
[22] Paragraphs 164 and 165 of the Inspector's report

…on balance, the existence of the underground cables and wayleaves are insufficient to prevent registration of land as a village green. Given the extent of the electricity network, it is very hard to believe that there are not numerous examples of village greens where there is some form of underground apparatus which may require maintenance or repair at some point. I do not consider that the Victorian statutes were designed to prevent that sort of activity and I consider it highly unlikely that any prosecuting authority would treat them in that way".

Inspector's conclusion

51. The Inspector's overall conclusion[23] 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".

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

Subsequent correspondence

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

54. The main objector offered support for the Inspector's findings and recommendation.

55. The applicant raised concerns that one of the aspects of his case had not been addressed in the Inspectors' report. It was not in dispute that on 23rd June 2008, the main objector had deposited a statement with the County Council under section 31(6) of the Highways Act 1980. This provision enables a landowner to confirm what, if any, public rights of way exist on his land and to confirm that no additional ways are dedicated for public use. It has the effect of preventing the acquisition (through use) of any further public rights of way by enabling the landowner to demonstrate that he has no intention to dedicate such rights.

56. The applicant's position is that the deposition of the statement by the main objector meant that any subsequent use of the paths around and across the application site would not have had the appearance to the landowner of being a 'rights of way' type of use, and could not be attributable as such, because the landowner had already taken steps to ensure that no such rights could be acquired. Therefore, as the use of the paths could not be relied upon to acquire any public rights of way, it must be considered as qualifying use for the purposes of the Village Green application.

57. The Inspector dealt with this point in a separate note[24] and, whilst accepting that she had not directly addressed it in her original report, she did not consider that it had any bearing on her recommendation. She said:

[23] Paragraph 166 of the Inspectors' report
[24] Dated 5th March 2019

"The question is how the use would have appeared to an objective landowner and whether the conduct brings home to the owner that a TVG right is being asserted. The fact that emergent footpath use is highly unlikely in reality to result in the acquisition of a PROW right due to the depositing of a statement does not mean that it is TVG use. In my opinion, such use would appear to a reasonable landowner to be footpath use which they had ensured could not result in PROWs being established by virtue of having deposited the statement. It is not a use which has the character of the assertion of a TVG right.

Therefore, I maintain my view that the use of the 'main' circular and east-west paths would bring home to a landowner the assertion of a public right of way and not a village green right (even though the depositing of the statement means that it is highly unlikely that any PROWs could ever be established on the land).

Accordingly, my recommendation in the Report that the application should fail in full for the reason that the applicant has failed to show 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 period stands".

Conclusion

58. It is clear that this case turns on the nature of the recreational use of the application site, particularly with regard to the use of the worn paths on the site and the extent of the recreational use towards the latter part of the material period. That is an issue that turns on findings of fact and the overall impression arising from the evidence, not only in terms of that heard orally at the Inquiry but also the Inspector's summary of that evidence as well as the written evidence submitted in support of the application.

59. No challenge is made to the Inspector's summary of the evidence presented at the Inquiry (set out at paragraphs 12 to 100 in her report). The impression given by the evidence is that walking and dog walking had comprised the '*predominant activity*' (see paragraph 16) and that the '*worn paths reflect the routes that people predominantly use*' (see paragraph 39). One witness went so far as to say that it was '*impossible to do anything but walk around the land*' (see paragraph 29). There was evidence that at least some of that walking involved using the land as a short-cut to the wider PROW network and/or local schools (see for example paragraphs 21, 22, 23, 28 and 60).

60. It is fair to say that walking was not the only activity that took place on the land; reference was also made by witnesses to activities such as children playing and fruit picking taking place on the land. By contrast, though, those activities were dependent on the physical condition of the land and were necessarily restricted during periods of thick vegetation covering the land or the muddy state of the land following its clearance in the mid-1990s. Activities beyond walking (or running) were not an everyday occurrence and more sporadic in nature, particularly towards the latter part of the material period. On balance, it is unlikely that they were sufficient in nature and frequency to indicate to the landowner that the land was in general recreational use by the community, outside of the rights of way

usage.

61. In terms of the applicant's comments on the section 31(6) issue, it does not follow that the landowner should have been aware that a Village Green right was being asserted (as opposed to a right of way) merely because he had taken steps to protect his land against the formal creation of Public Footpaths. Section 31(6) exists to provide a (non-physical) means by which landowners can protect their land, but that is not to say that continued usage should then be capable of giving right to an alternative right. Indeed, there may well be situations in which a landowner is perfectly happy to allow access to his land, but simply does not want the public to acquire a formal right of way (in which case section 31(6) can be used to prevent this). Regardless of the existence of the s31(6) statement in this case, the use of the defined tracks would nonetheless still have had the outward appearance of a rights of way usage (albeit that formal rights could not be acquired), rather than a general right to recreate over the whole of the application site.

62. 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

63. I recommend, for the reasons set out in the Inspector's report dated 27th November 2018, that the applicant be informed that the application to register land at Cryalls Lane at Sittingbourne has not been accepted.

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

The main file is available for viewing on request at the PROW and Access Service, Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

Appendices

APPENDIX A – Plan showing application site

Background documents

Inspector's report dated 28th November 2018
Inspector's response to the applicant's comments dated 23rd January 2019

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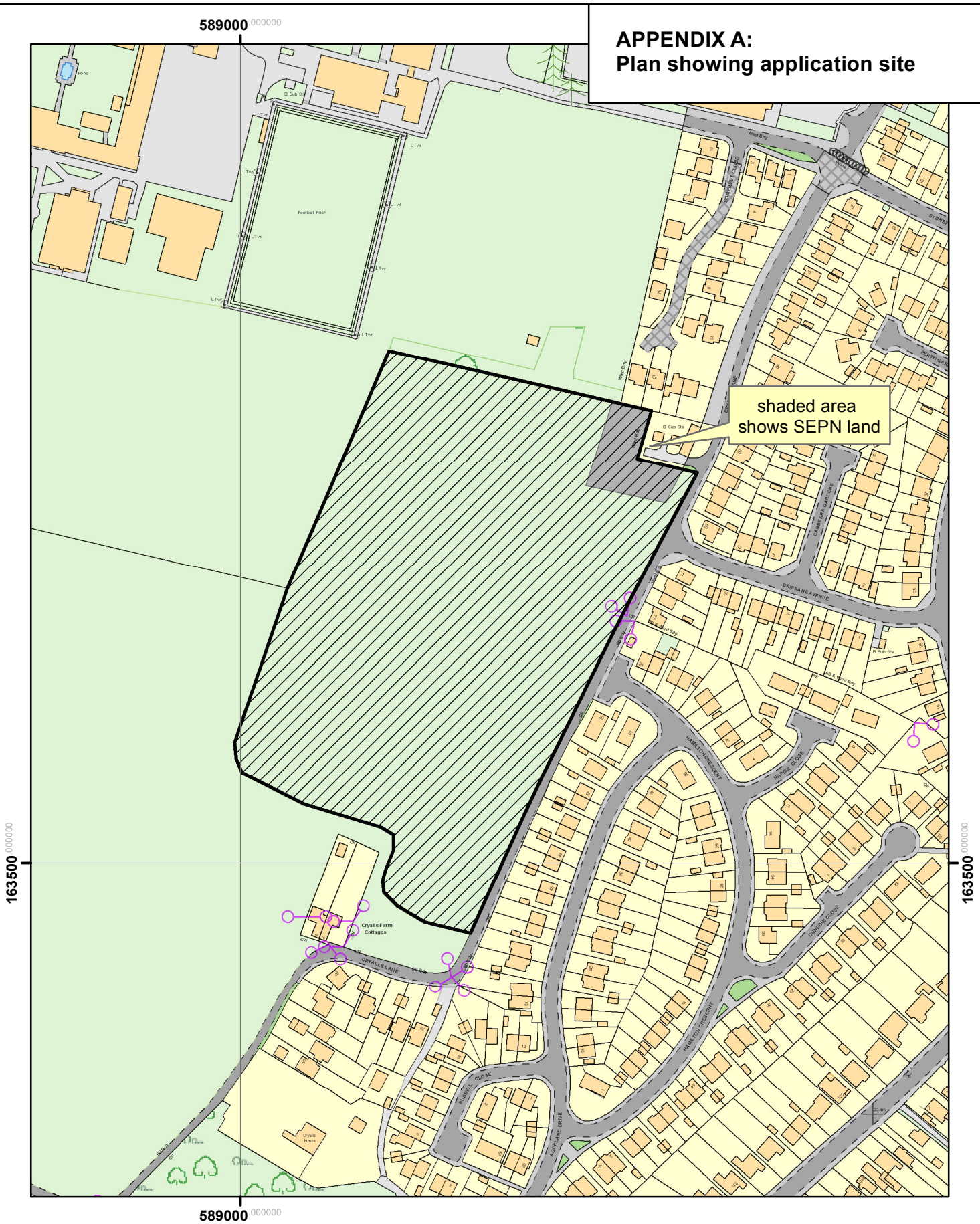
APPENDIX A:
Plan showing application site



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Land subject to Village Green application at Cryalls Lane in Sittingbourne

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Application to register land at Grove Park Avenue in the parish of Borden 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 18th June 2019.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 8th July 2018, that the applicant be informed that the application to register land at Grove Park Avenue at Sittingbourne has not been accepted.

Local Member: Mr. M. Whiting (Swale West) Unrestricted item

Introduction

1. The County Council has received an application to register land at Grove Park Avenue at Borden, near Sittingbourne, as a new Town or Village Green from local resident Mr. M. Baldock ("the applicant"). The application, made on 31st May 2016, was allocated the application number VGA668. A plan of the site is shown at **Appendix A** to this report.

Procedure

2. The application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 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**[1], e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

5. As a standard procedure set out in the 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.

[1] Reduced from two years to one year for applications made after 1st October 2013, due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013.

The application site

6. The piece of land subject to this application ("the application site") is officially situated within the parish of Borden, although it is also commonly referred to as part of Sittingbourne. It consists of a strip of grassed open space of approximately 0.57 acres (0.23 hectares) in size situated at the junction of Wises Lane and London Road (A2) and extending east along a corridor between the northern side of Grove Park Avenue and the southern side of fencing abutting the London Road (A2). Access to the application site is unrestricted via the footways of Wises Lane and Grove Park Avenue. The application site is shown in more detail on the plan at **Appendix A**.

7. It is to be noted that the majority of the application site is owned by Taylor Wimpey UK Ltd. and is registered with the Land Registry under title number K91230. A rectangle of land in the north-western corner of the application site is registered to the Highways England Company Ltd. under title number K937957. Both landowners have been notified of the application, but neither has responded.

Previous resolution of the Regulation Committee Member Panel

8. Following the consultation, objections to the application were received from Swale Borough Council ("the Borough Council") and Montagu Evans LLP on behalf of Mulberry Estates Sittingbourne Ltd. ("the objector"), which is the promoter of development on land to the south of Wises Lane that may require part of the application site for highway improvements.

9. The Borough Council expressed concern regarding the impact of the Village Green application on planning for future development and noted that it would be inappropriate to designate Village Green status for the application site as it could prejudice proper planning for development needs and supporting infrastructure (on the basis that the junction of Wises Lane and the London Road (A2) was key to achieving access to a major development site to the south of the Village Green application site).

10. The second objection, from Mulberry Estates Sittingbourne Ltd., was made on the basis that the application site has been identified as highway land and was therefore was not capable of registration as a Village Green.

11. The matter was considered at a Regulation Committee Member Panel meeting on 23rd October 2017[2], 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.

[2] The minutes of that meeting can be found at:
https://democracy.kent.gov.uk/ieListDocuments.aspx?CId=182&MId=7810&Ver=4

The Public Inquiry

13. The Public Inquiry took place at the UKP Leisure Club at Sittingbourne on 18th and 19th April 2018, during which time the Inspector heard evidence from witnesses both in support of and in opposition to the application. The Inspector also undertook an accompanied site visit with representatives of both parties.

14. The Inspector subsequently produced a written report dated 8th July 2018 ("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. In order to be qualifying use for the purpose of Village Green registration, it must have taken place 'as of right'; this means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*'). Permission in this context includes not only the express permission of the landowner, but also situations whereby use is by virtue of some existing right (e.g. where the land is specifically provided for the purposes of public recreation).

17. In this case, there is no suggestion that use of the application site took place secretively or forcibly; however, there is an issue as to whether use of the land can be considered to be in exercise of an existing right. The objector's position is that the application site is highway land and, that being the case, any use of it is therefore by virtue of the right to use it for highway purposes.

    Whether the application site is highway land

18. The first issue before the Inspector was whether the application site is highway land. In this regard, she heard independent oral evidence from the County Council's Senior Highway Definition Officer and considered documentary evidence, including Council records and a deed dated 28th January 1969 ("the 1969 Deed") in which the County Council agreed to take over the road now known as Grove Park Avenue and all verges (including the greater part of the application site) as a highway maintainable at the public expense.

19. Whilst there was no documented evidence to confirm that the adoption took place, she considered[3] that it had done on the basis that the County Council (and Swale Borough Council as its agent) had always maintained the land and the road itself is recorded in the List of Streets[4].

20. In respect of the small rectangle of land in the north-western corner of the application site, the Inspector was satisfied that this had been acquired by the Department of Transport in connection with he construction of the A2 and that, following the de-trunking of the A2, the ownership automatically passed to the County Council as Highway Authority under section 265 of the Highways Act 1980 (albeit that Highways England remains the registered landowner) and it has been treated as adopted highway[5].

21. She considered that in both cases the legal presumption of regularity should apply (i.e. that the authority has acted lawfully and in accordance with its duty) and recommended "*as a matter of fact that the registration authority should consider the whole of the application land as highway land*"[6].

The legal consequences of the land being highway land

22. Having concluded that the whole of the application site was highway land, the Inspector went on to consider the legal consequences of that in the context of the Village Green application.

23. Her starting point was that the statutory definition of a Village Green (both in the current Commons Act 2006 and its predecessor the Commons Registration Act 1965) has never expressly precluded highway land from being registerable as a Village Green. However, the case law in respect of the expression 'as of right' indicates that where use is permitted by the landowner, it cannot be qualifying use for the purposes of Village Green registration; indeed, it will normally only be qualifying use where it is trespassory in nature.

24. She referred to the House of Lords decision in DPP v Jones [1999] 2 AC 240 and noted that:

> *"[that case] is not to do with registration of land as a town or village green. The issue was, rather, whether the public were trespassing on highway land by holding a peaceful, non-obstructive assembly. It was held that they were not trespassing. The public highway is a public place that the public might enjoy for any reasonable purpose, provided that the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the public's primary right to pass and repass, and within those qualifications there was a public right of peaceful assembly on the highway.*

[3] Para 39 of the Inspector's report
[4] The List of Streets is '*a list of the street within [the] area which are highways maintainable at public expense'* required to be kept by the Highway Authority under section 36(6) of the Highways Act 1980. For Kent, this is available at: http://www.kent.gov.uk/roads-and-travel/what-we-look-after/roads/public-and-private-roads
[5] Para 40 of the Inspector's report
[6] Paras 41 and 42 of the Inspector's report

DPP v Jones is thus authority (of the highest level) that the extent of activities that may lawfully carried out on the public highway is far greater than simply using the highway to pass and re-pass. Anything reasonable can be done provided it does not obstruct the right of passage or cause a nuisance.

Applying that then to the wide ambit of lawful sports and pastimes which may be carried out on town or village greens means that a vast number (if not all) activities that are normally carried out on a town or village green may also lawfully be carried out on a highway verge. That being so, such activities would be lawful in any event on highway land and thus not capable of founding the acquisition of a prescriptive right by user 'as if of right'. Another way of putting it is that the public are not trespassing on the highway verge when they carry out these sorts of activities".

25. Her overall conclusions on this point were as follows:

"(a) There is nothing per se which precludes highway land from being registered as a town or village green;

(b) Indeed there may be in existence a number of pieces of land which are highway land which are registered, in particular there are a number of footpaths which cross town or village greens;

(c) However, qualifying user has to be 'as of right' rather than by virtue of an existing right which the public already have to use the land;

(d) The range of activities which the public may carry out on highway land is wide following DPP v Jones. The right extends to anything reasonable which does not interfere with the public's right of passage or cause a nuisance.

(e) If an activity were such as to cause a public or private nuisance, then it may not be a 'lawful' sport or pastime in any event".

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

26. 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*'[7].

27. The user evidence given at the Inquiry is set out at paragraphs 67 to 117 of the Inspector's report. That evidence indicates that the application site was used for a range of recreational activities, including ball games, children playing 'hide and seek', BBQs, frisbee, picnics and golf practice.

28. However, the key issue before the Inspector was whether any of that use could be considered 'as of right' and therefore qualifying use for the purposes of an application under section 15 of the Commons Act 2006. As set out above, for the

[7] *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

use to be 'as of right' it needed to be unconnected to the lawful use of the land as highway verge. In this regard, the Inspector concluded that[8]:

> *"the application is bound to fail on account of there being no use of the application land which can qualify as a 'lawful sports and pastime' for the purposes of acquiring a village green prescriptive right. This is because all of the activities which local residents have carried out on the land have been lawful uses of the highway verge and thus they undertook those activities by virtue of a pre-existing right they had. They were not trespassers".*

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

29. 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.

30. 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[9] 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 cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible 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*'[10].

32. In this case, it is not in dispute that the relevant locality is the parish of Borden[11], which is of course a legally recognised administrative division.

33. On the question of neighbourhood, the applicant originally relied upon 'Grove Park Avenue' but, prior to the Inquiry, also advanced two further potential neighbourhoods known as the 'Wises Lane Estate' and 'South West Sittingbourne'.

34. It was suggested by the objector that Grove Park Avenue was not, of itself, capable of constituting a qualifying neighbourhood, it being a single street and

[8] Paragraph 125 of the Inspector's report
[9] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[10] ibid at page 92
[11] Para 22 of the Inspector's report

therefore too small to constitute a neighbourhood for the purposes of a Village Green application. However, the Inspector disagreed with this argument and, having regard to recent case law[12], considered instead that the answer would most likely depend upon the particular characteristics of the area. She said[13]:

> *"I note that there is no limit on size for a neighbourhood (whether that may be large or small). It may well be that a single street has sufficient cohesiveness to be regarded objectively as having a distinct identity from the surrounding streets. In the case of Grove Park Avenue, there are strong factors to suggest this is so. In particular, it is a cul-de-sac and so has clear boundaries. The houses were all built together at the same time and so the residents arrived at once and formed an instant community which has stayed, as [one witness] explained. There is a Neighbourhood Watch and, although it encompasses other streets, each street has its own representatives who report to [the neighbourhood watch coordinator]. It is clear that the residents of Grove Park Avenue feel a particular identity and hold events together such as the BBQs and street parties referred to. I do not consider that Grove Park Avenue can in any way be said to be an artificial construct 'cobbled together' for the purposes for the village green application. In my opinion, Grove Park Avenue is sufficiently cohesive to be regarded as a neighbourhood in its own right".*

"a significant number"

35. 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*'[14]. 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.

36. In this regard the Inspector found that, had the recreational use submitted in support of the application been 'as of right' (which, in her opinion, it was not for the reasons set out above) then she would have been satisfied that it would have been sufficient to indicate that the land was in general use by the community[15].

(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?

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

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[12] *R (Oxfordshire and Buckinghamshire NHS Foundation Trust) v Oxfordshire CC* [2007] EWHC 776 (Admin)
[13] Para 132 of the Inspector's report
[14] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71
[15] Para 137 of the Inspector's report

38. In this case, the application is made under section 15(2) of the 2006 Act and no evidence has been presented to suggest that the actual use of the application site for recreational purposes ceased prior to the making of the application. However, as stated above, it has not been possible to conclude that the recreational use taking place did so 'as of right'.

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

39. 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' did not cease prior to the making of the application on 31st May 2016. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 31st May 1996 to 31st May 2016.

40. The Inspector heard evidence in support of the application from 9 witnesses, collectively spanning the material period. Although she does not conclude specifically on this point, she was satisfied that the use of the application site was sufficient to indicate that it was in general use of the community and, by implication, throughout the material period.

Inspector's conclusion

41. The Inspector's overall conclusion was that[16]:

> *"the application should fail in full for the reason that the applicant has failed to show that:*
>
> *(i) Any of the recreational use of the land that took place during the relevant period was 'as of right'. This is because, on balance, the evidence shows that the whole of the application land is highway land. The use which took place was carried out lawfully by virtue of the public's right to use the land as highway land and thus cannot amount to use which can go towards the acquisition of a prescriptive right".*

Subsequent correspondence

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

43. The objector did not submit any comments in respect of the report.

44. The applicant disputes the Inspector's findings in respect of the small rectangle land owned by Highways England as well as her interpretation of the House of Lords decision in DPP v Jones.

45. In terms of the Highways England parcel of land, the applicant asserts that it is a matter of opinion whether or not this is considered highway land and an issue that could equally be argued both ways. In response, the Inspector notes that her finding on this point has been reached on a balance of probabilities on the basis of the evidence before her.

[16] Paragraph 138 of the Inspectors' report

46. With regard to the DPP v Jones case, the applicant's position is that whilst this case is frequently cited as authority for the proposition that the public have a wide-ranging right of access on highway land (provided there is no interference with the right to pass and repass), the decision was not unanimous, with two of the five Lords sitting on the case giving dissenting judgements. The two dissenting Lords both argued that the legal authorities clearly supported the proposition that the public's rights to use the highway are limited to passage, re-passage and anything incidental or ancillary to that right. As such, the judgement should be read such that activities that take place on the highway are not undertaken 'by right' but rather on the basis that they would not be unreasonable in certain circumstances. The decision does not create any right as such to use the highway for recreational purposes; most of the use on the Village Green application site is therefore of a nature that is tolerated as opposed to in exercise of a legal right.

47. The Inspector's response to this point is that the passage relied upon by her in the DPP v Jones case is the *ratio decidendi* (i.e. the passage that establishes the legal precedent) whilst the dissenting judgements relied upon by the applicant are not legally binding and do not carry the same weight as the *ratio decidendi*. She agrees that the test to be applied depends upon the individual circumstances of each case and the kind of activities that are expected to take place on a highway verge are different to those one would expect to see on a main road. She adds that there is no binding court judgement specifically dealing with the recreational use of highway land in the context of section 15 of the Commons Act 2006, and her job as an Inspector is to make a recommendation on the basis of the view that the courts are most likely to take.

48. As such, having carefully reviewed the applicant's comments, the Inspector remains of the view that the application should be refused in full.

Conclusion

49. The crux of the matter in this case appears to be whether the application site can be considered 'highway land', which in turn informs the conclusion as to whether use of the application site can be considered 'as of right'.

50. There can be little doubt, on the basis of 1969 Deed, that it was clearly the intention of the developer for the road now known as Grove Park Avenue and the associated verges (which form part of the application site) to become highways maintainable at the public expense. The active maintenance of the road and verge by the County Council, and the inclusion of Grove Park Avenue on the 'List of Streets' suggests beyond any reasonable doubt (and in the absence of any documentary confirmation) that the adoption took place as set out in the 1969 Deed. The rectangle of land on the north-western side of the application site, whilst excluded from the 1969 Deed, appears to have been treated the same as the remainder of the site in terms of maintenance (there being no physical delineation between the two parts) and was originally acquired by the Department of Transport for highway-related purposes. The County Council, in its capacity as Highway Authority, considers this to be highway land - indeed, it is included as such on their mapping - and therefore, on a balance of probabilities, it would not be unreasonable to conclude that it is. Accordingly, the whole of the application site appears to be highway land.

51. That being the case, it is necessary to determine whether the recreational activities that took place on the application site did so 'as of right' or whether they can be considered an extension of a 'highway-type use'. As is noted by the Inspector, there is no direct judicial authority on this issue in the context of Village Green applications and, as such, the closest guidance available is the judgement in DPP v Jones. That case was not concerned with a Village Green application, but with the question of whether a peaceful assembly on the highway verge could be considered an act of trespass. The majority judgement held that any reasonable activity that does not obstruct the highway or create a nuisance is not trespassory in nature – i.e. that the public's right to use the highway extends to such activities. Looking at the evidence of recreational use submitted in support of the application, few (if any) of the activities could properly be said to constitute a nuisance or an obstruction and, as such, it is difficult to consider those using the application site doing so as trespassers; the users had an existing right to use the land by virtue of it forming part of the highway verge, and therefore use was not 'as of right'.

52. Having carefully reviewed the Inspector's analysis of the evidence (contained in her report), it would appear that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met and the land subject to the application (shown at **Appendix A**) should not be registered as a new Village Green.

Recommendation

53. I recommend, for the reasons set out in the Inspector's report dated 8th July 2018, that the applicant be informed that the application to register land at Grove Park Avenue at Sittingbourne has not been accepted.

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

The main file is available for viewing on request at the PROW and Access Service, Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

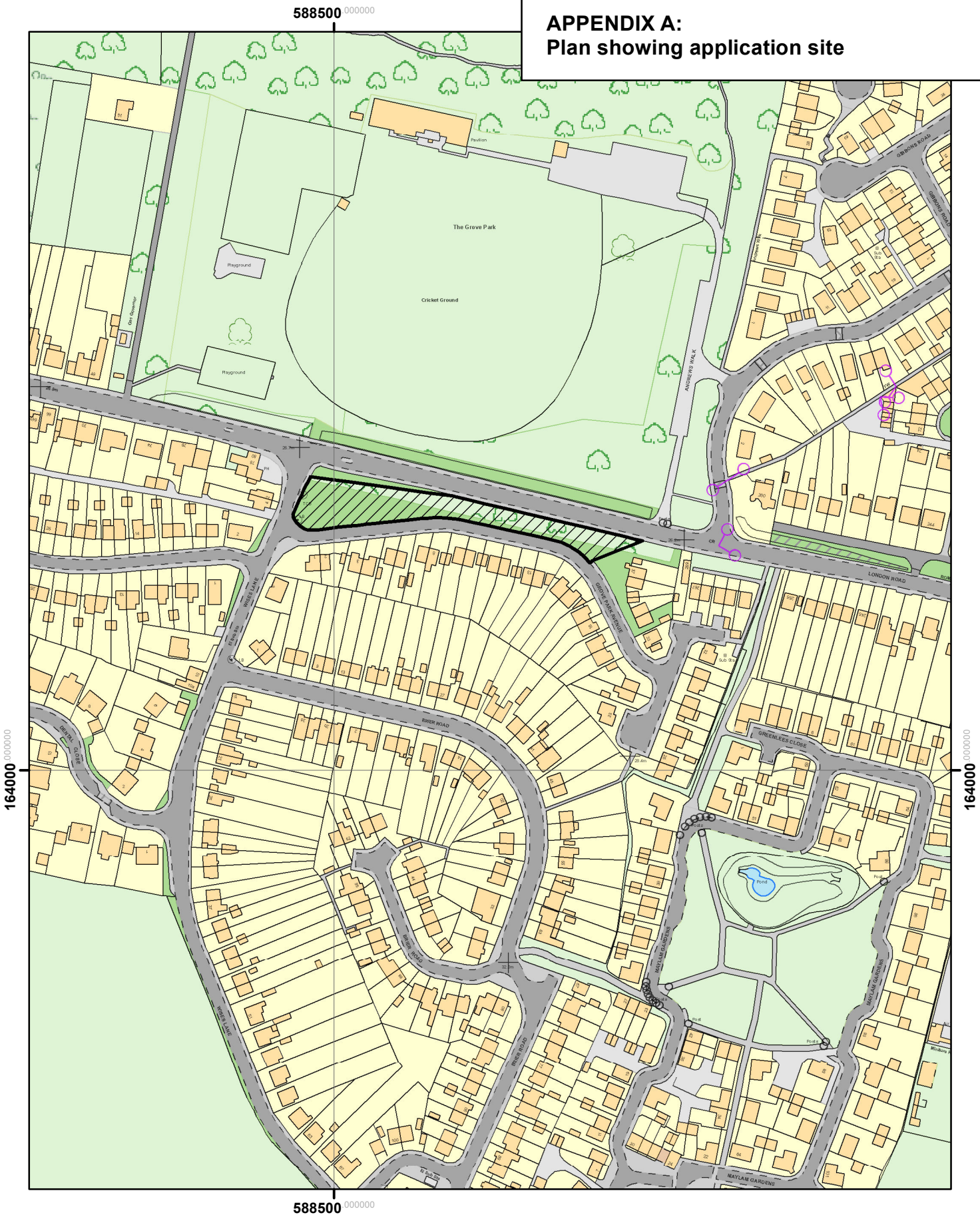
Appendices

APPENDIX A – Plan showing application site

Background documents

Inspector's report dated 7th July 2018
Inspector's response to applicant's comments dated 10th September 2018
Deed dated 28th January 1969 between George Wimpey Ltd. and Kent County Council

APPENDIX A:
Plan showing application site



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Land subject to Village Green application at Grove Park Avenue at Sittingbourne

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Application to register land known as Spires Ash at Headcorn as a new Town or Village Green

A report by the PROW and Access Service Manager to Kent County Council's Regulation Committee Member Panel on 18th June 2019.

Recommendation: I recommend that the County Council informs the applicant that the application to register the land known as Spires Ash at Headcorn has been accepted, and that the land subject to the application (as shown at Appendix A) be formally registered as a Town or Village Green.

Local Member: Ms. S. Prendergast Unrestricted item

Introduction

1. The County Council has received an application to register a piece of land known as Spires Ash at Headcorn, near Maidstone as a new Town or Village Green from the Headcorn Parish Council ("the applicant"). The application, made on 15th February 2018, was allocated the application number VGA676. 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. Traditionally, Town and Village Greens have derived from customary law and until recently it was only possible to register land as a new Town or Village Green where certain qualifying criteria were met: i.e. where it could be shown that the land in question had been used 'as of right' for recreational purposes by the local residents for a period of at least 20 years.

3. However, a new provision has been introduced by the Commons Act 2006 which enables the owner of any land to apply to voluntarily register the land as a new Village Green without having to meet the qualifying criteria. Section 15 states:
   "(8) The owner of any land may apply to the Commons Registration Authority to register the land as a town or village green.
   (9) An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land."

4. Land which is voluntarily registered as a Town or Village Green under section 15(8) of the Commons Act 2006 enjoys the same level of statutory protection as that of all other registered greens and local people will have a guaranteed right to use the land for informal recreational purposes in perpetuity. This means that once the land is registered it cannot be removed from the formal Register of Town or Village Greens (other than by statutory process) and must be kept free of development or other encroachments.

5. In determining the application, the County Council must consider very carefully the relevant legal tests. In the present case, it must be satisfied that the applicant is the owner of the land and that any necessary consents have been obtained (e.g. from a

tenant or the owner of a relevant charge). Provided that these tests are met, then the County Council is under a duty to grant the application and register the land as a Town or Village Green.

The Case

Description of the land

6. A plan showing the area of land to be considered for Village Green status ("the application site"), which consists of two parcels of land on the northern side of Sharp's Field at Headcorn, is attached at **Appendix A**.

Notice of Application

7. As required by the regulations, notice of the application was published on the County Council's website. The local County Member was also informed of the application.

Ownership of the land

8. A Land Registry search has been undertaken which confirms that the application site is wholly owned by the applicant under title number K791722. A copy of the relevant Register of Title is attached at **Appendix C.**

9. There are no other interested parties (e.g. leaseholders or owners of relevant charges) named on the Registers of Title.

The 'locality'

10. DEFRA's view is that once land is registered as a Town or Village Green, only the residents of the locality have the legal right to use the land for the purposes of lawful sports and pastimes. It is therefore necessary to identify the locality in which the users of the land reside.

11. A locality for these purposes normally consists of a recognised administrative area (e.g. civil parish or electoral ward) or a cohesive entity (such as a village or housing estate).

12. In this case, the application has been made by the local Parish Council. As noted above, a civil parish is a qualifying locality for the purposes of Village Green registration and, as such, it seems appropriate that the relevant locality in this case should be the civil parish of Headcorn.

Conclusion

13. As stated at paragraph 3 above, the relevant criteria for the voluntary registration of land as a new Town or Village Green under section 15(8) of the Commons Act 2006 requires only that the County Council is satisfied that the land is owned by the applicant. There is no need for the applicant to demonstrate use of the land 'as of right' for the purposes of lawful sports and pastimes over a particular period.

14. It can be concluded that all the necessary criteria concerning the voluntary registration of the land as a Village Green have been met.

Recommendation

15. I recommend that the County Council informs the applicant that the application to register the land known as Spires Ash at Headcorn has been accepted, and that the land subject to the application (as amended and shown at **Appendix A**) be formally registered as a Town or Village Green.

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

The main file is available for viewing on request at the PROW and Access Service based at Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

Background documents

APPENDIX A – Plan showing application site (as amended)
APPENDIX B – Copy of application form
APPENDIX C – Copy of the Registers of Title from Land Registry

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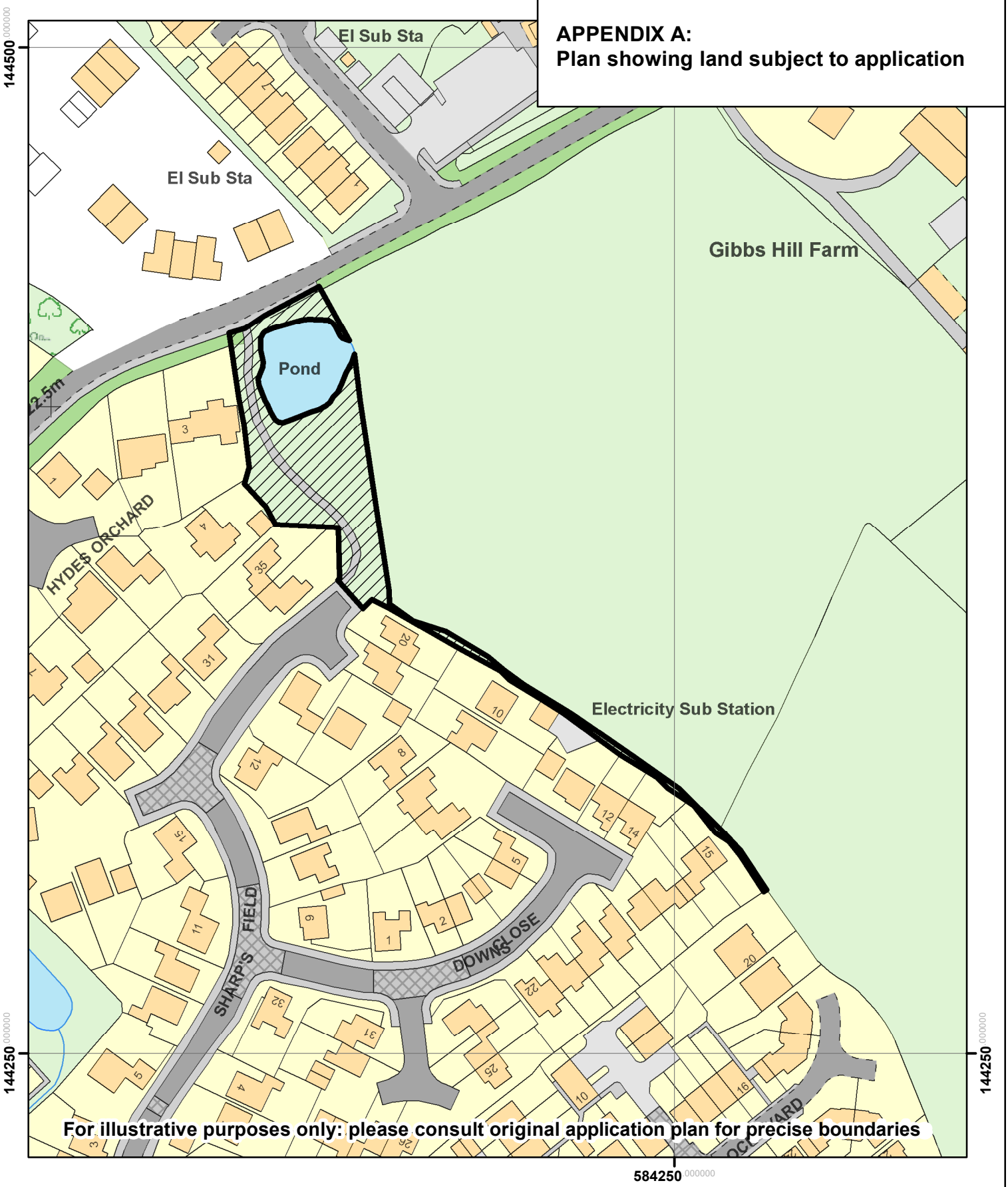
APPENDIX A:
Plan showing land subject to application



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

N
W E
S

Scale 1:1250

Land subject to Village Green application at Spires Ash at Headcorn

Kent County Council
kent.gov.uk

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APPENDIX B: Copy of application form

FORM CA9

Commons Act 2006: section 15

Application for the registration of land as a new Town or Village Green

This section is for office use only

Official stamp of the Registration Authority indicating date of receipt:

COMMONS ACT 2006
KENT COUNTY COUNCIL
REGISTRATION AUTHORITY
15 MAR 2018

Application number:

VGA676

VG number allocated at registration (if application is successful):

Note to applicants

Applicants are advised to read the 'Part 1 of the Commons Act 2006 (changes to the commons registers): Guidance to applicants in the pilot implementation areas' and to note the following:

- All applicants should complete parts 1–6 and 10–12.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete parts 7 and 8. Any person can apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete part 9. Only the owner of the land can apply under section 15(8).
- There is no fee for applications under section 15.

Note 1
Insert name of Commons Registration Authority

1. Commons Registration Authority

To the:

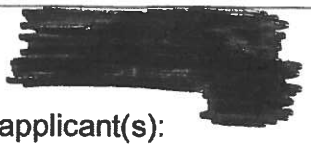
KENT COUNTY COUNCIL
INVICTA HOUSE
COUNTY HALL
MAIDSTONE
ME14 1XX

Note 2 *If there is more than one applicant, list all names. Use a separate sheet if necessary. State the full title of the organisation if the applicant is a body corporate or unincorporate. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email. If part 3 is not completed all correspondence and notices will be sent to the first named applicant.*	**2. Name and address of the applicant** Name: HEADCORN PARISH COUNCIL Full postal address: PARISH OFFICE (incl. Postcode) CHURCH LANE HEADCORN TN27 9NR Telephone number: 01622 892496 (incl. national dialling code) Fax number: (incl. national dialling code) E-mail address: clerk@headcornpc.org.uk
Note 3 *This part should be completed if a representative, e.g. a solicitor, is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here. If you supply an email address in the box provided, you may receive communications from the Registration Authority or other persons (e.g. objectors) via email.*	**3. Name and address of representative, if any** Name: Firm: Full postal address: (incl. Postcode) Telephone number: (incl. national dialling code) Fax number: (incl. national dialling code) E-mail address:
Note 4 *For further details of the requirements of an application refer to Schedule 4, paragraph 9 to the Commons Registration (England) Regulations 2008.*	**4. Basis of application for registration and qualifying criteria** If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5. Application made under section 15(8): ☑ If the application is made under section 15(1) of the Act, please tick one of the following boxes to indicate which particular subsection and qualifying criterion applies to the case. Section 15(2) applies: ☐ Section 15(3) applies: ☐ Section 15(4) applies: ☐

	If section 15(3) or (4) applies, please indicate the date on which you consider that use 'as of right' ended and why:
**Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.*	If section 15(6)* is being relied upon in determining the period of 20 years, indicate the period of statutory closure (if any) which needs to be disregarded:
Note 5 *This part is to identify the new green. The accompanying map must be at a scale of at least 1:2,500 and shows the land by means of distinctive colouring within an accurately identified boundary. State the Land Registry title number where known.*	**5. Description and particulars of the area of land in respect of which application for registration is made** Name by which usually known: SPIRES ASH Location: LAND OFF GRICE LANE TWO PARCELS OF LAND LYING ON THE NORTHERN SIDE OF SHARPS FIELD HEADCORN Common Land register unit number (only if the land is already registered Common Land): Please tick the box to confirm that you have attached a map of the land (at a scale of at least 1:2,500): ☐
Note 6 *It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly at a scale of 1:10,000.*	**6. Locality or neighbourhood within a locality in respect of which the application is made** Indicate the locality (or neighbourhood within the locality) to which the claimed green relates by writing the administrative area or geographical area by name below and/or by attaching a map on which the area is clearly marked: SCALE MAP ATTACHED Please tick here if a map is attached (at a scale of 1:10,000): ☐

Note 7 *Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.* *This information is not needed if a landowner is applying to register the land as a green under section 15(8).*	**7. Justification for application to register the land as a Town or Village Green** LANDOWNER
Note 8 *Use a separate sheet if necessary. This information is not needed if a landowner is applying to register the land as a green under section 15(8).*	**8. Name and address of every person whom the applicant believes to be an owner, lessee, proprietor of any "relevant charge", tenant or occupier of any part of the land claimed to be a town or village green** HEADCORN PARISH COUNCIL PARISH OFFICE CHURCH LANE HEADCORN ASHFORD TN27 9NR

Note 9 *List or enter in the form all such declarations that accompany the application. This can include any written declarations sent to the applicant (i.e. a letter), and also any such declarations made on the form itself.*	**9. Voluntary registration – declarations of consent from any relevant leaseholder of, and of the proprietor of any relevant charge over, the land** N/A
Note 10 *List all supporting consents, documents and maps accompanying the application. Evidence of ownership of the land must be included for voluntarily registration applications. There is no need to submit copies of documents issued by the Registration Authority or to which it was a party but they should still be listed. Use a separate sheet if necessary.*	**10. Supporting documentation** LAND REGISTRY DOCUMENTS
Note 11 *List any other matters which should be brought to the attention of the Registration Authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.*	**11. Any other information relating to the application**

Note 12 *The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or unincorporate.*	**12. Signature**  Signature(s) of applicant(s): Date: 24/1/2019

REMINDER TO APPLICANT
You are responsible for telling the truth in presenting the application and accompanying evidence. You may commit a criminal offence if you deliberately provide misleading or untrue evidence and if you do so you may be prosecuted. You are advised to keep a copy of the application and all associated documentation.

Please send your completed application form to:

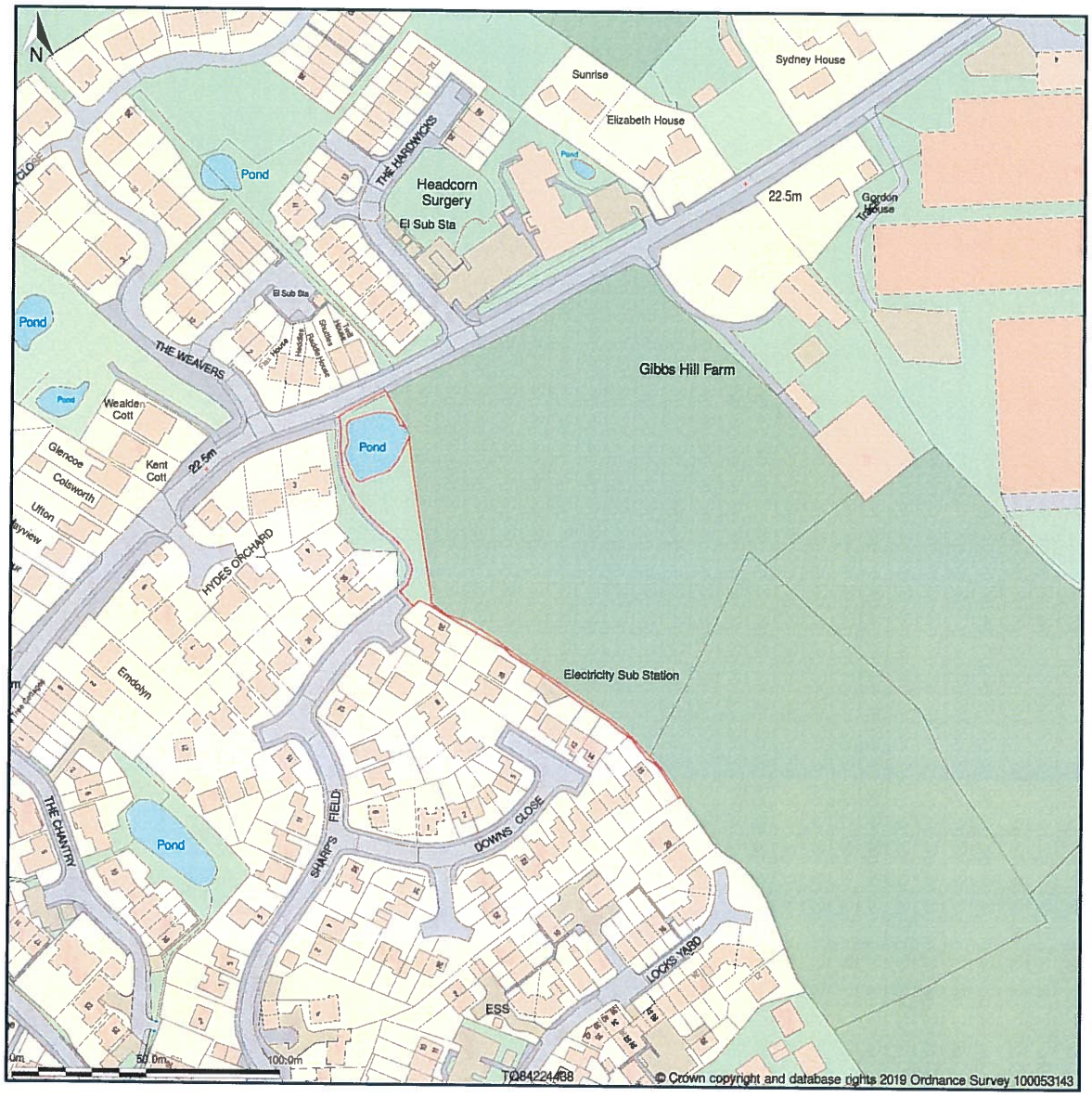
The Commons Registration Team
Kent County Council
Countryside Access Service
Invicta House
County Hall
Maidstone
Kent ME14 1XX

Data Protection Act 1998
The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the Commons Registration Authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public.

A copy of this form and any accompanying documents may be disclosed upon receipt of a request for information under the Environmental Information Regulations 2004 and the Freedom of Information Act 2000.

Buy A Plan
UK's Fastest and Easiest Planning Site

Spires Ash Grigg Lane Headcorn



Site Plan shows area bounded by: 584022.66, 144182.81 584422.66, 144582.81 (at a scale of 1:2500), OSGridRef: TQ84224438. The representation of a road, track or path is no evidence of a right of way. The representation of features as lines is no evidence of a property boundary.

Produced on 24th Jan 2019 from the Ordnance Survey National Geographic Database and incorporating surveyed revision available at this date. Reproduction in whole or part is prohibited without the prior permission of Ordnance Survey. © Crown copyright 2019. Supplied by www.buyaplan.co.uk a licensed Ordnance Survey partner (100053143). Unique plan reference: #00387058-985F99

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APPENDIX C:
Copy of Land Registry title

HM Land Registry

Official copy of register of title

Title number K791722 | **Edition date 19.07.2000**

- This official copy shows the entries on the register of title on 07 AUG 2017 at 16:41:01.
- This date must be quoted as the "search from date" in any official search application based on this copy.
- The date at the beginning of an entry is the date on which the entry was made in the register.
- Issued on 07 Aug 2017.
- Under s.67 of the Land Registration Act 2002, this copy is admissible in evidence to the same extent as the original.
- This title is dealt with by HM Land Registry, Nottingham Office.

A: Property Register

This register describes the land and estate comprised in the title.

KENT : MAIDSTONE

1 The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being Two parcels of land lying on the northern side of Sharp's Field, Headcorn, Ashford.

2 (30.11.1998) The land has the benefit of the rights granted by but is subject to the rights reserved by the Transfer dated 18 November 1998 referred to in the Charges Register.

3 (30.11.1998) The Transfer dated 18 November 1998 referred to above contains a provision as to light or air.

4 (18.03.1999) The filed plan of this title has been amended as to the part of the southern boundary where it abuts Sharp's Field.

5 (19.07.2000) The land edged and numbered in green on the filed plan has been removed from this title and registered under the title number or numbers shown in green on the said plan.

B: Proprietorship Register

This register specifies the class of title and identifies the owner. It contains any entries that affect the right of disposal.

Title absolute

1 (30.11.1998) PROPRIETOR: HEADCORN PARISH COUNCIL care of Bank Lodge, 1 Mill Bank, Headcorn, Kent TN27 9QX.

C: Charges Register

This register contains any charges and other matters that affect the land.

1 A Conveyance of the land in this title and other land dated 18 October 1934 made between (1) Jesse Boorman and George Boorman (Vendors) and (2) Sarah Down (Purchaser) contains covenants details of which are set out in the schedule of restrictive covenants hereto.

C: Charges Register continued

2 By the Conveyance dated 18 October 1934 referred to above the land was conveyed subject to the following rights:-

"Subject to all rights and easements and quasi rights and privileges in the nature of easements as have hitherto been used or enjoyed over or in connection with the property hereby conveyed."

3 The parts of the land affected thereby are subject to the following rights granted by a Deed dated 1 May 1995 made between (1) Galliford Homes Limited (Grantor) (2) Midland Bank Plc (Mortgagee) and (3) Seeboard plc (Seeboard):-

"FULL RIGHT AND LIBERTY for Seeboard and its successors in title FIRSTLY to retain lay and maintain (which expressions shall without prejudice to the generality thereof include to use and from time to time to adjust repair alter re-lay renew supplement inspect examine test and remove) electric lines as defined in section 64(1) of the Electricity Act 1989 and communications cables (hereinafter called "the underground electric lines") under the land coloured yellow (hereinafter referred to as "the yellow land") on the Plan Number DB/2M8444/14/3 annexed hereto and under also the roads (a road including in addition to the carriageway one or more pavements and/or verges where present or intended) and footpaths now or within Eighty years from the date hereof constructed (which expression for the purpose hereof shall be deemed to include laid out preparatory to construction whether or not actual construction has commenced) on or over the Property including (but not by way of limitation) the roads and footpaths shown on the said plan and the sites thereof before the same are constructed so far as the same lie within the Property all which said roads and footpaths and (if such be the case) the sites of those shown on the said plan before the same are constructed are hereinafter called "the Estate Roads and Footpaths" SECONDLY to retain construct erect and maintain (which expression shall without prejudice to the generality thereof include to use and from time to time to adjust repair alter reconstruct re-erect renew supplement inspect examine test and remove) electric lines (as previously defined) (hereinafter called "the overhead electric lines") over the Property in the approximate positions shown by continuous red lines on the said plan together with the necessary poles and stays in the approximate positions indicated in red on the said plan (and any other means of support and apparatus as Seeboard now requires or may hereafter reasonably require in connection therewith all of which are hereinafter collectively called "the poles and stays") THIRDLY in a proper and woodmanlike manner and at its own expense to fell or lop from time to time all timber and other trees now or hereafter standing on the Property which would if not felled or lopped obstruct or interfere with the construction erection and maintenance or operation of the overhead electric lines AND FOURTHLY to break up the respective surfaces of the sites of the poles and stays the yellow land and the Estate Roads and Footpaths so far as may be necessary from time to time for all or any of such purposes connected with the exercise of the rights and liberties herein granted and also for all or any of such purposes to enter (subject always to Seeboard complying with its covenants under clause 3 hereof) such parts of the Property as is reasonably necessary in the exercise of the rights and liberties hereby granted."

The said Deed also contains the following covenant:-

"THE Grantor hereby covenants with Seeboard as follows:-

(a) Forthwith at the Grantor's cost and to the satisfaction of Seeboard to lay ducts complying in all respects with the requirements of Seeboard (hereinafter referred to as "the ducts") to carry electric lines beneath the part of the yellow land also hatched black on the said plan

(b) With the concurrence of the Mortgagee (hereby testified) and with the intent and so as to bind the yellow land and every part thereof and every part of the Property which lies within 1.5 metres of the yellow land into whosesoever hands (including those of the Mortgagee and the persons deriving title under the Mortgagee) the same respectively may come and to benefit and protect the rights and liberties firstly hereby granted but not so as to render the Grantor personally liable in

C: Charges Register continued

damages for any breach of covenant committed after the Grantor shall have parted with all interest in the yellow land and the land within 1.5 metres either side thereof

(i) Not to do or permit or suffer to be done any act which would in any way interfere with or damage any underground electric line retained or laid by Seeboard in the exercise of the rights and liberties firstly hereby granted or the ducts

(ii) Not to alter or permit or suffer to be altered the existing level of nor (subject as hereinafter provided) to cover or permit or suffer to be covered the surface of the yellow land in such a manner as to render the laying of an electric line thereunder or access to any electric line retained or laid thereunder or access to each end of the ducts impracticable or more difficult than it is at the date hereof PROVIDED ALWAYS and it is hereby agreed and declared that (without prejudice to Clause 2 hereof) nothing in this covenant contained shall prevent the laying and/or re-laying (as the case may be) of appropriate surfaces on any part of the yellow land as forms the site of an intended or existing road or footpath or other way after the initial laying of electric lines thereunder pursuant to the rights and liberties firstly hereby granted

(iii) Without prejudice to the generality of the foregoing not to erect or permit or suffer to be erected any building or structure (other than such as are shown on the said plan and then only provided that the covenant on the part of the Grantor contained in sub-clause (a) hereof shall have previously been fully complied with) nor to plant or permit or suffer to be planted any trees on or within a distance of 1.5 metres of the yellow land

5. (a) In this clause the term "overhead electric lines" shall be deemed to include the intended route thereof before erection and the term "poles and stays" shall be deemed to include the sites thereof before erection

(b) The Grantor hereby further covenants with Seeboard with the concurrence of the Mortgagee (hereby testified) and with the intent and so as to bind the Property and every part thereof into whosesoever hands the same respectively may come but not so as to render the Grantor personally liable in damages for any breach of covenant committed after the Grantor shall have parted with all interest in the land referred to in the following subparagraphs or relevant part thereof and to benefit and protect the rights and liberties secondly hereby granted as follows:-

NOT without the previous written consent of Seeboard to:-

(i) erect or extend or permit or suffer to be erected or extended any dwellinghouse building or other erection or structure within 4.3 metres on either side of the overhead electric lines or so as to encroach upon the foundations of any of the poles and stays or upon the ground supporting the same

(ii) plant or permit or suffer to be planted any timber or other tree on the Property within a distance of 10 metres of the overhead electric lines

(iii) alter or permit or suffer to be altered the level of the ground within a distance of 5 metres on either side of the electric lines or within an area of land surrounding each of the poles and stays to a distance of 5 metres therefrom or elsewhere on the Property so as to obstruct vehicular access to any of the poles and stays

(iv) allow or permit or suffer to be allowed any vehicles machinery or plant of any description to approach or pass under the overhead electric lines unless a clear space of not less than 1.5 metres can be and is at all times maintained between any conductor forming part of the overhead electric lines and both all parts of any such vehicle machinery or plant and any person riding thereon."

NOTE:-The yellow land referred to is hatched blue on the filed plan so

C: Charges Register continued

far as it affects the land in this title. The yellow land also hatched black, overhead electric lines poles and stays referred to do not affect the land in this title.

4 The open space is subject to rights to use as amenity land.

5 (30.11.1998) A Transfer which included the land in this title dated 18 November 1998 made between (1) Galliford Homes Limited and (2) Headcorn Parish Council contains restrictive covenants.

NOTE: Copy in Certificate.

Schedule of restrictive covenants

1 The following are details of the covenants contained in the Conveyance dated 18 October 1934 referred to in the Charges Register:-

"THE Purchaser with the intent and so as to bind so far as practicable the property hereby conveyed into whosesoever hands the same may come and to benefit and protect the remainder of the Vendors' property at Headcorn aforesaid but so that the Vendors or their successors in title shall have power to release or vary this stipulation hereby covenants with the Vendors that the Purchaser and her successors in title will observe and perform the stipulation following:- No temporary building hut tent shed caravan house on wheels or other chattel intended or adapted for use as a dwellinghouse or sleeping apartment shall be made placed erected used or allowed to remain upon the said property."

End of register