Committee: Common and Village Green Registration Panel

Date: 22 December 2010

By: Director of Governance and Community Services

Title: Application for land known as The Common, New Ghyll Road, Heathfield to be registered as a town or village green

Purpose: To consider the application

Applicant: Mrs Jean Mayes

Application No: 1348

Contact Officer: Chris Wilkinson, Tel 01273 335744

Local Member: Councillor Rupert Simmons

RECOMMENDATION: To reject the application pursuant to section 15 of the Commons Act 2006 of Mrs Jean Mayes to have land known as The Common, New Ghyll Road, Heathfield registered as a town or village green.

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1. The Site

1.1 The land which is the subject of the application ("the Land") is shown shaded green on the map submitted with the application (annexed at **Appendix 1**). The Land comprises an area of undeveloped and currently dense, overgrown scrubland and which is roughly square in shape. It is some 1.4 hectares in area and in terms of its topography it slopes down from the east to west. It has a frontage to Ghyll Road from which access is gained at a bellmouth junction. Photographs of the site are annexed at **Appendix 2**.

2. The Law

2.1 The law governing applications for registration of land as town or village green is set out in Section 15 Commons Act 2006 ('the Act'). A guide to the law is attached at **Appendix 3**, although each element of the statutory test is addressed in the Inspector's report. In short, the applicant must prove that the land has been used by a significant number of inhabitants of a locality or neighbourhood within a locality for lawful sports and pastimes 'as of right' for a period of twenty years. The Commons (Registration of Town and Village Green)(Interim Arrangements)(England) Regulations 2007 apply to all applications made under the 2006 Act and govern how village green applications should be processed by Local Authorities.

3. The Application

3.1 The application is dated 29 November 2007 and was received by the Registration Authority on 3 December 2007.

3.2 The application was made under section 15(3) of the Commons Act 2006 as the use of the land had ceased before the date of the application but after 6 April 2007.

3.3 At the outset of the Inquiry the applicant sought to amend the Application so that it was made on the basis that Section 15(4) applied to reflect the date of use ceasing as of right before April 2007. The amendment to the application would not raise any additional disputed matters and there was no objection to this

change by the Objector. Accordingly, the Inspector recommended that the Application be amended accordingly.

3.4 A non-statutory public Inquiry was held on 19, 20 and 21 July 2010 at Cross-in-Hand Village Hall. The Inspector, appointed by the Registration Authority, heard submissions from the Applicant and the Objector. The Inspector then compiled a report which is attached at **Appendix 4**.

4. Inspector's Recommendation

4.1 The Inspector recommended that the Registration Authority should reject the application and not add the Land to the register of town and village greens on two grounds.

4.2 Firstly, that the Applicant has failed to establish that the Land has been used for sufficient lawful sports and pastimes as of right throughout the relevant twenty year period.

4.3 Secondly, the Applicant has failed to establish that the Land has been used by a significant number of the inhabitants of a qualifying neighbourhood.

5. Response from the Applicant and the Objector following the Inspector's Recommendation

5.1 On 9 November 2010 both the Applicant and the Objector were sent a copy of the Inspector's report recommending that the application be dismissed. Both parties were invited to make comments on the report by 23 November 2010.

5.2 No response was received from the Applicant. The Objector submitted a letter to the Registration Authority on 23 November 2010. They referred the Registration Authority to the case of *R (Chaston) V Devon County Council* [2007] EWHC 1209 (Admin) which held that an authority cannot depart from an Inspector's recommendation without good reason to do so.

5.3 It is noted that this case regarded a highway inquiry, not a town and village green inquiry, but the principle is a general one. The Objector states that this principle should be equally applicable in this instance.

6. Conclusion and reason for Recommendation

6.1 The Panel is recommended to reject the application for the reasons set out in the Inspector's report: that the Applicant has failed to establish that the Land has been used for sufficient lawful sports and pastimes as of right throughout the relevant twenty year period and also, that the Land has been used by a significant number of the inhabitants of a qualifying neighbourhood.

6.2 The application has been subject to a non-statutory public Inquiry.

Philip Baker
Assistant Director
Legal and Democratic Services

BACKGROUND DOCUMENTS: Applicant's submissions at the non-statutory public inquiry, Objector's statement in response to application, Objectors submissions at the non-statutory public inquiry, and the Objector's response following the Inquiry

MAP A

KEY

— CLAIMED LAND FOR REGISTRATION AS GREEN

AREA OF GHYLL ROAD NEIGHBOURHOOD

SCALE 1:2500

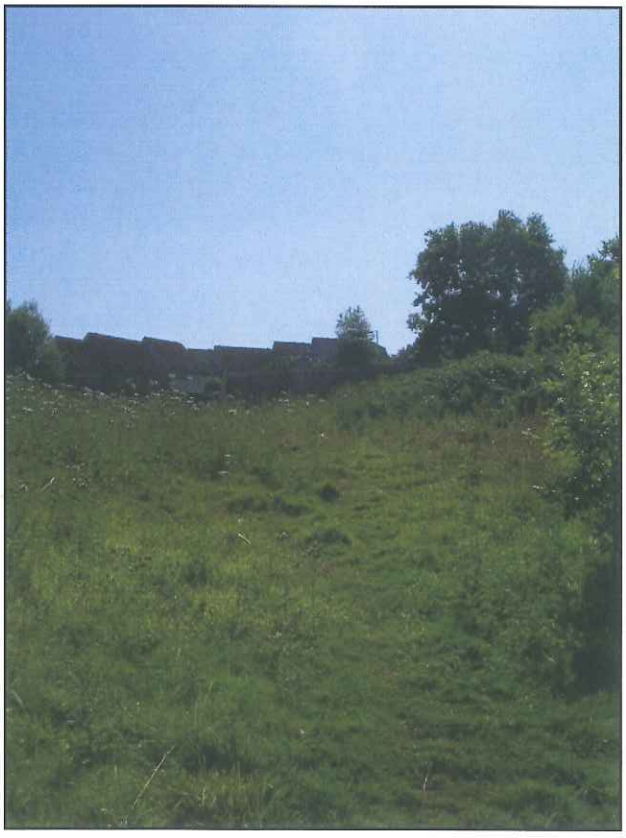
WITNESS LOCATION

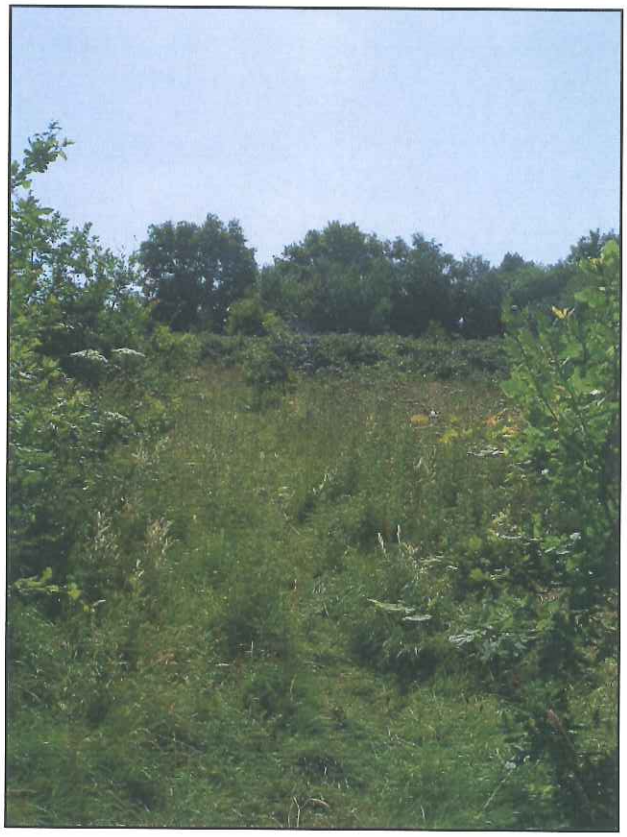
This is the map/exhibit referred to in the Statutory Declaration of Jean Mayer dated 30th November 2007

PETER J. BAILEY, Soc. C.
A COMMISSIONER FOR OATHS

Appendix 2

Photographs of land subject to Town Village Green Application.






GHYLL ROAD

Appendix 2

Village Green Applications

Guide to the law

East Sussex County Council are under a statutory duty to maintain a register of village greens as the common registration authority. This duty includes determining applications in whether land should be included on the register.

The registration of land as a village green is governed by the Commons Act 2006, section 15. It states:

15 Registration of greens

(1) Any person may apply to the commons registration authority to register land to which this part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where-

(a) 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; and

(b) they continue to do so at the time of the application.

(3) This subsection applies where-

(a) 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; and

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).

(4) This subsection applies (subject to subsection (5)) where-

(a) 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; and

(b) they ceased to do so before the commencement of this section; and

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

(5) Subsection (4) does not apply in relation to any land where-

(a) planning permission was granted before 23 June 2006 in respect of the land;

(b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and

(c) the land-

(i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or

(ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a), (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied-

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right".

(8) The owner of any land may apply to the commons registration authority to register the land as a 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.

(10) In subsection (9)-

"relevant charge" means-

(a) in relation to land which is registered in the register of tite, a registered charge within the meaning of the Land Registration Act 2002 (c.9);

(b) in relation to land not so registered-

(i) a chare registered under the Land Charges Act 1972 (c61); or

(ii) a legal mortgage, within the meaning of the Law of Property Act 1925 (c.20), which is not registered under the Land Charges Act 1972;

"relevant leaseholder" means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted.

The application process

The process begins with the applicant completing and submitting a CR44 Form and evidence to the County Council. There is a review of the application and then a notification exercise and objection period. The evidence is weighed up and a decision taken.

The determination of the application for a new village green is based on a consideration at the outset of the application form. An application can be rejected if the application is not properly made, or is technically deficient. An opportunity to address such a defect should be afforded to the applicant if the defect is easily remedied.

When an application is submitted it is usually accompanied by user evidence that the applicant has gathered. Sometimes this is in the form of historical research, setting out the history of the land, and sometimes this is in the form of questionnaires completed by users of the land.

If an application is initially accepted then the appropriate District and Parish Councils are notified and the application is advertised by way of notices on the site and public notices in the relevant local newspaper. Anyone identified as a landowner in the application is also notified. This gives an opportunity for objections to the application to be raised and also further support to be submitted during a six week notification period.

All the information is then considered. Often the evidence is overwhelmingly one-sided and the recommendation is an obvious one. If the evidence is finely balanced then a public hearing before an expert or a planning inspector is organised. A report following the hearing is written by the expert/inspector with a recommendation. This forms the basis of the report to the Committee with a recommendation, which is usually accepted by the Committee.

There is no set method by which an application has to be determined. Some authorities use delegated officer powers; others use a Committee or Lead Member resolution. In reaching a decision on the evidence, again there is no set process. Some authorities rely on officer judgement, others will hold a hearing before Members while others will hold a non-statutory public inquiry into the application in order for a planning inspector or an expert to hear the evidence before coming to a conclusion, which the party determining the application can accept or reject.

Rights of Appeal

When the County Council decides to accept an application the land is entered on the Council's register of town or village greens. It is then open to the landowner to make an application to the Secretary of State under the Commons Act 2006, section 16 to have the land de-registered, provided the land is less than 200 square metres. If the land is over 200 square metres the application to the Secretary of State must include a proposal that alternative land is registered in its place. The County Council is not involved in this process.

If the County Council declines to accept the application the only right of appeal is a judicial review.

Outline

An outline of the application process as exercised by the County Council at present is set out below.

Step No.	Event	Action to be taken
1	Application received	Stamp/Date it
2	Preliminary matters	o Give it an application number o Letter to applicant stating application number o Open file o Land Registry search
3	Preliminary examination of Application	o Ensure Application is "duly made" o If "no" then go to step 4 o If "yes" then go to step 6
4	Return Application to applicant	Letter explaining why Application is not duly made, giving time-period for remedying defect
5	Rejection of Application	Letter to applicant rejecting Application
6	Secondary examination of Application	o Prepare Notification to: o Site Notice o Interested councils o Local newspaper o Owners o Potential objectors o Local ESCC Member
7	Statutory six week objection period	
8	Receipt of objections	o Acknowledge receipt o Forward objection to applicant for comment/rebuttal evidence
9	Receipt of rebuttal comments	Acknowledge receipt
10	Consideration of Application	o Consider evidence provided by applicant and objections o Determine best way to proceed o If evidence is finely balanced go to step 11 o If evidence is obvious go to step 12
11	Set up a public hearing	o Contact either PINS or a barrister to hear the evidence in person o Hold hearing o Consider report
12	Report to Committee	o Write report in draft o Submit for approval o Write final report with recommendation o Send report to applicant
13	Determination by Committee	May accept or reject recommendation
14	Notify applicant of outcome	
15	If successful amend the register of town or village greens	

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT GHYLL ROAD, HEATHFIELD AS A TOWN OR VILLAGE GREEN

REPORT
of Miss Ruth Stockley
09 November 2010

East Sussex County Council
County Hall
St Anne's Crescent
Lewes
East Sussex
BN7 1UE
Ref: EE/CR06

Application No: 1348

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT GHYLL ROAD, HEATHFIELD AS A TOWN OR VILLAGE GREEN

REPORT

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1. INTRODUCTION

1.1 This Report relates to an Application made under Section 15(1) of the Commons Act 2006 ("the 2006 Act") to register land at Ghyll Road, Heathfield ("the Land") as a town or village green ("the Application"). Under the 2006 Act, East Sussex County Council, as the Registration Authority, is required to register land as a town or village green where the relevant statutory requirements have been met. The Registration Authority instructed me to hold a non-statutory public inquiry into the Application, to consider all the evidence and then to prepare a Report containing my findings and recommendations for consideration by the Authority.

1.2 I held such an Inquiry over 3 days, namely between 19th and 21st July 2010. I also undertook an accompanied site visit during the afternoon of 20th July 2010.

1.3 Prior to the Inquiry, I made directions dated 7th June 2010 as to the exchange of evidence and of other documents. Those documents were duly provided to me by both Parties which significantly assisted my preparation for the Inquiry. The Applicant produced a bundle of documents containing its witness statements and documentary evidence in support of the Application and upon which it wished to rely. In this Report, I shall refer to documents in the Applicant's bundle as "AB tab X" where X is the relevant tab within that bundle. The Objector produced a proof of evidence of Mr Richard Jones and two bundles of Appendices which I shall refer to in this Report as "RJ Proof" and "RJ App" respectively. In addition, the Objector produced a separate bundle containing 13 statutory declarations in support of its Objection and upon which it wished to rely. I shall refer to documents in that bundle as "OB tab X" where X is the relevant tab within that bundle. Both Parties also produced helpful Skeleton Arguments and separate bundles containing the legal authorities referred to. I have read all the documents supplied and have taken their contents into account in this Report.

1.4 I emphasise at the outset that this Report can only be a set of recommendations to the Registration Authority as I have no power to determine the Application nor any substantive matters relating thereto. Therefore, provided it acted lawfully, the Registration Authority would be free to accept or reject any of my recommendations contained in this Report.

2. THE APPLICATION

2.1 The Application is dated 29th November 2007 and was received by the Registration Authority on 3rd December 2007.[1] It was made by Mrs Jean Mayes of 10, Birch Way, Heathfield, East Sussex TN21 8BB ("the Applicant"). Part 5 of the Application Form states that the Land sought to be registered is usually known as "*The Common*" and its location is "*New Ghyll Road, Heathfield, East Sussex TN21 0AG*". A map was submitted with the Application attached to the statutory declaration in support which shows the Land subject to the Application hatched in red.[2] I shall refer to that map in this Report as "Map A". In part 6 of the Application Form, the relevant "locality or neighbourhood within a locality" is identified as "*Ghyll Road neighbourhood which includes Theobalds Green, part Sandy Cross and part Geers Wood, Parish of Heathfield and Waldron*". That neighbourhood was identified on the same map submitted with the Application and attached to the statutory declaration in support by means of a green line indicating its eastern boundary. Map A also identified the location of the households who had completed one or more questionnaire in support. I shall return to the issue of the relevant locality or neighbourhood within a locality later in this Report.

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[1] The Application is contained at AB tab 1 pages 1 to 11.
[2] The map is at AB tab 1 page 10.

2.2 The Application was made on the basis that Section 15(3) of the 2006 Act applied. The date on which use as of right was claimed to have ended was stated to be "*April 2007*". However, I shall return to those two matters later in this Report.

2.3 The Application was verified by a statutory declaration in support made by Mrs Jean Mayes, the Applicant, on 30th November 2007. It was also accompanied by some 45 evidence questionnaires in support.[3]

2.4 The Application was duly advertised in accordance with the statutory requirements, and an Objection dated 18th April 2008 was received on behalf of Barratt Homes Limited, the owner of the Land.[4] It was confirmed during the Inquiry that the correct title of that entity is BDW Trading Limited trading as Barratt Southern Counties which I shall refer to in this Report as "the Objector". The Applicant subsequently submitted a Response to the Objection on 6th June 2008.[5] Further correspondence was sent to the Registration Authority from both the Applicant and the Objector thereafter.[6] Additional representations in support in the form of letters and questionnaires were also submitted to the Registration Authority and are contained in the Applicant's Bundle.

2.5 I have been provided with copies of all the above representations in support and objecting to the Application which I have read and the contents of which I have taken into account in this Report.

2.6 Having received all such representations, the Registration Authority determined that a non-statutory public inquiry into the Application ought to be held.

2.7 At the Inquiry, the Applicant was represented by Dr Paul Stookes of Richard Buxton Environmental and Public Law Solicitors, and the Objector was represented by Leading Counsel, Ms Morag Ellis QC. Any third parties who were not being called as witnesses by the Applicant or the Objector and wished to make any representations were invited to speak, but no additional persons did so.

3. THE APPLICATION LAND

3.1 The Application Land is identified on Map A submitted with the Application on which it is hatched in red.[7]

3.2 The Land comprises an area of undeveloped and currently dense, overgrown scrubland and which is roughly square in shape. It is some 1.4 hectares in area and in terms of its topography it slopes down from the east to west. It has a frontage to Ghyll Road from which access is gained at a bellmouth junction.

3.3 The Land is located approximately one mile to the south of Heathfield and lies on the southern edge of the existing built-up area.[8] To the north-east is an industrial estate, whilst to the east across Ghyll Road is a residential estate known as Frenches Field. Immediately to the east of the Land is a long-distance public bridleway known as "the Cuckoo Trail" which follows the track of a former railway line going north to south through the District. A public footpath runs close to the south-western boundary of the Land which also provides vehicular access to Lower Theobalds Farm which lies to the west of the Land together with its open fields. To the immediate west of the Land is an area of ancient woodland and the Waldron Gill. To the north beyond Waldron Gill lies further woodland known as Geer's Wood.

3.4 The Land is currently enclosed with high boarding fencing with locked gates at the bellmouth. There is at present no means of access to the Land other than via the locked gates. "Private Land Keep

[3] They were compiled by a total of 47 individuals.
[4] The Objection is at AB tab 5 pages 343 to 345.
[5] The Response is at AB tab 5 pages 346 to 348.
[6] Such correspondence is at AB tab 5.
[7] AB tab 1 page 10.
[8] A location plan is at AB tab 4 page 333.

Out" signs are attached to the boarding close to the bellmouth entrance. There are no signs or notices on the Land itself.

3.5 There are currently no definitive rights of way through the Land. However, there is a pending application by Mrs Elizabeth Thorold dated 12th May 2006 to modify the Definitive Map to add a public footpath across the Land running between Ghyll Road and Theobalds Farm.[9] The Objector's predecessor objected to that application.[10] That application was being held in abeyance until the completion of the Inquiry into the present Application.

4. THE EVIDENCE

4.1 I would like to record at the outset that every witness from both Parties presented their evidence in an open, straightforward and helpful way. Further, I have no reason to doubt any of the factual evidence given by any witness, and I regard each and every witness as having given credible evidence.

4.2 The following is not an exhaustive summary of the evidence given by every witness to the Inquiry. However, it purports to set out the flavour and main points of each witness's oral evidence. I assume that copies of all the written evidence will be made available to those members of the Registration Authority determining the Application and so I shall not rehearse their contents herein in detail. I shall consider the evidence in the general order in which each witness was called at the Inquiry.

CASE FOR THE APPLICANT

Oral Evidence in Support of the Application

4.3 **Mr Nicholas Alan Robards**[11] has lived at 38 Frenches Farm Drive since 1997. Prior to that he lived at Mutton Hall Lane. He has known the Land since he was young when he moved to Heathfield in the late 1970's or early 1980's, but he did not use it frequently then.[12] He used it almost every day for around 10 years between 1997 and 2007 for walking, with and without dogs, and relaxing. His main use was for dog walking, and he had a dog from 1997 onwards, but he also used the Land to play ball games with his step daughter and to watch the wildlife in the area. He would spend anywhere between 10 minutes and up to an hour on the Land. He had marked on the plan attached to his Statement the various routes he had used over the Land.[13] The Land was accessible and open from all sides, but his main access was from Ghyll Road where the hoarding fencing is currently located. He also saw others using the Land for walking, with and without dogs, picking blackberries and bird watching, and he saw children playing there. There were more children and teenagers on the Land during the summer months. He would nearly always see other dog walkers on the Land. He was never asked to leave the Land and never sought permission to use it. He was only prevented from using the Land from 2007 onwards after the completion of the fencing of the Land which commenced in 2006.

4.4 In cross examination, he explained that it was Mrs Thorold who had provided him with an evidence questionnaire.[14] He could not remember when that was, but he had a conversation with her about the Land when he met her on the Cuckoo Trail and she asked him whether he would mind completing a questionnaire about his use of the Land. He had bumped into her on that footpath on many occasions over the last 10 to 15 years. She gave him a blank questionnaire on the next occasion she saw him as well as the Map annexed to his Statement.[15] He took the questionnaire away and completed it at home. The colours had already been drawn on the Map by Mrs Thorold. He could not recall having seen Map A referred to in question 3a of his evidence questionnaire, but assumed he had seen it as indicated in his response to that question. He had also seen the Map attached to the Application Form before and

[9] The Application and supporting documents are at RJ App tab 24.
[10] The objection is at RJ App tab 25.
[11] His witness statement is at AB tab 2 pages 88 to 97.
[12] He confirmed in cross examination that his answer to question 7 of his evidence questionnaire was incorrect.
[13] At AB tab 2 page 97.
[14] His completed evidence questionnaire is at AB tab 2 pages 91 to 95.
[15] At AB tab 2 page 97.

which he had signed on the back,[16] but he could not recall when. He could not remember whether the red crosses showing the location of the compilers of the questionnaires or the green line showing the neighbourhood were on the Map at the time he signed it. However, he assumed the green line was then on the Map given that it was referred to in question 3b which he had answered, and that it identified the locality or neighbourhood. He had no idea how far west it extended. He could not recall whether anyone had explained the boundaries to him prior to him signing the questionnaire. He had not attended any meeting which referred to the boundaries of the locality or neighbourhood, and he had not consulted any planning documents relating to the Land, the ward boundary, the parish boundary, a census or the Government Output Area. He was unable to explain why the green line cut through the middle of houses and whether such houses were in or outside of the line. There is no physical boundary on the ground along the line of the green line. There was nothing different in locational terms between those who lived to the north of the line and those who lived to the south of it. He agreed that they were all residents of Heathfield.

4.5 He had ticked the boxes himself in response to question 11 of his questionnaire identifying the recognisable facilities available to local inhabitants. However, he acknowledged in cross examination that he was unaware of the boundaries of the school catchment area he had identified or of the name of the residents' association. The community centre is on Sheepsetting Lane and is not within the area covered by Map A. The local church is not inside the green line on Map A. The only local shops inside the green line are on the industrial estate, namely a gun shop, as the convenience store on Hailsham Road is outside the green line. There are two doctors' surgeries in the area, but they are both outside the green line. There had been a scout hut within the green line, but that had now gone. He indicated, though, that the local inhabitants he was referring to when completing his form were the residents of Heathfield. Hence, the boxes he had ticked in response to question 11 of his questionnaire were not with reference to the green line but, rather, with reference to the area of Heathfield. He confirmed that he regarded himself as a resident of Heathfield, and that prior to seeing Map A, he had never thought that there was a green line in existence which had any pre-existing meaning. He was unaware who had identified the green line. He was unaware how people were selected who completed the evidence questionnaires and was unaware whether Mrs Thorold was receiving legal advice when she gave him his questionnaire. His house at 38 Frenches Farm Drive was first occupied in 1984.

4.6 In relation to his witness statement, he was requested by Mrs Thorold to write a statement which he then provided to her. It was typed and returned to him when he signed it. He did not think he was given a draft before he wrote it. He could not recall when he saw Map A.

4.7 He had completed a questionnaire dated 7th May 2006 in relation to a claimed public footpath across the Land.[17] The claimed route was identified in red on the plan at the back of his questionnaire. Mrs Thorold had made the application to the County Council to add that footpath to the Definitive Map. He had previously worked for Mrs Thorold in that he is a fencing contractor and he had erected some boundary fencing for her. There was a "distinct footpath" along the red line. There was that one main route through the centre of the Land. Other paths were used, but that was the main one. He also walked elsewhere on the Land with his dog, which would be off the lead, and not just on that path. He acknowledged, though, that the public user along that route had been sufficiently significant to create a worn path. The public also used the substantial open grass area that existed then, albeit not to the same extent as the worn path. At some stage, someone cut back brambles from the Land.

4.8 **Mrs Lesley Caswell-Lake**[18] has lived at Sandy Cross Farm since 1990. She has known the Land since 1990 and used it from that time until 2007. She used it daily between 1990 and 2005 to walk her dog and to walk with family and friends. Some of those family and friends lived within the green line and some lived outside it. From 2005 when her dog died, she used it weekly to walk and to take her grandchildren to play. They lived in Brighton at that time, but she looked after them quite frequently. She

[16] At AB tab 1 pages 10 and 11. His signature is the third from the end.
[17] His footpath questionnaire is at RJ App tab 24 pages 527 to 532.
[18] Her witness statement is at AB tab 2 pages 51 to 60.

had seen others using the Land for activities such as walking, with and without dogs, bird watching, blackberry picking, children playing and bonfire parties. They were local people that she had seen, but she would not have a clue which side of the green line they lived on. She had never been requested to leave the Land and had never sought permission from anyone to use the Land. She had never been prevented from using the Land until the fence was erected round it in 2006/2007.

4.9 Mrs Thorold had left a questionnaire with her to fill in when she came round to her house. She could not recall the details of what Mrs Thorold said to her, but she explained what was going to happen to the Land and that she was seeking to prevent its development. She could not recall whether Mrs Thorold discussed the concept of neighbourhood with her. She indicated that she considered herself to be a resident of Heathfield. She did not consider there to be anything distinctive about being one side or the other of the green line shown on Map A. In relation to her responses to question 11 in her questionnaire about the recognisable facilities available to local inhabitants,[19] she was unaware of the boundaries of the school catchment area or the name of the residents' association. The community centre, community activities and the sports facilities are on Sheepsetting Lane outside the green line and she was unsure whether there was a local church within the green line. The local shops are on Hailsham Road. The neighbourhood watch was for Hailsham Road, but it came to an end not long after she moved into the area.

4.10 Mrs Thorold provided a draft witness statement for her and asked her to sign it if she agreed with it, which she did. The plan attached to her letter dated 17th July 2008 was not coloured by her; she just signed it.[20] There were lots of worn paths on the Land. In particular, there was a distinguishable path through from Ghyll Road to Geer's Wood where the majority of feet went. She used it as a route through to the Wood, as did others. The areas off that path were not necessarily less used, though. She knew the Land as "the Cuckoo" because it was adjacent to the Cuckoo Trail. She often walked along the Cuckoo Trail, using it as frequently as the Land.

4.11 **Mrs Jean Mayes** is the Applicant. By way of clarification, she indicated that the Application was her idea with which she approached Mrs Beth Thorold. She had used the Land and walked on it for over 43 years.

4.12 Mrs Mayes was not prepared to answer any questions in cross examination. As a consequence, I am unable to give as much weight to her evidence as that given to other oral evidence that was subject to cross examination, particularly in the event of any conflict with her oral evidence.

4.13 **Miss Ayesha Godfrey**[21] lives on Burwash Road and works on the Ghyll Road Industrial Estate. She moved to Burwash Road in 2005 and previously lived in Crowborough. She used the Land every week day between 1996 and 2007 to play with her dog, walk and to enjoy the wildlife, accessing it from Ghyll Road. She saw other activities on the Land, including people walking, with and without dogs, enjoying the wildlife, picking blackberries and children playing. She was unaware whether those other users lived inside the green line on Map A. She had never sought permission to use the Land, had never been asked to leave the Land and had never been prevented from using it until around 2007 when the fencing was put up.

4.14 Although she works within the green line identified on Map A, she resides off the area shown on Map A, albeit in Heathfield, and she regards herself as being a resident of Heathfield. In her view, the green line has no relevance in practical terms. She gave her work address in her witness statement rather than her home address as it is easier for her to be contacted there. Her statement was typed for her and she signed it.

[19] Her evidence questionnaire is at AB tab 2 pages 54 to 58.
[20] At AB tab 2 pages 59 and 60.
[21] Her witness statement is at AB tab 2 pages 64 to 72.

4.15 In relation to question 11 she completed in her evidence questionnaire as to the recognisable facilities available to local inhabitants,[22] the school catchment area she was referring to is the school at Cross in Hand; the residents' association is off Map A; and the neighbourhood watch she was referring to is around the industrial area. Although there are various neighbourhood watch areas in the vicinity, there was none specifically for one side of the green line.

4.16 She had also completed a questionnaire in relation to a claimed public footpath across the Land.[23] There had always been a clear and defined route along the claimed way. There was also another path going down towards Geer's Wood. She had used both paths, as well as playing ball with her dog on the Land.

4.17 **Mr Stephen Bowen**[24] has lived at 37 Geer's Wood since 1983 when he purchased it new and has used the Land for over 27 years. He has always referred to the Land as "The Scrub Land", and he gained access to it from the Cuckoo Trail, from the footpath near Theobalds Farm and from Ghyll Road. He regularly used it, namely approximately once a week, to walk his dog which he had between 1989 and 2003, and with his children to play games and ride their BMX bikes and to enjoy the nature. He had seen others using the Land for similar activities and for blackberry picking, motorcycle riding and bird watching, but they probably did not all live west of the green line on Map A. The local scouts had also used the Land between around 1988 and 1995. They were drawn from across Heathfield. He was never asked to leave the Land and never sought permission to use it. He stopped using it when the fencing was erected in 2006 and 2007. Post 1986, there were 2 or 3 main paths across the Land which remained until 2006. He used those paths as well as the wider area. He saw others using the Land along those particular routes.

4.18 He obtained his evidence questionnaire from Mrs Thorold who came to his house with it.[25] He already knew her at that time. He was not aware of town and village green applications prior to then. She did not give him any explanation as to how the law in that area applied, but explained an application was being made and he agreed to complete a user form. He was handed a copy of Map A at the same time as he was given a questionnaire and he signed it on the back. He thinks that the green line was marked on it then. However, he expressed the view that the green line did not have any great significance, and he assumed Mrs Thorold was seeking to restrict the area in which she would contact people as it would be a mammoth task to seek the views of all the residents from Heathfield. He acknowledged that he did not give the green line a great deal of thought when he completed the questionnaire. His witness statement was drafted on his behalf from the information he had provided in his evidence questionnaire.

4.19 In completing question 11 of the questionnaire as to the recognisable facilities available to local inhabitants, he indicated that the school catchment area would include the whole of Heathfield and beyond. In Geer's Wood where he lives, there is a type of residents' association for his estate. There was also a neighbourhood watch on the Geer's Wood Estate set up around 1999. There was a scout hut, but it was dismantled around 2000/2001.

4.20 He was aware that planning applications had been made for the development of the Land. He had specifically objected to a previous planning application for the residential development of the Land in a letter dated 22nd May 2000.[26] His view was that the Land ought to be developed for industrial purposes rather than for residential development. He did not raise an objection at that time to the principle of the development of the Land, namely that there would be a loss of a valuable recreational area. He acknowledged in cross examination that he then regarded the proper role of the Land as being for industrial purposes and that he then had no objection to the development of the Land on the grounds of

[22] Her evidence questionnaire is at AB tab 2 pages 67 to 71.
[23] Her footpath questionnaire is at RJ App tab 24 pages 497 to 502.
[24] His witness statement is at AB tab 2 pages 30 to 38.
[25] His evidence questionnaire is at AB tab 2 pages 33 to 37.
[26] His letter of objection is at RJ App tab 7 page 51.

the loss of recreational land. He also agreed that there was nothing in his objection letter to alert the owner of the Land to its ongoing use for local recreation.

4.21 **Mr Michael Anderson**[27] lives at 16 Meadow Way and used the Land regularly once or twice a week between 1972 until 2006/2007. His wife used it more frequently. They walked their dogs on the Land, went blackberry picking along the edges of the Land and his wife studied the flora and fauna. Sometimes they used the Land as the end object of a walk where their dogs could run around; on other occasions they would use the Land as part of a circular route. He saw others using the Land for similar activities and children playing on it. However, he was unable to indicate on which side of the green line they lived. He was never given permission to use the Land and was never prevented from using it until it started to become boarded up in 2006.

4.22 An evidence questionnaire was handed to him by Beth Thorold at his home. He only knew her by sight before then, but he understood his wife had met her previously when they had discussed the application and his wife had indicated to her that she and he had used the Land and would be prepared to give evidence as to their use. Mrs Thorold had informed him about the proposed development of the Land and the reason it had been fenced. He had seen Map A previously when he completed his questionnaire. At that time, the Land was hatched and the green line was on the Map. There were also a number of houses identified from where other people had made statements or completed questionnaires. He had signed the back of the Map. He was not asked to comment upon the green line. He understood that it was the area being identified in the Application as a locality. He acknowledged that it was nonsensical to have a line drawn through individual houses and agreed that there were no practical differences in locational terms between himself at 16 Meadow Way, which was within the green line, and those at 30 Meadow Way which was outside it. For those living on the eastern side of Meadow Way who were within the green line, such as numbers 14 and 15 on Map A, they would have to go northwards and get onto Hailsham Road in order to gain access to the Land. Hence, they could not access the Land without going outside of the green line unless neighbours allowed them to walk through their gardens.

4.23 In his response to question 11 in his evidence questionnaire in relation to the recognisable facilities available to local inhabitants,[28] his reference to there being a school catchment area was merely an indication that the area fell within such a catchment area. He was not indicating that the identified locality was itself the school catchment area.

4.24 **Mrs Elizabeth Thorold**[29] has lived at Theobalds Farm since 1983, which property is immediately to the south-west of the Land. She and her family used the Land regularly between 1985 and 2007 when it was fenced off. She took her children onto the Land to study wildlife and nature, she used it for walking and to exercise her dogs. Her children played on the Land. The frequency of her use varied from once or twice a month to daily. She saw others using the Land daily, such as children playing, people walking, blackberry picking and bird watching. She never sought permission to use the Land and was never prevented from using the Land until 2007 when the fencing was complete. Details of the fencing that was erected round the Land and the dates of its erection are identified on the Plan attached to her Statement.[30]

4.25 The use of the Land by local residents increased over a period of time given that the local population expanded with new housing estates being built close by in Geer's Wood and Frenches Farm Drive. Frenches Farm Lane was built around 1985; New Ghyll Road was adopted in 1986; and the Frenches Farm Lane Estate was built and occupied around 1986. The Land had been open for public use since 1970, but there was a huge increase in that use when the two estates were built around 1985. Hence, the increase she was referring to occurred from earlier than the start of the relevant 20 year period rather than during it.

[27] His witness statement is at AB tab 2 pages 16 to 29.
[28] His evidence questionnaire is at AB tab 2 pages 19 to 23.
[29] Her witness statement is at AB tab 2 pages 108 to 148.
[30] At AB tab 2 page 118.

4.26 In order to obtain evidence to support the Application, she had some 250 flyers produced which she posted at houses west of the green line on Map A. The flyer invited recipients to contact her if they used the Land and were interested in filling in a form in respect of such use. She posted flyers on the Frenches Farm estate, on Theobalds and on Hailsham Road. All of Ghyll Road was sent a flyer as far as the entrance to Geer's Wood. That was their idea of the area which constituted a neighbourhood. People then responded to the flyers and she went to their homes with a questionnaire and the Map. Those people then often suggested others who used the Land. Almost all those properties west of the green line received a flyer; the 250 printed were not quite enough. The large majority of those houses received one, though. All the questionnaires given out were completed and they are all produced in the Applicant's Bundle.

4.27 In order to make the Claim, they were aware that a neighbourhood had to be identified. The Open Spaces booklet requires the neighbourhood to be marked. In relation to the facilities within the area, she did not dispute the comments made by other witnesses and observed that the questionnaire was "not very good" in that respect. She regarded her house as being within the identified neighbourhood. She was unable to say whether the houses dissected by the green line were within or outside the neighbourhood. She was of the view that there was a practical difference between those people living on Meadow Lane who were within the identified neighbourhood, such as Mr Anderson at number 16, and those who were outside it, such as those at number 32 just to the north of the green line. She explained that difference by reference to the location of open green spaces in Heathfield and which areas people would use. Those to the north of the green line would tend to go northwards to access open spaces, such as the recreational area at Tower Street, rather than using the Application Land, and that was the difference between those within and those outside the green line.

4.28 In response to a question from myself as to the northern, southern and western boundaries of the green line, Mrs Thorold clarified the identified neighbourhood by indicating that the northern boundary was straight across the page of Map A to the end of the dwellings on that Map, and then the western boundary was intended to include the houses shown on the northern part of Map A and then to come back to Ghyll Road, excluding the industrial estate but including her property, and then the southern boundary was to be drawn so as to meet the end of the green line on the eastern boundary.

4.29 When she purchased Lower Theobalds Farm in 1981, the Land was excluded from the sale and offered for sale as a separate plot. She was unaware that the Land had the benefit of an industrial planning permission at that time. She understands that the Land was owned by one Bernard O'Brien and/or his business partner between 1983 and 2006 when it was then purchased by Barratt Homes for development. In the Transfer of Lower Theobalds Farm to herself and her former husband, there was a clause stating that they "*shall not become entitled to any right of light or air or other right or easement or quasi right or quasi easement (other than such as may be hereby expressly granted) which would in any way prejudicially affect or restrict the free and unrestricted user by the transferor or those deriving title under it of the retained property or any part or parts thereof for building or other development or for any other purpose whatsoever*".[31] It was her understanding that the "*retained property*" referred to is the area of ancient woodland near to the Ghyll and not the Application Land. There was no reason why she would be prevented from using that Land.

4.30 In 2007, she was involved with, and was successful in, the High Court challenge made to the Secretary of State's Inspector's decision to grant reserved matters approval pursuant to the outline planning permission previously granted for the mixed residential and employment development of the Land. She wanted to protect matters of importance that ought to be protected. By that litigation, she was seeking to have the principle of the development of the Land revisited. Previously, she had written two letters objecting to the outline planning application made in 2000.[32] She acknowledged that in neither letter had she objected to the loss of the Land on the basis of the loss of recreational land, but she pointed out that such an issue was apparently not a matter they were entitled to comment upon. When the District

[31] At AB tab 2 page 142.
[32] Those letters are at RJ App tab 7 pages 57 to 60.

Council sent out a notice of the planning application, the notice indicated the points that could be referred to in any objections and she followed those particular points.[33] Although it did not state that the loss of recreational land could not be commented upon, it set out a list of issues that could be raised and that issue was not included.

4.31 She also objected to the planning application in 2005 for full planning permission for the mixed residential and employment development of the Land.[34] That application included the creation of an area of public open space along the course of the Waldron Gill which she specifically objected to in the last paragraph of her objection letter as she was concerned over the harmful effects of greater public access on habitats and ancient woodlands. However, that related to the area south of the Application Land which is a piece of rare wet woodland and was not a reference to the Application itself which has retained its protected species despite the public use made of it. She acknowledged that there was no reference in that letter either to recreational use on the Land. She was not receiving legal advice until the High Court application was made.

4.32 She also objected to the most recent planning application made in 2010 for the residential development of the Land.[35] Despite the principle of development of the Land again being in issue, she agreed that she did not raise the recreational use of the Land in that letter either. However, she explained that she had spoken to the Planning Inspectorate who had advised her that planning matters and town and village green issues were separate matters and so there was no reason to refer to the latter issues in relation to a planning application. She indicated that the reason no-one had raised the loss of a valuable recreational facility in response to the various planning applications was because the Land had been allocated for development a long time ago and from then onwards there was no point in objecting on that ground.

4.33 In 2006, she applied to East Sussex County Council for the Definitive Map of public rights of way to be modified so as to add a public footpath across the Land. The application has not to date been determined. She distributed the evidence questionnaires. However, she did not contact all those who had completed such evidence questionnaires to request them to complete a town and village green questionnaire because many of them were from outside the area who had come to do a circular walk. Once the bellmouth was constructed, there was easy access for people to come onto the Land and use it as part of a walk. They were using it as a "ramblers' path" rather than a "village green users' path".

4.34 **Mr Clive Boyle**[36] has lived at Stream Bridge Gates on Ghyll Road since 1998. Prior to then, he lived at 9 Swaines Way. He knew the Land as "Gas Holder" due to the location of the former gas holder site immediately to the north. His means of access to the Land used to be via the gas holder site itself where he worked and from where he walked down to the Application Land. He walked between the trees and over a post and rail fence. That occurred prior to 1986 and prior to the Frenches Farm Estate being built. Thereafter, he accessed the Land via the bellmouth, through the wood or across the footpath. He used the Land regularly between 1972 and 2007 for walking, with and without his dog which died in 1997, although he used it less often after 1997. His own children and grandchildren used the Land. His two daughters were born in 1966 and 1967. He has five grandchildren, who include Charley Farley who wrote his own letter in support of the Application.[37] They lived outside the green line, apart from two of them for an 18 month period whilst they lived with him and his wife when they were "between houses". He also saw the Land being used by others for walking and other activities, including blackberry picking, bird watching, kite flying and children playing. He regarded it as a children's play area. He had also taken part in ferreting on the Land, but that was prior to 1986. He was never prevented from using the Land and was never given permission to use it.

[33] That advice note is at RJ App tab 12 page 177.
[34] Her letter of objection dated 9th June 2006 is at RJ App tab 10 pages 143 to 145.
[35] Her objection is at RJ App tab 19 pages 373 to 412.
[36] His witness statement is at AB tab 2 pages 39 to 50.
[37] At AB tab 2 pages 49 to 50.

4.35 He obtained his questionnaire from Mrs Thorold with whom he had previously spoken about the Land.[38] He had not objected to any of the planning applications for the development of the Land.

4.36 **Mrs Tessa Harrison**[39] has lived at 57 Frenches Farm Drive since 1994 and used the Land from then until 2007 for walking on a weekly basis. She was aware that other local residents used the Land for activities such as walking, with and without dogs, blackberry picking, bird watching and children playing. However, apart from her own family, she was unaware where those other adults and children lived. Her use of the Land had never been challenged or prevented until the fencing took place which commenced in 2006.

4.37 She produced to the Inquiry a DVD showing her sister-in-law, Tricia Croft, and her husband on the Land in around 1993 exercising their dogs.[40] They then resided at 53 Frenches Farm Drive where they lived until around 2000 when they moved to Holly Drive. They have two children who are now aged 12 and 16, and would have been around 2 and 6 years of age respectively when they moved in 2000. The DVD was filmed in the large patch of land approximately 200 or 300 yards into the Land from where the fencing currently is on Ghyll Road. She indicated that that was the open area of the Land which most people used. The Land remained in a similar condition to that shown in 1993 during the 2000's until its use ceased. There were paths crossing the Land, as was apparent on the DVD. The claimed way subject to the Definitive Map Modification Order Application would be one of the paths shown on the DVD.

4.38 She was alerted to the fact that something was happening in relation to the Land, and so she contacted Mrs Thorold herself who came to see her and clarified what the proposals were for the Land. She was happy to complete a questionnaire because she viewed the Land as a piece of common land used for leisure purposes and so wanted to prevent its development. She signed the back of Map A when she completed the questionnaire. The green line was then marked on Map A. She interpreted it as being the whole neighbourhood.

4.39 In response to question 11 in her questionnaire as to the recognisable facilities available to local inhabitants,[41] her reference to there being a school catchment area was intended to mean that she regarded the Land as being a facility where local school children could play. The Residents' Association she referred to was the Frenches Farm Residents' Association that had existed since the Estate had been built and which managed some of the common areas on the Estate, such as car parking areas. It held formal meetings which were publicised within the Estate and subscriptions were paid. The Association covered the entire Estate, but did not go beyond it. Everyone on the Estate automatically became a member once they lived there and had to sign up to it when they purchased a property on the Estate. There was a neighbourhood watch in the area, but it no longer exists.

4.40 In her questionnaire, she responded to question 17 as to whether her immediate family used the Land that her nieces and nephews did so. That was a reference to Tricia's two children, and also her more local nieces and nephews who lived in Holly Drive and used to come down from there to use the Land. She regarded them as living in the same area as she did and not in a different one.

4.41 **Mr Ryan Sinclair**[42] has lived with his family at 67 Frenches Farm Drive since 1992. He is 20 years of age. He used the Land with his brother and friends from Frenches Farm Drive at least once a week for five years between 1997, when he was 7 years old, and 2002, usually at weekends, accessing it from Ghyll Road. They would play football, rugby, hide and seek and go BMX biking on the Land. He provided a plan showing the tracks they would use for BMX biking marked in red and the area where they explored and played games marked in green.[43] The plan was given to him by Mrs Thorold. She had

[38] His questionnaire is at AB tab 2 pages 43 to 47.
[39] Her witness statement is at AB tab 2 pages 73 to 87.
[40] The DVD is at AB tab 2 page 87 and six stills from the DVD are at AB tab 2 pages 87A to 87C.
[41] Her questionnaire is at AB tab 2 pages 76 to 80.
[42] His witness statement is at AB tab 2 pages 98 to 107.
[43] At AB tab 2 page 107.

marked the red lines on the plan after he had explained the location of the BMX tracks. There were also ramps on the Land in the late 1990's made from mud which remained for a couple of years. He used the Land less after 2002 and then for more teenage activities. He would then use the Land to cut through to the industrial estate to the north. He saw others using the Land for activities such as walking, walking with dogs and blackberry picking. He was never prevented from using the Land and was never asked to leave it and was never given permission to use it.

4.42 He obtained his questionnaire after Mrs Thorold had called round and asked if he used the Land. He was asked to complete a questionnaire which he did.[44] The green area on Map A was the area where people lived who had used the Land.

4.43 **Mr Brian Winter**[45] has lived at 2 Geer's Wood Cottages on Ghyll Road since 1963. He used the Land for nearly 60 years between 1944 and 2003. His use of the Land ceased in 2003 for no particular reason. He considered that the general pattern of use of the Land had remained the same during that time, although the use increased as more houses were built locally. He used the Land for activities such as walking, hunting rabbits and blackberry picking. He had never owned a dog. His hunting of rabbits took place when he was a child. Between 1986 and 2006, he used the Land regularly during the summer months. Although he roamed the area of the Land generally as a child, from 1986 onwards he used the paths across the Land. Blackberries were growing on the brambles by the sides of the paths. Others who were walking on the Land mainly used the paths. The local youngsters used to play on the Land, as did his seven children, particularly during the summer months, who frequently used it for motorcycling and children's games. Their ages now range between mid-forties and mid-fifties. The youngest would therefore have been around 20 years old in 1986. They had all left home by 1986, although five of them stayed in and around Heathfield. He was never given permission to use the Land and was never prevented from using it. Although he was a friend of Mr English and Mrs French, he did not use the Land on that basis. It was an open piece of land that everyone used and he was never challenged.

4.44 He had heard about the Land being purchased for building development and so he contacted Mrs Thorold who gave him a questionnaire which he completed.[46] He understood the reference in the questionnaire to the area bound in green to be the Application Land.

Written Evidence in Support of Application

4.45 In addition to the evidence of the witnesses who appeared at the Inquiry, I have also considered and had regard to the extensive written evidence submitted in support of the Application in the form of various evidence questionnaires, letters in support, photographs and other documentary evidence contained in the Applicant's Bundle. Further, after the close of the Inquiry, further letters and supporting documents were submitted under cover of a letter dated 10th August 2010, which representations had all been prepared post the closing of the Inquiry and for the specific purpose of objecting to the current planning proposals in relation to a larger site which includes the entirety of the Application Land. They provide further evidence of the use of the Land. A final letter in response to the Objector's submissions relating to such further information adduced was submitted dated 7th September 2010.

4.46 However, whilst the Registration Authority must also take into account all such written evidence, I and the Authority must bear in mind that it has not been tested by cross examination save insofar as it includes evidence questionnaires and documents compiled by witnesses who gave oral evidence. Hence, particularly where it is in conflict with oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to such cross examination.

CASE FOR THE OBJECTOR

Oral Evidence Objecting to the Application

[44] His questionnaire is at AB tab 2 pages 101 to 105.
[45] His witness statement is at AB tab 2 pages 149 to 167.
[46] His questionnaire is at AB tab 2 pages 152 to 156.

4.47 **Mr Richard Jones** is a Partner of Planning Perspectives LLP, planning and development consultants. He holds a BA (Hons) degree in town planning, is a member of the Royal Town Planning Institute and is a fellow of the Royal Institution of Chartered Surveyors. He has 32 years experience as a planning consultant.

4.48 He first visited the Land on 16th June 1998, and has thereafter visited it regularly, both in a professional capacity in his dealings with the various planning applications for the Land, and also at weekends when cycling on the Cuckoo Trail with his family. He lives near Edenbridge which is approximately 30 or 40 minutes drive away. He acknowledged that save for his first visit, he was unable to provide specific dates of his visits. However, during the relevant 20 year period, he had seen the Land on around 10 to 12 occasions, but he had never seen anyone on the Land apart from other members of the team instructed to act on behalf of the Objector. He had not observed any recreational activity on the Land. He was not aware of any notices being on the Land prior to 2006.

4.49 He produced a plan showing the location of the Land.[47] The circle on that plan is merely a 1km radius around the Land, but it has no particular relevance to the Application, it being a pre-existing plan. The Land is marked in red together with the wider area that was included in the various planning applications. The two primary schools in the area, Cross in Hand and Parkside, are identified on the plan, as is the location of the community centre on Sheepsetting Lane. There are no secondary schools in the area covered by the plan. The relevant school catchment area is a much larger area than that covered by the plan. He also produced a site plan showing the boundaries of the Land, the planning applications, ownership and also the claimed footpath route.[48] The Land is approximately 1.4 hectares in area.

4.50 Section 4 of his written proof of evidence sets out the detailed planning history of the Land. It currently has the benefit of outline planning permission for mixed residential and employment development with the reserved matters remaining under consideration. Development cannot therefore take place at present until the reserved matters have been approved, the previous approval having been quashed by the Court. He described the Land as "scrubland" in the three planning application forms prepared at different times, namely in May 2003, June 2005 and June 2006, and the planning authority's officers never took issue with that description. In the Statement of Common Ground between the Objector and Wealden District Council in relation to the 2006 reserved matters appeal, it was agreed that "*the vegetation on the site is largely scrub*".[49] He referred to two photographs taken in July 2004 which reflected his recollection of the Land.[50] It was scrubland with footpaths running through it.

4.51 The wider planning application site of which the Land is part has an extensive planning history involving numerous planning applications and a planning appeal. However, despite the recreational use of undeveloped land being a material planning consideration in the determination of planning applications for development of land, the recreational use of the Land was not raised at any time in relation to such applications by the public or by the planning authority's officers, and no objection was made on the basis of the loss of such a use. The Inspector determining the appeal against the refusal of reserved matters approval in 2007 did not identify the loss of the recreational value of the Land as a main issue nor did he make any reference to the Land's recreational use in his decision letter.[51] The particular concerns expressed related to the impacts of the proposed development on the ancient woodland, on protected species and on the loss of public views rather than on any recreational use of the Land. In particular, in paragraphs 10, 14 and 15 of his decision letter, the Inspector analysed the impact of the proposed development on views from the Land from public vantage points from outside it. In the scoping work undertaken for the Environmental Impact Assessment of the proposed development on the Land, the recreational user had not been raised. Even in the latest planning application for the residential development of the Land made in April 2010, no representation had been made that the Land had been

[47] RJ App tab 1 page 2.
[48] RJ App tab 1 page 4.
[49] RJ App tab 16 page 250 paragraph 2.4.
[50] Attached to Graham Bellamy's Statutory Declaration at OB tab 12 page 83.
[51] RJ App tab 11 pages 164 to 173.

used for recreational purposes.[52] Indeed, the first indication Mr Jones had of the claimed recreational use of the Land was when he was notified of the present Application on 28th February 2008. The planning process gave no indication to the Objector that the Land was being used for local recreational purposes.

4.52 He acknowledged in cross examination that there were references to the loss of "open land" in the representations made by local residents to the various planning applications, but he emphasised that there were no references to any recreational use of the Land and stated that there are many areas of open land that are not used for recreational purposes and are not town or village greens. Similarly, references to the need for habitat to be protected do not mean that the Land is used for recreational purposes, and Land does not need to be registered as a town or village green in order for the habitat to be protected. In the same way, references to the loss of an area of natural beauty are not a reference to the recreational use of Land and such areas are not necessarily registered as town or village greens. Such a visual matter of beauty is capable of being perceived from outside the site, including from the Cuckoo Trail from where the Land could be seen prior to the fencing. Issues of loss of a landscape, open countryside, a woodland, a greenfield site or a nature reserve raised by local residents in relation to the planning applications are not inextricably linked with the registration of such sites as a town or village green. There are many pieces of land to which such would apply and which are not town or village greens.

4.53 The Objector purchased the Land on 4th January 2006. Its eastern boundary was then boarded and gates were erected over the bellmouth. In September 2006, herras fencing was erected along the footpath boundary and, at the same time, the hoarding along the north east boundary was extended to cover the entire length of that boundary. Private Property signs were attached to the hoarding. The boundary adjacent to Lower Theobalds Farm was completely boarded in June 2007. He referred to a plan showing the extent and timing of the fence erection.[53]

4.54 Although the Objector only purchased the Land in January 2006 and the majority of visits by those acting on its behalf took place post January 2006, a few visits took place to the Land on its behalf or by other witnesses in support of the Objection prior to that date. In addition to his own visits, they were as follows as indicated in the various statutory declarations, namely James Pitt, the Objector's land manager, visited the Land on 8th October 2004 and on 7th April 2005; Darren Page, an architect, made visits on 13th December 2004 and on 28th September 2005; Adrian Baulf, a director of the previous owner of the Land, Oraclewatch Limited, visited the Land once prior to 1998 and then on three occasions between 1998 and 2005; Graham Bellamy, a highway consultant, visited the Land on 2nd May 2003 and on 7th July 2004; Elliot Toms, of Geo-Environmental Services Limited, visited the Land on 9th June 2005; and Ian Davis, an architect, made three visits on 2nd December 1998, 27th March 2001 and 13th December 2004.

4.55 The Land falls within the civil parish of Heathfield and Waldron. As of 2009, its population was 11,839. At ward level, it falls within the Heathfield North and Central Ward, the population of which was 8,022 in 2009. In his view and from his observations of the area, the town of Heathfield as a whole operates as a community and does not break down into different neighbourhoods. There is a local centre with local shops on Hailsham Road which is outside the identified neighbourhood. Two primary schools serve the settlement of Heathfield, namely Parkside County Primary School and Cross in Hand Church of England Primary School, but they are both outside the neighbourhood. Although the neighbourhood is within both their catchment areas, every dwelling in the country is in a school catchment area, and the relevant point is that the school catchment areas have no relationship with the neighbourhood. Local health services are provided at the Heathfield Community Centre, also outside the neighbourhood. There are two doctors' surgeries in Heathfield, but both are outside the neighbourhood. There are a number of local churches within Heathfield, but none within the neighbourhood. There is no local police station in the neighbourhood. There was previously a scout hut in the neighbourhood, but that was dismantled in 2000. There are no other public buildings in the neighbourhood. The only residents' association referred to is a management company for the Frenches Farm Estate which was compulsory to join for those living on the Estate and was not open to those living outside the Estate to join. There is no evidence of a current

[52] The representations are at RJ App tab 19.
[53] At OB tab 3 page 15.

neighbourhood watch operating in the neighbourhood. There was no signage he found within the area nor on the internet suggesting that there were any organisations or activities specifically relating to the claimed neighbourhood.

4.56 He further noted that the residential development within the neighbourhood is of varying age. The oldest properties front Hailsham Road and sections of Ghyll Road; the properties in Meadow Way and Swaines Way appear to have been constructed in the 1970's; those opposite the Land around Frenches Farm Drive were developed in the mid-1980's; and those around Geer's Wood date from the 1990's. Therefore, at the start of the relevant 20 year period, the Geer's Wood development was not in existence. He expressed the view that the claimed neighbourhood had none of the characteristics of a neighbourhood and did not exist but, instead, it was an area that had been arbitrarily identified, not least as evidenced by the use of the top of the page of Map A as its northern boundary, in order to include the addresses of as many as possible who had supported the Application.

4.57 If the commercial premises were excluded from the neighbourhood and 2.3 residents per dwelling were assumed in accordance with the 2009 household data, the maximum number of 50 people supporting the Application from the 350 properties within the neighbourhood would represent 6.2% of the claimed neighbourhood's population. He acknowledged in cross examination that the 47 individuals who had compiled the initial evidence questionnaires in support of the Application referred to a further 35 individuals who could have been contacted,[54] but stated that they did not all live within the claimed neighbourhood and it was unknown what their evidence would have stated. Hence, in his view, they ought not to be taken into account. Similarly, of the 8 persons who had produced evidence in support of the footpath application but not in support of the town and village green application, only 2 of them lived within the claimed neighbourhood, namely Tobias Bear and Elizabeth Mackie. Mrs Mackie was also one of the 35 additional names that had been referred to,[55] and she had indicated in her footpath questionnaire[56] that she had used the Land "as a footpath". There may have been others of the additional 35 who had merely used the Land as a footpath rather than as a town or village green. There were an additional 8 questionnaires in support from local employees.[57] However, it is unknown whether they lived in the claimed neighbourhood and many of them had not used the Land themselves. Insofar as they had seen others using the Land, those persons may have been the same people who had completed the questionnaires in support of the Application and so would not be adding any additional users to the numbers. Further, he pointed out that only 9 of the supporters lived within the neighbourhood during the entirety of the relevant 20 year period.

4.58 The Land falls within the Wealden 010D Output Area. That area has not been suggested as a neighbourhood for the purposes of the Application. Its population is 1682 on 2008 figures. As illustrated on the Objector's "Composite Plan" produced during the course of the Inquiry showing the boundaries of the Output Area in yellow, the eastern boundary of the identified neighbourhood in green as shown on Map A and the location of users as shown on Map A, approximately 10 of the Applicant's witnesses within the claimed neighbourhood fall outside that Output Area. The corresponding figure of the percentage of the inhabitants of that Output Area using the Land on the basis of the Applicant's evidence is 2.4%. Further, the locations of those identified users are all within the southern part of the Output Area.

Written Evidence Objecting to the Application

4.59 In addition to the evidence of witnesses who appeared at the Inquiry, I have also considered and had regard to the 14 sworn statutory declarations submitted on behalf of the Objector.[58] I have also noted the Objector's response dated 31st August 2010 to the Applicant's further representations submitted after the close of the Inquiry.

[54] In response to question 35 of the questionnaires.
[55] At AB tab 3 page 249.
[56] At RJ App tab 24 pages 515 to 520.
[57] They are contained in AB tab 6.
[58] Contained in OB.

4.60 In relation to such written evidence, I refer to and repeat my observations in paragraph 4.46 above that whilst such written evidence must be taken into account, I and the Registration Authority must bear in mind that it has not been tested by cross examination. Hence, particularly where it is in conflict with any oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to cross examination.

THIRD PARTY EVIDENCE

4.61 During the Inquiry, I invited any other persons who wished to give evidence to do so. There were no such other persons who gave additional evidence.

5. THE LEGAL FRAMEWORK

5.1 I shall set out below the relevant basic legal framework within which I have to form my conclusions and the Registration Authority has to reach its decision. I shall then proceed to apply the legal position to the facts I find based on the evidence that has been adduced as set out above.

Commons Act 2006

5.2 The Application was made pursuant to Section 15 of the Commons Act 2006. That Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.

5.3 Although the Application sought the registration of the Land by virtue of the operation of Section 15(3) of the 2006 Act, the Applicant applied at the Inquiry to amend her Application to make it under Section 15(4) instead, which application I shall consider below. Under Section 15(4), land is to be registered as a town or village green where:-

> "*(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
> *(b) they ceased to do so before the commencement of this section; and*
> *(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).*"

5.4 That subsection is subject to subsection (5) by virtue of which it does not apply to any land in respect of which planning permission was granted before 23rd June 2006 and other related criteria are satisfied. Subsection (5) states:-

> "*Subsection (4) does not apply in relation to any land where—*
> *(a) planning permission was granted before 23 June 2006 in respect of the land;*
> *(b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and*
> *(c) the land—*
> *(i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or*
> *(ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.*"

However, the Objector confirmed at the Inquiry that it was not relying upon that provision and did not contend that it applied to the Application. Therefore, I shall not consider it further.

5.5 Section 15(6) provides that in the determination of the relevant 20 year period referred to in Section 15(4)(a), any period during which access to the land was prohibited to members of the public by

reason of any enactment must be disregarded. However, no reliance was placed on that provision either and it is not relevant to the Application on the basis of the evidence adduced.

5.6 Therefore, for the Application to succeed, it must be established that:-

(i) the Application Land comprises "land" within the meaning of the 2006 Act;
(ii) the Land has been used for lawful sports and pastimes;
(iii) such use has been for a period of not less than 20 years;
(iv) such use has been as of right;
(v) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;and
(vi) such use ceased prior to 6th April 2007 and the Application is made within 5 years of the date of the cessation of the use.

The Burden and Standard of Proof

5.7 The burden of proving that the Land has become a town or village green rests with the Applicant for registration. The standard of proof is the balance of probabilities. That is the approach I have used.

5.8 Further, when considering whether or not the Applicant has discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in ***R. v Sunderland City Council ex parte Beresford***[59] where, at paragraph 2, he noted as follows:-

> "*As Pill LJ. rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111 "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green …". It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met.*"

Hence, all the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on a balance of probabilities.

Statutory Criteria

5.9 Caselaw has provided helpful rulings and guidance on the various elements of the statutory criteria required to be established for land to be registered as a town or village green which I shall refer to below.

Land

5.10 Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration.

5.11 However, it was stated by way of *obiter dictum* by the majority of the House of Lords in ***Oxfordshire County Council v. Oxford City Council***[60] that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered.

Lawful Sports and Pastimes

5.12 It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[61] that "*lawful sports and pastimes*" is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities

[59] [2004] 1 AC 889.
[60] [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.
[61] [2000] 1 AC 335 at 356F to 357E.

can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children's play.

5.13 However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way. In ***R. (Laing Homes Limited) v. Buckinghamshire County Council***[62], Sullivan J. noted at paragraph 102 that:-

> "*it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which 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 his fields.*"

A similar point was emphasised at paragraph 108 in relation to footpath rights and recreational rights, namely:-

> "*from the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.*"

5.14 More recently, Lightman J. stated at first instance in ***Oxfordshire County Council v. Oxford City Council***[63] at paragraph 102:-

> "*Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).*"

He went on area paragraph 103 to state:-

> "*The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e g, fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights.*"

The Court of Appeal and the House of Lords declined to rule on the issue since it was so much a matter of fact in applying the statutory test. However, neither the Court of Appeal nor the House of Lords expressed any disagreement with the above views advanced by Lightman J.

Continuity and Sufficiency of Use over 20 Year Period

5.15 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: ***Hollins v. Verney***.[64]

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[62] [2003] EWHC 1578 (Admin).
[63] [2004] Ch. 253.

5.16 Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: ***R. (on the application of Lewis) v. Redcar and Cleveland Borough Council***.[65]

As of Right

5.17 Use of land "*as of right*" is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[66] that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

5.18 "Force" does not merely refer to physical force. User is *vi* and so not "*as of right*" if it involves climbing or breaking down fences or gates or if it is under protest from the landowner: ***Newnham v. Willison***.[67] Further, Lord Rodger in ***Lewis v. Redcar*** stated that "*If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being vi…user is only peaceable (nec vi) if it is neither violent nor contentious*".[68]

5.19 "Permission" can be expressly given or be implied from the landowner's conduct, but it cannot be implied from the mere inaction or acts of encouragement of the landowner: ***R. v. Sunderland City Council ex parte Beresford***.[69]

Locality or Neighbourhood within a Locality

5.20 A "*locality*" must be a division of the County known to the law, such as a borough, parish or manor: ***MoD v Wiltshire CC***;[70] ***R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC***;[71] and ***R. (Laing Homes Limited) v. Buckinghamshire CC***.[72] A locality cannot be created simply by drawing a line on a plan: ***Cheltenham Builders*** case.[73]

5.21 In contrast, a "*neighbourhood*" need not be a recognised administrative unit. Lord Hoffmann pointed out in ***Oxfordshire County Council v. Oxford City Council***[74] that the statutory criteria of "*any neighbourhood within a locality*" is "*obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries*". Hence, a housing estate can be a neighbourhood: ***R. (McAlpine) v. Staffordshire County Council***.[75] Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must be an area which has a sufficient degree of cohesiveness: ***Cheltenham Builders*** case.[76]

5.22 Further clarity was provided on that element recently by HHJ Waksman QC in ***R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council***[77] who stated:-

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[64] (1884) 13 QBD 304.
[65] [2010] UKSC 11 at paragraph 36.
[66] [2000] 1 AC 335.
[67] (1988) 56 P. & C.R. 8.
[68] At paragraphs 88-90.
[69] [2004] 1 AC 889.
[70] [1995] 4 All ER 931 at page 937b-e.
[71] [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.
[72] [2003] EWHC 1578 (Admin) at paragraph 133.
[73] At paragraphs 41 to 48.
[74] [2006] 2 AC 674 at paragraph 27.
[75] [2002] EWHC 76 (Admin).
[76] At paragraph 85.
[77] [2010] EWHC 530 (Admin) at paragraph 79.

"*While Lord Hoffmann said that the expression was drafted with "deliberate imprecision", that was to be contrasted with the locality whose boundaries had to be "legally significant". See paragraph 27 of his judgment in Oxfordshire (supra). He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality… but, as Sullivan J stated in R (Cheltenham Builders) Ltd v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application.*"

Significant Number

5.23 "*Significant*" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers: ***R. (McAlpine) v. Staffordshire County Council***.[78]

Amendment of Applications

5.24 In ***Oxfordshire County Council v. Oxford City Council***,[79] the House of Lords addressed the extent to which a registration authority could amend an application. All of the Law Lords found that an amendment could be made at the authority's discretion, provided that such an amendment would not occasion unfairness to any objector.

6. AMENDMENTS TO APPLICATION

6.1 Before turning to the substantive issues, it is necessary to consider a procedural matter that arose during the Inquiry relating to amendments of the Application.

6.2 As noted in paragraph 2.2 above, the Application was made on the basis that Section 15(3) of the 2006 Act applied and that use as of right ceased in April 2007. However, at the outset of the Inquiry, the Applicant sought to amend the Application so that it was made on the basis that Section 15(4) applied with use as of right ceasing in January 2006.

6.3 As stated in paragraph 5.24 above, the legal position is that an amendment to an application may be made at the Registration Authority's discretion, provided that any such amendment would not occasion unfairness to any objector. In that regard, the Objector confirmed at the outset of the Inquiry that those amendments would cause it no prejudice and that it had no objection to those amendments to the Application being made. Indeed, I note that such amendments would not raise any additional disputed matters between the Parties and therefore did not cause any difficulties to the Objector in the presentation of its case to the Inquiry.

6.4 Consequently, I recommend that it would be reasonable and appropriate for the Registration Authority to exercise its discretion to allow those two amendments as sought to be made, and that the Application be amended accordingly so that it is made on the basis that Section 15(4) of the 2006 Act applies and that use as of right ceased in January 2006. The remainder of this Report is written on those bases.

7. APPLICATION OF THE LAW TO THE FACTS

Approach to the Evidence

7.1 The impression which I obtained of all the witnesses called at the Inquiry is that they were entirely honest and transparent witnesses, and I therefore accept for the most part the evidence of all the witnesses called for both Parties.

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[78] [2002] EWHC 76 (Admin) at paragraph 71.
[79] [2006] 2 AC 674.

7.2 I have considered all the evidence put before the Inquiry, both orally and in writing. However, I emphasise that my findings and recommendations are based upon whether the Land should be registered as a town or village green by virtue of the statutory criteria in Section 15(4) of the 2006 Act being satisfied. In determining that issue, it is inappropriate for me or the Registration Authority to take into account the merits of the Land being registered as a town or village green or of it not being so registered.

7.3 I shall now consider each of the elements of the Section 15(4) criteria in turn and determine whether they have been established on the basis of all the evidence, applying the facts to the legal framework set out above and also to the more detailed legal position referred to below where relevant to specific issues raised. The facts I refer to below are all based upon the evidence set out in detail above. In order for the Land to be registered as a town or village green, each of the criteria in Section 15(4) must be established by the Applicant on the evidence adduced on the balance of probabilities.

The Land

7.4 There is no difficulty in identifying the relevant land sought to be registered. The Application Plan is the definitive document on which the Land that is the subject of the Application is marked. The land sought to be registered is hatched in red on the map submitted with the Application.[80] There was no dispute at the Inquiry nor in any of the evidence adduced that that area of land comprises "land" within the meaning of Section 15(4) of the 2006 Act and is capable of being registered as a town or village green in principle and I so find.

Relevant 20 Year Period

7.5 Turning next to the identification of the relevant 20 year period for the purposes of Section 15(4) of the 2006 Act, as noted in paragraph 6.4 above, the Application as amended states that the use of the Land as of right ceased in January 2006. According to Mr Jones, the Objector started to erect fencing around the Land upon purchasing it at the beginning of January 2006, and it was totally fenced by June 2007. That is consistent with the evidence of the Applicant's witnesses, many of whom referred to the erection of the fencing commencing in 2006 and being completed in 2007. There was no evidence that the fencing of the Land commenced prior to 2006 nor that any person was prevented or hindered from using the Land prior to that date. Therefore, I find that the fencing of the Land by the Landowner commenced in January 2006, and given that the Applicant accepts by her sought amendment that use as of right ceased on that date, I so find.

7.6 It follows that the relevant 20 year period for the purposes of Section 15(4) is January 1986 until January 2006.

Lawful Sports and Pastimes

7.7 From the evidence, it is apparent that the Land has been used for some lawful sports and pastimes during the relevant 20 year period. Each of the witnesses who gave evidence in support of the Application referred to their own recreational use of the Land and of having seen others using the Land recreationally for activities such as walking, with and without dogs, children playing, blackberry picking and watching wildlife. Further, although I attribute such evidence less weight, I note that the various evidence questionnaires compiled by others who did not give oral evidence referred in response to question 16 as to the activities they took part in on the Land to having undertaken similar recreational activities and in response to question 23 to having seen others participate in similar activities. Such evidence was further confirmed by the additional user evidence submitted post the Inquiry.

7.8 There was no evidence of any formal activities having taken place on the Land, such as organised games or community events. Nonetheless, the use of the Land for informal recreational activities is sufficient for the purposes of the statutory criteria.

[80] At AB tab 1 page 10.

7.9 I note that Mr Jones had visited the Land prior to January 2006 and had never seen any recreational use of the Land. That was also the experience of a number of witnesses in support of the Objection who, in their written statutory declarations, had referred to a few visits to the Land prior to that date. However, in relation to the latter, those visits were relatively few in number and would also have been more likely to have taken place during the working week and in working hours when recreational use of land tends to be less frequent generally. Moreover, I give more weight to the oral evidence of the Applicant's witnesses as their evidence was subject to cross examination. As to Mr Jones's oral evidence, I accept his evidence that he saw no recreational activity of the Land when he visited the Land. However, I note that during the relevant 20 year period, he had only seen the Land on around 10 to 12 occasions. Although those visits included weekends when he was cycling along the Cuckoo Trail with his family, he would have been in the immediate vicinity of the Land for only relatively short periods during those times. Hence, the fact that he saw no recreational use of the Land on those 10 or 12 occasions does not mean that such recreational activity was not taking place at other times.

7.10 Further, I note from the 1993 DVD produced to the Inquiry by Mrs Harrison that there was an open area of the Land that would have been particularly suitable for exercising dogs and for children's play. Notably, the condition of that part of the Land shown on the DVD was in sharp contrast to the condition of the Land during my site visit when it was largely impenetrable due to the vegetation. I am aware that the Land has been wholly fenced since 2007 and so has not been used for some 3 years. However, that extent of vegetation growth within such a period of time suggests to me that at least the area of the Land shown on the DVD must have been in some use to some extent at that time in order for the vegetation to have been kept down to the level shown on that DVD.

7.11 In addition, it is my view that the main recreational activities referred to by the various witnesses, such as walking, with and without dogs, children playing, blackberry picking and wildlife watching, were "*lawful*" sports and pastimes. There was no suggestion by the Objector that any of those particular activities were other than lawful. The Objector did question the lawfulness of the activities of rabbit hunting and ferreting carried out by Mr Winter and Mr Boyle respectively, but as they were only carried out prior to the start of the 20 year period, I do not take them into account as part of the qualifying use in any event. Similarly, the lawfulness of motorbike riding on the Land was also questioned by the Objector. However, the only witnesses who referred to that activity were Mr Winter and Mr Bowen. The former was referring to that use having taken place prior to the relevant 20 year period, whilst the latter referred to others having participated in such an activity but he was unable to indicate whether they lived within or outside of the claimed neighbourhood. In those circumstances, I do not take that activity into account in any event as part of the qualifying use.[81] As to bonfires on the Land referred to by Mrs Caswell-Lake and in some of the written questionnaires, I do not accept that such would have been unlawful by being contrary to Section 1 of the Criminal Damage Act 1971. An offence under that provision requires an intention or recklessness that property will be damaged or destroyed. In my view, a seasonal bonfire held on Guy Fawkes night would not amount to an offence under that provision.

7.12 Therefore, I am satisfied from the evidence that on the balance of probabilities the Land has been used for some lawful sports and pastimes during the relevant 20 year period.

Extent and Continuity of Use for Lawful Sports and Pastimes

7.13 However, in order for the statutory criteria to be met, the recreational use of the Land must have been with a sufficient degree of frequency and to a sufficient extent throughout the entire relevant 20 year period to show the landowner that rights were being asserted. Therefore, it is necessary to assess the extent of the use over that period.

7.14 In doing so, it is firstly my view from both the oral and written evidence that the principal recreational activities that have taken place on the Land are walking, with or without dogs, children playing, blackberry picking and nature watching. Those were the main activities referred to by the

[81] The Applicant indicated in Closing Submissions at paragraph 30 that motorcycling and ferreting on the Land were no longer relied upon as part of the qualifying use.

witnesses who gave oral evidence and are the most frequently referred to activities in the written questionnaires and in other written evidence. There are very few references to activities such as kite flying, picnicking or any community based activities.

7.15 Secondly, in assessing the extent of the user, I take into account that some of the activities referred to are necessarily seasonal in nature, such as blackberry picking and bonfire parties, and so would not generally be taking place outside the relevant season.

7.16 Thirdly, and particularly significantly in relation to the Application, it is necessary to discount from the qualifying use the walking that took place on the Land that was more akin to the exercise of a public right of way rather than a recreational use over a town or village green. Applying the observations of Sullivan J. in the ***Laing Homes*** case and of Lightman J. at first instance in the ***Oxfordshire*** case as set out in paragraphs 5.13 and 5.14 above, it seems to me that the fundamental issue concerns how the particular use would appear to the reasonable landowner. Further, if the appearance is ambiguous, the use should be ascribed to the lesser right, namely a right of way.

7.17 Applying those principles to the evidence, there is clear evidence that during the relevant 20 year period there was a main defined worn path through the Land. Mr Robards referred to it as a "distinct footpath" through the centre of the Land. Miss Godfrey noted that there had always been a clear and defined route through the Land during her knowledge of the Land from 1996. In the DVD submitted by Mrs Harrison from 1993, a worn path is evident on the part of the Land shown. Moreover, Mrs Thorold made an application to the County Council for a public footpath through the Land to be added to the Definitive Map running from Ghyll Road to Theobalds Farm as identified by the dashed red line on the plans annexed to the various footpath questionnaires.[82] The compilers of those questionnaires indicated that they had used that route as a footpath between those two points.

7.18 It is also relevant to note that the route subject to the Definitive Map Modification Order leads from and to existing public highways. It leads from the bellmouth at Ghyll Road on the Cuckoo Trail and onto the existing footpath running along the south west of the Land. There were specific purposes expressed in the footpath questionnaires for individuals using that claimed public right of way, namely in particular as a route leading to and from Geer's Wood or as part of a circular walk in the area. Such uses of the route would seem to me to be referable to use of a public right of way.

7.19 Further, it is my impression from the evidence that a material amount of the use of the Land was of such a nature. Mr Robards indicated that he walked both along that path and elsewhere on the Land, but that the public's use along that route had been sufficiently significant to create a worn path. Mrs Caswell-Lake pointed out that there was a distinguishable path through the Land "where the majority of feet went". Indeed, she specifically used it as a route through to the Wood, as she also swa others doing. Similarly, Miss Godfrey indicated that she had used that path together with another one on the Land as well as using other parts of the Land. Again, Mr Anderson stated that sometimes he used the Land as the end object of a walk in order to exercise his dogs, but on other occasions he used the Land as part of a circular walking route. Mrs Thorold also acknowledged that once the bellmouth at Ghyll Road was constructed, there was easy access for people to come onto the Land and to use it as part of a walk. Mr Winter used the paths across the Land from 1986 onwards, and he pointed out that others who were walking on the Land mainly used the paths. Indeed, such material use of that path was confirmed by the defined worn line evident in the 1993 DVD.

7.20 It also seems to me that, having considered all the oral and written evidence in support of the Application, the use of the Land for walking, either with or without dogs, was the most common activity on the Land referred to. Indeed, that is further confirmed by the written user evidence submitted post the close of the Inquiry. Moreover, in relation to all the written evidence, it is not known whether or not those who used the Land for walking were using the defined paths as rights of way, as such is not apparent from their user forms or other written documents. It cannot be assumed, though, that they were not doing so,

[82] At RJ App tab 24.

particularly taking into account where the burden of proof lies. I further note Mr Winter's evidence that blackberries were growing on the brambles by the side of the paths. Hence, that activity, which was also referred to relatively frequently, could take place as part of, and incidental to, a walk across the Land and without needing to meander over the Land generally. In the same way, nature watching could take place as an incidental activity to walking along the paths.

7.21 Taking all such matters into account, it seems to me, and I so find, that a material amount of the use of the Land during the relevant 20 year period was a use that was referable to user as a public right of way. Accordingly, I discount such use from the relevant qualifying use.

7.22 Fourthly, and linked with the above matter, I saw in the DVD the particular area of the Land where Mrs Croft and her husband were exercising their dogs. Mrs Harrison indicated that that area was approximately 200 or 300 yards into the Land from the Ghyll Road point of access. She further pointed out that it was that open area which most people used. Indeed, as far as I could ascertain from the DVD footage, it appeared that apart from the worn paths there was a significant amount of vegetation in areas beyond that open area. I also note in that regard the photographs taken on 7th July 2004 by Mr Bellamy from the entrance to the Land on Ghyll Road showing extensive vegetation coverage in that area.[83] As to the written evidence, it is not possible to ascertain which particular parts of the Land were being used and, again taking into account that the burden of proof lies on the Applicant, I an unable to assume that such use was over the whole of the Land generally. Hence, insofar as the Land was used other than along the worn paths, and I accept from the evidence that such a wider use took place to an extent, it nonetheless appears to have been primarily limited to a particular part of the Land rather than being over the entirety of the Land subject to the Application.

7.23 Fifthly, in assessing the extent of the qualifying use, it is necessary to discount the use by those who were not inhabitants of the identified neighbourhood. I shall deal with the issue of the neighbourhood in detail below. However, two of the witnesses who gave evidence in support of the Application, namely Miss Godfrey and the Applicant herself, both resided outside the neighbourhood during the relevant 20 year period. Hence, their use must be discounted. Similarly, the use of those who produced written evidence who lived outside the identified neighbourhood throughout the relevant 20 year period must also be discounted from the qualifying use.

7.24 Further, in relation to the specific use of children playing on the Land, which was another of the main uses of the Land, there was little evidence to satisfy the burden of the proof on the Applicant to establish that any material amount of such use was by children living in the neighbourhood. Although Mr Robards, Mr Bowen and Mrs Thorold referred to their children using the Land and Ryan Sinclair gave evidence that he had played on the Land, other evidence of children's play on the Land must be discounted. Mrs Caswell-Lake took her grandchildren to play on the Land but they lived in Brighton; Mr Boyle's grandchildren used the Land during the relevant 20 year period but they lived outside the neighbourhood apart from two of them during an 18 month period; and Mr Winter's children did not use it within the relevant 20 year period. Further, in relation to the references by a number of witnesses and in the written questionnaires and other written evidence to children playing on the Land, the witnesses were unable to indicate, and the compilers of the questionnaires and other documents do not state, whether such children were inhabitants of the neighbourhood. In the absence of such evidence, the burden of proof is not established that those youngsters were local inhabitants and I therefore discount their use from the qualifying use.

7.25 Similarly, although each of the witnesses who gave oral evidence in support of the Application and who compiled evidence questionnaires in support referred to having seen others using the Land, there is no evidence in the majority of instances that those other persons were inhabitants of the identified neighbourhood. Indeed, the majority of the witnesses who gave oral evidence confirmed that they were unable to state whether such other persons lived inside or outside the green line on Map A. Therefore,

[83] At OB tab 12 page 83.

insofar as the evidence fails to establish that such other persons seen using the Land were inhabitants of the identified neighbourhood, I also discount such use from the qualifying use.

7.26 Sixthly, it is of relevance that there is a distinct lack of any reference to the Land's value as a local recreational resource in any of the objections or other documentation relating to the various planning applications that have been made during the relevant 20 year period.[84] I note Mrs Thorold's indication that she followed the guidance note of material planning considerations that could be raised as objections provided by the District Council, but issues such as the impacts on protected species and on the ancient woodland were nonetheless properly raised by a number of objectors when they were not specifically included in that guide. I find it surprising that no specific reference was made to such recreational use by anyone at any time as part of those planning processes if the Land was in fact being significantly used for recreational purposes given that the development proposals would clearly have prevented any such continuing use of the Land. If the Land was being used to any significant extent, I would have expected that such use would have been raised by someone as a material planning concern. Further, I do not regard the references to matters such as the loss of open land, loss of an area of natural beauty or loss of a valuable nature reserve to be implied references to the loss of a recreational area. That lack of any reference to such use tends to suggest that no substantial recreational use was in fact being made of the Land.

7.27 Seventhly, it is necessary for the Applicant to establish that the qualifying user took place to a sufficient degree throughout the relevant 20 year period. Yet, taking the above matters into account, it seems to me that such user was particularly limited during the earlier part of that period. During the first year of that period, 1986, five of the witnesses who gave oral evidence were using the Land. Of those, Mr Winter indicated that he specifically used the paths from 1986 onwards rather than other parts of the Land. Hence, it seems to me that his use was then primarily one that was more akin to the exercise of a right of way. Mr Boyle's primary use of the Land from 1986 onwards was walking, with and without his dog; Mr Anderson's primary use was also walking with his dogs, and although sometimes he used the Land for his dogs to run around, he also used it as part of a circular walking route; Mr Bowen used the Land to walk his dog as well as for his children to play; and Mrs Thorold also used it for walking, with and without dogs, and made the application for the Definitive Map Modification Order. In relation to those four witnesses, it appears to me that a material part of their respective use was likely to be more akin to the exercise of a right of way which element of their use must be discounted.

7.28 There were also some 15 additional persons who had compiled written evidence in support of the Application and who used the Land during 1986 as identified on the first schedule to the Objector's Closing Submissions, a number of whom were from the same household. Many of those used the Land for walking, which may or may not have been of a nature that was more akin to a right of way. In that regard, I note that the burden of proof is on the Applicant. It is also not possible to ascertain the extent and frequency with which they undertook the various specified activities other than walking. In such circumstances, and given that their evidence was not made subject to cross examination, I am unable to give their evidence considerable weight. I make the same observations in relation to the additional user evidence submitted post the Inquiry insofar as such evidence indicates that the individual's use was taking place at that particular time.

7.29 The Applicant also placed reliance upon the evidence of use of those who had completed footpath questionnaires. However, in relation to a number of those persons, they lived outside the identified neighbourhood and so their use must be discounted from the qualifying use on that basis. Further, those questionnaires specifically refer to the use of the specific route across the Land as a public right of way rather than the use of the Land as a town or village green. As noted above, the use of land as a public right of way is different from the use of land as a town or village green. Insofar as the user of the Land has been more akin to the exercise of a public right of way, as the use in the footpath questionnaires

[84] I am aware that such objections have since been made post the close of the Inquiry as contained in the further representations submitted, but they were specifically expressed in the covering letter of 10th August 2010 to have resulted from this particular contention raised by the Objector.

specifically related to, such use must be discounted from the qualifying use. Therefore, I do not regard the evidence of use contained in the footpath questionnaires as adding to the qualifying use.

7.30 In addition, the Applicant placed reliance upon the references in the Application evidence questionnaires to some 34 other local people "*who may have provided further evidence as to use*".[85] However, not only were some of those not resident within the identified neighbourhood and so their evidence would have to be discounted from the qualifying use on that ground in any event, it is also unknown as to whether such persons would have given evidence of a qualifying use over the relevant 20 year period and, if so, the nature and extent of any such use. Again, bearing in mind the burden of proof on the Applicant, it cannot merely be assumed that any of such evidence would support the Application. Therefore, without more, I do not regard that list of names as adding to the qualifying use. Further, although I note the evidence from employees in the area that they had seen others using the Land during the relevant 20 year period, in the absence of any evidence that those users they saw were inhabitants of the claimed neighbourhood, I am unable to add such use to the qualifying use.

7.31 Therefore, taking all those matters into account, it is my view that although the Land has been used for some lawful sports and pastimes over the relevant 20 year period, the relevant qualifying uses are relatively limited and have not taken place with such frequency and to such an extent throughout the relevant 20 year period that they would be capable of showing a landowner that rights over the Land were being asserted, and I so find.

Use as of Right

7.32 Turning to whether the qualifying use of the Land was "*as of right*", there was no suggestion that any of the use was by stealth. Moreover, the Objector did not contend that any such use was with permission, either express or implied. On the contrary, it is the Objector's case that such use has not occurred to its knowledge.

7.33 Nonetheless, the Objector does contend that an element of the qualifying use was "*vi*", namely "with force" and for that reason was not "*as of right*". As noted in paragraph 5.18 above, the requirement that the use be without force in order to be "*as of right*" does not merely require the use to be without physical force, such as by breaking down a fence, but also that it is not contentious, such as if it is carried out under protest from the landowner.

7.34 The particular use that is alleged to be "*vi*" during the relevant 20 year period is the use by the members of the Thorold family on the basis of the terms upon which Lower Theobalds Farm was transferred to them. That Transfer included a covenant that provided, in essence, that the transferees, namely the Thorold family and their successors in title, would not become entitled to any right which would in any way prejudicially affect or restrict the transferor's use of the retained land.[86] The Objector contends that such a covenant precludes the Thorold family from acquiring recreational rights over the Land which they would if it was registered as a town or village green. Hence, any use of the Land by them as a town or village green which would result in the acquisition of such rights would thereby be under protest from the landowner and accordingly "*vi*".

7.35 Mrs Thorold suggested that the "*retained property*" referred to in the covenant did not include the Application Land at all. However, such property was specifically identified on the attached plan as being edged in blue.[87] It seems to me to be clear that such land edged in blue includes the Application Land.

7.36 Nonetheless, in my view, the appropriate interpretation of the covenant in issue is that it precludes the Thorold family from acquiring rights **in their capacity as transferees of Lower Theobalds Farm** which would, inter alia, affect the transferor's use of the Land. The covenant related to the Transfer

[85] See Applicant's Closing Submissions at paragraph 6. There was an additional employee also referred to and hence the references elsewhere to 35 names.
[86] The full text of the clause is at AB tab 2 page 142.
[87] The plan is at AB tab 2 page 144.

of that property to them and, in my view, ought to be interpreted in that particular context. Consequently, it does not seem to me that it should be interpreted to preclude the Thorold family from acquiring rights by virtue of them being inhabitants of a neighbourhood, which rights attach to such inhabitants if land is registered as a town or village green. Hence, it does not seem to me that the use of the Land by any of the Thorold family was "with force" in the sense that it was "*vi*" and ought therefore to be discounted from the qualifying use.

7.37 Consequently, I find that the qualifying use of the Land, including such use by the Thorold family, was "*as of right*".

Use by a Significant Number of the Inhabitants of any Locality or of any Neighbourhood within a Locality

7.38 In order to determine this next issue, it is firstly necessary to identify the appropriate locality or, alternatively, neighbourhood within a locality for the purposes of Section 15(4) of the 2006 Act.

7.39 The locality or neighbourhood within a locality identified in the Application is "*Ghyll Road neighbourhood which includes Theobalds Green, part Sandy Cross and part Geers Wood, Parish of Heathfield and Waldron*". That neighbourhood was identified on Map A by means of a green line indicating its eastern boundary.

7.40 The Applicant does not contend that that area amounts to a "*locality*". Indeed, the area is not a recognised area known to the law and so cannot amount to a "*locality*". Instead, it is contended that the area identified is a "*neighbourhood within a locality*".

7.41 The identified neighbourhood falls entirely within the Heathfield North and Central Ward.[88] That Ward is an established administrative area which is properly regarded as a locality for the purposes of the 2006 Act. Therefore, I find that the claimed neighbourhood falls "*within a locality*".

7.42 The next question is whether that area is a qualifying neighbourhood for the purposes of the Act. In that regard, the fundamental issue to be determined is whether that area has a sufficient degree of cohesiveness to amount to a "*neighbourhood*" within the meaning of Section 15(4) of the 2006 Act. A neighbourhood cannot merely be an area drawn on a map.

7.43 In order to determine that issue, it is firstly necessary to identify the area included within the claimed neighbourhood. That is an important consideration, not least as if the Land is registered, registration confers rights only upon the inhabitants of that neighbourhood who need to be capable of identification. The green line on Map A identified the eastern boundary of the neighbourhood, but not the other three boundaries. That is undoubtedly insufficient to identify the neighbourhood for the purposes of the 2006 Act as it is unclear where its other three boundaries lie and thus which residential properties in those locations are within it and which are outside it. Mrs Thorold clarified the position by indicating that the northern boundary was to be drawn straight across the page of Map A to the end of the dwellings on that Map, and then the western boundary was intended to include the houses shown on the northern part of Map A and then to come back to Ghyll Road, excluding the industrial estate but including her property, and then the southern boundary was to be drawn so as to meet the end of the green line on the eastern boundary. On the final day of the Inquiry, the Applicant produced a plan purporting to show the boundaries of the neighbourhood as identified by Mrs Thorold in her evidence, ("the page 341M Plan").[89] However, the Objector contended that such Plan did not reflect Mrs Thorold's evidence and so had no evidential value on that basis.

7.44 It seems to me that the page 341M Plan does not precisely reflect the evidence of Mrs Thorold. In particular, the northern boundary on the Plan follows a south-westerly line from right to left rather than a direct westerly line as suggested by Mrs Thorold, and it includes the industrial estate which Mrs Thorold

[88] That is apparent from the Ward's boundaries shown at AB tab 4 pages 341J and 341K.
[89] At AB tab 4 page 341M.

indicated was excluded. Nonetheless, as that Plan is submitted as the Applicant's definitive position on the claimed neighbourhood, I propose to consider the identified neighbourhood on that basis.

7.45 In doing so, I note firstly the undisputed evidence of Mr Jones that the residential properties within it are of varying ages. Indeed, that was apparent on my site visit. As Mr Jones pointed out, there are older properties fronting Hailsham Road and sections of Ghyll Road. The properties in Meadow Way and Swaines Way appear to have been constructed in the 1970's. Those opposite the Land around Frenches Farm Drive were developed in the mid-1980's, and those around Geer's Wood date from the 1990's, namely during the course of the relevant 20 year period. Hence, the identified area has been built over different times and not as one estate or community.

7.46 Further, there is no evidence that the identified area functions as a particular community. It does not have its own facilities around which it functions. Hence, the local centre with local shops is on Hailsham Road which is outside the identified neighbourhood and therefore serves a wider area. The two local primary schools serve Heathfield generally and are not within the claimed neighbourhood. Similarly, local health services are provided at the Heathfield Community Centre, outside the neighbourhood, as are the two local doctors' surgeries. The local churches within Heathfield are all outside the neighbourhood, as is the local police station. Indeed, there are no community based public buildings in the neighbourhood.

7.47 Further, there is no evidence of any community organisations functioning in the claimed neighbourhood. The only residents' association referred to is a management company for the Frenches Farm Estate which was limited to those living on that particular Estate and was not open to those living elsewhere in the claimed neighbourhood. There is no current neighbourhood watch operating in the neighbourhood. No other organisations or activities were referred to as operating within the claimed neighbourhood.

7.48 Moreover, none of the evidence in support of the Application suggested that the claimed neighbourhood functions as a community in any way or even that the residents within that area regard themselves as living within a particular community as bound by the green line. On the contrary, such evidence tended to suggest that there was no such meaningful neighbourhood in existence as identified on page 341M. Mr Robards acknowledged that those within and those outside the green line were all residents of Heathfield, and there was nothing different in locational terms between those who lived on one side of the line and those on the other. Mrs Caswell-Lake similarly indicated that she considered herself to be a resident of Heathfield and that there was nothing distinctive about being one side or the other of the green line. Miss Godfrey expressed the view that the green line had no relevance in practical terms whilst Mr Bowen stated that it did not have any great significance. Mr Anderson agreed that there were no practical differences in locational terms between those residing in the houses on Meadow Way within the green line and those living on Meadow Way outside the line. Mrs Harrison, who lives within the green line, regarded her nieces and nephews who live in Holly Drive, which is outside the claimed neighbourhood, as living in the same area as she does. Indeed, none of the witnesses sought to suggest that the identified neighbourhood functioned as or was otherwise regarded as a community in its own right or that it was a recognised community in any meaningful way.

7.49 Mrs Thorold had been involved in the identification of the neighbourhood. She indicated that the reasoning for its identification related to the location of open green spaces in Heathfield and which of those areas residents would use. Hence, those to the north of the green line would tend to use open spaces further to the north, such as at Tower Street, rather than the Application Land. No other justification was provided for its identification.

7.50 It seems to me from the evidence that the identified neighbourhood has no particular cohesiveness or meaningful description. On the contrary, the impression I gained from the evidence is that the area was identified for the purposes of the Application, but it did not previously exist and is not recognised by local inhabitants as existing as a neighbourhood or as any form of community. That view is confirmed by the fact that the claimed neighbourhood splits some of the roads, such as Meadow Way and Geer's Wood,

with no explanation being forthcoming as to why some of the houses within those streets are inside the neighbourhood whilst others are outside it, and also that on its northern and eastern boundaries, significant numbers of individual houses are divided by the green line with no indication as to whether they are to be regarded as within or outside the neighbourhood.

7.51 Consequently, I find that the identified area does not qualify as a "*neighbourhood*" within the meaning of Section 15(4) of the 2006 Act.

7.52 Even if the area identified did qualify as a "*neighbourhood*", the qualifying use must be by a "*significant number*" of the inhabitants of that neighbourhood. That phrase is not defined in the legislation and should be given its ordinary, natural meaning. I note the calculations undertaken by Mr Jones as to the percentage of the population of the neighbourhood who had used the Land. However, it was made clear in the ***McAlpine*** case[90] that whether that element of the statutory criteria is satisfied is a matter of impression from all the evidence and that is the approach I have used. Further, as noted by Sullivan J. in that case,[91] "*what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers*".

7.53 Applying that approach, there are approximately 350 dwellings within that neighbourhood. I note the numbers and spread of users of the Land from the neighbourhood as helpfully plotted on Map A. However, for all the reasons identified in paragraphs 7.13 to 7.29 above, my impression of the evidence is that the *qualifying* use of the Land over the relevant 20 year period has been relatively limited. For those same reasons, it is my view that the qualifying use throughout that period has not been sufficient to indicate to the Landowner that the use was in general recreational use by the local community. Hence, I find that the use of the Land has not been by a "*significant number*" of the inhabitants of the identified neighbourhood.

7.54 No other identified area was suggested by the Applicant as a potential "*locality*" or "*neighbourhood*" from which a significant number of the inhabitants used the Land. The town of Heathfield and the ward of Heathfield North and Central are both localities within the meaning of the statutory criteria. Further, the Wealden 010D Output Area could be regarded as a neighbourhood. However, none of those areas were relied upon by the Applicant. Moreover, those areas are all materially larger than the identified neighbourhood, and the users were concentrated in relatively small parts of them rather than being distributed throughout those areas. That is illustrated in relation to the Output Area on the Objector's Composite Plan. Hence, for the same reasons as with the identified neighbourhood, and for the additional reason that the users would not be sufficiently spread throughout those areas, it is my view that the Land has not been used by a "*significant number*" of the inhabitants of any of those areas either.

Cessation of Use and Making of Application within 5 Years

7.55 I have already found in paragraph 7.5 above that the use of the Land as of right ceased in January 2006 when the erection of fencing round the Land by the Landowner commenced.

7.56 Further, the Application is dated 29th November 2007 and was received by the Registration Authority on 3rd December 2007, and so the Application was clearly made within 5 years of the cessation of the use and I so find.

8. COSTS APPLICATION

8.1 At the conclusion of the Inquiry, the Applicant made an application against the Objector for her costs incurred in relation to the Application.[92] The Objector had not been given any advance notice of that application and indicated that it was prejudiced accordingly as it was not in a position to respond fully to it.

[90] [2002] EWHC 76 (Admin).
[91] At paragraph 71.
[92] At paragraphs 44 and 45 of the Applicant's Closing Submissions.

8.2 I agree that in the absence of reasonable prior notification, the Objector would be prejudiced in responding to that application effectively "on the hoof". That is particularly so given that it raised the issue as to whether either myself or the Registration Authority have any jurisdiction to make an award of costs against a Party. I therefore indicated to the Parties that if I reached the provisional view that there was such jurisdiction, then I would give the Parties an opportunity to make further written representations on that issue prior to reaching my decision.

8.3 The determination of applications for the registration of town or village green is for the Registration Authority in accordance with the Commons Act 2006 and the subordinate legislation made thereunder. I am not aware of any provision in such legislation, or any other legislation, which would empower the Registration Authority to make a costs award and the Applicant did not refer me to any such provision. Further, the Inquiry itself was a non-statutory inquiry. Its procedure was not governed by any statutory provisions nor by any formal rules, but was ultimately a matter for my discretion.

8.4 I invited the Applicant to indicate the authority on which she based her submission that I and/or the Registration Authority had jurisdiction to make an award of costs against a Party in such circumstances. The authority referred to was the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007,[93] which Rules the Planning Inspectorate have apparently indicated their Inspectors will follow when conducting non-statutory town or village green inquiries.

8.5 However, firstly, I did not adopt those procedural Rules in relation to the Inquiry. I made Directions that were not based upon those Rules and I have at no stage adopted them. In those circumstances, it does not seem to me that they apply to the Application on that ground alone.

8.6 Secondly, the applicability of those Rules are set out in Rule 3 which sets out the hearings and inquiries they apply to, namely certain hearings "*afforded by the Secretary of State*" and certain inquiries "*caused by the Secretary of State to be held*". As the Secretary of State has had no involvement in the present Application and Inquiry, those Rules would not appear to apply on that ground either.

8.7 Thirdly, even if those Rules were applicable, it does not appear to me that they confer any jurisdiction on either myself or the Registration Authority to make an award of costs in relation to the Application in any event. Indeed, I am not aware of anything in those Rules, and I was not referred to anything within them by the Applicant, which addresses the issue of costs at all or entitles a costs award to be made in any circumstances. They deal with procedural matters, but they do not seem to me to make provision for a costs award in any circumstances and so do not seem to me to be of relevance on that basis either.

8.8 Fourthly, the current guidance governing an award of costs in public inquiries is contained in the Government Circular 3/09.[94] Paragraph 9 of that Circular notes that its guidance applies to all planning appeals made on or after 6th April 2009 and that it "*will also apply by analogy to proceedings under non-planning legislation initiated on or after that date, which previously relied upon DOE Circular 8/93 as a general statement of principles for the award of costs.*" Paragraph 9 of Circular 8/93 set out the proceedings in which costs could be awarded where an inquiry had been held and included "*opposed definitive map orders under sections 53 and 54 of the Wildlife and Countryside Act 1981 relating to public rights of way*". Notably, there is no reference in either Circular to non-statutory town or village green inquiries.

8.9. Moreover, and particularly significantly, paragraph 9 of Circular 8/93 and Part F of the Annex to Circular 3/09 refer to the statutory powers to award costs on which the guidance is in turn based, which powers include Section 250(5) of the Local Government Act 1972. That particular provision enables the Secretary of State in inquiries held under that section to make orders as to the costs of the parties at the

[93] SI 2007/2008.
[94] Such guidance was previously contained in Circular 8/93.

inquiry and as to the parties by whom the costs are to be paid. That provision applies, inter alia, to inquiries into opposed definitive map modification orders. However, in contrast, the Inquiry into the Application was not held under that provision nor under any statutory provision; on the contrary, it was a non-statutory inquiry. Therefore, in contrast to statutory rights of way inquiries, there does not appear to me to be any statutory provision conferring a power to make a costs award in relation to the determination of the Application. In the absence of any such statutory power or any other authority, it is my view that neither myself nor the Registration Authority has the power to make a costs award in relation to the Application.

8.10 In those circumstances, I have not sought any further representations on this issue from the Parties. Moreover, I shall not proceed to make a determination on the merits of the costs application. However, I note that if costs could in principle be awarded under Circular 8/93 or 3/09, it would only be on the basis that there had been unreasonable conduct on the part of the Objector. The Applicant's costs application did not specifically identify any such unreasonable conduct, and I did not regard the Objector's case or the conduct of its case or the holding of an inquiry which resulted from the Objection being made as unreasonable in any respect. Hence, I would have been unlikely to make any award of costs against the Objector in any event.

8.11 If, however, the Registration Authority takes the view that it may not accept my recommendation in relation to its lack of jurisdiction to award costs, then further representations on that particular issue and on the merits of the costs application should be invited from the Objector and then from the Applicant by way of response before the Registration Authority reaches a final decision on that issue in order to avoid any prejudice to the Objector.

9. CONCLUSIONS AND RECOMMENDATION

9.1 My overall conclusions are therefore as follows:-

9.1.1 That it would be appropriate to permit the Applicant to amend section 4 of her Application so that it is made on the basis that Section 15(4) applies and, further, that use as of right ceased in January 2006;

9.1.2 That the Application Land comprises land that is capable of registration as a town or village green in principle;

9.1.3 That the relevant 20 year period is January 1986 until January 2006;

9.1.4 That the Application Land has as a matter of fact been used for some lawful sports and pastimes during that 20 year period;

9.1.5 That the use of the Application Land for lawful sports and pastimes has not taken place throughout the relevant 20 year period to a sufficient extent and continuity to have created a town or village green;

9.1.6 That all the use of the Land for lawful sports and pastimes has been as of right;

9.1.7 That the Ghyll Road neighbourhood is not a qualifying neighbourhood;

9.1.8 That the use of the Application Land for lawful sports and pastimes as of right has not been carried out by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality;

9.1.9 That such use ceased in January 2006 and accordingly ceased prior to 6th April 2007;

9.1.10 That the Application was made within 5 years of the cessation of such use; and

9.1.11 That the Registration Authority has no jurisdiction to make an award of costs against the Objector.

9.2 In view of those conclusions, it is my recommendation that the Registration Authority should reject the Application and should not add the Application Land to its register of town and village greens on the grounds that:-

9.2.1 The Applicant has failed to establish that the Application Land has been used for sufficient lawful sports and pastimes as of right throughout the relevant 20 year period; and

9.2.2 The Applicant has failed to establish that the Application Land has been used by a significant number of the inhabitants of a qualifying neighbourhood.

9.3 It is also my recommendation that the Registration Authority should refuse the application to make an order of costs against the Objector on the ground that there is no power conferred on the Authority to make such an award.

10. ACKNOWLEDGEMENTS

10.1 Finally, I would like to thank the Applicant and the Objector for providing all the documentation to me in advance of the Inquiry and for the very helpful manner in which the respective cases were presented to the Inquiry. I would also like to thank all the witnesses who attended the Inquiry as they each gave their evidence in a clear, succinct and frank manner. I would further like to express my gratitude to the representatives from the Registration Authority for their administrative assistance prior to and during the Inquiry.

10.2 I am sure that the Registration Authority will ensure that both Parties are provided with a copy of this Report, and that it will then take time to consider all the contents of this Report prior to proceeding to reach its decision.

RUTH A. STOCKLEY

09 November 2010

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