

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	17 April 2019
Title:	Application for registration of land known as 'Monks Brook', Eastleigh, as town or village green (Application No. VG 234)
Report From:	Director of Culture, Communities and Business Services

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Purpose of this Report

- 1 The purpose of this report is to consider an application for the registration of land known as 'Monks Brook', in Eastleigh, as town or village green.

Recommendation

- 2 That the application to register as a town or village green land shown edged blue on the plan attached to this report at Appendix 1, comprising that part of the Land subject to this application lying within Hampshire only, be refused.

Summary of decision area:

- 3 Hampshire County Council is the Commons Registration Authority (CRA) for the purpose of exercising functions under the Commons Act 2006. One such function is the determination of applications made to register land as town or village green. The Regulatory Committee, in its capacity as Commons Registration Authority, is asked to consider an application for the registration of land known as 'Monks Brook', in Eastleigh, as town or village green. The application was advertised and attracted an objection, supported by substantial submissions, from the landowner. The applicant was given the opportunity to rebut the objections through an exchange of material. The available relevant evidence for this application has then been subjected to a non-statutory public inquiry conducted by Morag Ellis QC acting as Inspector on behalf of the County Council, in February 2018, and it is recommended that this application be refused for the reasons set out in Ms Ellis' advice report.

Legal framework for the decision:

4 S.15 COMMONS ACT 2006

Registration of greens:

s.15(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.

s.15(2) This subsection applies where-

- (a) a significant number of the inhabitants of the 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; and
- (b) they continue to do so at the time of the application.

See pages 9-11 of the advice report for the remainder of section 15.

5 THE COMMONS (REGISTRATION OF TOWN OR VILLAGE GREENS) (INTERIM ARRANGEMENTS) (ENGLAND AND WALES) REGULATIONS 2007

Consideration of objections

s.6(1) Where an objection is made under section 15(1) of the 2006 Act to register land as a town or village green, as soon as possible after the date by which statements in objection to an application have been required to be submitted, the registration authority must proceed to the further consideration of the application, and the consideration of statements (if any) in objection to that application, in accordance with the following provisions of this regulation.

(2) The registration authority –

(a) must consider every written statement in objection to an application which it receives before the date on which it proceeds to the further consideration of the application under paragraph (1); and

(b) may consider any such statement which it receives on or after that date and before the authority finally disposes of the application.

6 Applicant: Mrs. Ticehurst,
1 Mardon Close,
Swaythling,
Southampton,
SO18 2HP.

7 Landowner/objector:

Landowner: Hampshire County Council,
The Castle,
Winchester,
SO23 8UJ.

8 North Stoneham Developments Limited, and the Highwood Group Limited, of The Hay Barn, Upper Ashfield Farm, Hoe Lane, Ashfield, Romsey, SO51 9NJ have the benefit of an option to purchase over the application land.

9 The County Council, as landowner, is represented by Mr. George Laurence QC and Ms Ross Crail, of Counsel.

10 Hampshire County Council is the sole objector in this case.

Description of the land (please refer to the maps attached to this report)

11 The land which is the subject of the application VG 234 ('the Land') is shown edged blue on the plan annexed to this report (**Appendix 1**). It consists of approximately 4.6 hectares (11.36 acres) of land and is unregistered. The

administrative boundary between the county of Hampshire and the unitary authority of Southampton City Council runs through the area known as Monks Brook, and therefore the land is in two ownerships. It follows then, that the Land is subject to determination with regard to the registration of village green rights by two separate commons registration authorities ('CRAs'), namely those of Hampshire County Council and Southampton City Council. For the avoidance of doubt, this decision deals only with the Land subject to this application lying within Hampshire.

Background to the application:

- 12 The application for VG 234 was received on 14 September 2007, on the grounds that land known as Monks Brook in Eastleigh had been used by the inhabitants of the locality for lawful sports and pastimes for twenty years prior to 2007. When the application was received, another application was made in respect of the section of land lying within Southampton to Southampton City Council, in its capacity as the Commons Registration Authority ('CRA') for that part of the land.
- 13 A report dated 28 November 2007 (see **Appendix 2**) was taken to the Regulatory Committee seeking the Committee's agreement to authorise Southampton City Council to deal administratively with application VG 234 relating to the land in Hampshire, as well as that lying in Southampton. The intention was for Southampton City Council to revert back to the County Council once a non-statutory public inquiry had been held and an Inspector's decision letter issued with a recommendation as to how the application should be determined. Such a public inquiry was never held.
- 14 Another report was brought to this Committee on 27 April 2011 (see **Appendix 3**), seeking permission to secure information from the City Council with regard to progress in processing the two applications. This was provided and the whole application was returned to Hampshire. Officers attempted to secure agreement from the City Council to process to determination the claims for both pieces of land making up Monks Brook. They were unable to do so, and thus it was decided in 2016 by officers to progress the application, for the Hampshire land only, to determination. This application is now the oldest item on the County Council's waiting list of village green applications.
- 15 The application was formally advertised on Form 45 on 1 July 2016, according to the statutory requirements, and an objection to the registration was received from Hampshire County Council, in its role the landowner. The objection was accompanied by a substantial submission. On 12 April 2017, this Committee approved the holding of a non-statutory public inquiry to look into the matter (see report seeking authority at **Appendix 4**). Paragraph 7 (pages 11 and 12) of this report details the issues, put forward in the County Council's submission as the objecting landowner, that required to be considered. The need for transparency given that the County Council acts as the CRA in relation to this Application, and also owns the Land subject to determination in this report, was also discussed in this section of the 2017 report. This report deals with the issue of the Growth and Infrastructure Act 2013, detailing the reasons why it does not apply to this application (see paragraph 6.5, page 11). The inquiry was held by an Inspector, Ms Morag Ellis QC, over 2 days on 5 to 6 February 2018, in order that the evidence of any witnesses could be tested, and advice given to the Committee as to whether, or not, the application should be acceded to.

- 16 The Decision Report is appended to this document, as **Appendix 5**, and sets out the Inspector's findings and recommendation.

The Issue to be decided:

- 17 Whether or not to register 'Monks Brook', Eastleigh as town or village green, in accordance with section 15(2) of the Commons Act 2006.

Discussion:

- 18 Advice to officers from the County's legal department recommended that, as the landowner of the Application Land is the County Council, and the CRA is also Hampshire County Council, for the sake of transparency a non-statutory public inquiry, resulting in an advice report, should be held, presided over by a suitably qualified lawyer. Once authority for the inquiry had been obtained, Ms Morag Ellis QC ('The Inspector') was instructed to manage the public inquiry, hear evidence both for and against the applications, and prepare a report to Hampshire County Council advising on whether, or not, the land should be registered as a Town or Village Green. This advice report was provided to Hampshire County Council on 9 October 2018 (see **Appendix 5**). References to the Inspector's report are given throughout this discussion, both to the individual paragraph, and the page number(s) in which it is to be found. The report summarised the evidence heard at the Inquiry and, in summary, found that:
- 19 the applicant failed to establish requisite user for the relevant 20-year period as the available evidence demonstrates that the Application Land was not used, or there was not sufficiently significant use, by local inhabitants between September 1987 and 1990; further, there was an interruption to user in either 1995 or 1996 by an incursion onto the Land by travellers, lasting approximately two months (paragraph (i), page 1 of the Inspector's report)
- 20 what evidence was provided to the inquiry is too vague to justify registration of village green rights, reinforced by the clear confusion by supporters of the application as to the actual extent of the Application Land (paragraph (ii), page 2)
- 21 further, the available user evidence cannot justify registration because of the presence of a public footpath and another path, which will have accommodated at least a proportion of the walking and dog walking said to have been carried out on the land; in addition, the Land itself was left in an unattractive state and partially inaccessible after the traveller incursion, leading to the conclusion that significant use of the Land for lawful sports and pastimes ('LSP') has not been satisfactorily established (paragraph (iii), page 2)
- 22 the Applicant has not specified, or established by evidence, a qualifying locality, or neighbourhood(s) within a locality or localities (paragraph (iv), page 2)
- 23 Accordingly, the Inspector recommends that Application VG 234 be rejected (page 1).
- 24 The Inspector sets out the circumstances leading to the public inquiry. The Applicant, Mrs. Janet Ticehurst, submitted the application on 11 September 2007. The Land, known as Monks Brook lies within two administrative areas, the northern part within Hampshire, and the southern part lying wholly within Southampton. Ms Ellis found that it was the *'cross-boundary nature of the Application Land which accounts for the delay in bringing the Application to*

determination. Having explored various options, the position is that HCC must now determine the Application insofar as the land lies within its area. The southern parcel falls to SCC to determine' (paragraph 1.4, page 4). The Inspector also sets out in her introduction how she has dealt with the question of the ownership of the northern two-thirds of the Application Land. She says at paragraph 1.3 on page 4 of the report '*I should make it clear that I have treated HCC's ownership of the land the subject of this Report as wholly irrelevant. The Committee should do likewise. The fact that I am wholly independent of HCC is an important element in ensuring the lawful determination of this Application by the CRA*'.

- 25 The report also sets out details of the procedural preparations, particularly given that '*there are no procedural rules applying to a non-statutory inquiry and, whilst the manner of submission [by the objector] was not as helpful as it might have been, no prejudice was alleged, or demonstrated, as a result of the sequence of events which I have outlined. I considered it important for the CRA to have all potentially relevant material before it when making its determination. My advice is that it is lawful and appropriate for the CRA to have regard to all the material which was produced, presented and discussed at the inquiry, guided by my advice as to relevance and weight*' (paragraph 1.18, pages 8 and 9).
- 26 Reviewing the inquiry in the report, Ms Ellis says '*It is most unfortunate that the Applicant did not attend the inquiry or otherwise advance the case for registration. She made it clear to my Instructing Solicitor that she now has caring responsibilities for her husband...This turn of events makes the delay which has occurred in the determination of the Application particularly regrettable. My Instructing Solicitor, the Senior Map Review Officer of the CRA and I have, however, done all we could to keep the Applicant abreast of procedural development. I am satisfied that she has not suffered any procedural prejudice*' (paragraph 1.18, pages 8 and 9). For the avoidance of doubt, Mrs. Ticehurst had made it clear to the CRA that her attendance at the inquiry could not be expected due to her personal circumstances and the Inspector reports that she '*also stated to my Instructing Solicitor on 2 January that she would not be attending the inquiry and did not expect anyone else to do so in support of the Application. On 11 January she indicated that she had no more written material to submit*' (paragraph 1.10, page 6)

The Inspector's Legal Framework for the determination:

- 27 The Inspector explains the purpose of the report, having set out the wording of section 15 of the Commons Act 2006 ('CA 2006') at her paragraph 2.2 (pages 9-11). She says '*The process of determination involves simply applying the law to the facts; there is no discretion, nor are land use merits material*' (paragraph 2.3, page 11). Ms Ellis also says that the '*CRA should be guided by the general principle of being fair to the parties*' (paragraph 2.4, page 11). The CRA has '*no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties*', at paragraph 2.4, pages 11-12, again referring to the difficulty caused to the CRA in having only scanty relevant material from the applicant, and no witnesses willing to subject themselves to cross-examination at the inquiry.
- 28 Ms Ellis makes it clear that the '*burden of proving that land has become a TVG lies on the applicant, on the balance of probabilities*' (paragraph 2.5, page 12). Lord Justice Pill said in *R v Suffolk CC ex parte Steed* (1996) 75 P&CR 102 that '*it is no trivial matter for a landowner to have land, whether in public or private ownership,*

registered as a town green...’ (ibid.) He continues ‘It is accordingly necessary that all ingredients of this definition should be met before the land is registered, and decision-makers must consider carefully whether the land in question has been used by the 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’ (ibid.). At her paragraph 2.6 (page 13), Ms Ellis emphasises this – ‘It is necessary, in order to achieve registration under CA 2006, for all the relevant elements to be established’.

- 29 There is a body of further discussion of case law in this section of the report, organised by taking elements of the test in section 15 of the CA 2006, each in turn, and setting out relevant case law with extracts from judgements. This material is covered in paragraphs 2.7 to 2.23, pages 13-25. The question of how any use of the Application Land would have appeared to a reasonable landowner, particularly in relation to what type of right was being asserted by that use, is especially important in this consideration (see paragraph 2.9, page 14). This material covers ‘A significant number of the inhabitants of any locality, or of any neighbourhood within a locality, ‘indulged in lawful sports and pastimes’, ‘for a period of at least 20 years...(b) continue to do so at the time of the application’. It sets out the salient points from judgements on matters as what constitutes a ‘significant number’, ‘locality’, what counts as a ‘lawful sport or pastime’, confirms that qualifying user must be demonstrated throughout the 20-year period, without any interruptions, and distinguishes the concept of ‘as of right’ from that of ‘by right’.
- 30 New case law was awaited at the end of this inquiry, and it was agreed that Ms Ellis would delay her reporting until the judgement was available. This was issued on 12 April 2018 and any further submissions were invited from the parties, but no further submissions were received from the Objectors (paragraph 2.24, page 26). The new case law resulting from the judgement covered the issue of ‘locality’, and this is dealt with in greater detail in the Inspector’s report at paragraphs 6.25-6.29, pages 93-97). The judgement refers to whether an electoral ward could be a locality for the purposes of the 2006 Act, and whether a change in a ward’s boundary could stop time running in the relevant 20-year period (paragraphs 2.26-2.28, pages 27-28). Other case law considered a locality which was not in existence until a 20-year period had started to run (paragraph 29, pages 28-29), and the geographical ‘spread’ of users (paragraphs 2.20 and 2.31, pages 29 and 30).
- 31 It is customary in officers’ reports to Committee on village green applications to consider each element of the legal test in turn, and to include a summary table showing graphically whether each test is met, or not met. This format is inappropriate in this case, since there is a scarcity of relevant evidence on the user itself. It became clear to the Inspector that the major issue was to assess the quantity of user on the Application Land, and whether there was an actual twenty-year relevant period, once the objector’s evidence of adjacent road construction, spoil disposal and an incursion of travellers for several weeks, with the attendant effects on that Land, was set out. Other factors, such as the presence of public footpaths on or adjacent to the Land, and the lack of the identification by the Applicant of a qualifying locality or neighbourhood within a locality, rendered this usual approach in setting out the legal tests inappropriate. The sequence of subjects considered, as used by the Inspector in her report, has therefore been followed in this report. This report sets out Ms Ellis deliberations in some detail, for the sake of transparency, given that the CRA and the Objector are both part of Hampshire County Council.

Inspector's discussion of the available relevant evidence put by the Applicant:

- 32 In relation to this discussion, Ms Ellis sets out details of the actual application, being a '*validly completed...statutory application Form 44*' (paragraph 3.1, page 31). While the Applicant described the Land having been used for '*sports and leisure activities*' until its bisection by the Swaythling Link Road (paragraph 3.2, page 31), most of the supporting documents with the application consist of '*information about the claimed biodiversity of the Land and arguments in support of its registration relating to that value. As I have explained in the Legal Framework section of this Report, such arguments are irrelevant to the question of registration based on user under s. 15 CA 2006*' (paragraph 3.3, page 32). The wildlife photographs supplied date from the summer of 2007, and there is a list of species found on the land, both flora and fauna. Additionally, there are then 31 letters in three separate tranches, plus a petition of 60 names and addresses. In general, petitions are of little use in determining applications for village greens, in that they do not usually provide any actual evidence of user for consideration. Ms Ellis notes in her paragraph 3.42 (page 45) that the petition's '*covering letters are wholly concerned with the qualities of the land as greenspace and an historical and wildlife resource and the respective merits of either developing it or making it into a village green.*' She says that because the petition and the covering letters do not address any of the statutory questions '*arising under s. 15 CRA 2006, I have not considered them any further and advise the Committee that they do not provide relevant evidence, meaning that they should be disregarded*' (paragraph 3.42, pages 45-46).
- 33 Ms Ellis examines the individual letters for evidence that she can consider in lieu of having any actual witnesses available to her at the inquiry, from paragraph 3.10 on page 35 to paragraph 3.42 on page 45. What is common to the letters is that they do not address the required legal tests and do not provide information about dates of use, where precisely the writers walked or indulged in LSP, the frequency of use and other vital information. Descriptions tend towards the general as when Mrs. Jordan of 4 Mardon Close talked of use '*possibly dating from 30 years previously (i.e. the mid '70s) with the recent "mature" condition of the land where she claimed to "wander" with her grandchildren*' (paragraph 3.14, page 36). In the letter provided by the applicant's husband Mr. Brian Ticehurst (paragraph 3.15, pages 36-37), the Inspector notes that '*it is unclear whether he lived locally between the 1950s and 1993 and/or whether he used the land during that time. He claimed in the letter to have used the Monks Brook Playing Fields ['MBPF'] "many many times for recreational purposes since 1993*'. As Ms Ellis has noted in her summary of her decision at paragraph (ii) at page 2 of this report, such evidence is '*too vague*' to establish how any user of Monks Brook at any point in the relevant period would have appeared to the landowner. She deals with each of the letters separately and, in the majority, the Inspector notes that crucial details, such as dates or addresses when any claimed use was taking place, are missing. None of this evidence was able to be tested during the inquiry, further diminishing any weight that could be attributed to it.
- 34 Because there had clearly not been a focus, on the part of the Applicant, on matters that address the legal tests required to register village green rights, when officers took up the processing to determination of this application in 2015 they sought permission from the landowner to provide the Applicant with questionnaires published by the Association of Commons Registration Authorities ('ACRA'), which do focus on the relevant statutory questions. The intention was to deal fairly with an application lacking necessary relevant detail, and to be seen to be transparent in determining this application, as the landowner and the CRA are both parts of the

County Council. The landowner kindly gave permission and a number of these forms were provided to the Applicant to allow some relevant information to be collected to assist in determining whether village green rights could, or should, be registered over the Land known as Monks Brook. Fourteen questionnaires were duly sent to the CRA, all completed in July and August 2015. These are discussed by the Inspector at her paragraphs 3.44 to 3.69, pages 46 to 66 of the report.

35 Each questionnaire had a map attached, and the Inspector found that this OS extract (scale 1:3,500) did not have the Application Land marked by the majority of respondents, despite the form having an instruction on its first page to do so. Ms Ellis notes that *'the boundaries of the claimed land are, therefore, unclear'* (paragraph 3.46, page 47), as far as demonstrating individual understanding of the extent of the Land being claimed as village green, something she cites in her summary decision as illustrating the inadequacy of the offered evidence in demonstrating the required user for registration (paragraph (ii), page 2). None of the maps, which were provided without the administrative boundary, show a neighbourhood or locality. In answer to a question whether the neighbourhood or locality has an identifiable name, eight different names were put forward, at paragraph 3.48 on page 48. The Inspector comments that she concludes that it is *'highly questionable whether the respondents or, possibly, the Applicant understood the meaning of locality/neighbourhood in its legal context or properly addressed their minds to the question'* (paragraph 3.48, page 49).

36 Ms Ellis summarises the evidence of the 14 questionnaires:

- Mr. Allsworth said users were University Students, local walking clubs and Swaythling residents. He considered himself to be a local inhabitant, had not had permission to use the Land, his use was not restricted, there were no notices, but obstacles were put up to stop travellers entering. Regular walks were undertaken by people from *'outer lying areas'* organised by a local historian. There had been a *'permanently locked gate'* at the A335 entrance and the land was enclosed by fencing. His user was daily (paragraph 3.50, pages 49-50).
- Mr. and Mrs. Ashford said users were local inhabitants, and they had seen locals on the land. Their user was walking, they had only used part of the Land and their use was *'occasional'*, entering the land via public footpaths. They marked the location of three access points (paragraph 3.51, page 50).
- Mrs. Batten said users came from Swaythling, Mansbridge, Woodmill and Bitterne Park, and she had seen others walking, looking at wildlife and taking photographs. She had not had permission to use the Land, or been prevented from using it, or seen notices. There had been some community activities, and she had seen picnicking and kite flying. She had used part of the land, using it weekly, and now occasionally. Fencing was put up when the A335 link was built, and she accessed the Land via the gate next to the Fleming Arms, marked on her map (paragraph 3.52, pages 50-51).
- Dr. Diaper walked to the Land from her home in St. Denys, with users coming from the surrounding area. She had never had permission or been prevented from using the Land, but did not claim personal use, but rather gave details of organised nature walks in the previous four years – she had taken part in them in 2012. Her use was seasonal, and always from St. Denys, and she marked the northern entrance by the underpass and the crossing of the railway. She attached her own publication of station walks in South

Hampshire and Salisbury (paragraphs 3.53 and 3.54, pages 51-52).

- Mr. Halliday did not answer directly the question of being a local inhabitant, and said users came from Swaythling and Mansbridge, and Wessex Lane Halls of Residence. He had only used the Land in 1999-2000 and 2012-2015 on a weekly and seasonal basis. He had not had permission nor been stopped from using the Land, did not see notices, but saw other walkers, with and without dogs, on most occasions. He mentioned monthly nature walks since 1999, spoke of gates and accessed the Land by a public right of way. The gates were unlocked (paragraph 3.55, pages 52-53).
- Mrs. Halliday enclosed a leaflet with her form, identifying the locality or neighbourhood as Swaythling and Mansbridge. She described the land as being near her home and said users came from the locality cited. She had not had permission to use the Land, or been stopped, saw signs about nature walks, and saw other walkers, with or without dogs, daily. She took part in the nature walks and had seen seasonal activities when using all of the land (paragraph 3.56, page 53). The leaflet referred to was also submitted in further application paperwork, called '*Monks Brook Greenway*', dated April 1993 and published by Hampshire County Council and Southampton City Council. It includes helpful information, and therefore Ms Ellis includes it in full at her paragraphs 3.57-3.58, pages 53-58. It covers the provision of paths and intensive uses such as playing fields over this area, described as an '*important green corridor*' (page 55).
- Mr. Miller lives in Chandlers Ford, and the Inspector takes his replies '*to be relevant insofar as they might provide useful information, rather than as potentially relevant local user evidence*' (paragraph 3.59, page 58). His response is from 'The Three Rivers Community Rail Partnership'. He said users came from Southampton and beyond, that he had seen no attempts to exclude users, that there were Station nature walks he had participated in 6 times a year. Then he saw dog walkers and people enjoying fresh air and nature. These were locals and from further afield. He had known the Land since 2008 and used the full area shown on the map. The gates to deter travellers were always locked.
- Mr. Nash said users came from Swaythling and the surrounding area, he used the land without permission and was never prevented from doing so. He saw other people walking dogs and taking photographs, daily and weekly, and some of these were locals. School walks had taken place '*for years*', but no dates were provided, and wildlife clubs used the fenced Land. He had known it since 1967, had used all the Land and accessed it from the gated entrance (paragraph 3.60, page 59).
- Mr. Painton considered himself to be a local inhabitant, and said users came from '*everywhere*', citing Southampton and Eastleigh. He had been given permission to use the Land by SCC's Parks Department in 2006 for shrub clearance and dealing with travellers. His use had been prevented by HCC by '*motorway bypass storage*', but he continued to use the Land via the public footpath, for nature walks and art sessions with pupils from Mansbridge Primary School. He saw others (some locals) there daily for dog walking, Friends of Monks Brook Meadows and the Three Rivers Rail Partnership, for regular nature walking, carried out by organised groups. Mr. Painton had used all the Land on a weekly basis from 1980 to 2015, said it was enclosed since the building of the A335 link, with a permanently locked

gate on that road. He also drew pathways on his map (paragraph 3.61, pages 59-60).

- Mr. Ticehurst said that people using the Land came '*from all over town*', had never received permission or been prevented from using it. He saw other people there, on a daily basis, organised walks twice a year for '*several years*', along with scout training 2 or 3 times a year for 25 years. In addition, he had seen kite flying and orienteering. He had used the Land since 1950, using the whole area, though poor health had reduced his usage. His user was monthly in 2015. He mentioned an open gate and showed access points at the railway crossing and an indication of the direction of the Fleming Arms access. He had expressed his disappointment with the time taken to determine the Application in 2015, as people had lost interest since 2007 (paragraphs 3.62 and 3.63, pages 60-61).
- The Applicant, Mrs. Ticehurst considered herself to be a local resident, and had received permission in about 1983 for the City Council Community Environment Project, and referred to a leaflet connected with it (paragraph 3.64, pages 62-63). This encouraged walking and looking after the '*Meadow*'. She referred to the County Council's highway works in 2009 as a restriction to access, but continued to use the Land in any case, because public access was a part of the contract. The Inspector takes this to refer to the M27 junction enlargement rather than the construction of the link road. Mrs. Ticehurst had seen no signs preventing access, and saw others walking and jogging daily, blackberry picking, cub scouts and nature walks. Students from Sparsholt College would visit several times a year for about 10 years, there were guided nature walks and the Land was cleaned up 3 or 4 times annually. Mrs. Ticehurst knew the Land from 1946, using it on most days, and said the Land was enclosed in the 1980s when the A335 was built. She accessed the Land by the urban greenway from the Fleming Arms, and marked the stile at the junction of the A335 and the public footpath. There was a locked '*maintenance gateway*' on the A335. An additional statement was given in July 2015, which is set out at paragraph 3.65, pages 63-64, along with other material submitted in the same year dealing mainly with the natural history of the area (paragraph 3.66, page 64).
- Miss Linda Webb stated she visited the Land 3 or 4 times a week, with other users coming from Swaythling, Mansbridge and nearby areas. She presumed that she had permission for all purposes due to the '*public signs*' on the Land. Miss Webb saw other people daily using the Land for leisure, monthly organised nature and rail walks, over a period of 20 years, some of which she joined in 2015. She had known the Land for 30 years, but only used it between 2012 and 2015, using all of it 3 or 4 times a week. Fencing enclosed the Land and her access was via the underpass. Her map shaded both parts of the Land encompassing both ownerships (paragraph 3.67, page 65).
- Mr. and Mrs. Williams lived close by the Land, and said users came from Swaythling. They mentioned the traveller incursion happening some years before, with fencing and gates being put in place once it was cleared. Neither had permission or were prevented from using the Land. They had seen other people '*occasionally*', who they thought were '*probably*' from the locality, dog walking and berry picking. They had known the Land from 1969 and used it occasionally, describing it as enclosed with accesses at the

underpass, on the north-west corner of the Playing Fields and off Claudeen Close (paragraph 3.68, pages 65-66).

- Mr. Wyatt identified users as coming from Mansbridge, Swaythling and Bassett in Southampton, had never been given permission or been prevented from using the Land. He saw people walking with and without dogs 'daily', and referred to guided Wildlife walks 3 or 4 times a year, for about 4 years. His use of the Land was from 2003, twice a week. He said the Land had been closed 'for decades' with wooden fences containing gates and stiles, and Mr. Wyatt access it using stiles, a swing gate and the underpass – the gates were never locked. He showed most of the HCC Land on his map as village green, and objected to the proposed sports grounds with associated structures and resulting associated loss of wildlife and countryside, when there was no need, in a written statement (paragraph 3.69, page 66).

Inspector's discussion of the landowner's objection and the Applicant's rebuttal:

37 The County Council's initial objection rested on points relating to the question of a locality and the sufficiency of user. The County Council's Counsel, Mr. George Laurence QC, submitted that the application should not be the subject of a public inquiry, but be rejected. However, the landowner participated fully in the inquiry, and made submissions, also calling members of staff as witnesses (paragraph 4.1, page 67).

38 The objections relating to the locality chosen were put forward, and built on, at the inquiry because of the brevity of the response made by the Applicant in February 2017 (paragraph 4.2, page 67). This response is characterised by Ms Ellis as not dealing with any of the County Council's points of objection, instead focussing on the ecological interest of the Land, which is irrelevant to the legal tests that must all be met for registration to take place. However, the Inspector does perceive that the characteristics of the nature interest of the Land may be relevant in understanding '*the extent to which the land has been enjoyed for lawful pastimes connected with its features of nature conservation interest*'. The Applicant reiterates that the link road cut the Land off from direct access leading to beneficial effects on its ecology, along with increasing user as people with those specific interests started to use it. These include three ramblers' clubs, a camera club, cub scout groups and Sparsholt College students. The applicant concludes with '*her motto for the meadow: "Not trampled by thousands But treasured by hundreds"*' (paragraph 4.3, pages 67-68).

39 The bundle of documents submitted by the County Council in objection, along with four witnesses who spoke in relation to further documents, constituted the main procedural events of the inquiry in February 2017. The Inspector says '*Taking this evidence together, I have been able to gain a reasonably clear picture of the history of the Application Land. Because the Applicant did not participate in the inquiry, the witnesses were not cross-examined, but they were made available for challenge. I was also able to ask questions of clarification. In the event, much of their evidence was corroborated by contemporaneous documents and, to some extent, by certain detailed parts of the Applicant's supporting evidence. I therefore advise that significant weight can be given to their largely documented account of the land during the relevant 20 year period, 1997 – 2007. They were patently honest witnesses who did their best to assist the inquiry*' (paragraph 5.1, page 68).

40 The landowner's case concentrated on rebutting the claim that there had been a relevant period of 20 years, during which there was uninterrupted qualifying user

by a significant number of the inhabitants of the locality or neighbourhood, without prejudice to its own arguments about the legality of the selected locality (paragraph 5.2, page 68). A conveyance of 1959 in which the Land at Monks Brook was conveyed to the County Borough of Southampton showed that the Land was acquired under the Education Acts 1944 to 1948, and showed the land conveyed had formed part of Channels Farm in Swaythling. The plan shows a '*roughly rhomboid*' area of land, with its northern boundary lying to the north of the top of the Application Land. The area of land is an undivided parcel, with the A335 link road being built some years later, but the parcel contains the whole of the Application Land (paragraph 5.3, pages 68-69). A later conveyance of land at Channels Farm and Swaythling Farm to the City in 1961 includes the brook itself, and the land to the east up to the railway line, as well land that forms the SCC Application Land to the south of the administrative boundary. All this land was in SCC's freehold ownership. Endorsements to the 1961 conveyance vest Doncaster Drive in the County Council and, by a conveyance dated 1990, part of the 1961 land was conveyed to the Secretary of State for Transport, authorised under the Highways Act 1980. This land became the A335 Swaythling Link Road, with public rights of way on foot dedicated running from the City boundary northwards along what is now the link, and on the other side of the link, where the underpass comes up, as far as Stoneham Lane (paragraphs 5.3, 5.4, 5.5, pages 68-70).

41 Eastleigh Borough Council granted outline planning permission in 2016 for a major urban extension at North Stoneham Park, but this did not include any part of the Application Land (paragraph 5.6, page 70). However, the accompanying section 106 Agreement covenants the developer to '*prepare, implement and maintain habitat on a Translocation Area within a wider area of Mitigation Land comprising land including the Application Land*' (paragraph 5.6, page 70). The County Council's witness Mr. McCarthy stated that no such works have ever been carried out on the Application Land (*ibid.*). This sequence of events is broadly supported by aerial photographs of the area, covering the period 1971 to 2013, produced by the CRA and the County Council. The major change occurring between the photographs for 1971 and 1984 is the building of the Motorway and its attendant junction, Junction 5. By 1989 '*the shape of the Application Land has been established by the development of the Link Road*' (paragraph 5.7, page 70). The photographs show the Application Land differently, depending on the time of the year and the usage to which it is being put. Ms Ellis notes that '*caution must be exercised in the interpretation of aerial photography, which is an expert discipline*' (paragraphs 5.7 and 5.8, pages 70-71).

42 The landowner had made a comprehensive search of its records, but could not give much direct evidence, though it had made all potentially relevant documents available to the CRA. The Inspector chooses to focus on the principal items, but is '*satisfied that full disclosure of such records as remain has been made*' (paragraph 5.8, page 71). Mr. Lon McCarthy, a Development Surveyor in the County Council's Estates Office, knows the Land and has been employed in his role since August 2008 (paragraph 5.9, page 71). His second witness statement of 15 February 2018 confirmed the status of areas of land in the SCC documents from 1985, making it clear that there was authorisation for parts of the Land to be used for disposal of the spoil and other waste generated by the making of the Link Road, with a document showing the extent of the area for topsoil storage and site office, along with restoration conditions. This was on Area B, with Area D for use as a playing field, comprising approximately two-thirds of the

Hampshire part of the Application Land. Area B is to the south of the boundary with the City. The Inspector accepts Mr. McCarthy's '*deduction that...internal memoranda...of 1988-89 strongly suggest that by 1989, a playing field was established on Area D and that HCC had authorised the Education Department by resolution...to erect a 4.5m high chain-link on angle iron sports fence and the eastern side of the Link Road*' (paragraph 5.10, page 72). It is not possible to see from the 1991 aerial photography whether this permission was implemented. The importance of this, for Mr. McCarthy, is that it showed there was a playing field on the Application Land at this time, even though there is a memo of 30 August 1989 stating that Area D, including all the Application Land, had been seeded and was anticipated to be in use within the next year, that is by 1990 (ibid.).

- 43 Mr. McCarthy referred to the depiction of Eastleigh Footpath 28 on the Definitive Map, running along the southern boundary of the Hampshire Application Land, and along its western boundary to the underpass, marked on the OS base as 'Monks Brook Playing Fields'. Enquiries were made of the Environment Agency of the dates when the Land was used to tip road soil, but no specific answer was available. There is a reference to '*historic landfill*' on the Site D Details Sheet No. 1 and a 1985 permission application describing the previous use of the land as '*Site of old refuse tip, not used since 1975 (latest)*'. The Inspector draws the conclusion that these researches indicate that a small part of the Application Land was used prior to the Link Road construction used in the latter part of the 1980s for spoil disposal, was re-seeded in about 1989, with a chain-link fence on the western boundary put up in the late 1980s. She also refers to Footpath 28 as having been in existence on the southern and western boundaries of the Application Land for most of the relevant period (paragraphs 5.11, 5.12 and 5.13, pages 72-73).
- 44 The County Council called Mr. Trevor Baker, a Grounds Management and Arboricultural Officer since 1993. He was responsible in the 1990s for ensuring contractual compliance on sites, including the Application Land, and known the Land throughout his employment, regularly visiting it. Both parts of the Application Land were usable as a playing field, and was known as the Monks Brook Playing Field, east of Stoneham Way. The Application Land was never used or marked as a playing field, and Ms Ellis recalls this as consistent with the aerial photographs. However, an area towards the north of the HCC Application Land was known as the '*junior training ground*'. It had 16 boxes, occupying an area 42 by 42 metres, in 1993 when he took up his post. However, it was not in use then, or after, so it was no longer marked, but mown once a week in the growing season and fortnightly at other times until the mid-1990s. The cessation of mowing was after the traveller incursion of 1995 or 1996, and the boxes had occupied most of the Application Land. The debris from the incursion was put into large heaps and this debris, and deep ruts, prevented any further mowing of the area. Concrete posts and a barrier were put up at the entry point near the administrative boundary in the south west corner, and Mr. Baker also highlighted the footbridge over Monks Brook as the start of the public footpath on the Application Land. He saw children having lessons on the Land, coming from the local primary school and doing warm-up runs, though could not say how often. He saw people all over the Application Land, walkers and dog walkers initially, then motorcyclists. Because use of the Application Land ceased after the traveller incursion, Mr. Baker's main focus of work shifted to the west side, and his last involvement with the Application Land was in 2003. Though he was

aware of 'motorcycle issues' on the Land between 2004 and 2007, he could not comment on these, or the distinctive patterns on some later aerial photographs. The Inspector takes from this evidence that there was use of the Application Land for sporting purposes by schools after the restoration from tipping, terminating in 1995 or 1996, after the traveller incursion, when the land surface was left in a bad condition and secured against further unauthorised access by vehicles (paragraphs 5.14, 5.15, 5.16, pages 73-75).

45 Mr. John Pullen, a Principal Trading Standards Officer employed by the County Council started work in 1988, and he spoke about the closure of public rights of way in response to the 2001 Foot-and-Mouth outbreak. In February 2001, legislation enabled the closure of all footpaths by local authorities. The witness had not been able to trace a relevant statutory declaration in the County Council's records but found a memo from the Countryside Service stating that the rights of way network was closed. The Leader of the Council appealed on the County Council's web-site in March 2001 that the public refrain from all avoidable contact with farms and livestock, and the witness produced a Daily Echo article of June 2001 about the re-opening of paths. The witness said that the 7,000 footpaths referred to in the article were about 90 per cent of all the County's rights of way, and he did not know when the footpath on the Application Land was re-opened. An Order for Cumbria was produced, and Counsel invited Ms Ellis to infer that there had been a similar Order for Hampshire. Her view was that *'the Cumbria Order is [not] in any way probative in relation to Hampshire, but I do accept that Mr. Pullen's other evidence does establish, on the balance of probabilities, that such an order was made on or about 28th February 2001 by HCC in respect of all its public footpaths, including the one on and giving access to the Application Land'* (paragraph 5.20, page 78). The Inspector also accepted that *'on the balance of probabilities, that access to the Application Land via the public footpath will have stopped for at least month, and, possibly, 3 months or more'* (ibid.). It is her view that the Order would not have made access via the Link Road unlawful, but few supporters of this application claim to have used it, and she sees it as *'inherently unattractive for access by local residents'* (paragraphs 5.17, 5.18, 5.19 and 5.20, pages 75-78).

46 A further witness, Mrs Charlotte Smith, employed as a Landscape Architect since 1986, explained she has no personal knowledge of the Application or the Link Road, but was at the inquiry to comment on the documentary evidence. She concluded that it would be *'reasonable to draw a number of conclusions in relation to the discharge of the restoration conditions in respect of the permission for disposal of spoil from the road scheme'* (paragraph 5.21, page 79). Her conclusions, endorsed by the Inspector, were that:

- By autumn 1987, the County Surveyor had commenced regular mowing, indicating that the landscape contractor's establishment phase would have been complete;
- A further period of establishment would have been required before use for sports playing fields, and this is corroborated in an October 1987 email referring to funding *'until the turf is established'*;
- The 1989 memo mentioned by Mr. McCarthy indicated that the playing fields were not actually available even then;
- That it would be normal to exclude the public during such a period of establishment;

- A memo of 22nd October 1987 stated that the '*designated route of the footpath*' running from the west to the east of the Link Road was not '*at present defined*', requiring '*clearing and fencing*'. This indicates that access to the Land by that route was not obvious or easy at this date, which was before the dedication of the April 1990 conveyance path had been put into effect;
- The exclusion of members of the public from the newly sown turf by the closure of the access points rather than by putting up temporary fencing – though the Inspector noted the '*remnants of some old chestnut pale fencing about 10m south of the motorway slip road on my Site Visits, though it is possible that this was left over from the later works associated with the M27 junction*' (paragraph 5.21, pages 79-80).

Inspector's discussion of the Legal Tests for a section 15 application:

47 Since this application is unusual, because of the lack of representation at the public inquiry by the Applicant, or any substitute defender of the Application, or even any supporters, it is difficult to analyse the evidence advanced in support in the customary way for Members of the Regulatory Committee. Analysing each limb of the relevant test is a convenient method to ascertain whether all have been met satisfactorily, to provide the Committee with its determination regarding the registration of village green rights over the Application Land. However, the Inspector has chosen to deal with the material before her in two sections. These two sections address the nub of the difficulties caused by the lack of representation on behalf of the Application at the inquiry, namely establishing whether there was enough user by local inhabitants, and the locality itself.

'As of right/sufficiency of qualifying user...'

48 Firstly, given the problem that she says is faced with, Ms Ellis' view is that she must '*therefore approach the material in support of the Application with caution, since it was not subjected to cross examination and cannot attract the weight which evidence which has been so tested can carry. There are also many questions which I would have pursued with the Applicant and/or any witnesses whom she might have called*' (paragraph 6.2, pages 80-81). It is immediately clear from summaries of the material put forward in support of the Application that much of the information lacks precision on many of the necessary legal tests that must be met if village green rights are to be registered over this Land.

49 The Inspector says that there was little clear indication what parts of the Land the witnesses had used, and whether there was any variation over the relevant period of the parts of the Land used; recollections relate to periods of time outside the relevant years 1987 to 2007, before the area was bisected by the Link Road, when there was a single area of land called 'Monks Brook Playing Fields' between Stoneham Lane and Monks Brook. Supporters of the Application do not always specify times, or locations, over what is a large site, necessarily needing to be determined by two separate CRAs for administrative reasons. Some of the evidence falls outside the relevant period, including material put forward by the Applicant herself. The existence of an area known as 'Monks Brook Greenway', promoted by local authorities as a public footpath or trail compounds the confusion, though the promotional leaflet (published by the County Council and the City Council) says it does not include the Application Land. The Greenway is based '*around public rights of way which members of the public are, of course,*

entitled to use and which do not count towards user "as of right" for TVG purposes', as the Inspector comments in paragraph 6.3, pages 81-82. Ms Ellis discusses further aspects of the information given in this promotional leaflet in her paragraph 6.4 on page 82 of the report, saying 'The picture is, at best from the Applicant's point of view, confused. In the absence of anyone to explain why I should not, I take both the Definitive Map and the leaflet at face value, as the reasonable landowner would have been entitled to do'.

50 The difficulties described in the previous paragraph of this report of the existence of the Greenway gives rise to further potential confusion for those writing letters or filling in user forms. This has the effect of making it difficult to analyse just how much the Application Land itself was being used recreationally, since the writers often do not spell out what land they are referring to. On her analysis, Ms Ellis identifies that Messrs Sherman, Welch and Meads, and Miss Sait and Mrs Batten were not actually using the Application Land at all, if the promotional leaflet is taken as '*definitive*' (paragraph 6.5, page 83). In her user form, the Applicant answers the question about permission '*in the affirmative, citing the City Council Community Environment Project and the Greenway leaflet, claiming that the leaflet included "the Meadow"*'. The nub of the difficulty is captured further in this paragraph, where the Inspector says '*the contention that the Application Land was included in this leaflet is factually inaccurate. It is clear, however, that at least some other supporters believed the same and, knowing nothing about the collection of evidence, in particular, what supporters were told about the precise extent of the Application Land and/or the requirements of s.15 CA 2006, I have real doubts about the accuracy of much of the evidence in support; it might have been possible to resolve these concerns if I had heard the witnesses live, but, in the absence of that opportunity, my strong reservations about the sufficiency of the evidence remain*' (*ibid.*).

51 Ms Ellis refers to Eastleigh Footpath 28 which has run along the southern and western boundaries of the Application Land since 1990. It is her view that some of the user recorded in the evidential material '*will have been attributable to these routes*', particularly for the most frequent uses of walking, with or without dogs. She says '*such activities are compatible with public footpath use, including an element of dogs straying off paths*', while activities such as blackberrying, general nature watching and photography may also have taken place as incidental to public path use (paragraph 6.6, pages 83-84). Without live participants, the Inspector finds it '*impossible for me to form a clear view as to how much walking was attributable to actual public rights of way or to routes which might, to the reasonable landowner, have carried the appearance of incipient rights of way*' (paragraph 6.7, page 84). Some witnesses indicate that they used land off paths, for training dogs, or games with children, and Ms Ellis is aware that '*at least for some of the relevant period, there appears to have been some user which would reasonably have looked as though it was attributable to a TVG claim*' (*ibid.*), and this is confirmed by Mr. Baker's evidence of general use of the Land by walkers and dog walkers off the paths, for the years between 1993 and 1995 or 1996. However, having viewed the people from a distance, he did not know who they were, so this evidence cannot be attributed definitively to supporters of the Application. This is further complicated, in that some were likely to have been local inhabitants, since witnesses refer to seeing regular users, but there is also evidence that a number of people from outside the area used the land, particularly after the Link Road was constructed. Some supporters lived outside the relevant locality, or what that locality was viewed to be, given that even this

concept has been challenged and was probably not understood by those providing user evidence. The Inspector concludes that *'such wide usage is consistent with the promoted nature of the 'Monks Brook Greenway' which...was an area based on public footpaths and did not include the Application Land itself* (paragraph 6.7, pages 84-85). In any case, Mr. Baker's observations relate only to a limited period before the deterioration of the Land after the traveller incursion (paragraph 6.8, page 85).

- 52 The Inspector also accepts Mrs. Smith's evidence that there would have had to have been access restrictions for the public on the Land during the establishment of the sward, this conclusion being evidenced by a careful examination of the existing documents, constituting an interruption or interruptions to any exercise of LSP on it (paragraph 6.9, pages 85-86). The access restriction for turf growth followed on from a period when the Land was subject to the deposit of soil from roadworks, rendering the Land unattractive for recreation. Evidence was put to the inquiry showing that works were already underway before 1987 and that Site D (most or all of the Application Land) where the soil was deposited was fenced then. Even though the underpass serving the Link Road was in place, Eastleigh Footpath 28 was not dedicated until 1990 (paragraph 6.11, page 86). The aerial photography images of 1989, 1990, 1991 and March 1995 are consistent with the appearance of mown grass, bolstered by Mr. Baker's recollections of the land from 1993, and therefore Ms Ellis gives *'considerable weight to his description of the Land and interpretation of photographs'*, allowing that he is not an expert in the interpretation of such photography (paragraph 6.10, page 86). She says that she concludes, on balance, *'that a reasonable sward was, in fact, established by 1990, which presupposes a period prior to that during which there cannot have been significant recreational user. I therefore have no difficulty in concluding that the Land – or at least the major part of it – would have been inaccessible for one reason or another and not in regular use for LSP during the first three years of the claimed period, that is, 1987 to 1990'* (paragraph 6.11, pages 86-87). In the key issue of sufficiency of user over a 20-year period, this evidence is critical, indicating a sustained interruption to user.
- 53 Significantly, *'none of the evidence in support acknowledges limitations on access at this time. As Miss Crail submitted, this omission renders the written evidence unreliable, at least in regard to this part of the 20 year period'* (paragraph 6.12, page 87). Ms Ellis intends no personal criticism to those who submitted written evidence, but without witnesses open to questioning, it was not possible to *'clarify precisely what they were saying about the chronological and geographical scope of claimed user, but their absence meant that neither HCC's advocates nor I were able to do this'* (ibid.). The Inspector reiterates that *'the burden of proof lies on the Applicant and the Objector produced contemporaneous and expert evidence which casts real doubt on the soundness of the claim in relation to the early period'* (paragraph 6.12, page 87). Ms Ellis confirms in her paragraph 6.13 on page 87 that *'these findings of fact alone are enough to dispose of the Application, since the requisite 20 years' use upon which it is founded is not made out on the evidence'*, adding weight to the material in paragraph 8.6.2.5 above regarding the establishment of the sward. For completeness, she considers the remaining factual and legal issues.
- 54 The traveller incursion on the Land is put by various people as being either in 1995 or 1996, and there is no evidence relating directly to the incident but the Inspector says *'the imprecision as to date does not affect the validity of Mr. Baker's recollections to the effect that a substantial part of the Land was*

occupied by caravans, trailers, vehicles and fly tipping. Several of the Applicant's supporting statements make reference to the traveller incursion, so it was clearly a major incident of which local people were aware (paragraph 6.14, page 88). No evidence has been put forward to contradict it, and she accepts Mr. Baker's view that *'nobody in their right mind would have walked amongst them as there was an intimidating atmosphere with dogs running around'* (paragraph 6.14, page 88). The incursion lasted for at least 8 to 10 weeks, which Ms Ellis accepts as *'entirely plausible'* given the administrative time taken to deal with such incidents, and she accepts Mr. Baker's evidence, concluding that his *'memory of conditions on site during the encampment was clearly vivid'* (ibid.). There is, therefore, another period of about two months in late 1995 or early 1996 when there was an interruption, or diminution, of access to the land for LSP (paragraph 6.16, pages 88-89).

55 Mr. Baker gave evidence of the clear-up after the traveller incursion, detailing how the Land was not able to be returned to its former condition as a field of turf. It was no longer possible to mow the land because of *'rutting and the continuing presence of debris of glass, wood and metal'*. The heaps of debris were large and visible on the Application Land to the Inspector when she made her site visits there, more than twenty years after the clean-up. She says that *'while the post clean-up condition of the Land would not have physically prevented access, it certainly casts doubt on the applicability of descriptions in supporting statements/letters/questionnaires of the Application Land as an area of natural beauty'* (paragraph 6.17, page 89). Ms Ellis is of the view that the descriptions and wildlife photographs on the actual Brook itself (not part of Hampshire County Council-owned Land) included with the Application are very likely to be of areas to the south and east of the Application Land. This impression is strengthened by *'the imprecision of description and identification of relevant land'* and she has *'real doubts as to the extent to which some supporters are actually addressing the Application Land specifically, rather than a wider area including the Monks Brook and its associated Greenway'* (paragraph 6.17, page 89). There is also no indication of whether those who wrote letters and statements saw any map of the area (ibid.).

56 Ms Ellis addresses the question of the closure of Footpath 28, for between one and four months, due to the Foot-and-Mouth outbreak in 2001. She describes it as a *'difficult legal point'*, given the provisions of section 15(6) of the CA 2006¹, a matter on which she *'did not have the benefit of argument'*. The objector raised this matter. Its objection depends on the meaning given to the phrase *'access to the land was prohibited to members of the public'*, in a situation where some of the access to the Application Land was by means of public footpaths, and it can be said that *'access to the Land' was* prohibited by a closure Order. Ms Ellis characterises the statutory wording as *'ambiguous'*: it might mean all *'unauthorised human presence on the land'* (as in during wartime on military land) or more extensive powers within the Foot-and-Mouth Order, or both (paragraph 6.20, pages 90-91). The objector's advocate maintains this issue *'does not matter'* because the Inspector should find that use of the Land would have

¹ In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (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. In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (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.

ceased because people would have obeyed the Order, even if it did not prohibit them from going on the Application Land, only the public footpath on its perimeter. However, the Inspector does not find that this argument provides any resolution to the matter of whether she can take this interruption to user into account in her deliberations, because of the wording of section 15(6). This requires, in any consideration of a 20-year period of user, the disregard of any period where the public was excluded by virtue of any enactment, *'not the actual or assumed absence of user'* (paragraph 6.20, pages 90-91). The DEFRA guidance to Pioneer Authorities and the Planning Inspectorate on the Commons Act 2006, actually uses the example of an outbreak of foot-and-mouth disease in its wording on section 15(6) of that Act, in conjunction with the phrase *'an area of land'* being closed. The applicant is required to state the period of exclusion, and there must be evidence of twenty years' use not taking account of the period of statutory closure (i.e. use for 20 years and 6 months, but not counting the 6 months of closure) – paragraph 6.21, pages 91-92.

57 The Inspector turns to a standard textbook on commons, *'Gadsden on Commons and Greens'* (2nd edition), where section 15(6) is characterised as dealing with a specific situation, the denial of access due to an enactment, and states that it is doubtful whether the *'fortuitous incidence of foot-and-mouth disease'* could be relied on by landowners to defeat application, and the Hansard debates make it clear that this section was intended only to apply to statutory closures (paragraph 6.22, page 92). Ms Ellis concludes that the objector's submission is *'right as a matter of statutory interpretation'*, given that the Stoneham Way Link was a legally available entrance to the Application Land and is not a public footpath, but a highway verge, not falling within the scope of the closure Order. In which case, not all access to the Land was prohibited by statute, and even on her *'possible alternative reading'*, the closure would not be able to be disregarded. This leads her to give any presumed reduction of use during the foot-and-mouth outbreak little evidential weight, given that so little is known about what actually happened on the Application Land during that period in 2001 (paragraphs 6.22, 6.23 and 6.24, pages 92-93).

'of the locality, or of any neighbourhood within a locality...'

58 Secondly, on the matter of a chosen locality for this Application, the first submission made for the objector was that it failed because two localities were specified on Form 44, namely Eastleigh and Swaythling (paragraph 6.25, page 93). In this form, the Applicant did not say whether she claimed to rely on a locality or a neighbourhood. Ms Ellis asks why she should be treated as having opted for a locality, when she could have opted for a neighbourhood or neighbourhoods in a locality or localities, both of which have been established as valid by the Courts (paragraph 6.26, page 93). Mr. Laurence QC for the County Council drew attention to the absence of evidence establishing the neighbourhood of either Eastleigh or Swaythling or their combination, there being no map in the Application identifying a neighbourhood, and the existence in 2007 of administrative areas known to the law with those names (paragraph 6.26, pages 93-94). Further, he argued that there is nothing in the Act or Regulations to allow an applicant to rely on localities, and the Inspector agrees that *'it would be wrong to imply a power for the CRA to register on the basis of alternatives, since it would be fundamentally inconsistent with the statutory concept of a recreational area registered as a result of the actions of the residents of that particular place for the benefit of themselves and their successors'* (paragraph 6.27, page 94). She further says that it seems *'impossible to adopt an approach*

of essentially regarding the locality or neighbourhood as unimportant or variable' (ibid.). Ms Ellis does not think that the practice sometimes occurring at inquiries of allowing reconsideration by applicants of localities or neighbourhoods to reformulate their applications '*in the light of technical objections do not apply in this case*' where the Applicant has taken no part (ibid.). There is no requirement for the CRA to reformulate the Application, and neither does the Inspector have the means to do so (paragraph 6.27, page 95). She expressed the strong suspicion that '*many respondents did not understand the question properly, regarding it as related to the Application Land and/or the wider areas which some of them apparently thought formed part of the Application Land*', and there was no other evidence put forward in the Application that could assist (ibid.). The Inspector sums up '*As in all other respects, the burden of establishing the claim in this regard lies on the Applicant and she has failed to discharge it...Even though some information is before me about administrative areas, it is not for me or the CRA to reformulate the Application by unilaterally treating it as amended*' (paragraph 6.27, pages 95-96, and also paragraph 8.3.1 of this report). Similarly, Ms Ellis has no basis for considering any change to the relevant locality or neighbourhood(s), even though there was, at the time of writing the report, an outstanding appeal to the Supreme Court on this matter, and she thought there was no reason to wait for its outcome in this case because the Applicant had not advanced a case to justify this. The Inspector also set out references to other case law to show that it is further not necessary for an applicant to demonstrate community cohesion to establish a locality, and her discussion of this is at paragraphs 2.26-2.29, pages 27-29. It is her conclusion that it is '*neither necessary nor possible to determine them in the context of this application*' (paragraph 6.29, pages 96-96)

Conclusions:

- 59 Having considered all the available relevant material put before the inquiry, Morag Ellis QC concludes that '*I therefore find that there was a material period of time during which the Application Land was, on balance, most unlikely to have been used by local residents for LSP. My findings about the subsequent condition of the Application Land also reinforce the doubts which I have about the imprecision of the Applicant's supporting evidence*' (paragraph 6.18, page 90).
- 60 An important feature of this Application to register village green rights over the Land known as Monks Brook has been the lack of substantial evidence on crucial matters and the failure of the Applicant, and any supporters of the claim, to appear in front of the Inspector at the non-statutory public inquiry held on 5 and 6 February 2018.
- 61 The Inspector, in her advice report, has assessed whether the six legal tests under section 15 of the Commons Registration Act 2006 have been met. Her conclusions are that:
- 62 The Applicant has failed to establish the required user for the relevant 20 year period, from 1987 to 2007. The evidence put before the inquiry by the landowner, Hampshire County Council, shows that, on the balance of probabilities, the Application Land was '*not used at all and/or that there was not significant user by local inhabitants from September 1987 to sometime in 1990; there was an interruption in user in the latter part of either 1995 or 1996 (both of which fall well within the relevant period) for a period of around two months due to a traveller incursion*' (paragraph 7.1(i), page 97).

- 63 Without prejudice to the point made above, *'the evidence of user generally is too vague to found registration, especially since there was manifest confusion in the minds of supporters as to the extent of the Application Land'*, (paragraph 7.1(ii), page 97).
- 64 Again, without prejudice to the two points made above, the supporting evidence is too vague for registration to take place because of *'the presence of a public footpath and another path on the land which will have accommodated at least some of the walking and dog walking claimed to have taken place on the land'*, as well as the deeply disturbed state, and inaccessible condition of parts of the Land, following the occupation of it by travellers, *'it has not been satisfactory established that there was significant user of the Land for LSP off paths, allowing for some deviation from footpaths/retrieval of straying dogs'* (paragraph 7.1.(iii), pages 97-98).
- 65 Without prejudice to the three points above, the Applicant has neither specified, nor established by evidence, any qualifying locality, or a neighbourhood or neighbourhoods within a locality or localities (paragraph 7.1(iv), page 98).
- 66 The Inspector advises that the findings set out in her advice report apply solely to land in the ownership of Hampshire County Council, and the application relating to land lying within Southampton City Council's administrative area falls to be determined by that Council's CRA.

CORPORATE OR LEGAL INFORMATION:**Links to the Strategic Plan**

Hampshire maintains strong and sustainable economic growth and prosperity:	Yes
People in Hampshire live safe, healthy and independent lives:	Yes
People in Hampshire enjoy a rich and diverse environment:	Yes
People in Hampshire enjoy being part of strong, inclusive communities:	Yes

Other Significant Links

Links to previous Member decisions:	
	Date

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document

File: VG 234

Location

Countryside Access Team
Room 6.0
Castle Avenue
Winchester
SO23 8UL

IMPACT ASSESSMENTS:

1. Equality Duty

1.1 The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, gender and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Due regard in this context involves having due regard in particular to:

- a) The need to remove or minimise disadvantages suffered by persons sharing a relevant characteristic connected to that characteristic;
- b) Take steps to meet the needs of persons sharing a relevant protected characteristic different from the needs of persons who do not share it;
- c) Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity which participation by such persons is disproportionately low.

1.2 Equalities Impact Assessment:

2. Impact on Crime and Disorder:

2.1.

3. Climate Change:

3.1

This report does not require impact assessments but, nevertheless, requires a decision because the County Council, in its capacity as Commons Registration Authority, has a legal duty to amend the register of town and village greens in the circumstances described in this report.