IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS SHOEBURY COMMON AT SHOEBURY COMMON ROAD, SHOEBURY, SOUTHEND-ON-SEA, ESSEX AS A TOWN OR VILLAGE GREEN

REPORT

of Miss Ruth Stockley

13 October 2015

Southend-on-Sea Borough Council

Civic Centre

Victoria Avenue

Southend-on-Sea

Essex

SS2 6ER

Ref: TR

Application Number: VG 01/2013

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS SHOEBURY COMMON AT SHOEBURY COMMON ROAD, SHOEBURY, SOUTHEND-ON-SEA, ESSEX AS A TOWN OR VILLAGE GREEN

REPORT

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1. INTRODUCTION

1.1 This Report relates to an Application ("the Application") made under section 15(1) of the Commons Act 2006 ("the 2006 Act") to register land known as Shoebury Common located at Shoebury Common Road, Shoebury, Southend-On-Sea, Essex SS3 9HG ("the Land") as a town or village green. Under the 2006 Act, Southend-on-Sea Borough 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 submissions, 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 30 June 2015 and 02 July 2015 inclusive. I also undertook an accompanied site visit on 01 July 2015, together with an unaccompanied visit around the area comprising the claimed neighbourhood.

1.3 Prior to the Inquiry, I was invited to make directions as to the exchange of evidence and of other documents which I duly provided on 23 April 2015. Pursuant to my directions, those documents were duly provided to me by each of the Parties which significantly assisted my preparation for the Inquiry. The Applicants produced 5 bundles of documents numbered 1 to 5 containing their Application, supporting witness statements, evidence questionnaires, photographs, other documentary evidence in support of the Application and upon which they wished to rely, relevant legislation and relevant caselaw. I shall refer to those bundles as AB* with * representing the number of the bundle. Southend-on-Sea Borough Council in its capacity as Landowner ("the Objector") produced a bundle of documents containing its Objection to the Application, witness statements and other documentary evidence in support of its Objection and upon which it wished to rely, which I shall refer to as "OB". In addition, both Parties provided a skeleton argument setting out an outline of their respective cases, and the Objector also provided a supplementary skeleton argument dated 19 June 2015. I have read all those documents and 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 or any substantive matters relating thereto. Therefore, provided it acted lawfully, the Registration Authority would be free to accept or to reject any of my recommendations contained in this Report.

2. THE APPLICATION

2.1 The Application was made by Mr Peter Lovett of 72 Leitrim Avenue, Shoeburyness, Southend-on-Sea, Essex SS3 9HF on behalf of Friends of Shoebury Common ("the Applicants") and is dated 18 November 2013.[1] Part 5 of the Application Form states that the Land sought to be registered is usually known as "*Shoebury Common, Shoebury Common Road*", and its location is stated to be "*Shoebury Common Road, Shoebury, Southend-On-Sea, Essex SS3 9HG*". A map was submitted with the Application which shows the Land hatched.[2] In addition, the Land was further identified in the Application by reference to three Land Registry Titles, namely EX 861158, EX 841243 and EX 833899. In part 6 of the Application Form, the "locality or neighbourhood within a locality" in respect of which the Application is made is identified by means of the same attached map.

2.2 The Application is made on the basis that section 15(2) of the 2006 Act applies, which provision contains the relevant qualifying criteria. The justification for the registration of the Land in Part 7 of the Form is addressed by means of the various attached documents and photographs submitted in support of the Application.[3] It is also noted in Part 11 that the Applicants "*have over 1400 members who support the protection of this Common which has served both residents, visitors, walkers, water sportsman and nature lovers for around 150 years*". The Application is verified by a statutory declaration in support made on 21 November 2013.

[1] The Application is contained in AB5 at page 132 onwards.
[2] In AB5 at page 141.
[3] They are listed at AB5 page143.

2.3 The Application was duly advertised by the Registration Authority as a result of which an objection dated 14 October 2014 was received on behalf of the Objector.[4] In addition, a number of beach hut owners objected, and subsequently Mr Grubb, the lessee of Uncle Tom's Cabin, objected. The Applicants were given an opportunity to respond to the objections which they duly did.[5]

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

2.5 Having received such representations, the Registration Authority determined to arrange a non-statutory inquiry prior to determining the Application which I duly held.

2.6 At the Inquiry, the Applicants were represented by Mr Chris Maile of the Campaign for Planning Sanity and by Mr Peter Lovett. The Objector was represented by Mr Philip Petchey of Counsel. Any other parties who wished to make any representations were invited to speak, and two additional persons did so.

3. THE APPLICATION LAND

3.1 The Application Land is identified on the map submitted with the Application on which it is hatched. The Objector produced a larger scale copy of that map

[4] In OB at page 1 onwards.
[5] Their Response is at AB5 page 172 onwards.

at the Inquiry on which the Application Land is outlined in red and the four different Land Registry Titles which it comprises are identified.

3.2 The Land is separated by Shoebury Common Road. To the south, the three parcels of land run along the seafront. The eastern parcel is bound by beach huts along its southern and eastern boundaries with the Promenade lying further to the south. The central area contains a café known as Uncle Tom's Café together with a kite surfing school building and a public toilet block. It also comprises a car parking area. To the east and west of that central area are other areas of car parking, with grassed areas in front of the beach huts. The two more western parcels form a continuation of the Land and are essentially open grassed areas with beach huts along the southern boundaries. There is open access to all the Land to the south of the Road.

3.3 The northern part of the Land is split into a northern and southern area. The northern area is bounded to the north by the rear of residential properties, a number of which have rear garden gates leading out onto the Land. There is an embankment along that northern part leading down to a gravelled area. There is a gravel path across the centre of that area along its entire length. The southern part comprises a Public Garden to the west containing a number of benches. There is then an access leading to the northern part with blackberry bushes along it. Further east is a large open grassed area and further east is a smaller open grassed area. The southern boundary of that area of land with Shoebury Common Road comprises high hedges. There is a gated access to that area from Waterford Road to the east with easy pedestrian access at the

side of the gate. There is also more restricted access to that area from the south west corner off Shoebury Common Road, together with other access points along that Road through gaps in the hedges.

4. PRELIMINARY MATTERS

Application to Amend Application Land

4.1 At the outset of the Inquiry, the Applicants indicated that they sought to amend the area of the Application Land by excluding those parts of it which are occupied by buildings or other structures and those parts which comprise hard surfaced car parking areas. More specifically, on the plan attached to the evidence questionnaires marked "Map A",[6] it was sought to exclude those areas shaded in grey, which include the areas occupied by the 166 beach huts, Uncle Tom's Cabin, the public toilets and the kite surf shop, and those areas shaded in dark green, which include the hard surfaced car parking areas. The Application Land would instead comprise the remaining areas shaded in light green.

4.2 The Objector stated that it had no objection to the Application Plan being so amended, and indeed welcomed the simplification of the Application by the removal of those areas.

4.3 In ***Oxfordshire County Council v. Oxford City Council***,[7] 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

[6] For example, at AB4 at page 22.
[7] [2006] 2 AC 674 at paragraph 61.

the authority's discretion, provided that such an amendment would not occasion unfairness to an objector or any other person.

4.4 Applying that legal framework, the Objector confirmed that it had no objection to the proposed amendment. Further, it does not seem to me that such an amendment would cause any prejudice to any person. The Application Land would be reduced rather than increased, with no additional area of land being added, and the changed area did not raise any additional disputed matters between the Parties nor did it cause any difficulties to the Objector in the presentation of its case to the Inquiry. Consequently, I recommend that it would be reasonable and appropriate for the Registration Authority to exercise its discretion to allow the amendment as sought so that the Application Land is reduced so as to comprise only those areas shaded in light green on the plan marked "Map A". The remainder of this Report is written on that basis.

4.5 In addition, Mr Peter Grubb, the tenant of Uncle Tom's Cabin, proposed a further amendment to the Application Land in his letter dated 11 January 2015 to the Registration Authority so as to also exclude the area of the northern car park located on the part of the Land to the north of Shoebury Common Road. That amendment was not supported by the Applicants.

4.6 In my view, the Applicants are entitled to have their Application determined as they seek, subject to any amendments they propose and which are regarded as acceptable to the Registration Authority. I shall therefore consider the northern car park area as part of the Application. Nonetheless, I note that the

Registration Authority is entitled to register a reduced area of land to that sought to be registered if it determines that the relevant statutory criteria have been demonstrated only in relation to such a reduced area, and I shall take that into account in my recommendations.

5. THE EVIDENCE

5.1 Turning to the evidence, I 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 evidence given by any witness, and I regard each and every witness as having given credible evidence to the best of their individual recollections.

5.2 The evidence was not taken on oath.

5.3 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. I shall consider the evidence in the general order in which each witness was called at the Inquiry for each Party.

CASE FOR THE APPLICANTS

Oral Evidence in Support of the Application

5.4 **Mr Peter Lovett**[8] lives at 72 Leitrim Avenue. He retired around 5 years ago and bought a house overlooking the sea. His house backs onto the northern car park area, and he has a gate in his rear garden leading out onto that area which he uses frequently. As a child, he and his sister often went to the Land at weekends where they met their cousins and played games, including rounders, cricket, kite flying and football. He went on the boating lake situated on the northern area. Subsequently, he used the Land in the same way with his own children. More recently, he purchased beach hut 485, and over the past 4 years has used the Land throughout the year with his 3 children and 6 grandchildren. They have had picnics on the Land and played football, rounders and other games and flown kites there. The older grandchildren ride their bikes and scooters or swim in the sea. As his house backs onto the northern area, they often play football and other games in that area. He is not a dog owner, but he often looks after his children's 2 dogs. He walks daily. During the summer, he walks a circular route which includes the northern area around 3 times a week. When it snowed one year, the children used the embankment there as a slide. He tends to use that northern area when he is accessing the Land from his house. That area is in constant use by local dog walkers who also bring their children to play, especially during the summer months when dogs are not allowed on the beach.

5.5 He has never looked out of his bedroom window and seen no one on the Land. Over the last 4 years, he has seen hundreds of people enjoying various recreational activities on both the northern and southern areas on a daily basis.

[8] His witness statement and evidence questionnaire are at AB4 page 1 onwards. He also relied upon the Opening Statement and Evidence to Highlight for the Inspector documents at the beginning of AB4.

The only organised sports he has seen have been charity runs. Otherwise, the Land is use for unorganised lawful sports and pastimes. Dog walking is probably the most common activity on the Land, but there is also a lot of children's play, cricket, football, rounders and picnicking on the Land. School children visit regularly, and dog walkers are seen on all parts of the Land throughout the year. Children play football on the northern area; people picnic on the Land; and the Kite Club use it for training local kite surfers. Many meetings have been held on the Land. There are a few park benches on the northern area in the Public Garden where people come to sit quietly and read. He often sits on a bench in the Public Garden area at point 4 on Map A. Some of his recreational use is on the southern area when he is at his beach hut and uses the areas behind his beach hut.

5.6 In relation to the northern area, there have been around 4 or 5 occasions this year when he has gone onto that area and stayed there to play with the children rather than going on elsewhere. He has been to the southern area many more times. He often goes there as he also has cooking facilities there. The car park gates to the northern area off Waterford Road are nearly always locked so it is rarely used as a car park. There is an opening by the side of the gates which pedestrians can use. That area can also be accessed by pedestrians from many points along Shoebury Common Road as well as from 2 access points from Waterford Road and access points from people's gardens. Some dog walkers walk through the overflow car park area onto Shoebury Common Road to cut the corner. The northern car park area is used mostly by dog walkers. The southern part of the northern area is much better to play football or rounders

on than the overflow car park as it is a large grassed area whereas the overspill car park has a gravel strip down its length. The northern car park area is mainly a dog walking area. 95% of the use on that area is dog walking. People tend to play games and picnic more on the southern part of the northern area. The split of the recreational use of the Land south of Shoebury Common Road compared with that to the north is approximately 80% to 20% save in winter. During the summer, he sees people on the southern side daily.

5.7 The Land has been used by local people and by visitors for over 100 years. Shoebury Urban District Council formed in 1895 and it re-constructed the northern area to allow boating, mini golf and donkey rides. However, after that body became part of Southend Council in 1933, the northern area was allowed to deteriorate and there have been no improvements carried out to it over the last 35 years. Instead, that Council have merely grown hedges to enclose the northern part from view.

5.8 He decided to apply to register the Land as a village green in November 2013. He sent the questionnaire to around 600 e-mail addresses together with an information sheet,[9] and he requested people to sign Map A and to indicate on it the areas they had used for recreational purposes. Upon receipt of completed questionnaires, he asked the compilers whether they would be prepared to attend the Inquiry. If so, they then completed a more detailed questionnaire. He did not assist people in completing the questionnaires. There are around

[9] At AB4 page 13.

1200 members of Friends of Shoebury Common. It was formed in 2011 when the Council determined to build a sea defence wall on the Land.

5.9 **Mr Colin Blackall**[10] lives in Thundersley outside the Borough, but he owns beach hut 427 which has been in his family's ownership for 65 years. He and his Wife's families have lived in Shoebury for many years and they have a strong affiliation with the area. His family used the Land, including his children and grandchildren. They used all the area at the back of their beach hut regularly throughout the year. They went swimming, played rounders, football and cricket, flew kites and watched air shows. He and his Wife have been associated with a number of organisations who have used the Land, including scouts and guides, although the troops were outside the Borough. They had never sought permission from the Council to use the Land, save when they were holding a barbecue on the beach. They had seen many other people using the Land for activities such as swimming, football, cricket and kite flying

5.10 He recalled using the northern car park many years ago when the car park either side of Uncle Tom's Cabin was full. The area no longer has that extent of visitors. That was the only reason he used that northern area. There was previously a small boating lake there which had been dismantled. They had not used the northern area for recreational purposes as that was further away from their facilities in their beach hut.

[10] His evidence questionnaire is at AB4 page 129 onwards.

5.11 **Mr Jim Worsdale**[11] has lived at 62 Leitrim Avenue for 25 years and his rear garden gate leads onto the northern area. He does not own a beach hut. He used the Land as a child with his friends during the war and the immediate post war period. There was a boating lake in the northern area then. He recalled the northern car park being used in the past, but it is very rarely used now. More recently, he accesses the Land via his garden gate and walks round the northern car park area quite often and spends a lot of time sitting on one of the 9 benches in the memorial area which is a peaceful area. The areas he marked as "2" on Map A[12] where he sat on the benches should have been in the Public Garden area. The northern side of the Land is very little used in comparison to the southern side. The northern side is well used by dog walkers, and it is also used by courting couples at the top of the embankment immediately behind the houses. Some of the dog walkers walk down Waterford Road, along the path across the northern car park and onto Shoebury Common Road. Others walk along the back of the houses. Others walk the length of that area and then back again. There is a dog bin on that northern area. The southern side across Shoebury Common Road is much more extensively used than the northern side. The northern car park area has always been laid out as a car park. There have never been any recreational facilities on that particular area.

5.12 **Mr Andy Belch**[13] has lived at 15, Knollcroft since 2000, and he and his Wife have used the Land regularly. Between 2002 and 2014 they exercised their 2

[11] His written statement and evidence questionnaire are at AB4 page 41 onwards.
[12] At AB4 page 50.
[13] His evidence questionnaire is at AB4 page 207 onwards and his witness statement and other questionnaire are at AB4 page 236 onwards.

Boxer dogs daily on the Land as it was the nearest green space to their home. They have had picnics there, social gatherings, played games with family and friends and witnessed numerous recreational activities taking place. His access to the Land was from Waterford Road, and his predominant activity on the Land was dog walking. He had only used the northern area for dog walking. There are 3 or 4 access points from which the northern part can be accessed from the south. Many others walk dogs on that northern area. In his view, around 90% of the recreational use of the northern area was by dog walkers. Around 60% of dog walkers would walk a circuit which involved walking through the Land and beyond. Around 60% of the dogs would be off the lead. Some of the dog walkers walked from one access to another across the Land. He met the same dog walkers regularly on the Land. The northern area was more popular for dog walking than the southern area because it is contained by hedges and there is less fear of dogs running into the road if off the lead.

5.13 The slope on the northern area was used for sledging in winter months. He had seen people sitting on the embankment on the northern area looking out to sea and picnicking there in the shade. There could be hundreds of people using the northern area in a day. Many stay there rather than walk on as it is the first area of green they reach from the north. It is a unique and attractive area which should be protected. He had seen games being played on the southern part of the northern area, but when that was in use, others would use the area of the overflow car park. He had rarely seen it used as a car park, maybe on 10 occasions in 15 years.

5.14 **Mr Richard Glass**[14] lives at 22 Cranley Gardens and has lived in Shoeburyness all his life apart from a 2 year period. He played on the Land as a child, and his children played on it and then his 2 grandchildren who are aged 8 and 2. He played football there from the mid-1950's to the 1970's; occasionally used it for kite flying; ran daily; goes walking on the Land; played with his children and then grandchildren; and enjoys the open space. It is a safe area with children away from traffic. He has seen others playing cricket, football and rounders on the Land. The majority use the southern area.

5.15 He used the northern area regularly when the boating lake and a putting area were there. He has not used it much latterly. One of the problems with the northern side is that although you can get in with a buggy, you cannot then get out at the other end. Dog walkers use the northern part of the northern area, but he does not use it. He does not own a dog. He has played on the southern part of the northern area with his grandchildren where it is an open green area, but he does not normally go into the Public Garden area. Before he had grandchildren 8 years ago, he usually went to the southern part of the Land with his Wife. Even when he takes his grandchildren, the focus is on that area as they want to be near the sea. He does not use the overflow car park area as it is very foreboding. The gate at the entrance is off putting as it is necessary to squeeze through a small gap. The position was different when the boating lake and golf facility were there. The putting area was in the south eastern corner near to Waterford Road. The shed with amusements in it was at the south

[14] His witness statement and evidence questionnaire are at AB4 page 188 onwards.

western end of the boating lake as shown on photographs.[15] They were all on the southern part of the northern area. The overflow car parking area has always been laid out as such, but was always closed with the gate firmly locked.

5.16 **Mr John Budge**[16] has lived at 93 Leitrim Avenue for 18 years. He is the Secretary of the Shoeburyness Residents Association, which has been established for around 50 years. It has just under 1000 members, has regular AGM's, and represents the interests of Shoeburyness. Many members have contacted the Association requesting them to emphasise that it is essential that the Land is preserved for residents of the area. Groups from the Church use the Land, including the Boys Brigade and the Church football team which used to train on the Land. He has walked on both the northern and southern parts of the Land with his dog on numerous occasions until it sadly died last year, using the Land once or twice every week, often meeting up with other dog walkers. He and his Wife have also often gone for walks on the Land. In the last few years, their grandson has played on the northern area with friends; when he was younger, they often played football on the open grass behind the beach huts. He has been involved with painting and repairing 3 beach shelters with his church. He has cycled on both sides of the Land, and has seen many others using the grass areas for games and picnicking and relaxing. He has never sought permission to use the Land.

[15] At AB4 pages 291 and 300.
[16] His witness statement and evidence questionnaire are at AB4 page 70 onwards.

5.17 Due to the gate to the northern area always being locked, he tended to use one of the other access points. Many dog walkers would have entered and accessed that area via Waterford Road, or entered there and exited on the middle of Shoebury Common Road. Football has been played on the area of land to the south of the overflow car park. The percentage of use of the two areas varies between the summer and the winter. From April onwards, people sit on the bank on the northern side. There is no doubt that dog walkers make up a large part of users of the northern side, namely around 60% of them. He would generally only go into the area of the overflow car park as a means of access to somewhere else rather than to stay there. Therefore, when he was dog walking there, it would be as part of a longer walk, and he would usually enter the Land at the Waterford Road access and exit the Land in the middle of Shoebury Common Road. He very frequently saw other dog walkers following that same route. He was unable to say whether any of the dog walkers he saw used the northern area as a destination. He saw a few boys playing cricket on the northern area, but only on one occasion. He did not recall having seen any other games played on the overflow car park area. People would use the large open square area just to the south as a preference.

5.18 **Mrs Ursula Ellis**[17] lives in Hawkwell outside the Borough, but is the owner of beach hut 511. She and her husband drive to the area and park on the southern area near to Uncle Tom's Cabin. Sometimes she sits at the back of her beach hut on the Land with her husband when it is hot and they enjoy relaxing in such a lovely area. She has seen others kite flying, sailing and surfing, and

[17] Her witness statement and evidence questionnaire are at AB4 page 118 onwards.

school children having lessons there. Some people on the Land are visitors to the area from London. She is not a dog owner. They have also sat on the grass and had picnics. She has picked blackberries from the northern area in season. Otherwise, all her use of the northern area has been of the area to the south of the overflow car park. Most of the time she goes to her beach hut and uses the southern area, but sometimes she retreats onto the northern area. It has always been quieter there when she has been to that area. She probably uses the northern area 20% of the time and the southern area 80% of the time. She has never been onto the area of the overflow car park itself.

5.19 **Mrs Barbara Stapleton**[18] lives at 66 Admirals Walk. She came to Southend in 1973 when her son was 11 and she would bring him to the Land where they had picnics and played games. Her 2 children are now adults, but she still goes on the Land with them and her grandchildren. Her daughter lives in London and brings her children. Her family visits approximately every 6 weeks. Families have picnics on the Land; children play games; and couples sit relaxing and enjoying the surroundings. She has also dog walkers and cyclists using the Land. The grassy areas on both sides of the road give the area a rural feeling. It is a unique and very precious area. It is an ideal area for people living in flats or with small gardens. It is very important to preserve it for future generations.

5.20 Her means of access onto the Land is at the north east corner of the southern area from where she typically walks down the Promenade to the western end

[18] Her witness statement and evidence questionnaire are at AB4 page 338 onwards.

of the Land. She mainly uses the eastern part of the southern area as it is not always full with cars. On the northern side, she uses the Public Garden occasionally. The Council allowed the hedge to grow quite high on the road frontage, so she does not always feel safe behind that hedge with young children. If the hedge was kept cut by the Council, that area would be used much more. She has not used the eastern grassed part of the northern area, but has seen others using it. She has not gone onto the overflow car park area. It is not very often that there are any cars there. The northern area is used a lot less than the southern area, probably due to the high hedge.

5.21 **Mr Peter Hyde**[19] lives at 8 Dungannon Chase in Thorpe Bay which is close to the western part of the Land. There has been unrestricted access to the Land throughout the period his family has lived in the area. He has several friends who own beach huts, and has attended many events, such as barbecues on the beach and activity games including cricket and rounders on the grassed areas with children. His principal use of the Land is to attend such events at the beach huts. He also enjoys a walk on the Land, especially along the Promenade, which he does around 2 or 3 times a year on a summer's evening. He has not used the northern area as he is not a dog owner so he would not have reason to go there, but he has seen others using it for walking both with and without dogs, and sitting on the embankment. He has never walked through the overflow car park area.

[19] His witness statement and evidence questionnaire are at AB4 page 138 onwards.

5.22 There are 3 public beach shelters situated between the Land and the Promenade. They fell into disrepair, and the Council sought sponsors to take over their maintenance in exchange for limited advertising rights. In April 2012, Shoeburyness and Thorpe Bay Baptist Church, approximately half a mile away, agreed with the Council to repair and maintain the 3 shelters. Mr Hyde volunteered to co-ordinate the renovations. To date, 35 church members have spent over 1500 hours over 80 work days repairing and subsequently maintaining the shelters which have added further coherence to the neighbourhood, namely the community of people in Shoeburyness. Photographs of the shelters at different stages were referred to.[20] He drives and cycles around the area regularly to monitor the condition of the shelters as the Church continues to maintain them. He has seen people exercising their dogs on the Land on both sides of the road, and has seen lots of people picnicking and children playing on the Land.

5.23 **Mr John Widdows**[21] lives at 24 Waterford Road and has lived in Shoeburyness since 1996. During 2005, he formed a children's football club at Shoeburyness and Thorpe Bay Baptist Church, and they used the eastern part of the northern area of the Land to train from 2005 until 2008 once a week on Saturday mornings. He did not seek any permission from the Council to use the Land for training purposes. They met at the Church and all walked to and from the Land together. They entered the Land from the south east corner of the northern area through a space between the bushes. The hedges were very high most of the time. He has also used the northern area on occasions when

[20] At AB4 pages 139-141.
[21] His witness statement and evidence questionnaire are at AB4 page 60A onwards.

he has organised football games, mini-cricket, rounders and softball for his grandchildren, family and friends and their children. Some of his grandchildren live locally. In addition, he has used the Land with the Boys Brigade. He has seen others using the northern area for bird watching. However, usually, they were on their own in that area. He has also seen the pathway on the northern area being used by cyclists, runners and some dog walkers, and he has seen up to around 8 people walking along that pathway in a group. He is not a dog walker, so is not on the Land daily. During the summer holidays, he typically entered the Land from the south east corner of the northern area and used the eastern part of the northern area of the Land around 3 times per week. He often could not see what was taking place over the hedge on the overspill car park area. He has used that area, particularly when the children had their bikes when they would stay in the overspill car park area and ride along the pathway which ran from the entrance at Waterford Road through to the other side. They would have done that around 4 or 5 times last year, and probably much more the previous year. It is a safe place for children to ride their bikes and to learn how to ride. He saw dog walkers in that area, and on occasions he has seen families there. He has not seen football being played in that area as it is not sufficiently flat. The area to the south of the overspill car park has much more space for football.

5.24 **Mr Raymond Bailey**[22] lives at 91 Parkanaur Avenue, was born in 1942 and is a member of the Friends of Shoebury Common. He owns beach hut 428. He goes on the Land extensively, namely most days, in order to meet people and

[22] His witness statement, additional statement and evidence questionnaire are at AB4 page 99A onwards.

to update them on the position with the Land. His life had been taken over by the planning proposals for the sea wall on which he had spent enormous periods of time. He walks, cycles and drives to the Land. He accesses the Land from numerous different points as identified on Map A.[23] He goes to his beach hut regularly, around once or twice a week in the winter and much more often in the summer. He sits at his beach hut and looks out over the estuary; he has family gatherings there and they play games; he walks along the Promenade; and he is a patron of Uncle Tom's Cabin. The western part of the southern area has never been used as a car park and has always been available for recreation. He also uses the southern grassed area to the east of his beach hut. He has been on the northern area too which is a countryside area. The Public Garden has benches in it which he has sat on. He sometimes goes there to walk, such as to walk across it to go to the pub. During a summer, he would typically walk that route around 5 or 6 times. Sometimes he would meet people at the seats in the Public Garden. He has seen blackberry picking on either side of the access to the overflow car park area. He has used the southern area more over the years. The northern area tends to be quieter. He has seen dog walking and children playing in that area.

5.25 He indicated that the numbers who use the Land varies considerably. It can be very busy and can be quiet. The gates at the entrance to the overflow car park are kept locked which makes that area unwelcoming. He is not a dog walker, but has witnessed a lot of socialising by dog walkers who do not merely walk from point A to point B. It is a lovely area which has been cherished by the

[23] At AB4 page 117.

local inhabitants and should be saved for generations to come. It is a unique area with a lack of uniformity and is a very welcoming environment and friendly atmosphere for people of all ages with free and easy access. Families have picnics on the Land and play rounders, cricket and other games.

5.26 The Land was in part gifted by Colonel Ynyr Burges to The Shoeburyness Urban District Council "*for the recreation and benefit of the inhabitants of South Shoebury and others*" in 1899. In 2013, Mr Bailey carried out research of the Land Regisrty Title documents for the 3 main parcels of the Land, excluding the parcel to the west. Details of the original and current ownerships of those parcels and extracts from relevant conveyances are set out in his additional witness statement, including the restrictive covenants attached to the Land.[24] In relation to the northern area, the Land was acquired from Colonel Ynyr Burges in 1956. He acknowledged that the photograph taken around 1931 shows the boating lake in that area, and the area to the north as just a field at that time.[25] To the east of the boating lake in 1931 was a miniature golf area. He did not personally recall the overspill car park being laid out, and he has never personally seen it being used as a car park although he has seen photographs of it with vehicles on that area. The amounts collected by the Council from car parking charges show the very limited use of the overflow car park.[26] He pointed out that Mr Grubb was an expert on the local area with vast local knowledge and so he accepted what Mr Grubb stated about the area as being correct.

[24] At AB4 page 99B onwards.
[25] At AB4 page 332.
[26] E-mail at AB5 page 163.

Written Evidence in Support of the Application

5.27 In addition to the evidence of the witnesses who appeared at the Inquiry, I have also considered and had regard to all the written evidence submitted in support of the Application in the form of additional witness statements, evidence questionnaires, photographs and other documents. 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. 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

5.28 **Mr Peter Tremayne**[27] is a Principal Solicitor employed by Southend-on-Sea Borough Council. He examined the Council's records in respect of the ownership of the Land and produced the relevant documentation.

5.29 In respect of Title EX 861158, the middle parcel of the southern area, it is owned by the Objector as confirmed by the Land Registry title documentation produced.[28] There are 2 further relevant documents. Firstly, a Conveyance dated 22 November 1889 between Colonel Y.H. Burges and the Shoeburyness Urban District Council of that parcel of land by way of a gift "*to the intent that the same may be used as a Public Pleasure Ground*". The First Schedule contains restrictive covenants on the Council over the use of that part of the

[27] His witness statement and attachments are in OB at page 137 onwards.
[28] At OB page 144 onwards.

Land, including a requirement that the pleasure ground be preserved as an open space for the recreation and benefit of the inhabitants of South Shoebury and others.[29] Secondly, a note held in the Council's legal department dated 5 November 1945 over a dispute in 1931 between Captain Burges and the Council and its resolution.[30] That related to developments that had occurred on that part of the Land in breach of the Conveyance, namely the authorisation of the erection of bathing huts, the erection of a tea room, the authorisation of the laying out of a midget golf course and car parking. It was resolved by the Council agreeing to remove the refreshment pavilion and some of the bathing huts, and the Council to prohibit car parking.

5.30 In respect of Title EX 841243, the eastern parcel of the southern area, it is owned by the Objector as confirmed by the Land Registry title documentation produced.[31] There is one relevant Conveyance, namely an Indenture dated 29 January 1900, by virtue of which that land was conveyed by way of a gift to Shoeburyness Urban District Council.[32] The obligations on the Council were in the same terms as in the Conveyance by Colonel Burges.

5.31 In respect of Title EX 833899, the northern area, it is owned by the Objector as confirmed by the Land Registry title documentation produced.[33] There is one relevant Conveyance dated 9 August 1956 by virtue of which that land was conveyed to the Objector's predecessor by Major Ynyr Alfred Burges for £7,500 and subject to restrictions on its use as contained in the Second

[29] At OB page 164.
[30] At OB page 166.
[31] At OB page 149 onwards.
[32] At OB page 167.
[33] At OB page 140 onwards.

Schedule.[34] They included that the northern part of that area should be used for the purpose of parking private cars only and that the southern part should only be used as ornamental gardens, tennis courts and a putting green. Minutes of the Council's Law, Parliamentary and Development Committee of 22 July 1955 record that purchase.[35] Further, Minutes of that Committee dated 21 September 1956 record the Council's resolution that the land "*be appropriated for Parks and Pleasure Grounds and Car Parking purposes in accordance with the lay-out plan now submitted and transferred to the Committees concerned for future management*".[36]

5.32 In respect of Title EX 858764, the western parcel of the southern area, it is owned by the Objector as confirmed by the Land Registry title documentation produced.[37] There is one relevant Conveyance dated 18 July 1930 between Ynyr Alfred Burges and the Council's predecessor by virtue of which the land was conveyed as a "*parade*" for pedestrians adjoining the sea wall (together with a garden).[38]

5.33 Byelaws were made by the Council's Leisure Services Committee on 2 April 1986 pursuant to section 164 of the Public Health Act 1875 and sections 12 and 15 of the Open Spaces Act 1906.[39] By virtue of byelaw 1, they applied to the pleasure grounds specified in Schedule 1, which included "Shoebury Common". "Shoebury Common" is not further defined or identified in the

[34] At OB page 173.
[35] At OB page 175.
[36] At OB page 176.
[37] At OB page 157 onwards.
[38] At OB page 178 onwards.
[39] At OB page 182 onwards.

Byelaws. The byelaws were confirmed by the Secretary of State on 12 November 1986 and came into force on 26 November 1986. They regulate the recreational use of Shoebury Common.

5.34 He confirmed that from his researches, none of the parcels comprising the Land have been appropriated to any other use. There had been a de facto appropriation of part of the parcel comprising Title EX 841243, but in relation to part of it that is not subject to the Application as amended.

Written Evidence Objecting to the Application

5.35 In addition to the evidence of witnesses who appeared at the Inquiry, I have also considered and had regard to all the written evidence submitted in support of the Objection to the Application in the form of additional witness statements and documents which are contained in the Objector's Bundle. The Applicants confirmed that such evidence could be taken as read as they had no questions in cross examination for them.

OTHER EVIDENCE

5.36 During the Inquiry, I invited any other persons who wished to give evidence to do so. There were 2 such other persons who gave additional evidence.

5.37 **Mr Graham Harp** lives at 81 Marine Parade, Leigh-on-Sea, and is the Secretary of the Beach Huts Association. He was speaking on behalf of 83% of the beach hut owners who are members of the Association. He explained that the beach hut plots are leased from the Council to the hut occupiers who

then build a hut on their plot. The hut owners are therefore Council tenants and ratepayers. The leases have now all lapsed. Only around 50% of the hut owners live within the immediate area and so they often do not live in the neighbourhood. The beach hut owners have concerns over the effects of the registration of the Land on their car parking. The beach huts themselves are no longer proposed to be within the Application Land, but there are concerns that the use of the Land for car parking will be adversely affected. The owners wish to ensure that the status quo is maintained. The Association had submitted an objection to the Application. Provided that there would be no interference with their rights, then they would take a neutral stance. They would also require a reassurance that there would be no effects on their ability to maintain their beach huts.

5.38 **Mr Peter Grubb**[40] has been the tenant of Uncle Tom's Cabin since 1976. He is a founder member of Friends of Shoebury Common. Since the 1930's, his family has run businesses on Southend seafront. He previously operated the Bumper Boats on the northern area which business was closed following a vandal attack when he also had the boat lake backfilled. That was around 1978/1979. After the loss of the lake, visitors to the area declined. The car park on the northern area was in the past open daily and trading well. When he became the tenant of Uncle Tom's Cabin in 1976, it was operating normally during the summer holidays, at weekends and on public holidays, but remained shut at other times. However, following an invasion by travellers approximately 20 years ago, the access gates were kept closed and

[40] His witness statement was produced at the inquiry.

permanently locked. It has not functioned as a normal car park since then. He was given a key and a set of criteria to adhere to as to when he could open them, and that informal arrangement worked well. He re-installed a ticket machine together with a height restrictor to prevent caravans from entering the area. The parking area, however, has no signage and as the Tamerix bushes were allowed to grow, it became hidden from view by the bushes and its use declined. It was shut for the entirety of the summer last year.

5.39 He visits the Land daily and has a good working relationship with the Borough Council. He reports any damage or problems to them, such as if he sees a beach hut broken or tyres deposited on the Land. The eastern car park area is used extensively by a kite surfer who encourages both locals and visitors to engage in kite surfing training which he carries out in the morning. By the afternoon, that car park area is filling up with cars. He sometimes gives more lessons in the late afternoon. The usage of the southern area is very extensive and very wide ranging both in terms of uses and people. He supports the amended Application to register the Land as a village green. However, he would object insofar as registration would prevent the summer seasonal operation of any car park on the Land, including on the northern area.

6. THE LEGAL FRAMEWORK

6.1 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

6.2 The Application was made pursuant to 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.

6.3 The Application seeks the registration of the Land by virtue of the operation of section 15(2) of the 2006 Act. Under that provision, 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, 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.*"

6.4 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 by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;

(v) such use has been as of right; and

(vi) such use continued at the time of the Application.

Burden and Standard of Proof

6.5 The burden of proving that the Land has become a village green rests with the Applicants. The standard of proof is the balance of probabilities. That is the approach I have used.

6.6 Further, when considering whether or not the Applicants have 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***[41] 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.

[41] [2004] 1 AC 889. Although ***Beresford*** has been overruled by ***Barkas*** (see later), it was not done so on this point which remains good law.

Statutory Criteria

6.7 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

6.8 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.

6.9 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***[42] 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

6.10 It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[43] 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 can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children's play.

[42] [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.
[43] [2000] 1 AC 335 at 356F to 357E.

6.11 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***[44], Sullivan J. (as he then was) 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.*"

Continuity and Sufficiency of Use over 20 Year Period

6.12 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: ***Hollins v. Verney***.[45]

6.13 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***.[46]

Locality or Neighbourhood within a Locality

[44] [2003] EWHC 1578 (Admin).
[45] (1884) 13 QBD 304.
[46] [2010] UKSC 11 at paragraph 36.

6.14 A "*locality*" must be a division of the County known to the law, such as a borough, parish or manor: ***MoD v Wiltshire CC***;[47] ***R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC***;[48] and ***R. (Laing Homes Limited) v. Buckinghamshire CC***.[49] A locality cannot be created simply by drawing a line on a plan: ***Cheltenham Builders*** case.[50]

6.15 In contrast, a "*neighbourhood*" need not be a recognised administrative unit. Lord Hoffmann pointed out in ***Oxfordshire County Council v. Oxford City Council***[51] 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***.[52] 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.[53]

6.16 Further clarity was provided on that element by HHJ Waksman QC in ***R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council***[54] who stated:-

[47] [1995] 4 All ER 931 at page 937b-e.
[48] [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.
[49] [2003] EWHC 1578 (Admin) at paragraph 133.
[50] At paragraphs 41 to 48.
[51] [2006] 2 AC 674 at paragraph 27.
[52] [2002] EWHC 76 (Admin).
[53] At paragraph 85.
[54] [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

6.17 "*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***.[55]

As of Right

[55] [2002] EWHC 76 (Admin) at paragraph 71.

6.18 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***[56] that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

6.19 "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***.[57] 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*".[58]

6.20 "Permission" can be expressly given or can be implied from the landowner's conduct. Further, land that is used "by right" is being used with permission and so is not being used "as of right": ***R. (on the application of Barkas) v. North Yorkshire County Council***.[59] I shall return to the law on this issue in further detail below.

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

[56] [2000] 1 AC 335.
[57] (1988) 56 P. & C.R. 8.
[58] At paragraphs 88-90.
[59] [2014] 3 All ER 178.

for the most part the evidence of all the witnesses called for each of the Parties.

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 relevant statutory criteria 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 relevant statutory criteria in turn as set out in paragraph 6.4 above, and determine whether they have been established on the basis of all the evidence, applying the facts to the legal framework set out above. 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 relevant statutory criteria must be established by the Applicants on the evidence adduced on the balance of probabilities.

The Land

7.4 The relevant land sought to be registered is clear. As amended, the Application Land is identified on "Map A" annexed to Mr Lovett's evidence questionnaire which shows the Land subject to the Application as amended shaded in light

green.[60] The Land has clearly defined and fixed boundaries, and 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(2) of the 2006 Act and is capable of registration as a town or village green in principle and I so find.

Relevant 20 Year Period

7.5 As to the identification of the relevant 20 year period for the purposes of section 15(2) of the 2006 Act, the qualifying use must continue up until the date of the Application. Hence, the relevant 20 year period is the period of 20 years which ends at the date of the Application. The Application Form is dated 18 November 2013 and the accompanying statutory declaration is dated 21 November 2013. It follows that the relevant 20 year period for the purposes of section 15(2) is November 1993 until November 2013.

Locality or Neighbourhood within a Locality

7.6 Turning next to the identity of the relevant locality or neighbourhood within a locality for the purposes of section 15(2), the Application Form in part 6 merely identifies the locality or neighbourhood within a locality relied upon by reference to "Map Attached", namely the map identifying the Application Land.[61] That particular Map does not itself identify the separate locality or neighbourhood within a locality relied upon. At the Inquiry, the Applicants confirmed that they relied upon "limb (i)", namely the localities of the ward of West Shoebury and the Thorpe Ward, rather than on "limb (ii)" and a

[60] At AB4 page 22.
[61] At AB5 page 141.

neighbourhood within a locality. They submitted a plan marked "Map B" on which the boundaries of those two wards are marked.

7.7 Those Wards are recognised and established administrative areas with fixed and identifiable boundaries and are areas known to the law. In my view, they are each capable of being a locality for the purposes of section 15(2) of the 2006 Act. However, the difficulty arising is the Applicants' reliance on two localities in a limb (i) case. Lord Hoffmann stated in ***Oxfordshire County Council v. Oxford City Council***[62] that:-

> "*The fact that* ***the word "locality" when it first appears in subs(1A) must mean a single locality*** *is no reason why the context of "neighbourhood within a locality" should not lead to the conclusion that it means "within a locality or localities".*" (my emphasis).

Hence, it seems to me that in a limb (i) case, which is acknowledged to be much stricter and precise than a limb (ii) case, and indeed such strict precision led to the "*deliberate imprecision*" of a "neighbourhood within a locality" amendment, the word "*locality*" must be interpreted as being one single locality. Therefore, as the two wards of West Shoebury and Thorpe are two separate administrative areas, and so two localities, it is my view that they do not comprise a qualifying locality for the purposes of limb (i) of the section 15(2) criteria.

7.8 Having said that, it is open to the Registration Authority to amend an Application as referred to above in appropriate circumstances. Although the

[62] [2006] 2 AC 674 at paragraph 27.

Registration Authority has no investigative duty to find evidence or reformulate the Applicants' case,[63] it is entitled to find an alternative locality or neighbourhood within a locality on the basis of the available evidence. In that regard, it seems to me that the wards of West Shoebury and Thorpe, which are established and recognised areas, are areas with the requisite degree of cohesiveness in order to each amount to a neighbourhood. Although they are two neighbourhoods rather than one, that is not fatal to a limb (ii) case as found by the Court of Appeal in ***Leeds Group plc v. Leeds City Council***.[64] They are both within the Borough of Southend-on-Sea which is a qualifying locality. Therefore, on the basis of the evidence submitted, I am able to find that the two identified wards of West Shoebury and Thorpe are qualifying neighbourhoods within the locality of the Borough of Southend-on-Sea within the meaning of section 15(2) of the 2006 Act.

7.9 As both the Applicants and the Objector confirmed at the Inquiry that they would have no objection to me so finding if appropriate on the evidence and no prejudice to either Party was identified, I recommend to the Registration Authority that the Application be amended to rely upon the neighbourhoods of West Shoebury Ward and Thorpe Ward within the locality of the Borough of Southend-on-Sea.

Use of Land for Lawful Sports and Pastimes by a Significant Number of the Inhabitants of the Neighbourhood for at least 20 Years

[63] See Lord Hoffmann in ***Oxfordshire*** at paragraph 61.
[64] [2011] Ch 363.

7.10 The next issue I turn to is whether the Land has been used by a significant number of the inhabitants of the neighbourhood for lawful sports and pastimes throughout the relevant 20 year period from November 1993 until November 2013.

7.11 Given the nature of the Objection and how it is framed, I shall deal with this issue separately for the northern part of the area of the Land to the north of Shoebury Common Road and for the remainder of the Land. Moreover, I shall deal with the issue relatively shortly in relation to the latter given that the Objector does not dispute that the remainder of the Land has been so used and did not challenge the evidence of the Applicants' witnesses in relation to their actual use of the remainder of the Land.

(i) Land other than northern overflow car park

7.12 Starting then with the Land other than the northern part of Title EX 833899, I heard extensive evidence as to the recreational use of those parts of the Land from the Applicants' witnesses supported by the Applicants' written evidence. References were made in both the oral and the written evidence in support of the Application to recreational activities such as dog walking, general walking, children's play, football, cricket, rounders, kite flying, picnicking, sunbathing, relaxing, reading, cycling, running, barbecues, camping and sledging having been carried out on those parts of the Land. Each of the witnesses who gave oral evidence in support of the Application referred to their own and/or their family's and/or other people's varying recreational uses of some or all of those parts of the Land over different periods of time. Such evidence is supported by

a material amount of written evidence. Although people's recollections may fade over time, particularly in relation to details, I accept the evidence of each of those witnesses that they did in fact use the Land, and saw it being used, for the stated purposes.

7.13 Indeed, the very nature and location of those parts of the Land are such that they are highly likely to have been used for lawful sports and pastimes by the local community. On the southern side of Shoebury Common Road, the Land is located on the sea front with beach huts all along the southern and eastern boundaries. The area subject to the amended Application is grassed and recreational facilities are provided on other parts of it, including Uncle Tom's Cabin serving refreshments and the Kite Surfing School. Other facilities in the form of car parking and a toilet block are provided for the use of recreational users of the area. It is specifically laid out for and intended to be used for recreational purposes. On the northern side of Shoebury Common Road, the southern part is different in nature to that on the southern side of the Road, having been described in the evidence as more rural in nature and quieter. Nonetheless, it is an attractive grassed area suitable for recreational games on the eastern parts and for quiet relaxation on the western area in the Public Garden where memorial benches are located. Moreover, both areas are located within a built up residential area to the north. There is, and has been throughout the relevant period, unrestricted pedestrian access to both areas. I also saw from my site visit that they are very pleasant and attractive areas of open space of different characters. Given such circumstances, I would expect

those parts of the Land to have been used by local residents for recreational purposes.

7.14 Further, all such activities referred to in paragraph 7.12 above are lawful, and they are all capable of being recreational pursuits in principle. Therefore, I find that lawful sports and pastimes have been carried out on those parts of the Land during the relevant 20 year period.

7.15 As to the extent and frequency of the recreational use of those parts of the Land throughout the relevant 20 year period, it is necessary to ascertain whether such use has been carried out by a significant number of the inhabitants of the West Shoebury and Thorpe wards throughout that period. As indicated above, the question for determination is whether the qualifying use of those areas for lawful sports and pastimes has been of such a nature and frequency throughout the relevant 20 year period to demonstrate to the Landowner that recreational rights were being asserted over them by the local community.

7.16 In that regard, it seems to me that the evidence clearly establishes that the recreational use of those areas took place throughout the entirety of the relevant 20 year period. In reaching that view, it is relevant to note that it is not necessary for each user to have personally used the areas for the full 20 year period but, rather, for those areas to have been in use generally by local people throughout that period. I have also given considerable weight to the written evidence in relation to the use of those areas given that such was not

disputed by the Objector and there was no evidence to the contrary. In doing so, I find that for the entirety of the relevant period, there is evidence that such areas were in use by the local community.

7.17 As to the frequency of such use, the impression I gained from the evidence was that there was, and continues to be, an extensive use of the southern area. Mr Lovett referred to its use by people on a daily basis and to going there regularly himself; Mr Worsdale stated that it was used extensively; Mr Glass pointed out that the majority of users use the southern area; Mrs Stapleton's primary use was of the eastern part of the southern area; Mr Hyde always used the southern area; and Mr Bailey regularly uses the southern area. Mr Grubb attends that area daily and described its use as being very extensive and very wide ranging. Indeed, that extent of use is consistent with the numerous beach huts on that area, the trading businesses in that area and the extent of the car parking provision. Even discounting from such use the non-qualifying use by those who are not inhabitants of the neighbourhoods, as some of the beach hut owners are not, I find that the extent of the use of the southern areas was to a sufficient degree throughout the relevant 20 year period to demonstrate to a landowner that rights were being asserted over them, subject to the "as of right" issue which I address below.

7.18 It is also very apparent from the evidence that the southern part of the northern area was used much less frequently than the southern area. That is somewhat inevitable given that there are no recreational facilities in that area other than the benches in the Public Garden, no operational car park, no beach huts and

the area is somewhat hidden behind tall bushes. Nonetheless, my impression from the evidence is that it has nonetheless been used to a sufficient extent to satisfy the statutory criteria, particularly by dog walkers. Mr Lovett has played there with his grandchildren; Mr Worsdale has spent a lot of time sitting on the benches; Mr Glass has played with his grandchildren on the open green area; Mrs Stapleton has occasionally used the Public Garden; and Mr Widdows used that area for football training and games with family and friends. Further, from my site view, it seemed to me that the Public Garden was an attractive and peaceful place to spend time relaxing and the open grassed areas to the east were attractive areas for games and dog walking.

7.19 Taking into account that the Objector did not challenge the nature and extent of use of the Land aside from the overspill car park area, I find that this element of the statutory criteria is satisfied in relation to those other areas of the Land.

(ii) Northern Overflow Car Park Area

7.20 Turning to the northern part of the northern area, much of the evidence at the Inquiry focused on the use of that area. Firstly, the nature of recreational uses undertaken in that area were more limited. The typical uses referred to in the evidence were dog walking, walking, cycling, blackberry picking, sitting on the embankment and sledging down the embankment. I accept the evidence of those witnesses who referred to undertaking such activities on that area and to having seen others do so. Moreover, those uses are all lawful recreational activities.

7.21 Instead, in my view, the crucial issue is whether such recreational uses, insofar as qualifying uses that can be taken into account, have been carried out to a sufficient extent and frequency throughout the relevant 20 year period to demonstrate the assertion of recreational rights over that area by the local community.

7.22 In determining that issue, the following should be noted. I have attributed significant weight to the evidence given orally that was subjected to cross examination. However, I have given considerably less weight to the written evidence in relation to this particular issue as there was no opportunity to test it by cross examination; the particular issue was heavily in dispute; and, particularly significantly, the vast majority of the written evidence failed to indicate if or whether the activities being referred to were undertaken specifically on that northern part of the northern area and, if so, to what extent. I am unable to assume that they were undertaken on that area unless it is so stated as the onus is upon the Applicants to demonstrate the satisfaction of the statutory criteria on the balance of probabilities.

7.23 In terms of the oral evidence, it is apparent that the use of that particular area was very limited. Mr Blackall has not used it for recreational purposes;[65] Mr Glass has not used it; Mrs Ellis has never been onto that area;[66] Mrs Stapleton has never been onto that area either; and Mr Hyde has not used it. It was also of note that Mr Glass pointed out the difficulties of accessing the northern area

[65] He is not a qualifying user in any event as he resides outside the identified neighbourhoods.
[66] She is also not a qualifying user in any event as she resides outside the identified neighbourhoods.

generally as there was restricted access if pushing a buggy, and that he regarded the northern part of that area as "*very foreboding*" given the locked gate and the otherwise restricted access. Mr Bailey similarly referred to the locked gates as making that area "*unwelcoming*".

7.24 Further, I find that the evidence established that the primary recreational use of that particular part of the Land was for dog walking. Mr Lovett, whose home overlooks that area, expressed the view that some 95% of the use of that area is for dog walking. That was consistent with Mr Belch's stated view that around 90% of the recreational use of that area was by dog walkers, and with Mr Glass's view that it is dog walkers who use that area. Moreover, from my site visit, it seems to me that the nature of that area, which is not grassed down its centre and is not flat, is not particularly suitable for recreational activities such as the playing of games or picnicking. Indeed, given the attractive and relatively large grassed area immediately to the south, it would be surprising that people would use that northern area in preference. That view was expressed by Mr Lovett, by Mr Widdows who did not regard it as sufficiently flat for football, and is consistent with Mr Budge's evidence that he had only seen a cricket game being played there on one occasion and no other games.

7.25 In assessing the use of that area for dog walking, it is necessary to discount from such qualifying use any use that was more akin to the exercise of a public right of way than a right to recreate over land generally. That issue was

addressed by Lightman J. at first instance in ***Oxfordshire County Council v. Oxford City Council***[67] at paragraph 102 where he stated:-

> "*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 at 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*

[67] [2004] Ch. 253.

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.

7.26 Applying that legal position to the evidence, I bear in mind that although there are no recorded public rights of way over those the area, there is a physical gravelled path on the ground running from the access point at Waterford Road across the entire length of the area leading to the access point onto Shoebury Common Road. Walking across that area from one end of the path to the other would not, in my view, be a qualifying use in terms of the statutory criteria. Similarly, walking along a particular route around the perimeter of the area would amount to a use more akin to the exercise of a right of way.

7.27 It seem to me that it is evident that a material amount of dog walking, and general walking, on that area must be discounted. Mr Lovett stated that he walked a circular route on that area around 3 times a week. Mr Worsdale pointed out that some dog walkers walk along the central path and others walk along the back of the houses. Mr Belch's view was that around 60% of dog walkers walk a circuit. Mr Budge stated that he only generally went onto that area as a means of access to somewhere else rather than to stay there. Mr Widdows had seen the pathway being used by cyclists, runners, walkers and some dog walkers.

7.28 Having discounted such non-qualifying use, it seems to me that the evidence of the remaining dog walking use of the Land was very limited. Other activities such as blackberry picking and sledging are by their nature seasonal. There is very little evidence of other uses of that area of the Land. Instead, taking the evidence as a whole, it is my view that the recreational use of that part of the Land was no more than sporadic over the relevant 20 year period and insufficient to demonstrate to a landowner that recreational rights were being asserted over it by the local community.

7.29 Consequently, I conclude that that element of the statutory criteria has not been established in relation to the overflow car park area.

Use as of Right

7.30 The next and other fundamental issue between the Parties over which their respective submissions focused is whether the use of the Land has been "as of right" during the relevant 20 year period.

7.31 There was no suggestion in any of the evidence or the submissions that any of the use was by stealth. On the contrary, it was carried out openly during daylight hours and without any element of secrecy. The use of the Land has thus been *nec clam*.

7.32 Similarly, none of the use was carried out with force. Although use need not involve physical force to be *vi*, there was no evidence or suggestion of anyone having been challenged by the Landowner or having been requested to leave the Land or using the Land contrary to any sign to keep off it. Instead, the undisputed evidence was that no one had ever been prevented from using the Land nor been requested to leave the Land nor been informed that they should not be on the Land. Therefore, I find that the use of the Land was *nec vi*.

7.33 As to whether the Land has been used *nec precario* during the relevant 20 year period, there was no evidence of any express permission having been given for anyone to use the Land. Similarly, there was no evidence or suggestion that the use was pursuant to an implied permission, save and insofar as use "by right" amounts to use by permission.[68] I thus turn to that crucial issue as to whether the use of the Land was "by right" and thus not "as of right".

[68] In ***Barkas***, it was found that use "by right" is *precario*: see, for example, Lord Neuberger at paragraphs 29 and 37 and Lord Carnwath at paragraph 51.

7.34 In relation to this issue, it is appropriate to consider each of the separate parcels of the Land in turn. However, at the outset, all the Land is owned by the Objector as established by the relevant Land Registry title documents produced. That was not disputed by the Applicants. As to the parcel of the Land contained in Title EX 861158, the middle parcel of the southern area, that was acquired by the Objector's predecessor in title by way of a gift in a Conveyance dated 22 November 1889 for the express purpose of being used as a public pleasure ground. It was thereby conveyed as a recreational area for the public. It has been laid out as such, made available to the public, so used by the public and subsequently maintained as public open space. The statutory power available to the Urban District Council in 1889 to lay land out as a public recreational ground was section 164 of the Public Health Act 1875. It is also of note that the byelaws were made pursuant to that statutory provision. It follows that such land was acquired and held by the Objector's predecessor for public open space and duly laid out and maintained as such pursuant to statutory powers.

7.35 Applying the Supreme Court's decision in ***Barkas*** to those circumstances, the Court held in that case that a recreation ground provided and maintained by a local authority pursuant to section 12 of the Housing Act 1985 or its statutory predecessors was used by the public "by right" and not "as of right" within the meaning of section 15 of the 2006 Act. It further held that a recreation ground provided for public use by a local authority pursuant to any of its statutory powers would similarly be used by the public "by right" and not "as of right". Where land is held by a local authority for the statutory purpose of recreation,

and members of the public then use the land for that purpose, then they so use it pursuant to a statutory right to do so. They are accordingly not trespassers, which is a pre-requisite of land being used "as of right".

7.36 In my view, as this land was acquired by the Urban District Council for the purpose of public recreation, laid out and maintained as such pursuant to statutory powers, the public were entitled to use it. They were not trespassers, but were using the land "by right" and accordingly their use was *precario*.

7.37 It was contended by the Applicants that the parcel was never in fact appropriated as a public recreational area as certain of the covenants in the Conveyance were breached as evidenced in the note of 5 November 1945. However, the appropriation occurred when the land was acquired as public open space. There is no evidence that it was appropriated to any other purpose. Breaches of the covenants and wrongfully using the land for other purposes would not have the effect of lawfully appropriating it to another purpose. Instead, it remained held as public open space and the ***Barkas*** principles accordingly apply.

7.38 Turning to the parcel of the Land contained in Title EX 841243, the eastern parcel of the southern area, that was acquired by the Objector's predecessor in title by a Conveyance dated 29 January 1900 by way of a gift to be used for similar purposes and subject to similar obligations. In the same way, that has been laid out and provided for public recreational use and the public so use it.

They are not using it as trespassers, but "by right", for the same reasons as set out above.

7.39 The same position arises in relation to the land contained in Title EX 858764, the western parcel of the southern area. It was acquired by the Objector's predecessor by a Conveyance dated 18 July 1930 to be used as a parade for pedestrians together with a garden. It was duly laid out, provided and maintained as a public recreational area. In such circumstances, it was also appropriated for such purposes and the public use it "by right".

7.40 As to the land in Title EX 833899, the northern area, that was acquired by the Objector's predecessor by a Conveyance dated 9 August 1956. By that Conveyance, the southern area was required to be used as ornamental gardens and for other public recreational purposes. Minutes have been produced evidencing that that area was formally appropriated for parks and pleasure grounds. It was duly laid out, used and maintained as public recreational area. Thus, again, for the same reasons it has been used "by right".

7.41 However, the position is different for the northern area of the land in that Title. It was acquired for the principal purpose of car parking and was formally appropriated as such in the recorded minutes. Moreover, it was laid out as a car park. Although its use as a car park has reduced in fact, there is no evidence that it has been appropriated for public recreational purposes. It has not been laid out as a recreational area nor maintained as such. Therefore, in my view, the principles in ***Barkas*** do not apply to it.

7.42 The Objector further relies on the making of byelaws as evidence that the Council regulates the use of that area of the Land and its use is accordingly *precario*. However, it does not seem to me that it has been demonstrated that the byelaws apply to that area of the Land. They apply to "Shoebury Common", which is undefined and not identified, and they regulate the recreational use of that Common. However, that area of the Land was not acquired as a public recreational area but as a car parking area, in contrast to the other areas. The regulation of the recreational uses does not seem to me to be applicable to that separate area. Although that area is regulated by the terms of a Traffic Order, that is a regulation of car parking on that land and not a regulation of any recreational activities taking place upon it.

7.43 Instead, it seems to me that any recreational use of that northern area has been "as of right". Users were using it for recreational purposes as trespassers as the land was for the vast majority of the relevant 20 year period closed as a car park and the public were accordingly not then permitted to use it as a car park or for any other purpose. Thus, I find that the recreational use that did take place on that area was "as of right" throughout the relevant 20 year period.

Continuation of Use

7.44 The final issue is whether the qualifying use continued up until the date of the Application, namely November 2013. The Land remains unfenced and open to public access in its entirety and no signs have been erected restricting its use to date. It continues to be used for recreational purposes and that was not

disputed by the Objector. Therefore, I find that the qualifying use was continuing as at the date of the Application.

8. CONCLUSIONS AND RECOMMENDATION

8.1 My overall conclusions are therefore as follows:-

8.1.1 That the Registration Authority should amend the Application Land as sought by the Applicants to comprise those areas shaded in light green on the plan marked "Map A";

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

8.1.3 That the relevant 20 year period is November 1993 until November 2013;

8.1.4 That the Registration Authority should amend the Application to rely on the neighbourhoods of the West Shoebury and Thorpe Wards within the locality of the Borough of Southend-on-Sea;

8.1.5 That the neighbourhoods of the West Shoebury and Thorpe Wards within the locality of the Borough of Southend-on-Sea amount to a qualifying neighbourhood within a qualifying locality;

8.1.6 That the Application Land other than the area of the northern overflow car park has been used for lawful sports and pastimes throughout the relevant 20 year period by a significant number of the inhabitants of a qualifying neighbourhood within a locality throughout the relevant 20 year period;

8.1.7 That the part of the Application Land comprising the area of the northern overflow car park has not been used for lawful sports and

pastimes throughout the relevant 20 year period by a significant number of the inhabitants of a qualifying neighbourhood within a locality throughout the relevant 20 year period;

8.1.8 That the use of the Application Land other than the area of the northern overflow car park has been "by right" during the relevant 20 year period and accordingly not "as of right";

8.1.9 That the use of the part of the Application Land comprising the area of the northern overflow car park has been "as of right" throughout the relevant 20 year period; and

8.1.10 That the use of the Application Land for lawful sports and pastimes continued up until the date of the Application.

8.2 In view of those conclusions, it is my recommendation that the Registration Authority should reject the Application and should not add the Application Land or any part of it to its register of town and village greens for the reasons contained in this Report and on the specific grounds that:-

8.2.1 The Applicants have failed to establish that the Application Land comprising the area of the northern overflow car park has been used for lawful sports and pastimes by a significant number of the inhabitants of a qualifying locality or neighbourhood within a locality throughout the relevant 20 year period; and

8.2.2 The use of the Application Land other than the area comprising the northern overflow car park for lawful sports and pastimes has been "by right" and not "as of right" throughout the relevant 20 year period.

9. ACKNOWLEDGEMENTS

9.1 Finally, I would like to thank the Applicants and the Objector and their representatives for the very helpful manner in which the respective cases were presented to the Inquiry. I would further like to express my gratitude to the representatives from the Registration Authority for their significant administrative assistance prior to and during the Inquiry.

9.2 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

13 October 2015

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