IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A NEW TOWN OR VILLAGE GREEN DESCRIBED IN THE APPLICATION AS 'LEACH GROVE WOOD' AT LEATHERHEAD, SURREY

– APPLICATION NUMBER 1869 –

INSPECTOR'S REPORT AND RECOMMENDATION TO THE COMMONS REGISTRATION AUTHORITY – SURREY COUNTY COUNCIL

Introduction

1. I am instructed by Surrey County Council ('SCC') in its capacity as the commons registration authority ('the registration authority') to advise on an application to register as a new town or village green ('TVG') a small parcel of woodland (referred to in this report either as 'the land' or 'the wood') which is approximately 2.90 acres in size and is located at the southern end of Leach Grove in Leatherhead. The land is coloured green and marked LGW on the plan at Appendix/1 ('App/1'). The application is made pursuant to the provisions of section 15(3) of the Commons Act 2006 ('the 2006 Act') on the basis that qualifying user ceased with the erection of permissory signage on 9/01/2013.

2. The application in Form 44 is dated 22/03/2013 (A1/tabA) and was made by Philippa Cargill who lives at 54 Windfield ('the applicant'). The registration authority acknowledged receipt of the application and accompanying documents on 25/03/2013. These included the original neighbourhood plan in which the neighbourhood was described as *'South Leatherhead'* and comprised polling districts 1 and 2 within the locality of the South Leatherhead ward of Mole Valley District Council ('MVDC') (RA/B12). Put shortly, the grounds on which the application was made were that local inhabitants had used the land for informal recreation for a period of at least 20 years ending in January 2013. The application was supported by the evidence of those who completed Evidence Questionnaires ('EQs'). It was also accompanied by 116 EQs

(RA/G44).The overall tally of EQs has now risen to some 362 which demonstrates very clearly that this is a well supported application to register.

3. The application was duly publicised by the registration authority in accordance with the regulations (The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007). The publicity notice invited objections and a single objection was received from NHS Property Services Ltd ('the objector') to whom the application land had been transferred under arrangements contained in the Health and Social Care Act 2012. All land assets held by the former Strategic Health Authorities and Primary Care Trusts ('PCTs') which did not pass to Clinical Commissioning Groups vested in the objector which now manages, maintains and develops such assets on behalf of the Department of Health. In fact, I think that Surrey PCT may still be the registered proprietor of the land which is held under title number SY637083. I shall deal with the history of ownership of the application land in more detail below.

4. After being instructed by the registration authority I gave directions on 26/02/2015 dealing with the procedure at a public inquiry which took place over 5 days at a venue in Leatherhead on 13-16th April with closing submissions at County Hall on 27th May 2015. Representation at the public inquiry was as follows: Dr Ashley Bowes acted for the applicant and Jonathan Clay acted for the objector. I heard submissions (written and oral) from both counsel. Oral evidence was taken from 22 witnesses (including the applicant) who supported the application whereas the objector called only 2 witnesses. I will deal with this later. I am, however, indebted to both counsel for their assistance and helpful submissions. I am also grateful for the administrative support provided by Helen Gilbert of the registration authority.

5. I should mention at this stage that the applicant applied to amend her application on the issue of locality/neighbourhood. The claim under this head is now put in two ways. The applicant claims a locality comprising the polling district known as XB falling within the Leatherhead South ward of MVDC (this is the blue dashed line on App/1). Further or alternatively, she claims a neighbourhood comprised within the red line shown on App/1, again within the same locality. Very sensibly, Mr Clay raised no objection to the

way in which the applicant chose to reformulate her case under this head and I recommend to the registration that she should be permitted to do this.

The earlier application

6. A2 contains an earlier application to register the same land as a new TVG. The applicant's Form 44 was dated 25/01/2012 and the application was made under section 15(2) of the CA 2006. This is because it was being asserted by the applicant that qualifying user was continuing at the date of the application (there was no permissory signage in place at this stage).

7. The earlier application was withdrawn. When she gave oral evidence about this application the applicant said that she had wanted to pursue it but had been told by a resident of Highlands Avenue that the land could not be developed in view of its protected designation which she was told was *'Strategy Open Plan'*. She was unsure what this meant so she spoke to an officer at MVBC who again told her that the land's planning designation was *'Strategic Open Plan'*. When questioned by me about this, the applicant said that the officer might have told her that it was *'Strategic Open Land'* rather than *'Strategic Open Plan'*, although she could not be sure which it was.

8. The upshot to this was that the applicant rang the Open Spaces Society (OSS) for advice (she is a member) and she spoke to a Ms Nicola Hodgson who is evidently a solicitor. The gist of what she was told was that the planning designation was a *'knock-out blow'* to her application in that it meant that the land was being used with permission. The applicant said that she then rang the registration officer (Helen Gilbert) and, having relayed what she had been told, was advised to write to the registration authority formally withdrawing her application which is exactly what she did. It is plain, in my view, that she took this step as a direct result of the advice which she had been given by Ms Hodgson at the OSS, advice which was, of course, erroneous as the land's planning designation could have had no effect on its registrability as a new TVG.

9. There is documentation within the registration authority's bundle dealing with these matters. On 20/08/2012 Ms Gilbert wrote to the applicant to inform her that she had received an objection to the application to register from solicitors (Capsticks) acting for

9

the Surrey PCT (RA/G39). On 11/12/2012 Ms Gilbert wrote to the applicant and to Abigail Condry at Capsticks stating that as she had:

'been advised that, as the land has been designated as Strategic Open Land in the Mole Valley Local Development Framework Proposals Map (2009), any use of the land for lawful sports and pastimes within the period of such designation has been "by right" and not "as of right". As such, any such use would not meet the requirements of section 15 Commons Act 2006.

The Senior Property Solicitor asks if Mrs Cargill wishes to continue with her application. By this email I am therefore asking you, Mrs Cargill, if you wish to take the positive step of withdrawing your application. Surrey Primary Care Trust may however object to that and I would need to know their view. The decision to accept a withdrawal lies with this council.

I should appreciate views from both of you by Monday 7 January 2013.

Your responses will then be put to this council's Senior Property Solicitor for her to make a recommendation to this council.

Regards

Helen Gilbert'

10. On 19/12/2012 another solicitor at Capsticks (Rachel Strong) wrote to Ms Gilbert (but not to the applicant) stating that the objector did not object to the withdrawal by the applicant of her application to register (RA/G40). On 4/01/2013 the applicant wrote to Ms Gilbert stating*:*

'Yes, I hereby withdraw my application, but understand SPCT may object, and SCC will make the final decision' (RA/G42).

It is clear from this email that the applicant was still very concerned about the future of the land. On 15/01/2013 Ms Gilbert wrote to the applicant notifying her (in effect) that the objector was not objecting to her withdrawal of the application (RA/G42). It was put to the applicant that a report would now be made *'to the Head of legal Services for her to consider the withdrawal of the application'*. It is known to me that the Head of Legal

& Democratic Services at SCC has a delegated power to deal with unopposed applications to register land as a new TVG.

11. Ms Gilbert's report to Ann Charlton (as SCC's Head of Legal & Democratic Services) is dated 13/02/2013 (RA/G44). It contained a recommendation that the withdrawal of the application be accepted. The material parts of the report, for present purposes, read as follows:

'4. An objection was received from Capsticks Solicitors, on behalf of the owners of the land Surrey Primary care Trust.

5. Upon further investigation by the applicant it was discovered that the application land has been designated as Strategic Open Land in the Mole Valley Local Development Framework Proposals Map (2009). Any use of the land for lawful sports and pastimes within such designation has been "by right" and not "as of right" and would not meet the requirements of Section 15 of the Commons Act 2006.

6. In Oxford County Council v Oxford City Council [2006], the Court of Appeal held that an applicant has no absolute right to withdraw his application unless the registration authority considers it reasonable to allow the withdrawal. DEFRA's Guidance Notes for the completion of an application to register land as a village green states "the registration authority has discretion either to take no further action on your application, or to go ahead and determine the application you made, based on the evidence available".

7. In the Oxfordshire case the Inspector considered that it would be a waste of resources for a registration authority to process an application that the applicant did not wish to pursue unless there was some good reason to do so. There is no good reason as the Objector has consented to the withdrawal of the application.

8. The Commons Registration Officer is therefore placing this matter before the Head of Legal and Democratic Services for decision to accept the withdrawal of the application.

9. The Head of Legal and Democratic Services has the authority to take this decision under the Council's Scheme of Delegation as there is no dispute between the parties on the issue for decision.

CONCLUSIONS AND RECOMMENDATION

The evidence provided with this application, and the subsequent investigations, suggest that the criteria for registration has not been met. All parties are in agreement to withdraw the application. Therefore, Officers recommend that the withdrawal be accepted.'

SCC's Head of Legal and Democratic Services duly acted on this recommendation and, on 19/03/2013, Ms Gilbert duly notified the applicant that her withdrawal of the application had been accepted by the registration authority and accordingly she returned the application and supporting documentation (RA/G46).

12. Continuing with her oral evidence, the applicant spoke of a meeting of the Leatherhead Residents Association where, on informing members that she had withdrawn her application to register, she was told by another member (Tim Hall, who was also a county councillor) that the advice which she had been given *'wasn't right'*. Mr Hall gave her the name of Dr Ashley Bowes whom she later retained to act for her in these proceedings. Dr Bowes is an expert in this area of the law. The upshot was that she tried to reinstate her earlier application but it was too late as, by January 2013, permissive signage had already been erected which meant, of course, that any fresh application needed to be made under section 15(3). The applicant thought that the interval between the withdrawal of her earlier application and the time when she attempted to reinstate it was short.

13. When questioned by me about the withdrawal of the earlier application, the applicant said that in agreeing to withdraw she had relied on the advice which she had received from the OSS. She said that no one else gave her advice which was instrumental in her decision to withdraw

14. It seems that the trigger for the withdrawal was the erroneous advice received by the applicant from the OSS. The objector was no doubt pleased with this turn of events and Ms Gilbert clearly referred the matter for decision by the Head of Legal &

Democratic Services on the basis that there was no dispute between the parties that the application should be withdrawn. If there had been any dispute (such as if the objector was insisting on the application being determined on its merits as a duly made application to register) it would have been referred for decision by the relevant regulatory body which, in this instance, was (and still is) SCC's Planning and Regulatory Committee, which would have been provided with a comprehensive report on the merits of the application by the registration officer. It is even quite possible that counsel's advice may have been obtained seeing as this was a well-supported application by a committed applicant and it is possible that the regulatory committee might have sought reassurance that the OSS were correct in the advice which they gave to the applicant which had, of course, only been given orally. The view of the objector's solicitors on the correctness of such advice would no doubt also have been canvassed by the registration authority. In short, the application to register would, in all probability, have been processed and determined by the registration authority as if it had in fact been a substantive, opposed application on the basis of the contents of the application form and the accompanying documents and written submissions on both sides.

15. It is undoubtedly true that an applicant has no absolute right to withdraw an application. It is clearly important that the registration authority has the power to insist on determining a duly made application so that the status of the land is clarified in the public interest. This was the view of Vivian Chapman QC in his capacity as the inspector in the *Oxford* case (also known as the *Trap Grounds* case), a view with which Carnwath L.J concurred at [2006] Ch 74 at [104]. Mr Chapman also considered that a registration authority did not have to proceed with an application which the applicant did not wish to pursue where it was reasonable that it should not be pursued. For instance, the landowner may reasonably wish to have the status of the application land determined. Without such determination there is always a risk that the status of the land would remain in limbo and at risk of a repeat application.

16. In this case the objector might well have alleged that the status of the application land had already been determined by the withdrawal of the earlier application and that this precluded the applicant from proceeding with the present application (presumably by reliance on a *res judicata* estoppel). This was not in fact alleged prior to or at the

9

outset of the public inquiry and, indeed, in his closing submissions Mr Clay made it clear that he was not alleging this.

17. In order to complete the narrative under this head (should it be necessary), on 16/03/2015 Capsticks wrote to Ms Gilbert asking for disclosure of the registration authority's Decision Notice and a copy of the legal advice obtained by the registration authority. In her email dated 18/03/2015, Ms Gilbert said, firstly, that she did not understand what was meant with regard to a 'Decision Notice and, secondly, that any legal advice obtained by the registration authority was subject to legal professional privilege and, if held, is (as she put it) *'exempt from disclosure'*.

18. On 27/03/2015 (which was less than 3 weeks before the start of the public inquiry) Capsticks wrote in these terms to the registration officer:

'The "Decision Notice" referred to in our letter dated 16 March 2015 is the notification to the parties confirming the Registration Authority's decision to consider the application at a Public Inquiry, and the reasons for that decision. We should be grateful if you would provide us with a copy of this document so that we may establish why the County Council has decided that this matter is to be referred to a Public Inquiry, having previously concluded on the basis of legal advice that the previous application did not meet the requirements of section 15 of the Commons Act 2006 because the land has been designated as Strategic Open land.

Your comments regarding the legal advice obtained by the Registration Authority are noted. However, we do not agree that the legal advice obtained by the Registration Authority is subject to legal professional privilege, and we therefore consider that it falls to be disclosed. If we are not provided with copies of any legal advice obtain (sic) in advance of the Public Inquiry, Counsel instructed by NHS PS will consider making an application to the Inspector at the start of the Inquiry for disclosure of the same.

We look forward to hearing from you.'

19. This then was the first time in which the objector's solicitors appeared to be placing in question the soundness of the current application and the decision of the registration authority to hold a non-statutory inquiry.

20. The inquiry bundles were duly lodged on or about 30/03/2015 and in light of the documents contained in the registration authority's bundle at RA/G39-46, the objector would have been able to see how matters had unfolded between 20/08/2012, when the applicant was notified of the objection by Surrey PCT to her earlier application, and 19/03/2013, when the applicant was notified by the registration authority that her withdrawal had been accepted.

21. At the start of the public inquiry the objector's counsel renewed these requests for disclosure. After discussion on the matter, I indicated that I would be making the following recommendations to the registration authority:

(a) that they need not disclose to the objector any legal advice which had been given to officers in relation to the earlier application to register since it was subject to legal professional privilege; and

(b) that the current application to register could be determined as a free-standing application since the earlier application had been withdrawn and not determined on its merits and was accordingly not subject to a *res judicata* estoppel.

22. I also pointed out to Mr Clay that if he was going to claim that the withdrawal of the earlier application precluded the registration authority from proceeding to deal with the current application then he should indicate as much but, as previously indicated, no such contention was made.

23. There was one further matter raised by Mr Clay and that concerned his request that I hear evidence on oath. I informed Mr Clay that as a non-statutory public inquiry the registration authority had no power to insist that oral evidence be taken on oath.

The relevant statutory requirements

24. Section 15(3) of the 2006 Act enables any person to apply to register land as a TVG in a case where subsections 2, 3 or 4 applies.

25. Section 15(3) applies where -

'(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

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

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

26. It is not in dispute that user *'as of right'* ceased before the application was made and that the application to register was made within two years (now only one year in light of recent reform) from the cessation of such use.

27. One then looks at the various elements of the statute.

'a significant number'

28. *'Significant'* does not mean considerable or substantial. What matters is that the number of people using the application land 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 (see *R (McAlpine) Staffordshire CC [2002] EWHC 76 at [71] (Admin).*

'of the inhabitants of any locality'

29. Where first used in section 15(3)(a) of the 2006 Act the term *'locality'* is taken to mean a single administrative district or an area within legally significant boundaries. This emerges very clearly from what Vos J (as he then was) said at [97(i)/(ii)] in *Paddico (267) Ltd v Kirklees Metropolitan Council [2011] EWHC 1606 (Ch)* whose findings on locality were affirmed on appeal at [2012] EWCA Civ 262. In short, village green rights require to be asserted by reference to a particular locality.

30. Because of the later debate on locality, it is worth mentioning that in *Paddico* at first instance (see [106] at [2011] EWHC 1606 (Ch)) Vos J thought that a Conservation Area could be regarded as a locality since it had legally significant boundaries.

However, he rejected this outcome on the facts of the case as (a) the area had not been designated as such for the whole of the relevant 20 year period, and (b) users had not been predominantly from such area. Sullivan L.J rejected this finding on appeal at [2012] EWCA Civ 262 at [29]. He said this:

"I would respectfully disagree with the judge's view that the Edgerton Conservation Area could be regarded as a locality for the purpose of section 22(1) of the 1965 Act. It is true that its boundaries are legally significant, but they are legally significant for a particular statutory purpose, and those boundaries would have been defined by reference to its characteristics as an area of 'special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance' (see section 69(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990) – rather than by reference to any community of interest on the part of its inhabitants.'

At [62] Carnwath L.J (as he then was) also rejected the notion that a Conservation Area could be an original locality. He said that this:

'seems wholly impractical, since it is not a description of a community'.

31. I have mentioned this as the claimed locality in this instance comprises the polling district known as XB which is shown by the blue dashed line on App/1. Although the polling district is clearly an administrative district in one sense the question begs as to whether it is, in truth, a locality within the meaning of section 15(3) of the 2006 Act. I should perhaps also add that Carnwath LJ noted at [62] that where local government boundaries change, provided one has an historic district to which rights have become long attached, it may not matter if, subsequently, the boundaries are affected by local government reorganisation, so long as it remains an identifiable community. The position would, however, be different if the relevant locality did not even exist at the start of the 20 year period.

32. I might also add under this head that although at [69] in *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council [2010] EWHC 530 Admin* (known as the *'Warneford Meadow'* case) HH Judge Waksman QC appeared to accept that a ward

might well be a locality (since like a town or parish, it was a form of administrative unit) this was, however, founded upon a concession.

33. I shall return to the locality issue later when I come to the parties' closing submissions as there was keen debate over whether a polling district is even capable of being a locality in law for the purposes of the 2006 Act.

'or of any neighbourhood within a locality'

34. A neighbourhood is a more fluid concept. The expression *'neighbourhood within a locality'* need not be a recognised administrative unit. A housing estate can be a neighbourhood (*McAlpine*). However, a neighbourhood cannot be any area drawn on a map: it must have a degree of (pre-existing) cohesiveness (*R (Cheltenham Builders Ltd) v South Glos DC [2003] EWHC 2803 para 85*). In the *Warneford Meadow* case at [79] HH Judge Waksman QC said that the area *'must be capable of meaningful description in some way'*.

35. The statutory test is fulfilled if a significant number of the users come from any area which can reasonably be called a neighbourhood even if significant numbers also come from other neighbourhoods. The view I take is that the claimed neighbourhood must be an area which is cohesive, identifiable and recognisable as a community in its own right. There must, I think, be something about the claimed neighbourhood (or at least its core area) which distinguishes it from the surrounding areas. Only the inhabitants of the relevant neighbourhood have recreational rights over the land.

36. It is also clear that the expression neighbourhood can mean either a neighbourhood or neighbourhoods and the neighbourhoods concerned do not have to be located within a single locality (*Leeds Group PLC v Leeds City Council [2010] EWCA Civ 1438* at [26] and [56-7] and *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* at [27]).

'have indulged as of right'

37. The traditional formulation of the requirement that user must be *'as of right'* is that the user must be without force, secrecy or permission. The rationale behind *'as of right'* is acquiescence. The landowner must be in a position to know that a right is being

asserted and he must acquiesce in the assertion of the right. In other words, he must not resist or permit the use.

38. The nature of the inquiry is the use itself and how it would, assessed objectively, have appeared to the landowner. One first has to examine the use relied upon and then, once the use had passed the threshold of being of sufficient quantity and suitable quality, to assess whether any of the vitiating elements of the tripartite test applied, judging the questions objectively from how the use would have appeared to the landowner. In short, the use must be to a sufficient extent since use which is *'so trivial and sporadic as not to carry the outward appearance of user as of right'* should be ignored (*R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 AC 335, 375D-E*).

39. The issue of *'force'* does not just mean physical force. Use is by force if it involves climbing or breaking down fences or gates or if it is contentious or under protest. Nothing of the kind arises in this instance.

40. Use that is secret or by stealth will not be use *'as of right'* because it would not come to the attention of the landowner.

41. *'Permission'* can be express e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can also be implied but not by inaction (*R (Beresford) v Sunderland City Council [2004] 1 AC 889 at* [5]).

42. It is not alleged in this instance that use of the land was by virtue of an implied licence because of the way in which the land was managed over the years.

43. It is worthy of note in this case that between 30/01/1969 until 21/07/1993 (i.e. for around 7 months at the start of the qualifying period which began on 9/01/1993) the application land was vested in SCC following which title passed to the Secretary of State for Health. It is not, however, suggested in this case that the land had, at any time, been held by a public body for purposes which entitled the public to use it for informal recreation such as would preclude user as of right following *R (oao Barkas) v North Yorkshire CC [2014] UKSC 31*.

9

44. Although not an issue on as of right, Mr Clay raises the issue of statutory incompatibility (arising from *R (Newhaven Port and Properties Ltd) v East Sussex County Council [2015] UKSC 7*) to which I will return later.

'in lawful sports and pastimes'

45. The expression 'lawful sports and pastimes' ('LSP') form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user 'as of right' (see *Sunningwell at p.356F-357E*).

46. It is becomes necessary in some cases (and this is one of them) to distinguish between the use of paths or tracks as putative public rights of way rather than as qualifying LSP.

47. The law under this head was addressed by Lightman J in *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at [102/3] and in *R (oao Laing Homes Ltd) v Buckingham County Council* [2004] 1 P&CR 36 at [102-110] and in the *Oxfordshire* case at [2006] 2 AC 674 at [68]. There is also a very helpful analysis in the TVG report of Vivian Chapman QC in *Radley Lakes* (13/10/2007) at [304-305] who said that the main issue in such cases is whether the use would appear to a reasonable landowner as referable to the exercise of a right of way along a defined route or referable to a right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous, then it shall be ascribed to the lesser right, i.e. a right of way.

48. Mr Clay specifically invited me to consider those passages within *Laing Homes* [102-105] which require me to discount user which would suggest to a reasonable landowner that users believed they were exercising a public right of way which would include situations (a) where a dog off the lead roams freely outside the footpath whilst its owner remains on the footpath; (b) where owners are forced to retrieve their dogs which have run away from the footpath; or (c) where walkers casually or accidentally stray from the paths without any intention of going onto other parts of the application land.

49. The factual issues under this head which operate to preclude qualifying use are, as I see it, these: (a) whether any proven use of the land was in the nature of transit over defined routes, and/or (b) whether any use outside these defined routes would have been only occasional and/or ancillary to the exercise of putative rights of way over the land. I should also mention *Dyfed CC v Secretary of State for Wales* [1989] 59 P&CR 275 at 279 where it was said that there is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way.

'on the land'

50. The expression *'on the land'* does not mean that the registration authority has to look for evidence that every square foot of the land has been used. Rather the registration authority needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land had been used for LSP for the relevant period. The registration authority also retains a discretion to register part only of the application land if it is established that part but not all of the land has become a new TVG.

'for at least 20 years'

51. The relevant period in this case is 9th January 1993 – 9th January 2013. No one is suggestion interruption in this case.

Procedural issues

52. The regulations which deal with the making and disposal of applications by registration authorities outside the pilot areas make no mention of the machinery for considering the application where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.

53. In *Regina (Whitmey) v Commons Commissioners [2004] EWCA Civ 951* Waller L.J suggested at [62] that where there is a serious dispute, the procedure of *'conducting a non-statutory public inquiry through an independent expert'* should be followed *'almost invariably'.* However, the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by judicial process. There

is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs. However the registration authority must act impartially and fairly and with an open mind.

54. The only question for the registration authority is whether the statutory conditions for registration are satisfied. In its determination there is no scope for the application of any administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the application land as a TVG on account of the fact that it has been long enjoyed by locals as a public open space of which there may be an acute shortage in the area.

55. The onus lies on the applicant for registration and there is no reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.

56. The procedure is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The 2007 Regulations follow closely the scheme of The Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under section 13 of the 1965 Act. In a small number of pioneer authorities The Commons Registration (England) Regulations 2008 apply.

57. The prescribed procedure is very simple: (a) anyone can apply; (b) unless the registration authority rejects the application on the basis that it is not *'duly made'*, it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the registration authority then proceeds to consider the application and any objections and decides whether to grant or to reject the application.

58. It is clearly no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be *'properly and strictly proved'* (*R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p.111* per Pill LJ, and approved by Lord Bingham in *R (Beresford) v Sunderland City Council [2004] 1 AC 889, at para 2*).

Consequences of registration

59. Registration gives rise to rights for the relevant inhabitants to indulge in LSP on the application land.

60. Upon registration the land becomes subject to (a) section 12 of the Inclosure Act 1857, and (b) section 29 of the Commons Act 1876.

61. Under section 12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede *'the use or enjoyment thereof as a place for exercise and recreation'*.

62. Under section 29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any *'disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green'*.

63. Under both Acts development is therefore prevented and the land is effectively blighted.

Description of the application land

64. I visited the application land unaccompanied on 31/03/2015. I made a longer accompanied visit on 16/04/2015.

65. We are concerned with a 2.90 acre parcel of woodland containing a range of species of both deciduous and evergreen trees. The land is largely unkempt and run down and it is obvious that there has been very limited management over the years. Despite this, the main tracks are free of obstruction and are easy to walk on which is indicative of prolonged heavy use.

66. A number of fallen trees remain in situ on the ground and in some cases have done so for many years. It seems probable (and there was evidence about this) that there were more trees at one time than exist today. There are, for instance, a large number of much younger, self-seeded, trees scattered around the wood in places where other,

much larger, trees have fallen. Some trees have even been felled recently by the objector as they presented a risk to health and safety.

67. There are, as I say, a mix of trees, some quite mature, others less so. Most of the mature standing trees are extensively covered by ivy which are certain to contain wildlife habitats, as will the fallen trees. Further away from the tracks the undergrowth is fairly dense and, in one or two places, is largely impenetrable. It is, however, possible to leave the tracks in order to wander generally over most of the land although there is little evidence that people have done this in those areas where the undergrowth is dense which is the case on the eastern margins of the wood where it adjoins the hospital and school sites.

68. The application land is criss-crossed by tracks. At the time of my visits the land was dry and, being well-used, the compacted earth made use of the main tracks (of which there are two, if not three) a relatively simple affair. There is a single track leading into the wood at the southern end of Leach Grove which continues on the eastern side until it joins the public footpath (FP 138 – see O1/tab/2/39) running east-west between Highlands Road at its western end to Fortyfoot Road at its eastern end. Other subsidiary tracks leave the main track at various points and it is obvious that, over time, the routes of the various paths chop and change as and when trees fall down blocking paths. There are three openings onto the public footpath beyond which there are the allotments. It is also evident that there are openings or gates into the rear gardens of some, or indeed even all, of those houses in Highlands Avenue which back on to the wood.

69. In my view, it is probable that around 60-70% of the application land is reasonably accessible for informal recreation of varying kinds. Upon reflection, I think my estimate (given during closing submissions) of around 75% was too high. In his closing submissions Mr Clay said that he was *'genuinely astonished'* that I should arrive at such a high percentage. He thought that only *'less than 10%'* of the wood was accessible for walks, with or without dogs. I disagree. If one is looking only at the extent of the paths themselves then Mr Clay may be right, but it seems to me that one thing is indisputably clear and that is that there is ample space to walk around within the wood outside the tracks. Whereas in the case of the major and other tracks and/or

in the open or less overgrown areas away from the tracks, this would be relatively straight-forward, in my view, even the more densely vegetated areas elsewhere would, to a lesser or greater degree, be available for use to the hardy walker/explorer. However, it was certainly not my impression from what I was able to observe that the wood is being used mainly as a place of transit as there is clear evidence of use outside the tracks. The question whether the evidence proves that recreational use within the wood has been sufficiently general or widespread to amount to recreational use of the land as a whole is something which I will address later.

70. A total of 72 colour photos taken by the applicant accompanies her written evidence at A1/tab/D6. These photos were taken between 2010-14 and the applicant provided a very helpful index which follows her EQ at A1/D6.1a. The main tracks are clearly well-used but it is, as I say, still possible to venture off the tracks into a number of areas (some more open than others) where it would be relatively simple to wander around, with or without dogs, or for the purposes of children's play or watching wildlife. Indeed, someone has constructed earth humps on the south-west side close to the footpath although, having said that, I did not get the impression that they had been much used by children on bikes lately. These humps are said to have been constructed by local children whose use of the wood for these purposes seems to have been of short duration as it was objected to by local inhabitants.

71. The tracks running through the wood provide a convenient pedestrian link between Leach Grove and a number of locations to the south and south-east of the application land, including the allotments, the former St Mary's Church of England First School ('St Mary's Primary School'), Woodlands School, the Beeches care home, the Scout Hut, the Mencap building and the residential streets of Beech Holt and Tanners Dean. It is, I think, obvious that the wood is being used both as a place of transit and for informal recreation. It is certainly an attractive location for walks, with or without dogs, and for children's play and, as I say, the majority of the wood would accommodate this. It seems to me that the unused areas are integral to the enjoyment of the wood as a whole and form part of the function and attractiveness of the area.

72. There is no lighting or bins for dog faeces within the wood. Remarkably, fly tipping and the dumping of household and other wastes has always been minimal although there

was some evidence involving the dumping of garden waste and rubbish, particularly at the rear of the properties in Highlands Avenue some or all whom, as I say, have access directly into the wood. I suspect that this is more because local people have been enthusiastic about keeping the area clean and tidy rather than because of any plan of action on the part of the landowners from time to time to manage the land and thereby facilitate its use by local inhabitants for informal recreation.

73. On or about 9/01/2013 the objector (in the name of 'NHS Surrey') erected the below-mentioned permissive signage at each point of access/egress into the application land:

Leach Wood

This land is privately owned.

The public have permission to

enter this land on foot for recreation but this

permission may be withdrawn at any time.

Estates Management 01932 723180

74. I should add finally that I have been assisted by a number of photos some of which were taken after the end of the qualifying period. Those taken by John Hindson were taken in 2012, evidently as a result of the first TVG application.

History of ownership of the application land (including planning history)

75. Abigail Condry of Capsticks put in a very helpful statement setting out the relevant conveyancing, legislative and planning history of the land which I am content to adopt. This will be found at O1/43. Further information about the history (including the planning history) of the area emerged during the public inquiry and the accompanied view included a visit to the area of land to the east of the wood and since this area falls within the perimeter of the claimed neighbourhood I think it would be sensible if I dealt with this first.

76. The Leatherhead Hospital site (which included the application land) was transferred by the Trustees of Leatherhead Hospital to the Minister of Health in 1948 under the

National Health Service Act 1946. By virtue of the Secretary of State for Social Services Order 1968 SI No.1699 of 1968, title to the land along with other land vested in the Secretary of State for Social Services.

77. Under a conveyance dated 30/01/1969 the Secretary of State for Social Services sold a parcel of land (which included the application land) on the Leatherhead Hospital site to SCC. This is the land coloured pink and hatched red (which was approximately 7 acres) shown on Appendix/2 ('App/2'). Recital (d) to this conveyance shows that the land was surplus to the requirements of the Secretary of State. Mr Clay pointed out to me that this conveyance contained a term whereby the Secretary of State agreed to indemnify SCC in the event that owners/occupiers of those premises in Highlands Avenue had acquired rights of way over the land.

78. The north-west corner of the land conveyed (i.e. the land hatched red on App/2, which comprises a portion of the wood nearest Leach Grove) was subject to a restrictive covenant for the benefit of the adjoining hospital land which limited the height of any development on the pink parcel to no more than a single storey.

79 An extract from SCC's Property Register (which will be found at O1/AZC/11) discloses that the land was acquired under general powers but that on 2/02/1971 it was appropriated *'from Finance to Education, Health & Social Services'*. The same document also discloses that the land was required for the purposes of a *'Proposed Hostel for Confused Elderly & Proposed Junior Training Centre'*. In accordance with the provisions of section 24 of the Town and Country Planning Act 1959, the Property Register also shows that adjustments were made in the internal accounts of the authority in order to reflect the attribution of departmental responsibility for the incoming land asset for which SCC had paid £100,000 (vis: Education - £11,500; Health - £37,500 and Social Services - £51,000). It is though plain that the written records do not show that the pink land, or any part of it, was being acquired for or had otherwise been later appropriated by SCC as recreational open space.

80. Further researches at the Surrey History Centre in Woking have resulted in a note from Matthew Piggott (an officer at the Centre) of the minutes of the Finance Committee dated 9/02/1971 which stated that land at Fortyfoot Road in Leatherhead had been acquired for £100,000 *'on behalf of Education, Health and Welfare and*

Police Committees' (although the Police Committee had withdrawn its interest). It was said that the land required for the School was 0.80 acres and that the Home for the Confused Elderly and Special Training School extended to 3.55 acres which, since the entire holding amounted to some 7.10 acres, meant that the remainder extended to 2.75 acres on which the Health Committee were proposing to build a Health Centre. The minutes say that the *'appropriations approved by the Estates Committee include the whole 2.75 acres (£37,500) as a site for a Health Centre'.* This material will be found at O1/AZC/11/1.2.

81. The land acquired by SCC in 1971 was, of course, only partially developed. No Health Centre was ever built (this proposal was evidently abandoned in or prior to 1983) and the 2.90 acre parcel, which now comprises the land, remained as open space.

82. Under the National Health Service Reorganisation Act 1973 the services provided by hospitals and local authorities were brought together under the umbrella of Regional Health Authorities with services at a local level being run by Area Health Authorities.

83. Under section 16(1)(a) of the 1973 Act, all property held by local authorities wholly or mainly for the purposes of their *'health functions'* was vested in the Secretary of State. This would have included the land.

84. In 1993 the application land was duly transferred by SCC to the Secretary of State for Health. The conveyancing documentation comprised a Memorandum of Vesting dated 21/07/1993 and a plan dated 20/05/1992 on which the application land is coloured green. This plan will be found at Appendix/3 ('App/3').

85. App/3 is useful in that it shows that as at the date of the plan in May 1992 there was a circular path or paths running around the wood (with access into Leach Grove and the public footpath) and a complex of public and other buildings on the western side of Fortyfoot Road. This development currently comprises:

(a) on the northern side (separated by amenity green space):

(i) Woodlands School (which I understand to be a school for children with special needs);

(ii) a publicly-run care home known as The Beeches;

(b) on the southern side:

(iii) St Mary's Primary School (which has recently closed down and its premises taken over by Woodlands School);

(iv) a building housing the 1st Leatherhead Scout Group;

(v) Fortyfoot Hall which are used by a playgroup and the local Mencap group;

(vi) residential development in the gap between the Scout building and Woodlands School comprising the streets Tanners Dean and Beech Holt.

86. On the east side of Fortyfoot Road we have Fortyfoot Recreation Ground on which there are children's play facilities and a laid out football pitch with woodland on its south-east side. I should also mention that we were told by John Hindson that the reference on App/3 to *'Plan (um)'* signifies that the path or paths are *'unmaintained'*. Mr Hindson is also right when he says that the path marked on App/3 which traverses the wood from east to west is no longer evident on the ground

87. The 1993 Memorandum expressly stated that the land had been transferred to the Secretary of State for Health under the 1993 Act and the Transfer of Functions (Health and Social Security) Order 1988 with effect from 1/04/1974.

88. Under the National Health Service Act 1977 the Secretary of State would have held the land under section 87 which then provided that the Secretary of State could acquire any land, either by agreement or compulsorily, and any other land required by him for the purposes of the 1977 Act.

89. Section 1 of the 1977 Act imposed a duty on the Secretary of State:

'to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement – (i) in the physical and mental health of the people of those countries, and (ii) in the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with this Act.'

9

90. By section 8 of the National Health Service Community Care Act 1990, the Secretary of State was empowered to transfer property owned by him to an NHS Trust for the purpose of enabling it to carry out its functions.

91. By section 5(1) of the 1990 Act, NHS Trusts were established for the purpose of assuming responsibility for the ownership and management of hospitals and to provide and manage hospitals or other establishments or facilities which had previously been managed or provided by Regional, District or Special Health Authorities.

92. Ms Condry's statement tells us that on 20/09/1993 the Secretary of State transferred the Leatherhead Hospital Site (including the application land) to Epsom Health Care NHS Trust by way of a transfer order of the same date. The area of land transferred is shown edged red on the plan at Appendix/4 ('App/4').

93. The Epsom Health Care NHS Trust had been established on 21/12/1990 pursuant to the Epsom Health Care National Health Service Trust (Establishment) Order 1990/2414.

94. From 1/04/1991, the Epsom Health Care NHS Trust's functions were to: (a) own and manage hospital accommodation and services at Epsom District Hospital and associated hospitals; and (b) to manage community health services provided from Epsom District Hospital and to own the premises there from which those services were to be provided along with any associated premises.

95. Epsom Healthcare Trust NHS Trust was dissolved on 1/04/1999, and a new trust, the Epsom and St Helier National Health Service Trust, was established with effect from the same date and to whom the former Trust's land assets were transferred.

96. The Epsom and St Helier National Health Service Trust was established in 1999 by the Epsom and St Helier National Health Service Trust (Establishment) Order 1999/848.

97. Leatherhead Hospital (including the land) was, on 1/04/2002, transferred to the East Elmbridge and Mid Surrey PCT to whom the former Trust's land assets were again transferred.

98. PCTs had been established by the Secretary of State under section 16A of the National Health Service Act 1977 for the purposes of providing and commissioning primary healthcare services. Pursuant to Schedule 5A, para/12(1), PCTs were empowered to do anything which appeared to them to be necessary or expedient for the purposes of, or in connection with, the exercise of its functions, including acquiring and disposing of land or other property. The National Health Service Act 2006 updated the provisions relating to the functions and exercise of those functions by PCTs.

99. Pursuant to the Primary Care Trusts (Establishment and Dissolution) (England) Order 2006 (SI No.2006/2072), the East Elmbridge and Mid Surrey PCT merged with a number of other local PCTs to form the new Surrey PCT to whom the former Trust's land assets were, as before, transferred.

100. With the abolition of PCTs, Leatherhead Hospital (including the application land) was, on 1/04/2013, transferred to the objector under arrangements contained in the Health and Social Care Act 2012 and in the Surrey PCT Property Transfer Scheme 2013.

101. In light of the foregoing, after 1974 the land was, with other land, held by bodies discharging NHS functions and for these and no other purposes.

102. It is then plain (as Mr Clay correctly says in his closing submissions) that:

(a) after July 1993 the land was comprised within a single freehold title which included the hospital site (see App/4);

(b) in the discharge of their statutory health functions after July 1993, none of the foregoing NHS bodies had power to permit land to be used by the public for the purposes of LSP;

(c) throughout the relevant qualifying period, both the land and the hospital site would have been held for (as Mr Clay puts it in his closing submissions at [62]) *'health related purposes'* which, for the sake of convenience, I will refer to as the 'NHS functions' of the various NHS bodies identified above.

103. At [64-68] of his closing submissions, Mr Clay provides a very helpful summary of the NHS functions of the Secretary of State for Health and of the NHS Trusts and PCTs. In the case of the Secretary of State, his powers, duties and functions are defined in a

series of NHS Acts commencing with the National Health Services Act 1946. His functions included the provision of hospitals and a whole range of specialist services. Under section 211 of the National Health Services Act 2006, the Secretary of State can acquire land and other property required by him for the purposes of the Act and, under section 211(3), use such land for the purposes of any of the functions conferred on him by virtue of the Act.

104. NHS Trusts were established initially under the National Health Service and Community Care Act 1990 to create an internal market within the NHS for the provision and commissioning of health services. Between September 1993 and October 2006, the land was, as has been indicated, held by a series of NHS Trusts which managed and operated the hospital site in accordance with its NHS functions.

105. After 2006, the land and hospital site was owned by PCTs which were, as I say, established by the Secretary of State as administrative bodies, with responsibility for commissioning primary, community and secondary health services from providers. They had the power to acquire and dispose of property and were authorised to do anything which they considered necessary or expedient for the purposes of their functions (Schedule 3, Part 3, paragraphs 15(1)&(2) to the NHS Act 2006). The powers and functions of PCTs under the 2006 Act included the provision of health and pharmaceutical services, the provision of premises for those purposes and for the use of persons providing those services and the preparation of plans to improve health and health care. PCTs were abolished in April 2013 by the Health and Social Care Act 2012.

106. I have dealt with the conveyancing history of the land and the fact that it has been held for NHS functions in some detail in light of the case advanced by Mr Clay on statutory incompatibility arising out of the recent decision of the Supreme Court in the *Newhaven* case to which I will return once I have dealt with the evidence.

107. I turn next to the relevant planning history which Ms Condry has also very helpfully identified in her statement.

108. At some point in the early 1980s a revision of the Local Plan for the area allocated the land as a site for housing. However, as a result of the efforts of a local action group

(*'The Leach Grove Wood Protection Group'*) this policy was amended by MVDC in that Policy EV3 of the Leatherhead Local Plan, adopted in 1983, provided that the land was, along with other land shown on the Proposals Map, allocated *'for community and recreation uses'* and that MVDC would *'resist proposals which would disturb or displace any of the existing activities in this area'* (O1/tab/3/72-73).

109. The removal of the land for potential housing supply was objected to by SCC but the Inspector dealing with objections to the Local Plan nonetheless supported the decision of MVDC (O1/tab/3/75-76). The Inspector noted in 3.18 of his report that:

'such a fine area of woodland must be almost unique in its survival amidst development, and what is even more surprising, considering that access is not restricted, and the footpaths are well used, is the apparent lack of vandalism, litter or dumping so commonly found in urban open spaces'.

Much the same can be said today, such is the importance of the wood to local people.

110. Under the Mole Valley Local Plan (2000) (parts of which still remain in force), the land is currently designated as *'Strategic Open Land within Built-up Areas'* (policy ENV20). This means that development *'will not normally be permitted other than for purposes ancillary to the use of the land for outdoor recreation appropriate to the character of the area'*.

111. Since adopting the 2000 plan, MVDC adopted the Mole Valley Core Strategy in 2009. Policy CS 16 of the Core Strategy seeks to safeguard open space, sports recreational facilities from development. Any proposal for development will need to be assessed against Planning Policy Guidance Note 17 which is restrictive of development. A New Local Plan is evidently in preparation.

112. Before leaving Ms Condry's evidence, I should mention that, when the applicant's locality claim relied on the polling districts of Leatherhead South 1 and 2 within the South Leatherhead ward of MVDC, she produced a very helpful plan (which she has since modified) showing not only the boundaries of these polling districts but also an outline of the claimed neighbourhood (O1/tab/3/86A).

9

113. On this plan Ms Condry has also plotted the addresses of those who support the case for registration. I was sent a key to this plan by way of an email dated 20/04/2015 which I have added to the objector's bundle at O1/tab/3/86B. The red line on the modified plan represents the claimed neighbourhood. The blue and orange (numbered) dots are those who provided evidence questionnaires. The green dots are the addresses of those who provided evidence questionnaires but who have since moved out of the area. The red circles around the dots are the addresses of those who provided an EQ, a witness statement and who also gave oral evidence to the public inquiry. Those dots, which have been initialled, identify those witnesses who gave both oral evidence and provided a witness statement but who did not provide an EQ. I consider this to be a very helpful document which must have involved a good deal of work. What it does show, at a glance, is that if the claimed neighbourhood is a qualifying neighbourhood in law then the users of the land are widely distributed throughout such area.

The claimed neighbourhood

114. I have been around the claimed neighbourhood and the surrounding areas, partly on foot as well as in the car. I have also revisited the area as a desk top exercise on *Google earth* street view which is now an indispensable tool in these cases. I am confident that I have, for present purposes, seen enough of the claimed neighbourhood and the surrounding areas.

115. If one refers to App/1 one can see that we are dealing with a roughly triangular shaped area bounded by (running anti-clockwise) (a) Epsom Road (B2122) where it leaves the roundabout on the Leatherhead bypass; (b) The Crescent; (c) Church Street; and (d) Church Road until the road forks onto Highlands Road (B2033); and (e) thence into Headley Road until it meets the bypass. Dr Bowes clarified that the red line boundary is intended to be a mid-point in the affected carriageways.

116. Within the neighbourhood there are a number of community buildings/facilities which I have already identified in paragraph/85, in addition to the recreation ground at Fortyfoot Road and the Church Hall on the north side of Church Road, all of which are used by individuals from a much wider area.

117. For reasons which I do not understand, whereas the Church Hall lies within the claimed neighbourhood, the Parish Church of St Nicholas & St Mary, which is just across the road, falls just outside it. Nor are there any shops or convenience stores or the like within the claimed neighbourhood other than, within The Crescent, where one finds two takeaways, an opticians, a dental practice and a health shop of some description, all of which are bound to be frequented by people living within the town as a whole. The same applies in the case of the estate agents located on the corner of Church Street and Church Road. There is, for instance, no parade of shops which could be said to mainly serve the needs of an identifiable local community within the town of Leatherhead.

118. The land lies roughly in the middle of the claimed neighbourhood and is, I think, a cohesive feature, but possibly the only one within the claimed neighbourhood. I suspect that most people using the land, either as a place of transit or as a destination in itself for informal recreation, live in the nearby streets and would include many living in the streets to the south of Highlands Road which appear to me to comprise a number of separate developments of mainly detached dwellings, some of high value. The town of Leatherhead seems to be expanding in the gap between Highlands Roads and the bypass where there has been much residential development in recent years. One witness said that this was the *'posh area'* of town.

119. The major features in the gap between the north of the land and the railway line are St John's School and its extensive grounds, the two sports grounds on either side of Garlands Road, the Catholic Church of Our Lady and St Peter and Trinity Primary School. On the north-west side of the land we have the town centre which is, I think, mainly pedestrianised and, on the west side, we have, downslope, the River Mole (dominated by a heavily wooded weir area mid-stream) and the Bridge Street crossing. I have to say that without a much closer examination of the central area of Leatherhead (perhaps with the assistance of expert evidence) I have found it very difficult indeed to identify separate neighbourhoods within the town (in other words, where the characteristics of one area distinguish it from surrounding areas) as the area as a whole contains a good deal of residential and other development of varying ages and styles which are not specific to the claimed neighbourhood although, in light

of the evidence I heard, I do not doubt that within it, or at least in parts of it, there is a local community spirit.

Objector's other evidence

120. Before I turn to the applicant's evidence, I should deal with the written and oral evidence of **John Hindson** who was the objector's only other witness. I should mention here that I am particularly grateful for Ms Condry's own typed-up note of Mr Hindson's oral evidence.

121. Mr Hindson said that the land only came under his *'jurisdiction'* in January 2012 (he could not speak for the condition of the land before his first visit in February 2012). In his statement at O1/tab/2/12, he describes himself as the *'FM Service Delivery Manager for NHS Property Services (South East Region)'*. My understanding is that this means that he oversees the management of the objector's land interests in this region following the abolition of the PCTs on 1/04/2013. Mr Hindson had previously been the Estates Manager for Surrey PCT.

122. It was Mr Hindson's evidence that he was responsible for managing the wood and he cited as examples of this dealing with encroachments and the removal of unsafe trees and cleaning up after fly-tipping had taken place. He said that if the main paths were overgrown the objector would cut them back although this is something which he or men working for him also did. He asserted, however, that, as a wood, it *'should be allowed to grow naturally'* and that the objector did not manage it as though it were *'like Kew Gardens'*. He said that the objector's management is reactive and that it would be more likely to receive complaints if it maintained the wood to a higher standard. He said that on other sites they might even fence off to prevent public access altogether but not so in the case of the wood which he had been told by the former PCT's solicitor, Sally Barham, the public had a right to walk through.

123. It seems that when he visited the wood if he saw anything which caused him concern he would mention it to his Environment Manager (Derek Bennett). If it was something small it would be dealt with in-house within their Landscape Department. If it was serious then they would engage outside contractors. He did mention seeing (as he put it) a tepee-like structure made of wood which he thought was an *'impressive structure'*

- *'It was more of a hide than a den - It was about 8 feet tall, 3 feet wide and 2 feet in depth. It could have been something to sit in. Not a children's den. It looked like an adult had built it'.* Mr Hindson said that it was a *'bit of fun'*. Whatever it was, they dismantled it. I am not sure whether this occurred within the qualifying period.

124. Mr Hindson was, therefore, clearly aware that people were using the wood which was unfenced. He did say though that he had never actually seen any children playing in the wood although he accepted that this had happened but not on a regular basis. He mentioned what he described as evidence *'that children had been there'*, citing bike tracks on the main path (or paths) and bike ramps which he dismantled (a *'bike jump using planks of wood' - there was no evidence that the jumps were used - Others had been filled in'*). He accepted that there were now more open areas within the wood (i.e. where trees had come down) where children could play although this was not something which he had ever encouraged (*'After the holiday periods you get a number of things left on site'* which had to be removed - recently he had even removed a sofa and chairs). He says that he saw dog-walkers and others passing through the wood on the main track (with their dogs in the undergrowth) which, in his statement, he describes as merely walking on the paths as opposed to the use of the wood itself for LSP. Mr Hindson recorded that he made 13 visits to the wood before January 2013, although he thinks that he would have visited more frequently than this. Mr Hindson says that each of his visits would have involved a 5-10 minute walk around the wood (*'I usually do two full footpaths - I didn't do that big a walk - It tended to be early - about 6am to 10am'*). In his statement, he says that he observed the paths through the wood being used by local residents on their way *'to a number of local facilities adjoining the wood'*, namely the allotments, the recreation ground and St Mary's Primary School before it closed down. In his oral evidence, he said that he had seen *'dog-walkers and the occasional person going straight through'*. He said in his oral evidence that his visits were mainly to prevent squatters getting into the wood.

125. Although unsure of the date (but accepting that it might have been in late 2012/early 2013, i.e. following the first TVG application), Mr Hindson recalls being phoned by the applicant whom, he claimed, only spoke to him about the ivy on the trees. He says that this would have occurred before the felling of the three trees close to the rear boundary of a Mr Cuello who lived in Highlands Avenue and into whose garden a

9

branch had fallen. For her part, the applicant is sure that she spoke to Mr Hindson about trees being felled in the wood although she also remembers speaking to him about the ivy as well in the same call. Mr Hindson thinks that she would have spoken to Derrick Bennett about the trees being felled at the top end of the wood (they felled three trees and cut back another two - *'We try not to cut down a tree if it is not necessary'*). He could only recall speaking to the applicant about the ivy. In his statement, Mr Hindson has produced bills showing that contractors were involved in cutting up/felling/pruning back operations in the wood in 2013-14 after the end of the qualifying period.

126. When asked about the permissory signage which was erected in January 2013, Mr Hindson said that although he had been asked to erect signs saying that the public could access the wood, his concern was *'more about health and safety risks'* (as he also put it: *'I was concerned to ensure the people's safety was also considered'*) and that, as far as he was concerned, the signs did not restrict access and that the public were merely being allowed to use the wood at their own risk. He says that, as far as he was aware, the signs were nothing to do with the previous TVG application but with health and safety. This was a somewhat bizarre answer in light of the actual content of the January 2013 signage and the earlier withdrawn application. Exactly where health and safety came into it is anyone's guess. At any rate, Mr Hindson said that he was *'always made aware that it'* (i.e. the wood) *'was a public area - people could go through the woods. I never stopped anyone. If they did not have permission to do so, the wood would have been fenced off'*. When asked who had made him aware that people were allowed to go into the wood he said it was Sally Barham, the PCT's former solicitor, whom he said had told him that *'people could go through'*. All this is clearly strong evidence of acquiescence on the part of the landowner.

127. I do not attach a great deal of weight to Mr Hindson's evidence. Quite apart from his explanation for the signage, I am not convinced that he spent much time in the wood and I rather think that his periodic visits are unlikely to have been prolonged affairs. His diary at O1/tab/2/14 shows that he visited the wood on 13 occasions (no doubt during ordinary working hours – and his visits were usually once a month and sometimes twice a month) and his 5-10 minute walk around was, in my view, very probably insufficient time for him to draw firm conclusions about the general use of the

wood by local inhabitants. However, I doubt whether any of this matters very much as I agree with Dr Bowes that it does not matter very much if he saw no one engaging in LSP in the wood on his visits as the law does not require land to be in constant use for LSP in order to justify registration.

The applicant's evidence

Oral evidence

128. Although I will endeavour to summarise the evidence that I heard, what follows is not intended as a verbatim account, or even necessarily a complete account, of the evidence given by the applicant's witnesses at the public inquiry. It is simply a summary of some of the more salient issues dealt with in the evidence, particularly those that form the basis of my findings of fact. The summary is simply intended to be a sufficient account of the evidence for the registration authority to understand the reasoning behind my conclusions.

129. **Mrs Cargill (the applicant)**

(a) The applicant, lives at 54 Windfield. She claims to have used the land for informal recreation since 1991. Her EQ is at A/D.6.1a, along with the 72 photos which she has put in evidence to which reference has already been made. Mrs Cargill also produced a number of additional documents during the course of the public inquiry. I marked these documents A-H which are behind her evidence within A1. The documents A/B/C/D and F were utilised by her in the course of obtaining written evidence for use at the public inquiry as well as advising potential witnesses what to expect if they gave oral evidence. Document A is not quite the same as Document B since it advertises what is described as a pre-hearing get together on 9/04/2015.

(b) Documents A/B were accompanied by a locality/neighbourhood plan Documents A/B went out together after my directions had been issued on 26/02/2015. The plan would have been Document E which not only shows the boundaries of the currently claimed neighbourhood on App/1 but also discloses a different locality comprising polling districts 1 and 2 within the Leatherhead South ward of MVDC (which was in accordance with the claim made in the Form 44 at Box/6). Those responding were invited to agree to the boundaries of the claimed neighbourhood, failing which they

9

were invited to suggest an alternative. The applicant cannot be sure that those responding received a colour copy of the locality/neighbourhood plan at Document E but, even if they did not, the boundaries of the areas in question would have been apparent on the face of the uncoloured plan.

(c) Document C was a document entitled: *'Reminder of Importance of Neighbourhood & Locality'*. She specifically said at the top of the document that it was *'to help refresh your memory'*. The new plan (App/3) also accompanied this document to prospective witnesses by reminding them that the locality had been changed to polling station XB (within the same ward of Leatherhead South). By the time this statement had come into being it would seem that most of the statements had probably already been put in (*'Most of you have covered neighbourhood in your statements'*). The note (which was evidently circulated to her oral witnesses shortly before the start of the public inquiry) encouraged them to reflect on the correct neighbourhood: *'Establishing a Neighbourhood is possibly the barrister's biggest challenge'*. The note ended with a revised date for a get together at the house of a witness, Susannah Golding, on Sunday 12/04/2015 which was the day before the start of the public inquiry. The applicant accepted that by Document C she was trying to prepare her witnesses. As she put it, *'I wanted them to think through their statements again'*. She said that she was trying to prompt them to come to the inquiry *'and to be prepared'*. She denied, however, that she was prompting or coaching her witnesses when it came to the evidence they should give when it came to the issue of neighbourhood.

(d) Document D is headed: *'Conduct & Guidelines for Witnesses at the Hearing'* which contained guidance on how to address the Inspector, to keep *'calm, cool and polite'* and to take care when giving answers to questions. We should in fact have started with Document F (which was the first to go out) but it was produced late. The document is dated 11/07/2014 and is headed: *'Dear Leach Grove Wood Supporters'*. The context of this document was the decision of the registration authority to hold a non-statutory inquiry and the document invited 20 witnesses to come forward to provide written evidence for use at the public inquiry. The document also contained an exhortation to local inhabitants to provide financial support to help with the costs of instructing a barrister. Those responding were invited to fill in the form where

requested and to return it either to the address of the Leatherhead Residents' Association or to the applicant, who dealt with these forms in her oral evidence.

(e) The applicant said that she considered it her responsibility to prepare witnesses for the public inquiry *'to the best of my ability'*. She wanted to reassure her witnesses *'without putting words in their mouth'*.

(f) Documents G/H deal with the Highlands Road allotments. We have the names and addresses of a number of allotment holders in June 2001 and as at 18/10/2014. The applicant also gave oral evidence about this by identifying how many allotments were taken up in 2014 and the number of allotment holders living within the claimed neighbourhood.

(g) Pulling all this material together, it appears that in 2014 there were a total of 51 allotments of which only 49 were taken up. Of the 49 allotments, 15 were taken by those living within the claimed neighbourhood. The numbers change if one allows for the actual numbers of people involved as a number of allotments are held by couples. The applicant said that a total of 57 people are involved with allotments (i.e. as sole or joint allotment holders) whether living inside and outside the claimed neighbourhood, of which 27 (or 47%) lived within the claimed neighbourhood. This percentage obviously assists the case on cohesion. In the case of the June 2001 particulars within Document H, 37 individuals were identified by the applicant as allotment holders of whom 27 (or 73%) lived within the claimed neighbourhood.

(h) The applicant's statement will be found at A1/D6. She and her husband (who are not dog walkers) have used the wood for recreation ever since they moved into the area in 1991. I think they may even have two allotments (Plots 20B/21B). There is no pattern to their use which mainly involves walks for pleasure but it is frequent. She says that it may average out in her case at around once a fortnight. Use is not so frequent in the winter. She says that she sees children playing there along with mothers with prams. She recalls groups of boys riding cycles on the jumps (in two locations – one still very evident, the other very much less so in the central area which she pointed out to me at the accompanied site visit) and others simply watching what was going on. She said that she used to clear up the large amount of litter which they left behind, as did other locals. She seemed to recall that this occurred in 2009 when, as she put it, there were

three groups of boys making their jumps *'everywhere'*. She said that *'we were getting to the stage where we couldn't use the paths anymore as the boys were taking it over'*. This is hardly indicative of LSP and was probably neither prolonged nor otherwise had the requisite quality of qualifying use.

(i) The applicant objected to the assertion in cross-examination that *'there are commonly no people in the wood'*. She said that there was a 60/40 or 70/30 per cent chance that *'you would meet somebody in the wood'.* She accepted that she did not always see people in the wood.

(j) The applicant sought to justify her case on neighbourhood by saying that, bounded by the roads (see App/1), the area has *'a community and village feel to it'*. She says that a combination of the public buildings mentioned above and green space *'fosters a quiet but strong community spirit'*. She thinks of the claimed neighbourhood as her *'immediate neighbourhood, and that, at a guess, say 50-60% of my waking time is spent within it'*. When asked by Dr Bowes why she considered the claimed neighbourhood to be her *'immediate neighbourhood'* she said it was because of the number of people she knows who live within its boundaries *'and the quiet community spirit'*. When asked what distinguished the claimed neighbourhood from (as she put it) *'the broader community outside it'*, she said that people living within the neighbourhood were closer to her physically and that a lot of her time was spent in her neighbourhood – some 50-60% of her waking time: *'The infrastructure is there. Everything I need is there. I grow my own vegetables. I work at home. People come to me. I get involved in local campaigns'.* This was a reference (a) to the *'Fortyfoot Road Campaign'* between 2009-14 which involved the surfacing and adoption of this road, and (b) litter picking in the application land in October 2014 on the part of volunteer members of the Leatherhead Residents Association (the applicant sits on its Environmental Sub-Committee).

(k) Mr Clay cross-examined the applicant closely about the changes made by her in relation to her locality/neighbourhood claim which have already been addressed in paras 2/5 above. She accepted that those who put in EQs subscribed to a neighbourhood based on polling districts 1 and 2 within the MVDC ward of Leatherhead South (i.e. as per question/6 in the Form/44 – this is shown on the plan

attached to the application at Appendix/2, Map/3 – see RA/B12). In other words, the current formulation of the applicant's case on locality/neighbourhood was never even addressed by these witnesses in this evidence.

(l) It gets worse than this in that the EQs ask those responding to confirm (a) that the area outlined in green on the attached map was the relevant land (see RA/B10 – this is Map/1 in Appendix/2 to the Form/44), and (b) that he or she considered themselves *'to be a local inhabitants of the area in which Leach Grove Woods is situated'*, to which they all, not surprisingly, said *'Yes'*. In the result, they all answered affirmatively in circumstances where the relevant map attached to their EQs (i.e. the map at RA/B10) did not even delineate the boundaries of the area in respect of which those responding were claiming to be a *'local inhabitant'*. RA/B10 bears no relation to the neighbourhood plan at App/1 and shows only a handful of roads in close proximity to the application land. As a neighbourhood plan, it is wholly inadequate for current purposes.

(m) The same applies in the case of the map described as Map/2 which was also included within Appendix/2 to the Form/44. Map/2 is specifically linked to the applicant's comments in Section/7 of the Form/44 which deals with the justification for registration and the use of the land by local inhabitants *'of the South Leatherhead neighbourhood'* which is, I take it, a reference to polling districts 1 and 2 within the South Leatherhead ward. Map/2 does not actually delineate (whereas Map/3 at RA/B12 did) the neighbourhood which was originally being contended for (i.e. the two polling districts) and, of course, it bears no relation either to the applicant's current formulation at App/1 when it comes to her case on locality/neighbourhood. The applicant said that her Form/44 was filled in with the assistance of Dr Bowes but I rather doubt whether he was even on the scene to help at this point.

(n) The applicant said that her husband helped draw up the plan at App/1. She said that Dr Bowes was involved in the reformulation of her locality/neighbourhood claim. It seemed that there were not enough witnesses who could speak for the larger area on RA/B12 showing the two polling districts. She said it was this plan which she put to her witnesses at the public inquiry and she said that she selected only those witnesses to give oral evidence whom she *'thought were brave enough to do it'*. She readily

9

accepts that she gave her witness the guidelines comprised within the above-mentioned Documents at A/B/C/D.

(o) Before Dr Bowes very sensibly acknowledged on behalf of the applicant that, for the avoidance of doubt, the perimeter of the claimed neighbourhood was a mid-point running along the relevant highways, the applicant had asserted that her neighbourhood included the housing on both sides of Highlands Road and Epsom Road, going as far to say even that it included the whole of St John's School. She said that the neighbourhood boundary *'includes the buildings on or abutting the pavements on the outer edges of the red line'* (on App/1). At one point in cross-examination, the applicant accepted that the neighbourhood was in fact more extensive than shown on her neighbourhood plan (quite possibly because she said that she had friends living outside the boundaries shown on such plan) although, as she put it, *'my neighbourhood'* is as shown on the application plan. As I was concerned about her evidence under this head, I gave the applicant time to confer with her counsel following which Dr Bowes confirmed that the claimed neighbourhood perimeter was in fact a mid-point in the relevant carriageways rather than at the edge of the red line shown on App/1.

(p) The applicant was cross-examined at length on her locality/neighbourhood claim. It seemed obvious (as she herself accepted) that she did not have a correct understanding of the terms neighbourhood and locality. She accepted, by way of example, that more than half the allotments and those who used them came from outside the claimed neighbourhood. She conceded that there was also a considerable fluctuation in the number of people using the allotments and that there was not a long waiting list for allotments which is clearly significant on the issue of neighbourhood. Another inconsistency is the fact that on Document F (see para/126 above) the applicant has included in her call for witnesses anyone living in Reigate Road which falls outside the claimed neighbourhood. In the same document the applicant mentions that land might become a village green by *'walking in it rather than en route to somewhere else*'. Although this might arguably raise the spectre of coaching, Mr Clay was at pains to point out that there was no suggestion on his part of bad faith.

(q) In general I considered the applicant to be an honest and genuine witness not least when it came to her own use of the wood and that which she observed on the part of others. Further, although it was certainly my clear impression that she had not deliberately set out to direct the way in which evidence should be given by her witnesses when it came to neighbourhood, her reminder at Document C is bound to have been influential in steering her witnesses towards an acceptance (at least in the case of those who did) of the map at App/1 as showing the true neighbourhood. At the end of the day, the existence of neighbourhood for present purposes has to be an objective judgment in light of all the relevant circumstances as opposed to a judgment in which decisive weight is accorded to the subjective beliefs of those who choose to give oral evidence about this. As I think the applicant rightly said in Document C: *'Establishing a Neighbourhood is possibly the barrister's biggest challenge'.* In my view, the applicant is bound to have realised that a great deal of weight was going to be attached by her oral witnesses to her eventual neighbourhood plan.

130. **Susannah Golding**

(a) Ms Golding had lived at the following addresses: (i) at 5A St John's Road between 1999-2001 (ii) at 2 Poplar Road between 2001 -2007 and (c) at 22 Poplar Road to the current date. All these addresses lie within the claimed neighbourhood. She therefore used the wood between 1999-2013 i.e. for 14 years.

(b) Ms Golding's statement dated 16/03/2015 is at A1/D9 and it is accompanied by her EQ dated 20/03/2013. Her statement begins by agreeing with the claimed neighbourhood shown within the red lines on App/1 which she said she had no hand in drawing up but which she says she was shown when she was drawing up her statement. She considers the people living within this area as being her neighbours. She says she walks or cycles on the roads within the neighbourhood on a daily basis and feels *'a definite sense of community with the people that live here'* with whom she says she greets in passing or stops to speak to. She says that it is a really *'family-friendly'* neighbourhood and that her children (who were aged 14, 12 and 9 in 2013) had grown up in the area and used the land for building camps and playing hide and seek. She also deals with places where people meet such as the Church (which in

9

cross-examination she accepted was outside the neighbourhood), the recreation ground and the land.

(c) Ms Golding is a dog-walker and she uses the wood twice daily and she says that she meets up with neighbours walking their dogs. Her children also played in the wood on a regular basis. She also picked wild garlic and collects kindling from autumn through to the spring, often on a daily basis. She says that the wood is an important part of her life and an essential part of her local community.

(d) Ms Golding was pressed in cross-examination on the neighbourhood issue. It was put to her that, in effect, there was no single community group or activity serving the interests of those who lived in claimed neighbourhood, although Ms Golding asserted that a large number of people using the allotments, for instance, were local to the area. She did say, however, that she had seen very few people living outside the claimed neighbourhood using the land.

(e) In explaining her involvement, Ms Golding said that *'we think'* Leatherhead Hospital might close down in which case the land *'would be vulnerable to development'*. She said she was asked by the applicant whether she was interested in becoming involved with her application to register. She was and was given the EQ and was also asked to provide a statement. It is plain from what she said that she was asked to deal with how often she used the land and for what purpose. The applicant also showed her a map and she was asked what she considered were the boundaries of her neighbourhood and the neighbourhood plan which the applicant eventually produced met with her approval.

(f) As to where she walked within the wood, Ms Golding said that although she used the main paths she did not necessarily stick to them. She has been walking dogs since 2008 and this is one of the reasons (I think it was her main reason) for using the land. She says that the paths are *'well trodden'* and that nothing grows on them although when the brambles spread over onto the paths then she herself has cut them back. She says that most of the fallen trees have blown over recently. Some of the older trees which have fallen over have been on the ground for some time.

(g) Like the applicant, Ms Golding thinks that any maintenance carried out on the land by the NHS authority has been minimal and it is certainly untrue that they kept the paths open in the period 1993-2013. She characterised the objector's maintenance efforts as being *'fire-fighting rather than maintenance'*. She was only aware that the NHS owned the wood when the signs went up. She thought that it had belonged *'to the people of Leatherhead, having been given to the authority by a Mr Leach'*.

(h) I have no hesitation in accepting Ms Golding's evidence.

131. **Sandra Sullivan**

(a) Ms Sullivan moved to 1 Highlands Close with her partner in December 2011. She therefore used the wood for the last 2 years of the qualifying period. Her statement is dated 15/03/2015. Ms Sullivan (who works from home) and her partner use the land for dog-walking at least four times a week. She said that she goes *'round and round the woods'* and sometimes goes further afield to the recreation ground. She certainly walks off the tracks and goes wherever she can without getting caught up in the *'twigs and brambles'*. She said that she also saw other people walking their dogs through the wood some of whom she knew although only two lived in her street. She also mentioned *'seeing people coming and going with gates'*, which I take to be a reference to those with homes backing onto the land in Highlands Avenue.

(b) She too accepts the claimed neighbourhood which she says is a friendly place *'with the Church Hall, recreation ground, application ground and the allotments offering a central focus for everyone … Leatherhead is the town and wider community to which we belong … Our community is in the streets and open spaces around our own, the people we talk to on a daily basis whilst out walking the dog or doing a spot of gardening at the front of the house. This is the roads defined on the map produced by Flip Cargill plus a few more streets around the Church we regularly walk too'.*

(c) When cross-examined Ms Sullivan made it clear that she was not told that she should agree to the neighbourhood plan. In producing her statement she used Document A as a guide. She also agreed that she walked outside this area (Worple Road and St Mary's Road to the south and to the weir on the western side).

(d) Ms Sullivan was similarly an honest and genuine witness and I also accept her evidence.

132. **Elizabeth Turner**

(a) Mrs Turner and her husband lived at 4 Highlands Road between 2006-2012 and thereafter, until January 2015, at 55 Windfield. They now live at Walton-on-the Hill. They therefore used the wood for around 7 years during the qualifying period. They are both serving police officers. Mr Turner is a handler of police dogs one of whom he keeps at home permanently. They have two boys aged 2/4. Mrs Turner's statement is dated 16/03/2015 and will be found at A1/D22.

(b) The Turner family are very happy living in Leatherhead. She has developed strong friendships with her neighbours and enjoys using the local amenities of the recreation ground, the allotments, the church in Church Road and the town centre. Her children flourish in the local community.

(c) They have throughout regularly walked their dogs in the wood. At Highlands Road they would walk their dogs in the wood after dark. She said that they continue to use the wood at least three times a week. Since the birth of their first child in 2010 they have taken the children to play games in the wood. In her statement she said that they used the wood at least twice a week for recreational visits and that they quite regularly meet other dog-walkers, some of whom are known to them. Before the signs went up in 2013 she thought the wood was publicly-owned. She noted that away from the pavements, the wood and the recreation ground were the only dog-walking areas in the area. She thought that the wood was a 15 minute walk from the boundaries of the claimed neighbourhood which she supported. She said that when she was given Document A by the applicant (with plan) she was *'left to get on with it'*. She is clearly a supporter of the claimed neighbourhood.

(d) I have no hesitation in accepting Mrs Turner's evidence.

133. **Russell Turner**

(a) Mr Turner's evidence follows that of his wife. His statement is also dated 16/03/2015 and will be found at A1/D24. With suitable changes, the statements of Mr and Mrs

Turner are identical. Mr Turner is a police dog-handler. He and his wife work shifts which are not always the same. Sometimes he walks the dogs on his own.

(b) On walks he predominantly uses the wood although he sometimes used the recreation ground when he was with the children. He walks a circuit of the wood. He uses the paths and has seen others doing the same. Whilst living at Highlands Road (2006-2012) he walked three dogs (one pet and two police dogs – one of these dogs had to stay on the lead) in the wood whereas, at Windfield (until January 2015), he had two dogs (I think these were both police dogs whom he used to take home). He says that he has seen other *'fairly local'* families in the wood.

(c) He too agrees with the extent of the claimed neighbourhood. He says that the area is welcoming and friendly and that people he used to know also used the wood. He accepted that people to the south of Highlands Road used the wood although, with the exception of one family, he did not know anyone living within this area.

(d) Mr Turner was an honest and genuine witness whose evidence I also accept.

134. **Mrs Jennifer Hollingshead**

(a) Mrs Hollingshead lives at 65 Highlands Road which backs onto the wood. Her statement and EQ is at A1/D11/D11.1. Mrs Hollingshead has lived at this address since November 1985 and has therefore used the land for more than 20 years. It seems that she started doing so when she took on an allotment in around 1990. They walked their dogs in the wood after 1992 where they sometimes met up with other dog-walkers.

(b) Mrs Hollingshead gave up work to have a family in 1995 and as the children grew up and started at the Fortyfoot Playgroup and then, following on at St Mary's Primary School, she walked with the children through the wood which seems to have been a place of distraction and fun as she says that a five minute walk home usually lasted for thirty minutes with the children and their mother finding things of interest in the wood, such as collecting beech nuts, fir cones and looking out for the wildlife (birds and insects, trees and plants). Sometimes their school friends joined them on the way back home. It seems that the children also played in the wood whilst their parents worked on their allotment.

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(c) Mrs Hollingshead was rather vague about App/1 although she recalls receiving written advice from the applicant which would have been Documents A/B which she says came with a map. It must have been the neighbourhood plan at App/1 as she can recall the green parcel marked LGW on the document in question and says that it had another area but she cannot recall whether it was coloured or not. In re-examination she thought that the map she saw was probably black and white. In re-examination she clearly accepted the claimed neighbourhood (*'most definitely'*) which she accepted was her neighbourhood which she said was an area where she knew people – *'I know people outside area but I wouldn't class them as neighbours'* (at least half of her children's class at St Mary's Primary School lived within the claimed neighbourhood (she said that the school had around 180 pupils in 6 forms in an age range of 4-7). As she put it: *'You see other mums with their children and a lot of them live in that area'* (meaning the claimed neighbourhood). She also said that the wood, playgroup, primary school and recreation ground were *'key factors'* by which I took her to mean were key cohesive features (although the school closed around a year ago). It was Mrs Hollingshead who thought that the area to the south of Highlands Road was a *'posh area'* although she accepted that some of the 5-7 years olds living in this area would have attended St Mary's Primary School. She also accepted that anyone who could afford it used the playgroup.

(d) When questioned about her use of the wood Mrs Hollingshead said that she mainly strolls with her dogs on the main paths. There were, she said, more trees in the early years but several had blown over in the storms which brought about changes in the route of the paths passing through the wood. Commenting on the activities of others whom she had seen in the wood (see para/7 of her EQ), she said that some of the people whom she had seen lived within the claimed locality.

(e) I have no hesitation in accepting the evidence of Mrs Hollingshead.

135. **Emma Hollingshead**

(a) Emma Hollingshead (whose evidence I accept) is Mrs Hollingshead's daughter. She is aged 20 and her statement will be found at A1/D10. She was born in 1995 and can even remember, as a three year old, walking through the wood with her mother in her push chair on the way to her playgroup. This was followed by trips through the wood

on the way to St Mary's Primary School and playing there with friends some of whom lived to the south of Highlands Road. She recalls cycling through the wood and stopping and sitting on fallen trees. In the summer she recalls making camps out of fallen branches. As she got older she took the family dogs for walks in the wood. She also enjoys sitting and watching the birds and flowers and taking photos. However, she says that the wood is not as popular as the recreation ground (this was obvious on my accompanied visit to the area).

(b) Ms Hollingshead has seen dog-walkers and cyclists using the wood along with children and their mothers. She remembers boys cycling on the so-called bumps before someone put a stop to it. I understand her evidence to be that this activity lasted for around 2 months. She has never seen anyone with equipment carrying out maintenance in the wood – *'that's why it's so natural'*. She says that more people are using the wood for dog-walking early in the morning before they go to work. There are also dog-walkers in the lunch hour. At weekends Ms Hollingshead says that can stay in the wood with her dogs for between 1-2 hours. In the evenings she has only ever seen 2/3 dog-walkers.

(c) When it came to neighbourhood, Ms Hollingshead agreed with the claimed neighbourhood plan. She also mentioned that the two middle schools and secondary school in Leatherhead are outside the claimed neighbourhood. She still meets up with some of her friends at St Mary's Primary School. She recalled that they used to play in the wood on their way to school.

136. **Julia Jarrett**

(a) Mrs Jarrett has lived at 6 Highlands Avenue (which backs on to the wood) since 1979 and is thus a 20 years plus user of the land. Her statement and EQ is at A1/D12 and D12.1.

(b) Mrs Jarrett uses the wood (which she always assumed was public open space) once a week although not when it is muddy. Her children used to play and make dens in the wood and could also ride their bikes there in safety. Her grandchildren also play in the wood. The trees in the wood form a pleasant backdrop to her garden. She says that it is a delightful open space.

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(c) Mrs Jarrett agrees with the claimed neighbourhood and she saw the map relied on by the applicant when she drew up her statement. She says that her community includes the land within the red lines citing the fact that it included the application land in the centre, the allotments, the school and the hospital – *'That seems to me to be a community'*. She also said, however, that her neighbourhood included the church on Church Road which, until the 1990s, she regularly attended (her children also sang in the choir). The church is, however, outside the area of the claimed neighbourhood.

(d) I accept Mrs Jarrett's evidence. Her evidence was also noteworthy for the fact that I questioned Mr Clay on the relevance of that part of his cross-examination which concerned (in effect) this witness's subjective belief as to her entitlement to be using the wood *'as of right'*. Mr Clay said that he needed to ask questions as to whether this witness knew or ought to have known that she had a right to be using the wood and that this was relevant on whether her use was permissive. Mr Clay told me that he was familiar with the decision of the House of Lords in *R v Oxfordshire County Council ex parte Sunningwell parish Council [2000] 1 AC 335* when it was held that the law did not require subjective belief in the existence of the right. The same point is also addressed at [68-69] in *Newhaven* namely that whether use is to be treated as being *'as of right'* is a matter which should be assessed objectively.

137. **Ken Ellis**

(a) Mr Ellis has lived at 48 Windfield since November 1999. He therefore used the wood for around 13 years before January 2013. His statement and EQ will be found at A1/D8 and D8.1.

(b) Mr Ellis did not entirely accept the claimed neighbourhood plan at App/1 as he thought that his neighbourhood would also include (a) the High Street (i.e. as a continuation of Epsom Road) (b) The Withies where there is a catholic church which he attends (The Withies lies well outside the claimed neighbourhood) and the whole of Church Street.

(c) He accepted in cross-examination that the Leatherhead Residents Association covered a wider area, as did the hospital (which he said comprised a number of clinics rather than being a hospital for in-patients), the Bowls Club, the Library (which is just outside the claimed neighbourhood on the east side of Church Street) and the Doctors

Surgery at Linden Pit Path (again, just outside the claimed neighbourhood, but within polling district XB). He said that his neighbourhood would include all these facilities which *'we need as a community … Facilities everyone needs in the town'*.

(d) Mr Ellis and his wife have always had at least one dog which they regularly walk in the wood. He and his wife have also made many friends on their daily walks in the wood.

(e) Mr Ellis is a regular user of the wood for dog-walking. He was clearly an honest and genuine witness but his evidence on neighbourhood certainly did not assist the applicant.

138. **Les Prescott**

(a) Mr Prescott (whose evidence I accept) lived within the claimed neighbourhood at 26 Poplar Road for some 10 years between 2001-2010. He now lives in Yarm Court Road which is to the south of Highlands Road and outside the claimed neighbourhood. His statement and EQ will be found at A1/D20 and 20.1. He says that he and his wife used the wood for walks around once or twice a month in the summer but rather less than this in the winter. They saw others in the wood, including children playing and dog-walkers, whom he says *'were mostly neighbours we recognised including friends living in Highlands Avenue'*.

(b) He agreed with the claimed neighbourhood which he and his wife *'felt to be a part of'*. He also mentioned the following facilities: (a) the hospital (b) the Methodist Church (in Church Road) (c) the Church Hall (d) the Scout Group meeting place in Fortyfoot Road (e) the allotments and (f) the recreation ground which he said made it *'feel like our neighbourhood'.* Mr Prescott accepted that these facilities served *'a wider community'.* He said that *'they are part of the glue which binds my community together'*. He also agreed with Mr Ellis that High Street and Church Street should be included within the claimed neighbourhood. He also said that he knew a *'significant'* number of people living within the claimed neighbourhood. On the face of it, he seems to be defining his neighbourhood by reference to his relationships with other people rather than by reference to his surroundings.

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139. **James Moore**

(a) James is aged 12. He lives at 22 Highlands Avenue. His statement and EQ is at A1/D16 and D16.1. James can get into the wood via a gate in his back garden.

(b) It seems that James spends *'a lot'* of time in the wood with his friends (he mentioned Alex who also lives in Highlands Avenue). They climb trees, play around on their bikes or make dens. James said that he goes to the wood more often in the spring/summer/autumn when he thinks he visits three or four times a week. He does not visit the recreation ground as often as he goes to the wood to play around. He sees lots of people walking dogs in the wood.

(c) The family considers the wood so special that they actually buried their cat there as it use to prowl around inside the wood.

(d) James gave his evidence with great confidence and I have no hesitation in accepting what he said to the inquiry.

140. **Christopher Moore**

(a) Christopher is the brother of James. He is aged 10. His statement and EQ is at A1/D17 and D17.1. Christopher likes to pay in the wood with his elder brother and his friend Piers. He likes climbing trees and building dens. His mother can get them in for their tea by walking out of their garden gate. It was Christopher, I think, who produced the three photos of boys (that included his friends Lorcan and Alex) playing in the wood.

(b) Christopher said that he plays in the wood three or four times a week. He said that he did not see a lot of people in the wood although *'you do see people walking through'.* He said that the wood was important to him.

(c) Despite his young age, Christopher gave helpful evidence with confidence and great care. I certainly accept what he told me.

141. **Piers Bunford**

(a) Piers is aged 11 and lives at 5 Highlands Avenue. His statement and EQ will be found at A1/D5 and D5.1. Piers obviously had a lot of help with his statement.

(b) The wood is next to his home and close to his friends with whom he plays in the wood on his bike. He used to attend St Mary's Primary School and played in the wood before and after school. He also used the wood once as part of his scouting activities (he was also in the cubs which used the same building and he can remember that they too used the wood once for some organised activity).

(c) He says that whilst in the wood he sees people who live close by playing with their dogs. His neighbour also uses the wood for running practice. He says that he has been using the wood as a play area for as long as he can remember. He said that *'it's a nice place'*. Piers plays with James and Christopher Moore in the wood. They also play with another boy called Alex who also lives in Highlands Avenue. Piers says that he uses the wood frequently – *'whenever we have some free time'*. He says that he sees a lot of people in the wood – *'People on bikes and with dogs – children generally playing and building dens'.*

(d) In the case of Piers, I reiterate what I said in the case of the other two boys, namely that he gave his evidence with considerable confidence and I was grateful for the assistance he and his two friends. I certainly accept all that Piers told me about his own use of the wood and of what he saw there.

142. **Sharon Pavey**

(a) Ms Pavey has lived with her partner at 52 Highlands Road since March 2003 and therefore used the wood for a little under 10 years within the relevant period. They mainly use the wood for walking their dog. Ms Pavey produced 4 photos taken in 2014-15. Her statement is at A1/18.

(b) Ms Pavey said that the wood is safe for walking her dog and they go there daily, sometimes more than once a day (mornings and evenings). She says they see *'lots of other people walking through (and around) and enjoying the wood with their dogs and young children'*. She said that they meet most of their neighbours by walking their dog in the wood, although there are other users whom they do not know.

(c) Ms Pavey gave limited evidence on neighbourhood. I understood her to be saying in her statement that the key (or cohesive) features which make up her neighbourhood are the wood, the Beeches, Woodlands School, the hospital and recreation ground.

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Her reference to *'within the boundary'* in para/2 of her statement implies, I think, that she is a supporter of the claimed neighbourhood.

(d) Ms Pavey was also an honest and genuine witness.

143. **Steven Pavey**

(a) Mr Pavey's statement at A1/D19 is the same as his partner's. He says that it is difficult to exercise his dog in the recreation ground whereas they can walk their dog around the paths in the wood without getting their dog dirty. He does the evening walk. He says they mainly stick to the paths although his dog (whom they are happy to let off the lead) *'will deviate'*. He says they meet up with other dogs. They use various of the paths within the wood – *'We always see somebody, especially at this time of year when it's lighter … In summer you always see children cycling around'*.

(b) In common with his partner, Mrs Pavey was an honest and genuine witness and I have no hesitation in accepting their evidence.

144. **Heather Ward**

(a) Mrs Ward has lived at 35 St John's Road since 1978. Her statement and EQ is at A1/E24 and E24.1.

(b) She began by dealing with the neighbourhood issue. She thinks that Kingston Avenue (which backs onto Trinity Primary School – which she agreed accepted children from outside the claimed neighbourhood – she included this school as *'all my local grandchildren went there'*) and Park Rise should be added to the claimed neighbourhood (where, she says, many of the residents have known each other for years), as she also knew most of the residents within these roads. Judging from her statement, she would include Upper Fairfield Road as well as this is where her GPs Surgery is located which, she says, serves this area. She also has several friends in Upper Fairfield Road.

(c) She explained that her neighbourhood was anywhere within *'easy'* walking distance of her home. As she put it, this was on the principle that her group of friends lived within walking distance of her home. She agreed that it meant that her neighbourhood was larger than that claimed by the applicant (*'The red line is not a big area'*). She also

agreed that there was a mix of housing within the claimed neighbourhood, comprising housing of different ages and styles. The area appeals to her *'as we meet people we know as we go around the area'*. She says that the people she meets on her walks are those whom she sees regularly. She accepted, however, that she goes for walks outside the claimed neighbourhood and gave as examples of this trips to her GP or to the dentist or to the library.

(d) Mrs Ward has used the wood for many years. She says that the qualifying period 1993-2013 includes the childhood of three of her grandchildren (now aged 12, 10 and 9) who also lived in St John's Road. They regularly went for walks and played in the wood (which she says was within easy walking distance of her home), meeting up with other children or families whom they knew from Trinity School. In the 1970s her own children had also used the wood as a place to play.

(e) Mrs Ward said that it is in the summer holidays *'when you see the children'* in the wood. She has even been involved in Easter egg hunts in the wood. She thinks that she walks in the wood on average once a fortnight, weather permitting.

(f) Mrs Ward was plainly an honest and genuine witness. Her evidence on neighbourhood was, however, of little assistance to the applicant.

145. **Michael Brian**

(a) Mr Brian has lived at 30 Highlands Road since 1992. His statement and EQ is at A1/D4 and D4.1. Although his wife knows the applicant, he was not involved in the preparation of the neighbourhood plan.

(b) He supports the claimed neighbourhood although judging by his statement he would have preferred it if it had included the church at Church Road. Otherwise he says that the area contains all the ingredients for a neighbourhood citing the shops in The Crescent (which, when questioned, he said comprised a takeaway, a shop that sold kitchen appliances and a health food shop which he accepted were not used predominantly by residents living within the claimed neighbourhood), the (former) school, hospital, allotments, recreation ground and bowls club with the wood being central to the area. As he put it: *'Yes, it's a neighbourhood'*.

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(c) Until the signage went up in January 2013, Mr Brian thought that the wood was common land to which the public had a right of entry seeing as the land was unfenced and was not cared for in any way. He had no idea that it was connected with the NHS. He says that some of the paths are clear but that others are overgrown at different times of the year. Sometimes the growth at the sides of the tracks are cut back. He says that he has observed management within the wood taking place *'from time to time'.*

(d) Mr Brian's use of the wood over (as he put it) the last 10 years has been specifically with his three grandchildren who have enjoyed trips to the wood. He said this: *'The wood has formed and continues to form the young lives of all three children who all call the area the wooded park'*. His youngest grandchild (aged 5 and now at school) always wants to go to the wood whenever he visits his grandfather and the other, older, grandchildren (aged 13 and 11) never seem to mind going with him. He thinks that he goes to the wood around 30-40 times a year, mainly during the last 10 years, although it seems that his visits are less frequent now that his youngest grandchild has started at school. He says that he has seen and spoken to other adults and dog-walkers in the wood. He said they sometimes walk outside the paths. Whenever the children walk away from the established paths he says that he would follow them. He says that the wood is busier during the school holidays. I understood from his evidence that those whom he mainly comes across in the wood are dog-walkers although he does see accompanied children.

(e) I think that Mr Brian's use of the wood is fairly limited although his evidence on neighbourhood was supportive of the applicant's case. I thought that, in common with others, Mr Brian was an honest and genuine witness.

146. **David Brett**

(a) Mr Brett has lived at 41 Highlands Road since 1977. Before that, he lived at 64 Winfield after 1972. His statement and EQ will be found at A1/D3 and D3.1.

(b) In his statement Mr Brett says that he and his family used the wood *'as part of their local environment over the years'* and he specifically mentions bird watching, animal watching and picking blackberries. He says that in recent years he goes for walks in

the wood. His use is said to be at least monthly but sometimes weekly or even more often than this. His EQ also shows that he has seen children playing in the wood and others using it to walk to school, the allotments or to the recreation ground.

(c) In his oral evidence he says that he would have started using the wood in 1972 when he said there were more trees than there are today. By 1993, however, his own children were in their 20s and had left home. He finds the wood convenient as it is flat *'and very nice to walk in'*. He says that the wood has its *'thoroughfares'* and that the paths change as the trees fall down.

(d) On the question of neighbourhood, his statement notes that he agrees with the neighbourhood plan. As he puts it, it is an *'accurate depiction of the immediate environs of which we are a part'.* In his oral evidence he said that his community *'consists of people and all sorts of things'*. However, as the question of neighbourhood was explored in his evidence it was clear that he thought that it might even extend beyond the boundaries of the claimed neighbourhood. For instance, Mr Brett did find the exclusion of the church in Church Road *'puzzling'*. Overall, however, he seemed to accept that the claimed neighbourhood could be designated as a community in its own right with the wood located right in the middle of it.

(e) Mr Brett was an honest and genuine witness but I am not sure that he was really sure of his ground when it came to neighbourhood as I suspect that he found the concept difficult to grasp.

147. **Ms Alison Draper**

(a) Ms Draper has lived at 95 Poplar Road since 2001. Her statement and EQ will be found at A1/D7 and D7.1. Before 2001 she lived in Kingston Avenue for around a year and a half. This is outside the claimed neighbourhood. She says that she bought her home because of its proximity to the wood which has an abundance of wildlife. In her oral evidence she said that the wood *'provides a green corridor for wildlife'* and is a *'haven'*.

(b) Ms Draper is supportive of the claimed neighbourhood. She mentions all those facilities included within its boundaries which she says she has either used or visited. In her oral evidence, she specifically cited the recreation ground (where there are

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sometimes festivities involving the scouts and Mencap), the hospital (where she received physiotherapy at one time and also played the piano at church services), the Beeches care home (which evidently has open days and where she also played the piano – she also knows that local people have relatives at the home), the scout hut, the church hall (as a member of a hand bell group), the allotments (she is not an allotment holder although she knows people who are) and the parish church in Church Road where, at one time, she sang in the choir (she said she knew a lot of people in the area who attended this church. As a school governor (of a school in north Leatherhead) she said that she would have visited all the schools in the area. She also mentioned the retail outlets and opticians in The Crescent. She conceded in her oral evidence that all the community facilities within the claimed neighbourhood *'are enjoyed by people from within and outside the red line. No facility is enjoyed exclusively by people living within the red lines'* which is, of course, a reference to the boundaries of the claimed neighbourhood.

(c) In terms of her use of the wood, she said she went there for regular walks (*'I walk in and around the woodland. I walk around it a lot'*). Before 2006 she was not a dog-walker but between 2006-09 she looked after her daughter's dog when she used the wood daily in the early morning before going to work. She says that she now walks in the wood either early in the morning or later in the evenings. She says that she collects wild garlic in the spring, elderflowers in June and elderberries and blackberries in the autumn. Sometimes she collects small branches for kindling and she often meets local people whom she knows live within the claimed neighbourhood, when engaged in these activities in the wood. She also mentioned seeing local children (whom she believed lived in Poplar Road) building a camp (this would have been recently and had not lasted very long) and riding bikes *'on an assault course they had built'*. In her oral evidence she said that *'these children have moved on'*. In her statement Ms Draper says that since 2001 she has used the wood weekly but it would, as indicated, have been on a daily basis whilst she had a dog.

(d) Ms Draper was likewise an honest and genuine witness. As with other witnesses her evidence on neighbourhood did not greatly assist the applicant.

148. **Ms Imani Ayimba-Golding**

(a) Ms Ayimba-Golding's statement and EQ is at A1/A1/D1 and D1.1. She is aged 16 and lives at 22 Poplar Road. I think the family had earlier lived at St John's Road which also lies within the claimed neighbourhood.

(b) When (she thinks) she was only 2 she attended a nursery at the scout hut. She recalls after nursery playing in the wood with her parents. Later, until the age of 5, Ms Ayimba-Golding used to attend St Mary's Primary School. Since the age of 11, however, she has been attending a school on the other side of the motorway.

(c) Ms Ayimba-Golding says that she used to play in the wood a lot when she was growing up. When she was small her mother would take her there to play, sometimes with friends. These were friends who lived within the claimed neighbourhood. She still has friends who used to go with her to this school, one of whom lives in Highlands Avenue. When she was older she used to ride her bike around the wood with her sisters and also picked flowers in the summer and collected wild garlic for her father.

(d) Ms Ayimba-Golding recalls that she used to cycle through and play in the wood (she also played in the recreation ground). Her family also had 2 dogs (after 2008) for seven years although they now have only one dog which Ms Ayimba-Golding takes for a walk in the wood at weekends and in the school holidays.

(e) Ms Ayimba-Golding also attended a Sunday club at the church hall in Church Road. Evidently they would all troop across the road to the church at the end of the service. Her mother also used to have an allotment.

(f) Ms Ayimba-Golding said that she now goes into the wood once a week for a walk. She also runs in the wood as part of a wider circuit which takes in the recreation ground.

(g) As for neighbourhood, Ms Ayimba-Golding agrees with the claimed neighbourhood. She says that it is where most people she knows live. It is also a *'walkable distance'* from her home to see her friends whereas if she wanted to go into the town centre she would ride her bike.

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(h) Ms Ayimba-Golding was a good witness for the applicant and I certainly accept her evidence. Although only young, she gave evidence with great assurance. It is plain that she has used the wood frequently over the years.

149. **Ms Leila Ayimba-Golding**

(a) Ms Ayimba-Golding, who is aged 14, is Imani's younger sister and they attend the same school. Her statement is at A1/D2 and D2.1. Her evidence mirrors that of her sister.

(b) She says that she has walked in the wood for as long as she can remember. She remembers being taken there by her mother after school and playing hide and seek in the woods. She loves the flowers and collects wild garlic and kindling for her father. She also used to ride her bike over the humps which boys had made in the wood.

(c) She was shown a map of the claimed neighbourhood by her mother. She has many friends living both inside and outside its boundaries. She has her bike and goes where she wants. She also takes their dog for a walk in the wood. Her mother also has another dog or dogs to look after and she walks them there as well. They walk a loop of the wood and do not stick to the paths. She rode her bike on the humps which she says was popular for a couple of years.

(d) Ms Ayimba-Golding was also a confident witness and I also accept her evidence. It is plain that she and her family have been frequent visitors to the wood.

150. **Timothy Jones**

(a) Mr Jones has always lived at 67 Windfield since 1965 (he was born in 1959). His statement and EQ are at A1/D13 and D13.1. He says that he has been going into the wood since 1959 which was much larger that it is today as the general area was less developed. For instance, he thinks that St Mary's Primary School was only built in 1972/73 and that Woodlands School would have been built in approximately 1993/94 with the road being made up at around the same time.

(b) In his statement he says that there is *'a definite community of people who know, enjoy and "use" Leach Grove'*. He speaks of those who live close to the wood and those further away who also use it as (in effect, and as he does) *'a destination'* in its own

right. He says that some people living locally use the wood on a daily basis whereas others (including himself) would use it less regularly.

(c) Mr Jones says that he has used the wood regularly since 1993. The frequency of his visits vary but in his statement he thinks that he would have gone there every few months to take photographs. In his oral evidence, the claimed frequency of his visits for photography extended to once a fortnight although in the spring it could even be every day and he said that he might spend an hour there. It would be less than this in the summer, perhaps once a week *'to see what's going on'*. He said he could be there for between five to thirty minutes depending on whether there was *'anything interesting going on'*, which was a reference to plant life which he considered a suitable subject for photography.

(d) Although a metallurgist by training, Mr Jones is also a very keen landscape photographer and he takes photos of plant life in the wood. He also walked his dogs there (*'at least every week in the last years up to 2013'* – I think his dog died at the end of 2013 and had been with Mr Jones since 2007). He also mentions seeing local children playing in the wood, particularly those living in Highlands Avenue who have openings in their back gardens. He can also recall the boys riding their bikes on the humps to give a more exciting ride. He says that he has seen different groups of boys playing in the wood over the years.

(e) Interestingly, Mr Jones says that the paths change every two or three years. In 1972, for instance, they were entirely different to what they are now. He has certainly never seen anyone carrying out maintenance within the wood although he has seen some recent cutting.

(f) Although I thought that Mr Jones was probably exaggerating the frequency of his trips to the wood to take photographs, the thrust of his evidence was plain (and which I accept), namely that he has been a regular visitor to the wood over many years and has observed others there from time to time also engaging in informal recreation consistently with the evidence of all the others who gave oral evidence in support of the case for registration.

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151. In summary, including the applicant herself, there were 22 oral witnesses supporting the case for registration. Of these, 5 were minors (the Ayimba-Golding sisters, the Moore brothers and Piers Bunford) and one other (Emma Hollingshead) was aged only 20 and whose recollection of her early life would probably only have gone back to the late 1990s. If I had to, I would categorise her as a 15 year user. On the face of it, we have 22 oral witnesses of whom 7 were 20 year plus users, 7 were users for between 10 to 15 years and 8 for less than 10 years. Of the 22 witnesses, 3 now live outside the claimed neighbourhood (Turner x2 and Draper).

Applicant's written evidence

152. Of those whom it was hoped would give oral evidence (see A1/tab/D), 4 did not show up whereas Heather Ward, who was not intending to give oral evidence, did so. I have read all the evidence behind A1/tabsD&E. The weight to be attached to this material is limited as these witnesses did not appear to be questioned about their written evidence. When looked at in the round, however, the written evidence was largely consistent with the oral evidence. It is plain, I think, that the wood is well used for informal recreation by those living near enough to access it on foot without having to walk too far from their homes. The number of witnesses providing written evidence (statements and EQs) behind A1/tabsD&E adds up to 54 of whom only 22 gave oral evidence.

153. Beyond the statements and EQ behind A1/tabsD&E there are (a) the letters of support from 7 individuals behind A1/tabF2 (which I have also read); (b) an initial batch of 74 EQs and (c) a further batch of 288 EQs making a grand total of 362 EQs. I have looked at this material but not in great detail. This has undoubtedly been a well supported application. I have also looked again at the documents within A1/tabF1/F3 which do not really take the matter any further. It seems to me to be plain and obvious that the wood has for many years been a well used location for informal recreation.

154. Lastly, the applicant put in the written evidence of her husband Ian Cargill at A1/E31 who dealt with the locality issue. Mr Cargill deals with the polling district XB. He says that MVDC do not maintain maps of the various polling districts. Instead the records which they maintain are merely of lists of streets. Mr Cargill did, however, carry out a search online and he came across a report to MVDC titled *'Implementation of Electoral*

Review of Surrey County Council' dated 13/02/2013. The report sought approval (which was given) to the amendments which were being made to the various polling districts across the Borough (for instance, two new polling districts were added to the South Leatherhead ward). One sees from the report what the boundaries are in the case of polling district XB (which necessitated a small adjustment to the plan at App/1 which now includes Highlands Park) (E39/41).

155. An FOI request was made to the relevant officer at MVDC (Shaun Hughes) regarding electorate and other details in relation to polling district XB and his reply is at E43. In his email dated 19/05/2015, Mr Hughes says that there is no statutory obligation for the Electoral Registration Officer or Returning Officer to provide the information requested in the applicant's email dated 19/04/2015. He did, however, provide some information in relation to the polling district XB, namely that it contained 1,644 electors and 989 properties shown in what is described as a Property Register. I deal below with the legal position in relation to polling districts.

Submissions of the parties' advocates

156. In the first instance, I shall deal with the submissions of both parties to the exclusion of locality and statutory incompatibility which I will look at separately as they are discreet and complex issues.

Submissions of the applicant

157. **Sufficiency of use for LSP**

(a) The applicant argues that this has been made out on the evidence and that there has been due compliance with the reasoning of Sullivan J in the *McAlpine* case.

(b) The applicant invites me to conclude that the land has been in general use by the local community for informal recreation for the relevant period in light of the written and oral evidence.

(c) The oral witnesses confirmed that they had seen others using the land for LSP, and have indicated where they live within the claimed neighbourhood.

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(d) Reliance is placed on the evidence of Christopher Moore, James Moore and Piers Bunford all of whom indicated that the land was a play area for the local children. They were frequently there with their friends from within the neighbourhood.

(e) It is contended that there are photographs of recreational use taking place on the land which also contains a network of tracks with no obvious inhibitions on usage throughout the qualifying period.

(f) It is said that the land is to be preferred over the Fortyfoot Road recreation ground because of its seclusion, tranquillity, attractiveness to train dogs off the lead, making dens, and as a place to walk when conditions are wet because of the well-trodden paths.

(g) In planning terms, the land has over a number of years served a recreational function.

(h) The applicant also claims that the objector has been well aware of the public's use of the land and could not have failed to appreciate that it was in general use by the local community for informal recreation.

(i) In light of the above, it is contended that the land cannot be said to be in mere sporadic recreational use by the occasional trespassers but rather in general use by the local community for informal recreation.

(j) The whole of the land is being used for informal recreation in legal terms even though, in practice, not all of it is actually being used. In the first place, paths criss-cross the land and, in the second, the rest of the land is claimed to be *'part-and-parcel of the enjoyment of the whole land'.*

158. **Do the users come from a qualifying neighbourhood within a locality?**

(a) As indicated, I deal merely with the issue on neighbourhood whose boundaries are identified on App/1.

(b) The applicant argues that the neighbourhood test is not a high threshold relying on Sullivan J in *R(Cheltenham Builders) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin) who said at [85] that all that is required is that the area has a *'sufficient degree of cohesiveness'* and that a housing estate might well meet that test.

(c) Dr Bowes submits that the neighbourhood issue was most recently re-visited by HHJ Behrens QC in *Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch.). There the Inspector found *'The Haws'* and *'Banksfield'* constituted a neighbourhood on the basis of cohesion of their interconnecting streets which surrounded the application land at *'Yealdon Banks'* at [99]. The court ruled that the inspector had been wrong to find that the two areas comprised a single neighbourhood, but that it was in fact correct to say that they amounted two separate neighbourhoods on the basis of the cohesion of their interconnectivity and the rationality of the boundaries at [104], [105] and [107]. Dr Bowes submits that this conclusion was not challenged on appeal and no adverse comment about it was made by the Court of Appeal when, by a majority, it upheld the decision of the first instance judge.

(d) Dr Bowes submits that, when it came to cohesiveness, a common theme in the evidence was that witnesses met other local people whilst using the land. In other words, the close proximity of the land to their homes and the homes of others within the claimed neighborhood was itself a cohesive factor.

(e) Dr Bowes also points to the following matters which, as he puts it, *'serve as conductors for cohesiveness'*, namely:

- The parish church of St Mary and St Nicholas on Church Road.
- The church hall on Church Street which, it is said, *'also acts to bind the Church within the neighbourhood'* (even though it lies outside its boundaries).
- Then there are the allotments (of which 27 (out of 57) are held by inhabitants of the neighbourhood - in 2001 37 out of the 57 were held by inhabitants of the neighbourhood).
- There is also the scout hut in which the local scout troop regularly meet of which children living in the neighbourhood would be members (i.e. James Moore and Piers Bunford).
- There is the Fortyfoot Road playgroup which meets in the Mencap Hall on Fortyfoot Road which a number of local inhabitants use.
- Throughout the qualifying period St Mary's Primary School was attended by a number of children living within the claimed neighbourhood (Mrs Hollingshead

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thought that about half of her daughter's year lived within the neighbourhood, with only three or four living south of Highlands Road).

- The neighbourhood also has distinctive urban boundaries, serving to bind the smaller interconnecting streets within them together (a matter of some importance to HHJ Behrens in *Leeds*).
- Dr Bowes submits that it was clearly stated by witnesses that the claimed neighbourhood represents their neighbourhood, and that beyond the very busy major roads to the north, west and east lies outside their immediate neighbourhood. Witnesses were also clear that south of Highlands Road was a different neighbourhood.

(f) Dr Bowes submits that the claimed neighbourhood in this case falls into the housing estate category mentioned by Sullivan J in *Cheltenham Builders* or that of HHJ Behrens' group of interconnecting streets in the larger urban setting such as that which applied in *Leeds.* He submits that the presence of community facilities which either (i) fall physically outside the claimed neighbourhood or (ii) are used by a wider range of people than those living within the neighbourhood, is no bar to them being *'assessed in the factual matrix of cohesiveness'*. As Dr Bowes puts it: *'This is because they act as rallying points around which the neighbourhood can bind'* or, as Mr Prescott explained, that they acted as the *'glue'* which binds the *'existing community'* within the four roads. Dr Bowes says that that *'must be correct as a matter of law because facilities on a housing estate cannot be said to be for the exclusive use of the residents of that estate'*.

159. **Was the use of the land for lawful sports and pastimes?**

(a) Quite apart from the evidence of walking, with or without dogs, Dr Bowes also relies on the evidence children playing, making dens and camps etc, blackberry picking, garlic picking, collecting fallen pine cones, using the land as a destination for nature and bird watching, biking, picnicking, photography, collecting sticks and as a place to stroll for quiet reflection, sitting and listening to music etc.

(b) In the case of the use of paths on or crossing the land, where the tracks are not public rights of way (as is the case in this instance), Lightman J held in *Oxfordshire* at [2004]

Ch 253 at [103] that where there are no public rights of way over the land the registration authority should approach the matter as follows:

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

(c) Dr Bowes submits that much of the recreational walking, with or without dogs, in this instance could not rationally be described as *'transitory'*. In particular, he cites from the evidence of the following:

- Sandra Sullivan who walked *'in a double eight' 'round and round'* the wood.
- Elizabeth Turner does a *'circuit on the paths'*.
- Stephen Pavey who also walked *'circuits of the wood'*.
- Sharon Pavey who explained that most people she saw were walking *'around'* and not *'through'* the wood.
- Jennifer Hollingshead who used *'the paths to walk around the wood'*.
- Emma Hollingshead whose route to school would not take her through the wood - she explained that she would detour off her route to play in the wood.
- Stephen Pavey who explained that the usual route to the allotments would not involve going through the wood yet he had seen people walking through the wood on their way to the allotments.

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160. Dr Bowes submits that the vast majority of users did not use the wood as a place of mere transit. He says that the use is on all fours with the criteria for qualifying user laid down by Lightman J in *Oxfordshire*. In this instance, he argues, *'there is plainly sufficient LSP to justify registration of the land'*.

161 Has the use been continuous? Dr Bowes submitted that it had in that there was before the public inquiry evidence spanning the entire qualifying period. Indeed, there was evidence of user dating from the late 1960s. In the circumstances, Dr Bowes submits that I should find that the use of the land for informal recreation had been continuous.

162. **Was the use permissive or otherwise by right?**

(a) It is common ground that the effect of the signage erected on 9/01/2013 rendered subsequent use permissive.

(b) It was not alleged by the objector that use prior to 9/01/2013 would have been permissive. Nor was it alleged that user was either *Barkas 'as of right'* or otherwise subject to an implied permission arising from the way in which the wood was managed and/or as a result of the exercise of statutory powers.

(c) Dr Bowes submits that the only inference that can properly be drawn on the evidence is that the objector and its predecessor tolerated the consistent recreational use and chose to acquiesce in it. That choice, Dr Bowes submits, viewed objectively, can only mean that the use of the land has matured into a legal right which justifies registration.

163. **Can the registration authority lawfully determine this application?**

(a) Dr Bowes also deals with the *res judicata* issue. However, in light of his concession in his closing submissions, Mr Clay is not claiming (in my view, quite rightly) that a *res judicata* estoppel precludes the registration authority from determining this application on its merits.

(b) I think Dr Bowes is right when he submits that the decision on the part of the registration authority to consent to the withdrawal of the 2012 application was not a final decision on the merits of the application. As such, no *res judicata* arises.

Submissions of the objector

164. **Quality of the applicant's evidence**

(a) Mr Clay submits that the EQs should be treated with great caution unless they are supported by witnesses who appear at the inquiry. He is clearly right about this. He does though accept that they are of some evidential importance insofar as they comprise a large number of consistent statements which do indicate that such use of the land which did take place consisted predominantly of walking (with or without dogs) and cycling on journeys between destinations outside of the site itself, rather than the recreational activity of walking within the land itself.

(b) For instance, Mr Clay submits that most of those responding appear to have ticked the boxes which are concerned with walking to other destinations - school, allotments, Leatherhead, and the recreation ground. He also says that they are consistent in being marked by an absence of the evidence of user that would be expected to be provided in support of any successful application. In fact, Mr Clay goes as far as to say that the application stands or falls almost entirely on the basis of the evidence heard and submissions made at the public inquiry which, he says, was unsupported by any independent corroboration from anyone who did not have a direct stake in the outcome.

165. Mr Clay concedes that at no time during the qualifying period was the application land held for purposes which permitted informal public recreation to take place on the land. Essentially the land was held for the purposes of the wide-ranging statutory health functions of SCC and, after 21/07/1993, of the various NHS bodies mentioned above.

166. **Sufficiency of use**

Mr Clay submits that the numbers supporting the application are insufficient to justify registration. He also says that in the case of those seen by oral witnesses, the evidence linking these individuals to the claimed neighbourhood was very tenuous and *'unconvincing'*.

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167. **Neighbourhood**

(a) Mr Clay rejects the claimed neighbourhood which he said had gone through a number of changes. Indeed, in her own oral evidence the applicant said that she thought the area that formed her own neighbourhood was actually wider than that shown on App/1.

(b) Mr Clay submits that the area chosen as her neighbourhood by the applicant lacked cohesion and failed to meet the statutory test. He contended that many of the witnesses called by the applicant were influenced in their choice of area by leaflets and a meeting of supporters at the home of Susannah Golding. Indeed, the applicant confirmed in cross-examination that only those living within the *'neighbourhood'* were invited to give evidence in support of the application.

(c) Mr Clay submitted that the claimed neighbourhood was merely part of the urban area of Leatherhead which happened to surround the land. He said it was arbitrarily chosen and was not recognisable as a community in its own right and had no relationship with the administrative districts, wards or parishes of the area. He said its boundaries were vague and self serving and largely corresponded to the area within which most of the applicant's friends and neighbours and her chosen witnesses lived.

(d) It was said that the area has no particular character or social cohesiveness other than that created for the purposes of the application and a number of witnesses accepted in cross examination that their friends and community went wider than the area claimed which seems to have been based on the geographic spread of her witnesses.

(e) Mr Clay submitted that the boundaries of the claimed neighbourhood were not precise and appeared to cross or run along different sides or the centre of roads. The identified *'neighbourhood'* had arbitrary boundaries and, save from proximity to the site, had nothing to identify it as a neighbourhood or locality to enable it to meet the statutory test. Some parts have no relationship to manmade or topographical features. It was also said that the area is highly mixed, has no coherence in terms of its architecture, physical character, or its uses, or social or administrative community. It relies largely on community facilities, shops, library, theatre etc which are outside the defined area and which are used by a much wider catchment.

168. **Use of the land for LSP**

(a) Mr Clay invites me to find that the overwhelming majority of the applicant's references to use in the EQs refer to use which is of a transitory nature and he relies on the evidence of Mr Hindson who mentioned a number of matters:

- use of footpaths for walking between destinations outside the wood and for dog walking;
- that he had seen bike tracks on the paths which indicated that cyclists rode through the wood travelling between destinations;
- that he had never seen children playing in the wood;
- he described one occasion in 2012/13 when he found evidence that someone (he imagined children) had constructed a bike jump from planks of wood;
- that he had never seen anyone picking blackberries in the wood.

(b) Mr Clay submits that the evidence of walking, with or without dogs, or cycling was limited to a very small number of local residents and the use for children's play appears to have been only sporadic and mainly associated with use by children from adjoining properties in Highlands Avenue.

(c) It is also claimed that some of the tracks simply linked domestic garden gates with the principal paths, and I was reminded of the vendor's indemnity when the application land was transferred to SCC in 1969.

(d) It is said that the use of the land was low key and/or intermittent and the evidence suggests only very limited use by a small minority of the inhabitants of the claimed neighbourhood. Mr Clay also submits that casual bird watching while out walking in the wood is not LSP. I do not accept this.

(e) Mr Clay submits that most of the wood is not even capable of being used for LSP and should not even be considered for registration. He reminds me of what the applicant said in 2012 in support of her original application, namely that only around 45% of the land was accessible. This seems to me to be an under-estimate by reference to what

one sees at the moment - clearly more trees have fallen over the last 3 years. John Hindson also says that only around 45% of the land is accessible by way of footpaths.

(f) Mr Clay submits that the presence of paths is not in itself evidence of recreation and would also have varied over time. It is also said that walking to the school, to the allotments and into Leatherhead is an activity which is consistently recorded on the applicant's EQs and the majority of the completed forms refer principally or only to this activity. It is further submitted that it would be reasonable to infer that Mr Hindson's observations of what was happening on the land after 2012 would have applied before-hand. The weight of the applicant's case on qualifying use is also said by Mr Clay to be undermined by the absence of independent evidence i.e. from someone with no interest in the outcome of the application.

(g) Mr Clay submits that user is primarily referable to rights of way type use and is not explicable on the basis that the whole of the land on either side of footpaths is also used for informal recreation. Accordingly, while the objector may have gained the impression that people were using the paths for access and passage, the nature of the user has been such as not to give the outward appearance of use of the wood for LSP as of right. In other words, it is submitted that the predominant use of the land is that of the use of the paths which would be more consistent with right of way or highway use rather than the exercise of TVG rights and reference is made to the decisions in *Laing Homes* and *Oxfordshire* and to how the claimed user would have appeared to the landowner.

(h) Mr Clay also submits that the objector has not acquiesced in any significant wider use of the wood because (i) the nature of the user was such that it would not appear to represent a right to use the whole of the woods for LSP; (ii) other than walking on the paths, the level of use was so trivial and sporadic elsewhere that it would not have appeared to the reasonable landowner to be the assertion of the right claimed; and (iii) that the main user appears to be associated with use of footpaths or casual activities ancillary to such use, such as dog walking or bird watching, which would not be perceived by the landowner as the assertion of the much wider right to indulge in LSP throughout the whole of the wood.

169. **For a period of 20 years**

I think the point being made under this head turns on the claimed infrequency in relation to the evidence in the case of the children's bike jumps which seems to have been limited to children and their friends living in Highlands Avenue which was sporadic.

170. **As of right**

I take this head out of turn but Mr Clay is raising two issues on 'as of right' which I think properly fall under other heads. Firstly, he mentions that of statutory incompatibility which is one of construction and I deal with this separately. Secondly, he says that the use relied on would not have given the outward appearance of use as of right over the whole of the land. The main issue, of course, is whether the use would appear to a reasonable landowner as referable to the exercise of a right of way along a defined route or referable to a right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous, then it shall be ascribed to the lesser right, i.e. a right of way. This is an issue relating to qualifying LSP rather than 'as of right'.

171. **Statutory incompatibility**

Submissions of the objector

(a) The objector contends that section 15 of the 2006 Act should not be interpreted as extending to the land since registration would conflict with the statutory purposes under which it was held by the public bodies in question during the qualifying period.

(b) *Newhaven* is cited, in particular the leading judgement of Lord Neuberger and Lord Hodge (with whom Lady Hale and Lord Sumption agreed). The landowner's argument was set out at [75]:

'NPP's argument is that section 15 of the 2006 Act should not be interpreted as extending to the Harbour because it was reasonably foreseeable that registration of the Beach as a town or village green would conflict with the port authority's future exercise of its statutory powers".

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At [76] Lord Neuberger continued:

'There is no express exclusion [from section 15 rights] *of land held by statutory undertakers for statutory purposes*. *Therefore any restriction on the scope of section 15 would have to be implicit. NPP argues that statutory incompatibility provides that restriction.'*

(c) The objector rightly contends that no statutory enabling power exists which would confer power on an NHS body to grant the public recreational rights on land held for health purposes. That will not, of itself, however, prevent a green from being registered: see *Newhaven*, at [80] (per Lord Neuberger).

(d) Lord Neuberger said this at [91]:

'It is ... significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes.'

(e) In *Newhaven*, the Supreme Court considered the vires of the statutory body (in that case the port authority) and whether there was incompatibility between registration of the application land (i.e. Newhaven beach) as a TVG and the statutory purposes for which Parliament had authorised the landowner to acquire and hold such land. The court concluded at [92]: "*[In] our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.*"

(f) The objector continues that the court then defined the question at issue at paragraph [93]:

'The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where

Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes." *Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in Bennion, "Statutory Interpretation" 6th ed (2013):*

"Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."

While there is no question of repeal in the current context, the existence of a lex specialis is relevant to the interpretation of a generally worded statute such as the 2006 Act.'

(g) *And at [94-95] Lord Neuberger continued:*

'There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates (section 33 of the 1847 Clauses Act). NPP is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore (section 57 of the 1878 Newhaven Act, and paras 10 and 11 of the 1991 Newhaven Order).

[95] The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation - section 12 of the Inclosure Act 1857 - or to encroach on or interfere with the green - section 29 of the Commons Act 1876. See the Oxfordshire case [2006] 2 AC 674, per Lord Hoffmann at para 56.

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(h) The objector says that the beach in *Newhaven* was being used for LSP and the Court did not need to rely on evidence of actual port use of the beach:

(i) Lord Neuberger continued:

'[96]. In this case, which concerns as working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence.

[97] NPP has also suggested that vessels en route to and from other parts of the port might have to reduce speed in circumstances where such reduction would not be desirable to maintain the stability of the vessels. It also led evidence of proposals to unload materials for an offshore wind farm on the Beach. But we do not need to consider such matters in order to determine that there is a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green.'

(j) The objector submits that the decision in *Newhaven* turned on the fact that although the beach was not actually being used directly for harbour purposes, it was nevertheless operational land and part of the Harbour and held for those statutory purposes, and registration would impede the NPP in the exercise of its statutory functions.

(k) The cites from [101-102] in *Newhaven* where Lord Neuberger said this:

[101] … The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory

harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.

[102] In this context it is easy to infer that the harbour authority's passive response to the use by the public of the Beach was evidence of an implicit permission so long as such user did not disrupt its harbour activities …There has been no user as of right by the public of the Beach that has interfered with the harbour activities. If there had been such an assertion of right it would not avail the public, because the 2006 Act cannot operate in respect of the Beach by reasons of statutory incompatibility."

(l) The objector then poses this question: would registration of the land be incompatible with the statutory functions under which it is held?

He makes these points.

(i) The land was in 1993 transferred to the relevant NHS Trust by the Secretary of State for Health as part of a single contiguous landholding together with the adjoining Leatherhead Hospital and the rest of the land surrounding it, comprising car parks, lawns and wooded areas. Ms Condry's statement at paragraph 11 states:

*'On 20 September 1993, the Leatherhead Hospital site (including the Wood) was transferred from the Secretary of State for Health to Epsom Healthcare NHS Trust by way of a transfer order of the same date. I attach a copy of the completed Inland Revenue Particulars relating to this transfer as Exhibit "**AZC3**". The area of land transferred is shown edged red on the plan attached to this document.*"

(ii) The land edged red on the Plan attached to AZC3 forms a single contiguous area which includes the hospital and its grounds, as well as the land.

(iii) SCC and the relevant NHS bodies held (and continue to hold) this land for the purposes of its health functions. As Mr Clay puts it: *'It is now held as part and parcel of the same title as the Hospital and its fate is inextricably linked to that of the hospital.'*

(iv) Although the land is very different in character to that of Newhaven beach, the two cases are analogous. The Beach is part of the *'operational land'* of the Harbour and the land is held, with other land, for health purposes.

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(v) The term *'Operational land'* is a planning term and is defined in section 263 of the Town and Country Planning Act 1990 as *'land which is used [by a statutory undertaker] for the purposes of carrying on their undertaking'*. [The term *'statutory undertaker'* is any one of those bodies mentioned in section 262(1) and involves railways, tramways, road and water transport, canal and inland navigation, dock, harbour, pier or lighthouse undertakings or airport operators.]

(vi) Although the hospital is clearly not a statutory undertaker and the land is clearly not operational land within the meaning of the 1990 Act, the objector nonetheless submits that because the land is and was being held for health purposes by a public body it should be regarded as being analogous with the operational land of a port operator which is a statutory undertaker. The fact that every part of the land identified as being held for those purposes is not at any given time being used does not affect its status as land held for those purposes.

(vii) The objector claims that at no time after 1993 was any distinction drawn by the Secretary of State between the operational site of the hospital and the application land. The objector submits that *'the fate and function of the Site cannot be severed from that of the Hospital Site and its grounds. It is part of the same Title, held for the same purposes and to be available to the NHS for any of its statutory health functions, to be treated, in terms of its status, as part of the working Hospital land. The possible future need to use the land for the improvement or expansion of the hospital services that the PCT provides is no different, in principle, from, for example, the future works to alter the breakwater relied on by the SC in Newhaven, to establish statutory incompatibility.'*

(viii) The objector says that should the expansion or improvement of the Hospital services require the land, or any part of it, then there can be little doubt that its registration as a TVG would be capable of frustrating or impeding the exercise of its powers in respect of land which it holds for health purposes.

Submissions of the applicant on statutory incompatibility

(m) The applicant says that the fact that the land may be held within the same title as the operational hospital site does not mean that it is to be treated as part of the working

hospital. The submission of the objector (premised on the decision in *Newhaven*) that registration of the land would give rise to statutory incompatibility is denied.

(n) Five submissions are made by the applicant in answer to the plea of statutory incompatibility.

(i) The objector's very wide interpretation of the doctrine would have the net effect of removing from the 2006 Act every public body which held land for statutory functions which, if it chose to exercise, would be frustrated by registration of its land as a TVG. That is plainly not the intention of Parliament. It is particularly apposite to mention what was said by Lord Neuberger at [101] in Newhaven:

'In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.'

(ii) The court in *Newhaven* did not in fact cast the doctrine in the very wide terms advanced by the objector. In the first place, the doctrine was held to apply only to land held *and operated* for a particular statutory purpose (see Lord Neuberger at [93]) compared to land merely in the ownership of an authority which might be used for a particular purpose inimical to TVG use in the future (see Lord Neuberger at [101]). In the second, the court did not choose to overrule, confine or even disapprove of the three cases cited at [98]-[100] for which the registration of the land as a TVG frustrated the proposed exercise of the public authorities' statutory powers.

(iii) The doctrine depends upon a statutory construction by reference to the rule that general legislative provisions do not allow derogation from a special one (see Lord Neuberger at [93]). The special provision at issue in *Newhaven* was a statutory duty to *'maintain and support the harbour'* (section 49 of the Newhaven Act 1847). The application land formed a part of the operational land of the harbour even though it was not actually used as such. It was part-and-parcel of the land to which a statutory duty to maintain and support applied. As such, the Supreme Court found an

9

incompatibility with the duty at s.49 Newhaven Act 1847 and registration of the land as a TVG (at [94]).

(iv) By contrast there is no similar special duty imposed upon the NHS which would permit derogation from the general application of the scheme of the 2006 Act. Reference was made to the general duty on the Secretary of State at section 1 of the National Health Service Act 2006 as being an analogous duty to section 49 of the 1847 Act. This is wrong.

First, because section 1(1) requires the Secretary of State to *'continue the promotion in England of a comprehensive health service designed to secure improvement …'*, it does not place a duty on the Secretary of State merely a target, as the Court of Appeal held in *R v North & East Devon HA ex parte Coughlan* [2000] 2 WLR 622 (considering the materially identical wording of the 1977 Act) (per Lord Woolf MR at [22]). The fact the Secretary of State does not, in fact, secure *'a comprehensive health service'* is immaterial provided he has regard to the target to attempt to secure one to meet its objectives (per Lord Woolf MR at [25]).

Secondly, and in any event unlike section 47 of the 1847 Act there is no duty upon the Secretary of State to secure a health service on the application land. It is, therefore, incorrect to say that there is a duty of any kind to do anything on the application land. The point is best illustrated by reference to its enforcement: a claim for judicial review could not be sustained against the NHS for disposing of the hospital site and the land for a non-health purpose *per se*, whereas a claim might well be sustained against the port authority for disposing of land comprising part of the operational harbour in Newhaven because Parliament has specifically required it to maintain and support Newhaven harbour.

(v) Dr Bowes says that even if that is wrong, the land still cannot rationally be said to form part of the working hospital land in contrast to the man-made beach in Newhaven which was part of the working harbour to which a specific and narrow statutory duty fell upon the port authority to maintain and support. The beach was in fact part of the operational land of the statutory port undertaker (at [8]). The definition of operational land (which concerns land of statutory undertakers) is *'land which is used [by a statutory undertaker] for the purposes of carrying on their undertaking'.* The

land here is not used and never has been used by the NHS for the purposes of carrying on their undertaking (of health care functions). Indeed, it has been fenced off from the hospital site for the entirety of the qualifying period.

(o) Accordingly, the applicant submits that it has no case to answer on statutory incompatibility.

Further submissions of the objector in reply on the issue of statutory incompatibility

(p) The objector does not accept that its approach on this issue would have the effect of excluding all public authorities from the ambit of section 15; nor does the decision in *Newhaven* narrowly confine the doctrine of statutory incompatibility to (a) operational land (b) statutory undertakers, and (c) public bodies whose powers arise from a special Act.

(i) The objector does not cast the doctrine as widely as the applicant suggests. It is accepted that the court did not seek to extend the doctrine to local authorities who might in future wish to develop land: *Newhaven* [101]

(ii) The position of local authorities is entirely different from the NHS. Local authorities and some other public bodies (e.g.: development corporations) have a range of express powers to hold land for open spaces and recreation and are therefore in a position to protect their position regarding public access to land by holding land for recreational purposes under a swathe of powers, including e.g. Open Spaces Act 1906, as well as powers to dedicate land for recreational purposes when held for e.g. highways, housing or planning.

(iii) The Courts have been willing to infer that where such power exists (for example the 1906 Act) and where land has been used for recreation by the public, it can be inferred that it holds the land under such powers, even where it is not held or appropriated for other purposes: see *Naylor* at [45] and, indeed, the ratio in *Barkas*. For these reasons, following *Barkas*, local authorities with powers to hold land for recreational purposes are largely immune from claims under section 15.

(iv) By contrast, the NHS has no power to hold land for public recreational purposes. It is only able to hold land for 'NHS' purposes.

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(v) In enacting the 2006 Act, it cannot have been intended by Parliament that those public bodies who hold land only for health purposes and are unable to prevent prescriptive rights from being created, are nevertheless subject to section 15.

(vi) The objector's case is that the scope of the doctrine of statutory incompatibility is much narrower than that attributed to it as *'every public authority which holds land for statutory purposes'* by the applicant in her further submissions, and would apply to a relatively narrow band of public bodies which have no power to hold land as recreational open space and which are thereby precluded from relying on the decision in *Barkas*.

(vii) *Newhaven* recognised the relevance of this at [79] in describing the private law of prescription: *'As prescription is based on the fiction of a grant, a landowner who could not have granted the claimed easement cannot suffer prescription'.*

(viii) The point is explored further at [91]:

'As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (indulging 'as of right' in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, McEvoy v Great Northern Railway Co [1900] 2 IR 325, (Palles CB at 334-336) which proceeded on the basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.'

(ix) The objector acknowledges that this is not the complete answer: see *Newhaven* [92]:

'In this case if the statutory incompatibility rested <u>only</u> on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility

because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act." [emphasis added]

(x) In other words, the statutory incompatibility may arise where both (a) the public body has no power to hold land for recreational purposes; and (b) the use of the land for section 15 user would be incompatible with the exercise of the statutory purposes.

(q) In response to the applicant's submission that the court in *Newhaven* did not cast the doctrine in the wide terms advanced by the objector:

(i) The objector says that *Newhaven* addressed all possible future activities of the port operator. It was also unnecessary for the port operator to show current interference with its operational activities. Indeed, there was an express finding that *'There has been no user as of right by the public of the Beach that has interfered with the harbour activities"* [92]. It is, therefore, unnecessary, in order to demonstrate statutory incompatibility, to show either (a) that there is current active use of the land for statutory purposes, or (b) proven actual conflict between the relevant statutory purposes and the claimed user as of right.

(ii) The three cases at [98] to [101] of *Newhaven* are distinguished by the Supreme Court on the basis that (a) there was no statutory incompatibility alleged, and (b) the question did not arise. All three cases related to local authorities. None related to NHS or NHS purposes.

(r) There is nothing in the *Newhaven* decision which restricts the doctrine to statutory undertakers who hold the land under a *duty*, such as that involving the duty under section 49 of the 1847 Act. Rather, the decision is concerned with, and repeatedly uses the term, *'purposes'*. Statutory incompatibility is not confined to rights which conflict with *duties*, but arises wherever there is a conflict between those rights and any statutory *purposes*, whether they are established in the form of powers, duties or functions. The ratio of *Newhaven* is that it is not possible to acquire rights by prescription against a public authority which had acquired land for specified statutory

9

purposes when the use of the land for those purposes would be incompatible with those statutory purposes: [91]

(s) The objector says that the applicant is wrong in not applying the doctrine to operational hospital land.

(i) The objector relies on the full definition of *'operational land'* in section 263 of the Town and Country Planning Act 1990 and associated regulations which are much more complex than the short definition in subsection 1(a). Section 263 provides as follows:

'(1) Subject to the following provisions of this section and section 264, in this Act 'operational land' means, in relation to statutory undertakers:

(a) land which is used for the purpose of carrying on their undertaking

(b) land in which an interest is held for that purpose.

(2) *Paragraphs (a) and (b) of subsection (1) do not include land which in respect of its nature and situation, is comparable rather with land in general than with land which is used or in which interests are held,, for the purpose of carrying on of statutory undertakings.'*

(ii) The curious wording of subsection (2) is for the purpose of excluding shops, offices, showrooms and dwelling houses even if used in some way for the undertaking: see discussion in Encyclopaedia of Planning Law Vol 2 at P263.04 and *Minister of Fuel and Power ex p. Warwickshire County Council* [1957] 1 WLR86; 8P&CR 305.

(iii) Moreover the definition of operational land does apply expressly to certain land acquired with the intention of using it for the purpose of the undertaking where the acquisition occurred before 1968. For the full explanation of the term, the inspector is referred to the relevant pages of the Encyclopaedia of Planning Law Volume 2 at P263 and P264 which makes it clear that land can acquire the status of *'operational land'* through a range of different means, including having at one time had temporary planning permission for development which would, if carried out, involve its use for the purpose of carrying on the undertaking, even if that permission is spent and has expired.

(iv) In short, *'operational land'* is not concerned only with land in active use for the purposes of the statutory undertaking.

(v) The doctrine does not distinguish between land which is, at any given time, being *actively* used from land which may, at any time, be inactive but would qualify as being *'in use'* in the sense of being held for that purpose. The term *'use'* in the definition of Operational Land in the TCPA 1990 is not concerned with distinguishing active use *within* the land held by statutory undertakers for their statutory undertaking, but rather with distinguishing land which is held for their statutory functions by one means or another, and land which is not. Port authorities and other statutory undertakers are often large private companies (e.g. BAA) which may hold land for whatever purpose they please and their land holdings may and usually does include both *'operational land'* and land which is not *'operational land'*.

(vi) In the case of Leatherhead Hospital the application land is (a) part of the same title, and (b) is held under identical powers for identical functions and purposes. In any case, *Newhaven* does not suggest that the beach was in such active use, nor had any interference with the statutory duties or purposes occurred as a result of the use of the beach for LSPs.

172. **Locality of polling district XB**

Submissions of the applicant

(a) Dr Bowes submits that a polling district can amount to a locality for the purposes of the 2006 Act. In *Paddico (267) Ltd v Kirklees Borough Council* [2012] EWCA Civ. 262 Sullivan LJ approved the commentary in *Halsbury's Laws of England* that a locality is:

'…some legally recognised administrative division, as for instance a county, a hundred, a forest, a region of marshland, a city, a town or borough, a parish, a township within a parish, a villa, a hamlet, a liberty, a barony, an honour, or a manor'.

(b) A polling district is defined by reference to section 18A of the Representation of the People Act 1983. It is, therefore, the applicant asserts a *'legally recognised administrative division'.*

9

(c) Dr Bowes mentions that Sullivan LJ overruled the finding of Vos J in *Paddico* that a conservation area could be a locality. As previously indicated, he said this at [2012] EWCA Civ 262 at [29]:

'It is true that its boundaries are legally significant, but they are legally significant for a particular statutory purpose, and those boundaries would have been defined by reference to its characteristics as an area "of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance" (see section 69(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990) – rather than by reference to any community of interest on the part of its inhabitants.'

(d) Although not mentioned specifically by Dr Bowes, again in *Paddico*, Carnwath L.J also stated at [62]:

'The alternative suggestion of the Conservation Area seems wholly implausible, since it is not a description of a community, and in any event it was not in being for the whole of the relevant period. I accept that, where one has an historic district to which rights have long become attached, it may not matter if subsequently the boundaries are affected by local government reorganisation, so long as it remains an identifiable community. However where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link.'

(e) Dr Bowes submits that a polling district's boundaries are defined in accordance with strict rules, as set out in section 18A(3) of the 1983 Act:

'(3) The following rules apply–

(a) the authority must seek to ensure that all electors in a constituency in its area have such reasonable facilities for voting as are practicable in the circumstances;

(b) in England, each parish is to be a separate polling district;

(c) in Wales, each community is to be a separate polling district;

(d) in Scotland, each electoral ward (within the meaning of section 1 of the Local Governance (Scotland) Act 2004) is to be divided into two or more separate polling districts.'

Dr Bowes continues by stating that it is as such a requirement that polling districts are defined by reference to *'community of interest[s] on the part of its inhabitants'* because it is a statutory requirement to preserve existing communities. He says that that legislative requirement is re-enforced by the Electoral Commission Guidance at 5.15:

'The following should be considered as part of the assessment of the suitability of polling district boundaries:

Are the boundaries well-defined? For example, do they follow the natural boundaries of the area? If not, is it clear which properties belong in the polling district?

Are there suitable transport links within the polling district, and how do they relate to the areas of the polling district that are most highly populated? Are there any obstacles to voters crossing the current polling district and reaching the polling place e.g. steep hills, major roads, railway lines, rivers?'

(f) Dr Bowes also points out that *'polling districts'* is used as an example of a *'locality'* by the editors of *Gadsden* at 14-26.

(g) Dr Bowes submits that the clear object of local custom is certainty. The full text of the section of *Halsbury's Laws* (Vol/12(1) at para/616) approved by Sullivan LJ in *Paddico* reveals this objective. As such, the requirement is not whether the polling district is visible on a map (in the sense, I take it, of having definable boundaries) but rather if it is sufficiently certain, as *Halsbury's Laws* explains:

'A custom must be certain in respect of the locality where it is alleged to exist … Some definite limit must therefore be assigned to the area in which the custom is said to obtain'.

(h) Dr Bowes therefore submits that a *definite limit* does reveal itself from the polling district and *Paddico* represents no barrier to recognising a polling district as a locality. Dr Bowes does, however, accept that the boundaries of the polling district will have

9

changed but he says that this does not preclude its recognition as a locality in law for the purposes of the 2006 Act. He cites three authorities in support of this proposition.

(a) *Bremner v Hull (1866) LR 1 CP 748*: this case concerned a dispute involving the correct basis for the elections of churchwardens in the parish of Prestwich in Lancashire, a matter regulated by custom. The claimant had established what would otherwise have been a custom as to the election of the churchwardens. However, it objected to the custom on the basis that in 1848 the township of Whitefield had been severed from the parish and became a new district. Before that time, the arrangements for churchwardens from the township of Whitefield had been the same as those in respect of the other five unsecured townships. Erle CJ held that the 1848 change was not relevant to establishing a custom on the basis of 20-year custom:

'As to the effect of the order in council creating Whitefield a new district, I am unable to see any difficulty. Taking away the care of souls in a portion of a parish or district does not affect the cure of souls in the rest of the parish or the rights, powers and duties of the ecclesiastical officers appointed thereto.'

(b) *R v Inhabitants of the Hundred of Oswestry (1817) 6 M & S 361* concerned the obligation of the inhabitants to maintain a bridge over the River Tanah. Originally, the Hundred of Oswestry had comprised 60 townships, but in 1543 another was established by statute. Abertanah, had transferred from the county of Merioneth in Wales. It was thus argued that Abertanah was not liable to maintain the bridge. However, the High Court rejected the argument holding that the Hundred of Oswestry had a legal existence independently of its precise boundaries. Holroyd J stated:

'Although the hundred has varied at different times in its component parts, still it may be charged as a hundred immemorially.'

(c) In *Leeds Group v Leeds CC* [2010] EWHC 810 (Ch.) at [89] HHJ Behrens held that notwithstanding that Yeadon had ceased to exist in 1937 on its own terms, it still was capable of being a locality because the boundaries of Yeadon were *'defined'*.

(i) In light of these authorities, Dr Bowes contends that the *'overriding policy objective'* in customary law is that of certainty of entitlement (see *Halsbury's Laws* at Vol.32 para.16). He submits that the relevant polling station, which is the candidate locality in this instance, qualifies at it is:

- known to the law as defined pursuant to statute;
- defined by reference to the convenience of its inhabitants as a matter of law;
- certain at the point of registration because of the statutory list of streets.

Submissions of the objector on the claimed polling station locality

(j) Mr Clay makes the point that the chosen locality was not specifically relied on by the applicant herself or any of her witnesses in their evidence. There is, of course, no reason why it should be as a locality either exists in law or it does not. There is, for instance, no necessity to show that it is a cohesive community as applies in the case of a statutory neighbourhood.

(k) Mr Clay submits that a polling district is neither an administrative district nor an area with legally significant boundaries. It is no more than a bare list of addresses and is more akin to a postal code. It is an area within which electors are required to use a certain polling station. It has nothing to do with the community and they hold nothing in common other than a shared polling station which they are required to use at elections.

(l) Dr Clay submits that there is no precedent for a polling district. He also says that the older cases [*Bremner* and *Oswestry*] in relation to custom, relied on by the applicant, do not assist in determining whether a polling district is a locality for the purposes of the 2006 Act. He argues that the essential component of certainty is absent in that the applicant is unable to identify the existence of the current boundaries throughout the whole of the 20 year qualifying period. He clearly relies on the fact that the current polling district only came into being in February 2013 once the 20 year qualifying period had expired. He says that the applicant has produced no evidence to identify where the boundaries of the polling station were either at the beginning or end of the qualifying period. Moreover, he says that the polling district has no boundaries shown

on any published document and merely comprises a list of addresses falling within its catchment.

(m) As Mr Clay puts it, whilst sympathising with the applicant's difficulties in obtaining information in relation to the predecessor polling districts, we are nonetheless bound by what Carnwath LJ said in *Paddico* at [62]:

' ... where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link.'

Nor, he says, does it enjoy *'a community of interest'* (Sullivan LJ at [29]) who says in the case of a Conservation Area that it does not exist *'by reference to any community of interest on the part of its inhabitants.'* In dealing with this in his closing oral submissions, Mr Clay distinguished a ward which returned members and polling stations which did not.

Late submissions from the applicant on locality

(n) Dr Bowes sent me a further submission in which he stated that the applicant had been informed by County Councillor Tim Hall (a current member of SCC representing Leatherhead as well as being a member of MVBC between 1988-2010) who evidently chaired the SCC committee responsible for overseeing the boundary changes in 2013 which led to the change in what Dr Bowes describes as the *'ward patterns and the need to change polling districts'*. Mr Hall has evidently confirmed to the applicant that since 1988 there has always been a polling district B within the ward of Leatherhead South. It only received the addition of an 'X' in 2000 (as it is put to me):

'because the first letter represents where the ward comes on the list of wards (each ward is given a letter (e.g. X in the case of Leatherhead South) and then another letter to denote a polling district, e.g. B - thus Leatherhead South Polling Districts are XA, XB, XC, and XD).'

(o) Dr Bowes says that Mr Hall is able to confirm that the only change in the boundaries of the polling district since 1991 has been the relocation of the properties around Tyrrells

Wood and Highlands Farm (of whose location I am unaware) to the new polling district XC in 2013 (this is to the East of the A24).

(p) On the face of it, I am being told that the boundaries of the relevant polling district (that is, by reference to the list of its constituent streets) have been constant throughout the qualifying period with the exception of the two areas which moved into the next polling district of XC.

(q) Dr Bowes therefore says that this means that there is now sufficient clarity when it comes to the boundaries of the claimed locality and the position is consistent with the ratio of *Oswestry* and *Bremner*. The point is that variations in the extent of the subject locality will not necessarily destroy the custom.

173. **Further submissions from the applicant on neighbourhood**

(a) Dr Bowes submits that neighbourhood can be shown *'by very mundane characteristics'*. Reference is made to the obiter dictum of HH Judge Behrens QC in *Leeds Group Ltd v Leeds CC [21010] EWHC 810 at [98-107]*. Dr Bowes emphasises (a) the fact that the claimed neighbourhood is contained within 3 roads (the so-called *'hard-edged urban boundaries'*) and (b) the fact that there is a change in character in the case of the settlement to the south of Highlands Road and his outline closing submissions at [29] in which he mentions the various facilities to which reference has already been made herein ranging from the church (which actually lies outside the boundary of the claimed neighbourhood) and St Mary's Primary School (now closed)). An important point made by Dr Bowes is that the boundary roads constitute *'distinctive urban boundaries, serving to bind the smaller interconnecting streets within them together'*. I certainly see the point being made by Dr Bowes about this but I think cohesiveness calls for something more than an area which is merely bounded by distributor roads otherwise the term *'neighbourhood'* in the 2006 Act would be practically meaningless.

Further submissions from the objector on neighbourhood

(b) Mr Clay submits that the *'factual situation fatally undermines the applicant's position'*. He says the claimed neighbourhood has *'no particular cohesion, other than one which is thrown along the roads which surround a group of people who have completed a*

9

proforma/questionnaire'. He also reminded me that some of the applicant's witnesses, even the applicant herself, were not supportive of the boundaries of the claimed area.

(c) Mr Clay also submits that the area was somewhat contrived in that the applicant's case on the claimed neighbourhood seems to have been restricted to those who gave oral evidence. He also questions the exclusion of those features which were relevant to cohesiveness.

Discussion

174. **Sufficiency of use as of right for LSP on the land for at least 20 years (I shall be dealing with statutory incompatibility, locality and neighbourhood under separate heads)**

(a) Numerically, the application had ample support. As indicated, 54 individuals provided statements and EQs of whom 22 gave oral evidence. Of those giving oral evidence, 7 were 20 year plus users, another 7 were users for between 10 to 15 years with the remaining 8 having used the land for less than 10 years. In addition, albeit with some overlapping, there was a grand total of 362 EQs. If one turns to App/1, one sees the dashed blue line marking the boundaries of polling district XB. Within this area there are 1,644 electors (see email of Shaun Hughes dated 19/05/2015 at A1/E43). We have no population figures as such for either the claimed locality or the claimed neighbourhood (which are relatively small areas) but it seems to me that, without more, the numbers of those who supported the application to register were sufficient to justify registration.

(b) One has, of course, to look at all the evidence in the round to determine whether the number of people using the land would have been sufficient to signify that it is in general use by the local community for informal recreation. My impression of the evidence as a whole is that the claimed use for LSP was sufficient.

(c) Those who gave oral evidence all said that they observed others using the land and it is reasonable to assume that a number of these individuals would have lived within the claimed locality/neighbourhood in view of its proximity to their homes. Moreover, the written evidence of those who did not give oral evidence is also largely consistent with

and supportive of the oral evidence given by the applicant's witnesses in relation to the use of the application land for more than twenty years without permission or objection.

(d) The analysis of Sullivan J in *McAlpine Homes* at [73-77] is also very helpful under this head. It is clearly material that the land (for which the landowner had no use) is within easy walking distance of local housing and is plainly suitable for dog-walking and children's play. It is also easy to access the wood and there were no signs forbidding entry. Generally the circumstances were entirely consistent with the contentions of the applicant's witnesses that people were using the wood for informal recreation without restriction.

(e) Very sensibly, no issue was taken on spread as it was obvious that the supporters of the case for registration were adequately spread throughout the claimed locality/neighbourhood. This can be seen on the plan at O1/86A.

(f) No issue arises on *'as of right'*. There were no vitiating features in play which would preclude use as of right and the application land was at no time held by SCC or by any of the various NHS bodies mentioned herein for purposes which conferred an entitlement on members of the public to use the land for informal recreation. For instance, there was no evidence of any overt act or acts on the part of the objector, or its predecessor, to demonstrate that, before January 2013, the landowner was granting an implied permission for local inhabitants to use the wood. No issue either was taken on interruption. On the face of it, time did not stop running during the qualifying period.

(g) It seems to me that one can look at the expressions *'LSP'* and *'on the land'* together. In the case of LSP, there were credible accounts from a number of witnesses who spoke of their use of the wood as a place for informal recreation. This would have been mainly walking, with or without dogs, and children's play. The wood is an ideal environment for those who simply wish to wander around under the trees where there is plenty of space for dogs to roam off the lead. The place has much to commend it in environmental terms and there are plenty of openings off the main paths in which children can play, build camps or simply fool around on their bikes. There are a number of interconnecting paths and one can see just how easy it is to walk circuits around the wood, not least for those looking for a relatively short walk near their home.

9

The main 2/3 paths running through the wood are plainly heavily used. Grass no longer grows on these paths where the earth is very compacted and I consider that they would provide firm ground to walk on even in the wetter parts of the year.

(h) I have already indicated what my findings are in the case of each of the applicant's witnesses all of whom I found to be credible witnesses whose evidence I accept save that in the case of Timothy Jones I suspect that he may well have exaggerated the amount of photography which he did in the wood.

(i) In making this finding I have borne in mind that people are not very good at recalling accurately events that occurred some time ago. This reflection applies to many witnesses (on either side) at TVG inquiries, seeking to recall conscientiously events of many years ago. It will apply particularly where the events in question, such as walking dogs and playing with young children etc, are not of a kind to be particularly memorable. It applies with equal force to evidence which has not been subject to cross-examination. I also bear in mind that those giving evidence for the applicant will often be those who feel most strongly about development and who wish the wood to be retained for continuing recreational use. It seems to me that the overall pattern of events in the case of the wood, not least in relation to its long-standing planning status, is consistent with the evidence of the applicant's witnesses when taken as a whole, rather than giving undue emphasis to the evidence of particular witnesses.

(j) I turn next to LSP and the assertion (in effect) that the wood has predominantly been used as a place of transit on the established paths rather than as a destination in its own right for LSP. The law under this head has already been addressed (*Laing Homes* and *Oxfordshire* [47]) and, as it seems to me, the questions I have to decide fall within a narrow compass, namely (a) whether any proven use of the land was in the nature of transit over defined routes, and (b) whether any use outside these defined routes would have been only occasional and/or ancillary to the exercise of putative rights of way over the land. In my view, purely transitory use would undoubtedly have taken place but it was not the only or main use as I consider that there would also have been substantial use of the wood for LSP, such that it would have been plain to a reasonable landowner on the spot that such use was referable to a right to enjoy

recreation over the whole of a wider area of land rather than the lesser right, i.e. of a right of way.

(k) I have borne in mind those passages within *Laing Homes* [102-105] which require me to discount user which would suggest to a reasonable landowner that users believed they were exercising a public right of way which would include situations where a dog off the lead roams freely outside the footpath whilst its owner remains on the footpath or where owners are forced to retrieve their dogs which have run away from the footpath or where walkers casually or accidentally stray from the paths without any intention of going onto other parts of the application land. In my view, dog-walkers are liable to be using the tracks and roaming elsewhere within the wood. As I say, there are a number of interconnecting tracks on what is a small compact site. This is not, for instance, a case involving circular paths around fields or that of a single path or short cut leading to a specific destination (say shops) beyond the land where one might reasonably expect a flow of pedestrian traffic using the land mainly for the purposes of transit. This, however, is a case involving a small wood with a plethora of tracks which is likely to be magnet for local dog-walkers and children looking for somewhere interesting to play not too far away from their homes. Having said that, I do accept that the wood would have been used as a place of transit for parents and children walking to and from St Mary's Primary School yet, by the same token, there was evidence of children's play on the way home after school. For instance, Mrs Hollingshead said that what should have been a 5 minute walk home from the playgroup and, later on, the primary school, usually lasted for 30 minutes with the children finding things of interest to do in the wood such as collecting nuts, fir cones or looking out for the wildlife. Sometimes their school friends would join them.

(l) I should address the issue of *'on the land'*. The objector asserts that not all of the land would have been used for LSP. If this is right then I have to consider severance. As previously indicated, it is my impression that around 60-70% of the wood is reasonably accessible for LSP. This is not a case like *Oxfordshire* where only 25% of the land area, which was scrubland, was occupied by paths and clearings which would have been reasonably accessible to what was described as the hardy walker. Despite this, the House of Lords still found that such a narrow area of use would not necessarily be

9

inconsistent with a finding that there was recreational use of the land as a whole. As Lord Hoffmann put it at [67]:

'For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk'.

In the event, the House of Lords chose not to interfere with the factual finding of the inspector, taking the view that every case depended on its own facts.

(m) It is clearly understood that the expression *'on the land'* in section 15 does not mean that the registration authority has to look for evidence that every square foot of the land has been used. In my view, in determining whether it can sensibly be said that the whole of the land in this instance is registrable, the correct approach is to determine whether the unused areas are in fact integral to the enjoyment of the land as a whole. A wood such as this is a case in point. There are areas of mature growth which are unused or used only occasionally but they are palpably integral to the enjoyment of the wood as a whole. It would be absurd to sever out these unused areas.

175. **Statutory incompatibility**

(a) Put shortly, the issue is whether land held for the statutory purposes of the NHS falls within the same category as land held by a statutory undertaker for the purposes of its operations such that, consistently with the decision in *Newhaven*, the land in this instance would not be registrable as a matter of law.

(b) I have set out the competing submissions of the parties on this issue at [171] and, having considered the matter carefully, I prefer those of the applicant under this head.

(c) I agree with the applicant that the fact that the application land forms part of the same freehold title as the hospital site should not mean that it must be treated as part of the working hospital site when, as a matter of fact, it plainly is not and never has been.

(d) I also agree with the applicant's submission that the objector's case on statutory interpretation would in practice emasculate the provisions of the 2006 Act when it came to land held by public bodies for specific statutory functions. This can hardly

have been parliament's intention and support for what the applicant argues can clearly be found from what was said by Lord Neuberger at [101] in *Newhaven*:

'The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.'

(e) Dr Bowes rightly draws attention to what Lord Neuberger said at [93], namely that the doctrine was held to apply only to land that was acquired and held by a statutory undertaker (which does not apply in this instance) whose continuing use (because of the conflict between the applicable statutory regimes) would be inconsistent with its registration as a TVG. In *Newhaven* the operational land of the harbour (of which the beach formed part) was subject to statutory provisions which imposed on the undertaker a positive duty to maintain and support the operational land of the harbour which, in the event that works had to be executed in a way which affected the public's use of the beach were it registered as a TVG, there would be an obvious and irreconcilable clash as between the conflicting statutory regimes. The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in *Newhaven*) arises on the part of the landowner to do anything in the case of the land (in contrast to *Newhaven*) and the general duty imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected.

(f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being. As Dr Bowes says, in *Barkas* at [66] Lord Carnwath explained that land in public ownership is not outside the 2006 Act and to suggest that any land held for purposes inimical to TVG rights would be outside the 2006 Act would be absurd, not least as it might give rise to unnecessary speculation and debate about what the landowner's future intentions were for the land in contrast to the wholly proper analysis which, in my view, arises from *Newhaven* which focuses on the specific duty or duties

which are imposed on a landowner (in its capacity as a statutory undertaker) with regard to its holding and management of the land which would clash with registration of the land as a TVG. As indicated, no such conflict impacts on the holding of the land in this instance in the performance of the statutory health functions of the NHS and those bodies through whom they are discharged.

(g) Nor do I accept either that the principle in *Newhaven* applies only to those public bodies which have no power to hold land for public recreation since it might mean in practice that all or most publicly held land is outside the 2006 Act. This is because land held for statutory purposes which embraces the principle in *Barkas*, or which otherwise entitle local inhabitants to use the land for recreation, would be non-qualifying, as would land held by public bodies with no powers to permit recreation such as might apply, for instance, in the case of land held for education. In my view, if registration was to have been avoided during the relevant qualifying period in this instance then the answer was permissive signage or making user contentious.

(h) I therefore take the view that the doctrine of statutory incompatibility has no application in this case.

176. **Is a polling station a locality in law?**

(a) I agree with the submissions of the objector on this issue. The claim being made by the applicant is not one for which there is any authority which would bind the registration authority to accede to this submission.

(b) Mr Clay is, in my view, right when he submits that a polling district is not a qualifying locality within the meaning of this term where it is first used in section 15(3). I accept that a polling district is an area with legally significant boundaries but it has nothing to do with any community of interest on the part of its inhabitants. It is concerned entirely with the practicalities of administering the electoral process within a given area and has no reference to any community of interest on the part of its inhabitants (see *Paddico* at [29] and [62]). It is not as if polling districts return members.

(c) In arriving at the above view, I have taken into account the current Guidance of the Electoral Commission when it comes an overview of the legislative requirements when it comes to polling districts and polling places.

For instance, at 5.15 it is stated as follows under the heading *'Polling Districts'*:

'The following should be considered as part of the assessment of the suitability of polling district boundaries:

- *Are the boundaries well-defined? For example, do they follow the natural boundaries of the area? If not, is it clear which properties belong in the polling district?*
- *Are there suitable transport links within the polling district, and how do they relate to the areas of the polling district that are most highly populated? Are there any obstacles to voters crossing the current polling district and reaching the polling place e.g. steep hills, major roads, railways lines, rivers?'*

The foregoing matters plainly focus on the administrative practicalities at elections.

(d) Whilst I accept that polling districts may well be chosen for the convenience of its inhabitants, it seems to me that this is not a description of a community falling within the meaning of the term locality where used in section 15(3). If it did then the term 'locality' would, in my view, be devoid of any coherent meaning at all and could feasibly embrace legally significant boundaries of more or less any description without having any credible relationship at all with the claimed TVG, and, in my view, this cannot have been the statutory intention.

(e) A further difficulty facing the applicant under this head is that she is unable to identify with any or adequate precision the boundaries (or even its existence) of the relevant polling district (or any of its predecessors serving the area) throughout the whole of the relevant qualifying period. What we have is a current polling district created in February 2013 once the qualifying period had already expired. As Carnwath LJ stated in *Paddico* at [62]:

' ... where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link.'

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(f) On the face of it, however, in view of the claimed evidence from Mr Hall, it seems that the applicant may now be able prove this. As indicated above, the late submission from Dr Bowes dated 1/06/2015, if true (and there is no suggestion that the information coming from Mr Hall is or is likely to be erroneous), suggests that the applicant is now able to demonstrate with sufficient clarity both the existence and boundaries of the polling district throughout the qualifying period. On the other hand, although the current process is admittedly an informal one, it is, as it seems to me, very unfortunate indeed that on such an important point as this the applicant was unable to lay out such evidence on the final day of the inquiry. I do not know what Mr Clay thinks about this new information emanating from Mr Hall and which comes to me via the applicant and then through her counsel without any verifying documentation in support. I suspect that Mr Clay would be calling on me to ignore it as it is unsupported by any credible documents and also comes very late in the day. At any rate, it was still open to Mr Clay to deal with this in further submissions but he has chosen not to do so and, accordingly, I deal with the matter on the basis of the evidence as it has been presented to me which I take to be accurate.

(g) However, because of the view I take on the inability of a polling district to constitute a locality in law I do not consider that anything turns on this evidence from Mr Hall.

177. **Neighbourhood**

(a) The term 'neighbourhood' is an ambiguous term. It may mean *'the vicinity'* of a place or a person (see e.g. *Stride v Martin [1897] 77 LT 600*) but it may also refer to an area that is recognisable as having a degree of coherence such that people would recognise it as being separate or different from the areas immediately surrounding it. It is, in this sense, that the term 'neighbourhood' is used in the 2006 Act. It seems plain to me that a neighbourhood must be understood as meaning a cohesive area which is capable of meaningful description in some way. But beyond that it has no particular requirement, and whether the claimed neighbourhood is made out is a question of fact.

(b) In my view, it must, I think, be substantially a matter of impression whether the claimed area is a neighbourhood or not. My impression, and my considered view having heard the evidence and visited the area, is that the claimed neighbourhood is <u>not</u> a

neighbourhood within the meaning of the 2006 Act. Whilst it is correct that it is enclosed within busy, or relatively busy, roads, it did not seem to me that the character of the residential areas differed substantially or significantly from that within the adjoining areas.

(c) The residential properties comprised a mix of styles and ages and there was nothing in the way of facilities (that is, with the exception of the land itself) serving predominantly the claimed neighbourhood and none other. There are undoubtedly a number of community facilities located within the claimed neighbourhood but without exception these facilities serve (or rather served in the case of St Mary's Primary School) a much wider catchment. In these cases, one is always on the lookout for local shops or true community facilities such a small parade of shops with a post office, licensed premises, local schools, churches and the like, in other words, the sort of facilities that create a self-contained small community. It is the absence of those features which would indicate that one would need to see some other factor indicating cohesiveness but, with the exception of the land itself and perhaps the allotments as well, there is very really nothing beyond the fact that many of the applicant's witnesses, when asked to cast their mind to it, considered that their neighbourhood was simply the area in their own particular vicinity or where their friends mainly lived. I also think that most of the applicant's oral witnesses were unduly influenced by being presented with App/1 in their support of the claimed neighbourhood.

(d) It was also significant that a number of the applicant's witnesses took the view that the neighbourhood should in fact have been more extensive than claimed. In other words, there was no unanimity amongst the applicant's witnesses that App/1 was the true neighbourhood. See, for instance, the evidence of the applicant herself (who it seemed to me - as she herself accepted - did not really have a correct understanding of the terms neighbourhood and locality) and that of Sandra Sullivan, Julia Jarrett, Ken Ellis, Les Prescott, Heather Ward, Michael Brian and David Brett. For instance, more than one witness was puzzled as to why the church was not included within the claimed neighbourhood (whereas the church hall on the other side of the road was) which struck me as a bizarre omission. Indeed, it was the evidence of Imani Ayimba-Golding that she attended a Sunday club at the church hall in Church Road. Evidently they would all troop across the road to the church at the end of the morning service.

9

(e) Lastly, this neighbourhood had no name. That is not a necessary requirement, but if there is historical cohesiveness in respect of an area, one might expect it to have acquired some form of collective description.

(f) I have also borne in mind that when Parliament amended the Commons Registration Act 1965 to permit registrations to take place by reference to *'a neighbourhood within a locality'* it intended to make it easier to register TVGs, and did so by allowing them to be registered by reference to a concept that was not precise either as to definition, or as to boundary (see *Oxfordshire* per Lord Hoffmann at [27]). However, notwithstanding this, my conclusion for the reasons I have set out above (i.e. because the area does not have sufficient individual cohesiveness or community identity) is that the claimed neighbourhood is not a 'neighbourhood' within the meaning of the 2006 Act.

(g) It seems to me that if Parliament had intended that a neighbourhood should be interpreted to mean the area in which the recreational users reside, then it would have said so. Moreover, whilst I accept that the bar is set low in the *Leeds Group* litigation, having been to the area in this case and heard the evidence, I take the view that, as a matter of fact and degree, the applicant has fallen well short of what is required to be proved in order to satisfy the neighbourhood element.

178. **Findings of fact and recommendation**

(a) I find that a significant number of the local inhabitants of the claimed locality shown within the blue dashed lines on App/1 (being the polling district XB within the Leatherhead South ward of MVDC) indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

(b) I find that a significant number of the local inhabitants of the claimed neighbourhood shown within the red lines on App/1 and falling within the locality of Leatherhead South ward also indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

(c) I find that the objection advanced by the objector that the land was not registrable on the ground of statutory incompatibility was not made out.

(d) I find that the claimed locality is not a locality within the meaning of section 15 of the 2006 Act.

(e) I find that the claimed neighbourhood is not a neighbourhood within the meaning of section 15 of the 2006 Act.

(f) Because the applicant has failed to satisfy all the elements necessary to justify the registration of the land as a TVG, my recommendation to the registration authority is that the application to register (under application number 1869) should be rejected.

179. Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be *'the reasons set out in the inspector's report dated 9/06/2015.'*

William Webster

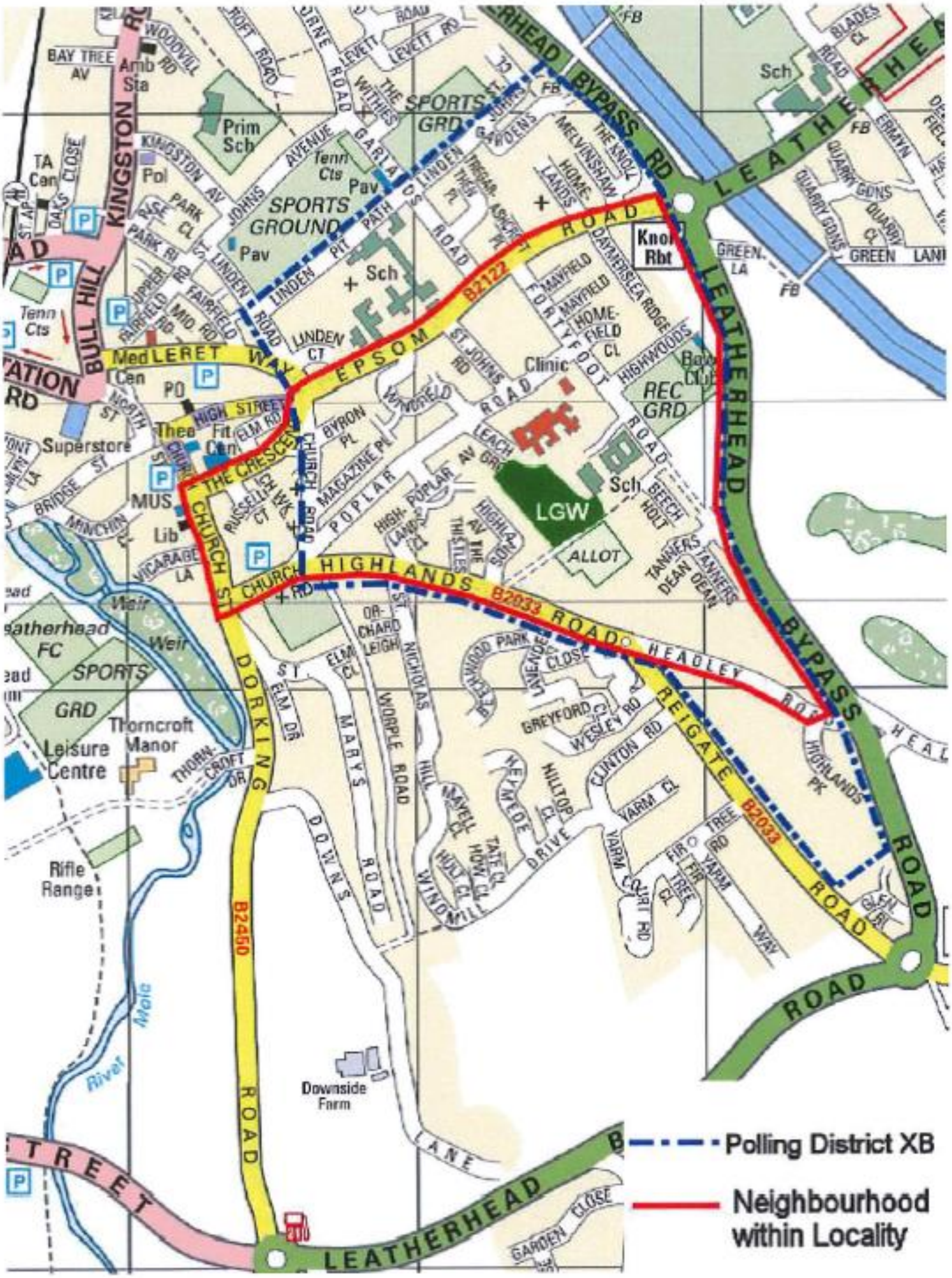
12 College Place

SOUTHAMPTON

SO15 2FE

Inspector **9th June 2015**

Appendix 1


Polling District XB
Neighbourhood within Locality
LEATHERHEAD BYPASS RD
EPSOM ROAD
B2122
HIGHLANDS ROAD
B2033
REIGATE ROAD
HEADLEY ROAD
DORKING ROAD
B2450
CHURCH ST
CHURCH RD
THE CRESCENT
HIGH STREET
LERET WAY
KINGSTON RD
BULL HILL
STATION RD
BRIDGE ST
SPORTS GROUND
LINDEN RD
LINDEN PIT PATH
ST JOHNS AVENUE
Knoll Rbt
Clinic
REC GRD
LGW
ALLOT
Sch
Prim Sch
Superstore
Thorncroft Manor
Leisure Centre
Rifle Range
Leatherhead FC
Downside Farm
River Mole
DOWNS LANE
WORPLE ROAD
MARYS ROAD
HIGHLANDS PK
WESLEY RD
CLINTON RD
GREYFORD CL
YARM CL
YARM WAY
POPLAR AV
BYRON PL
MAGAZINE PL
FORTYFOOT ROAD
MAYFIELD
HOMEFIELD CL
HIGHWOODS
BEECH HOLT
TANNERS DEAN
GREEN LANE
LEATHERHEAD ROAD

Appendix 2

SURREY COUNTY COUNCIL COUNTY VALUER'S DEPT.

LAND IN FORTYFOOT ROAD, LEATHERHEAD.

AREA COLOURED PINK : 7·1 ACRES. (APPROX)

SCALE : 1/1250

PREPARED BY | CHECKED BY | O.S. 1756

3530

56

9

Appendix 3


Leatherhead Hospital (General)
Woodlands School
Redbrake
FORTYFOOT ROAD
POPLAR AVENUE
HIGHLANDS AVENUE
Allotment Gardens
St. Mary's C of E First School
Swimming Pool
TANNERS DEAN
REPRODUCED FROM THE ORDNANCE SURVEY'S 1:1250 MAP WITH THE PERMISSION OF THE CONTROLLER OF HER MAJESTY'S STATIONERY OFFICE. CROWN COPYRIGHT RESERVED
AREA COLOURED GREEN: 1.1765 ha (2.907 acres) APPROX.
O.S. Ref TQ 1756 SW
Drawn by
Date 9.5.86
Completed by BC
Checked by GE
Scale 1:1250
SURREY COUNTY COUNCIL, VALUATION AND ESTATES DEPARTMENT
PROPERTIES IN FORTYFOOT ROAD & LEACH GROVE
LEATHERHEAD
PROPERTY SERVICES DEPARTMENT
DIRECTOR — I.G.BOBBETT
Valuation & Estate Management Division
County Hall
Kingston upon Thames
KT1 2DW
File Ref 5701 & 2572
Date 20-5-92
Plan Reg No CV47264
Plan File No D599
59

Appendix 4


Leatherhead Hospital
(Surgical)
Woodlands School
Radbrae
Fortyfoot Recreation Ground
POPLAR ROAD
WINDFIELD
Sherborne Walk
LEACH GROVE
POPLAR AVENUE
ANDS AVENUE
Poplar Road C of E Primary School Annexe
Bowling Grn
Estate Management Services
location Leatherhead Hospital
project ref.
job
title
drawn
checked
scale 1:1250
date 19 June 1991
approved
traced
drawing no. RB/MDS/140/11.
rev.
62

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