APPLICATION (REF. NO. 1888) BY MR NEIL JONES AS CHAIR OF THE REGENT CRESCENT GREEN PRESERVATION SOCIETY UNDER SECTION 15(2) OF THE COMMONS ACT 2006 TO REGISTER LAND AT REGENT CRESCENT GREEN, REDHILL, RH1 1JN AS A TOWN OR VILLAGE GREEN

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REPORT AND RECOMMENDATIONS OF THE INSPECTOR

CONTENT

KEY ABBREVIATIONS USED (others used are made clear in the Report)**:**

IB-1: Inquiry Bundle 1 - Application and related documents

IB-2: Inquiry Bundle 2 - Applicant's list of witnesses, witness statements, additional documents and legal authorities

IB-3: Inquiry Bundle 3 - Objector's list of witnesses, witness statements, other additional documents and list of authorities

IB-4: Inquiry Bindle 4 - Highway Authority documents

ID: Inquiry documents provided by the parties during the Inquiry (as numbered in the list below)

LIST OF INQUIRY DOCUMENTS (ID)

ID1A: Extract from Highway Law paras 1-12 to 1-18 and 6.44 by Sauvain et al, Sixth edition

ID1B: Extract from Defra's Guidance (December 2014) to commons registration authorities and the Planning Inspectorate, para. 6.10.28 on the meaning of 'neighbourhood'

ID2: Letter dated 3 December 2022 from Pat Taylor of the Regent Crescent Green Preservation Society

ID3: Plan showing area claimed as a TVG and the properties in Linkfield Lane which fall within the claimed neighbourhood.

ID4A: Prime Minister's statement on coronavirus (COVID-19), 23 March 2020

ID4B: Stay Home poster

ID5: Highways Search

ID6: Ward Map

ID7: *Lancashire CC v SSEFRA* [2016] EWHC 1238 (Admin)

ID8: Email from Ian Taylor of the Highway Authority to the CRA dated 26 January 2023

ID9: *Fitch v Fitch* (1797) 2 ESP. 543, 170 E.R. 449 (1797)

ID10: *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610

ID11: *Stancliffe Stone Co Ltd v Peak District National Park Authority* [2005] EWCA Civ 747, [2006] Env. L.R. 7

ID12: *R (on the application of The Noble Organisation) v Thanet DC* [2005] EWCA Civ 782, [2006] Env. L.R. 8

ID13: Applicant's Outline of Case

1D14: Objector's Outline of Case

1D15: Applicant's Closing Submissions

ID16: Objector's Closing Submissions

ID17: Inspector's Post Inquiry Note on the highway status issue

ID18: Applicant Response to Inspector's Note on the highway status issue

ID19: Objector's Response to Inspector's Note on the highway status issue

ID20: *Arnold v Britten* [2015] UKSC 36

1. INTROUCTION

1.0.1 I was instructed by the Surrey County Council in its capacity as the Commons Registration Authority ('CRA') to hold a non-statutory public inquiry to consider and to make recommendations to it on the application made by Mr Neil Jones ('the Applicant'), as the chair of the Regent Crescent Green Preservation Society, under section 15(2) of the Commons Act 2006 ('the Application'). The Application, allotted the CRA reference 1888, seeks the registration as a town or village green ('TVG') of land at Regent Crescent, Redhill, RH1 1JN ('the Application Land' and also referred to in this Report as 'the Green')[1].

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1.0.2 To help to ensure the fair and efficient running of the Inquiry, I provided Directions to the parties with regards to the procedure to be adopted at, and the provisions of the necessary documents in advance of, the Inquiry.

1.0.3 The Inquiry itself sat for four days from Tuesday 24 January to Friday 27th January 2023 at the New Council Chamber, Reigate & Banstead Borough Council, Town Hall, Castlefield Road, Reigate, Surrey RH2 0SH. The Applicant was represented by Mr Michael Feeney of counsel who called twenty-two witnesses (albeit four of these were speaking on behalf of their spouses as well), including Mr Jones himself. To assist the Applicant to provide its evidence as fully as possible, two of the twenty-two witnesses in support of the Application gave their evidence by video link.

1.0.4 One objection to the Application was received by the CRA. Shortly before the Application was received, Curwen Group Ltd. ('the original Objector') had purchased the freehold of the Application Land that is registered with Title Number SY 25218 from Regent Surfaces Co. Ltd. and objected by a letter dated 20 September 2021, requesting rejection of the Application. However, the land was sold again on 29th April 2022 to Luckyhome Properties Ltd. ('the Objector'), which maintained the objection made by their predecessors and

[1] As shown on the Map at IB-1, p.17. The Application Form 44 is found at IB-1 starting at p.3.

appeared at the Inquiry, represented by Miss Rowena Meager of counsel. Miss Meager called three witnesses.

1.0.5 At the outset I would make it clear, as I did at the Inquiry, that the merits of the use of the land for recreational purposes, whether in themselves or compared to some alternative use of the land, are of no relevance in determining this Application. For land to be registered as a TVG pursuant to an application under section 15, the Applicant must demonstrate on the balance of probabilities that the criteria in section 15(2) are met. As understandable as the different views on the merits of competing uses may be, it is the criteria in section 15(2) that the Application is to be solely assessed on.

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1.0.6 I was grateful to the two advocates for focussing on the statutory criteria and the issues arising from them. I would like to thank them both and the witnesses of both parties for the assistance provided to the Inquiry and the courtesy shown to me by all throughout. This assisted in the efficient and well-mannered nature of the Inquiry which is a credit to both parties. It is also a credit to the officers of the CRA who have greatly assisted me throughout, as well as to the staff at the Town Hall. I am grateful to them all.

1.0.7 However, I should make it clear, as I did at the Inquiry, that I have written this Report and reached the assessments set out within it independently of the CRA and any of its officers and the CRA will determine the Application taking account of the Report and my recommendations. I have not discussed the merits of any of the evidence provided or submissions made at the Inquiry with any officer or member of the CRA.

1.0.8 As I again informed the parties at the Inquiry, I had visited the Application Land and area prior to the Inquiry to assist me in understanding the evidence given and submissions made. I also made an accompanied site visit on the morning of the fourth day of the Inquiry, Friday 27th January 2023. I was accompanied by the Applicant and Mr Sharique Najam and his father on behalf of the Objector. We observed the Green, its nature and the vegetation

including the horse chestnut (conker) tree in the south-west corner; and the windows giving views onto the Green from the surrounding Regent Crescent properties. We identified the claimed blue line neighbourhood on the ground[2], including not just the Regent Crescent properties but also the relevant properties in Linkfield Lane as well as St Matthews Primary School. We walked north-eastwards along Linkfield Lane and went into the access to the Redhill Tennis Club (close to the junction of Linkfield Lane with London Road), which was referred to during the Inquiry, and crossed London Road and walked southwards and into the Memorial Park, observing the facilities there. I also spent some additional time, before and after being accompanied, walking around the area and observing the Green.

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1.0.9 Against that Introduction, the Report is now set out as follows:

2. The Application and supporting evidence
3. The Objection and supporting evidence
4. Assessment
5. Summary of conclusions and recommendations

[2] Map 3 at IB-1, p.18.

2. SUMMARY OF THE APPLICATION AND SUPPORTING EVIDENCE

The Application and original Evidence in Support

2.0.1 As noted above, the Application was made by Neil Jones as Chair of the Regent Crescent Green Preservation Society ('the Applicant') and dated 3rd May 2021, being received by the Registration Authority on 4 May 2021 and stamped and referenced application number 1888. The Application was advertised in the local press and a notice was posted on the site allowing a period of 7 weeks for representations from 15 July 2021 to 6 September 2021 in accordance with regulation 5 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

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2.0.2 The Application relates to an area of green open space bordered by the 22 houses comprising Regent Crescent and a section of Linkfield Lane (see Section 5 on page 6 of the Application Form – IB-1, p.6)). At the Inquiry the Applicant confirmed that it was intended to include the wall on the southern part of the Application Land adjacent to the pavement on the north side of Linkfield Lane given that it supports the soil of the Site. The Objector took no issue with this and I have considered the Application on this basis.

2.0.3 The Application is made under section 15(2) of the Commons Act 2006 on the basis, as set out in Section 7 on page 7 of the Application Form (Form 44) (IB-1, p.7), that a significant number of local people within the local area had used this space as of right, without force or secrecy and without having sought or been given permission to do so, for lawful sports or pastimes ('LSP') for over 50 years, without interruption with such use continuing at the date of the Application.

2.0.4 In terms of the locality or neighbourhood within a locality relied upon, Section 6 on page 6 of the Application Form (IB-1, p.6) states:

The claimed green is in Regent Crescent, Reigate & Banstead Borough Council, postcode RH1 1JN and shown outlined in red on the attached Ordnance Survey map (2a). It is also highlighted in green on the attached map Edited Copy (Title Plan) - 5Y25218 (2b).

The wider locality is shown on the Ordnance Survey map (3).

It is within the Redhill West & Wray Common ward/electoral division.

2.0.5 The attached Map (3) (IB-1, p.18), described as "*map indicating the locality making most use of the green"*, shows a blue line and a Note stating: "*the blue line shows the area in which households, and the school, have enjoyed immediate access to the Green. It is not possible to show the boundary which would include all those who come to the Green or enjoy it as part of a longer walk. It would also need to show St Matthews School using the Green for many years."*

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2.0.6 The 16 categories of documents accompanying the Application as originally made are listed in Appendix A to the Application Form (IB-1, pp.12-13). These include a statement to support the Application which itself refers to and relies upon the Appendix A documents ('the Supporting Statement'), various other maps, witness statements, certain posters and photographs.

2.0.7 In the Supporting Statement (IB-1, p.14) it is said that:

"*A significant number of local people - indeed all of the residents of Regent Crescent (22 households) - have made regular use of the grassed area for recreation for the last 54 years. Also, other local residents, from adjoining houses in Linkfield Lane, and parents and children using the school opposite, have regularly and repeatedly used the space recreationally*."

It is also said that:

"*The space has been used for many purposes, including: exercise; snowball fights; barbecues; picnics; kite flying; meeting together; relaxation; sun-bathing; easter-egg hunts (involving local schools); 'street parties' (e.g. Queen's Jubilee); Halloween events*."

2.0.8 The Application Land appears to have been provided as green space as part of the original development of Regent Crescent. On what basis and for what purpose it has been provided is one of the key issues that needs to be determined. The Supporting Statement states (IB-1, p.7):

"*The immediate residents of Regent Crescent have believed the land to be available for the use of anyone, in part because of their knowledge of a letter provided by the developers who built the houses in Regent Crescent in 1968 (copy attached - Regent Surfaces Letter - 1968), in which they state that they intended for the land to be taken over by the Local Authority and then it would be 'a public open space available for the use of anybody'. Our belief was that this had occurred as the land has been used in this way since 1968, and the local authority have mown the grass regularly and repeatedly since that time.*"

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2.0.9 There are statements from people who claimed to have used the land for the full 20-year period up to the date of the application date of 4 May 2021 and some from a more recent part of the 20-year period only. There are photographs of the land including those from 1 May 2021 (IB-1, pp.58, 59), 28 April 2021 (from Google Maps) (IB-1, pp. 45-46), 21 January 2021 (IB-1, p.57), 6 January 2010 (IB-1-, p.51) 21 August 2010 (IB-1, p.53), 8 August 2009 (IB-1, pp.47-48, 51), 2 February 2009 and 6 April 2008 (IB-1, p.51) and Winter 1977 (IB-1, pp.49-50 - these therefore pre-date the beginning of the qualifying 20 year period by being before 4th May 2001).

2.0.10 A letter of support was sent on 17 July 2021 from the Chair of the Local Governing Board of St Matthews School Redhill. In this, the Chair stated that the land has been in the care of the Council for decades (IB-1, p.76).

2.0.11 In response to the objection from the then landowner (as detailed below at para. 3.02), the Applicant provided a detailed response, with additional supporting evidence (including additional photographs, most of which but not all were taken after the 4th May 2021 - see Documents R1-R7 at IB-1, pp.88-144), contending that none of the objections was valid or substantial. The response included written statements provided by residents of Regent Crescent, either past or present (R1) and written statements provided by members of the wider community (R2). In summary the main points made in response included:

(1) The Objector has misunderstood the timeframe intended by the legislation. It is not required that each witness needs to have been resident throughout the 20-year period. It is erroneous to suggest that evidence dated from 2001 onwards be excluded and indeed such evidence is needed to demonstrate usage over the relevant 20-year period. A further 13 statements from people in the local area are now provided (Document R1); and also a further 15 from non-residents of Regent Crescent who have used the Green themselves or witnessed others doing so (Document R2).

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(2) In response to the Objector's contention regarding lack of evidence regarding certain activities, the Applicant refers to evidence from the School and others and states that as most of the use of the land was commonplace and not necessarily the subject of explicit record.

(3) The Applicant responded to specific points made about the evidence of Mr & Mrs Hanson, Mrs Albert, Mrs Grasse, Mr Genge, Mr Taylor, Mr & Mrs Spragg.

(4) In respect of the Objector's suggestion that the use of the land may have been permitted, the Applicant says that this is without evidence and contradicts the statement in the Information Sheet that Curwen's own Solicitors provided with the Auction Pack for the sale of the Application Land on 13th May 2021. This is provided as Document R5 and states "…*The solicitors acting for Regent confirmed that Regent was not aware of having given any licenses or permissions to use the Property (but that its knowledge was limited to the period 1993 onwards)….".*

The Applicant also says that until this transfer of the land to the Objector most residents had believed that the land was open space for everyone's use and had been adopted by the local authority. The letter from the previous owner, Regent Surfaces, was only shared with Mr Hanson's neighbours in April 2021 and indicates that they had intended

the local authority to take over the land. Reigate & Banstead went on to maintain the land in terms of regular mowing and it is unlikely that they would have done this had they considered it to be private land. However, the land has been maintained by the local authority (and its predecessor) for over 50 years – they mow the Green three times a year (as well as the verges adjoining the properties). As seen from Document R4, the conveyancing searches indicate that the roadway is publicly maintained, but not the central area (i.e. the Green), the legal title to which has clearly not been transferred to the local authority.

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(5) During this time the land has been used openly without challenge or any form of prohibition from the previous or current owners – there have never been any prohibition signs nor correspondence from the landowners.

(6) With regard to the Coronavirus restrictions, Mr Jones' comments have been lifted out of context. Supporting evidence regarding the specific larger group social events in 2020 are contained in original Documents 9 and 10 and the photos in Document 15 show people on their drives - with an explanation this event would otherwise have been on the Green as were events that have been held in other years of which there is further photographic evidence (Documents 14a and 14b).

(7) There is no basis for objecting that the Applicant is an unincorporated association. The legislation does not require that only a legal entity can make an application to register land as a TVG.

2.0.12 In addition to the additional user evidence in Documents R1 and R2, the Supplementary Clarification provided by the Applicant in respect of the "locality" which the users are said to be from: "*It is not an area known to law (e.g. parish or council area) as such, but is certainly an area that has significant social cohesiveness amongst the residents of Regent Crescent and those whose houses face directly onto the Green. This cohesiveness is also*

observed and reinforced by the comments/statements of those people providing statements who are from a wider area."

Additional written statements in support of the application provided for the inquiry

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2.0.13 These are set out in section B on pp.2-61 of IB-2. Many of them refer to being "consolidated" witness statements which the Objector sought to clarify. However, that phrase is of no significance in evidential terms and was included by the witnesses, as I understood, to indicate that it was to include the witness's original statement in order to provide a single statement as the source of their evidence, as I had suggested in my Directions (see also ID2 where the secretary to the Preservation Society, Pat Taylor, advised witnesses on this).

Oral evidence in support of the application

2.0.14 The following witnesses provided oral evidence at the Inquiry, called by the Applicant's counsel Michael Feeney:

- Neil Jones
- Dan Taylor
- Natalie Bramall, County and ward Councillor
- Adrian Genge
- Mrs Bridget Schofield
- Liam Ashe
- James Sheard (also speaking on behalf of Lara Sheard)
- Chris Spragg (also speaking on behalf of Sue Spragg)
- Susan Applegate
- Claire Gooders
- Sarah Hiscock
- Jill Harvey
- Claire Gray
- Mrs Anna Kirk
- Adam Holland (also speaking on behalf of Hannah Holland)

- Claire Harris
- Joanna Ashe
- Mike Campion (also speaking on behalf of Sue Campion)
- Heather Taylor (by Zoom)
- Pat Taylor
- Alan Sands (by Zoom)
- Paul Taylor

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The Applicant's Representations

2.0.15 The Applicant's contentions on the issues that arise were set out in:

(1) Outline of the Applicant's Case (ID13)

(2) Applicant's Closing Submissions (ID15)

(3) Applicant's Response (ID18) to the Inspector's Post-Inquiry Note on the issue of the highway status of the Application Land (ID17).

2.0.16 I have summarised these under each of the issues identified and addressed in my Assessment in section 4 below and taken them into account in my assessment of the issues therein.

3. SUMMARY OF THE OBJECTION AND SUPPORTING EVIDENCE

The original objection

3.0.1 As indicated above, one objection to the Application was received on behalf of Curwen Group Ltd. ('the original Objector'), which acquired the freehold of the Application Land that is registered with Title Number SY 25218 from Regent Surfaces Co. Ltd. on 21 April 2021. Curwen Group Ltd objected by a letter dated 20 September 2021 and requested rejection of the Application ('the Objection' – IB-1, pp.63-74).

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3.0.2 The main points initially raised in the Objection related to:

(1) The extent of the claimed use: it is contended that in the absence of any evidence from the wider community, the statement of six individuals cannot constitute a significant number (see paras. 1-3 of the Objection).

(2) The quality of the claimed use: specific points are made about some of the witness statements (the first para. 4). Further, it is alleged that there is no evidence of kite flying, Easter egg hunts involving schools or street parties.

(3) No express easements were included in the transfer deeds of the properties at Regent Crescent when they were first sold. It is entirely possible that Regent Services Company Limited decided to allow use of the Green which would defeat the application as it would be by consent (the second para. 4).

(4) Mr & Mrs Jones' evidence (Document 5(n)) refers to the COVID pandemic restrictions meaning they were unable to use the green space as they normally would. The use of the land for any sport or pastimes was prevented by the Coronavirus Legislation (the second para. 4).

(5) The Applicant is stated to be an unincorporated association which has no legal entity (para. 5).

I would comment at this stage that I do not understand this point being made by the Objector as regulation 3(c) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 in effect allows for an application to be made by an individual, a body corporate or unincorporate. This contention was not, however, relied upon by the Objector at the Inquiry.

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The current Objector

3.0.3 As referred to in section 1 above (para. 1.0.4), the Application Land was sold on 29th April 2022 by the Original Objector to the current Objector, Luckyhome Properties Ltd. who maintained the objection made by their predecessors and appeared at the Inquiry, represented by Miss Rowena Meager of counsel.

Oral evidence in support of the objection

3.0.4 Four witness statements in support of the objection were submitted as part of the Objector's case (IB-3). However, only three witnesses were called as Mr Munnan Bhatti was unable to attend the Inquiry but his evidence has been taken into account. Oral evidence was therefore provided by:

- Mr Sharique Najam
- Mr Azizur Rahman
- Jon Patchett

3.0.5 The essence of the Objector's evidence was that each of these had passed the Application Site, largely in vehicles, throughout the relevant 20 year period and they had never seen anyone at all on the site; that included not seeing anybody at either the School start or end times.

3.0.6 That of course is in contrast to the evidence in support of the Application, oral and written. Whilst there is dispute over the extent of the actual qualifying use, and how much of that related to the school or related to just people crossing the Site rather than recreating on it in a way that qualifies under section 15, there is clearly photographic and other evidence of at least some LSP use of the land as set out in section 2 above of this Report. This is considered in more detail in the Assessment in Section 4 below.

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Aerial photographs

3.0.7 It was not immediately clear to me what the Objector intended to be derived from the aerial photographs that it provided (IB-3, pp. 63-68, digital page numbers). However the Objector stated, in response to my request for clarification in this respect, that these photographs were only relied upon in respect of the extent of parking immediately adjacent to the Green and not to support the Objector's case on the lack of qualifying use of the Green.

Submissions on behalf of the Objector

3.0.8 The Objector's contentions on the issues were set out in:

(1) The Objector's Outline of Case (ID14)

(2) Closing Submissions (ID16)

(3) Post-Inquiry Submission (ID19) in response to the Inspector's Note date 1 February 2023 (ID17).

3.0.9 As for the Applicant's contentions, I have summarised those for the Objector under each of the issues identified and addressed in my Assessment in the next section and taken them into account in my assessment of the issues therein.

4. ASSESSMENT

4.0.1 The registration of a new green is governed by section 15 of the Commons Act 2006 which provides as far as is relevant at this stage:

15 Registration of greens

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

(2) This subsection applies where–

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

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

(3) This subsection applies where–

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, 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 this section; and

(c) the application is made within the relevant period .

(3A) In subsection (3), "the relevant period" means—

(a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b);

(b) in the case of an application relating to land in Wales, the period of two years beginning with that cessation……

4.0.2 The burden rests with an applicant to demonstrate on the balance of probabilities (i.e. that it is more likely than not) that each relevant statutory criterion is met. As indicated at the outset of this Report (paragraph 1.0.5 above), the merits of any competing uses for the Application Land are of no relevance to the determination of the Application, although these are understandably of course of importance to the parties.

4.0.3 Accordingly, in summary the legal test centres on the Applicant being able to demonstrate that:

(i) "a significant number of the inhabitants..."

(ii) "of any locality, or of any neighbourhood within a locality..."

(iii) "have indulged as of right...."

(iv) "in lawful sports and pastimes on the land..."

(v) "for a period of at least 20 years"; and

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

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The Determining Issues

4.0.4 However, with regard to this Application there are, as was agreed by the parties at the outset of the Inquiry, three key issues that arise:

(1) Whether any recreational use of the Application Land was sufficient; and, if so, whether it continued to the date the Application was received (4 May 2021) and, if not, what consequences follow ("the sufficiency of use issue").

(2) Whether the requirement for the Applicant to demonstrate a locality or neighbourhood within a locality can be satisfied ("the locality and neighbourhood issue").

(3) Whether any recreational use was "*as of right*" and thus qualifying use; or "*by right*" or otherwise permitted and therefore not qualifying use ("the *as of right* issue").

They are in no order of priority as each is a determining issue, in that if the CRA concludes that the Application does not meet the requirement in relation to any one of them, then the Application must be refused. That is potentially subject to the qualification with regard to issue 2 of whether there is an alternative neighbourhood or locality that could fairly and appropriately be identified and relied upon.

4.0.5 I now address each of these issues in turn.

ISSUE 1: THE SUFFICIENCY OF USE ISSUE

Whether any recreational use of the Application Land was sufficient; and, if so, whether it continued to the date the Application was received (4 May 2021) and, if not, what consequences follow.

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4.1.1 I will address this in the following order:

(i) The Applicant's case

(ii) The Objector's case

(iii) Assessment of this issue.

The Applicant's Case

4.1.2 I have identified in section 2 above the Application details and the supporting evidence relied upon. I have also taken into account the Applicant's evidence (oral, written and documentary) including as referred to in his Closing Submissions and in the Objector's Closing Submissions as well of course of my own record and impression of the oral evidence. The Applicant's case on qualifying use emphasised in particular[3]:

(1) That, based on *R (on the application of Alfred McAlpine Homes Ltd v Staffordshire County Council* [2002] EWHC 76 (Admin) the word '*significant'* does not mean a considerable or substantial number. What matters is that the number of people using the land must 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.

[3] Applicant's Closing Submissions at paras. 30-50 (ID15). See also Appendix 1 to the Applicant's Closing Submissions, which is a Witness Summary Table which helpfully provides the name, address, period of time and electoral ward relevant to each of the oral and written 'witnesses' in support of the Application.

(2) There was use of the Green by children from the Crescent as well as from St Matthews Primary School. There was more use by children of the Crescent at the weekends and holidays compared to children from the School but those latter children would congregate in larger numbers when they did go on the Green.

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(3) Young children (up until roughly their mid to late teenage years) who live on the Crescent would use the Green frequently to play games and run around.

(4) There was also consistent evidence from a number of witnesses that dog walkers on the Green came from both Regent Crescent and from further afield, including outside the claimed neighbourhood.

(5) There is no '*predominance test*' requiring recreational users to come predominantly from the relevant locality or neighbourhood. So, if others from outside the qualifying neighbourhood or locality have also used the Green that does not affect the qualifying user of the inhabitants of the claimed neighbourhood or locality.

(6) There is also no requirement to demonstrate a *geographical spread* of users across the whole of the claimed locality.

(7) Those visiting the Green for the purpose of seeing their families or friends also contribute to qualifying use as inhabitants. The Applicant relied upon *Fitch v Fitch* (1797) 2 ESP 543 (ID9) and paragraph 15-35 of Gadsden on Commons and Greens 3rd Edition in support of this contention[4].

(8) It is not necessary to show that the use was permanent but it must be carried out for at least 20 years up to the date of the Application.

[4] Para. 35 of the Applicant's Closing Submissions (ID15).

(9) The question of whether any temporal interruption to use is sufficient to interrupt the continuous 20 year use is a matter of fact and judgment, as held in *R (Naylor) v Essex CC* [2015] JPL 217 at [74].

(10) One of the main LSP uses indulged in was children playing on the Green including ball games such as football and cricket, collecting conkers from the trees in autumn, using bikes, flying kites, sledging, building snowmen and general running around/letting off steam. This included use for these activities by the children and grandchildren of the residents of the Crescent, as shown in the witnesses' evidence and numerous photographs of children playing on the Green[5]. While families have of course moved in and out of the Crescent during the qualifying period over time, there have always been families with children at Regent Crescent. Mrs Taylor stated that her recollection was that in the early part of the qualifying period there were roughly five or six families with young children.

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(11) The second LSP indulged in has been dog walking and exercising as supported by the Applicant's witnesses[6]. There is consistent evidence of dogs using the Green throughout the qualifying period. Although not all dog walkers would come from Regent Crescent, there has been a steady dog ownership among those residents and those living within the claimed neighbourhood as depicted by the Blue Line plan throughout the period. The fact that other dog walkers use the Green does not detract from the use made by those within the qualifying neighbourhood or qualifying locality. Although dog walks would sometimes start and end on the Green, there is evidence that dogs would be taken out just to exercise or sniff around on the Green and there was also evidence that dogs coming back from a walk would stop

[5] As summarised in paras. 37 and 38 of the Applicant's Closing Submissions (ID15).

[6] Para. 36 of the Applicant's Closing Submissions (ID15).

on the Green for a period for a final play or to throw a ball around, as would be expected.

(12) There were also the communal events and gatherings. These also demonstrate the cohesiveness of the claimed neighbourhood (as detailed under that issue, Issue 2 below, by the Applicant). There is substantial evidence that the residents of Regent Crescent would hold pre-arranged events on the Green on a regular basis, roughly two nor three times a year and that there would be further informal, ad hoc meetings between adults including the VE Day event (8 May 2020) and the Book Quiz Event. There is evidence that during both of these events people went onto the Green as well[7]. There are also more 'idiosyncratic' uses of the Green such as Mr Sands' bike club, of which Mr Sheard was also a member, that met on the Green about every two or three weeks from 2002 to 2011.

(13) The fact that the Green was used extensively by people from within the claimed neighbourhood and the claimed locality is entirely unsurprising as it is exactly what one would expect from a green, open space surrounded by residential housing. The Applicant's witnesses gave similar answers to the question as to what made the Green attractive for recreational uses – namely that the Green is a convenient, accessible and safe place to use for recreation, especially given that the gardens in Regents Crescent are relatively small. The late suggestion by the Objector to Mrs Taylor that the Green was unattractive because of the number of dogs on it was not supported by any evidence to suggest that dog fouling was a particular issue on the Green and children and dogs often share recreational spaces in parks. Further, the reliance by the Objector on a nitrous oxide cannister being found on the Green was an anomaly, as Mrs Applegate's evidence showed and the fact that she finds litter there when she goes on it roughly every

[7] Para. 42 of the Applicant's Closing Submissions (ID15).

two to three weeks does not demonstrate that the Green in unattractive to use.

(14) The Objector's evidence on user cannot be preferred to the far more substantial and compelling evidence produced by the Applicant. The experience of the Objector's witnesses derives primarily from driving past the Green[8]. Mr Rahman had said that he walked past the Green but later accepted that this was only for a 6 month period and, in any event, the route from his sister-in-law's house to St Matthew's School would not go past the Green. All the witnesses agreed that when driving past you would only see it for a few seconds. Therefore it would not be easy to see anything and you could easily miss it, even if driving by when there was someone on the Green. Also the bend in the road when coming from the west meant that you could not see the Green until the corner (as Mr Najam accepted under cross-examination) and the trees at the southern end of the Green also block views. The photographs at e.g. page 59 of IB-1 did not support Mr Patchett's initial suggestion that the foliage on the trees was high and so did not block views. Further, the road hazards near the Green, particularly at school drop off and pick up times when the road is busy and children are crossing the street, would naturally draw a driver's attention away from the Green and towards the road.

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(15) It became apparent that the Objector's witnesses had a pre-existing connection with Mr Najam, a Property Manager for the Objector.

(16) The Objector's inconsistent evidence cannot be preferred to the Applicant's evidence, which includes irrefutable documentary proof in the form of photographs.

(17) With regard to the Objector's contention that the 20-year use was interrupted during the COVID pandemic in 2020, section 15(6) of the Commons Act 2006 does not apply since during the lockdown in 2020

[8] Para. 44 of the Applicant's Closing Submissions – ID15.

use of the Green for exercise was not prohibited. The PM's speech from 23 March 2020 states that people could leave their homes for '*one form of exercise a day – for example a run, walk, or cycle – along with members of your household'* (see ID4A). The Applicant provided evidence from many witnesses and statements about the use of the Green during COVID[9]. The evidence shows that if anything the use of the Green (especially by dogwalkers) increased during the COVID Lockdown. Although most of the new dogwalkers came from outside of the claimed neighbourhood, the use by those on the Crescent who had dogs remained consistent. Use of the Green by children during this period would have undoubtedly been predominantly by those from the claimed neighbourhood whilst schools were shut.

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(18) In any event, even if there had been any interruption of use this would have appeared to the landowner as attributable to the COVID regulations and not to the cessation of an assertion of right – it would not be sufficient to interrupt the 20 year use. With regard to the decreased mowing of the Green, the Green was not mowed much starting roughly in March 2020 but photographs from Daniel Taylor (IB-2, p.19) show that the Green was mowed again by the time of the Application. There was no evidence that the brief change in the mowing schedule during the summer of 2020 substantially altered the use of the Green. Witnesses said that the Green was and could still be used between November 2020 and March 2021 (see IB-1 at p.103)[10]. One witness testified to the longer grass having advantages as children could explore the flowers more and play around more.

(19) Given the nature of the Green, it is no surprise that all the evidence demonstrates that inhabitants of both the qualifying neighbourhood and qualifying locality engaged in LSP throughout the qualifying period. There was use from children of St Matthew's School but the

[9] Para. 46 of the Applicant's Closing Submissions (ID15).

[10] Para. 49 of the Applicant's Closing Submissions (ID15).

fact that there was such use does not change the fact that there was also sustained and consistent use from those whose houses face are in close proximity to the Green. Given the consistent account of the Applicant's witnesses as to what they have done on the Green and as to what they have seen being done, it is impossible to describe the use of the Green over the qualifying period as either trivial or sporadic.

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The Objector's Case

4.1.3 The Objector helpfully summarises its understanding of the evidence of the Applicant's witnesses in the Appendix to its Closing Submissions. I have taken this into account, along with my own record of that evidence as well as the Applicant's submissions upon it. The key points made by the Objector include:

(1) "*Significant*" means that the number of people using the land in question in a qualifying manner has to have been sufficient to indicate to the landowner that the land has been in general use by the local community for informal recreation as distinct from occasional use by individuals as trespassers. Non-qualifying use does not contribute to the test.

(2) Only recreational use by members of the public from the relevant locality or neighbourhood will contribute to the "*significant number*" test. Therefore, use by those from outside the claimed locality or neighbourhood should be discounted. There is much reference in the Applicant's evidence to people from the local school meeting on (or next to) the Application Land but it is not known precisely where those people come from and it is invariably the case that the school catchment will extend well beyond the neighbourhood or locality upon which the Applicant relies. Mrs Gray said as a Church School the catchment area is wide. Further, some of the witness evidence is provided by people who do not live within the 'blue line' area on map 3

and their use must also be discounted[11]. Mrs Anna Kirk said that children from other schools, and not just St Matthews, would run on the wall and play on the Green and she referred to there being quite a few primary schools in the area. She said that school related use has always been the main use of the Green.

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(3) The case of *Fitch v Fitch* (1797) 2 Esp. 543, 170 E.R. 449 (1797) (ID9) referred to by the Inspector has no application[12]. The case was not brought under any of the village green legislation which only came into being in 1965. Unlike the 1965 Commons Registration Act, the Commons Act 2006 does not make provision for customary greens. Moreover, in *Fitch* the question was a million miles from regarding use by the school children and parents of St Matthews' School (potentially in their hundreds) who are not inhabitants of the claimed neighbourhood, as being capable of supporting the Application. Accepting their use (from whom no evidence has been heard) is capable of supporting the application would be to strip the statutory language of any real meaning.

(4) Little if any weight should be attached to untested evidence. Evidence should not be taken at face value as the evidence of e.g. Allan Sands and Mr & Mrs Holland demonstrates[13].

(5) All of the Applicant's evidence is typically vague and imprecise and fails to paint an accurate and sufficiently detailed picture of use that can be relied upon. Where there is considerable use by others besides those in the claimed neighbourhood (i.e. the school children and parents and dog walkers), and that distinction of origin is not properly made in the written evidence, that evidence cannot be relied upon[14].

[11] Para. 48 on p.19 of the Objector's Closing Submissions (ID16).

[12] Para. 6 on pp. 2-3 of the Objector's Closing Submissions (ID16).

[13] Para. 19 on p.8 of Objector's Closing Submissions (ID16).

[14] Para. 20 on p.8 of Objector's Closing Submissions (ID16).

(6) As is typical to cases where evidence is presented in respect of an extensive period, there is often a tendency for witnesses to recall their more recent use and project it backwards to earlier parts of a period in respect of which their memory is less clear. This appears to apply at the very least to the evidence in respect of the events on the Green with Mr Jones saying there was an average of 3 or 4 events over a year which was not borne out by other witnesses[15].

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(7) Any use of the Application Land as a throughfare (i.e. walking across it to get elsewhere or walking across it with one's dog as part of a longer walk) is to be disregarded for the purpose of a TVG application as being use more akin to a public right of way than village green use[16].

(8) Apart from that, the claimed use largely falls into 3 groups (1) children playing; (2) dog walking; and (3) communal events (organised and impromptu).

(9) Children playing: once the use associated with the School is discounted the Application Land has not been enjoyed as at recent levels throughout the whole of the Application Period. It is apparent that there are many more young families in residence now than at the beginning of or earlier in the Application period as shown by the evidence of Adam Holland who had the perception of less children in his early residence[17]. There is an extremely limited amount of evidence of use by children from the claimed neighbourhood in the first few years of the period prior to arrival of the Jones family[18]. Some use from 2007/8 (the Taylors) was when grandchildren came to stay and Spragg (older children). Such use cannot be said to have been proved to be adequate to signify the assertion of a right of public recreation.

[15] Para. 21 on p.8 of the Objector's Closing Submissions – ID16.

[16] Paras. 49 & 50 on pp.19-20 of the Objector's Closing Submissions. - ID16

[17] As I have recorded, Mr Holland said that that his perception was of less children on the Green in 2008 and more now.

[18] Para. 52 on p.20 of the Objector's Closing Submissions – ID16.

(10) Dog walking: use by dog walkers is use by residents both of the claimed neighbourhood and further afield. Evidence of such use suggests that it is more recent use that has intensified. Even some of the evidence of such use is best regarded as throughfare type use being a starting or finishing point rather than 'the destination'. Use by people from outside the claimed neighbourhood is irrelevant. Again such use, even when coupled with the limited use by children playing, is insufficient to bring home to a reasonable landowner that a right is being asserted against him[19].

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(11) Event use: there is no credible evidence of any organised event prior to 2007/8 when the first organised BBQ took place. There is evidence of a second BBQ around 2 or 3 years later (2009/10) but then nothing until much more recently when there has been mention of another one or two BBQs but dates, despite being more recent, have remained elusive. There has also been the VE Day celebration but not on the Green itself but with some people crossing the Green or children playing on it[20]; the book competition again not on the green and some Easter egg hunts – although again dates are largely imprecise. Both in recent times and historically people have talked of 'impromptu' gatherings – sometimes just for a chat or cup of tea and sometimes (more recently) reference to picnics[21].

(12) As a whole, there is insufficient evidence of the quantity and quality of use by inhabitants of the claimed neighbourhood from the beginning of the Application Period and throughout to satisfy the statutory test. Sufficient use still has to be proved by the Applicant on the balance of probabilities. Whilst the Inspector is entitled to draw inferences, it is submitted that there is adequate evidence before this Inquiry to decline

[19] Para. 54 on p.21 of the Objector's Closing Submissions (ID16).

[20] As for example witnessed by Adam Holland.

[21] As for example also witnessed by Mr Holland.

to make any inference that current and recent use was mirrored in the first few years of the Application Period.

Assessment of the Sufficiency of Use Issue

The Requirement

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4.1.4 This issue relates to whether the Applicant has demonstrated on the balance of probabilities that:

(i) a significant number of the inhabitants have indulged;
(ii) in lawful sports and pastimes on the land;
(iii) for a period of at least 20 years; and
(iv) they continue to do so at the time of the application.

The qualifying users also have to be inhabitants of a locality or a neighbourhood within a locality and the use must be *as of right*. These matters are addressed below under issues 2 and 3 respectively.

4.1.5 In terms of the correct approach to the requirement for a "*significant number of inhabitants*", the position is summarised in Gadsden at 15-36 as follows (with my emphasis):

> The words "significant number" were introduced into s.22 of the 1965 Act by s.98 of the 2000 Act and were retained in the 2006 Act. The purpose of the amendment in s.98 was explained by Baroness Farrington when introducing it:
>
> "It makes it clear that qualifying use must be by a significant number of people from a particular locality or neighbourhood. That removes the need for applicants to demonstrate that use is predominantly by people from the locality and means that use by people from outside that locality will no longer have to be taken into account by registration authorities. It will be sufficient for a significant number of local people to use the site."
>
> In *R. (on the application of McAlpine Homes) v Staffordshire CC* Sullivan J concluded that the inspector had approached the matter correctly in saying that "significant", although imprecise, is an ordinary word in the English language and needed no further definition. Whether the use had been by a significant number of local inhabitants was held to be very much a matter of impression. He said that the number might not be so great as to be properly

described as considerable or substantial, and held that "a significant number" meant a number that was anything more than de minimis and sufficient to indicate that the land is in general use by the local community. The judge did however say that "it would be difficult to see how six out of 20,000 or one out of 200 could be said to be significant".

Sullivan LJ said in *Leeds Group Plc v Leeds City Council* that only use by a significant number of the inhabitants of the locality or neighbourhood will suffice to satisfy the definition of a green. He said in that case that the use was clearly of such an amount and manner as would reasonably be regarded as the assertion of a public right. This echoed Lord Hope in *Lewis* who said that the use of the land must be "of such amount and in such manner as would reasonably be regarded as being the assertion of a public right".

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4.1.6 In terms of the qualifying use taking place over the 20 year period up to the date of the application, the use of the land must be continuous in that it must be frequent and without any substantial breaks. It is quite usual for there to be fluctuations in use, particularly seasonal ones. Thus the land does not have to be used for every hour on every day but nonetheless with sufficient frequency to show the assertion of a right to use the land.

Approach to evaluation of the evidence

4.1.7 The Application Site is surrounded to a large degree by the 22 properties in Regent Crescent, sitting on the other side of the road itself within Regent Crescent. The land has been an open grassed area since about the time of the first occupation of that development in the late 1960s.

4.1.8 It appears that the local residents considered that they were entitled to use the land, given its close relationship to the Regent Crescent properties, its grassed and open nature and the reasonably regular mowing of it by the authority. It was clear and understandable that, as for example Mr Jones stated, the Green was seen by the residents of the Crescent, or at least some of them, as an extension to their gardens[22].

[22] In addition to Mr Jones' oral evidence see that to similar effect of Mr Holland.

4.1.9 However, the claimed qualifying use has to be assessed on the correct basis in accordance with the statutory requirements and case law and I have assessed whether a significant number of inhabitants have used the land for LSP on the following basis:

(1) What matters is how the use would have appeared to the owner of the land.

(2) Any use which is the form of the exercise of a right of way, in just crossing the land, should be excluded.

(3) It is important to distinguish between the users who come from the claimed neighbourhood and those who reside outside of that claimed neighbourhood including those from the school who reside outside the claimed neighbourhood. That distinction is particularly important in considering whether the 'any locality' or 'any neighbourhood within a locality' criterion is satisfied, as addressed below under the next main issue. It is nonetheless also very important, when considering the significant test under this first issue, only to include qualifying users.

(4) I have also been careful not to take into account the evidence of use of the Green for LSP shown in the photographs taken after the 4th May 2021 and other evidence relating to such use. With regard to evidence of use before the start of the 20 year period in May 2001, the Applicant contends this nonetheless has some relevance as it shows how the land was used prior to the start of the 20-year period relied upon[23]. That may be the case, but in my view what has to be focussed on primarily is the evidence of qualifying user during the relevant 20-year period itself, allowing for appropriate inferences unless the evidence indicates otherwise.

4.1.10 The claimed qualifying user can be broadly categorised as follows:

(1) Children playing;

[23] Par. 23 on p. A7 of the Outline of the Applicant's Case (ID13).

(2) The walking of dogs; and

(3) Communal events including organised and impromptu gatherings.

4.1.11 In considering the evidence on this claimed use, key issues that arise and that I have taken into account in my assessment include in particular:

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(1) Whether the qualifying use was sufficient throughout the relevant twenty year period to 4th May 2021, including whether the use continued up until the application in the face of the COVID-19 restrictions that first applied in March 2020 (see ID4A & ID4B).

(2) The extent and implications of the School related use.

(3) The extent and implications of any throughfare use, namely walking across the land on the way to or from somewhere else without carrying out any LSP use on the land.

(4) The extent of use by children living in the claimed neighbourhood throughout the qualifying period and whether there were a fewer number of families with children in early part of the 20-year period and any implications of that.

(5) The extent of dog walking by residents of the claimed neighbourhood and those from beyond the claimed neighbourhood and whether walking on or over the Green.

(6) Whether there is credible evidence of events on the Green prior to about 2007/8 when the evidence indicated the first BBQ was held on the Green and the overall extent of events.

4.1.12 The evidence of witnesses in support of the Application of their children and grandchildren playing on the Green is listed in para. 37 of the Applicant's Closing Submissions (ID15). The Applicant also relied upon the photographic evidence of such use as referenced in para. 38 of his Closing Submissions. As noted above, I have also taken into account the Objector's comments on that evidence and its summary of that (see e.g. para. 52 on p. 20 of and the

Appendix to the Objector's Closing Submissions, ID16). Moreover, I have of course taken into account my own record of the evidence.

4.1.13 Similarly the Applicant highlights evidence relied upon in terms of dog walking on the land at paras. 40-41 of his Closing Submissions (ID15).

4.1.14 The Applicant's summary of the claimed communal events is set out in para. 42 of his Closing Submissions (ID15).

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4.1.15 Notwithstanding that none of the Objector's witness have any recollection of seeing a single person, my overall impression of the evidence was that there was reasonably regular use of the Green as a whole including use for the types (or certainly most of them) of LSP uses relied upon in the Application. Given the openness of the Application Land and its proximity to the properties in the Crescent, as well as some houses adjacent and opposite, it is far from surprising that use has been made of the Green. It is also not surprising that this use has been both 'individually' by members of the households as well as for some community activities. Furthermore, the proximity of the School and the convenience of the Green and its roadside wall (excluding the pavement itself on the north side of Linkfield Lane which is outside the Application Land) as a waiting area, meeting place and play area have resulted in the school related use significantly contributing to this overall reasonably regular use of the Application Land.

4.1.16 That overall impression is consistent in my view with the context and character of the Application Land in that:

(1) The Crescent alone only comprises 22 properties. However, they lie immediately adjacent to the U-shaped road within Regent Crescent which, together with Linkfield Lane, joins the two ends of the 'U' and encloses the Application Land, a relatively small area of green space. The claimed neighbourhood in terms of dwellings also includes numbers 12, 14, 15, 17, 19, 21 and 23 Linkfield Lane (see the blue line Map 3 at IB-1, p.18 and ID3).

(2) It is relatively flat, albeit with a gentle slope down towards Linkfield Lane. It is of a character and nature generally compatible in my view with the claimed LSP, notwithstanding at the end of the 20 year period when the grass had not been cut, the nature changed to a degree as addressed further below. I agree with the Applicant that there is no evidence to support the Objector's suggestion that dog fouling was a particular issue on the Green or unattractive to residents because of other reasons such as may be evidenced by the finding of a nitrous oxide cannister on it[24]. Indeed, I noted Mr Spragg's reference to others coming onto the Green 'primarily with dog poo bags'. Also, with regard to Susan Applegate's litter removal, she said that this was from people sitting on the wall at the front of the Green. Accordingly, I don't consider that in itself would have materially impacted upon the use of the Green.

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4.1.17 I should make it clear that I have of course taken into account the Objector's evidence in reaching this overall impression. However, I find the evidence of each of the Objector's four witness (with three having given oral evidence) to be somewhat surprising in observing no use of the Application Land at all, including that from the School for which there was persuasive evidence of having been observed by many of the Applicant's witnesses. The Objector's witnesses provided evidence that they have all driven by the Application Land on a fairly regular basis but I am not convinced how much actual notice of the Green they would have taken. Moreover, in addition to the oral evidence in support of the Application, there is photographic evidence of events and activities on the Green, although generally not covering the earlier part of the qualifying period there were two photos of children playing in the snow labelled from the winter of 1997 (at IB-1, pp.49-50) a few years before the start of the qualifying period in May 2001. It may well be that the Applicant is correct in that the nature of the road and distractions at the start and end of the school day school could have resulted in the Objector's witnesses not

[24] Para. 43 of the Applicant's Closing Submissions – ID15.

observing any activities on the land. I am not convinced that the vegetation would necessarily have shielded all users from being visible but it is possible that some would have been, particularly those closer to the trees and when the trees were in full or fuller leaf. Whatever the reason, I have only felt able to attribute very limited weight to the Objector's evidence. It still remains, nonetheless, for the Applicant to provide the evidence of sufficient qualifying use throughout the qualifying period of course notwithstanding my overall impression.

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4.1.18 Moreover, that overall impression is subject to the following important qualifications:

(1) Two of the main LSP uses relied upon by the Applicant are children playing on the Green and the walking of dogs.

(2) The Objector accepts that there are more families with children residing in Regent Crescent in more recent years but contends that the evidence indicates there were very few in the early part of the relevant 20-year period expiring on 4 May 2021 i.e. from 2001 to say 2006.

(3) There appears to be no dispute that a significant element of the use of the Application Land on weekdays during term time is by the school children of St Matthews Primary School opposite and their parents/carers. However, bar possibly for a small number, these children are and were not inhabitants of the claimed neighbourhood. As will be discussed under Issue 2, the Applicant does not claim that use by these should be taken into account in terms of the claimed neighbourhood. However, he did seek to rely upon such use based on an alternative argument that if it was not accepted that the claimed neighbourhood met the legal requirements, then the alternative qualifying locality of Redhill West & Wray Common electoral ward,

which was created in 2019 by adding three polling districts to the electoral ward of Redhill West, could be relied upon[25].

(4) Some of the use was clearly not qualifying use as it reflected use of the Application Land to walk directly across rather than to recreate within the scope of the section 15(2) meaning. The Objector has referred to this as 'throughfare' use and that includes people both with and without dogs crossing and not pausing for any meaningful period on the land.

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(5) There is also the issue of the extent of any use post the COVID-19 restrictions.

(6) Additionally, there is the issue of whether reduced mowing that occurred in 2020 caused an interruption in the use of the land.

4.1.19 I assess qualifications (1) to (4) as follows:

Use by children in the early part of the 20-year period:

(1) I acknowledge that there have been fluctuations over the relevant twenty year period with differing numbers of families with children at any given time. I have carefully considered in particular the Objector's contention that that there is little if any evidence of families in occupation at the beginning of the 20 Year period.

(2) I have taken into account the Applicant's reliance on the oral evidence of Heather Taylor, James Sheard, Jo Ashe, Clare Gooders, Sue Applegate, Chris Spragg and Alan Sands from whose evidence I would note as follows:

(i) Heather Taylor, the daughter of Paul and Pat Taylor was 8 years old when she moved with her family to 8 Regent Crescent. She went to University from 2003-2006 returning home during

[25] Para. 26 of the Applicant's Closing Submissions and ID6.

the holidays. She moved back home and live there between 2006-2014, when she moved out. She stopped using the green in 1998-9 when she was 12-13 years old. She joined the Tennis Club (on Linkfield Lane) when she was 9 years old. She referred to lots of children being around the conker tree in autumn time and seeing children playing frequently especially at weekends and in the summer. However, I did not find this particularly compelling in respect of the period from 2001-2006 and especially after 2003.

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(ii) James Sheard lived with his family at 6 Regent Crescent from 2005-2012. His children were born in 2008, 2011 and 2013. His family's first use of the Green began in 2010 when his first daughter was around 2. He saw children playing on the Green every day but not necessarily from the Crescent. So, Mr Sheard's evidence did not cover the period 2001-2004 and even after that he recognised that use was also made from children not living in the Crescent.

(iii) Joanne Ashe used to visit her grandparents who lived at 4 Regent Crescent from 1990 regularly when a child, walking about 15 mins from her home in Ranelagh Road, Redhill. She would play on the Green as a child with her cousins. Again there was not convincingly detailed or compelling evidence about the extent of use by children of the Crescent during the earlier part of the qualifying period, although I accept that there was likely to have been some.

(iv) Clare Gooders referred to more activity around school drop off and pick up time when parents would catch up. Her son was 7 in 2003, when Ms Gooders went back to work. She played prolifically on the land when she was a child. Here perception was different from some in that she said over the years the

green was probably used less by children and more by dog walkers.

(v) Sue Applegate has lived at 22 Regent Crescent since 2 April 2004 and referred to children playing on the Green. She referred to, as other witnesses had, the Green being very good for conkers. She referred to small children playing with balls, snowmen, badminton as well as dogs walkers and the activity at relevant School times.

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(vi) Chris Spragg has lived at 12 Regent Crescent since 1st September 2000. He said that over the last 5 or 6 years there had been new younger families although he said that the use of the Green had been pretty consistent through the twenty years. He said there had always been young families with young children. However, in my view the balance of the evidence indicates that in the earlier years there were fewer.

(vii) Mr Sands lived at 6 Regent Crescent from 2005-2012 and although he said that he would see other children playing he accepted that they were not necessarily from Regent Crescent. He was not sure how many families with children there were in 2002 but thought there were definitely some, yet he also said the pattern of use by children had not changed.

(3) I have also had regard to the written evidence in support of the application. I note for example that Norma Grosse and her husband lived at 16 Regent Crescent from 1990 and refers to her 3 grandsons visiting regularly between 2003 and 2012. Although her statement indicates children being present, there is no convincing particularisation of this.

(4) Notwithstanding that there was evidence of some families with children and some use by children in the earlier part of the qualifying period, my overall impression remains of relatively fewer children in the earlier

years in the Crescent properties. The evidence prior to 2004 is particularly lacking in my view. Although not conclusive in any way, I also note a lack of photographs from that period. It is perhaps surprising that there were none of children playing on the Green at that earlier time, although there were the photographs from 1997 as referred to above (at para. 4.1.17) – however, it can't be assumed such children would have continued to use the Green as the evidence strongly indicated that older children used the Green less. There is also in my view a lack of evidence of any specific incidents or activities by which use of the Green by children in the earlier part of the qualify period could be related to a particular year or years. Whilst I appreciate that it is more difficult to evidence given the time that has lapsed, this again just adds to the impression I gained from many of the Applicant's witnesses of a materially lesser use by children at that time, given the likely smaller number of families with children living in the Crescent.

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(5) I also recognise that I am entitled to draw inferences, as the Objector accepted (see para. 4.1.3(12) of this Report above) but submitted that there is adequate evidence before this Inquiry to decline to make any inference that current and recent use was mirrored in the first few years of the Application Period.

(6) Whilst the nature and proximity of the Green to the houses in the claimed neighbourhood does allow of a degree of inference, as explained above the distinct impression I have nonetheless gained from the evidence provided by the Applicant is that the use by children from those houses (as well as use for events as dealt withy below) was limited and materially less in that earlier part of the qualifying period than in recent years. Therefore, in my view the evidence overall negates any such inference.

Extent of the school related use and its implications:

(7) I have no doubt, again notwithstanding the lack of such observations by the Objector's witnesses, that use of the land by those going to the School opposite took place and possibly also from other schools. Many witnesses referred to parents and pupils from the school, waiting on or using the wall and application land itself. Some of the Applicant's own witnesses even suggested that such use might have been more frequent than use by residents of Regent Crescent (as referred to further below). I do recognise, however, that would only apply during term time and not at weekends or holidays or when schools were closed during part of the COVID-19 Lockdown period.

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(8) Nonetheless, as the school children are not and are not argued by the Applicant to be inhabitants of the claimed neighbourhood (other than the inhabitants of Regent Crescent and the Linkfield Lane properties within the blue line depicting the claimed neighbourhood), those living outside the blue line cannot be taken into account in assessing the compliance of the Application with the "*significant number of inhabitants*" requirement on the basis of the claimed neighbourhood.

(9) I have therefore considered whether *the significant number of* inhabitants is satisfied by use by the inhabitants of the claimed neighbourhood itself. As addressed more fully under the next issue, the Applicant relies in the alternative on the claimed locality rather than relying upon a neighbourhood. As explained below, there are procedural difficulties with that alternative that would arise. Nonetheless, for the purpose of this Issue 1 only, I have considered the alternative position of the Applicant.

(10) Based on the claimed neighbourhood, in addition to use of the land by the school pupils who are not inhabitants of that neighbourhood being discounted, use by others who are not inhabitants or related to inhabitants of the Blue line area as well as those undertaking a

throughfare use, have to be discounted. It is right to say that it is not entirely easy to carry out this discounting exercise. Nonetheless, I have done so having regard to the oral evidence in particular but also the written evidence where this is consistent with the oral evidence.

(11) With regard to the school children, I was struck by the number of witnesses who highlighted the school use e.g. Joanne Ashe referred to it being quite chaotic around school time; Heather Taylor referred to seeing children playing particularly on school days; Claire Harris who was aware of the Green since 1998 referred to children from the school being on the Green every day and other children a couple of times a week and at weekends; Mr Holland referred to his perception of less children in his early residence and knowing about ½ of those using the Green now and previously[26]; Anna Kirk who has lived at 17 Regent Crescent since 2017 said that the school related use has always been the main use with children from other schools than St Matthews also running on the wall and playing on the Green; as noted above (at para. 4.19.2(iv) of this Report), Clare Gooders referred to there being more activity around school drop off and pick-up times. So, it is not possible to characterise this school related as a minor or even a lesser element of the overall use. Indeed, during term time it is likely to have been the more significant use of the land during the school week and particularly so in the earlier part of the twenty-year period when in my view there was less use by the children from the claimed neighbourhood and additionally the evidence does not support the number of community events, certainly organised ones, being other than occasional at most as considered further below.

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[26] See para.4.1.3(9) above for the Objector's reference to Mr Holland's evidence which is consistent with my own note of his evidence.

Extent of dog walking use on the Application Land

(12) There was evidence of there being a number of dogs within the households of the claimed neighbourhood throughout the qualifying period. There was also evidence of the Green being used for dogs to exercise, sniff around and no doubt do their business, particularly first thing in the morning or in the evening. However, in terms of a daily walk or walks I would not consider that in most cases just using the Green would be adequate.

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(13) Also, the Green would be crossed sometimes by those from the claimed neighbourhood taking their dogs on a longer walk. I accept that, as was evidenced to some degree, that even on those longer walks the dog may have a final 'run around" on the Green on its return journey. However, I also would expect that at the end of their walk elsewhere, many would just have crossed the Green with perhaps a passing sniff of the land but unlikely to equate to LSP use and then back to their homes.

(14) Clearly account also needs to be taken of some of the dog walking on the Green being by those from outside of the claimed neighbourhood. There were a lot of references to this.

Extent of use for organised and impromptu events

(15) I have taken into account the Applicant's contention that there have been pre-arranged events on the Green on a regular basis, roughly two or three times a year and that there would be further informal, ad hoc meetings between adults including the VE Day event (8th May 2020) and the Book Quiz Event (24th May 2020). There is evidence that during both of these events people went onto the Green as well[27]. There are also more 'idiosyncratic' uses of the Green such as Mr Sands'

[27] Para. 42 of the Applicant's Closing Submissions. See also the evidence of e.g. Sue Applegate.

bike club) of which Mr Sheard was also a member) that met on the Green about every two or three weeks from 2002 to 2011. There was also reference to Easter Egg hunts, although the frequency of these was not entirely clear.

(16) It is not surprising that there are sometimes gatherings on the Green by the residents of the Crescent and one or two of the nearby Linkfield Lane properties. However, as the Objector contends and I find to be the case on the evidence, there is no convincing evidence of a BBQ or other formal gathering on the Green prior to 2007. Indeed the number of such events overall does seem quite modest in terms of the overall use of the Land. I have of course discounted those after 4th May 2021.

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(17) Again, notwithstanding Mr Sands' bike club meeting up on the Green about every two or three weeks from 2002 to 2011 (which I understood to be more of a rendezvous point for then cycling off and therefore not of any significant duration on any single occasion), my impression was that the evidence of "events" during the earlier part of the qualifying period was not strong. That was supported by Heather Taylor's evidence that she understood (from her parents referring to them) that there had been more community activities since she moved out and especially since COVID. Indeed she didn't recall communal events when she was living in the family home – she didn't herself attend any (1994-2003, being at University from 2003-6 and visiting regularly between 2006-2014).

(18) There have clearly been impromptu gatherings to greater or lesser degree over the qualifying period. That would be normal. However, I would expect some of those would be on the Green, of which there was evidence, and some would no doubt have been in front of people's houses or on the pavement, in the normal way of neighbourly interactions in respect of which there was also evidence.

The extent of the throughfare use:

(19) There was evidence of people just crossing the Green and doing so with and without dogs. Those who gave evidence of doing or seeing that included Mrs Schofield, who has been in occupation of 3 Regent Crescent since April 2019 (having purchased her property in August 2018). Mr Genge also referred to walking across the Green when visiting his mother. Mr Taylor referred to walking across when he parked his car in the corner of the Crescent. That seems unsurprising to me. It would be a perfectly normal thing to do given the openness and positioning of the Green. My impression was there that this non LSP use was a small but material element of the overall use of the Green, particularly if the School use is discounted.

I now consider the COVID-19 and mowing issues (qualifications (5) and (6) in para. 4.1.18 above).

The effect of the COVID-19 restrictions:

4.1.20 The Objector contends that I should not simply accept that qualifying use continued for a period of 20 years until the date of the Application given that in March 2020 the country went into Lockdown and everyone was ordered to "*stay at home*"[28]. The Objector further contends that although there has been reference to some use of the Application Land during that period (including some from users outside of the claimed neighbourhood walking dogs for example), the interruption to pre-COVID use was sufficient to bring any period of qualifying user (if there had been any) to an end.

4.1.21 With regard to temporal interruptions in use, Gadsden comments (at 15-31):

> Temporal interruptions to use are more complex. There may be cases where the landowner has carried out activities on the land or part of it which prevent its use for recreation for more than a de minimis period. This could include

[28] Para. 47 on pp.18-19 of Objector's Closing Submissions (ID16).

construction and engineering works, reprofiling the land, substantial landscaping works, archaeological investigations, installing utilities, and the like. If such works lasted for more than say a few weeks there would be a strong argument that there had been a sufficient interruption of use, albeit temporary, to prevent registration of the land affected as a green. This would be a matter of fact and degree to be considered in each case, both as to the physical extent and the duration of the interruption.

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4.1.22 There is a degree of inconsistency in the evidence relating to the use of the Application Land after the Lockdown in March 2020. The Applicant lists the evidence he relies upon to support such use in para. 46 of his Closing Submissions (ID15). However, Mr Jones said (under cross-examination) that during the main Lockdown (as he described it) he didn't recall seeing children playing on the Green.

4.1.23 However, Mr Genge said that during COVID he saw one or two children occasionally but not as many as usual – mainly they were playing and he saw people walking dogs occasionally. He saw people from the Crescent as well as one or two others walking dogs then. Clare Gooders said that she visited her parents, Mr and Mrs Hanson, every other day during COVID as she was in a bubble with them. She said that to begin with she saw no activity on the Green because she thought that everyone was too scared to go out. However, later she would see the odd person as the restrictions were relaxed and it got busier. Mr Dan Taylor said that the Green was handy during COVID as you couldn't drive elsewhere. Also, Mr Spragg said that as the schools were closed the Green was a blessing for parents on the Crescent, as it was a place where their children could play. He also said that he was not aware of any extended period when people were not on the Green. Mr Holland said that during the Lockdown they let the dog run or sniff around on the Green and it was a good place for children and they went there fairly frequently.

4.1.24 The evidence also indicated an increase in dogwalkers during Lockdown but the Applicant acknowledged that most of that increase appeared to come from those who came from outside of the claimed neighbourhood (see para. 47 of the Applicant's Closing Submissions, ID15).

4.1.25 Taking the evidence on the impact of COVID-19 overall, my impression is that a degree of qualifying use continued during Lockdown. I suspect that this was minimal for the first week or so, consistent with the recollection of some of the witnesses, whilst people came to terms with the restrictions imposed and warnings given. However, even in the early stages of Lockdown people were allowed to leave their homes for one form of exercise a day – for example a run, walk, or cycle, alone or with members of their household (see the PM's Statement on Coronavirus, 23 March 2020 - ID4A). Community events did not take place themselves on the Green, although a limited use of the Green by some did take place during those community events that took place in the Crescent (in relation to the VE Day event on Friday 8 May 2020 – see e.g. IB-1, pp. 34, 53 & 58; and the Book Title Challenge Event on Sunday 24th May 2020).

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4.1.26 In my view on the evidence overall, therefore, use for LSP by qualifying users did take place during Lockdown. The use of the Green for LSP was likely to have been less than in the period before Lockdown largely because of the lack of the normal school related use during the school week. That may have led to some, like Mr Jones, gaining the impression that no or fewer children were using the Green which would again be consistent with the significant contribution the School related users make to the overall LSP use of the Green. So, although I agree that there was no temporal interruption of the non-school related use during COVID, that does not necessarily mean that the level of qualifying use was sufficient to be perceived as an assertion of a right to use the land, given the absence of most of the school related use than would normally be the case (with only vulnerable and key worker children being allowed to attend schools during the first few months of Lockdown from 23 March 2020). Nonetheless, given that a degree of use continued and taking into account my finding that there were materially more children, especially younger children, resident in the Crescent at this time than in the early part of the qualifying period, I consider it likely that there was sufficient use overall of the Green so as any reduction in use not to constitute a

temporal interruption. In any event, in my view a reasonable land owner viewing the land would have been aware of the general restrictions on people going out and undertaking usual activities, including the 'closure' of schools, and so should not have been surprised that fewer than the normal number of children before Lockdown were using the Green. In contrast, a reasonable landowner is likely in my view to have a heightened awareness to people on their land during Lockdown alerting them to a protentional assertion of a right to use that land. The Lockdown was a quite extraordinary period in many respects and in my view it is appropriate to take this into account in terms of how any use of the Green would have appeared to a reasonable land owner.

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The effect of the changes in the mowing regime

4.1.27 The Application refers to the lawn being mowed normally 4 or 5 times a year and the evidence predominately supported this save in respect of the last year or so of the qualifying period[29].

4.1.28 Susan Applegate, who has lived at 22 Regent Crescent since 2nd April 2004 and walked past the site quite frequently as child before then (being a lifetime resident of Redhill), found benefit in the longer grass, as she was a keen observer of nature which benefits from the reduced mowing. However, she said that it was not suitable for people playing. She said that probably early in the pandemic the Council mowed a strip through the middle which provided a path. Her recollection was that it was mowed fully once after that and then mowed by neighbours after that. Likewise, Mr Dan Taylor, who has lived at number 9 since January 2017 said that both his daughter and their dog liked the longer grass. Mr Holland said that children quite liked the long grass as it allowed them to play more games such as hide and seek. However, consistent with Ms Applegate's evidence, Mr Jones said that the longer grass made the Green less accessible and attractive for recreation.

[29] See e.g. letter from Mr & Mrs Hanson in support of the Application dated 29 April 2021 at IB-1, p.20.

Overall Conclusions on the Use Issue

4.1.29 Firstly, I will set out my conclusions based upon the Applicant's primary case, as I understood it, namely based on the Claimed blue line Neighbourhood.

4.1.30 The evidence in that respect indicates clearly to me that:

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(1) The use by children during the qualifying period increased from about 2006, although I do not doubt that there was a degree of such use from May 2001 until then. The Applicant takes issue with this, contending that while families have moved in and out of Regent Crescent during the qualifying period, there have always been families with children at Regent Crescent. (I note there was no reliance on children from the Linkfield Lane properties)[30]. In particular, the Applicant relies upon the evidence of Mrs Taylor who had said that in the early part of the qualifying period ("at the beginning of the 2000s") there had been five or six families with young children. However, as the Objector also pointed out, my impression was from Mrs Taylor's evidence overall was that she was likely to be referring to the period after about 2005. The evidence of many children in the qualifying period before then I found to be less than clear or convincing, as explained above.

(2) Similarly, there is no convincing evidence of any meaningful number of, if any, events prior to 2006/7 with evidence of a BBQ on the Green at that time. The Applicant concedes this in so far as saying that there is evidence that the frequency of those events did increase towards the end of the qualifying period but relies upon it being easier to remember events that have happened more recently and that many of those who attended these events no longer lived at Regent Crescent[31]. I should make it clear that in reaching this conclusion I have assumed, as the Applicant contends, the families or friends of the inhabitants within the claimed neighbourhood also contribute to qualifying use as inhabitants.

[30] Para. 39 of Applicant's Closing Submissions (ID15).

[31] Applicant's Closing Submissions at para.10 (ID15).

(3) I consider that, setting aside the School related use, the non-qualifying throughfare use of walking across the Green and use by others than the inhabitants of the claimed neighbourhood were in combination a material but smaller element of the overall use than the use by the residents, particularly when the use by children from the Crescent and for community activities has increased as the evidence indicates.

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(4) However, given the extent and frequency of the school related use throughout the school week, I do not consider that the use was sufficient, particularly during the earlier part of the qualifying period up to about 2006/7 for which the evidence of use by children and for communal events was very much weaker.

(5) With regard to the impact of the COVID restrictions, it seems from my impression of the evidence to be likely that any reduction in use (particularly arising from the 'closure' of the School) would have not been for such a period so as to amount to a temporal interruption as explained above (at para. 4.1.26 above). Even if I had not so concluded, in my view a reasonable land owner viewing the land would have been aware of the general restrictions on people going out and undertaking usual activities, including the 'closure' of schools, and so should not have been surprised that fewer than the normal number of children before Lockdown were using the Green (again as explained at para. 4.1.26).

(6) Further, I do not consider that the change in the mowing regime has resulted in a material interruption, either physically or temporally in the use of the Green. It would have limited some uses but encouraged others as the evidence indicated but not with an overall material change.

(7) Therefore, setting aside those non-qualifying uses but taking account the claimed use by children, use for dog walking and for communal events and other gathering, in my view the evidence demonstrates that together with the school related use but only on that basis, the use of the land for LSP was sufficient throughout the twenty year period to

bring to the attention of a reasonable landowner that a right to use then land in that way was being asserted.

4.1.31 Accordingly, I conclude that the significant use criterion is met throughout the qualifying period but only if the School related use is included. Given that other than possibly a small number, the school related use has been by those who live outside the claimed neighbourhood, that requires the Application to be assessed on the basis of the locality being Redhill West & Wray Common electoral ward and not on the basis of the Applicant's primary case which relies upon the claimed blue line neighbourhood within that locality. The implications of this are now addressed under issue 2.

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ISSUE 2: THE LOCALITY AND NEIGHBOURHOOD WITHIN A LOCALITY ISSUE

Whether the requirement for the Applicant to demonstrate a locality or neighbourhood within a locality can be satisfied.

4.2.1 On day 3 of the Inquiry the Applicant clarified that, contrary to my understanding during the earlier part of the Inquiry, his case in this respect is based upon the claimed blue line neighbourhood within the locality of the electoral ward of Redhill West & Wray Common but also alternatively upon just that locality.

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4.2.2 A locality itself must be defined by reference to the limits of an administrative division known to the law. In *R. (on the application of Laing Homes Ltd) v Buckinghamshire CC*, Sullivan J referred to boroughs, parishes (civil and ecclesiastical) and manors. Other such units include electoral wards of all levels and polling districts[32]. I consider the meaning of a 'neighbourhood' and its application to this case below in my assessment below.

4.2.3 I now set out:

- The main points of the Applicant's contentions on Issue 2
- The main points of the Objector's contentions on Issue 2
- Assessment of Issue 2
- Overall conclusions on Issue 2

The Applicant's Case

4.2.4 The Application, although not entirely clear on this in my view, appeared to rely upon the claimed neighbourhood as shown outlined in blue shown on the plan identified as Map 3 to the Application, and found at IB-1 at p.18. That Blue Line Plan was annotated with the following note:

Note: The blue line shows the area in which households, and the school, have enjoyed immediate access to the Green. It is not possible to show the

[32] Gadsden 3rd Edition at 15-39.

boundary which would include all those who come to the Green or enjoy it as part of a longer walk. It would also need to show St Matthews School catchment area, as the families using the school have enjoyed using the Green for many years.

Mr Chris Spragg told the Inquiry that he drew the blue line taking Guidance from the Open Spaces Society to which he subscribes. He took into account, Mr Spragg told the Inquiry, that this guidance states that the neighbourhood had to be defined and have boundaries and it was not meant to be a barrier line i.e. it did not mean that the neighbourhood ceased at the line. Under cross-examination Mr Spragg said that he believed the blue area was the heart of the neighbourhood and there were people not in that area whom he considered to be part of the neighbourhood.

4.2.5 The Applicant submitted that the CRA is, subject to considerations of fairness towards the Applicant and any objector, free to determine the appropriate area having regard to the evidence, which may involve reliance on a different locality or neighbourhood within a locality than that submitted with the original application[33].

4.2.6 In his Closing Submissions the Applicant states that he defined the neighbourhood within the locality being relied upon as the houses on Regent Crescent, St Matthews Primary School and several houses on Linkfield Lane in close proximity to and facing the Green. In the Applicant's response to the original objection submitted by Curwen Group Ltd, the Applicant clarified that the intent was to define the Green and its adjoining households as a neighbourhood within a locality, which is an area with significant social cohesiveness among the residents of Regent Crescent and those whose houses on Linkfield Lane are in close proximity to the Green. The qualifying neighbourhood is within the locality of Redhill West & Wray Common electoral ward[34].

[33] Para. 8 on p.A3 of the Outline of the Applicant's Case (ID13).

[34] Paras. 2 to 29 of Applicant's Closing Submissions (ID15).

4.2.7 There was, contends the Applicant, substantial evidence given during the Inquiry of the events and gatherings that contributed to the cohesiveness of the qualifying neighbourhood. The Applicant relies upon what it says was overall the consistent evidence from his witnesses on the frequency of pre-arranged events and contends further that the consistent evidence is that there have been communal events and gatherings throughout the qualifying period, and these events demonstrate significant social cohesiveness between the residents of Regent Crescent and those whose houses on Linkfield Lane are in close proximity to the Green. The Applicant also relies upon there having been throughout the qualifying period frequent contact and communication between the residents of Regent Crescent and Linkfield Lane which has helped establish a community identity.

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4.2.8 The Applicant contends that contrary to the Objector's arguments, there is no reason why the use of a Green should not contribute to neighbourhood cohesiveness. Indeed, it would be highly surprising, says the Applicant, if the physical location of a green and a community's use of it could not contribute to neighbourhood cohesiveness. It is all but inevitable that communal recreation and use of a green will often contribute to social cohesiveness, and apart from citing a single line of guidance which appears to misinterpret caselaw, the Objector has not provided any reason why the use of a green should not contribute to neighbourhood cohesiveness.

4.2.9 The qualifying neighbourhood of Regent Crescent therefore satisfies the statutory requirements since it is a cohesive entity, recognised by its inhabitants as the heart of their community.

4.2.10 In terms of the Locality (paras. 22-29 of Applicant's Closing Submissions, ID15), the Applicant contends that as long as it would not be unfair to rely on a different qualifying locality than the one identified in the Application, there is no bar to registration pursuant to a locality or neighbourhood that was not submitted in the original application.

4.2.11 The locality relied upon, Redhill West & Wray Common, was created in 2019 by adding three polling districts to the electoral ward of Redhill West. Redhill West was composed of what are now polling districts RDW4 and RDW5. Two of the added polling districts (RDW1 and RDW2) cover the sparsely populated area of Reigate Hill and Gatton Park. As the name suggests, Redhill West & Wray Common is, in substance, the continuation of the electoral ward of Redhill West. Redhill West & Wray Common is composed of the former electoral ward of Redhill West, with three other polling districts added. The attached appendix (to the Applicant's Closing Submissions) lists the electoral ward for each witness that provided evidence on behalf of the Applicant that covered the qualifying period. The appendix demonstrates that all the witnesses who were resident in Redhill West would now fall under Redhill West & Wray Common, and all the witnesses who are now resident in Redhill West & Wray Common would have been residents of Redhill West prior to the change in 2019. In substance, as *per Lancashire CC* (as set out in para. 26 of the Judgment in that case, ID7), the alternative locality relied upon has not changed.

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4.2.12 The Applicant provided a map of Redhill West & Wray Common on 16 December 2022, the Applicant signalled its intention to rely on an alternative locality in its opening submissions[35] and the Applicant reiterated this position on day 2 of the Inquiry. On day 3 of the Inquiry it became apparent that the Objector and the Inspector had not understood this to be the Applicant's position. This aspect of the Applicant's case, as with the Applicant's case as a whole, rests on the evidence that has been produced in the Inquiry Bundles and heard before the Inspector. There has been no request to adjourn or recall witnesses. The Applicant accepts that, if necessary, the Objector should have the opportunity to comment on this aspect of the case further through written submissions. This arrangement ensures that there will be no prejudice to either side.

[35] Paragraphs 16-18 – ID13.

The Objector's Case

4.2.13 The Objector contended in its Outline Case that the Application does not adequately identify the neighbourhood within a locality or the locality upon which it relies and is thus defective. The Applicant must be required to provide clarity on the neighbourhood and locality. This is of vital importance as any use by people from outside the claimed neighbourhood or locality must be disregarded and it is therefore of vital importance that this issue is addressed promptly[36].

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4.2.14 It is not clear whether this Application is pursued as a neighbourhood application or a locality application. If reliance is placed on the blue line Map 3, there is no evidence at all that speaks to there being any cohesiveness such that those properties included within the blue line are an identifiable neighbourhood, properly so called. That blue line appears to be nothing more than an arbitrary line drawn on a map.[37] Further, the Applicant is calling witnesses from outside that Blue Line and their evidence will have no bearing on the Application unless the Applicant relies upon an area other than that shown by the blue line.

4.2.15 In its Closing Submissions the Objector reasserts those points. In addition, the Objector stated that Application was made in the basis of the Application Land being in a neighbourhood within a locality and the Applicant has confirmed the locality as the electoral ward of Redhill West and Wray Common. It has been confirmed that there have been changes to that 'locality' during the Application Period. Insufficient evidence has been produced at this juncture to enable any proper consideration of whether or not it is a locality that is capable of being relied upon. Reliance was placed on *Lancashire CC v SOS* [2018] 2 P & CR 15 (ID7) in which the Court of Appeal seemed, the Objector contends, to accept that substantial boundary changes for a locality during the relevant 20 year period could prevent registration. It

[36] Para18(ii) on p.7 of Objector's Outline of Case.

[37] Para. 25-26 on p.10 of Objector's Outline of Case.

asked itself whether there was a continuous, identifiable locality in existence throughout the relevant 20-year period, notwithstanding the changes. It was said that it was enough if the locality had existed in some clearly identifiable form throughout the relevant 20 year period as a coherent and continuous locality. In that case, the electoral ward was in existence throughout the 20 year period and was subject to only one relatively minor change, which did not alter the identifiable community of the ward. The court concluded that this was a matter of fact and degree for the inspector, and the Objector referred also to Gadsden & Cousins on Commons & Greens, 3rd ed, 2020, para 15-42 (which I set out below in para. 4.2.20)[38].

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4.2.16 The Inquiry heard no evidence at all, the Objector contends, that speaks to there being a cohesiveness as understood in the context of village green law such that the properties included within the blue line form an identifiable neighbourhood. Presumably the school has been included both because it contributes a substantial number of users (to boost the 'significant number' test) and because that use dwarfs the use of the remaining users if the school is removed from the claimed neighbourhood, rendering what is left as having the appearance of being much more trivial or sporadic, at least during some parts of the Application Period[39].

4.2.17 The claimed neighbourhood as constructed also offends the principle that the land itself cannot be the unifying feature which creates a neighbourhood. According to the Applicant in a supplementary clarification (IB-1, p.144) "*it is certainly an area that has significant cohesiveness amongst the residents of Regent Crescent and those whose houses face directly onto the Green*"[40]. The Applicant's outline submissions go on at para 14 "*The Green and the recreational opportunities it provides has created a local community out of the houses adjoining it …"* (emphasis added by Objector), further illustrating the flawed nature of the neighbourhood relied upon for this application. The

[38] Para. 36 on p.13 of Objector's Closing Submissions – ID16.

[39] Para. 37 on pp.13-14 of the Objector's Closing Submissions – ID16.

[40] Paras. 38-39 on pp. 14-15 of Objector's Closing Submissions. – ID16.

evidence heard at the Inquiry does nothing to perfect the obvious deficiency in the identification of the neighbourhood.

4.2.18 With regard to the Applicant's statement in its Outline Case (ID13 at para. 8 on p. A3) that the CRA is free to determine the appropriate area having regard to the evidence, the Applicant cannot, it is submitted, pray in aid the principles expressed in *Laing Homes* which concerned an application under a different statutory regime that did not require a locality or neighbourhood to be identified at the outset. That does not reflect the statutory regime under which this application has been made. A registration authority has no investigative duty which requires it to reformulate the applicant's case (para [61], Lord Hoffmann, *Trap Grounds*. *Trap Grounds* was also a case brought under the 1965 Act to which different Regulations also apply[41].

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4.2.19 It is submitted that it would be wholly unfair for the Inspector in this case to identify a neighbourhood or locality that is different from that relied upon by the Applicant in circumstances where it was the Applicant's responsibility from the outset to nail its colours to the mast and state unequivocally in Box 6 what neighbourhood or locality is relied upon. Furthermore, the Applicant has thoroughly confused the question of the locality in which the claimed neighbourhood is said to be located having provided a hotchpot of alternatives (IB-2, pp. 63-67). The 'clarity' the Applicant says was provided to the Inquiry on day 2 was not at all clear, both the Objector and the Inspector having understood the Applicant's position to be quite different from that which is now advanced.

Assessment of this Issue

4.2.20 Assistance on the approach to this issue is found in various authorities as referred to in Gadsden, and as the parties have referred to. In terms of the meaning of "neighbourhood" this is addressed in sections 15-44 and 15-45 of Gadsden (with my emphasis):

[41] Para. 44 on p. 17 of the Objector's Closing Submissions (ID16).

15-44

A neighbourhood is not a sub-division of a locality, and need not be a recognised administrative unit. What constitutes a neighbourhood has been considered under other statutory regimes. The cases on what constitutes a neighbourhood under other legislation have asked whether particular areas are "sufficiently distinctive to constitute a neighbourhood of its own" and whether they have a feeling of a community or neighbourhood. In one case the evidential factors which were noted as being helpful to identifying whether or not an area comprised a neighbourhood included: whether it had natural boundaries or distinct boundaries formed by a large road such as a motorway; the presence or otherwise of facilities which might be expected to exist in a given neighbourhood, including shops, primary schools and a post office; differences in housing types and standards; and differences in socioeconomic circumstances. The court stressed that these were only relevant indicators and the absence of or difference between certain factors did not prevent an area being a neighbourhood…….

In the context of greens, the issue came before Sullivan J in Cheltenham Builders. He said:

"I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."

15-45

What can in principle qualify as a neighbourhood is now, under s.15 of the 2006 Act, quite wide. As HHJ Waksman QC noted in the Oxfordshire & Buckinghamshire NHS Trust case, neighbourhood is a more fluid concept than locality and connotes an area that may be much smaller. However, the judge also noted and applied the requirement for a neighbourhood to have a sufficient degree of pre-existing cohesiveness. In Paddico, Vos J summarised the position by saying that a neighbourhood is understood as being a cohesive area which must be capable of meaningful description in some way. Even the definition of the word "neighbourhood" in the Shorter Oxford English Dictionary includes something which could be described as cohesiveness. It speaks in terms of a neighbourhood being a community or being a portion of a town considered in reference to the character or circumstances of its inhabitants. Defra guidance also suggested that a neighbourhood can be specified by reference to an obvious geographic characteristic such as the name of a village or housing estate.

4.2.21 With regard to changes in a locality, and as referred to by both the Applicant and Objector, guidance is found in the Court of Appeal's Judgment in

Lancashire CC v SOS [2018] 2 P & CR 15 (ID7) as referred to in Gadsden at sections 15-41 to 15-42:

In Lancashire CC, the Court of Appeal seemed to accept that substantial boundary changes for a locality during the relevant 20-year period could prevent registration. It asked itself whether there was a continuous, identifiable locality in existence throughout the relevant 20-year period, notwithstanding the boundary changes. It was said that it was enough if the locality had existed in some clearly identifiable form throughout the relevant 20-year period as a coherent and continuous locality. In that case, the electoral ward was in existence throughout the 20-year period and was subject to only one relatively minor change, which did not alter the identifiable community of the ward. The court concluded that this was a matter of fact and degree for the inspector. It is apparent from the Court of Appeal's consideration of the issue, however, that boundary changes could be substantial enough to prevent a locality from being relied upon for the purposes of s.15 of the 2006 Act. The community in question must not have changed substantially over the relevant 20-year period.

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4.2.22 Against this background, I will now address the following issues:

- The claimed Blue Line Neighbourhood
- The Locality Relied Upon
- Overall Conclusion on Issue 2

The Claimed Blue Line Neighbourhood

4.2.23 As referred to above (para. 4.2.20) the legislative change to include "*a neighbourhood within a locality*" was intended to import flexibility into this element of the statutory requirements for registration of a new green. However, there are limits to that flexibility. The term 'neighbourhood' must have some meaning, as the authorities referred to above confirm. For example, Sullivan J (as he then was) held in *Cheltenham Builders* that the registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning.

4.2.24 In this context, I have had particular regard to the following factors, taking into account the indicative only factors referred to at 15-44 of Gadsden (as set out at para. 4.2.20 above):

(1) There is a degree of cohesiveness and distinctiveness within Regent Crescent itself, both with and without the Green being taken into account. The Green and the Regent Crescent properties, however, together provide an enhanced cohesiveness given in particular their close relationship and the similarity of the design of the properties.

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(2) Regent Crescent itself also has distinct boundaries formed by Linkfield Road and the boundaries of the properties within the Crescent.

(3) However, the claimed neighbourhood (as shown by the blue line plan, Map 3, at p.18 of IB-1) also includes numbers 12 and 14 lying on the northern side of Linkfield Lane, to the immediate west of Regent Crescent, and 15, 17, 19, 21 and 23 lying on the southern side of Linkfield Lane directly opposite (save for number 15) Regent Crescent. Further, it includes St Matthews Church of England Primary School, lying to the south on the other side of Linkfield Lane.

(4) The School is the only facility in the claimed neighbourhood, albeit it is a large and significant one. A small proportion of the pupils at that school live or have lived during the qualifying period in the claimed neighbourhood. The school catchment area, although not evidenced in any detail before the Inquiry, is of course very much more extensive than the claimed neighbourhood. There is nonetheless some logic in including the School, given the evidence of use by school pupils (sitting on the wall and playing, standing and talking on the Green) during the school week, particularly at going home time. However, what was notable was the paucity of direct evidence from such users or their

parents/carers and further the lack of any evidence of where they live including the extent of the School's catchment area[42].

(5) However, it seems to me that the inclusion of the particular Linkfield Lane properties chosen is somewhat arbitrary. In particular, it is not clear to me why 15 Linkfield Lane is included but not number 13 and even more properties to the east. I note that a statement in support is provided by the occupant of number 13 (Lee Butler) but not of number 15. Furthermore, if one is including immediately adjacent properties then it has to be asked what about those, or some of those, in Hurstleigh Drive, as some of the Applicant's witnesses had also suggested.

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(6) I appreciate that the geographical proximity of the seven Linkfield Lane properties included is relied upon. In my view, however, more than just that is required in the circumstances for the claimed neighbourhood to have a sufficient degree of cohesiveness and or distinctiveness. I recognise that, as referred to in 15-45 of Gadsden, Defra guidance also suggested that a neighbourhood can be specified by reference to an obvious geographic characteristic such as the name of a village or housing estate. Also, as the Objector points out, it was held in *R(on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxford County Council* [2010] EWHC 530 (Warneford Meadow) that a single road can be a neighbourhood[43]. However, the Linkfield Lane properties have a different address and more importantly, apart from the geographical nexus, do not in my judgment relate at all convincingly in this context to the Regent Crescent properties. The properties in Regent Crescent are semi-detached and have a coherent design, having been built by the same developer at the same time, as I understand. Those opposite in Linkfield Lane (numbers

[42] The son of Sarah Hiscock, who did not live in the claimed neighbourhood, went to St Matthews and she would sit on the wall whilst he played with friends. Claire Gray worked at the School between 2005 and 2015 and again lives outside of the claimed neighbourhood.

[43] Para. 8 on p.3 of Objector's Outline of Case – ID14.

15, 17, 19 , 21 and 23) are detached and of different styles both to those in Regent Crescent and themselves. Number 12 and 14 are bungalows and very different from the other properties in the claimed neighbourhood.

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(7) Whilst I accept that social cohesiveness can be a relevant factor in this context, it is of note how much reliance the Applicant has placed on this to support his claimed neighbourhood. However, in terms of the events and contacts that the Applicant relies upon in support of this, in my view this provides only weak support to including the Linkfield Lane properties. Those included comprise seven out of the total of twenty-nine properties in the claimed neighbourhood (some 24%). Yet the occupants of only one of those (3.5% of the 29) Linkfield Lane properties, Mr Campion of number 19 (on behalf of himself and his wife), provided oral evidence at the Inquiry. However, Mr Campion stated that until recently he had not been involved very much with the Green (he attended the Platinum Jubilee Picnic in 2021 and he thought another event which he could not be sure of). Under cross-examination he accepted that his involvement post-dated the Application and he did not remember having been invited to events before then. As confirmed by Appendix 1 to the Applicant's Closing Submissions (the Witness Summary Table) (ID15), there was only one other witness (in written form only) from the Linkfield Lane properties within the claimed neighbourhood – that was Mr John Harris from number 12. Mr Jones referred to Mr Harris as not being part of the WhatsApp Group but having come to Christmas drinks with his dog but, he believed, he did not attend the BBQ or VE Day events. Mrs Schofield referred to having attended a BBQ on the Green which was attended by three quarters of those living in the Crescent (as clarified under cross-examination) and Mr Harris from 12 Linkfield Lane. Other than Mr Harris and the Campions, Mr Jones didn't appear to know who lived in the other Linkfield Lane properties within the claimed neighbourhood. Mr Genge

said that he did not know those who lived in Linkfield Lane but one or two came to the meet ups. Susan Applegate referred to a dog, called Alfie, whose owner lived in Linkfield Lane but beyond the blue line (clarified later in her evidence as one house beyond). She also, in the context of social cohesion/neighbourliness, relied by way of example upon the occasion that Mike Campion had been very helpful when she had got locked out of her house. Mrs Schofield referred to seeing on the Green quite regularly two dog owners from Linkfield Lane, Mr Harris and one other from the other direction without specifying from which property. I accept that this is not conclusive in itself but it is consistent with my overall impression of the arbitrariness and weakness of the claimed neighbourhood in respect in particular of the Linkfield Lane dwellings.

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(8) Therefore, whilst I acknowledge that in terms of "the circumstances of its inhabitants" and social cohesion there was some evidence of some of the Linkfield Lane residents included attending communal activities, that evidence was actually very limited even in more recent times. Accordingly, I did not find that evidence persuasive of any convincing basis for these properties to be included.

(9) Whilst (as noted above) I appreciate the close physical nexus of the Green to the Regent Crescent properties themselves, I also find that there is a lack of other factors demonstrating cohesiveness, as the Objector pointed out[44]. There is for example no residents' association and no neighbourhood watch scheme. The WhatsApp Group seemed to be a response to the COVID crisis and thus only arose towards the end of the qualifying period. Also, the WhatsApp Group did not appear to include any of the residents from Linkfield Lane.

(10) The cohesiveness did not seem to me to necessarily go much beyond that experienced by many close neighbours in many locations and,

[44] Para. 39 on p.15 of the Objector's Closing Submissions (ID16).

whilst laudable and understandably important and of value to those involved, does not in the circumstances in my view support a conclusion that the Claimed neighbourhood satisfies the legal requirement.

(11) The Applicant did not suggest any alternative to the blue line claimed neighbourhood. I agree with the Applicant, and contrary to the Objector's contention, that this is in principle possible even under the current legislative scheme. However, in my view it would be inappropriate for myself or the CRA to suggest one given the evidence before the Inquiry. That evidence included a variety of views from the Applicant's witnesses as to what they considered was their neighbourhood (e.g. Mr Sheard would include the whole of Linkfield Lane to the tennis club at the junction with Croydon Road and in the other direction too; Claire Gooders thought of the community as wider than just Regent Crescent and also including Hurstleigh Drive and further along Linkfield Lane; Mr Holland would also include Hurstleigh Drive, where he has friends and the people are friendly and sometimes use the Green; Claire Harris would also include Hurstleigh Drive as it is part of the neighbourhood she uses on a regular basis, where she walks her dog as it provides a 10 minute walk when she is short of time; she would also include St Beads Road, Carlton Road and Green Lane; Joanne Ashe, who has lived in 2 Regent Crescent since October 2020 but whose grandparents had lived at number 4, would include Hurstleigh Drive, Park Road and Linkfield Lane although as she grew up in Redhill she feels a part of that and of Reigate).

(12) Whilst as the Applicant says such differences may be understandable to some degree, they do in my view support that there is no readily identifiable alternative once one goes beyond Regent Crescent itself in terms of dwellinghouses. It was not contended by the Applicant that the Crescent itself with or without the School was an appropriate and sufficient Neighbourhood.

(13) Indeed the Applicant's approach seemed to me to reflect this lack of an obvious alternative to the claimed neighbourhood on the evidence, as their alternative argument did not rely upon an alternative neighbourhood but, as is in principle possible of course, the locality of Redhill West & Wray Common electoral ward alone. I address this further below.

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4.2.25 Accordingly, notwithstanding the flexibility that is to be applied to the identification of a neighbourhood, I conclude that the Applicant has not demonstrated sufficient cohesiveness or distinctiveness or logic to the chosen boundaries for the claimed neighbourhood.

The Locality Relied Upon

4.2.26 The Locality is significant in this case in two related respects. Firstly, if I had concluded (or the CRA concludes) that the claimed neighbourhood qualified as a matter of fact and degree, it would still be necessary for the Applicant to demonstrate that this lay within a qualifying locality.

4.2.27 Secondly, as noted above, the Applicant's alternative to the claimed neighbourhood is not to rely upon another neighbourhood but upon, as in principle he can, the same locality.

4.2.28 In my view the Applicant's case on locality and neighbourhood within a locality has been confused. I had understood, as had the Objector, that it had been clarified at the Inquiry that the reliance was then to be on the claimed neighbourhood within the claimed locality only and not with the claimed locality as an alternative and fallback position.

4.2.29 There would appear to be no reason in principle why the electoral ward of Redhill West & Wray Common is not a qualifying locality. However, the Objector has raised the issue of whether, applying the approach in *Lancashire CC* (ID7), the changes in the electoral ward over the qualifying period have resulted in substantial boundary changes for a locality during the relevant 20 year period which could prevent registration.

4.2.30 In his Closing Submissions the Applicant has accepted that, if necessary, the Objector should have the opportunity to comment on this aspect of the case further through written submissions[45]. This arrangement, the Applicant stated, ensures that there would be no prejudice to either side.

4.2.31 I am not in a position to conclude on whether the current electoral ward can properly be relied upon as the Applicant contends. The matter was raised late in the Inquiry and neither I nor the parties were in a position to deal with this properly. I made my view on this clear at the Inquiry and that I would not adjudicate on this and, if it became necessary to do so to determine the Application, I would ensure the parties were given a proper opportunity to provide further evidence and/or make further representations as appropriate.

4.2.32 I acknowledge that the evidence indicates that the school related use was a significant contributor to any LSP use of the Application Land and the Applicant's case currently lacks evidence to demonstrate that a sufficient number of the users of the Application Land for LSP are inhabitants of the claimed Locality. Therefore, even if the Application were to be successful in respect of Issues 1 and 3, it would still be necessary to consider:

(1) Whether it would be fair to allow the Application to be determined on the basis not of a neighbourhood within a locality but of the significant number of inhabitants of the claimed Locality.

(2) If it were considered fair to allow the Application to be considered on that basis, it would need to be considered how best to allow evidence and representations on this, and on the issue of the changes to the claimed Locality, to be provided and presented.

[45] See para. 4.2.12 of this Report above.

Overall Conclusion on Issue 2

4.2.33 I do not consider that the claimed neighbourhood satisfies the legal requirement in section 15(2) as interpreted by the courts. The Applicant does not suggest any alternative neighbourhood and I do not consider there is an obvious alternative that the CRA should consider, even if it would be appropriate to do so.

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4.2.34 Although I have concluded under Issue 1 that taking into account the School related use the Application would satisfy the sufficient use requirement throughout the qualifying period, it has not been demonstrated that those school related users are inhabitants from the locality relied upon. Further, it has not been demonstrated that the change in the locality that has taken place during the qualifying period has not been such that would prevent reliance upon it applying the approach in *Lancashire CC v SSEFRA* [2016] EWHC 1238 (Admin).

ISSUE 3: THE "AS OF RIGHT" ISSUE

Whether any recreational use was "as of right" and thus qualifying use or "by right" or otherwise permitted and not qualifying use **(the "*as of right*" issue)**

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Introduction

4.3.1 The issues in this respect centre on whether the land is highway maintainable at public expense ('HMPE') and consideration of the consequences of that. Even if not HMPE, there is still the issue of whether any qualifying use of the Application Land was "*as of right*" or the land is properly considered public open space or alternatively any qualifying use is by way of permission, given that the land has been regularly mowed by or on behalf of the Highway Authority during the relevant 20-year period.

4.3.2 In terms of the possible highway status of the land, it is not disputed that the Application Land is the subject of the Memorandum dated 5th July 1966 varying the Agreement dated by 9th February 1966 made under section 40 of the Highways Act 1959 between the then owner of the Application Land, Regent Surfaces Co. Ltd., and the then Borough of Reigate ('the Road Agreement' – IB-2, Doc C5 at p.69).

4.3.3 However, the potential significance of the Memorandum only became clear during the Inquiry, as the content of the Agreement only came to light in December 2022. I therefore indicated on the last day of the Inquiry (Friday 27th January 2023) that I would consider whether the parties should be given opportunity to make further representations on the highways land issue.

4.3.4 Having reflected on the matter, I concluded that it was appropriate to give the parties the opportunity to comment further on the status of the land in terms of whether it is properly considered as part of the adopted highway

and/or open space or neither. Both parties helpfully responded to the points that I raised in my Post Inquiry Note.[46].

4.3.5 In that context I now set out my assessment of these issues as follows:

- The position of the Highway Authority
- The Applicant's contentions
- The Objector's contentions
- Assessment of the issues arising.

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The Position of the Highway Authority

4.3.6 It was not until the 7th December 2022 that the Highway Authority stated that contrary to their previous position the Application Land was now considered to be a HMPE. To support that position the Highway Authority has provided (IB-4):

(1) Written comments on the Application.

(2) A copy of the Agreement dated 9 February 1966, as varied by Memorandum dated 5th July 1966, between Regent Surfaces Company Limited and The Mayor and Aldermen and Burgesses of the Borough of Reigate pursuant to section 40 of the Highways Act 1959 for the construction of Regent Crescent.

(3) Plan of Extent of the Publicly Maintainable Highway.

(4) Inspector's Report and Recommendation in respect of an application to register land as a TVG known as "Sawpit Green" at Row Town, Addlestone, Surrey (Application number 1858).

[46] See ID17, ID18 and ID19.

4.3.7 At my invitation Mr Ian Taylor, the Highways Information Team Manager for Highway Operations & Infrastructure Surrey Highways & Transport, provided oral evidence in the morning on Day 3 of the Inquiry and was asked questions by both the Applicant and Objector, as well as myself, to clarify the Highway Authority's understanding of the status of the Application Land.

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4.3.8 The Highway Authority consider that the Application Land is publicly maintainable highway land pursuant to the section 40 Agreement of 9 February 1966 as varied by the Memorandum dated 5th July 1966. However, they do not object to the Application to register the land as a village green on the basis that this would not impede the duty of the Highway Authority to maintain the Land pursuant to section 41 of the Highways Act 1980 and there are no plans to carry out any highways schemes which might alter the Application Land's "open space status".

4.3.9 Mr Taylor explained that the varied Road Agreement was read more carefully when the freehold owners made an enquiry about it. A colleague of Mr Taylor's went through it and realised that there was the Memorandum which made it quite clear that the area shown as open space was to be adopted as highway. Mr Taylor referred to areas of amenity land having been adopted by variations to a section 40 Agreement. He did not consider that there was anything in the letter from Regent Surfaces Co. Ltd. of 17 June 1968 (IB-1, p. 19) that changed that, even though the letter refers separately to the road and open space, as Mr Feeney pointed out to Mr Taylor. He considered that the Application Land was open space that had been adopted as part of the highway.

4.3.10 Mr Taylor also stated that the Application Land has been maintained as part of the highway and it was on the Highway Authority's grass cutting schedule. When Mr Feeney suggested that it could have been maintained on the basis that it was considered to be open space, Mr Taylor replied that open spaces are mowed by a different team which also maintains common land. Mr Taylor also pointed out that for a long time the Highway Authority had used the Borough Council to cut the grass on its behalf.

4.3.11 Mr Taylor also stated that there were no plans to carry out any works on the Application Land and that there was no conflict with any highway purpose as it would not impede any highway use.

4.3.12 Mr Taylor was unable to assist the Inquiry on the position of the final certificate referred to in clause 9 of the varied Road Agreement.

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4.3.13 When asked by Miss Meager on behalf of the Objector about the status of the plan showing highway maintainable at public expense, Mr Taylor said that it is the Memorandum itself that creates the highway status of the Application Land and confirmed that he considered it to be publicly maintainable highway with the right of the public to use it.

4.3.14 Following the giving of his evidence, Mr Taylor wrote to the CRA that afternoon stating:

"*I have just looked at the Open Spaces Act 1906 and s6 gives the following definition:*

The expression "open space" means any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied.

On that basis I would say that the land subject to the application could be regarded as open space within the meaning of this act and the response I gave to the Inspector's question on this point was incorrect. If possible could you let him know this and apologise to him on my behalf."

The Applicant's Case

4.3.15 No doubt reflecting the lateness of this issue arising and the emergence of relevant details, the Applicant's case on this issue has also evolved during the course of the Inquiry.

4.3.16 The Applicant did not originally challenge the highway status of the Application land. However, he contended that there is no prohibition on

registering a highway as a TVG, relying in part on *TW Logistics v Essex CC* [2010] AC 1050[47]. The Applicant also sought to distinguish the case of *DPP v Jones* [1999] 1 AC 240 and contended that it was never meant to apply to an area of open green space on which local inhabitants have been enjoying LSP for over 30 years[48].

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4.3.17 Nonetheless the Applicant did acknowledge that in ordinary cases and as a matter of practice, it will be unusual for a highway to be registered as a TVG since highway use and TVG use are usually incompatible and where that is not the case it is normally because the land in question is only highway verge and the only possible use would be walking over it[49]. This is not an ordinary case and the TVG use is not incompatible with the highway use and it has not been obstructing any highway use because there has, in practice, been no highway use to obstruct. The use of the Green would have appeared as, and would have been referable to, the assertion of a public right and not as a highway use.

4.3.18 The fact that the local authority (pursuant to an agreement with the Highway Authority) occasionally mowed the Green cannot amount to an implied licence on the part of the landowner to use the Green for LSP as grass might be mowed for many reasons, and landowners who do not wish to have people indulging in LSP on their property may also mow their lawns and they would be surprised to learn that they were inviting the public to indulge in LSP on their property by mowing their lawns.[50].

4.3.19 However, in his Closing Submissions, the Applicant's counsel challenged the highway status of the Application Land, pointing out that it was not until December 2022 that the Road Agreement was looked at again and SCC changed its mind and now stated that it was highway land. A map provided by SCC for an auction of the Green in May 2021 does not show the Green as

[47] See para.30 on p.A8 of the Outline of Applicant's Case, ID13.

[48] Ditto at para.34 on pp.A9-A10.

[49] Ditto at para. 35 on p.A10.

[50] Ditto at paras. 40-43 on p.A11.

publicly maintainable highway, nor did the map from Reigate & Banstead BC which was produced at some point before 2002[51]. That, contended the Applicant, can only be because the intent was not to dedicate the Application Land as highway, but as open space.

4.3.20 If the Green was supposed to be adopted as highway, then there would be no need to specify that it was open space or refer to it as such. The right to use the land as a highway would exist without referring to the Green as open space. The fact that the Green is referred to as open space demonstrates that it was not meant to be adopted as a highway[52]. Mr Taylor accepted that it was a reasonable interpretation that somebody could come to that the Road Agreement was attempting to achieve two different goals. In his subsequent message to the Inquiry, Mr Taylor acknowledged that on the basis of the definition within the Open Spaces Act 1906 the Application land could be regarded as open space.

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4.3.21 Mr Taylor's only explanation for how the Green was maintained as highway was that it was on a grass cutting schedule and it is just as likely that the Green was being mowed because it was open space[53].

4.3.22 The fact that the Road Agreement was intended to adopt the Green as open space is the only interpretation that makes sense in light of the letter sent by Regent Surfaces Co Ltd on 17 June 1968. If the intent of the Road Agreement had been to treat the road and the open space the same (as highway), there would be no reason to differentiate between the two in the manner the letter did.

4.3.23 Given that the Road Agreement attempted to adopt the Green as open space then, if the attempt was successful, the Applicant accepts that this TVG application would fail because any use would be "*by right" as opposed to "as*

[51] Para. 53 of Applicant's Closing Submissions, ID15; see also ID5 the Highways Search.

[52] Ditto. At para. 54.

[53] Ditto at para. 56.

of right"[54]. Given the wording of section 40(5) of the Highways Act 1959, there is potential that the Green was adopted as open space pursuant to section 40. Further, If the Road Agreement did not in this respect fall within the powers of section 40, then the Green would not have been adopted as either open space or highway[55].

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4.3.24 In that case, if the Green is not a highway, then the only possible argument on behalf of the Objector would be that the mowing carried out on the Green amounted to an implied licence or permission[56]. However, in its letter of 17 June 1968 Regent Surfaces Co Ltd stated that because the local authority will become responsible for the central open space, no rights to use it were granted to individual purchasers when their properties were transferred to them but as soon as the Local Authority take the open space over, it will be a public open space available for the use of anybody. If the Green was not adopted as open space pursuant to the Road Agreement, then the local authority never did 'take the open space over' and this letter makes it clear that until this happened Regent Surfaces Co Ltd was not giving any permission, implied or otherwise for residents to use the Green. The Information Sheet for the initial auction in May 2021 stated unequivocally that "Regent was not aware of having given any licences or permissions to use the Property (but that its knowledge was limited to the period 1993 onwards)".

4.3.25 Further the "occasional" mowing of the Green in circumstances where the Green was not adopted for recreational purposes does not amount to conduct which makes it clear that the inhabitants' use of the land is pursuant to the landowner's permission[57]. In *Barkas* the land was held for recreational purposes[58]. Further, the circumstances in respect of the Application Land are not comparable to the examples given in *Beresford* of excluding inhabitants

[54] Applicant's Closing at para. 60 - !D15.

[55] Ditto at para. 62.

[56] Ditto at paras. 62-64.

[57] Para. 64 of the Applicant's Closing Submissions – ID15.

[58] *R (oao Barkas) v North Yorkshire County Council* [2014] UKSC 31.

when the landowner wishes to use the land for his own purposes, excluding the inhabitants on occasional days or charging for entry. No implied permission was given in this case and the user was of right[59].

4.3.26 If contrary to the above, the Inspector accepts the Green is highway maintainable at public expense, the Application should still succeed as there is no prohibition on registering highways as a TVG and different rights can exist on the same land and *DPP v Jones* can be distinguished. As noted above, the Applicant contends that case was never meant to apply to an area of open space on which local inhabitants have been enjoying LSP for over 20 years. Further, Mr Taylor confirmed that there are no plans to carry out highway works and that it is unlikely that such works would be carried out and that the registration of the Green would not be inconsistent with any highway status and that there would be no conflict with SCC's statutory duty to maintain the highway.

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4.3.27 In the Applicant's Response (ID18) to my Post-Inquiry Note (ID17) the Applicant accepts that the absence of the Green being shown as part of the publicly maintainable highway in the statutory list under section 36(6) of the Highways Act 1980 does not itself conclusively demonstrate that the Green is not highway maintainable at public expense[60]. However, the Applicant contends that its absence is nonetheless highly significant for the interpretation of the varied Road Agreement itself[61]. The fact that there is no plan prior to December 2022 showing the Green as being HMPE is, the Applicant contends, strong evidence that the Green is not highway maintainable at public expense. In particular, the absence of any such plan is strong evidence that the intent of the Varied Agreement was not to adopt the Green as highway.

[59] *R (oao Beresford) v Sunderland City Council* [2003] UKHL 60.

[60] Applicant's Response at para. 2 – ID18.

[61] Applicant's Response at para. 3 – ID18.

4.3.28 The Applicant therefore maintains, as in his Closing Submissions, that the Green was not adopted as a highway pursuant to the varied Road Agreement[62]. However, the Applicant's position now is that in attempting to dedicate the Green as open space the then Borough of Reigate acted outside of its powers under section 40 of the 1959 Act and as a result, that part of the Varied Agreement purporting to dedicate the Green as open space is a nullity, and the Green is neither highway nor open space. That is because '*other relevant matters'* in section 40(5) does not cover dedication of the Green as open space. Section 40(5) primarily concerns, the Applicant contends, the costs of constructing, improving or maintaining a highway maintainable at public expense. That is the focus of section 40(5) and why it exists. It is in that context that *R (oao Redrow Homes Ltd) v Knowsley MBC* [2015] 1 WLR 386 was decided. Although the scope of section 40(5) is wide, it is not limitless[63].

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4.3.29 The fact that separate statutory provisions exist for local authorities to acquire open space by agreement (such as section 9 of the Open Spaces Act ("the 1906 Act") and section 164 of the Public Health Act 1875 ("the 1875 Act") demonstrates that the acquisition of open space is a separate matter for which local authorities have separate statutory powers[64]. The Applicant distinguishes the situation in *Naylor v Essex CC* [2015] JPL 217[65].

4.3.30 The effect of this is that the attempt to dedicate the Green as open space was ultra vires and a nullity. For the purposes of this Application, the result is that the Green is neither highway nor open space, and the user detailed in the Applicant's closing submissions was *as of right*[66].

[62] Applicant's Response at para. 4 – ID18.

[63] Applicant's Response paras. 5-7 – ID18.

[64] Applicant's Response at para. 7 – ID18.

[65] Applicant's Response at paras. 11-14. – ID18.

[66] Applicant's Response at para. 8 -ID18.

The Objector's Case

4.3.31 The Objector contends that The Application Land is highway land, maintainable at public expense[67]. To the extent that any claimed use of the Application Land is found to have occurred, such use is to be regarded as having been undertaken pursuant to the public right to use the Application Land as a highway. Once such use is discounted, as it must be, any residual use, if any (which is not admitted by the Objector), is wholly insufficient to support a decision to register the Application Land as a TVG.

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4.3.32 The Objector accepts that highway land is not precluded by law, per se, from being registered as a new TVG, the circumstances in which such registration is likely to occur will, it is submitted, be very rare[68]. That is because use by members of the public (and in the case of a TVG application it must be use by members of the claimed locality or neighbourhood only) will be regarded as being by right (i.e. pursuant to use as a highway) in so far as such use comes within what the public can lawfully do on a highway.

4.3.33 In *DPP v Jones* [1999] 2 AC 240 Lord Irvine, at page 254H, said "... *the question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on ...Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass* ...". To succeed in an application to register land as a new TVG the users must necessarily have been trespassers (for there would be no reason for a landowner to object to their use otherwise). Further, Lord Clyde, at page 279F, said "... *it seems to me, the particular purpose for which a highway may be used within the scope of the public's right of access includes a wide*

[67] Objector's Outline Case at para. 18(i) on p.7 – ID14.

[68] Objector's Outline Case at para. 20 on p.8 – ID14.

variety of activities, whether or not involving movement, which are reasonably consistent with what people do on a highway ...".

4.3.34 All of the activities which the Applicant's witnesses claim to have engaged in on the Application Land are, it is submitted, within the scope of the public's existing right of access to or use of the same, particularly where, as in this case, the highway land is not a metalled carriageway designed for the passage of vehicular traffic. None of the claimed acts of user relied upon by the Applicant are outwith the scope of use that can be reasonably attributable to use pursuant to the public's right to use the highway.

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4.3.35 Accordingly, the Objector contends that the status of the Application Land as public highway land, in the circumstances of this case, should be regarded as determinative of the Application and it should be dismissed on that ground alone.

4.3.36 Alternatively, the Objector contends that even if the Application Land is not highway land any qualifying use has been by way of implied permission. n *R (Lewis) v Redcar and Cleveland Borough Council* (No 2) [2010] 2 AC 70 ("Lewis"), Lord Walker accepted as a general proposition that if a right is to be obtained by prescription the persons claiming that right "*must by their conduct bring home to the landowner that a right is being asserted against him so that the landowner has to choose between warning trespassers off, or eventually finding out that they have established the asserted right against him*".

4.3.37 In Na*ylor v Essex County Council* [2014] EWHC 2560 (Admin), in respect of which decision permission to appeal was refused [2015] EWCA Civ 627, John Howell QC, sitting as a Deputy High Court Judge, stated at [29] in respect of private land that had been maintained by the local authority, that "*There is no doubt that permission to use land may be communicated by conduct. As Lord Bingham stated in R (Beresford) v Sunderland City Council [2003] UKHL 60, [2004] 1 AC 889 ay [5], "a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that*

the inhabitants' use of the land is pursuant to his permission'. In that case the registration authority considered that the use had been "by right", by virtue of an implied licence, as the Development Corporation, the Commission for New Towns and then the City Council had maintained the land in question by keeping the grass cut and maintaining perimeter seating and it would have been perceived as a recreational area provided for the use by the public for recreation. This reasoning was regarded by the Supreme Court in Barkas supra as "unimpeachable in common sense and in law" (when finding that the decision in that case by the Appellate Committee was wrong) ...".

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4.3.38 At [30] the Deputy High Court Judge continued "*In this case the District Council did at least as much by way of management and maintenance as the public authorities did in Beresford ... The Inspector found that the relevant land had been maintained by the District Council "as something which looked like, and was de facto available as, a piece of public open space or park land, or indeed a town or village green" and that "it was unsurprising ... that several witnesses for the Applicant said that (until recent times) they had believed that the land was in fact owned by the Council, as some kind of common or public amenity land*".

4.3.39 The Objector submitted that the principle adopted in *Naylor* would be equally applicable to this case where, as acknowledged by the Applicant and various witnesses, the local authority maintained the land for the purposes of making it available and attractive for general public use. In such circumstances, and in circumstances where it is now clear that the then landowner had given the land over to highway use, the owner could not have been expected to warn off people who it did not consider to be trespassers (as stated in *Lewis* above).

4.3.40 This position was maintained in the Objector's Closing Submissions which expressly refutes the Applicant's contention that the varied Road Agreement did not have the effect of dedicating the Application Land as highway land[69].

[69] Objector's Closing Submissions at paras. 22-35 on pp. 8-13 – ID16.

The Objector maintains that the Highway Authority ("the HA") amended the plan identifying highways maintainable at public expense ("HMPE") having considered the effect of the section 40 Agreement. That decision has not been challenged by the Applicant by way of judicial review proceedings which would be the proper way of challenging it. Instead, the Applicant seeks to circumvent the proper way of challenging the decision of a public authority by inviting the Inspector to find that the HA's decision was wrong and proceed accordingly. The Objector submitted that an Inspector presiding over a non-statutory inquiry does not have the jurisdiction to go behind the HA's decision to include the Application Land on the plan of HMPE and simply ignore that designation. In support of this submission the Objector relied upon *Stancliffe Stone Co Ltd v Peak District National Park Authority* [2005] EWCA Civ 747 (ID11), in which the Court of Appeal refused to go behind the list of mineral sites drawn up by a mineral planning authority, and also *R (on the application of The Noble Organisation) v Thanet DC* [2005] EWCA Civ 782 (ID12) in which the Court of Appeal concluded, administrative acts are valid unless and until quashed by a court.

4.3.41 The Objector, however, contends that in any event it is submitted that the Applicant's interpretation of the section 40 Agreement is wrong as the Memorandum makes clear that clause 9 is varied so that "*the said road*" (i.e. the land therein referred to) is to be construed as including the land labelled "*open space*" on the plan attached thereto. In consideration of that inclusion, Regent Surfaces Company agreed to undertake the works detailed in the second sentence of the Memorandum. They are interlinked sentences which between them create an entire agreement: the local authority adopts the land as highway land upon the agreement of Regent to set out the green area (i.e. the area that is included by the Memorandum).

4.3.42 The Objector relies upon the evidence of Mr Taylor for the HA that there are a number of examples of significant grassed areas being dedicated as HMPE in or around housing estates. Further, the land at Sawpit Green which is

highway land is around an acre. Highway land is not limited to carriageways and footpaths and regularly includes grassed areas of some sort.

4.3.43 The reference to the Open Spaces Act 1906 appears to have caused some confusion. The land has not been appropriated by the public authority under that Act and the fact that the land meets that description does not bring it within the purview of that statute. Appropriation under the Open Spaces Act 1906 would usually occur upon acquisition or by subsequent resolution. That would apply to local authority owned land, not land which is here vested in the HA for the purposes of being a HMPE.

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4.3.44 Whilst it is accepted that highway land is not precluded by law, per se, from being registered as a new TVG, the circumstances in which such registration is likely to occur will, it is maintained by the Objector, be very rare. That is because use by members of the public (and in the case of a TVG application it must be use by members of the claimed locality or neighbourhood only) will be regarded as being by right (i.e. pursuant to use as a highway) in so far as such use comes within what the public can lawfully do on a highway

4.3.45 All of the activities which the Applicant's witnesses claim to have engaged in on the Application Land are clearly within the scope of the public's existing right of access to or use of the same, particularly where, as in this case, the highway land is not a metalled carriageway designed for the passage of vehicular traffic. None of the claimed acts of user relied upon by the Applicant are outwith the scope of use that can be reasonably attributable to use pursuant to the public's right to use the highway.

4.3.46 The Applicant's attempt to distinguish *DPP v Jones* should be rejected. Reliance is placed on *TW Logistics v Essex County Council* [2021] AC 1950 which concerned land that had no highway designation and is, therefore, clearly irrelevant to the question whether the Application Land is capable of TVG registration. The Applicant seeks to go behind the status of the Application Land as highway land apparently on the basis that "*the paramount right is not the right to pass and repass; the paramount rights are*

the town and village green rights which have been asserted by local inhabitants". The Applicant's outline case goes on "*DPP v Jones … was never meant to apply to an area of open green space on which local inhabitants have been enjoying lawful sports and pastimes for over 20 years*". That submission fails to recognise that rights other than rights to pass and repass, as expressly recognised by the House of Lords in *DPP v Jones*, are capable of lawful enjoyment on the highway. The starting point is the highway designation and what follows is the bundle of rights that flow from that status, including, but not limited to, the right to pass and repass.

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4.3.47 If it is the Applicant's case that notwithstanding the Application Land's status as highway land it was not really meant to be so because an open green space is not properly considered highway land then that is wrong. This is illustrated by Highway Law, 6th ed, Sauvain, Stockley & Westaway, at para 1-13 (ID1A) where it is stated: "*Whilst it is an essential element of the nature of the right of highway that land should have been dedicated for the purpose of passage this does not mean that this is the full extent of the right to use the highway once it has been dedicated …".*

4.3.48 It is clear also, from the rights that accrue to a Highway Authority once land is designated highway land, that open spaces can form part of the highway. In the context of a Highway Authority's power to lay out verges and trees "*the power to plant trees, etc, is most likely to be used in relation to highway verge or in amenity areas associated with the highway that will not actually be used for passage*", Highway Law, ibid, para 6-44 (ID1A). In light of the fact that the Application Land is surrounded by roads, and on three sides by the road that was dedicated under the same agreement as the Application Land, the Application Land is better viewed as being akin to a verge, not that such an analogy is necessary, one that is surrounded on all sides by highways.

4.3.49 It is simply not credible, contests the Objector, to suggest that the Application Land should not be treated as highway land despite its designation. It is highway land, rights other than the right of passage can be exercised on that

land subject to the limitations identified in *DPP v Jones* and there can be no doubt at all that all of the activities that the Applicant claims have been engaged in on the Application Land are reasonable uses of the highway land in this case because they do not constitute a public or private nuisance and do not obstruct the highway.

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4.3.50 The Objector also maintained its position on implied permission in its Closing Submissions, if the land were considered not to be highway land[70]. The Objector further contended that whilst the subjective belief of the users is irrelevant to the statutory test under section 15(2) of the Commons Act 2006, as a matter of evidence the inhabitants of the claimed neighbourhood accepted that the regular maintenance of the Application Land by (or on behalf of) the Highway Authority throughout the period until around 2020 suggested to them that the space was public open space that they were entitled to use as a matter of public right. That is how it appeared to them and that demonstrates that there was an implied permission for the public to use the Application Land that was communicated to the public.

4.3.51 In such circumstances, and further still in circumstances where it is now clear that the then landowner (Regent Surfaces) had given the land over to highway use, the owner could not have been expected to warn off people who it did not consider to be trespassers (as stated in *Lewis* above).

4.3.52 In its post Inquiry submission in response to my Note of 1 February 2023, the Objector noted that the Highway Authority had provided no further submission in response to that Note and thus was presumably satisfied that the position adopted prior to the Inquiry and in Ian Taylor's evidence at the Inquiry.

4.3.53 Further, whilst the green space was not identified as public highway prior to December 2022 on any plan of HMPE, the Memorandum dated 5 July 1966 did incorporate the Application Land as HMPE at that time and it has

[70] At paras. 56-62 on pp. 21-23 – ID16.

remained so ever since. The previous plan of the HMPE, excluding the Application land was, as Mr Taylor said, incorrect and disregarded the substance of the varied agreement.

4.3.54 The Memorandum varies the original agreement to include the Application Land within the land that is to become HMPE as soon as the Surveyor is satisfied that the agreed works have been carried out to the requisite standard. It forms part of the Section 40 Agreement as a whole. To read that Memorandum as having any other effect is to import meaning to it that is not apparent on the face of the agreement. Any doubt as to the proper meaning and effect of that Memorandum as part of the section 40 Agreement is artificial and contrary to the proper, literal approach to the interpretation of contractual terms as advocated in *Arnold v Britton* [2015] UKSC 36 (ID20).

4.3.55 As Ian Taylor said in evidence, the list of streets is a tool that can be used to identify HMPEs but it can be subject to error, as in this case, where there has been a failure to record that which ought to have been recorded since 1966. The list of streets clearly does not have the evidential status equivalent to the Definitive Map and Statement.

4.3.56 Applying *R (on the application of Redrow Homes Ltd) v Knowsley MBC* [2014] EWCA Civ 1433, referred to by the Inspector, to this case, if indeed it is even necessary, that wide interpretation of section 38(6) of the 1980 Act and, thus, section 40(5) of the 1959 Act, provides sufficient authority for the later variation of the Section 40 Agreement to include the Application Land which is to be thereafter maintained as HMPE by the Highway Authority.

4.3.57 It is not, in fact, clear that it is necessary to have regard to the interpretation of section 40(5) as being wide enough to facilitate the later inclusion of the Application Land if that is what the parties are being invited to address by paragraph 3(2) of the Inspector's Note. As submitted at the conclusion of the Inquiry in respect of the proper interpretation of section 40(5), that provision is, on the face of it, concerned with what provision can be made for bearing expense, construction, maintenance and improvement. It says nothing as to

the ability of the parties to the Section 40 Agreement to make a variation to the same after its execution. That is a matter of contract law and it is clearly open to parties to any agreement to vary it consensually after the event, provided that it is executed in a form adequate to effect the variation.

4.5.58 There can be no doubt that the variation by the Memorandum, executed as a deed, was competent to vary the original agreement executed on 9 February 1966 to include the Application Land as HMPE.

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4.3.59 In this case, simply because the words "open space" are used to describe, quite accurately, the open grassed area of land (i.e. the Application Land) that is encircled by Regent Crescent and Linkfield Lane and incorporated into the Section 40 Agreement by the Memorandum, that does not equate to the Application Land having been acquired or appropriated by reference to the OSA such that it is vested in the local authority pursuant to the OSA and held by the local authority on a statutory trust pursuant to the same.

4.3.60 That state of affairs is contrary to the evidence of Ian Taylor who says it has always been maintained by the highways team, not the parks and open spaces team, entirely consistent with its status, as now acknowledged, by the Highway Authority. There is no evidence at all that the Application Land was acquired or appropriated or designated other than by the Section 40 Agreement and to find otherwise would have no evidential basis whatsoever.

4.3.61 The Objector submits (repeating paras 22 and 23 of its Closing Submissions) that it is not open to the Inspector to regard the status of the Application Land as being other than as identified by the Highway Authority and the now corrected plan of HMPE. There can be no serious doubt that the Application Land is, and has been since 5 July 1966, highway land by virtue of the Section 40 Agreement[71].

[71] Para. 17 on p.6 of Objector's Submissions, ID19, on my Note of 1 February 2023, ID17.

Assessment of the "as of right" issue

4.3.62 I now set out my assessment of this issue under the following headings:

- As a preliminary issue, the scope of my consideration of the highway status of the Application Land
- The substantive issues relating to the highway status of the Application Land
- Whether highway status of the Application Land would preclude its registration
- The implied permission issue
- Overall conclusion on the *as of right* issue.

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Preliminary issue – the scope of my consideration of the status of the Application Land

4.3.63 As noted above, the Objector submits in its Response to my Note (repeating paras 22 and 23 of its Closing Submissions, ID16) that it is not open to me to regard the status of the Application Land as being other than as identified by the Highway Authority and the now corrected plan of HMPE.

4.3.64 In support of this submission the Objector relied upon *Stancliffe Stone Co Ltd v Peak District National Park Authority* [2005] EWCA Civ 747 (ID11), in which the Court of Appeal refused to go behind the list of mineral sites drawn up by a mineral planning authority, and also *R (on the application of The Noble Organisation) v Thanet DC* [2005] EWCA Civ 782 (ID12) in which the Court of Appeal concluded, administrative acts are valid unless and until quashed by a court[72]. However, the principles confirmed by the Court of Appeal in those two cases have to be considered and applied having regard to the particular circumstances arising in this Application.

[72] See para. 4.3 .30 of this Report above.

4.3.65 The Objector accepts that the list of streets under section 36(6) of the Highways Act 1980 is a tool that can be used to identify HMPEs but it can be subject to error where there has been as in this case, the Objector contends, a failure to record that which ought to have been recorded since 1966. The Object accepts that list of HMPE streets clearly does not have the evidential status equivalent to the Definitive Map and Statement.

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4.3.66 Until very late in the process of the consideration of this Application, the Applicant had understood, as had the CRA, that the Green itself was not highway land. This change in position on the part of the Highway Authority did not occur until, as noted above, December 2022 and thus shortly before the commencement of the Inquiry.

4.3.67 As Mr Ian Taylor for the Highway Authority said, and the Objector itself relies upon, the highway status of the Application Land depends upon interpretation of the varied Road Agreement and the list made pursuant to section 36(6) is not definitive. Accordingly, I do not accept that in the particular circumstances of this Application I should not consider the meaning of the varied Road Agreement and the consequences of that, if I were to conclude that the Application Land has not been dedicated as highway land.

4.3.68 The Objector is effectively asking me to treat the list as conclusive, on the basis that it can only be challenged by way of judicial review proceedings. However, if I were to treat the list as conclusive for current purposes, that itself could raise difficulties as to the point in time at which that should be judged. At the date of the Application being received in accordance with regulation 4 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 the list did not include the Application Land as HMPE. However, it would in my view be incorrect to consider the list conclusive at that point, and the Applicant has not suggested so.

4.3.69 Given the previous public position taken by the Highway Authority that the Application Land was not highway land with this only changing in December

2022, in my view it would be incorrect and unfair to the Applicant not to consider whether the effect of the Memorandum is as the Highway Authority now and belatedly contends, as supported by the Objector.

4.3.70 The need for that consideration is in my view heightened by the fact that the 1966 Memorandum refers to what is now the Application Land as "Open Space" and the letter relied upon by the Applicant, dated 17 June 1968 from Regent Surfaces Co. Ltd. to Mr Hanson of 11 Regent Crescent, refers to it as to become an open space available for the use of anybody under the Road Agreement.

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4.3.71 Any view reached in due course on this issue by the CRA, taking account of my Report and recommendations, can of course in principle be challenged by way of judicial review which would be available to either party if they consider there to be a legal error in this respect which had affected the outcome of the determination of the Application.

The substantive issues relating to the status of the Application Land

4.3.72 As noted above, the letter from Regent Surfaces Co. Ltd. (IB-1, p.19) states (in the second paragraph) that the Road Agreement provides that once the road around the green space and adjacent to the houses is completed it was to be maintained by the Company for one year and would then be taken over by the Local Authority. That is indeed what the Road Agreement provided (see clause 2).

4.3.73 The letter continued (also in the second paragraph) that when the road is taken over the central open space will also be taken over by the Local Authority who will be responsible for its maintenance. That also seems to me to be a correct interpretation of the varied clause 9 of the Road Agreement.

4.3.74 As the Objector correctly details in its submissions, the Memorandum amended clause 9 so as to add to the road within Regent Crescent, which is coloured green on the plan attached to the Road Agreement, the land

uncoloured marked "Open Space – grassed area" (being the land enclosed by the proposed new road called Regent Crescent and the existing road called Linkfield Lane). Accordingly, clause 9 as amended should be read as follows (with my emphasis):

9. The said road and Open Space – grassed area when made or completed to the satisfaction of the Surveyor shall be and remain for ever open to the use of the public and when the period of maintenance mentioned in Clause 2 hereof shall have expired and the Surveyor has issued his final certificate that the said works have been executed to his satisfaction then (all of such conditions having been complied with but not before) the Corporation will give such notice and do such acts and things as may be required for securing that the said road and Open Space- grassed area shall become a highway maintainable at public expense and the same shall accordingly become and be such a highway.

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4.3.75 I recognise that the final certificate referred to in clause 9 is not in evidence and Mr Taylor could provide no assistance on this. However, in my view there is no reason to do other than presume that was correctly done. The road was completed, as was the central area which it appears was cleared, levelled (notwithstanding the slight sloping nature of the land) and turfed as required by the Memorandum. It appears clear that the Application Land has been mowed by the Highway Authority's maintenance team, or on its behalf, on a reasonably regular basis (about 4-5 times a year) until recently.

4.3.76 The varied wording of clause 9 is in my view clear and so at least on the face of the Road Agreement as varied the Application Land was dedicated as highway land. The Applicant however contends that the varied Agreement is in effect purporting to dedicate the land as public open space which could not lawfully be done by the Agreement and thus this is of no legal effect with respect to the Application Land, as addressed further below.

4.3.77 To support his position on the varied Road Agreement the Applicant relies on the fact that there is no evidence of any plan prior to that in December 2022

which shows the open land as part of the public maintainable highway. The map provided by Surrey for an auction of the land in May 2021 does not show the Green as part of the adopted highway. However, and as the parties both agree, that is not itself conclusive as to the status of the land as part of the public highway (see section 36 of the Highways Act 1980). There is no statutory provision in relation to the list of public maintainable highways required by section 36(6) corresponding to the "conclusive" provisions of s.56 of the Wildlife and Countryside Act 1981 in relation to a definitive map and statement.

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4.3.78 The Applicant nonetheless contends that this absence of any recognition of the Application Land as HMPE until December 2022 is highly significant and is strong evidence that it was not intended to adopt this land as highway. However, in my view, the previous absence of recognition of the status of the Application Land cannot override the plain and proper meaning of the varied Road Agreement. The wording of the varied clause 9 demonstrates in my view a clear intention to adopt the Application Land as public highway. The fact that the grassed part of the highway was intended to be available to the public to use for open space purposes does not in the circumstances conflict with the use of the land covered by the varied Road Agreement to pass and re-pass as addressed further below.

4.3.79 As set out above, in my view therefore the Memorandum plainly incorporates the open land as part of the public highway. I did explore with Mr Taylor and the parties at the Inquiry whether the Road Agreement could alternatively be interpreted as meaning, or purporting to mean, that the open grassed land is lawfully dedicated public open space but not part of the public highway. However, and correctly in my view after careful consideration, neither party supported such an interpretation save that the Applicant contends that in attempting to dedicate the Green as open space the then Borough of Reigate acted outside of its powers under section 40 of the 1959 Act and, as a result, that part of the Varied Agreement purporting to dedicate the Green as open space is a nullity and the Green is neither highway nor open space. That is,

the Applicant contends, because '*other relevant matters'* in section 40(5) does not cover dedication of the Green as open space. Section 40(5) primarily concerns, the Applicant further contends, the costs of constructing, improving or maintaining a highway maintainable at public expense.

4.3.80 Further, the Applicant contends that the fact that separate statutory provisions exist for local authorities to acquire open space by agreement (such as section 9 of the Open Spaces Act ["the 1906 Act"] and section 164 of the Public Health Act 1875 ["the 1875 Act"]) demonstrates that the acquisition of open space is a separate matter for which local authorities have separate statutory powers[73].

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4.3.81 In contrast, the effect of the Objector's interpretation would in my view be that the road and central open land have all become highway maintainable at public expense but with that central area being reserved/dedicated for use as open space by the public, akin to a road verge. The Objector however sees no necessity to rely upon section 40(5). As explained below, I agree.

4.3.82 The power under section 40(5) was widely drawn and provided:

> **(5) An agreement under this section may contain such provisions as to the dedication as a highway of any road or way to which the agreement relates, the bearing of the expenses of the construction, maintenance or improvement of any highway, road, bridge or viaduct to which the agreement relates and other relevant matters as the authority making the agreement think fit.**

4.3.83 This therefore includes power for the Agreement to contain such provisions as to:

(1) The dedication as a highway of any road or way to which the agreement relates; and

(2) Other relevant matters as the authority making the agreement thinks fit.

[73] ID18 at para. 7.

4.3.84 In *R (on the Application of Redrow Homes Ltd) v Knowsley MBC* [2014] EWCA Civ 1433 at issue was the interpretation of the identically worded section 38(6) of the Highways Act 1980. Although dealing with different subject matter (i.e. contributions towards maintenance of the highway), I note that it was held by the Court of Appeal that the starting point is that section 38(6) is expressed in wide and unqualified terms:

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14. In my view, the judge reached the correct conclusion largely for the reasons given by him and amplified by Mr Tucker QC. The starting point is that section 38(6) is expressed in wide and unqualified terms. On its face, it permits an agreement between a developer and a Highway Authority containing "such provisions as to the dedication as a highway of any road or way…, the bearing of the expenses of the construction, maintenance or improvement of any highway, road…to which the agreement relates and other relevant matters as the authority making the agreement think fit". It could hardly be wider in its scope.

4.3.85 I accept, as the Applicant contends, that Section 40(5) is not limitless. However, in my view it is not limited to the expenses of construction and maintenance or improvement of a highway, although these are of course specifically provided for (see para. 4.3.83 above).

4.3.86 Accordingly, in my view it is within the scope of section 40 for an agreement under that provision to indicate, as here, how different parts of the highway may be utilised provided that they can all be properly considered as part of the highway.

4.3.87 However, even without relying upon this provision, in my view the Road Agreement lawfully dedicates the Application Land as public highway. Given the fact that the rights over a highway are not limited to the right to pass and repass and a highway can include verges and amenity and treed areas (as addressed in more detail below under the next issue), I am of the view that the reference to open space within the varied Agreement does not make it a nullity as contended by the Applicant. I therefore now consider whether the

highway status of the Application Land, as I conclude, prevents its registration as a TVG.

Whether the highway status of the Application Land precludes its registration as a village green

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4.3.88 As detailed above, the Applicant contends that even if the Application Land is considered to be HMPE, that does not in the circumstances of this case preclude its registration as a TVG if the use for LSP and highway can co-exist. The Applicant distinguishes *DPP v Jones* [1999] 1 AC 240 on the basis that it concerned the peaceful protest on a narrow highway verge and it was never meant to apply to an area of open space on which local inhabitants have been enjoying LSP for over 20 years, where highway use has in practice been extremely low and where TVG rights and highway rights can co-exist. Further, the Applicant relies upon Mr Taylor's confirmation that it was unlikely that any highway works will be carried out on the land.

4.3.89 The Applicant further and correctly contended that what was fundamental was how the activities of the local inhabitants would have looked to the landowner[74]. The use of the Green as shown by the evidence would, the Applicant contends, have appeared as, and would have been referable to, the assertion of a public right and not as a highway use. The Green, the Applicant also contends, has only rarely been used to pass and repass, which is the primary highway right.

4.3.90 Gadsden (3rd Edition at 15-27) states that highway land is a particular type of land which may not be registrable as a TVG but does not exclude that possibility. It also notes, as did the Applicant, that the provision in section 22(1) of the Commons Registration Act 1965 which provided that a highway may not be registered as common land, but said no such thing about a green, is not reflected in the 2006 Act. Further, there is much discussion in the

[74] Applicant's Closing Submissions (ID15) at paras. 68-69 referring to Lightman J in *Oxfordshire CC v Oxford City Council* [2004] Ch 253.

Inspector's Report for the Sawpit Green TVG Application, provided to the Inquiry by Mr Ian Taylor, regarding the principle of whether highway land can be registered as a TVG. I note, as I pointed out at the Inquiry, the reference in paragraph 124 of that Report to a decision of the Chief Commons Commissioner in the matter of 'The Green', Hargrave in Suffolk who found that the highway had been dedicated with the reservation that it could be used by local inhabitants for recreation. I don't have the details of that case, so I do not attribute it with other than minimal weight. However, I do note that in substance in this case also the Application Land appears to have been dedicated as public highway also with the reservation that it can be used for recreation.

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4.3.91 The Objector does not dispute that highway land is in principle capable of being registered as a TVG but states that this will be rare given the wide range of activities that can lawfully take place on highway land. As the Objector points out, *DPP v Jones* recognised that "*..a highway is a public place on which all manner of reasonable activities may go on…Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass…"*[75]

4.3.92 Further, as the Objector also points out, Lord Clyde said "…*it seems to me, the particular purpose for which a highway may be used within the scope of the public's right of access includes a wide variety of activities, whether or not involving movement, which are reasonably consistent with what people do on a highway…"*[76]

4.3.93 Accordingly, although the primary purpose of a highway is to pass and repass, the rights that arise are wider than that[77]. Further, a highway can

[75] [1999] 2 AC 240 at p. 54H per Lord Irvine.

[76] Ditto at p.279F.

[77] See also para 1-13 of Sauvain's Highway Law 6th Edition (ID1A) as referred to at para. 32 on p.12 of the Objector's Closing Submissions – ID16.

consist of not just the road or path which are used directly for passing and repassing. As referred to above (at para. 4.3.87)[78], it can cover verges, treed and amenity areas as recognised in Sauvain on Highway Law, 6th Edition (at 6.44 – ID1A). As that text states in relation to the planting of trees within the highway boundary, "…*that power is not likely to be used in relation to the highway verge or amenity areas associated with the highway that will not actually be used for passage. In many cases, therefore, it would be difficult to argue that their presence created any significant hindrance to the reasonable use of the highway."*[79]

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4.3.94 In my view therefore the use of the Application Land for recreational purposes is within the scope of the public's right of access to a highway. Hence, the use cannot be *as of right* as it is authorised by the highway status of the land.

4.3.95 Moreover, in this case the varied Road Agreement makes it expressly clear that this additional part of the highway (additional to that in the original Agreement executed in February 1966) is an open space grassed area which, like the road itself, is to remain for ever open to the use of the public (clause 9 as varied). I am unable to see how the users of the Application Land for LSP could be considered to be trespassers and their use *as of right.* The use is not interfering with the passage of any vehicles or persons. Indeed, although the Applicant says the crossing of the land in the manner of a right of way is rare, the evidence clearly indicates such highway use did take place on the land as concluded under Issue 1 and my impression is that it was likely to have been regular and materially more frequent than the Applicant suggests (as addressed under issue 1). There was no evidence of any such crossing of the land in that manner being impeded in any way by the recreational use of the land.

[78] And see Objector's submission on this at para. 4.3.38 above).

[79] See also para. 33 on p. 12 of the Objector's Closing Submissions. -ID16.

4.3.96 Having regard to all the circumstances of the Application Land and taking into account the contentions of the Applicant and Objector, I therefore conclude that the highway status of the Application Land does preclude its registration as a TVG as the claimed LSP use has not been *as of right* .

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The Implied Permission Issue

4.3.97 If the CRA accepts my conclusion on the highway status of the Application Land, then the issue of whether the use was otherwise not *as of right* does not itself need to be determined in order to determine the application.

4.3.98 However, in the event that the CRA takes a different view to that set out above and concludes that the Application Land is not HMPE, the Objector contends alternatively that the use was not *as of right* but had implied permission from the landowner. Therefore, notwithstanding my conclusion that the land is HMPE and the claimed use thus *by right* and not *as of right* whether, I now assess whether in any event the claimed use for LSP was permitted and thus not *as of right.*

4.3.99 Permission can be either express or implied. In terms of the latter, a landowner may conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of land is pursuant to his permission[80].

4.3.100 The Applicant contends that the claimed LSP use was carried out *as of right* and thus without any permission express or implied. This is on the basis, it is contended, that if the Green is not highway, then the only possible argument on behalf of the Objector would be that the mowing carried out on the Green amounted to an implied licence or permission[81].

[80] See *Beresford* at [5] per Lord Bingham; see Gadsden at 15-70; and see *Naylor v Essex County Council* [2014] EWHC 2560 (Admin) as referred to in para. 59 on p.22 of the Objector's Closing Submissions - ID16.

[81] Applicant's Closing Submissions at paras. 62-64 – ID15.

4.3.101 The Regent Surfaces Co. Ltd. letter (at IB-1. P.19) stated (in the third paragraph) that as the Local Authority was to become responsible for the central open space, no rights to use it were granted to individual purchasers of the Regent Crescent properties when their properties were transferred to them. In my view that reference to no rights being granted to individual purchasers was referring to there being no specific legal entitlement (easement or licence) provided for in the conveyance for each of the Regent Crescent properties. Contrary to the Applicant's suggestion (see para. 4.3.24 above), I do not interpret that letter as the then owner not intending to allow the use of the Green by the residents for open space. It was in my view simply referring to the mechanism by which that use was to be achieved.

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4.3.102 The Applicant also relies upon the Auction Information Sheet in which it is stated that "…. *The solicitors acting for Regent confirmed that Regent was not aware of having granted any licences or permissions to use the Property (but that knowledge was limited to the period 1993 onwards).*"[82] Again, that is consistent with there being no express license or permission being granted to any of the occupants of the Regent Crescent dwellings on the transfer of their properties to them.

4.3.103 In terms of the mowing of the grass, the Applicant in his Closing Submissions refers to this as "occasional", which in my view does not fairly reflect the regularity with which this was carried out based on the evidence[83]. Moreover, this is reflected by the perception of the residents and expressly set out in part 7 of the Form 44 Application (ID-1, p.7) which states (with my emphasis):

The immediate residents of Regents Crescent have believed the land to be available for the use of anyone, in part because of their knowledge of a letter provided by the developers who built the houses in Regent Crescent in 1968….in which they state that they intended for the land to be taken over by

[82] Document R6 on p.138 of IB-1.

[83] See e.g. para. 4.3.18 of this Report above referring to the Applicant's submissions on this.

the Local Authority and then it would be 'a public open space available for the use of anybody'. Our belief was that this had occurred as the land had been used in this way since 1968, and the local authority have mown the grass regularly and repeatedly since then.

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4.3.104 The Objector relies upon *Naylor v Essex County Council* [2014] EWHC 2560 (Admin) in which it was held that there was no doubt that permission to use land may be communicated by conduct as seen in the approach of Lord Bingham in *R (Beresford) v Sunderland City Council* [2003] 1 AC 889 at [5]. In that latter case the relevant authority had maintained the land in question by keeping the grass cut and maintaining perimeter seating and it was held that this would have been perceived as a recreational area for the use by the public for recreation. In *Naylor* the Inspector found that the Council had not only mowed the grass regularly but it also regularly picked up litter from the relevant land and it erected and replaced a 'dog poo bin' attached to a post erected there[84].

4.3.105 In the case of the Application Land, this has been mowed regularly throughout the relevant twenty year period (save that this was less so in the last year or so given the implications of the pandemic) and there may have been a limited amount of litter picking by the authority[85]. This has been done by or on behalf of the Highway Authority.

4.3.106 However, if the land had not been lawfully dedicated as highway, the land owner of both the surface and beneath would have been the Objector's predecessors in title. In my view, and contrary to the Applicant's contentions, the original landowner had clearly intended the Green to be used by the residents and more generally, as explained above. However, the mechanism for that was by dedicating the land as highway under the varied Road Agreement and thus the surface of the Application Land would (as in my view it did) vest in the Highway Authority.

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[84] *Naylor* at [30].

[85] As referred to by Mr Jones in answer to my questions.

4.3.107 Hence, in the no-highway land scenario, the surface of the Application Land would have remained vested in the original owner, Regent Surfaces Co. Ltd., until it was transferred to the Curwen Group Ltd on 29th April 2021 (the current Objector's predecessor in title), some 5 days before the TVG Application was received by the CRA. Even if the varied Road Agreement had itself been ineffective in dedicating the land as highway, the original owner had clearly authorised the authority to allow the land to be used as open space. It seems to me to be wholly unrealistic in those circumstances that those using the Application Land would be, or be considered by the landowner to be, trespassers.

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4.3.108 As Lord Neuberger stated in *Barkas*:

> "*as against the owner (or more accurately, the person entitled to possession), third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers*".[86]

I acknowledge that beyond mowing the grass (and perhaps occasional littler picking) there do not appear to have been other actions similar to those in *Beresford* and *Naylor*. Nonetheless in the circumstances this would in my view have been sufficient to convey to the residents that their use was permitted. As noted above, that is clear from how the local residents have understood it with reference also to the 1968 letter from Regent, as well as the regular mowing. This is in the context of the Green being an open and unfenced relatively small area of land very closely integrated with the Regent Crescent dwellings, and not in say a field detached from the dwellings. I also note (as recorded at para. 2.0.10 above) that the Chair of the Local Governing Board of St Matthews School Redhill stated that the land has been in the care of the Council for decades (IB-1, p.76).

[86] *Barkas* at [27] as cited in *Naylor* at [22].

4.3.109 However, I acknowledge that unlike in *Naylor* the authority's actions, under this scenario, would be likely to have been under a mistaken understanding of the precise status of the land, although there seems to be an understanding between the original landowners and the authority that it was to be available for recreational purposes. The question is how the authority is empowered to do this. I accept that given the Road Agreement it might appear more difficult to presume that anything done by the authority was lawful, as in *Naylor* where the Inspector found that the probable basis for the Council's management of the land under an arrangement with the landowner was sections 9 and 10 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875[87].

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4.3.110 Nonetheless, and although it was not necessary to decide the point in *Naylor* , it seems to me that section 164 would allow the maintenance of land as an open space even though the authority has no interest in the land[88].

4.3.111 Section 164 of the 1875 Act provides that:

> **Any local authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.**

4.3.112 The Judge in *Naylor* indicated that there was no ostensible reason why such powers should not be exercised in respect of land that an authority may be able to manage and maintain by virtue of an agreement with its owner which does not give it an estate or interest in the land[89].

4.3.113 The Applicant's argument is that the Agreement actually purports to dedicate the Application Land as public open space and that is outwith the powers of section 40 of the Highways Act 1980. If that argument is correct, I see no reason why it should not be assumed that if that was the intention of

[87] *Naylor* at [16].

[88] *Naylor* at [51]-[54].

[89] Ditto.

the parties' that would be authorised by section 164, even though it was encompassed within the section 40 Agreement.

4.3.114 In the circumstances it would not in my view have been reasonable to expect the owner, or the authority, to resist the exercise by the members of the public of any right to use the land for LSP[90]. Whilst I accept that this point is not straightforward, it would in my view be artificial after so many years of use which the local residents understood that they were permitted to carry out to conclude otherwise. I consider that this artificiality re-enforces my entirely separate conclusion above that the Application Land has been lawfully dedicated as highway land. For the avoidance of doubt, this implied permission does not arise if my conclusions, on the highway status of the land, precluding in the circumstances registration of the Green as a TVG, are accepted.

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Overall Conclusions on the *as of right* issue

4.3.115 I consider that the Application land has been lawfully dedicated as public highway by the Road Agreement as varied by the Memorandum dated 5th July 1966.

4.3.116 Given that the use is a reasonable use of the highway in the circumstances and consequently *by right* and not *as of right*, then in my view it cannot be registered as a TVG.

4.3.117 Those conclusions, if accepted, would result in the Application being refused by reason of any LSP not being *as of right* as required by section 15(2) of the Commons Act 2006.

4.3.118 However, and although this point is less straightforward in the particular circumstances, I consider that in any event the use was pursuant to the implied permission of the land owner and thus *precario* and not as of right.

[90] See *Naylor* at [23].

5. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

SUMMARY OF CONCLUSIONS

5.0.1 In summary, my conclusions on each of the three key issues are as follows.

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ISSUE 1: THE SUFFICIENCY OF USE ISSUE

5.0.2 I have concluded that the significant use criterion is only met if the School related use is included and thus the Application is assessed on the basis of the locality being Redhill West & Wray Common electoral ward, as the Applicant contended in the alternative, and not on the basis of the Applicant's primary case of the claimed blue line neighbourhood within that locality.

ISSUE 2: THE LOCALITY AND NEIGHBOURHOOD WITHIN A LOCALITY ISSUE

5.0.3 I do not consider that the claimed neighbourhood satisfies the legal requirement in section 15(2) as interpreted by the courts. The Applicant does not suggest any alternative neighbourhood and I do not consider on the evidence that there is an obvious alternative that the CRA should consider, even if it would be appropriate to do so.

5.0.4 However, even if the CRA took a different view and consider the claimed neighbourhood does satisfy the statutory requirement, in my view the sufficiency of user requirement can only be met if the School related use is included, as explained under Issue 1.

5.0.5 Although the Application would satisfy the sufficiency of user requirement by taking into account the School related use, I have concluded that it has not been demonstrated that those School related users come from the locality relied upon alternatively to the claimed neighbourhood. Further, it has not been demonstrated that the change in the locality that has taken place during the qualifying period has not been to an extent that prevents reliance upon it.

ISSUE 3: THE AS OF RIGHT ISSUE

5.0.6 I have concluded that the Application Land has been lawfully dedicated as public highway by the Road Agreement dated 9 February 1966, as varied by the Memorandum dated 5th July 1966.

5.0.7 Given that the use is a reasonable use of the highway in the circumstances and consequently *by right* and not *as of right*, then in my view it cannot be registered as a TVG.

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5.0.8 Those conclusions on this Issue if accepted, would result in the Application being refused by reason of any LSP not being *as of right* as required by section 15(2) of the Commons Act 2006.

5.0.9 However, and although this point is less straightforward in the particular circumstances, I conclude that in any event the use was pursuant to the implied permission of the land owner and thus *precario* and not as of right.

RECOMMENDATIONS

5.0.10 Accordingly I recommend that Application reference 1888, made by Mr Neil Jones under section 15(2) of the Commons Act 2006 to register Regent Crescent Green as a town or village green, is refused.

5.0.11 If the CRA does not accept my conclusions on Issue 3, the *as of right issue*, I would recommend that it considers whether the Applicant should be allowed to seek to address the locality issues before dismissing the Application by reason of the sufficiency or locality/neighbourhood issue.

5.0.12 As noted above (at para. 4.2.19), the Objector contends that it would be unfair and inappropriate for the CRA to determine the Application on the basis of the claimed locality rather than the claimed neighbourhood within that locality. Further, the Objector contends that in any event it should be allowed to make further representations before the alternative basis is considered by the CRA. In my view fairness requires that the Objector is given such an opportunity, if that were to arise.

5.0.13 If I had concluded in the Applicant's favour under Issue 3 (the *as of right issue*), I would have recommended that the parties be given the opportunity to make further written representations on the two outstanding elements of Issue 2 (see para. 4.2.34 above). Whilst I have some sympathy for the Objector's concerns about the way the locality and neighbourhood within a locality requirement has been addressed by the Applicant, my own view is on balance that if the Issue 2 requirements were the only outstanding ones, it would be appropriate for the Applicant to be given a further opportunity to address this.

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5.0.14 Nonetheless, I could understand that the CRA could take a different view on that. I stress, however, that consideration of the locality issues would only arise if the CRA considers the use to have been *as of right* and accepts my view that the sufficiency of use requirement could only be satisfied over the qualifying period if the School related use is taken account and the locality requirement met.

STEPHEN MORGAN

APPOINTED INSPECTOR

LANDMARK CHAMBERS

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28th April 2023