APPENDIX 1

RE: LAND AT OXFORD MEADOW, SIBLE HEDINGHAM

COMMONS ACT 2006, SECTION 15

REGISTRATION AUTHORITY: ESSEX COUNTY COUNCIL

REPORT OF THE INSPECTOR
MR ALUN ALESBURY, M.A., Barrister at Law

into

AN APPLICATION TO REGISTER CERTAIN LAND OFF OXFORD MEADOW, SIBLE HEDINGHAM, ESSEX

as a

TOWN OR VILLAGE GREEN

CONTENTS:

Introduction

1.1. I have been appointed by Essex County Council ("the County Council"), in its capacity as Registration Authority, to consider and report on an application received by it on 25th April 2013 (dated 24th April 2013), for the registration as a Town or Village Green under Section 15 of the Commons Act 2006 of an area of land off the road called Oxford Meadow, in the village of Sible Hedingham. Sible Hedingham lies within Braintree District, which is itself within the County of Essex, for which the County Council are responsible as Registration Authority for these purposes.

1.2. I was in particular appointed to hold a Public Local Inquiry into the application, and to hear and consider evidence and submissions in support of the application, and on behalf of the Objector to it. However I was also provided with copies of the original application and the material which had been produced in support of it, the objection duly made to it; and such further correspondence and exchanges as had taken place in writing from the parties. Save to the extent that any aspects of it may have been modified by the relevant parties in the context of the Public Inquiry, I have had regard to all of that earlier material in compiling my Report and recommendations.

2. The Applicant and Application

2.1. The Application received by the County Council in April 2013 was made by Mrs Lisa Babbs, of 76 Oxford Meadow, Sible Hedingham, Halstead, Essex. Mrs Babbs is accordingly *"the Applicant"* for present purposes.

2.2. It was indicated in the Application Form as completed that the Application was based on ***subsection (2)*** of ***Section 15*** of the ***Commons Act 2006.***

2.3. The boundaries of the application site were shown on a plan which accompanied the Application. The originally completed application form was however somewhat unclear as to what was being put forward as a relevant *"locality"* or *"neighbourhood within a locality"* for the purposes of Section 15 of the 2006 Act. A plan accompanying the application (as Map A thereto) appeared to suggest that an area of land within Sible Hedingham, with relatively clear borders on its north-western and south-western sides, but otherwise bounded by the arbitrary east-west and north-south lines of the edges of a large-scale Ordnance Survey extract, was being put forward as a *"locality/neighbourhood"*.

2.4. That such a thing should occur was not especially surprising or unusual, as the standard (national) form (Form 44) on which applications of this kind are to be made offers very little clear, useful guidance to applicants in relation to the rather particular views which have been taken by the courts as to exactly what is meant and required by the terms *"locality"* and *"neighbourhood within a locality"*, as they appear in the Commons Act.

2.5. However, in discussion which took place at the Inquiry, the Applicant Mrs Babbs in due course made it clear that she wished to amend this particular aspect of her

application, and to put forward the whole of the Civil Parish of Sible Hedingham as the suggested relevant *"locality"*, with no lesser area within that parish being put forward as a relevant *"neighbourhood"*. No objection to this amendment was taken on behalf of any party to the Inquiry.

2.6. As for the Application Site itself, this was reasonably clearly delineated on the plans accompanying the application, although the thickness of the drawn lines marking the intended boundaries produced some slight lack of clarity as to the precise intended position of some of those boundaries (which it was possible to resolve satisfactorily at the Inquiry). The site is essentially an L-shaped area of open ground within a housing estate; both arms of the 'L' are largely down to grass, but interspersed with some trees and a few bushes. However, at the eastern end of the southern, 'horizontal' arm of the 'L' there is a small, roughly triangular, fenced 'play area', with some play equipment for small children. At the time of my site visits, both arms of the 'L' shaped site (leaving aside the small play area) presented themselves as reasonably well maintained, mainly grassed areas (with some remnants of concrete footings in the north-western 'vertical' arm of the 'L'), on which there are (as mentioned above) also a modest number of trees and bushes. The play area also had a presentable (indeed quite newly equipped and furnished) appearance

3. The Objector

3.1. Objection was made to the Applicant's application by Braintree District Council, currently the freehold owner of a small part of the land of the application site, and previously (I was given to understand) owner of the whole of it. Braintree District Council is accordingly *"the Objector"* in this Report.

4. Directions

4.1. Once the County Council as Registration Authority had decided that a local Inquiry should be held into the Application (and the objections to it), it issued Directions to the parties as to procedural matters, dated 6th November 2014. Matters covered included the exchange before the Inquiry of additional written and documentary material such as further statements of Evidence, case summaries, legal authorities etc. Since those Directions were in the event, broadly speaking, observed by the parties, and no issues arose from them, it is unnecessary to comment on them any further.

5. Site Visits

5.1. As I informed the parties at the Inquiry, I had the opportunity on the day before the Inquiry commenced to see the site, unaccompanied. I also observed the surrounding area generally.

5.2. After the close of the Inquiry, on the morning of 8th January 2015, I made a formal site visit, accompanied by the Applicant and representatives of the Objector. In addition to looking at the site, we visited various parts of the area surrounding it which had been referred to in the evidence, and walked (and approximately timed) a round trip on foot from the site to the gates of Hedingham School, then from the school to the fish and chip shop in the centre of the village, and from that shop back to the site. This walking 'circuit' was carried out with the agreement of the parties' representatives present, and arose from evidence which the Inquiry had heard, as to a similar route being sometimes walked by local schoolchildren.

6. The Inquiry

6.1. The Inquiry itself was held at the Town Hall in Braintree, over two days, on 6th and 7th January 2015.

6.2. Both the Applicant and the Objector made submissions, and oral evidence was heard from witnesses on behalf of both sides, and subjected to cross-examination and questions from me as appropriate. With the agreement of the parties participating in the Inquiry, all of the oral evidence was heard on oath, or solemn affirmation.

6.3. As well as oral evidence, and matters specifically raised at the Inquiry, I have had regard in producing my Report to all of the written and documentary material submitted by the parties, including the material submitted in the early stages of the process, which I have referred to above. I report on the evidence given to the Inquiry, and the submissions of the parties, in the following sections of this Report.

7. THE CASE FOR THE APPLICANT – Evidence

Approach to the evidence

7.1. As I have already to some extent noted above, the Application in this case was supported by various documents including plans, a statement of further supporting information, a substantial collection of completed evidence questionnaires, etc., from local residents. There was also other supporting material, including some photographs, part of which material was provided in response to the objection to the application which had been submitted by Braintree District Council.

7.2. Although the Directions for the Inquiry had provided for further written or documentary material to be submitted on behalf of the Applicant in the run-up to the Inquiry, in the event at the Inquiry the Applicant's case (apart from new oral evidence, and submissions) substantially relied on the written and documentary material which she had submitted previously.

7.3. I have read all of this written material, and looked at and considered such photographs and other documentary items as I was provided with, and have taken it all into account in forming the views which I have come to on the totality of the evidence.

7.4. However, as is to be expected, and as indeed was the subject of discussion and acknowledgement at the Inquiry itself, more weight will inevitably be accorded (where matters are in dispute) to evidence which is given in person by a witness, in this instance on oath, who is then subject to cross-examination and questions from me, than will necessarily be the case for mere written statements, evidence questionnaires etc., where there is no opportunity for such challenge or questioning.

7.5. With all these considerations in mind, I do not think it is generally necessary for me specifically to summarise in this Report all the evidence contained in any statements, or in particular questionnaires, by individuals who gave no oral evidence. In general terms they are broadly consistent with the tenor of the evidence given by the oral witnesses, and nothing stands out as being particularly worthy of having special, individual attention drawn to it in this Report.

7.6. In any event all of the written and documentary material I have referred to is available to the Registration Authority as supplementary background material to this Report, and may be referred to as necessary.

The Oral Evidence for the Applicant

7.7. ***Mr David Church*** gave evidence in support of the application. He lives at 9 Castle Meadow, Sible Hedingham. He has lived there from 1996. Mr Church had completed one of the evidence questionnaires lodged in support of the application.

7.8. In his evidence questionnaire Mr Church had stated that the land forming the application site was itself called Oxford Meadow, or sometimes referred to as the Old Scout Hut land. He used to gain access to this land from the Oxford Meadow footpath, and he went onto it to go for a walk once or twice a week. Walking was the activity he indulged in on the land.

7.9. He had also said that his immediate family uses the land; his son comes for a walk most weekends. He had also known of the Scouts engaging in activities on the land, although he himself had not participated in those activities. The activities he had said he had seen on the land were children playing, dog walking, team games, football, cricket, people walking, bicycle riding, and skateboarding.

7.10. He had never sought permission for any activities on the land, and nor had anyone given permission. He had never been prevented from using the land, and there had never been any attempt made by notice or fencing or other means to prevent or discourage use being made of the land.

7.11. In his oral evidence Mr Church explained that the two civil defence huts on the north-westerly arm of this L-shaped piece of land had still been in use in 1996. Both of them were used by the Scouts. They were both being actively used by the Scouts, and they were in fairly good condition at that time. That use stopped in the early-ish 2000s, something like 2004 he thought.

7.12. The item shown as *"Hall"* on the Ordnance Survey large scale maps was one of those huts. He thought that was what was known as the No.2 hut. The other hut was to the south of that one. The hut shown on the Ordnance Survey based plans did stay for some years after the other one went. However he personally did not use the Scout Huts. There had not been any fences around those huts.

7.13. When he had said he had seen team games happening on the land, he was meaning games of football and the like. He had also seen people playing with remote controlled cars on the land of the application site.

7.14. *In cross-examination*, having been shown some records kept by the Valuation and Estates Officer of Braintree District Council, Mr Church accepted that records showed that the civil defence hut on the land had been demolished in July 1999, and that in 2000 it had been recorded that the Scout hut had a useful life of one year. He agreed that perhaps the second hut to be demolished was demolished in about the year 2000, and that the other hut went a little before that.

7.15. As for his own use of the application site, he would go for a walk there one or two times a week, often using it as a short cut more than anything else. The majority of people use this land as a walk through, apart from the children playing on the land of course. As for the part of the land which has been set apart as a play area, the relevant age group of children would use that play equipment. It is not suitable for the older children as it is too babyish for them.

7.16. The majority of the skateboarders that he had referred to in fact use the roadway to the garages, at the northern tip of the north-west arm of the L-shaped site.

7.17. The skateboarders use the road from Oxford Meadow right round into the garages area. When he said 'skateboarders' he meant to include roller skaters as well.

7.18. Other children do in fact use the grassy area of the land, to play ball or run around playing other games, whatever they play nowadays. It might be football, cricket, tennis or just knocking a ball about.

7.19. He was not aware of a surfaced path leading to the southern of the former huts on the site. He could not recall under oath whether there had been a path that ran to the southern hut.

7.20. Children of the age he had been talking about are often out on the north-western arm of the L-shaped site, playing children's type football. The part where the old huts were is slightly visible from his house. He sees them playing on that arm of the 'L'. Sometimes he sees the children playing when he is walking as well. He cannot see the southern arm of the L-shaped site from his house.

7.21. He could not say how often he sees children playing ball on the application site. He does not make a note; he is just out for a stroll. It would depend on the weather, and the time of year. It happens a lot more in the summer, obviously.

7.22. Prior to 1999 the children could play on the football field (further east, not on the application site), and a lot of them did. The fencing in of the football field

increased the use of the land on the application site. Children used to play on the football field, and there were a lot of dog walkers there too.

7.23. As for the open green area of the Church field to the southwest, it depended on the age group whether children would use it. Five or six year olds would be out playing on the application site. This was not necessarily a lot of them, but certainly some of them. Some of them would play on the park swings too. There is also a play area off the southern side of Rectory Road (away from the site), but that is only suitable for a limited age group. Mr Church did not think that use by children of the application site land is only occasional; however he could not say definitely that one would see a child on there playing every single day.

7.24. Children used to play there when the Scout huts were there. It was not Scout land around the outside of the Scout huts. There were no fences around the huts. Children would draw their cricket stumps on the Scout hut wall, or use the hut as the goal. He was sure that he had seen children play cricket against the Scout hut wall. However that was ages ago. It was not the Scouts doing that, it was the children from the area generally. It was very rare for the Scouts to be there other than in the evenings.

7.25. Where he lives faces the area which contained the huts. He could not really see the huts themselves from his house however. His evidence is not based on the opposition which he has to housing development on part of the application site.

7.26. Scouts used to camp on the north-western part of the application site for one or two nights a year at the maximum. A fire would be going, and perhaps there would be half a dozen scouts sitting around a fire singing and indeed camping on the land. They were definitely camping there, but how many of them did it he could not remember. He thought there were possibly 2 or 3 or maybe 4 tents, and a little camp fire. There was no fencing or ropes that he could recall. That was in the north-western or top part of the L-shaped land. They only did it overnight, say from one afternoon until the day after, or possibly for a two night stay. He saw this camping from going onto the land himself. The tents tended to be more towards the garages side of the land, not the footpath side.

7.27. He personally tends to walk close to his boundary when he is on the land, in order to check his fence. The part alongside the fence used to be overgrown and wild until a couple of years ago. He would use the public footpath to check his fence. He would go there also to check his garage gutters. This would have been in the late 1990s or early 2000s, he could not be sure. One cannot walk down the footpath there for the whole length because there is an Oak tree in the way. He has been trying to get Braintree District Council to remove that tree.

7.28. The Scouts used to dry their tents on the land, as well as camping there. But that would be for 1 or 2 days at maximum as well.

7.29. He agreed that there had been no bank in the village for 20 years or so. Swan Street contains most of the village amenities. The application site land provides one of the routes for him to walk there. He thought the majority of people walking over the land would be doing that. However children who were playing would be

staying on the land, except that children do also cut through by the land in order to walk to school.

7.30. A lot of people used to park cars on the top north-western section of the L-shaped land, in order to go to church. They would park their cars there and walk across to the Parish Church. There is nowhere by the church itself to park. The area of the site where people used to park is now fenced off, so the parking no longer occurs. He thought that that blocking off of the land had been for a lot longer than the period since 2014 when the Greenfields Housing Association took over that part of the land. He thought that it had been blocked off several years ago, perhaps 2 or 3 years before the Inquiry. Prior to that people parked on the grassy part of the land between the entrance drive and the foundations of the old huts. They did that every Sunday. People could not play all over the land of course while cars were parked there, for perhaps 1½ hours or so for a church service.

7.31. In relation to Hedingham School, which is the senior school for the area, children might well walk to it. Also children from the school might typically come to this land, the application site, by the swings, in order to picnic in their lunchtimes. That only happens during the summer. He has seen 20 or more children do that.

7.32. As for the village hall, Mr Church does not use that as much as he used to. The Parish Council has in the past met at the Baptist Church, and it could be convenient to walk through the application site in order to get there.

7.33. As for signs, he had seen signs on the equipped play area. He goes past that play area every other day. He thought that some of the signs there were newer than the others.

7.34. ***Mrs Shirley Flegg*** lives at 25 Castle Meadow, Sible Hedingham. She said that her daughter lives at 77 Oxford Meadow. She had completed one of the evidence questionnaires lodged in support of the application. She had lived from 1987 to the present in her current house in Castle Meadow. In her evidence questionnaire she had stated that she goes onto this piece of land for walking, and that she did so daily. The activities she said she had taken part in included rambling, picnics, family games, sledging and dog walking. She had said that her immediate family uses the land.

7.35. She had also noted that the land had been used for Scouting for many years, but she did not know for how long. Activities she had seen on the land included children playing, rounders, dog walking, team games, football, cricket, picnicking, people walking and bicycle riding.

7.36. She had never been prevented from using the land of the application site, nor had anything been done to prevent use of the site by local inhabitants.

7.37. In her oral evidence at the Inquiry she reiterated that her use of the site was daily. The Scout hut part of the land is the only level area, which is why her grandchildren like to use it for games. It is much the better part of the site for ball games. Indeed both of her grandchildren had learned to walk on the Scout hut part

of the land. Her grandson had even camped out on that part. And children played badminton there. Conversely sledging would be on the other part of the land, where there is a slope. For dog walking she tends to use the Scout hut part of the land. Over the 20 year period relevant to the Inquiry she used to go all over the L-shaped area of land.

7.38. Her daughter had moved to 77 Oxford Meadow in 1989. The Scouts were very active at that time, and used to have camp fires and the like on the land. Her recollection was however that the Scout huts had been used for storage for a while before they were eventually demolished.

7.39. *In cross-examination*, when shown some photographs of the land apparently taken in July 2004, Mrs Flegg agreed that they showed that what appeared to be a portacabin was on the land at that stage, in the north-westerly part of the L-shaped area. One of those photographs also showed the part of the ground which was good for ball games, to the north of that portacabin.

7.40. She thought that the area used for ball games was all of the north-western arm of the site, not just the part that had been leased apparently to the Scouts. The Council grass-cutter machine used to be left on a part of that area, towards its northern end, where the grass was shown as worn away on an aerial photograph produced by the Objector.

7.41. The north-western part of the site was used for parking for people coming to funerals and the like at the Parish Church. A few people would park there every Sunday, but more for funerals and weddings.

7.42. As for the huts, when they were there people would obviously tend to stick to the grass. She would visit the land on a daily basis, and when she was more mobile the length of time she would spend on the land would depend on whether she had grandchildren with her. They would always tend to stop to play. Her grandchildren were born in 1993 and 1998. They liked to do things like playing on a rope swing. Her grandson, born in 1993, was quite adventurous. The rope swing was on the big tree on the corner of the site. That tree is visible in one of the photographs produced by the District Council.

7.43. Typically when she walks on this land she does a circuit which includes the application site, and then back to her house. She personally never used the site as a walking route to the shops. When she was more mobile she used to walk to the shops by cutting across what she called Grays Hall Meadow, the field towards the church. There is a public path around to the entrance to that meadow.

7.44. However her walking circuit nowadays involves using the application site land. She uses this land more than she used to for her walks. However even when more mobile she would go across the Scout hut land and then down to Yeldham Road, then up by the football field, and via the second (southern) arm of the application site, and so back to her house. That is an example of the sort of route she followed for recreation, or to walk the dog.

7.45. Nowadays she goes via the Scout hut field and back around to her house, a route taking only 10 to 15 minutes; that is much less than before.

7.46. For ball games you need a flat surface. The closing of the football field increased the use of the application site land somewhat, but children have always played on the application land. Children did not go off down to the football field all the time, when they were young. They were told to stay within sight of the house. Having this land nearby is part of the joy of living in a village in the country. She did not think that her grandchildren were any more fortunate than any other child would be, living in the houses surrounding the application site. It was a good area because people could supervise it while their children were playing. Her own grandchildren might have used the land more than children living in other streets, she could accept that.

7.47. When the Scout huts were on the land she did see the camping which took place. It tended to be in the summer holidays. They would have a bonfire at night, and camp on the site as well. There was a concrete surfaced area on the site which never had a building on it, and they used that for the bonfire, for their cooking. There would have been adults there with the Scouts.

7.48. As for community activities on the land, there was she recalled a table top bring and buy sale on that land, when the Scouts were still active. It was during the period when the Scouts used the hut. She thought it had been open to the public. She thought she had gone to it. It was to raise money for the Scouts, and was close to where the huts were. She could not recall if the Scouts made a charge to go to that sale.

7.49. When the Scouts used the land, she did not consciously keep out of their way. One could still walk through the land. When there were tents there, they were not so many as to cause problems if one wanted to traverse the land.

7.50. She recalled signs on the south-eastern part of the land, in association with the play area there. The first one she recalled was probably there from about 2005. She had certainly seen it.

7.51. *To me*, Mrs Flegg said that the area around the Scout huts was not fenced or roped off during the table top sales she had referred to. Any money made would have been from the sales alone. There had been nothing to stop anyone coming in from either direction.

7.52. ***Mrs Lisa Babbs*** (the Applicant) lives at 76 Oxford Meadow, Sible Hedingham. She had completed one of the evidence questionnaires lodged in support of her application.

7.53. She said that she had known the land of the application site since 2004, which is when her father-in-law moved onto the estate. In 2006 she and her family moved in from Braintree, and since then they have been using the land of the application site. They as a family play games on both parts of the L-shaped area, depending on which game.

7.54. Games of badminton are satisfactory on the grass in front of her house. Other games are played on the former Scout part of the land. The part in front of her house is sloping and is suitable for snowmen and sledging when there is snow. Those things tend to be on that southern arm of the land.

7.55. In her completed questionnaire she had said that she went onto the application site land typically for playing with her children, and walking to other areas of the estate and village. They played badminton and football in the summer, build snowmen in the winter, do sledging, cycling and walking children to and from school. She and her family use this land every day. She herself takes part in the ball games, cycling, walking, badminton, and generally having fun on the land. Her family use the land in a similar way. She had also known that a local walking group had used the land, and indeed the Palm Sunday Parade of the church sometimes uses the land.

7.56. In her evidence at the Inquiry she added that her own children do go out and play on this land on their own. She gives them boundaries as to where they can go outside the house. For example, people's dogs are let loose on the church field to the south west, and therefore that is not such a satisfactory place for children to go. Her children on this land have built dens, collected sticks and the like, and generally play games. Her daughter tends to tag along with her son. In the summer they are typically out on this land every afternoon or evening.

7.57. She said that she had heard from her husband that a nursery school used to use the civil defence hut on the western part of the land. Her husband indeed went to it.

7.58. Her reference to a local walking group had been to a group which meets on Tuesdays, and they do walk through the application site. She confirmed that the Palm Sunday Parade also passes through the application site, on its way between Castle Hedingham and Sible Hedingham churches; this happens every year.

7.59. As a family they used to park their car on the north-western part of the application land, the part known as the Scout hut land. This was in particular when football was taking place on the football field, because there was a lot of parking in the road on those occasions.

7.60. *In cross-examination* Mrs Babbs said that she uses the land of the application site every day. Indeed she lives right on top of it. She repeated that this use would be for playing games, or walking to other things in the village, including taking her children to school.

7.61. Adults mainly use the land in order to walk to places. She herself had only obtained witness statements from adults. When adults use the land they are usually either walking dogs or walking to or from somewhere. However children do play on this piece of land. Indeed children come over to this land from the school in the summer in order to eat their lunch. Year 8 children are allowed out of school, at the age of 14 or 15 years or so. So they are in about their third year at the school, and from then on they are allowed to go out at lunchtime. Perhaps there might be

up to 20 children on the land at lunchtime. They might go to the fish and chip shop in the village to buy food, or they may bring their own packed lunch.

7.62. Children having their lunch on the land do often leave litter, unfortunately. Girls among them will just sit on the ground. This happens from May to July mainly. She thought that the school children have nearly 1 hour 20 minutes off for their lunch time. The fish and chip shop is on the main road in the village. She thought it took the children about 5 minutes to walk to that shop. Then when they get to the application site they tend to be on it for about half an hour or so. They did that nearly every day in suitable weather.

7.63. Some do come over even in the winter if it is a nice cold crisp day, and then they might play football on the land. She did not know whether all the children who did that would be ones who actually live in the village. Indeed she did not know how many children go to the school.

7.64. She thought that it would be children who live in the village who would be the ones who walk across the application site land. Her own children had made friends with children who live on Castle Meadow through playing on this land. Probably her son has about 8 or 9 friends who he plays with on the land. They come from the houses behind the land, and to the side and over on Castle Meadow. Quite a few children from the immediate vicinity do use this land to play. They do not all necessarily play on this land all the time or all at the same time.

7.65. Some of the children will come to knock on her own door to see if her children will play. The children typically know their boundaries in terms of where they are allowed to go and play.

7.66. Generally she would say that she and her family live on an estate with quite a lot of elderly people, so there are not that many children. There are people who have lived in the local houses for 40 years or so. But then gradually the younger generation will move in.

7.67. Their children will then need this land to play on. Indeed the older people living locally have said, a lot of them, that they played with their own children or do play with their grandchildren on this land.

7.68. All of the evidence questionnaires she had produced had been collected in a three week period in the winter. She had had to ask the people who were actually there on the land at the time. The reason that she had pursued this application was that a lot of the population around are every elderly, whereas she realised that children need to have this area to play on in the future. Indeed that is her whole concern.

7.69. *To me*, Mrs Babbs said that people play with their dogs and perhaps throw balls for the dogs on the land. People also go out together for a general natter on the land with their friends. Usually people with their dogs are on a longer route somewhere, but they do play with their dogs on this land.

7.70. In relation to the school children using the land in the summer, she reiterated that some of them have packed lunches, and not all of them are eating fish and chips.

However she thought that all of them might have walked in a group from the school via the fish and chip shop, and then back to this land. They tend to walk with their friends, all together.

8. The Submissions for the Applicant

8.1. In submissions lodged before the Inquiry on behalf of the Applicant, in response to the objection from Braintree District Council, it was acknowledged that parts of the application site might have been occupied for periods by a civil defence hut and a Scout hut, and it was said that the Applicant was prepared to remove the relevant sections from the application site and continue with the application for the remainder of the site as a whole. Other than those matters the site had enjoyed uninterrupted use with no impediment to access over the 60 years or so that the housing estate had been in existence. Various other points were made about the early history of the land, which do not go to the criteria relevant to a ***Commons Act*** determination.

8.2. The civil defence hut was apparently given permission in July 1963. However it was only a small section of the application site; a large portion of the land remained used as of right by local people for the entire period of the civil defence hut lease. The civil defence hut lease itself was dissolved in 1968. It was said that there had been a period when a nursery school occupied the site run by a Mrs G Mansfield, but no official documentary evidence had been produced to show any details in relation to that.

8.3. A local Scout group were given permission to use the land in June 1984, but again the area was never fenced off nor notices erected to prevent access to local inhabitants. That Scout group would actively use the land during its once weekly meetings until 1991, when it was merged with another troop in Castle Hedingham and the meetings held in Castle Hedingham. The rest of the land, because of the lack of fencing etc., was used as of right during all that period.

8.4. It was suggested that the Second Hedingham Scout Group ceased to exist, thus making the lease void from 1992, which still provided 21 years of as of right access. The buildings and contents were overseen by the District Scout Association until 1999. At the time of those submissions it was thought that the buildings had been vacated and the equipment given to another Scout group in 2004. No new lease was ever agreed by the District Council. It was accepted that the eastern end of the southern part of the application site is occupied by a children's play area. However the work to this play area as it is now constituted was completed in January 2014. The play area is fenced.

8.5. The whole of the application site has always remained an open space since the housing estate was first built in 1952. The area has never been fenced. When parts of the area have been leased no notices have ever been erected to restrict the use of the land by local inhabitants, until late 2013.

8.6. This village green application has been made to ensure that the village as a whole is sustainable. There is no opposition to the idea of the provision of affordable housing in the village.

8.7. In her submissions to the Inquiry, Mrs Babbs pointed out that prior to 1952 it was clear from conveyance documentation that had been seen that the land's use was agricultural. The Council had rejected a few witness statements lodged on behalf of the Applicant on the basis that the land could not have been used before 1952. However in that era it was commonplace for children to roam free, including on agricultural land.

8.8. Several of those who had completed evidence questionnaires had lived in the village since they were born, some of them going back to dates like 1938. They did use to play in the fields as children.

8.9. Then in 1952 plans were made to develop a housing estate, and it was decided that the layout was to be as it was in fact built. It was seen fit not to put extra houses on the application land as it is, and to stop the road of Oxford Meadow where it in fact did stop.

8.10. When a new area to the west was developed in the 1980s and 1990s, that was by completely different developers. Again they did not develop the application site land.

8.11. Since one of Mrs Babbs's neighbours moved into her house in 1958, the land had always been in that state, open and with no fencing. Access was unrestricted. Yes, there had been some temporary buildings, the civil defence and Scout huts. But there was always open and accessible land around them. The very definition of a village green should be an open area within a settlement. Traditionally it would be an area of open grassland at the centre of a rural settlement.

8.12. With the new development that has been built, the area of the application site has remained a focal point, central to the housing estates around it. This land was left undeveloped to create an area where people can play, and not be completely surrounded by concrete.

8.13. As far as Grays Hall Meadow is concerned, part of that area is designated for an overspill burial site. It is true that children from the other end of the village do not necessarily come up to the application site to play, as they have a recreation ground in that part of the village. But children do come up to the application site from places like Brooks Meadow in the village in order to play. And more families are moving into the local area.

8.14. The fencing in of the football pitch area has caused the application site land to be used more frequently and more recreationally than in previous years.

8.15. Mrs Babbs confirmed that she wished this application to relate to use by the whole locality of the Parish of Sible Hedingham. In other words this should not be seen as a *"neighbourhood"* case.

8.16. The new play area and its fencing were put in in early 2014. However the grass was not cut in there for the whole of the summer, leading to months of complaints by local residents. There are now some signs around or attached to the fencing of the play area, but they were not installed straightaway. It took a fair few months for them to appear.

8.17. It was the Applicant's understanding that the civil defence hut was given permission in July 1963. It was clearly marked on documents that the area associated with it was no wider than the hut itself, so it did not extend into a large part of the north-western arm of the application site. So the remaining area would have been used as of right during the civil defence hut lease. People could use the area around the building as of right.

8.18. Then in June 1984 the Scouts were given permission to use the hut, but again the area was never fenced, nor local people prevented from using the land. The Applicant still believes that Scout meetings went on only until about 1991, when the group was merged with another troop in Castle Hedingham. Thereafter the Scout hut on the application site was not used other than for storage. But again the important point is that the whole area was never fenced off. The area outside the buildings was still all available for use by the relevant generation of local children. There was no-one to tell local children that they could not use the land around the buildings.

8.19. Even when the Scouts used their premises that did not interfere with local use. People could walk through the tents, for example, when the Scouts were camping there. They probably would not do that, but there was nothing to stop them.

8.20. The concrete bases on the land, some of which were associated with former buildings, have also been used for playing on by local children.

8.21. The main purpose of this application is to protect an area that has been left and developed around. It has been left as a green haven of open space. The cow field, or Grays Hall field, to the south west is lovely, but there are trees planted in it and the area is not so open. It is not easy to play football or Frisbee there. Indeed half of that meadow is full of trees, and the other part is sloping. It is not smooth ground, and there are lots of mole hills. None of that makes it very conducive for general play.

8.22. Children used to go to the football field as the main hub that they would use, until the fence was put there. Taking that away from the community has had a detrimental effect on the whole village. Since the fence was put up around that field, children have moved around to the only remaining area to play, namely the application site.

8.23. Mrs Babbs had not made this application for any kind of personal gain. Indeed she is looking to move away. She is pursuing this application for the benefit of future children. This space has been there and available for 50 years, and during that whole time it has never been inaccessible. Access to the land never stopped.

8.24. If this village green application fails, a lot of children will have nowhere to play, and that will be a very sad state of affairs. There are 300 houses going up in the village now, which is sad, because they are not needed. Local people have asked to use the application land for allotments. It certainly should be kept as a green space. If this land were built on children would only have a very small strip left to play on.

9. THE CASE FOR THE OBJECTOR – Evidence

9.1. ***Mr Nicholas Day*** said that he is the Parks and Open Spaces Manager of Braintree District Council. He has been in that post since November 2004, and is familiar with the application site land at Oxford Meadow.

9.2. To his knowledge the District Council had originally maintained the land to the south of 73 – 77 Oxford Meadow. They also maintained the play area at the eastern end of that land, near to the football field, but not the land on the application site to the west of the garages and No.77 Oxford Meadow (the 'north-western arm'). In June 2005 the District Council stopped maintaining the southern arm, nearer to the play area, and the Parish Council took over. Mr Day produced an email from the former Parks and Open Spaces Manager of the District Council relating to that.

9.3. The football field, to the east of the application site, has been leased to the local football club for many years, but used to be open for people to walk across. Mr Day recalled a fence being constructed around the field about 7 or 8 years ago, as he received a lot of complaints from adjoining owners. He had checked with the Council's Asset Management to see if the club were allowed to do this, and they said it had been authorised, as there had been trouble with dog fouling on the field. Although the land is leased to the football club, the District Council have always mowed the playing field under contract for the football club, and still do so.

9.4. The play area to the south-west of the playing field is owned by the District Council, and they have always maintained this. This is the play area that is within the extreme eastern end of the application site. That play area has recently been refurbished by the Council, in conjunction with Greenfields Community Housing Limited.

9.5. Mr Day confirmed that it was only the southern arm of the L-shape of the application site which the District Council's teams used to maintain. The area to the north-west was not maintained. He did not know if Sible Hedingham Parish Council had maintained that land to the north-west.

9.6. He produced some photographs taken in 2009, showing the fencing which had been erected around the football field. He confirmed that dog fouling had been a problem there, and that the football club had wished to stop that, and unauthorised users of that field.

9.7. The play area at the eastern tip of the application site had previously been refurbished shortly after November 2004. He produced a record showing that the work was in fact done in early summer 2005. Prior to 2005 the recreation area was not enclosed in the way it now is. All that was done in 2005 was the replacement of the play equipment. The present enclosure and equipment at that end of the site is new, from 2014, replacing the 2005 equipment. There were no fences until 2014. He confirmed that the 2014 work was partly funded by Greenfields Housing, who paid a £30,000 contribution. As for the 2004/5 revamp, the purchase of the equipment would have been through a capital programme, and part of the Council's overall budget. They would have to get three quotes for such work. Usually he would have the authority to authorise an order, and it would be checked by the Council's Procurement Department.

9.8. He explained what he understood about the signs which are currently to be seen around the play area. At least one of the photographed signs is of an early design which would have been there, he thought, since 2005. It is not attached to the new fencing. Another sign, in one of the photographs, was definitely part of the 2014 refurbishment. Then another of the signs on the site now looks like an intermediate one from between 2004 and 2014. It was more recent than 2005 but before the 2014 refurbishment. He thought it could have gone in at any time over the last 4 or 5 years. It is to a design which was introduced about 5 years ago. He acknowledged however that it could have been a sign from old stock which had been added when the work was done in 2014.

9.9. *To me* Mr Day confirmed that the signs around the play area were only intended to provide information to the users of the play equipment on that area (and therefore did not relate to the rest of the application site).

9.10. ***Mr Alan Mayle*** said that he has been employed by Braintree District Council since 1983, and is currently Building Control Service Manager with the Council. He produced information showing the dates of the final building certificates of some properties in the vicinity of Oxford Meadow. They were all on the road known as Friars Close, and all showed certificate dates in 1992. That was the last phase of the development which has been carried out to the west of the application site.

9.11. He also produced a new plan giving his estimate of the dates on which various pieces of development had happened in the general vicinity of the application site over the years. These were estimates based on the architectural style of the developments concerned, and various documents he had seen. His view was that most of the area closest to the application site and to the north-east of it had been developed in the 1960s. The area to the south-east had generally been developed in the 1970s, and the area to the west had been developed from the late 1980s to the early 1990s. The dates of some of the newer areas completed are in fact from computer entries kept by the Council showing when applications had been made, so they were from an actual record, rather than estimates.

9.12. The dates he had suggested for the original part of the development were something of a guess. It could have been from the 1950s or 1960s, based on

general knowledge, and building styles and materials. He was reasonably sure that the developed area to the south-east is from the 1970s.

9.13. ***Mrs Sarah Stockings*** said that she had been employed by Braintree District Council since 2005, and is currently the Property Law Manager with the District Council.

9.14. The application site was originally purchased by Halstead Rural District Council by a conveyance of April 1952. Prior to the purchase, a Valuation Office report indicated that the purpose of the purchase was for a housing site. Documents in the Council's records showed that by 1956 the Rural District Council had created the Oxford Meadow housing estate.

9.15. Mrs Stockings explained that she and colleagues had trawled through the deed packets retained by the Council. They had some difficulty initially finding documents relating to the period of ownership of Halstead Rural District Council, and the Objector, Braintree District Council, had now produced all that was available, for example on the matter of the civil defence hut. All of this involved a good two days' worth of searching through material, and she and colleagues had scoured the basement of the Council's premises to search for any more documents.

9.16. The records showed that there was a 1963 lease from the Rural District Council to Essex County Council for part of the western area of the application site, for a civil defence hut. However by 1968 the County Council had decided that the so-called Civil Defence Centre installed in that hut was surplus to requirements. It wanted the Rural District Council to accept a surrender of the lease, and indeed to pay the County Council for the value of the hut left there.

9.17. The plan associated with the civil defence hut lease showed that the area which had been leased in association with the hut was the area alongside No.77 Oxford Meadow. Mrs Stockings and the District Council's team had marked that area onto an annotated aerial photograph which also showed the boundaries of the present application site.

9.18. Various other documentation was produced from the records. Mrs Stockings reminded the Inquiry that Braintree District Council had come into existence in 1974, and it had inherited the property of the Halstead Rural District Council.

9.19. By a lease of June 1984 between the District Council and the Scout Association Trust Corporation, land to the east and north of the civil defence hut site was leased to the Scout Association for 21 years. The land leased to the Scouts extended westwards to the western boundary of the application site. In a northerly direction it did not reach up to the northern extremities of the present application site, but the northern boundary of the Scout lease land was significantly to the north of the northern boundary of the area that had been leased for the civil defence hut.

9.20. The relevant arm of the Scouts decided to surrender the lease of its area back to Braintree District Council in June 2005. The letter indicating that intention was

sent in February 2005. Mrs Stockings acknowledged that that took place several years after the Scouts had gone from the site in reality. She also pointed out that she herself had not been involved with any of this in 2005. However she became involved personally and professionally by 2007.

9.21. By 2007 she was in fact dealing with the transfer of the District Council's housing stock to the Greenfields Housing Association. There was an outside firm of solicitors acting for the District Council, but she herself was professionally involved as well. Large numbers of properties were transferred in those circumstances. Mrs Stockings produced a plan showing the areas of land around Oxford Meadow which were transferred to the Housing Association. The land constituting the bulk of the north-western arm of the L-shaped application site was not included in the transfer, as was clearly shown on that plan. The southern arm of the L was transferred to the Housing Association, as was the access road to the garages, which is included at the extreme northern end of the north-western arm of the present application site.

9.22. However, the play area at the extreme eastern end of the southern arm of the application site is now again the registered property of Braintree District Council. Mrs Stockings personally had been concerned with the transfer back to the District Council of that play area, and in fact in relation to several others of a similar character in the district. When then original stock transfer had taken place, there were a huge number of areas being transferred over, and numerous last minute changes. A number of play areas went over to the Housing Association, but it was later realised that Greenfields did not have the resources to maintain them, and the District Council had been maintaining them anyway. Mrs Stockings herself had not been involved in any of the discussion as to which recreation areas should be transferred back to the District Council.

9.23. Also in January 2014 the District Council entered into an agreement to transfer the land (within the application site) west of the garages and 77 Oxford Meadow, which land had been originally retained on the first transfer of housing stock, to Greenfields Community Housing Limited, requiring Greenfields to construct affordable housing on the site. After these transactions had taken place the only land remaining with the District Council on the application site was the land of the play area, transferred back to the District Council in 2010, as she had explained.

9.24. Mrs Stockings also produced some documentation relating to the Local Plans for the area. The land was not annotated or allocated for any specific purpose in the Local Plan of 1995. In particular it was not covered by allocations either for formal or informal recreation, unlike some other areas in Sible Hedingham. However in the 2005 Local Plan Review the eastern part of the southern arm of the application site, corresponding roughly to the current play area, was covered by an allocation for formal recreation, along with the football ground to its north-east. The large field towards the Parish Church, in common with a number of other areas, was allocated for informal recreation. Mrs Stockings herself had not been involved at all in the adoption of the Local Plan or its Review.

9.25. She explained the position in relation to the definitive map of rights of way. There is a public footpath running along the southern boundary of the southern arm of the

application site, and another public footpath running up the western boundary of the north-western arm of the site.

9.26. She produced documents dating from 1999, suggesting that the Scout hut was then in a dangerous condition and was due to be demolished, with a useful life of no more than 1 year. Documentation from 2000 showed that the civil defence hut had been demolished in July 1999, but still gave the Scout hut a useful life of 1 year. However another memorandum indicated that the Scout hut was in fact demolished in 2000. A memorandum of 2005 referred to the land being a cleared site, and said that a prefabricated building had now been removed.

9.27. A valuation carried out by the District Council for asset register purposes in 2010, in relation to the western arm of the application site, had valued it at £1 only, because no formal decision had been taken in relation to the sale of that asset, and it was not being positively marketed. It was therefore valued as amenity land only. It was noted however that there could be some potential for development of semi-detached houses on the site.

9.28. Other various records in relation to the land had been unearthed, through the search which had been undertaken for any relevant documentation. Mrs Stockings noted that in the 1990s the football club had been looking to improve its premises. The Scout huts by then had become dilapidated, and discussions had taken place as to whether the Scouts could relocate to the football field area. Indeed Lottery funding was sought for such a project. It seems however that this did not happen, presumably because funding could not be obtained.

9.29. The documentation relevant to those considerations did indicate that the Scouts had occupied both the area which had been formally leased to them and also the previous civil defence hut, even though no lease was ever completed on that particular property, and the Scouts never paid any rent on it.

9.30. Mrs Stockings reiterated that some documents from the Council's records would have been destroyed, so it should not be assumed that a complete record had been discovered of everything that had happened in relation to the application land and surrounding areas. Nevertheless she did search extensively for everything that was available.

9.31. That search had continued, and Mrs Stockings was able to produce a copy of a planning permission from July 1993 which had been granted for the erection of huts for use as Scout troop headquarters, adjacent to the civil defence hut on Oxford Meadow, Sible Hedingham. There was also a plan (even though it was rather difficult to read) associated with that application. That plan showed what was intended, but Mrs Stockings pointed out that neither she nor the District Council were sure whether the actual Scout hut as erected was precisely like that shown on the plan.

9.32. *In cross-examination* by Mrs Babbs, Mrs Stockings said that she was not personally aware of any fencing that had ever been on the site. She explained that the District Council's asset management file covering the years further into the

past had sadly been destroyed, and no-one in the Council's Asset Management Department now has personal knowledge of this site.

9.33. She acknowledged that there had been a reference in a 1952 covenant to fencing, but she did not have a lot of information about it. The conveyance provision had related to fencing along the southern boundary of the site, and she did not know why that fencing had never been carried out. She supposed that that conveyance could still be relevant, but she did not know whether there was anyone who would still be able to enforce it.

9.34. In relation to signs, she was not aware of any other signs that had ever been on the land other than those associated with the play area.

9.35. As far as the Scout hut was concerned, and the lease arrangements between the District Council and the Scouts, it was in reality up to the District Council and the Scouts at the end of the lease to agree what was a reasonable condition in which to leave the land. It was open to the District Council to accept the land back at a lesser standard than the lease might have implied. Mrs Stockings assumed that there was an arrangement between the District Council and the Scouts at the relevant time. A covenant in the Scouts' lease had only said that they had to maintain any fencing that was there on the site, not that they had to provide any fencing.

10. Submissions for the Objector

10.1. In submissions for the Objector produced before the Inquiry, it was pointed out that until November 2007 the Objector District Council had owned the freehold interest in the whole application site, whereupon it sold it to the Greenfields Community Housing Association. However, the area encompassing the present children's play area was retransferred to the Objector in 2010.

10.2. The Objector analysed the basis on which land may be registered as a town or village green under ***Section 15*** of the ***Commons Act 2006***, and the procedure by which such registration may be approached.

10.3. The onus of proof on such an application lies with the Applicant, and each qualifying element must be properly and strictly proved. The standard of proof is the normal civil standard, on the balance of probabilities.

10.4. The Registration Authority has no investigative duty in relation to town or village green applications so as to require it to find evidence or reformulate an applicant's case. The Registration Authority is entitled to deal with the application and the evidence as presented by the parties.

10.5. The Applicant must prove qualifying use of the application land for the whole of the relevant 20 year period. If the Registration Authority is not satisfied that there was qualifying use during all parts of the relevant 20 year period, the application must inevitably fail.

10.6. The Applicant does not hide the fact that the application here has been made in order to thwart the proposed development of the land concerned. The Objector's principal submission here is that the use of all of the application land has been 'by right' throughout the entire qualifying period. The ***Barkas*** case in the Supreme Court is highly relevant. It should be assumed by inference that the land here has been appropriated or lawfully allocated, in the sense discussed in that case, to public recreation. Such use of local authority land would be lawful, pursuant to either the ***Housing Act 1936*** etc,. or the ***Open Spaces Act 1906*** or the ***Public Health Act 1875***.

10.7. The relevant actions of the Objector Council which need to be considered under this heading include the designation of part of the site for recreation in the Braintree Local Plan, the maintenance of the site at the public expense, the installation of a children's play area on part of the land and the erection of signage in association with it, and the advertisement of the disposal of the land pursuant to ***Section 122*** of the ***Local Government Act 1972***. In other words the District Council held the land pursuant to a statute, the provisions of which were broad enough to encompass and enable the local authority to make the land available for recreational use, and the District Council clearly made the decision to use that land for recreational purposes.

10.8. In any event the land which was leased and occupied by the Scouts was clearly used permissively, and in accordance with the lease. It would not have been reasonable or legally possible for the District Council to oppose the use of the land by its own lessee.

10.9. Even if the Objector were wrong on that point, the fact that part of the application land was subject to a lease to the Scouts between 1984 and 2005 is relevant. Prescription should not run against the owner of a freehold interest whose land is tenanted, if the terms of the tenancy prevent the land owner from challenging trespassers, or if the landowner does not know of the trespass. Such use would effectively be secret as far as the owner of the freehold interest is concerned.

10.10. The children's playground area at the eastern end of the site was sold to the Housing Association in 2007 but reacquired in 2010. The obvious inference is that the Objector reacquired this facility and allocated it to public recreation in the ***Barkas*** sense. There is also a strong inference that the land had been acquired for the purposes of the ***Open Spaces Act*** or the ***Public Health Act 1875***, and this purpose was implicit in the acquisition.

10.11. The use of the land here which was not subject to the lease to the Scouts is impliedly permissive. The use of the site for sending children to playgroups being carried on there would not be a lawful sport of pastime. Scouting is not a lawful sport or pastime, it is an organised club for children. The use of motorised vehicles such as motorbikes on private land is not lawful.

10.12. Use that is more in the nature of a right of way, for instance that associated with a track or tracks, would also not qualify as a lawful sports and pastime, as a number of the reported cases have demonstrated.

10.13. Furthermore the requirement for use by a significant number of inhabitants has not been satisfied in this case. It is accepted that the term 'significant number' has never been defined, and does not necessarily mean a considerable or substantial number. Judicial authority suggests that it is a matter of impression rather than a mathematical exercise. Nevertheless the Applicant is put to strict proof that her application meets the significant number requirement, rather than there having been use by a very small number of immediately neighbouring people and children.

10.14. The Applicant must prove that it is more probable than not that the whole, as opposed to merely part, of the application site satisfies the statutory requirements for registration as a village green. The areas covered by the civil defence hut and the Scout hut, and a portacabin which appears to have been on the land, have clearly not been available for recreation while those structures were present.

10.15. In submissions during the course of the Inquiry it was suggested that the Objector District Council here provided the whole site for recreational use under ***Housing Act*** powers. There was of course the lease of part of the site to Essex County Council between 1963 and 1968, and then the lease of another part to the Scouts between 1984 and 2005. However that latter lease had excluded the area previously let to the County Council for the civil defence hut. The area of the old civil defence hut was never formally leased to the Scouts.

10.16. During the course of the Inquiry it was also acknowledged on behalf of the Objector that any objection was withdrawn based on the case of ***R (Mann) v Somerset County Council***. It was no longer argued that there was implied permission to use the whole of the application site based on such matters as the charging for admission to table top sales and the like organised by the Scouts. It was accepted that the evidence had been clear that local people could still access the land even while the Scouts had been carrying on activities like that, and that apart from the buildings themselves there had never been any fencing or obstruction to keep people off the rest of the open land.

10.17. In closing submissions on behalf of the Objector at the Inquiry, it was said that the first matter which needed to be dealt with comprehensively was the *"as of right"* test. The most important authority nowadays is the Supreme Court decision in the ***Barkas*** case. The Supreme Court had dealt with that case rather differently from how it was dealt with originally. The definition of *"appropriation"* has been broadened out by the Supreme Court from strict formal appropriation under ***Section 122*** of the ***Local Government Act 1972***.

10.18. It is clear from the Supreme Court that where a local authority lawfully sets aside land for recreation, people's use of that land is *"by right"*.

10.19. The ***Housing Acts*** are broad enough for a local authority to provide recreation land for local residents or the general public. So the structure of the analysis should be to ask first: for what statutory purpose did the relevant local authority acquire or hold land in the relevant period? In the ***Barkas*** case it was the ***Housing Act***. When the Supreme Court said that the ***Beresford*** case was wrong, Lord Carnwath

also referred to other relevant powers under which the land there was held. The decision says that the powers were very broad and did extend to recreation. Lord Carnwath thought that the land in that case could be used for recreation. Thus we have moved on and away from the ***Beresford*** idea of seeking a specific legal right to use the land in local people.

10.20. So the second question that can be asked is: were the statutory provisions under which the land was held broad enough to allow for recreational use by local people? The third question is whether or not by some action or decision of the authority there has been a formal appropriation, for example a formal minute related to the ***Open Spaces Act 1906***, or whether that was implicit in a decision, for example to open a public park or spend money on a public park. A decision like that would or might change the statute under which a piece of land was held. But if that sort of thing has not been done it is necessary to look at what Lord Carnwath said about appropriation in the ***Barkas*** case. Reference should be made to paragraph 73 of the ***Barkas*** judgment, and subsequent paragraphs. One sees that, in the documents referred to there, there had been no decision expressly appropriating or allocating the land concerned for recreation. It was simply noted along the way what the current use of the land was, and what the plans were.

10.21. One should also have regard to what Lord Neuberger said at paragraph 24 of ***Barkas***. In ***Barkas*** there had in fact been an allocation decision under the Housing Acts to allocate for recreation. So there was a statute which allowed for the provision of recreational facilities. In ***Beresford*** the New Town Corporation had had exceptionally wide powers to allocate the land for more or less anything that they thought appropriate.

10.22. From paragraph 5 of ***Barkas*** it can be seen that the statute there allowed for provision of recreation grounds, and more or less any facility which would serve a beneficial purpose in connection with the housing development. In ***Barkas*** Lord Carnwath did expressly agree with Lord Neuberger's analysis, as can be seen from paragraph 51. As for the express disapproval of the ***Beresford*** decision, even if Lord Neuberger did not agree with everything Lord Carnwath said, their other Lordships clearly all did, so that what Lord Carnwath has to say is binding as part of the decision.

10.23. Although Lord Carnwath in paragraph 66 of ***Barkas*** accepts that land in public ownership can be subject to the acquisition of village green rights, it is clear from paragraph 82 that he holds that inferences can be drawn as to the statutory powers under which land is held. The last part of paragraph 85 is particularly important. There Lord Carnwath agrees that one does not need a formal appropriation in order for land to be held for a recreational purpose. He agrees that there does not need to be a formal allocation or appropriation decision under the Act. Mr Wilmshurst for the Objector said that in his submission that only applies where the relevant Act contains a power wide enough to make such an allocation decision. In reality Lord Carnwath's approach to the matter ditches the whole allocation approach, and comes to a view based on 'implicit approval' of the purpose for which the land is being used. See for example paragraph 73.

10.24. So it can be said that there is a logical battleground as to the question: do we need a formal decision in order lawfully to allocate? That seems to be the position of Lord Neuberger. Or the alternative is the Carnwath approach. Paragraph 85 in Lord Carnwath's judgment suggests it is possible to draw an inference of implicit approval from, for example, officers' reports or the facts on the ground, or all the circumstances of a case. So each case will be very fact-specific, and there will be difficult cases on the borderline.

10.25. By way of recap, the first question to ask is: what is the formal statutory purpose for which land is held? The second question is: was that statute broad enough to include a power to provide for recreation? (as it was in both ***Barkas*** and ***Beresford***). The third question is: if the power is broad enough, has there been a lawful allocation, or decision taken so to allocate. There may be a fourth question as to whether that decision itself amounts to a formal or implicit appropriation to an entirely new statutory purpose. And then a fifth point might be Lord Carnwath's point, from his penultimate paragraph, where he seems to ditch all the decisions-based analysis, and refers to implicit approval and all the circumstances being relevant.

10.26. When one considers how to apply all these considerations to the present case, it does require the treating of different portions of the site in different ways. First there is what might be called the 'vertical' part of the L-shaped area of the site. That part itself is divided into a number of sub-areas. One might refer to the northern part as 'area A'. In fact some of that northern part is not even in the application site. That land had never been leased by the Council, and remained held under the ***Housing Act*** until its sale in 2007. That area clearly was acquired by the District Council's predecessor under the ***Housing Acts***.

10.27. Then there is an 'area B', which was not formally leased to the Scouts, but was leased to Essex County Council for a while for the civil defence hut and surrounding land. The first thing to be said about that area is that the footprint of the building was clearly not available for recreational use until the building was demolished in 1999. In reality it is not entirely clear where the buildings were on this land, but it is clear that there was a civil defence hut, and possibly another building to its left.

10.28. 'Area C' is the area which *was* leased to the Scouts, and where their new building seemed to go. It should be noted though in relation to area B that the District Council's records showed that, in respect of what had been the civil defence hut area, terms for a lease had been agreed between the District Council and the Scouts, but no lease was ever executed. In any event, in relation to both the civil defence hut and the later Scout building, the areas of those buildings clearly would need to be excluded from any possible designation under the ***Commons Act***. Logically one would exclude also the other footprint, to the west of the civil defence hut, because it is probable that was a structure too.

10.29. Since both areas B and C seem in reality to have been used and occupied by the Scouts, the logic would be to treat those similarly. Any use of the area actually leased to the Scouts, and logically use of the other area (B) just referred to, was clearly permissive under the lease, or the negotiations for a lease.

10.30. As far as area A is concerned, the District Council acknowledges that it has not maintained that area over the years. The Objector therefore can only rely on the penultimate paragraph of Lord Carnwath's judgment in ***Barkas*** for an inference, in all the circumstances of this case. It might be considered that there are other reasons why that land was provided by right. There was a clear connection with the other land to the south, and a lack of physical demarcation on the ground. Access was reserved to the Scouts over the accessway to the north, in order to get to the Scout lease land. Therefore it would be artificial to detach this land from the rest of the area concerned.

10.31. There is a further argument in relation to areas B and C, apart from the previous points. It can be said that by entering into the lease in relation to the Scout land, the land was allocated in effect for a use meeting the social needs of local people, like any other public facility. As for the civil defence land, it does not seem that the ***Housing Act*** provides any particular power to provide this. However ***Section 19*** of the ***Local Government (Miscellaneous Provisions) Act 1976*** includes a power enabling an authority to provide premises for the use of clubs or societies with athletic, social or recreational objects. It could be thought that there had been an implicit appropriation to the land being held for that sort of purpose.

10.32. Another question to ask is what happened when the Essex County Council civil defence lease came to an end. Did the land revert to housing use, or was the lease an implied appropriation to another purpose? The lease to the Scouts was in part within the qualifying period for the ***Commons Act***. There are fine distinctions to be drawn here.

10.33. It can also be questioned, by reference to the case of ***Williams v Sandy Lane (Chester) Limited*** [2006] EWCA Civ 1738 whether a ***Commons Act*** claim can be valid in respect of land which is leased to someone else, when the freehold owner was not able to do anything to deter trespassers on the land. In this case there was nothing in the Council's lease to the Scouts which enabled the District Council to intervene to prevent rights being accrued by local inhabitants. The Scout lease had no intervention provisions. So the question in this case would be what is meant by the District Council having knowledge of the matter. Would it mean that there needed to be knowledge of qualifying user by a significant number of people from the Civil Parish, or merely use by *some* local people? If it is the former, then at the time of the lease to the Scouts in 1985, the only developed areas in existence were the houses which had been built in the 1960s and 1970s, as identified on Mr Mayle's plan. So did the Council have knowledge of a significant number of people using the land before the Scouts' lease was granted? Alternatively one might have to conduct a discounting exercise, so that users who came from housing areas constructed after the Scout lease cannot generate a prescriptive right.

10.34. As for the bottom, more southerly section of the L-shaped application site, one must exclude the playground area. The remaining southern area was acquired for ***Housing Act*** purposes, and sold by the District Council in 2007. This land was never leased to anyone, and was continually maintained at public expense. It does also have a relation to the playground area at its eastern end. There was never any fencing around this land. So as far as the relevant period for this case is concerned

it was simply an area of grass provided by the Council, so as to encourage its use as an amenity or for recreation. There clearly is a power to provide recreation land under the ***Housing Acts***. The submission therefore is that that power includes more widely the making of land available to be used by the local inhabitants. Any decision taken in that respect, including decisions taken under delegated authority, should be assumed to have been lawful. As far as the southern part of the land is concerned, the District Council as Objector relies on the penultimate paragraph of Lord Carnwath's judgment. Appropriation or allocation decisions are not necessarily based on strict decision making.

10.35. As for the playground area, that was re-acquired in 2010, in company with a lot of other similar areas. The Council acquired it quite clearly so as to apply either ***Public Health Act 1875*** or ***Open Spaces Act 1906*** powers to these reacquisitions. Also there was public expenditure on the provision of the recreation equipment there, and the local plan allocations showed an allocation here for formal recreational use, which should be taken into account.

10.36. Also as far as the play area is concerned there plainly had been signage from at least the year 2005, which carried with it either express or implied permission to use that land.

10.37. The Applicant had now decided that this was a case to be based on the 'locality' of the Civil Parish of Sible Hedingham. There had in fact been no evidence to the Inquiry that that Civil Parish had been in existence for the entire 20 year period in a substantially unchanged manner. If the Registration Authority were minded to approve this application then further opportunity should be given for the Applicant to provide evidence to that effect.

10.38. As to the use made by the claimed users, the Objector's submission is that that use was overwhelmingly in the nature of a right of way, rather than as a destination village green. Of the three witnesses called for the Applicant, Mr Church was clear that he had used the land as a short cut to the village centre, and also said that children use the land as a route to or from school. He agreed that the majority of people would use the land to get to or from the village or the shops. It was also clear from his evidence that the northern part of the land had sometimes been used for car parking.

10.39. Mrs Flegg also said that land had been used for car parking for weddings and funerals. She said that the area covered by the Scout lease, being flat, was more suitable for ball games than the southern part of the land. She referred to herself doing circular walks, both nowadays and in her younger years. She also referred to a rope swing attached to a tree.

10.40. The positions of both Mrs Flegg's and Mrs Babbs's houses should be noted. They are very close to the application land, and not representative of other witnesses, including those who had just filled in questionnaires. These particular people can observe their own children on the land, unlike others in the locality. Thus it could be said that Mrs Babbs and Mrs Flegg are fortunate, but unusual and unrepresentative.

10.41. The witnesses had said that this is an elderly area. When one looks at the evidence questionnaires as to why people say they had been on the land, it is obvious that this is true, because time and time again people say that they use the land to get to somewhere else. It is reasonable to infer that this is the prime use of the land.

10.42. It should also be noted that using a route recreationally can, it has clearly been established, give rise to a public right of way. Therefore it should be inferred that people have been walking through this land in a way referable to the public right of way; it is not possible to have a satisfactory walk just on this land.

10.43. As to the question whether there has been use by a significant number of the inhabitants of the locality, this depends on discounting uses of the land which were not for lawful sports and pastimes. It is legitimate to have reference to the size of the locality selected by the Applicant. The locality eventually selected by the Applicant here is very large indeed.

10.44. Yet what we see is a small group of children, living in the immediate vicinity of this land, using the land perhaps with some degree of frequency. That sort of situation does not mean that the land should become a town or village green. Three or four children playing may well appear to fill this small space. And that is a view one might take if one were making the assumption that all of the evidence on the Applicant's side had been entirely truthful. In reality just a few people from the immediate surroundings using this small piece of land should not justify its registration as a town or village green.

10.45. Reference was made to the case of ***Powell v Secretary of State for the Environment*** [2014] EWHC 4009 (Admin). This was a decision of Mr Justice Dove in a public right of way case. It related to an Order extinguishing a public right of way, but never executed so as to appear on the definitive map. Paragraph 36 of the judgment is relied on. One has to consider how the use would have appeared to the owner of the land. There is no further test.

10.46. In this case there was an insufficient spread of use by people from throughout the claimed locality. Where there is an insufficient spread of use from the whole locality, as here, the quantitative and qualitative requirements of the 'significant number of the inhabitants of the locality' test are not met. On the basis of the Applicant's approach here, users from far away from the application site, but still within Sible Hedingham, would be given a right based on what had clearly, from the evidence, been no previous use by them of the land. Commons Act cases are not the assertion of a public right, but the assertion of a right on behalf of the inhabitants of a particular identified locality (or neighbourhood).

10.47. In his closing submissions, Mr Wilmshurst for the Objector made reference to the report of an Inspector (Mr Alan Evans of Counsel) in to a town or village green application in the Borough of Kirklees in West Yorkshire, on the question of the need for a spread of users within the relevant locality or neighbourhood. However he (Mr Wilmshurst) did not have a copy of that report with him at the Inquiry, and undertook, with the agreement of the Applicant, to provide a copy to me and to the Registration Authority (and to the Applicant) immediately after the Inquiry, identifying the paragraphs which were said to be relevant. The Applicant would

also be given a chance to comment on this report, and whatever points were said to arise from it.

10.48. That arrangement was duly followed, and I and the Registration Authority and Mrs Babbs were provided with copies of the report in question, and told that the paragraphs of the report which were relevant were those between paragraph 126 and 134.

10.49. In those paragraphs the Inspector concerned took the view that the application in that case should fail, as well as having failed on other grounds, on the basis that the applicant's evidence had shown insufficient evidence of geographical spread of users throughout the neighbourhood chosen by the applicant as the qualifying area for the application. That approach is entirely adopted by the Objector in the present case.

10.50. I should add that, although the Applicant Mrs Babbs was given the opportunity to comment on that Inspector's Report, and the paragraphs stated by the Objector to be relevant in support of its case, Mrs Babbs informed the Registration Authority that she did not wish to make any further comments in relation to the document.

11. DISCUSSION AND RECOMMENDATION

11.1. The Application in this case was made under ***Subsection (2)*** of ***Section 15*** of the ***Commons Act 2006***. That 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."*

The application in this case was stamped as received by the Registration Authority on 25th April 2013. This therefore is the date which would normally be taken as the one on which the application was 'made'.

11.2. The date on which the application is made is important because it is the *"time of the application"* from which the *"period of at least 20 years"* has to be measured backwards for the purposes of ***subsection 15(2)***. The relevant period of 20 years in this case is thus that between 25th April 1993 and 25th April 2013.

The Facts

11.3. In this case the dispute over questions of fact, especially in terms of the oral evidence which was given at the Inquiry, was not in the event particularly extensive.

11.4. The Objector (Braintree District Council) however quite reasonably took the line that it must be carefully questioned whether the evidence produced or called by the Applicant really did meet the statutory criteria or tests prescribed by the wording of ***subsection 15(2)***.

11.5. To the extent that there were material differences, or questions over points of fact, the legal position is quite clear that these must be resolved by myself and the Registration Authority on the balance of probabilities from the totality of the evidence available – and bearing in mind the point, canvassed at the inquiry itself, that more weight will generally be accorded to evidence given in person by witnesses who have been subjected to cross-examination, and questioning by me, than would necessarily be the case for written statements, questionnaires and the like, which have not been subjected to any such opportunity of challenge.

11.6. I would say at this point that I do not think that the nature of the evidence given to me necessitates my setting out in my Report at this point a series of 'Findings of Fact'. Rather, what I propose to do, before setting out my overall conclusions, is to consider individually the various particular aspects of the statutory test under ***Section 15(2)*** of the ***2006 Act***, and to assess how my conclusions (on the balance of probabilities) on the facts of this case relate to those aspects. It should not however be assumed that any facts I mention under one heading are only relevant to that heading. I have taken into account the totality of the underlying facts in reaching my conclusion under all the headings, and (of course) in reaching my overall conclusion as well.

"Locality"* or *"Neighbourhood within a locality"

11.7. I have already, much earlier in this Report (in Section 2), noted the point that the application form in this case showed that the Applicant had had (unsurprisingly) a less than clear appreciation of what the law envisages by the terms *"locality"* and *"neighbourhood within a locality"*. However, following discussion at the Inquiry, and with no objection from the Objector, the Applicant was given the opportunity to consider whether she wished to put forward a relevant *"neighbourhood"* whose boundaries were more appropriate to what is required than the distinctly arbitrary ones (defined to a significant extent by the edges of a large scale local map extract which happened to be available at the time) shown on the plan accompanying the application.

11.8. Having taken that opportunity, the Applicant took the decision, which she then indicated she intended to 'stick to', that she wished to have her application considered by reference to use of the land by the inhabitants of the *"locality"* of the Civil Parish of Sible Hedingham as a whole. She did not wish to have her case considered by reference to some smaller, identified 'neighbourhood' within that Civil Parish.

11.9. The Civil Parish of Sible Hedingham is certainly, in principle, an area capable of meeting the tests which the courts have laid down for being regarded as a 'locality'. It was clear from documents which were made available as part of the

evidence that it has been in existence for considerably longer than the 20 year period particularly relevant to this determination.

11.10. In spite of some hypothetical comments made on behalf of the Objector, it did not seem to me from the evidence available that there was the slightest basis for thinking that it was likely that the boundaries of the Civil Parish might have been materially altered during that 20 year period. Therefore, in my judgment, considering the application by reference to the 'locality' of Sible Hedingham Civil Parish is entirely open to the Registration Authority, indeed what is required in the circumstances of this case.

11.11. It is not for me at this point to make any observations as to the wisdom, or otherwise, on the part of the Applicant in choosing such a relatively large area, a significant number of whose inhabitants were claimed to have indulged in 'lawful sports and pastimes' on the land of the application site.

"A significant number of the inhabitants of the locality"

11.12. Case law in this field makes it clear that 'a significant number' does not necessarily mean a large number, or any particular defined proportion of the inhabitants of the locality (or neighbourhood) concerned. But it has to be a number, and a level of use, sufficient to get it across to a reasonably observant landowner that a general right to use the land is being asserted on behalf of the inhabitants, rather than there being (for example) incidents of trespass by a small number of individuals.

11.13. It is in reality quite difficult to apply such considerations to a composite area such as this application site, consisting of open unfenced ground, which it seems was deliberately left open when first a council housing estate, and later other housing, was developed around it. This is the more so when both arms of the 'L' shaped area have unfenced public footpaths running along their edges, and the southern arm is bounded on its north by another, surfaced footpath running alongside (and providing access to) part of the Oxford Meadow housing.

11.14. I mention these points now because, when deciding whether significant numbers of the relevant inhabitants have used the land for 'lawful sports and pastimes', one has (it seems to me) to discount all those who would have been using this land essentially as a route of passage, or to get to and from their houses, perhaps deviating to a greater or lesser degree from the footpath routes which they were essentially following.

11.15. In this instance it is perhaps particularly unfortunate that only three witnesses (including the Applicant herself) were called to give oral evidence in support of the application; and of those three only one (Mrs Flegg) had in fact been familiar with the land throughout the whole relevant 20 year period. Clearly it has to be accepted that it will be difficult for many people to come and give oral evidence at an Inquiry sitting during the working day, although it is my understanding that no request was made in this case for an evening sitting to be held, for example.

11.16. I do have regard to the fact that the Applicant obtained and submitted a considerable number (over 100) of completed evidence questionnaires from local people, but in a contested case they do not have the same status and weight as evidence from witnesses whose evidence can be tested and cross-examined. In any event the evidence questionnaires (all of which I examined) tend to confirm that the principal activity claimed by many local people was to walk across the land (sometimes with a dog).

11.17. Turning to the evidence which was able to be heard, and challenged, the witness Mr Church said he had used this land mainly as a 'short cut' when walking to or from other places in the village, and further that *"the majority of people use this [land] as a walk through"*.

11.18. It seemed clear from Mrs Flegg's evidence that her own main use of the land over the years had been as part (and often a rather small part) of one or other regular walking 'circuits' that she would follow.

11.19. In fairness, both Mr Church and Mrs Flegg did also give evidence about children (including Mrs Flegg's own grandchildren) playing on the land, and that was also the main theme of what Mrs Babbs had to say as a witness. I do not find it at all difficult to accept that Mrs Babbs's children (or Mrs Flegg's grandchildren), and a number of their very local friends, would have played reasonably regularly on the open ground of the application land, situated as it is, more or less right outside their homes.

11.20. I can also accept from the evidence given that some children from the local secondary school might from time to time congregate for a short period (in good weather) over their lunch break to eat their packed lunches, or fish and chips, towards the extreme eastern end of this site (around the small recreation/play area). The evidence overall however (even given the small number of witnesses) did give the strong impression that any such use of the application site by children had been very significantly less before the 'football field' was fenced, around 2006/7.

11.21. The Registration Authority does, it seems to me, need to bear in mind the principle that it is an important matter, potentially of great significance to a landowner, that his or its land should be registered as a town or village green. Although the standard of proof in these cases is the civil one of the balance of probabilities, it is clearly necessary that an adequate amount of convincing evidence be provided, in order to tip that balance in favour of registration.

11.22. In this case, I bear in mind that the Applicant quite deliberately chose (eventually) to frame her application in terms of use by the inhabitants of the locality of Sible Hedingham as a whole. Although I was not given a great deal of statistical information by either side, it was self-evident that Sible Hedingham is a large village, with many sizeable 20th century housing estates (as well as a wealth of more traditional buildings in some parts of the village). It is difficult in this context to see that the Applicant's case, as presented to the Inquiry, showed that anything approaching a 'significant number' of the inhabitants of that locality had made any material use of this land for 'lawful sports and pastimes', during the 20 year period required.

11.23. Even if the Applicant had sought to identify (as in my view she would have been more sensible to) a smaller 'neighbourhood' within this north-western part of Sible Hedingham, she would in my judgment have had some difficulty with establishing on the evidence she called that a significant number of the relevant residents had with any regularity used this land for 'lawful sports and pastimes'. Her evidence might well suggest (and does to my mind) that a significant number of people in the north western part of Sible Hedingham do fairly regularly follow walking routes along or across this land – which more or less correspond to the footpaths and footways on the land, or minor deviations from them. But that in my judgment does not help her case in terms of the statutory requirements of the ***Commons Act***.

11.24. I entirely accept that ***some*** children from the immediate vicinity will have played regularly on this land; indeed it would be surprising if they had not. But the Applicant has simply failed, in my judgment, to establish through evidence that anything close to a significant number of the inhabitants of Sible Hedingham have, with any kind of regularity, indulged in 'lawful sports and pastimes' there.

11.25. I reach this conclusion without even having needed to broach the somewhat vexed question (raised on behalf of the Objector) as to whether an applicant must show a sufficient geographical 'spread' of claimed users throughout the locality (or neighbourhood) concerned, in order for a claim to succeed.

11.26. Judicial authority on this point does not (it seems to me) lead very clearly in any particular direction on it. I have some reservations about the fairness of, or justification for, an approach which might in some cases arbitrarily 'catch out' lay applicants, acting perhaps without any specialist legal advice. To such applicants it may be far from obvious what might be the legal significance and ramifications of the choice of 'locality' or 'neighbourhood within a locality' in respect of which to make a claim, and the 'guidance' on the standard application form used in these cases is (in my view) of very little assistance to applicants in this regard. Clearly the users of any potential town or village green are always likely to come in greatest numbers from the houses closest to the claimed green. It must be a matter of judgment in each case whether usage has been sufficiently wide and general to constitute general use by then people of a 'neighbourhood' or (when relevant) 'locality'.

11.27. However, as I have noted above, in this particular instance the Applicant's case has not in my judgment met the statutory criteria in terms of 'significant number'. As will be seen, however, that is by no means the only respect in which I have concluded that the statutory criteria are not met in this case.

"Lawful sports and pastimes"

11.28. In reality most of what I need to say under this sub-heading has already been said under the previous one. The evidence overall has led me to conclude that, during the relevant period, the principal use by local people of this application site has been for various routes of passage on foot, more or less on the lines of the footpath routes on the land. There has also been use of the various versions of the fixed

recreation equipment (more recently enclosed as a small fenced play area) at the extreme eastern end of the site.

11.29. There has been use, during part of the period, by a local Scout group, and use of part of the north-western limb of the site for the parking of vehicles associated with services of various kinds at the Parish Church to the west; and also perhaps for the parking of a piece of grounds maintenance equipment.

11.30. For reasons which are either self-evident, or are ones I have already discussed, or will do later, none of the activities I have just listed consist of 'lawful sports and pastimes as of right'. Clearly, as I have acknowledged above, there has been *some* 'as of right' (i.e., without permission) use of this land by local children for games, etc., but not enough (in my judgment) to 'register' as use by a significant number of the inhabitants of Sible Hedingham.

11.31. And in particular (as discussed above), the fairly extensive use of this land for walking across it to get to places, or as part of a walk, has in my judgment had more the character of use as a route of passage, with minor deviations, than of lawful sports and pastimes 'on the land'. Therefore this aspect of the statutory criteria is also failed by the current application, in my view.

"On the land"

11.32. Under this sub-heading I intend to consider the point that this L-shaped piece of land in reality contains a considerable number of sub-areas, whose histories are materially different in a number of respects.

11.33. First, at the extreme northern end of the north-western limb of the 'L', the Applicant included in the application site (whether she intended to or not) a significant part of the vehicular access route to the block of garages situated to the east of that part of the site. Clearly it made no sense that that land should have been included in the application site, and in fairness the Applicant did not at the Inquiry suggest otherwise.

11.34. To the south of that is a part of the site, mainly grassy in its current state, which has never been let to the Scouts, or for a civil defence hut, or anything else. That is part of an area on which I accept (in the way I have discussed above) on the evidence that ***some*** lawful sports and pastimes probably have been indulged in with reasonable regularity by a small number of very local children, but which was also subject to the occasional (but regular) parking of vehicles connected with the church (and possibly also some grounds maintenance equipment).

11.35. To the south of that area is the area (forming the remainder of the north-west arm of the 'L'), is the area which, at least for part of the relevant period, was occupied by the local Scout group. About three quarters of that area was occupied pursuant to a formal lease to the Scouts, from 1984, and the other quarter (where the old civil defence hut was situated) was also occupied by the Scouts, following discussions with the District Council which never led to a formal lease of that part.

11.36. It seems clear from documentary evidence which the District Council were able to unearth that the Scouts were still in occupation of 'their' area and buildings until 1997, though further documentary records show that by 1999 the state of the building(s) was so poor that they were having to hire alternative premises elsewhere. The evidence then suggested that some element of the buildings was removed about 1999/2000 – but nevertheless some credibly dated photographs from July 2002 appeared to show that a structure looking like a portacabin was still on the 'Scout land' at that time. There remain some concrete bases on the site, apparently corresponding to the Scouts' own building and the old civil defence hut, and also another concrete base to the west. No one present at the Inquiry knew what purpose the latter base had originally served.

11.37. Clearly the sites formerly occupied (during at least part of the relevant period) by the two huts used by the Scouts cannot be capable of registration under the ***Commons Act***. It is not however impossible in principle, given the current state of the law, for the open area around the former huts, which the evidence showed had never been fenced off, to be 'eligible' for registration, if the evidence otherwise suggested this, even though most of this land was nominally occupied by the Scouts under their lease. This is because the evidence suggested that the Scouts were not present for much of the time, and even when they were present – e.g., having occasional overnight camps, or table top sales – it was possible for local people still to pass through the area unimpeded.

11.38. However, as I have indicated above, I am not satisfied on the totality of the evidence that local people (and in particular children) did in reality use this land for lawful sports and pastimes to a sufficient extent to constitute as of right use by a significant number of Sible Hedingham inhabitants.

11.39. The fact that adults on their walks, or dog walks, could still pass by, or through, even while the Scouts were engaged in their activities, does not in my view support a claim for a 'lawful sports and pastimes' use by those adults. This is because those activities were more referable (in my judgment) to the footpath routes passing through or alongside both main arms of this L-shaped site.

11.40. The southern arm of the site, apart from the small play area at its eastern end, has a noticeably more uniform appearance than the rest of the site. It seems clear from the evidence that it was always – at least from well before the relevant 20 year period – regarded and maintained as an amenity area associated with the nearby housing estate. Because of its nature and location, and from the evidence provided, I have no doubt that it will have been used from time to time by (at least) very local children for recreational purposes. However it was noticeable that even the witnesses on the Applicant's side took the view that this area was used significantly less for recreational purposes than was the flatter area in the north-west arm of the 'L'. The evidence suggested that use of this southern arm was more popular only in a cold winter, when snow made the sloping ground more attractive.

11.41. In general then, this southern arm is part of the area to which my overall conclusion applies, that the Applicant has simply failed to produce convincing

evidence of 'lawful sports and pastimes' use by a significant number of Sible Hedingham inhabitants.

11.42. Finally, under this sub-heading, I consider the small play area at the extreme eastern end of the site. It was clear from the evidence of Mr Day for the District Council that this area had only existed in the form in which I saw it since early 2014, i.e., a time outside the 20 year period which I am principally considering. The low fencing around the ground dates from the 2014 refurbishment.

11.43. In spite of the its having been unfenced until then, there is in my view no doubt on the evidence that a small play area, with appropriate equipment, was provided at that location by the District Council from at least as far back as 2004/5, and very probably before that. While I have little doubt that this play area will have been used for 'lawful sports and pastimes', in particular by younger children, the statutory criteria have not been met on that land for other reasons, which I shall discuss shortly.

"For a period of at least 20 years"

11.44. I would observe that, from the papers originally lodged with the Registration Authority by both sides of this matter, there was some lack of clarify as to the dates, both within and without the main relevant 20 year period, at which various changes had taken place in respect of the use or status of the component parts of this application site.

11.45. Thanks in large part to the extensive 'trawl' through the District Council's documentary records by that Council's witnesses, in particular Mrs Stockings, the position has been made noticeably clearer in many respects, and appropriate recognition is due for that.

11.46. In reality there is little that remains to say under this sub-heading relating to the 20 year period (April 1993 – April 2013). I have already indicated that I was not persuaded (on the balance of probabilities) that there had been 'lawful sports and pastimes' use of any part of the application site (except possibly the small recreation ground area) by a significant number of Sible Hedingham inhabitants for the requisite period of 20 years.

11.47. I am, as I have indicated above, satisfied from the evidence that *some* Sible Hedingham inhabitants (particularly some children living very close by), will have made *some* reasonably regular lawful sports and pastimes use of parts of the land during the 20 years. But that is not, in my judgment on the evidence, sufficient to meet the statutory criteria under ***Section 15*** of the ***Commons Act***.

"As of right"

11.48. Extensive reference was made, in the submissions on behalf of the Objector, to the judgment of the Supreme Court in the fairly recent case of ***R (Barkas) v North Yorkshire County Council*** [2014] UKSC 31. This was entirely appropriate, as

'Barkas' is clearly the leading case on what might be called the interaction between ***Section 15*** of the ***Commons Act*** and land owned by public authorities, in particular local authorities.

11.49. All practitioners in this field have had to familiarise themselves with the totality of what their Lordships had to say in ***Barkas***. Without detracting from the importance of considering the whole judgment, I would summarise matters by saying that what seems to me to be the key principle to emerge from ***Barkas*** is that, where a local authority has deliberately provided a piece of open land for local people to enjoy and use recreationally (including informal recreation), then the actual use of that land by those people will not be *"as of right"*, which implies something trespassory about the use. It will be 'with (implied) permission', or possibly 'by right', and will not support a claim for registration made under the ***Commons Act***.

11.50. This will be the case most strongly where evidence indicates that the land had been formally acquired or appropriated for some public recreational purpose, such as a recreation ground (as in ***Barkas*** itself), a park or a public open space. But the same principle will apply where the evidence suggests that the local authority has intentionally allocated or committed the land to local public recreation, whether or not a formal 'appropriation' to such purpose can be identified or inferred.

11.51. But on the other hand, it is still clear that local authority owned open land has no general exemption as such from ***Section 15*** of the ***Commons Act***.

11.52. With those considerations in mind, it is clear in my view that the (small) part of the application site which has been made available as a specifically provided 'play area' within the statutory 20 year period cannot be registered as 'town or village green', as use of it by the public (including local people) has been permitted, or 'by right'.

11.53. As for the entire remainder of the southern 'limb' of the application site, it seems clear by inference that it was deliberately set aside and provided by the District Council's predecessor as an open area of amenity land, associated with the immediately adjacent council housing estate built (apparently) in the 1950s. It certainly was the case, from the evidence which I received, that the District Council regularly maintained this land for amenity purposes, during most of the period of its ownership of the land (and then passed the task on, by agreement, to Sible Hedingham Parish Council).

11.54. There has been no suggestion that the land was deliberately and formally provided as a 'recreation ground', in the way that the land in ***Barkas*** had been. Indeed laying out land as a 'recreation ground' within a housing estate seems to require some formal step to be undertaken, as had been done in ***Barkas***.

11.55. However local housing authorities have long had the power, in laying out housing estates, to provide 'open spaces' in association with the housing. This is currently to be found in ***Section 13*** of the ***Housing Act 1985***, but it is my understanding that an effectively identical provision had existed for many previous decades, under earlier versions of the Housing Acts.

11.56. I mention this because in the Inspector's Report in a (town or village green) case at Chickenley Dewsbury [Borough of Kirklees, West Yorkshire] which counsel for the Objector introduced during his closing submissions, there is a discussion of this very point, by reference to one of the earlier versions of the housing legislation.

11.57. In that case, which was heard and decided several years before the Supreme Court judgment in ***Barkas***, the Inspector (Mr Alan Evans, of counsel) took the view (notably at paragraph 124) that the power to lay out 'open spaces' on housing land, under what is now ***Section 13*** of the ***Housing Act 1985***, did ***not*** imply the giving of any right or permission to local people actually to use such open spaces for recreational enjoyment. He contrasted this with the provision of 'recreation grounds' under what is now ***Section 12*** of the ***1985 Act***, which ***does*** give such rights or permission.

11.58. I have to express some considerable doubt as to whether now, in the light of the Supreme Court's judgment in ***Barkas***, that view expressed there in 2011 by the Inspector can still be right. It seems to me that the deliberate provision of an 'open space' on land held and provided for housing purposes, does not imply merely leaving a plot or patch of land un-built on, but implies an 'open space' [even if not a ***1906 Act*** *"Open Space"*, or a more formal (and usually larger) "*recreation ground"*] which has been intentionally provided for amenity and informal recreational use by local people. In such circumstances, in the light of the ***Barkas*** judgments, I cannot see that local people using that 'open space' land for 'lawful sports and pastimes' would have been trespassers, vis a vis the District Council or its predecessor, who (it can be reasonably inferred) deliberately provided this land for their amenity and use.

11.59. Thus, even if I had concluded, on the evidence, that a significant number of Sible Hedingham inhabitants had, for the requisite period, indulged openly in 'lawful sports and pastimes' on this particular part of the land (as opposed to just passing through it while walking somewhere, as discussed above), I would have been inclined to conclude that their presence on the land had been 'by right', or 'by permission', not 'as of right'.

11.60. The positon as to the north-western 'limb' of the application site is somewhat different. It seemed clear from the evidence that the District Council had never regularly maintained that area as a piece of amenity land, or 'open space', during its period as owner.

11.61. I have already reached the conclusion that the parts actually occupied by 'huts' or buildings during any part of the relevant 20 year period are clearly incapable of being registered as 'town or village green'. Use by the Scouts themselves of the land which they occupied, either under a formal lease or *de facto*, cannot in my view be 'as of right' use, as against the District Council as owner.

11.62. It would in my view be theoretically possible, especially in the light of the Supreme Court's decision in ***R (Lewis) v Redcar & Cleveland Borough Council*** [2010] UKSC 11, for a claim based on 'lawful sports and pastimes' use by local people to be engendered on the open land around the Scouts' huts, if there had

been mutual 'give and take', with neither the Scouts' nor local people's use interfering with each other.

11.63. However, I have already concluded that the evidence submitted and called for the Applicant was not sufficient to convince me (on the balance of probabilities) that there actually had been 'lawful sports and pastimes use' here, over the full 20 year period, by a significant number of the inhabitants of the locality of Sible Hedingham.

11.64. I reached the same conclusion on the further patch of open ground lying to the north of the area which was occupied by the Scouts. And the surfaced access road to the block of garages should never sensibly in my view have been included in the application site in the first place; as noted above, the Applicant at the Inquiry gave the strong impression that she agreed with this view. There was certainly no evidence that would have justified its registration under the ***Commons Act***.

11.65. Thus, looking at the north western 'limb' of the site as a whole, although it is not so clear as elsewhere on the site that any recreational 'sports and pastimes' use by local people would have been 'by right', or with permission, there was still insufficient convincing evidence that use meeting the statutory criteria had taken place, to the extent and for the duration required.

11.66. Thus my overall conclusion for the site as a whole is that no part of it merits registration as 'town or village green'. Before making my formal recommendation however, there is one further matter I should mention.

11.67. At the Inquiry very brief, passing mention was made of the fact that judgment was expected from the Supreme Court reasonably soon in the yet further 'town or village green' case of ***R (Newhaven Port and Properties Ltd) v East Sussex County Council***. That judgment has indeed been issued and published during the final days of my work on this Report, as [2015] UKSC 7.

11.68. I have needed to familiarise myself with it for professional reasons unrelated to this present Report. However I would express the view that in my opinion nothing in that judgment, important though it is, has any material bearing on any of the conclusions I have reached in this present Report. Accordingly it is not in my view necessary to ask the parties to this present case to put forward further arguments or submissions based on the ***Newhaven*** decision.

Final Conclusion and Recommendation

11.69. In the light of all that I have explained and set out under the previous sub-headings in this section of my Report, my conclusion is that on the evidence I have received, together with the submissions and arguments of the parties, registration as a town or village green is not justified, because the criteria in ***Section 15(2)*** of the ***Commons Act 2006*** are not met, for the reasons which I have given.

11.70. Accordingly my recommendation to the County Council as Registration Authority is that ***no part*** of the application site here should be added to the Register of Town or Village Greens under ***Section 15*** of the ***Commons Act 2006***.

ALUN ALESBURY
9th March 2015

Cornerstone Barristers
2-3 Gray's Inn Square
London
WC1R 5JH

APPENDIX I

APPEARANCES AT THE INQUIRY

FOR THE APPLICANT:

Mrs Lisa Babbs (the Applicant)

She gave evidence herself, and called:

Mr David Church, of 9 Castle Meadow, Sible Hedingham

Mrs Shirley Flegg, of 25 Castle Meadow, Sible Hedingham

FOR THE OBJECTOR:

Mr Paul Wilmshurst - Counsel
- Instructed by Mrs Sarah Stockings, Braintree District Council

He called:

Mr Nicholas Day, Parks and Open Spaces Manager, Braintree District Council

Mr Alan Mayle, Building Control Service Officer, Braintree District Council

Mrs Sarah Stockings, Property Law Manager, Braintree District Council

APPENDIX II

LIST OF NEW DOCUMENTS PRODUCED TO THE INQUIRY

N.B. This (intentionally fairly brief) list does not include the original application and supporting documentation, the original objections, or any material submitted by the parties or others prior to the issue of Directions for the Inquiry. It also excludes the material produced in the prepared, paginated bundles of documents produced for the purpose of the Inquiry on behalf of the Applicant and Objector, and provided to the Registration Authority (and me) as complete bundles.

FOR THE APPLICANT

No additional documents at the Inquiry

[Post-Inquiry] Email of 23 January 2015 from Mrs Babbs, indicating that she wished to make no further comments in relation to 'Village Green' Report re site at Chickenley, Dewsbury, West Yorkshire

FOR THE OBJECTOR (Braintree District Council)

Plan showing estimated completion dates of nearby housing estates.

Photographs of 'Play Area' signs

Planning Permission (10/9/1993) for Scout Huts

Bundle of Additional Information containing:

Extract of Braintree District Local Plan Adopted 1995

Extract of Braintree District Local Plan Review – Adopted Plan July 2005

Extract of Public Rights of Way Definitive Plan with legend

Plan No. 76A annexed to housing stock Transfer of 12 November 2007, with land transferred to Greenfields edged red, land previously sold coloured green and retained open spaces coloured blue

Pages 1 & 2 of Official Copy of Title No. EX865557

TP1 Transfer dated 23 June 2010 made between Greenfields Community Housing limited (1) and Braintree District Council (2) in respect of the play area.

Braintree District Council Valuation Report for Asset Register Purposes 31.3.1999

Braintree District Council Valuation Report for Asset Register Purposes 14.11.2000

Braintree District Council Valuation – Valuation and Estates Section – Property Record and Valuation Sheet – 24.3.2000

Braintree District Council Valuation Report for Asset Register Purposes – 10.3.2005

Braintree District Council Valuation Report for Asset Register Purposes – 31.3.2010

Extract of Halstead Area Housing Committee Minutes 1985/1986

Further Extract of Halstead Area Housing Committee Minutes 1985/1986

Extract of Finance and Land Committee Minutes 1985/1986

Extract of Finance and Land Committee Minutes 1986/1987

Extract from Halstead Area Housing Committee 1986/1987

Report to Land and Development Sub-Committee of 11.10.1990

Extract of Minute from the Land and Development Sub-Committee 11.10.1990

Information as to delegated decisions to Finance and Land Committee 5.2.1992

Information as to delegated decisions to Finance and Land Committee 14.5.1992

Extract from Minutes of Finance and Land Committee 14.5.1992 endorsing action re Football Ground, Oxford Meadow

Report to the Halstead Area Housing and Community Committee 12.5.1997 re Sible Hedingham Football Club and Scout Group

Extract from Minutes of Halstead Area Housing and Community Committee 12.5.1997

Report to the Halstead Area Housing and Community Committee 25.2.1999

Draft Minutes of Halstead Area Housing and Community Committee 25.2.1999

Minutes of Finance and Land Committee 1.4.1999

Halstead Local Committee Agenda 31.7.2007 including report re Lease of Hedingham

United Football Club Ground at Oxford Meadow

Extracts of correspondence from Asset Management Sible Hedingham Football Club file 30.8.1990 – 19.7.2007

[Post-Inquiry] Inspector's Report on 'Village Green' application at Chickenley, Dewsbury, West Yorkshire (2011), and covering note from the (present) Objector's Counsel, headed 'The Objector's Case on "Spread" '.