

DR/30/14

committee DEVELOPMENT & REGULATION

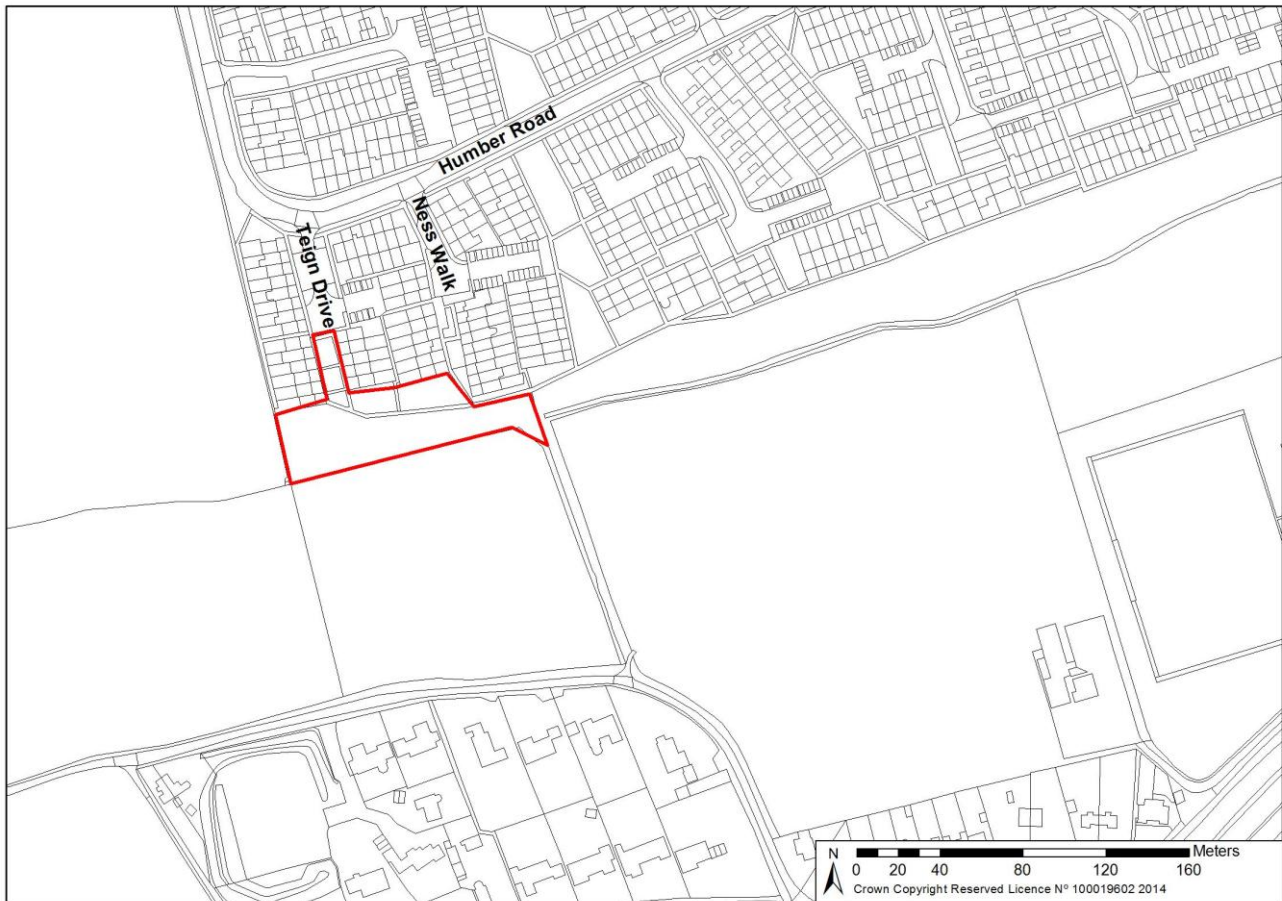
date 25 July 2014

VILLAGE GREEN APPLICATION

Application to register land at Horsemans Green, Witham, Essex as a town or village green

Report by County Solicitor

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1. PURPOSE OF REPORT

To consider an application made by Mrs Janet Shepherd under Section 15(2) of the Commons Act 2006 ("the 2006 Act") as amended, to register land at Horsemans Green as a Village Green.

2. BACKGROUND

The County Council has a duty to maintain the Registers of Commons and Town and Village Greens. Under Section 15 of the 2006 Act applications can be made to the Commons Registration Authority (CRA) to amend the Register.

The County Council as Registration Authority has received an application made by Mrs J P Shepherd to register the application site as a Town or Village Green under the provisions of Section 15(2) of the 2006 Act.

The application was advertised in the local press and on site on 1 May 2013. Notice was also served on the identified landowner Greenfields Community Housing by letter of 25 April 2013. Braintree District Council (BDC) also own part of the land and were also served with notice on 22 May 2014. The County Council received one objection to the application, from BDC.

In the case of Village Green applications the County Council has a discretion whether to hold an oral hearing before confirming or rejecting the application as there is no prescribed procedure in the relevant legislation. Where there is a dispute which "is serious in nature", to use the phrase of Arden LJ in ***The Queen (Whitney) v The Commons Commissioners*** [2004] EWCA Civ. 951 (para 29), a registration authority "should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry".

The objection, as examined in further detail below, indicated there is a permission to use the land which is not disputed. There are some cases where a "knock out blow" does arise i.e. it is possible to reject an application on legal grounds following a consideration of the papers. This potentially saves money and avoids an inquiry the outcome of which could be foregone conclusion before the hearing of any evidence. What is disputed in this case is the effect of the permission to use the land but the permission or the way that the land was made available to the users can be a knock out blow in relation to the statutory grounds required for a successful application such that a non-statutory public inquiry has not been held. This approach has been approved by counsel on the facts of this case.

3. THE APPLICATION SITE

The application form referred to a plan on which the application site is marked and is transposed onto a map of the area on the front page of this report. The applicant described the land as 'between the houses of Teign Drive and the area of land bordering Horsemans field between Teign Drive and Ness Walk'. It lies to the south of an existing residential area in Witham town. A number of pedestrian access pathways across the land were apparent from the application plan. The roadway and footways at

Teign Drive are publicly maintainable highway and footpaths across the application land are also recorded as being publicly maintainable. The paths in the south east corner, around the rugby and football ground, are recorded on the Definitive Map as Footpaths 76 and 77, Witham.

Counsel analysed the evidence in relation to two parts of the site which are shown on the map supplied by BDC at appendix 2 and separately hatched red (between the houses on Teign Drive) and hatched green (bordering Horsemans field).

4. DEFINITION OF A TOWN OR VILLAGE GREEN

The burden of proving that the land has become a town or village green lies with the applicant and the standard of proof is the balance of probabilities. In order to add the application land to the Register of Town and Village Greens it needs to be established that “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.”

Because the applicant relies on section 15 (2) of the 2006 Act it has to also be the case that the use continues at the time of the application.

5. THE APPLICATION

In March 2013 an application was made to the County Council to register the land as Village Green based on use for 30 years prior to the date of the application in 2013. Further information was requested in relation to the locality and the application was formally acknowledged on 20 March 2013. The application stated that the land had become a Village Green for the following reasons. “The claimed land has been used by the inhabitants of the locality ... for over 30 years and continues to do so for sports, dog walking community and children’s play without force, without secrecy and without permission. This was done in the belief that the land was and is a village green. A significant number of the inhabitants both past & present have used the claimed land as a village green for a range of pastimes as laid out in the attached witness statements ... As such the applicant believes that all relevant criteria required to be demonstrated in order for the land to be entered in the register of village green has been met. As evidence of the activities above we have attached photos gathered from local residents.....”

18 witness statements were submitted which are summarised in Appendix 1. Four were completed by two users. With the exception of the detailed statement from the applicant most of the user information is very brief and most do not indicate the dates of their use. The applicant’s statement included copies of some photographs.

A letter was also received from Mr K C Davies of the Humber Road Estate Community Initiative. To the extent that this contains comments in relation to his own use of the land, that is covered in Appendix 1. He made some more general comments as chairman of the Humber Road Estate Community Initiative. He said he fully supported the application for village green. He considered BDC’s commitments to the area as recreational was demonstrated by the provision of play and exercise equipment. He

thought the provision of the green space for resident use was consistent with the statutory duties of Braintree District Council.

Together with Mr Davies' evidence there is user evidence from 23 individuals.

6. LOCALITY

In part 6 of the form the applicant stated this was 'within Witham West Ward' and provided a further map. At the CRA's request a better plan was provided. Witham West Ward is an administrative area for the local authority and is capable of being a locality for the purpose of the 2006 Act. A substantial part of the Ward area is undeveloped land and the application land and the surrounding residential area falls within the Powers Hall End area to the east side of the Ward. The objector provided a map demonstrating the spread of the users over the locality area.

The Ward area and its relationship to the site is shown on the map at Appendix 3.

7. OBJECTION

A land registry search on 23 May 2013 shows that the first part of the application land, where it continues from Teign Drive, is in the registered ownership of Greenfields Community Housing Limited. Many individual properties are shown to have been taken out of the area covered by the original land conveyance but those transfers had the benefit of easements and reservations as set out in Chapter 1 of Part 1 Housing Act 1980 or part V of the Housing Act 1985 and paragraph 2 of Schedule 2 to the Housing Act 1980 or Schedule 6 of the Housing Act 1985. The landowner of the remainder is Braintree District Council).

Areas appeared to be left as open land in conjunction with the development of what was originally a council housing estate. An objection dated 28 June 2013 was received from BDC on 2 July 2013. It made a number of points summarised below.

The land was acquired with other land by Witham Urban District Council in December 1964. Those assets transferred to BDC in 1974. It was laid out as a housing estate with roads and open spaces in accordance with statutory powers now contained in the Housing Act 1985. Part of the land was transferred to Greenfields Community Housing Association in 2007; the rest (which forms the majority of the applicant land) remains with BDC. Third party rights exist in relation to a water pipe and also a right to take water from the land. Common footpaths within the land are subject to rights of way for owners, tenants and occupiers of the housing area. Byelaws confirmed on 13th December 1993 also apply to use of the land.

BDC specifically took the point that 'the site was laid out as a council housing estate with roads and open space in accordance with the powers which were re-enacted in Section 13 of the Housing Act 1985.' It also claimed in its objection that the majority of the present application site has been considered to be 'public open space', and indeed part of a larger area of public open space known as the Spa Road Recreation Area. Furthermore it says that the larger area (including the majority to the application land) has been the subject of byelaws 'for Parks, Recreation Grounds and Open Spaces' which it made in 1992 under the Open Spaces Act 1906.

BDC considers the land to be public open space except for the part between the dwellings of Teign Drive. Local Plans have defined this as informal recreation land since the Witham Town map of 1976 and is still shown on the Local Plan Review adopted in 2005 as such. This is replicated in part in the Site Allocations Development Management Plan 2013. The part not included is shown as a proposed road.

In relation to the more substantial part of the land behind Teign Drive, BDC confirm they treated this as open space laid out and available to the public and that use is 'by right' rather than 'as of right'. The notice referred to by the applicant in her statement was to prevent adverse possession and claims for public rights of way and to clarify that BDC consented to their use of the land. This was intended to prevent a claim for village green on the basis of use as of right and 'without permission'.

In relation to the rectangular section between the houses on Teign Drive, this is ancillary open space and forms part of the landscaping of the housing estate. It gives access to dwellings and abuts front gardens. It also provides access from other roads. Teign Drive was BDC owned properties, many now sold under the Right to Buy Scheme and the remaining land now transferred under its Housing Stock Transfer to Greenfields Community Housing Association. Use of this area is also considered to be 'by right'. Tenants would have rights of way over estate ways and similar rights would be included in 'right to buy' purchase documents. BDC considers this relates to all the use including by children for recreation. BDC would not give express permission, especially for use of the land by children but, as this was ancillary to the occupation of the residential properties, it would be unreasonable to withhold consent.

BDC were critical of the lack of user evidence in one statement and the lack of time period information in 8 statements. They did accept that those 8 statements could be supportive of the remainder.

BDC stated that the application land is south of the Humber Road Estate and is a part of a larger public open space known as Spa Road Recreation Area in Witham. Witnesses are from Humber Road, Ness Walk and Teign Drive, with the majority (10) from Teign Drive. 4 statements (6 users) demonstrate users abut or are near to the land. BDC consider this use is ancillary to the occupation of their properties. BDC do not consider that the statements provide sufficient information to evidence that a significant number of inhabitants have used the land to satisfy section 15(2).

The earliest user evidence is forty and a half years ago. Only 9 statements provide evidence of activities over a requisite 20 year period (Carter, 40.5 years; Shepherd (x2), 39 years; Heyman, 35; Holditch, 29; Thornhill (x2), 27; and Doran (x2), 27). The evidence is mainly anecdotal in relation to activities consistent with sports and pastimes.

The applicant's statement is consistent with BDC's view that the land is public open space and use is therefore 'by right'. BDC agrees with the applicant's statement that there are many pedestrian accesses which have never been blocked. There was no need to as the public can use the land 'by right'.

The applicant's photographs appear to be of the land between the houses on Teign Drive so are evidence of ancillary use. One photograph is of the dog waste bin which is

provided by BDC. This is consistent with BDC's view that the land is public open space and the public can use it by right.

A byelaw made on 14th December 1992 and confirmed on 13th April 1993 relates to the Spa Road Recreation Area. There is no plan accompanying the byelaw but BDC consider that it includes the area behind Teign Drive. It is made under section 164 Public Health Act 1875 and section 15 Open Spaces Act 1906 in respect of pleasure grounds. These are defined as including parks, playing fields, sports grounds, recreation grounds and open spaces. Any 'no ball games' sign would have been in accordance with the byelaw provisions.

In conclusion BDC considered that the application should be refused. The public use of the land behind Teign Road has been 'by right'. Use has been controlled by the byelaw. The land between the houses on Teign Drive is also 'by right' as regards the occupants of Teign Drive. The application does not therefore comply with s15 (2) of the Commons Act 2006.

Although not specifically mentioned by the objector any issues regarding potential 'as of right' uses following their transfer to Greenfields in 2007 would not of itself give rise to a requisite period of user between 2007 and 2013.

8. OUTLINE OF THE RELEVANT ISSUES

The relevant issues for consideration are:

- a. Has the use been for lawful sports and pastimes?
- b. Has there been 20 years of such use?
- c. Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes or is there a neighbourhood within a locality of which a significant number of the inhabitants have so indulged?
- d. Has the user by inhabitants been as of right?

Has the Use Been for Lawful Sports and Pastimes?

The onus is on the applicant to establish her case with sufficient certainty as to the nature, extent and time of the alleged activities and the locality of those who are claimed to benefit from the rights. The uses indicated in Appendix 1 would be uses which could be termed lawful sports and pastimes.

Use of the recorded highway routes across the site would be taken to be by virtue of those public rights but the users do not define their use of the land in those terms. To the extent that pedestrian use and dog-walking follows any adopted highway, that use can be attributed to the exercise of a right of way and as such is irrelevant to the village green application.

The relevant test is: "how the matter would have appeared to the owner of the land". Applying this test, can it be concluded that the use was sufficient to bring to the notice of a reasonable landowner the fact that village green rights were being asserted? Here the landowner has indicated that they viewed all use as being within the ambit of the

conveyance rights they had granted or by virtue of it being made available as open space.

Has there been 20 years use?

Use of the claimed land is continuing at the present date. The applicant has only indicated that the land has been used for 30 years and no specific time period has been claimed. It would be usual to take the 20 year period immediately preceding the application, from 1993 to 2013.

Taken together there is some evidence of use as set out in Appendix 1 in excess of 20 years up to the date of the application.

Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes or is there a neighbourhood within a locality of which a significant number of the inhabitants have so indulged?

The applicant indicated that the use of the site was by residents of the Witham West Ward area. The applicant provided a plan which indicates the addresses from which the users of the claimed green derive. The users were clustered around the streets in the immediate vicinity of the land. A significant number reside in Teign Drive.

Has the user by inhabitants been as of right?

The applicant indicates there has been no challenge to use by signage on the site until recently when a notice 'permitting' use has been erected. A 'no ball games' sign was observed which BDC say is consistent with the byelaw applicable to the site.

The critical issue appears to be whether the use that has taken place can be said to fall wholly within the 'as of right' use by providing the land as open space and ancillary housing land to the residents of the area since the estate was constructed.

BDC set out the manner of the acquisition and use of the land during their ownership. They regarded the public as having the benefit of a right to use the land they had provided specifically for this purpose. In relation to the land between the houses this had a slightly different character and purpose, being ancillary to the use of the houses but would still be viewed by them as giving the residents a right to use the land.

The landowner's action in erecting the 'no ball games' sign appears to indicate that the control offered by the byelaws has been applied in at least one instance. The very recent action of the 'permissive' notice on the land would not impact on the user evidence to a great degree as it comes at the very end of the relevant user period but it is equally clear that the points made by the landowner in relation to the deficiencies in the user evidence are sound.

Legal issues in relation to grounds for registration

Counsel was asked to consider if, in these circumstances, there is support from case law for an 'as of right' argument on behalf of a local authority landowner who has laid out land in the way that BDC has which has been used for these purposes. If that

argument was likely to be successful there may be nothing to be gained by holding a public inquiry on the application.

Counsel examined BDC's argument and supporting documents and provided an advice. The significant points are summarised below:

- The land applied for was left as open land in conjunction with the development of a council housing estate.
- BDC has specifically stated that the site was laid out in accordance with powers re-enacted in section 13 of the Housing Act 1985. It claimed the majority of the site was considered as public open space. The larger part was known as the Spa Road Recreation Area and the subject of byelaws made in 1992 under the Open Spaces Act 1906. This is the part shown hatched green on Appendix 2. Although there was no map or plan associated with those byelaws he did not consider that uncommon and left it to evidence or local knowledge to establish whether a particular piece of ground is or is not within an area covered by relevant byelaws.
- The applicant hasn't challenged in her reply to BDC's objection the point that the larger part of the land is said to be open space and subject to the byelaws.
- Taking account of recent case law (the Supreme Court in **R (Barkas) v North Yorkshire County Council** [2014] UKSC 31) it is inevitable that the Commons Act 2006 application must fail in relation to this larger plot of land. There is no logic or need to arrange a public local inquiry to reach this decision.
- The small piece of land between the houses at Teign Close was not claimed to be public open space or subject to the byelaws. This is the part hatched red on Appendix 2. It is stated to be subject to 'ancillary' rights in favour of local residents derived from their occupation of (later) ownership of properties on the housing estate. Counsel did not consider this in itself a sufficient answer to claims of use by local people from a housing estate more widely to have used a piece of land for lawful sports and pastimes recreational enjoyment.
- However, BDC asserted, without contradiction by the applicant, that the whole of the land, including this small but significant part, was laid out with roads and 'open spaces' in accordance with the same Housing Act powers. He considered this a plausible and logical argument. The most rational explanation for the existence of the small area in Teign Drive is that it was indeed provided as an 'open space' as part of the housing estate development in accordance with those powers. He considered that it was inevitable, following the same case law, that this part of the application must also fail as a matter of law, as a 'knock out' legal point and again would not need the commons registration authority to arrange a public inquiry to make a decision.

Counsel's advice is that a decision to refuse the application without a public inquiry is a reasonable course of action for the commons registration authority to take on the facts on the case as evidenced by the exchanges of the parties. The open space issue is the sort of 'knock out' legal point which means that there would be no logic or need for the commons registration authority to arrange for a public local inquiry. It is inevitable and unsurprising that local people should have been using this land for recreational enjoyment but it does mean that it does not pass the statutory tests for registration required for the application.

9. CONCLUSION

Although the user evidence may be adequate to demonstrate lawful sports and pastimes and the locality claimed satisfies the various legal tests, the manner in which the land has been provided by the district council is persuasive evidence that use of the majority of the land applied for has been 'by right'. It was recreational land provided by BDC during the period from when the estate was built in the early 1970s and use from then to when the application was made or when the land was transferred in 2007 was 'by right'.

The remaining land between the houses is subject to rights for the benefit of individual properties and forms part of the ancillary land to the housing estate since the estate was constructed. As such the use of these areas would also be 'by right'.

The recent decision by the Supreme Court on the interpretation of 'by right' use in the **Barkas** case makes it clear this is the correct interpretation on the facts described.

10. LOCAL MEMBER NOTIFICATION

The local member was aware of the application, has been consulted and had no comments to make.

11. RECOMMENDED

That the application is rejected on the basis that the use demonstrated has taken place 'by right' and village green rights have not arisen.

BACKGROUND PAPERS

Application by Mrs J Shepherd dated 21 January 2013 with supporting papers.

Local Member Witham Southern

Ref: Jacqueline Millward CAVG/78

APPENDIX 1

Evidence in Support

User evidence		
1	Mary Holditch	Moved in in May 1983. Children played on land from

	30 Ness Walk CM8 1TN Form dated 1/12/12	day moved in. Grandchildren also played there. Saw other children from window regularly as well as dog walkers.
2	Karen Davis 26 Chipstead Way Banstead SM7 3JP Form dated 14/12/2012	Played games 'down the block' and on the green. Interacted with horses, wildlife and many dogs walked there.
3	Lisa Baker 14 Teign Drive CM8 1TW Form dated 3/12/2012	Lived there 11 years. Children, aged 4 and 6, regularly used green. Green is directly outside home. Children ride scooters and bikes around the square in front of house. Busier in summer with some parents as well as children. Family have played rounders, football and cricket. Lots of families have snowball fights and build snowmen in winter.
4	Angie Carter 2 Ness Walk CM8 1TN Form dated 11/12/2012	Lived at address last 40 years. Self, husband and friends walked along footpath and surrounding area. Children played and picnicked on green and in fields. Spent time with cows in field when calving.
5	Carly Dobson 7 Teign Drive CM8 1TW Form dated 9/12/2012	Age 37. Played on 'big field' when a bit older. Football, rounder, ditch climbing, rope swing over ditch at bottom of Teign Drive. Moved away aged 21. Moved back 9 and a half years ago with husband and son. Son uses on bike, skateboard, scooter. Plays football with friends. Children and adults building snowmen and having snowball fights on 'bottom field' in snow last year (2011).
6	Graham and Jacqueline Doran 10 Teign Drive CM8 1TW Form dated 11/12/2012	Lived in Teign Drive 27 years. Green in front of house has been used by children to play on. Neighbours meet outside for barbecues etc. in summer. Used to be seating areas. Dog walkers, children playing. When estate built believed was a communal area on plans. 5 grandchildren who play out on the green.
7	Miss Edwards 78 Humber Road CM8 1TQ Form dated 7/12/2012	Take dogs for a walk daily. Also walk with friends and their children to the newly established park. Seen other children playing in summer.
8	Mrs Michelle Foxlow 3 Teign Drive CM8 1TW Form dated 9/12/2012	Uses green by Teign Drive to walk her dog.
9	David Harwood 74 Humber Road CM8 1TQ	2 daughters played there as kids and two nephews. Walked dogs on area. Grandsons played there and picnic in summer.

	Form dated 8/12/12	
10	Mrs Lynda Heyman 5 Teign Drive CM8 1TW Form dated 8/12/2012	Moved to Teign Drive April 1977. Son was 6. Constantly played games on the green area at the bottom of Teign, cycling around the square. Sometimes with friends. Grandchildren do same. Can see them front of house.
11	Elizabeth Massie 9 Teign Drive CM8 1TW Form dated 7/12/2012	Observes that has been used for casual recreation since the houses were built about 1973.
12	M Pegler 8 Teign Drive CM8 1TW Form dated 10/12/2012	Has 4 children who all play on green.
13	Amanda Pleasance 16 Teign Drive CM8 1TW Form dated 11/12/2012	Lived at 16 Teign Drive for over 7 years and green has been used for all kinds of reasons by community. Barbecues for each house, children's parties, and neighbours having a cup of tea and watching children play. Used by children in all weather.
14	Ms Lily Rainger 1 Ness Walk CM8 1TN Form dated 29/11/2012	Grandchildren played on green for years.
15	Janet and Trevor Shepherd 6 Teign Drive CM8 1TW Joint form dated 4/12/2012 Statement by Mrs Shepherd dated 21/01/2013	<p>Mrs Shepherd is the applicant.</p> <p>Moved in to house in 1973 when new. Could see children playing from window. Daughter born in 1975 and played on grass and set up tea sets on wall from early age. Would sit out with mums and be supplied with tea. Kids would play rounders on extended green when older. Was also football and a rope to swing on. Children came from surrounding roads. Green was intended for recreational purposes.</p> <p>Still live in property. Land is not fenced off and can access directly from 6 Teign Drive. Originally was concreted over and there was a fixed seating area. Photograph provided. Now grassed. Area has been used by residents and their families within locality continuously. Own children and of other families in Teign Drive have regularly played on land. Daughter learned to ride her bike and roller skate on the land. Observed over last 30 years sports, rounders, cricket and other sports, picking sloes, football and other ball games, kite flying, dog walking, setting up camps, playing with dogs and cars, model planes, roller skating, bike riding, playing Frisbee, bird watching and other activities. Tree on land used in past for</p>

		<p>swinging with rope.</p> <p>When weather good land used by people on a daily basis. Sunbathers. A place of congregation. Used for picnics, communal and private parties. Own family have used for family picnics, impromptu family gatherings, midsummer parties and family birthdays. Use has never been challenged.</p> <p>Pedestrian access points never blocked. Land used to walk dogs by others on daily basis. Route to Footpath 76 is well used. Dog waste bin installed on land.</p> <p>Never sought permission to use. Understood that when estate constructed was intended for recreational purposes ancillary to the housing.</p> <p>Approximately 10 years ago a sign erected by Council saying 'no ball games', possibly as a result of complaint by home owner to noise of balls against flank wall. Use continued thereafter. Not aware anyone has been asked to stop use.</p> <p>New sign noticed on 23 December 2012 stating permission is granted to use the land.[sign reads: NOTICE Highways Act 1980 s31(3) – Commons Act 2006 s15 THIS LAND IS PRIVATE PROPERTY Although this land is private property, permission is granted by the landowner for members of the public to access the land until further notice on condition that they do so at their own risk Please note that this permission may be withdrawn at any time No responsibility will be accepted for any loss or damage arising out of such use of the land.]</p> <p>Aware of planning application to develop and be a public highway to enable development of adjacent land. Collected approximately 160 signatures to a petition to support claim to remain a village green and not become a road.</p>
16	Sharon and Keith Thornhill 68 Humber Road CM8 1TQ Form dated 29/11/2012	Lived at 68 Humber Road for 27 years. During that time used Horsemans Field to play ball with grandchildren, feed the horses which were there and used the pathways through it on a regular basis. Continue to do so.
17	Paula and Daniel Voyce 4 Ness Walk CM8 1TN Form dated 3/12/2012	Lived at 4 Ness Walk since 1998. 3 children use this part of Teign Drive to play. Ages 10, 8 and 6, who are able to meet up with friends living in Teign Drive.
18	Natasha Winter 13 Teign Drive CM8 1TW Form undated	Moved in to property with two children because was somewhere safe to play.
19	K C Davies	Lived there since April 1980. Used green area to

	<p>40 Ouse Chase CM8 1TX</p> <p>Letter dated 06/02/2013</p>	<p>exercise dogs, children (2 and 6 when moved in, now 35 and 39) and grandchild. When moved in area was designated by Braintree DC as are for recreation and verbally confirmed by the Estate Manager. Daughter learnt to ride bike here. Braintree DC have provided play and exercise equipment showing commitment to use as recreational land. New notice at end of Teign Drive tends to confirm BDC acknowledgement of right to use the land.</p>
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