AGENDA ITEM 6b

DR/08/13

committee DEVELOPMENT & REGULATION

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VILLAGE GREEN APPLICATION

Application to register land known as 'Mill Lane Green' and adjoining sea wall at Walton on the Naze, Essex as a town or village green

Report by County Solicitor

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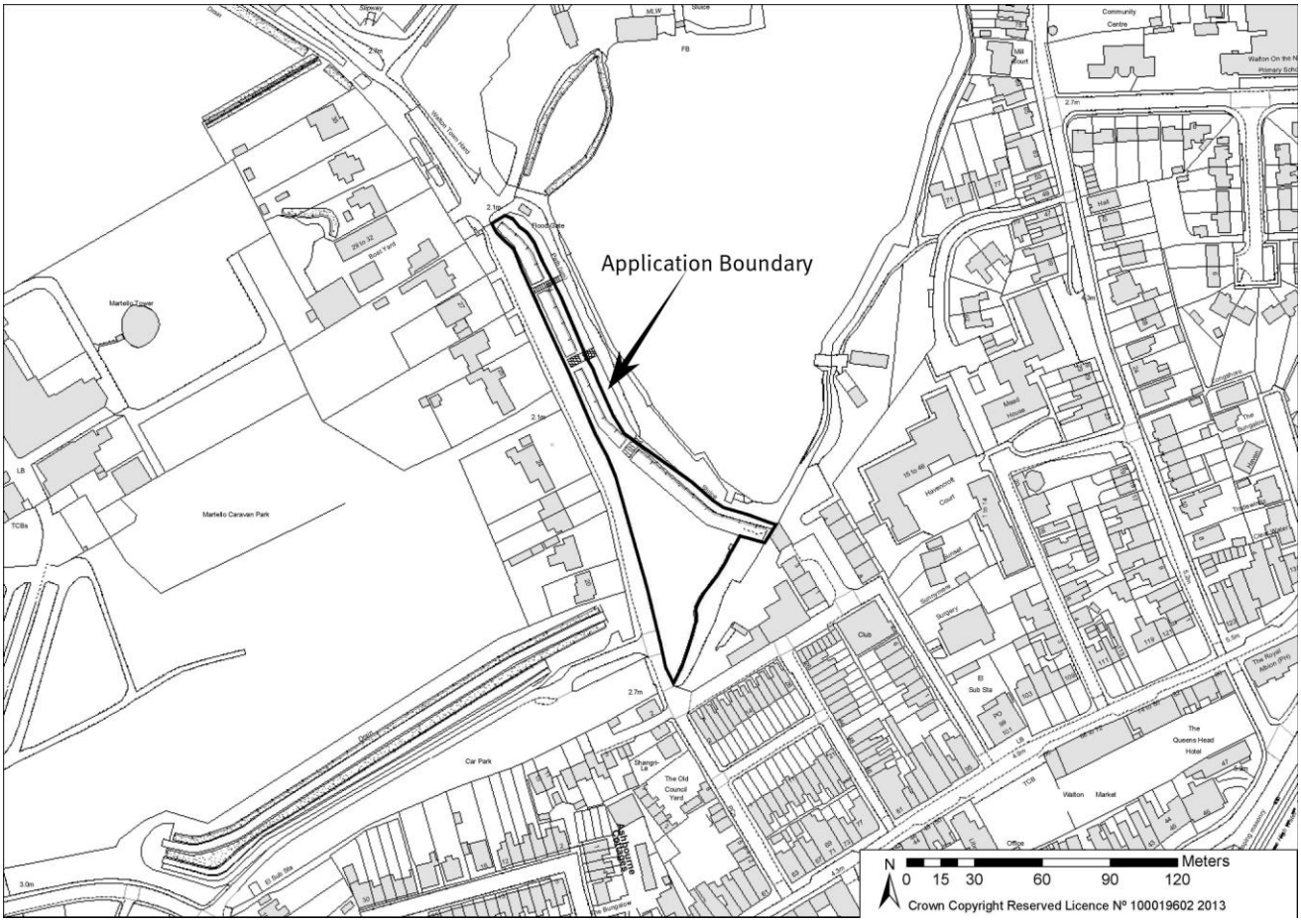


1. PURPOSE OF REPORT

To consider an application made by Miss Diana Humphreys to register land described as “Mill Lane Green and adjoining sea wall”, Walton on the Naze as a town or village green pursuant to Section 15(2) of the Commons Act 2006 (“the 2006 Act”).

2. BACKGROUND TO THE APPLICATION

The application dated 11th April 2011 was made by local resident Miss Diana Humphreys for registration of land situated off Mill Lane and including the sea wall in Walton on the Naze. The area applied for is on the plan at the front of this report.

Essex County Council is the commons registration authority in relation to the 2006 Act and caused a non-statutory public local inquiry to be held into the matter over a period of three days, namely 6th to 8th November 2012 before Mr Alun Alesbury of counsel. At the inquiry evidence and submissions were given in support of the applicant and on behalf of the objector, Silverbrook Estates Limited.

With the agreement of the parties all of the oral evidence was heard on oath or solemn affirmation. The proposed inquiry was advertised in advance both on site and in the local press.

The Inspector made a preliminary and unaccompanied site visit on 5th November 2012 before the start of the inquiry and made a further accompanied site visit with representatives of the parties after close of the evidence to the inquiry on 8 November 2012. In addition to going on to the site and looking at all of it the accompanied site visit visited parts of the area in the vicinity of the site which had been identified as the suggested ‘neighbourhood’ and other local features.

In addition to the oral evidence at the inquiry, both parties had exchanged documentary evidence in advance of the inquiry date and additional documents were produced during the inquiry. All the material submitted was taken into account by the inspector.

The inspector’s report is appended as Appendix 1 and he makes a recommendation of refusal. The applicant and the objector have had sight of the inspector’s report and further representations have been made which are summarised in section 15 of this report.

3. DESCRIPTION OF THE LAND

The applicant provided a plan defining the boundary of the application land when she submitted her application.

She described the land as ‘the triangle of grass at the town end of Mill Lane, and

the adjoining sea wall to the east of Mill Lane from the drainage ditch (south) to the flood gate (north)'.

The main, southern (triangular-shaped) part of the site is a grassy, somewhat overgrown, relatively flat area open to the carriageway of Mill Lane on its west side, with a small drop to the level of Mill Lane for some of its length.

The other part of the site, on the north-east side of the triangular area, and then running for some distance further northwards, has all the appearance of a relatively steep-sided sea defence bank – which is what it is. It has what appears to be a pedestrian path running along its top, though not an officially recorded or recognised one.

The inspector noted that the application land itself is clearly delineated on the ground. He also noted that, although at the time of the inquiry the triangular area presented a somewhat overgrown appearance, it was accepted on all sides at the inquiry that for most of the relevant period it had been regularly mowed and reasonably well maintained by or on behalf of Tendring District Council.

4. **THE APPLICATION**

In support of her application the applicant had stated the following.

"Since 1953 when the construction of the sea wall formed a natural 'village green' of this piece of land, the grass triangle at the top of Mil Lane along with the sea wall itself right up to the flood gate, have been in constant daily use by members of the public for recreational purposes such as picnics, ball games, bird watching, tobogganing and walking the dog.

"While the mere boating lake was operating, up to 1975, Mr Carter, the owner, made no challenge to this usage, despite his close supervision of the mere itself.

The council currently mows the grass and maintains the green, and this has been the case for over 20 years. They now provide a dog bin.

"It has been accepted as an area for public use for so long that it came as a surprise to some, on the death of Mr Carter and subsequent sale of the mere, that this piece of land is in private hands.

"In the current uncertainty amid possible developments in the area, we wish to safeguard the green and wall for people of Walton and visitors."

She included 3 evidence questionnaires and 15 evidence statements with her application. She provided some photographs. There were 49 signatures on a petition stated to support that 'we the undersigned think this green and sea wall defence reaching form the Fleet to the Town Hard should stay in public use'.

Silverbrook's objection was dated 14 November 2011.

Having seen the objection the applicant confirmed her intention to proceed with her application on 16th January 2012 and provided some additional photographs of the sea wall following works in 1993 to demonstrate that the area remained useable at that time.

In relation to the claimed locality or neighbourhood within a locality, the applicant stated on her form that 'the area can be defined as the open green and adjacent sea wall lying to the East of Mill Lane, extending between the open fleet brooding the industrial area behind Alfred Terrace to the South, to the Town Hard flood gates to the North.' This was in reality a description of the application site itself rather than of any locality or neighbourhood from which the claimed users of the site may have come.

In later exchanges the applicant produced material which appeared to suggest that the relevant 'locality' might be an area covering most of the central portion(s) of the town of Walton on the Naze, accompanied by a map and a note with a written description of that area. The same note appeared to envisage that there might be a wider 'neighbourhood' of people living elsewhere, being people who (presumably) might have used the claimed green while visiting Walton on the Naze for holidays etc. By the time of the inquiry the applicant had crystallized her thoughts in relation to 'locality' and 'neighbourhood'. In respect of a claimed neighbourhood, she put forward a quite tightly defined area identified on a clear plan, including properties in Mill Lane itself, in Marina Mews, and in Alfred Terrace, the whole being to the north of (but not including any properties facing) Walton on the Naze's High Street. A clearly marked, smaller scale plan was also put forward showing the suggested 'locality'. She indicated that this was intended to show the boundaries of the Walton Ward, which serves for electoral purposes in the District of Tendring, within which Walton on the Naze lies. The neighbourhood area is shown on Appendix 2.

At the inquiry itself it was a matter of agreement between the parties (i.e. the Applicant and the Objector) that in principle it is open to the Registration Authority to determine on the actual evidence what might be regarded as the appropriate 'neighbourhood' or 'locality', regardless of what an Applicant might initially have entered in this regard in the relevant section of the application form. The inspector confirmed this is the correct approach.

On behalf of the Applicant it was argued that the 'neighbourhood' she had most recently defined is the appropriate one to have regard to. The inspector considered that there was in any event no clear evidential basis for forming a view that some differently defined area of Walton on the Naze might have been regarded as a more appropriate 'neighbourhood' and he proceeded to consider the evidence on that basis.

The objector did criticise the suggested 'neighbourhood' in terms of its being legally satisfactory for the purposes of Section 15 of the Commons Act. As far as 'locality' was concerned, the objector had in pre-inquiry submissions criticised reliance on a District electoral ward as a "locality", and questioned whether it could be established that such an area had remained with sufficiently unchanged boundaries for the relevant 20 year period.

During the course of the inquiry, the following facts emerged: firstly, that there exists a Civil Parish known as Frinton and Walton, which includes Walton on the Naze, and has the benefit of an established Frinton and Walton Town Council; secondly, that Civil Parish appears to occupy the same area as was previously administered (before the 1974 local government reorganisation) by a long established Frinton & Walton Urban District Council; and, thirdly, there exists a very long established ecclesiastical Parish of Walton on the Naze, which appears to occupy the Walton on the Naze 'part' of the present Frinton & Walton civil parish.

The boundaries of that ecclesiastical parish are ascertainable, and include an area somewhat larger than the present Walton Ward of Tendring District. The parties agreed that it could be assumed, on the balance of probabilities, that Walton on the Naze Ecclesiastical Parish would have had constant boundaries for at least any relevant period of 20 years (and there was certainly no evidence to the contrary). The applicant argued as part of her case that the ecclesiastical Parish of Walton on the Naze should be regarded as the appropriate 'locality' for the purposes of this application and this was accepted on behalf of the objector.

The locality is shown, as taken from a plan obtained from the vicar by the applicant on which the boundary goes off the map to the north, on Appendix 3. It was conceded (apparently by the vicar himself) that there was some inaccuracy in the free-hand drawing of the boundary in the NW part of what is shown (but in an area devoid of housing). There was also another plan of the Ecclesiastical Parish, produced by the Objector's side, taken from the information on a Church of England website. This was on a smaller scale, and so went up to the northern end of the parish and its boundaries with the sea and the Walton Channel up there. It was a matter of agreement at the inquiry that this one was likely to be more accurate in the shape of the twists and turns of the western boundary than the Vicar's hand-drawn markings on a street map, in spite of the latter being at a larger scale. This locality area is also shown on Appendix 3.

At the close of the inquiry, the applicant's case was that the neighbourhood which had been defined was indeed a cohesive one. The streets orientate to Mill Lane rather than the High Street. There is a community feel and a high percentage of the neighbours know each other within these streets. The map or plan showing the neighbourhood had not been tailored to the applicant's evidence; it was actually the other way round.

5. THE EVIDENCE IN SUPPORT OF THE APPLICATION

The applicant's bundle includes 24 statements for oral witnesses, 27 'other witness statements' and 23 evidence statements.

The 14 people listed in this paragraph gave oral evidence in support of the application and their use of the application land and what they said is analysed in the inspector's report – Mr Simon Hipkin (paragraphs 7.7 to 7.22 of the inspector's report), Mrs Mary Cook (paragraphs 7.23 to 7.25), Mr Brian Green (paragraphs 7.26 to 7.35), Mrs Wendy Wright (paragraphs 7.36 to 7.43), Mr Jeremy Shiers (paragraphs 7.44 to 7.58), Mrs Margaret Sandell (paragraphs 7.59 to 7.67), Mr Fred Robinson (paragraphs 7.68 to 7.75), Mr Eric North (paragraphs 7.88 to 7.102), Mr Ashley Hatwell (paragraphs 7.103 to 7.109), Mrs Beth Hatwell (paragraphs 7.110 to 7.118), the applicant Miss Diana Humphreys (paragraphs 7.119 to 7.135), Mrs Penelope Potter (paragraphs 7.135 to 7.139) and Mr Roger Potter (paragraphs 7.140 – 7.142).

In opening the applicant explained that the grassy triangle was an area of salt marsh until the mid 20th Century and it was the landward end of the tidal Walton Channel, which in those days came right up to Kirby Road. The tidal mill pond, which had for centuries served Walton Water Mill, was until the 1960s run as a boating lake. After the 1953 flood a sea wall was built to protect the town from further disasters and the boating lake was left on the seaward side. The flood defence work left a grass covered triangle of dry land on the landward side between the sea wall and Mill Lane itself.

From that time on local residents and visitors began to use the grassy triangle for the recreational activities that the witnesses described. It was assumed by all that the grassy triangle, newly reclaimed from salt marsh by a government agency, was a public owned open space. This general assumption was later underpinned by the fact that the boating lake owner (at that time a Mr Ted Carter) at no point showed any interest in fencing, maintaining or doing anything to the grassy triangle after the construction of the sea wall.

Frinton and Walton Town Council mowed it from before 1974, and in 1989 it was known that Tendring District Council included it in their grounds maintenance documents. Along with the installation of a dog waste bin this care continued until very recently. When Tesco started consulting the residents of Mill Lane about their proposed development on the Martello Caravan Camp in September 2010 there was some concern about access to the land and its future use.

In 1993 the Environment Agency raised the level of the sea wall here and round the other side of the Mere but access had not been prevented by the work. As part of the work the contractors replaced all the steps over the wall and at a later date the Environment Agency put up handrails on the sets of steps. This must have been for the benefit of the public and not just for their own workforce.

Activities which had been carried out on the green and the adjacent sea wall include walking, dog walking, informal cricket, football and rounders, kite flying, Frisbee games, picnicking and family parties, tobogganing and snowman building, bird watching and sketching, November 5th bonfire parties, firing maroons for the two minute silence on Remembrance Day, landing the air ambulance and plain and simple hanging out.

The applicant did not accept that the evidence showed only a few people using the land. It is extremely unlikely that a piece of land like this would be used by only a few people, but that Tendring District Council would have maintained it open, in good condition, for many many years.

The applicant's case was that the whole of the land in the application site had been used. Clearly the steep sides of the sea wall bank are not suitable for playing cricket, but they form an integral part of the whole experience. This is just a matter of common sense. Furthermore the aerial photographs produced by the objector do show that use had taken place. It was also the case that the steep banks of the sea wall were used for activities such as tobogganing. Aerial photographs would not be expected to show traces of informal football matches just using jumpers etc., for goal posts. So the applicant's case was that the grassy triangle and the slope attached to it, and the path along the sea wall, were all an integral space.

Dog walking is a legal pastime on a village green. People are not on the land for only a few minutes. They went on to do things like fly kites, play rounders, or to sketch. Also youths hang about on the land for significant periods of several hours at a time, which is not a passing or transient use.

The inspector accepted that the application land had been open and generally unfenced for the whole of any relevant period of 20 years. It had also been quite well maintained and tended. The exception to this was that during the summer of 1993 when the civil engineering work relating to the construction of a new higher sea wall or bank affected the whole of that part of the application land which consists of the present sea wall or bank and the works effectively created that part of the land as it exists now. Those works also additionally affected a substantial portion of the larger, flatter, triangular area in the southern part of the application land.

On the balance of probability the inspector had to consider how the two different parts of the site had been used and also consider whether the passing of foot along the sea wall or bank had been use more widely for sports and pastimes with the remaining flatter part of the application land.

He did not consider that there was substantial evidence that the sea wall had been used to a material extent in a way which would warrant registration under the Commons Act 2006. Incidental activities such as stopping to watch birds with

binoculars or admiring the view are more referable to the use of a route rather than justification for the registration of the whole sea bank.

In relation to the part of the sea bank used for tobogganing down the bank and use by mountain bikes, the inspector found it credible that this could have occurred from time to time but it did not seem to him that there was enough evidence to show a sufficiently regular or continuous use of any part of the sea bank for 'lawful sports and pastimes'.

In relation to the flatter grassy triangle, it seemed highly probable that this area was mown and maintained by Tendring District Council precisely to encourage members of the public to use it for activities which would fall into the category of 'lawful sports and pastimes'. The user evidence for the applicant was found generally to be honest local people who used the land quite regularly for a mixture of activities. It was also commonsense that picnics would generally be by visitors to the town. It was not especially credible for the objector to label the land as a dog toilet. The fact that there were other areas that could be used by people as a town or village green was not relevant to the decision to be made.

The inspector concluded that the evidence does show that over a considerable period there had been a sufficiently continuous use by people of the triangular area of the site for lawful sports and pastimes – certainly sufficient to convey to a reasonably observant landowner that (were all the other statutory requirements met) a claim to use the land 'as of right' might be being asserted.

He also felt it is clear, both as a matter of commonsense, and from a general appreciation of the extensive jurisprudence in this area, that it is not necessary in order to establish a 'village green' claim to show that the area of land concerned was in extensive or any active use continuously during all waking hours. It will be a matter of common observation that village greens, including established ones, are not in active use the whole time. All that is necessary to establish one is that relevant use should be sufficiently regular and extensive (as opposed to sporadic, occasional incursions by individuals) to show that a right is being claimed by local people generally. He also considered that when the evidence shows that this land was for a long period a quite well maintained piece of open greensward, regularly mown by the District Council, it would be rather surprising if reasonably regular recreational 'lawful sports and pastimes' use had not been made of it.

6. THE OBJECTOR'S CASE

The application was advertised in the pres and on site on 29 September 2011 with objections to be made by 11 November 2011. Notice was also given direct to the owner identified on the application form. It transpired that there was a new owner, Silverbrook Estates Limited and additional time was given to them to object by 14 December 2011 and copies of the supporting evidence was sent to their solicitors Ellisons.

Natural England were contacted by the landowner and provided some comments dated 24 November 2011. The Environment Agency also made comments which were sent to the landowner's solicitors and the applicant on 14 November 2011. The Environment Agency did not object to the application and expressed the view that registration as a green would not prevent it from carrying out any necessary maintenance of the sea wall.

Silverbrook's objection was settled by Vivian Chapman QC and dated 14 November 2011. It sought to put the applicant to proof of the matters set out in section 15(2); it challenges the boundaries and legal status of the locality; it asked for the application to be rejected on paper due to the deficiencies; it indicated that use for dog defecation is not a sport or pastime, nor is it lawful as it creates a nuisance; Tendring District Council had maintained the land under the Public Health Act 1875 or the Open Spaces Act 1906 and provided the dog waste bin to enable use 'by right'; the land had not been available for all of the 20 year period as the 1993 aerial photograph showed part of the land being occupied by vehicles and machinery for woks on the sea wall and it is not accepted that it is continuing at the date of the application; the application was motivated to stop the development of the Mere and they will challenge the use claimed. The appendices were a plan of the application area within the ward and the parish areas and an aerial photograph of 1993.

Having seen this material the applicant confirmed her intention to proceed on 16th January 2012 and provided some additional photographs of the sea wall following works in 1993 to demonstrate that the area remained useable at that time.

Mr Titchmarsh of Silverbrook also wrote to the CRA on 13 August.

The objector's bundle contains 10 witness statements and 8 gave evidence at the inquiry which is summarised in the inspector's report; Mr Jack Robertson (paragraphs 9.6 – 9.21 of the inspector's report at Appendix 1), Mr Gerald Rayner (paragraphs 9.22 to 9.38), Mr David Todd (paragraphs 9.39 to 9.55), Mrs Pauline Chumley (paragraphs 9.56 to 9.66), Mr John Fletcher (paragraphs 9.67 to 9.77), Mrs Helen Pudney (paragraphs 9.78 – 9.108), Mrs Miranda Rayner (paragraphs 9.109 to 9.117) and Mr Russell Bettany (paragraphs 9.118 to 9.122).

The objector included an aerial photograph analysis in their evidence bundle. This included aerial photographs from 1953 to 2011. One was taken in the summer of 1993, the period when the works to heighten the sea wall were in progress.

The objector was represented by Tom Cosgrove of counsel at the inquiry.

A statutory declaration from Mrs Sylvia Bone who had lived at 8 Alfred Terrace since 1993/4 was produced and what she could see out of the bedroom at the back of her house is summarised in paragraph 9.3 of the inspector's report. She

observed less activity than claimed by the applicant's witnesses.

The objector's submissions are summarised in some detail in section 10 of the inspector's report, pages 49-58.

The fact that Tendring District Council had maintained the area including the dog bin provided would be appropriate actions under section 9 Open Spaces Act 1906 and section 164 Public Health Act 1975 and use would be pursuant to a statutory right of public recreation.

The objector submitted that there would be a conflict between protection for town and village green land and the Environment Agency's permissive powers to undertake works of maintenance of the sea wall and adjacent land.

Use for lawful sports and pastimes should be distinguished from use of what may be footpaths or rights of way. Much of the evidence consisted of walking along paths as an access route and short trips with a dog.

The objector did not accept that use had taken place to the extent suggested by the applicant. They viewed the use as trivial and/or sporadic.

The objector did not agree with the neighbourhood claimed by the applicant. The number of users demonstrated was not a significant number in relation to the locality.

Part of the land had not been available in 1993, as demonstrated by the aerial photograph, and any 20 year use had therefore been interrupted for at least 3 months from June 1993 so any use had not been continuous.

The inspector did not consider that points made by the objector about use of the application land as a 'dog toilet', that there were other better, nicer areas in Walton for people to use as a town or village green, the nature of the witnesses in relation to local connection and the morality of the claim were good points. The inspector did acknowledge the objector's analysis that only a small proportion of the objections made to a planning application for development of the wider Mere area had made a point about the present application site being used by people for recreation and enjoyment.

7. ISSUES RELATING TO THE USER EVIDENCE AND THE STATUTORY GROUNDS

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." It was disputed that the use had been extensive enough to pass this test, that any use may be as of right and there was a substantive interruption in 1993 such that use was not continuous.

Because the applicant relies on s15(2) of the 2006 Act it has to also be the case that the use continues at the time of the application.

8. LOCALITY AND NEIGHBOURHOOD WITHIN A LOCALITY

Section 4 of this report summarises the initial information provided by the applicant in her application, the clarification of the ecclesiastical boundary at the inquiry and the applicant's identification of a neighbourhood within the locality. The inspector concluded that both of these were acceptable in law to support the application.

The claimed neighbourhood is shown on Appendix 2 and the claimed locality on Appendix 3.

9. 'LAWFUL SPORTS AND PASTIMES'

The inspector considered that there was an important distinction between the part of the applicant land which was the sea wall or bank running along and within the entire eastern boundary and the part of the land which comprised the relatively flat grassy triangle in the south. Judicial authorities made it clear that it was important to distinguish between uses of land which consist of passing on foot from A to B along a defined route and uses of the whole surface of the land more widely for 'lawful sports or pastimes'.

In relation to the sea bank, he considered there was no convincing evidence this had ever been used to a material extent for anything other than a footpath type route along its top or for crossing over the bank laterally where steps had been provided. Stopping to look at birds with binoculars and other ancillary activities were also referable to using the path. Any use was not of a kind which would warrant registration under the Commons Act 2006.

There is a part of the sea bank immediately adjacent to the north east side of the grassy triangle. Evidence was before the inspector that this had been used for tobogganing from the bank to the flatter land and that mountain bikes were used up and down the bank. However, he did not consider that this was enough evidence to show a sufficiently regular or continuous, rather than sporadic or occasional, use of any part of the sea bank for lawful sports and pastimes.

That leaves the relatively flat grassy triangle. There was overwhelmingly clear evidence that for nearly all of the relevant period this had been quite a well maintained regularly mown area of ground, entirely open and unfenced with

access from Mill Lane. Maintenance by Tendring District Council was probably for the purpose of encouraging members of the public to use the land. Activities in the evidence of generally honest local people was for a mixture constituting 'lawful sports and pastimes' such as people walking with or without dogs, families or children playing informal games, young people 'hanging out' etc. He also accepted that people would have picnics on the land in good weather although they were more likely to be visitors than local inhabitants.

On the balance of probabilities the inspector considered that there had been a sufficiently continuous use by people of the triangular area of the application land for lawful sports and pastimes. It was not necessary to show that the land was in extensive or any active use continuously during all waking hours, but that use was sufficiently regular and extensive to show that a right is being claimed by local people generally. Due to the regular maintenance by the district council it would be rather surprising if use had not been made of it.

There were other issues around the nature of the use and the period of use which are examined below.

10. **USE BY 'A SIGNIFICANT NUMBER OF THE INHABITANTS' OF ANY NEIGHBOURHOOD**

As a starting point the inspector considered what was required is that the number of people using the claimed land signifies that it is in general use by the local community rather than occasional use by individuals.

Some of the users came from outside the claimed neighbourhood but still from Walton. The inspector did not consider that this caused any fundamental difficulty for the applicant's case. However, it was a more significant problem that a considerable element of the use over the years seemed to have been by visitors to the town from elsewhere completely, which was not surprising as Walton is a seaside town attracting visitors. The impression was not however that the use was entirely or almost entirely by visitors from outside the town.

On balance the inspector was convinced that there was a significant level of regular use for recreational purposes by inhabitants of the local neighbourhood as well as throughout the year. Nothing in the written evidence in the objector's aerial photographs caused him to take a different view.

11. **'AS OF RIGHT' USE**

Both sides gave evidence that for the major part of the relevant user period the land had been managed and maintained by Tendring District Council as if it were an area of public open space or parkland available and open for all to use. This may have continued a pre-1974 arrangement with Frinton and Walton Urban District Council. Some witnesses believed the land was owned by the district

council. It had in fact been in private ownership and the mowing was brought to an end by notice from the objector company.

Tendring District Council did not provide evidence or information in relation to the basis on which they were mowing and maintaining the land. From information which has been provided the district council had regularly mowed the land since at least 1989/90. A dog bin was first erected in 1998 and a new one installed in 2007. Tendring District Council regularly picked litter from the land.

As a creature of statute it must be assumed, and was so argued by the objector, that, unless there is clear contrary evidence, it was doing these properly and lawfully in pursuance of some statutory power enabling it to do so. Under section 9 Open Spaces Act 1906 councils can 'undertake the entire or partial care, management and control' of areas of open space even where it does not own them. The inspector considered this was probably apt to explain the circumstances at Walton.

Section 164 Public Health Act 1875 provided that an authority can 'purchase for take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever'. The inspector considered this was relevant as an alternative or in addition to the powers under the Open Spaces Act 1906.

It is clear from case law that where a local authority provides land for public use under either the 1906 or 1975 Acts that use of the land by the (local) public will be 'by right' not 'as of right'. The inspector considered the same applied to land belonging to someone else which is managed or controlled by a council under the Open Spaces Act 1906 or 'supported' as a 'public walk or pleasure ground' under the 1875 Act. In the absence of details of the precise legal basis for historic actions being available the commons registration authority can reach its decision on the basis of the most probable lawful explanation or justification for the actions concerned and the inspector considered that to be that Tendring District Council managed and controlled the land under the Open Spaces Act 1906 and had similar ability under the Public Health Act 1875.

It therefore followed that use of the land for recreational purpose by local people or indeed any body else over all of the relevant years for the claim was 'by right' not 'as of right'. The applicant's claim for village green status therefore failed on this ground required under the 2006 Act.

12. **USE "FOR A PERIOD OF AT LEAST 20 YEARS" AND "CONTINUE TO DO SO AT THE TIME OF THE APPLICATION"**

The twenty year period runs from approximately April 1991 to April 2011. The inspector considered that the applicant did make out her case that for almost all of

the relevant twenty years and more local people were using the land for lawful sports and pastimes and were still doing so at the time of the application.

However, evidence from both sides indicated that there was a significant period of interruption in the summer of 1993 while major works took place for the replacement and heightening of the sea wall or bank. The inspector formed the view that the works probably took about 3 months. Photographic evidence showed the works were extensive and for at least some of the time affected the great bulk of the application area. Part of the grassy triangle may have remained unaffected but no evidence of any such area was offered by the applicant.

The aerial photograph from summer 1993 shows some interference with this area. It was not possible for the inspector to accept that the site was available for use for lawful sports and pastimes 'as of right' during that period. It was a substantial interruption.

Consequently the application must fail because the evidence did not show continuous uninterrupted use of the application land for lawful sports and pastimes for the requisite period of 20 years as required by the 2006 Act.

13. LOCAL MEMBER NOTIFICATION

The local member has been consulted. Any comments from Councillor Page will be reported.

14. INSPECTOR'S CONCLUSION AND RECOMMENDATION

The inspector's conclusion is that the evidence in relation to the application has not met the statutory criteria set out in section 15(2) of the 2006 Act. In particular the criteria not met are those relating to 'as of right' use and use for a sufficiently continuous period of 20 years up to the time of the application.

This conclusion relates to all parts of the application land.

15. REPRESENTATIONS FOLLOWING INSPECTOR'S REPORT

The applicant and objector were given an opportunity to comment on the inspector's conclusions.

The applicant made the additional comments at Appendix 4.

The applicant expresses concern that the inspector made assumptions about the statutory basis on which Tendring District Council were maintaining on the land when there was no information from the district council to make that assessment. She considered that the inspector had speculated as to the nature of use which had been affected by the works in 1993 but misunderstood the nature of the exception built in to section 15. It is the commons registration authority's

understanding that this is only commonly used to apply to the period during which foot and mouth restrictions were in force. She considered that the land could be used for two purposes at the same time, i.e. village green and path use and suggested the inspector's conclusions were unsound in this respect. She put forward an interpretation of 'as of right' use and suggested that the actions of the district council had not interfered with this.

She reiterated that the inspector's report confirms they had satisfied the requirements of the 2006 Act criteria in all but two respects and she said that serious ambiguities existed in relation to those aspects.

The inspector has considered the further representations, acknowledges that some of the more legalistic points have not been fully understood by the applicant and stands by his analysis of the evidence and his recommendation in his report. His further comments are at Appendix 5.

He made a number of specific observations in relation to the applicant's comments. Firstly he does not accept that he made an 'assumption', unfavourable to the applicant in relation to the basis on which Tendring District Council had maintained the land. A conclusion had to be reached on the available evidence on the balance of probabilities and the inspector reached his conclusion on that basis. Secondly, where he had included additional detail in relation to witnesses who did gave untested written evidence this was because their evidence had been subject to specific discussion at the inquiry. In one case, Mrs Bone, the inspector had preferred the applicant's witnesses to her written evidence. Thirdly, he reached his conclusion in relation to the interruption in 1993 on evidence which was in fact given or on documentary or photographic material mainly produced by the applicant. The aerial photograph produced on behalf of the applicant was confirmatory of the evidence from the applicant's side. On this point or any other the inspector did not accept that he gave preference or greater weight to the material produced by the aerial photographic witness than he gave to the applicant and her witnesses. Finally, he considers the applicant confused the significance of any issues in relation to use in 1993 of any part of the grassy triangle. Even if some lesser part of the triangle had continued to be used, it would still have been subject to his conclusion that such use had been 'by right' and not 'as of right'.

16. **RECOMMENDED**

That:

1. The neighbourhood substituted at the inquiry by the applicant and described in section 4 and on Appendix 2 is accepted as the neighbourhood within the locality for the application;

2. The alternative boundary of the identified locality of the ecclesiastical parish of Walton on the Naze shown on Appendix 3 is accepted in substitution for the

original locality boundary set out in the application;

3. The inspector's analysis of the evidence in support of the application is accepted and his recommendation that the application made by Diana Humphreys dated 11th April 2011 is rejected for the reasons set out in the inspector's report and in summary in this report.

BACKGROUND PAPERS

Application dated 11th April 2011 with supporting papers.
Inspector's report and comments on further representations.
Further representations from applicant.

Local Member Frinton & Walton

Ref: Jacqueline Millward CAVG/63

APPENDIX 1 – INSPECTOR'S REPORT

RE: LAND AT 'MILL LANE GREEN' AND ADJOINING SEA WALL, WALTON ON THE NAZE, ESSEX

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 THE ABOVE-NAMED LAND

as a

TOWN OR VILLAGE GREEN

CONTENTS:

1. INTRODUCTION

1.1. I have been appointed by Essex County Council ("the Council"), in its capacity as Registration Authority, to consider and report on an application submitted to the Council, dated 11th April 2011, for the registration as a Town or Village Green under Section 15 of the Commons Act 2006 of an area of land described as 'Mill Lane Green and adjoining sea wall', off Mill Lane, Walton on the Naze. Walton on the Naze lies within the administrative 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 2011 was made by Miss Diana Humphreys, of 33 Mill Lane, Walton on the Naze. Miss Humphreys 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 clearly shown on a plan (*"Map A"*) which accompanied the Application. The originally completed application form was somewhat unclear however 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. The plan accompanying the application (*"Map A"*) did not identify any such area(s), and the part of the Application Form relating to *"locality or neighbourhood"* (section 6) had been filled in with wording which was in reality a description of the application site itself, rather than of any locality or neighbourhood from which the (claimed) users of the site might have come.

2.4. That such a thing should occur was neither surprising nor particularly unusual, as the standard (national) form (Form 44) on which applications of this kind are to be made offers little clear or useful guidance to applicants in relation to the 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. In later exchanges the Applicant produced material, including a map showing an area surrounded by a pink line, which appeared to suggest that the relevant 'locality' might be an area covering most of the central portion(s) of the town of Walton on the Naze, accompanied by a note with a written description of that area. The same note appeared to envisage that there might be a wider 'neighbourhood' of people living elsewhere, being people who (presumably) might have used the claimed green while visiting Walton on the Naze for holidays etc.

2.6. However by the time of the inquiry which I held the Appellant had crystallised her thoughts in relation to 'locality' and 'neighbourhood'. In respect of a claimed neighbourhood, she put forward a quite tightly defined area identified on a clear plan, including properties in Mill Lane itself, in Marina Mews, and in Alfred Terrace, the whole being to the north of (but not including any properties facing) Walton on the Naze's High Street. A clearly marked, smaller scale plan was also put forward showing the suggested 'locality'. I was given to understand that this was intended to show the boundaries of the Walton Ward, which serves for electoral purposes in the District of Tendring, within which Walton on the Naze lies.

2.7. At the inquiry itself it was a matter of agreement between the parties (i.e. the Applicant and the Objector) that in principle it is open to the Registration Authority to determine on the actual evidence what might be regarded as the appropriate 'neighbourhood' or 'locality' for the purposes of ***Section 15*** of the ***Commons Act***, regardless of what an Applicant might initially have entered in this regard in the relevant section of the application form, subject only to the question of fairness, and an Objector needing to know the case which he/it needs to meet and respond to. In my judgment this is the correct approach, and I so advise the County Council as Registration Authority.

2.8. At the Inquiry the Objector did not complain of being prejudiced by the identification of a suggested 'neighbourhood' as latterly identified by the Applicant on a clear plan, and as described by me in my Paragraph 2.6 above. [The Objector did however firmly criticise that suggested 'neighbourhood' in terms of its being legally satisfactory for the purposes of Section 15 of the Commons Act – a different matter, to which I return later in this Report].

2.9. On behalf of the Applicant it was argued, right through to closing submissions, that the 'neighbourhood' she had thus defined is the appropriate one to have regard to. I can say at this stage of my Report that there was in any event no clear evidential basis for forming a view that some differently defined area of Walton on the Naze might have been regarded as a more appropriate 'neighbourhood'. Accordingly I conclude, and advise, that the relevant neighbourhood to be considered is the one, latterly put forward by the Applicant, which I have just been discussing.

2.10. As far as 'locality' was concerned, the Objector had in pre-inquiry submissions criticised reliance on a District electoral ward as a *"locality"*, and questioned whether it could be established that such an area had remained with sufficiently unchanged boundaries for the relevant 20 year period.

2.11. However, from researches undertaken by both parties during the course of the inquiry, the following facts emerged, none of which was ultimately in dispute:

(i) there exists a Civil Parish known as Frinton and Walton, which includes Walton on the Naze, and has the benefit of an established Frinton and Walton Town Council;
(ii) that Civil Parish appears to occupy the same area as was previously administered (before the 1974 local government reorganisation) by a long established Frinton & Walton Urban District Council;
(iii) there exists a very long established ecclesiastical Parish of Walton on the Naze, which appears to occupy the Walton on the Naze 'part' of the present Frinton & Walton civil parish;
(iv) the boundaries of that ecclesiastical parish are ascertainable, and include an area somewhat larger than the present Walton Ward of Tendring District.

It was a matter of agreement between the parties that it could be assumed, on the balance of probabilities, that Walton on the Naze Ecclesiastical Parish would have had constant boundaries for at least any relevant period of 20 years (and there was certainly no evidence to the contrary).

2.12. Accordingly the Applicant accepted, and eventually argued, that the ecclesiastical Parish of Walton on the Naze should be regarded as the appropriate 'locality' for the purposes of this application. It was also expressly accepted on behalf of the Objector that the ecclesiastical Parish could be thus regarded as the 'locality', and in the event no objection was taken to its being so regarded.

2.13. Accordingly, albeit as a result of discussion between the parties (and me) at the Inquiry itself, there was eventual agreement on all sides as to the areas which should be considered as the claimed *"locality"* and *"neighbourhood within a locality"* by the Registration Authority, when making its decision on the application in this case.

2.14. As for the Application Site itself, it is clearly delineated on the ground. The main, southern (triangular-shaped) part of the site is a grassy, albeit now somewhat overgrown, relatively flat area open to the carriageway of Mill Lane on its west side, with a small drop to the level of Mill Lane for some of its length. The other part of the site, on the north-east side of the triangular area, and then running for some distance further northwards, has all the appearance of a relatively steep-sided sea defence bank – which is indeed what it is. It has what appears to be a footpath running along its top – though not (I understand) an officially recorded or recognised one.

2.15. I should perhaps note at this point that although at the time of the inquiry the triangular area presented a somewhat overgrown appearance, it was accepted on all sides at the inquiry that for most of the relevant period it had been regularly mowed and reasonably well maintained by or on behalf of Tendring District Council, in circumstances which I will have to consider further (to the extent that I am able to) at a later stage in this Report.

3. THE OBJECTOR

3.1. Objection was duly made to the application on behalf of Silverbrook Estates Limited as the registered proprietor of the land of the application site. The original objection statement was settled for the Objector by Mr Vivian Chapman QC., who did not in the event appear on behalf of the Objector at the eventual public inquiry. I later came to understand, through evidence given at the Inquiry, that the Objector Silverbrook Estates Limited had become the owner of the site in question (as part of a considerably larger landholding then acquired) in May 2009.

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 18th September 2012. 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, 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 in the afternoon of the day before the Inquiry commenced to see the site, unaccompanied. I also observed the surrounding area generally.

5.2. At the close of the evidence to the Inquiry, on 8th November 2012, I made a formal site visit, accompanied by the Applicant and a representative of the Objector. In addition to looking at the site, we visited and observed the suggested 'neighbourhood' surrounding the site, and other local features.

6. THE INQUIRY

6.1. The Inquiry was held at Columbine Centre, Walton on the Naze, over three days, on 6th and 7th and 8th November 2012.

6.2. Submissions were made on behalf of both the Applicant and the Objector 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 the 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

7.1. As I have already to some extent noted above, the Application in this case was supported and supplemented by various documents including plans, some completed evidence questionnaires and letters from local residents, and various other supporting material, including photographs.

7.2. Other written or documentary material was submitted on behalf of the Applicant in the run-up to the Inquiry, in accordance with the Directions which had been issued. Some of this consisted of written statements from witnesses who would in due course give evidence at the Inquiry itself.

7.3. I have read all of this written material, and also looked at and considered all the photographs, plus other documentary items with which I was provided, 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 or affirmation), 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 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, letters, or questionnaires etc 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 Simon Hipkin*** lives at 22 Mill Lane, Walton on the Naze. He said he has lived at that address, which is within the claimed neighbourhood, for 4½ years, and within the locality of Walton on the Naze for 35 years. Since living at his present address, which directly overlooks the application site, he has never been prevented from using the land for lawful recreation, and has never sought permission to do so. It is only within the last two years that he had become aware that the land is not in public ownership. Up until then he along with other residents had believed the land to be a public open space, as it was cut and maintained fortnightly by Tendring District Council. Also, the Objector company had made no attempt to limit public access to the site on taking ownership of the Mere and the site in 2009, and seemed entirely happy to allow the Council to continue to maintain the area at public expense up until the point when they became aware of the application for registration.

7.8. In summer months, and particularly before the Council were prevented from cutting the grass, he would use the area perhaps once a week for activities such as flying a kite with his young daughter, and teaching her to ride her bike. They also enjoy strolling along the sea wall and looking out over the Mere in evenings, particularly at the abundance of wildlife. In the winter, during periods of snowfall, they have used the sea wall for sledging and have made a number of snowmen on the Green.

7.9. As he lives overlooking the site, he has also witnessed a great number of people making use of the area for their own lawful recreation. Dog walking is by far the most prevalent activity, although in summer months the Green is in regular use by visitors for picnicking, kicking footballs, throwing Frisbees etc., particularly when driven from the beach at high water. A number of people he has spoken to over the years make regular visits to the site for bird watching, specifically to see the Kingfishers which nest in the Fleet along the Green's southern boundary. Groups of local teenagers also congregate there in the evenings to hang out. Again in the winter the area is popular for sledging among residents for the wider locality. It is Mr Hipkin's belief that this land has been in use for a great many years as a public open space without any challenge or objection. The fact that it has been maintained by the District Council for well over 30 years only serves to reinforce its status as a village green.

7.10. *In cross-examination* Mr Hipkin said that prior to moving to Mill Lane 4½ years ago he had lived in Florence Road, Naze End, in Walton on the Naze. Therefore all his

evidence about the site relates to the 4½ years that he has lived there. The last year prior to the inquiry is included in that period of 4½ years.

7.11. He is a self-employed Marine Surveyor and his work involves him travelling all over the place, primarily within the UK, but only very occasionally does he have to stay overnight elsewhere.

7.12. He confirmed that he had had a look through the evidence filed for the Objector. He would say that the claimed Green is used by a great number of people. The use is seasonal, but in the summer months it is not unusual to see someone there. On an average day one might see 20 or 30 people on the land. The main use is dog walking, but one sees people having picnics etc., as well. A lot of the dog walking is along the top of the sea wall within the site. People do appear to do a circular walk involving the land, they are not necessarily going to the boat yards to the north of the application site. The site is not really on an access route to anywhere in particular, the sea wall as a route is rather out of the way in order to get to the boat yards. Nevertheless people do use it he said. Most people come down Mill Lane and then take a detour from the lane to walk along the sea wall.

7.13. He did not think that defecation was the prime reason why people take their dogs out for a walk. Nevertheless he agreed that this (the Green) is not the place for a two hour walk with a dog, for example.

7.14. The Council used to provide a dog litter bin on the land, but this was removed at the time of the application. When that bin first disappeared there were regularly bags of dog waste hung onto the pole to which the bin had originally been attached.

7.15. In relation to the Applicant's plan produced for the inquiry showing a claimed *"neighbourhood"*, Mr Hipkin said that the area contained was effectively the streets adjacent to the application site. Certainly in Mill Lane and Alfred Terrace there is a real community, and within that he would also include Marina Mews. No doubt there are also people from Churchfield Road (outside the claimed neighbourhood) who also use it. He in fact had a childhood friend from Churchfield Road who used to play football there.

7.16. Some of the photographs produced on behalf of the Applicant were Mr Hipkin's. Two of them showed himself and his daughter. There had been no-one else there on that occasion apart from his wife taking the photographs. Those photographs seem to have been taken in the winter. If one stood there for half an hour or so one would see other people, one might well see 20 to 30 people if one stood there all day, he said.

7.17. He also explained the locations of a number of his other photographs, several of which he thought had been taken in the Spring of 2010. He agreed that the use of the land could be called sporadic, in the sense that the use of any open space is to a degree sporadic. Sometimes there are people there and sometimes not. His photographs had not been designed to show use of the land but to show what the land

had been like before the maintenance of it had ceased. He would not be in the habit of photographing members of the general public having picnics on the land for example.

7.18. He had known that Tendring District Council had maintained the land, and had assumed that the land was owned by that council. They used to mow the land, pick the litter and they also provided the dog bins.

7.19. The sea wall itself has always been considered to be a footpath he thought. The Environment Agency for example had provided handrails to the steps for people to get up onto the sea wall path. Mr Hipkin acknowledged that he had completed one of the evidence questionnaires which had been produced on behalf of the Applicant; he also agreed that he had been against the proposed redevelopment of the area of the Mere. He also acknowledged that he had not said anything about the use of the present application site land in the representations he had submitted on that planning matter. He had made objections to the planning application, but this village green application is a very different case. The Mere was a 27 acre site, he said.

7.20. *In re-examination* Mr Hipkin said that he understood that this present inquiry is to do with the registration of this specific application site as a village green. He explained that as well as the planning application there had been on the Mere, there had been a planning permission granted for a Tesco Supermarket on meadow land behind his house.

7.21. As far as the claimed neighbourhood was concerned, he agreed with the boundaries of that as they had been shown by the Applicant. Within Mill Lane he personally knew 90% of the people living there on a friendly basis, it has as good a community feel as anywhere. The streets in the claimed neighbourhood are all in close proximity to each other. He personally is not a dog owner. Prior to 4½ years ago he had still been involved in the world of boats, he had been a member of the Yacht Club in Walton for some 25 years. He used to drive past the application site regularly for all that time, but would not wish to say that he observed the land that closely at that time.

7.22. The photographs he had produced were just ones that he happened to have. He did not take them to show many people using the green. It is difficult to take photographs of strangers on pieces of land like this.

7.23. ***Mrs Mary Cook*** lives at 66 North Street, Walton on the Naze (which is outside the Applicant's claimed neighbourhood). She said that she has walked along this piece of green for at least 54 years. When her children were young they played and picnicked on it. She regularly walked her dog on it, and her husband and she walked it until his death on 21st April 2012. She continues to walk along it when she can. This land has always been treated as a public space and should stay one. She had never been asked to leave the land or been approached by anyone to say that she should not be there. She often used to go there from her house, passing through the floodgates by the east end of the Mere. A Mr Carter used to be the owner of the boating lake within the area

of the Mere. At other times she used to go around by road when the floodgates were closed.

7.24. *In cross examination* she said she knew that Mr Carter had owned the boating lake, but not that he had also owned the claimed Green. She used to go around his lake to get to the Green, but he never gave any indication that the Green was his. In giving this part of her evidence she was talking of the period around 1964/65.

7.25. *In re-examination* Mrs Cook said that Mr Carter had not given her permission to go round the side of his boating lake. He used to nod and wave, Mrs Cook used to go through the gates and along the base of the sea wall. She did not think Mr Carter's wave had been giving her permission, he was just being friendly.

7.26. ***Mr Brian Green*** lives at *"Sidestrand"*, Suffolk Street, Walton on the Naze (which is outside the Applicant's claimed neighbourhood). He said he had lived at this address since 1987.

7.27. His wife and he have kept a boat in Bedwells Yard for many years. The craft is moored in what is known as the Yacht Trust Pond and has been so for at least 10 years.

7.28. During the last 10 years he had regularly used the land in question to gain access to the sea wall on his way to check his boat's moorings. He used the raised sea wall rather than the road in order to enjoy the view and check the tide and wind conditions on his way to the Pond. His boat is very old and tender.

7.29. This would have been on average three times a week and is an essential part of his exercise regime. No-one had ever challenged his presence on this land.

7.30. Furthermore he and his wife have owned that boat since 1977, and often picnicked with their children on the grass under the sea wall when those children were young, before they moved to their current address. He has had unrestricted and unchallenged access to this land throughout the entire period since 1977, he said.

7.31. In the past he has regularly used the application site land for family picnics. When he and his wife first found their present boat it was derelict. He had always been convinced that the claimed Green was public land, in particular the grassy triangle that goes down to what is known as the Fleet.

7.32. *In cross-examination* Mr Green said that he used the land about three times a week. He is 76 now so he does not go down as often as he used to. Over the last 20 years he would say that he visited the land three times a week on average. It forms part of the journey from where he lives to the boatyards where he keeps his boat. He had explained why he likes to go up onto the sea wall within the application site. He does do that regularly, but it is not the only way he gets to his boat, it is a pleasant part of his journey to go up onto the sea wall on the way.

7.33. As far as his evidence about the picnics was concerned, that had been before 1987, with his children. But he has done it more recently with his grandchildren as well and nobody had ever objected.

7.34. *In re-examination* Mr Green said that there had indeed been a shorter way of getting to his boat than going via the claimed Green or the sea wall, but nevertheless he had often gone that way. Picnics when he had had them on the land with members of his family were not part of a journey anywhere.

7.35. *To me* Mr Green clarified that he had never in fact gone onto the land to have picnics with his grandchildren, though he had been on the land with those grandchildren. With his own children in the period from 1977 onwards they would come down to Walton on the Naze with their children; they did not live here then. Their children did not have local friends, and if the weather was good they would have a picnic on the application site.

7.36. ***Mrs Wendy Wright*** lives at 19 Alfred Terrace, Walton on the Naze. She said that her earliest memories of the Green area in Mill Lane being used as a gathering point for the community were from 1957 onwards. Local people assembled for firework night on November 5th, when a large bonfire was lit, and local youngsters took fireworks along to be let off there. Ball games and picnics have taken place on the Green for as long as she can remember. Her late father had worked on the boating lake after the War, around 1947 for a few years, and she can remember a green area next to the boating lake as a child.

7.37. She is concerned and annoyed by the removal of the dog litter bin from this public place. Mrs Wright explained that she has lived at her present address in Alfred Terrace for about three years. She had lived on a boat in France for 18 months before that. Before that she had lived in an area of Walton known as The Triangle, which was not particularly close to the application site.

7.38. She had always thought the application site was public land, she had walked her dog on the land and walked along the sea wall.

7.39. *In cross-examination* Mrs Wright said that it is during the last 3½ years that she has lived at her present address. She had lived at the Yacht Club from age 11 – 18. She had been born in 1946.

7.40. She cannot see the application land from her own house. Her use of the land is mainly walking her son's dog. Her son used to live on the other side and did have a view over the land. She walks her son's dog nearly every day.

7.41. Bonfire night does not happen on the application site land nowadays. The dog litter bin on the application site suddenly disappeared and the nearest one now is some way

away, by the car park. She had always thought that the application site was public land maintained by the Council for the public to use.

7.42. *In re-examination* she said that she personally remembered two or three bonfires there on the land. It was a nice place for a bonfire. She had seen ball games and picnics on the Green. When she lived at the Yacht Club she used to bike up and down. There was always life there, with people on the Green, especially in the summer. That would have been in 1957 – 1974.

7.43. She got married in 1964 and lived in another part of Walton. Then she had lived in Colchester for two years around 1979. Then she lived in Kirby le Soken for a while, ten years or so. She had been a member of the Yacht Club for about 35 years.

7.44. ***Mr Jeremy Shiers*** lives at Smalldown, Percival Road, Kirby le Soken. He said he had been a member of the Walton and Frinton Yacht Club from around 1985 – 2011. He also had a boat at Hall's Boatyard, Mill Lane, from around 1985 to around 1991. He has four children who all attended Walton Primary School from 1994 to the present time.

7.45. So, although he does not live in Walton, he has plenty of reasons to visit Walton and Mill Lane in particular. And indeed Walton is only about two miles from Kirby le Soken.

7.46. His parents moved to Frinton in 1960 when he was 5, and he has lived in this area ever since apart from October 1973 – April 1983 when he was studying. He has regularly walked on both the Green and the sea wall, especially since 1985 when he bought his first boat which he kept at Hall's Yard.

7.47. He has never seen any sign which indicated that the sea wall or the Green was privately owned. Neither had he seen any sign or barrier which restricted public access. He had never been told, and had never heard of anyone else being told, of restricted access to the sea wall and the Green. It is very common to see people walking on the Green and the sea wall, especially in summer. Mill Lane is one road where people can park for free in Walton which is reasonably close to the shops, so many people who do park there take time to have a break and walk on the wall and look at the Mere and the backwaters in general.

7.48. There is a byway (No.45) which runs from Mill Lane just north of the floodgates and through the southern part of Hall's yard. People sometimes walk along the sea wall and on the Green to get to byway 45 in order to walk to the quay and get a better view of this part of the backwaters. People walking to the Yacht Club, Bedwells or Hall's yard, or the Town Hard will walk down Mill Lane and often in doing so walk on the Green or the sea wall. People also walk down Mill Lane to walk along the sea wall, a route which had in fact been submitted by the previous Urban District Council of Frinton and Walton as Footpath No. 37. There is at least one group of people who walk on the application site pretty much every day, and they are the dog walkers.

7.49. Sailors visiting the Walton and Frinton Yacht Club or keeping a boat in the Pool also walk on the Green and/or the sea wall when walking into Walton, as do people fitting out their boats at Hall's and Bedwells Yard. Finally the residents of Mill Lane and the adjacent road walk on the sea wall and the Green, especially children, as it is one of the few local open green spaces where they can play.

7.50. There is a growing trend for open access to the coast and sea walls. The Walton Forum is promoting *"Walton Walks"*. In 2010 a public footpath (No. 48) was confirmed from Foundry Creek to North Street almost at Mill Lane. There is also an application to recognise the walk along the sea wall from Mill Lane to Island Lane as a public footpath. This present application links up with a number of those other paths.

7.51. In summary Mr Shiers said he has used the sea wall and Green definitely since 1985, and he has hazier recollections of using the sea wall before he went to college in 1973. His usage varied from every day when he was fitting out his boat or sailing, to maybe once a week in winter. When he takes his children to school they always go for a walk first, usually on the beach, but when the wind is strong or it is cold they walk down Mill Lane using the Green and sea wall to look at the boats, the Mere and the backwaters. It is very common to see other people on the sea wall and Green. Even in bad weather there are always the dog walkers.

7.52. He has never seen any barrier or restriction or sign to indicate that it was anything other than a public space, even when plans for the Mere development were being actively pursued. Nor has anyone ever challenged his use of the Green or the sea wall, and he has never heard of anyone else being challenged over their use of the sea wall or the claimed Green. He confirmed that when he used the Green and the sea wall with his children, that was not in order to walk through but to do activities of various kinds on the green space.

7.53. *In cross-examination* Mr Shiers said that Kirby le Soken is about 2 miles away from the application site. He had his first boat in Hall's Boatyard and used to go there often, he would walk into town often from the boatyard in order to buy a pie or a sausage roll, he would walk down Mill Lane and perhaps sit on the sea wall or the Green, meaning the sea wall to the east of Mill Lane on the application site. In truth what he used to do was that he would invariably go one way and back the other, in other words in one direction he would use the application site and in the other direction he would just go along Mill Lane. Most often he would only stop to have a look when going in one direction but would go direct along Mill Lane in the other direction.

7.54. He thought that people walking on the sea wall were not just using it as a through route but people might go to a particular place like that in order to enjoy and make use of it. He accepted that in his own statement he had described use of the land by

sailors as being use of an access route. He had said that, but he had also spoken about people stopping on the land, perhaps to admire a view or to eat something.

7.55. He could not say whether the Green was used by people every day or not. He had never mentioned games of cricket on the grass and had he seen them he would possibly have mentioned them. He had been asked to make a statement about the use of the Green. He had tried to limit his statement to two pages.

7.56. He accepted that picnicking on the land would be sporadic, not 24/7. Mill Lane is essentially a cul-de-sac but there is a trend for increased coastal access. He used to make a specific point of going onto this land precisely because it is green. He and his children would go onto the land for some exercise before school which he regarded as being good for the children. They do however usually go to the beach, it is when it is cold mainly that they go to Mill Lane. He is no longer a member of the Yacht Club.

7.57. *In re-examination* Mr Shiers gave evidence in relation to some of the other people he had seen on the land. Delivery men for example: it was a place where they can stop and have a break using the land for that purpose. He would also quite often see other people walking or standing on the sea wall. Delivery men have to have a break and this is a pleasant place to have such a break.

7.58. There was not a fixed formula for his use of the land with his children. He would say that 60-70% of the times he had been on or next to the land he had seen other people there. People do not just use the land to go from A to B. They might for example have been walking the dog, or having a sausage roll, or enjoying the view, or just sitting and de-stressing. Indeed sometimes people might sunbathe on the Green in good weather; people also let their dogs off the lead there, he has observed.

7.59. ***Mrs Margaret Sandell*** lives at 20 Mill Lane, Walton on the Naze. She said that when she was a child seventy years ago the boating lake was fenced round, and access was only through the ticket office entrance where one had to pay. The area of land outside the fence and down to Mill Lane was an open space of grass which had to be crossed to get to the boating lake. Following the big flood in 1953, a high sea wall was constructed along the line of the boating lake boundary fence and access was then over the wall by means of steps constructed by the Essex River Board; this is now the responsibility of the Environment Agency.

7.60. All the land on the land side of the sea wall in the area of the application site was used by everyone as a public open space and the Council kept it clean and cut the grass. A pooper scooper box was put up for the use of dog walkers and the area became a very pleasant recreation area used by the locals and summer visitors. When the pooper scooper was removed she and other local people had dreaded that the land might be fenced off. They were distressed to see the area subsequently left unkempt following the announcement of the proposed Mere development, and even more alarmed to find out that the developers claimed the land as their own. No notices had ever said that the land was private, and as it has been in constant use for the past 60

years everyone assumed that it was common land or at least Council land. She very much hopes that it will remain untouched and undeveloped for children to enjoy in the future.

7.61. The application site land had originally been just an open space outside the boating lake fence. The whole world used to come there to the boating lake, and people would regularly use the greensward outside. She personally moved to Walton about 9 or 10 years ago.

7.62. School children sit on the steps on the land or go along the sea wall and they use it as a social area. It is also true that much happens on the land at night. She has seen cricket being played on the land by visitors. It is used as a short cut by people but also as a recreational area.

7.63. *In cross-examination* Mrs Sandell said that prior to 9 or 10 years ago she had lived in Lower Kirby which is just to the west of Walton. She is the sister of the applicant.

7.64. She has seen children using the land as a short cut. When she says that visitors use the land, people tend to come for weekends to Walton on the Naze now rather than for summer holidays. That is when the weather is fine. This happens on lovely autumn days, not just in the summer. Lots of people come to the town. Thus most of the use of the land is at weekends and holidays and in the summer period. She personally does not need to use this land for a picnic because she has a garden nearby.

7.65. A lot of people come into Mill Lane and rush across to the sea wall to see what they can see. She had always assumed that this land was Council owned or maintained for public use. The Council used to mow the grass.

7.66. She had also seen people use the land for access to the boatyards to the north. Games being played on the land were mostly by visitors or holiday makers, but also sometimes by local children.

7.67. *In re-examination* Mrs Sandell said that use is mostly by visitors in the summer, but in winter she sees many local people taking their dogs for walks on the land.

7.68. ***Mr Fred Robinson*** lives at 33 Mill Lane with his partner, who is the Applicant. They lived there from summer 1976 to summer 1978 with their baby daughter, but then moved to Derbyshire where Mr Robinson taught in a residential school for children with behavioural problems, but during that time they spent most school holidays at 33 Mill Lane. They eventually moved back to live at 33 Mill Lane with their three young children in 1984, and he and his family have lived there ever since.

7.69. When the children were young they used to play ball games on the Green, flew kites, threw Frisbees and a boomerang. They all rode mountain bikes up and down the sharp slope, onto and then along the sea wall.

7.70. They now have grandchildren and he sometimes takes Jess his granddaughter to her primary school in Walton, along the sea wall which is the safest and most pleasant way to school. The withdrawal of grass cutting and removal of the dog bin has however made this journey far less pleasant.

7.71. The sea wall offers a magnificent open view of what has become a wild wetland environment close to the heart of Walton. He has watched a Cormorant swallowing and regurgitating a large eel, and seen Kingfishers shrimping in the sluice, and he has also seen little egrets in the vicinity.

7.72. He has known and enjoyed the Green for about 30 years and throughout that time he has seen many others doing so. Football, cricket and rounders are played mostly in the summer, and sledging and snowboarding take place in the winter. Families can be seen there enjoying a picnic, and dog walkers and bird watchers can be seen throughout the year. A group of teenagers regularly congregate on the steps near the sluice and although they do sometimes leave litter, he likes the fact that they spend time there. He has never asked permission to use the Green and he has never been prevented from doing so.

7.73. He had produced some photographs showing the post on which the dog bin used to hang. He confirmed that he had regularly seen people using the Green. People could be seen there for a large proportion of the time, and he had seen other people doing similar types of things such as walking dogs or bird watching. He has even joined in people's cricket games. He would say that it is quite often that other people are using the land, and he has certainly seen lots of local people using it on occasion, not just visitors.

7.74. *In cross-examination* Mr Robinson said that it would be fair to say that dog walking is the predominant use of the land. Prior to the land being in its present unkempt state, one would however also see games taking place there. When the grass was maintained it was not a regular occurrence to see organised cricket there, but one did see games. This was not a general location for regular cricket matches however, nor was it a regular location for rounders. Such use was sporadic, as he would expect for a village green. When he took his granddaughter to school using the sea wall he would access it at the northern end and walk along the sea wall to the southern end. The fence at the southern end of the sea wall is relatively recent, less than a couple of years old.

7.75. *In re-examination* Mr Robinson said the use of the land as a route to pass through from A to B is a fairly minor element of the use, the more general thing is people getting onto the sea wall because of what is on the other side. He had also seen people regularly using the grassy triangle.

7.76. ***Mr William Frederick ('Bill') Bates*** lives at 23 Mill Lane, Walton on the Naze. Soon after his and his family's arrival at their present house in April 1975, their sons Daniel and William then aged 2 and 5 were walked on the Green opposite their house.

They played cricket and football on the Green, they flew kites there, they tumbled, wrestled and played chase there and they also picnicked. They saw other people doing similar activities and at no time did anyone object, challenge or prevent them from using the Green. They assumed it was Council land. Later when older their children played with friends on the Green. His youngest son Daniel studied the night sky through his telescope mounted on a small table while sitting on a deckchair on the Green. When the winter snows came to Mill Lane Mr Bates' family and friends tobogganed down the sea wall's slope and across the Green. They built snowmen and engaged in snowball fights on the Green.

7.77. For many years their extended family has visited them from London, sometimes as many as 25 people. Without fail an extended all-age game of cricket was organised with stumps in front of the sea wall and plenty of green for the outfield, the pitch boundaries being along the sea wall, the Fleet (or drainage ditch) and Mill Lane, completing a triangular pitch. Refreshments were taken at intervals on the Green. Again there were never any objections or complaints from anyone.

7.78. They regularly used to see one of their previous neighbours relaxing in a deckchair on the sea wall after a stressful day at the office. No-one ever objected. During their 37½ years in Mill Lane both his wife and he experienced serious illnesses. An important part of their post-hospital recuperation was to walk the Green and enjoy the village green ambience.

7.79. Over recent years they have enjoyed their now grown up children, with their children, practising the exact same pastimes on Mill Lane Green, again still unchallenged or without objection from the landowner or anyone else. They have witnessed over the years Carnival floats being assembled on the Green by local people, and on one occasion they saw the practice rehearsal of the erection of a marquee in preparation for a Town Council function on the Millennium Square.

7.80. Thus Mr Bates' conclusion was that the previous owner of this land seemed to allow community use, and was not concerned in any way with the triangle of grassy land which is now the subject of the village green application. In fact that owner appeared to have been completely satisfied and happy to allow Tendring District Council to cut the grass regularly and to maintain tidiness, including the provision of a dog bin. Mr Bates said that his plea was that the land should be preserved as a village green in perpetuity.

7.81. His recollection was that Costain Building and Civil Engineering Limited won a contract let by the National Rivers Authority to carry out flood defence works which involved increasing the height of the sea wall, which had been originally built after the 1953 floods. This sea wall forms one side of the grass triangle known as Mill Lane Green, the other sides being the Fleet and Mill Lane. It is of course the sea wall which together with the Green forms the subject of the present application. The work commenced on 14th June 1993. He can confirm that his wife encouraged their son William to take photographs of the works and associated plant, materials and

equipment. Mr Bates produced a number of photographs which had been taken in that way. The photographs showed various aspects of the work, and the site while the work was going on.

7.82. Mr Bates confirmed that his son had had free access to the site during pauses while that work was going on. Some other photographs which he produced showed games going on on the land on another occasion (not during the works).

7.83. The family game of cricket which he had referred to was looked forward to almost every year. The grass was always well cut so it was possible to play such games. It was also the case that Mr Alan Frazer, the local butcher used regularly to play football there every Saturday with his grandson towards the southern end of the land. Of course that was in good weather.

7.84. The photographs that Mr Bates produced, other than his son's civil engineering photographs, had been taken by various family members on different occasions. Indeed one of the photographs was of some strangers having a picnic on the land who the Bates family had got friendly with. Apart from the Bates family and Mr Frazer with his grandson he could not recall other families having organised games on the land, but he distinctly recalls people walking dogs on the triangular area of the land for example.

7.85. *In cross-examination* Mr Bates explained that a notice about the proposed flood defence works (a copy of which he produced to the Inquiry) sent by the Costain engineering firm came through his own front door in June 1993. The sheet piling aspect of the work did indeed cause vibrations to his and neighbours houses. The work lasted for several months in 1993. The notice from Costains had told people to keep clear of the area of the works. His son who had taken the photographs in 1993 was aged 23 at that time. Mr Bates acknowledged that the photographs showed that some of the works which were undertaken in the summer of 1993 impacted on the grassy triangular part of the application site. While those works were going on, you could not go on there and play cricket for example. So there was to that extent an interruption to use of the land. Mr Bates said he did not know exactly when in the summer of 1993 his son had taken the photographs; he agreed that one would not want young people going on the land while those works were going on.

7.86. Mr Bates also agreed that the northern strip of the land (which effectively consists of the sea wall structure now) was never used for cricket going north beyond the apex of the triangle. He explained that some of his photographs showed members of the Bates extended family who had their annual game on the land. Some of the other photographs taken on different occasions have been from his bedroom window. The children seen playing in two of his photographs were his sister's son and a cousin. His sister lives in London. Mr Bates acknowledged that an earlier statement in relation to the land had been made by himself and his wife in March 2011. He had always understood the Council, that is Tendring District Council, to own the land. He had assumed that until recently because they maintained the land in good order.

7.87. *In re-examination* Mr Bates said that litter had been quite regularly dropped on the land by many of the people who used the land. *To me* Mr Bates explained that the handwritten date 14.06.93 on the notice from Costain Engineering which he had produced had been written onto that document recently by one of the applicant's team. It reflected the fact that the notice itself had mentioned that the work was starting on the 14th June, and it was known definitely that 1993 was the year when it took place. That is why the date had been written on in handwriting.

7.88. ***Mr Eric North*** lives at 7 Marina Mews, Walton on the Naze. He has been a resident in Marina Mews since 1986, although his association with Walton goes back to 1971 because he used to race boats based at Walton. His present property overlooks the land in question. He uses it regularly and has never been challenged or questioned by anyone for using it. When the owner of the boating lake (Mr Carter) was alive and still trying to maintain it, he had asked Mr North to keep an eye on the wooden building there for him. Mr North had mentioned to Mr Carter that he had seen someone sleeping rough in the ticket office and Mr Carter had asked Mr North to keep an eye open following that.

7.89. Mr North looks out of his window overlooking the land more often than most other residents because he is a freelance artist working out of his studio in Marina Mews. He specialises in computer generated illustrations and graphics. At least two or three times a day he needs to leave the studio and the computer screens to readjust his eyes and generally to rest from his work. As a result of that, over the years he has noticed a pattern of usage of the greensward of the claimed green. This is a pattern of usage and observation that he has noticed since 1986.

7.90. He can honestly say that he is surprised at the constant use that the greensward and the sea defence wall associated with it get. Clearly this use varies with the seasons, but the most common usage throughout the year are the dog walkers, of whom there are many including himself and his partner who use it daily.

7.91. However the more interesting usage come in the season from Spring to Autumn, and also half-term holidays. As the sea is of course tidal it is not unusual for tourists or day trippers to come down to Walton only to find that the beach is unsuitable to sit on and picnic on because of the state of the tide. Also any wind direction change from the sheltered prevailing south westerly makes picnicking on the beach less enjoyable. Hence people use the greensward as it is more sheltered from a north-easterly wind.

7.92. Over the years he has talked to many of these visitors or picnickers, mainly as a result of the curiosity and inquisitiveness of his collie dogs (of which he has had three). From those conversations he has had with the people using the Green he has gleaned many varied reasons for why visitors want to use the land in question. None of this of course was done because he had any idea that he would be giving evidence in the future about the use of the land.

7.93. These reasons were very varied apart from the obvious ones of the tide and the wind and the sand in people's food. The profile of visitors over the years has changed dramatically. Where once they came and took in the attractions of a big sea and sky experience, with the attraction of traditional refreshments and entertainment, and parked on Bathgate Meadow or nearby; now there are visitors who turn up in large people carrier cars, often in large family groups of two or more cars, they tend to arrive as totally self-contained units. It has frequently amazed Mr North to watch them disgorge themselves to trudge off to the beach laden with numerous cooler boxes, beach gear, barbeques etc. Because they have so much equipment a frequent option such people take is to wander over to the greensward of the application site for a picnic, perhaps play some games or sit on the sea wall and only then venture over to the beach. There is no set profile for these types of visitors, and they can vary from young families to pensioners. Another option which the greensward offers to these visitors is an element of privacy and less crowding than being on the beach. For example, he could remember a large Indian family having a picnic on the Green. He also remembered a group of pensioners from Halstead sitting recently on the strip of grass between the road and the car park who could not use the greensward because it had so much deteriorated lately, previously they had told Mr North that they had been delighted to use that area of greensward for their picnic.

7.94. However it is not just transient visitors who use the greensward, it is also the local community. Mr North frequently observes residents from Alfred Terrace and Churchfield Road playing with their young children on the land, as well as organised groups of children and teenagers playing rounders or cricket. There is no regular pattern to this. Cricket he can recall tends to become popular for example after there has been a particular Ashes test match or something of that kind, tennis becomes popular while Wimbledon is on. Rounders is not infrequent and children he has noticed are allowed by parents to be unsupervised on the greensward.

7.95. Denying the use of that greensward to sectors of the local community and visitors, and allowing it to become overgrown and unkempt is sending out a signal that Walton is in decline. Although this Green is only a small feature of the town, it is an important one to those who use it on a regular basis.

7.96. *In cross-examination* Mr North said he has an angled view of the site from his bedroom window. He actually carries out his work in a downstairs studio. He tends to spend 10 – 15 minutes upstairs doing back exercises several times a day, and while he is doing that he looks out of the window. He does this two or three times a day. He agreed that in total this would amount to much less than one hour a day. He might spend seven or eight minutes on each occasion looking out of the window so that it would amount to perhaps half an hour a day he thought. This could happen at any time during the day.

7.97. Ten years or more ago he used to travel regularly to his clients, but now he does a great deal of his work which involves contacting clients on Skype, so he doesn't need to leave his house. His work is international, ten years ago as he has said there was

an element of travelling but nowadays it would be true to say that even on a large project he would only go away to visit a client on perhaps one day per month.

7.98. As for the tourists or visitors who come onto the application site, people now tend to come to Walton for days or weekends rather than longer holidays. Parking is free in Mill Lane which makes it attractive. Having parked people then troop off to the beach. Certainly not everyone goes over onto the greensward. But people in people carriers find it an attractive option to go and have their lunch on the greensward and then go to the beach; that is not uncommon. In his view people tend to come from north-east London to go to Clacton or Frinton or Walton on the Naze. For example a lot of people tend to come from Ilford. Anyway they are visitors not local inhabitants.

7.99. How people use spaces and greenswards is difficult to predict. As for locals, dog walking would be their predominant use. Over the last 5 or 6 years twitchers or bird watchers have increased, they tend to use the sea wall part of the land.

7.100. Because of his own daily habits Mr North does not tend to observe anything on the land in the early morning or later in the evening. He is not clear that he has seen people taking short cuts and using the land as part of their walking routes. He walks his dog every day on the green opposite the house, not only on the greensward of the application site, but also on an area of green across the car park by the ditch to the north of his house.

7.101. He recalled that, around the time of the 1995 Ashes cricket matches, that was one instance when cricket was played a lot on the Mill Lane Green. However he had observed 1001 uses on the land over the years. He is very keen that the land should be kept as community land. He liked to see rounders being played on the land. You could have perhaps four or five families sometimes using the greensward with a baby and toddler group. And then those children might grow up and go away.

7.102. *In re-examination* Mr North stated that he is not a member or relation of the Bates family, nor of the Applicant Miss Diana Humphreys. He had however known Diana Humphreys since 1970.

7.103. ***Mr Ashley Hatwell*** lives at Backwater, 24 Mill Lane, Walton on the Naze. He moved to his present house in 2003. At that time his daughter was 5 years old. Over the last nine years he has often played on the green with his daughter, flying kites or playing football, tennis and hockey. During winter months when the snow has been heavy enough they have had occasion to build snowmen and join others tobogganing down the sea wall onto the Green.

7.104. Every summer he has witnessed holiday makers picnicking, playing ball games and sunbathing on the land. People often park their car next to the Green and set up camp for the whole day having picnics, playing games and enjoying each other's company. There was an occasion when a young man put up a tent on the Green. He has also

often seen people walking their dogs and using the land to walk to the boatyards and enjoy the view.

7.105. The Council used to cut the grass approximately every two weeks, normally on a Monday morning early, and he had always thought this was common land. He never asked permission nor was he ever prevented from using the land.

7.106. He had lived in Frinton for 12 years before moving to Walton in 2003. He produced some photographs which he had taken on the land in snow in 2010.

7.107. *In cross-examination* Mr Hatwell said that all of the photographs he had produced were taken on the same day in January 2010. One of the photographs was taken from his their house; they look across to the part of the site which is the sea bank, the child in the photographs is his daughter. Other people did go out tobogganing on the land earlier on that same day, he said.

7.108. It is certainly the case that some of the people who use the land are local people, for example there are local youths who go there in the summer to play or to sunbathe. He accepted however that other people using the land are visitors. He often sees people walking their dogs on the land or walking to the boatyards. Sometimes people come off boats and walk along the top of the sea wall on the land in their sailing gear. The tent he had referred to on the land once was in the year 2000, and it was quite a large tent, something to do with the Millennium celebrations; that was a one off occurrence. He confirmed that he had thought the District Council owned the land.

7.109. *In re-examination* Mr Hatwell said that in summer on most evenings and at weekends people do use the grassy triangle and at holiday times it happens almost every day. Indeed most of the time there would be people on there using the land.

7.110. ***Mrs Beth Hatwell*** also lives at Backwater, 24 Mill Lane, Walton on the Naze. Like her husband she has lived there since moving from Frinton in February 2003. In all the time since then up until the application was submitted in April 2011, she had thought that the Green and the sea wall was public or common land, as the Council regularly mowed the grass and emptied the dog bin situated very conveniently on the land by the road near the Fleet.

7.111. She had three dogs when she moved to Mill Lane, a Saluki and two Jack Russells. As they got older the Green and the sea wall were the perfect place to give them a short daily run and let them stretch their legs. Their cat also would sometimes accompany her, and when he saw another dog he would stand between her Saluki's legs for security until the other dog had gone. Now for the past four years she has walked a Lurcher on the Green and the sea wall.

7.112. Her daughter had always enjoyed walking or playing hockey, cricket, rounders or tennis, flying a kite or just throwing a ball for the dogs on the Green. In the winter

when there had been snow, the sea wall made a fun place to toboggan and roll down, and the Green has had many a snowman built on it.

7.113. They have enjoyed watching the birds over the wall feeding and resting on the mud at low tide, and on a few occasions have set up binoculars on the top of the sea wall to look at the moon and stars. Over the years she has seen many people enjoying spending time on the Green and sea wall, and even though the grass has not been cut this summer a large group of people set up tables and chairs at the bottom of the steps where the grass was not so long, opposite their house, and spent all day playing there and having fun. In all the years she has been in Walton she has never been challenged or prevented from using the land and nor has she ever thought to ask permission.

7.114. *In cross-examination* Mrs Hatwell said that she had known the land for 9 years. The group of people she had referred to who she had seen on the land this summer, she did not know them, so probably they were visitors to the town.

7.115. She had not really thought previously about who owned the land, she just thought it was common land; she knew that Tendring District Council mowed it but she had no idea who had owned it.

7.116. She has certainly seen people from the neighbourhood using the Green, for example she saw a gentleman walking a dog on the sea wall every day; indeed two or three people could be seen walking along the sea wall at more or less any time she thought. She had seen people playing cricket on the ground and seen lots of local people using it.

7.117. *To me* Mrs Hatwell said that her daughter is now aged 14. Many times her daughter has played on the land, for example rolling down the sea wall; she played hockey over there and they often had to chase around with hockey sticks and a ball on the land. On clear nights they would go over there and stand enjoying the stars and the quietness.

7.118. Mrs Hatwell also gave some further evidence a little later in the Inquiry than her main evidence. She said that on the 23rd December 2011 she had contacted Mr Trevor Mills of Tendring District Council, who had confirmed to her that the Council had been cutting this area (the application site) since 1989, when it was included in documents for grounds maintenance in the Frinton and Walton area. Then on 5th September 2012 Mrs Hatwell had spoken again to Trevor Mills, who told her that historically the Frinton and Walton Urban District Council had mowed the land prior to 1974; that when Tendring District Council came in in 1974 they carried on doing that, and then in 1989 documents were drawn up and this land was added to their grounds maintenance document saying *"Mill Lane Walton cut the grass and banks"*. She understood that there had been Tendring District Council tender documents in relation to this, dating from around 1994, and there was a previous such tender document as well. Mrs Hatwell also explained that a gentleman called Alan from

Tendring District Council had also telephoned on 23rd December 2011 to say that the dog bin on the land had been erected in 1998 and replaced with a new one in 2007.

7.119. ***Miss Diana Humphreys***, the Applicant, lives at 33 Mill Lane, Walton on the Naze. She lives in Mill Lane and has known Walton all her life she said, first holidaying at her Grandmother's house, and then, apart from a six year gap, living here since 1976. She does not remember the building of the sea wall after the 1953 flood, but her memory of the triangle of land is that it has never changed.

7.120. When the Mere was a boating lake there was a flag mast next to the hut associated with the lake. As a child she remembered a boy running over the wall expecting to see a large sailing ship. People have always made use of the small but convenient piece of land that constitutes the application site.

7.121. When their children were young they would go there for activities which required space, such as Frisbee, kite flying and trying out a boomerang that their son was given. He would also use the sea wall to practice mountain biking. She remembered a particularly beautiful summer evening walking along the wall and listening to a radio programme on her Walkman.

7.122. She drives or walks up the Lane every day and there is usually someone on the sea wall or the Green, she said. She has seen people playing cricket and football, walking with or without dogs, picnicking and playing; she has seen young people hanging out and going to and from school. Once someone was erecting a prototype tent on the land. She was going to the station at the time or she would have stopped and talked to them about it.

7.123. She now walks regularly along the sea wall with her grandchildren. Her granddaughter goes to Walton school and when she stays with her grandmother the obvious, most pleasant and safest route is along the sea wall and round the top of the Mere. She sees other school children using that same route. There had never been a fence or any signs prohibiting access to the land, and she has never been told to get off the land. Her memory is that it has always been kept mown by the District Council.

7.124. Miss Humphreys said that her daughter had come in the previous day with her own three children, and told Miss Humphreys that she had originally met a school friend of hers there on the land playing in the snow with her brother and that school friend had become a lifelong friend. That friend had lived in Churchfield Road, Walton. She, Miss Humphreys' daughter, had had great fun either playing or hanging out on the land of the application site. Miss Humphreys' daughter was very concerned that her children should also have the opportunity of using this land. It should be there for Miss Humphreys' grandchildren.

7.125. Miss Humphreys repeated that she regularly saw people playing on the land and that certainly those walking dogs on the land were from the neighbourhood which she had

identified. The neighbourhood that she and her colleagues have defined includes many houses with small gardens. The neighbourhood as defined consists of streets that she and her colleagues felt were orientated in particular towards the triangle of land on the application site.

7.126. *In cross-examination* Miss Humphreys said that she does personally know that some of the dog walkers are people from the neighbourhood which she had defined. She explained that she and her colleagues associated through the application had thought that one had to define a neighbourhood and that they had done that in response to the submissions which had been drafted by Mr Chapman QC. So therefore the area she proposed as the relevant neighbourhood was that on the plan produced for the benefit of the Inquiry.

7.127. It was hard to say why she had not included either Vicarage Lane or Churchfield Road in the proposed neighbourhood. Nevertheless the line which she had drawn on the plan had not just been drawn around the addresses of the people who were giving evidence. She could not explain why she had excluded people living in flats in the High Street from the neighbourhood. In any event she said it would also be true that people from the whole locality do use the Green, not just people from the neighbourhood she had sought to define.

7.128. Miss Humphreys explained that she works part-time, one morning and one evening a week. She also gave further explanation of the route which she follows to go to Walton School and also to see *"Aunty Margaret"*. They cross the triangle of land and go onto the sea wall and then there is a little drop down before they can continue around the sea wall on the other side of the Mere.

7.129. The cricket or football that she has seen on the land is not formal games, it is informal for example with jumpers for goal posts or sticks for a stump she said.

7.130. She and her family do tend to go away for a month to France every year in the school holidays so she does not tend to see things in the prime cricket season. However she does see family football being played on the land quite frequently.

7.131. She acknowledged that in the evidence questionnaire which she herself had filled in, she had talked about the sea walls being used as footpaths; indeed the sea walls around Walton have always been a wonderful way of getting about she said. The application site in this case of course consisted of the triangle of grassland and the sea wall. She acknowledged that the side of the sea wall bank is not itself used for cricket games, one could not play cricket there, however one can toboggan in Winter or mountain bike down that bank.

7.132. She acknowledged going across the land or along the sea wall is not the best way to the shops but she herself does use that route when she wants a more pleasant route to the shops.

7.133. The 1993 sea wall heightening works had probably lasted about three months she thought. Her own memory was somewhat hazy. Lorries had brought spoil to construct the higher sea wall from the building of the Clacton By-Pass she thought.

7.134. *In re-examination* Miss Humphreys said that she felt that the neighbourhood she had identified does indeed have a cohesiveness to it. *To me* she explained that she and her family had first moved to their present house in Mill Lane in 1976 and then came back in 1984 so that she has lived continuously in the Lane since 1984. The 1993 works had been very much related to the sea wall construction rather than in particular in relation to the rest of the village green. She also made the observation that amenity areas are frequently not used by people full time so there will be occasions when one does not see people on there. She also explained that in relation to the 1993 sea wall works she agreed with what had been said by Mr William J K Bates (son of the Mr Bates who had given oral evidence) in a written statement which he had provided. The gist of this was that during the time of the sea wall works there was still access to the Green and across the site to the boating lake and Town Hard, as there was not continuous surrounding hoarding preventing access to the site. Mr Bates Junior had provided a considerable number of photographs taken at the time of the sea wall works which had in fact been produced in evidence and spoken about by Mr Bates' father.

7.135. ***Mrs Penelope Potter*** lives at The Twizzle, 26 Mill Lane, Walton on the Naze. She supports the village green application, and said that she has lived at the above address since September 1998. She said that she and her husband had regularly used and on a daily basis have seen others using the application land as a public space. Dog walking, picnics, sitting on the grass, ball games etc., all take place there regularly. On possibly two or three occasions the air ambulance or police helicopter had landed there to transport patients to hospitals. At no time had anyone objected, challenged or prevented them from using the land, nor have they ever asked permission.

7.136. In addition friends living in Brantham, Suffolk have also used the land in the 1970s when visiting Walton with their small daughter and other family members.

7.137. Mrs Potter said that she regularly sees the same faces and the same dogs on the land. It is very regular for people to walk dogs along the top of the sea bank.

7.138. *In cross-examination* Mrs Potter said that she sees the dog walkers from their front bedroom. She sees them on the wall and also on the lower piece of land on the site. She sees people progressing along in the direction to and from the town. She sees people doing that regularly on most days.

7.139. Ball games are a relatively rare occurrence on the land at the sort of time the Inquiry was taking place, but in summer holidays or in the evenings in summer, and also when there is snow, one does see people there on the land. In her view one saw people on the land playing such games often but not every day, perhaps once a week one would see people there doing that sort of thing, nevertheless it would be true to

say that the land in question is very often in use. She has seen people using it who she has never seen before, but there are also people who she sees there often.

7.140. ***Mr Roger Potter*** also lives at The Twizzle, 26 Mill Lane, Walton on the Naze. The evidence he gave in chief was effectively identical to that just given by his wife (they used the same written statement as its basis). Mr Potter also added that people seen walking dogs on the land are from the neighbourhood which has been identified.

7.141. *In cross-examination* Mr Potter explained that he had dictated his statement to his wife who wrote it down. He agreed with his wife that he did not use the land himself on a daily basis.

7.142. He accepted that people who had picnics on the land may well often be visitors to the town. Anyway when they go they often leave rubbish there. Nevertheless the majority of users of the land are local people who are not carrying a lot of stuff with them. Local people would not carry a lot of stuff out onto the land to have a picnic for example.

8. THE SUBMISSIONS FOR THE APPLICANT

8.1. In opening it was said on behalf of the Applicant that the land at the town end of Mill Lane, Walton on the Naze, including what is now the grassy triangle which is the subject of the application, was an area of salt marsh until the mid 20th Century. It was the landward end of the tidal Walton Channel, which in those days came right up to Kirby Road.

8.2. The tidal mill pond, which had for centuries served Walton Water Mill, was until the 1960s run as a boating lake. After the 1953 flood a sea wall was built to protect the town from further disasters and the boating lake was left on the seaward side. The flood defence work left a grass covered triangle of dry land on the landward side between the sea wall and Mill Lane itself. From that time on local residents and visitors began to use the grassy triangle for the recreational activities that the witnesses would describe. It was assumed by all that the grassy triangle, newly reclaimed from salt marsh by a government agency, was a public owned open space. This general assumption was later underpinned by the fact that the boating lake owner (at that time a Mr Ted Carter) at no point showed any interest in fencing, maintaining or doing anything to the grassy triangle after the construction of the sea wall. Frinton and Walton Town Council mowed it from before 1974, and in 1989 it was known that Tendring District Council included it in their grounds maintenance documents. Along with the installation of a dog waste bin this care continued until very recently.

8.3. When in September 2010 Tesco started consulting the residents of Mill Lane about their proposed development on the Martello Caravan Camp, it occurred to some local people that the orientation of the new superstore and possible upgrading of the nearby car park road might seriously affect access to and use of the grassy triangle; they wondered how safe its continued status was as an easily accessible public green.

Members of the local community were further alarmed when it was discovered that the land was not owned by the Council as had been widely believed, but by the new owners of the former boating lake or *"Walton Mere"* as it has been known in the years since the boating business was closed. Although Mill Lane is strictly speaking a cul-de-sac, it is used by a fair amount of traffic; cars, lorries, vans, bikes and pedestrians are all constantly up and down. There are two boatyards, the Yacht Club, the Town Hard Association, fishermen and boating people, residents and leisure walkers. Of these, many of the walkers include the sea wall as part of their route, and yachtsmen use it as a survey point to observe the wind and the state of the tide. The proximity of the Mill Lane car park means that for visitors to Walton, whether from near or far, the Green is a convenient starting point.

8.4. In 1993 the Environment Agency raised the level of the sea wall here and round the other side of the Mere. The work did not stop people using the Green, and access, even to the wall itself, was not prevented. As part of the work the contractors replaced all the steps over the wall and at a later date the Environment Agency put up handrails on the sets of steps. This must have been for the benefit of the public and not just for their own workforce.

8.5. As the witness statements would show, activities which had been carried out on the Green and the adjacent sea wall include walking, dog walking, informal cricket, football and rounders, kite flying, Frisbee games, picnicking and family parties, tobogganing and snowman building, bird watching and sketching, November 5th bonfire parties, firing maroons for the two minute silence on Remembrance Day, landing the air ambulance and plain and simply hanging out. The recent decision to stop the mowing by the District Council, and to remove the dog waste bin, have been the only things which have interfered with people's use of the land.

8.6. In summary it could be said that the application land and the adjoining sea wall have been used by the public as an open space since it was created by the building of the earlier sea defences after the 1953 flood. Evidence statements to that effect show that people have been using it throughout the more then 50 years since that happened. Photographic and documentary evidence would show that the work to raise the wall in 1993 did not prevent this use. The District Council has been maintaining the land at tax payers' expense, mowing the grass for at least 38 years and latterly providing a dog waste bin. To the Applicant's knowledge no-one has ever been challenged or prevented from using the land, nor felt the need to ask for permission.

8.7. Closing submissions for the Applicant were made by ***Mr Charles Davison***, who had acted as advocate for the Applicant at the Inquiry. Mr Davison reminded the Inquiry that the tests under the ***Commons Act*** were to be assessed in terms of the evidence on the balance of probabilities.

8.8. As far as the question of *"neighbourhood"* was concerned, the Applicant's case was that the neighbourhood which had been defined was indeed a cohesive one. The streets orientate to Mill Lane rather than the High Street. There is a community feel

and a high percentage of the neighbours know each other within these streets. The map or plan showing the neighbourhood had not been tailored to the Applicant's evidence; it was actually the other way round.

8.9. As far as the matter of locality was concerned, the Applicant was entirely content that the locality should be identified as the Parish of Walton on the Naze (i.e. the Ecclesiastical Parish, because the Civil Parish involves the combination of Walton with the neighbouring town of Frinton).

8.10. As far as *"significant use"* was concerned, Mr Davison said that this is not a simple numbers game; the numbers which need to be demonstrated must be proportional to the size of the site. The issue concerned the meaningful use of the land and the social value of pastimes. The Applicant did not accept that the evidence showed only a few people using the land. Comments like that were just based on assertions by the Objector and are rejected by the Applicant. It is extremely unlikely that a piece of land like this would be used by only a few people, but that Tendring District Council would have maintained it open, in good condition, for many many years.

8.11. On the question of *"as of right"*, and the involvement of the Council with the land, it was said on behalf of the Applicant that it could not be proved that the Council had in some way taken the land under statutory powers. The Council's intentions were just being assumed on behalf of the Objector. Mr Ted Carter, who had been the previous owner of the land, had been known to be a recluse in his latter years, and not of totally sound mind. The Applicant understands that this is an unusual situation. It certainly would be very unusual that the District Council would have maintained the land for so long for the benefit of just a very small number of people, which is what the Objector seems to be suggesting.

8.12. The Applicant's case was that the whole of the land in the application site had been used, clearly the steep sides of the sea wall bank are not suitable for playing cricket, but they form an integral part of the whole experience. This is just a matter of common sense. Furthermore the aerial photographs produced by the Objector do show that use had taken place. It was also the case that the steep banks of the sea wall were used for activities such as tobogganing.

8.13. So the grassy triangle and the slope attached to it, and the footpath along the sea wall, were all an integral space. It was extremely unfortunate that the Objector's aerial photography expert was not available for cross-examination. Aerial photographs would not be expected to show traces of informal football matches just using jumpers etc., for goal posts. One needed to look at that expert's report with some circumspection.

8.14. When one looks at the ordinary photographs which have been taken one can see short grass and wear and tear, and the fact that the Council were having to pick litter. Where would all the litter have come from if the land was only sporadically used? Paths on the land are in fact more defined due to the grass being recently uncut.

Many of the aerial photographs do show wear on the grass, as indeed do other photographs which had been produced.

8.15. Much play was made on behalf of the Objectors about their witnesses having been born and bred in Walton. The Applicant's witnesses are also largely Walton born and bred. In any case someone who has lived in the locality for 50 years would not necessarily know more about the specifics of this case than someone who had lived in Mill Lane in particular for 10 years. Mrs Sylvia Bone, who did live in the neighbourhood and had produced a statement for the Objector, had not been available for cross-examination which was unfortunate. Her evidence was contradictory to that of other people whose homes overlooked the claimed Green.

8.16. In spite of having claimed no vested interests, all of the witnesses for the Objector had admitted to being approached to provide evidence, on top of which there were curious similarities in the wording of all their statements. None of the Applicant's witnesses had been schooled or guided; they were just passionate, honest local people, none of whose families stood to make any money out of this dispute.

8.17. The word *"sporadic"* had been artfully placed into the mouths of some of the witnesses. This should being taken to mean largely irregular in pattern rather than necessarily rare. Many of the activities which have been described were and are regular, and are neither irregular nor sporadic. Examples are daily dog walking which is certainly not sporadic; annual cricket matches – these are not sporadic but a regular annual activity. Other activities would have been less regular because they are weather dependent, but nevertheless frequent. Mrs Mary Cook had said that she could not make claims for other people's use, but not that she had seen nothing on the land. Miss Diana Humphreys might have been vague on the duration of the sea wall works but was not saying that she could not remember them at all. Mr Eric North had acknowledged that he spent only 30 minutes a day in his bedroom looking out. The Objector tried to use this to diminish his evidence, but that was far more time than most of the Objectors' witnesses observed the land. Most of their witnesses were just people who drove past the land from time to time, not residents spending any significant amount of time there.

8.18. The constant implication on behalf of the Objectors had been that dog walking is somehow not legitimate. Yet dog poo is only a by-product of leisure activity, not the sole reason for going on the land. Dog walking is a legal pastime on a village green. People are not on the land for only a few minutes, as the evidence showed. They went on to do things like flying kites, play rounders, or for sketching. Also youths hang about on the land for significant periods of several hours at a time, which is not a passing or transient use.

8.19. Throughout the period of the application all public notices had been systematically and efficiently removed, usually within hours. This would undoubtedly have reduced a number of witnesses that may have come forward.

8.20. The Environment Agency had stated that they did not have a problem with registration of this land as a Town or Village Green. It was clearly apparent from the Costain letter that had been sent in 1993 that the Environment Agency's predecessor the National Rivers Authority had known about the public having used the land in the past. The evidence showed that the work had interrupted use of the land for only about 6-8 weeks rather than three months or so. It was known that large parts of the site had been dug up in 1993, but the land was only closed off area by area. Hence the son of Bill Bates had been able to gain access to the area and take the photographs which he had produced. The Applicants and their witnesses are ordinary honest people.

8.21. The goal of the application had been to register a piece of land which the Applicants feel has for many years been a village green. The Applicants have at all stages acted in good faith.

9. THE CASE FOR THE OBJECTOR – Evidence

9.1. As had been the case with the Applicant's material, the Objector deposited a considerably greater volume of documentary material than was in the event referred to during the course of the Inquiry which I held. I have generally adopted the same approach in relation to all this material as I did in the Applicant's case. I have examined all of the material, and where it consisted of written documents have read all the documents. However this Report is primarily concerned with the evidence and submissions treated by the parties as having importance in the context of the Inquiry. Accordingly I do not propose in this Report to summarise evidential material which was not spoken to or referred to in the course of the Inquiry itself. It is all available as part of the record which the Registration Authority holds. I have also had regard to all of it in forming the conclusions which I express later in this Report.

9.2. Thus in the following paragraphs I shall principally be dealing with the evidence given by those of the Objector's witnesses who gave oral evidence. It is however appropriate to refer briefly to evidence statements produced by two particular individuals who did not give oral evidence, but whose evidence was the subject of some specific discussion at the Inquiry.

9.3. A statutory declaration was produced which had been sworn by a Mrs Sylvia Bone, who lives at 8 Alfred Terrace, Walton on the Naze, and had done since 1993/4. She said that from a bedroom at the back of her house she could see right across the application site, and that she spends a lot of time sitting in that bedroom window doing craft activities etc. The gist of her evidence was that contrary to the observation of quite a lot of the Applicant's witnesses she relatively rarely saw any activity on the land, which she did not regard as being a particularly pleasant area of land for people to walk on. She had seen dog walkers, she had seen a family having a picnic on one occasion, although she thinks that there are nicer areas to have a picnic. She also recalled one occasion a few years ago when she saw a couple of children

kicking a ball on the land, and one occasion when she saw some teenagers sitting on the sea wall. She did not think that the application site land was big enough for many of the sorts of activities which the Applicant's witnesses had mentioned.

9.4. A statement of expert witness opinion was also produced on behalf of the Objector from Ms Christine Cox, a professional aerial photographic interpreter and director of Air Photo Services Limited. The appendices to Ms Cox's statement included reproductions of aerial photographs taken at dates between 1953 and 2011. One of them had been taken in the summer of 1993, during the period when the works to heighten the sea wall were in progress.

9.5. Ms Cox commented on what could be seen in all of the aerial photographs which she produced. I have had regard to what she says in her statement, and to its limitations, in reaching the views which I express later in this Report. I now turn to the evidence given to the Inquiry by those witnesses who gave oral evidence, on oath or affirmation, and whose evidence was able to be subject to cross-examination and questioning by me.

9.6. ***Mr Jack Robertson*** lives at 9 Cedar Close, Walton Road, Walton on the Naze. He said that he is familiar with the application site.

9.7. He is the Managing Director of J Robertson & Co Limited, engineers to the building industry. He owns nearly all of what is known as Hipkins Yard, near the application site, and his company owns the largest unit. The company has traded from that unit for over 30 years. He works 5½ days per week and sometimes on Sundays. From Monday to Friday he works from 8.00am to 6.00pm, and on Saturdays he works 8.00am to 1.00pm.

9.8. The vast majority of his working day is spent at his desk in his office, which has a window that overlooks the application site. He can see the triangular patch of land and the majority of the narrow strip of sea wall from that window. He therefore sees what happens on the land for most of the working day. That has been the case for the majority of his years on the present site. He did have a temporary office in a container for a couple of years.

9.9. He had once walked across the land to get to an old boat shed on the other side of the sea wall, but that was about 15 years ago. He had not used the land himself for any other purpose.

9.10. Mr Robertson said that he does see people walking their dogs primarily on the triangular grassy part of the land. Sometimes people walk their dogs to the sea wall and over as well. On average he sees between 2 and 4 people per day, normally first thing in the morning and early evening. He recognises the majority of them as local people. The vast majority that he sees are there for short periods of time, approximately 3 – 4 minutes, just long enough for their dogs to foul, and then they go again. He cannot recall seeing any people walking their dogs on the narrow strip of

flat land alongside the sea wall in the northern part of the site. He can recall only one occasion in the last 20 years when he has seen someone playing with a dog on the application site and that was a young lad. It was definitely his view that it was normally in the morning and the evening that people are there with dogs, and only occasionally at other times. He thought he probably saw between 4 and 6 people a day with dogs on the land on average.

9.11. Some 5-6 years ago a family of gypsies parked their caravan on the land and they were there for about 1 week.

9.12. Occasionally he sees one or two people walk up to the sea wall to have a look over and then walk away again. Such people will tend to head for the nearest set of steps to access the sea wall. Occasionally people walk along the sea wall. When people get to the southern end most people just turn around and go back the way they came as the wall does not go anywhere from that point. The younger generation occasionally jump down the landwards side towards his yard, they will then walk along land which is privately owned, he thought by Tendring District Council and Titchmarsh Marina.

9.13. He recalled that the air ambulance had landed on the site twice since 1990. Once was when somebody was seriously ill in the doctor's surgery around the corner, and once about 5 years ago when a lady had hurt her leg on the other side of the sea wall. His neighbour had heard someone crying which turned out to be that lady, who had slipped on the other side of the sea wall and hurt her leg.

9.14. He had not seen any other activities on the land. It would be dangerous for small children to play there because of the ditch that runs right along one edge, and the drop to the road which exceeds 3 feet at one end, and the proximity to the road. He thought kite flying would be dangerous because of the overhead cables.

9.15. He has never seen anybody drawing or painting on the land. He has seen people drawing or painting beyond the floodgates on the Town Hard. He has never seen anybody fishing, playing rounders, cricket or football on the land. He has never seen any team games or anyone picking blackberries, except that this year he thought that someone had picked them in September. He had never seen anybody bird watching, picnicking or bicycle riding. To his knowledge there had never been any bonfire parties, community celebrations, fetes or other community gatherings or events on the land.

9.16. In his view there are much nicer places in Walton for people to go. The nearest is the Bath House Meadow which is intended as a recreational area. There are also large open areas at the Naze and of course on the beach. Those are much more suitable for leisure activities. From what he had observed, the principal use of this land by far is local people taking their dogs there for long enough to foul it, and then leave it. That tends to be early morning and late afternoon as he had said, which he thought corresponded with school and working days.

9.17. *In cross-examination* Mr Robertson said that he normally works until 6.00pm; he does sometimes see things out of his window after 6.00pm but his normal working day is 8.00am – 6.00pm. He thought that on average he was late home i.e. later than 6.00pm some two or three times a week.

9.18. He acknowledged that he does see people walking their dogs on the sea wall. When he had said he hadn't seen people with dogs on the narrow strip he meant the very narrow strip of land at the lower level between the sea wall and Mill Lane itself.

9.19. He accepted that no power lines actually cross the green triangle of land; they have gone over to the other side of the road at that point.

9.20. He had not had any guidance from anyone as to what he should say in his statement. People had asked him various questions, but the words of his statement are his own words. He has no personal business interest in the development of the triangle of land on the application site. He did not believe that his land had been included in any development plans which anybody had put forward.

9.21. He does object to this land being registered as a village green. The land behind where the Martello site is was the village green for Walton, with putting and things like that on it. He repeated that he had never seen anyone playing football on the application site land; he said that he does not see anything wrong with the land as it is.

9.22. ***Mr Gerald Rayner*** lives at 20 Beaumont Close, Walton on the Naze. He is a retired IT consultant. He said he is familiar with the application site.

9.23. He has lived at his current address for 26 years. He was born in Walton and has lived here for most of his life, with the exception of 2 years in his twenties.

9.24. He passes the application site on quite a regular basis. He is generally in his vehicle when taking a short cut through the car park on Mill Lane. On average he will use that cut through between two and three times a week, for domestic reasons.

9.25. He passes the land at different times of the day depending on the reason for his journey. He thought he had used that cut through for the past 20 years at the same level of frequency.

9.26. When passing the subject land in that way he would rarely see anyone on the land. If there is anyone on the land they will usually be on the grassy triangle, not on the narrow steep bank. If he does see someone on the land it would be the occasional dog walker using the land as a dog toilet, and again would normally be on the grassy triangle. He has observed the dog walkers and they appear only to use the land for a short time and do not clear up after their dogs. The dogs might be on or off the lead. He estimates that he might see someone on the land once a fortnight.

9.27. He has noticed that the grass on the land is unkempt. He has never seen anyone picnicking on the land, nor has he witnessed children riding bikes on it and in his opinion it is too small for such an activity. He is told (he said) that the land is a good place for kids to go and smoke dope without being seen. However he has not witnessed that himself, nor any other anti-social behaviour.

9.28. He has observed people walking along the sea wall. He has noticed that people walk straight to and up onto the sea wall, and that tends to be near the southern end of the grass triangle. If they are with a dog they might wander around for a bit to let their dog do its business. He has not noticed any activity on the narrow strip of land at the northern part of the site. In his view it is too steep and narrow to walk along.

9.29. He has never seen any community events taking place on the application site. He had attended events at Bath House Meadow (e.g. the Carnival), the Naze Tower or the Millennium Square in the High Street, which are well known and often used for such events. He used to organise a local folk music festival in the area and they used a variety of sites around the town. However he would have never thought to use the application site land as it is too small and out of the way.

9.30. He does recall that on one occasion which he thought was about 6-10 years ago some travellers used the land. He thought there had only been one caravan and it wasn't on the land for very long.

9.31. He was a member of the Yacht Club until 3 years ago, and would attend the club's social events. However this was not on a regular basis. He would pass the application side on his way to and from the Yacht Club and again he only witnessed the occasional dog walker.

9.32. The Yacht Club is past the Town Hard and Boatyards. When going to the Yacht Club he would normally walk there. That would be during licensing hours, either at lunch time or in the evening, and might be anytime throughout the year.

9.33. *In cross-examination* Mr Rayner said that attending the Yacht Club for social events was not on a regular basis but was sporadic.

9.34. The cut through that he would do in his car is a short cut on his route from the High Street going home. He agreed it probably takes about 10 seconds to pass the site while driving his car. He does look where he is going when he drives his car. Nevertheless if he saw someone on the land picnicking or playing something it would be so unusual that he would have noticed it.

9.35. He said that the land has always been unkempt in his view. He has seen dog faeces on the land.

9.36. He personally does not stand to gain or lose by any development on the land. He said that he had known Mr Fletcher, who he believed was connected with Silverbrook (the

Objector). However he did not really have any business connections with the Titchmarsh family, whose company Silverbrook is. He did however have a father-in-law who has a workshop at Titchmarsh Marina.

9.37. His motivation for coming as a witness to the Inquiry is that he had heard about the town or village green application and asked Mr Fletcher if he could add his voice to the objection. He had not wanted a village green to be registered based on a false premise.

9.38. *To me* Mr Rayner said that he had heard of the Town or Village Green application from his father-in-law. Then he had asked Mr Fletcher if his voice could be added to the objections. What had irked him was the claim that the land had been used for community events, he said.

9.39. ***Mr David Todd*** lives at Scenefielda, 103 Landermere Road, Thorpe-le-Soken, Essex. He is a farmer. He said that he is familiar with the application site.

9.40. He had lived in Walton on the Naze for 56 years until 2005. He lived in Church Road until 1993, and from 1993 he lived in Kirby Road; he has never used the application site land himself.

9.41. He was the Managing Director of Tower Security Walton Limited, a local security company until he sold the company in May 2011. Among other things the company was retained by Tendring District Council to check council car parks including the one in Mill Lane, and to check the security of ticket machines. They were sometimes informed by Tendring District Council that there were travellers on the move in the area and asked to make more frequent checks, that happened about once a month on average. That work had started in 1988 and his successors in the company still carry on such work.

9.42. His firm would routinely check the Mill Lane car park and the area where the appeal site is, on a daily basis twice a day. It was one of the open areas that they routinely kept an eye on. It was almost always him personally who carried out these checks as he lived in the area. He would attend at different times of the day.

9.43. Additionally through the 1990s and until 2003 they also checked one or two of the commercial units at the end of Vicarage Lane. He would drive along Vicarage Lane at different times of the day, often in the evening. The units would be checked three times in the evening and overnight, and three times per day at weekends. Again it was almost always him as he lived locally and tended to do most of the Walton work himself. Being in the security industry for many years his eyes and ears are always peeled.

9.44. He has observed people walking dogs on the land, generally on the sea wall, or cutting across the grassy triangle to the sea wall steps. However he estimates that about 75% of the time he has seen nobody on the land. It appears to him that people

are exercising their dogs and allowing them to do their business along the sea wall. He cannot remember the last time he saw somebody walk along the sea wall in recent times.

9.45. Those people he has seen walking dogs tend to use it as a local place for their dogs to mess. The land is not a particularly attractive area. There are other more attractive areas for people in the community to use including the open areas at the Naze, Bath House Meadow and indeed the beach. He has always viewed this land as just a convenient place for local people to allow their dogs to foul. The people he has seen do not stay on the land for very long; in his view they stay just as long as it takes for their dogs to do their business.

9.46. His visits to the area would typically be for 4 – 5 minutes or so. Also Tendring District Council had asked his firm to check for travellers. His firm's twice a day checking was something that was done 7 days a week, not just on weekdays.

9.47. As to other activities, on one or two very odd occasions he has seen people park on the land on exceptionally busy Sundays in the summer. He did have a vague recollection of seeing children playing on the land, but this is very rare he said. He has never seen anybody playing rounders, cricket or football on the land. He has never seen anybody fishing, drawing or painting. He has never seen anybody picnicking, kite flying or cycling on the land. He has never seen any community celebrations or events on the land. Those all tend to be held on other more suitable areas.

9.48. The conclusion he draws from what he has seen is that the land is used by a small number of local people as a convenient place for their dogs to foul; it is not an area that people in the community use for everyday outdoor activities; such activities take place at better locations in the town.

9.49. Mr Todd explained that as far as checking on the District Council's car parks was concerned, his firm took over the checking after 6pm except on Sundays, when it might well be during the daytime that they would check as well. In other words their checks on the land were typically after 6.00pm.

9.50. *In cross-examination* Mr Todd said that when he used to check the Mill Lane area it was primarily the car park that he and his colleagues would be inspecting, unless they had been warned of potential traveller activity. It could be once a month that they would be informed of traveller activity.

9.51. It was true that for much of the year their observation of the area of the application site would be in the dark, but of course the evenings are light during the summer period.

9.52. Mr Todd said that people often have a misconception that there is a public right of way long the sea wall but that is not the case. He had however seen the top of the sea

wall here being used as a dog toilet. He spends much time telling people not to exercise dogs on land that they should not be on.

9.53. It is the case that he has worked for Titchmarsh Marina for 29 years, but that has no bearing on this case. His work is professional. He personally feels that this application is one big confidence trick.

9.54. He objects to the village green application because he is a local born and bred. For local people like him it is a joke that what was Teddy Carter's Marsh, subsequently filled in with spoil, should be claimed as a village green.

9.55. *In re-examination* Mr Todd said that he had been asked if he was able to give evidence at the Inquiry and he agreed to do so. *To me* Mr Todd said that the filling in of the marsh with spoil had taken place in the late 1960s he thought. He used to play there as a child, catching eels in the Fleet. Teddy Carter used to allow local children to do that. He had never taken a lot of notice of the state of the grass on the land, he said.

9.56. ***Mrs Pauline Nina Chumbley*** lives at Cairn Lodge, Hall Lane, Walton on the Naze. She is familiar with the application site; she has lived in Walton on the Naze all her life, and at her present address since 1990.

9.57. She travels along Mill Lane and past the application site approximately once each week. Sometimes she drives down Mill Lane and through the car park as a short cut to Kirby Road. By doing that one can see across the application site. Sometimes also she visits the Yacht Club which is beyond the flood defence gates at the end of Mill Lane. Sometimes she parks in Mill Lane next to the application site to go to the local iron works which is just before the application site on the right hand side.

9.58. She is a member of the Town Hard Association, which allows you to use the Hard just inside the floodgates and to moor your boat there. Her father kept his boat there until 1994/95, and while it was there she would go to the Hard two or three times per week.

9.59. Over the last 20 years she has herself walked across the grassy triangle of the land to the sea wall, had a look over the wall and walked back. That would be only if she happened to be in the area, and it has not occurred more than perhaps six times over the last 20 years.

9.60. When she has been passing she has observed people on the grass triangle part of the land with dogs on about 25% of the occasions. Normally she sees one or two people. Sometimes she sees nobody on the land. As she has lived in the area all of her life she generally recognises the people she sees walking their dogs. They tend to be people who live in and around Mill Lane. She believes they are taking their dogs out to use the land as a toilet.

9.61. Over the years she has noticed the odd person walking along the sea wall. She tends to see more people with dogs on the grassy triangle than she does people walking along the sea wall.

9.62. Most people tend to use the larger open areas at the Naze Tower, the green on Naze Park Road, or the Bath House Meadow, these are the normal places for people to visit for recreation.

9.63. As for other uses she has seen bird watchers on the land but not more than twice in the last 20 years. The bird watchers were standing on top of the sea wall holding binoculars. Similarly she has seen children cycling on the grass not more than twice in the last 20 years. She has never seen children playing on the land, or teenagers hanging around. She has certainly never seen people or children playing rounders, fishing, drawing or painting, playing team games, picking blackberries, playing football or cricket, picnicking, kite flying or attending any community celebrations. Community celebrations tend to be held elsewhere. Most recreational use takes place at other areas such as the beach. In those areas one will see lots of children playing and many of the activities that she had mentioned. Community events tend to be held at those other locations also.

9.64. *In cross-examination* Mrs Chumbley said that she stuck to her estimate that it was on about 25% of times that one would see people on the land. One would not really see non-local people walking on this land. In other words on about 25% of the times she had been near the land she had seen local people walking dogs, or just wandering across the land.

9.65. She objects to the application in this case because if on someone's title deeds it shows that they own a piece of land they should be able to use it as they want to. She herself works in the Martello Caravan Park off Kirby Road. No-one had told her what to say in her statement. She is certain that she has not seen children playing on the land.

9.66. She knows the Titchmarsh family, and someone from the family had asked her to make a statement.

9.67. ***Mr John Fletcher*** lives at Seafoam, Princes Esplanade, Walton on the Naze. He is familiar with the application site. He has lived at his current address since 1971 and had been born in Walton on the Naze in 1938.

9.68. He works three days a week at Titchmarsh Marina. He has worked there for the last 12 years, but since 2008 he has worked part-time three days a week; prior to that it was full time. He will drive to work, and will often cut through the car park off Mill Lane onto the Kirby Road, and from the short cut through he can see the subject land. He estimates that on average he will use the shortcut at least once a week, but quite often he will use it twice a week, depending on the traffic on his way to work. He passes the subject land at the same time each day on his way to work, and that is

usually around 9.00am. He added that in summer he occasionally cycles to work as well.

9.69. While using the cut through he has seen dog walkers on the grassy triangle part of the land. He has noticed that most of the dogs appear to be on leads; their owners will often walk up the sea wall steps and over the sea wall onto the old boating lake land. He will usually see no more than one dog walker a day when he cuts through on his way to work. He has rarely seen anyone walk along the sea wall. Those he has observed had tended to walk over the sea wall onto the old boating lake.

9.70. It is also the case that the barber he goes to is situated on Mill Lane, and last week when he was waiting for him to open he saw a woman walking her dog across the application site and over the sea wall. That dog walker was gone no more than five minutes and then returned. In his view the purpose of the walk was to allow the dog to do its business.

9.71. Mr Fletcher is the Secretary of the Town Hard Association which is located at the bottom of Mill Lane past the subject land. He attends the Hard approximately once a fortnight throughout the year. When visiting the Hard he has seen dog walkers on the application site. Again the dog walkers appear to be walking across the land, over the sea wall steps and onto the old boating lake land. He has noticed that the dog walkers return over the sea wall usually after no more than five minutes, and once again it is his view that the purpose of these walks is for the dogs to do their business. He has rarely seen more than one dog walker per day when passing the land. His visits in connection with his role as Secretary of the Hard Association will usually be in the mornings, but occasionally in the evening. He cannot recall seeing any dog walkers on the land when he has been there in the evening. The Town Hard has a hut. It is his practice to check to make sure that boats are not there on the Hard for too long a period, and also to check the state of the gravel.

9.72. He is also the Secretary of the Fairways Committee. The chairman of that committee lives at the bottom of Mill Lane. On average he will visit the chairman about once every six weeks for committee purposes; he will tend to visit in the mornings; when passing the application site on his way he might see the odd dog walker. He estimates that he will see a dog walker about 25% of the time. When he goes to the Hard he might drive or cycle or walk, but he probably drives on most of the occasions. He has been on the Fairways committee for a couple of years, and has had his role with the Town Hard Association for some 6 or 7 years. He has not observed any other activities taking place on the land when passing other than the dog walking to which he had referred.

9.73. He is a member of the Yacht Club, located down Mill Lane past the floodgates. He visits the Yacht Club for social reasons, and both the Town Hard Association and the Fairways committee hold meetings at the Yacht Club. On average he estimates that he will visit the Yacht Club at least once a month throughout the year with more visits in the summer. He will pass the subject land on foot or by vehicle and the time of day

will vary according to the reason for his visit. He has only seen dog walkers using the application site in the mornings, he has never seen that activity in the evenings. So on those visits he estimates that he might have seen a dog walker on no more than 15-20% of the times, and has never seen any other activities on the land.

9.74. On one occasion during the summer he saw a family picnicking on the land and their children kicking a ball around. He has observed this activity just the once in the last 5 years. He believes that the family had parked along Mill Lane, and it seemed to him that they were not local to the area and may have been tourists having some food before heading home.

9.75. The Fairways committee which he had referred to controls the moorings on the backwaters around Walton which are owned by the Crown Estate. The Crown Estate had set up the Fairways committee in order to control those moorings.

9.76. *In cross-examination* Mr Fletcher explained that the different percentages he had given for the proportion of the times when he had seen dog walkers related to visits at different times of day. Thus he had never seen a dog walker on the land on his evening visits for example.

9.77. He said that his presence at the Inquiry has nothing to do with his Titchmarsh connections. He had received no guidance as to what should be in his statement. He had learned from the Titchmarsh family what was going on in relation to the application in respect of this land, and asked himself *"Why?"* there are other more suitable areas in the town to be a Town or Village Green. Then he discovered that when someone's land is registered as a town or village green they get paid no recompense. He found that morally repugnant.

9.78. ***Mrs Helen Pudney*** gave her address as Titchmarsh Marina, Coles Lane,Walton on the Naze. She is a Company Secretary and is familiar with the application site.

9.79. She is the fulltime Company Secretary of Titchmarsh Marina (Walton on the Naze) Limited, and has been since September 1993.

9.80. In March 2004 Mr Ted Carter, the previous owner of Walton Mere, Mill Lane, including the application site, passed away and his relatives contacted her firm to see if they would be interested in purchasing the site. They felt that the site had potential to be a catalyst for the much needed regeneration of the town, so they entered into negotiations, but those negotiations became lengthy and drawn out because of probate matters and issues with the Land Registry. Accordingly in 2004 her firm withdrew from the negotiations, and the site was put on the open market for sale. Following some 15-18 months with no other serious interest expressed, the Carter family sought to re-open negotiations with the Titchmarsh interests (Mrs Pudney's maiden name was Titchmarsh). The terms were then agreed and in May 2009 Silverbrook, a Titchmarsh company, purchased the Mere site including the application land.

9.81. In December 2009 they were approached by the Walton Forum, a regeneration steering group, who were keen to involve the Mere site in their Walton Trail project, so that visitors to the town are more likely to see and visit it. Mrs Pudney produced correspondence showing her firm's commitment to improving public access to the site, which has always been at the heart of their regeneration proposals for the whole of the Mere site.

9.82. Preparatory work on the regeneration project began in May 2009, and in August 2010 they employed a project manager to take the scheme forward. With an outline scheme proposal in April 2011 they embarked on a period of public consultation which was announced in the local press. They announced their desire to discuss their aspirations for the site and to show to the residents of the town and the surrounding villages their initial regeneration proposal.

9.83. On 18th April 2011 they held a public meeting in the Columbine Centre in Walton on the Naze, which was attended by about 250 people. They also held four further public exhibitions in April 2011 in Walton, Frinton and Kirby-le-Soken.

9.84. At the public meeting on 18th April 2011 objectors to their proposal produced a document which they called *"Secret Waters"*, a copy of which she produced. That document was distributed to those attending the meeting by two individuals who stood outside taking the opportunity to tell people why they felt residents of the town should object to the regeneration plans.

9.85. It was around that time that some residents in the immediate area around the application land placed signs outside their premises publicly opposing the regeneration proposals. She produced some photographs.

9.86. During their exhibitions they handed out leaflets detailing the proposals and inviting feedback. All the responses were sent to their planning consultants. Those planning consultants, following the consultation, had produced a statement of community involvement which was submitted to the District Council in support of a planning application.

9.87. In total the planning consultants had received 97 responses, the details of which were summarised in their report. Mrs Pudney has seen the original responses. None of them, including that completed by the Applicant, refer to the loss of the application site as a site used by the community for recreation, sports or pastimes. In December 2007 a petition appeared on Tendring District Council's internet Planning Portal in relation to the company's planning application, which expressed opposition to development. It was said that 2,743 people had signed that petition, but the petition did not mention the protection, or the loss, of the application land as a site used by the community for sport, recreation or pastimes. Mrs Pudney suggested that this was because such use had not in fact been made of the land.

9.88. In September 2011 they had submitted an outline planning application for their regeneration proposal for the whole Mere site, including the application land which would provide access to the rest of the site. She produced a bundle of the objections which had been submitted to that application.

9.89. Of 147 objections only a small number, on her reading of them, might perhaps relate to the application land. She quoted from the four objection statements which had made reference to people using the land as a leisure or amenity space.

9.90. Thus only four out of 147 objections had referred to use of the application land, and two of those had specifically referred to use by tourists or visitors, who she would assume were not from, and therefore not resident in, Walton. The application site is simply not suitable for children playing, or picnics, or sports. Those activities take place in other areas of the town and the beach that are more suited to them.

9.91. Mrs Pudney explained the circumstances in which she and her firm had been given notice of the town or village green application. She believed that the application was nothing more than an attempt to thwart development of the Mere site. The application land provides the only viable access to that site as North Street has been pedestrianised and Saville Street is too narrow for emergency vehicles. She produced some local newspaper articles in relation to this matter.

9.92. The application site has a grassy area of just over half an acre and the total size of the site including the sea wall is just under 1 acre.

9.93. She produced some maps of the Frinton and Walton Civil Parish and the Walton Ward for the purposes of election to Tendring District Council. She had also got a colleague to find a map of the Ecclesiastical Parish on the internet.

9.94. The town of Walton on the Naze is blessed with many areas of public open space, and she identified a number of them. She thought that all of those other areas lent themselves to leisure, sports and recreation much more suitably than the application site.

9.95. Since acquiring the Mere site in May 2009 she had visited the site on average two or three times a month for various meetings with people involved in bringing forward the regeneration proposal. Since 2011 she has been a committee member of the Big Society Project Group who meet on a monthly basis at Walton's pre-school in Stanley Road. Prior to that she had served as a committee member on the Walton Forum Group, where again she attended regular committee meetings from December 2001, held in the Forum Project Office at the top of Mill Lane. While attending those meetings she parked in Mill Lane if there was space, or in the Mill Lane car park. Each time she observed the application land.

9.96. When viewing the land she estimated that she had seen a dog walker there only 10% of the time, and it was always in the singular. Often they walk along the widest part

of the triangular grass area to and over the sea wall and then they disappear from sight. The most usage she had ever witnessed was members of the public walking along a footpath (No.48) which runs from North Street along the top of the sea wall behind Canada Cottages and past the Naze Marine Caravan Site.

9.97. The application site is not in her view large enough to properly exercise or play with a dog. She has never seen a dog off its lead there. She concludes from what she has observed that a very small number of people with dogs take them onto the application site just long enough for them to do their business and then leave. This is the only dog walking activity she has ever witnessed.

9.98. As to other activities, she has never seen anyone kicking a ball or playing rounders, fishing, playing football, cricket, kite flying or cycling. The land in her view is not big enough for these sorts of activities and it is unsafe to do so. The green triangle borders the road and for a large part of its length has a drop of about three feet to the road. There is also a drainage ditch or channel running along one end with a drop of about four feet. There are electricity cables overhead.

9.99. Any dog let off the lead, or ball game played in the area, would be at risk of going into the road. Whenever she had witnessed traditional recreational activities they have always been carried out in the other locations she had mentioned. She had never seen anyone painting or drawing on the land. There is nothing to see, and the view across the Mere is obstructed by the sea wall. She has never seen anyone picnicking on the application land. It is not a nice area to sit, being one used for dogs to mess. The other areas mentioned are much more pleasant for a picnic.

9.100. She has never seen any community activities, celebrations or events taking place on the land. Again such events tend to take place elsewhere on more suitable and attractive areas. She produced a table of annual events that are held in Walton on the Naze, and of their locations. None of them involve the application land.

9.101. She confirmed that it is the Silverbrook company, the Objector, which owns the Mere site and the claimed village green area. That company had been set up for the regeneration of the Mere. It is the case that her parents, who of course are called Titchmarsh, are the two Directors of the Titchmarsh Marina company.

9.102. She understood that her family had come to Walton in the early 1900s, and in consequence she is very familiar with the area and has always lived here.

9.103. She believed that the drawing showing a suggested neighbourhood which had been produced on behalf of the Applicant had been designed so as to show a high percentage of claimed users of the land from within it. She herself would have taken any suggested neighbourhood up to the High Street, and would have included Vicarage Lane and Churchfield Road.

9.104. She herself had not seen people walking along the sea wall in the northern part of the application site. She had not even seen people walk along it at all.

9.105. *In cross-examination* Mrs Pudney said that the land of the application site is owned by the Objector Silverbrook Estates, which is itself owned by her parents. Her parents are the major shareholders and directors of the company.

9.106. She had never seen a dog off the lead on the site. Her visits to the vicinity of the site two or three times a month were for Silverbrook meetings. Silverbrook had acquired the site in 2009.

9.107. She agreed that the electricity cables that she had mentioned do not in fact go across the triangular part of the application site. She had typed out her statement herself.

9.108. *To me* Mrs Pudney agreed that this site in the past, before the Council gave up maintaining it, had been a regularly well mown site. She confirmed that her family did not acquire it until 2009. Before that it was a well tended site. She had never actually seen anyone mowing it, but it was well tended. But then, after her family's company had taken over, about a year ago she started to write to the District Council to find out why they were doing this work. There was correspondence with Tendring District Council in the documentary material which the Objector had produced, including in particular a letter from the Horticultural and Transport Services Manager of the District Council dated 8th December 2011. However she or her company had not really managed to obtain further information from the District Council than what was shown there. She added that she believed that Tendring District Council had done the mowing of the ground of the application site, during the period when they undertook it, by agreement but she had not managed to obtain a copy of that agreement. The only information in writing which had been obtained from Tendring District Council was the letter from Mr Mills of that Council dated 8th December 2011. That had confirmed that the District Council had maintained the area of the application site for the previous 22 years. The maintenance of the area had formed part of the Frinton and Walton Grounds Maintenance Contract, which had first been let under compulsory competitive tendering in 1990. The only maintenance that had been carried out on the land had been grass cutting. Mr Mills in that letter had been unable to confirm any maintenance operations prior to 1989. Mr Mills of the District Council had said that he had no knowledge of the statutory powers exercised by TDC, as he had not been party to the formulation of the tender documents.

9.109. ***Mrs Miranda Rayner*** lives at 20 Beaumont Close, Walton on the Naze. She is a personal trainer and is familiar with the application site.

9.110. She has lived at her current address for 20 years. She had been born in Walton and has lived in the area for all her life. In the course of her business she travels a lot around the local area to and from clients. She will often pass the subject land when she cuts through the car park just off Mill Lane to join the Kirby Road on her way home. When cutting through the car park she can see the subject land. She will use

that shortcut five out of seven days. This would be at differing times of the day between 7.00am and 8.30pm, depending on her client appointments each day.

9.111. She often does not see anybody on the land when she drives past to take the short cut. Occasionally she will see a dog walker. She estimates that she sees a dog walker about 2% of the time she passes by the subject land, and this is often only one dog walker. She has observed that the dogs tend to go on leads. It seems to her that the dog walkers are not on the land for a long time because they do not tend to be moving far. It seems to her that they are using the land as a dog toilet. She has noticed that the dog walkers tend to stick to the triangular area of the subject land rather than walking up the narrow strip to the north. She has not noticed the dog walkers sticking to any path; rather they appear to wander round the triangular grassy area.

9.112. She has occasionally seen people walking along the sea wall to the top, northern end of the subject land. The walkers appear to use the land as a cut through up and onto the sea wall. She has not noticed walkers using a path across the land onto the sea wall; rather they tend to head for one of the sets of steps along the sea wall.

9.113. She is a keen runner and normally goes out for a run once or twice every week. She runs various different routes around Walton and estimates that her route will pass the appeal site once a month. She does not run on the appeal site as it is too overgrown for running. She usually goes out for her run either mid-day or first thing in the evening. When running past she has witnessed the same activities as she had previously described. Once in a blue moon she would see a person on the land when she runs past.

9.114. She regularly socialises in the evenings with friends at the Victory Public House on Newgate Street. She will pass the subject land when driving home from the pub in the evenings, as she would make use of the short cut through the car park off Mill Lane. She normally visits the pub about two or three evenings a week. She has never seen anyone using the land when she drives home, which on a Friday might be about 9.00 or 9.30pm, or on other nights might be about 11.00pm. She has never observed any other activities taking place on the land. She has never seen any community activities take place there. Such activities are normally held at the Millennium Square or at Bath House Meadow. She has attended the carnival which finishes at the Bath House Meadow. In her opinion those areas are more suitable for community activities and are well known within the area for the holding of such events.

9.115. *In cross-examination* Mrs Rayner said that if she is in the Victory Pub she would go home via Alfred Terrace. She agreed that when she drives past it is quite often in the dark. However when she runs past it is usually daylight.

9.116. She personally is against this land being listed as a village green. Her understanding was that it would mean that nothing, for example a visitor centre, could be built on this site even though it is the best site in the town for such a development.

9.117. She had been told as a child not to go onto this site to play as there is a storm drain which passes through there. The reason why she was here to testify at the Inquiry was in order to tell the truth. She is neutral as far as the merits of any applications on the land are concerned, but she believes the truth should be heard. Her family have a boat at Titchmarsh's Yard and a shipping container *"workshop"* at Titchmarsh Marina, and another one elsewhere in Walton.

9.118. ***Mr Russell Clive Bettany*** lives at 29a Saville Street, Walton on the Naze. He is a publican and the landlord of the Victory Public House in Suffolk Street, Walton on the Naze. He has lived in the Walton area all his life.

9.119. He observes the piece of land in question between four and eight times a week when he walks past. He walks to the Yacht Club on average once per week, otherwise he will walk his dogs along the top of the sea wall to the floodgates and back. He uses the path that runs along the top of the sea wall. His dogs are kept on the lead, and generally he would walk past between 3.00pm and 5.00pm. He has only ever seen the occasional other dog walker on the land, perhaps 10% of the time. When he does see somebody it is only one person with a dog. About 50% of the time he recognises that individual as local. The people he has seen have generally had their dogs on the lead. They are not there long and he believes that they take their dogs there to foul and then leave.

9.120. He has never seen people just walking on the land. During the summer months of July and August he has seen the very occasional picnic at the weekend. This is only on the odd weekend when the town is very busy, and only when the weather has been fine, in July or August. This may happen perhaps twice or three times during a warm summer but not more. From what he has observed the picnickers are people who are parked in the Mill Lane car park. They are day trippers who prefer to sit on the grass rather than eat in their cars. He never recognised any of them as locals, and believes that locals would go elsewhere to nicer areas in the town. While they are picnicking he has seen the picnickers break out into the odd game of bat and ball, cricket or kicking a ball about. He has never recognised those people as locals and believes that they are day trippers.

9.121. He has never seen teenagers loitering on this land; he has never seen anybody playing rounders, fishing, drawing or painting, team games, blackberry picking, bird watching, kite flying, cycle riding, bonfires, community or other fetes or celebrations. Those activities and other regular leisure activities tend to take place on the nicer areas which are also much larger, such as Bath House Meadow, the Naze or indeed the beach. The application site is not very big and is not really conducive to many conventional leisure activities. It has overhead cables which would make kite flying dangerous, and there is a deep ditch along one side, and there is a drop of at least three feet to the road from the edge in places. Mill Lane is also quite a busy road with regular traffic to and from the car park and to and from the Yacht Club area beyond the floodgates. It is therefore not particularly safe and not particularly convenient. It might be convenient if you were not local, or parked in Mill Lane and didn't know

that there were nicer areas to use. That is why he believes that the use by other people that he has mentioned is by people who do not live in the area.

9.122. He thought he had walked along the sea wall in this area since 1993. He was against it being registered as a village green because he does not think it would be safe. He accepted that he had seen other people walking along the sea wall as well as himself.

10. THE SUBMISSIONS FOR THE OBJECTOR

10.1. Quite a lengthy set of submissions had been produced on behalf of the Objector at the time of the original objection. These were in the form of an objection statement settled by Mr Vivian Chapman QC. This objection statement remains available to the Registration Authority as a discrete document. It is also the case that the arguments advanced on behalf of the Objector by the time of the Inquiry differed to a certain extent from those which had been set out by Mr Chapman QC.

10.2. Accordingly I do not propose in this Report to set out at length a full record of those original submissions by Mr Chapman, although I shall briefly note some of the main points made.

10.3. Mr Chapman summarised the relevant statutory requirements under ***Section 15*** of the ***Commons Act 2006*** and explained the basis on which the courts had approached the matter of locality and neighbourhood. He also explained the guidance that the courts have given on the question of what constitutes a significant number of local inhabitants. He explained the meaning of *"as of right"*, and drew the distinction between as of right and *"by right"* use.

10.4. He pointed out that for many years the local authority had maintained the application land by mowing the grass and erecting and clearing a dog waste bin. These were matters which had been acknowledged in the Applicant's own application form. The Objector argued that the local authority would have been exercising statutory powers under either the ***Public Health Act 1875*** or the ***Open Spaces Act 1906***, and that the public accordingly had a right to enter upon the application land. Any use by members of the public would thus not have been *"as of right"*.

10.5. Mr Chapman's submissions also explained the expression *"lawful sports and pastimes"*. Using land for defecation by dogs is not a sport or pastime, and nor is it lawful since it creates a nuisance. Using the land as part of a walk from A to B is not a sport or pastime either for the present purposes.

10.6. As far as the requirement that 20 years use is concerned, it was pointed out that a 1993 aerial photograph showed part of the land being occupied by vehicles and machinery for works on the sea wall.

10.7. The motives behind the application were questioned, and it was suggested that the main object was to try to thwart plans for development of the area of the Mere. Other observations were made as to how the application should be dealt with procedurally.

10.8. Before the Inquiry itself a further set of submissions was provided on behalf of the Objector. This constituted a summary of the Objector's case, and also stated that it repeated the contents of the earlier statement drafted by Mr Chapman QC to which I have just been referring.

10.9. In relation to the matter of locality and neighbourhood, the further submissions pointed out that the use of Electoral Wards to constitute a locality was something which had been disapproved of in judicial decisions in this field.

10.10. In relation to the question of *"as of right"* use, further submissions were made relating to the fact that Tendring District Council had maintained the claimed area for the entire relevant period, including erecting and emptying a dog waste bin. Even in the absence of clear and unequivocal evidence spelling out the basis upon which that Council had maintained the area, it is proper to assume that its actions were lawful, provided they are permitted by some appropriate enabling legislation. The ***Open Spaces Act 1906*** allows a local authority to acquire by agreement a right over any open space and to undertake the entire or partial care or management or control of any such open space – see ***section 9*** of the ***1906 Act***. ***Section 164*** of the ***Public Health Act 1875*** also allows for a local authority to maintain lands for the purpose of being used as public walks or pleasure grounds. District Councils are local authorities for the purpose of the 1875 Act and the 1906 Act.

10.11. In both cases any use of the land which had occurred during the relevant period would be pursuant to a statutory right of public recreation under either of those two Acts, so that the use would be by right not as of right.

10.12. It was accepted that whether a significant number of inhabitants have actually indulged in lawful sports and pastimes as of right on a piece of land as required under the ***Commons Act*** is the question of fact in each case. Nevertheless it is important to distinguish 'lawful sports and pastimes' use from use which might constitute the use of footpaths or rights of way, and where there is any ambiguity the less onerous right should be found to exist on the land.

10.13. Although the land is privately owned the Environment Agency has permissive powers to undertake works of maintenance to the sea wall and adjacent land which is on the application site. It is reasonably foreseeable that such works would conflict with the provisions under the ***Inclosure Act 1857*** and the ***Commons Act 1876*** which protect town or village greens. Because of these inconsistent rights the land should not be registered as a town or village green.

10.14. Full closing submissions were made on behalf of the Objector at the Inquiry itself. The statutory basis for a claim under ***Section 15*** of the ***Commons Act*** was reiterated.

It was pointed out that it was well settled in law that the meaning of *"as of right"* use is without permission, force or secrecy. It is clear from the decision of the House of Lords in the ***Beresford*** case that effectively this means *"as **if** of right"*. This point has more recently been discussed in the Court of Appeal in the case of ***Barkas*** [2012] EWCA Civ 1373, per Sullivan LJ at paragraph 26 ff. Such use is to be distinguished from use *"by right"*. As Sullivan LJ pointed out in the ***Barkas*** case, while a non-lawyer might dismiss this distinction as a semantic quibble, it is in fact a distinction of some importance in the context of applications such as the present one.

10.15. It is for the Applicant to prove 20 years use as of right which subsists at the time of the application. Indeed the burden is on the Applicant to prove all the relevant matters needed to satisfy the various legal requirements in section 15. All of those necessary ingredients must be met before the land can be registered, and there is good reason for this – it is no trivial matter for a landowner to have land registered as a town or village green, as the courts have acknowledged; such matters must be properly and strictly proved.

10.16. Thus for example the Applicant is required to prove that the land in question is a green, and that the whole and not merely part or parts of it have been used for not less than 20 years. Of course a commonsense approach is required when considering whether the whole of the site has been so used, but such matters nevertheless require proof and careful consideration.

10.17. It is obvious that the evidence produced by the Applicant does not in a number of respects provide anything like sufficient evidence to lead to registration in this case. The evidence the Applicant relies on is characterised by being vague and non-specific on key legal issues. Much of the live evidence has in fact revealed that the suggested uses of the land have simply not taken place to the extent initially suggested. Other documentary evidence that has been put forward is not in the form of a sworn statement or a statutory declaration, and should be given less weight for that reason. Much of the Applicant's evidence is non-specific and vague.

10.18. By contrast the evidence put forward at the Inquiry on behalf of the Objector, but that has not been called orally, should be given more weight. Thus for example the expert's report by Ms Cox, which remained unchallenged and not even commented upon by the Applicant in evidence, was clear in its conclusions and specific to relevant issues. The evidence from Mrs Sylvia Bone was in sworn form and was compelling. It should be recalled that she had lived in a property with a view of the land for nearly all of the relevant 20 year period, and had spent a lot of time looking at the land for the reasons that she set out. She was clear that the suggestion of regular activities, sports or pastimes of the kind required for registration had taken place on the land during that period was simply incorrect.

10.19. Indeed, as several oral witnesses who have lived in Walton all their lives have made clear (for example Mrs Rayner, Mr Todd, Mrs Chumbley), the suggestion that the area of land in question had been used for the required activities to constitute a village

green is not credible. They had confirmed in terms that their evidence was not motivated by financial gain but because they felt it appropriate to stop such an application because they honestly believed it to be unfounded.

10.20. On the matter of locality and neighbourhood the Applicant had identified originally the locality to be relied on which was a Ward; nevertheless, as a result of the clarification which had taken place at the Inquiry, there was no issue taken on behalf of the Objector with the suggestion that the Ecclesiastical Parish of Walton on the Naze can properly be regarded as a locality, and should be regarded as the relevant locality for the purpose of this dispute. It is the case that treating the relevant locality as being the Ecclesiastical Parish actually increases the area and population somewhat, above that which the Objectors had considered in relation to the previously identified Walton Electoral Ward.

10.21. Insofar as a neighbourhood had now been identified by the Applicant, the Objector argued that the area concerned does not have the cohesive qualities required to constitute a neighbourhood in law. It was pointed out that in the case of ***Paddico*** [2011] EWHC 1606 in the High Court, earlier authorities on the subject of locality and neighbourhood had been reviewed in a way that had not been said to be incorrect in the later Court of Appeal decision in the ***Paddico*** case. It was clear that a locality had to be an administrative district, or an area within legally significant boundaries. It was clear that the term neighbourhood was to be understood as being a cohesive area and must be capable of meaningful description in some way. It does appear that a neighbourhood can lie within one or more localities, and it also appears from the judicial decisions that there might be more than one neighbourhood whose inhabitants make the relevant use of a claimed town or village green.

10.22. It was accepted on behalf of the Objector that the previous predominance test, which required claimed village greens to be predominantly used by the inhabitants of the relevant locality or neighbourhood, had been replaced by the test requiring usage by a significant number of inhabitants. Thus not all of the users of a claimed town or village green need to be inhabitants of the locality or neighbourhood in question.

10.23. The Court of Appeal in the ***Paddico*** case had confirmed that the High Court's approach in the same case to the a question of locality was generally correct, but added that the locality must have boundaries that are not only legally significant, but which are set by reference to a community of interest to the inhabitants, and the court emphasised that the locality had to have been in existence for the 20 year period. It should be noted however that these observations in the Court of Appeal were concerned with the matter of locality and not neighbourhood.

10.24. It was suggested that the House of Lords in the ***Oxfordshire (Trap Grounds)*** case had not overturned the conclusion of Sullivan J in the ***Cheltenham Builders*** case that a neighbourhood cannot simply be an area of land that an applicant for registration chooses to delineate on a plan. It must have cohesiveness. It should not be an area

that is in some way tailored to the evidence of alleged use. That would be to put the cart before the horse.

10.25. In this case there seems to be no proper basis or rationale to explain why the particular claimed neighbourhood was chosen, or why certain residential streets and areas were excluded. For example why was Vicarage Lane not included in the red line? The Applicant herself could not explain this. Why was Churchfield Road not included in the application? Again the Applicant said she was not familiar with the system and really had no explanation or answer on such questions. She had earlier in the application chosen a broader and more generalised area. That approach now seems to have been abandoned, no doubt in the light of the evidence she relied on as to the users of the site. However as it turned out some of the alleged users lived in streets outside the latest claimed neighbourhood, and there was no explanation as to why they might not be in a neighbourhood or neighbourhoods as yet unspecified. In any event what had been identified is clearly not a proper neighbourhood in law. There was no proper justification of its cohesiveness in the evidence.

10.26. It was accepted that the court decisions in this field do tend to suggest that registration authorities can treat the matter of locality or neighbourhood as questions of fact, and determine on the actual evidence what are the most appropriate areas to be so regarded. However that is only true up to a point, because it must be done with fairness to the objector who owns the land. In the ***Laing*** case that point had been accepted in principle, and in that case at the inquiry there had been ample time to deal with alternatives which were suggested during the hearing. That is not the case here. The Applicant has amended the suggested locality once already, at the last minute in her Inquiry bundle. It is not appropriate for a new claimed neighbourhood or neighbourhoods to be mooted or decided upon after the evidence, and without fair opportunity for the Objector to consider and argue against, if appropriate, during the Inquiry's hearing of evidence. That stage is now past. The chosen neighbourhood here is bad in law, as is clear from the evidence. At best the Applicant must rely on this being a locality case based on the Ecclesiastical Parish. The Objector does not object to the use of the Ecclesiastical Parish as the relevant locality.

10.27. As the question of use by a significant number of inhabitants of the relevant locality or neighbourhood, the Objector suggests that the number of people using the relevant area has to be sufficient to indicate that the use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals. It is not of itself purely a numbers game. It is a question of fact and degree.

10.28. In relation to the locality, that has simply not been shown in evidence; the evidence provided by the Objector on population numbers indicates that the Ward has a population of over 4,000, and the Walton Parish would have a somewhat higher population than that. The Applicant has not provided specific evidence of numbers of users, but on any sensible view use by locals taken at its highest is in the tens rather than the hundreds. Such figures do not even begin to support a claim of significant

numbers in relation to the locality. Also in relation to the larger area of the claimed locality there is no evidence as to the spread of users from within that area.

10.29. In relation to the suggested neighbourhood, as submitted previously there is no adequate neighbourhood that has been identified, nor evidence of the numbers of inhabitants within that area, even assuming that it was a cohesive neighbourhood. No analysis has been undertaken, but on any view the numbers are minimal; the burden in these matters is on the Applicant, and it has clearly not been discharged.

10.30. It is clear from the legal authorities that what is required to be shown is use by a significant number of the inhabitants of the locality or the neighbourhood, that must be more than trivial or sporadic. As several of the Applicant's own witnesses had accepted in terms, the alleged uses were at best sporadic in nature.

10.31. The Objector submits that the user of this land during the relevant period has been pursuant to a legal right, so that it was by right rather than as of right.

10.32. There is undisputed evidence that Tendring District Council had maintained the land, or substantial parts of it, for over 20 years. Such maintenance (grass mowing, litter collection, dog poo bin) was clearly aimed at providing and maintaining a facility that might be used by the public, even though it was in the event not used sufficiently for village green purposes. It is proper to assume that such actions were lawfully undertaken, and the maintenance lawfully provided and permitted by appropriate enabling legislation. Such actions were clearly done so as to be beneficial to the area. The Council could not properly have acted in such a way without proper statutory authority, and it is clear that this was not a case of mistake. For many months, as the documents show, the Objector has asked the District Council for specific details of the relevant statutory enabling provisions or authority, but has not received a clear answer that provides any certainty. It is fair to say that the District Council have not in terms accepted that statutory powers were used. The position appears to be that there is a lack of evidence on that particular issue so that, in terms of documents, there is no definitive answer. All that is certain is that the Council did maintain the land and considered that they were entitled to do so. This is of considerable evidential importance in the submissions of the Objector

10.33. The Objector's argument is that the actions by the District Council were and/or should properly be assumed to have been either under sections 9 and 10 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875.

10.34. It is clear that such provisions do not require a council to own the land in order to apply. In fact quite the opposite is the case. Section 9 of the 1906 Act requires only that the authority acquires either the freehold of any open space or *"any term of years or other limited estate or interest in, or any right or easement on or over"* the land. In terms the *"entire or partial care"* of any open space can be undertaken, whether any interest is transferred or not. Ownership by the relevant Council is not a pre-requisite. Section 10 of the 1906 Act is expressed in similar terms. Having acquired

any interest or control over space (ownership not being required) the Council are then required to hold and administer the open space so as to allow the public to enjoy it. That appears to be exactly what was intended by the District Council in this case by their maintenance, and indeed what most of the Applicant's own witnesses in terms assumed when asked about this in cross-examination. Most of them assumed that the land was maintained or indeed owned by the Council as common land.

10.35. Similar points can probably be made about section 164 of the Public Health Act 1875. Again ownership is not required. An authority may purchase or take on lease or lay out or plant or improve land, and may support pleasure grounds provided *"by any person whomsoever"*. It is clear in terms that this does not require ownership by the Council concerned.

10.36. Any user that has occurred on the land here will accordingly be pursuant to a statutory right of public access to public open space. Such use would be *"by right"* and not *"as of right"*.

10.37. The law in this field is somewhat complicated in terms of caselaw. The well known ***Beresford*** case [2003] UKHL 60 discussed this issue to a considerable extent, and clearly touched on the possibility of a use of land being not 'as of right' because it was pursuant to a statutory right.

10.38. It is of relevance to note that in the House of Lords in the ***Beresford*** case, at paragraph 30, there was a suggestion that it would not be necessary to see specific documents formally authorising 1906 Act maintenance if those documents could not be found. That passage was quoted in the more recent High Court decision in ***Malpass*** [2012] EWHC 1934. There is a clear indication from that decision that, in the absence of evidence spelling out under what authority land was held, it was proper to assume that it was lawfully held. By analogy in the present case, and in the light of the evidence, the Registration Authority is entitled to assume that the maintenance which took place by Tendring District Council was lawful and pursuant to appropriate statutory provision.

10.39. More recently in the decision in the ***Barkas*** case in the Court of Appeal [2012] EWCA Civ 1373 it was confirmed by the Court that there should be no distinction between section 10 of the 1906 Act and section 164 of the 1875 Act, or any other enactment, in the context of village green submissions. The ***Barkas*** case did not address directly the ownership issue, but it did not need to on the facts of that case. In the Objector's submission the answer is clear in any event. Accordingly on the balance of probabilities the use here, insofar as it has taken place at all, in the relevant period, was by right and not as of right. That in turn means that the application for registration cannot succeed as a matter of law.

10.40. On the question of lawful sports and pastimes, there are a number of aspects to the Objector's case. First it was not proved that all of the claimed area had been used for sports or pastimes. Some parts of it were clearly unused, or used for other things.

Also activities claimed and evidenced (principally sporadic dog walking and walking from A to B) do not amount on the facts in this case to lawful sports and pastimes. Certainly one needs to take out of any calculation or assessment of the use of the land use as an access route along which people walk. Another way of putting this is that the use of a right of way or an access route does not equate to the sort of use as of right which is required for a village green claim.

10.41. The Objector also argues that the alleged uses have not been sufficient in time or extent or nature to meet the Commons Act test. They have been too trivial and/or sporadic to constitute uses as of right. Much of the claimed use had not been by local inhabitants in any event.

10.42. It is accepted by the Objector that lawful sports and pastimes constitute a single composite class. In other words as long as an activity can properly be called a sport or a pastime it falls within the class; however the Applicant has to prove that the land in question was used in the way required for a village green, and the whole of it and not merely part or parts of it have been used for the period of at least 20 years. A commonsense approach is required. If use is in truth just referable to the use of routes or paths across the land, they should not be seen as contributing to uses relevant to the Commons Act test.

10.43. The lack of sufficient appropriate user in this case was supported by the expert analysis provided in writing by Ms Christine Cox. It is suggested that her conclusions are of particular relevance and importance. She confirmed from a range of aerial photographs spanning many years that there is no evidence of any regular communal activities of games etc., on the land. Her analysis revealed that the site may have been used for light transit along defined routes (but not sports or pastimes), but that this was very rare and in any event was interrupted in 1993 by the sea wall construction works. Her evidence tends to be confirmed by the oral evidence tested at the Inquiry.

10.44. Much of the evidence revealed that the vast majority of what limited use there had been had consisted of walking along paths as an access route, and not for recreation per se. This particularly applied to use of the path along the sea wall, and/or very short trips with a dog, normally for the dog to use the land as a place to defecate. Such access or other use should be discounted from any analysis on the basis of the relevant judicial authorities. Even then such use has been very limited and sporadic (and so inadequate in terms of amount and sufficiency), but that had been the major constituent of such evidence as there had been of use over the years.

10.45. Many witnesses who had had regular sight of the land confirmed that any use of the land was characterised by no more than sporadic or limited or trivial use. Many of the witnesses called for the Objector had suggested that when they saw people taking dogs onto the land they only stayed for a few minutes in order to let their dogs foul the land. This was not a recreational use, and nor did it take place particularly

frequently. Similar evidence was given by many witnesses who had lived in Walton for all their lives and knew the land well.

10.46. The attack on such compelling evidence on behalf of the Applicant had barely existed. The merits of the evidence called on behalf of the Objector was strongly commended.

10.47. It was particularly telling how many of the witnesses called by the Applicant provided little substantive evidence to assist the Applicant once their evidence was tested. Many of them could only really assist for modest proportions of the relevant 20 year period, or spoke of people using parts of the land as access routes, for example along the sea wall. The evidence called by the oral witnesses for the Applicant was analysed in this respect.

10.48. It was pointed out that a number of the witnesses had accepted that many of the people who it was claimed had been seen on the land at various times would not necessarily have been local people, but were likely to be holiday makers. That was a point repeated by several of the witnesses, or in statements. There just was not evidence to suggest that the site had been used regularly for ball games by locals, or even by visitors from afar.

10.49. Even Mr Bates had indicated that, save for his extended family who come down infrequently from London, he could not recall seeing other families doing such activities on the grassy area other than dog walking. Many of Mr North's observations had appeared to relate to visitors to the area rather than local inhabitants, certainly so far as picnics and the rare game of rounders that he could recall were concerned.

10.50. The Objector understands that all the evidence needs to be considered carefully. However it submits that the thrust of the oral evidence that has been tested, and other documentary evidence which has been properly assessed, reveals that the northern strip of the application site along the sea wall has not been used on any view for sports and pastimes. The side of the bank and the narrow strip alongside are unusable, and no-one has suggested use save for access up the steps. The apparent footpath along the top has been used primarily for access to the north or south, and should be discounted for village green purposes. Accordingly that land, even assuming any other area had had sufficient use, should be excluded. The activities claimed on the wider area of the land are primarily not referable to sports and pastimes, either consisting of access routes or dog fouling, and in any event did not take place on anything other than a sporadic and trivial basis. Thus there has not been demonstrated a sufficiency of use to justify registration, and much of the alleged user evidence relied on by the Applicant is in fact from visitors and not local inhabitants, and should accordingly be discounted.

10.51. In relation to the requirement of use for a period of at least 20 years, it is clear that a substantial part of the land was not available for the full 20 years. The 1993 aerial

photograph should be consulted, as should the photographs in the Appellant's bundle which showed the works to the sea wall which took place, in 1993 it seems. Any use over the whole land has been interrupted clearly for more than a *de minimis* period, so that any such use would not have been continuous. The Applicant cannot show 20 years use, even apart from the other criticisms of the Applicant's evidence, because the evidence itself reveals a substantial interruption to that alleged use in the material period.

10.52. The evidence is clear. The sea wall works were clearly substantial. They appear to have started in June 1993, and to have lasted at least three months, and probably for longer, as the works were not complete at the end of August. Mr Bates was clear that the works did impact on the grassy triangle on the land, and that while the works were going on the activities on the land could not take place. It is clear from the photographs that some form of orange fencing was placed on the land, and in any event the physical nature of the works and the large vehicles placed on the land would have prevented ball games or cricket or other sports and pastimes from taking place there at that time. The Applicant on her own admission had only a vague recollection of that period. The Objector does not need to show that no-one could walk across the site of the works during that period, but the land was not used in the way required to justify a village green application.

10.53. It is further argued that the land cannot be registered as a village green because of the conflict between such registration and the ability of the Environment Agency to come onto the land and repair the sea walls in the future. Such a requirement is reasonably foreseeable, and on the basis of the decision of the High Court in the recent ***Newhaven*** case, it ought to be concluded that land in circumstances such as this cannot properly be registered as town or village green under the ***Commons Act***.

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 section 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 was dated 11th April 2011, and appears to have been submitted to the Registration Authority at or shortly after that time. No issue arose between the parties as to the very precise date which should be taken as *"the time of the application"*. It clearly must have fallen in April/May 2011. There was no suggestion from any party that it would make any difference to the eventual

conclusion on this application which particular date between 11th April and the end of May 2011 should be taken to be the date on which the application was formally made.

11.2. Clearly if there were any question of the claimed use of lawful sports and pastimes having started for the first time during the months of April or May 1991, this uncertainty about precise dates would present a serious evidential problem. Conversely, if, on the evidence, it would not make any difference to the conclusion whether the relevant 20 year period had commenced on 11th April 1991 or (say) 31st May 1991, or any dates in between, there is no reason for the Registration Authority (or myself) to be concerned over the very precise date which should be taken as the 'time of the application'.

The facts

11.3. In this case there was very little dispute of fact about some of the matters which are clearly relevant to the resolution of an application of this kind. For example the land had clearly been open and generally unfenced – and in that sense publicly accessible – for effectively the whole of any relevant period of 20 years, subject to one important point which I note below. It had also been quite well maintained and tended – including regular mowing – by Tendring District Council, again during effectively the whole of any relevant period (subject to the same exception), according to the overwhelming balance of the evidence from both sides.

11.4. The one exception to this, but again something on which there was much agreement from both sides, is that for a considerable period during the summer of 1993 the site underwent a substantial amount of civil engineering work, relating to the construction of a new higher sea wall or bank. It is clear that that work affected the whole of that part of the application site which consists of the present sea wall or bank – indeed the works effectively created that part of the site in the form that it has now.

11.5. It is also clear from the evidence, including supporting photographic material provided from both sides, that those works additionally affected at least a substantial portion of the larger, flatter, triangular area in the southern part of the site. The extent by which those works affected the triangular area is to some extent a matter of speculation (as I discuss later), rather than there being a dispute between clearly defined evidential positions on both sides.

11.6. Aside from those important matters, there undoubtedly were other areas of factual dispute between the parties, notably as to the extent of actual use made of the land during the relevant period, the nature of any such use, and the sort of people typically making such use as took place.

11.7. It is necessary therefore to reach a judgment, on the balance of probability, as to some elements (i.e. the disputed aspects) of the evidence which has been given, insofar as it was relevant to the determination whether the statutory criteria for registration have been met. The point was quite reasonably made on behalf of the Objector that it must

be carefully questioned whether the evidence produced or called on behalf of the Applicant really did meet the statutory criteria or test prescribed by the wording of ***subsection 15(2)***.

11.8. To the extent that there were material differences, or questions over points of fact, the legal position is quite clear that they 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 (and mentioned by me earlier in this Report) 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 statement, questionnaires and the like, which have not been subjected to any such opportunity of challenge.

11.9. 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"

11.10. In Section 2 of this Report I discussed at some length the point that a relevant 'locality' had not really been put forward in the Applicant's application form; but that at the Inquiry itself it came to be common ground between the parties that the appropriate 'locality' to be considered – and one which meets the judicially prescribed tests for such an area – is the ecclesiastical Parish of Walton on the Naze. I agree with that view, and so recommend.

"Neighbourhood within a locality"

11.11. This is another subject I discussed in Section 2 above. As noted there, the Applicant eventually put forward a plan of a quite tightly defined suggested *"neighbourhood",* including most of Mill Lane itself, and a small number of lesser streets off it.

11.12. The Objector sought to argue that this suggested area was 'arbitrary', or 'not cohesive', or that it had been artificially concocted to fit the evidence, and that therefore it did not as a matter of law qualify to be regarded as a 'neighbourhood' for the purposes of ***Section 15*** of the ***Commons Act***. My attention was drawn to the well-known (but it seems to me *obiter*) remarks of Sullivan J (as he then was) in ***R (Cheltenham Builders Ltd) v South Gloucestershire DC*** [2003] EWHC 2803 [Admin], at para 85, where he said that a neighbourhood has to have a *"sufficient*

degree of cohesiveness". It might be noted however that those remarks were made in the context of a case where (it seems) an area had been delineated on a plan by a line which appeared *"to bear no relationship to any man made or natural geographical features"*, and which *"bisects individual houses and cuts across numerous streets and an adjoining area of open space"* – Judgment, para. 14.

11.13. I am also conscious that 'neighbourhood' is an ordinary, quite common English word, and that Lord Hoffman in the House of Lords (with whom several others of their Lordships agreed) in ***Oxfordshire CC v Oxford City Council*** [2006] 2 AC 674, observed – albeit also *obiter* – that *"'Any neighbourhood within a locality' is obviously defined with deliberate imprecision."*

11.14. In my judgment therefore it is wrong in principle to take an overly prescriptive or 'legalistic' view of what must be the characteristics of a 'neighbourhood'. This is not to suggest that what Sullivan J said in '***Cheltenham Builders***' was wrong – as a matter of the ordinary use of English, and of commonsense, one would expect an area which people refer to as their 'neighbourhood' to have an element of cohesiveness or identity about it – not just to be an area defined by arbitrarily marked lines on a map.

11.15. But equally there is no requirement, in my view, that a 'neighbourhood' must have a pre-existing commonly used name. Equally, in my judgment, there is no basis for supposing or requiring that towns or settlements in England and Wales should be seen as consisting of neatly defined *"neighbourhoods"*, about whose boundaries there is no scope for disagreement or divergence of view. 'Neighbourhood' is, after all, a 'deliberately imprecise' term.

11.16. With those thoughts in mind, I have to say that I do not understand, and certainly do not agree with, the Objector's criticisms of the Applicant's choice for her suggested 'neighbourhood'. It is quite clearly and sensibly defined by reference to actual boundaries and features on the ground. As the Applicant herself, and her advocate Mr Davison, explained, it is intended to represent the local area of the town, centred around Mill Lane, which has the feature of being (almost) like a large cul-de-sac, with only one main access to it. The Applicant spoke of this area as having a sense of community, and I have to say that it seems to me entirely plausible, and a normal use of English, to conceive that someone might say 'I live in' [or 'my house is in'] 'the Mill Lane neighbourhood' (of Walton), meaning something closely approximating to the area Miss Humphreys has identified.

11.17. It also seems to me, as a matter of impression and judgment, that the area she has identified has a reasonably cohesive character. I do not doubt that it would be possible for someone else to say: *"Well, I think you could have identified a larger part of Walton, to the north of the High Street, and called that a neighbourhood"*, or even that a larger part of central Walton, on either side of the High Street, might conceivably be regarded as a 'neighbourhood'. But no one did argue for such a large area. The area put forward by the Applicant is perfectly plausibly described as a

'neighbourhood' in my opinion; it is not arbitrary, it is reasonably cohesive, and she has defined it clearly by reference to boundaries that make sense.

11.18. I would further add that it does not seem to me at all to be the case that the Applicant has 'concocted' this suggested 'neighbourhood' to meet the evidence she had been able to obtain. It is true (but unsurprising) that a lot of the evidence statements, letters, completed evidence questionnaires etc. that she had obtained had been provided by people from within the suggested 'neighbourhood'. However during the course of the Inquiry the Applicant and her 'team' very helpfully produced two plans showing where, within the suggested 'neighbourhood', and within Walton more widely, the providers of all those statements etc came from. It was clear from this exercise that a fair number of claimed users of the application site came from homes in other parts of central Walton, outside the suggested 'neighbourhood', with some others from relatively more distant parts of the town, both to the north-east and south-west.

11.19. None of that is particularly surprising, and it does not in my view counter the reasonableness or plausibility of the neighbourhood which the Applicant has identified. It does however (in my judgment) render almost unarguable the Objector's apparent complaint that the suggested 'neighbourhood' had somehow been artificially drawn simply to encompass the user evidence that was available. That argument was clearly wrong in my view.

"Lawful sports and pastimes on the land"

11.20. The first thing which needs to be said here is that it seems to me that an important distinction needs to be drawn between two distinct parts of the application site – the sea wall or bank running along (but within) the entire eastern boundary of the application site, and the relatively flat grassy triangle in the south.

11.21. It is particularly clear from the judicial authorities in the field of town and village green law that it is very important to distinguish between (a) uses of land which consist of passing on foot from A to B along a defined route – and which might therefore (hypothetically) provide evidence towards the recording of a route as a public right of way; and (b) uses of the whole surface of the land more widely for 'lawful sports and pastimes'.

11.22. As far as the sea bank stretching to the north of the northern area of the grassy triangle is concerned, it seems to me that there was no convincing evidence that this had ever been used to a material extent as anything other than a footpath-type route along its top, or for crossing over the bank laterally at the locations where steps have been provided. There was in my judgment no substantial evidence that that part of the site had ever been used to a material extent for lawful sports and pastimes in a way which would warrant registration under the ***Commons Act***.

11.23. I entirely accept that people walking along, or crossing over the sea bank will from time to time have stopped to watch birds through their binoculars, or to take stock of wind and water conditions, or just to admire the view etc. I also accept that, in themselves, these things might sometimes form elements of 'lawful sports and pastimes' on a piece of land. However, in the context of the sea bank, and the obvious path along it, and the obvious routes to cross it, it seems to me that such activities, when they have taken place, are more referable to being incidents of the use of a path from A to B, than as justification for the registration of the whole sea bank (or the extremely narrow flattish strip of land between it and the Mill Lane carriageway along this length) as 'town or village green'.

11.24. My conclusions in respect of the part of the sea bank immediately adjacent to the (NE) side of the grassy triangle are essentially similar. I only mention this part of the bank separately because there was some evidence that, during periods of snow, local people would toboggan down the (SW) side of the bank on to the flatter area of the triangle. Three was also some reference in the evidence to 'mountain bikes' at times being used to ride up and down the sides of the bank. I regard it as credible that this might have happened from time to time. I also, as will be seen, accept the Applicant's point that the evidence overall suggests that, for much of the relevant period, the grassy surface of the application site was reasonably well maintained and regularly mown. However, as a matter of judgment, it does not seem to me that, on the balance of probabilities, there was enough evidence to show a sufficiently regular or continuous, as opposed to sporadic or occasional, use of any part of the sea bank for 'lawful sports and pastimes' relevant to a claim under the ***Commons Act***.

11.25. That leaves for consideration the relatively flat grassy triangle. I stress that in this part of this section I am only considering whether there is reasonably substantial evidence of regular use of the land for 'lawful sports and pastimes', not the important related issues of ***who*** had been indulging in such use, or whether it lasted without material interruption for the requisite full period of 20 years. Those are matters I shall turn to later.

11.26. It is important (it seems to me) on this immediately present issue to recall that, on the overwhelmingly clear balance of the evidence, supported also by clear photographic evidence which was produced to the Inquiry, this was for nearly all of the relevant period quite a well-maintained, regularly mown area of ground, entirely open and unfenced from access from Mill Lane. It seems highly probable (as I shall discuss later) that it was thus maintained by Tendring District Council precisely for the purpose of encouraging members of the public, including local people as well as visitors to the town, to use it for things which would fall into the category of 'lawful sports and pastimes'.

11.27. I found the witnesses called for the Applicant generally to be honest local people, and am inclined on balance to believe their evidence that this land was quite regularly used for a mixture of things constituting 'lawful sports and pastimes', such as people walking with or without dogs, families or children playing informal games, young

people *"hanging out"*, etc. I also accept that people would quite regularly have picnics on the land, in good weather, although the evidence (and commonsense) does suggest that they would generally be visitors to the town, rather than local inhabitants.

11.28. I did not find especially credible what seemed to be a somewhat orchestrated strand of evidence from several of the Objector's witnesses, to the effect that the land was only ever significantly used as a 'dog toilet' – such evidence several times being given by people whose only regular observation of the land was a sidewards glance from a car, while manoeuvring round a junction near the south west corner of the site.

11.29. Likewise there was a considerable, and repetitive strand of evidence from many of the Objector's witnesses to the effect that there are other, much better, much nicer areas on Walton on the Naze for people to use as a town or village green. This evidence was not relevant to the decision to be made. It does not matter whether there are other, more pleasant open areas in Walton, or that the application site was not the area generally associated with town carnivals, firework displays, November bonfires or the like. None of that would matter if the evidence otherwise supports sufficiently continuous 'lawful sports and pastimes' use of the land by the local inhabitants of the nearby neighbourhood.

11.30. There was also a noticeable suggestion on the evidence of some of the Objector's witnesses that as locals born and bred (like the family standing behind the Objector company) they knew better than some of the witnesses called for the Applicant, who might not have lived in Walton for quite so long. Points like that are not helpful to the proper resolution of a dispute of this kind. Nor are comments (of which there were some) along the lines that a claim like the Applicant's should be seen as morally offensive because the owners of a piece of land ought to be able to do what they like with it.

11.31. A rather better point made on behalf of the Objector was the evidence suggesting that only a small proportion of the objections which had been made to a planning application for development of the wider area of the Mere [involving as I understand it, use of the present application site for access purposes], had made a point about the (present) application site being used by people for recreation and enjoyment.

11.32. Nevertheless, on the balance of probabilities I conclude that the evidence does show that over a considerable period there had been a sufficiently continuous use by people of the triangular area of the site for lawful sports and pastimes – certainly sufficient to convey to a reasonably observant landowner that (were all the other statutory requirements met) a claim to use the land 'as of right' might be being asserted. I make two further points. First, it is clear, both as a matter of commonsense, and from a general appreciation of the extensive jurisprudence in this area, that it is not necessary in order to establish a 'village green' claim to show that the area of land concerned was in extensive or any active use continuously during all waking hours. It will be a matter of common observation that village greens, including established ones, are not in active use the whole time. All that is necessary to establish one is that

relevant use should be sufficiently regular and extensive (as opposed to sporadic, occasional incursions by individuals) to show that a right is being claimed by local people generally.

11.33. The second further point is that when (as I have mentioned above) the evidence shows that this land was for a long period a quite well maintained piece of open greensward, regularly mown by the District Council, it would frankly be rather surprising if reasonably regular recreational 'lawful sports and pastimes' use had not been made of it.

"A significant number of the inhabitants ... of any neighbourhood ..."

11.34. I start from the proposition (which I believe to be undisputed) that what is required is that the number of people using the claimed land has to have been sufficient to indicate that their use of the land signifies that it is in general use by the local community, rather than occasional use by individuals. Or, putting the matter another way, what needs to be shown is use by a significant number of inhabitants of the neighbourhood (or locality) that must be more than trivial or sporadic. All of this is agreed, and backed by judicial authority.

11.35. Clearly, as I have noted above, some of the user evidence put forward for the Applicant, including some of the evidence given orally, related to use of the clamed green by residents of Walton who live ***outside*** the Applicant's claimed neighbourhood. However I was specifically not invited by the Applicant to consider the possibility of a larger 'neighbourhood' than the one she had eventually specified.

11.36. It does not seem to me, on my understanding of the law in this field, that this point in itself causes any fundamental difficulty for the Applicant's case. As long as the evidence shows that there has been the requisite use by a significant number of inhabitants who ***do*** live in the identified 'neighbourhood', that is sufficient to meet the statutory test. It does not matter that residents of other parts of Walton used the land from time to time, or even if they did so quite frequently or regularly.

11.37. A more significant and problematical point for the Applicant's case seems to me to be the undoubted fact that a considerable element of the use made over the years of the 'grassy triangle' seems to have been by visitors to the town from elsewhere completely, rather than people from any part of Walton on the Naze. To call this an 'undoubted fact' might be an exaggeration, but I use the expression because many of the Applicant's own witnesses acknowledged that users of the greensward were quite often visitors to the town, or even that families having picnics there (for example) would usually be visitors, who had parked their cars either in Mill Lane, or in the nearby car park.

11.38. None of this is at all surprising since, as noted several times, the grassy triangle (and indeed the sea bank) were entirely unfenced, quite well maintained, and (to any observer with commonsense) entirely available for public use. I was also shown

photographic evidence of at least one 'visitor' family sitting having a picnic on the claimed green. And, of course, Walton on the Naze is a seaside town which would be expected to attract visitors.

11.39. Clearly (to consider one hypothetical extreme) if there was evidence suggesting that a grassy area in a seaside town, although well used, was entirely, or almost entirely, used by visitors from outside the town, and never (or hardly ever) by local inhabitants, the statutory test under the ***Commons Act*** would not be met. The impression I formed on the totality of the evidence here, however, is that this was not such a case.

11.40. I ought to mention in passing the particular instance of the regular annual Bates family cricket match on the claimed green. The evidence on this was criticised by the Objector on the basis that it showed use by outsiders, not local inhabitants of the neighbourhood. I am not inclined to agree with that viewpoint. It seems to me that use by local people of their (claimed) village green to play games with visiting members of their own families is entirely within the scope of a 'lawful sports and pastimes' use by the inhabitants of a locality or neighbourhood, which would be capable of supporting a claim for town or village green registration.

11.41. Although there was clearly use of this land by other visitors without local family connections in fine summer weather, half term holiday periods etc., the evidence on balance convinced me that there was a significant level of regular use for recreational purposes by inhabitants of the local 'neighbourhood' as well, throughout the year. As I have indicated above, this does not mean that I believe that the claimed green was always 'teeming' with people, just that the use was in reality sufficiently regular to represent use by significant numbers of local people who behaved as if they had a right to be there for recreational purposes, rather than being sporadic trespassers.

11.42. To repeat an expression I have used before, none of this strikes me as being in any way a surprising conclusion to reach in respect of what was clearly a reasonably well maintained open, accessible area of grass, in what could legitimately be described (I hope without offending anyone) as the 'back streets' of a small seaside town. Indeed the view I formed on the balance of the evidence is that the use here, over a considerable number of years, was at more or less exactly the sort of level one would expect of a similarly situated area which actually ***did*** enjoy the formal status of 'town or village green'.

11.43. I should perhaps add that I have reached these conclusions having fully in mind the written (but therefore untested) evidence produced by the Objector in the Report by Ms Christine Cox of Air Photo Services. Nothing in that report causes me to take a different view from that which I have expressed above.

"As of right"

11.44. It has long been clear that the basic meaning of the 'as of right' test in town or village green cases is that represented by the Latin tag *"nec vi, nec clam, nec precario"* – the use has to have been without force, without secrecy and without permission. There is no question of force (e.g. breaking down fences, ignoring prohibitory signs) here; nor of entry by secrecy or stealth. As for use by permission, the law has been fairly clear that a landowner cannot escape a 'village green' claim merely by leaving land open and accessible and easy to use, and then saying that an implied permission had been given. Something much more explicit – either an express, revocable permission, or at least something which clearly, unambiguously conveys the point that only a revocable permission is being granted, is required before a 'village green' claim can be defeated on the basis that 'permission' to use the land had been granted.

11.45. However it has been apparent, at least since the deliberations of the House of Lords in ***R (Beresford) v Sunderland City Council*** [2004] 1 AC 889, that the *'nec vi, nec clam, nec precario'* approach does not quite adequately cover the full range of factual circumstance which can arise when considering the 'as of right' test. In particular, there was speculation by their Lordships in the ***Beresford*** case to the effect that it does not quite deal with the circumstances where, because of something about the basis on which the land is owned, or held, or managed, members of the (local) public actually have a legal ***right*** to go on the land concerned, so that their use is 'by right', whereas 'as of right' by contrast must mean 'as ***if*** of right'. In other words, for a 'village green' claim to be made out, there has to have been something trespassory about the use of the land concerned – local people have to have been using it for 20 years ***as if*** they had a right to do so, when in fact they did not. They cannot generate an 'as of right' claim by using land if in fact they already had a legal right to be on there.

11.46. This speculation by their Lordships in ***Beresford*** had seemed to be correct, and has been quite widely followed in 'village green' determinations. That it does in fact represent what the law is has now been emphatically confirmed by the Court of Appeal in ***Barkas v North Yorkshire County Council*** [2012] EWCA Civ 1873. A use of land by local inhabitants cannot have been 'as of right' if it was in reality 'by right'.

11.47. Why is this relevant to the present case? One of the curiosities of the facts here is that it is quite clear, from evidence given by both sides, that the land concerned was, for the great bulk of the relevant period, managed and maintained by Tendring District Council as if it were an area of public open space or parkland available and open for all to use. Indeed for many of the relevant years the Council had also maintained what the parties called 'dog poo bins' on the land, which were attached to a post which the Council had erected on the land. It even seemed, from such evidence as was available to the Inquiry, that this arrangement had possibly carried right on through from the days of the Frinton and Walton Urban District Council before the local government reorganisation of 1974.

11.48. It was unsurprising therefore that several of the witnesses for the Applicant said that (until recent times) they had believed that the land was in fact owned by the District Council, as some kind of common or public amenity land. Yet the evidence seems to be clear that for the whole of the period relevant to this case the freehold of the land was in fact in private ownership – initially (and apparently for a long period) by Mr (Ted) Carter, until he died in 2004; then by his executors or heirs, until it was sold to the present Objector in May 2009. It seems, again from undisputed evidence, that the maintenance and mowing of the Application Site by Tendring District Council was in fact continued through to October 2011, when it was brought to an end by notice from the Objector company.

11.49. The question therefore logically arises as to what was the basis on which Tendring District Council were mowing and maintaining this land for all of those years, including effectively the whole of the relevant years for present purposes, as something which looked like, and was *de facto* available as, a piece of public open space or park land, or indeed a town or village green.

11.50. It is somewhat unfortunate that Tendring District Council did not provide any evidence or information aimed directly at the matters of relevance and concern to the present determination. This was not for want of trying on the part of the parties, both of whom tried (and succeeded to a limited extent) to obtain relevant information from the Council. In the case of the Applicant the information obtained was from telephone conversations which Mrs Hatwell had been able to have with two different officers of the District Council. In the case of the Objector almost the only information obtained was in a letter of 8th December 2011 from one of the two gentlemen (Mr Trevor Mills) who Mrs Hartwell had been able to speak to.

11.51. Fortunately the information obtained via both these routes was mutually consistent, and none of it was disputed between the parties. It seems clear that the District Council have maintained the land, by regularly mowing it, since at least 1989/90, and probable that there had been a much longer term arrangement, going back to before 1974. It also seems clear, and uncontroversial, that the Council first erected a dog bin on the land in 1998, and replaced it with a new one in 2007. It appears to be undisputed that the Council regularly picked litter from the land.

11.52. Why did the Council do those things? It seems clear that this was not the result of some mistaken belief on the Council's behalf that it owned the application site (and in any event no-one suggested this explanation). I appreciate that this was a difficult area of the case for the Applicant (without legal representation) to deal with. However in my view Counsel for the Objector (Mr Cosgrove) was right in arguing that the District Council – itself a 'creature of statute', as the courts like to say – must be assumed, unless there is clear contrary evidence, to have been doing these things properly and lawfully, in pursuance of some statutory power enabling it to do so.

11.53. The Inquiry's attention was drawn to the powers in ***Section 9*** of the ***Open Spaces Act 1906***, which enable Councils to *"undertake the entire or partial care, management and control"* of areas of open space, even when the Council does not own them. It is then clear from ***Section 10*** of the same Act that the Council, having acquired control (or some higher interest), holds and administers the land concerned *"in trust to allow, and with a view to, the enjoyment thereof by the public as open space ..."* I have to say that, on the face of it, these statutory powers and duties do seem very apt to provide an explanation for the circumstances which occurred at Mill Lane, Walton.

11.54. The Inquiry's attention was also drawn to words in ***Section 164*** of the ***Public Health Act 1875***, which provide for an authority to:

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

The provision goes on to allow the authority to *"make byelaws for the regulation of any such public walk or pleasure ground..."* It is clearly arguable, in my view, that this power also is relevant as an alternative, or in addition to the powers under the ***Open Spaces Act 1906***, as an explanation and justification for the actions, over a prolonged period, of the District Council in relation to the management and maintenance of this land.

11.55. It is clear, not least from the recent case of ***Barkas***, which I have referred to above, that where a local authority provides land for public use under either of the ***1906*** or ***1875 Acts*** just referred to, use of that land by the (local) public will be 'by right' not 'as of right'.

11.56. In my judgment it is also clear that that same principle must apply to land belonging to someone else, which is managed or controlled by a Council under ***section 9*** of the ***1906 Act***, or 'supported' as a 'public walk or pleasure ground' under the ***1875 Act***.

11.57. It is unfortunate that there was not more 'input' from, or investigation by, the District Council as to the precise formal basis on which it had come to maintain and manage this land over so many years. It is however my understanding of the law in this field that it is proper for the Registration Authority (and thus me), where the precise legal basis for historic actions cannot be traced, to reach its decision on the basis of the most probable lawful explanation or justification for the actions concerned.

11.58. On this basis, the view I have reached on the evidence available is that the most probable explanation of the situation which prevailed here is that Tendring District Council managed and controlled the land under the provisions I have referred to under the ***Open Spaces Act 1906***, but fortified by their ability to do much the same

thing under ***Section 164*** of the ***Public Health Act 1875***. I reach this conclusion the more readily, given the absence of any alternative suggestion or argument from the Applicant as to the legal basis for the District Council's actions.

11.59. It follows therefore, in my judgment, that use of this land for recreational purposes by local people, or indeed anybody else, over all of the relevant years, was 'by right', not 'as of right'. The Applicant's claim must therefore fail on this ground.

"For a period of at least 20 years"
"continue to do so at the time of the application"

11.60. The relevant period of at least 20 years runs from (approximately) April 1991 to April 2011, with nothing turning on the precise date in April (or indeed May) 2011 which should be taken as the 'time of the application'. I have discussed this point above.

11.61. It will be apparent from the views and conclusions I have expressed above that in my opinion the Applicant did make out her case that for almost all of the relevant 20 years (and more) local people were indeed using this land for lawful sports and pastimes. I also conclude that they were still doing so 'at the time of the application'.

11.62. However it is also clear, on the evidence from both sides, that there was a significant period of interruption in the summer of 1993, while major works took place for the replacement and heightening of the sea wall or bank. Extensive photographic evidence was provided in relation to the appearance of these works, while they were being undertaken.

11.63. Although there was not complete agreement between the parties about this by the time of closing submissions, the view I formed on the balance of probabilities from all the evidence (including much from the Applicant's side) is that the works probably took about 3 months. They may have had some element of being phased, but the evidence was unclear about that.

11.64. What was clear, from photographic evidence produced from the Applicant's side , is that the works were very extensive, and that for at least some of the total time they were affecting the great bulk of the site all at the same time. By that I mean that they were affecting, in a major way, the whole of that part of the site constituting the present sea bank, and also a substantial part of the 'grassy triangle'. I accept that, from the photographs produced by the Applicant's side, it does appear that some part of the triangle might not have been affected by the works. However it is completely unclear how much of that grassy triangle might have been left unaffected during the works, and no view or evidence was put forward on behalf of the Applicant as to the definition of any such unaffected area. That some of the grassy triangle was affected by the works was also confirmed by the one aerial photograph from Summer 1993 put forward by Ms Cox for the Objector.

11.65. I accept the point made on behalf of the Applicant that it may well have been possible, and probably was, at times when the workmen were not actively carrying out the physical works, for members of the public interested in that sort of thing to wander on to the site of the works and look at them. Mr Bates junior obviously did just that, and took several photographs to record the fact.

11.66. However I cannot accept on the evidence presented that during the period of those works the site was available for local people to use it for lawful sports and pastimes, as of right. This was a substantial interruption to use in my view, not something that can reasonably be regarded as *'de minimis'*, or so temporary as to be of no significance.

11.67. As I have acknowledged above, it seems there may well have been some part of the grassy triangle which was unaffected by the works. However it was not at all clear to me what area that was, and the Applicant did not propose that any particular view should be taken on that question. It is for the Applicant to make his or her case on applications such as this, and then to support it with evidence which proves it on the balance of probability. In this case therefore it is not appropriate that I should even speculate as to whether (hypothetically) a case could be made for an uninterrupted 20 year use on some lesser part of the 'grassy triangle''.

11.68. My conclusion on this point therefore is that the evidence does not show that there was a continuous uninterrupted use of the application site for lawful sports and pastimes for the requisite period of 20 years.

Other considerations

11.69. Out of deference to the fact that the point was raised on behalf of the Objector, I ought to say something about the argument that, because the sea wall or bank might at some point in the future need to be raised further, or improved, by the Environment Agency, pursuant to statutory powers, that circumstance ought to be regarded as incompatible with the registration of this land, or a substantial part of it, as a 'town or village green'.

11.70. This point arises from the long and complex judgment of Ouseley J in the case of ***Newhaven Port and Properties Ltd v East Sussex County Council*** [2012] EWHC 647 (Admin), which related to a town or village green claim made in respect of land in the operational area of Newhaven Port. It was held that such land should not be registered under the ***Commons Act***, because to do so was incompatible with a different statutory regime which enabled the port authority to carry out inconsistent works for the future development of the port.

11.71. Because of the other findings I have reached, it is not really necessary for the Registration Authority (or myself) to reach a view on this point in this case. All I would say therefore is that it seems to me that the factual circumstances here are very far removed from those of operational land within a working port. I also note most

particularly that the Environment Agency itself, in a letter to the County Council dated 10th November 2011, does not make any objection to the ***Commons Act*** application. Indeed it expresses the view that registration under that Act would not prevent it as a body from carrying out any necessary maintenance of the sea wall.

11.72. In the circumstances therefore it seems to me wholly inappropriate that the Registration Authority should reject the Applicant's claim on this additional ground, raised only by the landowner objector, and not by the Environment Agency itself.

Conclusion and Recommendation

11.73. 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. In particular, the criteria not met are those relating to 'as of right' use, and use for a sufficiently continuous period of 20 years up to the time of the application.

11.74. Accordingly my conclusion and 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
11th January 2013

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

APPENDIX I – APPEARANCES AT THE INQUIRY

FOR THE APPLICANT

Mr Charles Davison (lay advocate)

He called:

Mr Simon Hipkin, of 22 Mill Lane, Walton on the Naze
Mrs Mary Cook, of 66 North Street, Walton on the Naze
Mr Brian Green, of 'Sidestrand', Suffolk Street, Walton on the Naze
Mrs Wendy Wright, of 19 Alfred Terrace, Walton on the Naze
Mr Jeremy Shiers, of Smalldown, Percival Road, Kirby-le-Soken
Mrs Margaret Sandell, of 20 Mill Lane, Walton on the Naze
Mr Fred Robinson, of 33 Mill Lane, Walton on the Naze
Mr William (Bill) Bates, of 23 Mill Lane, Walton on the Naze
Mr Eric North, of 7 Marina Mews, Walton on the Naze
Mr Ashley Hatwell of 'Backwater', 24 Mill Lane, Walton on the Naze
Mrs Beth Hatwell of 'Backwater', 24 Mill Lane, Walton on the Naze
Miss Diana Humphreys (the Applicant), of 33 Mill Lane, Walton on the Naze
Mrs Penelope Potter, of 'The Twizzle' 26 Mill Lane, Walton on the Naze
Mr Roger Potter, of 'The Twizzle', 26 Mill Lane, Walton on the Naze

FOR THE OBJECTOR (Silverbrook Estates Ltd)

Mr Tom Cosgrove, Counsel

- instructed by Messrs Ellisons,
Headgate Court, Head Street,
Colchester, CO1 1NP

He called:-

Mr Jack Robertson, of 9 Cedar Close, Walton Road, Walton on the Naze
Mr Gerald Rayner, of 20 Beaumont Close, Walton on the Naze
Mr David Todd, of Scenefielda, 103 Landermere Road, Thorpe-le-Soken
Mrs Pauline Nina Chumbley, of Cairn Lodge, Hall Lane, Walton on the Naze
Mr John Fletcher, of 'Seafoam', Princes Esplanade, Walton on the Naze
Mrs Helen Pudney, of Titchmarsh Marina, Coles Lane, Walton on the Naze
Mrs Miranda Rayner, of 20 Beaumont Close, Walton on the Naze
Mr Russell Clive Bettany, of 29A Saville Street, Walton on the Naze

APPENDIX II

LIST OF NEW DOCUMENTS PRODUCED TO THE INQUIRY

NB. This (intentionally brief) list does not include the original application and supporting documentation, the original objections, or any material or correspondence submitted by the parties prior to the issue of Directions for the Inquiry. It also excludes the material produced in the prepared, paginated, and for the most part satisfactorily indexed, Bundles of Documents produced for the purposes of the Inquiry on behalf of the Applicant and Objector, and provided to the Registration Authority (and me) as complete bundles.

By the Applicant:

Two Plans showing addresses of providers of evidence: (1) within the claimed Neighbourhood; and (2) within Walton on the Naze more widely.

List of witnesses from Neighbourhood & Locality

Map showing Ecclesiastical Parish of Walton on the Naze (provided by the Vicar)

Note of closing submissions.

By the Objector:

Plan showing Ecclesiastical Parish

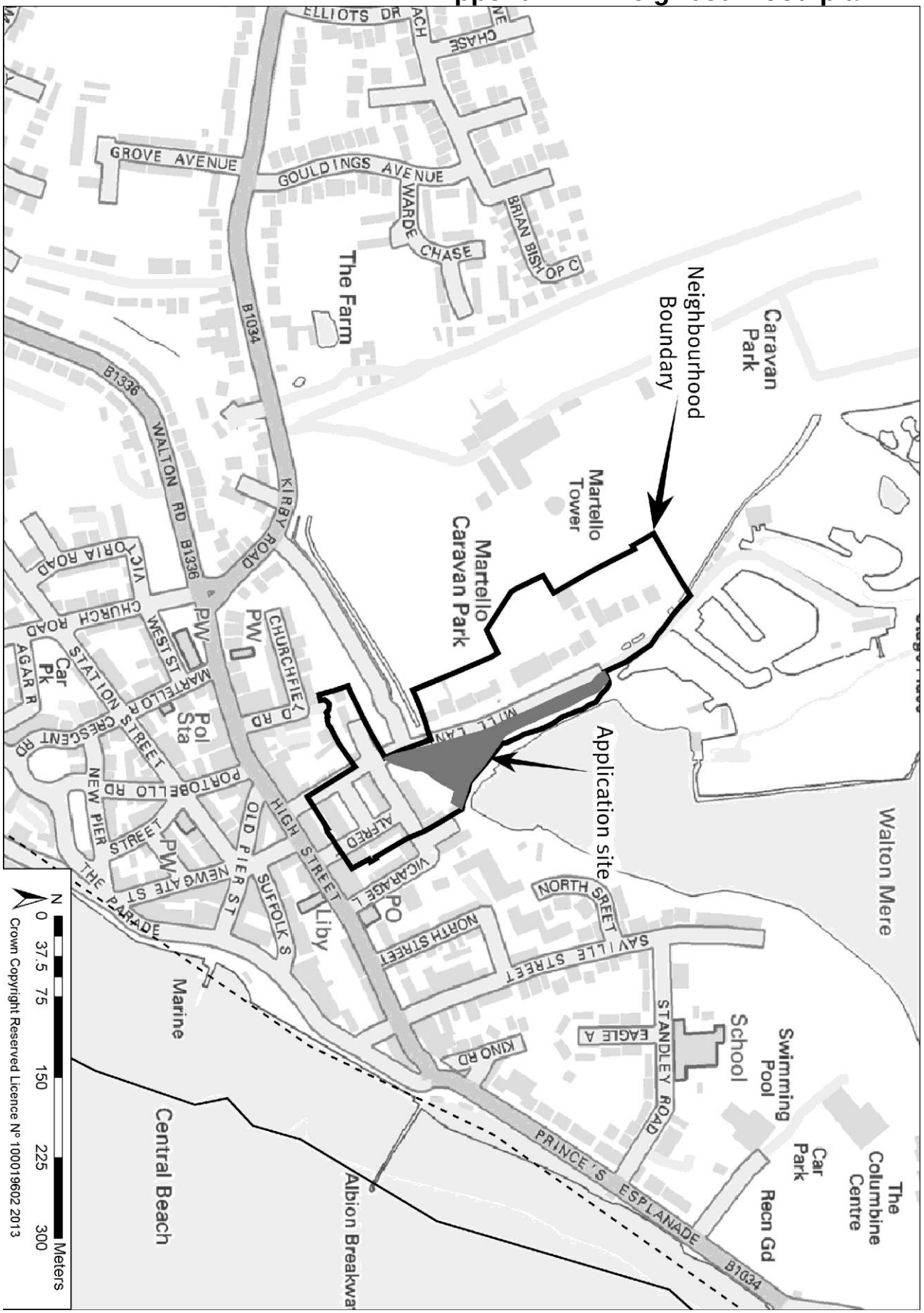
Report by Ms Christine Cox, of Air Photo Services

Written Note of Closing Submission

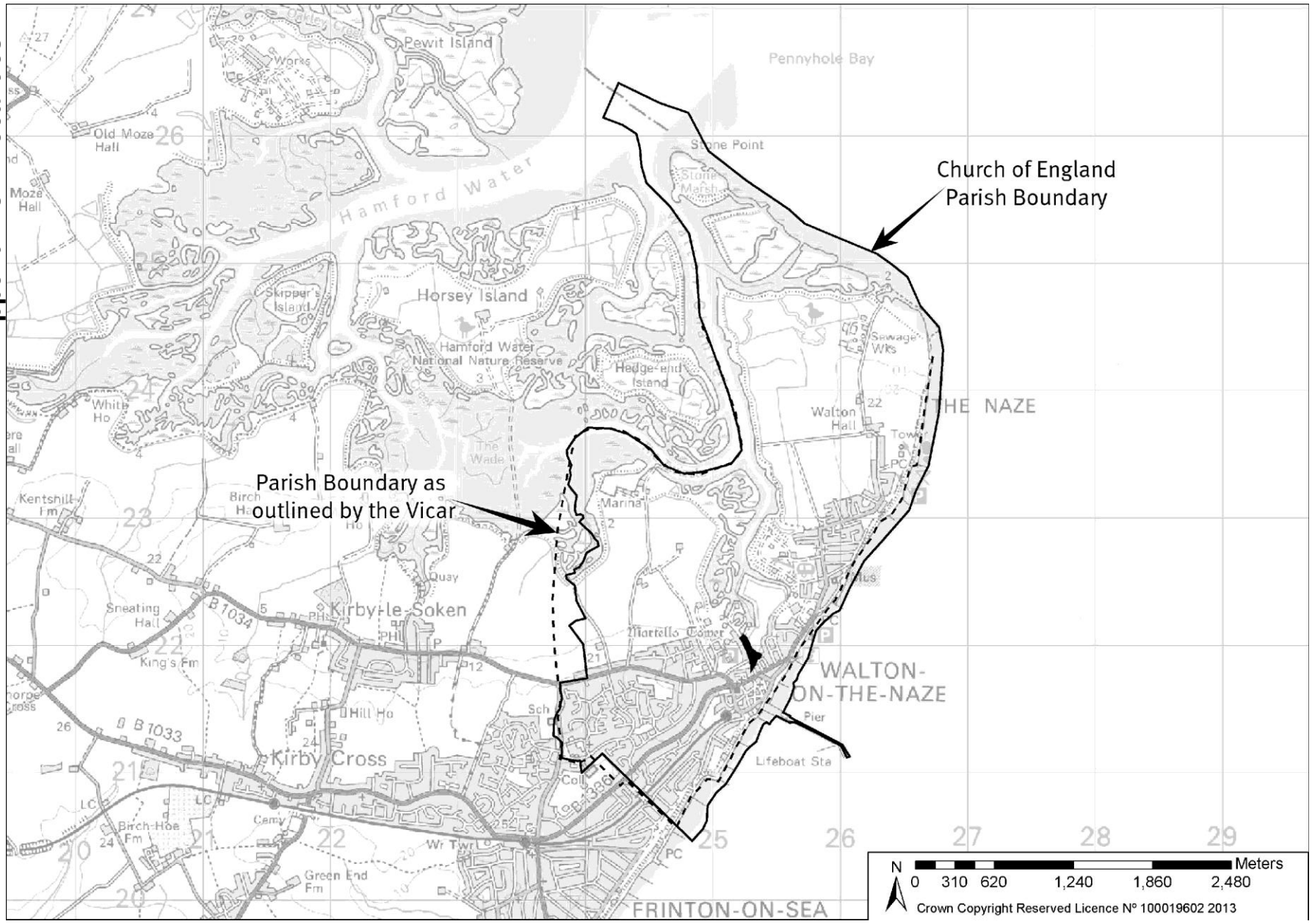
By the Registration Authority:

Street plan (extract) of Walton on the Naze

Appendix 2 – Neighbourhood plan



Appendix 3 – Localities



Appendix 4 – Further Representations

Response to the Inspector's Report on Village Green Application

LS/CAVG/63

26/1/13

WE DISAGREE WITH THE INSPECTOR'S DECISION AND RECOMMENDATION THAT THE APPLICATION BE REJECTED.
We claim that no action by TDC interfered with our "as of right" use and that, therefore, it was wrong of the Inspector to find against us on this ground.
We also reject his conclusion that the claimed use of in excess of 20 years was interrupted within the meaning of the Commons Act 2006.
We therefore claim that the criteria set out in Section 15(2) of the Commons Act 2006 have been met, including those relating to "as of right" use and continuous use, and that the recommendation be to grant registration.

1. First, we would like to thank Essex Legal Services for taking our application seriously enough to send it to Public Inquiry and not rejecting it "on paper" as urged to do by Mr.Vivian Chapman QC in his objection statement dated 13th December 2011.
   We would further like to thank the staff, specifically Jacqueline Millward and Lloyd Simpson, for attending the Public Inquiry, and the Inspector, Mr Alun Alesbury, for conducting the inquiry in a fair and good natured way.

2. We received a hard copy of the report on Wednesday 16th January and we have read the report and now feel able to comment on it.
   We understand that the inspector accepted the evidence given by our witnesses and that he looked very thoroughly at all the evidence, including visiting the land, and that he gives a fair and full account of the proceedings as we experienced them.
   We agree that the meaning of "locality" was established and also the meaning of "neighbourhood within a locality", and we acknowledge that he accepted that we had drawn the neighbourhood for sound reasons and not just to include the addresses of witnesses.
   We agree that the definition of "lawful sports and pastimes" was satisfied.

   We do have reservations however. Despite saying that witnesses who were prepared to make their statements verbally and be cross questioned would have more weight than written statements, (para 7.4) he has quoted from the statement of Mrs.Sylvia Bone (para 9.3) who was not present, though not from any of our written statements. This is all the more galling as, unlike the objectors, we were scrupulous in not asking for statements from anyone whose livelihood or leisure activity was in any way connected with Titchmarsh Marina.
   Although the Inspector acknowledged that the absence of the expert witness, Ms Christine Cox, (para 10.18) meant that her evidence was untested, nevertheless her evidence was obviously instrumental in his deciding the period of uninterrupted use.

   This brings us to our most serious objections: the Inspector's decision on the issue of "by right" and "as of right" in which we feel the Inspector made an erroneous conclusion, not helped by the lack of documentary evidence from Tendring District Council. More of this later. Secondly, the issue of uninterrupted use, in which he based his decision on the aerial photographs despite the absence of the expert witness. More of this later.

3. On the issue of "by right" and "as of right", the Inspector refers to Vivian Chapman's objector statement in which his assumptions are that the local authority were exercising statutory powers under either the Public Health Act 1875 or the Open Spaces Act 1906, a theme taken up by the objector's barrister, Mr.Cosgrove. However, at no point during the Inquiry, nor in the Inspector's report, was it established that Tendring District Council was acting under these powers. During the Inquiry the Inspector expressed his frustration that neither applicant nor objector could obtain documentary evidence as to the motivation of TDC. Our complaint is that, in the absence of any evidence, the Inspector makes the assumption that the council were acting under statutory powers. This is the central element in the objector's case and the Inspector has based his decision on an assumption. (para 11.52) Following the Inspector's report and his, and our, frustration at the lack of information, TDC have become aware of their responsibilities to give the relevant information re statutory powers. We would like to include this, whatever the result, when we receive it, in an addendum to our response in the very near future.

   The Inspector expresses the view (para 11.42) that the green has been used at exactly the sort of level as a similar area which did actually enjoy formal status as a town or village green. In other words we have been using the land AS IF it had a formal statement.
   It surely flies in the face of natural justice when we attempt to formalise our relationship with the land in this application that we discover we were using it AS OF RIGHT. We are not now clear what has happened to our rights and by what means these rights have been taken away. Is this a case of "Heads they win, tails we lose"?

4. On the issue of "20 years' use"; para 11.5 of the report "the extent to which these works affected the triangular area is, to some extent, speculation". Why then, does the Inspector feel able to conclude that there was a lengthy interruption of use in 1993 given the contradictory evidence put forward by the applicant and the objector? Aerial photographs produced by the objector were untested because of the absence of Ms.Cox, yet her evidence was given more weight than the applicant's witnesses. A further point to be made here is that it was agreed that the 1993 works were mainly to the sea wall and bank. In para 11.24 the inspector rules out the use of the grassy bank and sea wall for lawful past times and states that only the "grassy triangle" is to be considered from now on. It is therefore curious that the works to the bank are still considered and in great detail, later on in the report, and considerable weight is given to this part of the evidence. There is an acceptance that there was a degree of disruption to part of the triangle but it was admitted that the extent of this disruption could only be speculated upon.

   In addition, section 15 of the commons Act, under which registration of villages greens takes place, states "In determining the period of 20 years referred to in subsections (2a, 3a and 4a) there is to be disregarded any period during which access to the land was prohibited to members of the public BY REASONS OF ANY ENACTMENT" Surely the statutory works undertaken by the Environment Agency/Costain should be classified as an enactment.

The Inspector rejects Mr.Cosgrove's claims regarding the Newhaven case and cites a letter from the Environment Agency of 10th November 2011 (para 11.72) in which they express the view that registration under the act would not prevent them carrying out necessary maintenance work on the sea wall.
It seems contradictory therefore that it was precisely and only such maintenance work in 1993 (when they were acting independently of the owner) that was regarded as a break in the 20 year requirement.

To summarise our paras 3 & 4, there has been a presumption in favour of the objector on both significant points of law.

5. A summary of what we think the judgement should have been and why:
*The period and point of application was determined para11.1 and 11.2 and we concur.
*The facts were set out Para11.3 to 11.9 and had little disagreement about them as set out.
*The locality was defined para11.10 with which we agree.
*The neighbourhood within a locality was defined para11.11 to 11.19 and we agree with the inspector's argument and conclusions.
*The lawful sports and past times on the land were defined and the extent quantified para11.20 to 11.33.
Whilst we would agree with the inspector's conclusion in para11.32, our opinion is that his argument in 11.23 is unsound in not considering the possibility that the use of a piece of land can be for two purposes at the same time: in this case, a footpath and part of the ground used for sports and past times. He does not seem to have considered that these two uses can co-exist or that they don't materially conflict with each. Hence his conclusion 11.24 is unsound.

6. We think also his description of the District Council's purpose ... to encourage members of the public . . . to use it, misleads him into a later unsound adverse judgement.
We welcome the Inspector's assessment that the requirement that "A significant number of the inhabitants ... of any neighbourhood ..." (11.34 -11.43) had used the land had been satisfied.
The "As of right" (11.44 - 11.59) argument was difficult to assimilate, but we think that we have done so correctly whilst **disagreeing with the Inspector's conclusion in 11.59.**
The argument as to whether we could claim a "by right" or "as of right" (or as presented 'as if of right') use of the land rested on a detailed and difficult definition of the two terms and their distinctions.
[Briefly a "by right" use is a use granted by the owner, either by express permission or by it being imposed on the owner by a third party (for example, a Local Authority) having the right endowed on them by a written piece of legislation (a statute).
An "as of right" use is a use claimed by a group, such as a neighbourhood, on land without permission from the owner (by a lease or license for example) or without that use being denied by the owner (by a fence or a sign saying 'Not for Public Use' or similar): that is, an "as of right" use is a use established by virtue of a group using the land concurrent with the owner's identifiable disinterest, the latter of which it is incapable of proving the contrary.]
Our disagreement stems from his reliance on Barkas v North Yorkshire County Council, where a group was not allowed to establish an "as of right use" since the Council had 'dedicated' the use of the land already, thus the Applicant already had a "by right" use and could not therefore claim an "as of right" use.

The Inspector, we think, wrongly translates this onto our case: we would, given the opportunity, point out that, although the Inspector goes to great length (11.52 - 11.58) to demonstrate that Tendring District Council (TDC) had a "by right" use of the land, in our case, TDC were not a party to the claim, by neither being the owner of the land (as was North Yorks CC in the Barkas case) nor the Applicant.
The owner, in our case, had the right (which he was allowing to lapse or be ineffective) and had not permitted or denied the use of the land to the users.
It follows that the TDC, who had the use "by right" (of statute) could not themselves claim use "as of right".
Neither could TDC 'dedicate' the use "by right" to the applicant, as it was not their land to dedicate. In the Barkas case North Yorks CC could, since it owned the land in question, we believe.
Also it would not be just if a third party could, independently and solely by their use, establish that use "by right" and thereby interfere in the relationship between a group of users and the disinterested owner, and thereby extinguish the applicant's right to a claim of use "as of right". And in this case it was implicitly accepted by the Inspector (11.50) that the users had no formal relationship with the Local Authority.
We would claim, therefore, that no action by TDC interfered with our "as of right" use and that, therefore, it was wrong of the Inspector to find against us on this ground.

7. Similarly we disagree with the Inspector regarding part of his interpretation of "for a period of at least 20 years" and "continue to do so at the time of the application" (11.60 - 11.68).
We agree, of course, with his finding that the period was 20 years and continuous at the time of application.
However, he goes on to say (11.62 - 11.67) that the use was interrupted by necessity by a statutory undertaking (the Environment Agency (EA)) by their occupation of a significant part of the land in order to carry out works to the adjacent sea wall. We agree that this did indeed occur, although we argue it was only for part of the land and for a shorter time than was alleged.
However, as in the argument above, we claim that the "by right" use (and occupation) of a statutory undertaking cannot deny our claim for an "as of right" use on the land to be established over the right of the owner.
Although both the owner and the users were physically prevented from using the land in part, or in entirety, for a certain period, neither the disinterest in the use by the owner nor the "as of right" use by the users had been interrupted.
This is implicitly supported by the Inspector in his acceptance that the land did not need to be continuously used to define it as being used continuously (11.32).
The Inspector also failed to consider whether the temporary occupation of the land, in part or entirety, by a statutory undertaking interrupted the use, amounted to an authoritivea minimum or qualifying period of 'interruption'. Therefore, the Inspector had no precedent on which to base his opinion that the EA's works were, in this case, sufficient to constitute an interruption within the meaning of the Act (Commons Act 2006).
So we reject his conclusion (11.68)
We agree with his conclusion that there are no 'Other considerations' (11.69 - 11.72) that would prevent him coming to a positive decision on this application.
Thus we still claim that the the criteria in Section 15(2) of the Commons Act 2006 have been met, including those relating to "as of right" use and sufficient continuous use (11.73) and that the Inspector's recommendation (11.74) should be overturned.

8. **Conclusion and personal statement.**
   I was chosen to be the named applicant by a group of people living in the neighbourhood who, with no legal experience at all, tried to grapple with these difficult matters in an attempt to safeguard the environment where we live.

We gave our evidence in an honest and sometimes naïve way which sometimes contradicted our argument.
Our lay advocate in the Inquiry is an ex-resident and friend who, while having an academic background, was far from comfortable in the adversarial environment of the Inquiry. Nevertheless he embodied our passionate concern and aspirations for our home town.

We were pitted against considerable financial interest and professional legal argument, while being in no position to respond in kind. Nevertheless we feel the Inspector's report vindicated our original decision to pursue the application and it was with great regret and sadness that we read his conclusion and recommendation.

We hope that you will present our objections and observations to the committee in their entirety together with any additional germane information which we may be able to submit before the committee meets.

The report confirms that in all respects we have satisfied the requirements of the Commons Act 2006 in our application to register the piece of land at Mill Lane green as a Village Green except in two aspects where serious ambiguities exist. We trust that the committee will recognise the moral status of our case and come to an independent decision.

Signed

Di Humphreys.

APPENDIX 5 – INSPECTOR'S COMMENTS ON APPLICANT'S FURTHER REPRESENTATIONS

RE: LAND AT 'MILL LANE GREEN' AND ADJOINING SEA WALL, WALTON ON THE NAZE, ESSEX

COMMONS ACT 2006, SECTION 15

COMMENT ON APPLICANT'S 'RESPONSE' DOCUMENT

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1. I have seen the Applicant's 'Response to the Inspector's Report' document. I have considered her further representations as set out in that Response.

2. My general comment is that nothing in her Response has caused me to wish to change any aspect of my analysis of the evidence given, or of the legal issues, or to make any alteration to the conclusions or recommendation of my Report. The Response also tends to confirm the impression created at the Inquiry itself that the Applicant and her 'team' never really gained a clear understanding of the legal issue they needed to address as to the distinction between use of land "as of right" (as required under the Commons Act) and use "by right".

3. There are however a small number of more specific observations I feel I should make. First, on the by right/as of right issue, the Applicant seems to believe I made an "assumption", adverse to her own case, as to the basis on which Tendring District Council had maintained the land concerned, ostensibly for public amenity/recreational use, over many years.

4. That is not a correct view of the matter, as I sought to explain with some care in the relevant part of the last section of my Report. Both sides at the inquiry were clear in their evidence that the District Council (and possibly even its predecessor before the 1974 local government reorganisation) had regularly maintained this land over very many years as some sort of publicly available open space or recreation area.

5. In the absence of any clear, specific evidence or material, from the District Council or elsewhere, as to the precise formal basis on which the Council

had done all that work over the years, it nevertheless followed that the Council must be taken to have done the work under some lawful power available to it to do so. The Applicant at the inquiry did not argue against this last specific point, although it was argued on her behalf that it could not be 'proved' that the Council had taken the land under statutory powers.

6. It followed that a conclusion needed to be reached, on the balance of probabilities from the evidence which actually was available, as to the most probable lawful basis for the District Council's actions and behaviour over so many years in relation to this land. The Objector put forward an extremely plausible and credible legal basis for such actions and behaviour, as discussed in my Report; no plausible 'rival' explanation was put forward in this respect on behalf of the Applicant.

7. The conclusion I reached as to the most likely explanation for the District Council's management of the land over the years was therefore a conclusion on the balance of probabilities from the evidence produced by the parties (and their legal arguments based on that evidence), and not an "assumption".

8. The Applicant also expresses concern that in my Report I include brief summaries of the specific (untested) written evidence provided by the Objector from two witnesses (Mrs Sylvia Bone and Ms Christine Cox) who had not come to give oral evidence at the inquiry, whereas I did not do that in respect of the more numerous written statements produced for the Applicant.

9. As I sought to explain in my Report, this was only because the written evidence from those two particular witnesses had been the subject of some specific discussion at the Inquiry itself (unlike the equivalent statements provided for the Applicant).

10. It should also be noted that, as far as Mrs Bone is concerned, where what she said differed from the case for the Applicant, it was in almost every respect the evidence of the Applicant's witnesses which I preferred, as I made clear in the Report.

11. The Applicant in her Response also asserts that, in respect of the interruption to use of the land caused by sea-wall replacement works in 1993, I in my Report had given more weight to the untested evidence of Ms Cox than to the evidence given by the Applicant's witnesses. This I am afraid is a serious misreading of my Report.

12. As I sought to indicate, both in my recording of the evidence, and in my discussion of this topic, most of the evidence about the 'interruption' in 1993 was in fact given, or produced in documentary or photographic form, by witnesses for the Applicant, who gave their evidence about this in a very fair and open manner. The vast preponderance of the photographic evidence about the interruption was produced on behalf of the Applicant,

not the Objector. My reference in paragraph 11.64 to one aerial photograph submitted by Ms Cox was in the context of its being confirmatory of the photographic and other evidence provided from the Applicant's side.

13. Nor is there any other conclusion in my Report which is based on my giving preference or greater weight to the material produced by Ms Cox, over that which I have given to the evidence of the Applicant and her witnesses.

14. Finally, the Applicant seems to have a somewhat confused view of the potential significance of the point that I accepted that not all of the 'grassy triangle' part of the land had been affected by the works in 1993. This is a point I covered in my paragraph 11.67. Additionally, even if some (unidentified) lesser part of the triangle had had uninterrupted 'lawful sports and pastimes' use for 20 years, it would still be subject to my conclusion that such use had been 'by right'.

15. I do not feel it necessary to comment on any other aspects of the Applicant's Response. As I have indicated above, nothing in it causes me to wish to alter my conclusions or recommendation in this case.

ALUN ALESBURY
1st February 2013

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