

Hampshire County Council

Decision Report:

Decision Maker:	Regulatory Committee
Date of Decision:	18 June 2014
Title:	Application for registration of land known as Causeway Farm in the parish of Petersfield as town or village green (Application No. VG 251)
Reference:	5914
Report from:	Director of Culture, Communities and Business Services

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1. Executive Summary:

1.1 Hampshire County Council is the Commons Registration Authority (CRA) for the purpose of exercising functions under the Commons Act 2006. One such function is the determination of applications made to register land as town or village green. The Regulatory Committee, in its capacity as Commons Registration Authority, is asked to consider an application for registration of land known as 'Causeway Farm', in Petersfield, as town or village green. The application was advertised and attracted three objections, which were supported by in two cases by substantial submissions. The applicant was given the opportunity to rebut the objections, and the County Council has asked questions of clarification of the applicant and landowner. The available evidence has been analysed by officers and it is recommended that this application be rejected for the reasons set out in the report.

2. Legal framework for the decision:

2.1 Section 15 Commons Act 2006

Registration of greens:

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

(2) This subsection applies where -

(a) a significant number of the inhabitants of the locality, or of

any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years:
and
(b) they continue to do so at the time of the application.

- (3) This subsection applies where –
(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
(b) they ceased to do so before the time of the application but after the commencement of this section: and
(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).
- (4) This subsection applies (subject to subsection (5)) where –
(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
(b) they ceased to do so before the commencement of this section; and
(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

3. Applicant:

- 3.1 **Mr. Phillip Haines**, ('the Applicant') of 7 Old Mill Close, Exeter, Devon, EX2 4DD, formerly of Maples, 108a The Causeway, Petersfield, GU31 4LL. On 16th June 2013, Mr. Haines requested that he be allowed to withdraw his application because he had moved away from the area. This application to withdraw was advertised and **Mrs. G. Fry** of Hill Brow, Liss has taken it over.

4. Landowners:

- 4.1 The landowners are **Mr. G. Goad** of Uppark, Petersfield and **Ms J. Segal** of Cathcart Road, London SW10. The other landowner is **4LL Limited**, of Walton Lodge, Bridge Street, Walton on Thames. Mr. Goad is represented by WYG planning consultants, of St. Clairs Farm, Droxford.

5. Description of the land (please refer to the map attached to this report)

- 5.1 The land which is the subject of the application ('the Land') is shown edged red on the plan annexed to this report. It consists of approximately 4.34 acres (1.76 hectares) of land lying on the western edge of Causeway Farm, close to a residential area along a road called 'The Causeway' to the south of the town of Petersfield. The Land is comprised in the registered title numbers HP 482265 and SH37575.

Petersfield Footpath 38 runs along the eastern boundary of the Land, and this is part of a promoted route, the Hangers Way’.

6. The application:

- 6.1 The application was received on 3rd March 2010. It states that the Land should be registered as town or village green because it has been used by a significant number of the inhabitants of a locality for lawful sports and pastimes for at least 20 years, and they continue so to use it. The application identified the town of Petersfield as the locality in respect of which the application is made.
- 6.2 The application was accompanied by a map of the Land being claimed as town or village green, photographs, and 44 completed user evidence forms.

7. Issues to be decided:

- 7.1 In order to register the land being claimed as town or village green, the legal tests under section 15 of the Commons Act 2006 must be met. That is, ‘*a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years*’. All parts of the legal test must be satisfied for registration to take place.

8. Legal Framework:

- 8.1 In determining this application, the Committee is exercising its function as the Commons Registration Authority. The onus of proof lies on the applicant to satisfy the Committee that the land should be so registered. All the legal requirements of section 15 of the Commons Act 2006 must be met and the required standard of proof is the usual civil standard of proof, namely ‘on the balance of probabilities’.
- 8.2 The House of Lords has said the registration authority has no investigative duty in respect of any application to register a new town or village green. The registration authority is entitled to determine the application on the basis of the evidence presented by the parties – *Oxfordshire County Council v Oxford City Council [2006] 2AC 674*.
- 8.3 The Court of Appeal has said the registration authority has a duty to decide applications reasonably and fairly, and to bear in mind that its decision carries legal consequences. There should therefore be no presumption either in favour or against registration. If the application is accepted, this may have a significant effect on the interests of the land owner. If it is rejected, the rights of the local inhabitants will not receive the protection intended by Parliament when the Commons Act 2006 was brought into being – *R (Whitmey) v Commons Commissioners [2005] QB 282*.

9. User Evidence:

- 9.1 The applicant supplied 44 forms setting out witness evidence of use of the Land in support of a claim for village green rights. Of these 44 forms, 42 users said that they gained access to the Land from a track leading off The Causeway, a main route into Petersfield, along which many of the witnesses have their properties. This track is part of Petersfield Footpath 38, and can be seen on the location map of the land being claimed. Only two said they had not come to the land this way, **Mr. Kamen** and **Mr. Williamson**. Eight users have access from their back gardens onto the Land. Additionally 7 users also accessed the Land from Broadway Park, a nearby caravan park through which the Hangers Way also runs, and where there is another public footpath connects with The Causeway. **Mr. Chapman** accessed the Land from Heath Road, to the east of Heath Pond and **Mr. Stoneman** from Sussex Road, to the north. **Mr. Goodsir** got to the Land by crossing a stream.
- 9.2 The frequency of use varied from 'occasionally' or 'infrequently' (**Commander Boulton** and **Mr. Cooper**), to weekly (9 users) and daily (5 users). **Mrs. Mott** accessed the land 'several times a day' and **Mr. Caplen** had used the Land 5,000 times. A graph has been prepared showing this usage, and can be found at **Appendix 1**.
- 9.3 The user evidence graph at Appendix 1 indicates the first use of the Land for lawful sports and pastimes was in 1960, with 5 users by 1970. By 1980, there were 10 users, with 15 users in 1990, and 25 by 2000. In 2010, when the majority of the evidence forms were completed, there were 42 people saying that they were using the Land in this way. The number of users has increased steadily over time, and the majority of use falls within the period 1995 to 2010.
- 9.4 Users were asked to specify the lawful sports and pastimes they had indulged in on the land. By far the most popular activities were recreational walking (26 witnesses), wildlife observation (20), walking dogs (19) and the picking of blackberries, sloes and mushrooms (17). There was also picnicking, bird watching, kite flying and general enjoyment of the countryside and meeting others there. **Mr. Cox** mentions an annual bonfire party, and the occasional game of football. There seem to have been no communally-organised activities on the Land, but they are not necessary for village green rights to have been acquired.
- 9.5 All but three witnesses mention that they saw other people walking on the Land, and **Mr. Caplen** mentions seeing teenagers camping there. Only **Mr. Sollis**, who mentions seeing others walking dogs and picking blackberries, makes an additional comment. He says '*the track [presumably the public footpath] is used extensively by the retired community at Broadway Park as a flatter (no hill) path to town for shopping, etc.*'.

- 9.6 Where permission to use the Land is concerned, the majority of users stated that they had not sought it from the landowner. **Mrs. Duggan, Mrs. Shepherd** and **Mrs. Massey** stated that it was '*not applicable*', and **Mr. Howard, Mr. and Mrs. Stride** and **Yvonne Manning** did not answer the question. **Mr. and Mrs. Keen** said they did not require permission because they had been told by '*previous owners of the house that it was all right to go onto the land*', while **Mr. Kyte** and **Jessica Warman** said that there was no-one around to ask. **Mrs. Mott** reported that she had been advised by a previous owner of her house that the Land was '*generally used by everyone with direct access through their gardens*'. **Mr. and Mrs. Port** did not ask permission, as they watched others using the land and followed their example. No permission was '*sought or given*' according to **Mr. Sollis**. **Mr. Watkinson** did not ask for permission, but said that '*neighbours indicated that the then owner of Causeway Farm did not like people dog walking across the field because of cattle grazing, but had no objection to people using the land being claimed*'.
- 9.7 None of the witnesses report having been stopped while using the Land. **Mr. Silman** notes that he did not use the Land during a period of foot and mouth disease, but any period of statutory closure does not interrupt use. **Mr. and Mrs. Stride** and **Mrs. Williamson** did not answer the question. Others had been seen on the Land by either the owners of it, or their agent. **Mr. Cooper, Mrs. Crew, Mr. and Mrs. Dredge** and **Juliet Dredge** all comment that, despite this, they were not stopped from using the Land.
- 9.8 Users were asked on the forms whether they saw any fencing or other indication, such as notices, that they should not use the Land. **Mrs. Williamson** gave no answer to this question, and **A. Peyton-Bruhl** did not know whether any such features had been present on the Land. The majority of respondents say they did not see any fencing or notices, or were not aware of them. **Mr. and Mrs. Stride** said they had seen '*none whatsoever*'. **Jim** and **Joanne Dredge** comment that the land has never been fenced, that is '*nothing other than the usual fencing designed to keep horses in*'. However, **Mr. Morrison** said that '*some barbed wire fencing was erected along the line of the footpath about 7 or 8 years ago*' [that is in 2002 or 2003]. **Mr. Watkinson** agrees that contractors '*started erecting a barbed wire fence alongside the public footpath*', but this was not completed and was demolished within a short space of time. He does not say by whom, and puts this as happening in 2007 or 2008.

10. Landowner Evidence:

- 10.1 When this application was advertised on Form 45, it attracted three objections, from **Mr. G.G. Cumming**, of 106 The Causeway, from **Phillips Build and D.G. Phillips (Bosham) Limited**, and from **Mr. G. Goad**. The objectors were asked to provide support for their objections, and both Phillips Build and Mr. Goad provided substantial submissions, which are discussed below. The applicant was given an opportunity to

meet these objections, and the County Council has also asked questions of clarification of both the applicant and Mr. Goad. The material provided in answer to these questions, plus the original submissions, form the evidence that follows.

10.2 **Mr. Cumming** wrote that he objected to the roadway from The Causeway to the dwellings at 106 and 106A The Causeway being included in the application, since he has a right of way over the track, and his services run beneath it, for which he has shared responsibility with other householders. He was further concerned that, should the track be included in the 'common' land, the owner would have little interest in the maintenance of it, increasing the financial burden on the householders. For the avoidance of doubt, this application is not to register any of the Land as common, but to record any town or village green rights that may have been acquired over it.

10.3 Laytons Solicitors put forward a submission on behalf of **Phillips Build and D.G. Phillips (Bosham) Limited**. D.G. Phillips has a beneficial interest in the land known as Causeway Farm and made objection to the application on the following grounds:

- The evidence relied upon by the applicant is not sufficient
- Use of the Land was primarily for '*pedestrian passage*', not capable of conveying to a reasonable landowner the appearance of local inhabitants asserting a right to engage in lawful sports and pastimes on the Land
- For part, or parts, of the relevant period, the majority of the application site was fenced for the keeping of horses and ponies and/or signs were erected at Causeway Farm confirming the private nature of the land, so that at these times use was contentious, as therefore not 'as of right'
- The application is unclear as to whether the applicant is relying on Petersfield as a locality or neighbourhood within a locality, and the County Council was invited to direct the applicant to clarify this point
- On the available evidence, there has not been a significant number of the inhabitants of Petersfield using the land during the relevant 20-year period
- D.G. Phillips identified an issue of insufficient spread within the locality specified in the application to meet the statutory test
- Highway use of the public footpath passing across the land is not eligible as use contributing to the acquisition of village green rights and should be disregarded
- Any use taking place with the consent from time to time of the owners should be disregarded as ineligible

10.4 **Mr. Trevor Phillips**, secretary of **Phillips Build Limited** and director of **D.G. Phillips (Bosham) Limited** has also made a statement, in which the relevant points are:

- In 1998 he secured an agreement with Mr. Goad to promote the land at Causeway Farm, including the Land subject to the application, for development
- Has visited the Land from time to time, since 1998
- During that period, after discussions with Mr. Goad, arranged for 3 signs to be put on site confirming that there were no rights to go on that land other than on the public footpaths
- For part of the time since 1998, most of the land has been fenced off, along the western edge of the Hangers way – confirms he has seen the fence both upright and trodden down
- Has seen people using the Hangers Way public footpath, but has not seen anyone using the Land for formal or informal recreation until the village green application was submitted

10.5 A submission was made by **WYG Planning and Environment** on behalf **Mr. Geoffrey Goad**, a former registered owner as Trustee of Causeway Farm. Mr. Goad was the owner of the Land during the relevant period. The grounds of his objection are:

- The evidence exhibits high use, and local householders cutting across the Land on worn tracks, both of which do not qualify for the acquisition of village green rights
- There has been insufficient use by local inhabitants during the 20-year period to bring home to the landowner that a right to exercise lawful sports and pastimes was being asserted
- The applicant is relying on trivial user, since the local people did not suggest during the period that recreational rights exist on the Land, *'notwithstanding the opportunity given to local residents by the local residents by the local planning authority to object to various planning applications and planning policy allocations in the East Hampshire District Local Plan relating to sites which included the land'*
- That a significant number of the inhabitants of the civil parish of Petersfield have not used the land for lawful sports and pastimes, when regard is had to the size of the civil parish
- The users are not spread across the civil parish
- There is not a 20-year period of continuous use because from 1984 to 1992, the land was in the possession of a turf cutting company, and the taking of turf was incompatible with use for lawful sports and pastimes; from 1995 to date, the land was let for the grazing of animals, a use incompatible with lawful sports and pastimes; for a significant period in 2001, access was prohibited because of foot and mouth disease
- A significant part of such use that has taken place is not as of right, and should be discounted because it was carried out in disregard of notices posted on site which should have alerted users that their use was contentious

- This contention is reinforced, in that the use was by force, consequent on the breaking down of fences and fence posts erected on the land
- Vehicular access is incompatible with use of the land as village green, and ought to be excluded
- There is an existing public footpath across the land, so the land over which it runs is not capable of being registered as village green
- In conclusion, it was submitted that the evidence fails to demonstrate that the legal tests have been met

10.6 To substantiate these allegations, **Mr. Goad** submitted a personal statement outlining the history and management of the Land. The primary points from this statement are given in **Appendix 2**, attached to this report. A statement given by Martin Hawthorne (an employee of WYG), involved with Causeway Farm from 1988 to 2010 and since April 2012, confirms many of the points made by Mr. Goad in his statement. In addition, Mr. Hawthorne puts forward the following points:

- He suggested in 2003 that fences and notices should be put up on Causeway Farm because of trouble with trespassers (referred to in Mr. Goad's statement), and these were put up by Mr. Keet and Mr. Trevor Phillips, though these related mostly to land north of the public footpath, rather than the Land itself
- The fences and notices were subsequently damaged and the police called because horses had escaped as a result of the damage to the fences
- He has visited Causeway Farm on average once or twice a year, though more often when involved with planning and other matters, and believes he has not seen anyone other than on the public footpath, especially not indulging in lawful sports and pastimes
- He has seen broken barbed wire fencing when visited Farm in 2011, on the same line was fenced in 2003
- Some witnesses have access to the Land via gates in the boundary fences of their gardens and there are clear worn paths from these to the Hangers Way (Footpath 38)

11. Clarification of points of the Evidence:

11.1 After the evidence was submitted, the County Council felt it necessary to clarify some points of the evidence. These related particularly to how the Land was farmed and managed, the position of fences and notices, especially in relation to the escape of horses, the fencing of Petersfield Footpath 38 for the landowner. In relation to the applicant's submissions, evidence was requested to substantiate his statement that the Land was unfenced, that grazing is not automatically incompatible with village green use, and why user which is of a highway in nature should be included as admissible evidence. Answers were supplied by

both parties, and these are included in the discussion of the evidence, in relation to the legal tests required to be met, below.

12. Analysis of the Evidence:

12.1 Each limb of the legal test, set out above at paragraph 7.1, will be examined in turn, in relation to the available evidence. Only if each test is met can village green rights be recorded over the Land. If any test cannot be satisfied, then the application must be rejected.

12.1.2 **'A significant number...'** Use of land as of right for lawful sports and pastimes has to be by a significant number of inhabitants of the locality or neighbourhood within a locality. Guidance has been provided by the Courts as to whether use of the land has been by a 'significant number'. In *R (McAlpine) v Staffordshire County Council [2002] EWHC 76*, the Court said that 'significant' does not mean considerable or substantial. The number of people making use of the land has to be sufficient to indicate that it is in general use for informal recreation, rather than being used occasionally by individuals as trespassers. It follows that the user must be of such a volume, intensity or duration so as to come to the attention of the landowner, in order that he or she may, if he or she so wishes, take action to prevent or further permit the user. Unfortunately, as the Land includes a public footpath, it is not possible to tell from the information in the forms whether those people seen walking along the public footpath were doing so recreationally, which does qualify as a lawful sport or pastime, or to reach the shops for instance, which would be highway use, and therefore not qualify to meet the legal test for village green rights. The user form has a category 'people walking', and the majority of the witnesses have not qualified this or added any information. The comment made by **Mr. Sollis** in paragraph 8.5 about use of the track as a means of reaching the town, may suggest that some of the walking seen by witnesses may not be of a nature to contribute to the acquisition of village green rights. He also mentions that his own walking is for 'access to the town', and that walking should be discounted.

12.1.3 Every case depends on its facts. In this instance, 44 users have testified that they used the Land for a period of 40 years, with the greatest use concentrated in the relevant period of 1980 to 2010, the 20 years immediately before the submission of the application, but with user also recorded from 1960. Users say that they were seen by landowners or their agents, and not stopped from using the land, so their use was capable of coming to the attention of any reasonable landowner. **Mr. and Mrs. Keen** and **Mrs. Mott** had all been told by previous owners of their homes that it was all right to go on the land. **Mr. Hawthorne**, an agent of Mr. Goad, noted that there were clear worn tracks over the Land, from the back gardens of the properties fronting The Causeway, and **Mr. Goad** himself stated that he was aware of people on the footpath and causing damage to fences and

notices posted on or near the Land. **Phillips Build** contend that the Land was used primarily for highway uses, and **Mr. Trevor Phillips** arranged for 3 signs and fences to be put on site and in the vicinity of the land to inform the public that access might at times be prohibited when livestock was in the fields.

- 12.1.4 While the landowner denies that there has been a significant number of the inhabitants of the civil parish of Petersfield using the land for lawful sports and pastimes, relating this to the size of the parish, it would appear that this test has been met. The number of users from the parish indicate that they represent a significant number, in that both the landowner and his agents were aware of people using the Land, as well as Petersfield Footpath 38. They dispute that the user was for lawful sports and pastimes, but the volume of it was sufficient for them to go to the trouble of putting up notices and to attempt to fence off Footpath 38 to confine users to the footpath only, in 2003 to 2005, and again in 2007 and 2008.
- 12.1.5 It appears that the use that is contained in the evidence put forward does indicate that the use of the Land by the local people is not of a trivial and sporadic nature, but was of a volume and quality to come to the attention of the landowner and his agents. Therefore, this legal test has been satisfied.
- 12.2.1 ‘...of the inhabitants of any locality, or of any neighbourhood within a locality...’ The locality, or neighbourhood within a locality, cited for this application by the applicant, is the town of Petersfield. The landowners talk of the civil parish of Petersfield as the locality. These two areas are not the same, with the parish being the larger. A ‘locality’ and a ‘neighbourhood within a locality’ each have their own independent meaning in law. A locality is accepted as being an administrative district or area within legally significant boundaries, be they civil or ecclesiastical. A parish would suffice. A neighbourhood within a locality need not be an area known to law but should be a cohesive area of a meaningful description. A housing estate would suffice.
- 12.2.2 A map at **Appendix 3** shows the location of witnesses completing user forms for this application. This shows that most of the users reside along The Causeway, on both sides of the road, while a number come from the caravan site (Broadway Park) to the south of the Lane. A small number come from further afield and this is the kind of pattern that Judge Vos noted in his judgement in a law case¹, saying ‘*that is precisely what one would expect and would not...be an appropriate reason for rejecting registration*’. There is a suggestion by the landowners (D.G. Phillips and Mr. Goad) that there is an insufficient spread of users from across the locality or neighbourhood

¹ *Paddico (267) Limited v Kirklees Metropolitan Council, William John Magee and Thomas Michael Courtney Hardy on behalf of Clayton Fields Action Group* [2011], paragraph 106.

within the locality. In other words, user has not been by the inhabitants of the locality or neighbourhood in a locality generally, but rather by a small select group of people. The Courts have rejected the 'spread and fit' approach, most notably in *Leeds Group plc v Leeds City Council [2010] EWCA 1438* where the Court said that there was no requirement that recreational users should come predominantly from the locality or the neighbourhood within the locality. It is sufficient that a significant number do so and it does not matter if as many or more users come from further afield.

- 12.2.3 It is suggested that the requirement outlined in paragraph 12.2.1 above has been met by the present application.
- 12.3.1 '**...indulged as of right...**' The phrase 'as of right' means without stealth, force or permission. If any user falls within these three categories, it must be disregarded.
- 12.3.2 Use of the Land appears not to have been with stealth, in that the landowners and their agents were aware that people were using it. Some users living adjacent to the Land had put gates into their boundaries to facilitate access. This open use resulted in the landowners and their agents putting up signs denying a public right of way and informing that access might be prohibited, followed by two attempts to fence the public footpath off to prevent use of the Land.
- 12.3.3 The making of gates in the back boundaries of properties on The Causeway to gain access on to the Land can be argued to represent the use of force. Land Registry plans for these properties do not indicate whether the house-owners are responsible for the upkeep of the boundary fence with the Land. If the gates allowing access to the land were put into the boundaries without the agreement of the landowner, then any use from back gardens must be discounted as use by force, and this means that the use of 8 witnesses who went on to the land by these gates cannot contribute towards the acquisition of village green rights.
- 12.3.4 An owner of a property on The Causeway wrote to Mr. Goad about the actions of the applicant with regard to the applicant's boundary with the Land in 1996. This resulted in Mr. Haines writing to Mr. Goad to say that he had no intention of enclosing or encroaching '*with a view to future ownership rights*' of his land, which abutted land which had been purchased from Mr. Goad. Further, in 2001 Mr. Goad entered into an agreement with the occupant of a house on The Causeway to rent land adjoining his garden to grow vegetables. These actions indicate that Mr. Goad took an active personal interest in The Causeway boundary with the Land, was aware of what was perceived to be an encroachment problem in 1996, and took action to clarify the position as a landowner actively involved with his land and those attempting to use it.

- 12.3.5. Force does not mean solely acts such as climbing over fences and gates. Use can be forceful because it is contentious, and use continues despite the presence of fences and notices indicating that the public are not welcome to use land. Between the years 2003 and 2005, notices were put up indicating to the public that '*Access may at times be prohibited especially when horses and other livestock are in the fields*', consistent with the use of the Land for grazing, as documented by the tenancies exhibited by Mr. Goad. The applicant argues that grazing is not necessarily incompatible with the acquisition of village green rights, and cites the *R. v. Oxfordshire County Council and another, Ex parte Sunningwell Parish Council UKHL 28 [2000]* case in support of this. However, the hedged and fenced nature of the Land, and the problems Mr. Goad says he encountered with escaping horses when fences were vandalised in the same period, show that there was conflict. Mr. Goad has exhibited photographs of the damaged fences and police tape. Mr. Haines was asked, as a matter of clarification, to provide photographs to show that the Land had never been fenced, as he has asserted. Every photograph that he has provided shows boundaries marked by hedges and trees, as do the available aerial photographs and maps, which indicate boundaries marked by continuous lines, signifying solid boundaries. Officers are of the opinion that the Land has been hedged and fenced for many years, and is shown as such on all the editions of the Ordnance Survey County Series 1:2,500 mapping, dating from 1871. Two witnesses at paragraph 8.8 confirm that the land was fenced to keep horses in. It may be that the applicant recognises the word '*fenced*' as defined in a very narrow way that does not allow him to recognise that hedges do form solid boundaries that contain a piece of land. Such boundaries would be necessary on land let for the grazing of animals, as this land has been.
- 12.3.6 Mr. Goad used tenancies for grazing in which the tenants were asked to take '*all reasonable steps to prevent acts of trespass*' to prevent the acquisition of new rights of way '**or other easements**' [emphasis added] on the holding. He was thus taking an active interest in preventing the local inhabitants and wider public from acquiring fresh rights other than those already provided by Petersfield Footpath 38, and took steps through the tenancies to ensure this did not happen. It is accepted that these tenancy agreements are and were not public documents, so users of the Land are unlikely to be aware of their contents. However, it is suggested that these tenancies are evidence of how the landowner wished to deal with his land and prevent the acquisition of any rights which might adversely affect his use and enjoyment of the Land. Further, the effects of the implementation of such clauses by tenants may come to the attention of users, though they may not be aware that the impetus for them originates with the landowner. It is established law that an objector need not demonstrate that the use of the land was contentious throughout the whole 20-year period. One of the more recent cases on 'contentious use' said that use was contentious if the user knew the landowner

objected to the use of the land, but that use nevertheless continued – *Newham v Willison (1988) P&CR*. The issue is whether the landowner did enough to let the user know that his or her use was contentious.

12.3.7 Given that there have been notices indicating that the public would be excluded at times, clauses in tenancies indicating that tenants were to prevent the acquisition of new rights, fencing (evidence of which is exhibited in Mr. Goad's statement) and use from properties that could be seen as using force, it seems that use of the land was contentious and therefore not as of right. Therefore this legal test is not met.

12.4.1 '**...in lawful sports and pastimes...**' Lawful sports and pastimes are derived from custom, and include recreational walking (including dog walking), children playing, fruit picking, picnicking, wildlife observation, bird watching, kite flying and communal activities. These last are not, however, necessary for an application to succeed. By far the most popular activities on the Land have been walking, with and without dogs, wildlife observation, fruit picking and bird watching. The Land is crossed by a public highway, Footpath 38, which forms part of the Hangers Way. The public has a right to use this highway on foot. Such use is not solely limited to passage along the highway from A to B. It includes any reasonable use of the highway which does not restrict the passage of other users. Twenty six users (including **Commander Boulton, Mr. Silman, Mr. Howard, Mrs. Crew and Mrs. Manning**) have completed their user forms indicating that they used the land for walking. In order to determine whether this use is merely exercising the existing public right to use Petersfield Footpath 38 or amounts to a qualifying use for the purposes of this application requires closer analysis. Guidance from the Courts in *Oxfordshire County Council v Oxford City Council and another [2004] (EWHC 12 (Ch)) [Trap Grounds]* indicates that it is necessary to show that the general use of the land was for recreational purposes (which would be supportive of the application) and that such use cannot be attributed to use of a linear route (which would be supportive of the exercise of highway rights and not a qualifying use).

12.4.2 Walking for a purpose and recreational walking on a highway cannot contribute to the acquisition of village green rights, because this is the exercise of existing rights. Recreational walking over land that is not a highway falls within the definition of a lawful sport or pastime, whereas purposeful walking on a linear route (for instance to reach shops) does not. There are 4 instances where the witness admits that they have walked to reach shops or other specific place. One person mentions playing football, another an annual bonfire party and 3 others talking of socialising and meeting others, and these are the only activities of a communal nature carried out on the Land.

12.4.3 At paragraph 8.5 there is a discussion about what witnesses saw other people doing, and all of them saw other people walking. A

witness says there that he thought the retired community were using the track as a flatter route to the shops, so it does seem that a proportion of the users were walking with a purpose along the public footpath, and so it would appear that that proportion of walking over the Land should be discounted from contributing to the acquisition of village green rights in that it is in the nature of highway usage. The difficulty lies in knowing what proportion to exclude, since the form used to collect evidence does not allow for such a distinction to be made. However, it does appear that users were dog walking, a qualifying lawful sport or pastime, and carried out variety of other such qualifying sports and pastimes, so it appears that this test has been met.

12.5.1 '**...on the land...**' It does appear that the users have used the Land, which was readily accessible from The Causeway via Petersfield Footpath 38. This footpath runs on the eastern boundary of the Land, alongside a boundary consisting of a hedge with trees in it, passing out of the southern end of the Land over a footbridge. Aerial photographs of the Land show that it has had a hedged boundary on two sides, with individual boundary fences to the properties along The Causeway. This is consistent with use of the Land for grazing, as evidenced by the tenancies exhibited by Mr. Goad.

12.5.2 The photographs also show that the Land has a close cropped surface, and is indistinguishable from the adjoining fields, over which village green rights are not claimed. Both the Land and these fields appear to have been used for grazing over the period that is being scrutinised, and so it would seem that there are no areas shown in the photographs of the Land that indicate that there is an area of it that was too overgrown or otherwise unavailable to users. Therefore, it seems that this legal test has been met.

12.6.1 '**...for a period of at least 20 years**'. Providing that the other tests have been met, as long as users have been indulging in lawful sports and pastimes on the Land for at least 20 years, then village green rights are registerable over the Land. It is usual to examine the period leading up to the making of the application, which in this case was in 2010, thus giving a relevant period of 1990 to 2010. This is the period in which the heaviest use of the Land by the inhabitants is shown on the user evidence graph, at Appendix 1. There is use in every year over the 20-year period, by up to 43 users in the five years between 2005 and 2010. However, during this 20-year period, there were notices and fencing put up in both 2003 to 2005 and in 2007 and 2008 show that use in that period was contentious. Therefore, there is no 20-year period between 1990 and 2010 in which there has been use as of right of the Land which would qualify for registration of village green rights.

12.6.2 The High Court in *Oxfordshire County Council v Oxford City Council and another* [2004] case (EWHC 12 (Ch)) [Trap Grounds] has

considered whether other periods than the 20 years immediately before the making of the application can be considered. It appears that other periods can be taken into account, and there is evidence of use on the graph from 1960. However, there are smaller number of witnesses for this early period meaning that there would not have been a significant number of users to come to the attention of the landowner. Further, there is only evidence of the management of the Land from 1983 onwards, when Mr. Goad purchased Causeway Farm. This would give a period of 1983 to 2003. During this time, the land was used for the taking of turf, which would have left the land with a bare soil surface for part of the year, which Mr. Goad argues is incompatible with the exercise of lawful sports and pastimes. There was also a barbed wire fence along the public footpath, and notices already mentioned. Therefore, this evidence suggests that there is not any 20-year qualifying period where use has met all the legal tests.

13. Conclusions

- 13.1 The evidence put forward in this application indicates that 44 witnesses have completed user evidence forms to demonstrate use of Land known as Causeway Farm in Petersfield for lawful sports and pastimes, for a period of time in excess of 20 years. In order for village green rights to be registered over this Land, each element of the legal test set out in paragraph 7.1 must be met. If any one part of the test cannot be satisfied, then rights cannot be registered over the land.
- 13.2 The separate elements of the legal test have been discussed with reference to the evidence set forward by the applicant, and the evidence put forward in objection to the applicant by the landowner over the relevant period during which the rights must have been acquired. From this material, all of the tests have been met, apart from that which requires that use must be without stealth, force or permission.
- 13.3 The landowner took an active interest in the potential for encroachment from the boundaries with the properties along The Causeway, and took action if he thought there was a possibility of encroachment. He and his agents were also aware of the use of Land for sports and pastimes, and attempted to confine the public to Footpath 38 and stop them from straying over the rest of the Land. This was attempted by the use of notices (exhibited in evidence) and barbed wire fencing (also exhibited in evidence and acknowledged by some witnesses) in 2003 to 2005 and 2007 and 2008. These actions rendered use of the Land for lawful sports and pastimes contentious, thus disqualifying any use during these periods as falling under the heading of force. The landowner has also provided examples of tenancies for the Land, with clauses requiring tenants to prevent the acquisition of any new public rights or other easements, providing another instance of his interest in the prevention of the acquisition of rights over his land.

13.4 Officers of the commons registration authority consider that use of the Land has been not been 'as of right', in that the use of the Land was contentious and consequently does not qualify to meet the required legal test as set out in section 15 of the Commons Act 2006.

14. Recommendation

14.1 That, in connection with the application to register land known as Causeway Farm, Petersfield, as a town or village green, it is recommended that Members reject the application, for the reasons set out above.

CORPORATE OR LEGAL INFORMATION:**Links to the Corporate Strategy**

Hampshire safer and more secure for all:	yes/no
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	yes/no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	yes/no
Corporate Improvement plan link number (if appropriate):	
OR	
This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because the County Council, in its capacity as Commons Registration Authority, has a legal duty to decide whether or not the register of towns and village greens should be amended.	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document

File: VG251

Location

Countryside Access Team
Room 0.01
Castle Avenue
Winchester, SO23 8UL

IMPACT ASSESSMENTS:

1. Equalities Impact Assessment:

1.1

2. Impact on Crime and Disorder:

2.1

3. Climate Change:

- a) How does what is being proposed impact on our carbon footprint / energy consumption?

- b) How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts?

This report does not require impact assessments but, nevertheless, requires a decision because the County Council, in its capacity as Commons Registration Authority, has a legal duty to amend the register of town and village greens in the circumstances described in this report.