

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	10 February 2016
Title:	Application for registration of land known as Rectory Field in the parish of Headley as town or village green (Application No. VG 257)
Reference:	7309
Report From:	Director of Culture, Communities and Business Services

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1) Summary of decision area:

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 'Rectory Field', in Headley, as town or village green. The application was advertised and attracted four objections which, in two cases, were supported by substantial submissions. The applicant was given the opportunity to rebut the objections through an exchange of submissions. The available evidence has been analysed by officers and it is recommended that this application be refused for the reasons set out in the report.

2) Legal framework for the decision:

2.1. S.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) Purpose of report:

The purpose of this report is to assist the Committee in determining an application to register land in Headley parish as town or village green.

4) Applicant: Professor Michael Withers of Arford, Headley.

5) Landowners: Guildford Diocesan Board of Finance, represented by Charles Russell Speechlys LLP, with title absolute under title number SH 29512.

6) Description of the land (please refer to the map attached to this report):

6.1. The land which is the subject of the application ('the Land') is shown edged blue on the plan annexed to this report. It consists of approximately 8.476 acres (3.43 hectares) of land, is roughly rectangular in shape, and faces to Long Cross Hill, High Street and Crabtree Lane in the village of Headley. It abuts a number of properties in Oval Road. The land is comprised in the registered title number SH 29512.

7) The application:

7.1 The application form (Form 44) was received on 29th October, 2010, and was originally signed by Mr. John Smith. It was later re-submitted by Professor Withers on 13th January 2011. The form 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 (or neighbourhood in a locality) for lawful sports and pastimes for at least 20 years, and they continue so to use it. The application identified the parish of Headley as the locality or neighbourhood within the locality, in respect of which the application is made.

7.2 The application was accompanied by a map of the Land being claimed as town or village green, a map showing the locality, and 68 completed user evidence forms.

7.3 This report on the application for village green rights over Rectory Field should

be read in tandem with the report of the Director of Culture, Communities and Business Services, agenda item **, on an investigation into an application for a Definitive Map Modification Order to record public footpaths over this same field. Much of the evidence submitted on behalf of the freeholder covers both applications.

8) Issues to be decided:

- 8.1 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.

9) Background:

- 9.1 In 2011, an application was made to the County Council for a Definitive Map Modification Order (DMMO) to record a number of routes across Rectory Field, as public footpaths. The applicant, Mr. Peter Mackey, supplied 21 completed user evidence forms, with the rest of the evidence of highway use taken from the village green application user forms. The Modification Order has been investigated concurrently with the village green application.
- 9.2 The question of whether land can be both highway and subject to village green rights is unclear, and there is currently no case law to assist with this. In light of this, it was decided that both investigations should be progressed at the same time, to enable highway land to be distinguished from land used for lawful sports and pastimes. Therefore all the user evidence for both applications has been examined with a view to establishing as clearly as possible what use has been made of Rectory Field over the past four decades.
- 9.3 The collection of evidence for these two applications involves different forms, asking slightly differing questions, and the form for village green focuses on the whole of the land comprising Rectory Field, rather than on linear routes. The information on the rights of way user forms is of less use for the determination of the village green application, than the village green evidence is for the rights of way claim. Nevertheless, the Access Team’s officer investigating the rights of way claim has gleaned useful information from the village green forms, and used that information in the preparation of his parallel report to the Regulatory Committee.
- 9.4 One important aspect of the evidence collected for both reports is a series of aerial photographs of Rectory Field taken between 1971 and 2008 (to be found in that report’s Appendix 2), which show the state of cultivation (if any) of the field, worn routes and other features. A discussion of what these photographs show can be found at paragraphs 9.2.1 to 9.2.8 in the DMMO report, and in **Appendix 3** to this report. Other written evidence comprises a letter from Mr. Peter Ellis (the tenant prior to the current tenancy) to Ms Sharron Kay written in May 1999, submitted by the Diocesan Board in response to the village green application and DMMO application, and an email received from the former sheep farmer grazing his animals from 1985-1990 (this evidence and a discussion of it can be found in **Appendix 3** of this report and paragraphs 9.3.1

and 9.3.2 of the DMMO report). From this evidence it is clear that the tenants of the Diocese were aware that use was being made of Rectory Field by the public, and Mr. McDonald sets out the facts about the fencing used to keep the sheep in the field. Mr. Ellis was quite clear that there was at least a diagonal path through the centre of the field in 1999.

- 9.5 Officers have also received information in relation to both the rights of way and village green applications from the daughter of the late Mr. Ellis, and this is summarised in the DMMO report at paragraph 11, particularly 11.8.1 to 11.8.4 (and in **Appendix 3** of this report). This sets out, anecdotally, the history of the letting of Rectory Field, and states that Mr. Ellis was very much in favour of public access there, though he also made attempts at discouraging damaging behaviour in the field. It should be noted that no copies or evidence of any tenancy agreement containing any standard or specially written clauses dealing with the management of public access to Rectory Field since the 1950s has been submitted to officers, by any party, in response to either of these two applications. The closest reference to public use and how this was viewed is found in the letter written by Mr. Ellis to Ms Kay in 1999, as mentioned in the preceding paragraph. Many institutional landowners use such agreements to clarify whether they wish public rights of any kind to be acquired over the tenanted land, and to set out sanctions if the tenants do not adhere to their wishes.

10) User Evidence:

- 10.1 The applicant supplied 68 user forms setting out witness evidence of use of the Land in support of a claim for village green rights. Rectory Field lies at the heart of the parish of Headley. This is reflected in the number of different access points to the Land. Seventeen separate access points are listed in the forms, with witnesses commonly using more than one. These range from '*open access*', '*an opening*' and '*by entrance*' to various named points around the field, such as '*at Long Cross Hill*', '*by the Rectory*', '*from Crabtree Lane*' and '*at the church centre*'. By far the most popular access points were from Long Cross Hill, where 41 people got on to the field, by the church centre, where 21 people accessed the Land and by the Rectory, where 17 people got onto the Land.
- 10.2 The frequency of use has been described in the forms as varying from '*rarely*', '*occasionally*', '*sometimes*', to one or more times a month, to '*daily*' and '*almost daily*', to '*frequently*'. Twelve users accessed Rectory Field on a daily, or almost daily, basis, with 8 using the Land 1 to 3 times a week, and 7 more than 4 times a week (and 4 further witnesses using it '*several*' times a week). Two people completed village green user forms without actually having used the Land, and so their evidence must be discounted, while two others used it only rarely. A graph has been prepared showing the usage recorded in the forms, and this can be found at **Appendix 1**.
- 10.3 The user evidence graph at **Appendix 1** indicates the first use of the Land for lawful sports and pastimes by witnesses was in 1960, with 7 users in or from 1970. By 1980, there were 11 users, with 28 in 1990, and 45 by 2000. In 2010, when the relevant period for use ends, there were 62 people who filled in forms to demonstrate qualifying use. The number of users has increased

steadily over time, and the majority of use falls within the relevant period, during which twenty years' use as of right (one of the legal tests to be met) has to be demonstrated. The question of which users were using the Land for highway user only is discussed at paragraph 13.4.1 below.

10.4 Users were asked to specify the lawful sports and pastimes they had indulged in on the land. The range of activities falling into this description detailed in the forms is:

- Dog walking
- Recreational walking
- Exercise
- Picking blackberries
- Playing with children
- Painting/drawing
- Running/jogging
- Attending communal activities
- Tobogganing
- Cycling
- Leisure pursuits

By far the most popular of these was dog walking, with 36 witnesses reporting making such use of the Land, followed by recreational walking, with 24 witnesses recording this. Trailing far behind was picking blackberries, with 7 witnesses, exercise (4 witnesses), painting and drawing (3), running or jogging (2) and playing with children (2). **Mr. Hurst** cycled on the Land with his mountain bike, and **Mrs. Bailey** reported attending communal activities, while **Mr. Emuss** had gone tobogganing there. While there is no necessity for there to have been communally-organised activities on the Land, there are 13 references in the forms to community activities. **Mrs. Deeks** and **Mr. Edmead** refer to bonfire parties, and there are 7 specific references to attending fetes. However, **Mrs. Dodds**, **Mr. Gillies** and **Mrs. Schofield** refer to the Land in the context of *parking* for the fetes, and **Mr. Mackey** and **Mr. Saville** refer to it in the context of '*car parking*' or '*overflow parking for the village green*'.

10.5 All but one witness saw other people on Rectory Field while they were using it themselves. **Mr. Atkinson** mentions that some of these people were using the Land for access by foot between Arford and Headley Church, and he does discriminate this use from simply '*people walking*'. Nearly all witnesses refer to either dog walking or people walking, with 4 not mentioning the former, and only 5 the latter. It is not known where the witnesses refer to people walking on the Land whether they are making the same distinction that Mr. Atkinson made. There are worn routes over the Land where any walking might be categorised as highway use, and therefore not eligible for inclusion as a lawful sport or pastime. Also commonly seen were people walking, children playing blackberry picking, bird watching, drawing and painting, kite flying and bicycle riding. Witnesses were invited to tick boxes on the form offering a large range of activities. It should be borne in mind that this latter evidence is not of actual use; rather it is observation, and provides a context in which witness use took place.

- 10.6 Where permission to use the Land is concerned, the majority of users stated that they had not sought permission from the landowner. Seven witnesses gave no answer to this question and three people answered that it was '*not applicable*'. **Mrs. Schofield** reported that she had sought permission, '*for the fete*', and **Mr. and Mrs. Clifford**, and **Ms. Dumble** did not consider permission was needed as they '*thought it was a public footpath*'. Information gained from a telephone conversation with Mrs. Irwin-Brown (the daughter of the former tenant, the late Mr. Ellis) in March 2011 suggests that Mr. Ellis gave his permission for part of Rectory Field to be mowed and used for parking for the annual village fete, and that had been going on since about 2001.
- 10.7 Answers to the question on the user form regarding whether witnesses had ever been stopped from using the Land fell largely into two categories. Two witnesses gave no answer or said it was not applicable, and two people said they were stopped. **Mrs. Edmead** answered 'yes' but provided no other detail, while **Mr. Gareth Gray** said that he had been stopped '*in recent months, as the new occupier has installed a fence preventing local inhabitants from accessing the land*'. This form was completed in 2011, and this date tallies with other information provided by witnesses. Of the other answers, 26 users say that they were never stopped from using the Land, while 37 say that they were, but not until relatively recently. The event that appears to have prevented users from continuing their access to the Land has been pinpointed in the information contained in the forms as occurring between May and July 2011, when a fence was erected around the field by a tenant of the Guildford Diocesan Board of Finance. **Mr. Atkinson** comments that he has been '*prevented from even crossing the land*', and **Mrs. Deeks** recorded that a gate was put up, which **Mrs. McLean** confirms was padlocked. The fencing was of barbed wired, according to **Mr. Fisher**. **Mrs. Schofield** records that in 2010 the Land was '*ploughed up and access was not possible*', further commenting that notices were put up in 2011. **Gina Stretton** states that she was prevented from accessing the Land '*only between 1988 and 1990, because it was let out temporarily for sheep grazing*'.
- 10.8 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. Dowse** and **Lyn Lane** did not answer this question, and 7 users said that they saw no fencing, notices or any other indication that they should not be on the Land. Fifty eight witnesses report seeing fences, a 5-barred padlocked gate, and notices, around some or all of Rectory Field. **Mrs. Bagley** commented that the fencing had been '*reconsidered*', and that there was '*now a path round the edge*', which refers to a permissive path currently in place around the perimeter of the field. Various dates from March 2011 were put forward for the date of the comprehensive fencing and **Mr. Fisher** says that a 'Keep Out' notice was put in place on 26th May 2011. **Mr. Farmer** refers to the fences appearing in 2011, and a notice reading '*Private no public right of way*'. What does emerge from the answers to the question about fencing and notices is that there were two earlier periods when some fencing was also in place. Six witnesses refer to fencing on Rectory Field around 1990, for the purpose of containing grazing sheep. It is mentioned by **Mr. Evans**, who calls it a sheep field, and **Mrs. Moore** said part of the field was '*fenced and gated for sheep*'. **Mr. Saville** says that a part of Rectory Field was '*always fenced*', and he may

here be referring to the southern half, which was fenced from 1999 onwards. This was described by **Mr. Robin Hall** as a '*hay field for donkeys*' from 2003, and **Mrs. Hall** refers to a donkey field, fenced in 2001. **Mr. Emuss** refers to there being a donkey field '*years ago*', and **Mrs. Gamble** said that one third of Rectory Field had been fenced off '*15 years ago*'. **Mr. and Mrs. Howard-Duff** state that this part of the field had been a '*donkey field for years*, while **Mr. Jackson** said that the southern half had been fenced off for many years. Taken as a whole, it seems that witnesses are in accord that the fencing that was put up on the southern half of Rectory field during the relevant 20-year period during which qualifying use as of right use of the Land for lawful sports and pastimes must be demonstrated, was put in place in the middle months of 2011.

11. Landowner Evidence:

11.1 When this application was advertised on Form 45 on 6th March 2015, it attracted four objections, from **Charles Russell Speechlys LLP** on behalf of **The Guildford Diocesan Board of Finance**, **Mr. Andrew Luff**, a tenant of the Diocesan Board, **Mrs. A. Roffe**, a resident of Headley and **Mr. and Mrs. Whittaker**, residents of a property near the Land in Headley. The objectors were asked to provide support for their objections, and The Diocesan Board and Mr. Luff provided substantial submissions, summaries of which are set out below. The two other objections consisted of letters. The applicant was given an opportunity to meet these objections, and the material resulting from this process form the evidence that follows.

11.2 Charles Russell Speechlys put forward a submission on behalf of **The Diocesan Board**. The Diocesan Board is the freeholder of Rectory Field, and made objection to the application on several grounds:

- That the Land was let on tenancy to J. Ellis and Sons (Bordon) in the early 1950s, including the entirety of Rectory Field
- Part of Land was farmed pursuant to a tenancy agreement until 2005, and the Land was 'agricultural land' under section 1(4) of the Agricultural Holding Act 1966
- The Land used for wheat or barley growing during first 10 years of tenancy
- This was followed by a market gardening business growing potatoes, which ceased in the 1970s, and fodder maize was grown on part of the field until 2005 – photographs of this have been provided, including one dating from June 1999
- The land was ploughed after 2005 and left fallow
- Part of the field was used for grazing animals and the grass was topped each year
- The Land has been used intermittently since at least 1988 for sheep grazing
- The applicant alleges that the whole area was fenced off in 1988 for keeping sheep, but these removed in July 1990, and two gates were removed before October 2010
- Sheep were also grazed for at least 2 months in 1995, substantiated by information from Mrs. Whittaker – the field was fenced and had a locked gate, meaning that any entry was by force
- 2.5 acres of the southern half of the Land was sublet by Mr. Ellis to a tenant, Mrs. Kay, from May 1999

- This land has been entirely fenced to allow the grazing of two donkeys and a number of chickens
- Mrs. Kay remains a sub-tenant and the Land remains fenced – photographs have been provided
- The tenancy granted to Ellis and Sons was surrendered in a Deed of Surrender dated 7th December 2010, and Rectory Field was let to Mr. Andrew Luff from May 2011, who has re-fenced the entirety of the field, not already fenced by Mrs. Kay
- Mr. Luff has created a permissive path round the area he has fenced
- **Appendix 2** attached to this report sets out the arguments of the Diocese relating to the legal tests in greater detail

11.3 The current tenant of Rectory Field, **Mr. Andrew Luff** has submitted his own arguments against the registration of village green rights over Rectory Field, as follows:

- Rectory Field has only been used for agriculture purposes, namely grazing sheep, hay, cereal and maize cropping
- application refers to maize being grown on an area where Mr. Luff had maize growing and provides photographic evidence from 1999 showing no footpath
- questions witness evidence that they walked through field when it was being used for growing crops
- asserts that people walking with dogs off the leash was not allowed or done as of right
- Mr. Luff says the footpaths were only present because of '*criminal damage*' caused by the trampling of crops
- members of the Ellis family who were the previous tenants over a period of 60 years stopped anyone they saw walking across the field
- questions witness evidence that all parts of the field have been walked, when part has been leased with no public access since June 1999
- has not found any evidence of public use other than with permission since 1945
- occasional use for car parking for village fete every two years and access on any other occasion with permission of the then tenant
- when field no longer used for grazing seep, fence and gate kept in place and taken down some years later – has photographic evidence to show it still rolled up in field
- there are no gaps in the hedge, apart from corner marked on application map, where original boundary fence pulled down
- the field was ploughed in preparation for cropping
- there is a village green nearby, and no need for the land to be registered as village green because it is agricultural land
- the field was fenced by Mr. Luff as the Diocesan tenant and, on their instructions, a permissive path put round the field, where there is room for dogs to be let loose
- raises the question of who would maintain the field if it were to be a village green, resulting in an overgrown area of waste land
- if registered as a village green, could not be used as a car park for activities held on existing village green
- only inhabitants of Headley would be allowed to walk on the land if it is registered as village green

- Mr. Luff provides a number of photographs and other material relating to Rectory Field

11.4 **Mrs Roffe** has lived in the village for almost 40 years, close to Rectory Field and wrote to make the following observations:

- has seen sheep, and donkey and chickens on part of the field over the years
- does not recall seeing people engaging in lawful sports and pastimes on the Land
- believes part of the field has been used on occasion, and with permission, for parking for the village fetes
- has seen people using the field as a short-cut, and does not see how this type of use could '*constitute indulging in a lawful sport or pastime*'
- there is already a village green in Headley
- map with the application shows the whole field as having been used by witnesses, whereas the southern half has been fenced for several years, and has not been used for lawful sports and pastimes

11.5 **Mr. and Mrs. Whittaker**, who live near Rectory Field state:

- the field was used to graze sheep in 1995, and was later used for haymaking
- in 1999 Miss Kay and Mr. Catton leased half of the field, after which it was fenced
- at no time in the last 20 years has anyone indulged in lawful sports and pastimes on this parcel of land
- raises issue of maintenance of any new village green

12. Response to objections to advertisement of application:

12.1 The County Council, as the Commons Registration Authority, is not able to reject a village green application without first allowing the applicant to meet any arguments put forward in submissions in response to the advertisement of the application on Form 45. The applicant, **Professor Michael Withers**, submitted his response in July 2015, and it is the relevant material can be summarised as follows:

Value of Field:

- Rectory Field is considered as the area in the centre of the village where the approximately 800 dogs in Headley can run free without being considered as a nuisance, since they are not welcome on the existing village green
- asserts that Diocesan estimate of number of dog walkers far too low – potential witnesses only using the main diagonal path over the field were directed to the parallel application for a public footpath on that route
- witnesses almost all live in the centre of the village – Diocese quotes a total population of the parish of 5,500, while there are 800 dwellings in the central area and a population of 2,000
- percentages quoted by Diocese of limited evidential value
- there is no requirement for any witness to have used the Land for a full 20 years, and field was fenced after qualifying period ended
- application was acknowledged as valid by the Commons Registration Authority, within the two-year grace period

Use of Field:

- farmer fenced and gated whole field for sheep in 1988, until 31st July 1990 – this is when qualifying period begins
- farmer left Headley on 24th October 1990 (not 2010 as suggested) and took field gates away – corroborated in submission
- no evidence of any sheep being reintroduced in 1995 as has been suggested, or in any year post 1990 – appears landlord and tenant did not know who owned sheep or where they came from
- contends that small patches of maize sown up to 1988 ‘*unfenced and avoiding the well-trodden footpaths*’ as reported by Sharron Kay, and crops sometimes overgrown with weeds and not harvested
- two activities of dog walking and maize cultivation continued in parallel without detriment to each other

Witness Statements – General:

- Mr. Luff did not have a tenancy on the field during the qualifying period

13. Analysis of the Evidence:

13.1 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.

13.1.1 ‘**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 in 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. This means that the use of the application land was not trivial, or sporadic, but of a nature that would indicate to that the users were asserting a right over the land.

13.1.2 Every case depends on its facts. In this instance, on the face of it 68 users have testified that they used the Land in the required way for a period of 50 years, with the greatest use concentrated in the period 1990 to 2010, the 20 years immediately before the submission of the application, but with user also recorded from 1960. Only 6 of the witnesses indicated that they did not know who the owner of the Land is, and most of them knew who occupied the Land. Some people did admit to being seen while on the Land, and **Mrs. Bagley** reported that the owner had explained the situation to her in 2011. **Mr. Dowdeswell** was told by the tenant Mr. Luff that the land would be fenced and he would not be able to walk there. **Mr. Fisher** was told, when on the Land, that it was being fenced to grow wheat and to stop people walking there, though he gives no details as to who told him this and when. **Mr. Alan Hall** says he was seen on the Land, but nothing was said to him and **Mrs. Marjorie Hall** stated that she had been seen there, but did not answer the question

about what was said to her, if anything. One witness, **Mr. Leigh**, commented that the landowner, the Diocese of Guildford, were '*not there, so cannot see users*'.

13.1.3 The Diocesan Board, using various statistics denies that there has been a significant number of the inhabitants of the parish of Headley using Rectory Field in a manner that would give rise to the acquisition of village green rights, or, by implication, come to the attention of the landowner. However, it is clear from the user evidence supporting the application that the majority of users were aware of the identity of the landowner and of its tenants. Some users say that they were seen using the Land, but were not stopped, though a very small number were told that there would be fencing which did, in fact, prevent further access. Evidence submitted in response to the advertisement of this application by the Diocesan Board indicates that the tenants farming Rectory Field were very much aware of how the land was being used by inhabitants of the parish. From the evidence referred to in paragraph 9.4 above, it appears that Mr. Ellis was upset by people destroying crops and asked them politely to walk around the edge of the field to avoid doing this. It is not known whether he did this on instruction of the freeholder, the Diocesan Board – no evidence, written or otherwise, has been put forward by any party that any explicit instructions relating to the management (or acquisition) of public rights were given to tenants.

13.1.4 Taking into account the evidence from the aerial photography of Rectory Field over a sustained period showing worn tracks, it appears that the use of the Land by the local people was not of a trivial or sporadic nature, but was of a volume and quality to come to the attention of the landowner and its agents. Therefore, this legal test has been satisfied.

13.2.1 '**...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 parish of Headley. A locality is accepted as being an administrative district or area within legal significant boundaries, be they civil or ecclesiastical. A parish would suffice to serve this purpose.

13.2.2 A map at **Appendix 4** (Plan 1 and Plan 2 at different scales) shows the home locations of witnesses completing user forms for this application. This map shows that most of the users reside in the centre of the village of Headley, with a small number coming from further afield. This is the kind of pattern that Judge Vos noted in his judgement on a law case¹, saying '*that is precisely what one would expect and would not...be an appropriate reason for rejecting registration*'. The Diocese reserves the right to address the geographical spread of the users, but 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.

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.

13.2.3 It is suggested that the requirement outlined in paragraph 13.2.1 above has been met by the present application.

13.3.1 ‘...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.

13.3.2 Use of the Land appears not to have been with stealth, in that the landowners and their tenants and agents were aware that people were using it. This is made clear in the letter sent by Mr. Ellis to Mrs. Kay in May 1999 (see **Appendix 3**), when he says ‘*The public we are all concerned about*’, commenting that the path through the centre and to the Holly Bush had, at that time, been reduced by ‘*ploughing and cutting*’. He recognised Mrs. Kay’s need to fence in her animals and thought ‘*the walking public will adopt a re-routing of their walks*’. This turned out to be the case, as the aerial photography shows.

13.3.3 Force does not mean just 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 the land. Only five people mention the presence of notices anywhere on Rectory Field. Two users said the notice read ‘*Keep Out*’, while another said ‘*Private – No public right of way*’. Four of these reports either say explicitly that the notices were put up in 2011 or were ‘*now*’ in place. This would suggest that any notices on Rectory Field were associated with the change in tenant to J.R. Luff, and fall outside the relevant 20 year period of 1990 to 2010. From this, it does appear that there were no notices on Rectory Field during the 20-year period suggesting that the public should not go on the Land.

13.3.4 Evidence has been put forward that Rectory Field was fenced for grazing sheep until 1990, and it has been accepted by 6 witnesses that this fencing was in place (see paragraph 10.8). It also appears to have been accepted that the southern half of the field was fenced off for donkeys in 1999, in accordance with the subletting of it to Mrs. Kay. All the other reports are that the fencing that stopped users from walking or carrying out any other activities on Rectory Field occurred with the fencing put up by Mr. Luff in May or June 2011. From the discussion of this same issue in relation to the rights of way claim for routes in Rectory Field of the separate report (paragraph 13.6, see **Appendix 3**), none of the users stated that they had to climb or jump over anything to gain access to the Land. Further, it seems from the officer’s investigation of the evidence for the rights of way claim, which included taking signed statements from witnesses, that where there was fencing between 1985 and 1990 and from 1999, that fencing was respected by local people, and there were no reports of vandalism or entry by force. Therefore, it seems that any use by the public of the Land, either for village green or rights of way use, was not contentious.

13.3.5 The report on the rights of way application discusses the issue of grazing for sheep on Rectory Field in paragraph 13.9.5 to 13.9.7 (see **Appendix 3**). The evidence regarding sheep grazed for a few months in 1995 is discussed in the first of these two paragraphs, and it is considered there by the officer that the evidence provided by the landowner is not sufficient to negate the proffered

user evidence. There is nothing to suggest that the owner of the sheep was doing anything other than to put up a fence to keep the sheep from straying into the surrounding area, rather than putting up fencing aimed at keeping the public out so that public rights could not be acquired over the land, though this might have been a useful benefit of having the fencing there. The change in tenancy to J.R. Luff in 2011, and Mr. Andrew Luff's fencing of the Land in such a way as to deny public access to it is in contrast to Mr. Ellis management of the land in relation to such matters. Further, the provision of a permissive route around the fenced area indicated to all the users that they were not to use the area inside the fence, and this has apparently been respected by the local inhabitants. The officer's comments on the lack of consent by the Diocese to dedicate public rights over the Land, and the absence of a formal agreement covering the Ellis tenancy, where such instructions and any penalty for breaching them could have been included, gives rise to a reasonable assumption that there was none. No copy of any formal tenancy agreement for the Ellis tenancy has been provided by the Board. Therefore, it appears that the fencing around Rectory Field prior to Mr. Luff's tenancy cannot be taken, on face value, to be an expression by the Diocesan Board of an intention not to dedicate public rights of any kind.

13.3.6 Most of the witnesses answered that they had not sought permission to use the Land. Six people provided no answer, three answered '*not applicable*', one person asked permission only for the village fete, and others considered that they considered they were using a public footpath. Some witnesses imply that some of their use of the Land was for attending the village fete, suggesting that the fete was held on the Land itself, but Rectory Field apparently was used only in the sense that it provided parking for that event (see paragraph 10.6 above). The Diocesan Board contend that this use is with permission. However, this is not relevant, as this use is not a lawful sport or pastime, like attending a communal activity such as a village fete.

13.3.7 From this evidence, it appears that this legal test has been met, for the northern half of Rectory Field. It has not been met on the southern half, which has been securely fenced from 1999.

13.4.1 '**...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 Rectory Field have been walking, with and without dogs, and wild fruit picking. In setting out their answers to activities carried out on the Land, seven witnesses refer to attending the village fete, but three actually reinforce the information that the land was used for *parking* for the fetes, and offer support for the information given in paragraph 13.3.5 above. Further, 44 of the 68 users describe either the sole purpose of their walking as being to reach the shops and other facilities in the absence of a footway by the side of the road, or attribute some of their exercise of lawful sports and pastimes to this purpose. The highest proportion of the use of the Land can therefore be attributed to walking of a highway nature, that is as a short cut or for purposeful walking, as opposed to recreational walking. Guidance from the Courts in *Oxfordshire County Council*

v Oxford City Council and another [2004] (EWHC 12 (Cn)) [Trap Grounds] indicates that it is necessary to show that the general use of the land was for recreational purposes (which would be support 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). 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 or a pub, or the church) does not. Therefore, any such highway use must be disregarded for the purposes of acquiring village green rights, though it can be considered for the parallel rights of way application.

13.4.2 At paragraph 10.5, there is a discussion about what witnesses saw other people doing, and the majority of them saw dog walking, people walking, children playing, and wild berry picking. Since answering this question was a 'ticking' exercise on the form, and from the evidence of the aerial photography of Rectory Field over the years of some well-worn paths over the land, it is not possible to tell how much of the walking carried on by other people is also of a highway nature. The difficulty lies in knowing what proportion of this use to exclude, since the form used to collect evidence does not allow for such a distinction to be made. However, it does appear that a lot of users were dog walking, a qualifying lawful sport or pastime, though set against this is the admission that some users who completed forms were dog walking on the paths, which might be highway use. In any case, all the use carried out by other people is anecdotal, and has less weight. When the 19 users who do not report carrying out any lawful sports or pastimes are removed from the qualifying evidence, the case for village green rights is weakened but it is felt by officers, on balance, with other direct evidence, of a variety of uses not involving walking, this test is met.

13.5.1 '**...on the land...**' Because of the way that the Land has been used, it is clear that the southern half has been fenced since 1999, and therefore is ineligible to be considered for the registration of village green rights because there has not been sufficient use of it by local inhabitants exercising lawful sports and pastimes in the period 1990 to 2010. This leaves the northern half of the field (north of A to D on the rights of way plan accompanying the parallel report, see **Appendix 3**) for consideration.

13.5.2 The Diocesan Board has provided information about the cropping of the land, as has the present tenant, Mr. Luff, to show that crops have been there, and the letter from Mr. Ellis to Mrs. Kay (see paragraph 13.3.2 above) confirms that, in 1999 at least, the land had been ploughed, reducing the width of the diagonal path, and rendering the surface of the field difficult to use for activities such as children playing. Mr. Ellis would be upset when people destroyed crops as they re-established the diagonal and other paths, and asked them to walk on the perimeter of the field instead. There are photographs of maize growing in the field, and it seems that users would trample down the routes they had been using while the crop was still young to re-establish the diagonal path. This is confirmed by the available aerial photography.

13.5.3 The applicant was given the opportunity to answer the submissions made by

the Diocesan Board and the current tenant and, on the question of how the field was used for lawful sports and pastimes, says that *'dog walking and maize cultivation continued in parallel without detriment to each other'*. In the context of the legal tests for the acquisition of village green rights, this does not appear to be use of the whole of the land, or even any extent of the land, but rather the use of the well-worn paths, which may, or may not, contribute to the acquisition of public highway rights.

13.5.4 Because there is little evidence in the material submitted with this application that the whole of the land was in use for lawful sports and pastimes, it is considered that this legal test, as applied to the remaining part of Rectory Field, is not met.

13.6.1 **'...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 pastime on the Land for at least 20 years then village green rights are registerable over that Land. It is usual to examine the period leading up to the making of the application, which in this case of 2010, 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 this 20-year period, with 63 users in 2010. Because of the uncertainty over the uncorroborated account of fencing for sheep in 1995, it is considered that this test has been met. For ease of reference before turning to the conclusions of this report, a table giving the legal tests and whether they have been met, and why, is set out below:

Legal Test	Met?
'A significant number...'	Yes – <ul style="list-style-type: none"> ● 68 user forms ● use from 1960 ● most users in relevant 20-year period ● most users knew who landowner is ● some seen on the land but not stopped ● aerial photographs show worn tracks
'...of the inhabitants of any locality, or of any neighbourhood within a locality...'	Yes – <ul style="list-style-type: none"> ● applicant cites the parish of Headley ● a parish serves this purpose ● majority of users live in centre of parish ● case law suggests this pattern is what is expect of village green use
'...indulged as of right...'	Yes – <ul style="list-style-type: none"> ● use open and without permission ● use not contentious – notices appeared in 2011, outside relevant period ● landowner and tenants aware that land being used by the public ● no evidence of tenancy agreement requiring prevention of acquisition of public rights
Legal Test	Met?
'...in lawful sports and pastimes...'	Yes – <ul style="list-style-type: none"> ● pastimes said to have been indulged in fall

	<p>into acceptable categories</p> <ul style="list-style-type: none"> ● mostly recreational/dog walking ● some highway use reported on forms ● however, enough exercise of lawful sports and pastimes to qualify
‘...on the land...’	<p>No –</p> <ul style="list-style-type: none"> ● southern half of land fenced off in 1999, so not enough use ● evidence of ploughing and cropping with linear paths open ● applicant admits that dog walking and maize growing continued in parallel ● little evidence that the whole of the field was used in the right way
‘...for a period of at least 20 years...’	<p>Yes –</p> <ul style="list-style-type: none"> ● from the user evidence graph, the 20 years prior to the application show heaviest use ● no clear evidence of any interruption to use in that 20-year period

14. Comments by applicant and landowner:

14.1 The applicant says that *‘this material does not fully represent the extent of use of the field. It is probably true that the walkers kept mostly to the worn paths shown on successive photographs and respected any patches of maize that were growing, but walkers were able to roam anywhere on the field. Most walkers valued the opportunity to let their dogs off the lead and the dogs were able to run everywhere – all but the largest dogs would be able to run between any maize stalks without causing damage. Mrs. Irwin-Brown has said that the soil was poor and Sharron Kay has given evidence that the maize was unfenced and sometimes overgrown with weeds and not harvested. It is submitted that the whole of the land was in use for lawful sports and pastimes.’*

14.2 The Guildford Diocesan Board of Finance has made comments on this report, which can be found at **Appendix 4** of this report.

14.3 The current tenant of Rectory Field, Mr. Andrew Luff, has made the following comment. He says that the village fete *‘has never been held on field. Only used as a car park with the permission of the landlord/tenant’*.

15. Conclusions:

15.1 The evidence put forward in this application indicates that 68 witnesses have completed user evidence forms to demonstrate use of Land known as Rectory Field in Headley for lawful sports and pastimes, for a period of time of at least 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.

15.2 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 application by the landowner, relating to the relevant period during which the rights must have been acquired. From this material, all the tests have been met, apart from that which requires that the use must have been over the bulk of the land, rather than on only part of the land, or on linear routes.

15.3 The Diocese contends that, while the Land has been the subject of tenancies, there can be no claim against it. It appears that the letting of Rectory Field happened in an almost accidental fashion, when Ellis and Sons were asked to assist the then Canon, and no tenancy agreement has been submitted by the landowner in submission to indicate that any tenant has received specific instructions as to how Rectory Field should be managed for public access. This covers the period from the 1950s. However, in the same submission it states that landowners and tenants were exerting control over the land during the relevant period, but this control did not appear to include the total exclusion of the public until 2011, when Mr. Luff fenced off the land and put in a permissive alternative footpath round the field. It seems that the local inhabitants have respected the fencing and exclusion since it took place.

15.4 The aerial photography of Rectory Field does indicate that it carried several worn paths over it, in the period since the early 1970s. This would indicate that the local inhabitants were in the habit of using linear routes over the Land, particularly when there were crops growing there. There is evidence that it was ploughed and this affected the width of the diagonal route across the field. A ploughed service is not compatible with the exercise of lawful sports and pastimes, and the applicant has said that dog walking and maize growing were carried on in parallel.

15.5 Therefore, officers of the registration authority consider that use of the Land has not been of the whole, or any substantial part, of its extent. Since this legal test has not been met, the Land does not qualify to be registered as a town or village green under section 15 of the Commons Act 2006.

16. Recommendation:

16.1 That the application to register land shown edged blue on the attached plan as a town or village green be refused.

CORPORATE AND LEGAL INFORMATION ABOUT THIS DECISION:

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.)

(Quote list of documents here: e.g. list the relevant letters, memos, etc. and their location)

<u>Document</u>	<u>Location</u>
File: VG 257	Countryside Access Team Room 0.01 Castle Avenue Winchester SO23 8UL

IMPACT ASSESSMENTS:

1. Equality Duty

1.1. The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, gender and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Due regard in this context involves having due regard in particular to:

- a) The need to remove or minimise disadvantages suffered by persons sharing a relevant characteristic connected to that characteristic;
- b) Take steps to meet the needs of persons sharing a relevant protected characteristic different from the needs of persons who do not share it;
- c) Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity which participation by such persons is disproportionately low.

1.2. Equalities Impact Assessment:

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.