

HAMPSHIRE COUNTY COUNCIL**Decision Report**

Decision Maker:	Regulatory Committee
Date of Decision:	11 April 2011
Title:	Application for registration of land lying to the south east of Tichborne Way and between the former railway spur accessing the armaments depot and the disused Bedenham railway line in Gosport as town or village green (Application No. TVG 248)
Reference:	2729
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 for the purpose of exercising functions under the Commons Act 2006. An application was made by Mrs Janet Lidgley (“the Applicant”) of 6 The Chine, Holbrook, Gosport for the registration of land lying to the south east of Tichborne Way and between the former railway spur accessing the armaments depot and the disused Bedenham railway line in Gosport as town or village green as shown edged red on the attached Plan (Appendix 1).

The Landowner (Hampshire County Council) objected to the application.

1.2. On 11 February 2010, this Committee resolved that –
 “a non-statutory public inquiry be held and the inspector appointed to conduct the inquiry be asked to hear the evidence for and against the application and then to prepare a written report advising the Registration Authority whether to accede to or to reject the application”.

A copy of the Decision Report is attached as Appendix 2 for reference.

1.3. An Inspector (Mr V Chapman QC) was instructed to hold a non-statutory public inquiry and to prepare a Report for the Registration Authority. That inquiry was held and took place over 5 days in July 2010 and the Inspector has prepared his Report (“the Inspector’s Report”) which is dated 11 October 2010 and may be found at Appendix 3.

1.4. The Inspector’s recommendation to the Registration Authority is that the application be granted in part and refused in part. The Plan at Appendix 4 shows coloured green and yellow the area recommended for registration and coloured hatched brown and hatched yellow the area recommended for refusal.

The Inspector’s Report further contained several procedural recommendations which are discussed at paragraph 5.2 (below).

- 1.5. Following circulation of the Inspector’s Report to the parties to the inquiry, the Landowner took the opportunity to make further submissions. These further submissions are dated 12 November 2010 and are attached as Appendix 5. The Applicant chose to make submissions on the Landowner’s submissions and these are to found at Appendix 6, dated 15 December 2010.
- 1.6. As a result of these further submissions, Officers were faced with two opposing views on an issue of law upon which there is no decided case law. To assist the Committee in reaching a decision in this application, Officers instructed Ms Morag Ellis QC to advise on two specific issues. Her Advice (“the Advice”) is dated 4 February 2011 and attached at Appendix 7.
- 1.7. This Advice was circulated to the parties and the Applicant chose to make further submissions dated 18 March 2011 and are to be found at Appendix 8.
- 1.8. Having considered all the evidence; submissions and Advice provided by all parties, Officers recommend that -
 - 1.8.1. that the procedural recommendations set out in the Inspector’s Report and discussed below be accepted;
 - 1.8.2. that the application to register land lying to the south east of Tichborne Way and between the former railway spur accessing the armaments depot and the disused Bedenham railway line in Gosport as town or village green be refused.

2) Legal framework for the decision:

2.1. S.15 COMMONS ACT 2006

Registration of greens:

s.15(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.

s.15(3) This subsection applies where –

(a) a significant number of the inhabitants of any locality, or of any neighbourhood in 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 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).

s.15(6) In determining the period of 20 years referred to in subsection[...](3)(a)…, there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

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3) Background

- 3.1 The Decision Report to Committee (11 February 2010) sets out the background to this application and may be found at Appendix 2.
- 3.2 The Report considers the evidence; advice; representations and submissions from all parties and presents a recommendation to Members for determination of this application.

4) Chronology

Event	Date	Appendix Number
Non-statutory public inquiry	July 2010	
Inspector's Report	11 October 2010	3
Further Submissions from Landowner	12 November 2010	5
Response by Applicant	15 December 2010	6
Advice from Ms Ellis QC	4 February 2011	7
Further Submissions from Applicant	18 March 2011	8

5) The Inspector's Report

- 5.1 The Inspector's Report of 11 October 2010 sets out in detail the application; the applicable law; and a discussion of the evidence received at the inquiry. Members are requested to read all the Appendices for completeness and are welcome to view the files on this matter, should they so wish.
- 5.2 A number of procedural applications were dealt with at the inquiry and it is recommended at paragraph 108 of the Inspector's Report that the Registration Authority accedes to the following procedural applications –
- i) the Applicant's application to amend her application to rely on user by the inhabitants of the neighbourhood of Downside within the locality of the ecclesiastical parish of Rowner;
 - ii) an application by Mr Gerard Lidgley to be added as a co-applicant;
 - iii) an application by the Landowner (Hampshire County Council) to rely on an Amended Statement of Objection;

iv) an application by Gosport Borough Council to make a late objection to the application.

5.3 The substantive recommendations of the Inspector's Report are to be found at paragraphs 109 and 110.

5.4 Paragraph 109 recommends that the application should be rejected in respect of -

- i) an overgrown part of the Triangle; and
- ii) an area at the western end of the embankment.

Both these areas are shown coloured hatched yellow and hatched brown at Appendix 4. In so far as the overgrown part of the Triangle (hatched brown) is concerned, the Inspector advised that he was not satisfied that the area was used to a material extent for recreation and was not therefore in general for recreation by the local community. The overgrown part of the Triangle was sufficiently large and distinct to be treated simply as a subsidiary part of the larger area used for recreation.

So far as the area at the western end of the embankment (hatched yellow) is concerned, the Inspector advised that it was too steep and overgrown to be used to any material extent for recreation.

5.5 At paragraph 110, the Inspector recommends that the Registration Authority should accede to the application to register the remainder of the land as new town or village green. The whole of the area recommended for registration by the Inspector is shown on Appendix 4 coloured green and yellow.

Again, the Inspector looked at this area in two parts. One part forms the eastern end of the embankment (coloured yellow). The second is the grassy part of the Triangle bounded by the embankment and the overgrown area of the Triangle (coloured green). In essence, he advised that these areas of land had been used in the requisite way by the requisite people in the requisite manner for the appropriate length of time. Accordingly, the recommendation in the Inspector's Report is for registration.

5.6 Much time was spent at the inquiry dealing with the 'holding powers' of Gosport Borough Council in respect of the land. This was, for both parties, an important issue as should it be shown that the land was 'held' in a particular way by Gosport Borough Council, then any use of the land by the public would be "by right" (for example, use was by virtue of a permission or other lawful authority) and not "as of right". Members will recall that in order for any user of land to qualify towards a claim for a town or village green, that user has to be "as of right". If user were therefore to be shown to be "by right", the application for registration would fail.

5.7 Members are referred to the contents of s4 Physical Training and Recreation Act 1937 ("the PTR") and s19 Local Government (Miscellaneous Provisions) Act 1976 at Appendix 9. The Inspector concludes at paragraph 99, and this has not been challenged, that Gosport Borough Council appropriated the land pursuant to s4 PTR in 1960. A change to the legislation brought about by s19 LG(MP)A 1976 provided that any land held pursuant to s4 PTR would now be held

pursuant to s19 LG(MP)A. This Act gave a discretionary power to local authorities to provide recreational facilities – see s19(1) LG(MP)A. The Inspector’s conclusion, again unchallenged, is that “recreational facilities” are not defined in the Act and that a grassy area suitable for public informal recreation is such a “facility”.

- 5.8 The Inspector concludes that the grassy area of the Triangle was, during the relevant 20 year period (1989 – 2009), a recreational facility made available to the public pursuant to s19 LG(MP)A. The issue, he concludes, is whether the public was using the grassy area pursuant to a statutory right or not. If use was *not* pursuant to a statutory right, then such user would be without permission (ie, “as of right”).
- 5.9 The Inspector’s Report concludes that whilst s19(2) LG(MP)A gives local authorities a discretion as to whom the recreational facilities should be made available and a discretion to charge for use of the facilities, the section does not give the public a legal right to use the land. In other words, members of the public using the Triangle were not exercising a legal right to use the land and their use therefore was not permissive.
- 5.10 Registration of the grassy area is therefore recommended in the Inspector’s Report as all the necessary elements in support of registration have been made out. However, submissions received from the Landowner as well as our own experience as a Registration Authority have prompted us to take further advice on this matter.

6) Landowner’s Further Submissions

- 6.1 Appendix 5 contains Further Submissions received from the Landowner following its receipt of the Inspector’s Report. These submissions urged the Registration Authority to accede to the procedural requests detailed in paragraph 5.2 (above) and to reject the application in accordance with paragraph 5.4 above. Further detailed submissions were made in respect of the land recommended for registration, seeking to persuade the Registration Authority to not go along with the Inspector’s recommendation.
- 6.2 Dealing with the eastern end of the embankment, the Inspector concluded that this land was ‘highway land’ as it forms part of the structure supporting the carriageway of Tichborne Way along which vehicles drive. The Landowner seeks to establish that such use of this area of land was compatible with its status as public highway and any use was therefore “by right” and not “as of right”. The argument being that if any such use was “by right” (ie, permitted use), the land cannot by definition be registered as town or village green.
- 6.3 Turning to the grassy area, the Landowner seeks to persuade the Registration Authority that any user was by virtue of a statutory right. It is argued that the appropriation to s4 PTRAs for recreational purposes in 1960; the statutory modifications wrought by the LG(MP)A; the fact that Gosport Borough Council made the land available to the public under s19 LG(MP)A; and the fact that the land was so used all support the view that use was not “as of right”, but was pursuant to a statutory right. The application for the grassy area of the Triangle could and should be refused on that basis.

6.4 It is perhaps worth commenting at this point that all the land the subject of this application was subject to the s4 appropriation in 1960 and, should Members, accede to the view expressed in paragraph 6.3, then the application for registration of the whole of the Triangle might be rejected on similar grounds.

7) Applicant's Response

7.1 The Applicant chose to respond to these submissions and her response (dated 15 December 2010) is to be found at Appendix 6.

7.2 The Response urges at paragraph 8 the Registration Authority to return to the Inspector to ask whether he considers it necessary to advise further and/or for a second opinion to be obtained. In conclusion, however, the Applicant urges that the Registration Authority follow the recommendations contained at section 10 of the Inspector's Report – "Conclusions and recommendations" – and summarised at paragraphs 5.2 to 5.5 (above).

7.3 The Response expands on the Applicant's submissions that user was "as of right" as opposed to "by right", aligning the Applicant with the Inspector's conclusions at paragraphs 25 and 99 of the Inspector's Report.

8) The Advice

8.1 Following receipt of the Landowner's Further Submissions and the Response by the Applicant, coupled with Officers understanding of the case, it was decided to approach alternative Counsel for an overview of the differing legal views. As already indicated, there is no direct case law specifically on the issue – see paragraph 25 of the Inspector's Report. Officers felt Members would be assisted by seeking the opinion of a barrister who has had no previous involvement in this application. Officers also considered it prudent to seek this advice, given the likelihood of any potential challenge to whatever decision is made by this Committee. Ms Ellis QC was so instructed. She was not instructed as an alternative Inspector – Mr Chapman having fulfilled the terms of his Instructions in that respect. Neither was she appointed in place of Mr Chapman. Ms Ellis was asked to advise the Registration Authority on the competing views on the "as of/by right" argument in light of the representations made by the parties and the fact that there is a lack of legal authority on the point. She was also asked to advise on the highway use point raised by the Landowner (see paragraph 6.2 above).

8.2 The Advice is dated 4 February 2011 and is to be found at Appendix 7.

8.3 Dealing with the eastern end of the embankment, the Advice concludes that this highway land should not be registered as new town or village green because of a lack of evidence of use. Officers were advised to seek clarification on this point from the Inspector as he had heard and reported upon the evidence received at the inquiry. Should Members wish for officers to pursue this particular point then Members may wish to defer a decision in accordance with option 2 (see paragraph 10.3) below. However, in light of the recommendation of this report, Officers believe that this point is academic and it has not been pursued.

8.4 The Advice also covered the user "as of/by right" issue in the light of the statutory holding power of s19 LG(MP)A. Counsel's advice is that the land was held under

a statutory provision which gave Gosport Borough Council discretionary powers, which were not exercised. The land was used by the public recreationally in a manner consistent with the statutory basis upon which it was held. Any use of the land by the public was consistent with and attributable to the statute and such user therefore was “by right” – see paragraph 2.15-18 of the Advice. Therefore, the application should be refused in respect of the entirety of the application land.

- 8.5 The Advice does re-iterate the point that this area of the law is untested and Ms Ellis is aware of Inspectors taking differing views at other non-statutory inquiries held through the country – see paragraph 2.18 of the Advice. Officers also recognise that this interpretation is contrary to Mr Chapman’s (the Inspector) who did hear the evidence at a public inquiry.
- 8.6 The Report from Mr Chapman QC contains recommendations. It is ultimately a matter for Members to decide whether to follow those recommendations. This question is, as has been stated already, untested and officers wished to test the conflicting views by obtaining an independent opinion from Counsel who had no previous involvement in this matter. Such a course of action is prudent, particularly here where an opinion was sought on a question of law arising out of agreed documents upon which detailed written submissions had been made. Counsel was not being asked to comment on oral evidence, which would have been quite improper. The Advice contains Ms Ellis’ opinion and is not binding on Members who may legitimately form the view that they will follow Mr Chapman’s recommendations as he had the benefit of hearing the evidence first-hand.

9) The Applicant’s Further Submissions

- 9.1 The Applicant has chosen to make Further Submissions upon receipt of the Advice. These cover three principal areas. First, that if the Registration authority follow the advice of Ms Ellis QC without reverting to Mr Chapman QC in the first instance, then any decision will be unlawful in the public law sense. Second, the Advice is plainly wrong in substantive law. Third, the Advice is based on wrong facts. The Registration Authority is urged to take the Inspector’s Report as the starting point for its determination process and to accept partial registration of the Triangle as the starting point for its determination. In any event, the Registration Authority is urged to refer the matter back to the Inspector before any decision is taken.
- 9.2 The first submission can be summarised in the following way. The Applicant opines that she has a legitimate expectation that this matter will be referred back to Mr Chapman QC, the Inspector, for his advice and opinion. Officers merely comment that the remit of the Inspector’s role has been detailed in paragraph 1.3 above. That role has been fulfilled. The public inquiry was held on a non-statutory basis for which there is no prescribed procedure and there is no reason why the Applicant should hold an expectation that matters will be referred back to the Inspector. In any event, the Registration Authority is at liberty to seek advice from whomsoever it wishes – on this occasion, there are strong conflicting views expressed by the parties and the Registration Authority wished to seek further advice on the competing views.
- 9.3 The second submission involves a detailed analysis of user. Essentially, the

Applicant submits that the correct question to ask is whether the LG(MP)A conferred a legal right on members of the public to use the land. The case for the applicant being that the statute does not confer a legal right to use the land (and therefore use was without permission), and not that use of the land was attributable to statute (and therefore lawful). Officers' advice to members on this point may be found at paragraph 10.4 below.

- 9.4 The third submission is viewed with a degree of sympathy by Officers. It is acknowledged that the Advice does contain some factual errors, but Officers believe that these do not impact upon the ultimate advice offered by Ms Ellis QC. For example, Ms Ellis errs when she writes at paragraph 2.4 of her Advice that "...the land was always intended to be used for recreation..". But this does not impact upon the agreed fact that the Triangle was appropriated under s4 PTR A (and later s19 LG(MP)A). It is the effect of the statutory provisions upon use of the land with which the Advice is concerned – a question of interpretation and not fact.

10) Available Options

- 10.1 It is the role of the County Council, as Commons Registration Authority, to determine this application. In this case, there are clearly a number of alternative courses of action available to members, depending on the view they take of the facts of the case and the conflicting legal opinions. In light of the evidence and opinions discussed above, Officers have summarised the three key options available to members. It should be noted that this is not an exhaustive list – members may wish to consider other options, but officers would comment that those other options appear largely without merit or legal authority. Therefore, these are the three potential courses of actions which appear most reasonable:
- i) **Register part of the land as a town or village green and refuse the application in respect of the remainder of the land**
 - ii) **Defer the determination of the application until certain points are resolved**
 - iii) **Refuse the application in respect of the whole of the land claimed**

Officers will consider the merits of each of these course of actions below:

10.2 Option i) **Register part of the land as a town or village green and refuse the application in respect of the remainder of the land**

- 10.2.1 If Members are minded to follow the advice contained within the original Report of Mr Chapman, having taken into account the advice provided by Ms Ellis QC and the submissions of the Applicant and Objector, then they may resolve to record the land shown in green and yellow at Appendix 4, and reject the application where it relates to the hatched yellow and hatched brown land.
- 10.2.2 Officers would **not** recommend this course of action. Hampshire County Council holds Mr Chapman QC in particularly high regard and acknowledges the thought and consideration he has put in to preparing his report, and coming to the conclusions he has reached. However, in this case officers find the advice of Ms Ellis QC more persuasive in its analysis of the key point at issue, namely in its interpretation of the as of right/by

right question, for the reasons more fully discussed in option iii) below.

10.3 Option ii) **Defer determining the application**

10.3.1 If Members consider that they cannot properly make a decision based on the evidence and arguments before them, they may wish to defer making any decision on the application until further legal advice is obtained, or certain factual matters are resolved. This could involve returning the material to Mr Chapman for further comment on the issues of law or issues of fact. This material would then be returned to Committee when these matters have been clarified.

10.3.2 Officers would **not** recommend this course of action. Members are well aware that ultimately they have responsibility for determining this application, even if that determination involves difficult and complex decisions. This application certainly involves complex and difficult decisions, but that is not to say that members do not have before them the facts and the advice necessary with which to make those decisions. Officers are of the view that there is little to be gained from obtaining further advice on the 'as of right' issue. Instead Officers consider that there are two alternative views before the Committee and it is up to Members to decide which view they prefer. Having considered the case in depth, Officers prefer the view of Ms Ellis QC; that is to say that use of the land during the relevant period was 'by right' and therefore the tests laid out in section 15(3) of the Commons Act 2006 have not been met.

10.3.3 Members may feel that that it may be necessary to clarify the factual elements of the nature of the use of the land regarded as 'highway' in accordance with Ms Ellis' advice. If Members are in agreement with officers on the 'as of right' issue, it is not necessary to return to the 'highway' question as this would be irrelevant given that the applicant has failed to make her case on other grounds.

10.4 Option iii) **Refuse the application in respect of the whole of the land claimed**

10.4.1 If Members are minded to follow the advice Morag Ellis QC, having taken into account the report provided by Mr Chapman and the submissions of the Applicant and Objector, then they may resolve to refuse the application in its entirety.

10.4.2 This **is** Officers' preferred course of action for the following reasons:

10.4.3 It is not in dispute that the whole of the land was appropriated by Gosport Borough Council in the 1960s for the purposes of s4 Physical Training and Recreation Act 1937. Changes in legislation over the years meant that this land was held pursuant to s19 of the Local Government (Miscellaneous Provisions) Act 1976 during the relevant 20 year period which is under consideration for this application (1989 – 2009).

10.4.4 The text of both s4 PTR A and s19 LG(MP)A are provided at Appendix 9 for completeness.

- 10.4.5 S19LG(MP)A contains in s19(1) a discretionary power for a local authority to provide recreational facilities both in and outside its area. S19(2) LG(MP)A contains a further discretionary power to enable a local authority to regulate use of the facility.
- 10.4.6 Officers endorse the view that the land at the Triangle was held pursuant to s19 LG(MP)A. This 'holding' of the land would then enable the local authority to provide recreational facilities pursuant to s19(1) LG(MP)A. Recreational facilities are not defined in the Act, but examples are give in s19(1)(a)-(f). Officers agree with the Inspector that a grassy area such as the Triangle is capable of being a "recreational facility" as it facilitates informal public recreation. Evidence was given of dog-walking; kite flying; walking and the like, all activities which might reasonably be defined as recreation. Further, it is considered that there is no *duty* on a local authority to provide recreational facilities (for example, in the form of buildings or other structures) on the land, it being merely a discretionary power. So, as at the Triangle, the local authority may take no action in providing facilities on the land yet the grassy area itself would qualify as such a facility.
- 10.4.7 s19(2) LG(MP)A provides further discretionary powers to a local authority to regulate use of the land – eg, by charging or restricting the class of persons to whom the facility is made available. Officers support the view that Gosport Borough Council did not seek to exercise these powers and, consequently, the land was left unregulated and open for use by all. There was extensive use of the land, that is not disputed by the land owner. This use continued unabated until the appearance of a compound on the land in January 2009.
- 10.4.8 In essence, officers support the view that the Triangle is a recreational facility, duly authorised by statute upon which the local authority has taken no action to regulate or restrict use. It is therefore available for use by the public without further ado and any use by the public arises out of the statutory basis on which the land is held. The public was making use of the Triangle for recreational purposes but that use was authorised by statute (LG(MP)A). On this interpretation, officers are inclined to recommend that the application be refused.
- 10.4.9 So far as the Land owner's submissions about the use of the highway land (the embankment) are concerned, officers share the views of both the Inspector and Ms Ellis QC and are not supportive of the view that the use of this land was pursuant to the exercise of rights on a public highway.
- 10.4.10 Officers are not aware that the Inspector's conclusions against registration in respect of the two overgrown areas of the Triangle (see paragraphs 90; 91 and 109 of the Inspector's Report) have been challenged by the Applicant and, in the absence of such a challenge, officers would recommend registration of these area be refused for the reasons given by the Inspector.
- 10.5 Officers concede that the Applicant has put forward a strong case for registration and readily accept that all the statutory requirements for registration of the land coloured green and yellow on the Plan at Appendix 4 under s15 Commons Act

2006 would have been met were it not for the debate about whether or not use of the land was as of right/by right. Officers fully accept that the point has never been litigated and until it has been, we are reliant on opinions and submissions from the parties as well as our own advice received from the Inspector and Counsel appointed to give an overview to the Registration Authority following receipt of the Land owner's submissions.

- 10.6 There is a risk that any decision (either for or against registration) will be challenged and it is important therefore that, as always, any debate is full and open to ensure a robust decision is taken. A legal challenge to any decision taken today cannot be ruled out given the fact that there is currently no authoritative legal guidance on the specific "as of/by right" at issue.

11) Recommendation

- 11.1 That the procedural applications laid out in paragraph 2.2 of this report be accepted
- 11.2 That the application made under s15(3) of the Commons Act 2006 be refused on the basis that –
- 11.2.1 – in respect of the overgrown area and overgrown embankment referred to in paragraph 5.4 above, the application be refused for the reasons set out in the Inspector's Report and for the reasons given in paragraph 11.2.2 (below);
 - 11.2.2. – in respect of the remaining land, that the application be refused on the basis that the land in question was held on a statutory basis as a recreational facility and use of the land was therefore pursuant to this statutory right.

CORPORATE AND LEGAL INFORMATION ABOUT THIS DECISION:**Links to the Corporate Strategy**

Hampshire safer and more secure for all:	no
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	no
Corporate Improvement plan link number (if appropriate):	

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)

Document

File: TVG248

Location

Chief Executive's Department
(Legal Services)
Room 157
E II South
The Castle
Winchester