

APPENDIX 2

In the Matter of
An Application (TVG 249) to Register
Land at the Disused Railway, Bridgemarky, Gosport, Hampshire
As a New Town Green

REPORT

of Mr. VIVIAN CHAPMAN Q.C.

19th May 2010

Hampshire County Council

The Castle,

Winchester,

Hampshire SO23 8UJ

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1. The Bedenham branch line

[1] The Portsmouth Branch Railway Act 1839 authorised the construction of a branch railway line from the main London and Southampton Railway Company line at what is now

Eastleigh. It ran via Fareham to a terminus at Gosport, just across the harbour from Portsmouth. The branch line opened in 1841 and was originally the only railway line linking London to Portsmouth. The line lost much of its importance as a passenger line when a direct line to Portsmouth opened in 1848. However, it remained an important freight route to the naval victualling and armaments yards in Gosport.

[2] The line south of Fareham was “singled” (i.e. converted from a double track to a single track) in the 1930s. Passenger services on the line were withdrawn in 1953. Freight continued to use the line as far as Gosport until 1969. In that year, the line was closed south of the Bedenham naval branch. From then on, the line south from Fareham to the Bedenham naval depot was known as the Bedenham branch line. The line served depots at Bedenham, Priddy’s Hard and Elson. Between 1986 and 1991 (the precise date is in dispute) freight use of the Bedenham branch line ceased and the line has not since then been used for railway purposes.

[3] In about 1989, Hampshire County Council (“HCC”) put forward a project to use the disused railway line from Fareham to Gosport as part of a new tram system linking Fareham and Portsmouth via Gosport and a tunnel under Portsmouth Harbour. The scheme was known as the South Hampshire Rapid Transit scheme (“SHRT”). After a public inquiry, the scheme was authorised by the South Hampshire Rapid Transit Order 2001. However, the government withdrew funding for the scheme in 2004 and the scheme was abandoned in 2006.

[4] The SHRT scheme was replaced by the more modest South East Hampshire Bus Rapid Transit Scheme (“BRT”) promoted by HCC, Southampton City Council and Portsmouth City Council. The BRT scheme proposes to use the disused railway line from Fareham to Gosport (a distance of about 5 miles) as a dedicated bus route. HCC acquired the freehold of most of the branch line in 2007 with a view to its use for the BRT scheme. Planning permission for the first phase of the BRT scheme was granted in July 2009. In August 2009, HCC fenced off access to the railway line in order to start work on implementation of the BRT scheme. The BRT scheme is estimated to cost £20m.

2. The town green application

[5] On 29th October 2009, Mrs. Kathleen Margaret Goodwin of 106, Woodside, Gosport applied¹ to HCC, in its capacity as the relevant commons registration authority (“CRA”), to register part of the disused Bedenham branch line as a new town green. The application was in the prescribed form 44. The application form was completed as follows:

- The application was stated to be made under Commons Act 2006 (“CA 2006”) s. 15(3), qualifying use having ended on or about 10th August 2009.

¹ R1 (i.e. red bundle page 1)

- The application land was stated to be part of a disused railway corridor formerly known as the Bedenham Branch Line as shown on an attached map marked “A”. This showed the application land as running from a little way south of a bridge over Wych Lane to the point where the Hoeford Stream passes under the line in a culvert.
- The locality or neighbourhood within a locality in respect of which the application was made was shown coloured green on an attached map marked “B”. The land coloured green on Map B comprised (a) Nos. 52-118 Woodside (even nos. only), (b) Nos. 363-391 Fareham Road (odd nos. only) and (c) 21 Wych Lane. The applicant requested permission (a) to amend the application to add No 5 Dale Drive to the neighbourhood and (b) to specify the ecclesiastical parish of Bridgemary as the locality. HCC as objecting landowner did not oppose the application.
- The justification for the application was stated to be 20 years’ open and unchallenged use of the application land for informal recreation by local people.
- The application was supported by the prescribed statutory declaration and accompanied by a number of letters of support.

[6] The application was regarded by HCC as CRA as being duly made and was publicised in accordance with the relevant regulations. There was only one objection statement² lodged within time. This was by HCC in its capacity as landowner. The objection statement was settled by leading and junior counsel and took numerous points in objection to the application.

[7] HCC as CRA decided that the application should be considered at a non-statutory public inquiry. It appointed me as an inspector to hold the public inquiry and to report in writing whether the CRA should accede to or reject the application. I gave written Directions as to the conduct of the public inquiry on 18th February 2010. The public inquiry was held in a hall near the application land on 22nd, 23rd, 25th & 26th March 2010. Unfortunately, Mrs Goodwin was too unwell to attend but she wished the public inquiry to proceed and was represented by Mr. Lidgey, a retired solicitor. The objector was represented by Mr. George Laurence QC and Ms Claire Staddon of counsel instructed by the legal department of HCC as objecting landowner. I am very grateful both to Mr. Lidgey and to Mr. Laurence and Ms. Staddon for the helpful way in which they conducted their respective cases, which meant that the public inquiry was conducted in a calm and constructive atmosphere. I must also express my gratitude to the team from HCC as CRA, Ian Austin, Sylvia Seeliger and Emma Noyce, who arranged the public inquiry and gave me administrative assistance throughout with exemplary efficiency. On the last day of the public inquiry I had an accompanied site view, which I found very useful. After the public inquiry, Mr. Lidgey requested permission to make further written submissions on a recent decided case and I

² B1 (i.e. blue bundle page 1)

gave both parties the opportunity to make such submissions. Both parties put in further written submissions. The objector did so on 12th May and Mr. Lidgey did so on 17th May.

3. The application land, neighbourhood and locality

[8] It is convenient at this stage to describe the application land, the claimed neighbourhood and locality. The layout of the application land and neighbourhood is best understood by reference to plan B342 produced by the objector.

The application land

[9] The application land is a stretch of disused railway line about 450 yards in length. It is shown edged red on plan B342. The northern end of the application land is the place where the Hoeford Stream passes underneath the railway in a culvert. There is nothing on the surface of the railway line to mark this feature. At this point, the railway line runs on an embankment at a much higher level than the surrounding land which is formed by a valley which carries the Hoeford Stream eastwards underneath the railway line towards Portsmouth Harbour. The upper surface of the embankment is the width of two railway lines and one can see where the remaining single line has recently been lifted and taken away. Towards the southern end of the application land, the railway line passes on a bridge over Wych Lane. Since the singling of the line this bridge has been reduced in width so that part of the application land is simply the space over which the bridge used to extend. To the north of the Wych Lane bridge, there is a pedestrian underpass which cuts through the railway embankment. To the south of the Wych Lane bridge, the surrounding ground level is higher and the line is on a shallow embankment. There is no physical feature on the ground corresponding with the southern end of the application land. Apart from along the top of the railway embankment from the north or south, the only obvious access route to the top of the embankment is a very well worn path leading from a car parking area at the rear of Woodside and adjacent to Wych Lane up the embankment on the northern side of the western entrance to the pedestrian underpass. This path is well shown in the photograph at B133. The path is now blocked with Heras fencing at the top of the embankment.

The claimed neighbourhood

[10] The claimed neighbourhood (as sought without objection to be amended at the public inquiry) is shown coloured green on plan B342. It essentially falls into four parts:

- First, there are the houses on the western side of the railway in Woodside. Nos. 52-118 (even nos.) Woodside form one side of a longer road called Woodside which in turn is part of a large estate of houses built in the 1960s or 1970s. Nos. 52-106 (even nos.) back onto the railway line. Nos. 108-118 (even nos.) back onto the Hoeford Stream. Between the backs of Nos. 52-106 and the railway embankment there is a deep hollow at the bottom of which there is a tributary stream (forming ponds in places) which runs

northwards from near Wych Lane into the Hoeford Stream. Thus, to gain access from these houses onto the top of the railway embankment, it is necessary to climb steeply down into the hollow, cross the stream and then climb steeply up the railway embankment.

- Second there are the houses on the eastern side of the railway in Fareham Road. Fareham Road is the main A32 road from Fareham to Gosport. Nos. 363-391 (odd numbers) all back onto the railway line. They are at a somewhat lower level than the top of the railway embankment (more so at the northern end).
- Third, there is 21, Wych Lane, which is a house with a large garden which adjoins the railway line south-east of the Wych Lane bridge.
- Fourth, there is 5 Dale Drive, which is a house which adjoins the railway line south-west of the Wych Lane bridge. This is the house which Mr. Lidgey applied at the public inquiry to add to the neighbourhood.

The locality

[11] During the course of the public inquiry, Mr. Lidgey identified the locality within which the selected neighbourhood was situated as the ecclesiastical parish of Bridgemary. The boundaries of the parish are shown in the map at B360. The northern end of the application land (i.e. the Hoeford Stream) coincides with the parish boundary. The application land and the selected neighbourhood are situated in the extreme north-western part of the parish.

4. New greens: law and procedure

[12] The substantive law relating to the registration of new greens is complex and always developing. The procedure is governed by somewhat unsatisfactory rules. It is therefore useful, at this stage, to summarise my understanding of the law and procedure.

[13] Section 15 of the CA 2006 was brought into force on 6th April 2007 and contains (so far as relevant) the following provision for the registration of new greens:

“Registration of greens

(1) *Any person may apply to the commons registration authority to register land as a town or village green in a case where subsection... (3)...applies.*

...

(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).*

...

(6) *In determining the period of 20 years referred to in subsections...(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."*

What is a Town or Village Green?

[14] A town or village green is land which is subject to the right of local people to enjoy general recreational activities on it. There is no legal requirement that it should consist mainly of grass, be situated in or in reasonable proximity to a town or village, or be suitable for use by local inhabitants for traditional recreational activities³.

What is the Effect of Registration?

[15] The effect of registration of land as a new green can be summarized as follows. Land becomes a new green only when it is registered as such⁴. Registration as a new green confers recreational rights over the green on local people⁵, but not so as to override the right of the landowner to continue to use his land as before⁶. Registration as a new green subjects the land to the protective provisions of s. 12 of the Inclosure Act 1857 and s. 29 of the Commons Act 1876, which in practice preclude development of greens⁷.

³ *Oxfordshire County Council v Oxford City Council & anor.* [2006] 2 AC 674 (the *Trap Grounds* case) per Lord Hoffmann at paras. 3-16, & 37-39, Lord Rodger at para. 115 & Lord Walker at paras. 124-128 (Lord Scott dissenting at paras. 71-83)

⁴ *Trap Grounds*: Lord Hoffmann at para. 43, Lord Scott at para. 110 & Lord Rodger at para. 116 (Lady Hale dissenting at para. 142 in relation to the original definition.

⁵ *Trap Grounds* and see *R (Lewis) v Redcar & Cleveland Council* [2010] 2 WLR 653 (the *Redcar* case): Lord Walker at paras. 42-47, Lord Hope at para. 72

⁶ *Redcar*: Lord Walker at paras. 39-47, Lord Hope at paras. 70-77, Lord Brown at paras. 98-106, Lord Kerr at para. 115

⁷ *Trap Grounds*

...a significant number...

[16] “Significant” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers⁸.

...of the inhabitants of any locality.....

[17] A “locality” cannot be created by drawing a line on a map⁹. Until very recently, it was thought that a “locality” must be some division of the county known to the law, such as a borough, parish or manor¹⁰. An ecclesiastical parish can be a “locality”¹¹. It will be seen that the courts have adopted a very narrow construction of “locality”. The House of Lords in the *Trap Grounds* case appeared to recognise and uphold the narrowness of this definition of “locality”. However, it has recently been held in the *Leeds* case¹² in the High Court that a “locality” can have a less rigid meaning.

[18] In the *Trap Grounds* case, Lord Hoffmann said that it had been decided in the *Sunningwell* case¹³ that the narrowness of the definition of locality was qualified only by the fact that it was sufficient if the recreational users of the green came “predominantly” from the relevant locality¹⁴. However, this qualification was applied on consideration of an earlier, and narrower, definition of a prescriptive green under s. 22(1) of the Commons Registration Act 1965 (“CRA 1965”) in the *Sunningwell* case. Under the current definition, the test is not whether the users come predominantly from the relevant locality or neighbourhood, but whether a significant number of the users come from such locality or neighbourhood¹⁵.

...or of any neighbourhood within a locality...

⁸ *R (McAlpine) v Staffordshire CC* [2002] EWHC 76 (Admin) (the *McAlpine* case) at para. 77

⁹ *R (Cheltenham Builders Ltd) v South Glos. DC* [2004] 1 EGLR 85 (the *Cheltenham Builders* case) at paras. 41-48

¹⁰ *Ministry of Defence v Wiltshire CC* [1995] 4 All ER 931 at p 937b-e, *Cheltenham Builders* at paras 72-84 and see *R (Laing Homes Ltd) v Buckinghamshire CC* [2003] 3 EGLR 69 (the *Laing Homes* case) at para. 133

¹¹ *Laing Homes*

¹² *Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch) where the judge held that a village that had not been an administrative area known to the law since 1937 was nonetheless a “locality”.

¹³ *R v Oxfordshire County Council ex. p. Sunningwell Parish Council* [2000] 1 AC 335

¹⁴ *Trap Grounds*: Lord Hoffmann at para. 25.

¹⁵ *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) (the *Warneford Meadow* case) followed and applied in the *Leeds* case.

[19] A “neighbourhood” need not be a recognised administrative unit. A housing estate can be a neighbourhood¹⁶. However a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness¹⁷. It was said in the *Leeds* case, that the cohesive factor cannot be simply the fact that recreational users of the application land live in the area. A neighbourhood need not lie wholly within a single locality¹⁸. In the *Trap Grounds* case, Lord Hoffmann pointed out the “*deliberate imprecision*” of the expression. The statutory test is fulfilled if the applicant can prove that a significant number of qualifying users come from any area which can reasonably be called a “neighbourhood” even if significant numbers also come from other neighbourhoods¹⁹. I do however consider that a neighbourhood must have ascertainable boundaries because only the inhabitants of the relevant neighbourhood have recreational rights over the land²⁰.

...have indulged as of right...

[20] Although the statutory creation of a new green by 20 years’ use does not depend on the inference or presumption of a grant or dedication, the expression “as of right” echoes the requirements of prescription in relation to easements and public rights of way. In both cases, qualifying user must be “as of right” because the inference or presumption of a grant or dedication depends fundamentally on the long acquiescence of the landowner in the exercise of the right claimed²¹. The subjective intentions of the users are irrelevant²².

[21] The traditional formulation of the requirement that user must be “as of right” is that the user must be without force, secrecy or permission (or in the time-worn Latin phrase *nec vi, nec clam, nec precario*). The unifying element in these three vitiating circumstances is that each constitutes a reason why it would not be reasonable to expect the owner to resist the exercise of the right claimed²³. It was held in the *Redcar* case that there is no further requirement that the recreational user by local people should not defer to the use of the land made by the landowner.

[22] “Force” does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates or if it is contentious or under protest²⁴. There is an undecided

¹⁶ *McAlpine*

¹⁷ *Cheltenham Builders* at para 85

¹⁸ *Trap Grounds*: Lord Hoffmann at para 27 disapproving *Cheltenham Builders* at para. 88

¹⁹ *Warneford Meadow*

²⁰ *Trap Grounds*: para. 69(i), *Warneford Meadow*

²¹ *Dalton v Angus & Co.* (1881) 6 App. Cas. 740 at 773 as cited by Lord Hoffmann in *Sunningwell* at p. 351B and by Lord Walker in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 (the *Beresford* case) at para. 76

²² *Sunningwell*

²³ *Sunningwell* per Lord Hoffmann

²⁴ *Redcar* per Lord Rodger at paras. 88-90 and see *Warneford Meadow*

question whether user which involves ignoring a prohibitory notice such as “Private Keep Out” is user by force²⁵.

[23] Use that is secret or by stealth will not be use “as of right” because it would not come to the attention of the landowner.

[24] “Permission” can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied, but permission cannot be implied from inaction or acts of encouragement by the landowner²⁶. It was held in the *Beresford* case that permission must be revocable or time limited: permission that is unlimited and irrevocable amounts to acquiescence.

[25] “As of right” means “as if of right”. If user is in fact pursuant to a legal right, e.g. under a statutory right of public recreation under s. 164 of the Public Health Act 1875 or s. 10 of the Open Spaces Act 1906, it is “by right” or “of right” rather than “as of right”. This point was fully discussed by the House of Lords in the *Beresford* case.

...in lawful sports and pastimes on the land...

[26] The words “lawful sports and pastimes” form a composite expression which includes informal recreation such as walking, with or without dogs, and children’s play²⁷. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way²⁸.

...for a period of at least twenty years...

[27] In the case of an application under CA 2006 s. 15(3), the period of 20 years is the 20 years immediately before the cessation of qualifying use. It is immaterial that the statutory test for qualifying user may have changed during the 20 year period²⁹.

Procedure

[28] In most of England, including Hampshire, procedure on applications to register new greens under the CA 2006 is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007³⁰. The 2007 Regulations closely

²⁵ See the discussion by Sullivan J at first instance in the *Redcar* case at [2008] EWHC Admin 1813 at paras 11-16

²⁶ *Beresford*

²⁷ *Sunningwell* at pp 356F-357E

²⁸ *Trap Grounds* in the High Court: *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at paras 96-105

²⁹ *Redcar*: Lord Rodger at paras. 120-121, *Leeds* at paras 108-110.

³⁰ There are new 2008 Regulations but, at present, they only apply to a small number of pilot authorities, not including HCC.

follow the scheme of The Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under s. 13 of the Commons Registration Act 1965. Those regulations proved quite inadequate to resolve many disputed applications and registration authorities have had to resort to procedures not contemplated by the Regulations to deal with such applications.

Who can apply?

[29] Anyone can apply to register land as a new green, whether or not he is a local person or has used the land for recreation.

Application.

[30] Application is made by submitting to the CRA a completed application form in Form 44. The House of Lords in the *Trap Grounds* case has emphasised that the procedure is intended to be simple and informal and that applications are not to be defeated by technical objections to the form of applications provided that the applications are handled in a way which is fair to all parties³¹. An application can be amended with permission of the CRA if it would cause no unfairness to the objector.

Accompanying documents.

[31] Although the application form has to be verified by a statutory declaration by the applicant or his solicitor, there is no requirement that the application should be accompanied by any other evidence to substantiate the application. Instead, reg. 3 provides for the application to be accompanied by any relevant documents relating to the matter which the applicant may have in his possession or control or of which he has the right to production. In many cases, there are few, if any, of such documents as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years.

Evidence.

[32] The applicant is only required to produce evidence to support the application if the CRA reasonably requires him to produce it under reg. 3(2)(d)(ii).

Preliminary consideration.

[33] After the application is submitted, the CRA gives it preliminary consideration under reg. 5(4). The CRA can reject the application as not “duly made” at this stage, but not without giving the applicant an opportunity to put his application in order. This seems to be directed to cases:

- where Form 44 has not been duly completed in some material respect,

³¹ Lord Hoffmann at paras 60-62, Lord Scott at para 110, Lord Walker at para 124 & Lady Hale at para 144.

- where the application is bound to fail on its face, e.g. because it alleges less than 20 years use, or
- where the supporting documents disprove the validity of the application

Publicity.

[34] If the application is not rejected on preliminary consideration, the CRA proceeds under reg. 5(1) to publicise the application:

- by notifying the landowner and other people interested in the application land
- by publishing notices in the local area, and
- by erecting notices on the land if it is open, unenclosed and unoccupied.

Objectors.

[35] Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land.

Objection Statement.

[36] Any objector has to lodge a signed statement in objection. This should contain a statement of the facts relied upon in support of the objection. There is a time limit on service of objection statements. The time limit is stated in the publicity notices issued by the CRA. However, the CRA has a discretion to admit late objection statements.

Determination of application.

[37] After receipt of objections the CRA proceeds to “further consideration” of the application under reg. 6. Under reg. 6(4) the CRA may not reject an application without giving the applicant a reasonable opportunity to deal with (a) any matters contained in the objection statements and (b) any other matter in relation to the application which appears to the CRA to afford possible grounds for rejecting the application. The most striking feature of the regulations is that they provide no procedure for an oral hearing to resolve disputed evidence. The regulations seem to assume that the CRA can determine disputed applications to register new greens on paper. A practice has grown up, repeatedly acknowledged by the courts at the highest level, most recently by the Supreme Court in the *Redcar* case, whereby the CRA appoints an independent inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not. In some cases, procedural fairness will make an oral hearing not merely an option but a necessity³². In the *Whitney* case³³, it was held that the procedure by non statutory

³² *Trap Grounds* case per Lord Hoffmann at para 29 approving Sullivan J in *Cheltenham Builders*

³³ *R (Whitney) v Commons Commissioners* [2005] 1 QB 282.

public inquiry did not infringe art. 6 of the ECHR because any decision of the CRA is subject to review by the courts. A non statutory public inquiry has no power to award costs.

Procedural issues.

[38] A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be “properly and strictly proved”³⁴. However, in my view, this does not mean that the standard of proof is other than the usual civil standard of proof on the balance of probabilities.
- **Defects in Form 44.** The House of Lords has held in the *Trap Grounds* case that an application is not to be defeated by drafting defects in the application form. The issue for the CRA is whether or not the application land has become a new green
- **Part registration.** The House of Lords also held in the *Trap Grounds* case that the CRA can register part only of the application land if it is satisfied that part but not all of the application land has become a new green. Indeed, the House thought that a larger or different area could be registered if there was no procedural unfairness³⁵.

5. Procedural applications

[39] At this stage, it is appropriate to consider various procedural applications that were made during the course of the public inquiry. They raise points which, in my view, go beyond my discretion as inspector to decide. They have to be decided by the CRA after considering my recommendation.

Extension of neighbourhood

[40] The first application was that by Mr. Lidgey to extend the neighbourhood by adding 5, Dale Drive. Technically, it seems to me that this involves an amendment of the application which defines the neighbourhood as excluding this property. There was no objection to the application by HCC as objector. I cannot see that anyone would be prejudiced by the amendment. I recommend that the amendment should be allowed. I will consider the application on the assumption that this amendment will be allowed.

Identification of locality

³⁴ *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in *Beresford* at para. 2

³⁵ Lord Hoffmann at paras 61-62, Lord Scott at para 111, Lord Rodger at para 114, Lord Walker at para 124 and Lady Hale at para 144.

[41] The second application was that of Mr. Lidgely to identify the locality within which the neighbourhood is situated as the ecclesiastical parish of Bridgemary. Technically, it seems to me that this also involves an amendment of the application to define the locality. HCC as objector did not object to this application: indeed it sought clarification on the point. I cannot see that anyone would be prejudiced by the amendment. I recommend that the amendment should be allowed. I will consider the application on the footing that the relevant locality is the ecclesiastical parish of Bridgemary.

Addition of applicant

[42] Third, Mr. Lidgely applied to be joined as co-applicant. His reason was that Mrs. Goodwin was very ill and that it would be convenient if he were an applicant in his own right. Again, it appears to me that this technically involves an amendment of the application. HCC as objector did not object to this application. I can see that Mrs. Goodwin's serious illness could cause practical difficulties, especially if her condition deteriorated, in challenging a decision of the CRA. I do not see that anyone would be prejudiced by this amendment of the application. I recommend that the CRA grants permission for the application to be amended by adding Mr. Lidgely as co-applicant.

Admission of late objection

[43] The fourth application was made by letter dated 15th March 2010 from Gosport Borough Council which I received at the beginning of the public inquiry. Gosport Borough Council applied for permission to make a late objection to Mrs. Goodwin's application, although it did not wish to attend the public inquiry. The letter briefly stated the proposed grounds of objection. Apart from some policy matters (which are not relevant) it adopted the objection made by HCC as landowner. Mr. Laurence explained that it might be useful to have an objector other than HCC as landowner because, if HCC as CRA decided to register the application land as a new green, it would be procedurally difficult for HCC as landowner to challenge that decision in the courts. I think that there may be ways around that difficulty, e.g. by delegating the decision to another local authority under Local Government Act 1972 s. 101(1)(b) or by seeking the directions of the court before making a decision as Oxfordshire County Council did in the *Trap Grounds* case. However, I can see that it could be procedurally convenient to have an independent objector. Mr. Lidgely did not make any serious objection to the application. He rightly pointed out that the objection was made at the last minute. He also said that he was informed that the objection had not been properly authorised by Gosport Borough Council. However, I think that the question whether the objection is unauthorised is justiciable by a court on judicial review and not by HCC as CRA. Since the grounds of the late objection raise no material new issue, it seems to me that it would cause no unfairness to the applicant to admit it. Admission of the late objection might bring some procedural convenience in the future. I therefore recommend that the late objection of Gosport Borough Council should be admitted.

6. The railways legislation

[44] HCC, as objecting landowner, placed considerable reliance on an argument that, if local people did use the railway line for recreation, they were committing a criminal trespass under railways legislation with the result that their sports and pastimes were not “lawful”. As this argument raises certain factual issues on which evidence was called at the public inquiry, it is convenient at this stage to consider the relevant railways legislation relied upon by the objector.

Regulation of Railways Act 1868 s. 23

[45] By s. 23 of the Regulation of Railways Act 1868 (as amended by s. 14 of the Regulation of Railways Act 1871):

“If any Person shall be or pass upon any Railway, except for the Purpose of crossing the same at any authorized Crossing, after having [once] received Warning by the Company which works such Railway, or by any of their Agents or Servants, not to go or pass thereon, every Person so offending shall forfeit and pay any Sum not exceeding Forty Shillings for every such Offence.”

[46] By s. 2 of the 1868 Act:

“The Term “Railway” means the whole or any portion of a Railway or Tramway, whether worked by steam or otherwise”

This definition is rather circular. No authority on the meaning of “railway” was cited to the public inquiry. It seems to me that the expression “railway” in normal language does not refer simply to the railway tracks but extends to the structure supporting the railway tracks, such as an embankment or bridge. The 1868 Act is not a purely criminal statute and so there is no reason to give the expression an artificially narrow construction. However, I consider that it is implicit in s. 2 that a “railway” means a working railway so that s. 23 does not apply to a disused railway.

[47] It therefore appears to me that it would have been a criminal offence under s. 23 of the 1868 Act for an unauthorised person to go onto the application land while the line was still in railway use, provided that he or she had previously received at least one qualifying warning not to do so.

British Transport Commission Act 1949 s. 55

[48] By s. 55 of the British Transport Commission Act 1949:

“(1) Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any

electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty not exceeding forty shillings.

...

(3) No person shall be subject to any penalty under this section unless it shall be proved to the satisfaction of the court before which complaint is laid that public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such offence is alleged to have been committed and such notice shall be renewed as often as the same shall be obliterated or destroyed and no penalty shall be recoverable unless such notice is so placed and renewed.”

Reference to the British Transport Commission was replaced by its statutory successors as it was replaced in turn by the British Railways Board, Railtrack plc and Network Rail.

[49] Mr. Lidgey argued that the nearest station to the application land for the purposes of the section was in Portsmouth. I do not think that this is geographically correct even as the crow flies³⁶. However, subsection (3) refers to the nearest station “on the railway” and, in my view, that must refer to the nearest station on the same railway line. In the present case, that was Fareham Station.

[50] Although the language of the section is not entirely clear on the point, I would construe it as relating only to a working railway and not a disused railway. As a section imposing criminal penalties I think that a narrow construction should be adopted.

[51] It therefore appears to me that it would have been a criminal offence for an unauthorised person to go onto the application land while the line was still in railway use, provided that appropriate warning signage was previously displayed and renewed at Fareham Station.

7. The documentary evidence

[52] A wealth of undisputed documentary evidence was produced to the public inquiry by both sides. In particular, there were many dated photographs of the application land and its surroundings. This documentary evidence provided an essential background to the witness evidence that was heard by or submitted in writing to the public inquiry. I think that it would be useful at this point to summarise the documentary evidence in chronological order.

1839

³⁶ See for example the railway map at B48

[53] Construction of the branch railway line to Gosport was authorised by the Portsmouth Branch Railway Act 1839³⁷.

1841

[54] The branch line to Gosport opened in 1841³⁸.

1910

[55] An OS map of 1910³⁹ shows the stretch of railway line comprised in the application land. It has been marked up in green to show the neighbourhood relied upon by the applicant. The map shows the Hoeford Stream passing, as now, in a culvert under the railway line. It also shows the Wych Lane bridge. None of the neighbourhood had been developed. The neighbourhood between the Fareham Road and the railway line north of Wych Lane was marked “Hoeford”.

1932

[56] An OS map of 1932⁴⁰ shows the same area. Again, it has been marked up in green to show the neighbourhood relied upon by the applicant. The map shows the Hoeford Stream culvert and the Wych Lane bridge as in 1910. Four houses had been built between Fareham Road and the railway line. 21 Wych Lane had been built. None of the neighbourhood west of the railway line had been developed. The neighbourhood between Fareham Road and the railway line north of Wych Lane was still marked “Hoeford”. There was some development on the south side of Wych Lane to the west of the railway bridge

1940

[57] An OS map of 1940⁴¹ shows that the railway line had been singled and that the neighbourhood between Fareham Road and the railway line had been developed as it is today. None of the neighbourhood west of the railway line was yet developed. The description “Hoeford” now applied to both sides of the Fareham Road between Wych Lane and the Hoeford Stream south of Wych Lane. There was considerable residential development on the south side of Wych Lane to the west of the railway bridge.

1953

[58] In 1953, passenger services on the branch line were ended⁴².

³⁷ Objector’s Railway Statutes Bundle tab 1

³⁸ R59: Branch Lines Around Gosport by Mitchell & Smith

³⁹ B305 & 305A

⁴⁰ B306 & 306A

⁴¹ B307 & 307A

⁴² R59: Branch Lines Around Gosport by Mitchell & Smith

1969

[59] Freight continued to be taken to Gosport until 1969 and thereafter trains ran only as far as the Bedenham Naval branch⁴³. The line south of Bedenham Junction was closed in that year⁴⁴.

1970

[60] A photograph⁴⁵ was produced by Mr. DJ Stephens of 112, Woodside. It showed either 110 or 112 Woodside in course of construction in about 1970. The railway embankment is clearly visible in the background. There is some light undergrowth on the steep western flank of the embankment but the rails and sleepers are in view.

1971

[61] An OS map of 1971⁴⁶ showed most of the application land and of the neighbourhood lying north of Wych Lane. The neighbourhood is shown coloured green. All the houses which are in the Woodside part of the neighbourhood had been built with the exception of nos. 84 & 86. There was considerable residential development to the west of Woodside.

1975

[62] Another photograph⁴⁷ was produced by Mr. DJ Stephens of 112, Woodside Road. It dated from 1975 and showed children playing on the railway line. They seem to be in gorse bushes at the edge of the embankment although it is unclear precisely where it was taken.

1977

[63] Another photograph⁴⁸ was produced by Mr. DJ Stephens dating from 1977. It showed his daughter with a visiting French student on the railway track. The track itself seems to be clear and in good condition although there seems to be a fair amount of vegetation on top of the embankment on both sides of the track. There seemed to be a less overgrown area to the east of the railway track which represented the route of the rails which were taken up in the 1930s.

1983

⁴³ R59: Branch Lines Around Gosport by Mitchell & Smith. B41 2009 The Rapidly Dwindling Railway Heritage of Gosport by Dave Rowlands.

⁴⁴ B48: The Railways of Great Britain A Historical Atlas by Cobb

⁴⁵ R32

⁴⁶ B308 & 308A

⁴⁷ R33

⁴⁸ R34

[64] An OS map of 1983⁴⁹ shows the application land, the neighbourhood (coloured green) and most of the locality of Bridgemary. The map showed that the pedestrian underpass at the Wych Lane bridge had been built. The neighbourhood was the same as in the 1971 OS map (i.e. the same as today except for nos. 84 & 86 Woodside). The land on both sides of Wych Lane west of the railway line had been extensively developed for residential purposes with ancillary community facilities.

1986

[65] In 1986, the last train ran from the Priddy's Hard depot leaving Bedenham and Elson as the only depots with rail connection to the branch line⁵⁰.

[66] The Structures section of the Environmental Department of HCC retains a series of photographs of the Wych Lane pedestrian underpass. There are photographs⁵¹ from October 1986 showing the western and eastern sides of the underpass. The photograph of the western side shows a very well worn path climbing the railway embankment on the northern side of the underpass to gain access to the top of the embankment through a broken down wire mesh fence at the point marked "X" on the photograph. This is the access path which is still visible today.

1989

[67] A British Transport Police ("BTP") Occurrence Book was produced to the public inquiry by Inspector Morriss of the BTP. The book recorded the following incidents:

- on 8th April 1989, two constables of the BTP attended the railway line at Bridgemary, Gosport at 1150 and cautioned and gave advice to 20 juveniles⁵².
- on 8th May 1989 at 0915 two police constables met at Wych Lane and walked the line. One constable was from the BTP and the other was the Bridgemary Beat Officer from the local constabulary. They met six walkers trespassing on the line. All of them were under the impression that it was a recognised short cut to various locations. The trespassers were "advised". There were complaints about motor-cyclists riding up and down, stones being thrown from the track, rubbish, and drunks taking a short cut at night. It was noted that there was a complete lack of fencing⁵³.

⁴⁹ B309 & 309A

⁵⁰ B326A: Branch Lines Around Gosport

⁵¹ B242 & 243

⁵² B323B(1)

⁵³ B323D(2)

[68] Some photographs⁵⁴ were produced which were taken by Mr. DC Rowland on 15th June 1989 near the Bedenham depot. They showed a weed killing train on the branch line south of the application land. The track was therefore being used by trains and maintained in June 1989.

[69] A photograph⁵⁵ from the HCC Environmental Department Archives is dated August 1989. It shows the fence at the top of the track leading up the embankment on the northern side of the western entrance to the Wych Lane pedestrian underpass. The wire mesh of the fence has clearly been broken down to allow pedestrian access to the railway line.

[70] The relevant 20 year period for the purposes of this application began on or about 10th August 1989.

1989-90

[71] There are two photographs⁵⁶ from the HCC Environmental Department archives which are dated 1989-90. The photograph taken from the western side of the Wych Lane pedestrian underpass shows a well-worn track leading up the embankment on the northern side of the underpass and leading to a hole in the wire mesh of a fence at the point marked "X" on the photograph.

1990

[72] On 23rd March 1990, Mrs Mary Ford of Bridgemary Road, Gosport was struck and killed by an empty freight train while walking her dog beside the single track on the branch line about one mile north of Bedenham Junction. At the inquest, the train driver said that the track was only used six times a week by one train on three days⁵⁷. I infer that this means that on three days a week, one train made one journey down the line and then a return journey up the line.

[73] The BTP Occurrence Book has numerous entries relating to trespass on the Bedenham branch line in 1990:

- on 25th April 1990, two police constables walked the Gosport line from Fleetlands to Morriss Close. 22 persons were cautioned and advised for trespass and approximately 30 more were seen from a distance. Gates were seen in the rear of certain gardens⁵⁸
- on 2nd May 1990, a police constable travelled on the 1050 train from Fareham to Bedenham and saw numerous trespassers on the line. It appears that, on the same day,

⁵⁴ B44, B187 & B338-341

⁵⁵ B245

⁵⁶ B244 & 246

⁵⁷ B432-3: The News Fareham & Gosport Final Edition 7th June 1990

⁵⁸ B323D(3)

another police constable visited the line and warned 8 persons seen trespassing on the railway including a 4 year old boy who was placing stones on the running rail⁵⁹.

- on 28th May 1990, a police officer visited the “Bednam” line where he saw and warned several young persons⁶⁰.
- on 30th May 1990, two police officers visited the Gosport to Fareham line near Gregson Avenue after a report that there were children on the line. The line was searched but no children were found⁶¹.
- on 3rd June 1990 a pensioner was warned and ejected at “Bednam”⁶².
- on 16th June 1990 four trespassers were warned on the Fareham to Gosport line⁶³.
- on 29th June 1990, various adults and juveniles were seen trespassing on the railway line at Gosport. The adults were reported for process and the juveniles were “advised”⁶⁴.
- on 4th July 1990, a trespasser was seen crossing the Fareham to Bedenham railway line and was reported for process⁶⁵.
- on 15th August 1990, there was a lineside patrol in the Gosport area to deal with trespassers. No trespassers appear to have been seen⁶⁶.
- on 31st August 1990, two constables conducted a trespass patrol of the Bedenham line. Three persons were seen in the distance, one of whom ran away. Two adults and one juvenile were seen and advised before crossing the line⁶⁷.
- on 7th September 1990, between 1900 and 1930, six persons were seen from a distance by an officer trespassing on the Bedenham railway line⁶⁸.

[74] A photograph⁶⁹ in the Freight Only Yearbook No. 2 shows a locomotive pulling two vans and two wagons arriving at Bedenham on the Bedenham branch line on 15th August 1990. The

⁵⁹ B323D(4)

⁶⁰ B323D(5)

⁶¹ B323D(6)

⁶² B323D(7)

⁶³ B323D(8)

⁶⁴ B323D(9)

⁶⁵ B323D(10)

⁶⁶ B323D(11)

⁶⁷ B323D(12)

⁶⁸ B323D(13)

⁶⁹ B185-6

caption to the photograph states that the branch line was scheduled to receive a train three times weekly in the summer.

1990-92

[75] Two further photographs⁷⁰ from the archive of the HCC Environmental Department are dated only between 1990 and 1992. The photograph taken on the western side of the Wych Lane pedestrian underpass shows the usual track leading up the embankment on the northern side of the underpass leading to a hole in the wire mesh fence at the point marked “X” on the photograph.

1991

[76] The BTP Occurrence Book has a number of entries relating to trespass on the Bedenham line in 1991:

- on 26th April 1991 an adult was reported for process and a juvenile “advised” during a trespass patrol by two constables on the Bedenham line.
- on 27th May 1991, two constables patrolled the line between Fareham and “Bednam”. Six people were advised and the dangers of the railway line pointed out. Five people were cautioned “re trespass offences”
- on 31st May 1991, nine people were seen trespassing on the Gosport Fareham line. All were strongly warned on the dangers of trespass and one was cautioned.
- on 16th July 1991 there was a redacted entry headed “Trespass Bednam Line”.

[77] The remaining section of the branch line from Fareham to Bedenham closed in 1991, according to The Railways of Great Britain A Historical Atlas by Cobb⁷¹.

1992

[78] The BTP Occurrence Book has one entry for 1992. On 27th February 1992 rail safety patrols were carried out on the Bedenham Line. Several details of offenders were taken and 20+ youths “advised re dangers”.

1993

[79] The BTP Occurrence Book records a trespass patrol on 22nd February 1993. 15 Adult trespassers and two juveniles were seen on the Bedenham line. That is the last relevant entry in the Occurrence Books.

⁷⁰ B248-9

⁷¹ B48

1994

[80] Mrs. Morge of 21, Wych Lane produced some photographs⁷² dating from 3rd April 1994. One was taken from the railway embankment on the north eastern side of the Wych Lane bridge. It showed the railway fencing broken down at that point, but it is not clear whether this was used for access. Another showed the railway line looking towards Gosport. Although the sides of the embankment were overgrown, the line was still fairly clear and there was a narrow track on the eastern side of the line along which a dog was walking.

1995

[81] The Railtrack South West Zone Weekly Operating Notice for 11th to 17th February 1995⁷³ was produced to the public inquiry. Under Part C (signalling and permanent way alterations) it was recorded under the heading “Details of Work Already Carried Out” that the Bedenham branch had been closed and the Fareham ground frame “A” and its connections had been disconnected pending abolition.

[82] A series of photographs⁷⁴ from the archive of the HCC Environmental Department showed the Wych Lane pedestrian underpass and its surroundings in August 1995. The track climbing up the embankment on the north western side of the underpass is clearly visible. It passes through a broken down wire mesh fence at point “X” on the photographs to give access to the top of the embankment. There is no view up or down the railway lines.

1997

[83] Photographs⁷⁵ from a railway bridge and structures examination report of 1st February 1997 show the line overgrown but passable on foot south of Wych Lane bridge. The fencing at the top of the embankment north-west of the pedestrian underpass appears to be standing although in poor repair.

1998

[84] By letter dated 1st April 1998⁷⁶, Railtrack wrote to the HCC Rights of Way Officer by way of notice under s. 31(6) of the Highways Act 1980 to the effect that it did not recognise the existence of and did not intend to dedicate any public rights of way over the Gosport/Fareham line. The letter stated that:

⁷² B376-7

⁷³ B191-3

⁷⁴ B250-255

⁷⁵ B332 & 334

⁷⁶ B410

“It has been noticed that unauthorised persons are making use of the land for walking and exercising dogs etc.”

There followed some debate between Railtrack and HCC about the efficacy of the letter of 1st April 1998. In a subsequent letter dated 12th May 1998, Railtrack wrote:

“The line has in the past been the subject of intensive patrolling by the British Transport Police who have cautioned any member of the public seen that they are committing the offence of statutory trespass (under Section 55 of the British Transport Commission Act 1949).”

[85] In the spring of 1998, the proposed order to implement the SHRT scheme was subject to public consultation. There were a number of written objections to the SHRT scheme of which four were produced to the town green public inquiry:

- Three of the objections⁷⁷ were in standard form and made by the occupiers of nos. 375, 378 & 383 Fareham Road (i.e. addresses within the neighbourhood relied upon in the town green application). They objected to the interference with the privacy and quietness of their houses, but did not mention that they or their neighbours had enjoyed recreational use of the railway line.
- There was also an objection letter dated 16th April 1998⁷⁸ written by the solicitors for English, Welsh and Scottish Railway (“EWS”), which claimed that EWS had freight operating rights over the Bedenham branch which would be affected by the SHRT scheme.

[86] There were further photographs⁷⁹ of the Wych Lane bridge and underpass in the HCC Environmental Department archive which were taken in November 1998. There was still an obvious track leading up the embankment on the north-western side of the pedestrian underpass and gaining access to the top of the embankment through a broken down wire mesh fence. There is a good view looking south along the railway line from a point just north of the Wych Lane bridge. The railway line was more overgrown than Mrs. Morge’s 1994 photograph but still perfectly passable by pedestrians.

[87] In November 1998, Mr. Peter Titmuss, a professional photographer, was engaged to provide a portfolio of photographs of the branch line in connection with the forthcoming public inquiry into the SHRT scheme. The key to the photographs is lost but two photographs⁸⁰ were produced to the public inquiry as showing the application land. It was said that the photographs must show the application land because the photographs before and after these photographs in

⁷⁷ B201-209

⁷⁸ B210

⁷⁹ B256-258

⁸⁰ B58/59

the portfolio showed the line north and south of the application land. Having been shown the whole portfolio during the town green public inquiry, it did appear to me that the two photographs were probably of the application land although it was not possible to identify the exact position from which the photographs were taken. The photographs show that the railway line along the application land had become quite overgrown in places, although there was still room to walk along the line on the sleepers. It was very noticeable from looking at the other photographs in the portfolio that most of the rest of the line was much less overgrown and looked more like the view south of the Wych Lane bridge in the HCC photographs of November 1998.

1999

[88] A public local inquiry was held into the SHRT scheme in March/April 1999⁸¹. The date of the inspector's report does not appear from the extracts submitted to the town green public inquiry, although Mr. Herbert thought that it was dated May 1999. The inspector dismissed the EWS objection on the basis that it was improbable that the line would ever be used for freight. The section of the line from Fareham to Fort Brockhurst was described by the inspector as still operational, although disused. It was neglected and overhung in places by trees and shrubs. The question of recreational use of the line did not appear to have been raised before the public inquiry or mentioned in the report.

[89] A photograph⁸² from the HCC Environmental Department archive dated June 1999 shows the usual access track leading up the embankment on the north-western side of the Wych Lane pedestrian underpass and entering the top of the embankment through a broken down wire mesh fence at the point marked "X" on the photograph.

2001

[90] The proposed South Hampshire Rapid Transport Order was approved by the Secretary of State in a decision letter⁸³ dated 8th May 2001. There was no mention of recreational use of the disused railway line.

[91] The South Hampshire Rapid Transit Order 2001⁸⁴ was made on 3rd July 2001.

[92] There are three photographs⁸⁵ dated September 2001 from the HCC Environmental Department archives. One is taken from the top of the Wych Lane bridge looking northwards. Although the line crossing the Wych Lane bridge is still reasonably clear, the line north of the bridge appears to be completely overgrown. Another is taken from the western side of the Wych

⁸¹ B220

⁸² B259

⁸³ B220

⁸⁴ Objector's Railway Statutes Bundle tab 12

⁸⁵ B260-262

Lane pedestrian underpass. Although there may still be a beaten path leading up to the top of the embankment on the northern side of the underpass entrance, it is much less obvious than in previous photographs. This suggests that the path was much less used in September 2001 than previously.

2002

[93] A press release dated 3rd July 2002⁸⁶ announced the start of a soil survey along the entire route of the projected SHRT tram service. The press release stated that some site clearance work would also be completed on the more overgrown sections of the disused railway between Fareham and Gosport. There was reference to the soil survey in the local newspaper (The News) on 12th July 2002⁸⁷.

2003

[94] A meeting⁸⁸ was held on 17th January 2003 between representatives of Railtrack and SHRT at which there was discussion about the impending disconnection of the Bedenham Branch line.

[95] Two photographs of 16th February 2003⁸⁹ showed the disconnection of the branch line from the main line at Fareham Station. The photographs show the southern end of the platforms at Fareham Station. No signs are in shot which warn the public against trespassing on the railway.

[96] Some photographs⁹⁰ dated March 2003 were produced from the HCC Environmental Department archives. A photograph of the line looking southwards from the Wych Lane bridge showed the line passable although the lines were still a little overgrown. A photograph of the line looking northwards from the Wych Lane bridge showed that a fairly narrow route had been cleared through the undergrowth on the eastern side of the railway tracks. A photograph of the western side of the Wych Lane pedestrian underpass showed that the beaten path up the embankment on the northern side of the underpass entrance had become rather more well-used than as shown in the September 2001 photograph⁹¹ although not as well-used as in 1995⁹² or 1998⁹³.

2004

⁸⁶ B194-5
⁸⁷ B196
⁸⁸ B50
⁸⁹ B198-200
⁹⁰ B263-266
⁹¹ B261
⁹² B254
⁹³ B257

[97] Some photographs⁹⁴ dated July 2004 were produced from the HCC Environmental archives. A photograph looking northwards along the line from the Wych Lane bridge showed that the line south of the Wych Lane bridge had become overgrown again after the 2002 clearance. A photograph of the western entrance to the Wych Lane pedestrian underpass showed the beaten path up the embankment reduced in size since 2003.

[98] On 7th December 2004, Network Rail wrote to the Rights of Way section of HCC to renew its 1998 notice under HA 1980 s. 31(6) in relation to the Gosport/Fareham Railway Line. Network Rail wrote:

“It is noted that unauthorised persons are making use of this land for walking and exercising dogs etc.”

2006

[99] There is a photograph⁹⁵ dated October 2006 from the archives of the HCC Environmental Department. It shows the western side of the pedestrian underpass at the Wych Lane bridge. The embankment on the northern side of the underpass entrance appears to be overgrown with no sign of a path leading up the bank onto the top of the embankment.

[100] Photographs⁹⁶ taken by Malcolm Cameron in November/December 2006 show that the railway line was heavily overgrown both north and south of the Wych Lane bridge.

2007

[101] On 30th March 2007 HCC acquired the route of the branch line, including the application land, for £90,000 and HCC was registered as proprietor on 2nd July 2007⁹⁷.

2008

[102] Photographs⁹⁸ taken by Malcolm Cameron on 4th June 2008 show views of the railway line looking north from the Wych Lane bridge and in the vicinity of 106 Woodside (i.e. at the northern end of the application land). The line was heavily overgrown.

[103] A photograph⁹⁹ taken by Malcolm Campbell on 18th November 2008 looking north from the Wych Lane bridge shows the railway line as being heavily overgrown.

2009

⁹⁴ B267-268

⁹⁵ B270

⁹⁶ B165-169

⁹⁷ B36

⁹⁸ B170-173

⁹⁹ B174

[104] A photograph¹⁰⁰ dated March 2009 from the HCC Environmental Department archives shows the western side of the Wych Lane pedestrian underpass. The track leading up the embankment on the northern side of the underpass entrance is again obvious.

[105] In or about 14th August 2009 the application land was secured and this led to the present application made on 29th October 2009.

2010

[106] There is a useful portfolio of photographs taken by Mr. Batcheldor on 24th February 2010¹⁰¹ and 11th March 2010¹⁰² together with a key¹⁰³. Of course, although these photographs are very helpful in showing the features of the application land and its surroundings, they are not evidence of the physical situation on the ground during the relevant 20 year period.

8. Witnesses for objector

[107] Because so much of the undisputed documentary evidence summarised above came from the objector's witnesses, I think that it will be convenient for me to deal first with the objector's witnesses before turning to the applicant's witnesses. I will deal first with the witnesses for the objector who gave oral evidence to the public inquiry and I will deal with them in alphabetical order rather than in the order in which they gave evidence to the public inquiry.

Witnesses who gave oral evidence

Mark Victor Batcheldor

[108] Mr. Batcheldor is a qualified civil engineer who has been employed by HCC as a senior engineer in connection with the BRT scheme since November 2008. He produced a witness statement dated 15th March 2010¹⁰⁴ and a further witness statement dated 19th March 2010¹⁰⁵. In the event no reliance was placed on the further witness statement. He gave oral evidence to the public inquiry. His evidence covered the following matters.

[109] First, he gave evidence of what seems to have been his only visit to the application land before the date of the application to register it as a new green. This was on 21st November 2008. At that date a 1 metre wide path was being cut through the dense vegetation along the BRT route to allow access for personnel working on the BRT scheme. I accept this evidence.

¹⁰⁰ B271
¹⁰¹ B86-134
¹⁰² B135-148
¹⁰³ B149
¹⁰⁴ B77
¹⁰⁵ B158A

[110] Second, he produced the numerous photographs (with key) that he had taken on and around the application land on 24th February and 11th March 2010¹⁰⁶. I accept that these photographs were taken by Mr. Batcheldor at the dates and places to which he testified.

[111] Third, he identified a number of sections of the application land which could not have been used for recreation by local people on any basis. They are shown on plan MVB5¹⁰⁷. They consist of:

- Area 1, which is a part of the application land which had until March 2009 been enclosed and incorporated for many years into the grounds of 391, Fareham Road,
- Area 5, which is the part of the Wych Lane railway bridge which was removed many years ago, probably when the line was singled in the 1930s
- Area 8, which is a part of the application land which has been enclosed and incorporated for many years into the grounds of 5, Dale Drive.

The fact that these areas of land had not been accessible for recreation throughout the relevant 20 year period was not in dispute at the public inquiry and I proceed on that basis.

[112] Fourth, based on information supplied by another witness, Mr. Iain Cox, he prepared an accessible areas plan (also MVB5¹⁰⁸) which showed which parts of the application land were accessible and which parts were inaccessible (before they were cleared) because of dense vegetation:

- Area 2, consisting of most of the railway line north of the Wych Lane bridge, was inaccessible because of dense vegetation
- Area 3, the embankment and railway line between the Wych Lane bridge and the pedestrian underpass, was accessible together with the path leading up the embankment on the north western side of the underpass
- Area 4, the surface of the remaining railway bridge at Wych Lane, was accessible
- Area 6, a tongue of the top of the embankment south of the Wych Lane bridge, was accessible
- Area 7, the rest of the top of the embankment south of the Wych Lane bridge was inaccessible.

¹⁰⁶ B86-149

¹⁰⁷ B155

¹⁰⁸ B155

Really, this was Mr. Cox's evidence rather than Mr. Batcheldor's evidence. The accessibility of these areas was in issue at the public inquiry and I will consider it in more detail in relation to Mr. Cox's evidence.

[113] Fifth, Mr. Batcheldor visited Fareham Railway Station on 24th February 2010 and took photographs of railway warning signs at the south end of the platforms¹⁰⁹. I accept that these photographs accurately show the position of warning signs on Fareham Station on 24th February 2010. It was not suggested otherwise on behalf of the applicant.

[114] Sixth, Mr. Batcheldor said that he saw no recreational use of the application land on his visits to it. It was not suggested to him in cross-examination that he had. I accept this evidence.

Allan Malcolm Cameron

[115] Mr. Cameron produced a witness statement dated 15th March 2010¹¹⁰ and gave oral evidence to the public inquiry. He is a chartered civil engineer who has been employed by Gifford LLP for 15 years. In April 2006, he was seconded to a joint venture with Mott MacDonald Ltd. called Mott Gifford which in November 2006 was commissioned by HCC to carry out a feasibility study for the BRT scheme. He visited the railway line four times:

- He first visited the BRT route, including the application land, in November/December 2006. He accessed the application land with a colleague on the north-west side of the Wych Lane bridge and took some photographs¹¹¹. Apart from an area at the Wych Lane bridge, the whole of the application land was inaccessible because of dense vegetation.
- He next visited the application land on 4th June 2008, accompanied by some colleagues. He accessed the application land at Wych Lane bridge by the path on the north-west side of the bridge. Apart from an area at the bridge, the application land was again inaccessible because of dense vegetation. He took some photographs¹¹² from the Wych Lane bridge area. It was not possible to walk northwards along the railway line. They therefore walked along Woodside and gained access to the embankment, with the permission of Mrs. Goodwin, through a gate at the side of 106, Woodside. He again took photographs¹¹³ which show the densely overgrown state of the line above 106, Woodside.
- Mr. Cameron next visited the application land with colleagues on 18th November 2008. He took a photograph¹¹⁴ looking southwards from the bridge over Wych Lane showing

¹⁰⁹ B150-154

¹¹⁰ B159

¹¹¹ B165-169

¹¹² B170-171

¹¹³ B172-173

¹¹⁴ B174

the densely overgrown state of the line. He had extreme difficulty preparing engineering drawings because of the dense vegetation along the railway corridor, including the application land. On this visit, contractors were cutting a small amount of pathway through the vegetation.

- He next visited the application land in December 2008/January 2009 to check for land encroachments. He walked along the narrow pathway that had been cut through the vegetation. The land on either side of the pathway was inaccessible because of dense vegetation.

[116] Mr Cameron said that on his various visits he noticed the various parts of the application land that were inaccessible for one reason or another. He confirmed that they were as shown on plan MVB5¹¹⁵. On none of his visits did he see anyone on the application land except for those involved with the BRT scheme. Mr. Cameron was questioned in some detail by Mr. Lidgey, but was unshaken in his evidence, which I accept.

Mark Champion

[117] Mr. Champion produced a witness statement¹¹⁶ dated 11th March 2010 and gave oral evidence to the public inquiry. Mr. Champion had worked at the Defence Storage and Distribution Agency (previously known as the Royal Naval Armaments Depot) in Gosport since 1979. He is now the site manager. The depot had been served by the Bedenham branch line.

[118] In the early 1980s, there had been an explosion at the armaments depot known as Priddy's Yard in Gosport. Priddy's Yard was also connected to the Gosport branch line and in 1986, the last train ran from Priddy's Yard¹¹⁷.

[119] Mr. Champion produced from the Agency archives an exercise book in the handwriting of the last driver to drive trains in and out of the Royal Naval Armaments Depot at Bedenham. It recorded train movements in and out of the depot. The book covered the period from 13th March 1991 to 24th June 1991, when the last movement was recorded. There were 10 recorded train movements between 8th May and 24th June 1991. The exercise book was classified and Mr. Champion was unable to show the contents of the book to the public inquiry although he had the book with him at the public inquiry. I had no reason to doubt that Mr. Champion was correctly informing the public inquiry about the contents of the book.

[120] I accept the evidence of Mr. Champion.

Iain Cox

¹¹⁵ B155
¹¹⁶ B324
¹¹⁷ B326A

[121] Mr. Cox produced a witness statement dated 15th March 2010 and gave oral evidence to the public inquiry. He has been employed by HCC as a Land Surveyor since 2004. He dealt with three events in 2008:

- In July 2008, he was instructed to provide cross section information at various points along the rail corridor. He carried out some surveying work on and in the immediate vicinity of the Wych Lane bridge. It was not possible to survey the whole of the railway corridor because of the large amount of vegetation clearance that would have been necessary. Some clearance with hand tools was necessary.
- In September 2008, Mr. Cox was instructed to carry out a topographical survey on areas of the railway corridor including the application land. He and a colleague carried out the survey in September and October 2008. The relevant parts of the survey are in plan IC1¹¹⁸ which he produced. The survey only covered those parts of the railway corridor which were physically accessible to a surveyor. It was decided not to clear any vegetation since there was a proposed clearance contract to take effect in early 2009. He liaised with Mr. Batchelor in the production of the accessible areas plan (MVB5¹¹⁹). It was based on his survey IC1 subject to addition of Area 6 which his survey did not show. In short, Mr. Cox's evidence was that, in September/October 2008 Areas 2 and 7 on plan MVB5 was inaccessible because of dense vegetation. I questioned Mr. Cox whether he meant that the areas were physically inaccessible or whether he meant that it was not possible to achieve the site lines require to effect a survey. He said that the areas were physically inaccessible.
- In November/December 2008, a 1 metre wide track was cut along the application land with transverse 1 metre wide paths at 10/20 metre intervals. It was then possible to complete the topographical survey of features in the vicinity of Wych Lane bridge.

[122] I am quite satisfied that Mr. Cox was an honest and accurate witness and I accept his evidence.

Leslie John Herbert

[123] Mr. Herbert produced witness statements dated 11th March 2010¹²⁰ and 24th March 2010¹²¹ and gave oral evidence. He is a qualified town planner, now retired. He was employed by HCC from 1989 to 2004 as part of the SHRT project team. His evidence fell into three parts:

¹¹⁸ B180

¹¹⁹ B155

¹²⁰ B181

¹²¹ B234A

- First, he produced a number of documents aimed at throwing light on the dates (a) when the Bedenham branch line ceased to be used for rail traffic, (b) when it was cut off from the main line and (c) when clearance works were effected on the line in connection with the SHRT scheme. I have reviewed all these documents (the authenticity of which was not disputed) in section 7 above.
- Second, he produced an album of photographs taken by Peter Titmuss in November 1998 which included the photographs¹²² of November 1998 considered in section 7 above. He confirmed that they were taken on the application land.
- Third, he gave personal evidence derived from his involvement in the SHRT scheme and his numerous visits to the railway line between 1989 and 2004.

[124] As for his own visits to the railway line, he said that he did see a few trains running on the line during the early years of his involvement with the project, although he could not be precise about dates. In the early days, the ballast from the original double track was obvious and was difficult to walk on. After 1991, the ballast beds and embankment became steadily overgrown with brambles and scrub. By the time of the 1999 public inquiry into the SHRT scheme, parts of the line had become accessible only with difficulty. The track bed had to be cleared in 2002 to enable a ground condition survey to be carried out. If he accessed the line at Wych Lane bridge, he climbed up the embankment. He never had to climb over a fence although he may have got through the wires.

[125] Mr. Herbert had carried out an analysis of the formal objections to the SHRT scheme. Only three of the supporters of the present application lodged formal objections¹²³ to the SHRT scheme and none did so on the basis that the railway line was used for recreation.

[126] I accept the evidence of Mr. Herbert.

Michael Morriss

[127] Mr. Morriss produced and verified an unsigned witness statement¹²⁴ dated 24th March 2010 and gave oral evidence to the public inquiry. He is a police inspector with the British Transport Police, having joined the police in 1976. He produced occurrence books dating between 1989 and 1993 which contained entries relating to trespass on the Bedenham branch line. I have summarised them in section 7 above. He was not personally involved in the recorded incidents. The authenticity of the occurrence books was not challenged and I accept them as a contemporaneous record of the incidents described.

¹²² B58 & 59

¹²³ B201-209

¹²⁴ B323B

Philip James Samms

[128] Mr. Samms produced a witness statement¹²⁵ dated 15th March 2010 and gave oral evidence to the public inquiry. He is a qualified civil engineer, who has worked for HCC since 1992. He is currently Head of Engineering Consultancy. He produced and commented on a series of historical photographs from the archives of the HCC Environmental department showing the Wych Land pedestrian underpass and views from the top of the Wych Lane bridge. He was not personally involved in taking the photographs. I have reviewed all these photographs in section 7 above. The authenticity of the photographs was not in dispute.

Heather Walmsley

[129] Ms. Walmsley produced a witness statement¹²⁶ dated 17th March 2010 and gave oral evidence to the public inquiry. She is a qualified town planner who has been employed by HCC since 1989. In 2008, she was transferred to the Transport for South Hampshire team to client manage the BRT scheme. As part of her job, she was involved from October 2008 to June 2009 in extensive public consultation about the BRT scheme, including public meetings, circulating questionnaires and monitoring correspondence and telephone calls from members of the public. The major public concern that was identified was that clearance of the old railway line would open it up to use by undesirables with consequent vandalism, loss of security and loss of privacy. None of the feedback reflected use of the line by local people for recreation. It was not suggested in cross-examination by Mr. Lidgley that Ms. Walmsley's evidence was in any way inaccurate and I accept it.

Steven Andrew Wilson

[130] Mr. Wilson produced a witness statement¹²⁷ dated 15th March 2010 and gave oral evidence to the public inquiry. He is a Principal Urban Designer with Mott MacDonald. His evidence was directed to the issue whether the neighbourhood relied upon by the applicant (i.e. the land coloured green and labelled Areas A, B, C & D on plan B304) has sufficient cohesive qualities as to amount to a neighbourhood for the purposes of CA 2006 s. 15.

[131] First, Mr. Wilson traced the history of the development of the neighbourhood by reference to OS maps of 1910¹²⁸, 1932¹²⁹, 1940¹³⁰, 1971¹³¹ and 1983¹³² (all of which are

¹²⁵ B235
¹²⁶ B273
¹²⁷ B287
¹²⁸ B305
¹²⁹ B306
¹³⁰ B307
¹³¹ B308
¹³² B309

undisputed and are discussed in section 7 above). He pointed out that Areas B & C had been developed by the 1940s but that Areas A & D were not developed until at least the 1960s. There was also a barrier between (a) Areas B & C and (b) Areas A & D formed by the railway embankment and the area of land behind nos. 54-88, Woodside which was in separate ownership until recently.

[132] Second, Mr. Wilson pointed out that the two sides of the railway embankment have their own distinct road systems, joined only by Wych Lane. To the east of the railway line there is the long-standing A32 Fareham Road. To the west of the railway, there are the roads such as Woodside and Dale Drive constructed in connection with new developments in the 1960s and thereafter.

[133] Third, Mr. Wilson points to the diverse architectural styles of the four parts of the claimed neighbourhood:

- Area A is part of a larger 1960s housing estate with houses of similar design.
- Area B is a pre-1940 ribbon development along the Fareham Road on long narrow sites, with houses of different styles and many having been altered or extended.
- Area C is a single house built before 1932 at the end of an older terrace of houses with a large garden adjacent to the railway.
- Area D is a single detached house accessed by a cul-de-sac from Wych Lane.

[134] Fourth, Mr. Wilson points to the fact that Areas A & D are connected to Areas B & C only (a) by the Wych Lane bridge (for vehicles) and (b) by the Wych Lane underpass or scrambling over the railway embankment (for pedestrians).

[135] Fifth, Mr. Wilson analysed community facilities and events within and outside the claimed neighbourhood. There are no such facilities or events within the neighbourhood. As for facilities outside the neighbourhood, school catchment areas are separated by the railway line, and there are no medical facilities, churches, shopping facilities, public houses, community events, sports or social clubs or neighbourhood watch areas specific to the neighbourhood.

[136] Sixth, enquiries were made of local estate agents, from which it emerged that the estate agents generally regarded the two sides of the railway line as being different areas, Area A being regarded as part of a larger area sometimes called Woodcot or the Woodcot Estate and Area B sometimes being described as North Gosport or Fareham Borders.

[137] Mr. Wilson concluded that the claimed neighbourhood did not have sufficient cohesive qualities to amount to a neighbourhood for the purposes of CA 2006 s. 15.

[138] The factual content of Mr. Wilson’s evidence was not disputed, and I accept it. I deal below with the question of law whether the claimed neighbourhood is capable of amounting to a neighbourhood for the purposes of CA 2006 s. 15. This question was in dispute between the parties.

Witnesses who did not give oral evidence

[139] The objector also relied on written statements from a number of witnesses who did not attend the public inquiry to give oral evidence. I deal with them in alphabetical order.

Graham Dodsworth

[140] There were produced two written statements from Mr. Dodsworth, one dated 11th March 2010¹³³ and one dated 22nd March 2010¹³⁴. He has worked for British Rail since 1991 and at Fareham Station since 2001. He referred to warning signs photographed on Fareham Station by Mr. Batchelor in February 2010¹³⁵. His evidence was those or similar signs had been in place on Fareham Station since 2001 and that similar signs had been in use by British Rail/ Network Rail since 1991.

[141] This evidence was not contradicted and I see no reason not to accept it.

Stewart Hurdle

[142] A witness statement¹³⁶ of Mr. Stewart Hurdle dated 24th March 2010 was produced to the public inquiry. Mr. Hurdle is a Revenue Inspector employed by South West Trains. He has worked for the railways since 1978. He referred to warning signs photographed on Fareham Station by Mr. Batchelor in February 2010¹³⁷. His evidence was those or similar signs had been in place on Fareham Station since 1978. For the last four years, he has been involved in three monthly health and safety walks, at which these signs have been checked. Defective signs are reported and replaced. This evidence was not contradicted and I see no reason not to accept it.

Tony King

[143] There was produced a short email¹³⁸ from Mr. King dated 22nd March 2010. He was station manager for Fareham Station in 1996. He said that there were signs warning against trespass on the station although the email is rather vague about the wording and positions of the

¹³³ B327
¹³⁴ B327A
¹³⁵ B150-153
¹³⁶ B323F
¹³⁷ B150-153
¹³⁸ B323A

signs. He said that there were similar signs today, although it is unclear whether can speak for the intervening period. I found this evidence too vague to be of much assistance.

Donald Macaulay

[144] There was produced a written statement¹³⁹ from Mr. Macaulay dated 12th March 2010. He has been employed by Network Rail as Assistant Structures Management Engineer for the Wessex area since 2007. He produced some documents from the Network Rail files dealing with inspection and repair in the area of the application land:

- A report¹⁴⁰ of 29th January 1991 noted that a length of chainlink fencing had been pulled down in the vicinity of the Wych Lane bridge wing wall and needed urgent attention
- A report of 1st February 1997¹⁴¹ commented that urgent attention was needed to wingwall and boundary fencing at Wych Lane. The chainlink fence Fareham end up and downsides had been pulled down. An examination supplementary sheet of 24th February 1997¹⁴² recommended repairs to fencing to wingwalls and boundary fencing.
- A completion certificate¹⁴³ of 1999/2000 certified that damaged chainlink fencing had been removed and replaced at bridge 32 (Wych Lane) with completion on 18th December 1999.

It was not suggested at the public inquiry that these documents were not authentic.

Nick Redgell

[145] A written statement¹⁴⁴ dated 22nd March 2010 by Mr. Nick Redgell was produced to the public inquiry. Mr. Redgell has worked at Fareham Station since 2001. He is a supervisor. Part of his job is to check on safety signs. He referred to warning signs photographed on Fareham Station by Mr. Batcheldor in February 2010¹⁴⁵. His evidence was those or similar signs had been in place on Fareham Station since 2001. He regularly checks the signs and they are replaced within a couple of days if they are “faulted”. Further, all station staff are under a duty to report defective signs to him as supervisor. Mr. Redgell has worked for the railways for 30 years and these signs are standard at all stations. This evidence was not contradicted and I accept it.

David Charles Rowland

¹³⁹ B327
¹⁴⁰ B329B
¹⁴¹ B330
¹⁴² B336
¹⁴³ B336A
¹⁴⁴ B323C
¹⁴⁵ B150-153

[146] A written statement¹⁴⁶ dated 17th February 2010 by Mr. Rowland was produced to the public inquiry. He produced photographs¹⁴⁷ taken by himself on 15th June 1989 of a weedkilling train on the Bedenham branch line. I have mentioned these photographs in section 7 above. It was not suggested at the public inquiry that the photographs were not authentic or not taken on the date stated by Mr. Rowland.

David Titheridge

[147] A written statement¹⁴⁸ dated 22nd March 2010 by Mr. Titheridge was produced to the public inquiry. Mr. Titheridge has worked for South West Trains and its various predecessor organisations since 1965. He has travelled to work via Fareham railway station nearly every day for 45 years. He referred to warning signs photographed on Fareham Station by Mr. Batchelor in February 2010¹⁴⁹. His evidence was that those or similar signs had been in place on Fareham Station since 1965. This evidence was not contradicted and I accept it.

Peter Titmuss

[148] A written, but unsigned, statement¹⁵⁰ of Mr. Peter Titmuss was produced to the public inquiry. He is a professional photographer. In 1998, he was commissioned by HCC to take a series of photographs of the old Bedenham branch line which was proposed to be used as the route for the SHRT scheme. He took the photographs in early November 1998 and they included the photographs B58 & 59 mentioned in section 7 above.

9. Witnesses for applicant

[149] I now turn to consider the witnesses relied upon by the applicant. I propose first to consider (in alphabetical order) the witnesses who gave oral evidence to the public inquiry. I will then consider the statements of witnesses who did not give oral evidence.

Witnesses who gave oral evidence

Barbara Anne Allen

[150] Mrs. Allen lives at 387, Fareham Road. She produced a witness statement¹⁵¹ dated 3rd March 2010 and gave oral evidence to the public inquiry. She has lived at this address since 1978. Her husband died in about 1993. She has three children, now aged 41, 40 and 29. The oldest has children of his own. Mrs. Allen's evidence was not easy to follow. She seemed very

¹⁴⁶ B337
¹⁴⁷ B338-341
¹⁴⁸ B323B
¹⁴⁹ B150-153
¹⁵⁰ B323M
¹⁵¹ R14

tired and unwell, which made her rather vague and confused on dates and other details. I was unable to ask a number of points of clarification after re-examination because she was obviously too exhausted to continue. Her evidence seemed to break down into four periods:

- First, there was the period when the trains were still running, transporting munitions. She could not remember when the trains stopped running. During this period, the top of the railway embankment was open and her children used to play on the railway embankment. “There would be room for both the trains and the pedestrians on the line”. It was not clear whether Mrs. Allen herself used the railway line for recreation during this period
- Second, there was a period after the trains stopped running when the line got progressively more overgrown. She did not seem to be surprised by the 1998 photographs¹⁵² showing only a narrow path left through the vegetation. I understood her to say that she sometimes walked along the railway track during this period.
- Third, there was a period when it was not possible to walk along the railway line because of the vegetation. She was shown the 2001 photograph¹⁵³ of the line north of Wych Lane bridge and said that it was wonderful: overgrowth can be very good for nature. During this period, she was able to gain access to the embankment to pick blackberries and elderflowers at the back of her house by climbing her garden fence. “It was fine by me if the railway line was overgrown. I only got access from my garden. It was not an impenetrable thicket at the back of my house”
- The fourth period has been since the railway line was recently cleared. Until then, the back of her house was secure because people could not get along the embankment. Once it was cleared, her greenhouse was broken by stones thrown from the railway line. Her grandchildren have climbed the back fence onto the embankment.

[151] I am very doubtful whether Mrs. Allen would have let her children play on a railway line that was still being used by trains, even if they were infrequent. I think that the probability is that the Allen family did not make a great deal of use of the railway line until the trains stopped in 1991. There was then a period (roughly 1991-2001) when the line through the application land was open although gradually becoming more overgrown. I accept that the Allen family probably used the line for recreation during that period. After 2001, it seems to me that the line was totally overgrown for a number of years (subject to limited clearances in 2002 and 2008) and that Mrs. Allen accepts that she could not and did not use it generally for recreation. I do accept that she probably entered the application land immediately behind her own back garden on a number of occasions for a few years to pick blackberries and elderflowers. There was no satisfactory

¹⁵² B58-59

¹⁵³ B260

evidence that Mrs. Allen has herself otherwise used the application land for recreation since the 1990s.

Monica Elizabeth Margaret Boorn

[152] Mrs. Boorn produced a written witness statement¹⁵⁴ dated 14th March 2010 and gave oral evidence to the public inquiry. Mr. and Mrs. Boorn have lived at 74, Woodside since 1970. They have two sons, now aged 32 and 27. Mrs. Boorn wrote in her witness statement that she thought that the last train on the line was in 1986 but she accepted that she could not really remember the date. She has used the line for dog walking and blackberry picking and her children have played on the line. She did not give clear evidence on the dates when these activities took place nor on the extent to which the line had become overgrown. I am inclined to think that her main user period was between 1991, when the trains stopped, and about 2001, when the line had become wholly overgrown, and then during the limited clearances of 2002 and 2008. Originally, there was no fence between their back garden and the railway embankment, but subsequently they erected a fence themselves. Mrs. Boorn gained access to the old railway line by the access track near the Wych Lane bridge. She entered through a gap in the fencing which was in a “U” shape. She remembered a fence being up, but it did not last long and was trampled down. Mrs. Boorn saw other people on the line. They were not necessarily from her side of Woodside. Anyone could use the line and she expected that there were lots of other people that she did not recognise. I think that Mrs. Boorn was wrong in thinking that the last train ran in 1986. Subject to my comments about the period when I think that she used the line, I accept her evidence.

Kenneth Buckley

[153] Mr. Buckley produced a witness statement¹⁵⁵ dated 2nd March 2010 and gave oral evidence to the public inquiry. He has lived at 375, Fareham Road since December 1997. In his witness statement he wrote of seeing children cycling and playing hide and seek and tag among the shrubbery of the former branch line. He said that he saw organised ball games and dog obedience training on the line. As for his own use “I...have walked taking the air on it until about September 2009”. In cross-examination, Mr. Buckley could clearly recall only two visits to the railway line from his house in Fareham Road. The first was in 1998, shortly after moving to Fareham Road. He walked to the Wych Lane bridge, climbed up the embankment and clambered over a metal fence. He then walked along the railway line, passing the back of his own house, and walking as far as 379-381 Fareham Road. It was easy to trample down the undergrowth. He could not remember the date of the second visit, but he heard a child that had had got stuck in the undergrowth behind his garden. He climbed over his garden fence to rescue the child. Asked about the photographs, Mr. Buckley said that he could not recognise the November 1998

¹⁵⁴ R37A

¹⁵⁵ R17

photographs¹⁵⁶ but that the September 2001 photograph¹⁵⁷ looking north from the Wych Lane bridge was “more like what I have seen”. He maintained that the undergrowth did not prevent people cycling and playing ball games on the railway line and that he had seen and heard them doing so from his garden. I accept Mr. Buckley’s evidence about his own visits to the railway line. The November 1998 photographs¹⁵⁸ show that there was still a narrow walking route along the railway line in 1998. No doubt, it was possible to get onto the railway line in an emergency to rescue a child stuck in the undergrowth. However, I cannot accept Mr. Buckley’s evidence that the line comprising the application land has been generally used for recreation such as cycling and ball games since 1997. The 2001 photograph¹⁵⁹ which Mr. Buckley himself accepted as accurate shows that the application land north of the Wych Lane bridge was too overgrown for that sort of recreational use. No doubt adults and children could and did sometimes force their way through the undergrowth (like the stuck child rescued by Mr. Buckley). However, I cannot accept that it was in general use by local people for recreation from 1997 to 2009. Apart from the limited 2002 and 2008 clearances, I think that the evidence is clear that the line was too overgrown to be generally used for recreation by 2001.

Frederick Gerald Diaper

[154] Mr. Diaper submitted a short written statement¹⁶⁰ dated 25th October 2009 in support of the application and an amplified written statement¹⁶¹ dated 2nd March 2010 to the public inquiry. He also gave oral evidence to the public inquiry. Mr. Diaper was born in 1929 and has lived at 102, Woodside since about 1974. His wife died in 2004. He has two children, aged 52 and 49, who were in their teens when he moved to Woodside. They left home long ago. Mr. Diaper gave evidence of use of the line when the trains were still running. First, he said that the children played hide and seek on the line. I find it hard to believe that anyone would have let their children play on an active railway line. In any event, it must have been only for a short period in the 1970s since the children were aged between 14 & 11 when they moved to Woodside in 1974. Second, he said that he and his wife used to walk on the line when there were trains passing. There was space on the embankment to keep out of the way of the trains. Mr. Diaper also gave evidence that he and his wife used to walk their dogs along the railway line and take tea and biscuits to picnic there. He did not say when this was, except that he gave up keeping dogs after his wife died. His main access to the railway line was up some steps at the rear of his house. However, he did also walk across the top of the Wych Lane bridge and see the place where people walked up near the underpass. There was a fence there. It was broken down 9 times out of ten and was nearly flat on the ground. Later, he corrected this to 10 times out of ten. In his

¹⁵⁶ B58-59
¹⁵⁷ B260
¹⁵⁸ B58-59
¹⁵⁹ B260
¹⁶⁰ B379
¹⁶¹ R18

second witness statement, he said that the line north of the Hoeford stream became overgrown and impassable long ago. However, it was always possible to walk along the section from the Wych Lane bridge to the Hoeford stream. In cross-examination he was pressed with photographs which showed this section as being overgrown with vegetation from the late 1990s onwards. He said that in his statement he was “over-exaggerating a little” but “that was only in spasms...you could still get through”. I accept that Mr. and Mrs. Diaper sometimes walked on the line before the trains stopped. I think that their main use for dog walking was probably in the 1990s after the train stopped running in 1991 and before the line became totally overgrown by 2001. It would seem odd to me to walk one’s dog along an active railway line. Mr. Diaper seemed to be in denial about the overgrown state of the line from the late 1990s onwards. I think that he has probably made little or no use of the application land in this period. As for the fence at the Wych Lane bridge, I considered that Mr. Diaper’s first thoughts were more accurate than his second thoughts and that the fence was sometimes re-erected although mostly pulled down.

Elaine Mary Driver

[155] Mrs. Driver produced a witness statement¹⁶² dated 27th February 2010 and gave oral evidence to the public inquiry. She and her husband have lived in 5, Dale Drive since 1984. This is the property in respect of which an application was made at the public inquiry to add it to the claimed neighbourhood. When they moved in, part of the application land was fenced in as an extension to their garden and it has remained fenced ever since. This part of the application land has not been used by local people for recreation. It is Area 8 on plan B155. Mrs. Driver did not want Area 8 to be registered as a new green. Mr. and Mrs. Driver have three sons, now aged 45, 42 and 40. When Mr. and Mrs. Driver first moved in, there were trains running three times a week on the branch line carrying freight to the armaments depot. In her witness statement, she simply said that the trains stopped running “many years ago”. In her oral evidence, she said that she recollected that they stopped in 1988 and disagreed with the evidence of Mr. Champion¹⁶³ that it was in 1991. She could not explain the grounds of her recollection that the trains stopped in 1988 and I consider that her “recollection” was swayed by a desire to place the date before the start of the relevant 20 year period. As for recreational use of the railway line, I found her evidence rather hazy on dates and details. She did not claim that her sons ever went on the line although they were teenagers when they moved to 5, Dale Drive. She did not claim to have seen anyone using the line for recreation although she used to hear other people walking their dogs and talking (presumably from her garden). She did not claim to have used the line when the trains were still running. She said that she and her husband used to access the former railway line at Wych Lane bridge and walk along to the Hoeford stream crossing with their dogs and to pick blackberries. She said that the line became totally impassable with vegetation to the south but was “always passable” from her house to the Hoeford stream. Her evidence somewhat unravelled

¹⁶² R19

¹⁶³ B324

under cross-examination. Faced with photographs of the Wych Lane access to the line she said that she “did not use this access on a regular basis”. Asked why she only walked to the Hoeford Stream, she said that it was because she was “happy” with that walk. Asked about dog walking, she said that she only walked the dog along the line “irregularly”. Shown the November 1998 photographs¹⁶⁴, she said that there was a time when she did not take her dogs on the line because of mangy foxes. Shown the July 2004 photograph looking north from Wych Lane bridge, she said “It is very hard to remember when I went up on the line. I think that the probability is that Mrs. Driver has been up on the railway track infrequently. I am not satisfied that she used it before the trains stopped in 1991 or after it became overgrown by 2001.

Patricia Christine Goater

[156] Mrs. Goater gave oral evidence to the public inquiry. She had not submitted a written statement. Mrs. Goater is 63. She lived in Bridgemary from the age of 2 (c. 1949) until 1967. Her father took her up on the railway line to pick primroses and blackberries. Lots of children from the area played there. The line was still a passenger line in those days. She got married in 1967 and moved away from the area. In 1987, she and her husband and their three children (aged 12, 10 and 7) moved back to the area to live at 101, Wych Lane, where she has lived ever since. It is about five minutes walk from the Wych Lane railway bridge. She and her husband have had dogs since 1991 and have walked them on the old railway line. Her husband has picked elderflowers and elderberries there to make wine. She did not say that her own children played there. She said that kids rode bikes there. The path by the Wych Lane bridge has been there as long as she can remember. Mrs. Goater was not cross-examined about the growth of vegetation on the railway line She was however questioned about the area from which recreational users of the application land came. She thought that it was from a much wider area than the claimed neighbourhood shown coloured green on plan B342. It was not, however, very clear on what evidence she based this view. Because of the limited cross examination it would not be right to make specific findings about the reliability of her evidence and I simply weigh it in the balance with all the other evidence.

Ann Scott Hammond

[157] Mrs Hammond produced a witness statement¹⁶⁵ dated 27th February 2010 which confirmed a witness statement¹⁶⁶ of the same date by her husband, Alfred Ernest Hammond. She gave oral evidence to the public inquiry. Mr. and Mrs. Hammond have lived at 100, Woodside since 1971. They have three children, born in 1972, 1974 and 1975. Mrs. Hammond could not remember exactly when the trains stopped running. However, she said that when the trains were still running, she and her husband would walk on or alongside the tracks. When there were trains

¹⁶⁴ B58 & 59

¹⁶⁵ R42

¹⁶⁶ R20

“the driver would whistle and wave to us”. In her husband’s witness statement (as verified by Mrs. Hammond) he said that in the time that they have lived at 100, Woodside, they have enjoyed “daily walks” with their dogs along the former railway corridor. They went by themselves to pick blackberries. Mr. and Mrs. Hammond always gained access to the application land not directly from the back of their house but by the informal path beside the Wych Lane bridge. Sometimes there was fencing at the top of the path and sometimes it had been vandalised (although not by them). She realised that the landowner did not want people to go on the railway line but she took advantage of the fact that someone had knocked down the fence. Asked in cross-examination about the frequency of her use of the railway line since the trains stopped, Mrs. Hammond was not very certain. As for the 1990s, she could not say how often she walked from Wych Lane to the Hoeford stream. “I would say more than once or twice a year”. As for the period 2000-2005, she could not say how often she walked along the application land other than it was “periodically”. As for the last five years: “I went every month. It could have been. I am not saying it is. I can’t say how often I walked along the railway in this period.” Asked about the vegetation growing over the line since the mid 1990s, she said “It is not so overgrown to the north of the Wych Lane crossing” I accept that Mr. and Mrs. Hammond had sometimes walked along the railway line when the trains were still running. Their evidence on this point was not challenged in cross-examination. However, there does seem to be a discrepancy between their written and oral evidence about use in the 1990s and afterwards. Their written evidence gave the impression of use for “daily walks”. Mrs. Hammond’s oral evidence suggested that use during this period was infrequent. Neither in their written or oral evidence did they really face up to the incontrovertible evidence that the line north of Wych Lane was overgrown with vegetation by 2001 at the latest.

George Jerzi Knoll

[158] Mr. Knoll produced a witness statement¹⁶⁷ dated 1st March 2010 confirming the witness statement¹⁶⁸ of his wife Mrs Jacki June Knoll (whose evidence I consider below). However, the main part of his evidence consisted of the production of and commentary on a DVD based on a video which he took on the railway line in 1992. It is a very short video. I was shown it at the public inquiry and given a copy which I have viewed while preparing this report. It shows a boy and dogs walking along the railway line together with blackberries and wild flowers at the side of the line. The line is largely clear of vegetation although the sides are heavily overgrown. Mr. Knoll could not remember when the last train ran on the line, but the video seems to me to be consistent with the evidence that the line was last used by trains in the summer of 1991. Mr. Knoll said that it was possible to climb the embankment at the back of his house (64 Woodside) but that his normal entrance was by the informal track to the north-west of the Wych Lane pedestrian underpass. There were bits of fencing on the ground. He never saw the fence up. He

¹⁶⁷ R45

¹⁶⁸ R22

did not know whether the fence had been pulled down or fallen down of its own accord. It appears to me from the photographs that it must have been pretty obvious that the fence had been pulled down. Otherwise, I accept Mr. Knoll's evidence.

Jacki June Knoll

[159] Mrs. Knoll produced a witness statement dated 1st March 2010 and gave oral evidence to the public inquiry. Mr. and Mrs. Knoll have lived at 64, Woodside since July 1989. They have four children, now aged 33, 31, 27 and 26. There is a photograph of the back of their house at B91, although the stairs down the bank were only erected last year. The trains were still running when they moved into their house. There were only two trains a week. There was always sufficient room for trains and pedestrians to use the line. Mrs. Knoll thought that the trains stopped running during the first year that they lived in the house. Mrs. Knoll and her family used the railway line for the following purposes:

- The children played on the line
- Mr. and Mrs. Knoll walked and played with their dogs along the line
- Mr. and Mrs. Knoll used to pick blackberries on the line.

When her children were young, Mrs. Knoll used sometimes to gain access to the railway line directly from her back garden. However, it was a difficult climb up the embankment and her usual route has been by way of the informal track on the north-western side of the Wych Lane pedestrian underpass. She was questioned about fencing at the top of that track and shown photographs B242, B244, B245, B247, and B252. She said words to the effect that she had seen wire mesh fencing trampled down but had never seen fencing that formed an effective barrier to access. Mrs. Knoll accepted that the line got overgrown after the trains stopped. Shown the November 1998 photographs¹⁶⁹ she said that "it was sort of like that. I remember it a bit flatter". She questioned whether the photographs were taken in November in view of the greenness. Shown the September 2001 photograph¹⁷⁰ she said that there was a worn path that you could not see from the photograph. Shown the July 2004 photograph¹⁷¹ she accepted that the line grew back after an earlier clearance. Shown the photograph of November/December 2006¹⁷², she said that you could always walk through on little beaten down paths. I think that Mrs. Knoll was mistaken in thinking that the trains stopped within a year after she moved in, since there is convincing evidence that they ran until June 1991. I am not satisfied that she and her family made any material recreational use of the line until the trains stopped running. Certainly, I find it hard to believe that any mother would allow her children to play on a railway line that was still

¹⁶⁹ B58-59

¹⁷⁰ B260

¹⁷¹ B267

¹⁷² B165

being used by trains. I do accept that she and her family used the line for dog walking and blackberry picking after the trains stopped in 1991 and until the undergrowth became impenetrable by at least 2001 and then as and when the line was partly cleared in 2002 and 2008. I got the distinct impression that she had not personally been up on the railway line for some years.

Laura Jozefa Knoll

[160] Laura Knoll produced a written witness statement¹⁷³ dated 2nd March 2010 and gave oral evidence to the public inquiry. She is the second child of Mr. and Mrs. Knoll. She was 10 when she moved with her parents to 64, Woodside in 1989. She left home at the age of 18 in 1997 to go to college and has not lived in Woodside since then. She now lives near Petersfield. Ms. Knoll said that she used the old railway line as a child living at home:

- To walk the family dogs
- To play Frisbees and ball games
- To pick blackberries
- Between the ages of 13 and 14 (1992-1993) to meet girlfriends
- Between the ages of 15 and 17 (1994-1996) to meet boyfriends

I accept this evidence but she did not suggest that she used the line when the trains were still running. I think that this evidence relates to the period after 1991 (when the trains stopped running) to 1997 (when she left home). Ms. Knoll and her husband visit her parents in Woodside and she gave evidence of walking her dogs on the line in December 2008. I think that must have been after the one metre wide clearance that took place in November/December 2008. Ms. Knoll was questioned about her access to the railway line and shown photographs of the informal path by the north western side of the Wych Lane pedestrian underpass, in particular photographs B244 (1989-90), B245 (1989), B247 (1990), B248 (1990-1992) and B251 (1995). This was her usual way of access to the old railway. The wire mesh was always down. She did not consider it to be a fence. She thought that it was designed to help people get up the embankment onto the line. I accept that this was her usual access to the railway line and that she did not personally break down the fence. However, it seems to me obvious from the photographs that there was a fence at the top of the informal track which was erected to keep out trespassers but which had been broken down by trespassers to gain access. I reject her evidence that she believed that the broken down fence was a device to help people access the old railway line.

Janice Adele Lilley

¹⁷³

[161] Mrs. Lilley produced a witness statement¹⁷⁴ dated 7th March 2010 and gave oral evidence to the public inquiry. She and her husband have lived at 76, Woodside since 1981. They have three sons, who are now aged 41, 40 and 33. When they first moved to Woodside, there were still freight trains for the Frater depot using the line. She could not say when they stopped running. There was one train which went down to the depot mid-morning and returned about an hour and a half later. Since they knew when the trains ran, they were happy to let their children play on the line. Mrs. Lilley used to pick blackberries (not always on the application land) and walk her mother's dog on the line. She walked along the railway line to Fareham. The line began to get overgrown in the mid 1990s. She remembered the track getting as overgrown as shown in the 2001 photograph¹⁷⁵ looking north from the Wych Lane bridge. "It was more or less like that to the north". However, Mrs. Lilley said that there was always a way through, although not comfortably. Shown the July 2004 photograph¹⁷⁶ looking north from the Wych Lane bridge, she said that "I do not say that everyone walked through but people were still walking through and using it". Shown the 2006 photograph looking north from the Wych Lane bridge, she said "I can't see a path on that photo, but photos can lie" Originally, Mrs. Lilley and her family used to access the track through a gate in her back garden, down a steep descent from the garden, across a stream and then up the steep side of the embankment. However, that route became overgrown in the mid 1990s and she then used to gain access to the railway line by the path that climbed up the embankment on the north-western side of the Wych Lane pedestrian underpass. There was a fence at the top of the path but it was usually vandalised and she stepped over it. The fence was re-erected from time to time but it was soon vandalised again. It would then be left for a few years before it was repaired. Mrs. Lilley herself never vandalised the fence. I accept Mrs. Lilley's evidence about her access to the application land. I am not convinced that she and her family made much recreational use of the line while the trains were still running. It seems to me that it would be very odd to allow one's children to play on a working railway line, even if one thought that one knew the usual times of the trains. I accept that she and others used the line for informal recreation from 1991, when the trains stopped running, until the line became wholly overgrown north of Wych Lane by 2001, at latest. However, I do not think that the application land was capable of use for general recreation after that except during the periods when it was partly cleared in 2002 and 2008 in connection with the SHRT and BRT schemes.

Brian Masterton

[162] Mr. Masterton produced a written witness statement¹⁷⁷ dated 7th March 2010 and gave oral evidence to the public inquiry. Mr. Masterton is a wildlife consultant from Southampton. He was instructed to monitor badger setts and other ecological matters on the whole of the old

¹⁷⁴ R23

¹⁷⁵ B260

¹⁷⁶ B267

¹⁷⁷ R47

railway line from Fareham to Gosport. He first visited the line in 1994/95. He walked the whole length of the line. He looked at badger setts on the application land in about 1996. There were adults using the line for dog walking and children playing on the line. Mr. Masterton did not give any clear evidence about the dates or frequency of his visits to the application land after 1996. However, he seemed a perfectly genuine witness and I accept his evidence, so far as it goes.

Vivienne Edith Morge

[163] Mrs. Morge produced a written witness statement¹⁷⁸ dated 2nd February 2010 and gave oral evidence to the public inquiry. Mrs. Morge has lived at 21, Wych Lane since 1986. This is the property falling within the claimed neighbourhood which lies on the south eastern side of the Wych Lane bridge. She and her sister used to walk their dogs along the old railway line but she has not been able to use the line for the last 15 years because she is disabled by rheumatoid arthritis. She used to access the line over the fence at the bottom of her garden. Her boyfriend used to pick blackberries on the line. She has seen and heard walkers on the line, although she could not say where they had come from. Mrs. Morge's house is at the end of a row of cottages in Wych Lane which are not included in the claimed neighbourhood. Mrs. Morge did not know whether the inhabitants of the cottages had used the line for recreation. There was an access by the Wych Lane underpass with a fence that was always tumbled down. I accept Mrs. Morge's evidence subject to the point that I consider that the fence was sometimes re-erected. I accept that Mrs. Morge may not herself have seen it upright.

Patrick Radford

[164] Mr. Radford lives at 52, Woodside. He did not submit a written witness statement but gave oral evidence to the public inquiry in relation to the fence at the top of the informal track leading up to the railway embankment on the north western side of the pedestrian underpass. He could not remember a fence there when the trains were running. However, about 7 or 8 years ago a chain link fence was erected at the top of the track. It was only a couple of widths of chain link. He thought that it was at about the time of an accident elsewhere in the country when a car went down an embankment onto the railway line. A bad job was made of erecting the fence and it was down within a short time. He could only remember constant access up there. The photographic evidence shows that there was a broken down fence across the top of the informal access track when the trains were running, but I accept Mr. Radford's evidence about the fence erected 7 or 8 years ago.

Wendy Diane Radford

¹⁷⁸

R50

[165] Mrs. Radford produced a witness statement¹⁷⁹ dated 7th March 2010 and gave oral evidence to the public inquiry. She and her husband (Mr. Patrick Radford) have lived at 52, Woodside since 1969. They have three children, born in 1962, 1964 and 1978. She could not say from her own memory when the last train ran on the line, although she had hearsay evidence that it was in 1988. Mrs. Radford gave evidence of three types of recreational use of the application land by herself and her family:

- First, her children played on the railway line. She did not put any precise dates on the children’s play, although, judging by their ages it seems likely that she was referring to the 1970s and 1980s.
- Second, she used to walk her dog along the old railway in the 1970s, 1980s and 1990s. She did not walk along the line after 2000.
- Third, she used to pick blackberries on the line although only “on the corner” after 2000. I understood this to mean near the Wych Lane bridge.

She saw other people using the railway line for walking dogs and she saw other children playing there. She did not know where they came from. They came from “all over the shop”. The line got overgrown but was still accessible. She could have walked through the vegetation if she had wanted to do so, but thought that she was too old to go there. A group of teenagers were on the railway line two years ago: they must have got through. She used to gain access to the railway embankment from the back of her garden, where there was only a temporary fence. It was an easy climb up the embankment. However, her husband put up a stronger fence at the end of the garden about 3 or 4 years ago¹⁸⁰ and, since then, she has accessed the railway embankment by the informal track beside the Wych Lane pedestrian underpass. There has always been a fence at the top of that track but it was never repaired when the trains were running. However, within the last 10 years the fence was put up again. It ran from the edge of the underpass to posts on her property. It would have stopped people entering the embankment from Wych Lane. It lasted no more than a week and was not repaired again. She said that she knew that she was going on an area on which she was not supposed to go. I am very doubtful whether Mrs. Radford and her children used the railway line to any material extent while the trains were still running before June 1991. I accept that she walked her dog on the line from 1993 until the line became wholly overgrown (which may have been as late as 2000). Apart from blackberry picking near the Wych Lane bridge, I felt that Mrs. Radford had little evidence of recreational use of the application land after 2000.

Louise Vivienne Sharp

¹⁷⁹ R24

¹⁸⁰ Mr. Radford thought that it was about 7 years ago

[166] Mrs. Sharp produced a witness statement¹⁸¹ and gave oral evidence to the public inquiry. She and her husband have lived at 54, Woodside since 1986. They have five children, now aged 35, 32, 26, 24 and 22. The oldest was about 10 when they moved to Woodside. The youngest still lives at home. When they moved to Woodside, the railway line was still in use about once a day. A freight train used to take goods to the armaments depot at Frater. Mrs. Sharp could not remember the year in which the trains stopped running. Mrs. Sharp gave evidence of three different recreational uses of the old railway line:

- First, her children used to play games on the line. She did not say when this was but, judging by the ages of the children, it must have been largely in the 1980s and 1990s
- Second, she had a dog between about 1993 and 2000 and used to walk it along the railway line. She saw other dog walkers doing the same. Some were from Woodside although she could not say where they all came from.
- Third, she picked blackberries on the old railway line, although she did not say when.

Until they got the dog, she usually accessed the embankment from their back garden, which was not fenced and had steps leading down to the foot of the embankment. After they got the dog, the garden was fenced to keep the dog in and she usually accessed the embankment by the informal track near the Wych Lane pedestrian underpass. There was a fence at the top of the path, but, when she saw it, it always had a hole in it. She illustrated the hole with a “U” shaped movement of her hands. She stepped through the hole. She knew that people were not supposed to be on the line but it was in constant use. Asked where users of the line came from, she said that there were “the inhabitants of anything adjoining” and also that people could come from anywhere, Gosport or Fareham. Asked about the vegetation on the track, she said that it became overgrown only about two years ago. Shown the 1998 photographs¹⁸², she said that the railway line was still passable. Shown the 2001 photograph¹⁸³, she said that it was overgrown but not inaccessible. However, she said that “I do not know if I was up there at that particular time”. There was “not really any reason for me to be there”. I consider that Mrs. Sharp was clearly wrong in her recollection that the application land only became overgrown about two years ago. I think that Mrs. Sharp’s main period of use of the railway line was dog walking in the 1990s after she acquired her dog in 1993. It seems that she lost her dog in about 2000 when the line was becoming totally overgrown. I do not think that she has used the land much, if at all, since her dog died. I accept that her children sometimes played on the line when it was still a working railway but I doubt that they did so to any material extent as I find it difficult to believe that any parent would allow her children to play on a working railway line.

¹⁸¹ R25

¹⁸² B58-59

¹⁸³ B260

Fay Skittlethorpe

[167] Mrs. Skittlethorpe produced a written witness statement¹⁸⁴ dated 2nd March 2010 and gave oral evidence to the public inquiry. She has lived at 96, Woodside since 2007 with her husband and their four children aged 15, 10, 7 and 5. Mrs. Skittlethorpe did not live in the area before 2007 but her husband lived in Bridgemary Avenue for many years before going into the army and he told her that he used to use the railway line from Bridgemary Avenue. It was not clear when or how often this was. Mrs. Skittlethorpe said that, since moving to Woodside in 2007, she has taken the children onto the embankment taking the air and nature watching. At one time this was every weekend. It was possible to get access to the embankment directly from her back garden but it was too steep for the children and she took then via the path at the Wych Lane bridge. The old railway line was overgrown but it was possible to get through on winding tracks, some made by animals. Mrs. Skittlethorpe's evidence about access through the undergrowth is, I think, explicable as use of the one metre track cut in late 2008.

Roger Ian Stell

[168] Mr. Stell produced a written witness statement¹⁸⁵ dated 4th March 2010 and gave oral evidence to the public inquiry. Mr. and Mrs. Stell have lived at 82, Woodside since 1987. They have two children, now aged 35 and 33. The trains were still running about once a day when they moved to Woodside. He thought that the trains stopped in 1989/90 rather than 1991 although he had no specific reason in mind for that belief. He did not use the line when the trains were running, "at least not in the morning". Indeed, he did not give any specific evidence of using the line except that his witness statement said that "we used to blackberry pick every year". In his oral evidence he said that he had not himself used the railway corridor in recent years. However, it was a popular place for dog walkers and youngsters. There was no fence between his back garden and the railway but he let the bottom of his back garden become overgrown to deter intruders and so could not access the embankment directly from his garden. There was an access to the embankment by a path near the Wych Lane bridge. There was a fence at this access but it was broken down. He agreed that the railway line had become overgrown in the last ten years but he thought that you could still get through although he has not personally done so. The impression that I got was that Mr. Stell had not made much use of the old railway except for picking blackberries after the trains stopped in 1991 and before the application land become overgrown by 2001.

Donald John Stephens

¹⁸⁴ R27

¹⁸⁵ R29

[169] Mr. Stephens produced a written witness statement¹⁸⁶ dated 2nd March 2010 and gave oral evidence to the public inquiry. He has lived in the Bridgemary area since 1951. As a child, he lived in Chatfield Road. From 1964 to 1970, he lived in the Little Close prefabs north of the railway line. Mr. and Mrs. Stephens moved to 112, Woodside in 1970. He built the house himself. The house does not back directly onto the railway line but backs onto the Hoeford stream in a section of Woodside that is at right angles to the railway line. They have lived there ever since. They have three children, now aged 44, 40 and 38, who no longer live at home. He used to get access to the railway line by walking along the Hoeford stream and climbing the railway embankment. There was a path which people used to cross the line near the Hoeford culvert to get to the Hoeford PH in Fareham Road. He called the path “the wibbly wobbly way”. He and others used to walk along the railway line and his children played on the line. There was room for the trains to pass pedestrians. He produced three photographs from the 1970s which I discuss in section 7 above. In the 1980s, the pedestrian underpass was built by the Wych Lane bridge. A fence was erected to stop people climbing up onto the line from the new underpass. However, it was always down. Mr. Stephens knew that one should not go on the railway but he did not intend to do any damage. Until about 1998, Mr. Stephens had dogs which he walked along the railway line. He accepted that the line became overgrown during the 1990s and, as the vegetation became more impassable, fewer people used the line. If you really wanted to get through, you could do so. He produced an aerial photograph¹⁸⁷ downloaded from the internet. He said that he could date it to between 2003 and 2007 from the car standing in his front drive. It shows part of the old railway line. The photograph is not very clear but the old railway line looks very overgrown. The impression that I got was Mr. Stephens and his family had gone onto the railway line before the trains stopped and had seen others doing the same although I was not convinced that it was to any very great extent. During the 1990s, after the trains stopped and before the line got very overgrown in the late 1990s, I think that Mr. Stephens did make considerable use of the line, particularly for dog walking. I do not think that he has made much (if any) use of it since he lost his dog in 1998.

Colin George Walsh

[170] Mr. Walsh produced a written witness statement¹⁸⁸ dated 28th February 2010 and gave written evidence to the public inquiry. He is married with three children, now aged 30, 21 and 17. The youngest still lives at home. As a child, he lived in Chatfield Road, which is about five minutes’ walk from the Wych Lane bridge. He lived there until he got married in 1979. He and other children used to play on the railway line, often gaining access near Gregston Avenue, which is south of the Wych Lane bridge. They made dens. There was only one freight train in each direction every day. After they got married in 1979, Mr. and Mrs. Walsh lived in Hanbridge

¹⁸⁶ R31
¹⁸⁷ R31d
¹⁸⁸ R35

Crescent until 1998. He walked on the railway line “every day”. His children played on the line. He got access from various places, but sometimes by the informal track at Wych Lane bridge. In the late 1980s or early 1990s “a cheap tacky fence was put up” but “the amount of people who used it was such that the fence would not have lasted 5 minutes...There may be remains of the fence trampled down to nothing”. Shown the 1989 photograph¹⁸⁹, he agreed that “anyone could see that this was a fence that was kicked down”. Mr. and Mrs. Walsh moved to 62, Woodside in 1998. He got a dog in about 2000. He said that he walked the dog on the line “every day” until January 2010. He denied that the line had been overgrown during the last 10 years. He said that it only became overgrown in the last three years and that it was still possible to get along the line. I felt that Mr. Walsh was unreliable in his evidence about use of the line. He was clearly wrong in saying that the line had only become overgrown in the last three years since the photographs clearly show that it has been overgrown for much longer.

Maureen Jacqueline Webster

[171] Mrs. Webster produced a written witness statement¹⁹⁰ dated 2nd March 2010 and gave oral evidence to the public inquiry. She has lived in the area since 1971. Mr and Mrs. Webster moved to 373, Fareham Road in 1989. They had three children aged between 5 and 8. Mrs. Webster said that she did not see any trains on the line after moving to Fareham Road. If there had been trains she would not have let her children on the line. However, it seems to me that there is clear evidence that the trains ran until June 1991. I cannot believe that Mrs. Webster would have forgotten meeting a train while using the line for recreation. It seems to me probable that she did not use the line until after the trains stopped in 1991. Mrs. Webster’s evidence was that her family used the old railway line as follows:

- Her children played on the line. She did not give any dates. However, it is clear that she would not have let them use the line before the trains stopped in 1991. Judging by their ages, it seems to me probable that they played on the line in the 1990s.
- She had pigmy goats in the late 1990s which she used to take on the line to feed
- She has had dogs all the time she has lived at Fareham Road and used to walk them along the railway line most evenings. Her evidence was that this took place from 1989 until the application land was fenced off in 2009. Despite being shown the 2001 photograph¹⁹¹, she was reluctant to accept that the line became seriously overgrown. She attributed the impenetrable appearance of the 2001 photograph to a selective camera angle and the time of year.

¹⁸⁹ B245

¹⁹⁰ R36

¹⁹¹ B260

- She picked blackberries on the line.

She said that she saw children playing and other dog walkers on the line although she did not give any dates. The rear of her garden was fenced against the railway and she used the informal access by the Wych Lane pedestrian underpass to gain access to the railway line. She was asked about the fencing at the top of the access track. She said that there was never fencing which blocked the access. She gave inconsistent evidence as to whether there was fencing lying on the ground which she had to step over. However, the photographic evidence seems clear that there was. My view is that Mrs. Webster used the line (and saw others using the line) after the trains stopped in 1991 and until it became overgrown by 2001 at the latest. Probably she used it again when it was partly cleared in 2002 and 2008. I also think that she must have known that she was accessing the line by crossing a broken down fence that had been erected to keep people off the line.

Peter Ruddle White

[172] Mr. White produced a written witness statement¹⁹² dated 4th March 2010 and gave oral evidence to the public inquiry. He met his future wife in 1974. She lived with her parents at 47, Woodside, which is on the other side of Woodside from the claimed neighbourhood. They married in 1975 and then lived in married quarters in Gosport until about 1978/79, when they moved to Woodcot Road. In February 1990, they moved temporarily into 47, Woodside to stay with his in-laws. In August 1990, they moved into their present house at 90, Woodside. They have a son called Samuel who is now aged 23 and who submitted his own witness statement¹⁹³ to the public inquiry. Initially, Mr. White said that he thought that the last train on the line was in 1988. However, when cross examined about his written evidence concerning hearing a train¹⁹⁴ it emerged (after some rather evasive answers) that he accepted that he had heard a train when staying with his in-laws in Woodside between February and August 1990. I got the distinct impression that Mr. White was anxious to push the last train back before the start of the relevant 20 year period. I find it hard to understand how he was unaware that trains used the line until June 1991. Mr. White said that from 1990 to 2009, he and his wife used the railway line for dog walking, strolling and chatting with neighbours. He built his son a tree house on the railway embankment. In his written evidence¹⁹⁵, he wrote that the railway line was used by his neighbours but not by the public at large. When questioned about this evidence, he said that by “neighbours” he meant the people in Woodside but that he had no idea whether people from other streets used the line. Most people in Bridgemary knew of the line. I felt that his written evidence on this point was tailored to the perceived requirements for registration of a new green. Mr. White accepted that the line got overgrown over a period of time, but said that he could

¹⁹² R37

¹⁹³ R56

¹⁹⁴ WS para. 6

¹⁹⁵ WS para. 5

always get through. I thought that he was playing down the extent of the vegetation. Asked about access to the line, Mr. White said that he gained access by a track near the Wych Lane bridge where there was no fencing at all. Later he said that, if there was any fencing, it was well and truly trodden into the ground. In his written evidence, he said that there was a length of chain link fencing at the Wych Lane bridge. He seemed at one point to be saying that he accessed the line by a different track from that used by the other witnesses, but I found it very difficult to see how there ever was more than one informal track leading up to the line at Wych Lane bridge and I think that he must have used the same route as all the other witnesses. My overall impression was that Mr. White was an unsatisfactory witness.

Witnesses who did not give oral evidence

[173] I now turn to deal with the witnesses for the applicant who submitted written evidence but did not give oral evidence to the public inquiry. I approach this evidence with caution because I have not seen the witnesses, some of the written evidence is rather imprecise and the objector has had no opportunity to test the evidence by cross examination. However, I give appropriate weight to this evidence. I start by summarising the user evidence:

Name	Address	Claimed user period	Ref.
Michael Adams	383, Fareham Road	Over 20 years until 2009	R38
Diane Blackburn	118, Woodside	1999-2009	R39
William Mark Blackburn	118, Woodside	1999-2009	R15
Nigel George Boorn	74, Woodside	1970-2009	R57a
Jack Leslie Brooks	104, Woodside	1989-2009	R16
Susan Ivy Cope	114, Woodside	Unspecified	R40
Brian Edward Driver	5, Dale Drive	Unspecified	R41
Kathleen Margaret Goodwin	106, Woodside	Over 20 years until 10-08-2009	R11-13g
Alfred Ernest Hammond	100, Woodside	1971-2009	R20
Gerald Harris	98, Woodside	1999-2009	R21
Rosemary Betty Harris	98, Woodside	1999-2009	R43
Peter Frank Lilley	76, Woodside	1981-2009	R46
Phil Radford	Formerly 52, Woodside	Unspecified	R51
Richard Lee Sharp	54, Woodside	1986-2009	R52
Alan Trevor Smith	108, Woodside	1970-2009	R53
Janis Lorraine Smith	108, Woodside	1970-2009	R28
Michael Dennis Stephens	Formerly 112, Woodside	Unspecified	R55

		save within 15 year period before 1996	
Pearl Christine Stephens	112, Woodside	1970-2009	R54
Peter Joseph Webster	373, Fareham Road	1989-2009	R57
Samuel Lee White	90, Woodside	Last 23 years	R56

[174] Mr. Lidgey also submitted written evidence¹⁹⁶ from himself although he did not offer to support this evidence orally. This evidence dealt with the final train use of the Bedenham branch line:

- First, Mr. Lidgey said that he had attended a local museum and had seen a photograph entitled “1986 The depot’s rail link went out of use”. However, this plainly did not apply to the Bedenham branch since there was clear evidence that a woman was run down by a train on the line in 1990 and that the last train ran in June 1991. Indeed, many of the applicant’s own witnesses recall trains after 1986. Probably the wording applied to the Priddy’s Hard depot branch.
- Second, he referred to evidence from Mr. Peter Keat of the Gosport Railway Society who said that the last scheduled service ran in 1986 and that the final rail movement was the weed killing train of June 1989. However, it appears to me that there is clear evidence that Mr. Keat was wrong.

10. Findings of fact

[175] I now turn to make findings of fact. For this purpose I have reread all the written evidence submitted to the public inquiry together with all my notes of the oral evidence. I therefore take account of all the evidence submitted to the public inquiry, whether specifically summarised above or not.

When did the trains stop running?

[176] I find that the trains stopped running on the Bedenham branch line in June 1991. I reject the suggestion made by Mr. Lidgey on behalf of the applicant that the trains stopped in 1986 or, at least, before the start of the relevant 20 year period in or about 10th August 1989. I rely on the following evidence for finding that trains were still running on the line after the start of the relevant 20 year period:

¹⁹⁶ R57b-e

- The evidence of Mrs. Knoll that the trains were still running for a year after she moved into 64, Woodside in July 1989
- The report of the fatal accident on the line in March 1990¹⁹⁷.
- The evidence of Mr. White that he heard a train on the line between February and August 1990.
- The BTP occurrence book report of police officers travelling the line on a train in May 1990¹⁹⁸.
- The photograph of a train on the line in August 1990¹⁹⁹.
- The evidence of the Cobb Historical Atlas that the line closed in 1991²⁰⁰.
- The evidence of Mr. Mark Champion that the last train was on 24th June 1991.

Physical state of the application land

[177] I find that the physical state of the application land changed considerably over the relevant 20 year period from 1989 to 2009.

[178] First, there was the period before the last train ran in June 1991. I find that, during this period, the railway line itself and the top of the railway embankment were relatively clear of vegetation. It was physically possible to walk along the line or alongside the line on the ballast of the former second set of rails.

[179] Second, there was the period between 1991 and 2001. During this period the application land became progressively overgrown. The line towards Gosport was still relatively clear in 1994, according to Mrs. Morge's 1994 photograph²⁰¹, and again in 1997, according to the HCC 1997 photograph²⁰². By 1998, the line south of the Wych Lane bridge was fairly overgrown, although still easily passable. However the 1998 Titmuss photographs²⁰³ show that the line north of the Wych Lane bridge was heavily overgrown, with only a narrow track left along the sleepers between encroaching vegetation. By the time of the 2001 HCC photograph²⁰⁴, I find that the line north of the Wych Lane bridge was completely overgrown. The line where it crossed the Wych Lane bridge was still fairly clear of undergrowth. There is no clear evidence as to the state of the line south of Wych Lane bridge in 2001 but subsequent evidence suggests that it was still passable.

¹⁹⁷ B432-3
¹⁹⁸ B323D(4)
¹⁹⁹ B185-6
²⁰⁰ B48
²⁰¹ B377
²⁰² B332
²⁰³ B58-59
²⁰⁴ B260

[180] Third, there is the period 2002-2003. The July 2002 press release²⁰⁵ is evidence that some site clearance of overgrown parts of the line was planned. The HCC March 2003 photographs²⁰⁶ show, and I find, that a pathway had been cleared in late 2002 through the undergrowth north of the Wych Lane bridge. However, the photographs suggest that the line south of the Wych Lane bridge was still open, although somewhat overgrown and that no clearance work had taken place south of the bridge. The line crossing the bridge itself was still clear.

[181] Fourth, there is the period from 2003 to 2006. I find that during this period, the line both south and north of the Wych Lane bridge became totally overgrown, as shown by the 2006 Cameron photographs²⁰⁷ and evidence. Only the bridge crossing and short stretches of the line near the bridge remained reasonably accessible.

[182] Fifth, there is the period from 2006 to 2008, I find that during this period the line north and south of the Wych Lane bridge remained overgrown and inaccessible. I rely on the evidence of Mr. Cox as plotted on the accessible areas plan MVB5²⁰⁸ and the evidence of Mr. Cameron. I find that the only parts of the application land remaining physically accessible at this time were the areas on and close to the Wych Lane bridge crossing marked as areas 3, 4 and 6 on the accessible areas plan MVB5. I find that, in November/December 2008, a narrow pathway was cut through the vegetation along the railway corridor as seen by Messrs. Batcheldor, Cameron and Cox, although the land on either side remained densely overgrown.

[183] Sixth and finally, there is the period from late 2008 until the application land was fenced off in the summer of 2009. I find that the land remained in much the same state as at the end of 2008, i.e. with a narrow path cut through the vegetation and the rest of the application land being inaccessible save for areas 3, 4 and 6 on the accessible areas plan MVB5.

[184] I find that the only parts of the application land which remained reasonably accessible during the whole of the relevant 20 year period were areas 3, 4 and 6 on the accessible areas plan MVB5. I reject any of the evidence to the contrary of the applicant's witnesses.

Was the application land used for recreation by a significant number of local people during the relevant 20 year period?

[185] It is necessary to set aside areas 1 and 8 on the accessible areas plan (MVB5) which, it is common ground, were fenced off as part of adjoining gardens and were not available for public

²⁰⁵ B194-5

²⁰⁶ B263-266

²⁰⁷ B165-169

²⁰⁸ B155

recreation during the relevant 20 year period. It is also necessary to set aside area 5 on the same plan, which was where the bridge had been removed after the line was singled. As to the rest of the application land, I consider that it is necessary to break down the 20 year period.

[186] First, there is the period from 1989 until the trains stopped running in June 1991. I have found this the most difficult time to make a clear finding about. Many witnesses for the applicant were insistent that they and others used the line for recreation while the trains were still running. The BTR occurrence book for 1990/91 suggests that there was a considerable degree of trespass on the line before the trains stopped running. There is no positive evidence that the line was not used for recreation during this period. However, it seems to me that common sense revolts against the idea that a railway line which was still being used by trains was in general use by the local community for recreation. It is true that the trains were infrequent and seem to have run at reasonably predictable times. They were freight trains carrying munitions and probably did not run very fast. However, no one could be absolutely sure when a train might be coming. I find it very hard to believe that any normally responsible parent would allow their children to play on a working railway line or that a working railway line would generally be considered to be a suitable or attractive place to walk, with or without dogs. After anxious consideration, I am not satisfied on the balance of probabilities that the application land was used for recreation by a significant number of local people before the trains stopped running in June 1991.

[187] Second, there is the period from 1991 to 2001. I find that, after the trains stopped running, local people did start to use the disused railway line to a material extent for informal recreation such as walking with or without dogs and children's play. Towards the end of that period, however, the line north of the Wych Lane bridge became very overgrown and eventually impassable. I find that recreational use of the line north of the Wych Lane bridge had largely ceased by 2001. No doubt, the odd hardy individual could and did force his or her way through the vegetation north of the Wych Lane bridge but I consider that general recreational use by local people had ceased.

[188] Third, there is the period 2002-2003. In late 2002, a narrow track was cut through the vegetation north of the Wych Lane bridge and I accept that this was used for recreation by local people.

[189] Fourth, there is the period from 2002 to 2006 during which the line both north and south of the Wych Lane bridge became totally overgrown. I find that there was no material use of the overgrown parts of the line once the narrow track cut in late 2002 had been overgrown. Although I think it probable that areas 3, 4 and 6 on the accessible areas plan (MVB5) remained accessible, there was no specific evidence of recreational use of this area, it presented little, on its own, in

the way of attraction for recreational use and the 2006 photograph²⁰⁹ suggests that the informal access track to the north west of the Wych Lane pedestrian underpass was disused.

[190] Fifth, there was the period from 2006 until late 2008 when a narrow track was again cut through the overgrown parts of the line. I find that the application land was not used to any material extent for recreation by local people during this period.

[191] Finally, there is the period from late 2008 until the end of the relevant 20 year period in August 2009. I accept that the narrow track cut in late 2008 was used by local people for recreation. The March 2009 photograph²¹⁰ shows increased use of the informal access path to the north west of the Wych Lane pedestrian underpass.

[192] The only parts of the application land which remained reasonable accessible throughout the relevant 20 year period were, in my view, areas 3, 4 and 6 on the accessible areas plan (MVB5). However, I do not consider that there was any satisfactory evidence on which I could find that these areas were used independently for recreation to any material extent when the rest of the application land was overgrown and incapable of recreational use

How did local people gain access to the application land?

[193] Although some witnesses gave evidence of gaining access to the application land from their back gardens, I find that the predominant route of access was by the informal path to the north west of the Wych Lane pedestrian underpass. Although many of the applicant's witnesses were reluctant to acknowledge the fact, I find that there was at all material times a wire mesh fence at the top of that path. For most of the time the wire was trampled down and it was possible to step over or through the wire. However, there was evidence from Mr. and Mrs. Radford and Mr. Walsh that the fence was re-erected within the relevant 20 year period, although it was soon broken down again. This evidence is supported by the documents produced by Mr. Macaulay. I find that the fence was erected to keep people off the line and that this was obvious to people who used that access, as was recognised by Mrs. Hammond, Mrs. Radford, Mrs. Sharp and Mr. Stephens.

Where did recreational users of the application land come from?

[194] I find that a considerable number of recreational users of the application land came from the claimed neighbourhood. This makes sense since they all lived very close to the railway line. However, there was evidence that users came from a wider (although undefined) area. This was

²⁰⁹ B270

²¹⁰ B271

the evidence of Mrs. Boorn, Mrs. Goater, Mrs. Radford, Mrs. Sharp, Mrs. Skittlethorpe, Mr. Walsh and Mr. White.

Warnings against trespass

[195] There was evidence in the BTP occurrence books that some trespassers on the line were given oral warnings although there is no evidence that such warnings were given to people from the claimed neighbourhood or in relation to the application land. I do however find that notices were clearly exhibited during the relevant 20 year period at Fareham Station giving public warning to the public not to trespass upon the railway and that such notices were renewed as often as obliterated or destroyed. I accept the unchallenged evidence to that effect by Mr. Dodsworth, Mr. Hurdle, Mr. Redgell and Mr. Titheridge. It is true that the 2003 photographs²¹¹ of Fareham Station do not show such signs but they could be out of shot or temporarily missing and awaiting renewal.

11. Applying the law to the facts

[196] I now turn to apply the law to the facts that I have found. It is convenient to do so by reference to the various elements of the statutory requirements of CA 2006 s. 15(3).

“...a significant number...”

[197] I am satisfied that most of the application land was used for informal recreation by a significant number of local people from no earlier than 1991 (when the trains stopped running) until no later than 2001 (when most of the application land became very overgrown). During the period from 2001 until the end of the relevant 20 year period in August 2009, the application land remained inaccessible apart from narrow tracks cut in 2002 and 2008.

[198] Three parts of the application land were not used for recreation by a significant number of local people during any part of the relevant 20 year period:

- Area 1 on the accessible areas plan MVB5²¹² which was enclosed as part of the grounds of the adjoining property in Fareham Road,
- Area 5 on the accessible areas plan which was nonexistent since it formed part of the Wych Lane railway bridge which had been removed many years ago, and
- Area 8 on the accessible areas plan, which was enclosed as part of the adjoining property in Dale Drive.

²¹¹ B198-200

²¹² B155

[199] Parts of the application land remained clear after the rest of the application land became overgrown by at least 2001, i.e. areas 3, 4 and 6 on the accessible areas plan. This is land on top of and on each side of the Wych Lane bridge. There was no evidence to suggest that there was recreational use of these areas after the rest of the application land had become overgrown and I consider that use of these areas by a significant number of local inhabitants also ceased by 2001.

“...of the inhabitants of any locality or neighbourhood within a locality...”

[200] The applicant’s case is that recreational use of the application land was by the inhabitants of the neighbourhood shown coloured green on plan B342 within the locality of Bridgemary. I have no difficulty in accepting that the ecclesiastical parish of Bridgemary was a “locality”. In the *Trap Grounds* case, Lord Hoffmann pointed out the “*deliberate imprecision*” of the expression “neighbourhood”. However, I do not read this comment as meaning that a “neighbourhood” can be any area which is drawn on a map. A “neighbourhood” must still have the qualities which enable it to be identified in ordinary language as a “neighbourhood”. The requirement of some degree of cohesiveness identified in the *Cheltenham Builders* case was re-affirmed in the *Warneford Meadow* and the *Leeds* cases. In para. 3 of his final written submissions of 17th May 2010, Mr. Lidgey expressly disclaimed any alternative submission that the various parts of the claimed neighbourhood could be broken down into separate neighbourhoods. The applicant’s case is that the claimed neighbourhood is as shown coloured green on Plan B342 and nothing else.

[201] In my judgment, the claimed neighbourhood lacks sufficient cohesive qualities for it to be described as a neighbourhood. I accept the analysis of Mr. Wilson on this point. I reach this conclusion with some regret, since I have little doubt that it would have possible to identify a relevant neighbourhood, e.g. Woodcot, of which a significant number of inhabitants used the application land for recreation. However, it is not for the CRA to undertake its own inquiries and it has to deal with the application as it is made. On the case put forward and on the evidence adduced to the public inquiry, it is not possible to find an alternative neighbourhood to that put forward by the applicant. However, in my view, no harm is done since the application fails on several other grounds as well.

“...have indulged as of right...”

[202] Although a handful of witnesses had accessed the application land from their own back gardens, the predominant route of access was by way of the informal track by the north western side of the Wych Lane pedestrian underpass. In view of my findings of fact in relation to the wire mesh fence at the top of that track, I consider that local people using that route were gaining access to the application land in a manner that was not “as of right” because it involved climbing over a fence that was obviously intended to keep the public off the line. The fence was trampled

down, re-erected and trampled down again, but I consider that it was at all material times clear that access was against the wishes of the landowner and was hence contentious and not “as of right”.

“...in lawful sports and pastimes...”

[203] The informal recreational activities enjoyed by local people on the application land, such as walking with or without dogs and children’s play amounted to “sports and pastimes” as that expression was construed in the *Sunningwell* case. However, there is an issue whether those activities were “lawful”. The fact that they were trespassory did not prevent them from being lawful: the *Warneford Meadow* case. However, were they criminal?

[204] I do not consider that the informal recreational activities of the local people on the railway line amounted to criminal offences under s. 23 of the Regulation of Railways Act 1868 Act because there is no evidence that they were given qualifying warnings under the Act. However, I do consider that any use of the line by local people before the line ceased to be a working railway in June 1991 did involve commission of a criminal offence under s. 55 of the British Transport Commission Act 1949. I am satisfied that Fareham Station was the station nearest on the railway nearest to the application land and that the prescribed notices were affixed at that station and renewed as often as obliterated or destroyed. In my view, user that amounted to the commission of a criminal offence cannot be a “lawful” sport or pastime.

[205] There was discussion at the public inquiry whether the principle in *Bakewell Management Ltd. v Brandwood*²¹³ might be engaged. Under this principle, the acquisition of an easement by prescription is not precluded by the fact that the user relied upon was criminal if the user would not have been criminal if the dominant owner had granted the right to enjoy such user. I do not consider that this principle applies in the present case. The registration of a new green under CA 2006 s. 15 does not depend upon any implied or imputed grant by the landowner but simply upon compliance with the statutory requirements and it seems to me clear that criminal user is not “lawful”.

[206] In his final written submissions of 17th May 2010, Mr. Lidgey argued that, under CA 2006 s. 15(6), any period during which access to the application land was forbidden by s. 55 of the 1949 Act falls to be disregarded in determining the period of 20 years. However, the public inquiry was conducted on the footing that the relevant 20 year period was the 20 years before August 2009 and I think that it is too late for Mr. Lidgey to seek to alter the 20 year period in his

²¹³ [2004] 2 AC 519

final submissions. In any event, I do not see how this argument helps the applicant since there was no evidence of recreational use of the line before user was forbidden by statute.

“...on the land...”

[207] For the reasons explained above, during the relevant 20 year period there was no recreational use of areas 1, 5 and 8 shown on the accessible areas plan MVB5.

“...for a period of at least twenty years...”

[208] For the reasons explained above, I find that there was no qualifying user of any part of the application land for a period of at least twenty years.

[209] The objector took a number of other interesting and difficult legal points, some of which were discussed in the *Leeds* case. However, since I consider that the application fails on a number of points which do not involve any controversial points of law, I do not think that it is necessary for me to express a view on these further legal points.

12. Conclusions and recommendations

[210] I conclude that the application fails for the following reasons:

- Areas 1, 5 and 8 on the accessible areas plan MVB5²¹⁴ have not been used by local people for recreation at any time during the relevant 20 year period
- No part of the application land was used for recreation by a significant number of local people for a period of at least 20 years
- Any recreational use of the application land before June 1991 was a criminal offence under s. 55 of the British Transport Commission Act 1949 s. 55 and therefore did not amount to use for “lawful” sports and pastimes.
- The access to the application land used by most local people involved climbing over a fence clearly intended to keep public off the railway line so that user was contentious and not “as of right”
- The applicant has failed to prove user by the inhabitants of a neighbourhood within a locality since the claimed neighbourhood lacked the cohesive qualities to amount to a neighbourhood.

[211] I recommend that the CRA should accede to the following procedural applications:

²¹⁴ B155

- The applicant's application to extend the claimed neighbourhood to include 5, Dale Drive,
- The applicant's application to identify the claimed locality as the ecclesiastical parish of Bridgemary,
- Mr. Lidgely's application to be joined as co-applicant, and
- The application of Gosport Borough Council to make a late objection.

[212] I recommend that the CRA should reject the application to register the application land as a new green. Under reg. 9(2) of the 2007 Regulations the CRA must give written reasons for rejecting the application. I recommend that they are stated to be "the reasons set out in the Inspector's Report dated 19th May 2010".

Vivian Chapman QC
19th May 2010
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London WC2A 3NN