CITY AND COUNTY OF SWANSEA

NOTICE OF MEETING

You are invited to attend a Meeting of the

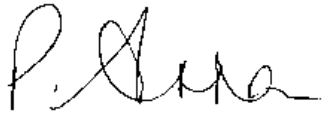
RIGHTS OF WAY AND COMMONS SUB COMMITTEE

At: **Committee Room 2 - Civic Centre, Swansea**

On: **Wednesday, 13 August 2014**

Time: **2.00 pm**

AGENDA



Patrick Arran
Head of Legal, Democratic Services & Procurement
5 August 2014

Contact: Democratic Services: - 01792 636016

RIGHTS OF WAY & COMMONS SUB COMMITTEE (12)

Councillors

Labour Councillors: 8

Ann M Cook	Jennifer A Raynor
Joe A Hale	Robert V Smith
Jane E C Harris	Des W W Thomas
Yvonne V Jardine	T Mike White

Liberal Democrat Councillors: 2

Paul M Meara	John Newbury

Independent Councillor: 1

Keith E Marsh	

Conservative Councillor: 1

Linda J Tyler-Lloyd	

Officers:

Phil Holmes	Head of Regeneration & Planning
Deb Smith	Directorate Lawyer, Legal, Democratic Services & Procurement
Sandie Richards	Principal Lawyer
Kim Flanders	Planning Policy & Environment Manager, Regeneration & Housing Department
Chris Dale	Countryside Access Team Leader (Rights of Way), Regeneration & Housing Department
Mike Workman	Rights of Way Officer, Legal & Democratic Services & Procurement
Democratic Services	
Planning Services	
Archives	
Spare	

28 Copies

Disclosures of Interest

To receive Disclosures of Interest from Councillors and Officers

Councillors

Councillors Interests are made in accordance with the provisions of the Code of Conduct adopted by the City and County of Swansea. You must disclose orally to the meeting the existence and nature of that interest.

NOTE: You are requested to identify the Agenda Item / Minute No. / Planning Application No. and Subject Matter to which that interest relates and to enter all declared interests on the sheet provided for that purpose at the meeting.

1. If you have a **Personal Interest** as set out in **Paragraph 10** of the Code, you **MAY STAY, SPEAK AND VOTE** unless it is also a Prejudicial Interest.

2. If you have a Personal Interest which is also a **Prejudicial Interest** as set out in **Paragraph 12** of the Code, then subject to point 3 below, you **MUST WITHDRAW** from the meeting (unless you have obtained a dispensation from the Authority's Standards Committee)

3. Where you have a Prejudicial Interest you may attend the meeting but only for the purpose of making representations, answering questions or giving evidence relating to the business, **provided** that the public are also allowed to attend the meeting for the same purpose, whether under a statutory right or otherwise. In such a case, you **must withdraw from the meeting immediately after the period for making representations, answering questions, or giving evidence relating to the business has ended**, and in any event before further consideration of the business begins, whether or not the public are allowed to remain in attendance for such consideration (**Paragraph 14** of the Code).

4. Where you have agreement from the Monitoring Officer that the information relating to your Personal Interest is **sensitive information**, as set out in **Paragraph 16** of the Code of Conduct, your obligation to disclose such information is replaced with an obligation to disclose the existence of a personal interest and to confirm that the Monitoring Officer has agreed that the nature of such personal interest is sensitive information.

5. If you are relying on a **grant of a dispensation** by the Standards Committee, you must, before the matter is under consideration:

   i) Disclose orally both the interest concerned and the existence of the dispensation; and
   ii) Before or immediately after the close of the meeting give written notification to the Authority containing:

a) Details of the prejudicial interest;
b) Details of the business to which the prejudicial interest relates;
c) Details of, and the date on which, the dispensation was granted; and
d) Your signature

Officers

Financial Interests

1. If an Officer has a financial interest in any matter which arises for decision at any meeting to which the Officer is reporting or at which the Officer is in attendance involving any member of the Council and /or any third party the Officer shall declare an interest in that matter and take no part in the consideration or determination of the matter and shall withdraw from the meeting while that matter is considered. Any such declaration made in a meeting of a constitutional body shall be recorded in the minutes of that meeting. No Officer shall make a report to a meeting for a decision to be made on any matter in which s/he has a financial interest.

2. A “financial interest” is defined as any interest affecting the financial position of the Officer, either to his/her benefit or to his/her detriment. It also includes an interest on the same basis for any member of the Officers family or a close friend and any company firm or business from which an Officer or a member of his/her family receives any remuneration. There is no financial interest for an Officer where a decision on a report affects all of the Officers of the Council or all of the officers in a Department or Service.

CITY AND COUNTY OF SWANSEA

MINUTES OF THE RIGHTS OF WAY AND COMMONS SUB COMMITTEE

HELD AT COMMITTEE ROOM 2, CIVIC CENTRE, SWANSEA ON WEDNESDAY, 18 JUNE 2014 AT 2.00 PM

PRESENT:

Councillor(s):	**Councillor(s)**:	**Councillor(s)**:
A M Cook	K E Marsh	R V Smith
J E C Harris	J Newbury	L J Tyler-Lloyd
Y V Jardine	J A Raynor	T M White

Officers:

S Richards	-	Principal Lawyer
C Dale	-	Countryside Access Team Leader (Rights of Way)
B George	-	Transport Strategy Officer
M Workman	-	Rights of Way Officer
J Parkhouse	-	Democratic Services Officer

1 **ELECTION OF CHAIR FOR THE 2014/2015 MUNICIPAL YEAR.**

RESOLVED that Councillor J A Raynor be elected Chair for the 2014/2015 Municipal Year.

(Councillor J A Raynor, Chair presided)

2 **ELECTION OF VICE-CHAIR FOR THE 2014/2015 MUNICIPAL YEAR.**

RESOLVED that Councillor R V Smith be elected Vice-Chair for the 2014/2015 Municipal Year.

3 **TO RECEIVE ANY APOLOGIES FOR ABSENCE.**

Apologies for absence were received from Councillors J A Hale, P M Meara and C Richards.

4 **TO RECEIVE DISCLOSURES OF PERSONAL AND PREJUDICIAL INTERESTS.**

In accordance with the Code of Conduct adopted by the City and County of Swansea, no interests were declared.

5 **MINUTES.**

RESOLVED that the Minutes of the meeting of the Rights of Way and Commons Sub-Committee held on 23 April 2014 be agreed as a correct record.

6 **ACTIVE TRAVEL (WALES) ACT PROGRESS REPORT. (FOR INFORMATION)**

The Transport Strategy Officer provided a report which presented an update on the works associated with the Active Travel (Wales) Act 2013. It was outlined that the legislation contained three principle requirements to which local authorities must conform. Firstly, that a local authority will provide a map of currently available Active Travel Routes. The routes contained in the map must either conform to the active travel standard or where it provides a link to a key service such as schools, hospitals, places of employment and/or retail. The maps will cover all communities with a population of 2,000 or greater and the communities considered to conform to this threshold have been identified by the Welsh Government in a consultation document published in November 2013. Whilst the local authorities are now awaiting the outcome of this consultation and a formal list of communities, it is expected that largely the whole of the City and County of Swansea area will be included, with the possible exclusion of Gower.

Secondly, the legislation required that the Local Authority will prepare a second map which sets out all the programmes anticipated Active Travel Schemes which may be delivered over the next five years (2014-2018). These routes also need to be publicly accessible but does not need to be published in hard form and can therefore be presented electronically if appropriate.

Thirdly, the Act is to make good progress against realising the elements defined in the second map to ensure that the routes are continually improved and built upon. This does not therefore require simply that the new routes will be constructed each year but that the network will be improved in some way. It was added that whilst these are the principle requirements of the Act, there is also a further significant implication as the Act also interfaces directly with the Highways Act and principally with section 3, 4, 9 and 12. These sections deal with the "creation", "improvement", "maintenance" and "interference" of the highway and require that when any works are undertaken that consideration be given as to how measures which promote active travel could be incorporated.

It was explained that the Welsh Government is currently preparing a draft guidance document to advise on the Active Travel (Wales) Act standard infrastructure. The guidance will therefore describe best practice and the forms of route which are required in order to conform to the expectations of the Act. The draft guidance document was made available in May 2014 and will be subject to a 12 week public consultation prior to being revised and formally published in the Autumn of 2014.

The Committee asked a number of questions of the officer who responded accordingly.

RESOLVED that:

(1) the contents of the report be noted;

(2) a web link to the Welsh Government webpage be circulated to the Committee.

7 **APPLICATION TO REGISTER LAND KNOWN AS THE GREEN, ACCESSED OFF Y LLWYNI, LLANGYFELACH, SWANSEA AS A TOWN OR VILLAGE GREEN - APPLICATION NO. 2729(S).**

The Head of Legal, Democratic Services and Procurement presented a For Information Report informing the Committee of the proposal to hold a non statutory inquiry. It was outlined that the Council had received an application made by Mrs Margaret E. Boyter under Section 15(2) of the Commons Act 1996 in respect of land known locally as the Green, access off Y Llwyni, Llangyfelach, Swansea. The application sought to register the land as a town or village green and a plan of the land was provided at Appendix 1 of the report.

It was added that the land was predominantly owned by the Council and the Council had made an objection to the application. The Head of Legal, Democratic Services and Procurement had used his delegated authority granted by the Committee on 15 February 2012 to instruct Counsel to advise on the application and the appropriate procedure to adopt in determining the application. Counsel had advised that there were issues of fact and law in dispute and it would be appropriate to hold a non statutory inquiry. The holding of such an inquiry would ensure that evidence from both the applicant and the objectors can be heard and tested and the issues examined and argued over. Once the inquiry had taken place, Counsel will issue a report with recommendations for this Committee to consider and make a decision.

8 **ALLEGED PUBLIC FOOTPATH FROM PENTRECHWYTH ROAD TO BROKESBY ROAD AND FOOTPATH NO.451 - COMMUNITY OF BONYMAEN.**

The Head of Legal, Democratic Services and Procurement presented a report which sought to determine the application as required by the provisions of the Wildlife and Countryside Act 1981.

It was outlined that an application was submitted on 3 March 2013 to register a 50 m length of path which passes alongside the Canaan Congregational Chapel which closed in the same month. Plan number 1 of the report showed the length concerned between points A and B. The claim was initially supported by eight people, who apart from two, alleged use in excess of 20 years. On 7 November 2013 a further six users' evidence forms were submitted, each signatory having alleged a minimum of 20 years use. All the usual individuals and organisations had been consulted and one objection had been made by the person who converted the former New Inn public house into a residential property, which is situated immediately to the west and adjacent to the path. That development closed the path with two balls at

either end of the path, although the path is not shown in the Land Registry and to date no one has provided any proof of title.

The Committee were provided with the grounds for recognising the path as a public right of way, the evidence, the routes claimed, the evidence against the application and the distribution of claimants/specialist user groups.

In the absence of any counter evidence, it was clear that the path had been in use for the period of 1993-2013 and that the use is uninterrupted. Whilst the majority of those who made use of the path do live in the relatively confined area, there are a contingent who do not. Consequently, the test as to whether it is reasonable to allege a public path exists via the route A-B-C the public right of way can be satisfied.

RESOLVED that a Modification Order be made.

9 **ALLEGED PUBLIC FOOTPATH FROM LANDOR DRIVE TO THE CROFT - COMMUNITY OF LOUGHOR.**

The Head of Legal, Democratic Services and Procurement presented a report which sought to amend the previous report submitted to the Sub-Committee on 26 February 2014. It was explained that at the meeting on 26 February 2014 it was noted that some of the text in the report under the heading "the possible existence of a public path via G-F" did not correspond to the letters on plan number 3. It was therefore decided that an amended report should be submitted and include the required changes in full.

It was noted that the Ward Member had received the report and had made no further comment.

RESOLVED that the amendments to the report be noted and agreed.

10 **COUNTRYSIDE ACCESS BUDGET.**

The Head of Economic Development and Planning presented a For Information Report which informed the Committee about the sources of funding available for work on public rights of way and countryside access.

It was outlined that the report considered the resources available for works to improve and maintain the 400 miles of public rights of way and other public access in the City and County of Swansea. The funds available for the current financial year were outlined as follows:

Authority	£43,000
Coast Path Grant (100%)	£44,000
ROWIP Grant (Countryside Access Plan) (100%)	£37,000
Natural Resources Wales (NRW) Grant (50%)	£6,750
Gower Society Grant (50%)	£8,000
RDP (100%)	£10,000
TOTAL:	**£148,750**

It was added that the Authority's funds were slightly less than the previous financial year. The Authority's £43,000 is used for maintenance, as funding from grants can only be used for improvements. The Coast Path Grant was offered this year for specific storm damage repairs. The ROWIP Grant and NRW Grant are fixed amounts offered each year, although both are gradually declining. Both grants are tied to actions in the Authority's Countryside Access Plan (ROWIP). The funding for both the Coast Path and ROWIP is from Welsh Government, but is administered and distributed by NRW. A Gower Society Grant of £3,000 will be available for the foreseeable future, subject to agreement with the Gower Society. Additional Gower Society funds are also available for larger individual projects. The RDP Grant ends this year with future funding uncertain at present. This round of RDP funding had only been available in Mawr and Pontarddulais, but if continued it may be available in all of the rural areas of the City and County of Swansea. In addition to the above funds, the Authority employed a two man Ranger Team to maintain the Public Rights of Way Network. The annual running costs of the Ranger Team is £58,000. The Rangers have worked exclusively for the Countryside Access Team since 2002.

Since 1996, the funds available for the Public Path Network had varied considerably and were dependent on what sources of funding were available as outlined in the chart contained in the Appendix of the report. In 2002, the UK Government provided extra funds to all authorities to carry out the additional duties under the Countryside and Rights of Way Act 2000. Some of this additional funding was added to the existing Authority Revenue Budget and some was kept separate as a "CROW" Budget although in practice both budgets were used to carry out improvements to and maintenance of public paths. Hence the last financial year the CROW Budget was added to the Revenue Budget.

The Committee asked a number of questions of the officer who responded accordingly. The Chair requested further information be provided with regards to the management of grants for the Authority.

RESOLVED that:

(1) the contents of the report be noted;

(2) details regarding the management of grants within the Authority be provided at the next meeting.

11 **DATE OF NEXT MEETING - 2 P.M. ON WEDNESDAY, 13 AUGUST 2014.**

NOTED that the next meeting is scheduled for 2.00 p.m. on Wednesday 13 August 2014.

The meeting ended at 2.56 p.m.

CHAIR

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee – 13 August 2014

EXTINGUISHMENT OF FOOTPATH NO. 88
COMMUNITY OF LLANGYFELACH

Purpose:	To decide whether to proceed with the Order for confirmation or to abandon the Order.
Policy Framework:	PPO16 of the Countryside Access Plan.
Statutory Test:	Section 118 of the Highways Act 1980.
Reason for Decision:	To decide whether to proceed with the Order for confirmation or to abandon the Order.
Consultation:	All the statutory consultees which included the Local Member, the Clerk to the Community Council, the owner/occupiers of 4 Cae Penpant, 49 Heol Waun Wen, and Penpant House, Dwr Cymru, The Ramblers Association and their local representative, Wales and West Utilities, the British Horse Society and their local representative, the Open Spaces Society, Natural Resources Wales, B.T. and Byways and Bridleways Trust.
Recommendation(s):	That the Extinguishment Order be referred to the Planning Inspectorate for determination
Report Author:	Mike Workman
Finance Officer:	Sarah Willis
Legal Officer:	Sandie Richards
Access to Services Officer:	Phillip Couch

1.0 Introduction

1.1 On the 11th day of March 2014 this Council made an Extinguishment Order under section 118 of the Highways Act 1980 to remove the length of path shown between points A-B-C-D-E-F. Footpath No. 88 between points A-X is under the ownership of this Council, the remaining sections under the ownership of those who have title to the three separate

properties built on the path. The alternative is vested in this Council having been adopted as public ways.

1.2 One hundred and twenty four objections were made to this Order and another thirty three from the pupils of Llangyfelach Primary School.

1.3 The Order was made under delegated authority by officers of this As objections have been made to the Order, there is no authority for officers to decide whether the Order should be forwarded to the Planning Inspectorate or be abandoned.

1.4 Under the Act, the Council has the discretion to abandon the Order after it has been made if it considers it is not expedient to confirm the Order.

2.0 Background

2.1 Lliw Valley Borough Council made a Diversion Order in 1988 to take account of the earlier housing development between points B-C-D-E-F. That Order failed as there was no consent from the owner of land over which the alternative was intended to pass.

2.2 Since 1988 further residential development has occurred within Llangyfelach at different times. At each phase alternative paths and footways have been set out by the individual developers which in effect have created an alternative route for Footpath No. 88.

2.3 The attached plan shows the alternative route as a broken line which includes tarmacked footpaths via A-X and Y-Z between 1.5 and 2.0 metres in width, but in the case of the latter set in a wider corridor. A-X passes across an area of green open space. The remaining lengths of the alternative includes the footway of Cae Penpant and the footway alongside Maes Teilo.

2.4 The footways and footpaths between points A-X-Y-Z and onto Swansea Road have been adopted as public highways and included into this Council's "list of streets". Therefore that adoption has secured the public's right to utilise this alternative walkway.

3.0 Grounds for Making an Order under Section 118 of the Highways Act 1980

3.1 An order may be made if it is considered the path is not needed for public use.

3.2 The basis for making this Order is evidently due to the existing alternative that has been secured and which is in good condition.

3.3 The Council and/or the Welsh Ministers shall not confirm an order unless they are satisfied it is expedient to do so having regard to the extent to which the path would be used by the public.

3.4 The objection apart from three letters, are solely concerned with the loss of what is considered to be a village green between points A and X, and the presumption the Extinguishment Order is linked to the potential development of the site. Each objector and the Headmaster of Llangyfelach Primary School were sent a letter explaining the reasons why the Order was made. Secondly that their concerns over the loss of the green area of open space is likely to be determined in October this year, when a public inquiry will be held to determine the outstanding application to register the area as a village green. At the time of writing thirteen people have withdrawn their objection after having received this explanation of why the Order was made.

3.5 However two responded to state that they do not wish to withdraw for the following reasons:

(a) The extinguishment is a forerunner to leaving a plot of land which could then be used for rebuilding.

(b) The village green is accessible by this footpath.

(c) There may be other access to the village green but none cross the village green.

(d) The closure of Footpath No. 88 will result in increased walker traffic through the alternative route.

(e) Footpath No. 88 allows access to a local shop through a flat surface, whereas the alternative is via steep incline.

3.6 Section 118 also enables a Council or the Welsh Ministers to take account of any other order that has been made to provide an alternative. In this example no additional order is outstanding as the alternative has already been set out and adopted. Consequently consideration can be given to the existing alternative and therefore whether the path being extinguished is likely to be used, given the provision of the alternative.

3.7 Therefore addressing the outstanding objections:

(a) If the site was to be developed, then the consent could make provision for the existing path and in effect build around the path. Alternatively consent for development does provide valid grounds for either diverting or extinguishing the path, if it is necessary to enable the development to proceed. As such whilst the existence of a public path is a material consideration as to whether or what type of comment is granted, it would not of itself prevent a development. Nonetheless there is no outstanding application to develop the site.

(b)&(c) Should the area being designated as a village green, access to and over that green would be obtainable from all the surrounding paths and adopted roads. There would be no need to retain a public footpath. (notwithstanding a public footpath and the land over which it crosses cannot be designated as a village green).

(d) There is no path set out across the grass, it is simply a designated line following an old field boundary consisting of a bank and a row of mature trees.

(e) The alternative therefore is more likely to be used throughout the year as it is tarmacked and also provides access to the same destinations. Secondly apart from the section between X-Z the remaining length is on level ground. There is no level alternative to the section X-Z.

3.8 Section 118 also states that any temporary circumstances preventing or diminishing the use of the path shall be disregarded. Therefore the fact that part of Footpath No. 88 has been built on, is not a reason in itself for extinguishing the path. The basis for why it is considered the Order should be confirmed however is due to the provision of the alternative.

3.9 The decision as to whether or not an Extinguishment Order should be confirmed shall have regard to this Council's Access Policy and the relevant extracts are contained in Appendix 1.

3.10 Any order that diverts, creates or extinguishes a public path can render the Council liable to pay compensation to the owners of the land adversely affected. In this instance the effect the loss of the public right of way would have where it can be shown:

(a) the value of an interest of a person in land is depreciated; or

(b) that a person has suffered damage by being disturbed in his enjoyment of the land in consequence of the coming into operation of the Order.

There is no perceived loss to the Council as a consequence of this Order being confirmed and coming into operation. Evidently the confirmation of the Order would be in the interests of those three properties built across the path.

4.0 Conclusion

4.1 For the above reasons it is considered the order could be confirmed by the Welsh Ministers if it is submitted to the Planning Inspectorate for determination.

5.0 Equality and Engagement Implications

5.1 There are no equality and engagement implications with this report.

6.0 Financial Implications

6.1 There are no financial implications associated with this report.

7.0 Legal Implications

7.1 There are no legal implications associated with this report.

Background Papers: ROW-000232

Appendices: Appendix 1

APPENDIX 1

(a) Policy PPO16 states:

"Extinguishment will be considered where the requisite legal tests are met that the path is no longer needed for public use. This test may be met if there is alternative public access that has effectively replaced the path."

(b) Under paragraph 5.16:

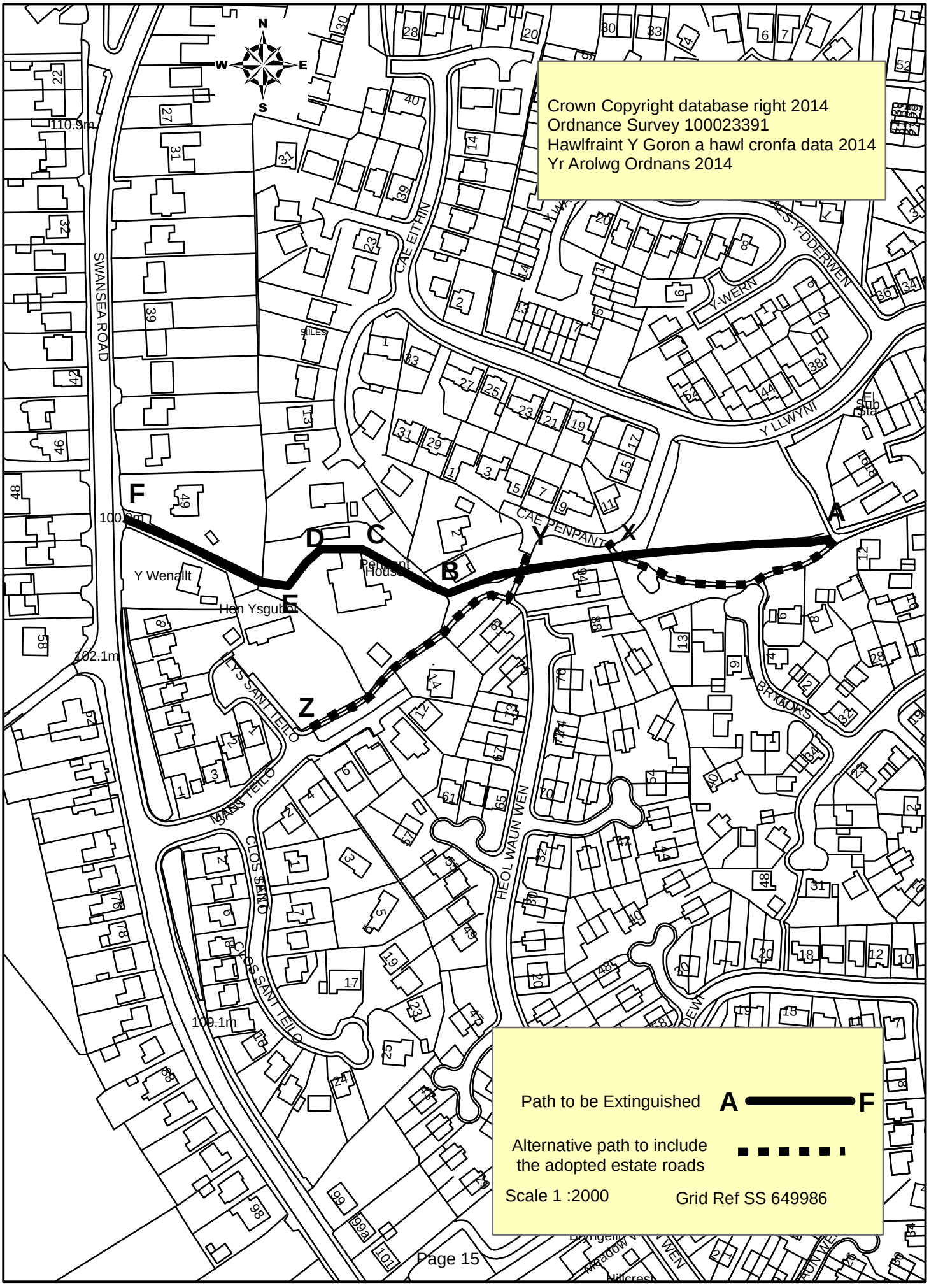
"Large scale development can completely alter an existing landscape and the access needs of the public will change considerably. To reflect this change the existing public access may require partial or complete alteration, but in doing so the overall public access should be maintained or enhanced."

PPO17:

"Diversions of paths across sites affected by development will only be permitted where it is proven that the path must be diverted to enable the development to be carried out, and only then where an acceptable alternative route is provided."

PPO18:

The stopping up of paths for development will only be permitted in exceptional circumstances.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SWANSEA ROAD
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Y LLWYNI
CAE PENPANT
Y Wenallt
Hen Ysgubor
Pentwyn House
LLYS SANT TEILO
MAES TEILO
CLOS SANT TEILO
HEOL WAUN WEN
BRYNORS
A
B
C
D
E
F
X
Y
Z
Path to be Extinguished A — F
Alternative path to include the adopted estate roads
Scale 1 :2000
Grid Ref SS 649986

Report of the Head of Legal and Democratic Services and Procurement

Rights of Way and Commons Sub-Committee – 13 August 2014

IMPLICATIONS OF THE CASE OF R (ON THE APPLICATION OF BARKAS) (APPELLANT) –v- NORTH YORKSHIRE COUNTY COUNCIL AND ANOTHER (RESPONDENTS) [2014] UKSC31 ON APPLICATIONS TO REGISTER COUNCIL OWNED LAND AS A TOWN OR VILLAGE GREEN

Purpose:	To provide an up-date on the recent decision of the Supreme Court in the above case and its implications on village green applications relating to Council owned land.
Policy Framework:	The Council in its capacity as Commons Registration Authority is required by statute to determine applications for land to be designated as a town or village green.
Report Author:	Sandie Richards
Finance Officer:	S. Willis
Legal Officer:	Nigel Havard
Access to Services Officer:	P. Couch

FOR INFORMATION

1. Introduction

1.1 The Council in its role as Commons Registration Authority (CRA) has a statutory duty pursuant to Section 15 of the Commons Act 2006 and the Commons (Registration of Town or Village Greens) (Interim Arrangements) (Wales) Regulations 2007 to determine applications for land to be registered as a town or village green.

1.2 The effect of registration of land as a town or village green is that it is protected from development for ever and preserved for use by local people.

1.3 Under the terms of the Council's constitution the Rights of Way and Commons Sub-Committee of the Planning Committee discharges the functions of the Council with regard to village greens.

2. General issues

2.1 Applications can raise difficult issues of both fact and law. Additional difficulty is involved in circumstances where the land in question is owned by the Local Authority in that a conflict arises as the Council is both the CRA and the objecting owner of the land. These roles have to remain separate as far as is possible so as to minimise challenge by way of judicial review. The Council, in its role as CRA must consider the application purely on the merits of the case by applying the relevant law and in accordance with the principles of natural justice.

2.2 A case recently heard by the Supreme Court has implications for the determination of applications where the land subject to the application is owned by a local authority.

3. Implications of Recent Case Law

3.1 To register land as a town or village green applicants must be able to provide evidence that there has been recreational use of the land by a significant number of inhabitants of any locality or neighbourhood within a locality for a 20 year period and that the recreational use has been **as of right, ie without force, without secrecy and without permission having been granted.** The recreational use must be for lawful sports and pastimes.

3.2 In the case of R (on the application of Barkas) (Appellant) -v- North Yorkshire County Council and Another (Respondents) [2014] UKSC31 (referred to as "the Barkas case) the land was provided and maintained by the local authority as "recreation grounds" under what is now section 12(1) of the Housing Act 1985.

3.3 The Supreme Court has determined that whilst the applicant was able to meet the requirements regarding the recreational use of the land by the required users for the required time period, they could not show that they used the land "as of right". In these circumstances the Court determined that the land is used "**by right**" by the powers of the Housing Acts. Consequently, such land is not registerable as a town or village green on the basis of such use.

3.4 The decision has implications for applications for the registration of land as a village green in circumstances where the land is held by a local authority for public recreational purposes pursuant to any statutory power at any time during the relevant 20 year period for the purposes of section 15 of the Commons Act 2006.

3.5 This position does not apply to land owned by a private individual or company where there is no legal duty and no statutory power to allocate land for public use and would be expected to protect their own legal rights.

4. Equality and Engagement Implications

4.1 There are no equality and engagement implications.

5. Financial Implications

5.1 There are no financial implications.

6. Legal Implications

6.1 The legal implications are set out in the body of the report.

FOR INFORMATION

Background papers: None

Appendices: None

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee – 13 August 2014

APPLICATION TO REGISTER LAND KNOWN AS CWM GREEN, WINCH WEN, SWANSEA AS A TOWN OR VILLAGE GREEN

Purpose:	To consider the determination of the application to register the land in question as a town or village green in light of the recommendation made in the report and addendum of the Inspector.
Policy Framework:	None.
Reason for Decision:	The Authority has a statutory duty to determine the application.
Consultation:	Legal, Finance, Planning and Local Members.
Recommendation(s):	It is recommended that the Application for the above registration be **REFUSED** in accordance with the recommendation of the Inspector.
Report Author:	Sandie Richards
Finance Officer:	Sarah Willis
Legal Officer:	Nigel Havard
Access to Services Officer:	Phil Couch

1.0 Introduction

1.1 The Council has received an application made by Mr. Brian Walters under Section 15 of the Commons Act 2006 in respect of land known as Cwm Green, Winch Wen, Swansea which is shown on the plan attached as Appendix 1 to this report.

1.2 The land in question is in the ownership of the Council.

1.3 An objection to the registration of the land has been received from the Council in its capacity of the owner of the land.

1.4 In accordance with the procedure previously approved by this Committee, a non statutory inquiry was held before an independent inspector on 25th and 26th February 2014 to consider the application. The Inspector was Mr. Alun Alesbury, M.A., Barrister at Law.

2.0 The Remit of the Inspector

2.1 The role of the Inspector was the act on behalf of the Council solely in its role as Commons Registration Authority. The Inspector had no involvement with the Council in its capacity of landowner or objector, other than in the context of receiving evidence and submissions from the Council in those capacities, as one of the parties to the disputed issues relating to the application.

3.0 The Report of the Inspector

3.1 Following the Inquiry the Inspector has written an Interim Report of his findings. A copy of this report is included as Appendix 2. The report was interim in nature because the decision of the Supreme Court in the case of R (Barkas) –v- North Yorkshire County Council (referred to as "the Barkas case") was imminently expected. The facts of the Barkas case are very similar to those in the application being considered in this report and have direct consequences upon it.

3.2 Following the publishing of the decision in the Barkas case, the Inspector invited the parties to comment on the implications of the decision on the application and provided an addendum to his Interim Report which is attached as Appendix 3.

4.0 The Role of this Committee

4.1 The Inspector's findings are not binding on this Committee. It is for the Committee to reach its own determination on the matters of fact and law arising as a result of the Application.

4.2 It is for this Committee to determine the Application fairly, putting aside any considerations for the desirability of the land being registered as a Town or Village Green or being put to other uses.

4.3 However, the Inspector has had the opportunity to assess the evidence of all the parties and has heard witnesses in person and considered all the written evidence before him. It is therefore not appropriate for this Committee to re-open issues regarding the quality of the evidence unless they had extremely strong reasons to do so.

5.0 Legal Test to be Satisfied

5.1 The Commons Act 2006 is the statutory regime governing village greens. Section 15 of the Act sets out the requirements which must be met if the land is to be registered. Registration of town and village greens is determined by this Council in its capacity as Commons Registration Authority. The process of determination of any application is focused on whether a village green has come into existence as a matter of law.

5.2 The application in this case was made under s.15(2) of the Commons Act 2006. That section applies where:

"a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
b) they continue to do so at the time of the application."

5.3 The test can be broken down as follows:

"a significant number of the inhabitants . . ."
It is sufficient to show a general use by the local community as opposed to mere occasional use by trespassers. It is not assessed by a simple headcount of users.

5.4 *". . . of the inhabitants of any locality or any neighbourhood within a locality "*
This is not defined by any arbitrary margins and must be a recognised county division such as a borough, parish or manor. An ecclesiastical parish can be a locality as required by s 15(2). It is acceptable for the users of the land to come 'predominantly' from the locality. A neighbourhood must be clearly defined and have a sufficient cohesiveness. It must also be within a locality.

5.5 *". . . have indulged as of right . . ."*
Use 'as of right' is use without permission, secrecy or force. The key issue in user 'as of right' is not the subjective intentions of the users but how the use of the land would appear, objectively, to the landowner. Use is 'as of right' if it would appear to the reasonable landowner to be an assertion of a right. Permission by the landowner, perhaps in the form of a notice on the land, would mean that the use is not 'as of right'. Equally use by force, such as where the user climbs over a fence or other enclosure to gain access to the land would not be use 'as of right'.

5.6 If the use of the land is not sufficient in terms of frequency or regularity to reasonably bring it to the attention of a landowner, then it may be a secret use which again would not be use 'as of right'. Another example of a secret use could be where the use takes place exclusively under the cover of darkness such that it would not be reasonable to expect a landowner to become aware of it.

5.7 The Supreme Court in the *Barkas case* held that where land is held by a local authority for public recreational purposes pursuant to any statutory power at any time during the relevant 20 year period, use of that land by other is 'by right' by the powers of the legislation concerned and not 'as of right'.

5.8 *". . . in lawful sports and pastimes on the land . . ."*
This is broadly interpreted so that general recreational use including walking with or without dogs and children's play would all be included.

5.9 *". . . for a period of at least 20 years . . ."*
The fulfilment of the 20 years continuous use must immediately precede the application under s.15(2). For this purposes of this application the relevant period is measured back from October 2011, with the use continuing at the date of the application.

6.0 Burden and Standard of Proof

6.1 In order for an application to be successful each aspect of the requirements of section 15(2) must be strictly proven and the burden of proof in this regard is firmly upon the Applicant. The standard of proof to be applied is 'on the balance of probabilities.' Therefore, the Applicant must demonstrate that all the elements contained in the definition of a village green in section 15(2) of the Commons Act 2006 have been satisfied.

6.2 This Committee must be satisfied, based on the evidence and the report of the Inspector and its subsequent addendum that **each** element of the test has been proven on the balance of probabilities. In other words, it must be more likely than not that each element of the test is satisfied.

7.0 The Inspector's Findings

7.1 The Inspector addresses each of the elements of the test and these are set out below.

7.2 *" . . . a significant number of the inhabitants . . ."*
This is addressed in paragraphs 11.3 to 11.17 of the Interim Report. The Inspector concludes that it has been clearly established that significant members of the identified neighbourhood have used the claimed land over many years.

7.3 *" . . . of the inhabitants of any locality or any neighbourhood within a locality"*
This issue is dealt with in paragraphs 11.7 to 11.12 of the Report. The Inspector takes the view (at paragraph 11.7) that the application form as originally submitted did not make it entirely clear what the Applicant was claiming in regard to this particular aspect of the statutory criteria. However, he has concluded (at paragraph 11.12 that the suggested 'neighbourhood' of Bonymaen/Winch Wen was an entirely appropriate area to be regarded as a 'neighbourhood within a locality' for the purpose of s.15 of the Commons Act 2006 and was a cohesive area with its own identity.

7.4 *". . . have indulged as of right . . ."*
This issue is dealt with in paragraphs 11.22 to 11.46 of the Interim report and also in the Addendum at paragraph 7. The Inspector has concluded that following the decision in the *Barkas* case, the use of the land has been 'by right' as the public already has a statutory or other legal right to use it.

7.5 *" . . . in lawful sports and pastimes on the land . . ."*
This matter is dealt with by the Inspector in paragraphs 11.18 to 11.19 of the Interim Report. He finds that the evidence is clear that the use of the land by

local people has been for the sort of informal recreation that the courts have indicated should be regarded as falling within the expression “lawful sports and pastimes.”

7.6 *“for a period of at least 20 years; and . . . continue to do so.”*
In paragraphs 11.20 to 11.21 of the Interim Report the Inspector concludes that it was quite clear to him that the land has been well used by local people for recreation for a period very considerably in excess of the requisite period of 20 years, measured back from October 2011 and that the use was continuing at the date of the application.

8.0 Formal Conclusion and Recommendation

8.1 The Inspector’s conclusions and recommendation are set out in paragraphs 9 and 10 of the Addendum to the Interim Report.

8.2 The Inspector concludes that:

a) registration of the application land as a town or village green is not justified in this case because the statutory criteria set out in section 15(2) of the Commons Act 2006 are not met in relation to the site.

b) in particular, the criteria is not met in relation to the use of the land ‘as of right’ in the sense required by the Commons Act 2006.

8.3 The Inspector therefore recommends that the application site should not be added to the statutory Register of Town and Village Greens under section 15 of the Commons Act 2006.

9.0 Recommendation

9.1 It is therefore recommended that the application for registration be **REFUSED** for the reasons set out in paragraph 8.0 above.

10.0 Equality and Engagement Implications

10.1 None.

11.0 Financial Implications

11.1 Refusal of the application will mean that the land is still available for future development or sale.

12.0 Legal Implications

12.1 None over and above those included in the body of the report.

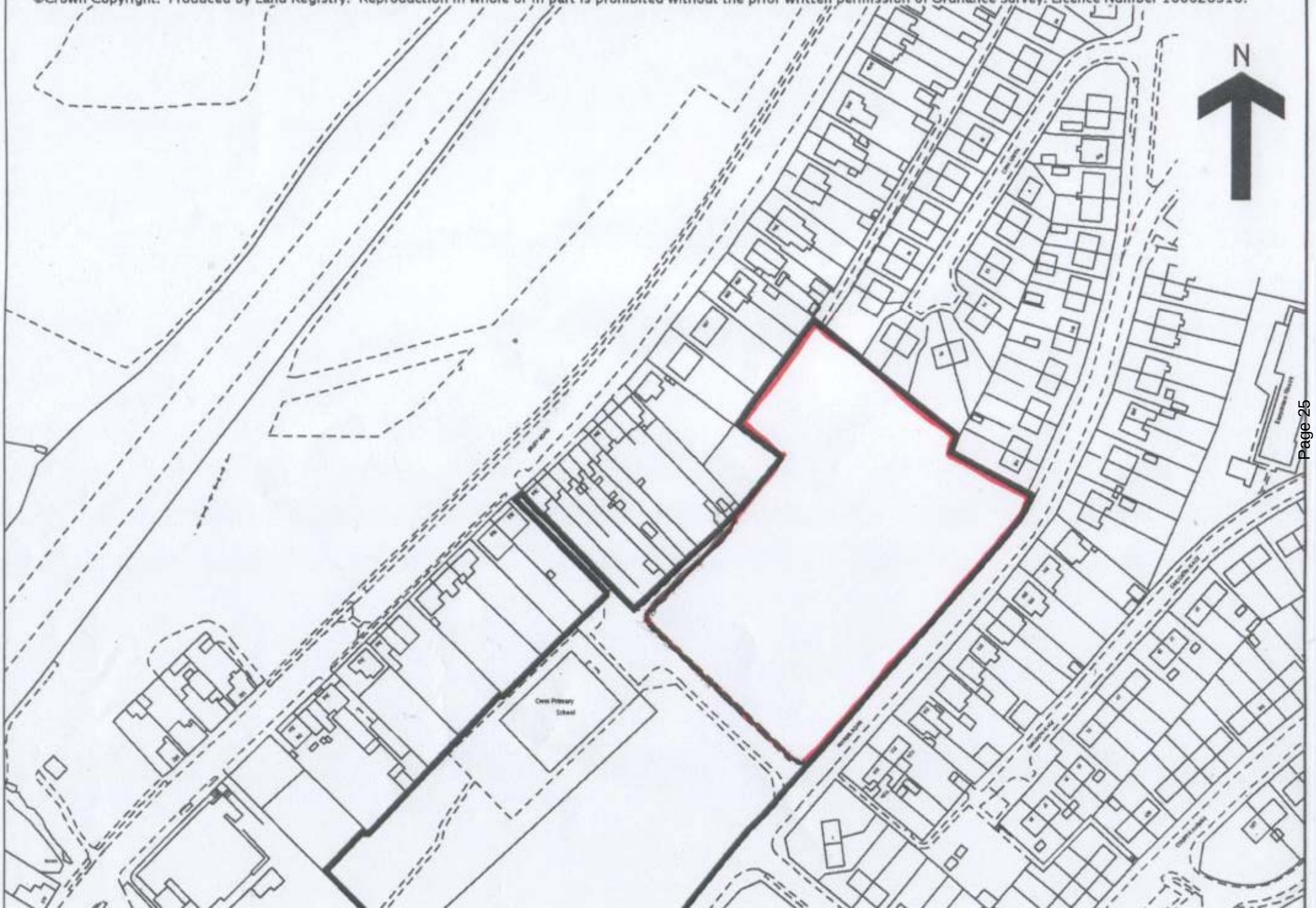
Background Papers: Contained in application file.

Appendices: Appendix 1: Plan of the application site

Appendix 2: Interim Report of the Inspector, Mr. Alun Alesbury, M.A., Barrister at Law

Appendix 3: Addendum to the Interim Report

Revised Cwm Green application site 26/2/14.



Revised Cwm Green Application Site, 26/2/14 [PLAN A]

COMMONS ACT 2006, Section 15

CITY AND COUNTY OF SWANSEA
(Registration Authority)

RE: LAND KNOWN AS CWM GREEN, WINCH WEN, SWANSEA

INTERIM REPORT OF THE INSPECTOR MR ALUN ALESBURY, M.A., Barrister at Law

into

AN APPLICATION TO REGISTER THE ABOVE-NAMED AREA OF LAND

as

TOWN OR VILLAGE GREEN

CONTENTS:

1. INTRODUCTION

1.1. I have been appointed by the Council of the City and County of Swansea ("the Council"), in its capacity as Registration Authority, to consider and report on an application, received by the Council on 7th October 2011, for the registration of an area of land known locally as Cwm Green, at Winch Wen, Swansea, as a Town or Village Green under ***Section 15*** of the ***Commons Act 2006***. The site is within the administrative area for which the Council is responsible, and (as the site was originally formulated in the application) was also almost entirely within the freehold ownership of the Council.

1.2. The Council, in its capacity as owner of the site concerned, was the principal, and by the time of the Inquiry the only, Objector to the application. It is important to record that my instructions in relation to this matter have come from the Council solely and exclusively in its capacity as Registration Authority under the Commons Act. I have had no involvement with the Council in its capacity as landowner or objector, other than in the context of receiving evidence and submissions from the Council in those capacities, as one of the parties to the disputed issues relating to the application.

1.3. I was in particular appointed to hold a non-statutory Public Local Inquiry into the application, and to hear and consider evidence and submissions in support of it, and on behalf of the Objector(s). Hence I was provided with copies of the original application and the material which had been produced in support of it, the objections duly made to it, and such further correspondence and exchanges as had taken place in writing from the parties. Save to the extent that any aspects of that early material may have been modified by the relevant parties in the context of the Public Inquiry, I have had regard to all of it in compiling my Report and recommendations.

2. THE APPLICANT AND APPLICATION

2.1. The Application was itself dated, and also noted as received by the Council on 7th October 2011; it was made by Mr Brian Walters, of 228 Mansel Road, Winch Wen, Bonymaen, Swansea, SA1 7JT. Mr Walters is therefore "the Applicant" for the purposes of this Report. The application form indicated that the application was based on ***subsection (2)*** of ***Section 15*** of the ***Commons Act 2006***.

2.2. The form as submitted did not make it entirely clear what the applicant's views were in relation to the question of the relevant 'locality' or 'neighbourhood within a locality' for the purposes of the application, although the Applicant's answer to the relevant part of the form did include the sentence: *"The green is in the community of Winch Wen within the Ward of Bonymaen".* At the Inquiry it was agreed between the parties that in fact the claimed green lies within the Community (in the Welsh local

government/legal sense) of Bonymaen [which may well be coterminous with a local government electoral ward of Bonymaen], and that this Community area should be taken as the relevant 'locality'. The Applicant further produced for the Inquiry a plan showing the suggested "neighbourhood" [within the Community area of Bonymaen] from which it was claimed that a significant number of the local inhabitants had used the claimed green in a manner which met the relevant statutory criteria. No party to the inquiry objected to this refinement or clarification of the original application. Accordingly it is on the basis of this clarified 'neighbourhood within a locality' that I have gone on to consider this application, and it is my advice and recommendation to the Council as Registration Authority that it should do likewise. A copy of the Applicant's plan showing the suggested 'Neighbourhood' is appended as 'Plan B' at the end of this Report.

2.3. As far as the application site itself was concerned, boundaries were shown on a plan which accompanied the application. As originally drawn, these boundaries included a relatively small piece of land (in the north-western part of the overall site) which I understand to be the property of the estate of the late Mr John Gwyn Thomas (the remainder of the site being entirely in the ownership of the Council itself). An objection to the application was made by solicitors acting on behalf of Mr Gwyn Thomas's estate. It was made clear at the Inquiry that that small area (which is completely enclosed) had been included in the application site inadvertently, and the Applicant produced a plan showing a revised, slightly smaller site excluding that area. This further minor change to the application was acceptable to all parties, and indeed produced the result (I was given to understand) that the objection on behalf of the late Mr Gwyn Thomas's estate was no longer pursued. Accordingly, from now on in this Report (unless the sense requires otherwise), when I refer to 'the application site', or just 'the site', I am referring to the slightly reduced area of land as shown on the Applicant's revised plan dated 26th February 2014. A copy of this plan is appended at the end of this Report as 'Plan A'.

2.4. The site is currently (as I was able to see it) a reasonably well maintained area consisting mostly of mown grass, but with some tarmac paths, and an area devoted to play equipment. It slopes generally down from the south-east to the north-west. It is completely unfenced from Mansel Road along its south-east boundary, and also from the roadway (and pavement) along its south-western side. It is however generally fenced and/or hedged along its boundaries with residential curtilages on its north-eastern and north-western sides. I note in passing that there is another area of open grassland to the south-west of the application site, separated from it by the roadway just referred to, but that area is not included within this current application; I was informed that this land also belongs to the Council, and that it had been appropriated to the Education Department of the Council's predecessor in 1972.

3. THE OBJECTOR(S)

3.1. As I have already noted, by the time of the Inquiry, the only remaining objector to the application was the Council of the City and County of Swansea itself, as the owner of the area of land covered by the application. The Council in that capacity is therefore *"the Objector"* for the purposes of the remainder of this Report.

4. DIRECTIONS

4.1. Once the Council as Registration Authority had decided that a local Inquiry should be held into the application [and the objection(s) to it], it issued Directions to the parties, drafted by me, as to procedural matters in November 2013. Matters raised included the exchange before the Inquiry of additional written and documentary material, such as any further statements of evidence, case summaries, legal authorities, etc. The spirit of these Directions was broadly speaking observed by the parties, and no material issues arose from them, so it is unnecessary to comment on them any further.

5. SITE VISITS

5.1. As I informed parties at the Inquiry, I had the opportunity on the day before the Inquiry commenced to see the application site, unaccompanied. I also observed the surrounding area generally.

5.2. At the close of the Inquiry on 26th February 2014 I made a formal site visit to the site, accompanied by representatives of both the Applicant and the Objector. In the course of doing so, I was again able to observe parts of the surrounding area more generally. The Inquiry venue was also close to the application site, so I was also able to familiarise myself in a general way with the area on a number of other occasions during the inquiry period.

6. THE INQUIRY

6.1. The Inquiry was held in a room provided at the Cefn Hengoed Leisure Centre, Caldicot Road, Winch Wen, on 25th and 26th February 2014.

6.2. At the Inquiry submissions were made on behalf of both the Applicant and the Objector, and oral evidence was heard from witnesses on behalf of both sides, and subjected to cross-examination, and questions from me as appropriate. With the agreement of the parties participating in the Inquiry, all of the oral evidence was heard on oath, or solemn affirmation.

6.3. As well as the oral evidence, and matters specifically raised at the Inquiry, I have had regard in producing my Report to all of the written and documentary material submitted by the parties, including the material submitted in the earlier stages of the process, which I have referred to above. I report on the evidence given to the inquiry, and the submissions of the parties, in the following sections of this Report, before setting out my conclusions and recommendation.

7. THE CASE FOR THE APPLICANT – EVIDENCE

Approach to the Evidence

7.1. As I have already noted above, the original Application in this case was supported and supplemented by a number of documents; these included a plan, witness statements, some photographs, and other supporting material.

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

7.3. I have read all of this written material, and also looked at and considered the photographs and other documentary items with which I was provided, and have taken it all into account in forming the views which I have come to on the totality of the evidence.

7.4. However, as is to be expected, and as indeed was mentioned in the pre-Inquiry Directions, and at the Inquiry itself, more weight will inevitably be accorded (where matters are in dispute) to evidence which is given in person by a witness, who is then subject to cross-examination and questions from me, than will be the case for mere written statements, etc, where there is no opportunity for challenge or questioning of the author.

7.5. With these considerations in mind, I do not think it is generally necessary for me specifically to summarise in this Report such evidence as was contained in the statements, letters, etc by individuals who gave no oral evidence. In general terms it was broadly consistent with the tenor of the evidence given by the oral witnesses, and nothing stands out as particularly needing to have special, individual attention drawn to it by me.

7.6. In any event all of the written and documentary material I have referred to is available to the Registration Authority as supplementary background material to this Report, and may be referred to as necessary.

The Oral Evidence for the Applicant

7.7. ***Mr John Hague*** lives at 283 Bonymaen Road, Bonymaen, Swansea. He has had a close association with Cwm Green over many years. His evidence was given, he said, as a lifelong resident of Bonymaen, a former Swansea City Councillor and Deputy Leader of that local authority.

7.8. Around 1980 the present application site was transformed from an ugly coal tip surrounded by Japanese knotweed.

7.9. Between 1950 and 1955 Mr Hague had attended Cwm Primary School, and the coal tip at the back of the school was the only open space, and so became a natural and ready-made play area. He and the other youngsters would play there and slide down the tip, regardless of what their parents of the teachers thought about it. That was more or less where the application site now is. There was nowhere else to play. That is just like today because there is nowhere else for kids to play other than what is now the transformed green and pleasant Cwm Green.

7.10. Mr Hague said that he understood that the village green application was being made in order to protect this valuable green parkland from any form of future physical development. As an experienced builder he is aware that the former tip would need raft foundations which would add significantly to the cost of any building project there.

7.11. Over the years, at Cwm Green the local authority has developed an enclosed playground for the very young. Its swings, slide and roundabout are very popular. The wider parkland is also very well used by older boys and girls for informal sports. The council has also developed a hardstanding area for netball and basketball.

7.12. When he was young there were three parks in the area. One was at the junction of Jersey Road and Bonymaen Road; that has long since been removed. Bonymaen Park still exists but has been the subject of much vandalism, and is some distance from Cwm Green. The third park is opposite the Halfway public house at Trallwyn. That features a soccer pitch maintained by the council. But swings, a roundabout and a slide for the youngsters disappeared years ago.

7.13. So the play facilities for local children have dwindled quite considerably over the years. That is why local residents and those who occasionally visit from further afield treasure the facility at Cwm Green. It would be a sorry day for the community and the youngsters if this important parkland were to be lost.

7.14. Over the years the community has grown tremendously but the facilities have not. There was once a park on Cefn Road which has now become a reservoir. Many facilities in the area have been lost.

7.15. Mr Hague asked where these recreation facilities would be replaced if they were lost. He pointed out that there also had been an old airshaft which came up through the present application site. It was filled in, but he queried how well that was done. This land was not well used until it came into use as parkland. Any idea of developing on this land seriously needs reconsidering because there are not a lot of public facilities here on the east side of the river in northern Swansea.

7.16. The parkland on the application site is used every day quite extensively, albeit maybe not in bad weather. This extensive use is to his own knowledge. He passes by along the road beside the site frequently and he sees it being used. It has been well used over many years.

7.17. *In cross-examination* Mr Hague said that in 1956 he was aged 11; he remembers the area around the site being developed by the local authority. But the Cwm Green was deliberately left undeveloped. In the period from 1956 to 1970, which was before the area was landscaped, children did nevertheless play there, sliding down the coal tip; the land was largely waste and unoccupied.

7.18. He could remember when the local authority had landscaped the land. The council then maintained the area; it was their property. It was a park area that the council provided for the benefit of local inhabitants, like all the other parks in Swansea. The previous park which had existed at the junction of Jersey Road and Bonymaen Road went in the 1960s he thought. The Cefn Road park went in the late 1950s. The soccer pitch opposite the Halfway public house went about 9 years ago.

7.19. He confirmed that he had seen people using Cwm Green. He could not say offhand if he knew the people he had seen using it while he was driving past. He acknowledged that it is possible to park on the road adjacent to the application site. One does see both adults and children playing on the land.

7.20. He acknowledged that people could possibly come from all around to use this land, but his view was that people would not travel very far to play there. Therefore the people using it would tend to be from the relatively close area. He did not know however if he had always seen the same people using the land.

7.21. ***Mr Ian Challacombe*** lives at 20 Cefn Llwyn. He said that he had lived bordering Cwm Green since 1969, when it was an eyesore coal tip. He

lived at 292 Jersey Road from 1969 until 1982, living at home with his parents, and has lived at 20 Cefn Llwyn from 1984 to the present day, with only a 2 year gap when he moved briefly to Morriston.

7.22. There have always been ball games such as football, rugby, cricket etc, along with various other leisure activities, at Cwm Green with no restriction on access at any time. He, his children and now his grandson have used the lovely open green area and the playground equipment. Also during the winter children use the natural slope of the green to sledge down in the snow. This area has been transformed from the ugly coal tip of 1969 to the park area since 1980, and it must be preserved for future generations to enjoy.

7.23. He explained that he has a good view of Cwm Green from where he lives. He thought there could be more than 100 people who use the green regularly. The play area is used extensively and football goes on there. The youngsters who use it he was sure were from around the local area because of their age. He has lived backing onto the green for 45 years.

7.24. *In cross-examination* Mr Challacombe said that he did remember the site as it was as a coal tip up until 1969. He did use the site when it was still the tip, and could clearly remember when it was landscaped in the 1970s. It has always been well maintained by the council since then. It had always been his impression that the council wanted members of the public to use this land.

7.25. Generations of local people have grown up using this land, he said. His own generation used it, and his children. He knew those who were using the land personally at those stages. Now however it is a new generation and his grandson uses it. He does know that the children using it are from the local area, that is not just an assumption on his part. And by the local area he means the whole estate up to Cefn Hengoed. And from there down to the old park at Bonymaen, and Cwm. One does see familiar faces using it, he said, and he recognised them.

7.26. He mentioned that his own postal address used to be Winch Wen, but that was changed by the Post Office to Bonymaen.

7.27. He himself had only ever used this land for recreation, and the access to it had never been restricted.

7.28. As for the previous mine working on the land, his understanding was that there used to be a concrete cap on the ventilation shaft, but trees fell down into it on two occasions, so that the shaft was eventually filled in.

7.29. He also mentioned that the local Family Centre hold a fun day in summer months on the green, and the green is extensively used by them.

7.30. ***Mrs Pauline O'Brien*** lives at 237 Mansel Road, Winch Wen, Bonymaen. She had written one of the statements which accompanied the application in this case.

7.31. She and her husband Peter have lived at their present address for more than 51 years. They live in one of 12 semi-detached houses which adjoin Cwm Green, and they were one of the first couples to occupy a property there. When all the 12 houses were occupied there were 19 children living there, and three of the women were expecting as well.

7.32. It was a lovely location, the only downside being the eyesore coal spoil tip covering a large area of land at what is now known as Cwm Green.

7.33. The council of the day told them it was intended to transform this land to parkland, but there was no action on the part of the council for several years. It was left to the residents to campaign for the promised parkland, and they did that after about 7 years. Eventually it happened. The mineshaft was capped, the colliery spoil removed, and the area was grassed. All that happened about 30 – 35 years ago.

7.34. Naturally the local people were delighted, for it provided a green and safe environment for the community which was growing all the time. The land has been well maintained by the city council and there is little or no vandalism.

7.35. Her grandchildren visit her with her daughter regularly, and they love going over to the playground. There has always been free and easy access to the green, and they even have picnics there in the summer. The green was particularly well used in the previous summer, although the fine weather may have had something to do with that. Cwm Green is local people's pride and joy, and it is a feather in the council's cap that it is so well maintained.

7.36. Mrs O'Brien said she dreaded to think what would happen if Cwm Green became a development site. The nearest other park would involve crossing four or five roads. Cwm Green is the only bit of greenery in Winch Wen where children can play safely.

7.37. When she moved into her house she had three boys who played on the land when it was a tip, because there was nowhere else to play. It was heaven when it was made into a park. Nowadays her three grandsons play there.

In fact all local boys play there every day of the week. They have done that for the whole time the land has been laid out as parkland. She confirmed that they have indeed had picnics there themselves. When they are playing on the land children do all sorts of things there; there is always lots of activity there the whole time.

7.38. *In cross-examination* Mrs O'Brien confirmed that she and her husband moved in in 1962; when they bought the house they were told that the council would make a park there; in fact the estate agent told them that there would be a chemists, a Co-op and a park in the area, but the park took a long time to appear. The capped shaft was a nightmare while it remained like that. The council turned the land into a park in about the early 1970s, and since then it has been very well maintained. The Council intended the land to be used by the residents of the area. There had been no attempts to restrict use of the land, but rather to encourage it if anything.

7.39. Every time she looks out at that land she sees people using it. Many of them are people she knows, but not all of them. She thought a lot come from down in the Bonymaen area. This park has always been nicer than the Bonymaen park.

7.40. *In re-examination* Mrs O'Brien confirmed that the parkland had been well used last summer due to the good weather. Both morning and afternoon children in large numbers would meet there to play.

7.41. She estimated that probably one might see about 20 children playing there in the morning and another 20 in the afternoon. They could be the same children or different ones.

7.42. ***Mr Derek Bellamy*** lives at 220 Mansel Road, Winch Wen, Bonymaen. He had provided one of the written statements which accompanied the original application.

7.43. In his evidence Mr Bellamy said he is probably the only resident of the area to have lived at two addresses overlooking Cwm Green – 220 Mansel Road, his current address, and at Cefn Llwyn next to the park. He has lived at those two houses for a total of more than 40 years.

7.44. When they moved to the area the only downside was the eyesore state of the Cwm Green land, which of course was not known as Cwm Green in those days. Coal spoil heaps dominated the landscape and it was not a pretty scene.

7.45. In the absence of any official information from the council, he would estimate that the area was transformed from the previous eyesore state to a green and pleasant piece of land at least 30 years ago, around about 1980. Since then it has been widely used for a variety of informal sporting activities – football, cricket, basketball and rounders are the most popular pastimes. The younger children have their own enclosed playground which, like the wider green, is well maintained by the council. His own son used to play there. Now his two daughters make a beeline for the green when they visit his wife and himself.

7.46. Over the years he has witnessed many families picnicking on the green in the summer months, countless pet owners exercise their dogs there, and people just stroll and chat. It is in every sense a true village green and he hopes it is designated as such.

7.47. *In cross-examination* Mr Bellamy acknowledged that the land has always been maintained well by the council. He thought the land had been completely transformed by what the council did.

7.48. Local people had never had to seek permission to use the land, and it certainly has benefited the local residents.

7.49. His own son actually played football on there before it had been cultivated by the council. Since then the council have encouraged people to use it by maintaining it to a high standard. No-one has ever tried to prevent anyone from using it or to restrict that use.

7.50. He could not put a figure on the number of people using it, but the parkland is well used. People walk their dogs, children including his own grandchildren played there in large numbers at all sorts of different times. And also families would play there after children had been picked up from the nearby buildings when they were in fact a school.

7.51. His view was that most of the people who use the park are local people on foot. And the children using it are mostly from the local area.

7.52. There were a lot of other children who were the same age as his own children, so they tended to know those children, but now it is his grandchildren who use the land.

7.53. *To me* Mr Bellamy confirmed that the usage pattern on the land has been much the same since about 1980, but of course it depends on the weather.

7.54. ***Mr Brian Challacombe***, lives at 292 Jersey Road, and he and his family moved into that bungalow in 1969. At that time the coal tips which bordered the bottom of their garden had not been removed. That took place some years later, in 1976, prior to the development of houses at Cefn Llwyn, which was adjacent to the tips.

7.55. When the tips were removed the area was landscaped and footpaths were created. A hardstanding was laid with netball posts being erected and also benches provided. Then came a soft area with swings, roundabouts, a slide and other facilities for younger children. It was in all but name a park.

7.56. One of the problems the authorities had faced concerned an old colliery air shaft which terminated just short of Mansel Road. It took several attempts by the Coal Board and the council to fill it in. That proved difficult because the shaft was on a slope and not a vertical drop. It ran diagonally under Cwm Green.

7.57. For generations Cwm Green has been a recreational area for both children and adults. Today and for a long time it has been a place of beauty, and it is delightful to see children playing games or just running around in the knowledge that they are in a safe environment. The green is used all the year round.

7.58. *In cross-examination* Mr Challacombe said that although when they first moved into their house the coal tips were still there children nevertheless played there, especially in the winter in order to slide down the tips. Since the park was created the council has maintained the land to a very high standard.

7.59. Everyone locally thought that this was a long stay park which would remain there indefinitely. He had always thought that it was a park where all members of the public were invited to use it.

7.60. From his back window he can see all the children playing on the land because of the way it slopes towards him. He does not necessarily know all the children but he just sees them playing. They come from all the various surrounding areas and obviously he does not know all of them.

7.61. *To me* Mr Challacombe said that all of his own children and also his grandchildren, and now indeed his great-grandchildren, have played there on the park. They have played there with local friends. All but one of a total of six of his grandchildren and great-grandchildren live in Bonymaen or Winch Wen.

7.62. ***Alderman Mair Gibbs*** lives at 180 Mansel Road. She said that she is a former Councillor who had represented the Bonymaen Ward, which includes Winch Wen. She has lived near the application site all her life. In 1936, when she became of school age, she had to pass some very large and ugly coal tips spreading from Jersey Road to Mansel Road. Those tips were most unsightly and unhealthy, but to the children of the time they were their playground. They would often find tin sheets, planks of wood or whatever and slide down the colliery spoil slopes.

7.63. When she joined Swansea City Council in 1986 she became a member of a committee responsible for regeneration. Money became available for regeneration projects in areas of deprivation, and Bonymaen was one such area. It became known as the Swansea Valley Project. They managed to find sufficient funds to upgrade the children's playground at Cwm Green and properly maintain it. Of course the park had been established many years before that, and unlike a lot of playgrounds the one at Cwm Green has never been vandalised.

7.64. Cwm Green is a favourite among young children and mums from the adjoining Family Centre, and the new Welsh Medium Primary School which backs onto Cwm Green. Cwm Green attracts children of all ages, especially during the school holidays. The community needs to retain this area for the future of their children and for future generations.

7.65. She explained that during the time she was Lord Mayor of Swansea she was often asked to appear at school sports days which were held on Cwm Green. She had represented the area for 28 years, so there are not many people in the area she does not know. She does tend to know the people who live in this Ward, she said. Thus she tends to know all the families who use the park.

7.66. It is important to protect what the local area has got now. The council has maintained the area really well, there has been first class maintenance of it.

7.67. *In cross-examination* Alderman Gibbs said that all the local people had used this land for recreation even when it did consist of coal tips. She had not been politically minded at the time when the land was restored, but she did recall that there had been a lot of these tips around Swansea. When the council started developing the houses around here, that was an important activity that was undertaken after the Second World War.

7.68. As for the period from 1956 to the early 1970s, she was not on the local authority at that time, but that was a time when money had been needed to build houses for the people. She reiterated that since the parkland at Cwm Green was landscaped it had always been well maintained.

7.69. The council's positive actions had changed the area, and money was spent on the area in order to improve it; it would be a terrible waste if that was lost.

7.70. As far as the local area is concerned, people would tend to use the name Winch Wen for the part which was to the north of Caldicot Road, and Bonymaen for the area to the south of Caldicot Road.

7.71. It was her understanding that equipment had been removed from the former Halfway park because it was unsafe, but that was a sad event. In the early 1970s she herself had not been on the council but she was involved in the local area. She recalls that the council landscaped Cwm Green as a park for the benefit of the local public. Since then the local people have used the park regularly.

7.72. Bonymaen park is rather different from Cwm Green, and somewhat off the beaten track. Her own observation would be that families with children come to the Family Centre near Cwm Green and then go into the parkland there. In her view the whole area of Bonymaen, which includes Winch Wen, is rather like a big family. Cwm Green is roughly at the point where one could say that Bonymaen meets Winch Wen.

7.73. Children from the school go to the park to kick around after school. She was referring to children from Cefn Hengoed School. During the school holidays one can also see lots of children playing down there. Sometimes there could be close on 50 children playing there or maybe more.

7.74. On a bank holiday or during the school holidays, whenever she passes there would be children playing down there, it is very well used.

7.75. The children at the local school know that the green is currently under threat and are concerned about it, she said.

7.76. She would say that there are more than 20 children usually there playing. She could not identify precisely who they are because she would not ask them, but she knows them by sight.

7.77. ***Mr Brian Walters***, the Applicant, lives at 228 Mansel Road. He has lived in Mansel Road from 1986; previously to that he had worked in Yorkshire. It was his understanding too that local people regarded Winch Wen as being the part of the area to the north of Caldicot Road, and Bonymaen to the south of that road.

7.78. One selling point for his house when he bought it was the fact that it faced this green of Cwm Green. It is lovely to see so many children using the green, especially in the Spring and during the Summer holidays.

7.79. He does not know all the children who use the land but he sees many of them time and time again. He does sometimes see cars pull up and youngsters get out of them in order to play on the parkland. However he would say that well over 90% of the youngsters using the parkland are locals. The people who use the park come from both the north and the south side of Caldicot Road. On the last day of good weather before the Inquiry Mr Walters estimated that about 35 to 40 youngsters had been playing on the green.

7.80. At the height of the summer holidays one is looking at very many more children than that playing there.

7.81. Old mine workings are always a worry and they were never properly filled in so there is a real concern that house building might take place there on this land.

7.82. When his grandchildren visit they make a beeline for the green. The use of the green has been consistent since 1986, much as it is now. However the children's playground on the green has been upgraded on at least one occasion.

7.83. He himself had not been aware of the old mine workings on Cwm Green when he moved in.

7.84. *In cross-examination* Mr Walters said that nowadays he does not personally know the youngsters who are using the green. However he does very often see the same children there from one week to the next. They are sometimes there with their parents. It is reasonable to assume that they are local.

7.85. The Village Green application was made in 2011. The application was made in part because the land had been identified as a possible area for future development in the Council's Development Plan. The local people had thought it wise to try to secure the future of the site. This land had been a *"candidate site"* for 33 houses.

8. **The Submissions for the Applicant**

8.1. In opening submissions the Applicant stressed that although the application had been lodged in his name, it has the endorsement of the communities of Winch Wen and Bonymaen. A public meeting had been held in September 2011. It was well attended and the proposal to seek Village Green status received the unanimous support of the packed audience who were present.

8.2. Village and Town Greens come in all sorts of shapes and sizes. However Cwm Green actually looks like a village green, it serves as a village green and meets the specific legal meaning of village green that applies in Wales and England.

8.3. It is regrettable that the council has not been able to produce documentation which would assist the case. The original conveyance is said to have been lost, but there is no doubt that the site was bought by the then local authority in the mid-1950s. Today's council does not have a record of who installed the original playground equipment, nor who authorised the installation.

8.4. The council is correct in saying that the current children's playground equipment was installed in 1997/1998 when new health and safety guidelines decreed that playgrounds must have a soft surface and be enclosed. The original playground equipment, two swings, a slide and a roundabout were installed on the hardstanding that is now the netball pitch a number of years earlier. Residents who have lived there for many years recollect that the original equipment was installed some 40 years ago.

8.5. However local people are not just concerned about the playground but the whole site, and these same residents are certain that the transformation of the site from colliery spoil tips to a lovely park area happened in the late 1970s, since when the land has been widely used, mainly by youngsters from the community and further afield.

8.6. So the land in question falls entirely within the ***Commons Act 2006*** definition. A significant number of the inhabitants of the area have indulged as of right in lawful sports and pastimes for at least 20 years, and continue to do so. People wander onto the green, not requiring the council's permission, and there is no record of the number of people, including children, who use the green, but in the Spring and Summer months it is a most significant number.

8.7. A Welsh Medium Primary School backs onto the green, and the Bonymaen Family Centre overlooks the site. Around 300 families a year benefit from visiting the Centre at Cwm Green.

8.8. The inhabitants of Winch Wen have already lost a number of amenities including a children's playground on land opposite the Halfway public house, and the closure of the swimming pool in the building where the Inquiry was held.

8.9. The witnesses being called for the Applicant are respectable and reliable witnesses most of whom have lived in the Cwm Green locality for many years, in one case more than half a century. Mr Walters said he could have called 60 or more witnesses but they would all be giving the same basic evidence. He had tried to avoid repetition of more or less identical evidence as the Directions for the Inquiry had suggested.

8.10. In closing submissions Mr Walters referred to the fact that the Objector had pointed out that the burden of proof lies with the Applicant, and that the standard of proof is the balance of probabilities. The Applicant believed that it had been shown to that standard that Cwm Green meets all the criteria for designation as a Village Green.

8.11. At the Inquiry much emphasis had been placed by the Council's representative on where the children and adults who use the green came from. They might indeed come from near and far, but logic dictates that the vast majority come from the more immediate locality.

8.12. The criteria of the ***Commons Act*** stipulate that a significant number of the inhabitants of a locality or a neighbourhood within a locality should have indulged as of right in lawful sports and pastimes on the land for at least 20 years, and that is the case here.

8.13. However the local authority maintains that Cwm Green is held on trust for the public to use for recreation, and so argues that the use of Cwm Green has been by right and not as of right. The Applicant's understanding of the case-law points which had been made on behalf of the authority is that where local authorities hold land expressly as open space or parkland that land cannot be registered as a village green. That gives rise to a question as to the status of Cwm Green.

8.14. There is no question of doubt that Cwm Green was purchased compulsorily by the local authority of the day as part of a wider area of potential residential development. Indeed the Council's case summary had acknowledged that the purpose of the ***1953 Compulsory Purchase Order*** and the subsequent conveyance was for the local authority to build housing. The underlying scheme had been referred to as the Bonymaen and Winch Wen Housing Scheme.

8.15. However the site now known as Cwm Green was not developed. Mr Stephenson for the council had stated that the inference to be drawn therefore was that the local authority intended that this land should be used for the enjoyment of the public. However the Applicant says that the inference to be drawn is that the land, with the old mine workings below ground, was considered unsuitable for development.

8.16. Houses now stand at the Cwm Green end of Cefn Llwyn, making vehicular access to that point impossible. Residents have failed to get an answer to the question: *Why wasn't the Cefn Llwyn housing development continued into the site now known as Cwm Green?* In the same way, why did the development of houses in Mansel Road come to an abrupt stop at number 231? The local authority has failed to provide any documentation or evidence showing that the land now known as Cwm Green was originally intended to be recreational land.

8.17. Mrs O'Brien in her evidence had stated that it was only after a concerted campaign that the local authority agreed to remove the colliery spoil heaps and to grass the area. Former Councillor John Hague recalled the transformation of the site more than 30 years ago. Mr Hague is a builder by trade and is in no doubt that the former tip would require raft foundations to accommodate any development above ground. That he said would add significantly to the cost of any development, and probably render it cost-prohibitive. That probably explains why we don't see developers queuing up to build on Cwm Green.

8.18. The Applicant's witnesses are good, honest, decent people who are genuinely concerned about the future of this site.

8.19. Cwm Green is the only piece of greenery in Winch Wen where children can play safely. The Applicant strongly hopes that it continues as a safe haven for youngsters for many years to come. It is believed that the vast majority of the local community share that hope.

9. THE CASE FOR THE OBJECTOR – Evidence

9.1. Oral evidence (supported by a bundle of documents) for the Objector (the City and County of Swansea as landowner) was given at the Inquiry by ***Ms Jane Harries***, the Landlord Services Manager of the Council, employed by the Council's Director of Place in the Housing and Public Protection Services of the Council. Ms Harries had held her present post for the previous 8 years and had worked for the Council within its Housing Service since June 1986.

9.2. She explained that she made her statement essentially from the records of the Council's Corporate Building and Property Services, and also the Council's Culture and Leisure Services. She acknowledged that she did not have first hand knowledge of the site, although it forms part of the portfolio of housing land for which she has operational responsibility. She is aware that the local community use the site for recreation purposes, and that there is a children's play area and a basketball/netball court there.

9.3. The Council's records show that the site was originally acquired on 4th January 1956, by the County Borough of Swansea, which was the present Council's predecessor. Prior to that there had been a compulsory purchase order called the Swansea (Bonymaen and Winch Wen) Housing No.45 Compulsory Purchase Order 1953. Ms Harries produced a plan showing the area of land which the Council acquired.

9.4. While the conveyance was silent as to the purpose of the original acquisition, the Council's acquisition records showed that the relevant land referred to in the Compulsory Purchase Order plan had been acquired for the housing department, and it would seem that is was acquired for the Bonymaen and Winch Wen Housing Scheme. Other records show that some of the acquired housing land adjoining the nearby school, along with the site of that school (not on the present application site) was subsequently appropriated to the Education Department of the Council. However these records reaffirm that the purpose of the original acquisition of land under the CPO plan had been for housing.

9.5. Ms Harries produced a plan which showed the housing land still owned by the council in the vicinity of the site. That plan shows the land of the present application site marked as *"Housing"*.

9.6. The Council's records show that children's play equipment and a netball and basketball court were installed on the site in approximately 1997/1998. The records of the Council's Parks Service show that the Council has maintained the land since August 1998. However she noted from most of the statements supporting the application that the Council would seem to have started to maintain it some considerable time before 1998. That evidence seemed entirely credible. Indeed she accepted that it would have taken some time to landscape and lay out the land from its original state as colliery spoil tips. The Council continues to maintain and inspect the play equipment and mow the grass on the site on a regular basis.

9.7. Ms Harries said that she believes that the Council has set out the site to provide recreation for its council tenants and other people in the community, although she accepted that there are no formal council records available to support that. In general terms that understanding of what had

happened was consistent with aerial photographs which had been found, and also with the evidence of local residents in support of the application.

9.8. The Council maintains the area of Cwm Green as part of its general maintenance of open spaces and play areas. That meant that the grass was cut about 13 or 14 times a year. That maintenance responsibility is met from the Council's general funds, and not from its housing revenue account. That she said would be because this land is recognised as being open space and a play area. In contrast the housing revenue fund would maintain grass verges and the like within a housing area.

9.9. *In cross-examination* Ms Harries said that she could not herself comment on why Cwm Green had not been built on, in spite of being 'housing' land. She thought it could have been because of the presence of colliery air shafts but she did not know. It could possibly have been because of the nature of the land in some other respect.

9.10. She could not explain why it was that no records could be found as to why or how the land had been restored and converted to parkland.

10. The Submissions for the Objector

10.1. In submissions on behalf of the Objector provided before the Inquiry began, it was argued that the land here was held on trust for the public to use for recreation. Therefore the use of the land would have been *"by right"* and not *"as of right"*, and the application should be dismissed for that reason. Additionally the Applicant should be put to proof as to whether a significant number of the inhabitants of the locality have in reality used the land for sports or pastimes.

10.2. As to the history of the land, in 1956 the local authority had purchased the land now known as Cwm Green as part of a wider housing project for Bonymaen and Winch Wen. The area surrounding Cwm Green was thereafter developed into housing. Cwm Green itself however was not developed for housing.

10.3. The Applicant's own evidence suggested that there had been a campaign which had succeeded some 30 or 40 years ago to get the site turned into parkland. Therefore, based on the Applicant's own contentions, it was argued on behalf of the Objector that Cwm Green is an open space for the purposes of the ***Open Spaces Act 1906***. There is no suggestion of any building having been present on the land. The land was previously waste and unoccupied until it was landscaped into an area for recreation around 1970, and it has been maintained as an area for recreation since then. That

meets the definition for open space as defined in ***Section 20*** of the ***Open Spaces Act 1906***.

10.4. The land being classified as open space would mean that the local authority was under a duty to hold and administer the land in trust for the public, by virtue of ***Section 10*** of the ***Open Spaces Act 1906***.

10.5. It is settled law that the public does not use a recreation ground *"as of right"* if the public already has a statutory or other legal right to use it. The cases of ***R (Beresford) v Sunderland City Council*** [2004] AC 889, and ***Barkas v North Yorkshire County Council*** [2012] EWCA Civ 1373 were referred to. Therefore the persons who have used Cwm Green have done so as beneficiaries of the Council holding the land on trust for their use and enjoyment as open space. This is not use *"as of right"*.

10.6. As for the requirement for a significant number of inhabitants to have used the land in cases of this kind, whether the number of people is significant or not is a matter of degree relative to the size of the population of the locality. With this application there was very limited evidence of how many people had in fact used this recreation ground. This was not the Objector's major point, but the Applicant must still prove his case. The local authority was aware that there were currently 4,987 persons registered on the Electoral Roll in the Bonymaen Ward.

10.7. In opening submissions at the Inquiry itself, the history of the site following the ***1953 Compulsory Purchase Order*** was referred to. The site was initially waste land, with no buildings on it, and unoccupied. It was landscaped in about 1970 and thereafter maintained as an area for recreation which was then enhanced in 1997/1998 with a playground.

10.8. As to the status of the Council's acquisition, it was argued that the land was initially acquired as open space, albeit as part of a wider transaction for housing. Therefore the land met the criteria described in ***Section 20*** of the ***Open Spaces Act 1906***. Then the land was developed to become a different type of open space, but still within ***Section 20*** of the ***1906 Act***, it was suggested.

10.9. In the alternative, the Objector's argument was that the acquisition had been under the 'umbrella' of housing purposes, but had been for open space use on this land. In other words the effect of the classification of this land as housing land was largely inconsequential.

10.10. If the land was held as open space then ***Section 10*** of the ***Open Spaces Act 1906*** would apply. If the true position was that the land was held for housing, then the provision of a recreation ground here would have been

under ***Section 80*** of the ***Housing Act 1936***. In either of these ways, the decision of the Court of Appeal in the ***Barkas*** case would tell us that use here had been by right and not as of right.

10.11. On the question of the extent of the use of the land, the point was reiterated that there was an important evidential requirement for the Applicant to prove his case. The Objector would not itself assert a positive case, but in the documents to date there had been very little evidence that the persons who used Cwm Green were from the locality, or a neighbourhood within the locality, and also limited evidence as to how many people had in fact used the land.

10.12. In closing submissions at the end of the Inquiry, Counsel for the Objector said that the starting point was that the acquisition here had been under a Compulsory Purchase Order. The wider area around the present application site had been developed extensively following that. The inference must be that this land had been deliberately left as public open space. The local authority would have known about the landscape here, and deliberately not used this land as land for housing or development.

10.13. It was clear that this land was then landscaped in the 1970s for recreation, and further enhanced in 1997/1998 with a playground and basketball/netball court.

10.14. Therefore it was said that the ***Open Spaces Act 1906*** applied, although the land had been purchased under housing legislation. It had never in fact been used, or it seems intended to be used, as actual housing. This land meets the definition in ***Section 20*** of the ***Open Spaces Act*** of *"open space"*. It was both *"waste"* and *"unoccupied"*.

10.15. After it had been landscaped it was used for the purposes of recreation, and indeed still as open space. Therefore the land has been used by those people who have used it *"by right"*.

10.16. In the alternative if the land is not an 'open space' as such but is held for housing – this is not the Council's primary case but it is accepted it is a conclusion open to the determining authority – then this is a case like ***Barkas***. In other words it was a case where the local authority had power to lay out the land as a recreation ground, but no obligation to do so. There is no dispute at all that the local authority had laid out this land for the benefit of the public.

10.17. The case of ***Barkas*** says that in such circumstances the local people who use the land to engage in pastimes do so by right and not as of right. Also it can be said that the members of the public here clearly had *permission* to

use the land, and were not asserting a right. The local authority actively encouraged the use of this land.

10.18. It needed to be recalled where the burden of proof lies in a case of this kind. The Objector's view is that this burden of proof has not been satisfied. Applications of this kind must be taken seriously, and must be strictly proved. There had been very limited evidence from people who used the land, as opposed to people who have seen other people using the land. There had been very limited evidence as to the number of people using the land. They might have been the same 20 people using the land both mornings and afternoons, or they might have been different people.

10.19. Mr Ian Challacombe had said that over 100 people might be seen on the land. Mr Walters said that he saw many of them time and time again.

10.20. As to the neighbourhood of Winch Wen/Bonymaen, there had in fact been very limited evidence if any of where the people using the green actually came from. Bonymaen/Winch Wen is quite a large area. One can legitimately ask, are the 20 or 50 people using the land the same people coming back time and again?

10.21. The Electoral area of Bonymaen had been shown to be quite a big area, and there was limited if any evidence of a significant number of those people using the land. Thus the Objector's position is that this has been an honest but mistaken application, and that the core issue here is really local people's concerns over the planning of this land. It follows that the land should not be registered as a town or village green.

10.22. It was acknowledged that the case of ***Barkas*** was going to the Supreme Court, but there may be a delay of several months before any judgment is issued, and it is unclear if it will have any impact on this present case. The Court of Appeal decision in that case therefore is still good law.

10.23. The majority of the evidence in the present case had not suggested any knowledge of where the people using the green had come from. For example, where did the people using the Family Centre come from?

10.24. It was accepted that it was difficult to distinguish this case in some ways from the ***Beresford*** case in the House of Lords. However, when this land was acquired, it was a different type of land. It had coal tips on it, but could be regarded as 'open space' land because it met the definition. In the ***Beresford*** case however the land appeared to have been created for the specific purpose it was being used for.

10.25. It was accepted that there was nothing more solid than inference on which the Objector could hang the *'Barkas'* point. The land had been acquired for housing purposes 60 years ago, and it remains held for that purpose today. There is nothing concrete, it was accepted, to say that it was under statutory powers that it became provided as recreational land.

10.26. In further submissions it was argued that the case of ***Beresford*** could be distinguished, because here the land had not been acquired for public recreation but as part of an extensive acquisition. In ***Beresford*** it seemed that, had the originally envisaged development been carried out, public access would have been regulated and fees charged for use, but that those plans were never fully realised. Therefore the use by local inhabitants in the ***Beresford*** case had in effect been 'in the meantime'. It should be noted that in the ***Beresford*** case the court had been unable to infer an appropriation for a recreational open space, because that would have been inconsistent in that case with the site's perceived development potential. So it was reiterated that what had happened in ***Beresford*** had been some sort of interim arrangement, during which the local public had used the land as of right.

10.27. In contrast, in the present case the coal tip had always been kept as open space, with a deliberate lack of development. The ***Beresford*** case lends support to the proposition that inferences can legitimately be drawn.

10.28. It was clear from the ***Barkas*** case as well that one can infer that various Acts apply to particular pieces of land. In any event, in the ***Barkas*** case it appeared that the land had been acquired under statutory powers for housing. The CPO in this case would almost certainly have been under the ***Housing Act 1936***, which was generally similar to the ***Housing Act 1957*** which followed it. Therefore this land was governed by the ***Housing Acts***, and the power to provide recreation land would have fallen within the relevant ***Housing Act***. Therefore this case and this land would have fallen squarely into the principles enunciated in ***Barkas***. So it can be inferred that the local authority exercised powers under the ***Housing Act*** to lay out and provide this land for recreation, exactly as had happened in ***Barkas***. Consequently the village green application here should be rejected.

10.29. On the question of the extent of the use that had been demonstrated, the well known ***McAlpine*** case had shown that it was required that general use by the local community must be demonstrated. In this case the local authority owner had wanted the community to use the land, that was true, but it was still legitimate to ask whether the evidence had in fact shown general use by that community.

11. DISCUSSION AND RECOMMENDATION

11.1. The application in this case was made under ***Subsection (2)*** of ***Section 15*** of the ***Commons Act 2006***. That section applies where:

> *"(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
>
> *(b) they continue to do so at the time of the application."*

The application was dated and marked as received by the Council as Registration Authority on 7th October 2011. That date therefore is the 'time of the application', from which the relevant 20 year period needs to be measured (backwards).

The Facts

11.2. In this case there was relatively little dispute in relation to the underlying factual background as to the history of this site, or indeed as to the use which had been made of it over the years – although the Council as Objector did correctly take the point that the law in this field puts the onus on an applicant in fact to prove and therefore justify his/her case that the various aspects of the statutory criteria set out in ***Section 15(2)*** have in reality been met on the piece of land concerned.

11.3. To the extent that any of the facts were in dispute, it is necessary to reach a judgment as to the disputed aspects of the evidence given, insofar as that evidence was relevant to the determination whether those statutory criteria for registration have been met or not.

11.4. Where there were any material differences of that kind, or questions over points of fact, the legal position is quite clear that they must be resolved by myself and the Registration Authority on the balance of probabilities, from the totality of the evidence available. In doing this one must also bear in mind the point, canvassed briefly at the Inquiry itself (and mentioned by me earlier in this Report) that more weight will (in principle) generally be accorded to evidence given in person by witnesses who have been subjected to cross-examination, and questioning by me, than would necessarily be the case for written statements, questionnaires and the like, which have not been subjected to any such opportunity of challenge.

11.5. I will say at this point that I do not think that the nature of the evidence given to me in this case necessitates my setting out in my Report, in a formal way, a series of 'findings of fact'. Rather, what I propose to do, before explaining my overall conclusions, is to consider individually the various particular aspects of the statutory test under ***Section 15(2)*** of the ***2006 Act***, and to assess how my conclusions (on the balance of probabilities) on the facts of this case relate to those aspects. It should not however be assumed that any facts I mention under one heading are only relevant to that heading. I have taken into account the totality of the underlying facts in reaching my conclusions under all the headings, and (of course) in reaching my overall conclusions as well.

11.6. Before discussing and setting out my conclusions on the various statutory criteria, it is however appropriate that I should re-state the point that it is only those criteria under the ***Commons Act*** which I am considering. As I made clear at the Inquiry, the question of what *ought* (or ought not) to be the future of this particular piece of land, in terms of potential planning proposals, or of what might be thought desirable in the (local) public interest, is entirely outside the scope of these proceedings under the commons legislation. These proceedings only relate to the facts as what use has been made of this piece of land during the relevant period in the past, and the legal consequences of those facts in the particular circumstances of this case.

"Locality"* or *"neighbourhood within a locality"

11.7. I have mentioned earlier, in Section 2 of this Report, that the application form as originally submitted did not make it entirely clear what the Applicant was claiming in regard to this particular aspect of the statutory criteria. I did not find this surprising or unusual, as in my view neither the 'standard' form [Form 44] on which applications of this kind are required to be made, nor the explanatory notes within the form, make it very clear to a lay applicant what is required in this respect.

11.8. The application form as completed made mention of *"the community of Winch Wen within the Ward of Bonymaen*". As noted in section 2 above, Winch Wen, whatever it may be in terms of colloquial usage and local understanding, is not a *"Community"* in the particular sense that this term has in the framework of Welsh local government.

11.9. There is, it seems, a City Council electoral ward of Bonymaen. However it also emerged at the Inquiry (and this was a matter of agreement on all sides) that there is in fact a 'Community' area of Bonymaen, in the full Welsh legal and local government sense. It may well be that this has exactly the same area as the electoral ward just referred to, but I am not certain of that. In any event, at the Inquiry both parties agreed that the

Community of Bonymaen met the criteria required in order to be the relevant *"locality"* for the purpose of ***Section 15*** of the ***Commons Act***.

11.10. However that 'locality' appears to cover an area rather wider than that from which the evidence suggested that users of the claimed green would typically come, including areas of open countryside stretching away to the east. At the inquiry the Applicant produced a plan showing the suggested 'neighbourhood', within that wider 'locality', from which users of the claimed green would normally come.

11.11. I believe that the Registration Authority retains a copy of this plan, but for the avoidance of doubt I attach a copy at the end of this Report, as 'Plan B'. It was suggested, after some discussion among the local residents who gave evidence, that this 'neighbourhood' could be appropriately called 'Bonymaen/Winch Wen' [or possibly the other way round]. This clarification was in any way objected to by the Objector.

11.12. In my view, having familiarised myself with the area, and heard the evidence, the suggested 'neighbourhood' of Bonymaen/Winch Wen thus defined was an entirely appropriate area to be regarded as a 'neighbourhood within a locality' for the purpose of ***Section 15*** of the ***Commons Act 2006***. It seemed to me to be a cohesive area with its own identity.

"A significant number of the inhabitants"

11.13. The law is quite clear in this context that 'significant' does not necessarily mean or imply a large number, or some fixed proportion of the inhabitants of the relevant area: see, notably, ***R (Alfred McAlpine Homes Ltd) v Staffordshire County Council*** [2002] EWHC 76, [2002] 2 PLR 1. Nor do there need to be a large number of actual witnesses giving oral statements, or providing written ones. It is (potentially) just as relevant to hear evidence of what witnesses have observed other local people doing on a claimed green, as to know what those witnesses claim to have done there themselves.

11.14. As was said by Sullivan J (as he then was) in the ***McAlpine*** case, *"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 trespassers"*. On this basis I have to say that I have concluded that there was abundant evidence of use of the claimed green by quite large numbers of the local inhabitants, especially but not only

children, over many years. There was also abundant evidence to justify the conclusion that most of these users have come from within the 'neighbourhood' whose identity I have discussed.

11.15. Many of the Applicant's witnesses accepted that use has been more intense when the weather has been good, and during times when children of school age would be more free to play. None of that is surprising. Indeed the Objector did not really argue that the Applicant's claim in this regard was incapable of being justified; it merely required that the Applicant be put to proof as to the elements of his case.

11.16. The fact that the Objector's own case was that it has made the land available and maintained it well, for informal recreational use, also makes it entirely unsurprising that this substantially unfenced, attractive grassy area should actually have been used by the local inhabitants for that purpose.

11.17. My conclusion on the evidence therefore is that it has been clearly established that significant numbers of the inhabitants of the identified neighbourhood have used the claimed land over many years.

"Lawful sports and pastimes on the land"

11.18. The evidence was also clear, in my view, that this use by local people has been for the sort of informal recreation that the courts have indicated should be regarded as falling within the expression *"lawful sports and pastimes"*. Again, this was not really a matter of dispute at the Inquiry.

11.19. I would further say that, in my judgment, the evidence supported the view that it has been the whole of the application site (as eventually clarified by the Applicant), rather than some lesser part of it, that has been in regular use by the local inhabitants.

"For a period of at least 20 years; and ... continue to do so"

11.20. My conclusion on this aspect is that it was quite clear that this land has been well used by local people for recreation for a period very considerably in excess of the requisite period of 20 years, measured back from October 2011 (and that the use was continuing at the date of the application). The evidence was convincing that this recreational use had certainly gone on for the whole period since the land had been restored and

laid out in a way that was suitable for that purpose, which happened at some time around the late 1970s.

11.21. Indeed there was evidence, which seemed to me to be entirely credible, that local children in particular had quite often used this land for some recreational purposes (e.g. sliding down on tin trays, or when there was snow on the ground) even when there had been colliery spoil tips there. However it is not necessary for me or the Registration Authority to form any view as to the legal significance of that type of use, as the regular use of the land in more or less its present attractive form has been demonstrated over a period well in excess of what the statute requires.

"As of right"

11.22. The classic legal test, supported in a considerable number of judicial decisions, as to whether a use has been 'as of right' or not, has been whether the use complies with the Latin maxim *"nec vi, nec clam, nec precario"*. This requires that the use should have been 'without force' – not, for example, by breaking down the owner's fence in order to get on to a piece of ground, or in defiance of prohibitory notices. The use must have been 'without secrecy' – sneaking into an owner's land under cover of darkness, for example, would not constitute 'as of right' use.

11.23. And the use has to have been 'without permission' [*nec precario*]. It is clear that express permission from a landowner, whether given orally, or (for example) by a notice, is something which, if established, would counter a claim of 'as of right' use. It seems, from the pronouncements of the House of Lords in the leading case of ***R (Beresford) v Sunderland City Council*** [2003] UKHL 60, [2004] 1 AC 889, that an *implied* permission from a landowner to use his/its land might also be sufficient for it to be concluded that any use of the land was not 'as of right'.

11.24. But it is clear from that case itself that, in order to have that effect, i.e. the implied grant of a revocable licence or permission, there would need to have been some specific overt conduct by the landowner showing that a revocable permission was being given. It is not sufficient (to negative a claim of 'as of right' use) that the landowner should appear to have encouraged use of its land, or to have laid out or maintained its land in a way which would facilitate or encourage its use. To be 'as of right', the use by local people does not have to be adverse to the landowner's interests.

11.25. Thus, in ***Beresford*** itself, the land concerned had been owned by the local authority, and was laid out with recreation in mind, with seats for people to sit on, and with the grass regularly cut and well maintained. None of that was sufficient, it was held, to constitute an implied revocable permission, so the use by local people had been 'as of right'. The land concerned was therefore rightly to be registered as 'town or village green' under the predecessor to the ***Commons Act 2006***.

11.26. Turning to this present case at Cwm Green, there is no question of the regular use by local people having been 'by force', or in secret. The land was clearly well used, in broad daylight, by a considerable number of local people. Being entirely unfenced on two sides, it was openly available for use without the slightest degree of 'force' being required; nor were there any prohibitory notices.

11.27. The facts on the ground were in reality quite similar in many ways to those which had applied in the ***Beresford*** case, and indeed Counsel for the Objector was unable to identify anything in terms of those 'facts on the ground', in relation to the manner in which the Council in this case had made the land suitable and available for use, and in which the local people had in fact used it, which made the circumstances in any way distinguishable, at that level, from those in ***Beresford***.

11.28. However in ***Beresford*** itself their Lordships, while deciding that the land there should be registered, made a number of *obiter* observations which implied that there might be certain categories of land owned by local (and possibly other public) authorities, and made available for public use, where members of the public have an actual ***right*** to be on and to use the land. In such circumstances the public (including local inhabitants) would be there 'by right', and therefore not (it seems) 'as of right'. This latter term should in this context be understood as meaning *"as* ***if*** *of right"*, i.e. people had to have been using land ***as if*** they had a right to be there, ***when in fact they did not***.

11.29. The most obvious example of this point, which was referred to by their Lordships in ***Beresford***, is land held as 'Public Open Space' under the ***Open Spaces Act 1906***. Land in that category is held by a local authority under a statutory trust for the public to use it, and it was strongly implied by the House of Lords that local people's use of such an area could not have been 'as (if) of right', because people had an actual right to be on the land ('by right').

11.30. Since the time of the ***Beresford*** judgment, a considerable jurisprudence has grown up, in the decision-making of Registration Authorities on ***Commons Act*** claims, and supported to a degree by the lower courts, based on those *obiter* observations of the House of Lords which I have referred to. This has produced the result that there have been many decisions (with no successful challenge to them through the courts) to the effect, first, that land held by local authorities as 'Public Open Space' cannot be registered under the ***Commons Act***.

11.31. Secondly, a considerable number of cases have turned upon the point that there is quite long established judicial authority to the effect that members of the public also have a ***right*** (subject only to any byelaws which might exist) to go onto and use land which is held as a public park or pleasure ground under ***Section 164*** of the ***Public Health Act 1875***. Later amending legislation also meant that many 'recreation grounds' were provided under ***Section 164*** as well.

11.32. In consequence many local authority landowners have successfully defeated 'village green' claims on land held under ***Section 164*** of the ***1875 Act***, or indeed in cases where, although the formal basis of the local authority's holding of the land was somewhat unclear, the best inference from the evidence available was that it was held either under ***Section 164,*** or the ***Open Spaces Act 1906***.

11.33. That this has been the correct view of the law after ***Beresford*** has been implicitly supported by a number of decisions in the courts, e.g. ***R (Malpass) v Durham County Council*** [2012] EWHC 1934 (Admin); and in the well-publicised litigation about a beach at the port of Newhaven in Sussex, at least at the level of the High Court. Of more specific relevance here, this approach has been expressly supported by the courts so far in the case of ***R (Barkas) v North Yorkshire County Council,*** to which I shall return shortly.

11.34. I should say at this point that I am entirely unpersuaded by one of the arguments argued on behalf of the Council as Objector in this present case. This was to the effect that I and the Registration Authority should conclude that the land had been held by the Council as 'Public Open Space'. This argument was (in essence) that because the land had previously (as the old colliery spoil tips) laid 'waste' and 'unoccupied', it had fallen within one of the potential statutory definitions of 'open space'; then latterly it had been used for recreation, and so met another of those potential definitions [see ***Section 20*** of the ***Open Spaces Act 1906***].

11.35. I regard this argument as unsound, not least because it was completely clear from the Council's own evidence and documents that the land concerned was originally acquired by the Council's predecessor for housing purposes, under (or at least because of) a Compulsory Purchase Order under the housing legislation in force in the 1950s. Further, it was confirmed by the evidence produced by Ms Harries, the Objector's only witness, that the land here is ***still*** held, in the Council's records, for housing purposes.

11.36. Thus I conclude that there is no convincing basis at all for thinking that the land here is held as statutory 'Public Open Space', or indeed as a public park or pleasure ground under ***Section 164*** of the ***Public Health Act 1875***. To this extent, therefore, the land can be seen as being 'like' that owned by the local authority in the ***Beresford*** case.

11.37. On the other hand, however, the fact that the land concerned here was acquired by the Council (or its predecessor authority) for housing purposes, but has in fact since then been made available for use as a park or recreation ground, within an area that was (previously, from the evidence here) a council housing estate, means that the circumstances here are an even more direct parallel to those which applied in the ***R (Barkas) v North Yorkshire County Council*** case.

11.38. In terms of decisions issued as at the time of writing this Report, that case has reached the level of the Court of Appeal, where the reference is: [2012] EWCA Civ 1373. In ***Barkas*** a recreation ground had been provided in what had been a council housing estate, on land which had been held for housing purposes. It was established that, under powers contained in the successive ***Housing Acts*** of ***1936, 1957*** and ***1985***, local housing authorities had had the statutory power to provide recreation grounds, on 'housing' land which was otherwise devoted to housing accommodation.

11.39. The Court of Appeal held (as had the High Court in the case) that in these circumstances the use of the recreation ground by local people – even ones who did not live in the nearby 'council houses', had been *"by right"*, and not *"as of right"*, and therefore the land could not be registered as a 'town or village green', even if it had as a matter of fact been used for lawful sports and pastimes for more than 20 years.

11.40. If this judgment of the Court of Appeal were the last word on the matter I would necessarily have to advise the Registration Authority in the present case that the circumstances here are so closely similar to the facts in

Barkas that the Applicant's claim must be rejected, in spite of all of the other criteria under ***Section 15(2)*** of the ***2006 Act*** having been met.

11.41. However, permission was given by the Supreme Court to take the ***Barkas*** case on to that court, on a further appeal, on the same point which I have been discussing in the three preceding paragraphs. Furthermore, the Supreme Court's hearing of that appeal has in fact taken place, on 2nd April 2014 [I note by way of an aside that I did in fact have the opportunity myself to observe those proceedings taking place].

11.42. It follows therefore that a decision from the Supreme Court is now imminent, on the very point which in the event I have concluded is the critical one in terms of reaching a legally correct decision, one way or the other, on the present case. Clearly I do not know exactly when the Supreme Court's decision on ***Barkas*** will be handed down, although I note that in another 'village green' case heard by that court in early 2014, the judgment was given slightly less than 2 months after the hearing date.

11.43. In many circumstances it is not thought appropriate that legal proceedings in one case should be delayed because a judgment *might* emerge on an appeal in other, unrelated proceedings which could change the law in some relevant way. However in my view, and I so advise the Registration Authority, the circumstances here are particularly striking ones in terms of their potential significance. The Supreme Court appeal in ***Barkas*** was precisely on the point on which (in my judgment) the determination of the present case depends, and the appeal has already in fact been heard.

11.44. In these unusual circumstances my recommendation to the Council as Registration Authority is that it should not actually reach or issue a determination of the Applicant's application until the Supreme Court's decision in the ***Barkas*** case has been issued. There would then need to be a short opportunity for both parties (the Applicant and the Objector) to make submissions as to what effect the Supreme Court's decision should have on the result in this case. My present advice is that it would be perfectly appropriate, and fair to both sides, if those submissions were invited to be in writing, rather than through a reopening of the inquiry.

11.45. I would then advise that I ought to provide a short Addendum Report to the Registration Authority, having had the opportunity myself to see the Supreme Court's judgment in ***Barkas***, and any submissions or representations which the parties make in the light of it.

11.46. In that way a proper decision can be taken by the Registration Authority, without any risk of its becoming apparent shortly thereafter that it was at odds with a newly issued Supreme Court decision.

Conclusion

11.47. For the reasons explained in the previous paragraphs, and most unusually, this present Report can only be an interim one, pending the imminent issue of the Supreme Court's decision in the case of ***R (Barkas) v North Yorkshire County Council***.

11.48. My recommendation therefore is that the Council as Registration Authority should not at this present moment issue a determination of this present case. It is entirely appropriate however, in my view, that copies of this Interim Report should be made available to the parties to these proceedings, so that they might be aware of what the situation is, and of the potential need for them to submit further representations once the Supreme Court's decision in the ***Barkas*** case has been published. I emphasise that such further representations should be confined to the implications of that decision, rather than a reopening of the case more generally.

ALUN ALESBURY
9th May 2014

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

APPENDIX I – APPEARANCES AT THE INQUIRY

FOR THE APPLICANT

Mr Brian Walters (the Applicant) of 228 Mansel Road, Winch Wen

He gave evidence himself, and called:

Mr John Hague, of 283 Bonymaen Road, Bonymaen

Mr Ian Challacombe, of 20 Cefn Llwyn, Winch Wen

Mrs Pauline O'Brien, of 237 Mansel Road, Winch Wen

Mr Derek Bellamy, of 220 Mansel Road, Winch Wen

Mr Brian Challacombe, of 292 Jersey Road, Winch Wen

Alderman Mair Gibbs, of 180 Mansel Road, Bonymaen

FOR THE OBJECTOR – the Council of the City & County of Swansea as landowner

Mr Simon Stephenson, Counsel
- Instructed by Mr Patrick Arran, Head of Legal Services

He called:

Ms Jane Harries, Landlord Services Manager, Housing and Public Protection Services, City & County of Swansea, c/o Civic Centre, Swansea

APPENDIX II

LIST OF NEW DOCUMENTS PRODUCED TO THE INQUIRY

N.B. This (intentionally brief) list does not include the original application and supporting documentation, the original objection, or any material submitted by the parties or others prior to the issue of Directions for the Inquiry. It also excludes the material contained in the prepared bundles of documents produced for the purposes of the Inquiry on behalf of the Applicant and Objector, and provided to the Registration Authority (and me) as complete bundles.

FOR THE APPLICANT

Revised Application Site Plan [Plan A to this Report]

Plan showing suggested 'Neighbourhood' [Plan B to this Report]

Written note of opening submissions

Written note of closing submissions

FOR THE OBJECTOR

No new documents submitted

COMMONS ACT 2006, Section 15

CITY AND COUNTY OF SWANSEA
(Registration Authority)

RE: LAND KNOWN AS CWM GREEN,
WINCH WEN,
SWANSEA

ADDENDUM REPORT
(including FINAL CONCLUSIONS AND RECOMMENDATION)
OF THE INSPECTOR
MR ALUN ALESBURY, M.A., Barrister at Law

into

AN APPLICATION TO REGISTER THE ABOVE-NAMED AREA OF LAND

as

TOWN OR VILLAGE GREEN

1. In my Interim Report into this application, dated 9th May 2014, I advised that no final decision should be taken by the Registration Authority until the Supreme Court had issued its judgment in the case of ***R(Barkas) v North Yorkshire County Council***, and both parties in the present case – the Applicant and the Objector – had had the opportunity to comment on that judgment and its potential significance.

2. In the event the Supreme Court handed down its judgment in the ***Barkas*** case on 21st May 2014 – reference [2014] UKSC 31. I have now received and been able to consider the submissions or comments which the two parties in the present case have made in the light of that judgment.

3. In short, the Supreme Court has upheld the decision of the Court of Appeal in ***Barkas***, and indeed gone further than that in holding that the previous House of Lords decision in ***R (Beresford) v Sunderland City Council*** [2003] UKHL 60, [2004] 1 AC 889 had been wrong on its facts [although the reasoning and logic behind many of the *obiter* remarks in ***Beresford***, to which I made reference in my Interim Report, has been upheld].

4. I note that Mr Walters, the present Applicant, is somewhat critical of the Supreme Court's ***Barkas*** decision in his latest representations, although he does acknowledge that "*we have no option but to accept the ruling*". Plainly I agree with him on the last point. Mr Walters however goes on to suggest a number of respects in which the factual background at Cwm Green is different from the situation at the land in Whitby, Yorkshire, which underlies the ***Barkas*** litigation.

5. Clearly the facts at Cwm Green are not absolutely identical to those in ***Barkas***, as Mr Walters seeks to point out. However there are striking parallels, such as the point that in both cases there has been land, originally acquired for housing purposes as part of a much larger municipal housing scheme, but which has in fact been deliberately laid out as a recreational area for people from the surrounding housing to use.

6. More significant than that sort of point, however (in my view), is that the two reasoned judgments of the Supreme Court in ***Barkas***, with which the other members of the Court agreed, do not confine themselves to a narrow decision based on the very precise factual

situation at the Helredale playing field in Whitby. They contain extensive discussion of the principles which apply to situations where a local authority landowner has deliberately laid out and maintained a piece of land for (local) public recreation and enjoyment.

7. I have to advise the Registration Authority, having read and considered that discussion and reasoning of the Supreme Court, that in my judgment there is no way in which it could now be correct to hold that the recreational use of Cwm Green by the local people of Bonymaen/Winch Wen has met the 'as of right' test in ***Section 15*** of the ***Commons Act***. Local people's use of this land was most clearly 'by right', which the Supreme Court appears to have regarded as a form of use 'by permission', or '*precario'* [by reference to the oft-quoted Latin maxim set out in paragraph 11.22 of my Interim Report].

8. The application here therefore cannot possibly succeed. I realise that this will be very disappointing to the Applicant and his supporters. I do stress however that my conclusions only relate to the question whether the criteria set by ***Section 15*** of the ***Commons Act 2006*** have or have not been met in the case of this land. They have no relevance to the question of what, in planning terms, *ought* to be the future use of this piece of open recreation land. Nor do they have any effect on the requirements under the ***Local Government Act 1972*** for special procedures to be followed, if at any time in the future there were ever to be proposals that the use of a piece of open land of this character should be changed, or that it should be disposed of to some different owner.

Final conclusion and recommendation

9. My conclusion in this case is that the application fails, because the criteria set out in ***Section 15*** of the Commons Act 2006 are not met in relation to this land, in particular as to the requirement for 'as of right' use.

10. Accordingly my recommendation to the Council as Registration Authority is that no part of the site to which this application relates should be added to the statutory Register of Town or Village Greens,

for the reasons explained in my Interim Report, as supplemented by this Addendum Report.

ALUN ALESBURY
3rd July 2014

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

Report of the Head of Legal, Democratic Services and Procurement

Rights of Way and Commons Sub-Committee – 13 August 2014

APPLICATION TO REGISTER DISUSED RAILWAY LAND, NORTH-EAST OF STATION ROAD, LLANMORLAIS, SWANSEA AS A TOWN OR VILLAGE GREEN

Purpose:	To consider the determination of the application to register the land in question as a town or village green in light of the recommendation made in the report of the Inspector.
Policy Framework:	None.
Reason for Decision:	The Authority has a statutory duty to determine the application.
Consultation:	Legal, Finance, Planning and Local Members.
Recommendation(s):	It is recommended that the Application for the above registration be **REFUSED** in accordance with the recommendation of the Inspector.
Report Author:	Sandie Richards
Finance Officer:	Sarah Willis
Legal Officer:	Nigel Havard
Access to Services Officer:	Phil Couch

1.0 Introduction

1.1 The Council has received an application made by Mr. David James Matthews under Section 15(3) of the Commons Act 2006 in respect of disused railway land, north east of Station Road, Llanmorlais, Swansea which is shown on the plan attached as Appendix 1 to this report.

1.2 The land in question is held under a long lease by Mr. Richard Beynon.

1.3 After the Council had publicised the application approximately 40 statements or letters of objection were received by the Commons Registration Authority as well as some communications which were more neutral in character. However, the principal case in opposition to the application has been co-ordinated on behalf of Mr. Beynon.

1.4 In accordance with the procedure previously approved by this Committee, a non statutory inquiry was held before an independent inspector on 18th to 20th March 2014 to consider the application. The Inspector was Mr. Alun Alesbury, M.A., Barrister at Law.

2.0 The Remit of the Inspector

2.1 The role of the Inspector was the act on behalf of the Council in its role as Commons Registration Authority. Submissions were made on behalf of the Applicant and the Principal Objector and oral evidence was heard from witnesses on behalf of both sides and subjected to cross-examination and questions from the Inspector. All of the oral evidence was heard on oath or solemn affirmation.

3.0 The Report of the Inspector

3.1 Following the Inquiry the Inspector has written a Report of his findings. A copy of this report is included as Appendix 2.

4.0 The Role of this Committee

4.1 The Inspector's findings are not binding on this Committee. It is for the Committee to reach its own determination on the matters of fact and law arising as a result of the Application.

4.2 It is for this Committee to determine the Application fairly, putting aside any considerations for the desirability of the land being registered as a Town or Village Green or being put to other uses.

4.3 However, the Inspector has had the opportunity to assess the evidence of all the parties and has heard witnesses in person and considered all the written evidence before him. It is therefore not appropriate for this Committee to re-open issues regarding the quality of the evidence unless they had extremely strong reasons to do so.

5.0 Legal Test to be Satisfied

5.1 The Commons Act 2006 is the statutory regime governing village greens. Section 15 of the Act sets out the requirements which must be met if the land is to be registered. Registration of town and village greens is determined by this Council in its capacity as Commons Registration Authority. The process of determination of any application is focused on whether a village green has come into existence as a matter of law.

5.2 The application in this case was made under s.15(3) of the Commons Act 2006. That section applies where:

"a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

b) they 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)."

5.3 The test can be broken down as follows:

"a significant number of the inhabitants . . ."
It is sufficient to show a general use by the local community as opposed to mere occasional use by trespassers. It is not assessed by a simple headcount of users.

5.4 *". . . of the inhabitants of any locality or any neighbourhood within a locality "*
This is not defined by any arbitrary margins and must be a recognised county division such as a borough, parish or manor. An ecclesiastical parish can be a locality as required by s 15(2). It is acceptable for the users of the land to come 'predominantly' from the locality. A neighbourhood must be clearly defined and have a sufficient cohesiveness. It must also be within a locality.

5.5 *". . . have indulged as of right . . ."*
Use 'as of right' is use without permission, secrecy or force. The key issue in user 'as of right' is not the subjective intentions of the users but how the use of the land would appear, objectively, to the landowner. Use is 'as of right' if it would appear to the reasonable landowner to be an assertion of a right. Permission by the landowner, perhaps in the form of a notice on the land, would mean that the use is not 'as of right'. Equally use by force, such as where the user climbs over a fence or other enclosure to gain access to the land would not be use 'as of right'.

5.6 If the use of the land is not sufficient in terms of frequency or regularity to reasonably bring it to the attention of a landowner, then it may be a secret use which again would not be use 'as of right'. Another example of a secret use could be where the use takes place exclusively under the cover of darkness such that it would not be reasonable to expect a landowner to become aware of it.

5.8 *". . . in lawful sports and pastimes on the land . . ."*
This is broadly interpreted so that general recreational use including walking with or without dogs and children's play would all be included.

5.9 *". . . for a period of at least 20 years . . ."*
The fulfilment of the 20 years continuous use must immediately precede the application under s.15(2). For this purposes of this application the application states that use of the claimed land 'as of right' ceased on 21st April 2009, which was less than two years before the time of the application. 21st April

2009 is therefore the date from which the relevant 20 year period needs to be measured backwards.

6.0 Burden and Standard of Proof

6.1 In order for an application to be successful each aspect of the requirements of section 15(3) must be strictly proven and the burden of proof in this regard is firmly upon the Applicant. The standard of proof to be applied is 'on the balance of probabilities.' Therefore, the Applicant must demonstrate that all the elements contained in the definition of a village green in section 15(3) of the Commons Act 2006 have been satisfied.

6.2 This Committee must be satisfied, based on the evidence and the report of the Inspector and its subsequent addendum that **each** element of the test has been proven on the balance of probabilities. In other words, it must be more likely than not that each element of the test is satisfied.

7.0 The Inspector's Findings

7.1 The Inspector addresses each of the elements of the test and these are set out below.

7.2 *"Locality" or "Neighbourhood within a Locality"*

This is addressed in paragraphs 11.6 to 11.11 of the Inspector's Report.. The Inspector concludes that the village of Llanmorlais as defined by the Applicant in the Inquiry is the 'neighbourhood' to be considered for the purpose of this application.

7.3 *"Significant number of the inhabitants"*
"*lawful sports and pastimes on the land"*
"for a period of at least 20 years"

These issues are dealt with together in paragraphs 11.12 to 11.45 of the Report. The Inspector is of the view (at paragraph 11.22) that use of the land during the relevant period "was so sporadic and minor that it could not reasonably have conveyed to an observant landowner that a right to use the land generally for sports and pastimes was being claimed on behalf of the local community."

The Inspector is also mindful (at paragraph 11.26) of caselaw which states that care should be taken to avoid treating use of what might be linear 'footpath' routes (and activities incidental to such use) as representing elements of a 'lawful sports and pastimes' use of a wider area of land as a whole.

The Inspector has concluded (at paragraph 11.29) that he does not find that a significant number of the inhabitants of Llanmorlais indulged in lawful sports and pastimes on the application land for the relevant period of 20 years.

7.4 "*As of right*"

This issue is dealt with in paragraphs 11.30 to 11.32 of the Inspector's Report. The Inspector states that he has no doubt that during the relevant period (1989 to 2009) the local people who did 'trespass' on the land did so as if they had the right to do so. However, on the balance of the evidence he takes the view that they did not *in fact* do so in the relevant period, either in significant numbers, or to any extent which can be regarded as significant (as opposed to trivial or sporadic).

7.5 *"Application is made within the period of two years [from] the cessation [of use]"*

Paragraphs 11.33 to 11.45 deal with this aspect of the legal test. Members will note that this aspect of the statutory criteria attracted a considerable amount of debate and discussion at the Inquiry. The Inspector states (at paragraph 11.44) that he is "not persuaded on the balance of the evidence that there is any more appropriate day than 21st April 2009 as the date from which the relevant 20 year period is to be measured back." However, this does not overcome the Inspector's more fundamental conclusion that the evidence did not support the view that a significant number of the inhabitants of Llanmorlais had used the land for 'lawful sports and pastimes' over the relevant 20 years.

8.0 Formal Conclusion and Recommendation

8.1 The Inspector's conclusions and recommendation are set out in paragraphs 11.45 to 11.47 of the Report.

8.2 The Inspector concludes that on balance, what took place over the relevant period of time "was no more than sporadic and very intermittent 'trespass' by a small number of individuals" and further "that the great majority of any such use as did take place was more akin to the use of a linear route from A to B (and back to A again) than use of 'the land' of the application site as a whole."

8.3 The Inspector recommends that ***no part*** of the land to which this application relates should be added to the statutory Register of Town or Village Greens, because on the evidence it does not meet the criteria required for such registration for the reasons explained in the report.

9.0 Recommendation

9.1 It is therefore recommended that the application for registration be **REFUSED** for the reasons set out in paragraph 8.0 above.

10.0 Equality and Engagement Implications

10.1 None.

11.0 Financial Implications

11.1 There are no financial implications for the Council as the land is not in Council ownership.

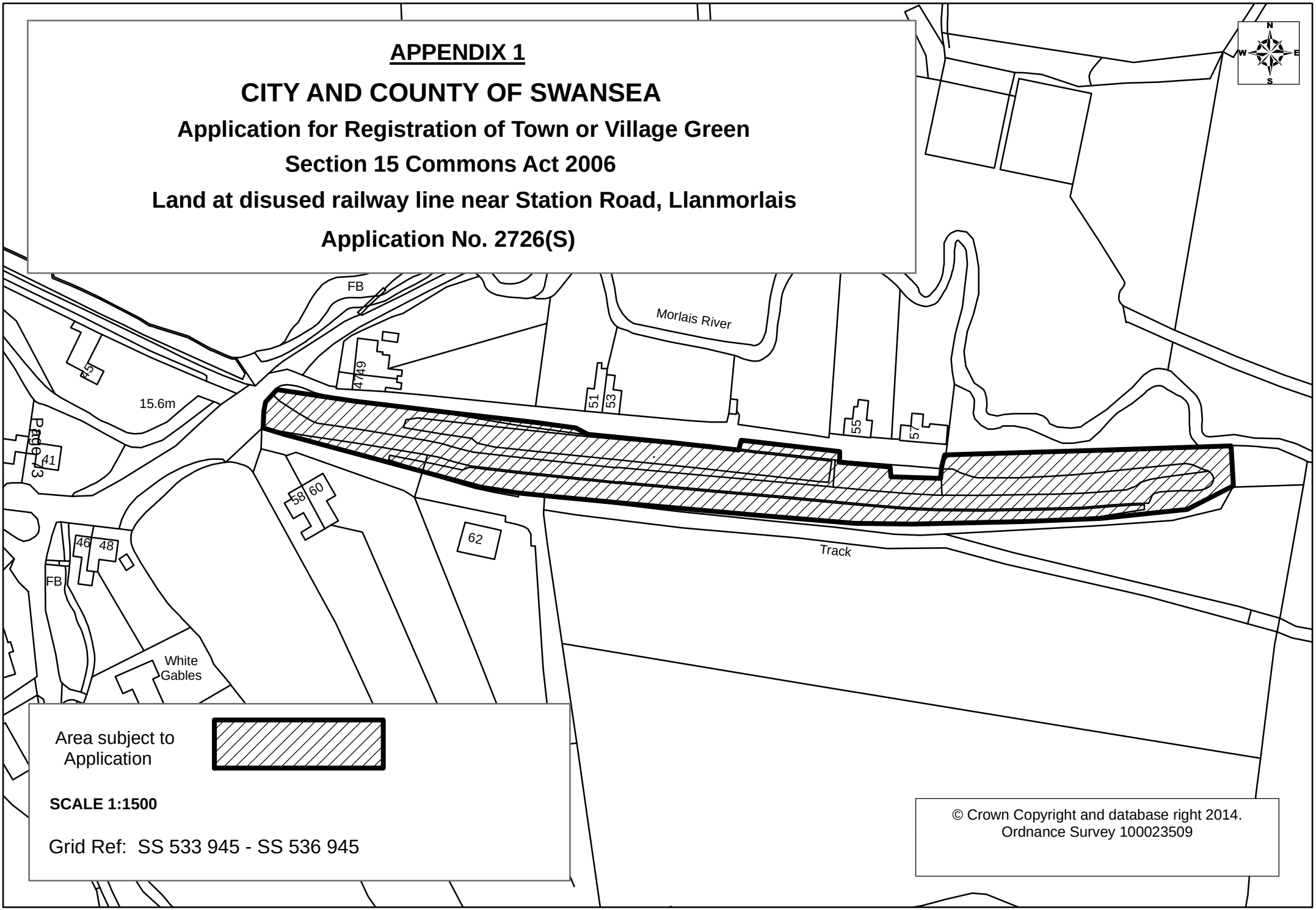
12.0 Legal Implications

12.1 None over and above those included in the body of the report.

Background Papers: Contained in application file.

Appendices: Appendix 1: Plan of the application site

Appendix 2: Interim Report of the Inspector, Mr. Alun Alesbury, M.A., Barrister at Law


APPENDIX 1
CITY AND COUNTY OF SWANSEA
Application for Registration of Town or Village Green
Section 15 Commons Act 2006
Land at disused railway line near Station Road, Llanmorlais
Application No. 2726(S)
N
W
E
S
FB
Morlais River
45
47
49
15.6m
51
53
55
57
41
58
60
62
46
48
FB
Track
White Gables
Area subject to Application
SCALE 1:1500
Grid Ref: SS 533 945 - SS 536 945
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Ordnance Survey 100023509

COMMONS ACT 2006, Section 15

CITY AND COUNTY OF SWANSEA
(Registration Authority)

RE: DISUSED RAILWAY LAND, NORTH-EAST OF STATION ROAD, LLANMORLAIS

REPORT OF THE INSPECTOR
MR ALUN ALESBURY, M.A., Barrister at Law

into

AN APPLICATION TO REGISTER THE ABOVE-NAMED AREA OF LAND

as

TOWN OR VILLAGE GREEN

CONTENTS:

1. INTRODUCTION

1.1. I have been appointed by the Council of the City and County of Swansea ("the Council"), in its capacity as Registration Authority, to consider and report on an application, received by the Council on 29th March 2011, for the registration of an area of long-disused railway land (mainly a cutting), to the north-east of Station Road, Llanmorlais, as a Town or Village Green under ***Section 15*** of the ***Commons Act 2006***. The site, situated on the northern side of the Gower peninsula, is within the administrative area for which the Council is responsible.

1.2. I was in particular appointed to hold a non-statutory Public Local Inquiry into the application, and to hear and consider evidence and submissions in support of it, and on behalf of those who had objected to the application ("the Objectors"). Hence I was provided with copies of the original application and the material which had been produced in support of it, the objections duly made to it, and such further correspondence and exchanges as had taken place in writing from the parties. Save to the extent that any aspects of that early material may have been modified by the relevant parties in the context of the Public Inquiry, I have had regard to all of it in compiling my Report and recommendations.

2. THE APPLICANT AND APPLICATION

2.1. The Application, accompanied by various documents, including letters and statements in support, etc. was, as already noted, received by the Council on 29th March 2011; it was made by Mr David James Matthews, of 51 Station Road, Llanmorlais, Swansea, SA4 3TW. Mr Matthews is therefore "the Applicant" for the purposes of this Report. The application form indicated that the application was based on ***subsection (3)*** of ***Section 15*** of the ***Commons Act 2006***, and explained that the date on which use of the land 'as of right' was believed to have ended was 21st April 2009.

2.2. The form as submitted did not make it entirely clear what the Applicant's views were in relation to the question of the relevant 'locality' or 'neighbourhood within a locality' for the purposes of the application. The Applicant's answer to the relevant part of the form made reference to *"The Village and community of Llanmorlais"*, and made mention of an attached map. In the context of the Inquiry it was later a matter of agreement between the participating parties that there is not in fact a 'Community' (in the formal Welsh local government/legal sense) of Llanmorlais [although there is one called Llanrhidian Higher, which includes Llanmorlais and the application site], and that Llanrhidian Higher should be taken as the relevant 'locality'. The relevant plan with the original application had not in fact shown any clear boundaries for Llanmorlais itself, although it most clearly exists as a place, and is identified on Ordnance Survey maps. However the Applicant subsequently produced, in his bundle of papers for the Inquiry, a plan showing boundaries for the suggested "neighbourhood"

of Llanmorlais, from which it was asserted that a significant number of the local inhabitants had used the claimed green in a manner which met the relevant statutory criteria. No party to the inquiry objected to this refinement or clarification of the original application. Accordingly it is on the basis of this clarified 'neighbourhood within a locality' that I have gone on to consider this application, and it is my advice and recommendation to the Council as Registration Authority that it should do likewise.

2.3. As far as the application site itself was concerned, clear boundaries were shown on a plan which accompanied the application.

2.4. The site, at the time when I was able to see it, was fenced and gated on all sides which might have been relevant to (local) public access to it, and had very much the appearance which might be expected of a long-disused railway cutting, with areas of scrub, trees and bushes, muddy and boggy parts, and other parts giving the impression that low level agricultural activity, in the nature of grazing, might have taken place there.

3. THE OBJECTOR(S)

3.1. In this particular case, after the Council had publicised the application locally, around 40 statements or letters of objection were received, as well as some communications which were more neutral in character. All of these have been made available to me, and I have had regard to all of them in my deliberations, although some of them raised points which are not in fact relevant to the statutory criteria set by ***Section 15*** of the ***Commons Act***.

3.2. By the time of the Inquiry however, and perhaps in response to the Directions which are referred to below, it had become clear that the principal case in opposition to the application was being coordinated on behalf of Mr Richard Beynon, who I understand to be the current long-leaseholder of the application site. It is therefore appropriate to regard Mr Beynon as being 'the Principal Objector', and I shall refer to him as such, where there is a need to distinguish him from all the others who registered objections at the initial stage.

4. DIRECTIONS

4.1. Once the Council as Registration Authority had decided that a local Inquiry should be held into the application [and the objection(s) to it], it issued Directions to the parties, drafted by me, as to procedural matters in December 2013. Matters raised included the exchange before the Inquiry of additional written and documentary material, such as any further statements of evidence, case summaries, legal authorities, etc. The spirit of these Directions was broadly speaking observed by the parties, and no material issues arose from them, so it is unnecessary to comment on them any further.

5. SITE VISITS

5.1. As I informed parties at the Inquiry, I had the opportunity on the day before the Inquiry commenced to see the application site, unaccompanied, but not to go onto it. I also observed the surrounding area generally.

5.2. On the last day of the Inquiry, after the conclusion of all the evidence, I made a formal site visit to the site, accompanied by representatives of both the Applicant and the principal Objector. In the course of doing so, I was able to observe the site more fully than I had previously been able to, and also once again parts of the surrounding area more generally. The Inquiry venue was quite close to the application site, so I was also able to familiarise myself in a general way with the area on a number of other occasions during the inquiry period.

6. THE INQUIRY

6.1. The Inquiry was held at the Llanmorlais and District Community Hall, in Llanmorlais, on 18th, 19th and 20th March 2014.

6.2. At the Inquiry submissions were made on behalf of both the Applicant and the principal Objector, and oral evidence was heard from witnesses on behalf of both sides, and subjected to cross-examination and questions from me as appropriate. With the agreement of the parties participating in the Inquiry, all of the oral evidence was heard on oath, or solemn affirmation.

6.3. As well as the oral evidence, and matters specifically raised at the Inquiry, I have had regard in producing my Report to all of the written and documentary material submitted by the parties, including the material submitted in the earlier stages of the process by people or organisations who did not in the event appear at the Inquiry itself. I report on the evidence given to the inquiry, and the submissions of the parties, in the following sections of this Report, before setting out my conclusions and recommendation.

7. THE CASE FOR THE APPLICANT – EVIDENCE

Approach to the Evidence

7.1. As I have already noted above, the original Application in this case was supported and supplemented by a number of documents; these included plans, witness statements, some photographs, and other supporting material.

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

7.3. I have read all of this written material, and also looked at and considered the photographs and other documentary items with which I was provided, and have taken it all into account in forming the views which I have come to on the totality of the evidence.

7.4. However, as is to be expected, and as indeed was mentioned in the pre-Inquiry Directions, and at the Inquiry itself, more weight will inevitably be accorded (where matters are in dispute) to evidence which is given in person by a witness, who is then subject to cross-examination and questions from me, than will be the case for mere written statements, etc., where there is no opportunity for challenge or questioning of the author.

7.5. With these considerations in mind, I do not think it is generally necessary for me specifically to summarise in this Report such evidence as was contained in the statements, letters, etc. by individuals who gave no oral evidence. In general terms it was broadly consistent with the tenor of the evidence given by the oral witnesses, and nothing stands out as particularly needing to have special, individual attention drawn to it by me.

7.6. In any event all of the written and documentary material I have referred to is available to the Registration Authority as supplementary background material to this Report, and may be referred to as necessary.

The oral evidence for the Applicant

7.7. ***Mr Ioan Stock*** lives at 55 Station Road, Llanmorlais. Mr Stock said that since his marriage to Mrs Stock in 1957 they had lived in Station Road, Llanmorlais, for 2 years at No. 47, and at 55 Station Road from 1960 to the present day. Over those years they had brought up their family of 4 daughters and 1 son.

7.8. His eldest daughter now lives in Pontardulais. His second daughter lives in Brynmill, Swansea. His third daughter lives in West End, Penclawdd. His fourth daughter lives in Gowerton.

7.9. Their family has now increased, with many grandchildren and great grandchildren. During the period they had been in Station Road they have seen the now disused railway line, often identified as *"the cutting"*, change. In the late 1950s to the early 1960s one train a day delivered coal and other goods to the siding. Historically the railway served the collieries in the valley and formed a transport link to Swansea and beyond. Mr Stock produced a map extract dating from 1915 which showed the previous layout of the railway tracks.

7.10. Following the Beeching Report in the 1960s (he believed), the railway line closed, but remained in the ownership of British Rail. Consequently the cutting became covered with trees, bushes, bracken, brambles and many other plants. As a result more wildlife in the form of birds and small animals formed a habitat along the disused railway. The trees, bushes etc., which form an attractive avenue along both sides, provide shelter for people and wildlife. Over the seasons both sides of the cutting are clothed in many wild flowers. The City Council of Swansea has placed a Tree Preservation Order on many of the trees. Mr Stock produced a copy of part of a communication in relation to that Order. However, he said, the bed of the railway track has generally remained open, making a pleasant walkway along the length of the cutting.

7.11. Over the years, from the time the railway closed in the 1960s, the land was left open until 2009, when the land was leased to a local contractor/farmer called Mr Richard Beynon (the principal objector). In April 2009 Mr Beynon erected a fence around the land which is still in place. Mr Stock had understood the land was presently in the freehold ownership of the Sketty Park Estate. He produced some photographs which he said showed the open nature of the cutting.

7.12. During the period from the mid-1960s until the land was fenced off in 2009, many people used the land for various purposes. The Stocks' five children were brought up at 55 Station Road. As the children grew up the cutting, i.e. the application site, became a playground where they could play safely, constructing dens, picking blackberries and nuts, generally enjoying an area to see and play with other friends from the village and beyond. A rope swing was constructed on a tree opposite 51 Station Road, which many children from the village and surrounding area enjoyed. In the early 1980s their son Philip camped with friends at the top end of the cutting where the railway buffer used to be. This was locally known as the stop block. Other notable events were bonfire parties with fireworks, hotdogs and hot drinks which were held in the area opposite No. 55. Generally their children had enjoyed the area of the cutting as an open space where they had the freedom to enjoy the natural environment and develop their own play. As they grew up their experiences with the cutting changed to enjoying what the natural environment offered.

7.13. All those activities were in the period 1966 to 1986. As the Stocks' children got married and had families of their own, their grandchildren played in the cutting when they visited, enjoying the freedom and safety to play as their parents had. Likewise the Stocks' own children continued to have access to a facility offering a pleasant and peaceful walk in the period from 1983 to 2009. The area that was used over those years was from adjacent to No.47 Station Road to the area at the eastern end of the cutting where the stop block used to be. Near that there was a sign placed on an

iron gate indicating private property beyond. However there had been no signs between No. 47 and the stop block. There used to be a small cabin in that area near the stop block, placed there for the Llanmorlais Shooting Club, who had a pheasant shoot in the valley. That cabin had been put there by Mr Beynon's father, he believed.

7.14. As it was adjacent to their home, the Stocks found the cutting a haven of peace for walks to enjoy the changing seasons. Autumn is particularly attractive when the foliage of the trees changes colour. Spring and summer bring more activity, with bird life and small mammals. Many birds can be observed there. He gave examples of the wildlife which can be seen there.

7.15. The cutting should be restored to the open space it was from 1966 to 2009, and registered as a village green so that local people can continue to enjoy it. Throughout the whole period from the mid-1960s to 2009 none of Mr Stock's family asked for permission to have access to the cutting; no signs were erected restricting access, and the cutting was accepted as an accessible open space.

7.16. *In cross-examination* Mr Stock said that an aerial photograph which he had produced, including part of the application site and his own property, had been downloaded from Google Maps. The date printed on it was 12th January 2009, but that appeared to be the date that it was downloaded or printed. A handwritten date 12th September 2008 was the date Google had given to Mr Stock as the date of the photograph. Mr Stock could not remember exactly how it was that he had obtained that information. He had written the words *"no fence"* on the photograph afterwards. He had downloaded the photograph in connection with another inquiry (not relating to the Commons Act) which had been taking place. Mr Stock had only produced this photograph to the present Inquiry to show how close his house is to the old railway line.

7.17. He accepted that it may not have been quite correct to say that the railway line closed after the Beeching Report in the 1960s, and that the track might have been lifted in 1959. The line had been used to store empty coal wagons for quite a period. He had thought it was closed after Beeching but accepted it might have been before. People used to walk up the track even when the rails were still there.

7.18. He believed that then land of the application site had been used for 40 or so years, not just the 20 years required under the ***Commons Act*** legislation. His children had enjoyed it during the whole period, and his grandchildren after that. The period of his own children using the land had mainly been from 1966 to 1986. His grandchildren used it after that.

7.19. His own son had died in 1986. His other children did still use the land after 1986, in the way he had explained, up until it was closed off in 2009.

7.20. His daughter Christine who lives in Brynmill left home in 1982. His daughter Gail left in 1978, and his daughter Anne left home in 1982; his daughter Jayne had left home in 1986. Gail, Anne and Jayne had all provided written statements, as had some of his grandchildren. Mr Stock accepted that, at any time his children or grandchildren come back to visit, they are not actually inhabitants of Llanmorlais. However, his grandson Craig Williams had lived with them for quite some time. Craig is his daughter Jayne's son.

7.21. Mr Stock could not recall every incident when his grandchildren visited or played on the swing on the land. He had had a heart attack in 2002, and regularly walked up the cutting, several days a week up to more or less the end of the period that the Inquiry was concerned with. However he then had a bypass operation in December 2008. Between his heart attack and his bypass he used to walk regularly up and down; but he did not visit after his bypass operation.

7.22. The fencing around the land had gone up piecemeal. The part in front of his house was an area where Mr Beynon had dumped a load of trees. There has now been a scrapped van dumped in front of Mr Stock's house. Mr Stock's own use of the land stopped in November 2008.

7.23. Mr Stock said he had seen several children from the village swinging on the swing on the land. However he had not taken a camera with him when he went to see the children there. He accepted that there had been a boundary fence on the north side of the railway line in the 1950s. However in the area from No.47 to No.57 Station Road the fencing more or less disappeared. The boundary fence of the railway fell into disrepair over a period of time. It was not replaced by a hedge, but some bushes and trees appeared. There was not a continuous hedge, it was open in parts. In parts the boundary had disappeared completely. Before the railway disappeared in the 1950s, Mr Stock accepted that there used to be a gate with a key.

7.24. From the 1950s until 2009 he had frequently used the land, all the time, five times a day sometimes, and at other times less than that.

7.25. He also recalled that he had seen the Scout troop from Penclawdd walking up the track. He saw the shoot walk up the track every Saturday. Also his own sister-in-law used to walk across the track from his house on a regular basis. He used to take his grandchildren in there to identify trees, birds, fruits etc. Between 1989 and 2009 he used the land for various reasons, to pick blackberries or nuts, or to walk up to the stop block. Sometimes that

would be 3 times a week or sometimes once a week. He had been working up to 2001 in Gorseinon.

7.26. He would still use the cutting in the winter during the daytime. It is a nice walk and crispy under foot.

7.27. The top end of the cutting from his house is quite dry compared with the lower part. He thought that between 1989 and 2009 his visits could tot up to 2000.

7.28. He had seen Mr Ron Sanders walking his dog on the land, and also other people walking dogs. He thought that Mr Sanders had walked his dog there on a daily basis. He had also seen Mr Jeff Adlam in there cutting bean sticks. Some of the people he saw in the cutting were people he did not know, for example some people from Crofty. He thought he had seen Dr Upton on the land, but could not now remember when. However he had seen him there several times. He thought he saw someone or other in the cutting every week. He had seen Mr Les Thomas and both his sons there quite often. They were there almost every day. He had occasionally spoken to Dr Upton in the cutting at the time when the planning inquiries were on. The first of those he thought had been in 2006. He had spoken to Dr Upton around that time. He would have walked up the cutting to Mr Stock's house.

7.29. He had found out that the cutting had changed hands because Mr Beynon turned up in December 2008 and started chopping trees down. Mr Stock had contacted the local authority. That had been immediately after his bypass operation. However Mr Stock did not recall a visit from Mr Beynon and Mr Watson in December 2008. His wife had told him to go into the house. But she had not told him that those gentlemen had been in the house. He had become aware that Mr Beynon was the leaseholder when Mr Beynon turned up with spray paint and put a line down the middle of their road. Mr Stock did not know why he had done that.

7.30. Various things had just become known by word of mouth, and Mr Matthews and Mr Stock asked a solicitor to look into the matter. Mr Stock thought that he had sent Mr Beynon a letter. Thus by January 2009 Mr Stock had become aware that the landownership had changed, in that Mr Beynon had a lease. What Mr Stock had then been concerned about was the boundary issue.

7.31. It was true that Mr Stock's solicitor had threatened injunction proceedings. Prescriptive rights which he and others enjoyed, for example to car parking on part of the land, had been raised in his solicitor's letter. He, Mr Stock, had not known that access to the cutting had been stopped by then. It was Mr James Matthews who had taken the initiative with the solicitors.

7.32. Mr Beynon did set back the fence he had erected to allow vehicles to manoeuvre. The eventual fence was not on the original line which Mr Beynon had marked with spray paint. He did set back an area which was mostly used by the postmen and delivery vehicles. Mr Stock accepted that the solicitors dealing with the issue of the fencing had said nothing about prescriptive rights in the cutting itself.

7.33. In relation to the Tree Preservation Order, which dated from March 2010, Mr Stock said that he thought the tree cutting work which had been done was between December 2008 and April 2009. He had included the Tree Preservation Order letter because it supported what he said about the natural environment of the cutting.

7.34. *In re-examination* Mr Stock said that before Mr Beynon's fencing one could access the track practically all the way along, except where Mr Sanders had fenced off the bit in front of his house. The railway fence had disappeared. At the south-west corner of Mr Stock's own property there used to be a gap, and he could walk down into the cutting at many points. There were gaps all the way along. The western end of the track was wide open.

7.35. From his own property he does not have a clear view of the line. His grandson has now reduced his hedge, but it used to be 4ft high, and his garden slopes down to the north.

7.36. *To me* Mr Stock said that his own family had not been the only or main users of the cutting. When they used to have bonfires for Guy Fawkes, several of the families from the area came and joined in. Many of those were from Llanmorlais. Also Les Thomas's children used to play with his grandson Craig, and other girls used to play with his daughters there.

7.37. In terms of seeing other children from the village swinging on the swing in the cutting, he had seen that several times. Various children from the village did it.

7.38. He had taken his own grandchildren into the cutting in order to identify trees and wildlife on several occasions. Mr Stock said when he went into the cutting for his walks he was mostly on his own, but he would see others there from time to time.

7.39. ***Mrs Susan Hughes-Davies*** lives at 47 Station Road, Llanmorlais. She said that she was born in and had lived at this address for 67 years. The disused

railway track is directly opposite her house. Her family and she have used the area for over 40 years since the railway ceased operating.

7.40. She personally has used it for picking blackberries and walking with her two sons when they were young. A section of the track is clearly visible from outside her house, and her children were able to play there safely. When her sons were old enough they played and explored the whole length of the track together with other children from the village. They would play hide and seek and climb trees, and do what most children would do in a safe and natural environment, with the freedom to explore without restriction. They would do that every day after school and in the holidays.

7.41. Her grandchildren have also been able to enjoy the same kind of activities when they visit, and they regularly stay with her in the holidays. As the track is so near to her house she has been able to see how much it has been used by walkers with their dogs, and also those from outside the village.

7.42. After the railway closed the metal tracks and most of the posts along the private roadway were removed. On occasions the land was cleared, she believed by the owner. From the 1960s the area was open and accessible to residents, and has always been able to be used. Over the years a beautiful mix of trees has grown on both sides, and also areas of blackberry bushes and undergrowth.

7.43. A drainage channel on the right side helped the water to flow away. A drain was put in on the actual railway cutting itself close to her property to alleviate water problems after the railway closure. The landowners have clearly visited this area and carried out work, or asked other parties to do it, over the past 40 years. At no time did they put up signs or fences to stop use by residents. It would have been obvious to whoever cleared the track that it was being used by local people.

7.44. She could not remember the dates of any of the clearance work that had taken place.

7.45. The swing that Mr Stock had referred to could be seen along there, and one would hear children playing up there. This was especially at weekends and school holidays. She herself has to go out onto the road to see what goes on there in the cutting. She has to be outside to see it, which she often is.

7.46. She has lived there all her life, and this area has always been called the line as far as she was concerned, and that is where they played. She gave names of various children she had seen playing there, and said some children from Crofty would also play there. Her sons left home 15 years and 10 years

ago. Her oldest grandchild is now 20 and the youngest is 15. They used to come every weekend.

7.47. The area is now in a dreadful state, an eyesore. It used to be such a pretty area.

7.48. She herself had not been notified of Mr Beynon becoming the leaseholder in December 2008. She remembered the fences going up but not precisely when it was. She could not remember if some clearance had been carried out before the fences went up. The land was used regularly by dog walkers from Llanmorlais and Crofty.

7.49. *In cross-examination* Mrs Hughes-Davies said that her sons had been born in 1973 and 1978. She confirmed that her sons had left home 10 years ago and 15 years ago. She has 4 grandchildren; three of them live in Gowerton, and one in Pontardulais.

7.50. Her sons had used the railway cutting to play; up until they were teenagers they still used to play there. When they were young they played there all the time, weekends and evenings. Friends used to come up from Crofty. They played there up until they were about 15 or 16 years old. She herself when she was younger used to play on that land. It was a safe place, even when the trains were there. However it is a long time now since she herself was playing on that land.

7.51. More recently she has gone up there for blackberries or primroses, or because it was a nice place to walk. She would go up there a few times a week throughout the year, it was just pleasant to walk there. Even when the neighbouring cycle track had been produced, she would use that track only about the same amount as she would use the cutting.

7.52. She herself had never seen any clearance work going on in the cutting. She would not have taken much notice of the clearing. She was still using the land, but when one saw things happen one would just take them for granted. When the fencing had been put in she did not go there then. She had not noticed a JCB in the cutting.

7.53. She vaguely remembered all the mud being piled up, but had no other memories relating to that. She has no photos of the use of the cutting by herself or her family. She did not have a camera until later in life.

7.54. When she used to walk up the cutting she used to see people in there, cutting bean sticks. She would see people there, sometimes a neighbour called Gloria with the dogs. She would do that every evening. She would

see her own granddaughter with Gloria for example. Her own grandchildren have never lived in Llanmorlais, but they often visit.

7.55. She did not know exactly when the drainage work in the cutting had been done. When she is actually in her house she cannot hear any activity on the site. Walkers in the cutting would have seen work being done however.

7.56. She would not say that there were many people using the railway cutting, but there were some. She did not know how many because she did not take any notice. She could not explain why it would be obvious that there were local people using the land. She said that she most probably would have said hello to anyone she knew using the cutting. However she did not remember any such occasion. She recalled that she did see Mr Stock using the cutting. She could not say how often, but he used to walk quite a bit at that stage. That would have been at the end near her house. However she would not necessarily see Mr Stock every time he walked there. She thought she had seen Mr Stock there at the same time as herself, but she could not say how often. She did not remember.

7.57. She recalled that she did go to bonfire parties there. The last one was more than 10 years ago but she was not sure when it was.

7.58. *To me* Mrs Hughes-Davies explained that her own visits to the cutting would mainly be in Spring or Summer because it was primroses or blackberries that she was most interested in. She estimated that she perhaps made 8 visits in total per annum. Or perhaps she visited every couple of weeks when she was with her grandchildren, who are now aged 23, 19, 18 and 15. That would have been while they were up to about age 13 or so.

7.59. She confirmed that the sort of growth that occurred in the cutting made it a good place to cut bean sticks.

7.60. ***Dr Neil Upton*** lives at 33 Station Road, Llanmorlais. He and his family have lived at that address since 1975, and his children grew up there.

7.61. His children and their local friends used to play on the old railway line over its full length when they were young. He and his wife walked their dogs on the track in question. They had their first dog in the early 1980s. It was ideal as the dog could be let off the lead to run freely. Their last dog died about 5 years ago at the age of 16. The old railway line on the application site was also a favourite spot for blackberry picking. Access was unrestricted, the easiest being to enter via the old line at its junction with Station Road. There was no fencing as he recalled on the Station Road perimeter. Access on the right had side, looking up the track, was difficult because of the steepness of the bank and thick bushes. The track itself,

though muddy in some parts, particularly after rain, was fully open and made for a secluded, pleasant walk. At no time was permission required, nor were there any signs to restrict access to the track.

7.62. It was in 1994 that they got their second dog. Their first dog they acquired in 1988. Dr Upton would take him on various walks. They would go to various places around Llanmorlais, but including this site. This site is ideal as a dog can be let off the lead without problems of sheep. Dr Upton would mainly go up this site from Spring to late Autumn because of the light evenings.

7.63. When the Sustrans track was tarmacked, that became easier for an old dog. But when he was younger Dr Upton would take the dog up the application site track once or twice a month. He could not remember who he had seen while out walking in particular places.

7.64. Their son and daughter would go up there with their friends. They both now say that they played a lot up there in those days. The last time he himself had been up to the site was before it was fenced off. The Uptons' children are now aged 42 and 40, so their childhood use mostly preceded the 1989 – 2009 period.

7.65. *In cross-examination* Dr Upton said that his use up to 2006 would be in association with one of his grandchildren. They used to look after their grandchildren up to about 2006/7.

7.66. His second dog had died about 5 or 6 years ago at the age of 16. In his latter years the dog's back end had gone, and Dr Upton took him on the tarmac because it was easier for him. In the cutting there were often quite deep tyre tracks which were difficult for the dog when he was old. In winter also he would tend to take his dog to other places than this track.

7.67. What is now the Sustrans track had become overgrown during the latter years before Sustrans cleared it in 2005.

7.68. Dr Upton estimated that he used the railway cutting once or twice a month from Spring through to early Autumn. He also went blackberrying in there about once or twice a year. Usually the locals had got there first. He was fairly sure that he had seen Mr Stock up there; it was quite likely that he had seen him there. One would see people in the cutting, either people walking or children up on the banking.

7.69. One would only be in there for a few minutes, not for very long, so one might not be there at the same time as anyone else. He could not remember

when it was that he had first heard of the town or village green application. It was Mr Matthews who had told him about it.

7.70. *In re-examination* Dr Upton said that on one or two occasions he had seen children up on the embankment. That could have been in the summer holidays. He did not recognise any of the children he saw there.

7.71. ***Mrs Carolyn Morris*** lives at 58 Station Road, Llanmorlais. She and her husband have lived at that address since 1967. In that time their two sons had attended Llanmorlais Primary School and Gowerton Comprehensive School before leaving the area to establish their own families. Their children used to play on the application site, making dens and playing games. In happier times they would access the Llanmorlais Valley along with other villagers via the railway track in search of blackberries, mushrooms and hazelnuts. They frequently walked there, often taking their animals with them, as it is a pleasant walk, particularly in the summer when the trees provide shade.

7.72. In those days when children roamed more freely their sons and their friends would vanish into the valley via the railway track, building dens, fishing for trout in the stream, or checking out the local flora and fauna against their I-Spy books. She recalled her own boys pointing out to them a colony of long-tailed tits opposite No.57. It never occurred to them to ask permission of anyone to use the track and no-one knew who the owner, if any, was.

7.73. She reiterated that over the years the application land had been a very pleasant place to walk in Spring and Summer. The children enjoyed it and there were plenty of plants there. The children used to build dens and pick blackberries.

7.74. When the children were grown up she herself used to pick blackberries there or walk there, or indeed walk with one of their cats. It was a quiet place. She thought she must have observed others in there and said good morning or good afternoon but she could not remember.

7.75. Their house looks out onto the old railway station yard, and from it one can see the western entrance to the site. She has observed people entering and exiting at that point. For example someone called Emlyn Lewis used to go and cut bean poles there. Also she would frequently see children.

7.76. In 2007 some teenagers were building a den at the top of the land, 3 or 4 of them; she thought that was in Spring or Summer. Also Gloria Sanders takes her dogs for a walk there on the land.

7.77. *In cross-examination* Mrs Morris said that her children are now aged 50 and 49. They left home in their early 20s. When they were about 18 or 19 they went away to college. Then they came back for a short period, and then went away again because they had jobs which took them away. One of them was back for one year and the other for less than that. Thus their activity in the cutting was more than 25 years ago.

7.78. Children used to use this land as an access to the higher reaches of the Llanmorlais valley. She herself would go up there perhaps 2 or 3 times a week in the summer. She would walk to a gate at the eastern end of the land and then turn back. She used it fairly regularly during the relevant 20 years, apart from periods of illness when she could not walk very far. Her usage would have dropped off as she got older.

7.79. She last walked this land before the diggers got in there. She never used it while the diggers were in there, which was in late 2008 early 2009 she thought.

7.80. She had been told of the change of ownership of the cutting by Mr Stock, at the time when the land was being excavated. That would have been when she visited Mr Stock's wife. She was a regular visitor.

7.81. Her view was that there were always children in the cutting. She had seen a shed up at the far eastern end of the cutting. It was just a rather battered shed made of wood, but she had never seen two huts there at the same time.

7.82. She thought that a Mr Lewis who she had seen in the cutting was a member of the shooting club. From her own house they can see people approaching the cutting if she is at her front window. One can tell which way they are going. In the cutting itself there were trees and the views were rather restricted, but one could tell the way people were going, the way they were heading.

7.83. *In re-examination* Mrs Morris confirmed that there was a wooden shed at the end of the cutting, but she could not remember any other structure up at that end. She remembers a gate across the old track up there.

7.84. *To me* Mrs Morris said that when she had referred to excavation on the track, there had been some plant on the site and they were pushing over trees and clearing the land. That was what she had meant. As far as she had been able to see that was happening all the way up the site.

7.85. ***Mr Gawain Roberts*** lives at 15 Pencaerfenni Lane, Crofty. He said that he had grown up in Llanmorlais and lived there from between the ages of 1 and 27, leaving in 2004 and returning in 2013 at the age of 36.

7.86. During his childhood and teenage years, Llanmorlais was a wonderful place to live, with plenty of places to find adventure. The Morlais River, the old railway line, and the Wern, all of those were places to play and explore. With reference to the current application, 'the line', as they called it, referred to the region of wooded land following the former railway from the bonfire field, which was behind No.9 Riverside in the village, all the way up to beyond No.57 Station Road. Sometimes they would go up further to where the pheasants were kept for the shoot.

7.87. The main times in which they used the line would have been between 1987 and about 1998. First that would be as youngsters with other children from the village. He could name a number of those, and there were also a number from Crofty. Then later on there was his younger brother Rowan and various of his friends who he could name. They also had other friends from Crofty. They used to play a game called *"the knock"*, and they played it on three different sections of the line. They played from the bonfire field to the swing, and then from the swing to the top, and then the part of the line that is over the road, i.e. the section within the village green application. His younger brother's generation used it after the period that he himself was able to describe.

7.88. They gained entrance wherever the vegetation allowed, and at the entrance. They were always under the impression that a right to access this land existed, because it was a natural continuation of the old railway line. They never had the impression that there was any kind of ownership or stewardship of the area. They made dens of ferns and branches, had acorn fights and used the entire area at their leisure, making paths and clearing brambles and nettles. He could never recall ever being approached by anyone taking issue with their use of the area.

7.89. As a member of Penclawdd Scouts, they followed the line on at least 2 occasions between 1988 and 1994, following the old railway its entire length, stopping to learn how to build fires and cook sausages. He learned to build a pyramid fire on one of these trips, and got to use his first penknife. They did not have to beat a path through the undergrowth at all, and he remembered feeling some pride, knowing that he knew the area they were in while other boys didn't.

7.90. As an older teen, in the mid to late 1990s, he had a paper round delivering the Swansea Herald. He would deliver to No.57 and then cut through the old railway area to deliver to the old lady who lived in the pre-fab on the south side. He believed that her old house had burnt down. No.62 is now

on the site. The last time he walked through the area was on a return visit in the summer of 2005, on a night hike with his brother Rowan and another friend. He did not recall any impediment in terms of the track being overgrown, or there being any signs saying that it was not open for use. It had always been an old railway line belonging to the village, a place for play, exploration, learning and leisure.

7.91. Llanmorlais is a very small village, so all the children used to know each other. Children from Crofty would occasionally join them individually. Also occasionally they would come up as a group, and then the children would not intermingle.

7.92. In 2005 he had spent the summer back here when his wife had gone back to the United States. This land then was no different from how it always was.

7.93. *In cross-examination* Mr Roberts explained that he had returned to Crofty in 2013. When he had lived in Llanmorlais his address was 8 Riverside, just behind the bonfire field.

7.94. He did in fact play on the line up to himself being aged 21. His brother Rowan had been 6 years his junior. There is a slower pace of life here. This area was just fun to run around. The game called *"the knock"* had involved a lot of running, and the cut was fun for that as it is so narrow.

7.95. In the cutting they would usually play at weekends, but it would depend on the number of children about. The cutting probably lent itself to fewer people going there, because of its steep bank profile. He and his friends would not just play in one area but all round the village. They would play for most of the day when he was young; it is a very safe area and parents were not worried. On days when he and his friends were playing he would have lunch either at his own home or the home of a friend.

7.96. Sometimes they would go further, to where the pheasants are kept for the shoot. No permission was ever asked for that. However they would not play beyond where the shoot was; they would go and see the pheasants but not to play, it was to try to catch them, but they never did. He had been for a night hike through the cutting, from the western end and up the cutting to the end and back. He did not particularly recall seeing shooting huts at the far end, neither one nor two of them.

7.97. *To me* Mr Roberts explained that his reference to the bonfire field was a reference to a field to the east of his old house in Riverside. The village would have a 5th November bonfire there, with a firework display, but that finished at the end of the 1980s or in the early 1990s.

7.98. ***Mr (David) James Matthews***, the Applicant, lives at 51 Station Road, Llanmorlais. He said that he was born in 1967, and the earliest memories he has are of visiting his grandmother at the house he has now lived in for 13 years. Throughout his childhood his family would visit almost every Sunday, and stay frequently in the school holidays. His grandmother would regularly take his sisters and him on nature walks, to collect sticks for kindling for the coal fires. His two elder sisters were born in 1962 and 1965.

7.99. The area proposed to be registered was a wonderful and safe environment. His parents and grandmother would allow his two sisters and him complete freedom to explore, play, build dens, climb trees and use the rope swing left by other children in the neighbourhood. They would meet other villagers walking their dogs, and children from the village. Throughout the 1980s and 1990s weekly visits with his niece would be along the same lines. They would play along the disused track, and the adults would accompany them as it was a perfect place to play hide and seek.

7.100. After his grandmother passed away he moved into the property in 1998. Since then he has frequently used the track. From the years from then through to 2009 nearly every week he had taken care of his cousin's dogs. That was a reference to Gloria and Ron Sanders. Walking them come rain or shine either Saturday or Sunday, sometimes on both, and at least twice on those days. The area was rich with wildlife. Blackberries and hazelnuts were plentiful some years.

7.101. His nieces, nephews and extended family continued to visit, and have always used the railway track in its entirety. They had been extremely disappointed that Sustrans did not consider adopting this stretch when they constructed their track in 2004/5, but their reasoning was that it did not lead anywhere or complete a route, so there is no official through route. It would have been a lovely tree-lined route in the summer for more people to be encouraged to enjoy. However keeping the area un-tarmacked has helped to preserve the wildlife habitat.

7.102. Like all village greens its nature changes through the seasons. It is a wonderful sight to see the snowdrops and primroses on the bank outside his property during the first signs of spring. The dense trees and foliage provide a wonderful shady and cool area during the summer months. Autumn brings fruits, and the avenue of trees during winter snowfall is beautiful. There is no question that the land becomes wet, and this may deter some dog walkers in wet weeks, but the hardier walker and especially children would come equipped with wellingtons to walk the area, or they would access the private track on which Mr Matthews resides.

7.103. It was with great regret that they saw a lot of the trees and undergrowth bulldozed, although after that clearance in January/February 2009, that made them realise the size and nature of the site. Some clearance work had been done once or twice in the past 20 years, and again no signs or restrictions were put in place.

7.104. Although some boundary posts (unfenced) were put in place in March and early April 2009, the use of the land was still unrestricted, and fencing was not erected that affected people's access. To this day there are still no signs restricting access or notifying residents that it is private property. But the complete fencing of the area at the end of April 2009 certainly gave the impression of restricted access.

7.105. A Tree Preservation Order was placed on many of the well-established trees on the site in March 2010. The report leading to this stated that this is an attractive stretch of trees stretching for some 200 metres on both sides of the track, which is accessible to local residents and a valuable habitat for a variety of wildlife.

7.106. During Mr Matthews' usage of the site, which was at least on a weekly basis, he never experienced an issue with access, or any hindrance on the line. The land was just a beautiful wildlife habitat. He would avoid walking his dogs there while children were on the line, as the springer spaniels can be very excitable.

7.107. Some Objectors refer to the land as being so overgrown it was impassable. As the trees matured the undergrowth on the ground became less due to the tree coverage. From his experience and observation it appears that since major clearance in 1991, and on occasion since, it has been kept back. Whether it was the owner, the shooting club or a third party he was not sure, but the cutting was always accessible, and always opened out at its most easterly point by the gate. The statements by shooting club members that they used this as a route many times a day confirm its accessibility. Some Objectors refer to the ground being boggy. Like many other greens or parks, during periods of heavy rainfall the ground would get wet. But it was just wet, nothing that would prevent usage. There was a drainage channel on the south side which coped with the excess water. At no time was it so wet that one could not access the whole line.

7.108. He and his sisters as youngsters used to stay with his grandmother during a lot of the school holidays, from about 1971 until he was 10 or 11. All three of them would stay, and they would use the area to the front of the house. His grandmother used to take them for walks along the line, and would cut kindling wood for her coal fires with a bandsaw.

7.109. When he was 6 or 7 his grandmother took him to the end of the cutting. There were no street lights and no light pollution, and one could see the night sky really well.

7.110. During those years they used to see other children and occasionally play with them there. That was not frequent, not necessarily every time they went down there.

7.111. They would also meet other villagers walking dogs, or village children.

7.112. Later on, in the 1980s and 1990s, they would carry on visiting his grandmother. However he was not involved in any play on the line so much in the 1980s, and his use during that period was infrequent.

7.113. In the 1990s, when his nieces came along and his grandmother became elderly, they would go down to Llanmorlais and look after her. He would go with his nieces and his sisters and walk round the whole village. The nieces would be allowed to play outside without supervision. He had not been able to find photographs of his nieces on the land, but he was sure they existed. In those days one was not generally taking pictures all the time.

7.114. Up until the time when he moved into his property, he would not say he was a heavy user of the application land. His use was concentrated around weekends and holidays.

7.115. When his grandmother died in 1996, he moved into the property a year or so later, in fact in 1998. At first he did not use the track because he had no necessity to. It was around that time that his relatives the Sanders asked if he would walk their dogs. They went away quite a lot, and he started using the track in around 1999/2000 to walk their dogs a few times a year.

7.116. Then over the years that slowly increased. By about 2004 he was regularly taking their dogs for walks, almost every weekend. The track was perfect for that. Ron Sanders had installed a direct access gate from his property. In those days they tended to stay at the easterly end of the site. The dogs were content to have sticks or balls thrown up onto the bank for them, or they would go down towards the river. The springer spaniels greatly enjoyed this.

7.117. The gate was just to the left of No.57 Station Road, it was in a fenced area which Mr Sanders had enclosed. Although he described it as a gate, it was really a section of wire cut so that it could be pulled back.

7.118. Sometimes he walked the dog down to his house and accessed the cutting outside No. 51. He did not have to take any leads for the dogs, that was the nice thing about it. That dog walking was mainly at weekends, very rarely during the week.

7.119. During school holidays he would often delay going out with the dogs because he could hear children on the line. Also, during the spring, summer and autumn, the tree line and hedges made it very difficult from his house to see who was on the track. However one could hear children and occasionally catch a glimpse. It was for example quite frequent that he would hear children on the rope swing opposite his property.

7.120. The shooting club would use the track about three times a day between June and October. He had only occasionally seen someone walk up the route, because of all the undergrowth. However he did not dispute for one moment that the shooting club did use it. It was a good access for them. But it was quite difficult to see people on the track during spring, summer and early autumn. They only took a few minutes passing along the route.

7.121. He did not suggest that anyone other than the shooting club used the land as a through route.

7.122. His own main use started around 2000, and then increased. The Sanders had got a new dog needing more exercise.

7.123. On a couple of occasions he saw Jeff Adlam washing his car while he Mr Matthews was using the land. Mr Adlam would be washing his car outside the application site, near his own house No. 53. He is Mr Matthews's next-door-neighbour. Mr Matthews was not sure that Mr Adlam would have seen him.

7.124. At no time during the whole of this period did Mr Matthews ever think that he needed permission to go onto the old railway track. He was not aware of any changes to the situation. He has seen other people on the track, but does not know their names. They may have had dogs with them, but when he went out with a dog he did not have a lead, so if he heard other people on there with dogs he would take them up the private track by No.57 instead.

7.125. Thus in the period 2004 to April 2009 he would say he had used the track once or twice a day on weekends throughout, except when he was away, or when Ron and Gloria Sanders were there.

7.126. Llanmorlais is not a big village. If he did see other people on there, or hear them, he would generally stay off the track or wait until they had gone.

7.127. Around Christmas 2008 he thought he had heard that there was some kind of problem with the drainage, or with the vegetation on the land. Sketty Park Estates had said about a year before that, around Christmas 2007, that there was a possibility that the land might be leased to someone. He recalled seeing some work at the eastern end of the track in spring 2008. Because of that he was concerned because it was such a nice area. The work done then was that some small trees or bushes had been cut back slightly. He himself had contacted the Tree Preservation Officer to see if it was possible to preserve any of the trees. He had received an email response in February 2008 from that Officer, who offered to meet him. However that did not happen, and the work did not seem to be carrying on, so Mr Matthews did not pursue the matter at that stage.

7.128. Then on Christmas Eve 2008, at a time when he himself was either working or at his mother's in Killay, Mr Stock had told him that Mr Beynon had been up the track doing some clearance work. Mr Matthews had then contacted Ruth Thomas, the agent for the Sketty Park Estate. He thought that was the week after, i.e. in the first week of the new year. He had an interesting discussion, and Ms Thomas told him that the estate had leased the land. Then Mr Stock had told him that Mr Beynon or a worker had been up to mark out a new boundary line near his property, in order to stop parking. He himself had observed, in the first week of 2009, a JCB parked almost at the furthest east part of the site, where the far gate was.

7.129. When Ruth Thomas had told him the land had been leased, he Mr Matthews had said he was quite annoyed that the estate had not contacted the local people to inform them of any changes. He mentioned to her the car parking spaces that local residents had enjoyed for some 40 or 50 years. She had said that Sketty Park Estates were aware that residents had used areas of the lane for car parking, and they had not had any intention of taking any action against that. Ms Thomas had told Mr Matthews that the leaseholder had taken on the lease of the land *"warts and all"*.

7.130. Solicitors were later instructed in connection with the prescriptive rights issue to do with the car parking. At that time Mr Matthews had been a bit concerned about the car parking space issue. A friend of his, a local solicitor, wrote a letter to Mr Beynon saying that the local residents had prescriptive rights. That had all happened quite quickly. During that stage he had on one particular occasion been asked if he could walk the dogs. That was the first occasion he had walked up there after the clearance had started at the top. By that time it was mid-January 2009. Branches had been piled up outside Mr Stock's property, where an old van now is placed. That was so even though that location was where Mr Stock had previously had prescriptive rights to park.

7.131. At that stage it was not easy to get from the private track onto the cutting because of the debris of trees and shrubs pushed to one side, but it was still possible. Thus on that occasion he walked to somewhere near the mid-point of then land, around Nos. 53 to 55, and there was a little track one could get through into the cutting. From that point he had walked up to see what clearance had taken place, and then back down to Station Road.

7.132. Most of the work had been concentrated at the top end of the land east of No. 57. Shrubs and trees had been cleared on the right hand side. He had not been able to see a small shed at the eastern end. To the east of No. 57 an earth bank with an old fence on top, along the northern edge of the application site, was being taken down and bulldozed. But there had been no difficulty in his usage.

7.133. Thereafter he must have used the track again 3 or 4 times over weekends when he took the dogs out. In February he may have walked the dogs 2 or 3 times, and then another 2 or 3 times in March 2009. Further works had been done on the land.

7.134. It was disappointing at first to see how much vegetation had been removed, but things do grow back. The area had been opened up and was still a nice place to take a dog for a walk.

7.135. There was a lot happening around that period, but he definitely did walk there once in mid-January and at least twice in February, and twice in March 2009. It was accessible and he could still get on to the land. In February 2009 the debris outside Mr Stock's house was removed, but there was no fencing there at that stage. So in February/March 2009 where he got onto the land would have been more or less in front of Mr Stock's house. On those occasions he took the dog up to the eastern end; he would tend to keep the dog up towards the eastern end rather than the western end of the land. He did not see anyone else on the land on those occasions. On reflection, he thought he did see Les Thomas's two younger sons on there in the January/February 2009 period, but at a time when he Mr Matthews was not on the land. They were just walking up. Those boys were in their late teens.

7.136. His own usage around that period had been limited. The next significant thing to happen was the fence posts going up in April 2009, and then their being wired. That was done from No. 55 all the way along to No. 47. The posts were put in over a few days, and then they were wired, along a stretch which had previously been completely unfenced.

7.137. The fence posts were up in early 2009, but there was still no gate at the end. However by that time it was virtually impossible to get onto the land anywhere other than at the Station Road entrance. Then a gate to that entrance appeared. Mr Matthews believed that happened in mid-April, around 21st April 2009. However the gate was at first unlocked, with no signs and no lock. From that point on he deferred to the fact that the area had been completely enclosed.

7.138. *In cross-examination* Mr Matthews said that it had been his idea to make the village green application. He had thought of it after the Tree Preservation Order had been made in 2010. The Tree Officer Mr Appleby's comments about the land being accessible, and also his own solicitor on the car parking issue, had told him that if they had always used the land then there might be prescriptive rights to carry on using it. Prior to that he had had no idea that it might be a town or village green.

7.139. In the 1980s he remembered playing with Philip Stock in the river, but could not remember playing with him on the line, i.e. on the application site.

7.140. In 1998 he moved completely to Llanmorlais, and was there in the evenings and at weekends, and he was on the electoral roll. He accepted that his childhood memories were as a visitor, not a resident. His nephews and nieces had also always been visitors not residents. He did use the land as a child from 1972 onwards, but was not a resident then. He did not claim to have become an inhabitant before 1998.

7.141. He has used the footpaths that exist on Tir Gil Farm. He has never knowingly trespassed on the farm. He knows Mr Beynon the Objector. He, Mr Matthews, knows that Mr Beynon is quite possessive of his land. He could imagine that from January 2009 it was likely that Mr Beynon would not be happy that people were using part of the land of which he had become leaseholder. Mr Matthews had also been aware that Mr Beynon was having work done on the land. That work had been completed in April, and Mr Matthews had noted it down as 21st April.

7.142. The posts had been put in and then the wire was put up later. The one thing he had noticed was that there was no gate at the far end and he Mr Matthews was confident that it had never been wired all the way across.

7.143. He acknowledged that he had been in correspondence with Mr Watson in early 2009. What had concerned him at that time had been about the parking spaces. He himself had always used the land at weekends, and never saw either Mr Beynon or Mr Watson there on the land on those weekends.

7.144. He had known that Ron and Gloria Sanders are members of the shooting club, with permission to use this land. Their dogs were gun dogs. He, Mr Matthews, had no idea if they had permission to exercise their gun dogs on the land. Gloria and Ron had never told him that they had rights to use the land.

7.145. As for his visits in February/March 2009, he would guess that those had been on at least two occasions in each of those months. He could not recall seeing a JCB on the land other than on his January visit. When he went on the land he normally would walk up and back. He did not believe or agree with the suggestion that the JCB had been on the site for about 4 months. He thought it might have gone off to do other jobs around the farm, if it had been on the farm for as long as that. He did not take any photographs on those occasions, to his regret. He had not thought to do so.

7.146. When the branches had been piled up outside Mr Stock's house he had not taken any photographs, but he knew that others had done so. Those photographs however were not in Mr Matthews' evidence or present at the Inquiry. There were so few photographs because of the nature of the area, and because the use is predominantly by children playing, or dog walkers or people blackberrying. His own view was that the cutting seemed to be almost an extension of his own garden. He himself had at the time of the Inquiry a 3½ year old daughter, and only had 3 photographs of her in his garden.

7.147. One's tendency to take photographs might be greater if one was talking of an open park, but this site is a small area in a small village; one would not be automatically taking a camera.

7.148. As for the relevant neighbourhood in this case, Mr Matthews had now clarified it and drawn a line on the map. He had gone into great detail (in writing) in the explanation he had given about the relevant neighbourhood here.

7.149. In terms of the cohesiveness of the neighbourhood, when he had looked at it he was trying to find where residents were in easy reach, and where the users of the land would predominantly come from.

7.150. In relation to the state of the land before the levelling works, he disagreed with the suggestion that only 30% of the land was accessible. He referred to an aerial photographs which had been taken in 1971; he thought more of the area was accessible than that in the old days. There was only a thin line of trees and shrubs. The rest of the land was very open. Yes, there are impenetrable pockets on the land. That is what makes the land attractive. Those pockets were mainly on the left hand side. He did not think that the land was much more open from No. 47 up to approximately his house.

From No.57 onwards, where the bank had been taken away, that area has been opened up he thought. There were some large bushes near No. 47, but he would not have said it was overgrown there.

7.151. As for shooting huts, there was always a small wooden shed up at the eastern end, which he believed was locked most of the time. For a short period there was a small green kiosk-type thing there. He did not think that that was to do with the shooting club. It was set back along the ridge where the bank is. It was not there for long, he thought about 1 to 2 years. It all became overgrown, and one could hardly see it because of the scrub. It was back in the 1990s that he first saw it, and he thought it was only there for one or a maximum of two years. Whether it had been swallowed up among the trees he did not know. He had not thought that that kiosk was that large. It just looked as if it had been dumped there. It had looked rather as if it had been an ex-car park hut for one person. The wooden hut on the left hand side up there was larger. He did not think that that was made of corrugated steel. The roof might have been, but it was a dark building so he thought it was wooden. Mr Matthews said that he knows this cutting very well.

7.152. *To me* Mr Matthews said that he would typically go onto the track through the side near his house, and then up to the east. His journey back might be a journey back to the same point, or further to the west and then back to his house. When he went towards the east he would probably go to a point just short of where the gate used to be. There was no reason why he would not have walked to the western end as well.

7.153. In seeking to define the neighbourhood for the benefit of the Inquiry he was seeking to show the core village associated with the name Llanmorlais, excluding outlying farms and so forth. The neighbourhood he was pointing to was really the village of Llanmorlais, which is a cohesive collection of houses, not including outlying houses and farms just because they might have a Llanmorlais postal address.

8. THE SUBMISSIONS FOR THE APPLICANT

8.1. In submissions made before the Inquiry commenced, the Applicant pointed out that this is an application made under ***Section 15(3)*** of the ***Commons Act 2006***. The case as refined for the Inquiry is that a significant number of the inhabitants of the neighbourhood of Llanmorlais, which the Applicant has defined, had indulged as of right in lawful sports and pastimes on the land concerned for the relevant period of at least 20 years. In the submissions the area is often referred to as *"the cutting"* to identify this specific section of the whole disused railway line. The disused railway line in its entirety runs north to south parallel with New Road, and then turns westward where it runs parallel with Station Road, past No. 45 Station

Road, where it crosses over that road and continues. It is from that crossing point on that the section being applied for as a village green starts. Local residents often refer to the whole disused railway line in its entirety as *"the line"*, but for clarity the section in the application site is being referred to as *"the cutting"*.

8.2. The cutting is at the furthest easterly part of Llanmorlais. To the north is the private track or access way leading to Nos. 47 to 57 Station Road. To the south the farmland at Tir Gil is fenced, and to the east there is a gate onto Tir Gil Farm.

8.3. The criteria for registration under ***Section 15*** of the ***Commons Act*** were addressed. The definition of the phrase *"as of right"* has been considered in much High Court caselaw. People need to have used the land concerned for the required period of time without force, secrecy or permission. In this case there is nothing to suggest that use has taken place secretly, or that any formal permission had been granted to the local residents for use during the 20 year period stated on the application, which was from April 1989 to April 2009, or indeed the decades before that. None of the user evidence submitted with the application makes mention of any challenge to use during that time, and none of the witnesses recall any barriers, prohibitive notices, signs or fencing to deter use. None of the Objectors have referred to such notices or barriers. The area was simply left open, as the aerial photographs and maps show. Only 4 of the Objectors' letters made any reference to permission, or to the shooting club use of the land. None of the Objectors' letters mentioned notices or fencing. The area was simply open.

8.4. The owners Sketty Park Estates had been absentee landlords save for periods when clearance work (most notably in 1991, as an aerial photographs showed), and the construction of a drain outside No. 47 on the cutting itself to improve drainage, had taken place. Sketty Park Estates were aware of usage, and in particular of residents using the land for parking. The Tree Preservation Notice of March 2010 referred to the area as an attractive stretch of trees which is accessible to residents, and is a valuable habitat for a variety of wildlife.

8.5. The Applicant submits that an officer of the Council clearly observed during his site visits in 2008 and 2009 that its location and openness made it accessible to residents. Mr Matthews had contacted Mr Appleby, the Tree Preservation Officer, in February 2008, and the officer told Mr Matthews that he had walked the area. That confirms its accessibility, and the Applicant's claim that it has always been usable. Therefore it should be taken that the use of the land had been as of right.

8.6. Use of the land was for lawful sports and pastimes. The last commercial train left Llanmorlais in 1957 and the tracks were removed almost immediately. Over the next 5 to 10 years all associations with the railway were removed such as sleepers, rails and fence posts. From the mid-1960s

the cutting became an open and accessible area in the village. Lawful sports and pastimes can be commonplace activities such as have been discussed in the many legal cases about village greens. In this case the evidence is that the most important use of the land is for children to play (20 of the users giving evidence of taking children to play there, or of having played as children, or having seen children playing there). The land has also been a place for recreational walking, dog walking, blackberry picking etc. Mr Stock had provided ample evidence of his own large family's usage, including bonfire parties when his children were younger.

8.7. The fact that the area is bordered by well-established trees further along the track does limit certain types of usage or activity which are commonly associated with village greens. However the character of the land is irrelevant. The fact that the site does not look like a traditional image of a village green is not relevant to the determination of the case.

8.8. No doubt there are small areas on the application land that are inaccessible in summer because they are dense with foliage and undergrowth. Similarly some parts of the banks of the cutting are steep and/or covered in foliage and established trees. These small pockets make this amenity attractive to local residents for the children to play and adults to enjoy nature or to walk. These areas are included in the application because they form part of the character and make-up of the area. Caselaw, including the well-known ***Oxfordshire*** case, frequently referred to as *"Trap Grounds"*, shows that areas parts of which are scrubland or inaccessible can still be registered as town or village greens. In the present case the areas accessible for the local public are in excess of 70%, the Applicant would say.

8.9. The claimed neighbourhood Llanmorlais is a relatively small village. The witness statements plus additional letters prove beyond doubt that the land was not just used occasionally by individuals, but was a recognised and cherished amenity. It was used by the community at large, often and frequently. 19 residents have completed, singularly or jointly, statements or proofs. There are supporting statements from relatives who use the track while visiting, and provide evidence that they regularly played with children from the neighbourhood. The question of whether use has been by a significant number of the inhabitants is a matter of interpretation, as again discussed in the caselaw.

8.10. Witness statements given by residents which equate to approximately 10% of the households of the village confirm wide use by a variety of inhabitants, and cannot be interpreted as use by only occasional individuals or trespassers.

8.11. As to the period of use, the application was submitted on 29th March 2011. The cutting has been used by local residents over a considerable length of

time, and evidence in the witness statements dates back to the 1960s. The relevant period here is April 1989 to April 2009. At no time had there been any interruption or restriction of use of the area by the owner or others. The area has been open and accessible for all local residents during that period.

8.12. Sketty Park Estates were absentee owners or landlords except during the clearance work referred to, lasting a day or so, or minor construction work. Sketty Park Estates had not up to the end of January 2014, commented on the application to register the land as a village green.

8.13. Since the removal of all the railway-associated items during the 1960s the area has been open and accessible. Fencing from the railway period only remained in situ on the south side of the application land, and partly beyond No. 57 Station Road where it borders farmland. At the very east point of the land, at the end of the cutting, a gate was installed to secure the neighbouring farm during the 1960s, but access was available for the shooting club.

8.14. The main entrance at the junction of Station Road was never fenced or closed. Most of the concrete posts associated with the old railway fencing were removed in the 1960s, and only three of them remained. The main entrance to the land that most local residents would have used is at its junction with Station Road. No barriers or signs existed until April 2009, when fencing and an unsecured gate were installed. The residents living from No. 51 to No. 57 had a variety of access points along the length of the private track between their houses and the cutting, until fencing was erected in April 2009. Plans showing the fencing erected during that period (2009) were produced.

8.15. As for the objections, the number of them submitted was a surprise to the Applicant, but the Applicant had sought to respond to them all. Of the 40 or so letters submitted, only the one from Mr Beynon's agent is of any substance.

8.16. The majority of objection letters stated that the land was impassable, in direct contradiction not only to the supporting evidence given by users, but also to two of the Objectors who state that they regularly used the land as an access, on a daily basis, to get to the pheasant shoot, albeit with permission from the landowner. One Objector from outside the claimed neighbourhood even claims that the land has always belonged to the current leaseholder. Many of the letters are from connected people from outside the area. Of the letters coming from within the village, some are from people who have recently arrived there, and several are from the same family. Other comments have no relevance at all to the application. None

of the Objectors clarify the years if any when they tried to use the land, and none of them refer to fencing or prohibitive notices.

8.17. This is a genuine application to allow the inhabitants of Llanmorlais once again to enjoy this amenity. It is not trying to defeat a planning application for example.

8.18. A lock was placed on the access gate onto Station Road in July 2011, directly as a result of the notification of the application for a village green. Until that date it had remained open. Since that time works have been carried out such as the large soil deposit opposite No. 57 Station Road. New channels of drainage from the fields on the south side of the cutting have been dug, and clearance material has been deposited in front of the drain at No. 47 Station Road. That has increased the water being diverted onto the cutting, giving the impression that it is wetter than it has been at some times in the past. That has left the land in a very poor state. These things, coupled with the grazing of a considerable number of cattle, and vehicle usage in the last 2 years, have made the track bed extremely wet during the winter months. There is no question that remedial works would improve and return the land back to its previous quality.

8.19. The village of Llanmorlais, the 'neighbourhood' identified by the Applicant, falls within the Llanrhidian Higher Community boundary, identified as the 'locality'. That Community is divided into two electoral wards, Llanmorlais and Penclawdd. Both Llanmorlais and Crofty lie within the Llanmorlais ward, along with various isolated houses and smaller settlements some distance away.

8.20. Llanmorlais village is a different and unique village, distinct from the village of Crofty which lies to the north-north-west, separated by the B4295. Llanmorlais had its own local shop and post office until the late 1990s. It has its own community centre and sports facility. The local school closed in 2010. Station Road lies at the heart of the village, and the village expanded to include Riverside and Trem y Mor. To the west, on the other side of the B4295, there are 4 houses at Osbourne Place, just before the entrance sign to Crofty. Other aspects of the suggested boundary of Llanmorlais were explained. The Applicant provided a map which showed the detail of the boundaries of the suggested neighbourhood within the locality. The Applicant's view was that the claimed neighbourhood certainly does show the kind of cohesiveness which the court cases have indicated to be required.

8.21. At the opening of the Inquiry it was reiterated that the land in question had always been accessible from the 1960s right up until April 2009, when complete fencing appeared and obstructed access. The Objector appears to assume that all residents knew that they required permission to use this

land. It seems to be suggested that since Mr Beynon leased the land from 24th December 2008 residents must have known that they needed his permission. However there is no evidence of fencing or signage, either by the freeholder Sketty Park Estates or by Mr Beynon the leaseholder, until April 2009. It was only then that Mr Beynon went ahead and fenced and gated the land.

8.22. While the land was simply under the ownership of Sketty Park Estates it was open and accessible, with no signs and no indication that it was private property, or that permission was needed.

8.23. It was only later on that local people found out that Mr Beynon had leased the land from December 2008. Information had been received about various dates when clearance work was carried out on behalf of Mr Beynon, in late December 2008 and also in January and February 2009. Then none was apparently done in March 2009. During those times the work being carried out was rather sporadic, and mainly involved clearance beyond No. 57 Station Road. The fence posts were only erected in April 2009, and the gate was installed last of all, and remained unlocked for 2 years. Even then there were no signs indicating that it was private property.

8.24. The photographs which had been produced tend to support the Applicant's case.

8.25. In closing submissions the Applicant pointed out that Llanmorlais is in the Gower Area of Outstanding Natural Beauty. Llanmorlais itself has a relatively small population. Therefore one would not expect residents to meet each other on a regular basis on the application land, or to find that the land was over-saturated with people.

8.26. It was reiterated that there was no gate to this land until April 2009, and there were definitely no signs. Even after April 2009, although there was a gate it was left unlocked for 2 years. The Applicant's own evidence had been that he had witnessed users of the land between January and March 2009. For example, Mr Adlam had used the land after the fences were installed, and other people entered the land close to his garage. The Applicant's own evidence had been that he used the site once in January and twice each in February and March.

8.27. The Applicant's evidence had been that he knew that the leaseholder was Mr Beynon, but that did not affect his belief that as this area of land had been unfenced there were no restrictions on its use. It was clear from the caselaw that there was no need for evidence as to the personal beliefs of users about their right to use the land. The fact that users were subjectively indifferent to the question of whether they had rights or not is irrelevant. The Applicant accepts that *"as of right"* means something different from

"of right". So being a peaceable and open trespasser seems to be the requirement of the law.

8.28. Even if Sketty Park Estates knowingly gave permission for one group's access, they still (one would have expected) should have erected signage to indicate that other people could not use the land, if they had wanted to prevent 'village green' rights from accruing.

8.29. It was around the end of 2008 and the start of 2009 that the Applicant heard through hearsay that the areas local people had been using for parking their cars could be removed. That was the context in which the neighbours were first told that they may have acquired prescriptive rights. It may be that work was being carried out on the land on behalf of Mr Beynon in the first few months of 2009, but it was not communicated to the rest of the neighbourhood that this somehow was intended to prohibit people from using the land. The Objector could have done something along those lines but chose not to. In any event, bearing in mind the well-known ***Redcar*** case, the fact that work was going on did not prevent recreational use of the land at the same time from being as of right. It is not unusual for a resident to witness a landowner carrying out works on the land and to act with courtesy towards the landowner.

8.30. As for the shooting club, it had turned out that there are only 3 shooting members in Llanmorlais. It had been said that permission for the shooters to use the land was verbal; that was somewhat difficult to believe. Sketty Park Estates had not objected to the application, whereas they had made objections to the previous proposal to create the Sustrans track on the other part of the old railway line.

8.31. Mr Watson says that he visited several residents on 24th December 2008, a memorable date. Apparently he tried to contact the Applicant, but the Applicant was not aware of it. It seems that the only person to whom any real contact was attempted was Mr Stock, and he was ill at the time. Therefore it cannot be claimed that there was notification to local people on Christmas Eve 2008 that they needed permission to be on the land.

8.32. As for the question about the extent of use by local people, the Inquiry had heard from 6 witnesses, all of whom provided evidence of usage and recollection of the full relevant 20 years, and also of consistent use at various times. In making the decision it is also necessary to take account of the other written statements from local residents which had been submitted. Some of the original questionnaires had stated usage through into 2009, and thus they covered the period even when the new leaseholder had arrived on the land. Collectively all this evidence shows that there was not just use by one or two isolated individuals on a sporadic basis. On the balance of probabilities this land can be seen as having been well used, as is the rest of

the old track. It may be that not necessarily all of the users used the land for the full 20 years, but there needs to be adequate use over the whole period.

8.33. As will be the case on other open spaces, use increases in the warmer seasons and the school holidays, which is something that witnesses at this Inquiry, including the Applicant, had personally noted.

8.34. The aerial photographs show that the cutting is quite a large area. The cutting is by no means just a simple track or a through route; it is not an A to B walk. This is a very unique and interesting area which is a dead end. It was the trees and the embankments which over decades meant that children did not just go in there to walk a route, but to explore them or make dens or swings, or play hide and seek. It was like one big playground.

8.35. This is an interesting, sheltered and diverse area which needs to be retained.

8.36. As well as the evidence given directly by those who had come to the Inquiry, evidence had been given of other local people including children who had been seen playing on the land over the years. Even some of the Objectors' witnesses, such as Mr Adlam and Mr Sanders, had named residents seen on the land. Also they themselves had used the land. In a small minority of cases the use of this land by individuals may have seemed trivial or sporadic. However, taken together, this cutting seems to have been widely known and used by local people.

8.37. There is nothing to oppose the principle that on the balance of probabilities the upcoming generations of the village, for the whole relevant period, have played here. The Applicant had witnessed that sort of thing personally.

8.38. There was nothing to suggest that Sketty Park Estates were aware that use had been continuing on the cutting. However the Applicant's contact with the Estates' representative at the time the lease was taken did confirm that they were indeed aware that the land was used by local residents.

8.39. The Applicant's side had produced great detail in terms of identifying the land and the relevant neighbourhood. Care had been taken to ensure that the application should not fail. The Applicant believes this area is a beautiful and special part of the village of Llanmorlais. The Applicant is satisfied that the application is valid and meets all the criteria required for registration of this land.

9. THE CASE FOR THE OBJECTOR(S) – EVIDENCE

9.1. ***Mr David Thomas*** lives at 28 Station Road, Llanmorlais. He said that as a resident of Station Road, Llanmorlais for over 70 years he wished to dispute the proposal that the land of the application site has been used lawfully for sports and other pastimes.

9.2. As a child growing up in the village, the land was used for the railway, and after the line was closed the land fell into disrepair. From 1974 until 2007 Mr Thomas had been a member of the Morlais Valley Shooting Club. The club members had sought and been granted permission to use this land from Sketty Park Estates, in order to gain access to the shoot which was situated in the Morlais Valley. On no occasion did he ever come across children playing, or any member of the public walking their dogs, or any other persons just walking, or indulging in kite flying etc., on the application land.

9.3. Members of the shoot including himself regularly used this access for the purpose of feeding, general husbandry and for shooting on shoot days. They were entitled to carry shotguns, and members would have been accompanied by their gun dogs. The land was always very boggy and overgrown, and wellingtons or field boots as footwear were the order of the day. Regular access for feeding the birds was necessary because the foodstore was situated at the end of the cutting on Mr Beynon's land, and one of the sheds can still be seen there today. During the rearing programme from June to October, members of the shoot would have attended at least 3 times daily on a rota basis to feed and check on the chicks.

9.4. As the Morlais Valley Shooting Club was well known in the village, it would have been highly irresponsible for any parent to have allowed their children to play on such ground, or for any dog walkers to be in the vicinity.

9.5. This ground is not in the centre of the village, where one would expect to find a village green. The shooting club in his day had mostly had 25 members, of whom about 4 or 5 were from out of the area, and the rest from either Llanmorlais or Penclawdd.

9.6. Mr Thomas would accept that there might have been local people on the land from time to time, but he and the shooting club had never come across them. The shoot typically assembled on Saturdays at around 9 to 9.30am. They shot up the valley. It was possible to drive a vehicle up the application land with care after the rails of the railway track had gone. However because the sleepers had been removed there were ruts.

9.7. The first shed that the club had at the eastern end of the application land was put there in order to shoot foxes. Mr Peter Beynon, the Objector's father, had put it there. It measured about 6ft x 4ft, opening on the far side. It was tall enough to stand up in. Later on there was a fibreglass shed to store corn in. It was a sentry-post-type structure, in which there could be kept a freezer and some corn. The first structure had been made of wood with corrugated iron sheets on it, and the second structure was fibreglass. In his view anyone walking up the cutting would have seen them. The fibreglass structure had been there from about 1988 to 2002 he thought.

9.8. *In cross-examination* Mr Thomas said that the Secretary of the shooting club, Mr Fred Holt, had sought permission from the landowner to use the land of the line, which belonged to Sketty Park Estates. Mr Thomas thought that Mr Holt was a solicitor. They also had a land agent in the club as a member. They had sought that permission in about the mid-1980s. They did not go up the cutting from 1974 to the mid-1980s.

9.9. Then in the mid-1980s they sought permission. He was not sure whether that had been in writing, but permission was given probably verbally. Probably there was nothing in writing. That was the same as for all the shooting in the valley.

9.10. For some time they did use the access past No. 62 Station Road, to the south of the application land. However that stopped when the club stopped parking at the entrance, and drove up to the other end. Up until the mid-1980s they would park at the western end, and then went off via No. 62 or via the footpath to the north-east. However from the mid-1980s onwards most people parked up near No. 62 and walked up the cutting. The club members would congregate at the east end of the cutting. A lot of them still went up the lane to No. 62, but generally after that people walked up the cutting. There was a stone track which went on past No. 62 on the south side.

9.11. They started using the cutting because people complained when they congregated at the western end, about the dogs and so forth. They did still use the lane to the south of the site by No. 62 as well, even after the mid-1980s. However the track up by No. 62 was always boggy and wet too, as well as the cutting. There was not a track beyond No. 62 then, it was a field, but very boggy. However he would not say that the cutting was easier than walking up the field.

9.12. He agreed that it was overgrown in the cutting, but wearing wellington boots and barbour jackets and leggings one can get through most places.

9.13. The actual shoot was a lot further on. One would either go across a bridge to the north, or carry on to where the shoot was. When going up to feed during the June to October period he would take a gun with him.

9.14. There were 25 members in the club; 3 of them were specifically from Llanmorlais, namely Ron and Gloria Sanders and himself.

9.15. *In re-examination* Mr Thomas said that he believed that an agreement had been discussed between the Sketty Park Estates and Fred Holt. Fred Holt was a first class solicitor.

9.16. *To me* Mr Thomas explained that there had been occasions when one could see that people had been up there through the application site.

9.17. As far as the actual shooting was concerned, that was always carried out considerably further to the east than the application site itself.

9.18. The annoyance to local people when the shooting club used to congregate at the west end of the application site had been a result of the congregation of the shooters and their dogs, not the parking of their cars.

9.19. As for the change of practice by the shooting club, yes indeed the cutting had remained fairly difficult to pass through, and he did carry on going up past No. 62 a lot of the time, but he used the track through the cutting as well.

9.20. He finished shooting in about 2004/5. Around that sort of time the shoot no longer had the access that it needed, because Mr Richard Beynon had refused access. The club carried on shooting, but did not enter via Llanmorlais.

9.21. ***Mr Jeffery Adlam*** lives at 53 Station Road, Llanmorlais. He had written one of the letters of objection. Mr Watson, the Objector's agent, had had no involvement in the production of that letter. Mr Adlam had been concerned that the creation of a village green on this land adjacent to his house would encourage anti-social behaviour.

9.22. He lives overlooking the cutting. However one has to go outside to their gate to have a good view of the cutting. One cannot see people in the cutting from their house windows.

9.23. When he is outside he can see the cutting, but not when he is actually in his own garden. He is not constantly monitoring the cutting.

9.24. As for the usage he was aware of in the cutting, he had seen children using the swing in the cutting twice between 1989 and 2009. As for seeing anyone else using the cutting, he had seen the shooters, and just before the fence was installed he did see boys going up the cutting with some pieces of wood to make a den at the top of the cutting. After the fence went up a policeman had asked him if he had seen boys going up there. He had not seen those boys making any trouble. He himself went up then to have a look, and it seemed that the boys had jumped into a hedge.

9.25. Mr Adlam had never seen James Matthews or Mr Stock walk up the line on the application site. He had seen them up on the top track by the houses, but not down on the line ever.

9.26. He had been told of a fire which had burnt the boys' den down. That was just after the policeman came up.

9.27. He had seen the shooting huts up at the far end of the land some time ago. He remembered seeing the green one. It was there the last time he went up to look at the den. That was about 3 years ago, before the fence went up.

9.28. Of Mr Adlam's children, his daughter Emma had said she made more use of the river, and where the Sustrans walk is now, but they did come up the cutting occasionally as well. His other daughter had had friends from Bryn, and they made a den in the cutting when she was aged about 6 or 7. That daughter is now aged 37, and his daughter Emma is now aged 42.

9.29. *In cross-examination* Mr Adlam said that the structure he had seen up at the far end of the cutting was not in fact a shed. It was not a shed that had been burnt down, but a den constructed by boys. He had seen the kiosk-type structure, but he did not remember another shed. The kiosk was a green one.

9.30. He had seen children on the swing when coming home back in the 1980s, he thought. He thought those children might have stopped using the swing on growing older. There are no younger generations in Llanmorlais these days.

9.31. However he had seen those boys coming up the track just before the fence went in, about 3 months before the fencing. He went up the track, in 2012 he thought, but was not confident of that date, it might have been 2011.

9.32. He was not approached by anyone around the time when the fence went up. No-one had approached him or discussed the matter at all.

9.33. His own parking area had been left more or less as it was. He had known that it was not his own land, he had always known that. He had cleared that land to increase his parking area, and never sought permission or contacted the landowners about it. The landowner had never done any of that clearance. He never thought he was trespassing however. Latterly he had put a new double gate up, so that he can put his vehicles on his own land now.

9.34. *In re-examination* Mr Adlam said that since 1989 he had been up to the end of the cutting not very often, in fact he thought it was once, so he was not familiar with the detail up there.

9.35. *To me* Mr Adlam said that he did go up the cutting to look at the den before it was burnt down; he had been told it was subsequently burnt down, but did not see it.

9.36. His father-in-law had died in 1997, and before that he used to go up there and get bean sticks for him. So he supposed that from 1989 to 1997 he had gone up there to collect bean sticks. He would get in by just going down the bank. He might go in either direction from that point to collect bean sticks. He might have to go up or down some considerable distance either way, because there might not be any sticks in the cutting. He recalled that while doing that he did also see Royston Jones bringing bean sticks back.

9.37. He told me that the den he had seen had not been right up on the top of the bank, but on the lower part of it, towards the eastern end of the cutting. That occasion had been about 3 months before the fence went up.

9.38. ***Mr Ron Sanders*** lives at 57 Station Road, Llanmorlais. He said that part of the application site is in clear view from his property. The only people he had seen using this land during the 40 years that he has lived in his house had been a local shooting club, with permission from the landowners, and the occasional dog walker.

9.39. This land has always been boggy and overgrown, so he has not seen anyone playing ball games on it. He objects to the idea of a village green on it. It has been leased since 2009 by Mr Richard Beynon who uses it for grazing livestock.

9.40. Since Mr Beynon cleared the land a lot more light has got into the area and it is now green and grassy.

9.41. Mr Sanders was not sure of the exact date Mr Beynon took over the land. He had been a member of the shooting club, as also had been his wife. He would recognise the other members of the club, and he used to see some of them coming up the line to attend the shoot. As a member of the shooting club he had permission to use the line, and to walk his dogs there. He also had permission to take his car up to the shoot.

9.42. At the top end of the line there was a clearing. The shooting shed was up a slight rise to the left, but people going up there might have missed it. The shed was made of corrugated tin and about 7 or 8 feet by 10 feet. There was ample room to stand up in it. Also down on the stream side there was a green car parking kiosk brought up there by a member. At the time when boys had caused trouble up there, there had been about 3 or 4 chairs in that shed. Those boys had also got into the other shed, and there were beer cans, cigarette stubs and lighters etc., there; the police were called.

9.43. There were 3 or 4 pallets near the car parking shed. The car park shed was there up until just before the fencing was put up, he thought. It had been there for at least 10 years.

9.44. He often sees Mr Stock outside his property, where his car is parked on the widened area at the top of the cutting. He had also seen James Matthews on the cutting, once or twice only. James used to walk their dogs when they were out.

9.45. *In cross-examination* Mr Sanders said that he was not completely sure that the land had been leased from December 2009, though that was what he had understood. Mr Beynon had come up to his property and told him that he had a lease, and would be clearing the land but leaving the substantial trees. He had come up a couple of weeks before Christmas, just before the clearance started.

9.46. It was true that Mr Sanders' wife Gloria had also submitted an objection. She used to walk the dogs on the land a couple of times a week. Springer spaniels are quite energetic. However they have quite a lot of garden, and she did not always use the line.

9.47. He knew that Mrs Hughes-Davies used to come up regularly to go out with Gloria, but he did not recall them going onto the line. He did recall the swing being present in the cutting, but had never seen children playing on it. However there was some evidence that the area around the swing was well used.

9.48. If he personally accessed the land he would use the side gate that he himself had made. His understanding was that the permission to the shooting club

to use the land was given before he joined the club; he joined about half way through.

9.49. He had fenced off an area in front of his house some 30 or so years ago; he had been in his house for 35 years. He had fenced that area, put seed on it and made it tidy. He had not thought he was trespassing. He phoned the Sketty Estate and asked that if ever the land was sold he should be offered it. He had tried to keep the area in front of his house clean and tidy.

9.50. He would imagine that Sketty Park Estates would come out and maintain the land from time to time. He had never seen any signs or notices, or indeed anything except Mr Beynon's gate at the very top of the line, to stop other people going beyond that. He thought the shooting club had put that there.

9.51. He worked 5 days a week until his retirement. He thought he had seen Mr Adlam up in the cutting on a couple of occasions, cutting bean sticks. He had also seen Dr Upton and his wife and dogs, but not many other people.

9.52. *To me* Mr Sanders said that the shooting club carried on satisfactorily until Mr Richard Beynon took over and there was a disagreement with him. For another couple of years they had to go round and enter the shooting area via Penclawdd but then he, Mr Sanders, gave up. He told me that when he went onto the land via his side gate it would either be going to the east end to walk his dogs or to attend the shoot.

9.53. ***Mr Johnny Francis*** lives at 5 Station Road, Llanmorlais. He does not support the village green application. He had been a local resident in the village for the past 67 years, plus 4 generations of his family before that.

9.54. He had never known children to play on the application site. People had walked there years ago, but it was not a place that the village ever used.

9.55. He was a founder member of the shooting club in 1969. He was in it for 8 or 10 years, but after that he never went near the place. They used to shoot on various pieces of land around Llanmorlais.

9.56. He thought that by no means everyone in the neighbourhood in fact knew about this village green application; not everyone had received notices of it or of the Inquiry. He had noticed some signs of drug use around the village; people had entered his property, and there was a bad feeling in the village about it. His own son and daughter had certainly never played up the railway cutting. They used to know the Stock children.

9.57. His general impression of the application site was that it is a secluded place. He could honestly say that after he finished with the shooting club he never went there. He does go up the cycle track. That is the track that is now the Sustrans track. People who have given evidence, and said they walked on the cutting in the application site, he had in fact seen on the Sustrans track. However he had never spoken to those people. He has never heard the noise of children playing in the cutting, although he regularly passes the end of the site. He would rather see sheep in the cutting than drug users.

9.58. *In cross-examination* Mr Francis said that the shooting club had run from 1969. They never used the track back then. They either went to the right past No. 62, or up to Tir Gil Farm, depending on where they wanted to drive the pheasants.

9.59. He confirmed that he gave up the shooting club after 8 or 10 years, and since then had never been up there. The area of the cutting used to have old railway fencing more or less where the fencing is now, but there was never anything across the entrance. There has never been a fence across before, nor any signs. It is private land though, so he would keep out of it. Although there were no signs or fencing at the start of it, it was nowhere he wanted to go.

9.60. As for the Sustrans track, he walked on that 4 or 5 times a week from 1969. That also was an old railway track, and he thought he could go on there. That was a track which everyone would use. It never came into his head that he was trespassing on that track. In fact there were really good blackberries along there, and he was quite sure that one could go along there to pick blackberries or nuts. When he walked along there he walked on what is the cycle track. It is better that the application site should be used to produce lamb or pork or beef, he thought.

9.61. ***Mr Alan Watson*** is a Chartered Engineer and the principal of Alan Watson Associates, whose address is in Uplands, Swansea. He said that although he is an engineer and not a lawyer he considers that by his qualifications, expertise and personal experience he is appropriately qualified to give evidence.

9.62. As Mr Richard Beynon's agent since 1969, he had been retained to advise on the planning and environmental issues arising at Tir Gil. He had previously advised Mr Peter Beynon, Richard's father on some planning and regulatory matters. He had therefore kept a close eye on Tir Gil and the neighbouring land including the cutting.

9.63. In his view the application to register the cutting, which has been used as farmland since 2009, is ill founded for a number of reasons. The evidential basis for use of the land over a period of 20 years ending 21st April 2009 is

inadequate. Any usage outside that permitted by the landowners at the time had been so small that it did not meet the tests required by the Act.

9.64. Also use over the past 20 years had not been *"as of right"*. While it is accepted that the western end of the cutting had been open, until fenced and gated by Mr Beynon, the rest of the land had always been fenced. Along the access road ending at 57 Station Road, as the fence fell into disrepair it was largely replaced by a hedge of brambles and scrub. Furthermore it has been generally known in the village that the landowner has not permitted access without permission. The Morlais Valley Shooting Club for example sought and was granted a licence to access the land by Sketty Park Estates.

9.65. It is also part of the Objectors' case that there is a procedural point that the application was made outside the statutory period. It is considered that any as of right use which did take place ended when Mr Beynon took over the land in December 2008, and in any event had ended before 29th March 2009. The Applicant mistakenly equates loss of use *"as of right"* exclusively with complete fencing of the land, or the posting of signs. There are therefore various reasons why the application should be dismissed.

9.66. Historical research had shown that the arrival of the railway in Llanmorlais in 1862 revitalised coal operations in the area, extending beyond Llanmorlais into the Morlais Valley, and between 1880 and 1914 coal mining was again a key factor in the area's economy. The Llanmorlais, the Old Llanmorlais and the Cwm Vale collieries were connected by tramroad to the railway at Llanmorlais. It is understood that the railway was closed for passengers in 1931, and for freight in 1957, and the track was lifted in 1959/60.

9.67. Sketty Park Estates became the freeholder, and Mr Beynon has held a long lease on the land since December 2008. Although it pre-dates Mr Watson's personal experience at Tir Gil, he had spoken to both Peter and Richard Beynon about use of the cutting in the early 1990s to access parts of the farm south of the Morlais River. At that time the track was passable by tractor or by a 4 wheel drive vehicle. At that time there were no internal tracks on the farm, and that can be clearly seen in some of the aerial photographs which had been produced by the Applicant. Tracks across fields for access in wet weather are now considered an essential part of good management, and avoid serious damage to land which can be caused by driving tractors across soft ground. For example they are often a requirement for single farm payments. Mr Peter Beynon had also been contracted by Sketty Park Estates to carry out maintenance work on the cutting, including drainage works, in the early 1990s.

9.68. Mr Watson himself had walked the cutting occasionally when visiting Tir Gil, and saw little evidence of use by others. As time passed the use of the cutting for access became less necessary, and a good network of access tracks is now available within Tir Gil. The reduction in use of the cutting resulted in heavier growth of scrub, and by 2008 it had reached the point of being so heavily overgrown with trees, brambles, nettles and other vegetation that it was practically impassable in summer. Access was more clear in the winter, but the ground was then more wet and boggy.

9.69. The nature of the land, having been a railway cutting, is that the only part of it which was generally accessible in practice was the bed of the old railway. Consequently the only route that could be taken, even by those with the energy and persistence to overcome the undergrowth and wet ground, would be a linear one to the end of the track and back. Further progress would not be possible without then trespassing on the land of Tir Gil Farm. The track was bounded at its eastern end by an unusual angle-iron gate, which was still visible now although in rather a poor condition. Reference had been made to a sign on that gate. He personally could not recall ever seeing it. The evidence appeared to be that it had been placed there by the shooting club.

9.70. On 24th December 2008, shortly after the land had been leased to Richard Beynon, he Mr Watson, had accompanied Mr Beynon and visited residents living close to the land, including Mrs Stock (Mr Stock was ill) to advise them about the change of ownership, to inform them about the nature of the repairs to the fencing and the clearance work that was being undertaken, and to clarify the arrangements for car parking on the land. They had called at Mr Matthews' house but he was away. They therefore asked Mrs Stock to pass the information to him. Mr Watson was surprised by Mr Stock's claim that he was not aware of that visit.

9.71. There can have been no reasonable doubt after that date that, whatever the previous access had been, the circumstances had changed and that any access would no longer be *"as of right"*. Work to repair the fencing was started shortly afterwards and continued through the winter. Workers were on the site on December 24th, 29th and 30th in 2008 and then on January 15th and 23rd, February 13th, April 3rd, 7th, 15th and 16th in 2009. The work to clear the track was noisy and obvious, not least because a very large, tracked JCB was used. Having told the residents about the new circumstances, the date on which any unauthorised entry to the land without secrecy must have ended should be taken as 24th December 2008. Whether or not the information had been passed on to Mr Matthews by Mrs Stock, it was clear by 16th January 2009, when the solicitor's letter about a possible injunction was sent, that they were familiar with the changed circumstances.

9.72. The workers engaged in clearing and fencing the land did not see any local residents using it at any time during the total of 2 working weeks while were working on the land. Furthermore much of the clearance work using the JCB was carried out by Mr Richard Beynon outside normal working hours. The only time any local resident was seen on the land between December 2008 and April 2009 was when Mr Beynon noticed Mr Stock's grandson taking cut wood from the land. Mr Beynon told him the land was private and asked him to leave. There is apparently a dispute as to whether that wood was taken with permission from the workers on the site. But when Mr Beynon saw the trespasser he was very clear in asserting his property rights. That incident was reported to the local police. Later in the spring the police were again involved, in relation to a fly tipping incident where Mr Matthews tipped waste on the land. Mr Beynon was plainly and obviously asserting his rights to the land. Mr Watson himself had been in email correspondence over that period with Mr Stock and Mr Matthews about various points to do with the cutting. The fencing work was completed on 16th April 2009, with the installation of the gate to the site. Before the gate had been installed the western access had already been sealed by fencing wire, due to the method of construction of the gateway. The works diary does not record the date on which the wire was installed across the entrance, but it is thought to be either 3rd or 7th April 2009.

9.73. Mr Watson noted that Mr Stock in his evidence had commented that the land was originally fenced, but had observed that over the years the boundary fell into disrepair and in large part disappeared as an identified boundary. In Mr Watson's view the latter part of that was a tenuous claim, as the original fence posts and associated fencing were clearly visible at the time they were repaired and replaced in late 2008 and early 2009. He produced a photograph showing what he said was some of the original fencing. While he accepted that the western end of the cutting had been open until fenced and gated by Mr Beynon, the rest of the land had always been fenced. Along the access road ending at 57 Station Road, as the fence fell into disrepair it was largely replaced by the hedge of brambles and scrub which he had referred to. Mr Matthews himself had described it as a thick hedge. However like many natural hedges there are areas where it was possible to force access through to the cutting.

9.74. In relation to the application, a total of 17 forms had been provided in support of it. However of those 6 had related to a single household, the Stock family at 55 Station Road, and two other households had duplicate representations. Consequently there were only 9 local households supporting the application. Even from the 10 houses immediately surrounding the land only 3 claimed to have made any use of the land. Furthermore there are more households objecting to the registration than supporting it, among the homes in the immediately surroundings.

9.75. In Mr Watson's view it was not practical to define a relevant locality in this case, so it is necessary to define a smaller neighbourhood. He accepted that 'neighbourhood' was an imprecise term. However the caselaw still showed

that it needs to have a cohesive character. Mr Matthews has amended the neighbourhood relied on in the original application to a larger and more reasonable area. In Mr Watson's view it is still a somewhat arbitrary collection of houses with a unique boundary. The majority of the area of Llanmorlais had been excluded, and it is not accepted on behalf of the Objector that a sufficient degree of cohesiveness had been established in relation to the area identified by the Applicant.

9.76. *In cross-examination* Mr Watson said that he accepted that there never used to be a fence across the western end of the application site. In relation to the fencing from No. 47 to 55 Station Road, it was less clear if any fencing was there during the relevant period. He did not think that the wire of the previous railway fencing had actually been removed, although he accepted that it might have been left to degrade. There were 17 or 18 old concrete posts still there in 1971 for example. It used to be fenced all the way along at the time the railway operated.

9.77. Later on along that boundary it used to look like a thick hedge. However Mr Watson had not walked near that boundary a great deal, as it was not of particular interest to him in terms of the farm. He did not dispute that there were plenty of places where people could get through that hedge if they wanted to, so people could get access onto the old railway cutting.

9.78. He said that he could not justify the cost involved in going through his old diaries to search for all the dates when he had visited the land, but he thought he had probably visited 4 or 5 times before Mr Beynon took the lease of the application land. He thought the first time he had walked the land was around 2003. Mr Peter Beynon had used the cutting for access, even before the lease was acquired, for example in the 1990s, and this piece of land was always seen as potentially a sensible addition to the farm.

9.79. Then later on he visited the land more frequently, with his terrier called Ziggy; for example he was perhaps on the land a couple of times in 2005. However he was walking there with permission. The Beynons had permission from Sketty Park Estates to use the track as an access. It is in fact sensible for landowners to give permission in such circumstances, because it avoids the accrual of claims to have acquired private rights. It is normal to give an open-ended permission which can then be withdrawn. He had been surprised that the agents for the Sketty Park Estates would agree with Mr Matthews that he had acquired prescriptive rights over a part of their land.

9.80. After 2005 Mr Watson made about 5 visits to the land in total, perhaps once or twice a year, towards the time when Mr Beynon acquired the lease. He himself had not got involved in the lease discussions between Mr Beynon and the Sketty Park Estates.

9.81. As it got closer to the time when Mr Beynon took over, the undergrowth on the land became thicker. No vehicle had gone down there for several years. It was more difficult to get through, especially by the end of 2008. It was definitely challenging to get through there.

9.82. In 2008 Mr Watson thought he had probably gone there twice, once before Mr Beynon took over, and once on the 24th December. Then in 2009 his visits were much more frequent, because of the various complaints that Mr Matthews was making. Thus between the 24th December 2008 and the 16th April 2009 he Mr Watson had visited the site 4 times.

9.83. The Countryside Commission for Wales had become involved, and he met a representative on site, and also a gentleman from Swansea University who was an expert on Dormice. He personally had not met Mr Appleby the tree officer on site. He knew that Mr Beynon had had invited him. He, Mr Watson, is very keen on tree planting and the maintenance of trees.

9.84. There had been a consultation about the possible Tree Preservation Order, which gave the opportunity for response. It was probably true that there was no tree specifically worthy of preservation on site. However, if clearance had been the aim of Mr Beynon, that land would have been cleared quickly. Mr Beynon has a 125 year lease of the land. Mr Watson understood that Mr Appleby's visit had been in 2008, before the gate was installed. Mr Appleby had not contacted Mr Watson about coming out to do a survey.

9.85. Mr Watson explained what could be seen in various of the photographs which had been produced on behalf of the Objector. He had not produced a large number of photographs, because he tried to keep the costs associated with the Inquiry as reasonable as possible.

9.86. The fencing work had been completed on the 16th April 2009, and the gate was installed. The procedure is that one puts fence wire in before one even puts in all the posts; it is a method which is commonly used to save time in fence construction.

9.87. However he had not come down to the site to check whether the fencing was there or not. It was Mr Beynon who told him that he had installed posts, and in particular that a wooden fence post that he had installed had been knocked down.

9.88. The reference to Mr Stock's grandson he thought was relevant because it showed Mr Beynon asserting property rights against a trespasser. Given

the small number of users who claimed to have used the land, that is important. He, Mr Watson, had not been aware that Mr Stock's grandson had been invited on by the workers to collect the wood. Both the workers had told him that they had not given permission. Anyway the result in the end was that Mr Beynon withdrew the complaint.

9.89. Later in the spring of 2009 the police became involved in relation to Mr Matthews tipping garden waste over the hedge. It was possible it might have been in 2010, but in any event it was garden waste which Mr Beynon claimed that Mr Matthews had put onto Mr Beynon's land.

9.90. More generally, Mr Watson was not particularly aware of any vandalism on the site, such as the claimed fire in a den, or the breaking up of the original parking hut. It was possible, insofar as at the east end of the site there were some man-made things that might have attracted vandals. The shooting hut up there was not in fact in the cutting, but on the Tir Gil land just outside it. Mr Beynon had told him of finding children there in about 2004 or so. As for the question of whether a JCB was left in the cutting for a period by Mr Beynon, it was not a bad place to leave a JCB at the far end of the cutting, well away from the road. These things do get stolen sometimes.

9.91. As for the dates on which clearance works were done, Mr Beynon himself had done a lot of the clearing. He would not keep a work diary for that sort of work. He and his wife are on the farm twice a day. Therefore they are on the farm on a daily basis. Mr Watson was not suggesting that they would be using the JCB on a daily basis, but they would certainly be on the farm every single day. Also Mr Beynon or his wife will have driven past the entrance to the cutting perhaps 4 times every single day. However Mr Watson accepted that such passing only takes a matter of seconds.

10. SUBMISSIONS FOR THE OBJECTOR

10.1. In normal circumstances a well-founded proposal for a new village green should be a unifying experience, which draws the community together with the common goal of demonstrating the long established enjoyment of the piece of land proposed for designation. This application however is not well-founded. It has been a divisive experience for the residents of Llanmorlais, which has generated an unusually large number of objectors. There are more local objectors than supporters. Mr and Mrs Beynon have been subject to very significant expense in dealing with the application. This follows after a string of appeals and public inquiries over the past few years, precipitated by the intensive lobbying of Mr Matthews in relation to essential improvements to their farm. The Beynons' appeals were successful, but also time consuming and expensive distractions from the business of farming. Small farms operate on low margins, and quite

reasonably seek to minimise their further costs, including in relation to this application.

10.2. The evidential basis of this application, having been tested at the Inquiry, has been proved to be weak. Any usage outside that permitted by the landowners at the time has been so small that it does not meet the tests required by the Act. Such use as has taken place over the past 20 years has not been as of right. It was true that the western end of the cutting had been open until fenced and gated by Mr Beynon, but the rest of the land had always been fenced or surrounded by a hedge of brambles and scrub. Furthermore it was generally known in the village that the landowner has not permitted access without permission. The Morlais Valley Shooting Club for example sought and was granted a licence to access the land by Sketty Park Estates. Also any conceivable as of right use of the land ended when Mr Beynon took over in December 2008, or at the very latest before 29th March 2009. The Applicant is wrong to equate the end of use as of right exclusively with the complete fencing of the land.

10.3. The burden of proof in an application such as this rests with the Applicant, to prove all the statutory ingredients of the relevant part of ***Section 15*** of the ***Commons Act***. In this case the relevant subsection is ***ss.(3)***. The date of the application was 29th March 2011, and the application claimed that the use of the land as of right ceased on 21st April 2009. Therefore the relevant 20 year period to be considered is 21st April 1989 to 21st April 2009.

10.4. The requirement of the statute for a significant number of the inhabitants of the relevant area to have used the land was considered by the High Court in the case of ***R (McAlpine) v Staffordshire County Council*** [2002] EWHC 76. Contrary to what the Applicant says in this case, ***McAlpine*** did not say that the evidence of 6 witnesses alone is sufficient to demonstrate that a significant number of people have used the land. In that case there were 16 witnesses, albeit 2 of them gave evidence that the Inspector decided was not particularly helpful. Of the remaining 14 witnesses, 6 gave evidence of the whole period. In that case it was not merely an issue about what those 6 witnesses themselves did; it was vital also to know what they saw others doing on the meadow over the 20 year period. Apparently in the ***McAlpine*** case each of the 6 witnesses gave compelling evidence about the number of other users they had seen and recognised on the proposed village green. The ***McAlpine*** case emphasised that the normal approach should be one of relying mainly on the oral evidence given under oath, and tested by cross-examination. The oral evidence which has been heard at the Inquiry in this present case therefore should carry much more weight than untested written statements.

10.5. Particular caution is urged in relation to any further evidence which may be adduced from the questionnaires submitted in support of the application, as they were in a standard form which was suggestive of the answers required, and can be read as starting almost from an assumption that a village green existed. The form also suggested the uses which were perceived to be

relevant, and automatically makes a default assumption that they had been carried out over the whole area of the land. Furthermore the form used provided no details of how regularly, or in what circumstances, any claimed use has taken place.

10.6. In this case only 6 witnesses gave oral evidence in support of the application and, after testing by cross-examination, it is important to note that not a single witness was able to cover the whole 20 year period, in terms of their own use as an inhabitant of Llanmorlais.

10.7. There is no doubt that the inhabitants of Llanmorlais have made *some* usage of the cutting over the relevant period. The evidence of Dr Upton for example seemed reasonable and balanced. He claimed occasional but limited use of the cutting, from late spring to early autumn over the period until 2006. He was consistent with his dates, based on the ages of his dogs, and was the only person seen in the cutting, apart from the permitted members of the shooting club, by Mr Sanders.

10.8. There is also little doubt that, as with any area of interesting ground close to the homes of young children and teenagers, there has been some use by children for playing, using swings (as witnessed twice in 20 years by Mr Adlam) and making dens. It is notable however that the only actual evidence of use by a teenager in the relevant 20 year period was given by Gawain Roberts. While there was a high level of uncertainty about the usage made of the cutting in particular in that evidence, it is significant that Mr Roberts, like most of the other witnesses for the Applicant, completely failed to notice the shooting hut on the land adjacent to the eastern end of the cutting.

10.9. Limited use without permission was demonstrated by Mr Adlam himself, although he was an Objector, with his annual collection of bean sticks for his father-in-law until 1997, and his single subsequent visit to the end of the track to inspect the den. This was very low level use, and anyway it is not clear that the collection of bean sticks represents a lawful activity or pastime, as it involves the removal of property without permission. (It is not claimed that this point would apply to blackberry picking).

10.10. It was apparent from the oral evidence that the two users claiming the most significant usage of the cutting were Mr Stock and Mr Matthews. It is notable that, in spite of their respective claims of extensive usage, neither appeared to have ever met the other while in the cutting, or to have seen the other use it. Equally surprising is the lack of supporting evidence for their claims by other users and residents.

10.11. Mr Stock relied particularly heavily on claimed usage over the period 1966 to 1986. This pre-dates the relevant period, and although it is not doubted

that the memories are valuable to Mr Stock, he was mistaken about the relevance of this period to the Inquiry, and the establishment of prescriptive rights. Any usage by his children and grandchildren after that time is not relevant to prescriptive rights, as they were not inhabitants of Llanmorlais. Mr Stock's own use of the cutting since 1986 was much less clear. His statements were effectively silent about such usage, relying almost exclusively on claims of use by his family. When given the opportunity to expand on his statement about his own usage, Mr Stock proved to be a notably unhelpful and sometimes aggressive witness.

10.12. Mr Stock's ambiguity made it very difficult to establish with any confidence how frequently he or others had used the cutting over the relevant period. If Mr Stock had used the cutting for anything other than a small number of times over the 20 year period, then he should certainly have been aware that there were two huts at the eastern end, notwithstanding the fibreglass parking attendant's hut being smaller than the quite large shooting hut. Mr Matthews was the only witness for the Applicant who seemed to be aware of this second hut, but even he was quite wrong about the time for which it was in place, as demonstrated by the subsequent evidence of David Thomas and Ron Sanders, who were clearly far more familiar with the huts. Mr Adlam did not recollect the second hut, but that is hardly surprising given his very limited use of the cutting.

10.13. Whether or not Mr Stock was told by Mrs Stock of the visit made to his home on 24th December 2008, while he was upstairs in bed, is not particularly important, although it was surprising to hear his claim that he had never been told about it. In any event he was fully aware of the change of circumstances, and before 16th January 2009 he, together with Mr Matthews, had instructed solicitors to send a notice about injunction proceedings to Mr Beynon, because of his fencing of the cutting. This of course was not in relation to the town or village green claim, but related to their car parking arrangements. What was clear and unambiguous is that any usage by Mr Stock stopped in November 2008, when he had a heart bypass operation.

10.14. Mr Matthews made the same mistake as Mr Stock, in relying on visits to the cutting by those who were not inhabitants of Llanmorlais, including his own visits before 1998, and those of his nieces, to attempt to build a case for prescriptive rights. The Applicant's case has simply not been supported by the evidence, and the case is not proved to the relevant standard.

10.15. For the purpose of demonstrating that 20 years use has *not* been established, it should be noted that of all the witnesses only Mr Matthews claims to have used the cutting in the period since Mr Beynon took over the land. Even the limited usage of the cutting claimed by Mr Matthews in the early part of 2009 is still very much open to question. He had a good recollection

of his visiting the eastern end of the cutting in January 2009, when he reported seeing the parked JCB in the correct location; he claimed no usage in April, and said he *"must have used it"* in February and March, and then had to guess what his usage was. His evidence varied from between 1 to 2 and 2 to 3 visits at different times as his evidence and cross-examination progressed. The details of these claimed uses were very vague, particularly compared with his recollection of the visit in January. Notably however he claimed that he was certain that the tracked JCB was not on the cutting, and that it was wrong to claim that it was. It would, he said, have been glaringly obvious to him. In fact the tracked machine was stored at the eastern end of the cutting from December 2008 to April 2009, for reasons explained during the Inquiry. Had Mr Matthews visited the cutting at that time he would certainly have seen it.

10.16. The application is also notable for a nearly complete lack of photographic or video evidence of usage over the claimed 20 year period, in spite of evidence that some users were keen photographers; for example Mr Stock's daughters, even though they were not inhabitants of Llanmorlais over the relevant period. Just a single photograph was provided in the evidence. That was taken in July 1998, at an unspecified location in the cutting, and is of Craig Williams, Mr Stock's grandson. Craig is not even an inhabitant of the neighbourhood, and therefore any use by him is not relevant to the Applicant's case. Some photographs post-dating the 20 year period were taken by Mr Matthews while trespassing on Mr Beynon's land.

10.17. The letters in support of the application are vague in the details and timing of the claimed use of the land. Consequently it can be said that there has not been the necessary appearance of continuity of a *"lawful sports and pastimes"* use of this land. Any claim which is essentially based on prescription must be continuous, without interruption. Use which is trivial or sporadic does not convey the outward appearance of use as of right. For presumed dedication to occur it should be obvious to the landowner that the land was in regular use by the local public. The evidence available here indicates that this has not been the case, and this failing in the application is particularly notable during the period in late 2008 to early 2009, after Mr Beynon had taken over the land.

10.18. The caselaw is helpful in relation to these low levels of usage. Use of land cannot be sufficient to satisfy the statutory tests unless the use is sufficient to carry to the mind of a reasonable person such as a landowner that a continuous right of enjoyment is being asserted, and ought to be resisted.

10.19. The evidence given at this Inquiry, together with the weight of support for the objection to this application from longstanding local residents, indicates very limited use of the land. Even those who with licence or permission were regular users of the land saw little evidence of other unlicensed use. Nor did Mr Peter Beynon, the farmer of the adjacent land over most of the relevant period, or his son Richard Beynon, the farmer of the adjacent land

over the remainder of the relevant period, and now the landowner. Nor did many of those residents whose homes overlook the land. An occasional use by a mere handful of local residents is not sufficient to amount to the assertion of a right for the local inhabitants generally.

10.20. In this case the experiences of Mr Sanders and Mr Adlam are analogous to how the level of usage would appear to a reasonable landowner who was on the spot, and their testimony was clearly that there was very limited evidence of any use. Furthermore, for the period after Mr Beynon took over the land, he was an owner who was spending a lot of time literally on the spot, clearing the land himself. He saw only one trespasser, Mr Stock's grandchild, and took immediate action to warn the trespasser off.

10.21. It is relevant in this case that the cutting was heavily screened for much of the year. Mr Matthews claimed for example that he could see Mr Adlam washing his car, but Mr Adlam did not it seems see him. In these circumstances the level of usage which needs to be established must inevitably be significantly higher than in the case of more open land, if the landowner is to be put in a position where he can have the opportunity to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. The claimed use of the cutting by Mr Matthews alone in the period between January and March 2009 cannot reasonably be said to reach this threshold.

10.22. In summary therefore, even the totality of the oral evidence and the submissions for the Applicant do not provide adequate evidence that the number of people using the land was actually anything more than occasional use by individuals as trespassers. Moreover the usage of the cutting over the period December 2008 to April 2009 was extremely limited, even compared with the low levels of usage over the rest of the relevant 20 year period. It was certainly insufficient for Mr Beynon to recognise that a use as of right was being asserted.

10.23. Given the linear nature of the cutting, it is important to consider, in the event that any rights might be considered to have been established, whether they would be as possible footpaths rather than use of the land for sports and pastimes. The importance of this point has been emphasised in several cases, notably ***R (Laing Homes Limited) v Buckinghamshire County Council*** [2003] 3 PLR 60***,*** and ***Oxfordshire County Council v Oxford City Council*** at first instance [2004] EWHC 12.

10.24. In the latter case the High Court Judge's comments were not in any way disagreed with in the later judgments of the Court of Appeal and the House of Lords.

10.25. In this present case practically all the evidence of claimed access relates to use of the track for walks with or without dogs. Although the Objector says that this usage was limited, and had never risen to a level at which prescriptive rights could be established, if a different conclusion were to be reached then it is suggested that this would be on the basis that any right established should be as a footpath, rather than as a right to use the land as a village green. Even in those circumstances the present application should therefore fail.

10.26. The question of what is meant by *"as of right"* use has been considered by the courts on a number of occasions. It is now settled law that the correct approach is that use as of right does not turn on the subjective beliefs of the users, but on how the matter would have appeared to the owner of the land.

10.27. In the case of this land Sketty Park Estates, owners of the land until December 2008, clearly demonstrated that use of the land was not as of right, by the granting of express permission to the locally popular Morlais Valley Shooting Club. It does not matter whether that permission was given orally or in writing. Established members of the local community would be likely to be aware of this position, but the fact that the shooting club felt the need to ask permission indicates that there were known to be restrictions on access to the land. The granting of permission to use the cutting by members of the shooting club means that any access to the cutting by those members, for example to walk or exercise dogs, does not contribute to the establishment of prescriptive rights. Although less obvious, it is at least arguable that in the case of Ron and Gloria Sanders, both of whom were members, when they asked Mr Matthews to exercise their gun dogs, that permission would extent to Mr Matthews in the event that he was using the cutting with the dogs.

10.28. It is the Objector's case that the application here was made outside the statutory period. Mr Beynon took over the land in December 2008, and started work to clear the cutting on 24th December 2008. Mr Beynon and Mr Watson had visited local residents living close to the land on that day, to advise them about the change of ownership, and to inform them about the nature of the clearance work that was being undertaken, and the repairs to the fencing. They also sought to clarify the arrangements for car parking on the land. There can have been no reasonable doubt after that date that, whatever the previous access had been, the circumstances had now changed, and that any access would no longer be as of right. Work to repair the fencing was started shortly afterwards, and continued throughout the winter; but having told the residents about the new circumstances, the date on which any unauthorised entry to the land without requiring secrecy ended should be 24th December 2008.

10.29. The workers engaged in clearing the land did not see any local residents using it at any time during the total of 2 working weeks during which they

were working on the land. If the claims of the Applicant were robust, and the land was being used on such a regular basis as they claim, it would have been expected that this would have continued, particularly if the use really was *"as of right"*. The only time any local resident was seen on the land between December 2008 and April 2009 was when Mr Beynon noticed Mr Stock's grandson taking cut wood from the land. Mr Beynon told him the land was private and asked him to leave. As the Inquiry heard, the incident was reported to the local police. As the requirement is that the use should have ended no more than 2 years prior to the date of the application, the application in this case was out of time, and should therefore fail.

11. DISCUSSION AND RECOMMENDATION

11.1. The application in this case was made under ***Subsection (3)*** of ***Section 15*** of the ***Commons Act 2006***. That section applies where:

> *"(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
> *(b) they 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). "*

The application was dated 28th March 2011, and stamped as received by the Council as Registration Authority on the following day, 29th March 2011. The latter date therefore is the 'time of the application'. The application states that use of the claimed land 'as of right' ceased on 21st April 2009, which was less than two years before the time of the application. 21st April 2009 is therefore the date from which the relevant 20 year period needs to be measured (backwards).

The Facts

11.2. In this case there was significant dispute in relation to some of the underlying factual background as to the history and extent of the use of this site over the relevant years. The Objectors correctly took the point that the law in this field puts the onus on an applicant to prove, and therefore justify, his case that the various aspects of the statutory criteria set out in ***Section 15(3)*** have in reality been met on the piece of land concerned.

11.3. To the extent that any of the facts were in dispute in this case, it is necessary to reach a judgment as to the disputed aspects of the evidence given, insofar as that evidence was relevant to the determination whether those statutory criteria for registration have been met or not.

11.4. Where there are any material differences, or questions over points of fact, the legal position is quite clear that they must be resolved by myself and the Registration Authority on the balance of probabilities, from the totality of the evidence available. In doing this one must also bear in mind the point, canvassed briefly at the Inquiry itself (and mentioned by me earlier in this Report) that more weight will (in principle) generally be accorded to evidence given in person, by witnesses who have been subjected to cross-examination, and questioning by me, than would necessarily be the case for written statements (particularly 'pro forma' statements), questionnaires and the like, which have not been subjected to any such opportunity of challenge.

11.5. I do not think that the nature of the evidence given to me in this case necessitates my setting out in my Report, in a formal, preliminary way, a series of specific 'findings of fact'. Rather, what I propose to do, before explaining my overall conclusions, is to consider individually the various particular aspects of the statutory test under ***Section 15(3)*** of the ***2006 Act***, and to assess how my conclusions (on the balance of probabilities) on the facts of this case relate to those aspects. It should not however be assumed that any facts I mention under one heading are only relevant to that heading. I have taken into account the totality of the underlying facts in reaching my conclusions under all the headings, and (of course) in reaching my overall conclusions as well.

"Locality" or "Neighbourhood within a Locality"

11.6. As is quite common, the initiating application and its supporting documentation in this case were not framed in a way which reflected a full appreciation of the rather particular interpretation which the courts have placed upon the terms *"locality"* and *"neighbourhood"*, as they appear in the statute. However, by the time of the Inquiry it was appreciated by all active participants that a 'locality' needs to be an area or division of the country known to the law, and a 'neighbourhood' (it seems), though the term is a (deliberately) vague one, must have some cohesiveness about it, rather than just being an area defined by arbitrary lines drawn on a map.

11.7. With those considerations in mind, it was a matter of no dispute between the parties that the only sensible 'locality', within which both the application site and the claimed users can be seen to be placed, is the Community area of Llanrhidian Higher (which has its own Community Council). However it was also a matter of agreement (as I understood the parties' positions) that this is a 'neighbourhood' case, as the Community

area is large, and covers several other villages and hamlets, as well as Llanmorlais, and a lot of open countryside around them.

11.8. The Applicant's considered view, as presented to the Inquiry, was that the appropriate 'neighbourhood' (within the locality of Llanrhidian Higher) to be considered is the village of Llanmorlais, and he produced for the Inquiry a plan, the logic of which he explained quite carefully, showing what he believed to be the boundaries of the village itself.

11.9. As I understood the position, at the Inquiry it was accepted for the principal objector (Mr Beynon) that it was appropriate to look at Llanmorlais as the relevant neighbourhood, but it was argued that the area to be considered should be the geographically much larger area which might have Llanmorlais as part of its postal address (or regard itself as associated with the village), including outlying farms and groups of houses. I understood the logic behind this to be that it would strengthen the Objector's argument that those who claimed to have used the application site were not a 'significant number' of the relevant inhabitants.

11.10. On this point I disagree with the Objector's argument. It was quite clear that the local people whose use was argued to justify the claim here were almost entirely from the nucleated small village of Llanmorlais itself, not the outlying areas. Mr Matthews the Applicant had made a sensible attempt to plot a boundary for the predominantly built part of the settlement of Llanmorlais, where people actually live. This certainly produced a very irregular-looking shape on the map, but that just reflects (as best the Applicant could) the reality of the layout of the village of Llanmorlais itself.

11.11. Accordingly I conclude, and so advise the Registration Authority, that the village of Llanmorlais as eventually defined by the Applicant, is the 'neighbourhood' to be considered for the purpose of this application. It entirely meets (in my view) the tests of cohesiveness, and of not just being an arbitrary 'line on the map'. People in Llanmorlais quite clearly know that this is the place where they live.

"Significant number of the inhabitants"
"lawful sports and pastimes on the land"
"for a period of at least 20 years"

11.12. Unusually, I intend to consider all of these three elements of the statutory criteria [***Section 15(3)*** of the ***Commons Act 2006***] together, as in this

particular case it seems to me that it would make the discussion somewhat artificial were I to take them all individually.

11.13. The railway on the application site ceased operating in the late 1950s, and the tracks were lifted fairly soon afterwards. It seems to be undisputed that there was never, until spring 2009, any kind of gate or barrier at the western end of the site, where the railway used to run through. It also seems probable from the evidence that during the period principally under consideration (spring 1989 – 2009) there was virtually no effective railway ***fencing*** remaining along most of the north side of the site, although there were a few remaining posts; and there was a significant amount of vegetation, albeit not a formal hedge as such. Indeed it seems highly likely from the evidence that for much of the time after the disappearance of the railway – i.e. going back much earlier than 1989 – there would not have been much surviving railway fencing on that side which actually functioned as such.

11.14. I find it entirely credible that during the period from the 1960s, through to the early part of the 1980s, about which Mr Stock in particular gave much evidence, his children, living right next to the disused line, would have used that land from time to time – possibly quite regularly – for play.

11.15. It seems clear from the aerial photograph from 1971 produced for the Inquiry that at that time the *"cutting"* was not particularly heavily vegetated, so it also seems credible that there might have been some play on this relatively open land by other children from the village during those earlier years. And clearly there was use of that kind by Mr Matthews himself, and his sisters, on some of their visits to their grandmother at No. 51 Station Road (albeit they were not actually local inhabitants at the time). I do not discount the possibility that local adults, particularly those living very close to the disused railway, might have walked on this land from time to time as well, or even held the occasional bonfire party there. I see no reason to disbelieve the evidence of Mr Stock, for example, about that sort of thing having happened during the earlier years after the railway's disappearance.

11.16. However Mr Stock's own children began leaving home for their adult lives from 1978, and I gained the strong impression from his evidence that some of his recollections, like the bonfire parties on the piece of land in front of his own house, were from the very early years of the period from the mid 1960s, about which he reminisced extensively.

11.17. A difficulty from the point of view of the Applicant's case arises from the undoubted fact that the land on the application site became very much more

heavily vegetated over the years, with the banks of the cutting becoming heavily covered with trees and scrub. This was clear from the evidence of numerous witnesses, and also from the aerial photography which was produced from various years, notably 1986, 1991 and 2008.

11.18. There was some reference from several witnesses to occasional clearance work by Sketty Park Estates during their period of ownership, but it was not clear how extensive that ever was, or whether it ever did anything much more than keeping open the route along the actual track bed of the old railway. It is clear that the estate never in any major way cleared the trees and scrub from the banks. But it also seems clear, from the evidence from various sources, that the track bed of the old railway itself always remained passable as a route, even if it might not always have been a particularly easy passage at some times of year, for considerable parts of the time under consideration.

11.19. My conclusion from the evidence overall is that what I have just set out in the preceding paragraph represents a good summary of what the application site was like for much of the critical period from Spring 1989 to Spring 2009.

11.20. I do not doubt that during this period some local people, such as Mr Stock and Dr Upton, for example, would occasionally walk up the old track on the site, with or without dogs. Mr Matthews also started doing so, although not very frequently, from about 1999/2000 onwards, after he had acquired his late grandmother's house – although he says the frequency of his walks later increased somewhat.

11.21. One striking feature of the evidence of the Applicant's witnesses was how seldom (during the relevant 20 year period) any of them recalled ever meeting or encountering anyone else on their occasional walks up the track on the site – which everyone agrees was a 'dead end', and did not lead on to other usable footpaths or destinations. The only people (during this period) having permission, or a right, to go any further, and use the track as a practical through route leading somewhere, appear to have been the Morlais Valley Shooting Club, and farming members of the Beynon family.

11.22. This may explain why (former) members of the Shooting Club say that they seldom (or never) saw anyone else when they used the cutting over the years. I should say that I do not doubt that occasionally, even in the relatively 'overgrown' relevant years from 1989 to 2009, children or youths will have made forays on to the application land, and played, or made

'dens'. A notable feature of much (not all) of the evidence of this sort of use during the relevant period was however that it concerned use by visiting children who do not actually live in Llanmorlais, even if they have relations living there. Even leaving aside that point, however, my conclusion on the evidence overall is that such use during the relevant period was so sporadic and minor that it could not reasonably have conveyed to an observant landowner that a right to use the land generally for 'sports and pastimes' was being claimed on behalf of the local community.

11.23. As far as local adults (or indeed children) walking along the old track is concerned, an interesting and somewhat esoteric point was briefly raised at the inquiry as to whether, when Mr Matthews took the dogs of his neighbours Mr and Mrs Sanders (as he apparently did with some element of regularity) for a walk up the cutting, doing that in some way partook of the permission which Mr and Mrs Sanders themselves had to walk there, with their dogs, as members of the Shooting Club.

11.24. It is not I think necessary for me to resolve that particular point. My conclusion in any event (even if Mr Matthews' element of it was not with the benefit of vicarious 'permission') is that the walking on the land by local people during the relevant period was so relatively infrequent that it could only properly be regarded as trivial and sporadic. It was not a level of use to convey to a landowner that a right was being claimed.

11.25. Furthermore, it seems to me from the evidence that in any event such walking along the track by local (non-shooting) people as there was in the relevant period had very much the character of following a linear route along the old track bed, rather than use of the surface of the land as a whole, albeit that this route did not lead to a place from which further progress could be made. It was, for practical purposes, a 'dead-end' route for those not engaged in shooting or farming.

11.26. Caselaw tells Registration Authorities, and Inspectors such as myself, to be particularly careful to avoid treating use of what might be linear 'footpath' routes (and activities incidental to such use) as representing elements of a 'lawful spots and pastimes' use of a wider area of land as a whole.

11.27. It seems to me to be a least strongly arguable that such limited evidence of walking in the cutting as there was for the relevant years had more the character of a footpath type use than 'lawful sports and pastimes on the land' as a whole. Any potential public footpath claim is of course entirely

outside the scope of this Inquiry, and I make no comment at all on its possible soundness.

11.28. I also make the above remarks in full knowledge and appreciation of the view that the House of Lords took in the well-known 'Trap Grounds' case (***Oxford City Council v Oxfordshire County Council*** [2006] UKHL 25). Scrubland, even if impenetrable in large parts, can still be registrable as a whole under the ***Commons Act***, if local people use it generally for 'lawful sports and pastimes' recreation, on the parts which are penetrable. Not every square inch must be in active use. I do not however consider that this is an appropriate analogy for the present case, where such (very limited) use as there was during the relevant period consisted almost entirely of walking a single linear route. This conclusion is not affected by the trivial and sporadic amount of 'play' type use by locally resident children, possibly just off that linear route, which I find took place over the relevant years.

11.29. It follows therefore that I do not find that a significant number of the inhabitants of Llanmorlais indulged in lawful sports and pastimes on the application land for the relevant period of 20 years. This means that in my view the present application must fail. However it is appropriate that I should also say a few words about the other two aspects of the statutory criteria which generated some discussion at the Inquiry.

"As of right"

11.30. The evidence was entirely clear that, from the disappearance of the active railway in the 1950s through to the appearance of Mr Beynon's new fencing and gate in Spring 2009, there was absolutely no practical impediment to entry to the site from its western end, and probably also along large parts of its northern boundary, at least until dense vegetation grew up. There were never any prohibitory signs. Even when the gate appeared in April 2009, it was left unlocked, and there were still no signs.

11.31. Caselaw tells us that *"as of right"* means *"as <u>if</u> of right*", and implies a situation where people do things as if they had the right to do so, even though in fact they did not. I have no doubt, as far as the relevant period (1989 – 2009) was concerned, those local people who did 'trespass' on this land did so as if they had the right to do so. There was no reason for them not to do so; for them it would seem to be just an abandoned piece of railway track. It is simply that, as I have explained at length above, I find on the balance of the evidence that they did not *in fact* do so in the relevant period (1989 – 2009), either in significant numbers, or to any extent which can be regarded as significant (as opposed to trivial or sporadic).

11.32. However those few who did enter on the land certainly did so in an 'as of right' manner, in my opinion.

"Application is made within the period of two years [from] the cessation [of use]"

11.33. This aspect of the statutory criteria in fact attracted a considerable amount of debate and discussion at the Inquiry, and this, and evidence about it, took up a not insignificant proportion of the overall inquiry time.

11.34. The point pursued on behalf of the principal objector was (in brief) that Mr Beynon's partial clearance works, and preparatory fencing work, began around the turn of the year 2008/9, and that turn of events, together with his attempts to notify local people of these changes, must have told local people that they were no longer allowed to go on the former railway land.

11.35. Alternatively, or additionally, it was said that work for the fencing and new gateway at the western end was done using a technique which involved wire being stretched across the intended gateway position for a few days, before the new wire was cut and the gate inserted. According to Mr Watson, who was not personally present, based on a *works diary"*, the first part of that exercise was *"thought to"* be done on 3rd or 7th April 2009. Mr Watson, again saying what he understood had happened, rather than giving direct personal evidence, believed the new gate was installed on 16th April 2009. The date cited in the application for 'cessation' of use had been 21st April 2009. The suggestion therefore was that the Applicant had proposed a date that was too late, and so failed to meet the statutory criteria in that respect.

11.36. I found these particular arguments on behalf of the principal objector to be lacking in merit. There does not seem to me (at least from the evidence which I received) to have been anything about the visits to a few local people that were apparently made on and around Christmas Even 2008 which would have told the inhabitants of Llanmorlais that any use of this land for 'lawful sports and pastimes' would no longer be 'as of right'.

11.37. Delivering the news that there was a new long leaseholder, that the fencing was going to be repaired/reinstated, and that there would be some clearance work etc., would not in my view send an inherently obvious and clear message that any 'as of right' use for lawful sports and pastimes was being challenged and brought to an end.

11.38. The further fact that, even when then land was newly fenced and gated, the gates were apparently left unlocked for a prolonged period, tends to lend retrospective support to that view. Also, it appears to be established through the caselaw that the intended (or actual) presence of grazing animals on a piece of land is not necessarily inconsistent with the accrual of 'town or village green status'. However, as I have indicated above, on my view of the balance of the evidence, there had not in fact been use for 'lawful sports and pastimes' by a significant number of Llanmorlais inhabitants during the relevant 20 year period. So the fact that I find in favour of the Applicant's arguments on this point about the 24th December 2008 'notification' does not alter my overall conclusion.

11.39. In relation to the above matter, and even more so the argument about the detail of the fencing operation as apparently finished in April 2008, it was striking that Mr Beynon, the Principal Objector, was in the Inquiry room during most of the inquiry (as indeed was Mrs Beynon), but chose not to give any evidence at the witness table. Instead it was left to Mr Watson, who had not been personally present, to say what he thought, on the information he had been able to glean, had probably happened, along the lines which I have summarised in my paragraph 11.35 above.

11.40. Even if what Mr Watson understood was wholly factually accurate, it did not seem to me that what he reported represented the kind of clear challenge to any 'lawful sports and pastimes' users that he thought it did. On his own account, the particular method he described of installing fencing with an intended gate in it is a standard method of carrying out such work. The fact that in carrying out such work a few strands of wire were temporarily stretched across the (previously open) intended gateway position does not to my mind evince on balance a clear intention to forbid entry to anyone who had been entering 'as of right' before, given that those strands were in fact shortly removed and replaced by an openable farm-type gate. This interruption would have been too inconsequential and trivial, in my judgment, to have made the crucial difference.

11.41. Nevertheless the Applicant accepts that by 21st April 2009 (the date by which he believes all the fencing and gating works had been completed) it had become apparent to local people that any 'as of right' use was being challenged. Mr Watson believes that work was completed by 16th April 2009.

11.42. I have to say that, in my experience, it is not at all uncommon for the precise date on which any challenge to local people using a piece of land took place itself to be a subject of dispute, which can only be resolved, on the balance of probabilities, by hearing and weighing the evidence from all

sides. In this case the application was 'logged in' by the Registration Authority on 29th March 2011. Under the provisions of ***Section 15(3)*** of the ***Commons Act 2006*** it would be inherently open to the Registration Authority, in respect of an application made on that date, to register land whose 'as of right' use by local inhabitants had been brought to an end on any date no earlier than 29th March 2009.

11.43. It seems to me, as a matter of fairness and justice, and the proper administration of the law, that, had the evidence led on balance to a conclusion that 'as of right' use had in fact been brought to an end on one of the days between 29th March and 21st April 2009, the Applicant would have had a very strong case to seek a minor amendment to his application to reflect that, and that such a variation could have been allowed by the Registration Authority without any material unfairness or injustice to the Objector(s).

11.44. As it is, I am not persuaded on the balance of the evidence that there is any more appropriate day than 21st April 2009 as the date from which the relevant 20 year period is to be measured back. However, once again my conclusion in favour of the Applicant's argument on this particular point does not overcome my more fundamental conclusion that the evidence did not support the view that a significant number of Llanmorlais inhabitants had used the land for 'lawful sports and pastimes' over the relevant 20 years.

11.45. I conclude, on balance, that what took place over those years was no more than sporadic and very intermittent 'trespass' by a small number of individuals (even if it might not have felt like 'trespass', on a disused railway line such as this). And I further conclude that the great majority of any such use as did take place was more akin to the use of a linear route from A to B (and back to A again) than use of 'the land' of the application site as a whole.

FINAL CONCLUSION AND RECOMMENDATION

11.46. It follows that my conclusion is that the Applicant has not made out his case for registration of the application side under ***Section 15(3)*** of the ***Commons Act***.

11.47. My recommendation to the Council as Registration Authority therefore is that ***no part*** of the land to which this application relates should be added to the statutory Register of Town or Village Greens, because on the evidence it does not meet the criteria required for such registration, for the reasons explained in this Report.

ALUN ALESBURY
18th July 2014

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

APPENDIX I

LIST OF APPEARANCES AT THE INQUIRY

FOR THE APPLICANT

Mr (David) James Matthews, the Applicant, of 51 Station Road, Llanmorlais

He gave evidence himself, and called:

Mr Ioan Stock, of 55 Station Road, Llanmorlais

Mrs Susan Hughes-Davies, of 47 Station Road, Llanmorlais

Dr Neil Upton, of 33 Station Road, Llanmorlais

Mrs Carolyn Morris, of 58 Station Road, Llanmorlais

Mr Gawain Roberts, of 15 Pencaerfenni Lane, Crofty

FOR THE PRINCIPAL OBJECTOR (Mr Richard Beynon)

Mr Alan Watson, Chartered Engineer, of Alan Watson Associates,
Planning and Environmental Consultants,
Uplands Court, 134 Eaton Crescent,
Uplands, Swansea SA1 4QR

He gave evidence himself, and called:

Mr David Thomas, of 28 Station Road, Llanmorlais

Mr Jeffery Adlam, of 53 Station Road, Llanmorlais

Mr Ron Sanders, of 57 Station Road, Llanmorlais

Mr Johnny Francis, of 5 Station Road, Llanmorlais

APPENDIX II

LIST OF NEW DOCUMENTS PRODUCED TO THE INQUIRY

N.B. This (intentionally brief) list does not include the original application and supporting documentation, the original objections, or any material submitted by the parties or others prior to the issue of Directions for the Inquiry. It also excludes the material contained in the prepared bundles of documents produced for the purpose of the Inquiry on behalf of the Applicant and the Principal Objector, and provided to the Registration Authority (and me) as complete bundles.

FOR THE APPLICANT:

List of oral (and unavailable) witnesses
Coloured version of Mr Stock's aerial photograph No. 5

FOR THE PRINCIPAL OBJECTOR:

'Summary Proof' of Evidence of Alan Watson
Closing Submissions for Principal Objector
'Circular' headed 'Village Green Status for …' [put in by Mr Francis]