IN THE MATTER OF:

AN APPLICATION TO REGISTER LAND KNOWN AS "CORONATION GARDENS" AT EAST LANGTON, LEICESTERSHIRE, AS A TOWN OR VILLAGE GREEN PURSUANT TO SECTION 15 OF THE COMMONS ACT 2006

REPORT

OF ROWENA MEAGER (INSPECTOR)

Dated 26 March 2016

Leicestershire County Council

County Hall

Glenfield

Leicestershire

LE3 8RA

INTRODUCTION

1. I have prepared this report following an application dated 5 November 2014, received on 6 November 2014 ("the Application") by Leicestershire County Council ("the Council"), as Commons Registration Authority, to register land known as Coronation Gardens in the village of East Langton ("the Application Land") as a new town or village green ("TVG") pursuant to section 15(2) of the Commons Act 2006 ("the 2006 Act").

2. The Application was made by East Langton Parish Council ("ELPC") ("the Applicant"). Given that the Application is made under section 15(2) of the Act the relevant period of use is the twenty years immediately preceding the Application; 5 November 1994 to 5 November 2014 ("the Application Period").

3. Notice of the Application was displayed and published / advertised in accordance with the procedure laid down by regulation 5 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 ("the 2007 Regulations") by a notice dated 18 December 2014. The Application was advertised in the public notices section of the Harborough Mail on 18 December 2014.

4. The Application Land is co-owned by Anthony Hignett, Piers Marlow-Thomas, Simon Marlow-Thomas and Vanessa Peach, title to which is registered at HM Land Registry under Title No LT313826. An Objection Statement was sent to the Council under cover of a letter dated 30 January 2015 from Wilsons Solicitors LLP on behalf of the co-owners ("the Objector") together with witness statements by all four co-owners.

5. The grounds for objection were broadly that the Application had not been made in accordance with the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 ("the 2007 Regulations"), there had been a trigger event in accordance with section 15C and Schedule 1A(4) and / or (7) of the 2006 Act and no terminating event had occurred, use by the local inhabitants was permissive and could not, therefore, have been use as of right, use has not been by a significant number of the inhabitants of the locality and there has not been use of sufficient quantum over the Application Period.

6. The Application was the subject of a non-statutory public inquiry ("the Inquiry") over which I presided beginning on Monday 23 November 2015 and concluding on Tuesday 24 November 2015. At the Inquiry the Applicant was represented by Mr Charles Streeten of Counsel and the Objector was represented by Mr Piers Marlow-Thomas.

THE APPLICATION LAND

7. The Application Land is in the heart of East Langton. It is broadly rectangular in shape, measuring, very approximately, 55 feet in width (ie the width of road frontage) and 30 odd feet in depth (from the front to the rear of the site). It is elevated above the level of the adjacent pavement and is laid out as a formal garden with stone steps, pathways and a lawned area. Until around 2002/3 there were benches to sit on. The Application Land has a frontage onto Main Street and is flanked by houses either side.

8. The Application Land was laid out as a formal garden in 1953 by Colonel Hignett (the then owner of the land) to commemorate the Queen's coronation. There is a plaque on the Application Land that says "*This garden was laid out in commemoration of the coronation of Her*

Majesty Queen Elizabeth II, 1953, in which year East Langton was placed first in the Leicestershire Village Competition for the best kept village".

9. In the summer of 2014 an access way, approximately 16.5 feet in width, was created across the full depth of the northernmost section of the Application Land to provide vehicular access to land behind the Application Land in the ownership of the Objector. To that extent the Application Land changed towards the very end of the Application Period.

THE APPLICATION TO REGISTER A TVG

10. As noted in the foregoing the Application is made pursuant to section 15(2) of the 2006 Act. The substance of the relevant parts of section 15 of the 2006 Act are set out below:

*"**15 Registration of greens***

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

(2) This subsection applies where –

(a) a significant number of the inhabitants of 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.

(3) …

(4) …".

11. In order for an applicant to succeed in an application to have land registered as a new TVG the Council must be satisfied that each and every part of the foregoing statutory test is met.

THE STATUTORY TEST

… a significant number …

12. "Significant" does not mean that a considerable or substantial number of people must have made TVG type use of the land. It simply means that the number of people using the land in question in a qualifying manner has to have been sufficient to indicate to the landowner that the land has been in general use by the local community for informal recreation as distinct from occasional use by individuals as trespassers[1].

13. It is not necessary for the recreational users to come predominantly from the relevant locality or neighbourhood[2]. Nor is it necessary for there to be a spread of users coming from across the entirety of the claimed locality or neighbourhood. Vos J in *Paddico (267) Limited v Kirklees Metropolitan Council & Others*[3] was unimpressed by, and rejected, a contention that an inadequate spread of users throughout a claimed locality would be fatal to an application for registration.

14. However, only recreational use by members of the public from the relevant locality or neighbourhood will contribute to the "significant number" test. In other words, use by people that do not come from within the claimed locality or neighbourhood does not support an

[1] *R (McAlpine) v Staffordshire County Council* [2002] EWHC 76 (Admin), para [77].
[2] *R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxford County Council* [2010] EWHC 530.
[3] [2011] EWHC 1606 (Ch), para [106(i)].

application for registration of a new TVG and should be discounted to the extent that evidence of such use is adduced. The statutory test is clear that use must be by "a significant number of the inhabitants of any locality or of any neighbourhood within a locality". Those components of the test must be read together.

… of the inhabitants of any locality …

15. A "locality" must be an area known to the law such as a borough, parish or manor[4].

… or of any neighbourhood within a locality …

16. A "neighbourhood" need not be a recognised administrative unit or an area that is known to the law (in other words it does not have to meet the same stringent criteria that applies to establishing a locality). A housing estate can be a neighbourhood[5], as can a single road[6]. However, a neighbourhood cannot be just any area drawn on a map. It has generally been accepted that it must have some degree of cohesiveness[7].

… have indulged as of right …

17. User "as of right" means user that has been without force, without secrecy and without permission (traditionally referred to by lawyers as *nec vi, nec clam, nec precario*). The basis for the creation of rights through such user is that the landowner has acquiesced in the exercise of the

[4] *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931, 937.
[5] *R (McAlpine) v Staffordshire County Council* [2002] EWHC 76 (Admin).
[6] *R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxford County Council* [2010] EWHC 530 (*Warneford Meadow*).
[7] *R (McAlpine) v Staffordshire County Council* [2002] EWHC 76 (Admin).

right claimed (in the case of applications to register a new TVG the period of user required is twenty years)[8] and the user can rely upon their long use to support a claim to the right enjoyed.

18. The landowner cannot, of course, be regarded as having acquiesced in user unless that user would appear to the reasonable landowner to be an assertion of the right claimed[9]. If the user is by force, is secret, or is by permission, (ie *vi, clam*, or *precario*) it will not have the appearance to the reasonable landowner of the assertion of a legal right to use the land.

Force

19. Force is not limited to physical force. User is by force not only if it involves the breaking down of fences or gates but also if it is user that is contentious or persisted in under protest (including in the face of prohibitory signage) from the landowner[10]. However, 'perpetual warfare' between landowner and users is not necessary[11] to prove contentiousness.

Stealth

20. User that is secret or by stealth will not constitute user as of right because such use would not come to the attention of the landowner and he could not, therefore, be said to have acquiesced in such use.

[8] *Dalton v Angus & Co* (1881) 6 App Cas 740, 773.
[9] *R (Lewis) v Redcar & Cleveland Borough Council* [2009] 1 WLR 1461.
[10] *Smith v Brudenell-Bruce* [2002] 2 P & CR 4.
[11] *Cheltenham Builders,* at para [71].

Permission

21. Use that is permissive is 'by right' and is, therefore, not capable of being 'as of right', a point reinforced by the recent decision of the Supreme Court in *R (on the application of Barkas) v North Yorkshire County Council and Another* [2014] UKSC 31. In *Barkas* lengthy consideration was given to the earlier decision of the House of Lords in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 that appeared to accept that possibility that even use that on the face of it might appear to be permissive was also capable of constituting use 'as of right'.

Concurrent use by landowner

22. In circumstances where there has been concurrent use by the landowner it is well established that use by the landowner alongside use by recreational users will not automatically prevent land qualifying for registration as a new TVG if the co-existing uses are not incompatible with each other[12]. It is accepted that low level agricultural use of application land is not *necessarily* inconsistent with use of the land for lawful sports and pastimes[13].

… in lawful sports and pastimes …

23. The term "lawful sports and pastimes" is a composite phrase that includes informal recreation such as walking, with or without dogs,

[12] *R (Lewis) v Redcar & Cleveland Borough Council* [2010] 2 AC 70.
[13] *Oxfordshire, per* Lord Hoffmann at para 57; *Redcar, per Lord Walker* at para 28.

and children playing[14] and, indeed, any activity that can properly be called a sport or pastime. Lord Hoffmann in *Sunningwell* expressly agreed with what had been said in *R (Steed) v Suffolk County Council* (1995) 70 P & CR 487 about dog walking and playing with children being in modern life the kind of informal recreation which may be the main function of a village green.

…on the land …

24. It is not necessary for the whole of the land to have been used for lawful sports and pastimes but only that the land has been used in the appropriate manner. There may be land, for example, that has a pond on it or, as in *Oxfordshire*, that is not wholly accessible for recreational use. The fact that some of the application land might have been inaccessible for use for lawful sports and pastimes does not preclude registration. It is not necessary for a registration authority to be satisfied that every square foot of a piece of land the subject of an application has been used.

… for a period of at least twenty years …

25. In the case of an application under section 15(2) of the 2006 Act the relevant period is the twenty year period immediately preceding the application, the final day of the period being that upon which the application is made.

[14] *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335, 356F-357E.

PROCEDURAL MATTERS

26. The burden of proof that the Application Land meets the statutory criteria for registration as a new TVG lies firmly with the Applicant. It is no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be "*properly and strictly proved*"[15]. That means that if any part of the statutory test is not satisfied, an application must fail as a matter of law. The standard of proof is the usual civil standard of proof of the balance of probabilities.

27. An application will not be defeated by drafting errors or defects in the application form[16]. It is the substance of an application, supported by evidence, that dictates whether an application is successful or not. The issue for the Commons Registration Authority is whether or not the Application Land has become a new TVG by virtue of all the components of the statutory test being met.

EVIDENCE FOR THE APPLICANT GIVEN ORALLY

28. Having set out briefly in the foregoing the generality of the law as it relates to the test for registration of a new TVG I now turn to consider the witness evidence produced on behalf of the Applicant. I will deal first with the witness evidence given orally to the public inquiry. Whilst the Objector had initially indicated that there would be no cross examination of witnesses, in the event the Applicant's witnesses were all asked some questions to which I will refer hereafter as cross examination.

[15] *R v Suffolk County Council, ex parte Steed* (1996) 75 P & CR 102, 111, *per* Pill LJ, approved by Lord Bingham in *R (Beresford) v Sunderland City Council*, para [2].
[16] *Oxfordshire County Council v Oxford City Council & Another* [2006] 2 AC 674.

29. I will summarise the evidence that I heard in the order in which the Applicant's witnesses gave their evidence. However, what follows is not intended to be a *verbatim* account, or even necessarily a complete account of the evidence given to the Inquiry. It is simply a précis of some of the more salient issues dealt with in evidence, particularly those that form the basis of my findings of fact. The précis is simply intended to be a sufficient account of the evidence for the Council to understand the reasons and reasoning behind my conclusions.

Matthew Weare

30. Mr Weare produced an evidence questionnaire ("EQ") dated 17 October 2015, a witness statement ("WS") dated 15 June 2015 and a letter dated 10 September 2014. He has lived in East Langton since 1992, first at 2 Stable Cottages (directly opposite the Application Land) from 1992 to 2000, then for 10 years at The Hollies and since then at Autumn House, all on Main Street.

31. In his written evidence Mr Weare said that his family has enjoyed making regular use of the Application Land. He referred to his children playing there when they were younger but more recently using it as a meeting place with friends. He said that he would meet friends and villagers there informally. His EQ makes reference to occasional picnics and meeting for dog walks.

32. There was no real elaboration of Mr Weare's or his family's use of the Application Land during his oral evidence. I do not know what age his children are or if he has a dog. The ages of his children might have assisted in establishing whether their use has continued throughout the whole 20 years but without having been told so for certain, it seems to me to be rather doubtful unless Mr Weare has a number of children

whose ages are spread out. He said of other people's use that they would meet there, children would play, sometimes walkers would stop there to eat their sandwiches. He said walkers would be more likely to appear at weekends and locals would use the Application Land almost daily in the summer months.

33. Mr Weare was asked if he knew who maintained the Application Land. He said that since Michael Fulford had moved to the village (he lives in Ruth Cottage next to the Application Land) he has mowed it. Prior to that Robert Gilbert mowed it.

34. Mr Weare was asked if he recalled access to the Application Land being prevented in 2004, 2008 and 2014. He said that he did not recall that. He said he had never been given permission to use the Application Land and he thought it belonged to the village. However, when it was put to him that the Objector regarded him as a trespasser he accepted that he was.

Mark Williams

35. Mr Williams produced an EQ dated 26 October 2015 and a WS (jointly with his wife, Jane) dated 8 June 2015. He has lived at The White House, Main Street, East Langton, opposite the Application Land, since June 1996. He has three children born in 1997, 1999 and 2002.

36. He said his children used the Application Land from a very early age for playing. They did so regularly although he said that now he (and presumably his family) use the land infrequently. I am not clear about the period during which his family more regularly used the Application Land.

37. He said he has also seen use by others, some from the village and others walking through but who stop for a few minutes to take a drink or have a picnic. Particularly in the summer there have been children there. Recently he has seen skateboarding and he said when there were benches people would sit and talk and have a picnic. He confirmed that there was generally more activity in the summer and people would use the whole of the Application Land. He said it is too small to divide up into sections by reference to use.

38. Mr Williams confirmed that Michael Fulford of Ruth Cottage regularly maintains the Application Land, strimming, mowing and weeding. He also recalls that there were benches that Mrs Marlow-Thomas (Colonel Hignett's daughter) would have brought in during the winter but that were eventually not put back out as, according to Simon Marlow-Thomas, their state had deteriorated.

39. Mr Williams was asked if he recalled works and the Application Land being cordoned off (or part of it) in 2004, 2008 and 2014. He said he had no recollection of land being cordoned off in 2004. He did recall seeing a tape cordon around part of the land (not the whole land) at some point and thought it might have been 2008. He could not recall whether he ignored the cordon or not. He definitely recalled the works to create the access way in 2014. He said the area was closed off for a week or possibly longer. He said it could have been 2 or 3 weeks but that he was not sure. He did not breach the cordon.

Eunice Loney

40. Mrs Loney produced a WS dated 17 June 2015. She has lived at The Old Stables, East Langton, for over 27 years. She said it is 2 minutes from the Application Land which she passes most days. Asked in what circumstances she would pass the land she said that between 2001 and

2012 they had a dog and would walk it round that way probably twice a day and would see someone with a dog or a child. She also referred to the fact that the house opposite did not have a garden and the children could use the Application Land.

41. Mrs Loney referred to the Application Land as having been a meeting point over the years where neighbours would meet and chat and watch the children play. She said her neighbours now take their grandchildren to play there. She confirmed that Michael Fulford had always maintained it. She had not seen anyone else maintaining it.

42. Mrs Loney and her husband knew Colonel Hignett and his daughter Angela Marlow-Thomas quite well. She recalls them being very proud of the gardens that Mrs Loney said they had been able to give to the village.

43. Mrs Loney was asked if she could recall works and fencing in 2004, 2008 and 2014. She had no recollection of works in 2004 or 2008. She did recall the works in 2014 but was away, she thought, while the works were actually taking place. She thought that by the time they returned from holiday the wall had been removed and the vehicular gate installed and she had no recollection of fencing.

Mike Vybiral

44. Mr Vybiral produced an EQ dated 23 October 2015, a WS dated 28 June 2015 and a letter dated 11 November 2014. He lives at Logan Cottage, Grange Lane, East Langton, and has done so for 35 years.

45. His evidence was that his family has used the Application Land irregularly since 1980. His son used it for playing and socialising from 1982 to 1998 when he left the village, more in the summer than the

winter. Mr Vybiral said that he has used the garden occasionally since 1980 but that he regularly walks or drives past and often sees children playing there. He also said that walkers from further afield would sometimes stop and eat sandwiches there.

46. Mr Vybiral said in his WS that in the early years of his residency in the village he was consistently told by local residents that the Application Land was given as a gift to the village by Colonel Hignett in around 1953. He told the Inquiry that he understood Michael Fulford maintained the Application Land.

47. Of the works referred to by the Objector Mr Vybiral recalled nothing of the 2004 and 2008 works. His wife first told him about the 2014 works and he then went to have a look. He said there was a tape cordon that he thought was there for no more than a week. He said he thought he had crossed the tape to have a look.

Michael Fulford

48. Mr Fulford produced an EQ dated 12 October 2015 and a WS dated 9 June 2015. He has lived at Ruth Cottage, Main Street, East Langton, since 1992. His home is next door to the Application Land and Mr Fulford is the person that has maintained the Application Land since moving to East Langton. He has mowed the grass and kept the weeds down. He said that Mrs Marlow-Thomas used to compliment him on his efforts and thanked him for keeping the land tidy.

49. Mr Fulford said in his WS that apart from a small amount of construction work that was carried out in 2004 he is the only person that has maintained the Application Land apart from occasional villager help. Mr Fulford also confirmed that there had been benches on the Application Land in the summer and that they would be taken

in by Mrs Marlow-Thomas in the winter. However, in 2003 the benches were not returned.

50. Other than Mr Fulford's use of the land for gardening he said he used the land for socialising. His EQ says he uses the land weekly. Presumably some or much of that use is referable to his maintaining the land. I was not told how often he goes onto the land for the purposes of socialising. His evidence was that walkers who were not local would sometimes rest there and that the land was used by local children for playing regularly but more in the summer than the winter.

51. Mr Fulford was asked more about the works in 2004. He said the works were carried out where the access way now is. There were slabs replaced and a part of the wall repaired. There was red and white tape around the area where the works were taking place, not the whole of the Application Land. That tape was in place for around 1 or 2 weeks he thought. Mr Fulford was asked whether he thought there was a change in the way people used the land while the tape was in place. He said he could not recall but that if it was winter time it would not be used much anyway.

52. Mr Fulford had no recollection of the works in 2008. He does recall the 2014 works. He certainly recalled there being tape across the front of those works but could not remember if the tape went back towards the rear boundary. However, when he was taken to a photograph of the works that showed the area taped off he agreed that tape did go from the front to the rear of the area. He thought the tape was in place for a couple of weeks.

Anne Abbott

53. Mrs Abbott produced an EQ dated 20 October 2015, a WS dated 12 June 2015 and a letter (jointly with her husband, Steven Abbott) dated 6 September 2014. She has lived at Nora Cottage West, Back Lane, East Langton, for 39 years. Her evidence was that she used the Application Land for sitting, relaxing, talking to neighbours and walking her cats. She used it about once a month. She had occasionally helped Michael Fulford to maintain the garden.

54. Mrs Abbott's evidence was that she saw other people using the land. Sometimes local people (about 75 % she estimated) but also walkers passing through the village and mothers and children from other villages.

55. Mrs Abbott was asked about the various works to the land. She recalls that there were two occasions when there was some work to slabs and pointing of the wall. She did not recall seeing any area cordoned off. She remembered the 2014 works and there being tape across the frontage. She did not recall the tape from the front to back of the site but accepted, when taken to a photograph, that it was taped off. However, she said that tape was not there for long. She thought it had gone by the next day.

56. Mrs Abbott also referred to an occasion in around 1992 when Colonel Hignett's land agent (Fishers) put up some fence posts with string between them. They were removed on the same day.

Clare Freer

57. Mrs Freer produced an EQ dated 24 October 2015 and a WS dated 2 June 2015. She also produced some photographs showing children

playing and picnicking on the Application Land on 31 July 2015 (outside the Application Period) and children and an adult playing on and tidying the Application Land in the summer of 2005. Mrs Abbott lives at The Forge, Main Street, East Langton, (adjacent to the Application Land) and has done so since 1997.

58. Mrs Freer said she used the land regularly, most weeks, to meet with neighbours and chat, to read and to tidy the hedge. She said her children would meet their friends there, play tag and ball games and would draw, do their homework and climb trees. She said others used the garden for rest and recreation too. She said she saw people there regularly, certainly weekly but daily in the summer.

59. Mrs Freer confirmed that she had seen Michael Fulford maintaining the land. She had never seen any staff of the Marlow-Thomas family doing so. She vaguely recalled works in 2004 to the steps. She did not recall fencing but said there may have been tape to warn people of wet cement. She had no recollection of works in 2008. In 2014 she certainly recalled the work and the tape cordon. She said that she and several others stepped over the tape to go and have a look. She crossed the tape 3 or 4 times and saw 3 or 4 others do the same. She said the tape was only down one side and was there for a few days, maybe a week.

Karen Skupinski

60. Mrs Skupinski produced an EQ dated 18 October 2015, a WS dated 16 June 2015 and a letter dated 3 September 2014. She moved to East Langton in 1970 when her parents took over the tenancy of The Bell Inn. In 1978 they all moved into Orchard Cottage, Main Street, renting it from Colonel Hignett. Mrs Skupinski purchased Orchard Cottage in 1987 and her mother continued to live there. She moved back to

Orchard Cottage with her three children in 1998 (born 1986, 1987 and 1993).

61. Some of Mrs Skupinski's evidence relates to her use of the Application Land as a child. That use is outside the Application Period. However, in her letter she refers to Mrs Marlow-Thomas having knocked on her door and saying that seeing Mrs Skupinski's daughter playing on the Application Land reminded her of when Mrs Skupinski used to play there as a child and that Colonel Hignett would be thrilled that the garden was still being enjoyed by the village children. Her more recent use has consisted of dog walking, retrieving children when they were younger and sitting on the benches until they disappeared.

62. Mrs Skupinski said that she would walk past the Application Land every day. She had a dog until March 2015 (she had had it for 15 years). She would see other people using the Application Land, mostly children playing. She said she would see that extremely regularly if not most days.

63. Mrs Skupinski did not recall the works or any temporary fencing in 2004 or 2008. She did recall the 2014 works and the tape being there for a while but she disputed that it was as long as three and a half weeks. She thought it might have been there for a week or just over.

WRITTEN EVIDENCE FOR THE APPLICANT

64. In addition to the witnesses from whom I heard oral evidence the Applicant produced a number of other EQs, WSs and letters (behind Tab 4 of the Applicant's Bundle), all of which I have read. It is beyond the scope of this report to summarise in detail that additional evidence. However, I can confirm that I have given it appropriate weight in making my findings. That weight is necessarily more limited due to the

fact that I have not had the benefit of hearing the evidence directly and it has not been subject to any challenge the Objector might have wanted to make.

65. Furthermore, whilst much of that evidence speaks to use of the Application Land it is in extremely general terms and I am not able to discern from it an accurate picture of each witness's use, their period of use, the frequency of that use, exactly what the use was at various times, etc. WSs and EQs of the type I have before me generally portray an impression of moreorless consistent use throughout the whole of the period of residence / use whereas the reality is usually that different uses occur at different times within the relevant period, using the land with differing regularity. This is hardly surprising given that people acquire and lose dogs, they have families, their children go to school or leave home, they retire, they suffer ill health, and so on, all of which events impact on the use that they might make of the Application Land over a twenty year period. It is very rare for individual use over a full twenty year period to remain constant and consistent. The relevance of this will become clear when I turn to make my findings of fact and then apply the statutory test to those findings.

66. By way of random illustration of the foregoing, at pages 84 to 87 of the Applicant's Bundle are a WS and EQ from Mr and Mrs Galloway. They have lived in East Langton for the past 42 years. The EQ makes clear that no use of the Application Land is made any more. The use referred to is historic, it being referable to when their children were younger. I do not know how old Mr and Mrs Galloway are, how old their children are or whether any of the use their evidence refers to occurred during the Application Period and if it did, for which part of the period. I am unable to make any positive findings about the Galloway's use of the Application Land on the strength of such evidence.

67. Behind Tabs 1 (attached to the Application itself), 5 and 6 of the Applicant's Bundle is further documentary evidence. There are some more EQs, references to minutes from the ELPC minute book, some plans and photographs. There is also a petition with 100 signatures on it in support of the following proposition:

"*The Coronation Garden was set aside in 1953 by the then owner, Colonel Derrick Hignett. It was set aside for all time. Villagers contributed to its assembly by purchasing and installing walling, flagstones, laying turf and planting decorative trees. The village also installed a wooden bench and plaque to commemorate the Coronation. Since 1953, the Coronation Garden has been maintained by villagers for rest and for social meeting and as a play area for children. On that basis, we believe that the land upon which the Coronation Garden is sited, having been in continuous use 'without force, secrecy or request' has become the village green of East Langton*".

EVIDENCE FOR THE OBJECTOR GIVEN ORALLY

68. The Objector chose not to call any witnesses to give oral evidence and be cross examined. However, during the course of the Inquiry Anthony Hignett, who had provided a WS dated 29 January 2015, asked to speak to the Inquiry, which he did. What he talked about was really not relevant to the test for establishing whether the Application Land qualifies for registration as a TVG. He simply offered an explanation for why the owners of the Application Land had created the vehicular access way and installed the gate into their land behind.

WRITTEN EVIDENCE ON BEHALF OF THE OBJECTOR

69. As noted at paragraph 4 above, all four of the co-owners of the Application Land provided WSs which appear at Tabs 3 – 6 of the

Objector's Bundle. In addition to those statements, which I have carefully read, I was provided with the following additional written evidence upon some of which I make a brief comment.

70. There is a letter from Glynn Houlston who was a part time gardener to Mrs Marlow-Thomas until her house was sold following her death in 2003. His letter states that he was regularly asked to plant and maintain the Application Land. That evidence is, of course, in stark contrast to the Applicant's evidence.

71. A letter from J C Saunders of Saunders Horticulture Limited confirms that Mr Saunders was instructed by the Hignett / Marlow-Thomas family to make good the wall and paving following the creation of the vehicular access in the northern part of the Application Land.

72. There is a letter from Shaun Hazlewood confirming that as a builder employed by the Marlow-Thomas family over the last 20 years he has worked on the Application Land when there has been a need for attention to loose slabs or stone work. He provided a second letter dated 17 November 2015 offering more detail about the work he carried out. According to records and time sheets that go back to 2000 Mr Hazlewood wrote that he had worked on the Application Land between 8 March 2004 and 27 March 2004 (odd days between other jobs) and that he took temporary fencing and blocked off the garden while over the next 3 weeks he re-laid slabs and pointed stonework. Between 5 August 2008 and 8 August 2008 he re-laid loose slabs. Again he took temporary fencing to keep people of the slabs. Between 21 July 2014 and 13 August 2014 he removed part of the front wall and created an access to the rear of the land.

73. There is then correspondence confirming the level of insurance provided for the Application Land and the Cricket Ground. There s a

copy letter that was sent by Mr Piers Marlow-Thomas to the signatories to the petition (some of whom confirmed receipt and some denied it). There is correspondence in 2015 (post Application) between the Parish Council and the co-owners' solicitor regarding the possibility of the Application Land being gifted to the Parish Council subject to conditions that were not acceptable to the Parish Council.

74. Finally, there is a completed application form (Form 44) by the owners for the voluntary registration of part of the Application Land pursuant to section 15(8) of the 2006 Act, excluding the northern section of the land over which vehicular access is required. That application has never been fully completed so as to be duly made. Although Mr Marlow-Thomas told the Inquiry the final steps would be taken to put that application in order I am not aware that it has ever been done.

SITE VISIT

75. I conducted my site visit on the afternoon of 23 November 2015 and was accompanied by representatives of both Applicant and Objector. I observed the Application Land and noted any physical features that had been brought to my attention during the evidence.

FINDINGS OF FACT

Use of the Application Land

76. I find that there has been use of the Application Land for lawful sports and pastimes ("LSP's), particularly children recreating and people meeting and socialising. However, as will be apparent from my summary of the evidence that I heard, I really have no clear picture of consistent use throughout the whole of the Application Period and that is what the Applicant must prove on the balance of probabilities.

77. I have tried to piece together a picture of the full twenty year period and satisfy myself that I heard clear evidence of use throughout the entirety of the period. That is an impossible task when one has no idea when certain uses began and ended, for example. My comments regarding Mr Weare's evidence (within my summary of his evidence), by way of a single example, clearly point to the fact that I do not know between what years his children were regularly playing on the Application Land because I was never told.

78. And take Mr Vybiral's evidence where it is clear that his son's use of the Application Land ceased early on in the Application Period and since then it appears that his personal use of the Application Land has been no more that a couple of times a year. Even then, I have no idea what he does on the land, how long he stays there or any other relevant information that might assist me to make positive findings in respect of his use. Similar comments apply to much of the other evidence that I heard, although not all.

Maintenance and Repair

79. Despite the letter produced by Glynn Houlston from whom I did not hear evidence in person, I find that Mr Fulford was the primary maintainer of the Application Land during the Application Period. He was assisted occasionally by other villagers but I have not heard any evidence of anyone having seen Mrs Marlow-Thomas' gardener on the land. I accept the Applicant's evidence in this regard.

80. I find that works of repair occurred in 2004 and 2008 and in 2014 works were carried out to create a vehicular access across the northern section of the Application Land to provide access to the land behind it. I find that there was temporary fencing on each occasion but that certainly in

respect of the 2004 and 2008 works the fencing was likely to only have been there for a short period of time. Perhaps just a few days or less. I find that there was a section of the land cordoned off in 2014 and I have seen the photographs that show the extent of that area and the means of separation from the remainder of the Application Land.

81. I also find that at the behest of Mrs Marlow-Thomas the benches were removed from the Application Land each winter and returned in the spring. This pattern continued until Mrs Marlow-Thomas died and the benches were not returned to the land in 2003. There have been no benches there since that time.

Permission

82. The majority of the Applicant's witnesses (both oral and written) appear to be very aware of the fact that the Coronation Garden was created on land that, at that time at least, belonged to Colonel Hignett. However, some or possibly all appear to have been under the misapprehension that the Application Land had been gifted to the community. It was only once the 2014 works were carried out that there appears to have been a general realisation that the Marlow-Thomas family continued to own the land. Prior to that the Applicant's witnesses generally thought that they were entitled to use the land by virtue of the fact that it belonged to the village. It does not, of course, matter what they thought. As a matter of fact they were either permissive users or they were not.

83. I have no contemporaneous written evidence dating back to 1953 when the garden was created that enlightens me as to whether Colonel Hignett then, or at any time thereafter, expressly granted permission for the general use of the Application Land. However, a plaque was erected, the text of which is reproduced at paragraph 8 above, that was

positioned at the rear of the garden between the position of the two benches that disappeared from the garden in around 2002. Generally speaking, the point of putting up a plaque is so that people can read it, suggesting that people were permitted (invited, even) to be on the garden to do so. The same could also be said of the benches.

84. Further, there was not only no attempt to secure the garden from the highway, steps were constructed that provided access to the garden and paths were constructed as a route to the area where the benches and plaque were situated. The structure of those steps and path was maintained throughout by the owners ensuring continuing safe access.

85. I have seen written confirmation that the Coronation Garden was insured by the owners. I only have evidence going back to 2010 but it is possible that there was a change of insurance agent during the Application Period. It is certainly the case that during part of the Application Period I have written evidence that the owners had a public liability insurance policy in respect of the Application Land, suggesting that use by the public was anticipated and permitted.

86. Finally, the fact that Mrs Marlow-Thomas appears to have spoken enthusiastically to people about their use of the land (eg Skupinski) and thanked Mr Fulford for his efforts in keeping the land maintained would suggest that the use was permissive rather than simply tolerated or acquiesced in.

87. I do find as a fact that use of the Application Land was by the permission of the owners, consistent with the written objection that was submitted in the Objection Statement (referred to at paragraph 4 above) and notwithstanding the Objector's apparent change of stance advanced at the Inquiry (by which time the Objector was no longer legally represented) which was that the users were trespassers.

APPLYING THE LAW TO THE FACTS

88. This section of my report will be structured by reference to the various components of the statutory test that I set out at the beginning. I remind myself that the burden of proof that the Application Land meets the statutory criteria for registration as a new TVG lies firmly with the Applicant. It is no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be "*properly and strictly proved*".

… a significant number …

89. As noted at the beginning of this report, 'significant' does not mean that a considerable or substantial number of people must have made TVG type use of the land. It is not a mathematical test. It simply means that the number of people using the land in question in a qualifying manner has to have been sufficient to indicate to the landowner that the land has been in general use by the local community for informal recreation as distinct from occasional use by individuals as trespassers.

90. As will be apparent in due course, I do not consider that other aspects of the statutory test are met and, therefore, I have not heard evidence from a significant number of local inhabitants that can be said to have made qualifying use of the Application Land although I have seen and heard evidence from a sufficient number of people to be considered significant in the context of a TVG application.

… of the inhabitants of any locality …

91. The Applicant relies upon the Parish of East Langton as its locality. There can be no doubt that the parish meets the definition of a locality for the purposes of the statutory test.

… have indulged as of right …

92. As will be evident from my findings of fact I have concluded that the inhabitants of the locality used the Application Land with the permission of the owners of the land. Given that the statutory test requires the use relied upon to be without permission (ie trespassory) in order for it to be qualifying use, that is an end to this Application.

93. For clarity, as was stated by His Honour Judge Robert Owen QC (sitting as a Judge of the High Court) at paragraph [36] of *R (Mann) v Somerset County Council* [2012] EWHC B14 (Admin), "*… ultimately, it is necessary to scrutinize all the circumstances of the particular case to determine whether the grant of permission or implied licence is made out, whether by reason of overt acts or demonstrable circumstances or, indeed, relevant circumstances …*".

94. The facts I have recited at paragraphs 83 to 86 above (inclusive) are, in my view, sufficient overt acts and / or demonstrable circumstances for me to make the finding that the use relied upon by the local inhabitants was with the permission of the landowner.

95. Had it been necessary for me to consider whether use of the Application Land when there were fence posts and tape in place was *vi*, I would have concluded not. Firstly because it was only relevant to part of the Application Land so continuing to use the remainder that was unfenced would clearly not have been by force. Secondly, the temporary barrier that the posts and tape represented did not amount to an expression by the landowner, in my view, that there was any objection to recreational use of the Application Land which is what is required to render use *vi*.

… in lawful sports and pastimes …

96. I have no difficulty in concluding that the activities I heard the Applicant's witnesses speak about were LSPs in so far as it encompassed children playing, socialising, relaxing, picnicking, dog walking and so on. I am less certain, however, that maintenance of the garden by Mr Fulford could be regarded as a LSP. It seems to me that it is not really something that can be described as recreation so much as something that facilitates recreation or use. I have discounted Mr Fulford's maintenance activity from my overall assessment of LSP use but, as will be clear, that is not critical to the outcome of this Application in any event.

… on the land …

97. I am quite satisfied, given the size and nature of the Application Land, that use of any part of it really amounts to use of the whole of it.

… for a period of at least twenty years …

98. I am perfectly satisfied that I have heard evidence that spans the whole twenty year period. What is required is continuous use throughout that period. In other words use that has not been interrupted (either by action by the landowner of because there were sufficiently long periods of non-use so as to say that use ceased for a time). For the avoidance of doubt I do not consider that the various works conducted on behalf of the landowners were sufficient to 'interrupt' any period of qualifying use.

99. However, as will be evident from my findings of fact, I am not satisfied that I have heard evidence that demonstrates, on the balance of probabilities, adequate or sufficient use of the Application Land (notwithstanding the fact that I have found it to be permissive in any event), continuously, throughout the whole of the Application Period. Of course it is not necessary for there to have been use every day or every week. What is required is evidence of use that has continued to such a degree throughout the Application Period so as to bring home to any reasonable landowner that a right is being asserted.

100. From the evidence that I have seen and heard I have been unable to piece together a clear enough picture of use throughout the whole of the twenty year period to be able to make any positive finding that, on the balance of probabilities, such use has occurred. For that reason I do not consider that this part of the statutory test has been met either.

… and they continue to do so at the time of the application …

101. I have no evidence to suggest that use of the Application Land had been prevented save for in respect of the works that had been carried out in the summer of 2014 and I do not consider that those works brought use of the Application Land as a whole to an end. I am satisfied that whatever use was being made of the Application Land continued up to the date of the Application.

OTHER ARGUMENTS ADVANCED BY THE OBJECTOR

102. Given that I have concluded that the Applicant has failed to satisfy the statutory test under section 15(2) of the 2006 Act there is no real need for me to address any further arguments advanced by the Objectors. I do so, however, very briefly, for completeness.

103. The Objector has said that the Application was flawed, that there had been a trigger event and that the Application is therefore not valid. This allegation was dealt with comprehensively by the Council in a document dated 27 February 2015 entitled "*Reasons for the decision that the right to make the application has not been excluded and / or procedurally flawed*". I have read that document and agree with its reasoning and conclusions. I therefore do not accept this argument by the Objector for those reasons. There has been no challenge to the Council's stated position in reply.

104. The Objector made lengthy oral opening and closing submissions (unsupported by written submissions) of which I have taken a very careful note. Other than the points identified at paragraph

5 above the Objector made further submissions regarding inappropriate conduct on behalf of the Parish Council and deficiency in respect of the legislation itself. Those are not points that have any bearing on the proper disposal of this matter but I mention them simply because they were raised before me. I will not take time in this report considering matters that will not assist in the determination of the Application.

ACKNOWLEDGEMENTS

105. Before I set out my final conclusion which by now will have become apparent, I would like to express my thanks to the Commons Registration Authority for its efficient organisation of the Inquiry and the assistance that was provided to me. In particular I would like to express my gratitude to Anthony Cross who dealt with all matters arising prior to and throughout the Inquiry process in a very helpful and highly efficient manner. I would also like to express my thanks to the witnesses and members of the public who attended and spoke to the Inquiry. Finally, I was greatly assisted by the parties' representatives. I am grateful to them for their thoughtful analyses and submissions on the issues before the Inquiry.

FINAL CONCLUSION AND RECOMMENDATION

106. I conclude that the Application fails. I recommend that the Application to register the Application Land as a new TVG should be rejected. The reasons for rejection, subject to the relevant Committee following my recommendation, can simply be stated to be those set out in this report.

ROWENA MEAGER

No 5 Chambers

26 March 2016

This page is intentionally left blank