The Story of a Claim for a Bridleway between BW54 Broxhead Common to Cradle Lane

PART 2

It is worth remembering that in the **May of 2007** I had been elected as the District Councillor for Selborne Ward in East Hampshire. In June of that year I was also elected to the Board of Trustees for The British Horse Society. So by the 12th November 2008, which is the date of the objection by Hampshire County Council to their own Order for the bridleway as claimed, I was well on the way to a better understanding of how local democracy worked, or should I say was supposed to work.

My first priority was of course to my Constituents and there were many of these who had rights of way problems. Knowing of my interest and long experience I was called on to help. Two main problems come to mind.

The first was a request to bring to fruition a 13 year persistent plea to the responsible authority, Hampshire County Council, to replace a footbridge over a small stream at Dorton, which was across the fields behind the Selborne Village Church of St Mary. The lack of this bridge was preventing many of Selborne's residents from enjoying one of the shorter circular walks in the village. The second problem was the abuse by 4WD's and armies of motor cyclists on local BOATS which have a fragile clay subsoil and are therefore easily damaged by motor vehicles. This again was inhibiting use and or enjoyment by walkers, cyclists and horse riders, but letters of complaint also came from local residents who found the noisy sport a nuisance particularly at week-ends.

In **September 2007**, I was invited to the Annual Conference of the Institute of Public Rights of Way (IPROW) and seeing that Jane Yates of English Nature was to talk on how to find funding for rights of way improvement plans, I sought the approval of East Hants District Council (EHDC) who agreed that I should go. IPROW as was later explained to me is a relatively small organisation of mostly Rights of Way Officers and other professionals with a similar interest.

On arrival at the venue the first persons I encountered were none other than Andrew Smith, HCC's ROW Manager and Alex Lewis who did a double take as they passed me and went on their way. Once in the hall however Andrew sought me out and asked what I was doing there. He seemed anxious although I couldn't think why. I explained that I had been attracted by the talk from Jane Yates on the Agenda and was looking forward to her talk. He did not tell me at that time that he was their Vice President and would be making a short dissertation later. Perhaps this would have explained his nervousness.

I was kept company for most of the proceedings by Bob Milton who at the time was a Trustee of the Open Spaces Society. Anyhow it was an enjoyable occasion and I looked forward to future training sessions put on by IPROW.

However that was not to be. On **6th March 2008** I received an invitation as usual from IPROW to attend one of their training courses entitled 'Successful Public Path Orders – Meeting the Tests.' At the top of the email was a short sentence: '*Please circulate this message to your district councils and legal sections as the course may well be of interest to them'.* It then went on to say "*There are many potential pitfalls in making public path orders as is clearly evident in the number that are rejected or criticised by the Secretary of State, PINS and consultees! This course looks at a crucial part of public path orders – the tests that should be considered, whether they can be met and making the order under the appropriate legislation. With this preparation for a defendable order, the course then looks at writing the statement of case and proof of evidence for Public Inquiry or other processes of determination."*

7th March 2008 – I forwarded the email to the Chief Executive of EHDC and the Leader of the Council and said: "The Institute of Public Rights of Way Management courses are informative and occasionally enlightening. Although I would not need to attend by any means all of them, having already considerable experience, there are some which I would find useful. In addition it is helpful to meet or re-establish contact with the officers of councils throughout the country and listen to the day to day problems which they are experiencing or not as the case may be.

The contractors such as the sign makers, bridge suppliers etc are also to be found at many of these meetings. Although EHDC do not have the statutory responsibility for ROW, they have a responsibility to still be kept well informed as to the service they should expect from HCC as the statutory authority. (They are at present set to charge Selborne Parish Council and the County Councillor over £10,000 for a statutory duty which I have had two quotes for under £7,000 absolute maximum).

75% of EHDC is rural and much of it is SSSI and AONB. One quarter could be in the new South Downs National Park which is at present underrepresented in respect of ROW. I do not therefore need to explain why the electorate may have a genuine interest in rights of way as a whole both from the user and landowner aspects.

Please may I ask that EHDC join IPROW with a view to permitting me to attend my chosen courses. I met Geri Coop who runs the courses, many years ago at a BHS Access Conference and as you can see she keeps me on her email list even tho' I am not a member."

I did not attend that event but was given the ok from EHDC for the next IPROW Conference which was to take place on 23/24 September 2008.

I immediately emailed Geri and asked her to send application forms for membership and to save me a place at the Conference. I was totally unprepared for her reply which said: "*Although I appreciate your interest in IPROW, unless your position has changed significantly in the last year, I have to say you do not fulfil the criteria for membership so I hope to save you time in making an application that will be refused.*

IPROW is a professional body whose members are primarily those employed in rights of way or outdoor access by local government. We may accept applications from non-local government employees in certain circumstances, such as employed in the private sector or self-employed de-facto *as a rights of way officer for one or more authorities or, very occasionally, because the applicant demonstrates a particular area of expertise. In response to demand from members and potential members, this is an issue on which IPROW is tightening up and existing membership may also be reviewed against this criterion.*

Regarding the conference, we have decided, again in response to pressure from members, that training events are open to members and potential members only (i.e those fulfilling the criterion above) as there has been significant negative feedback to the presence at events of others, particularly from pressure groups. Unfortunately, your conduct at last years conference antagonised some members and was the subject of complaint and I am therefore unable to accept a booking from you for any future event.

I hope you will not take this message personally as I expect you do an admirable job for the BHS and no doubt also as a councillor, but this is a very thorny issue which has caused considerable disquiet and debate among members and criticism of IPROW from potential members. We have decided to take a stricter policy in order to avoid losing members in the very area of the profession which it is our primary aim to support, even though that may mean refusing attendance or application from non-professionals who support our purpose.

With very best wishes for your continued success in access."

17th June 2008 – I replied: "Thank you for your reply. I apologise for asking something of you that you feel unable to provide. I only asked you, as over a considerable number of years I have been receiving emails from IPROW inviting me to training sessions etc. At last years AGM I felt welcomed and encouraged to join or for my Council to become a member, so I am absolutely astounded and dismayed at you assertion below that there was something about my conduct which has caused controversy and even antagonism.

For my part, my presence at the AGM was triggered by an interest in an item on the agenda of a presentation by Jane Yates on funding Rights of Way Improvement Plans. I sat quietly throughout the conference and said not a word in public. I therefore feel entitled to ask for an explanation to the assertion that "*unfortunately, your conduct at last year's conference antagonised some members and was the subject of complaint and I am therefore unable to accept a booking from you for any future event".*

As a Councillor, I respectfully ask therefore that for my own peace of mind as it is so out of character, that I may be told who my accusers are and of what I am accused that is of so serious a nature as to prevent my attendance at any future event?

Thank you for your good wishes for my continued success in access. I often wonder why it is so difficult."

Later the same day I forwarded this email to three County Councillors and the MP saying how dismayed I was to receive such a communication and asking for a thorough investigation of the Rights of Way Department particularly with regard to:

1. Procurement and cost comparisons of purchased products plus authorised contractors or lack of.
2. The muddy waters of prioritization of statutory duties. If tax payers were allowed to prioritise their statutory duties it is doubtful if we could afford even half of the services we currently provide.
3. The expectation that Parish Councils should contribute to the implementation of statutory duties
4. Action by the officers to problems within the parish/ward without prior consultation with local members of District or Parish Councils resulting in the erroneous advice to landowners that they may obstruct a public right of way.
5. Failure to maintain the paths with the excuse that there is insufficient funding, an excuse which has been perennial for the last forty years.
6. Failure to protect our open spaces because they 'don't know anything about common land.'

I am now very concerned that a body which purports to represent the public interests in the management of rights of way and the countryside should turn inwards to become even more obtuse and autocratic than it already is. Do we know who funds IPROW?

PS While writing this I have received another message from Geri which says she would find it easier to talk on the phone and will phone me later. It will be interesting to hear what she has to say‼"

30th June 2008 – the Leader of EHDC, Ferris Cowper emailed IPROW.

"I understand you have denied admission to your conference to Cllr. Comber who is my nominee and special representative on Right of Way matters

My understanding is that your conference is open to non-members who do not fulfil your quite proper membership criteria.

It would be a strange situation indeed if my local authority was curtailed in its ability to be effective in this area by your organisation. I don't know how I would explain this to my vociferous local rights of way lobby.

Please reconsider Cllr. Comber's application to join the conference. I'm certain any past misunderstandings will not recur.

3rd July 2008 - a lengthy reply is received. It says: *"I am sorry to say that your understanding that the IPROW conference is open to all comers is not correct, though I*

regret that my oversight of Ms Comber's presence on the mailing list this year may have contributed to that misunderstanding.

IPROW's conference and other training events have previously been open to non-members of the Institute but we have revised this policy in response to members who have opposed the attendance of non-practitioners. Such events are designed for the frank exchange of views and experience between practitioners from a variety of authorities and the presence of councillors or user group representatives seriously inhibits freedom of speech because members are wary of anything they say being subsequently misquoted or used against them. Whether or not this happens, and I am in no way alluding to Ms Comber's conduct this is a very real perception.

In addition, IPROW's events are an opportunity for members to leave the conflicting pressures of the office behind them and for them to encounter councillors and user group representatives in what they expect to be a secluded environment is not conducive to extracting greatest professional benefit from the event.

The discomfort of members in the presence of delegates in similar roles to Ms Comber has been recurring since attendance was opened to non-practitioners some years ago so although others have found our openness useful, it seems to have been countering the spirit and objectives of both the Institute's membership and its events. Therefore, we have decided to address both issues by limiting access to all training events to practitioners only. Although we may of course review the situation in the future.

I emphasise that this action is not prompted solely by Ms Comber and is not applied only to her enquiry about membership of the Institute or attendance at the conference – it is applied to all prospective members and delegates."

I never did receive the promised phone call and to this day have no idea what it was about my behaviour that had caused eternal banishment from IPROW. I am told that it is a very small pond but nevertheless I remained concerned not only for the libel and possible slander but as ever for the public. In the light of IPROW's mission statement which I found on their web site it is difficult to comprehend how that can be achieved if the elected representatives (councillors) are excluded from their events. The mission statement read:

1. *To represent and promote the views and interests of members in the fields of public rights of way and access to the countryside*
2. *To promote the professional standing of those who work in its profession*
3. *To promote high standards in the management of public rights of way and access to the countryside*
4. *To encourage the exchange of ideas and information in its profession and to foster communication and co-operation between related bodies*

5. *To promote and foster a better understanding between rights of way and countryside access professionals and the whole community.*

Points 4 and 5 need to be respected or the room for conflict with land owners is huge.

Further enquiries revealed that local taxpayers are charged for nine officer memberships to IPROW. Members of the Hampshire Local Access Forum, which is administered and funded by Hampshire County Council and Southampton and Portsmouth City Councils, also receive a copy of Waymark for a small fee. But the really interesting thing is that in addition Members are also given exclusive access to a forum via the web where best practice issues are shared and common problems and questions are discussed and answered.

Sadly it seems I may have been one of them! However even more dismal is that instead of resolving their issues positively they have chosen to pull up the drawbridge which will only further the promotion of secrecy, misunderstanding, and misconception.

However it seems there may be a change of heart for three years later from their web site I read:

"IPROW's work has never been limited to members only, with the result that its membership is a low proportion of practitioners and a frequent answer from non-members is that they don't need to join because the information is available to them anyway. Some training events are designed with a small number of participants for optimum benefit and to avoid such courses being very expensive, they are subsidised to an extent by courses with more participants. As competition for limited place courses is high because of their exceptional value for money, members are given priority in booking as a benefit of membership and their support of IPROW.

Regional seminars are a recent innovation and are justifiably popular with members because of the excellent opportunity they hold for networking and informal exchange of experience and views. They are free and local but produced at a cost to IPROW. They are seen as a benefit of membership and therefore limited to members.

Allowing non-members to attend IPROW events has very rarely resulted in a new member but new members have been acquired through their wish to attend a regional seminar or member-priority event which indicates that such events are desirable to members and will encourage non-members to join.

IPROW's effectiveness and value to both individuals and the profession is dependent on the proportion of the profession that it represents, so anything that encourages non-members to join is useful."

This statement is a direct contradiction from the views expressed in the emails above!

Could I be forgiven therefore, for wondering if this set of communications led to the objection by HCC's officers to my claim for a bridleway?

Well no point in wondering I had to do what all good councillors do and ask the questions:

First of all I must address the issue of why the objection had been made by Hampshire County Council

- without further reference to the Regulatory Committee. The making of the Order was after all a material change to the issue since the Committee originally resolved that an Order should not be made.
- What the grounds of the objection actually were. It just made no sense to me because it was against HCC's policy of providing more off road access to the countryside. The objection itself was detrimental to public interests so why would a public body act in this way and object to the Secretary of States instruction to make an Order for a bridleway?

12th December 2008 my first port of call would be to Hampshire County Council's Executive Member for Efficiency, Performance and Rural Policy.

17th December 2008. I emailed my fellow County Councillor. I say fellow because there should be no hierarchy in politics; district or county, we are all elected by the public after all. I copied to the Leader of my Council and his deputy, I also attached a copy of my claim as he had requested and asked five questions.

1. "Given the detailed review of evidence which had taken place already with the Planning Inspectorate; why has Andrew Smith decided to oppose his own Order
2. Have the Councillors requested him to do this and if not why is he wasting taxpayers time and money on it, especially as it is a bridleway link to be found in the ROWIP's
3. Is it realised that the Inspectorate can and do award costs against Councils who seek to argue on points which have already been covered
4. Andrew Smith seems to be arguing for the sake of doing so rather than realising the public benefit. This of course he is quite welcome to do, but not I suggest in the name of Hampshire County Council
5. Please may I advise that the objection be withdrawn asap as the HCC should be spending money on its statutory duties rather than litigation, especially in a case such as this where it is arguing against its own policies of public access."

16th January 2009 - I had no reply so wrote again.

"When I heard HCC were intending to oppose its own DMMO, I emailed you on 17th December asking the following questions:

1. Who makes the decision whether to contest the Order required by the Secretary of State. Is it councillors or officers?

2. Whoever it is, I should like to know as a taxpayer, why money is being wasted in officer time, which will be considerable, in arguing a case when the Inspectorate have confirmed that they are happy with the evidence?
3. Why HCC is not primarily concerned with the public benefit of this Order in getting horse riders and other non-motorised users, off road past the gun club? We went to Judicial Review over this one and are likely to do so again in these circumstances
4. The path is shown on the ROWIP. What is the point of identifying missing links in the bridleway network, getting the DMMO, only to have HCC argue against its own Order because they don't agree with the evidence?
5. In your opinion, should HCC be spending its slender resources on litigation rather than a real benefit to non-motorised users of the public sector? Why is no concern being shown for green issues and obesity issues which are both addressed by the addition of an off road route.

On another subject, at the beginning of December, you kindly asked a question at Council over the state of BOAT U29 Cradle Lane, Parish of Headley, which is now closed to all except walkers due to its unsafe condition. In fact I have not been able to have the pleasure of riding on it for many years due to the derelict state of the surface of the path, photos of which I have sent to you previously. You have said that you have not received a reply in writing so I am still waiting. I am sure that you understand my frustration in these matters and why I am now beginning to think that the LGO may be the only one who can help. This is why I am addressing this also to Judith Downing, HCC's Compliance Officer, who may be able to assist with the questions above. I shall then have shown, and I know you can confirm, that I have taken more than reasonable steps to get this problem resolved. This is a requirement before approaching the LGO. I am also very embarrassed to have to keep bothering you."

6th February 2009 – a letter from the Executive Member for Efficiency, Performance & Rural Policy arrives apologising for the delay in responding but he wished to ensure that he had all the facts before doing so. He goes on:

My comments in red.

"I do understand why it might appear odd that the County Council is objecting to an order to add a bridleway to the definitive map at the same time as it is looking for opportunities improve[sic] the rights of way network for users. I think the problem lies in the fact that there are a number of different ways in which access can be improved but the definitive map process is applicable only where the desired path already exists. It cannot be used to add a path to the map unless the path is already a right of way.!!!

My understanding of the situation is that the Regulatory Committee did not feel the evidence presented with your application was sufficient to show that the bridleway existed. The Secretary of State concluded that there was sufficient evidence to justify the making of an order, although he did not go as far as deciding whether the bridleway should be added to the definitive map. In any event, the effect of his decision is to facilitate a public debate about the evidence. The County Council's objection to the order has been based on the Regulatory Committee's view of the evidence

rather than on any assessment of the public benefit of the bridleway. But some of the evidence was withheld !!

Therefore, please see below answers to the five questions you originally asked your local councillor.

1. *Andrew Smith is an officer of the County Council and is merely implementing the decision of the Regulatory Committee. No he is not as the Reg Comm has not discussed since the instruction to make the Order has been received.*
2. *There is no need for further ratification from Councillors because the objection is in accordance with the Committee's decision As above*
3. *I understand that costs can be awarded against any party whose conduct at, or in advance of, a hearing or inquiry incurs unnecessary or wasted expense. Costs should not be awarded against any party merely for sustaining an objection*
4. *It is a shame that the County Council's view of the evidence differs from yours but given that we have taken the view that the right of way has not been shown to exist, it could also be argued that the Council would be acting inconsistently if it did not object to the order. It would be inappropriate to use the 1981 legislation to gain improvements to the network on the basis of public benefit. ???*
5. *I do not think the County Council will be withdrawing its objection to the order. Quite apart from the fact that it reflects the decision of the Regulatory Committee,?? there would be no saving of costs as there are other objections which need to be sent to the Secretary of State which will cause him to hold a hearing or public inquiry. This is all part of the statutory process set out in the 1981 Act and is intended to ensure that an order is only confirmed if it is fully justified on the facts: it is not really litigation"*

14th February 2009 – I respond to the above trying to explain where he may have misled himself. I ask further questions:

1. Andrew Smith is Assistant Head of Countryside Service – Access, and is not acting under delegated powers. Is that correct?
2. As the Committee have not had a chance to debate the decision of the Secretary of State that an Order should be made, or in other words, that the Planning Inspectorate thinks that on balance, the Committee have come to the wrong conclusion, please may I know why further ratification is not being sought?
3. Office time in preparing the report and attending the PI will be considerable. Please will you explain to me why this sort of expense is permissible while we are continually told there is not enough money to keep such paths as we have in a useable condition?

As you will doubtless be aware, the Hampshire Local Access Forum is diligently seeking for lost ways, such as the one under discussion, to be fast tracked on to the Definitive Map. Can you please tell me if they are aware that their discoveries may well not be acceptable to the Regulatory Committee and to use your own words that 'it would be inappropriate to use the legislation to gain improvements to the network on the basis of public benefit?'

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Well I had asked the questions and no further answers were forthcoming for the moment anyway.

I had to continue with my historical researches which I had started in the Autumn of the previous year with a view to re-submitting the Claim for Bridleways on Broxhead Common. Planning Inspector Mark Yates had said he believed that there was a right for horse riders to use the common under the terms of the lease. This was the reason that he refused to make an Order because it meant that riding was taking place with permission, but, he added more historical investigation would do much to support the user evidence.

I therefore decided to add the present claim to the portfolio I was writing, as it contained much material which would be common to both. If this matter was now going to Public Inquiry I might as well ask for help for the many irritating nuisances which HCC Rights of Way Department had failed to address on the common over the years despite many requests.

These were issues mainly to do with Broxhead Common such as:

- a request to reclaim the alignment of FP3 so that it was back on the historical route across the common. It had been diverted in 1973 for the interest of the landowner, since when he had erected three unauthorised bridle gates which were a nuisance and unnecessary.
- Removal of other unauthorised gates on BW4 and BW54
- The clearance of other routes which had become overgrown and unusable such as the path around the illegally fenced 80 acres.
- A missing link for a restricted byway identified in the FA 1910
- An additional width to BW4 which had been narrowed when the landowner fenced it along the headland of a field. Although it was 3 metres the actual tracks used by the public since time immemorial were at least three metres beyond the new fencing.
- And reclamation of the path around the Free Piece which we had all once used to access Broxhead Common before the landowner locked the gates in 1988/9

Now however if I was to defend my present claim the search must intensify. I knew that my 15 claimants were telling the truth. We had all used the path as described and half of us for the whole of the twenty years. Why would it be thought that anyone would spend the time, energy and money if this were not the case?

Nevertheless I must categorically prove that 'on the balance of probability' this use had not only happened but that the way existed and had been enjoyed.

I spent many days and hours in both the Winchester Records Office and the National Archives at Kew during that winter and early spring of 2008/9. I did not hope to find much because there is an inbuilt tendency to believe information given out by local

authorities, they are after all well informed defenders of our rights of way and open spaces. We all believe, initially anyway that they must be right.

Colin Piper had said that there was no Inclosure map for Broxhead Common in his report and Hampshire County Council had always said there were no records for the Finance Act 1910 because they had been destroyed in the blitz of WW2. This can be seen in the Statement of Patricia Mandy Smith Phd. B.Sc who was a ROW Officer with HCC at the time when the Public Inquiry was held for the 1997 claim to upgrade FP54 to BW54. It is well worth a read but for now as it is rather long I will quote a few snippets. In the section entitled, Background to the Orders she says: *"....Until the early 1960's much of the area was open heath and registered common land. In 1964, the estate owner Mr Myers fenced off and ploughed a large part of the common, the fences were authorised, and the County Council was granted a lease over the unfenced and uncultivated parts of the common. This leased area, which is hatched on the map at Appendix 1b, is now a Site of Special Scientific Interest and local nature reserve. Local riders, who had previously been able to roam all over the common, were affected by this outcome……..*

4.2 There is no inclosure award for this area

4.3 The next significant map is the Ordnance Survey 1870 25" which shows a number of paths and tracks crossing the open common…..the whole area is listed in the Book of Reference as Common.

4.4 Following the 1909/10 Finance Act, the Inland Revenue carried out a national survey of land holdings to establish base values. The results of their survey are now held in the Record Office at Kew. Unfortunately, many of the records for Hampshire were destroyed during the Second World War. The maps have survived, and Appendix 17 is a copy of the 1909 County Series map coloured in the same way as the original at Kew……As there is no trace of the supporting documentation, it is impossible to say if the owners claimed any reduction in value due to the existence of public rights of way.

6.3 …The tracks which border or pass through fields and plantations appear to have been recorded, while those which cross the open common have not. This may reflect the fact that the air photographs show a much more extensive network of worn paths and tracks, and the whole of the open common was regarded as available for general access.

14.1 The enclosure of part of the common in 1964 obliterated many of these tracks, but riders continued to gain access from Picketts Hill to the bridleways on the southern part of the common."

It is noticeable that nowhere in that report which itself is not entirely accurate, does it suggest the lease does not give horse riders a right to ride on Broxhead Common.

So now I decided it was time to really check that out and during those searches many more important documents came to light.

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I can't remember quite what order my delving took but I can remember on one occasion meeting a fellow BHS Trustee in the National Archives at Kew. She apparently is a regular in such places and asked me if I had looked in the OS Book of Object Names.

Not only had I not looked I didn't even know what that was. She explained that the Ordnance Survey used to keep books which they filled in by hand, of the local names of places and sometimes a description. "Always worth a look" she said.

I followed her advice and found that she was quite right. Under Broxhead was the description of 'common' but then the writer had initialled an alteration to read "Broxhead Public Common." The importance of this was that my claim for a bridleway from BW54 Broxhead Common to Cradle Lane runs along the northern edge of the common, partly on the land which HCC rents and partly along a slice of common which it transpired nobody now seemed to own. This latter section was obviously part of an old highway and was the point where my claim crossed the road C102 before entering the Lithuanian owned land on the other side. Even more interesting was that on the Finance Act Map of 1910 as described by Mandy Smith above, this land was also coloured in the same hue as Broxhead denoting its status as 'common land'. The significance of that was that there would have been nothing to prevent use of the claimed way by the public.

My determination now was to check everything I could find with regard to Broxhead Common. Hampshire County Council had been unhelpful to the point of being obstructive when I or other horse riders had required our traditional tracks to be maintained. They were now so overgrown with gorse that we could not push through them. The common was in a declining state with little maintenance taking place. In addition HCC were now saying that there was no permission for horse riders to access the common other than on the bridlepaths, and these did not provide a circular route.

It was not difficult to find in the Winchester Record Office the Record Book for the FA1910. The landowner of Broxhead at that time was a C. W. MacAndrew and I discovered that he was awarded tax relief of £655 for rights of common and £635 for rights of way. That record had at least had escaped destruction from Hitlers's Reichstag. It was a valuable indication of the extent of public user, but how much weight would that carry without the more detailed information which might be found in the Valuer's Field Books?

I therefore decided to spend as long as it took at the National Archives ordering up every single Valuer's Field Book catalogued, just to make sure that as HCC had stated, the records for the area of Broxhead Common had indeed been destroyed in WW2.

I was waiting for my last order of the day. Announcements were being made that the Archives were closing when the last Field Book arrived. I was tired as I casually flipped through the pages; and then there it was, page after page of properties with commoners rights on Broxhead Common. It included Headley Park as the owner and Headley Wood Farm.

I could not believe my luck. How could HCC be so wrong? If I could find these records then so could they and what is more I am only a volunteer not a professional.

Back in the early 1960's the Broxhead Commoner's Association formed by John Ellis had been instructed by HCC that if they wished to prove Broxhead was a common then they would have to find the commoners. They had spent years identifying local commoners, some whom could remember from their old relatives and some who had the rights on their property deeds, but there was no mention at all of the FA 1910 records. Was this because they had been told that there were none?

My claimed path shows clearly on the FA 1910 map which is actually the same as the OS 1910. One path is described in the Field Book as an 'accommodation road from Broxhead Common towards Lindford', I had always suspected that this was part of BW4 and had been blocked off in the 1970's. Two Public Footpaths are listed, one from Broxhead Common to Headley Wood Farm plus another but the position not stated. These would hardly add up to the massive sum of £635 so the tracks over the common must be included in the assessment.

Talking of maps I had managed to find about two dozen maps from 1787 to the present most of which showed the route. Only one, dated 1869 was not exactly on the same alignment having a slightly different junction with other paths.

Most fascinating of these was the oldest one I found from a reference in the Chief Commons Commissioner's report for the Commons Registration in 1965. This was the 1787 map which accompanied the report of the Commissioners of Wood, Trees and Forests, of George 111 into a study of Alice Holt and Woolmer Forests. Broxhead Common lies between the two.

It is very accurately drawn and based upon a perambulation of the area in 1635. It showed that Cradle Lane did not end where it does today on the hairpin bends past Headley Park, but continued along the arm of what was once obviously an old road still shown on today's modern maps. In addition it is depicted as 'road' and went right across the common on a line not dissimilar to the one claimed. From all of this it would be reasonable to deduce that my claimed route followed the old highway of what was once Cradle Lane.

I also found the actual report which contained the Answer of Henry Lord Stawell Lieutenant of the forest and his right hand man keeper Daniel Annett. These were fascinating descriptions of how the forest was used and accessed by the surrounding parishes as well as the many commons which were named and surrounded the forests and stretched from Farnham to Liss. Broxhead was named as one of them.

These Commissioners also advised that as the forests had common rights of pasture they should be treated in the same manner as the New Forest and Forest of Dean.

This provided good evidence of the openness and accessibility of the area then and even after the inclosures of the mid nineteenth century.

The Officers report had stated that there was no Inclosure Map or Award for the area.

In fact that was wrong as I found it not in the Headley Inclosure Awards but in the Binsted Inclosures. This shows the claimed route on the south side of the C102 and its continuation across the open Broxhead Common.

I found much evidence in the old Minute Book for Headley Parish Council about events surrounding the issue of the unauthorised fencing of 80 acres of that common with letters from the surrounding parish councils expressing their disapproval for same.

Not least amongst all of this was the decision of the Chief Commons Commissioner who dealt with the claims for commoners rights to Broxhead Common in the 1965 Commons Registration Act.

So all of this was included with my file because I was actually hoping that PINS would act as the Appeal body they are purported to be and deal with the long standing issues on Broxhead Common such as

- at least six unauthorised gates which are all to some degree form impossible to a nuisance.
- A bridleway across the headland of part of the fenced 80 acres which had been recently fenced in to a tight three metres rather than accommodate the obvious alignment that was actually used. This would have added an extra three metres.
- A claim for other paths to be made available in the light of the public nature of the common which had now become available through the FA1910 records in particularly.
- A claim for the Restricted Byway of some 30' in width which was actually named in the FA 1910 field books.
- The missing link which was part of a section of the above
- Claim for a path around the 'Free Piece'
- Resubmission of DMMO to ugrade FP3 to bridleway which it was designated under the 1965 Definitive Map Review.
- Resubmission of claims for bridleways on Broxhead (Mark Yates) with the extra historical evidence to back up the claims

After all Page 14 of the Statutory Instruments ROW Hearings and Inquiries Procedure (England) Rules, within the Guidance on Procedures for considering objections to Definitive Map and Public Path Orders, November 2008, says, under Procedure at the Inquiry, (3) '*Paragraph (2) shall not preclude the addition in the course of the Inquiry of other issues for consideration or preclude any person entitled or permitted to appear at the inquiry from referring to other issues which he considers to be relevant to the inquiry.'*

I said I would be grateful if these other matters in the file may be considered as associated issues, given the new evidence, which clearly shows that Broxhead is a 'public' common.

I went on to say how little written evidence or correspondence exists in the background papers to the CRA 1965 and how I had made enquiries in case these were still considered working documents and may be in HCC offices.

It may be that the evidence in the records of the FA 1910 were unavailable at the time or that HCC was even unaware of them, but what is more difficult to comprehend and quite lamentable , is that no thought seems to have been given to the report of the Chief Commons Commissioner dated 1974 which was centre to the deliberations at the time. He clearly states:

"The evidence ranged far and wide. It was not confined to what had been done by the applicants, but covered the actions of a large number of other persons, some named and others described in such vague terms as 'people from the village of Lindford','all the cottagers',' a lot of people in the village', 'local people' and 'anybody', and it extended to matters which were not the subject of the registration…….

Acts done as of right are essential for the foundation of a claim by prescription. The doctrine of lost modern grant does not involve any belief in the existence of an actual grant which the grantee has mislaid. It is but a legal fiction which furnishes an explanation for a state of affairs which would otherwise be inexplicable. In my view, what has happened during the period of living memory can be explained by the breakdown of the manorial system and its replacement by the notion acquiesced in by the owners until Mr Myers began to erect his fences in 1963, that a common is open to anyone to use as he pleases."

3rd April 2009 – I receive a letter from the Planning Inspectorate which said:

"It is understood that the Order was made on the direction of the Secretary of State and I understand from the Council that they will be taking an opposing stance at the forthcoming Inquiry. Accordingly, I am writing to ask whether you would be prepared to present the case for the Order at the Inquiry.

The Inspector will not have access to the appeal documents. It is therefore very important that you submit all the evidence you intend to rely upon to the Inspector in advance of the Inquiry, even if it was submitted as evidence for the Schedule 14 appeal……."

7th April 2009 – I emailed my acceptance to present the Inquiry and ask if I may know if and when I will be informed of the basis for the objection by the County Council.

Reply by email: " *….In the meantime you may wish to contact the council to request clarification of their grounds for objecting to the Order (e.g committee minutes). Please note it will be a matter for the Council to decide whether or not to agree to this."*

I reply saying that I had already asked the question of HCC ROW Deputy Head, at a meeting of East Hampshire District Council's Community Forum. He had replied that it was too complicated a subject to talk about but that he would reply to me in writing. Of course that reply was never forthcoming even though I notified the Chair of the meeting that I had not received it. Would it be alright for me to now press for that response?

In the reply I am advised to contact Maggie Blair who deals with Rights of Way Cases at Hampshire County Council. "*She may be able to assist you to clarify the issues. The Council refers to a Regulatory Committee meeting on 10th January 2007 at which it was decided to refuse to make the Order, which may be of use".*

I feel this correspondence is beginning to take a circular course so on

9th April 2009 – I respond "…However the main point for you is that my questions as to the Order have not been addressed by the Compliance Officer. I did however receive a letter from Cllr Ray Ellis with which I was not at all happy so wrote again directly to him, but have had no further response to that either.

Please let me know if you would like me to send you copies of the correspondence?"

In the reply from the office of the Planning Inspectorate it says: "*Thank you for your 2 e-mails and attachments. Your comments have been noted.*

It is up to you what documents you wish to send to this office.

When an Order Making Authority is instructed to make an Order following an appeal to the Secretary of State, they often take a neutral stance. Although unusual there is nothing that prevents them from deciding to take an opposing stance.

The objection letter has been taken as being an objection by the Order Making Authority as their letter indicates that the Recreation and Heritage Department is the part of the Council that investigates rights of way claims. Also, in the covering letter to this office dated 10th March 2009 from Maggie Blair, it states 'Please note that the Council objects to this Order.'

Finally, the issues you are raising relate to the actions of the Council and whilst they will be brought to the attention of the Inspector it is up to the Council to respond to your questions. Aside from this, I will answer any questions that I can and give information about how the order will be processed by this office."

10th April 2009 – I reply "Thank you very much for this. I understand that the objection has been taken as being made on behalf of the Hampshire County Council. I just wanted to draw attention to the fact that it is being made on the back of the one and only decision of the Regulatory Committee made in 2007. Once the SOS had required the Order to be made no further consideration was afforded the Reg. Comm. in the light of the Inspector's decision.

My questions to the Council in this regard have not met with any explanation.

I have no problem with the Hampshire County Council taking an opposing stance, but that it should be a truly democratic decision……..."

Tuesday 29th September 2009 - saw the start of the Public Inquiry at the Millenium Hall, Liphook. I had with me Bob Milton as a McKensie friend and my nephew Jo who is a barrister. Although he had not been involved in this case he had been kind enough to come and be supportive. Also keeping me company was a long standing friend who was in some way a mentor when it came to rights of way. He was an ex footpath secretary for the Ramblers Association. His name is Jim Colbourne.

The Inspector was Helen Slade MA FIPROW. She was small, feisty and very schoolmarmish. She opened the Inquiry to an interested audience by saying that she thought they may be here to listen to the issues concerning the common, however she would not be addressing these. She went on to say more than once that if the word 'common' was heard to be uttered then she would apply costs to the person who spoke it.

My heart sank. This Inspector was a fellow of IPROW. Surely that would not make a difference? Surely the Inspector must be impartial. But if that was the case why was the Broxhead Common and all the issues I had cited not to be included? The Planning Inspectorate is after all an appeal body or so I had been informed by the Local Government Ombudsman when I had written to him. He said they would be the right people to deal with these issues and he could not investigate himself if they were involved.

The objectors had hired a barrister by the name of Mr Grant and John Montgomery from a Planning firm, and of course the HCC solicitor with Colin Piper the Map Research Officer.

I was preparing to present the case as requested by the Planning Inspectorate when Mr Grant in his loud voice started complaining bitterly that I should be a witness rather than an advocate and it was wrong for me to present the case as he would not be able to cross examine me. Whereupon the Inspector asked if I would mind just taking the witness stand to show the route which I used to ride. Remembering some recent training on Public Inquiries at the British Horse Society that one should never attempt to be both advocate and witness, I reminded her that I was there as an advocate to present the case. "But surely" she said "you do not mind just telling us where you rode. Not wanting to upset her I agreed.

However it turned out not to be a case of just stating the route. She allowed me to be kept on the witness stand all morning being cross examined by the Objectors, Mr Grant.

It was to deprive me of the opportunity to present my case and when I pointed this out to the Inspector she said I could do that when I cross examined the Objectors.

At the end of the morning onlookers were sympathising with me over the way I was being treated but I told them not to worry. If the Inspector reached the right conclusions and the Order was eventually confirmed, then I could stand it.

There was also another unexpected problem. I knew my hearing was not as good as it once was but I had no idea just how much hearing loss I was suffering from. The hall had a resonance which made it sometimes impossible to understand what was being said or to follow proceedings. Other people were also experiencing a similar problem. It did not help, but I struggled on with the Inspector being acerbic to the point of rudeness. For example on the third day of what was to become a four day Inquiry when the Inspector continued with what had become harassment, I decided to point out that Public Inquiries were supposed to be for ordinary people like myself but it seemed to me that deference was constantly to Mr Grant. Her reply was that it must be a very long time since I had been to a public inquiry since it was not like that these days and we must not keep professional people waiting.

On another occasion she referred to HER inquiry with some theatricals to go with it. I was referring to my bundle and a specific piece of evidence but before I could go any further she slammed her hand on her copy and asked me if it was my bundle. I replied that it was. "Did you write it" she asked. "Yes of course" I replied. "Well then I know what's in it then don't I?" she said. I replied "Well I hope so but it is a rather large bundle so I thought I would point out the relevant bit of information I have in mind".

These were probably the only exchanges I had with her but I did not feel that I had agreed to present this case just to be bullied. On the contrary the whole Inquiry had been caused because I had actually acquired a public benefit, and the Hampshire County Council had decided to support the landowners in objecting to the confirmation of that Order.

After three days the Inquiry adjourned after a site visit.

During that visit Colin Piper pointed to a rut in the ground saying he thought this was the way the horses must have gone. I replied that it was not so and that the groove had been made most probably by motor cycles because Headley Park held a motor cycle event annually. The Objectors representatives swore blind that was not correct and motor cycles had never set wheels on Baigents Hill. The Inspector looked at me managing to seem doubtful and suspicious at the same time.

I explained that the motor cycle event happened because my husband allowed them to use our farmland for the same event. In fact the occasion could not happen if that was not the case. Still the Objectors swore blind that motor bikes never ever entered Baigents Hill.

When I got home I found the schedule for the event which said it started at Headley Park. I presented this to the Inquiry when it reconvened on **3rd November 2009.** But as ever when I presented any evidence of note it was not remarked upon and quickly buried.

13th December 2009 – I received the Inspector's decision. She had refused to confirm the Order. I read it and re read it. There were several inaccuracies but of note here is her statement "*In an area where there is apparently so much pressure for riding access, this does seem to me to be a level of frequency which struggles to demonstrate user by the public at large. It seems to be more consistent with user by a small number of people who may have had a degree of connection. Mrs Comber herself lives along Cradle Lane and at least one other witness kept her horse with Mrs Comber. I accept that other riders came from further afield, but all riders using the Baigents Hill section of the Order route would have had to use that part of Cradle Lane running past Mrs Comber's property. Furthermore, the application by Mrs Comber was made on behalf of a local Bridleways Group, suggesting a limited section of the public. ……I am also doubtful that it would be reasonable to consider that the numbers of users satisfied the description of 'the public at large.' Thus, even though I am prepared to accept that use of a route over Baigents Hill did occur during the required period of 20 years between 1977 – 1997, and that individuals using the path may have been members of the public, I am not satisfied that the use could properly be described, on the balance of probabilities, as having been exercised by the public at large."*

"In view of my conclusion in respect of the volume of use, it is not necessary for me to consider whether or not the use of the route was exercised as of right. Deemed dedication cannot arise because the user was not by the public in general."

She had misled herself on two counts. The first is that I don't live along Cradle Lane and the second and fatal to her decision was that the Act does not require the 'public at large'. It recognises that it may just be local people involved.

The Inspector also noted in the report under 'Preliminary Matters', the confusion which had arisen at the Inquiry because several plans of the Order route had been produced by the County Council over the years and the identifying lettering was shown differently on the Order plan. "*Also further confusion because the original application, made on behalf of the Three Counties Bridleways Group, concerned a longer route. The County Council's own Statement of Case refers, initially; to the application for the northern section but then goes on to consider the evidence for the whole Order route. Mr Piper offered no explanation for this.* "

She might have explained that it was I who was being asked for an explanation rather than Mr Piper, which I subsequently came up with.

I was hugely disappointed by her decision. I lived with it until the New Year but then decided that I could not accept it. I decided to speak with my Solicitor and take Counsel's opinion. This all took time but after a visit to the Barrister in Lincoln's Inn, at the Chambers of George Laurence QC, we decided to Judicially Review.

The matter never reached the Judiciary because by April 2010 Defra had agreed to withdraw and quash Inspector Helen Slade's decision. The point of law upon which she

had misled herself was that the act recognised that claims would be made by local people and therefore did not depend on the 'public at large'.

Now Defra decided to quibble about costs so this was sent to the High Court for decision. On 28th April 2011 I was notified that it had been decided to allow me full costs and also the costs incurred in getting those costs.

However in the meantime we have to decide the way forward.

3rd December 2010 I instruct my Solicitor to write to HCC:

Dear Mr Austin

Mrs Maureen Comber v Secretary of State for Environment, Food & Rural Affairs

(Interested Party – Hampshire County Council) Claim No CO/3374/2010

I am instructed by my client Cllr Mrs Maureen Comber to write to you with regard to the above.

You will remember that the Order decision dated 11 December 2009 has been quashed. It is now time for us to decide how we will proceed.

My client has drawn my attention to the fact that at the time your Council ("HCC") took the decision to object to the previous Order dated 8 October 2008, it was not conversant with the substantial new historical evidence presented at the Public Inquiry on 29 September 2009.

Having regard to the change to a coalition government and other variations such as the emphasis on "localism" and "the Big Society" and most importantly, the downturn in government grants to local government, my client instructs me to ask whether HCC is willing to withdraw its objection to the previous Order, bearing in mind that it is made in the interests of the public and in accordance with HCC's policies of improving access to the countryside. Indeed, it is shown on HCC's Rights of Way Improvement Plans for the South Downs.

I am also enclosing for your consideration a copy of a letter dated 16 November 2010 sent by the Under Secretary of State, Norman Baker, to my client's MP, Damien Hinds. The letter is, I hope, self explanatory. Certainly, my client regards the letter as supportive of her own position and trusts that you will see it in that light too.

We have until 9 December to respond to the Planning Inspectorate in Bristol before the case is allocated to a different Inspector. Accordingly, I would be obliged if you could let me know as soon as possible before then if HCC does indeed wish to withdraw its objection.

The letter referred to is this:

From the Parliamentary
Under Secretary of State

Department for
Transport

Great Minster House
76 Marsham Street
London SW1P 4DR

Tel: 020 7944 2566
Fax: 020 7944 4309
E-Mail: norman.baker@dft.gsi.gov.uk

Web site: www.dft.gov.uk

Our Ref: NB/030829/10

Damian Hinds MP
House of Commons
London
SW1A 0AA

16 November 2010

Dear Damian,

Thank you for your letter dated 3 November, enclosing a copy of an email from Councillor Maureen Comber of The Old Cottage, Frith End, Bordon, GU35 0QS, who asks about horse riding and sustainable transport.

I understand the problems that horse riders face in finding suitable safe routes, but I believe that our planning guidance already sets out a framework to remedy these problems. Contrary to Councillor Comber's suggestion, horse riding can benefit from Section 106 agreements and there are many specific examples of S106 funding being used to create or improve bridleways.

Section 106 (S106) of the Town and Country Planning Act 1990 allows a local planning authority to enter into a legally-binding agreement or planning obligation with a landowner in association with the granting of planning permission. The remit of S106 agreements is laid out in Circular 05/05. A planning obligation must be *necessary* to make the proposed development acceptable in planning terms.

Planning Policy Statement 7 (PPS7) deals with rural areas and states that planning policies should provide for a range of suitably located recreational and leisure facilities for horse riders. Planning Policy Guidance 17 (PPG17) deals with open space, sport and recreation and requires local authorities to promote health and well-being by providing opportunities to people of all ages for informal recreation to walk, cycle or ride within parks and open spaces or along paths, bridleways and canal banks. It states that local

authorities should seek opportunities to provide better facilities for walkers, cyclists and horse-riders, for example by adding links to existing rights of way networks and specifically states that planning obligations should be used as a means to remedy local deficiencies.

More specifically, the Countryside and Rights of Way Act 2000 requires local authorities to produce a "rights of way improvement plan" (ROWIP) to meet the present and likely future needs of the public and to consider the needs of equestrians through the creation of bridleways and restricted byways.

The second issue your constituent raises is that horse riding should be considered in transport terms rather than just recreational terms. In transport planning, the main policy document is PPG13 on transport, which emphasises that new development should reduce the need to travel, especially car travel, and be accessible by public transport, walking, and cycling. PPG13 does not mention horse riding

The national Sport England Survey, which looks at recreational journeys, identifies that 0.8% of population or 340,000 people go horse riding at least once a week and this represents 65 million journeys nationally a year. This emphasises the importance of horse riding, particularly in more rural areas. In comparison 1.8 million people (4.5% of population) cycle once a week for recreation which represents 270 million recreational cycle journeys.

However, when looking at journeys for transport reasons, the National Travel Survey shows that the use of horse riding for non-recreational reasons is negligible, whereas there are approximately 650 million transport cycling trips and nearly 9,000 million non-recreational walking trips (excluding 2,800 million "just walk", recreational and holiday trips).

I hope therefore planning policy has struck the right balance of promoting horse riding, along with cycling and walking, for recreational purposes whilst concentrating on walking and cycling as a way of meeting transport needs in new developments.

I hope this reply is helpful

Yours sincerely

NORMAN BAKER

6th December 2010 HCC replies negatively. I comment in black.

Thank you for your letter of 3 December.
The County Council continues to object to this order being confirmed. Our consistent position throughout has been that the historic evidence did not and does not support a common law dedication on either the route to the south or the north of Picketts Hill. Neither does or did the user evidence support a common law or statutory dedication on either route. A complete reversal from the officers report to the Regulatory Committee which says on balance there is enough user evidence.

We have not been presented with any new evidence which would cause us to consider altering this position. That is not true.
It is interesting to note that your client chose not to challenge the Inspector's findings in respect of the historic evidence, including the "substantial new historic evidence" presented by your client to the inquiry, during the judicial review. This would indicate that there is no criticism on her part of how the Inspector received and dealt with that evidence. Not challenged because it was not considered. She had convinced herself that the user was insufficient and decided therefore that she did not have to evaluate the historical.

Whilst we are aware of our policies regarding access, this application was made under the Wildlife and Countryside Act 1981. It is therefore an evidence based application and we as the order making authority have to reach a view based on the evidence in support and against the application. Policy is not a relevant issue in this type of application under the Wildlife and Countryside Act."

How they could say that when the Inspector had not considered the historic evidence because she decided there was no need to since she had decided the User evidence was flawed. How could they say that when so much more supporting evidence had been added as mentioned above.

8th December 2011 – my Solicitor writes to the Planning Inspectorate:

First, we entirely agree with your indication that the Order will now need to be re-determined by a different Inspector. We also agree that this reconsideration should be undertaken on the basis of the evidence that has already been submitted and is on your file. Subject to the two caveats mentioned below, we do not have any further evidence to adduce at this stage and we cannot see that anything would be served by now re-opening the Public Inquiry - the new Inspector will already have access to all of the necessary relevant evidence.

The two caveats to the above are as follows. First, I must reserve Mrs Comber's position as regards whether we would need to adduce further evidence on her behalf should any other party seek to adduce further evidence at this stage (and we would therefore be grateful to see copies of any other comments that you receive on the question of how the matter should now be taken forward). Secondly, we would be grateful to receive a full description of the papers that you have and intend to make available to the new Inspector, so that we can confirm that everything that was produced at the Inquiry is indeed still available in order for the matter now properly to be reconsidered. We have retained copies of all of the material produced on behalf of Mrs Comber at the earlier Inquiry, and will be happy to provide copies of any of that material if it would be of assistance to the Inspectorate.

Whilst we are therefore firmly of the view that there is no reason for the Public Inquiry to be re-opened for further evidence to be submitted, we can see that it would be helpful (indeed, we suggest, essential) for the new Inspector to receive submissions on the legal significance of the existing evidence, particularly in light of our successful court proceedings with respect to the earlier Inspector's reasoning. We envisage that this might be done either simply in writing, or alternatively, by way of a limited hearing at which submissions (both written and oral) would be made by any parties who wished to do so, but which would not receive new evidence, nor involve the full re-opening of the Public Inquiry with all of the attendant delay and expense.

On balance, we are of the opinion that such a limited hearing will be the best way to proceed (rather than by dealing with the matter simply on the basis of written submissions). This in our view is the "route" most likely to ensure that the new Inspector has a full and proper opportunity to consider the rival arguments and to appreciate the legal significance of the evidence, and as we say, will avoid the expense and unnecessary duplication of evidence that would no doubt result from the reopening of the Public Inquiry.

In the circumstances, we very much hope that the new Inspector will agree that a limited hearing is the best way forward. If, however, he/she disagrees and prefers the matter to be dealt with by means of an exchange of written submissions, then we suggest that it would be most helpful if such submissions were sequential rather than simultaneous (i.e. with the parties involved thereby being given an opportunity to comment on the submissions of the other parties).

I look forward to hearing from you in due course as to the procedure which is to be adopted by the new Inspector and as to the proposed timetable for the re-determination of the Order. I am obviously concerned on behalf of Mrs Comber that the existence of the rights which she claims for the public should be established and added to the Definitive Map and Statement as quickly as possible.

I was therefore somewhat disappointed to hear from the Planning Inspectorate on 31st December 2010:

The Planning Inspectorate

4/05 Kite Wing
Temple Quay House
2 The Square
Bristol
BS1 6PN

Direct Line: 0117 372 8895
Customer Services: 0117 372 6372
Fax No: 0117 372 6241
e-mail: david.bourton@pins.gsi.gov.uk

Mr N S Spicer
Godwins Solicitors
12 St Thomas Street
Winchester
HAMPSHIRE
SO23 9HF

Your Ref: CEP/CR694

Our Ref: FPS/Q1770/7/70R

Date: 31 December 2010

Dear Mr Spicer

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53
Hampshire County Council
The Hampshire (East Hampshire District No. 27) (Parish of Headley) Definitive Map Modification Order 2008

Thank you for your letter of 8 December in response to mine of 18 November regarding the re-determination of the above-mentioned Order. Please accept my apologies for the delay in sending this further letter.

Having carefully considered the responses we received to my letter of 18 November, we have decided that it will be necessary to hold a further inquiry. We will be offering dates for an inquiry to sit between Tuesday 28 June – Friday 1 July 2011, and my colleague Mr Kevin Noakes will be in touch shortly to formally offer these dates. I have enclosed copies of those responses to my letter of 18 November other than your own, for information. Your response will be copied to these parties for information in a similar fashion.

In addition, I think it may be helpful if I explain at this juncture that the Inspector re-determining the Order will have sight of all of the previously submitted statements of case and proofs of evidence, which will have been copied to you in line with the timetable adhered to beforehand on this Order. The Inspector re-determining the Order will also have sight of those inquiry documents listed at the back of the decision dated 11 December 2009.

If any of the above requires further clarification from me please do not hesitate to contact me.

Yours faithfully

David Bourton
Rights of Way Section

While the County Council are publicly funded, I as a volunteer am not, however I was determined not to undergo the Kangaroo Court as previously, where I had been asked to present the case and then because of the connivance of the Inspector with the opposition Barrister, was forced to spend the whole of the first morning on the witness stand. I noted the instructions in the last paragraph of that letter. I had little choice but to ask my lawyers to act for me this time.

29th January 2011 - I had continued my investigations as to the propriety of the HCC officers objecting to their own Order without the matter having returned to the Regulatory Committee. This was a material change and in my opinion without delegated powers the Officers should not have taken it upon themselves. Now at last I received an email from the Head of Governance at HCC:

Dear Councillor Mrs Comber,

I have been forwarded by the Head of Governance, Mrs Barbara Beardwell, your request for information as to the process that should be followed where the County Council has received an Application for a Map Modification Order and that Application has been presented to the Regulatory Committee and as per the recommendation, refused. Mrs Bearwell has requested that I reply to you direct on her behalf.

Where the County Council's Regulatory Committee refuses to make an order to an Application for a Map Modification Order, the legal framework for appealing against such a decision is contained within Schedule 14 of the Wildlife and Countryside Act 1981. Schedule 14 enables the Applicant to appeal against that decision to the Secretary of State and if on considering the appeal, the Secretary of State considers that an order should be made, the Secretary of State may direct the County Council to make an order, **and the same procedure would then be followed as if the Application had been approved by the County Council's Regulatory Committee.**

The County Councils Rights of Way Officers have adopted a process to be followed where the County Council's Regulatory Committee originally refused the application to make the order, and having considered any appeal, the Secretary of State later directs the County Council to make such an order. The process to be followed in such circumstances was presented and adopted by the Regulatory Committee in March 2009. For your information I attach below a copy of the report detailing the process to be followed.

I trust you will find the above information of some assistance.

I found that most interesting. The objection had therefore been made by Officers on 12th November 2008, without referring the matter back to the Regulatory Committee. The process to be followed was not adopted until 11th March 2009 not long before I heard from the Planning Inspectorate on 3rd April 2009 asking me to present the Order and when the process for the next public inquiry was well under way.

The County Councils Rights of Way Officers, adopted process to be followed where the County Council's Regulatory Committee originally refused the application to make the order, would have necessitated a return to the Regulatory Committee.

I had been seriously disadvantaged at the 2009 PI, by not being informed of the new directive or given a chance to impart the considerable amount of new historic evidence I had discovered such as the Valuers Field Books and Record Book for the Finance Act which showed that substantial increment value duty relief had been given for public access to Broxhead Common.

……

The Public Inquiry was booked for 28th June to 1st July at the more familiar Kingsley Village Centre. A further letter from the Planning Inspectorate dated:

10th February 2011 advises:

> I should explain that as the whole of the Inspector's decision of 11 December 2009 was quashed by the High Court, the re-determination will look at all of the evidence submitted. This will include all of the previously submitted statements of case and proofs of evidence, which will have been copied to you in line with the timetable adhered to beforehand on this Order. However, we will also ask those participating in the Order to submit any further evidence which they wish to bring forward to the redetermination. **For parties who participated in the initial determination, the timetable set out below should therefore be considered to represent the stages at which any *additional* evidence which they wish to bring forward should be submitted.**

……

I now asked for Counsel's opinion as to the pecularities on Broxhead Common and the apparent unauthorised fencing of 80 acres.

The Broxhead Commoners had been so sure that they had won the right for the whole of the 200 acres on the east side of the B3004 to be registered as common land. John Ellis who was Chair had gone to his grave not understanding exactly how or why the 80 acres had remained enclosed. Another Commoner had actually written to the Prime Minister to ask why the fencing had not been removed

The letter was passed to the Department of Environment who explained that the whole area to which he referred was indeed registered common land.

It was obvious that the DOE did not realise that the HCC and the landowner had done a deal which took the form of a Consent Order in the Court of Appeal in 1978.

There were two very important events which happened in 1965. One was the Commons Registration Act which provided for confirmation of existing and also unregistered common land throughout the UK. The second was the review of the Definitive Map of Rights of Way. It appears that HCC made a mess of both.

In 1963 the new owner of Broxhead Common, Headley in Hampshire, fenced in 80 acres of this public open space. John Ellis the local miller at Headley Mill who was himself a commoner and Chair of the Headley Parish Council, complained of this illegal act. In 1968 he formed the Broxhead Commoners Association after he had been advised by Hampshire County Council that if he wished them to register the common he would have to find the other commoners to prove it was common land.

The MOD who owned the common to the west of the B3004 did not object to the registration of the land in their possession but the new landowner, a Mr Sefton Myers did object to the land now in his ownership on the east side of the B3004, even though the McAndrews from whom he had bought it in 1962, and whose family had held it since 1905, were firmly on the side of the commoners and confirmed that the common had been freely used for 'air and exercise' by the public which included horse riders for the 60 years of their ownership.

Meanwhile the whole 400 acres had been provisionally registered by Hampshire County Council. So the commoners fought their case raising money and spending much time and energy looking for possible commoners.

The result of all this was that on 22nd November 1974 the Chief Commons Commissioner issued his decision that the whole 400 acres of the common east and west of the B3004 should be registered.

Broxhead had once again changed hands in 1970 and the new landowner, Mr Peter Whitfield apparently objected to both the registration of Broxhead as common land and for commoners rights. The latter appeal had been lost in the High Court before Mr Justice Brightman.

The case for the appeal against the registration of the common land was set down to be heard by the Court of Appeal on 24th May 1978.

However in the event the appeal was not heard because the Hampshire County Council and the landowner came to an agreement that the HCC would support his application to the Secretary of State for the fenced 80 acres and not pursue its registration as common land. "*The Respondents jointly and severally consent to the amendment or withdrawal of the said County Council of the provisional registration pending before the Commons Commissioner by the said County Council so as to exclude all reference to the said area on the Commons Register. The balance of the common approximately 100 acres would be let to HCC to provide inter alia for the management of the said land by the County Council in such a way as to conserve its scientific and landscape qualitites while permitting reasonable access for the landowner and the public without prejudice to the confirmation of the registraion of the 100 acres as common land.*" Five acres of land shall also be held

and rented by HCC for a peppercorn rent to sub-let the whole to cricket clubs or other bodies approved by the landowner.

This single act of vandalism cut across many of the tracks used by horse riders. John Ellis records that there was a total of 23 all used by equestrians. But for the next 30 years HCC denied the 80 acres was common land and that the subsequent lease of the rest of the common land did not give horse riders access to any part of the common. Horses must keep to the bridleways they said as they continue to reiterate to this day.

……..

I had joined the Headley & District Bridleways Group sub committee on 10th July 1978. It was affiliated to The British Horse Society. On 6th November 1985, on the allocation of Committee work I was given the problem of Broxhead Common.

As I have said the illegal fencing obstructed many of the tracks used by horse riders. The landowner while not agreeing to dedicate any new bridleways agreed to consider permissive routes. It was by this means that horse riders accessed the bridleways in the middle of the common from the north side on Picketts Hill by using the path around 'The Free Piece'. We could also follow a path around the outside of the fenced 80 acres on the narrow strip of common leased by HCC on the west side.

Sadly this was not to last because the path around the fenced common became overgrown and requests for the HCC land managers to clear it fell on deaf ears. The path around the free piece was gated and locked by the landowner in 1988/9 leaving no legal access to the common for horse riders from the north side of the common.

However realising that access from the north side relied on the one permissive path which was no longer available and on the advice of the then ROW Officer from HCC, I submitted a claim of 20 year user to upgrade FP54 Parish of Headley to bridleway. The County Council were in any case well aware of the need for a legitimate access for horse riders from the north because for many years and during the litigation over the common, the landowner had obstructed Bridleways 4 and 46 on the common and the public had effected various practical diversions to avoid the obstructions. In 1982 the land owner and Hampshire County Council agreed to seek to formalise the diversions by means of Orders.

In order to try and get the immediate problem resolved the Bridleways Group objected to the proposals to formalise the illegal obstructions on the definitive bridleways until agreement had been reached to upgrade FP54.

But the HCC could still not make up its mind what to do about the problem. An offer to dedicate the path around the unauthorized fencing from the landowner met with an objection from English Nature which put an end to that. The Council then decided to

make a Creation Order but having done so did nothing to make progress and at a secret session of their Committee then withdrew that decision.

I had now involved my Solicitor who rightly said "there is no doubt that this has been a very long and frustrating course of events for Mrs Comber with continued technical errors by the Council holding up decisions being taken and inordinate lengths of time for matters to be considered and buried by the Sub-Committee. Mrs Comber applied pressure through the Ombudsman that the Council should reach a decision in respect of bridleway access from the north of the Common.

However the matter churned on with HCC making decisions and then reversing them until at last on 25th September 1997 after a three day Public Inquiry at which the HCC took a neutral stance, the instruction came through from the Secretary of State via Inspector David Bryant that HCC should make a Creation Order to upgrade FP54 to bridleway.

I have already documented that long and tortuous journey in the Battle for Broxhead Common which can be found on www.horseytalk.net . This was followed by the tale of my experience explained in the title Judicial Review and then Claims for Bridleways on Broxhead Common; so after all of that here we were about to embark on the third scrutiny by the Planning Inspectorate for my latest claim which could be an off road link between the upgraded FP54 on Broxhead Common to Cradle Lane.

.....

12th April 2011 - I receive Counsel's Opinion re Broxhead Common. It is very interesting and informative. I learn that there are in fact three lines of registration for common land. A)owners, B) rights C) common land. There is something strange about the Consent Order in the Appeal Court 1978 between HCC and the landowner; Counsel tells me; he wonders why the HCC need to agree to support the landowner's application for the fencing if the land is not common land? By the way, he adds there is a page missing in the Consent Order.

I asked him if he was sure because although I had noticed that page 3 was missing the document seemed to read alright. I assumed that the pages had been misnumbered. I had checked this before and whether I had it from John Ellis or the copy in the registration papers at the Council Offices in Winchester, it had always been the case that there was not a page 3.

No it was definitely missing he informed me.

I had to take another look. However when I returned to the Commons Registration Department I could not find the copy of the Consent Order at all this time. I popped over the road to look in the legal filing department. Several files were shown to me but none had the Consent Order in it. I left a copy of the front page with the clerks who kindly said they would have a thorough look for it and let me know when they found it.

27th April 2011 I received the following email from the Records Assistant, Chief Executives *"I am sorry I have been unable to trace the 3rd page of the court or appeal you requested. I have been told that this Appeals Office should have a copy of the document.*

The address of the Civil Appeals Offices is: Civil Appeals Office, Rook E307, Royal Courts of Justice, The Strand, London, WC2A 2LL.

27TH April 2011 – My Solicitor writes to the Court of Appeal asking for a copy of the Consent Order between HCC and the landowner in 1978.

After two or three weeks he telephones them and they tell him they are unable to find the document. It was therefore a stroke of good fortune that a colleague of mine had done an FOI in 2009 for the papers referring to Broxhead Common. Amongst them was the Consent Order with the missing page 3.

This page turned out to be Crucial and explained why the Schedule had been approved by the Appeal Court.

IT IS ORDERED that upon the said terms of settlement the said Appeal of the said Anthony Gary Peter Whitfield from the said Order dated 24th March 1977 do stand dismissed out of this Court.

As soon as the landowner's appeal was withdrawn the schedule would be ultra vires because the land in question would immediately have become registered common land under the terms of sec Sec 5(2) and 7(1)(2) of the Commons Reg Act 1965 states:

5(2) *The period during which objections to any registration under sec 4 of this Act may be made shall be such period, ending not less than two years after the date of the registration, as may be prescribed.*

The date of this decision is November 1974 so two years takes us to 1976 as the end of the period for objections.

&(1) If no objection is made to a registration under sec 4 of this or if all objections made to such a registration are **withdrawn** *the registration shall become final at the end of the period during which such objections could have been made under section 5 of this Act or, IF AN OBJECTION MADE DURING THAT PERIOD IS WITHDRAWN AFTER THE END THEREOF****, AT THE DATE OF THE WITHDRAWAL***

(2) ***Where by virtue of this section a registration has become final the registration authority shall indicate that fact in the prescribed manner in the register.***

CRA 1965

.....

With the date of the PI fast approaching and on the advice of my lawyers, I set about looking for even more witnesses. Not an easy task eleven years after the claim was lodged. Four had passed on and others were not in sufficiently good health to attend. However some of the claimants who had not been able to come the last PI, agreed to come to this. Others submitted witness statements but then I had an unbelievable piece of luck. I made contact with one of the daughters of the MacAndrew family who had owned the common for sixty years. I had met their Mother shortly before she died towards the end of the 1990's. Her dismay at the turn of events with the unauthorised fencing of the common land was no secret. She had persistently proclaimed the right of the public to access for 'air and exercise'. Now however three of her remaining daughters put pen to paper to confirm what we all knew.

Below is my statement of case:

WILDLIFE AND COUNTRYSIDE ACT 1981

THE HAMPSHIRE COUNTY COUNCIL (EAST HAMPSHIRE DISTRICT NO. 27) (PARISH OF HEADLEY) DEFINITIVE MAP MODIFICATION ORDER 2008

SUPPLEMENTARY STATEMENT OF CASE

ON BEHALF OF THE APPLICANT

MRS MAUREEN COMBER

FOR THE PUBLIC INQUIRY

COMMENCING ON 28 JUNE 2011

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1. This Statement of Case is described as "Supplementary" because the Planning Inspectorate already has copies of the material provided on behalf of the Applicant at the earlier Public Inquiry held in connection with this matter, which commenced on 29 September 2009. The Inspector at that Inquiry, by a Decision Letter dated 11 December 2009 ("the 2009 Decision Letter"), determined that the Order sought by the Applicant ought not to be confirmed; but that Inspector's decision was quashed by the High Court by a Consent Order dated 11 October 2010. The purpose of this Supplementary Statement of Case is accordingly to make clear the Applicant's position on various matters following the successful conclusion of those High Court

proceedings. The Applicant continues to rely on all of the material previously submitted to the Inspectorate in connection with the previous Inquiry, and has already indicated in correspondence (and now confirms) that she intends to submit a number of further witness statements in accordance with the Inquiry timetable by 31 May 2011.

The background context

2. The Application for the Order, pursuant to section 53(5) of the 1981 Act, adding a claimed Bridleway to the Definitive Map, was registered with Hampshire County Council ("the County Council") on 9 October 2000. The Application was initially refused by a notice dated 16 January 2007, following which the Applicant appealed on 23 January 2007 to the Secretary of State pursuant to paragraph 4 of Schedule 14 to the 1981. The Secretary of State in due course directed the County Council to make an Order, on the basis (see paragraph 58 of the Report of the Inspector appointed at that stage) that " … a bridleway is reasonably alleged to subsist as claimed".

3. The Order was accordingly made by the County Council on 8 October 2008. If confirmed its effect will be to add sections of bridleway to the Definitive Map and Statement for Hampshire ("the Definitive Map") between points A - B; D - B; B - C; and E - F ("the Claimed Bridleway") as shown on the plan annexed to the 2009 Decision Letter ("the Plan").

4. There were 7 objections to the Order, including one from the County Council (i.e. the Council which had been directed to make the Order by the Secretary of State) itself. Following the quashing of the 2009 Decision, that remains the current position: i.e the Order has been made, has been objected to, and a valid decision remains to be made as to whether the Order should be confirmed.

The Applicant's Position

5. The Applicant's challenge to the 2009 Decision Letter succeeded on the ground that the Inspector had applied the wrong legal test in assessing the sufficiency of the user evidence adduced in support of the Application. The effect of the Court Order however, as in all such cases, was to quash the 2009 Decision in its entirety. The Inspector now appointed to consider the matter must accordingly review all of the evidence in effect *de novo*, including the historical map evidence which the Applicant continues to rely upon both (i) as sufficient on its own to establish the existence of the claimed bridleway; and (ii) as corroboration and support for the claim based on modern user.[1] In order to assist the Inspector in this regard the Applicant has collected a number of further copies of relevant historical map evidence which will be exhibited to a Witness Statement to be made by her and provided to the Inspectorate in accordance with the Inquiry timetable by 31 May 2011.

The relevance of the history of Broxhead Common

6. One of the unusual complexities of this case concerns the status of Broxhead Common over which the Southern sections of the claimed bridleway pass, and to which the whole of its length would provide access from the North. The Applicant takes this early opportunity to state her understanding of the current position, and of the relevance to this claim of that position.[2] The County Council is itself the relevant Commons Registration Authority, and so will no doubt be able to confirm the accuracy of this account of the position at the Inquiry.

7. The history of Broxhead Common is long and complex. The Applicant will exhibit to her Witness Statement, to be provided to the Inspectorate in accordance with the Inquiry timetable by 31 May 2011, certain documents in connection with that history, in particular a decision of the Chief Commons Commissioner dated 22 November 1974 ("the Decision of the CCC"), concerning disputes relating to the registrations in the Rights section of Register

[1] The fact that no High Court challenge was made to the 2009 Inspector's conclusions concerning the historical map evidence is irrelevant. The new Inspector will need to review this evidence again and take it fully into account in properly arriving at a new decision.

[2] The Applicant of course acknowledges that this Inquiry is not directly concerned with the status of Broxhead Common (in whole or in part) as registrable common land. The Inquiry's concern is simply whether the bridleway claim is made out. But the question of whether part of the claimed route passes over common land, or is capable of giving access to such land, is clearly relevant in assessing the map and user evidence for the claimed defined route (for example, it would have made use of the route by horseriders more likely than if it did not provide access to or pass over common land, and it would make it more likely that tracks evident on the ground, or apparent from historical map evidence, were in fact used by the public, rather than their status being that of private rights of way of some sort). In fact, as will be explained below, its significance goes considerably beyond that.

Unit CL 147; the High Court judgment of Brightman J. dated 24 March 1977 (1975 W. No. 3423) ("Brightman J.'s Judgment") on an appeal from the Decision of the CCC; and a Court of Appeal Consent Order dated 24 May 1978 in the same matter, the significance of which is considered further below.

8. Section 1 of the Commons Registration Act 1965 ("the 1965 Act") provided for a register of three distinct matters, to be contained in separate register entries, to be maintained by Hampshire County Council, as follows:

> "*(a) land in England or Wales which is common land or a town or village green;*
>
> *(b) rights of common over such land; and*
>
> *(c) persons claiming to be or found to be owners of such land or becoming the owners thereof by virtue of this Act.*"

9. The entire 404.656 acres of Broxhead Common was added as a provisional registration "by the registration authority without application" on 23 April 1968 (see Entry 1 in the "Land Section" of the current register for Register Unit No CL147, a copy of which will also be provided with the Applicant's Witness Statement).

10. Among the notes to this registration there is a reference to an Objection No OB 274 of Mr Anthony Whitfield of Headley Wood Farm, made the 2 September 1970. It (along with other objections) is noted in the first paragraph of the Decision of the CCC, and at the top of page 2 of Brightman J.'s Judgment (although there stated to have been made on 1 September 1970).

11. Turning to the "Rights Section" of the register (i.e. the part dealing with the rights described at para (b) in paragraph 8 of this Statement), one finds that a large number of people claimed rights over the common; and that these too attracted various objections. Note 3 to this section of the register records (again) the Objection No 274 of Mr Anthony Whitfield of Headley Wood Farm, made 2 September 1970 in respect of registration entries (i.e. claims of rights of common) Nos 1-41.

12. It seems therefore that Mr Whitfield objected *both* to the registration of Broxhead Common as common land (i.e. in the Land Section of the register), *and* to the various claims of rights of common over it (i.e. in the Rights Section), although the Applicant has been unable to trace the actual Objection No 274. It is stated at the top of page 2 of Brightman J.'s Judgment "that Mr Whitfield lodged a formal objection to the registration of part C in the Land Section and also to the registration of Mr Connell's and Mrs Cooke's rights of common of pasture", although (intriguingly) the Decision of the CCC begins by making mention only of the second type of objection – i.e. to the Rights Section of the register; and indeed Brightman J. continues by stating that he "is not concerned with the registration of part C as common land but only with the claims to rights of common thereover".

13. It seems that what happened therefore is either that Mr Whitfield did lodge separate objections to the Land Section and to the Rights Section of the register (as Brightman J. appears to suggest); or that he lodged merely an objection to the Rights Section of the register, but the registration authority chose also to note that objection in an entry added to the Land Section of the register.

14. There is considerable significance in this point. By way of example, in the Court of Appeal decision in *President and Scholars of Corpus Christi College Oxford v Gloucestershire County Council* [1983] QB 230, the college concerned objected as landowner to an entry in the Rights Section of the register, but did not separately enter any objection to the Land Section. They were successful in sustaining their objection to the entry in the Rights Section of the register, but the entry in the Land Section nevertheless in due course became final; and their application pursuant to section 13 of the 1965 Act to amend the register by removing the land from the Land Section of the register (which was the application before the Court of Appeal) was unsuccessful, because, under the terms of section 10, the registration as common land had become "conclusive evidence of the matters registered".

15. And indeed this possibility was expressly contemplated by the 1965 Act. The definition of common land contained in section 22 of the 1965 Act is as follows:

> "*(1) In this Act, unless the context otherwise requires, "common land" means—*

(a) land subject to rights of common (as defined in this Act) whether those rights are exercisable at all times or only during limited periods;

(b) waste land of a manor not subject to rights of common;

but does not include a town or village green or any land which forms part of a highway;"

16. Paragraphs (a) and (b) of this definition are mutually exclusive, but paragraph (b) clearly contemplates registration of land (provided that it is waste land of a manor) that is *not* subject to any rights of common. (In fact, the evidence in the *Corpus Christi* case was that the land concerned was *not* waste land of the manor, but nevertheless it was too late for the objector to do anything about it once the entry in the Land Section of the register had become final.) But it is clear that there is nothing inherently contrary to the scheme of the legislation in having land recorded as common land in the Land Section of the register, but with no rights of common recorded in the Rights Section of the register – indeed section 22(1)(b) expressly contemplates it.

17. It is also significant that the 1965 Act provides two (and only two) specific circumstances where an entry in one section of the register is to have consequences for another part of the register. The implication is clear, and was accepted as such by the Court of Appeal in the *Corpus Christi* case, that there are no other automatic consequences from objections made in respect only of particular sections of the register:

"*Only two exceptions to this independence of the two kinds of registration are to be found in the legislation. Both of these follow from the fact that, since rights of common cannot exist in the air, a registration of rights must necessarily entail a registration of the land which is alleged to be subject to the rights (see section 4 (2) (b)), and an objection to a registration of the land as common land must necessarily also be treated as an objection to any registration of alleged rights over the land: see section 5 (7). But the converse does not follow and is nowhere indicated: a registration of the land is treated as being independent from the existence or absence of any registration of rights over the land; and an objection to any registration of rights is treated as being independent from any objection to the registration of the land in question.*"

18. Turning to the Broxhead Common position, what happened is perhaps an even more extraordinary tale than that in the *Corpus Christi* case. The Decision of the CCC was to uphold certain Rights entries in respect of the entire Common (subject to a small parcel, known as Wildman's Plat being excluded). As far as the Western part of the Common is concerned (i.e. the area to the West of the road leading from Sleaford in the North to Lindford in the South, and in the ownership of the Secretary of State for Defence) this was done on the basis of the acceptance on behalf of that landowner that seventeen of the applicants were entitled to rights of common over that land, as set out on page 21 of the Decision of the CCC.

19. Rights on the Western part of the common were therefore recognized and accepted by the landowner concerned, and in due course became final and conclusive. But, as the Chief Commons Commissioner put it:

> "*The fact that this settlement has been arrived at is not, of course, evidence against the other Objectors and, in particular, is not evidence in relation to the question of the existence of rights of common over the land to the east of the Sleaford-Lindford road.*"

20. It is this Eastern section of the Common which is directly of relevance to the Inquiry, because it is over part of this section of the Common that the Southern section of the claimed bridleway passes, and to which all of the claimed bridleway leads. The owner of the Eastern part of the common did not make any such concession at the time of the registration application in the late 1960s/early 1970s; and so it was necessary for the Commissioner to determine each of the claims in respect of the Eastern part of the Common. It appears however that the Rights claimed were not *different* in respect of the two parts of the common: i.e. they were claimed by the same people and extended, in principle, over the entirety of the Common. The position, however, was that the Secretary of State accepted that seventeen of the claims were valid as far as the land in his ownership was concerned, whereas the owner of the Eastern part of the Common (Mr Whitfield) denied them all.

21. The CCC accordingly examined these claims in detail, and concluded that two of the forty-one claims were valid as far as the Eastern part of the Common was concerned, those of Mr

Connell (see page 7 to 8 of the Decision of the CCC) and of Mrs Cooke (see pages 10 to 12); and were based on their having acquired such rights (to summarize some complex law) by reason of devolution of title, rather than by prescription. In fact, the CCC did not accept that *any* rights had been acquired by prescription or by lost modern grant - i.e. by modern user. He set out his reasoning as follows, at pages 14-15 of his decision:

> "*To my mind, this is a case like* Hammerton v Honey *(1876) 24 WR 603 in which the claim failed because the evidence proved a user far more extensive than was requisite to support the claim. As was pointed out in that case, it is not permissible to pick out the items in the evidence which support the claim and reject the rest. This is not a case where there have been occasional acts going beyond the rights claimed. What has been proved is totally different, an intermittent, sporadic and promiscuous use by the general body of inhabitants which does not support the individual claims at all.*
>
> *…. In my view, what has happened during the period of living memory can be explained by the break-down of the manorial system and its replacement by the notion, acquiesced in by the owners until Mr Myers began to erect his fences in 1963, that a common is open to anyone to use as he pleases. Such use is not the use as of right related to the needs or capacity of a dominant tenement, which is essential where a claim to a right of common is based on prescription or lost modern grant.*
>
> *I have identified … two properties to which rights of common are attached, but the evidence relating to the others leads me to the conclusion that the acts of their owners or occupiers in relation to the Common have been those of inhabitants of the neighbourhood enjoying the Common as they pleased with the good-natured toleration of the owners rather than those of the owners or occupiers of particular properties enjoying rights attached to their properties.*"

22. This evidence is enormously significant for the purposes of this Inquiry. It demonstrates that the CCC's view of the user evidence was that it was of *public* user of the common, rather than of the more restricted user by a defined class of commoners with properly registrable rights. The Applicant's own evidence, and the other user evidence provided in support of the claim, also confirms and corroborates that this was the case. Although such user may have been 'too public' to be registrable as a right of common; it is precisely the kind of user required to establish a public right of way.

23. But the relevance of the commons issues does not end there. At the conclusion of his Decision, the Chief Commons Commissioner set out each of his determinations concerning the Rights claimed by the various applicants for registration. He did so entirely in the terms of the Rights Section of the register, without indicating anything concerning the Land Section (see pages 17-20 of his Decision).

24. Mr Whitfield appealed against the Decision of the CCC to the High Court, challenging the conclusions that Mr Connell and Mrs Cooke had registrable rights in connection with the Eastern part of the Common. Again leaving out a lot of the detail, Brightman J reasoned as follows:

> "*The Chief Commons Commissioner found as a fact that there was a right of common of pasture over the whole of the Common attached to each of the tenements, whether customary, freehold, copyhold or leasehold, mentioned in the survey of the unpartitioned manor made in 1636. He interpreted the 1637 partition is having the effect of attaching to each of the tenements in the two-twelfths parts of the manor the like rights of common over such two-twelfths and so also in respect of each tenement in the ten-twelfths.*[3]
>
> *…*
>
> *There are no sufficient grounds for challenging the finding of the Chief Commons Commissioner that in ancient days the manorial tenants enjoyed rights of common, both before and after the partition. There is, in my judgment, plenty of documentary evidence to justify that finding of fact.*
>
> *…*
>
> *If therefore the lease of 1678 was granted by the Lord of the Manor to be held as customary land according to the custom of the manor, and the later leases were granted on a like basis, I have no reason whatever to doubt that the rights of common enjoyed by the manorial tenants would have ultimately vested in Gamblen.*[4] *If, however, the leases were common law leases, it seems to me impossible to argue that any rights of common attached thereto and passed by the conveyance of 1929….*

[3] Brightman J. at 6C. These conclusions are at the foot of page 6 of the Decision of the CCC. Note that the CCC also found at page 4 of his decision that "[t]he land comprised in the Register Unit I identify as that referred to in the allotments of Brocas's ten twelfths and as containing nothing included in the Fauntleroy allotments."

[4] Mr Connell's predecessor in title.

I must therefore examine the leases to see whether they were grants according to the custom of the manor or were ordinary leases taking effect under the common law."[5]

…

25. Brightman J. examined the position at length, concluding at page 13 that he could see no reason to depart from the conclusion of the Chief Commons Commissioner that the rights of common were held as tenants of the manor. It followed that Mr Connell's claim to rights of common remained sound.

26. Brightman J. did not however accept that Mrs Cooke's claim to common rights withstood scrutiny. He held, at page 18, that the Chief Commons Commissioner had made an improper inference of fact in connection with her alternative argument, based on section 62(1) of the Law of Property Act 1925: "[i]n the result the appeal of Mr Whitfield fails against Mr Connell but succeeds against Mrs Cooke."

27. There is an interesting discussion with Counsel, at the conclusion of Brightman J.'s Judgment, as to what his powers were with respect to the register (beginning at 21F). Brightman J. made no order altering the register in any way, but left the matter to the Chief Commons Commissioner, but with liberty to apply should there be any difficulty (at 22F-H). It is clear however that what was being comtemplated, by Counsel and by Brightman J was the removal of the registration of Mrs Cooke's rights – which Brightman J. had held not to be made out - from the Rights Section of the register. The Appeal before Brightman J. was simply not concerned with the Land Section.

28. But the case did not end there. Mr Whitfield appealed against Brighman J.'s decision concerning Mr Connell's rights (i.e. now the single registered commoner) to the Court of Appeal. And those proceedings were in due course compromised, by a Consent Order dated 24 May 1978. It appears from the Consent Order (i) that Mr Connell agreed by the terms of

[5] Brightman J. at 8.

the Consent Order to release his rights of common over the 80 fenced acres owned by Mr Whitfield; (ii) that the County Council agreed not to "pursue its provisional registration of the said area as common land and the Respondents jointly and severally consent to the amendment or withdrawal by the said County Council of its provisional registration pending before the Commons Commissioner of the said area so as to exclude all reference to the said area on the Commons Register"; and (iii) that the Respondents further agreed to support any application by Mr Whitfield to the Secretary of State, under section 194 of the Law of Property Act 1925, i.e. for permission to erect the pre-existing fences.

29. There are several matters that are curious about this Consent Order. There is nothing odd about Mr Connell agreeing to surrender his rights of common. It is perfectly clear law that a commoner can surrender his rights. But it is curious that the Court and parties felt in a position to determine by consent the state not only of the Rights Section of the register, but also what the Land Section should say. And there is a strangeness in the Respondents agreeing to support Mr Whitfield in any application he might make to the Secretary of State under section 194 of the Law of Property Act 1925 in respect of the pre-existing fences. If the view had been reached that the 80 acres was not properly registrable as common land, why was any such application to the Secretary of State necessary?

30. The further significance of this for the purposes of this Inquiry (above and beyond the significance of the factual conclusions of the CCC set out at paragraph 15 above) lies in the fact that it is to these very 80 acres of (disputed) common land that the claimed bridleway leads: i.e. 80 acres which were initially placed on the register, but then it appears removed in accordance with the Court of Appeal's Consent Order.

31. The Applicant makes the following points in connection with this evidence concerning the commons registration process.

32. First, the Inspector should conclude, in the light of the CCC's findings, that there was public resort to the area of common land accessed via the claimed bridleway, and that this provides very considerable support for the bridleway claim. It strengthens the case that the

historic map evidence shows public rather than private tracks over the common; and it corroborates the modern user evidence.

33. Secondly, (although this is not a matter that requires any decision by the Inspector), the Inspector ought to be aware that the Commons Act 2006, when it is brought into force in Hampshire (it is currently in force only in respect of certain pilot areas), will provide a mechanism for areas of land excluded from the register in ways such as that in which the 80 acres were here excluded, to be returned to the register. The relevant provisions are contained in Schedule 2 to the 2006 Act, and are as follows.

4 Waste land of a manor not registered as common land

(1) If a commons registration authority is satisfied that any land not registered as common land or as a town or village green is land to which this paragraph applies, the authority shall, subject to this paragraph, register the land as common land in its register of common land.

(2) This paragraph applies to land which at the time of the application under sub-paragraph (1) is waste land of a manor and where, before the commencement of this paragraph–

(a) the land was provisionally registered as common land under section 4 of the 1965 Act;

(b) an objection was made in relation to the provisional registration; and

(c) the provisional registration was cancelled in the circumstances specified in sub-paragraph (3), (4) or (5).

(3) The circumstances in this sub-paragraph are that–

(a) the provisional registration was referred to a Commons Commissioner under section 5 of the 1965 Act;

(b) the Commissioner determined that, although the land had been waste land of a manor at some earlier time, it was not such land at the time of the determination because it had ceased to be connected with the manor; and

(c) for that reason only the Commissioner refused to confirm the provisional registration.

(4) The circumstances in this sub-paragraph are that–

(a) the provisional registration was referred to a Commons Commissioner under section 5 of the 1965 Act;

(b) the Commissioner determined that the land was not subject to rights of common and for that reason refused to confirm the provisional registration; and

(c) the Commissioner did not consider whether the land was waste land of a manor.

(5) The circumstances in this sub-paragraph are that the person on whose application the provisional registration was made requested or agreed to its cancellation (whether before or after its referral to a Commons Commissioner).

(6) A commons registration authority may only register land under subparagraph (1) acting on–

(a) the application of any person made before such date as regulations may specify; or

(b) a proposal made and published by the authority before such date as regulations may specify.

34. It is sub-paragraph (4) that is relevant here, and to which emphasis has been added. It will apply directly to the 80 acres of Broxhead Common which appear to have been removed from the Land Section of the Register without consideration of whether the land was waste land of a manor. (It was in fact such land, and so ought to have remained on the Register, notwithstanding the surrender of Mr Connell's rights, by virtue of section 22(1)(b) (rather than (a)), of the 1965 Act, as set out above at paragraph 15 of this Statement.)

35. Thirdly, the Applicant raises these issues now and in detail to give the County Council an opportunity to clarify matters for the Inspector - if it is able to do so. It would particularly be helpful for the Inspector to be clear as to whether objections were made at the outset by Mr Whitfield both to the Rights Section and to the Land Section of the register; and the exact terms of the relevant "Final Disposal Notice" (which appears to have made on or about 18 December 1978) of the CCC following the Court of Appeal's Consent Order; and whether any application was ever made in respect of the fencing pursuant to section 194 of the Law of Property Act 1925. This further information will assist in establishing whether the actual effect on the Register was that the 80 acres were removed from the Land Section, in addition to Mr Connell's rights being removed from the Rights section, which is what the

Applicant currently assumes must have happened. (But, and as already indicated, even if that was the case, the 2006 Act will in fact provide a mechanism for the 80 acres in due course to be restored to the Register).

Conclusion

36. The Applicant maintains her position that the Order made in this matter ought to be confirmed. The historical map evidence, the modern user evidence, and the history of this area of Broxhead Common together yield no other possible conclusion.

Edwin Simpson

New Square Chambers

Lincoln's Inn

18 May 2011

I telephoned the Planning Inspectorate and asked if it was possible for me to have an Inspector who had absolutely nothing to do with IPROW. I explained that it had been made known to me that I had upset them in some way which they were unable to explain to me. Hopefully this would not be an issue but to make sure I suggested that the Inspector should not be an FIPROW. I was assured that the Inspector who was appointed would not be an associate of that organisation. They even told me his name. But on the day the Inspector was not the person I had been told it would be but a Mr Alan Beckett FIPROW.

I tried to comfort myself by thinking that he must surely be impartial. Hopefully his report would be free from bias and that he would look at all the evidence and come to his conclusion on the 'balance of probability'.

This PI took five days although I can't exactly say what took up the extra time except perhaps that I was kept for four hours on the witness stand!

I also remember at one point the Inspector asking Colin Piper if, having heard and seen the extra historical evidence, he would change his recommendation for the claim; to which he replied that he would not. So the Inspector asked him why this was. "Because" he said, "I believe it is a case of where the claimant wished to ride rather than had ridden". Which I took as a polite way of saying we were all fabricators.

Our Counsel's summing up was as follows:

WILDLIFE AND COUNTRYSIDE ACT 1981

THE HAMPSHIRE COUNTY COUNCIL (EAST HAMPSHIRE DISTRICT NO. 27) (PARISH OF HEADLEY) DEFINITIVE MAP MODIFICATION ORDER 2008

CLOSING SUBMISSIONS

ON BEHALF OF THE APPLICANT

MRS MAUREEN COMBER

IN RESPECT OF THE PUBLIC INQUIRY

COMMENCING ON 28 JUNE 2011

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1. These Closing Submissions address first the historical background and map evidence, which is principally of relevance in respect of the Southern section of the claimed route (the Broxhead Common section). They then consider the modern user evidence in

respect of the same section (which falls to be considered both pursuant to section 31 of the Highways Act 1980 and at common law), and finally the modern user evidence (which falls similarly to be considered in these two ways) in respect of the Northern section of the claimed route (the Baigents Hill section).

The historical background and map evidence

2. In its Opening Statement to the Inquiry the Applicant set out in detail the relevance of the 'commons history' to this claim. The Applicant acknowledges that this Inquiry is not directly concerned with the status of Broxhead Common (in whole or in part) as registrable common land. The Inquiry's concern is simply whether the bridleway claim is made out.
3. But the question of whether part of the claimed route passes over common land, or is capable of giving access to such land, is clearly relevant in determining (i) whether the bridleway leads anywhere that would be of interest to members of the public on horseback (or whether, when BW54 was a footpath, it was a cul-de-sac route[6]); and (ii) whether (particularly given the evidence from the 1974 Commons Commissioner's Report) it was likely on the balance of probabilities that defined tracks on the ground were being used by the public or were merely private routes.

What do the old maps show?

4. It is submitted on behalf of the Applicant that the Inspector should conclude as follows. First, that the map evidence, beginning with Taylor's map of 1759 (CC Bundle 68), the 1787 'Alice Holt' Map, and Milne's Map of 1791 (CC Bundle 69); and continuing right up to the modern day Ordnance Survey maps shows Cradle Lane (or at any rate, and whatever its proper name, a route) continuing to the South of Picketts Hill. The first section of this route to the South of Picketts Hill, from E to B, has followed a remarkably consistent and 'confined' alignment throughout that period. It appears on the modern maps in a manner little different from those of more than 200 years ago. Mr Piper properly and fairly acknowledged that this section must have been a physical feature of some importance (even in 1787) for it to have been included on such a small scale map. He also indicated that in his view these early maps (he highlighted in

[6] As to which see generally Halsbury's Laws 4th ed 2004 reissue, Vol 21, para 119.

particular the 1787 map, but the Applicant says that they all show a similar route) are of considerable significance to the claim.

5. It is accepted that these maps alone are not conclusive as to status. What they show must be interpreted sensibly in the light of other available evidence in order to conclude, on the balance of probabilities, the likely status attributable to any particular route. The Applicant submits that the evidence as to the public status of the E to B extension of Cradle Lane is overwhelming. It provides access to common land (indeed it is included within the land today registered as common land); and we know that in 1974 (nearly two hundred years after 1787) the Chief Commons Commissioner (the CCC) reasoned as follows.

The Reasoning of the CCC

6. Rights on the Western part of the common (i.e. to the west of the Sleaford-Lindford road) were accepted by the landowner concerned (the MOD), and in due course became final and conclusive.

7. The owner of the land to the east of that road made no such concession. The CCC accordingly examined these claims in detail, and concluded that two of the forty-one claims were valid as far as the Eastern part of the Common was concerned, those of Mr Connell (see page 7 to 8 of the Decision of the CCC) and of Mrs Cooke (see pages 10 to 12); and were based on their having acquired such rights (to summarize some complex law) by reason of devolution of title, rather than by prescription. In fact, the CCC did not accept that *any* rights had been acquired by prescription or by lost modern grant – i.e. by modern user. He set out his reasoning as follows, at pages 14-15 of his decision:

> "*To my mind, this is a case like* Hammerton v Honey *(1876) 24 WR 603 in which the claim failed because the evidence proved a user far more extensive than was requisite to support the claim. As was pointed out in that case, it is not permissible to pick out the items in the evidence which support the claim and reject the rest. This is not a case where there have been occasional acts going beyond the rights claimed. What has been proved is totally different, an intermittent, sporadic and promiscuous use by the general body of inhabitants which does not support the individual claims at all.*

…. In my view, what has happened during the period of living memory can be explained by the break-down of the manorial system and its replacement by the notion, acquiesced in by the owners until Mr Myers began to erect his fences in 1963, that a common is open to anyone to use as he pleases. Such use is not the use as of right related to the needs or capacity of a dominant tenement, which is essential where a claim to a right of common is based on prescription or lost modern grant.

I have identified … two properties to which rights of common are attached, but the evidence relating to the others leads me to the conclusion that the acts of their owners or occupiers in relation to the Common have been those of inhabitants of the neighbourhood enjoying the Common as they pleased with the good-natured toleration of the owners rather than those of the owners or occupiers of particular properties enjoying rights attached to their properties."

8. This evidence is enormously significant for the purposes of this Inquiry. It demonstrates that the CCC's view of the user evidence in 1974 was that it was of *public* user of the common, rather than of the more restricted user by a defined class of commoners with properly registrable rights. Such user was too general in nature to create rights by prescription for particular commoners; but – so long as confined to specific alignments – it is precisely the kind of evidence required to establish a claim to a public right of way. The Applicant's own evidence and the other user evidence provided in support of the claim, also confirms and corroborates that this was the case. Although such user may have been 'too public' to be registrable as a right of common; it is precisely the kind of user required to establish a public right of way. It should also be noted that the CCC's attribution of such user to "the good-natured toleration of the owners" is precisely the kind of user necessary (as confirmed in *Sunningwell*) to establish a public right of way – i.e. no distinction is to be drawn between user that is tolerated and user that is acquiesced in: they are the same for the purpose of time running for prescription).

9. As far as the length of the claimed route from E to B is concerned, which has always followed a defined and narrow alignment across part of the common, and providing access (from the North) to the rest of the common, there can be no doubt that the

"use by the general body of inhabitants" acknowledged over the common generally by the CCC in 1974 will have taken place over this specific narrow alignment.

10. The Applicant specifically submits that, at common law (and even without reliance on section 31 of the 1980 Act), the body of map evidence taken in conjunction with the evidence from the decision of the CCC in 1974 is sufficient to establish the public status of the section of the route from E to B.

11. The precise alignment of the route on to the South and West from point B has not been as consistent over such a long period. Nevertheless the Applicant submits that the map evidence as a whole is indicative of a through route of some sort across the common to Lindford (see Taylor, Alice Holt and Milne; and the evidence from the Finance Act map and supporting documentation)[7] and that, at any rate since the OS County Series 25 inches to 1 mile Map of 1909 a track/fence line have been in clear existence along both of the claimed stretches B – A and B – D (CC Bundle 85). These stretches of claimed route are then shown continuously, for example in the 1939 OS Map (CC Bundle 86) and 1971 OS Map (B – A now clearly shown as a track and not just a fence line: CC Bundle 88).

12. The Applicant accordingly also submits that, at common law (and even without reliance on section 31 of the 1980 Act), this body of map evidence taken in conjunction with the evidence from the decision of the CCC in 1974 is also (in addition to the section of the route from E – B) sufficient to establish the public status of the sections of the route from B – A and from B – D.

User evidence for the Southern section of the claimed route (Broxhead Common)

[7] The Applicant does not understand the suggestion made on behalf of the CC that the route referred to is one leading to the East towards Headley or Arford. It is much more likely to be what it says.

13. The Applicant has already indicated that it relies on the modern user evidence as support for the conclusion at common law that bridleway rights exist from E – B, from B – A, and from B – D. The modern user evidence corroborates that user was by the public, and that it was to bridleway status.

14. But the user evidence is also relied upon more generally for the purposes of section 31 of the 1980 Act. For these purposes the first question (and it is not a straightforward one in this case) is to consider when user was called into question. For the Southern section of the route there appear to be the following possibilities:

- 1963, when Mr Whitfield erected fences around the "80 acres" (to which previously the public had had access);

- 1989, when the gate at point D was locked;

- 1997 (the date accepted by the previous Inspector) when various prohibitive notices were erected.

1963

15. It will be recalled that the decision of the CCC in 1974 was appealed to the High Court and to the Court of Appeal. As a result of the compromise of the Court of Appeal proceedings (by a Consent Order dated 24 May 1978): (i) Mr Connell agreed by the terms of the Consent Order to release his rights of common over the 80 fenced acres owned by Mr Whitfield; (ii) the County Council agreed not to "pursue its provisional registration of the said area as common land …"; and (iii) the Respondents further agreed to support any application by Mr Whitfield to the Secretary of State, under section 194 of the Law of Property Act 1925, i.e. for permission to erect the pre-existing fences.

16. It is still not apparent whether any such application was ever made (which, had there been a date of such permission being granted would have been a further possible date for calling into question – i.e. the date on which an "illegal" obstruction became a lawful one.)

17. In any event the Applicant, having heard all of the evidence brought forward at the Inquiry does **not** contend for 1963 as the date of calling into question of the claimed route. It appears that any gate providing access on to the common at point D remained unlocked at this stage, and that bridle access along E – B and from B – A and from B – D and on to the common continued as a matter of fact to take place.

1989

18. The evidence before the Inquiry indicates that from 1989 the gate at point D (i.e., to be more precise, the gate on the Western side of what is now BW54 at point D (but was then FP54) was locked.[8] The 1987 storm had already made the section of the route between E and B difficult (although not impossible) to traverse; and it appears that after the 1990 storm this section became even more difficult – although still not impassable.

19. But in the Applicant's submission, the locking of the gate in 1989 did call into question user of the route South of Picketts Hill to gain access to the Common. Because BW54 was then merely a footpath, the impossibility of gaining access to the common (which clearly from the user evidence is what in fact bridle users from the North, of E – B and B – A and B – D proceeded to do) left such bridle users with nowhere lawful to go – a clear indication that their rights were being called into question. The matter is even clearer if one considers users coming from the South (i.e. from the common) and attempting to make their way through to Picketts Hill. Their use would clearly have been called into question not only by the locked gate at D, but also by an equivalent locked gate further to the South. (It is, in the Applicant's submission, perfectly possible for the locking of a gate that is not actually on the claimed route itself, but which

[8] On the significance of locked gates, see generally Halsbury's Laws 4th ed 2004 reissue, Vol 21, para 126.

prevents lawful access to the claimed route, to call user of a route into question – just as it is possible for notices erected other than on the claimed route itself – as in 1997 – to have a similar effect.)

1997

20. If the Applicant is right that the locking of the gate at D called user of the Southern section of the route into question in 1989, then the relevant 20-year period will have been 1969 to 1989. If the Applicant is wrong about that, then the Applicant accepts that user was called into question by the 1997 notices, in which case the relevant 20-year period will have been 1977 to 1997.

The User evidence

21. The Applicant submits that there is clearly sufficient evidence of bridleway user of this section of the claimed route, whether considered from 1969 to 1989, or from 1977 to 1997. The previous Inspector (apparently on the basis that the users may have belonged to a particular user group) applied the wrong legal test in assessing whether the user was sufficiently representative of the public. Her mistake was understandable, but nevertheless was a clear mistake. It is inevitably the case that bridle users will come from a *relatively* local area, and also may well know one another, and may belong to related local organizations. But this is entirely irrelevant in determining whether or not *the quantity of user is such as to bring to the attention of a reasonable landowner that public rights are being asserted*. That remains the proper (and only) test for the Inspector to apply in this case, and it is not to be glossed by the use of phrases (as used in error by the previous Inspector) such as "public at large" (see in particular paragraph 36 of the previous Decision Letter).

22. In fact there is now in any case a considerably larger body of user evidence than was available at the previous Inquiry (and it does not come from the members of any particular Bridleway group). The Applicant relies on the written and oral evidence adduced at the last Inquiry (15 users, helpfully summarized at CC Bundle 110), and on that adduced at this Inquiry. The evidence summarized at CC Bundle 110 begins in the 1940s (entirely credibly, given the CCC's reference in 1974 to the period of "living

memory"); is extensive by the middle of the 1960s (7 users); and continues until the late 1990s.

23. At this Inquiry the Inspector has had further written user evidence adduced, and has heard oral evidence from Mrs Childs, Mrs Booton, Mrs Williams, Mr Colbourne, Mr Milton, Mrs McBeath, Miss Burr and Mrs Comber (to avoid double counting it should be noticed that Miss Burr, Mrs McBeath and Mrs Comber number among the 15 users summarized at CC Bundle 110, from the last Inquiry). The evidence from those who claim to have used the Southern section of the route (in connection with gaining access to the common) is remarkably consistent. Prior to the storms in 1987 and again in 1990 there was no evidence of any obstruction to these Southern sections of the route (in particular there was no evidence of any 'gate' or other similar feature at or near point B as *might* (the point can be put no higher than this) appear to be indicated by an aberrant line on the OS Map of 1971 [although Mr Piper accepted that this could be an indication of some other kind of feature such as a bank – or indeed simply a mistake]; and there is no evidence of permission, nor of challenge, nor that access was made by force, nor of any other overt actions being taken by or on behalf of the landowner to satisfy the so-called proviso to section 31.

24. The Applicant submits that the extent of user over the Southern section of the route was sufficient to bring to the attention of a reasonable landowner that public rights were being asserted for a 20-year period prior either to 1989 or 1997;[9] and that the landowner did not take sufficiently overt steps either to prevent such as of right user from continuing nor to satisfy the proviso.

The Northern (Baigents Hill) section of the route

[9] If the latter date is the right one, then the possible interruption of user caused by (principally) the 1990 storm becomes relevant. (As to interruption generally, see Halsbury's Laws 4th ed 2004 reissue, Vol 21, para 125.) The Applicant submits first that certain users continued to make their way through the difficult section; and that others lawfully deviated so as to find their way onto/from Picketts Lane. In such circumstances (i.e. where the through route as a whole continues to be asserted) such "lawfully-deviating user" is capable of leading to the acquisition of prescriptive rights along the principal route [which, it should also be recalled, for this section has been part of a major linear route/feature on the ground for more than 200 years].

25. The Applicant does not claim that the map evidence is of any relevance to this section of the route – although the findings of the CCC of public user of the common in 1974 remain of significance, as does the evidence from the 1978 Ramblers' Survey (summarized at CC Bundle 16, para 7.14) that the Baigents Hill woodland to the north west of Cradle Lane was then unenclosed.

26. The date of calling into question for this section of the route is less difficult. It is whenever the area of land (and particularly the entrance points at F and E) became securely gated/fenced, which the last Inspector accepted (correctly, it is submitted) was in around 1999.

27. For the 20 year period prior to that the user evidence is similar in extent and degree to that for the Southern section of the route. It is given credibility by the facts (i) that the section of Picketts Hill from where Cradle Lane meets it from the North to point E is plainly and obviously hazardous for horseriders; (ii) from the fact that at point F (and assuming no or plainly inadequate fencing) there was clearly an obvious and level access (which is still apparent on the ground, and the track from F to the South discernible in aerial photographs) onto (what the users say was) a 'track' leading into the Baigents Hill area; and (iii) that there was a readily available means of gaining access to Picketts Hill at point E (and on occasion, although not the more usual route, at E1).[10]

28. The user evidence that the fencing (if any existed at all) was inadequate to prevent access at point F prior to 1999 is consistent and convincing (note the acceptance by Mr Podvoiskis that the fencing was not well-maintained; and the specific reference by Mr Krevit in 2006 to mending the perimeter fencing of the woodland approximately 8 years ago – i.e. in or around 1998, when it is accepted the area was finally secured). The evidence is similarly convincing that access was possible around any structure (perhaps first a wooden gate, then a metal pole with one end on the ground – although

[10] Incidentally, the Applicant submits that there is little if any significance to be attributed to the sketch prepared by Mr Piper of the several routes in the vicinity used by Mrs Comber. They accurately reflect her own (and others') evidence that, on occasion, riders "scrambled up the bank" to the North West of Cradle Lane, and at times emerged at E1 rather than E; but they do not detract from the case that is now made that there was sufficient user of the routes now claimed.

this may, conceivably, have been one of a pair of cantilevered gates) that may have existed at point E. And indeed the fact that access on horseback was possible is corroborated by Lithuanian House Ltd's own witnesses who attest to meeting horseriders on the land.

29. The evidence of notices (whether at E or elsewhere) is similarly unconvincing. There may perhaps have been an old and obscured "private" notice at E; but it was ineffective to address specifically the question of the status of the route itself (as opposed to the woodland generally), and appears not to have been observed at all by the vast majority of users.

The evidence of challenges

30. Lithuanian House Ltd (LHL) relies in particular on evidence of challenge to users of the Northern section of the claimed route. The Applicant submits that the *written* evidence of such challenges adds nothing of any significance to the oral evidence (such as it was) actually adduced at this Inquiry. That written evidence does not attest to actual challenges, but rather to being told of such challenges. It also does not attest to any valid authorization for such challenges, such that they could be taken genuinely as evidence of the landowner's (i.e. the corporate landowner's) lack of intention to dedicate: see *Bolton v TJ Graham* [1957] 1 QB 159 at 172-3, and generally para 742 of Halsbury's Laws 4th ed 2006 reissue, Vol 27(2) (considered further below).

31. As for the evidence given orally on behalf of LHL at the Inquiry, the Applicant submits that it supports the fact that horseriders were using the route; that access was therefore not prevented by fences or gates; and that such challenges as there were were infrequent, and related to the relatively short period of the Summer camp in the woods at the end of July/beginning of August, such challenges being motivated principally by (entirely understandable) safety concern for those using the campsite for a relatively brief period, rather than by any concern to contest the existence of a public right generally. To that extent the position is equivalent to the taking (say) of a hay

crop from a meadow at certain times of year, or from the coexistence (previously thought of as "deference") of golfers and walkers in *Redcar*; and is not a reason for preventing the general body of such user from being as of right.

32. Furthermore, it is far from clear that the challenges can properly be taken as demonstrations of the corporate intention of LHL. In *Bolton Engineering v TJ Graham* [1957] 1 QB 159, CA, Denning LJ stated as follows, at 172-3:

> *"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in Lennard's Carrying Co. Ltd. V. Asiatic Petroleum Co. Ltd.30 So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty. That is shown by Rex v. I.C.R. Haulage Ltd.,31 to which we were referred and in which the court said 32: "Whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company ... must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case."*
>
> *So here, the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case. Approaching the matter in that way, I think that, although there was no board meeting, nevertheless, having regard to the standing of these directors in control of the business of the company, having regard to the other facts and circumstances which we know, whereby plans had been prepared and much work done, the judge was entitled to infer that the intention of the company was to occupy the holding for their own purposes. I am of opinion, therefore, that the judge's decision on this point was right."*

33. And in *Tesco Supermarkets v Nattrass* [1972] AC 153 at 173, *per* Lord Reid:

> *Reference is frequently made to the judgment of Denning L.J. in H. L. Bolton (Engineering) Co. Ltd. V. T. J. Graham & Sons Ltd. [1957] 1 Q.B. 159 . He said, at p. 172:*
>
> *"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."*
>
> *In that case the directors of the company only met once a year: they left the management of the business to others, and it was the intention of those managers which was imputed to the company. I think that was right. There have been attempts to apply Lord Denning's words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Lord Denning intended to refer to them. He only referred to those who "represent the directing mind and will of the company, and control what it does."*
>
> *I think that is right for this reason. Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. Lennard's case [1915] A.C. 705 was one of them.*

34. There is no evidence to indicate in this case that those (allegedly and infrequently) issuing challenges to users were expressing the validly determined intention of the corporate landowner. Rather – and entirely credibly – they were expressing surprise at horseriders approaching an active campsite, and concern as to the safety of those camping there. Such evidence is not capable of satisfying the proviso, nor of

preventing user from being as of right (particularly not following the Supreme Court decision in *Redcar*.) Note for example the evidence of Ms Vida Gasperas, who was clearly not acting on the basis of any instruction, because she challenged on the first occasion (in 1996), but not on the second, in 1999. Nor does the erection of various wooden structures by those camping at the site assist LHL's case. They were not designed to prevent bridle users, nor did they effectively evidence any lack of intention to dedicate held by the corporate landowner. Any users coming across them (if indeed they were across the claimed track at all, which is far from established by the photographic evidence, and undermined by the general lack of recollection of them by users at all) in any event simply went through them, or deviated around them.

Conclusion

35. The Applicant respectfully requests that the Inspector confirm the Order in respect of both the Northern and Southern sections of the claimed route so as to add the claimed lengths of bridleway to the Definitive Map and Statement for Hampshire.

Edwin Simpson

New Square Chambers

Lincoln's Inn

13 July 2011

……

However my hopes of success were soon dashed on receiving the Inspector's report dated 20th September 2011.

On reading it I thought his reasoning was even more perverse than the previous Inspector's decision and once again it came to mind that he was a FIPROW as she had been. The only difference was that she came from the Isle of Wight, and wrote a column for the local newspaper on ecology. It would be unthinkable therefore that she would not have an association with the Vice President of IPROW who was none other than Hampshire County Council's Assistant Head of Countryside and Rights of Way. Hampshire County Councils Access Officers are to the best of my knowledge still well entrenched in the leadership of this organisation.

I am very disappointed that the irregularities even criminal malfeasance may have occurred with regard to the lease of Broxhead Common, have not been addressed by the Appeal Body known as the Planning Inspectorate despite the clear direction on Page 14 of the Statutory Instruments ROW Hearings and Inquiries Procedure (England) Rules, within the Guidance on Procedures for considering objections to Definitive Map and Path Public Orders, November 2008, where it says under Procedure at the Inquiry, (3) ' *Paragraph (2) shall not preclude the addition in the course of the Inquiry of othe issues for consideration or preclude any person entitled or permitted to appear at the inquiry from referring to other issues which he considers to be relevant to the inquiry.'*

Why is that I wonder?

What this decision seems not to be, is an evaluation of the claimed route using the known and established assessment criteria. For example there are two things of note in this decision report. The first is that the 'balance of probability' which is the civil standard of proof; quoted in para. 9 which is the first and last we hear of it. The second is that there is very little reference to case law and clearly the Inspector has misled himself in several respects.

So too the rather obvious attempt at picking out and promoting the negatives without weighing against the positives.

Let me explain further:

Background

Para. 10 . The dangers to horse riders on the C102 was the subject of a successful Judicial Review of the Local Highway Authority which the Judge said could be resolved by discussion and agreement. My claim would be a resolution of this problem but it has not been mentioned or referred to by the Inspector.

Para 11. It may be 'convenient' to deal with the two parts of the Order route separately but it is not true to say the nature of my evidence differs slightly between the two because less reliance is placed upon documentary use. There is documentary evidence from the Quarter Sessions that the bends in the road were agreed to be straightened by cutting through Baigents Hill. The work had started and can be seen on the ground today. Also the FA Map 1910 shows part of Baigents Hill as common land which has been omitted from the register. Surely this must add to the 'balance of probability that horse riders were already avoiding the dangerous bends and heading towards the exit from Baignets Hill on the claimed way.

Para 12. The Inspector has misled himself by stating that the majority of the claimed route south of Picketts Hill crossed by the claimed way is owned by Mr Whitfield, for it is not. He owns the common crossed by D – B and B – A. It is rented to HCC, but this has not been mentioned. As he correctly says 190 metres of the claimed route C – B has no identifiable owner, but this does not run across land owned by Mr Whitfield but rather LHL.

Para 14 **Documentary Evidence** - it is accepted that the strongest piece of documentary evidence was the 1787 survey map of Alice Holt Forest and the surrounding area. The Inspector says there is no indication of the status (public or otherwise) of any route shown. That cannot be right either because it is quite clearly shown on the map that it is a part of Cradle Lane before the time that a new road was built (C102) which diverted traffic to a more easterly alignment to meet the Toll House at Sleaford. Also considered on the balance of probability I would say that there is every reason to consider that the route which on the map key is shown as 'road' is more likely to have been a public one since the other evidence describes the nature of the common and surrounding parishes and their freedom of pasture and other rights which were being claimed at the time. He goes on to say that the route is shown on Taylor 1759 and Milne 1791 but provide no evidence of the status of the route. However I would say that this is always the case. It is the accumulation of evidence that the route exists which tips the 'balance of probability' in favour of the claimants. Surely also it is not unreasonable to suppose given the accessibility that it is a public road simply because it does not say it is 'private'.

Para 15. Here again the Inspector confuses himself. The declaration for the FA 1910 speaks of an accommodation road from Broxhead Common to Lindford. It is actually shown on the Estate Map for the sale of Headley Wood Farm in 1962, running from the C102 rather than along the line of C – B. The claimed path along the section C - B is Cradle Lane which crosses the FA 1910 declaration and continues south west across the common on much the same alignment as the claimed route.

It is disappointing that the Inspector having referred to and identified a missing path declared as an accommodation road, as stated on the FA 1910 and interpreted on the sale map half a century later as 'a right of way for all purposes' ignored the fact and did not consider reinstating it to the Definitive Map even though I had taken the trouble to lodge a claim for it in 2009 soon after I discovered it.

Para 16. Again the Inspector has misled himself when he states that "*the Binsted Inclosure plan of 1857 does not show any highway on the alignment of the Order route".* This is the map which seems to have escaped the notice of the present and previous researching officers of HCC. It shows a definite road or path alignment between the unfenced plot 2130 ref 'Free piece in common'. On checking the Award, it speaks of a diversion for Cradle Lane which presumably is on to the C102 although I cannot find a stopping up order for the section C – B. Anyway to say "*this suggests that there was no highway of any description over the Order route at the time of inclosure"* cannot be right given the mapping evidence both before and after the event.

Para 17 - the Inspector picks out the 1869 OS map which he says does not show any evidence of B – A or B – D at that date. In fact the map shows the path D – B but it does not join the junction of paths at this point in exactly the same way as it does on the later maps, however this is part of the claimed route which runs over open common land and it could equally be that the connection was too small to map at this time. I think this is a reasonable assumption on the balance of probability.

Para 18 – "*The pattern of tracks over the section of Broxhead Common at issue is shown by successive OS maps to change during the course of the twentieth century. Some show a route which approximates to C-B-D. Whereas I accept that some of these twentieth century maps show a continuation of a track over the common to the west of D, none of the maps are indicative of the status of the tracks shown and do not provide evidence of the existence through the twentieth century of a public bridleway on the route claimed. These maps provide no status of the routes shown."*

OS Maps do not claim to show the status of routes shown. But if in doubt why has he not considered the evidence of John Ellis in 1965, who claimed that there were at least 23 tracks on the common all used by horse riders.

Why is there no mention of the FA Record Book which shows that the landowner claimed £635 for rights of common and £655 for rights of way.

Surely this must add to the 'balance of probability' but that is never mentioned after the brief reference in para. 9

Para 19. – "*The land crossed by C – B – D and C – B – A are shown in the Finance Act records as lying within hereditament 1359 which at that date was part of Headley Farm"* Here again the Inspector misdirects himself. They were at that time part of Headley Park. *"A reduction in site value of £635 was granted to this hereditament in compensation for the land being encumbered by public rights of way or user, but there is nothing in the valuation book or field book entries to demonstrate to which routes the deduction might refer."* Once again he misleads himself £655 was the sum granted for rights of way and user. £635 for common land. The description of the property in the Record Book is Broxhead Common, just that, not Headley Park or Headley Wood Farm. If an accommodation road is declared for the FA 1910 then it must be assumed it was also a public road otherwise compensation would not have been given.

"Finance Act records do not provide evidence of the status of the claimed route over Broxhead Common" But I say that they give a very good indication of the balance of probability.

Para. 20 - 25 "*..there is no indication in the CCC's report that the inhabitants were engaged in the exercise of linear access along defined routes on the common or over the claimed route. I addition there is no evidence within the report that the activities described to the CCC took place on horseback. The CCC report is not evidence that in 1974 or prior to that date the 'general body of inhabitants' were engaging in linear access on horseback over the common to link with the Order route or vice versa."* But he has left out this further comment from the CCC

"…in my view, what has happened during the period of living memory can be explained by the breakdown of the manorial system and its replacement by the notion, acquiesced in by the owners until Mr Myers began to erect his fences in 1963, that a common is open to anyone to use as he pleases. Such use is not the use as of right related to the needs or capacity of a dominant tenement, which is essential where a claim to a right of common is based on prescription or lost modern grant.

I have identified…two properties to which rights of common are attached, but the evidence relating to the others leads me to the conclusion that the acts of their owners or occupiers in relation to the Common have been those of inhabitants of the neighbourhood ejoying the Common as they pleased with the good natured toleration of the owners rather than those of the owners or occupiers of particular properties enjoying rights attached to their properties."

As my barrister put it " …it demonstrates the CCC's view of the user evidence in 1974 was that it was of PUBLIC user of the common, rather than of the more restricted user by a defined class of commoners with properly registrable rights.

Para 24. The Inspectors assessment of the location is also muddled. Broxhead Common is not confined to the area east of the B3004 but spreads to the west and adjoins Kingsley. Had he taken the trouble to read the relevant copies of the report of the Land Commissioners of George 111 he would have found a description of the area at the time which included all the surrounding villages of Headley, Kingsley, Lindford etc adjoining the commons which stretched from Farnham around and through the forests to Liss. Broxhead was not confined to Lindford by any means.

Para 25 – "*Although the claimed route is shown in its entirety on some maps, and parts of the claimed route on others…..none of the maps submitted provide evidence of the status of the route……None of the maps submitted in this case provides the required quality of evidence from which it could be concluded on the balance of probabilities, that public equestrian rights had been dedicated over the Order route at some point in the past".*

So none of the evidence from the Commons Commioner,

- the FA 1910,
- Queries over the Consent Order from the Court of Appeal 1978 between the landowner and HCC
- the illegal fencing of the common which cut off all the tracks used by horse riders,
- the evidence of John Ellis that at least 23 tracks on the common were used by horse riders;
- plus the former landowner who owned the common for 60 years and whose daughters had taken the trouble to write of their knowledge of how the common was open and used by equestrians during all of that time.
- The many maps on which the path is shown.
- The answer of Lord Stawell as Lieutenant of Alice Holt Forest in 1787 and his keeper Daniel Annett as to the conditions prevailing in the villages and commons surrounding the forest at this time.

- The later evidence from the Ordnance Survey Book of Object Names that Broxhead was a public common.

All of this and it doesn't tip the scales of the balance of probability?

Why is this Inspector's assessment so divorced from the normal criteria? He seems to be in denial almost as if he has been told to refuse to confirm the Order. He is after all the third Planning Inspector to have scrutinized the case.

User Evidence

Para 29 "*It is difficult to see how the locking of a gate which does not stand on the claimed route can have any impact upon the use of that route"*

The locking of the gate prevented horse riders from continuing along the claimed route to join the bridleways on the common as the claim is obviously part of a longer route. This was the only access on to the common before the gate was locked by the landowner in 1988/9. The use of FP54 before 1997 required them to turn right through the now locked gate by D because there were other locked gates along FP54 beyond that point which made access from the north side of the common impossible. The evidence of use for the 1997 PI was considered insufficient because the Inspector decided that the date of challenge was in fact 1965.

It is perhaps unwise to extract information from previous Public Inquiries because each case will be different.

Para 31 – Of course the locking of the gate in 1989 had an impact upon the ability of local equestrians to use the Order route south of Picketts Hill because they could no longer access the common. Again the Inspector misdirects himself.

Para 32 – Again the Inspector misdirects himself when he says that the notices erected in 1997 at the request of the landowner brought into question the use of the Broxhead Common section of the Order route. The reason is that there were no notices on B – D and the notice at the other end was not on the actual Order route. In any case they were erected by EHDC without lawful authority since it was found by the LGO in 2000 that they had not a proper agency agreement with the HCC. Both Councils were found guilty of maladministration.

Para 35 – The lawful deviation incurred the use of the highway C102 which is very close to the Headley Park Rifle and Pistol Range. We had Judicially Reviewed HCC about its responsibilities with regard to road safety under sec. 130 HA 1980 successfully. Mr Justice Sedley said the problem could be resolved by discussion and agreement. This claim which HCC had encouraged me to make would have resolved that problem if it had been successful.

Para 36 – The Inspector says that because the claimed route is not already a highway of some description and on the Definitive Map there is no lawful right of deviation around obstructions on C – B. I would argue with that. We could see from the 1787 map that C – B was part of Cradle Lane. This explained the presence on the maps, even the modern ones, of an obvious old road alignment,

so although it is not on the Definitive Map there is no evidence that it had been stopped up when Cradle Lane was diverted on to the new alignment of the C102 at the time of the Inclosures 1857. Once a highway always a highway??

Para 38 – The Inspector accuses us of abandoning the route after the 1990 storms, which he says is fatal to the claim. However, evidence in the bundle shows the consistent attempts I had made to get it cleared, not least of which was the Judicial Review in 1996 amongst others.

I wonder why the Inspector makes no reference to this or the advice of Mr Justice Sedley?

Para 39 – The Inspector says that the claim cannot succeed because owning to the storm damage there cannot have been 20 years use of the route before 1997. To which I would reply that it is not necessary to show 20 years consistent use of the route but only that the route has actually been enjoyed; in any case the obstruction was as a result of storm damage rather than any attempt by a landowner to prevent specific use. Furthermore it appears that there is no registered landowner of the section C – B which one might expect if it is public highway and a continuance of Cradle Lane.

Para 40 – The Inspector says that as he has concluded there was insufficient evidence of use for a period of not less than 20 years there is no need to consider whether the use was as of right or without interruption or whether there was a lack of intention to dedicate.

As with the previous Inspector he has manufactured a reason not to look at ALL the evidence. Probably a prerequisite if there is a prejudged intention to refuse to confirm the Order??

Baigents Hill

Para 43 – The Inspector says that no documentary evidence has been submitted from which it would be possible to conclude that the Order route had been dedicated as a public bridleway at some time in the past.

He does not mention the evidence from the three surviving MacAndrew sisters whose parents and grandparents owned both Headley Park and Headley Wood Farm. Neither does he mention the evidence from the FA 1910 that part of Baigents Hill is shown as common land. The track he identifies would therefore have been on common land.

Again the impression is given that he is avoiding these inconvenient truths.

User Evidence

Para 50 – the Inspector finds my frequency of use exaggerated.

How these figures were arrived at was explained in the summing up of the previous Public Inquiry. He has obviously not bothered to read this and has halved my original. This is a deliberate and lamentable attempt at messing with the evidence. He goes on to demolish as much of the witness evidence as possible even suggesting that the evidence from those not at the Inquiry because they have passed on or moved abroad should be treated with a degree

of caution. Once upon a time it was considered that those who had passed on should be treated with respect as they were unable to be questioned.

One might have granted his decision some degree of credibility if he had not apparently decided to suggest that we were all in some way not telling the truth. At the same time he gives no leeway on difficulty encountered in trying to remember from as far back as 1945.

Also no criticism is made of the inordinate length of time that HCC had failed in its Statutory Duty to take up the claim for research, thus adding to the problem as a whole.

Whatever the detail it is for sure that all the witnesses had ridden and enjoyed the route.

Para 59 – It was established at the PI through the evidence of Mr Cornish that no authority had been given by LHL to challenge horse riders. Mr Alkis may have been a Director throughout the period bute there is no evidence that the Board had given him authority or otherwise to challenge horse riders. There simply was no solid evidence that hores riders had been challenged at any time, although it was said some were during the two week period of the camp, however no actual evidence was forthcoming as to the description of the riders or horses purported to have been so challenged.

Para 62. I resent the implication that because some of us chose not to ride through the campsite when in situ we were being somewhat secretive and opportunistic. I would say we were being entirely reasonable and trying to accommodate the situation rather than seek confrontation. That is what reasonable people do.

However this miserable conclusion on the part of this Inspector only underlines his preconceived ideas about this case, confirmed for me by the fact that he is a FIPROW. He obviously resents the fact that I Judicially Reviewed his colleague and even more that I won that case.

Para 65 – again the Inspector seems to be making it up as he goes along. I took the trouble of personally showing him the route over Baigents Hill and how it followed a line of large trees. Others may have ridden slightly to the right or left of it but it is a relatively short distance before one reaches the 'turning circle'

Para 70 – It is on record of the minutes of the Headley & District Bridleways Group that Mr Menzies had written to the supposed landowner who had fenced across all the customary tracks used by horse riders on Broxhead Common asking for permission to use the claimed path C – B - D south of Picketts Hill in 1982, because from a previous request to re-instate the bridleways he had been told that statutory bridleways would not be a consideration but permissive ones might be considered.

Neither the landowner or his agent made it known that this landowner did not in fact own the section C – B. Had he done so I am sure further investigations would have been made by that bridleways group. B - A is a gravel track which provides access to the Forestry Commission plantation, and B – D is the old route

around and close to Common Cottage over the common land now rented by HCC which like most other tracks on the common has been allowed to overgrow so that it can no longer be used.

Para. 71 The Inspector relies on this correspondence to show there was no intention to dedicate but does not examine the fact that C – B is part of an old road alignment which only now seems to be owned by no-one. No questions are asked about how this landowner can retain the illegal fencing of 80 acres of Broxhead Common and then refuse access to the rest of the common by horse riders even on land which he does not own and common land rented to HCC.

There is no balance of probability considered with the historic evidence. This is a contrived and misleading decision. Most noticeable is the almost complete lack of consideration given to the common land declared for the FA 1910 or the muddy waters of the so called Consent Order 1978 between the landowner and HCC. It is stated that the claimed route runs over the edge of Broxhead Common both registered land on the south side of the C102 Picketts Hill and unregistered land owned by LHL. That must make it a consideration in the evidence produced because it can be clearly seen that as an old route there must be an expectation that it was being used both before and after the illegal fencing was erected in 1963. In fact it is confirmed by the family who owned the common from 1905 to 1962.

This raises the question of why this is so obviously a contrived decision.

- Were the Inspectors bribed by the landowners? This may seem incredible but I actually know of an attempt.

- Could it be the Inspector did not like my successful Judicial Review of his colleague?
- Could it be that he has absorbed the slander of me form his IPROW colleagues.
- Could it be that Hampshire County Council are so out of order with regard to their failure to register common land which had been declared as such by the Chief Commons Commissioner in 1974, that there is some kind of cover up?
- Or could it involve a Government directive to do with farming and common land?
- Have LHL declared themselves for diplomatic immunity on some false pretext.

All I know is that the witnesses were trying to tell the truth and surely all 20 of us could and would not have subscribed to anything less. The questions above should be so remote that they do not need to be asked.

As if this Inspector's decision was not enough of a blow he then decided to stick the knife in and apply costs against me for extra time which he said had been incurred because the Objectors had had to read more evidence than they needed to. This despite PINS advice to present everything I could and despite the fact that all the evidence had been through the previous PI, except for some aerial photographs.

This confirmed to me that this decision was vindictive because we had not asked for costs even though I am a volunteer and funding this PI with the best lawyers in

town, to the tune of £50,000. Neither had we asked for or expected another full public inquiry.

I think David Cameron and Eric Pickles need to be told they will not find many volunteers if this is the sort of experience to be expected.

An explanation is needed otherwise the Big Society let alone localism can never be a reality.