

have heard I am satisfied that from about 2000 the application site was used for a wide range of pastimes which are not restricted or necessarily ancillary to its use as a through route. I have heard, and do not doubt, evidence of the use of the application site for children's play, for picnics, for bike riding and for kite flying. I have heard evidence of use of the application site for exercising and training dogs and that this use involved the use of the whole site and was not limited to certain tracks through the site. That this type of use was taking place does not surprise me having regard to the open nature of the site and its proximity after about 2000 to a much expanded residential community. I therefore consider that after about 2000 there was use of the land for sports and pastimes which went beyond its use as a through route.

100. Secondly, on 3 April 2003, English Partnerships granted to George Wimpey Limited a licence to occupy part of the application site as a construction compound. The term of this licence extended for a five month period commencing on 24 March 2003. I heard some evidence that this licence may have followed on from an earlier licence entered into in 2002. Mr. Moore for the Applicant recalled that the compound was in existence for some 18 months. In my view, that part of the application site which comprises the land the subject of this licence and which was used as a site compound could not in fact have been used, nor was it used, for sports and

pastimes during the period of the licence and occupation by George Wimpey Limited.

Use as of right

101. There is no evidence that use of the application site has at any time been by force or stealth.
102. However, the concept of use “as of right”, requires use to be such that the landowner would appreciate that the user was asserting a right to use the land and that the landowner was tolerating, acquiescing or encouraging this use.
103. First, and as is plain and obvious, since I have concluded that there was no material use of the application site for sports and pastimes between at least 1993 and the 1998, there was no use “as of right” during this period.
104. Second, in more recent years and since about 2000, when the land has been laid to grass, I have concluded that the application site has been used for lawful sports and pastimes by local inhabitants. I have heard that during the period since the land was placed into set aside in 1999 the grass was cut at least once a year any maybe more often. The process of cutting was mechanical and took a day to be cut and then a further day or part of the day for gathering the grass and baling, when it occurred. I also heard evidence that most local residents would avoid the application site when this process was taking place. Although I accept that in some

circumstances for a user to avoid land when in use by the landowner is not consistent with an assertion of right and therefore with use as of right. Avoiding land while it a crop was maturing would be an example of this. However, cutting of grass is as much a matter of good and responsible management as anything else and is the type of activity which can be expected on most traditional village greens. Avoiding land when the landowner is cutting the grass would not, in my view, be perceived by any reasonable landowner as an act of deference by the user to the landowner's entitlement to manage his land. Furthermore, it seems that since this process only took place on one or two days in each year, I consider that the interruptive effect is de minimis. I consider therefore that since around 2000 when the land was in fact used for sports and pastimes, the occasions when local inhabitants would avoid the land due to grass cutting and gathering taking place was de minimis and is not inconsistent with use as of right during that part of the 20 year period.

105. Thirdly, I have heard evidence of the erection of estate fencing in 2002. I also heard evidence that some of the boundaries of the application site were fenced prior to this date. However, gaps were intentionally left in the estate fencing erected in 2002 to allow access by local residents and that fencing did not therefore physically prevent access. I am satisfied also that prior to 2002 there was no fencing which operated to prevent access to the

application site. I do not therefore consider that for any part of the relevant 20 year period the land was fenced to as to render access by local inhabitants forcible and thereby other than as of right.

106. Fourthly, there are the notices. The evidence of Mr.Ashcroft and Mr.Hollamby is that notices were placed close to the gaps in the estate fencing after the erection of that fencing in 2002. There is some conflict between Mr.Ashcroft's evidence and that of Mr.Hollamby as to whether notices on the estate fencing were erected in 2002 or 2003. However, I do not consider that this conflict is material to my overall conclusion on this aspect nor does it undermine the reliability of either Mr.Ashcroft or Mr.Hollamby's evidence. Mr.Ashcroft gave evidence, which I accept, that in 2006 and 2007 notices were erected at establish entrance points to the application site along the Silkin Way boundary but that these were continuously vandalised or dislodged. The notices which had been erected all contained either identical or words very similar to the notices which were present at the date of my site inspection and which I set out in paragraph 10 above.

107. As a matter of fact I consider that the Objector had erected notices close to gaps on the estate fencing and at locations corresponding with established openings along the Silkin Way boundary before the application was submitted and therefore during the relevant 20-year qualifying period.

Furthermore, I consider that most users would have been aware at one time or another of the presence of these notices. Even users who entered the application site via Silkin Way would, in my view, have recognised the presence of the rear side of the notices positioned near the gaps in the estate fencing in 2002 or 2003 and most would have taken time to investigate what these notices said. Furthermore, the notices close to the gaps in the estate fencing are certainly highly visible from the Peregrine Way and Pintail Drive and local inhabitants driving along those roads would have seen the notices, in my view.

108. In terms of the effect of the notices, the Applicants suggest that these notices concerned the issue dedication of public rights of way and had no bearing on the quality of use of the land for other recreational activities. I accept that as a matter of principle that a notice erected for the purposes of s.31 of the Highway Act 1980 which said no more than that a landowner was not intending to dedicate a right of way over his land would not, generally, affect the issue as to whether use of land of sports and pastimes was as of right. However, although the notices erected on the application site were intended, in part, to indicate a lack of intention to dedicate a right of way, they went in my view considerably further than simply addressing that issue. The notices stated that the land was “private land” and that there was a “right of way on foot only (with the permission of English

Partnerships)”. In my view, notices expressed as such are indicative of a landowner seeking to control the use made of his land rather than acquiescing or tolerating the use made of it by the public. The notices did not merely indicate a lack of intention on the part of the landowner to dedicate a right of way but were expressed as limiting access to and use of his land by the public to passing and repassing only, for which permission was given. I am reinforced in this view by Mr.Ashcroft’s evidence as to the intention on the part of English Partnerships in the way that the notices were expressed and the reason for their erection. I conclude therefore:

- a. that the notices were erected during the relevant qualifying period in the same or substantially the same terms as the notices present on the application site at the time of my site inspection;
- b. that most if not all users would have been aware of the notices;
- c. that the terms of the notices went beyond seeking only to indicate that no public right of way was intended to be dedicated and were a clear expression of control by the landowner as to the purposes for which its land could be accessed and used by the public;
- d. the presence of these notices is not therefore consistent with a landowner acquiescing in the use of his land but is an expression of control of that use;

- e. from the date in 2002 or 2003, when these notices were erected, any use of the land for sports and pastimes was not as of right.

109. I conclude therefore that the use of the land was not as of right during the whole of the qualifying 20 year period.

Use by a significant number of the inhabitants of the locality

110. The Applicant relies on Apley Castle Ward as its locality. There is no issue that an electoral ward may be a locality for the purposes of an application to register land as a town green.

111. I have already concluded that the requirement to establish use of the land for sports and pastimes during the period between at least 1993 and the end of the 1998 growing season has not been shown. There was therefore no use by a significant number or indeed any material number of the inhabitants of the relevant locality during that part of the qualifying period.

112. I accept during the land was placed into set aside that the use of the land increased as housing development took place. From the evidence which I have heard I am satisfied that from about 2000 there was considerable use of the application site for sports and pastimes. The evidence produced for the Applicant made this plain.

113. Although I have received evidence, both oral and written, directly from only a modest number of the inhabitant of the locality, I am satisfied that this reflected use by others. The proximity of an open field close to new housing development leads to me to conclude, from general experience, that those inhabitants who live closest to the application site would be inclined to use it for sports and pastimes, particularly since it was not suggested nor am I aware of any alternative location where similar types of recreational activity could occur in the vicinity. I am satisfied therefore that a significant number of inhabitants who live closest to the application site used the land for sport and pastimes in the latter part of the relevant 20 year period (ie. from about 2000 onwards).

114. However, the requirement is that the land is used by a significant number of the inhabitants *of* the relevant locality. I consider that this requires the users of the land to be spread throughout the locality and not to originate from just one part of it. I am reinforced in this view by the fact that, if registered, the inhabitants of the whole of the locality relied upon would enjoy a right to use the registered green for sports and pastimes. It is therefore logical to assume that in order to qualify as a green, inhabitants spread over the whole area which would benefit from the rights must have been shown to have used the land sought to be registered for sports and pastimes. The plans produced for the Applicant and for the Objector both

show that, although those parts of the locality closest to the application site have generated significant numbers of users, no users who have produced evidence, either written or oral, to the inquiry originate from areas to the south-west of the locality, around Jay Drive, Kingfisher Way, Sulby Drive and Weatherdale, or from the residential area within Apley Castle Woods or from Pool Farm Avenue and Lawton Farm Road. I am not therefore satisfied that use of the land when it has occurred since around 2000 has been by a significant number of the inhabitants *of* Apley Castle Ward.

#### Conclusions and Recommendation

115. In respect of the qualifying requirements, I conclude that:

- a. the application site was in active arable cultivation between 1993 and 1998 and possibly for several years prior to this period. The application site was not capable of use and was not in fact used to any material degree during this period for sports and pastimes. On this basis the Applicants have not shown that the land was used for all of the qualifying 20-year period between June 1987 and June 2007 for sports and pastimes.
- b. material levels of use of the land for sports and pastimes began in around 2000 and have increased as development has taken place around the application site;

- c. however, since the erection of notices in 2002 or 2003, the use of the application site for sports and pastimes which has occurred has not been acquiesced to or tolerated by the landowner and the effect of those notices is that use was not as of right;
- d. although since around 2000 there has been use of the land by a significant number of inhabitants who live close to the application site, it has not been shown that such use as there has been has been sufficiently spread throughout the qualifying locality to be considered to be use by a significant number of the inhabitants *of* the Apley Castle Ward.

116. I conclude therefore that application site has not been shown to meet the qualifying requirements for its registration as a town green. My recommendation is therefore that the application should be rejected for the reasons set out in this report.

PP DOUGLAS EDWARDS

Francis Taylor Building,  
Temple, London.  
EC4Y 7BY.

8 August 2008.



**VILLAGE GREEN HEARING – 8<sup>th</sup>, 9<sup>th</sup> 10<sup>th</sup> APRIL 2008**  
**APA CLOSING STATEMENT**

This closing statement has been prepared by John Davis, Chairman and Helen Hampton, Hon Sec of the Apley Preservation Association, known as APA, for the inspector, Douglas Edwards of Francis Taylor Building, Temple, London at the hearing of the 'Application by the Apley Preservation Association to Register Land Off Peregrine Way as a Town Green'. The land in question to be known as 'the field' throughout this closing statement.

We have been able to confirm that although our approach and application throughout has been to ensure that the ground known as 'the field' be delineated as a 'village green' that this was entirely compatible with the term 'town green' used in the inspectors direction document by the inspector and others.

Further a number of procedural issues were addressed at the beginning of the hearing which need to be identified and their impact discussed before we move to the body of our response to the hearing.

The location of the field relative to the surrounding area and therefore the position of the witnesses who appeared and others who submitted evidence questionnaires and did not gain the opportunity to speak.

Some fifty evidence questionnaires in support of registration of the field as a new green, known throughout as the 'village green' were submitted prior to the hearing. Everyone made clear their support for a 'village green' which was initiated and motivated by local people, for local people and in doing so satisfied both the issues of significant number of residents and sufficient spread of use.

We have been able to satisfy the inspector as to our choice of locality, namely Apley Ward, its position in the wider parish of Hadley & Leegomery and the various ward name changes that have taken place over the recent years.

The 'field' takes up a central location within the ward and is bounded, as we said in our opening statement by Apley Woods, the Silkin Way, a bridle path, Peregrine Way and Eider Drive.

In addition, we have been able to confirm the approximate acreage of the field as 6acres. We had chosen to select the date of our application, 14<sup>th</sup> June 2007, as the identifiable reference point for the required twenty year period of usage, as of right and therefore satisfy an initial request by the objector as to our choice of 15.2 rather than their suggestion of 15.4. We were also able to satisfy the inspectors request as to the progressive nature of the building development around the 'field'.

Over the past three days we have clearly demonstrated that the meadow at Apley Castle, known locally as 'the field' has been used, without interruption by local residents for more than 20 years. We gathered 50 witnesses to testify that they had used the field regularly for many years and 12 of these came forward willingly to speak at this hearing. Each and every one of these residents gave a truthful and accurate account of their usage of the field. Their real fear of loosing their open space was their motivation in this case and they have made their case through APA.

We are confident in our knowledge and claims that this particular field has not been farmed for decades. We acknowledge that nearby fields have and were farmed but it does not apply to this field. We believe that it is entirely possible that Mr Cooke is confused about which fields he farmed in Apley Castle Park, particularly once building started to take place.

During his cross examination on two separate occasions he referred to adjacent fields, on the opposite side of Peregrine Way and the other side of the Silkin Way, under the name 'Bovis' on the Maff forms and that it was always difficult to separate yields from fields.

'The field', which we would like to see dedicated as a village green is at the heart of our community. It serves a purpose for local residents and provides the adjoining woodland with valuable breathing space. This field is widely used by many local people on a daily basis as we have shown and it has been for more than 20 years.

It is one of the few remaining green areas left that attracts local people to come here to walk their dogs, play with their children, enjoy the countryside or simply reflect on the beauty of what remains of the original parkland.

This area is known as Apley Castle Park and should we lose this important field to development then almost all of the original parkland that made up the Apley Estate will have gone.

From our witnesses who braved the ordeal of cross examination we have taken in addition to their 'evidence questionnaires' some high points that they added to the personality of the hearing, their bold contribution to achieving 'village green status' for 'the field'.

Paul Robertson said 'it's a meeting point' for local people and that he had used the field for 19 years.

Janice James said 'it's always been a green field with grass' and that as a trainer of working dogs we used the field every day. She has used the field for 22 years.

John Moore said that he had 'accessed the field from all directions' and 'it's a social gathering now' during his 26 years using the field without anybody trying to stop him.

Pamela Steele only ever remembers grass being in the field that was cut for hay in her 19 years of use.

Caroline Bentley said 'we've flown kites in the field' and 'there are no other open spaces'. She had never seen a crop having used the field for 26 years.

Janet Bolas said emotionally 'we want our village green' and added 'its not a ploughed field' and she has used the field for 37 years.

Brian Buckle said that local people 'always go up to the top field' and on his access from the Silkin Way the 'the old five bar gate was never closed' he has used the field for 27 years.

Robert James used the whole field with dogs at all times 'several times a day', had seen people training falcons and added that 'new signs went up on Monday 7<sup>th</sup> April 2008'. He has used the field for 22 years and never been asked to go or stay.

Ron Plenderleith said that he currently walks his dogs twice a week in the field. He trained there in the early '60s when in the forces and since living locally again has used it regularly since 1981.

Valerie Buckle said that she 'can't remember it being planted with anything' and she too has used it for 27 years.

Sudesh Mejer said that she used the field with her husband for jogging and recalls 'the farmer mowing the grass in the field'. He smiled at her but did not ask her to leave. She has used the field for 11 years.

Gerry Hunt said 'its where we go to exercise and walk' he added that he had never seen it ploughed, 'I was there it was grass' he said adding he had used the field for 18 years.

So a spread of comments and anecdotes from witnesses covering thirty seven years of involvement and enjoyment of the field and all hoping that we achieve 'village green' status.

We would now like to respond to some of the points made during the cross examination of our witnesses, by the objectors, adding our views and comments.

#### Signage

Signage and the partial fencing has played a large part in the Objectors cross examination of witnesses. Some of our witnesses have said that they have never seen the signs. That view is totally acceptable when one considers that there are several and various access points to the field and few of these have ever held any signs at all. Where signs do exist they face outwards and anyone entering the field at an unsigned point and leaving at a signed exit will not see the sign there.

Additionally the signs have been removed and changed, the wording has changed which we understand was due to lack of signs. There has been a flurry of sign erection at various points since the application was lodged and even this very week.

There has been reference to the removal of signs by persons unknown. We have shown that there has been some anti social behaviour from time to time in the area, which could be an explanation for such occurrences.

In terms of users of the field seeing the signs and 'ignoring' them, as the Objector's barrister has put it on several occasions, we would contend that in much the same way as the fence was viewed, users merely thought that the signs were also intended to be seen as a deterrent to stop less welcome persons accessing the field in vehicles.

Our information is, nevertheless, that the wording used on the signs, which makes reference to the Highways Act, has no bearing and renders them of no influence or import in the case of a village green registration.

Additionally the metal fence was never intended as a means of stopping use of the field, but was only there to stop vehicular access from one side of the field which borders a road. The rest of the field perimeter, three more sides remains open to all, as always.

In terms of the dating of the erection of the fencing I refer to Page 49 of the evidence bundle provided by the Objector, where a report on a meeting to discuss works on the field and surrounding area is provided.

Mr. Hollanby admitted when asked by the Inspector that these discussions were about works, some of which had not actually taken place and some of which, at the very least, were still in progress. Mr. Hollanby claimed that these works were completed by June 2002, but on Page 57 of the bundle, Mr. Ashcroft states that the signage was initiated just after the completion of the fencing in early 2003. This date should also be taken into account in the earlier references to signage erection.

Mr Ashcroft confirmed under questioning that fencing adjacent to the field was completed in 2003.

#### Aerial Photographs

The Objector's Barrister has made much of the reference and use of aerial photographs in a large part of his cross examination. The point was well made by our witnesses that it is impossible to make judgements of what is growing on a piece of land from the air.

Bob James said 'they say photographs can't lie but that's not true is it' and Ron Plenderleith said 'that interpretation of aerial photographs is a skilled business'.

As was clear on the site visit, 'the field' that appears flat from the photographs is in fact anything but flat in reality, being high adjacent to the woods and low next to Eider Drive.

Also some of the photographs were not correctly dated and labelled and in fact the main photograph, page 87 had the date 'suggested' several times, hardly an accurate assessment. As such they can have no value and should be disregarded, in our view.

The variation in quality of the copy photographs in the bundle was considerable and they could be considered as picture maps. Even though an original was introduced late it still remained undated and may have been colour enhanced. The Objectors barrister passed over this point when it was mentioned by our last witness.

The computer printed digital photograph, submitted as late evidence on Wednesday morning, showed only a very small part of the field in question, was of very poor quality and in any case referenced only the part of the field which we are not claiming as part of the village green, the 'roundel gardens' occupy this corner.

For these reasons we maintain that any evidence or discussion about that photograph should be deemed as irrelevant.

One final point to make is that we introduced on the second day a photograph originally supplied to us by EP which shows the area now. It emphasises the current positioning of the field within the community and was taken in 2006 as the foundations of the hospice are clearly shown.

#### The Farmer's evidence

The farmer Mr. Cooke gave a very full account of farming practices and processes used on his land. He gave no detail of dates and location or any precise plantings of any specific crops. Some of his verbal evidence at this point did not match with what he claimed on the MAFF records, which had been supplied as late evidence on Tuesday morning.

He said at this point, before discussion about the MAFF sheets, that the set a side started in 1998 and that prior to that he had rotated spring cereals, later evidence showed that to be incorrect.

When questioned in detail about the MAFF records it was apparent that there were several anomalies on each sheet submitted.

#### 1996

The totals in Column L did not reflect the claimed acreage on the Bovis field which the farmer claims is the field in question. On this sheet the Grid reference for the field is 9326. This sheet is stamped with a 'calculations correct' imprint and there is a code of 'H744' in the top right hand corner.

1997

Totals are correct in column L and field grid reference is again 9326. This sheet is not stamped with the 'calculations correct' imprint and no code is present.

*\*\*This fact is also true for all following forms also.*

1998

Totals are correct in column L but field grid reference is now 8925. There is a second entry for a 'Bovis' field, this one with different acreage and a grid reference of 7854. The farmer felt that this second Bovis field was the one opposite the first one, on the other side of the Silkin Way.

1999

This return shows the field with the grid reference 8925 as set a side.

For 2000, 2001, 2002 and 2003 the field with grid reference 8925 is shown as set a side. One of these sheets is not signed.

The farmer was asked to explain how the grid reference system worked. He explained that this was done by MAFF and his field agent.

He appeared unable to explain how the number for each field was arrived at and was unable to say how he would locate each reference.

He was unable to

- a. identify the grid references or even explain how they are formed
- b. explain why there are two grid references for what he claims is the same field
- c. explain why he has referred to two fields called Bovis on the same record
- d. respond when asked if the two fields either side of the Silkin Way have become confused in his mind due to very similar acreage.
- e. in addition he was unable to answer the Inspector's questions about set-a-side and some other aspects of the form.

As a result of this confusion the inspector agreed that the land agent should explain. Mr Chris Jones from Berry's the land agents, attended on the last day and explained grid references and admitted that his client would not be expected to understand them.

His belief is that most farmers rely on local 'names' to identify fields and he is aware that it is common practice to call several fields by the same name.

His explanation of how the MAFF forms work was a convoluted and we feel a little less than transparent. Auditing of these forms appears to have been sporadic. Mr Jones said he always used information supplied by the farmer in the first instance. When asked about acreage Mr Jones referred out of context to tenancy agreements, which of course are related and should cross refer given ~~their~~ both drive financial considerations.

*they*

We maintain that there is sufficient doubt now raised by the failure of these so called records to have the farmer's evidence that he did farm the field in question in the period under discussion withdrawn.

We close now with reference to our opening statement and clarification with some additional points following the work of the hearing.

We believe our case is straightforward and concise.

- a) All the people who have come forward have used the field 'as of right' for whatever period they were around and up to the present day in most cases. They did not do it secretly nor by force; they simply accessed the field and used it for the recreational activities they have mentioned.
- b) They have also seen other people doing the same thing. They have never sought permission to enter the field nor have they been asked to leave it.
- c) All have indulged in several activities which can be described as 'lawful sports and pastimes'. These have included for example Frisbee games, football, cricket, picnicking, kite flying, golf pitching, dog walking, dog training, berry picking, bird watching, bike riding and even falconry. All the pastimes in fact that local people have undertaken on village greens all over the country for decades. They have shown and we have witnessed that they have used the whole field. They are also aware that many other people from the locality do the same thing in significant numbers and always have.
- d) They have not personally seen any evidence of farming activity or anything which would stop them using the field for the period they have been residents and some for more than 20 years.
- e) They have however been aware that the grass on the field has been cut for silage, which would happen on any village green.
- f) We have confirmed and comply with the area criteria and the location of Apley Ward.

We have worked hard on our application and brought twelve decent, honest and hard working people together this week in order to allow them to express their deeply held views. There were many more who contributed and their statements have also been submitted as evidence, but additionally there were others who would have contributed but were intimidated by the thought of a formal hearing. It is important to give credit to those who have spoken at this hearing, they should be congratulated for their courage and belief in what they needed to say.

Lastly we understand that there are several cases which support our case with legal precedent. We have chosen not to refer to these directly but trust that they can be taken into account where appropriate.

This is our closing statement and we look forward to formal registration of the field as the village green.

IN THE MATTER OF

**AN APPLICATION TO REGISTER LAND**

**AS A TOWN OR VILLAGE GREEN**

**PURSUANT TO THE COMMONS ACT 2006**

AND IN THE MATTER OF

**LAND KNOWN AS THE FIELD, OFF PEREGRINE WAY, APLEY CASTLE**

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**OBJECTOR'S CLOSING SUBMISSIONS**

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**1 THE APPLICATION**

1.1 An Application dated 14 June 2007 has been brought by the Apley Preservation Association. This Application relies on section 15(2) of the Commons Act 2006. The Applicant was offered every opportunity to rely on section 15(4) but expressly declined to do so. Accordingly, the relevant period for consideration is 14<sup>th</sup> June 1987 to 14<sup>th</sup> June 2007.<sup>1</sup>

1.2 The Applicant must prove the following:

- (a) A significant number of the inhabitants ...
- (b) ... of any locality or of any neighbourhood within a locality ...
- (c) ... indulged as of right ...

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<sup>1</sup> It may be noted that a claim based on an earlier period before erection of signs would have been doomed to fail in any event, not only because of agricultural use in the 90s, but also, even on the applicant's evidence, the planting of sugar beet in 1983 (1985?): see the evidence of John Moore. Further use in those years was most probably insignificant, even if it later became significant. The Inspector is invited to find accordingly, or at least make comment, notwithstanding the absence of a section 15(4) application. He is also invited to record the full explanation of the implications of section 15(4) and the Applicant's response that they did not and would not seek to rely on that section.

- (d) ... in lawful sports and pastimes on the land ...
- (e) ... for a period of twenty years; and
- (f) they continue to do so at the time of the application.

## **2 THE SITE**

- 2.1 Consists of a field of approximately 6 acres crossed by permissive footpaths ("the Field").
- 2.2 A plan of the Field is appended to the Application<sup>2</sup> and images of the Field can be found in the Objector's Bundle at tabs 3 and 4.

## **3 THE ISSUES**

- 3.1 It was the Objector's case in opening and remains its case that this Application should be rejected on a number of grounds, some of which are interrelated but any of which is sufficient to defeat the claim:
  - (a) user was not as of right and/or continuous having regard to agricultural use of the Field;
  - (b) user was not as of right having regard to the fencing and/or signage present on the Field;
  - (c) user was interrupted by agricultural activities and/or the presence of a site compound on the Field in 2003;
  - (d) relevant user (which excludes use as a through-route) has not been by a significant number of inhabitants of the locality relied upon and even the witness evidence in support of the Application suggests use by insignificant numbers for at least part of any relevant period, and
  - (e) there is insufficient spread of use throughout the locality.

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<sup>2</sup> OB/1/11

#### 4 USER AS OF RIGHT: AGRICULTURAL USE

- 4.1 The Field has been actively farmed during the twenty-year period claimed and long before as demonstrated by the agricultural tenancies included in the Objector's Bundle<sup>3</sup>, and the witness statement of Gerald Richard Cooke<sup>4</sup>.
- 4.2 The intensity of agricultural use of the Field is detailed at paragraphs 4 to 10 of Mr Cooke's witness statement. In summary he states that the land was usually ploughed in December, seeded in March and harvested in August. All of these processes required the use of agricultural machinery which made it unsafe for members of the public to access the land. While the crop was growing people were also prevented from using the Field for lawful sports and pastimes.
- 4.3 Further, such arable farming activity is evidenced by contemporaneous (MAFF Common Agricultural Policy) records made long before this application was contemplated. The agent responsible for compiling those records presented as credible and meticulous, and his evidence of criminal and financial sanctions, and random spot-checking, together make it very unlikely that these records are false. Further, the Applicant's case would require much more than false declarations in 1996 and beyond, but false declaration that the Field was not permanent grass in the 5 years prior to 1993.
- 4.4 The photographic evidence is compelling: see in particular OB/4/87 showing crops and tractor markings on the Field, and the December 1993 photograph showing the Field in a ploughed condition.
- 4.5 It may be noted that local inhabitants' misconception that the Field has been available for public use for the last twenty years may well derive from the allocation of the Field to 'set aside' (also evidenced in the records) since 1998. A period of 10 years is often enough for inhabitants to convince themselves (or be told by others) that a Field has 'always been this way', particularly when combined with use in fallow years.
- 4.6 Of course this evidence conflicts with the evidence of several Applicant's witnesses who suggested at the Inquiry<sup>5</sup> that either the field has not been cropped, or that only a grass crop has been taken. Can these witnesses be wrong on this point? The short answer is 'yes' having regard to:
- (i) The credibility of the farmer Mr. Cooke, Mr. Jones and of Mr. Ashcroft. Note that the Applicant expressly declined to cross examine Mr. Ashcroft on his simple but

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<sup>3</sup> OB/6/122-296

<sup>4</sup> OB/2/17

<sup>5</sup> Mostly in evidence going well beyond their witness statements, e.g. Paul Robertson, Janice James, John Moore.

clear evidence that he had knowledge of the Field from before 1991 and had personally witnessed ploughing sowing and cropping for cereals.

- (ii) The availability of clear contemporaneous records made without contemplation of this dispute.
- (iii) The contrasting evidence of Applicant's witnesses which often appeared hazy about some aspects but adamant on the 'only grass' point. The impression that this was something of an Applicant's mantra was reinforced by what might be described as 'communal indignation' in the Inquiry room at any suggestion the field had ever been cropped!
- (iv) Clear indications from many of the witnesses, that the field was a through route along permissive paths either to the obviously attractive adjacent woods or as part of a circuit, so that little or no attention was paid to the nature of the crop. As Mr. Hunt put it, if a field was in crop, he would neither go near it nor pay it much attention. Such lack of attention was clearly widespread and extended to 'communal blindness' in respect of clearly displayed and prominent signs.
- (v) The evasiveness of witnesses who (it is submitted) could recognise a cereal crop or a ploughed field on an aerial photograph, but would go to almost any lengths to avoid giving a straight answer (including most recently Mr. Hunt), or would suggest far-fetched explanations such as irrigation or burning.
- (vi) Evidence from the Applicant's witnesses' own proformas that any use was subject to any crops and only when the land was 'fallow' – see Ken and Carol Hughes (*"Common usage across farmers fields when fallow and around the edges of field when crops /livestock were on it.."*), J Grateley (*"farming and public use"*).
- (vii) Confirmation from a number of witnesses that throughout the 80s and part of the 90s, the landscape was more rural with a patchwork of fields over which it was possible to walk, and a limited number of locals did walk. The combination of (a) a relatively rural landscape to the 90s and (b) no cultivation of the Field after 1999 provides obvious opportunity for inaccurate memory even if not all were as candid as Caroline Bentley who commented *"You're asking me about a long long time ago. I don't even remember what was happening yesterday."* Brian Buckle commented that *"the fields have changed so much"* and agreed *"It is a difficult task when you have seen many fields developed and focus is shifted onto one field – it is hard to remember."*

4.7 The Inspector is invited to make the following findings:

- (i) **Photo OB/87<sup>6</sup> was probably taken in 1997 and certainly between 1991 and 1998.** [Witnesses who expressed a view thought 1997 *'about right'* (Valerie Buckle) and many agreed that the state of housing precludes a date before 1991 or after 1998]
- (ii) **Photo OB/94<sup>7</sup> dates from April 1999 and on balance shows the Field in its first year of set-aside.** [The date on the reverse of the photo has not been challenged and is consistent with development – note the nearly finished properties adjacent to the Field. The farmer (Gerald Cooke's) evidence was clear and compelling. The absence of vegetation around the trees is consistent (only) with recent cultivation and contrasts with grass to the trunks apparent on inspection during the Inquiry.]
- (iii) **The additional photo dated 14/12/93 is as dated and shows part of the Field in a ploughed condition. It is likely that the part of the Field not visible on the photo was similarly cultivated.** [The photo is clear and shows the plough lines (including around the edges), and the clear delineation between ploughed land and headland. Suggestions of grazed field, burning or short grass are absurd and simply indicate the lengths to which Applicant's witnesses will go to try to save what they see as a very valuable amenity. The MAFF agricultural records (OB/8) are also consistent, showing set aside in 1993 and the existence of ploughing without seeding is consistent with the credible evidence of Mr. Cooke of ploughing before Christmas (1993) to plant in Spring 1994.]
- (iv) **It is likely (or the Applicant has failed to prove to the contrary) that the Field was cultivated for cereal and root crops between 1987 (and before) and 1998.** [No other conclusion is consistent with the photos, the evidence of Mr. Cooke or the MAFF records. The photos and records were contemporaneous: Mr. Cooke is far more independent than the witnesses devoted to the Applicant's cause.]
- (v) **During such periods of cultivation, in general members of the public would not access the Field, particularly during mechanical operations, but also when the Field was ploughed or whilst the crop was growing.** [Whilst witnesses were understandably reluctant to admit the existence of crops on the

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<sup>6</sup> Original provided.  
<sup>7</sup> Original provided.

Field, a clear picture emerged of respect for growing crops and an unwillingness to go onto any field which was being cultivated: for example

John Moore - "*absolutely*" would avoid a hay crop on any field.

Pamela Steele – "*if someone was using a mechanical machine I would not enter that field. Wouldn't go on a field while there were crops on it*"

Janet Bolas – would walk around the edge of cornfields,

Brian Buckle – wouldn't go on a field which had crop on it,

Robert James – would stay off land when cropped unless out shooting.

The photographs also illustrate the absence of significant use of cultivated land – note the absence of desire lines in the crop OB/87 or on recent set aside OB/94, and contrast the clear desire lines visible in other fields.]

- (vi) **Accordingly, there was not continuous user as of right during the period 1987 to 2007.** [Signage is dealt with separately, but it is clear that the public deferred to agricultural use and/or that such use interrupted the period of use]

4.8 Even if the Applicant's witnesses evidence had been correct, it included clear evidence (consistent with the farmer's evidence of what occurred in set aside years) of:

- (a) Agricultural use for cutting grass (including Paul Robertson, Janice James, John Moore, Pamela Steele)
- (b) Use of machinery for cutting, turning and baling.
- (c) A minimum of 3 different operations over a period of 'a week or so' (Pamela Steele) although the witnesses conceded the period could be affected by the weather – a point subsequently confirmed by Mr. Cooke who said that up to 3 turning operations would be required in poorer weather.
- (d) Most ~~if not all~~ of the witnesses did not and would not go on the land when machinery was being used, or in some cases, when the crop (whatever it was) was growing.

For these reasons the Inspector is invited to find that **further, there was not continuous user as of right by reason of cutting, turning and baling during set-aside years.**

- 4.9 Sometimes it is asserted that agricultural use did not substantially affect recreational use, and although it would be difficult to assert in the circumstances of this case (including acceptance by witnesses that they would not go on the land when it was being cultivated), it may be noted that in any event, the relationship between use of land for lawful sports and pastimes and agricultural use was examined in *R (Laing Homes Ltd) -v- Buckinghamshire County Council*<sup>8</sup> in which Sullivan J held that:

*"the proper approach is not to examine the extent to which those using the land for recreational purposes were interrupted by the landowner's agricultural activities, but to ask whether those using the fields for recreational purposes were interrupting [the landowner's] agricultural use of the land in such a manner, or to such an extent, that [the landowner] should have been aware that the recreational users believed that they were exercising a public right."*

The question to be considered is therefore whether the landowner's agricultural use was interrupted and if so to what extent.

- 4.10 Mr Cooke made clear in his witness statement at paragraphs 9 and 10<sup>9</sup> that any use of the Field by the public while his crops were growing would have damaged the crops and that such use whilst mechanised processes were being undertaken would have been unsafe. He also pointed out that on the rare occasions he saw people using the Field he would challenge them.
- 4.11 Even the haymaking described by the Applicant's witnesses both demonstrated an interruption in use and that any public use clearly deferred to use by the farmer. In the *Bridgefields, Wem* case<sup>10</sup>, agricultural use was held *"inconsistent with the existence of an unqualified right for local inhabitants to indulge in lawful sports and pastimes on the Land. Recreational activities could not take place freely whilst the grass was in the latter stages of growth, whilst it was being, cut, dried or baled, without harming the crop...Consequently, I find that use of the Land was not as of right."*<sup>11</sup>
- 4.12 It is clear therefore that if there was any use of the Field for lawful sports and pastimes such use deferred to the agricultural use of the Field and as such was not as of right. The Application should accordingly be rejected.

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<sup>8</sup> [2003] PLR 60 para 82: Objector's Authorities Bundle tab D

<sup>9</sup> OB/2/19

<sup>10</sup> OAI.

<sup>11</sup> Para 8.46.

## 5 USER AS OF RIGHT: FENCING AND SIGNAGE

- 5.1 The Field is fenced. The current fencing was erected in 2002<sup>12</sup>. There are gaps provided in the perimeter fencing to allow access to permissive paths across the Field. Positioned as per the plan of locations submitted during the Inquiry are signs bearing the wording:

PRIVATE LAND

NO PUBLIC RIGHT OF WAY – RIGHT

OF WAY (ON FOOT ONLY) WITH THE

PERMISSION OF ENGLISH PARTNERSHIPS

These signs were erected in late 2004/early 2005 to replace signs which had been erected at a similar time as the 2002 fencing. Paul Robertson told the Inspector he first noticed the signs in 2002/2003. Signs erected very recently include one with slightly different wording (due to stock availability).

- 5.2 In view of the fencing and/or signage use of the Field (other than along a permissive path) was clearly by force and not as of right. There was some suggestion by witnesses that the fencing only excluded vehicles, but the gaps in the fences were provided specifically to allow access over permissive footpaths<sup>13</sup> and were accompanied by signs which rendered any use of the land permissive (alternatively if the permission was exceeded – by force).
- 5.3 Witnesses making any significant use of the Field cannot realistically contend that they did not see the signs. The suggestion made on inspection that they would not be seen by those coming out of the Field might be right for an one-off visitor but could not possibly be right for those alleging regular visits and use of the whole Field. Some may have ignored them, others abided by the permission, but those such as Caroline Bentley who first suggested she had never seen signs, when asked whether she had walked past signs and ignored them, conceded that *'It looks like I have done'*. Janet Bolas and John Moore accepted signs were present but used the land regardless. Brian Buckle agreed that he had effectively ignored signs erected in 2002/3, as did Ron Plenderleith. Gerrard Hunt thought the signs were wrong and ignored them.
- 5.4 In any event, about a third of the Applicant's own witnesses acknowledge the existence of the signs (with slightly differing dates) in proforma statements. Even some of those

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<sup>12</sup> As detailed in the witness statement and exhibits of Neil David Hollamby at OB/2/31: 80% complete in May 2002

<sup>13</sup> See plan of permissive footpaths submitted and confirmed in evidence by Mr. Ashcroft.

who denied signage in their proformas (see for example Paul Robertson), gave contrary evidence to the Inquiry and the overwhelming likelihood is that in accordance with the evidence of Mr. Hollamby and Mr. Ashcroft, signs have been erected since 2003 at the latest. **The Inspector is invited to find accordingly.**

- 5.5 As the Application relies on user as of right continuing up to the date of the Application, 14 June 2007, the Application should be rejected by reason of fencing and/or signage alone.

## **6 CONTINUOUS USER AND INTERRUPTION**

- 6.1 On 3 April 2003 the Objector entered into a licence agreement with George Wimpey West Midlands Limited<sup>14</sup> to allow George Wimpey to occupy part of the Field as a site compound while building homes nearby. The licence period was to be "5 months commencing 24 March 2003". The evidence of the Applicant's witness John Moore, who was familiar with it, confirmed use for "18 months ish".
- 6.2 The existence of this site compound interrupted any use of that part of the Field for a period of 5 months. The Application in relation to the Field (which includes the site of the Compound) should therefore fail<sup>15</sup>
- 6.3 In so far as any use has been as of right (which is disputed) such use has clearly been interrupted by agricultural activities and has not been continuous.
- 6.4 Use as of right was interrupted (and ceased) by reason of the fencing and/or signage.

## **7 SIGNIFICANT NUMBER**

- 7.1 The Applicant has redefined the locality on which it relies as Apley Castle Ward.
- 7.2 This locality has a population, calculated in the 2001 census of 2981. Of this number only 68 people have submitted pro forma evidence and only <sup>11</sup>11 appeared in support of the Application at the Public Inquiry (Mr. Plenderleith is not an inhabitant of the locality).

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<sup>14</sup> OB/2/24

<sup>15</sup> It is also arguable that the construction of the service road amounted to public users deferring to landowner, although there is no specific evidence on the effect of use of the road.