Appendix 2

LAND AT STATION ROAD, NEWPORT.

CLOSING SUBMISSIONS FOR THE OBJECTOR

1. It is common ground that, since the application is made under s.15(2) CA 2006, the relevant qualifying period ("QP") is the 20 year period between 15.12.1991 and 15.12.2011.
2. The burden of proving qualifying use during the whole of that period rests on the Applicant ("A"). The standard of proof is the balance of probabilities, albeit having regard to the guidance given by Lord Bingham in *Beresford* (see Obj. Statement of Objection para.8 (OB p.2)).

Issue 1 – Has the land been used throughout the qualifying period for LSP?

3. A seeks to have registered as a green a substantial area of land – in excess of 10 acres.
4. Two points of principle arise.
5. First, A is required to demonstrate that the land has been used such that it may be sensibly said that the whole of the land has been used for LSP for the whole of the qualifying period – see *Cheltenham Builders* para.29, *Trap Grounds* - Lightman J. at para 95 and Lord Hoffmann at para.67.
6. Secondly, the use must be for activities which properly fall to be considered as LSP – see
   a. *Trap Grounds* per Lightman J. at paras.96-105 esp 102-104;

b. *Laing Homes v Bucks CC* - p.102-105;

c. *DPP v Jones* – Lord Irving LC page 13.

d. Report of Vivian Chapman QC – Radley Lakes, Oxfordshire paras.304-306.

e. See also eg. reports of Stephen Whale and Alexander Booth at AB tabs 21 and 19 respectively.

7. In the present application two major factors loom large which engage directly the above considerations.

8. First, a large amount of the land sought to be registered as a green has been in arable cultivation for a substantial part of the relevant QP.

9. Secondly, the use of the land relied on by A to an overwhelming extent comprises use which it attributable to use of actual or potential public footpaths. That the use relied upon is attributable to use of public highways is plainly how that use would have been (and, on the basis of Mr.Bubb's evidence) was perceived by the reasonable landowner.

10. In respect of the first of those matters, the substantially unchallenged evidence is that for a substantial part of the QP the "round field" has been used for a cycle of arable cultivation. The evidence demonstrates that:

a. between 1992 and 1998 the cycle comprised cultivation of fodder crops – grass (for silage), wheat, barley, maize (O113))

b. 1998 – 2000 arable cultivation for winter wheat and winter barley (O 114)

c. 2000 – 2002 – arable cultivation (ibid)

d. 2002-2008 – set aside

e. 2008-2012 – oil seed rape, wheat, wheat, oil seed rape (O.5 , evidence of M.Bubb).

11. The evidence demonstrates that the process of active arable cultivation between land preparation and harvest took up a very substantial part of each year, with, in most cases, the period between harvest and the commencement of the cycle for the next year being a matter of weeks.

12. The area of the round field used for cultivation has remained largely constant with a 6 m strip left on the northern and eastern boundaries (see Bubb para.5 p.O5) (see evidence of Mr.Broad – evidence of well trodden paths and this has been the case since 1991 (xx day 1). The southern boundary beyond the extent of the hedge on its east side has been actively cultivated for many years (see aerial photos at O359 (2003) and O360).

13. In respect of the round field and elsewhere, it is plain that the overwhelming majority of users confined themselves to the paths. This is particularly the case when the round field was in arable cultivation. The majority would use the paths on the application land as part of a wider walk or circuit including the many formal and informal paths on adjoining land – Mr.Broad (day 1) would he "stick to headland" and would use the land "as part of a circuit"'. Mr.Broad stated that people were "fair minded" and would "stick to footpaths" on application land and wider countryside beyond (xx day 1).

Mr.Broad, a long standing and palpably honest witness, answered affirmatively to the question posed that "majority use the well trodden paths" (xx day 1). Mr.Yarrington confirmed that people would not trample over crops (xx day 1). Mr.Rudd confirmed that people generally kept to paths, that there was much use of paths but that he had seen people not stick to paths but this was "not very common" (xx day 1). Mrs.Briscoe confirmed in xx that she would "generally stick to paths" (xx day 2). Mrs.Clarke would also generally confine herself to paths (day 2 xx). Mr.Coombe would stick to path on round field when there was an "obvious crop" (xx day 2). Mrs.Ashley confirmed that she would not walk on farmer's crops. Mr.Goulding stated in his written evidence that he and his family would generally keep to paths (A323). Mr.Gittus would "more often than not go around the edge of the arable field out of "respect for farmer's field"" (x and xx day 2). Mr.Wiggin would keep to worn paths (day 2 xx). Mr.Benbow would stick to paths when crop in field (day 2 xx), as would Mr.Richards (xx day 2), who stated that "majority of time people would walk around the perimeter but occasionally across field". Crossing the field was the "exception and not the rule", he confirmed (Mr.Richards xx day 2). Mr.Dredge sticks to paths (day 2 x). Mr.Pocock and his family generally stick to paths (A235 and xx day 2) as does Mr.Evans (x day 2) and Mrs.Ashton, if crops or horses in fields – Mrs.Ashton "wouldn't dream of walking across the fields" (xx day 3).This evidence from witnesses for the A, accords with the majority of those who have submitted written

evidence – see A71 (Cooper), A75 (Charles and Pat Corfield), A169 (Marion Horrocks), A185 (Colin Meadows), A189 (Grace Meadows), A195 (Lathy Mills), A247 (Pauline Stansfield), A261 (Susan Thaker), A 275 (Louise Yarrington), A300 (Ros Barsley), A331 (Paul Ibbetson).

14. So far as the horse field is concerned, there is of course a legally recognised footpath that crosses this field in the north-south direction on an alignment parallel with and close to the western hedge of that field. Formerly a stile gave access onto the field at either end of the path. Now a set of kissing gates provides that access. The land was used by Mr.O'Brien for the keeping of horses for the whole of the QP. At least two horses have been kept on the land (evidence of Mr.O'Brien). Although horses were taken off the land from time to time, esp when waterlogged, the Applicant's evidence demonstrates that horses were "predominantly there" (Mrs. Clarke day 1). Mr.Edge stated that there had always been horses in horse field – odd few days when no horses (xx day 2).

15. It is plain that for a large number of inhabitants esp those with children and/or dogs the presence of horses was a disincentive to use and they generally stayed off the horse field. Mr.Broad referred to "giving the horses a wide berth" (x day 1) and that he "didn't use the horse field much" (xx day 1). He observed that the horse field was "generally used less frequently" (xx day 1). It was put to Mr.Broad that the fact that the horse field was less well used was not surprising as "horses were not tethered and … would think twice

about walking into field with horses". He responded "yes. Absolutely. I would agree that you would think twice about dog walking. If I saw horses I would choose to go another way" (xx day 1). Mr.Davies would not enter horse field with a dog (day 1 xx). Mrs.Bronwen Jones would not enter horse field with her daughter or with her husband's family dog (xx day 1). Mrs.Fletcher agreed that "some people were discouraged by untethered horses" (xx day 1). Mr.Yarrington did not see people walking around the horse field (xx day 1). Mr.Toland generally didn't take scouts into horse field as horses and young boys "don't mix" (x day 1). Mrs.Coulthard-Jones used horsefield only when there were no horses in it (x day 2). Mrs.Clarke confirmed that the horse field was used less (xx day 2). Mr.Healey would not take his children or dog into the horse field (day 2 xx).

16. The use which has taken place in the horse field has largely, indeed almost exclusively, been to cross the field along an alignment which reflects the lawful route – see eg. Mr.Wiggins (day 2), Mrs.Fletcher, Mr.Pocock (day 2 xx).

17. So far as the pond in the horse field is concerned, a few refer to "pond dipping" although it is notable that Mrs.Fletcher she had "never seen anyone at the pond – until last year it was just a bog" (x day 1). Mrs.Fletcher's visits to the pond comprised a minor diversion when crossing the horse field - she would "look at it then carry on walking" (xx day 1). Mrs.Couthard-Jones diversions to visit

the pond too are part of a walk through the horse field and beyond (xx day 2).

18. For those who entered the horse field, the evidence is that they generally confined themselves to the route of the footpath.

19. The woodland area on either side of the entrance from Station Road to the junction with the route around the round field and across the horse field, as well as the tree belt at the northern boundary, was completely overgrown in the past. It was described as a "thicket" (Dan Nicholas xx day 1). Mrs. Carol Jones accepted that it was impenetrable until 2006/7 (xx day 1). In 2006-7 it was cleared and planted with bulbs and spring flowers in association with the Council (and to which we will return later in these submissions.). Mr.Gavin Edwards used the woodland belt track "just for access – getting where I needed to go". He recalled the woodland belt as "pretty much overgrown" (x day 2). The woodland belt on the north side had an modest informal path running east-west through an otherwise overgrown area. Save for some evidence of children's play, the area off the paths was largely impenetrable and was not penetrated. Even after the area to the south of the Hutchison Way at the entry point off Station Road was cleared and planted in 2006-7 the area was not penetrated or used, as evidenced from the successful display of flowers, the fact of which is plainly not consistent with active use. Mr.Gittus volunteered that if people walked on spring flowers they would be in trouble: (xx day 2).

20. Mr.Broad accepted in xx that people stayed on track in woodland area (xx day 1). He accepted that people would not trample where the bulbs had been planted. Mr.Davies too observed that the route through the woodland was "not well used". Although he would not stick to paths in woodland when foraging for fungi, others he witnessed would relatively infrequently leave the paths and enter the undergrowth in this area (xx day 1).

21. The use of all these routes, through the horse field, around the round field and through the woodland, must be excluded from qualifying LSP, on the basis of the principles set out above. Use of these routes would include use for walking and dog walking, jogging [1]and orienteering[2].

22. It is notable that Mr.Gittus regarded the route along the northern boundary of the round field as a "permissive path" (response to Inspector's Questions day 2).

23. Although not legally an activity permitted on a footpath such as the legally recognised footpath comprising the Hutchison Way, cycling along the paths, whether formal or informal, within the land together with the limited horseriding which has taken place would, to any reasonable landowner, be attributed to the use or, in the case of the Hutchison Way, reasonable extension to the use of these paths rather than any independent LSP. These activities too do not fall to be considered as qualifying LSP. Cycling and horseriding on the

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[1] Mr.Yarrington confirmed that people generally jog around the headlands (xx day 1)

[2] Mr.Broad's evidence demonstrates that use of the land for orienteering was limited to the round field (chief day 1).

land has been rare in any event and seems to be limited to a route to and from Station Road along Hutchison Way and using the paths on the round field.

24. Uses which are part of the wider lawful use of public rights of way, (as in DPP v Jones) or are otherwise ancillary or incidental to use of a right of way (as in report of Alex Booth) should also be excluded from the qualifying LSP, namely:

a. blackberry picking either side of the hedge separating the round field from the horse field which is no more than a short step off the worn paths (see eg. Mrs.Carol Jones xx day 1; Mrs.Fletcher xx day 1, Mr.Yarrington (xx day 1);

b. stopping to take photographs or observe wildlife on or off the paths. Mrs.Fletcher agreed that her wildlife photography was "opportunistic" and as with others, and as is normally the case, it took place while out walking and as and when the opportunity to photograph or observe arose;

c. sitting on or adjacent to the path for wildlife observation, rest or contemplation, as apparently did Mrs.Ashley from time to time (x and xx day 2), Mrs.Ashton (xx day 3)

d. straying off the path to observe an interesting feature eg. a pond or to search for historic artifacts[3].

e. playing with children on the paths or even if this involves straying off the paths;

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[3] Mrs.Fletcher's questionnaire at O131 qu.12 refer to field walking – looking for historic objects on mole hills and paths …".

f. walking dogs even if dog or owner strays off path (see Laing Homes).

25. These are all activities which fall to be considered as part and parcel of use of a right of way or activities incidental to that use. On the approach in *Laing, Radley Lake* and *DPP v Jones* these activities do not fall to be considered as LSP.

26. There is, it is submitted, an obligation to exclude all use attributable to use of the actual or potential paths or use incidental thereto. When these activities are excluded, there is manifestly an insufficiency of activity which may properly be considered as LSP and which may sensibly generate a conclusion that the whole of the land has been used throughout the QP for LSP.

27. There is some evidence of individuals who choose to walk through and over the arable field when in crop. This was however acknowledged to be the "exception not the rule" (see evidence of Mr.Richards xx day 2). That many individuals would choose to walk up and down tractor "tram lines" rather than use the well worn tracks is wholly unrealistic and is inconsistent with (a) the overwhelming amount of the evidence given for A and (b) the physical existence of the worn paths on the ground, which have existed for much of the QP having created by use and (c) common sense. That those engaged in orienteering may have used the tractor tracks is acknowledged. That others using the land for recreational purposes did so other than most exceptionally accords

neither with the evidence nor with normal experience as to how most people behave.

28. Kite flying is, the balance of the evidence suggests, exceptional, as many witnesses acknowledged and as A's own table of use at A445 demonstrates (see composite table). Mr.Broad described it as "rare" (xx day 1). Mrs.Briscoe described it as "occasional" (xx day 2), as did Mr.Edwards (day 2 x). Mr.Rudd referred to kite flying mainly on arable field but not when crops growing (x day 1). Mr.Rudd later in xx described kite flying as occasional. Those who give direct evidence of kite flying recall it taking place when there were no crops in the arable field and therefore only took place for a limited period. Mrs.Bronwen Jones referred to kite flying as "occasional" (xx day 1) with her husband's power kite flying being limited to 2002 to 2004.

29. Evidence of use of the land for picnics is equally scant. Mr.Broad saw picnicking "once or twice" and accepted that it was "pretty rare" (xx day 1). He agreed that the land does not lend itself to picnicking (day 1 xx). Mr.Rudd referred to picnics not being "on a permanent basis" (x day 1) and later in xx that picnics were "not regular". The few incidents when it took place or was observed seem to have been limited to the arable field margins and very occasionally the woodland belt. To the extent that it did take place, it should be construed as incidental to use of paths.

30. Painting and sketching is wholly exceptional (Mrs.Briscoe described it as "occasional" (day 2 xx)), as is sledging. It appears that the

sledging referred to my Mrs.Bronwen Jones sledging took place before the QP and before infilling of the former railway line in 1992 (day 1 xx).

31. Dog training occurred, accordingly to Mrs.Ashley, on two or three occasions (day 1 xx and Inspectors questions).

32. Scout and guide use of the land also seems to have been rare and was limited to use of paths in the round field and woodland (see evidence of eg. Dan Nicholas and Will Ellerby (day 3 xx). Mr.Ellerby stated in xx that Scout leaders would teach us to walk outside and not across the crops (xx day 3). Mr.Toland's evidence (day 1) that tents were erected seems unlikely certainly during the years of arable use and is not consistent with the evidence of the former scouts etc, from whom the inquiry has heard.

33. Ball games including football was a rare activity. Mr.Broad has witnessed football "less than a dozen times" (xx day 1). The land does not lend itself to such use in any event. Mr.Wiggins stated that the ball games he had seen had been on the northern boundary path of the arable field and not on the horse field (xx day 2).

34. The planting of bulbs and flowers which took place in 2006/7 was with the express or implied permission of the Council, as landowner (about which see issue 2 below).

35. There is some evidence of boys building dens and "hanging out" on the land however this seems to have been very localised and confined to a small area adjacent to the entry point onto the horse field. Mrs.Clarke reported that she had been told that "this was

where the dens were predominantly" (xx day 2). Moreover, it seems also to be isolated to a short period of years at the beginning of the QP. Bronwen Jones referred to such use until she was 10 years old i.e. 1989; Mrs. Carol Murphy's children had left home by 1992, Mrs.Fletcher's son Richard was 13 yrs old in 1998 when they moved to the area and would have ceased building dens by circa 2000 (xx day 1)). Mrs.Grubert's children were born in 1970 and 1972 respectively and were therefore grown up by 1991. Will Ellerby ceased making dens in 1991 to 1992 (x day 3). Mr.Dan Nicholas, who referred to den building and playing, ceased using the land for these purposes in 2005/6 and during the period between 1994, when he began, and 2005/6 the level fluctuated (xx day 1). Mr.Tom Clarke's period of use was pretty much the same (day 2 xx) It is notable that there is little evidence of these activities taking place by children and young teenagers from 2000 onwards. It has been much less overgrown since the clearance in 2006/7 in any event.

36. Mr.Yarrington's nature observation which involved much use apparently of the tractor tram lines (day 1 x and xx) if accepted as reliable, may also amount to an LSP. This is plainly different from the majority of nature observation which took place as part and parcel of walking along the lawful right of way or the informal paths around the round field or through the woodland. However, Mr.Yarrington's evidence must be treated with a little caution. His

suggestion that snowball fights took place "all the time" (x day 1) as with much of his evidence has the tone of exaggeration about it.

37. Mrs.Carol Jones' trips with school children from the Newport Junior School was limited to three occasions a year and was educational and not therefore an LSP in any event (xx day 1).

38. The petting and feeding of horses took place from outside the application site (ie. from the Station Road gate (see A325 and Mr.O'Brien's evidence) and from outside the southern boundary of the horse field (evidence of Mr.O'Brien). It was also discouraged (see Mr.O'Brien). It is acknowledged that some visits to the horses took place from the northern stile (now kissing gate) to the field. In respect of petting/feeding horses, we make the following points:

    a. in so far as it took place on the application land it was limited in extent and highly localized. Many visits to the horses were from outside the application land in any event (as stated above);

    b. within the application land, it took place in large measure from the Hutchison Way path. It would fall to be considered as incidental to use of the path in any event (see Radley Lakes);

    c. in law, it is not a qualifying use. It is not a "use of land" for LSP (as, for example, walking on land, sitting on a bench attached to the land or even climbing trees may be, as trees are part of the land). It is use of a private chattel kept on the land. Put another way it is making use of a "use" lawfully taking place by another on the land rather than use of the land itself. As such, to the

extent that it is decisive, it is submitted in law that this activity is not a qualifying use in any event.

39. It is submitted therefore that the limited range of activities which may be considered as LSP is far too limited in frequency and extent and too localised to provide any proper or sensible evidential basis to conclude that the land or any sensible part of its has been used through the QP for LSP.

40. On this basis, the application must it is submitted fail.

Issue 2 - Use as of right

41. Without prejudice to the earlier submission, the clearance of the land near the entry point from Station Road and the planting of wildflowers and bulbs in 2006/7 was carried out (a) in partnership with the Council, (b) with funding from the Council and (c) with the assistance of Council officers and personnel (see A201 – evidence of Mrs. Carol Murphy and Mrs.Murphy XX).

42. This activity must be considered to have taken place with the permission express or implied of the landowner.

43. For this reason it is not a qualifying use.

44. In any event, clearance and planting on land is not a LSP in any event. If anything it would fall to be considered as an act akin to the assertion of ownership or occupation. However on the basis of the earlier submission concerning use as of right in respect of this use,

the legal status of the use does not need to be resolved on this occasion.

45. Metal detecting which was limited to the arable field was permissive (Mrs.Fletcher x day 1).

Issue 3 - Use by a significant number of the inhabitants of a neighbourhood within a locality

46. For the reasons set out earlier in these submissions, there has not been use of the land by a significant number of local inhabitants for LSP. Although many may have used the paths within the application land, and on the arable field and along the Hutchison Way in particular, this does not amount to LSP and therefore the significance test cannot be met.

47. In terms of neighbourhood, A offers, through his amendment, a qualifying neighbourhood shown on the map at A40. This map is described in opening for A as an area "hemmed in by four roads" namely Wellington Road, Audley Avenue, Avenue Road and the Bypass".

48. The principles which govern the identification of a qualifying neighbourhood are as follows:

a. a neighbourhood is not "any area of land that an applicant for registration chooses to delineate upon a plan" (Cheltenham Builders para.85);

b. a qualifying neighbourhood must have a "sufficient degree of cohesiveness" to be recognised as such (ibid); and

c. this cohesiveness must be "pre-existing" and a neighbourhood must be "capable of meaningful description in some way" (per HH Waksman QC in *Oxon and Bucks NHS Trust* at page 19).

49. A surprising feature of the present case is the total absence of any evidence whatsoever to demonstrate that the area identified on the plan relied on by A is a neighbourhood. No evidence whatsoever has been advanced to demonstrate any cohesiveness or identity within the area relied on. The area said to be a neighbourhood is not identified by name but only by its boundary roads.

50. Moreover the boundaries of the alleged neighbourhood are entirely random and in places cut directly through neighbouring houses within a street. Mr.Rudd had no explanation for this (xx day 1) or indeed why the boundaries were drawn where they are.

51. A was put to strict proof on this point (O3 para.16, O404 para.9). No evidence even approaching proof has been adduced.

52. No qualifying neighbourhood has been identified.

53. The A may draw no reliance from the report of Alexander Booth concerning land at Napsbury Fields, St Albans (AB tab 19). The Inspector addressed the neighborhood issue at paragraphs 123-129 (PP 18-20). The facts which led to that conclusion are very different from those in the present case. In any event, whether or not a neighbourhood has been demonstrated is entirely fact sensitive. The alleged neighbourhood comprised three residents associations. There are none here. Those associations "a history

of collaboration" which the Inspector found to be "important" (para 125); this factor too does not apply in the present case. Mr Booth found that the neighbourhood alleged was to some extent "cut off" and isolated by busy roads or a railway line (para 126). There is no evidence of such factors in the present case. The boundaries of the neighbourhood advanced here are largely arbitrary (see xx of Mr Rudd day 1). As such the considerations in Napsbury do not arise in the present case. In any event, it is submitted that the approach in Napsbury was wrong in law in that it does not properly apply the Cheltenham Builders test or the approach of HHJ Waxman in the NHS case. The Inspector should therefore be cautious before approaching, as a matter of law, the neighbourhood test in the way in which Mr Booth did.

54. This element of the qualifying requirements has been met.

55. This provides a further reasons for rejection of the application.

56. No issue is taken concerning locality.

Conclusion

57. For the reasons set out in these submissions, the qualifying requirements are not met in respect of the application land, whether considered as a whole or in part.

58. The application should be rejected and the Inspector is requested to recommend accordingly.

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