Appendix 3

IN THE MATTER OF LAND KNOWN AS LAND AT STATION ROAD, NEWPORT, SHROPSHIRE

B E T W E E N:-

MR JOHN RUDD

Applicant

- and -

TELFORD AND WREKIN COUNCIL

Objector

APPLICANT'S WRITTEN CLOSING SUBMISSIONS

(All references in bold and in square brackets are to the bundle – page number/colour)

Introduction

1. This is an application by John Rudd ("the Applicant") made on 15 December 2011 to register land at Station Road, Newport, Shropshire as a Town or Village Green pursuant to s.15(2) Commons Act 2006 ("the Act").

2. The land which is the subject of this inquiry ("the Land") is formed of 3 areas **[Red/9]**:

    a. Wooded Area – 0.304 hectares or 0.75 acres[1];
    b. Horse Field – 1.388 hectares or 3.43 acres; and
    c. Round Field – 2.372 hectares or 5.86 acres.

3. These submissions also make reference to an area referred to in the Inquiry as the Wooded Belt (to distinguish this area from the Wooded Area at the start of the Hutchinson Way), which is an area of trees running along the old railway line along the northern edge of the Round Field.

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[1] These sizes are taken from the Ordnance Survey Map 1/2500 scale, originally published in 1960, revised in 1974 and published in 1976.

4. The Land is bordered by Station Road to the East, the Wooded Belt to the North, part of a public footpath to the West and further fields to the South.

The Application

5. The application was made on the basis that:

> *It plays an important role as part of the entrance to a public right of way known as 'the Hutchison Way and provides an area of valuable open countryside between the built environment and the A518 bypass upon which the general public have been able to partake in recreational activities for over 20 years.*
>
> *The area of open 'green land' provides a natural habitat and sanctuary to a plethora of wildlife and wildflowers which intern* [sic] *have provided an opportunity for the local and greater community to experience the natural habitat at close quarter* [sic]. **[Red/5]**

6. The locality was originally stated in error to be Church Aston and Lilleshall ward **[Red/12-13]**. But permission was given to the applicant to amend its case to rely on the "neighbourhood" limb in s.15(2) of the Act **[shown on Map 2 – Red/40]**.

Description of the Land

7. The Land is owned by Telford and Wrekin Borough Council ("the Objector") as freeholder and is depicted as the area edged in red in the plan at **[Red/9]**. Both the Applicant and Objector have submitted photographs, including aerial ones, of the Land as part of their evidence. In addition, an accompanied visit to the Land was carried out on Thursday 25 October 2012.

8. Two existing public rights of way **[definitive map – Blue/171a]**, the Hutchison Way which runs approximately through the middle of the land, bisecting the Horse Field and the Round Field, and another pathway (sometimes known as a bridal passage) to the far west of the land which runs past a small part of its western border crossing the old railway line.

9. The land now has fencing on it, which can be best seen from various photographs attached to Mr Alan Slater Fox's witness statement **[Blue/20-50]**. This was not

present at the time of the application and was erected, according to the Objector's evidence on 17 February 2012 **[Blue/10]**.

The Wooded Area

10. The Wooded Area is a copse to the north east of the land. It contains a kissing gate at its entrance from Station road before it separates into three paths, which have been created and defined by the fencing that was put up earlier this year. It is common ground that one of these paths forms part of the Hutchison Way public right of way. There is a second that goes round, slightly to the right from the entrance before joining with the first path and continuing on into the Round Field. The third path is even further to the right in the area that borders the recycling centre and caravan land. This is described as a made-up path and Mr Fox made clear on the accompanied land visit that this had been made up since the fencing had been erected. The applicant's evidence suggests that the creation of these three paths is artificial and bears no relation to how the Wooded Area was during the relevant period.

The Horse Field

11. The Hutchison Way public right of way leads from the Wooded Area to another kissing gate which was erected in 2006 to replace a stile which existed before at the entrance to the Horse Field, the second main area of the land. The Horse Field contains the continuation of the Hutchison Way right of way. In the Horse Field, there are a number of features including **[evidence in the bundles follows description]**:

    a. An ephemeral stream which is crossed with the aid of planks that have been lain for the purpose **[Red/305]**;
    b. An ephemeral pond that rises and falls with the wetness of the weather **[Red/83]**;
    c. Kissing gates at the northern and southern entrances to the Horse Field **[Northern one can be seen at Red/205]**;
    d. A post **[Red/221]**;

e. A ridge and furrow **[Red/123]**;

f. A oak tree **[Red/89]**;

g. Various flora and fauna including Blackthorn at its South Eastern corner and blackberry and elderflower bushes in the hedgerow separating the Horse Field from the Round Field **[Referred to in witness statements including XXXXX]**. Luke Harrington, John Rudd.

12. The Objector has issued continual annual licences for horse grazing on the Horse Field to a Mr Edward O' Brien since 16 August 1993 **[Blue/108]**. These licences have not been disclosed to the inquiry.

The Round Field

13. Past the entrance to the Horse Field on the left and travelling straight on leads to the Round Field. This part of the land has been licensed by the Objector to various farmers over the course of the relevant period. These are described in the evidence of Michael Bubb and Christopher John Jones as the following sequence:

a. 1991-1998 – Mr Marsh farmed the land in conjunction with his dairy business where the land was used for cattle grazing and the growing of fodder crops – the exact sequence and timings of the use of the land during this period are in dispute but the Objector contends that the land was used as grassland for silage production, and for wheat, barley and maize at other times **[Blue/113]**;

b. 1998-2000 – Mr Marsh sub-let the Round Field to E. J. Stokes & Son on a two year Farm Business Tenancy ("FBT") commencing on 30 November 1998 and ending on 29 September 2000 – again, the precise use of the land during this period is in dispute but the Objector claims that it was used for growing winter wheat and winter barley **[Blue/114; Blue/120]**;

c. 2000-2002 – Mr Marsh sub-let the Round Field to H Timmis (Farms) Limited (Tenant) on a two year FBT commencing on 30 September 2000 and ending on 29 September 2002 – the details of how the field was used in this period are vague **[Blue/114; Blue/139]**;

d. 2003-2010 – The Round Field was sub-let by Mr Marsh on a series of FBTs to J. H. Thomas & Son – it is common ground that from 2003-2008 the area was used as set aside **[Blue/115; Blue/162; Blue/174; Blue/200; Blue/291]**; and

e. 2008-2011 – Overlapping with J. H. Thomas & Son's FBTs, in the years following the withdrawal of set aside on the Round Field, J. M. Bubb & Sons held periodic licence agreements to farm the land for the remainder of the relevant period – it is common ground that the crop rotation in these recent years has been Oil Seed Rape – Winter Wheat – Winter Wheat – Oil Seed Rape **[Blue/5; Blue/116; Blue/310; Blue/319; Blue/328; Blue/337]**;

14. In the evidence of both the Applicant and the Objector there are a series of helpful aerial pictures which give an impression of how the land was being used at various points in the course of the relevant period **[Red/307; Blue/355-360]**.

15. On 17 February 2012, the Objector came onto the land to erect fencing to cordon off the boundaries of its land. In the course of putting up the fencing, the Objector also fenced off the Hutchison Way, created a parallel fenced off path through the Wooded Area and built a fence bordering the Wooded Belt to the north of the Round Field. A fence was also put in to the couth of the Horse Field and the southern border of the Round Field separating it from the abutting fields to the south. In so doing, the Objector closed off an access point to the land from next to the Pumping Station at Baddely's Wells **[this can be seen on the map at Red/9 and in the photos attached as exhibits to Mr Fox's witness statement Blue/20-50]**.

16. It is a matter of some dispute the exact timings of the erection of the fencing, which areas were blocked off at which point and when some or particular points of access were reinstated. In any case, the fencing is the subject of much evidence from the witnesses before this inquiry and its effect lies outside the relevant period, occurring as it did since February this year.

The Legal Test

17. Section 15 (2) of the Act provides that:

This subsection applies where-

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

(b) they continue to do so at the time of the application.

18. The burden is therefore on the Applicant to prove to the civil standard of the balance of probabilities that:

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

The Law

A. Significant Number

19. Any consideration of user that may be referable to recreational use of a town or village green is a matter of degree to be determined by the decisionmaker on the facts of each specific case – *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25. The courts have been loathe to issue prescriptive guidance other than to point out that the key test is how the local inhabitants' use of the Land have appeared to the reasonable landowner – *R (oao Laing Homes Limited) v Buckinghamshire County Council* [2003] EWHC 1578 Admin; *Oxfordshire*.

20. At [71] of his judgment in *R (oao Alfred McAlpine Homes Ltd) v Staffordshire County Council* [2002] EWHC 76 (Admin) Sullivan J defined "significant" for the purposes of s. 15 of the Act as meaning *"that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers."*

B. Neighbourhood

21. A neighbourhood within a locality need not be a recognised administrative unit but it must not be any area arbitrarily delineated on a map. The registration authority must instead be satisfied that the proposed area has a sufficient degree of cohesiveness otherwise the word "neighbourhood" would be devoid of meaning – [86] of Sullivan J in *R (oao Cheltenham Builders Limited) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin).

22. Cohesiveness should be seen in the context of the recent amendments introduced into the Act in 2006, the new neighbourhood within a locality limb, which was drafted with *"deliberate imprecision"* – per [27] of Lord Hoffmann's judgment in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25; Report of Alexander Booth – Napsbury Fields, St. Albans, Herts.

23. A neighbourhood carries an easily understood, ordinary meaning, which is clearly defined in the *Oxford English Dictionary* as *"a district or portion of town"*, *"a small but relatively self-contained sector of a large urban area"* and *"the nearby or surrounding area, the vicinity"* – [99] *Leeds Group Plc v Leeds County Council* [2010] EWHC 810 (Ch). In *Leeds*, at [103], Judge Behrens said that Sullivan J's references to cohesiveness have to be read in the light of Hoffmann in *Oxfordshire*, the overall purpose of the Act and the plain meaning of the word. The relevant part of Judge Behrens judgment was approved by Sullivan LJ in the Court of Appeal – *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438.

24. In the same case, Sullivan LJ confirmed that where a town or village green serves two neighbourhoods sufficiently, that too must suffice to satisfy the neighbourhood requirement of the Act – [27] in *Leeds Group* (CA).

C. As of Right

25. As of right does not require the user to have a legal right, rather the user must have been engaged in the activities on the land unopposed by the landowner and nec vi,

nec clam nec precario (not by force, nor by stealth, nor by licence) - *Lewis v Redcar and Cleveland Borough Council* [2010] UKSC 11.

26. The test is objective and it matters not the subjective viewpoint of any particular user – Lord Bingham at [3] in *R (oao Beresford) v Sunderland County Council* [2003] UKHL 60.

27. An implied permission cannot be imputed to *"equivocal"* behaviour. At [7] of Lord Bingham's judgment in *Beresford* his lordship states:

> *Recognising that the authorities preclude reliance on mere inaction as giving rise to an implied licence to use the land, the council has placed reliance on its conduct in mowing the grass on the land and providing benches for the accommodation of spectators and other users of it. This, it was said, showed that the council was encouraging the public to use the land, from which its licence to do so could be implied. Both the mowing of the grass and the provision of benches are open to more than one explanation. But the argument is in my opinion open to a more fundamental objection. As already pointed out, the 1965 Act drew heavily on principles established under the Acts of 1832 and 1932, relating to private and public rights of way respectively, and in neither of these instances could acts of encouragement by the servient owner be relied on to contend that the user by the dominant owner had not been as of right. Such conduct would indeed strengthen the hand of the dominant owner. Here the conduct is in any event equivocal: if the land were registered as a town or village green, so enabling the public to resort to it in exercise of a legal right and without the need for any licence, one would expect the council to mow the grass and provide some facilities for those so resorting, thus encouraging public use of this valuable local amenity. It is hard to see how the self-same conduct can be treated as indicating that the public had no legal right to use the land and did so only by virtue of the council's licence.*

28. Any implied permission must be granted through overt conduct such as charging entrance or asserting his ownership by excluding people from the land completely from time to time – per Lord Walker at [83], [85] in *Beresford*.

D. Lawful Sports or Pastimes on the Land

29. Lord Hoffmann shed light on the meaning of "sports and pastimes" in his judgment in *Sunningwell*. At page 357D of his judgment in *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335, he said:

As a matter of language, I think that "sports and pastimes" is not two classes of activities but a single composite class which uses two words in order to avoid arguments over whether an activity is a sport or a pastime. The law constantly uses pairs of words in this way. As long as the activity can properly be called a sport or a pastime, it falls within the composite class. As for the historical argument, I think that one must distinguish between the concept of a sport or pastime and the particular kind of sports or pastimes which people have played or enjoyed at different times in history. Thus in Fitch v. Rawling (1795) 2 H.B1. 393 , Buller J. recognised a custom to play cricket on a village green as having existed since the time of Richard I, although the game itself was unknown at the time and would have been unlawful for some centuries thereafter: see Mercer v. Denne [1904] 2 Ch. 534 , 538-539, 553. In Abercromby v. Town Commissioners of Fermoy [1900] 1 I.R. 302 the Irish Court of Appeal upheld a custom for the inhabitants of Fermoy to use a strip of land along the river for their evening passeggiata. Holmes L.J. said, at p. 314, that popular amusement took many shapes: "legal principle does not require that rights of this nature should be limited to certain ancient pastimes." In any case, he said, the Irish had too much of a sense of humour to dance around a maypole. Class c is concerned with the creation of town and village greens after 1965 and in my opinion sports and pastimes includes those activities which would be so regarded in our own day. I agree with Carnwath J. in Reg. v Suffolk County Council ex parte Steed (1995) 70 P. & C. R. 487, 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green. It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right.

30. As a matter of principle, horse-patting should be considered to come within the class of lawful sport or pastime. Horses, as chattels or personalty, are different from land, or realty, and accordingly the legal frameworks which apply to Land (trespass, nuisance and the like) do not apply to personalty. Finally, we have not been able to find any authority on the point but nor have we been able to find any law against horse-patting. In our Diceyan constitution, therefore, it is allowed.

E. For not less than 20 Years and Continue to do so when the Application was made

31. It is common ground that the application was made on 15 December 2011, meaning that the relevant period being considered by this inquiry is thus 15 December 1991 – 15 December 2011.

32. Deference, or civility, on the part of the public while engaging in lawful sports or pastimes as of right does not amount to confirmation that this exercise was by licence of the landowner – *R (oao Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11.

33. While excluding the public completely from the Land can amount to interrupted use (*Betterment Properties (Weymouth) Limited v Dorset County Council* [2010] EWHC 3045 (Ch) and [2012] EWCA Civ 250, give and take and the coexistence of two rights are insufficient to defeat, and not inconsistent with, qualifying user as recreational user referable to a town or village green. At [74-75] of his judgment in *Redcar* Lord Hope explained the issue of how to interpret the deference by the public in the following terms:

> *74. I agree that care needs to be taken in drawing conclusions from cases about the creation of a right of way by dedication. But the concepts of partial dedication and the coexistence of rights on both sides appear to me to be capable of being applied generally. Lord Hoffmann would not have mentioned give and take in the Oxfordshire case [2006] 2 AC 674 if he had thought that it had no application to town and village greens. If it were otherwise it would in practice be very difficult, if not impossible, to obtain registration in cases where the owner is putting his land to some use other than, perhaps, growing and cutting grass for hay or silage. There being no indication in the statute to the contrary, I would apply these concepts to the rights created by registration as a town or village green too.*
>
> *75. Where then does this leave deference? Its origin lies in the idea that, once registration takes place, the landowner cannot prevent use of the land in the exercise of the public right which interferes with his use of it: the Laing case [2004] 1 P & CR 573, para 86. So it would be reasonable to expect him to resist use of his land by the local inhabitants if there was reason to believe that his continued use of the land would be interfered with when the right was established. Deference to his use of it during the 20-year period would indicate to the reasonable landowner that there was no reason to resist or object to what was taking place. But once one accepts, as I would do, that the rights on either side can coexist after registration subject to give and take on both sides, the part that deference has to play in determining whether the local inhabitants indulged in lawful sports or pastimes as of right takes on an entirely different aspect. The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice coexist.*

34. Notices must be suitably worded to be effective for the purposes of defeating user as of right – *Betterment* (CA).

The Applicant's Evidence

35. The Applicant called 32 witnesses, who gave evidence and were cross-examined.[2] In addition a number of witnesses supplied witness statement but did not give live evidence.[3] There are questionnaires which many of the witnesses filled in and are attached to their witness statements, as well as some other which are provided in the Applicant's bundle **[Red/Tab F]** and also in the application bundle **[Green/Tab 1]**. There are also 376 evidence cards coming from a total of 303 households, many though not all of which can also be found in the Applicant's bundle **[Red/Tab G]**. The application bundle also contains emails written to the Registration Authority **[Green/Tab 2]**. There is some duplication between the evidence cards and witness statement.

36. A summary of the Applicant's witness evidence is attached to these closing submissions at Appendices 1-3. The summary is drawn from verbatim notes taken at the Inquiry by the Applicant's counsel.

The Objector's Evidence

37. In addition to that contained in his witness statement **[Blue/9-51]** Mr Fox gave evidence on behalf of the Objector and was cross-examined. In examination in chief, he explained the route that he had taken when he conducted the surveillance of the Land over Easter Monday. In cross-examination, he was challenged on the methodology and instructions for the survey that he asked Mr Robert James to carry out on the Land in April 2012. In particular, his evidence was that he had become

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[2] With certain very few exceptions where the Objector's Counsel, Mr Edwards QC, chose not to cross-examine.

[3] These were G. R Cooper **[Red/71]**, Charles Corfield **[Red/75]**, Stuart Evans **[Red/115]**, Craig Henderson **[Red/163]**, Marion Horrocks **[Red/169]**, Colin Meadows **[Red/185]**, Grace Meadows **[Red/189]**, Kathy Mills **[Red/195]**, Pauline Stansfield **[Red/247]**, Susan Thacker **[Red/261]**, Gary Wade **[Red/263]**, Louise Yarrington **[Red/275]**, Ros Barsley **[Red/299]**, Paul Ibbetson **[Red/331]**, Helen Taylor **[Red/349]** and Phil Walker **[Red/355]**.

aware of the Land in 2008 but more involved in the last two years after he had taken up his new role of Service Delivery Manager. He discussed the fencing that was erected by the council in February 2012 and accepted that detailed monitoring of the site had only been conducted after the village green application had been made in December 2012.

38. In addition to the evidence contained in his witness statement **[Blue/51-106]** Mr James gave evidence regarding the survey he carried out on the instructions of Mr Fox. He discussed his qualifications for the work and the methods he had employed. He described the route he had taken around the Land when he was recording use by the public. In cross-examination he was challenged about his suitability, experience and methods. He explained that he was following Mr Fox's instructions.

39. In addition to that contained in his witness statement **[Blue/4-8]** Mr Bubb gave evidence about his own crop rotations since he had entered into a series of annual periodic sub-tenancies with Mr Marsh. In examination in chief, he described the rotation that he had followed and that his plans to grow potatoes this year. In cross-examination he was asked to assist the inquiry by explaining the sequential growing patterns of different crops including grass for silage, oil seed rape, wheat and winter wheat, barley and winter barley, and maize. He explained the lengths of time in each cycle when human activities might be harmful to the crops or the land and explained that he was happy to coexist with the public, who he had never sought to prevent from coming onto the Land and who had been more than cooperative and respectful until now.

40. In addition to Mr O'Brien's witness statement **[Blue/107-111]**, he gave live evidence concerning his horse grazing licences on the Horse Field. Mr O' Brien's evidence was somewhat incoherent and contradictory. In cross-examination, he claimed that he did not have to check the fences before suggesting that he had to check fences all the time. At one point he said that his wife always came to feed the horses once a day at lunchtime and then he would do it in the evening, at another he said that his wife would accompany him to help carry the feed over the fence, at another he said that he needed his wife to accompany him whenever they were feeding the horses, and especially when it is dark in the winter (before also saying that this could be his

son from Birmingham). He said had watched someone calling a dog for about three hours. He admitted that his "memory was crap" and that although it was possible for people to do all sorts of things on the Horse Field, he had never seen anyone doing anything though he did claim that some girls had snipped off the tails and hair on the back of the hind legs of one of his horses. In response Mr O' Brien claimed that he had put up notices which said "keep off of the horses" though he accepted that no evidence of the notices had been preserved or provided.

41. Mr Jones, whose report into the farming uses of the Land appears in the Objector's bundle **[Blue/112-354]**, did not give live evidence. Attached to his statutory declaration were various tenancies already discussed at [12] of these submissions, some of which did not apply to the Land **[see Blue/120-139, 215, 234, 253, 272]**.

Submissions

42. There are five distinct parts of to the test that fall to be considered by the Inspector in this inquiry:

a. Whether the numbers and extent of user by the local inhabitants was significant?
b. Whether the area marked out by the Applicant, or any other material area, constitute a neighbourhood for the purposes of s. 15 (2) of the Act;
c. Whether the user of the land by local inhabitants was as of right;
d. Whether such user was lawful sports and pastimes;
e. Whether such user has continued for a period of not less than 20 years up to the date the application was made;

43. The Applicant makes the following submissions on each of these issues in turn.

A – Significance

44. The user of the Land by the local inhabitants of the southern part of Newport South and Church Aston was significant in terms of the evidence of both large numbers and of regular and continued use by the community. As the high number of written

evidence cards (376), questionnaires (56), letters and emails sent to the council and included in evidence illustrates that a significant number of members of the public use the Land. It is clear from the case law that determining what is "significant" is a matter of impression for the decisionmaker but it is equally clear that, when compared to some of the leading cases (*Cheltenham Builders*, *Oxfordshire*), the numbers involved in the Save Newport Campaign are impressive. As already noted 32 witnesses gave live, tested, evidence of their own use of the land the user that they had witnessed.

45. The inquiry heard evidence of witnesses who have used the Land for all manner of different sports and pastimes (see below) which have involved user of all parts of the three different areas on the Land: the Wooded Area, the Horse Field and the Round Field.

46. In particular, the overwhelming evidence was that the Wooded Area was used for dens (Dan Nicholas, Gregory Toland, Janet Clarke, Paul Clarke, Brian Richards), tracking with the cubs and scouts (Dan Nicholas, Gregory Toland, Will Ellarby, Tom Clarke), nature observation (Stephen Davies, Charmaine Briscoe, John Rudd, Linda Fletcher, Luke Yarrington, Dan Nicholas, Alan Goulding, Gill Ashley), reading (Gill Ashley), and fungi foraging (Luke Yarrington, Dan Nicholas, Linda Fletcher, Alan Goulding).

47. The evidence given at the inquiry indicated that the Horse Field has been used to its fullest extent, with no set path on the field until the Objector erected its fencing earlier this year. This is best illustrated in the photo of Dave Gittus **[Red/143 – top]**. Many activities were reported as going on here by witnesses such as horse patting (Janet Clarke, Dan Nicholas, Luke Yarrington, Tom Clarke), Pond dipping (Carol Murphy, Linda Fletcher, Pat Coulthard-Jones, Dan Nicholas, Tim Wiggin,

48. The inquiry heard much evidence of the use of the Round Field for flying kites (Ken Broad, Bronwen Jones,

49. Evidence was also heard of uses of all areas of the land such as walking, dog walking, playing with children, running and jogging (almost everyone), Fruit picking

(predominantly in the hedgerow between the Horse Field and the Round Field, in the Wooded Area and in the Blackthorn bushes in the South Eastern part of the Horse Field), bird watching (Steven Davies, Ken Broad, Carol Murphy) horse riding (mainly using the Round Field and the Wooded Area) photography, orienteering and other forms of long-distance, cross-country or rough terrain training (Ken Broad, Ken Gittus, Alison Pay), cycling/tricycling/BMX/Mountain biking (Stephen Davies, Charmaine Briscoe, Janet Clarke, Ken Broad, Dave Gittus, John Coombes, Tom Clarke), snowball fights (Bronwen Jones, Dan Nicholas, Luke Yarrington), football and ballgames (Ken Broad, Charmaine Briscoe, Tim Wiggin, Gavin Edwards, Paul Evans), Frisbee (Dan Nicholas, Rob Edge), Astronomy (Luke Yarrington, Gregory Toland), drawing and painting (Carol Murphy, Jayne Overal, Paul Evans), picnicking (Ken Broad, Charmaine Briscoe, John Rudd, Past Grubert, Gill Ashley, Rob Edge, Trevor Pocock) and socialising which, again, was enjoyed by almost everyone.

50. What emerged clearly in the evidence was significant use across most of the land most of the time. The limited exception was that the local inhabitants, almost to a person, explained that they would avoid the crops on the Round Field when they were there. Instead, people would use the headlands around the field and the tractor tracks, also known as tramlines, that traversed the Round field. Ken Broad, Jayne Overal, Luke Yarrington, Rob Edge, Dan Nicholas, Tom Clarke and James Healey all referred to these tracks as means of crossing the field when it was in crop.

51. The witness evidence, along with the questionnaires, evidence cards and correspondence contained in the bundles, given to this inquiry presents nothing less than a detailed and varied picture of significant use by many local inhabitants of all parts of the Land.

B – Neighbourhood

52. The Applicant was granted permission on 27 September 2012 to rely in the "neighbourhood" limb of s. 15 (2) of the Act to put forward a neighbourhood which appears on the map in the Applicant's bundle **[Red/40]**. It consists of a composite of the southern part of Newport and Church Aston and is hemmed in by four roads,

Wellington Road to the West and the North, Audley Avenue to the North and the East, Avenue Road to the East and the Bypass.

53. As per Sullivan J in the *Cheltenham Builders* case, a neighbourhood must have a degree of cohesiveness to ensure that it is a meaningful concept. However, the case law makes clear that the degree of cohesiveness necessary is a relatively low threshold following the passage of the Act, whose purpose was, in part, to make the registration of town or village greens simpler for local residents (*Oxfordshire*; the *Leeds Council* cases).

54. The inquiry heard various witness evidence on "neighbourhood". Bronwen Jones gave evidence of her baby group which she said was based in Church Aston and her and two of her friends used to cross the Land from Newport South to attend **[See [21] of Appendix 1 for a summary of Mrs Jones's evidence]**. Janet Clarke explained some of the amenities of the neighbourhood including the local shop, Springfield Stores, now known as Premier and open from 9am-9pm **[see [8] of Appendix 2 for a summary]**. Jayne Overal pointed to Church Aston on the map, its borders, and amenities **[see [33] of Appendix 2 for a summary]**. Alison Pay explained that a neighbourhood could be a collection of houses with a local shop and a village hall. She said that Church Aston had all of these until recently when the shop, and sub-post office was closed. She pointed out, however, that now there was a village shop that served the community in Newport, Springfield Stores **[see [30] of Appendix 3 for a summary]**.

55. In light of the evidence, however, the Applicant proposes a slight modification to the logic described in the statement of John Pay **[Red.35]**. Instead of following the statistical boundary at the North-Western most corner of the proposed neighbourhood, a small revision should be made so that the boundaries continue to follow the natural borders provided by the main roads of Audley Avenue and Wellington Road. The Applicant accepts that this would be a more natural and appropriate boundary for the neighbourhood as proposed. The slightly amended neighbourhood would then include:

- The Village Shop at Springfield Stores;

- Two churches
- The Church Hall in Church Aston
- The Village Hall in Church Aston
- The Baby Group in Church Aston
- The Newport Running Club which assembles at Audley Avenue
- The Baby Group based in Church Aston which also serves inhabitants of South Newport
- Cubs, Scouts, Brownies and Girl Guide Groups

56. Finally, the neighbourhood lies within the localities of Church Aston and Lillieshall Ward and Newport South Ward.

57. In the event that the Inspector does not consider the proposed neighbourhood to meet the requisite legal criteria, which it is submitted by the Applicant that it does, the Applicant makes two further possible alternative neighbourhoods, either of which would meet the requirements set out in the cases.

58. The first of these would be to invite the Inspector to consider Church Aston on its own as a neighbourhood. This was never put forward in preparation for the inquiry because those instructing felt that the southern part of South Newport fitted properly alongside it as part of a neighbourhood with a genuine community spirit.[4] Notwithstanding this, and the fact that the arguments for its existence overlap with those for the first proposed neighbourhood, Church Aston clearly fulfils the requirements of cohesiveness in that:

a. Residents say they live/are from Church Aston;
b. It has its own village hall;
c. It has its own church and church hall;
d. It has its own baby group, cubs, scouts, brownies, Running Club and assorted other associations and clubs; and
e. Its borders are marked by the Church Aston stones.

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[4] A spirit which was attested to by a number of the witnesses including Bronwen Jones, Janet Clarke, Alison Pay and Tom Clarke.

59. The second of these would be to suggest that the Land is used by significant numbers of two neighbourhoods, a possibility allowed in the recent cases (see the *Leeds* Cases).Locality/Neighbourhood.

60. Whichever of these three options is chosen, it is submitted that the Applicant clearly meets the legal requirements laid down in the "neighbourhood"

C – As of Right

61. The evidence to this inquiry plainly shows that the Land has been used nec vi (not by force) and nec cram (nor by stealth). The only issue before the inspector is whether the user of the land was nec precario (by licence).

62. No evidence was produced to suggest that any express permission had been granted by the council or anyone else for the public to use the land. Similarly, as we have seen, the clear evidence from the witnesses was that local inhabitants used the land in all sorts of different ways across all areas of the land with the exception of the Round Field when in crop.

63. In terms of the suggested implied permission by the council arising from the Newport IN Bloom project, this support for local regeneration does not amount to the sort of overt conduct necessary to defeat the exercise of rights by public user of recreational use as a town or village green. Instead, the situation is at worst analogous to the sorts of maintenance and improvement efforts that were described by their lordships in *Beresford* as not amounting to an implied permission.

D – Lawful Sports or Pastimes

64. As we have seen, the inquiry has heard overwhelming evidence of a wide range of lawful sports and pastimes being carried out on the Land by the local inhabitants. These included:

a. Walking/Dog Walking
b. Running/Jogging

c. Cycling
d. Photography
e. Bird Watching
f. Nature Observation
g. Ball games
h. Kite flying
i. Picnicking
j. Horse Patting/Petting
k. Drawing/Painting
l. Pond-Dipping
m. Orienteering
n. Astronomy
o. Hide and Seek
p. Frisbee
q. Fruit picking
r. Socialising
s. Horse riding

65. The list is impressive.

E – Not less than 20 years and Continuously at the Time the Application was made

66. As the case law suggests, the proper assessment of whether the user of the land amounts to user which is referable to recreational use as a town or village green is how it would appear to the reasonable landowner. It is submitted that the depth and breadth of usage by the local inhabitants of South Newport and Church Aston could not have failed to appear to the reasonable landowner, not the Objector but the objective reasonable landowner, as the exercise by the public the Land for recreational use which could only be seen as referable to use as a town or village green.

67. The Objector points to the various periods of interrupted use on the Round Field in particular. Mr Edwards QC has suggested that the fact of crops on that field has

meant that the public has been necessarily unable to use it as a town or village green. But, it is submitted that this cannot be right for three reasons.

68. The first is that the periods when the Round Field has been used as grassland or lain fallow account for approximately half of the relevant period under consideration in this inquiry. In the early period, the field was used as grassland as part of the dairy farming of Mr Marsh. In the mid-1990s, it appears that the field was used for growing grass for silage and then for other fodder crops. Then again between 2002-2008, the field was put in set aside meaning that the whole field was not in crop.

69. Secondly, the evidence given by Mr Bubb confirmed that, depending on the crop, the periods of time when the field could be used without damage or danger were significant throughout the year.

70. Thirdly, the evidence on the farming given in Mr Jones's report of the Round Field is often vague or misleading. As already noted, he has included various sub-tenancies that do not appear to relate to the Land. He has included, for example, E. J. Stokes and Sons first sub-tenancy **[Blue/120]** for the period 1998-2000 but if one turns to the aerial photograph inserted late into the Objector's bundle **[Blue/402a]** it is apparent that when winter wheat was being grown on the rest of the land, the Round Field appears to be covered in grass.

71. For all these reasons, the Objector's arguments about interrupted use merely amount to a contention that the Land was being used by two coexisting groups for different purposes. In other words, this is the classic situation of give and take and coexistence referred to by Lord Hoffmann and examined in detail in the *Redcar* case.

The Objector's Case

72. Notwithstanding the fact that the burden of proof is on the Applicant, the Objector's evidence was noticeably weak.

73. Mr Fox's survey was unreliable because his instructions did not ensure that a suitably rigorous methodology was followed to gain an accurate picture of the usage

of the Land. His evidence was unrepresentative of the relevant period because he chose to examine the land after its character had been changed by the erection by the Objector of fencing to cordon off and, in the words of several witnesses, "corral" the public down the Hutchison Way and onto the Land from particular access points. Finally, his evidence was largely irrelevant insofar as the surveillance of the Land represented a different site to that that has been the subject of various user by the local inhabitants during the relevant period of 15 December 1991 – 15 December 2011.

74. Mr James's evidence was little better. His work on the Land carrying out the survey commissioned by Mr Fox can only be described as ineffectual. He accepted that he had no expertise in surveillance and he was only following instructions. He collected data which he admitted was taken from different routes and stopped in his car to record what he had just seen from memory. He did not record contemporaneously his own route, the direction in which the people he had seen were coming from or going to, and he accepted that he could not comment on the use of the land in the relevant period. Despite the lack of relevance of his survey evidence, he actually recorded seeing a considerable number of people, eighty six, over the course of ten cold and predominantly wet days in April over the Easter holidays.

75. It is submitted that Mr O' Brien's evidence cannot be considered credible. He frequently contradicted himself, often going back on what he had just said and vice versa. He also admitted that his memory was terrible. Even if he did put up some signs about his horses, which is not accepted by the Applicant and was not corroborated by a single other witness, the signs, even on Mr O' Brien's own account, did not refer to the land or its use.

76. By contrast Mr Bubb's evidence was seemingly reliable and useful. He helped to clarify, from a position of some expertise, the various rotations of crops which may have been grown and harvested on the Round Field. He painted a picture of coexistence such as that envisaged by their lordships in *Redcar* where he did not expect the public to keep off the field because they had been using the Land first.

77. The credibility of Mr Jones's evidence was undermined, as noted above, by his inclusion of several tenancy agreements which did not even cover the application Land.

78. Counsel for the Objector sought to paint a repetitive picture of use of the Land that was characteristic of user as a public right of way or incidental to the public right of way across Hutchison Way. In this attempt, Mr Edwards QC was repeatedly contradicted by the evidence of the Applicant's witnesses. Activities which were said by the witnesses to involve the whole Land, or parts of the Land away from the footpaths were described by Mr Edwards QC as "occasional" in nature. However, more and more "occasionals" add up to many people with many diverse interests using the Land in many different ways. They cannot be reduced or shunted out of sight as occasional exceptions. Instead, such uses, pond-dipping, astronomy, historical investigation, foraging, bird watching, kite flying, picnicking, ball games, and fruit picking to name but a few, are clearly representative of the staple English pastimes.

Additional Matters

79. Before concluding, we will address some comments towards the two authorities to which the Inspector drew attention on Thursday which have not yet been mentioned in these submissions: *Dyfed v Secretary of State for Wales* [1990] 59 P & CR 275 and *DPP v Jones* [1999] 2 AC 240.

80. Both cases concern the limits of what a user can do on public rights of way. As such they may have relevance for the way the Objector wish to put their case. However, neither authority speaks to the situation, as is the Applicant's case in this inquiry, where user by the local inhabitants of the neighbourhood is referable to the land as a town or village green.

Conclusion

81. The overall picture presented was one of pervasive use of all the areas of the Land. The Horse Field and Wooded Area were used all the time by many different people

for a whole range of different sports and pastimes. The Round Field, meanwhile, was avoided, except for the tramlines or tractor tracks, when it was in crop because the local inhabitants were rightly respectful of the farmer's livelihood. However, there was no question of the user of the field not being shared by both. The result was exactly the kind of give and take which Lord Hoffmann thought could characterise user referable to a town or village green.

82. For all these reasons, the Applicant respectfully asks that the Inspector recommend that the Land be registered as a town or village green under s. 15 (2) of the Act.

Rose Grogan and Daniel Stedman Jones

28 October 2012

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