IN THE MATTER OF AN APPLICATION
FOR THE REGISTRATION AS A TOWN OR VILLAGE GREEN
OF LAND AT STATION ROAD, NEWPORT

INSPECTOR'S REPORT

I. Introduction

1. This Report is concerned with an application for registration of an area of land off Station Road, Newport as a new town or village green, pursuant to the provisions of section 15 of the Commons Act 2006. It was submitted to, and falls to be determined by, Telford and Wrekin Council as the commons registration authority for the area for the purposes of those provisions.

2. The Report is divided into eleven parts, as follows: Part I. Introduction (paragraphs 1-2); Part II. The legislative framework (paragraphs 3-15); Part III. The Application (paragraphs 16-24); Part IV. The Application Land (paragraphs 25-34); Part V. The Applicant's evidence (paragraphs 35-161); Part VI. The Objector's evidence (paragraphs 162-195); Part VII. The law (paragraphs 196-238); Part VIII. The case for the Objector (paragraphs 239-260); Part IX. The case for the Applicant (paragraphs 261-286); Part X. Findings and conclusions (paragraphs 287-336); Part XI. Recommendation (paragraphs 337-339).

II. The legislative framework

3. Section 15 of the Commons Act 2006[1] provides, insofar as relevant to this application:

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[1] In what follows, I shall refer to the Commons Act 2006 as "the 2006 Act", and to section 15 simply as "section 15".

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

(2) This subsection applies where –

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

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

Subsections (3) and (4) provide for cases in which qualifying user has ceased before an application is made.

4. "Land" is defined in section 61 of the 2006 Act as follows:

" 'Land' includes land covered by water".

5. Provision for the establishment and maintenance of registers of common land and town or village greens was originally made by the Commons Registration Act 1965 ("the 1965 Act"). Section 13 of that Act provided for the amendment of those registers "*where ... (b) any land becomes common land or a town or village green".* Procedural provisions for the addition of land to the registers by the local authorities responsible for their maintenance were enacted in the Commons Registration (New Land) Regulations 1969 ("the 1969 Regulations").

6. The original definition of "town or village green" in section 22(1) of the 1965 Act was as follows:[3]

"land [a] *which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or* [b] *on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or* [c] *on*

[2] Part 1 of the 2006 Act applies to all land in England and Wales except the New Forest, Epping Forest, and the Forest of Dean: section 5.

[3] The letters [a], [b], and [c] did not appear in the statute itself, but have been interpolated by me to reflect the common practice of referring to the three distinct categories of land registered under the 1965 Act as, respectively, "class a", "class b" and "class c" greens.

which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years."

That definition was amended by section 98 of the Countryside and Rights of Way Act 2000 with effect from 30 January 2001. As amended, it read:

> *"land* [a] *which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or* [b] *on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or* [c] *which falls within subsection (1A) of this section".*

Land fell within section 22(1A) if it was

> *"land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either*
>
> *(a) continue to do so, or*
>
> *(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."*

No regulations were ever made for the purposes of the subsection.

7. All applications for the registration of land as a town or village green made since 6 April 2007 are governed by section 15[4]. The criteria for the registration of new greens in section 15 are similarly worded to those in section 22(1A) of the 1965 Act. It follows that case law relating to the section 22(1) definition of "town or village green", both as originally enacted and as amended in 2001, applies or may apply by analogy to section 15.

8. Applications made under section 15 in respect of land in England are currently governed by the Commons (Registration of Town or Village Greens) (Interim

[4] See the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007 for the relevant commencement and saving provisions.

Arrangements) (England) Regulations 2007 ("the 2007 Regulations").[5] Their provisions are similar, but not identical, to those of the 1969 Regulations. In each case, the application has to be in the prescribed form and supported by a statutory declaration made by the applicant.[6] However, the prescribed forms (Form 30 in the case of the 1969 Regulations and Form 44 in the case of the 2007 Regulations) are substantially different from one another. A registration authority receiving such an application is required (if satisfied that it is duly made) to notify the affected landowners and other potential objectors and take other steps to publicise the application.[7] The authority is then to proceed to further consideration of the application and any statements in objection.[8] Anyone can object to the application, whether or not interested in the relevant land.

9. Neither set of Regulations contains any provision for an oral hearing to be held before the authority "disposes" of an application by "granting" ("accepting", in the 1969 Regulations) or "rejecting" it.[9] However, determining applications on paper would in many cases be unsatisfactory, especially where there are material disputes of fact which can only fairly be resolved by hearing oral evidence which is tested in cross-examination. A practice has accordingly developed among registration authorities of appointing an independent inspector to conduct what is often called a non-statutory[10] inquiry and report back to the authority on the evidence and the law, with a recommendation as to how it should determine the application. That practice has received express judicial endorsement in several cases,[11] and was impliedly approved by the House of Lords in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 ("*Sunningwell"*) and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (*"Oxfordshire"*). The decision, however, remains the

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[5] Save in the seven "pilot [or pioneer] areas" specified in Schedule 1 to the Commons Registration (England) Regulations 2008 ("the 2008 Regulations"), which do not include Telford and Wrekin.
[6] 1969 Regulations, regulation 3(7); 2007 Regulations, regulation 3(2)-(3).
[7] 1969 Regulations, regulation 5(4); 2007 Regulations, regulation 5(1).
[8] 1969 Regulations, regulation 6; 2007 Regulations, regulation 6.
[9] 1969 Regulations, regulations 7, 8; 2007 Regulations, regulations 8, 9.
[10] The inquiry is "non-statutory" not in the sense that the authority has no power to hold it (for section 111 of the Local Government Act 1972 confers power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions, including determining a section 15 application), but in the sense that there is no provision for it in the particular legislation specifically governing such applications.
[11] *R v Suffolk County Council, Ex p Steed* (1995) 70 P&CR 487 ("*Ex p Steed"*), pp 500-501; *R (Cheltenham Builders Ltd) v South Gloucestershire Council* [2004] JPL 975 ("*Cheltenham Builders"),* paragraphs 34-40*; R(Whitmey) v Commons Commissioners* [2005] QB 282, paragraphs 28-30, 62.

registration authority's to make. The duty to determine the application is not delegable to anyone outside the authority and it is the duty of the authority to assess the submitted evidence and consider the arguments on both sides for itself when performing the duty to determine the application.[12]

10. The House of Lords held in *Oxfordshire* that in response to an application for registration of land as a green made under the 1965 Act and 1969 Regulations, the registration authority was entitled, without any amendment of the application, to register only that part of the land the subject of the application which the applicant had proved to have been used in the requisite manner for the necessary period. There was no rule that the lesser area should be substantially the same as, or bear any particular relationship to, the whole area originally claimed. See in particular Lord Hoffmann's speech, at paragraph 62. At first instance, Lightman J had declared the jurisdiction to exist subject to the qualification that its exercise would "*occasion no irremediable prejudice*" to anyone. The appeal against that declaration was dismissed by the Court of Appeal and the House of Lords, so that the "irremediable prejudice" test stood. However, Lord Hoffmann said that "*it is hard to see how [registration of part] could cause prejudice to anyone*". There would seem to be no reason why the courts would adopt a different approach to applications under the 2006 Act and 2007 Regulations,

11. It was also held in *Oxfordshire* that registration authorities had power to allow amendments to 1965 Act applications. At paragraph 61, Lord Hoffmann said this:

> *"It is clear from the [1969] Regulations that the procedure for registration was intended to be relatively simple and informal. The persons interested in the land and the inhabitants at large had to be given notice of the application and the applicant had to be given fair notice of any objections (whether from the land owner, third parties or the registration authority itself) and the opportunity to deal with them. Against this background, it seems to me that the registration authority should be guided by the general principle of being fair to the parties. It would be pointless to insist upon a fresh application (with a new application date) if no prejudice would be caused by an amendment, or if any prejudice could*

[12] *Ex p Steed* in the Court of Appeal (1996) 75 P&CR 102, pp.115-116.

be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared."

In the same paragraph, he went on to say:

"*the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties.*"

Again, I can think of no reason why the courts would adopt a different approach to applications made under the 2006 Act and the 2007 Regulations.

12. The burden of proof that the applicable criteria are satisfied rests on the applicant for registration. It has been said that it is "no trivial matter"[13] for a landowner to have land registered as a green, having regard to the consequences. As confirmed in *Oxfordshire* by the House of Lords, registration gives rise to rights for the relevant local inhabitants to indulge in lawful sports and pastimes on the land, and attracts the protection of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 ("the 19th century legislation") which, in summary, make it a criminal offence to build or do anything on the land which interferes with local inhabitants' enjoyment of their rights.[14] It was also said that all the ingredients of the 1965 Act definition had to be "properly and strictly proved", and careful consideration had to be given by the decision-maker to whether that was the case.[15] However, there was no suggestion that the standard of proof was anything other than the usual civil standard, i.e. the balance of probabilities.

13. I shall return to the case law bearing on the interpretation and application of the provisions in the 1965 and 2006 Acts for registration of land as a town or village green, with particular reference to the legal issues arising in this case, in Part VII of this Report (paragraphs 196-238 below).

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[13] *Ex p. Steed* (1996) 75 P&CR 102, at p.111 per Pill LJ, approved by Lord Bingham in *R (Beresford) v. Sunderland City Council* [2004] 1 AC 889 ("*Beresford*") at paragraph 2.

[14] Those rights may, however. be qualified so as to permit the landowner to continue activities carried on by him before registration: *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70 ("*Lewis*"). See further paragraphs 215-225 below.

[15] See the references at footnote 13 above, and also *Beresford*, paragraph 92, per Lord Walker.

14. A section 15 application can only succeed if (or to the extent that) the land the subject of the application is proved to satisfy the criteria set out in section 15(2), 15(3) or 15(4). Conversely, if those criteria are met, the application must be granted. No regard can be had to considerations of the desirability of the land's being registered as a green on the one hand, or of its being developed or put to other uses on the other hand. All such considerations are wholly irrelevant to the statutory question which the registration authority has to decide, namely whether the land (or any part of it) is land which satisfies the specified criteria for registrability.

15. The only context in which it is legitimate to have regard to a subsisting planning permission or proposal for development of the land the subject of an application is in assessing the credibility of witness evidence. That is because of the possibility that witnesses might be motivated to exaggerate or even fabricate evidence, or their recollections might be subconsciously coloured, by their support for, or opposition to, the proposed development.

III. The Application

16. The application with which this Report is concerned ("the Application")[16] was made by Mr John Rudd ("the Applicant") in the form prescribed by the 2007 Regulations, Form 44, accompanied by the requisite statutory declaration. It was submitted to Telford and Wrekin Council in its capacity as registration authority for the purposes of the 2006 Act ("the Registration Authority").

17. The area of land the subject of the Application ("the Application Land") comprises two adjacent fields and a wooded area adjoining them to the north west, totalling approximately 4.56 hectares (11.26 acres) in area. It is described in more detail in Part IV of this Report (paragraphs 25-34 below). The Application Land is edged red on the map attached to the Applicant's statutory declaration,[17] a copy of which is for convenience appended to this Report as Appendix A. Appendix B to this Report is a

[16] There is a copy of the Application at pp 1-11 of the Applicant's Inquiry Bundle. Throughout the remainder of this Report, references in the form "A [no]" are references to pages in the Applicant's Inquiry Bundle. References in the form "O [no]" are references to pages in the Objector's Inquiry Bundle.

[17] A9.

copy of the plan produced at my request by the Objector to show the respective areas of the three constituent parts of the Application Land (with which the Applicant did not take issue).

18. The justification for the Application was stated in part 7 of the Form 44 as follows:

> "*The [Application Land] should be registered to have village green status as in part this is strategic in 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. This 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]."

19. The Application was expressed (in part 4) to be made under section 15(2), that is on the basis that qualifying use was continuing at the time of the Application. As to that date, the Application as originally submitted on 2 December 2011 did not fully comply with the 2007 Regulations, in that the Applicant failed, as required by part 6 of the form, to:

> "*show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked*".

That omission was addressed in subsequent correspondence and the Application was treated as duly submitted on 15 December 2011. The burden of proof on the Applicant was, therefore, to show that there had been a period of at least 20 years' qualifying use of the Application Land ending on that date.

20. The Applicant initially identified the electoral ward of Church Aston and Lilleshall as the "locality" for the purposes of part 6 of Form 44.[18] However, he subsequently applied to amend the Application to rely instead on a claimed "neighbourhood within a locality", namely the area edged blue on the large-scale map at A40 (a copy of which forms Appendix C to this Report). That area, to which I shall refer as "the Claimed Neighbourhood", lies partly within the Church Aston and Lilleshall electoral ward and partly within the Newport South electoral ward. The boundaries of those wards are depicted on the large-scale map at A39. The application was not opposed and permission to make that amendment was granted on 27 September 2012.[19]

21. The thinking behind the amendment seems to have been that expressed in the "Note on Locality & Neighbourhood" compiled by Mr John Pay (a Church Aston Parish Councillor) at A35. He suggested that the choice of the Church Aston and Lilleshall electoral ward was inappropriate for two reasons; first, it included a large rural area to the west and south and, secondly, it excluded the population of Newport South Ward directly proximate to the Application Land. That Note continued:

> "*I would therefore suggest a more appropriate geography - a local 'neighbourhood' - for the purposes of identifying a meaningful local community which relates to and makes use of the Application Site. This neighbourhood is identified by four roads - Wellington Rd, Avenue Rd, Audley Avenue and the A518 By-Pass... It comprises the built up area within Church Aston Parish and the southern 'super output area' of the Newport South Ward. According to the 2001 Census, this area has a population of 2,600 (comprising 1068 households), which includes a sparse population within the rural area of Church Aston Parish (which cannot be disaggregated).*"

In a footnote Mr Pay explained that Newport South Ward comprised 2 'super output areas' which were small areas introduced by the Office of National Statistics to improve the reporting and comparison of local census statistics.

[18] See the letters of 14 and 22 December 2011 at A12-13.
[19] See direction 11 of my Further Directions of that date.

22. The Registration Authority gave notice of the Application, as required by the 2007 Regulations. One written objection was received, from Telford and Wrekin Council in its capacity as the freehold owner of the Application Land ("the Objector").[20] The grounds of the objection, in summary, were that:

- the evidence submitted in support of the Application did not disclose use of the Application Land for lawful sports and pastimes to a sufficient extent to justify registration as a green;

- much of the activity relied upon was not properly referable to use of the land for sports and pastimes and should therefore be discounted;

- during the qualifying period, a substantial part of the land had been used for arable cultivation, at which times it had not been used or capable of being used for recreational activities; it could not reasonably be contended that those parts of the land in arable cultivation had been used for lawful sports and pastimes throughout the qualifying period;

- the remaining part of the land had been used as grazing land, and had not been used for recreational use beyond the use of any actual or putative public footpaths;

- the evidence so far disclosed did not demonstrate use by a significant number of the inhabitants of the electoral ward of Church Aston and Lilleshall in either a numerical or a geographic sense.

The Objector accepted, however, that there were disputes of fact as to the extent of use and other matters, such as to necessitate the holding of a public inquiry where evidence could be given orally and cross-examined (see paragraph 9 above).

[20] O1-3. When later in this Report I refer to Telford & Wrekin Council in capacities other than that of commons registration authority, or landowner and objector to this Application, I shall call it simply "the Council".

23. Miss Lana Wood was initially instructed by the Registration Authority to conduct a non-statutory public inquiry and to report thereafter with her recommendations as to whether the Application should be granted or rejected. However, she had to withdraw and I was instructed in her stead. The inquiry took place at the Royal Victoria Hotel in Newport over four days (22, 23, 24 and 25 October 2012) and concluded at Meeting Point House in Telford on 29 October 2012. I held a formal site visit accompanied by legal and lay representatives of the parties on the afternoon of 25 October. The Applicant was represented by Miss Rose Grogan and Mr Daniel Stedman Jones of Counsel and the Objector by Mr Douglas Edwards QC. I am grateful for their assistance and for the administrative support provided by the Registration Authority's officers Mrs Maria Schultz and Miss Lisa Eccleston.

24. In the closing submissions made on behalf of the Applicant, it was proposed for the first time that there be what was described as a "slight modification" to the Claimed Neighbourhood. It was also submitted that the Registration Authority had power without amendment of the Application to register the Application Land on the basis of an alternative neighbourhood or neighbourhoods, and that there were two candidate alternative neighbourhoods: Church Aston and South Newport. The Objector did not agree that the Registration Authority had any such power, and the Applicant did not seek to further amend the Application. Additional written submissions on the issue were lodged by both parties following the close of the inquiry. I shall return to it in more detail at paragraphs 304-308 below.

IV. The Application Land

25. As previously mentioned, the Application Land comprises two adjacent fields with a wooded area lying alongside them to the north-west. The respective positions and sizes of its three constituent parts can conveniently be seen on the plan prepared by the Objector,[21] at Appendix B to this report.[22] The larger of the two fields (2.156 hectares, or 5.32 acres), shaded green on that plan, is arable land which it is common ground has been used for parts of the period 15 December 1991-15 December 2011 for the growing

[21] See paragraph 17 above.

[22] The Objector's Bundle contains a sequence of aerial photographs showing the site taken in July 1999, June to August 2000, and September 2003, and a Google earth map dated 24 June 2009: O355-360.

of arable crops. The smaller field to the east, lying next to Station Road (1.387 hectares, or 3.43 acres), shaded purple on that plan, is pasture which it is common ground has been used for the grazing of horses more or less continuously throughout that period. The wooded area, shaded blue on that plan, is 1.016 hectares, or 2.51 acres. Those areas were referred to at the inquiry as "the Round Field", "the Horse Field", and "the Wooded Area", and I shall adopt that nomenclature in this Report.

26. The layout and appearance of the Application Land remain broadly the same now as they were in December 1991, but there have been some changes over the years. One of the principal changes occurred after the making of the Application, in early 2012, when the Objector erected new wooden post and rail fencing incorporating metal gates around and across the land[23] in such a way as to restrict public access over the land to particular routes. This caused considerable controversy. In certain places the fencing was breached by persons unknown and the Objector did not persist in renewing it, so public access can now in practice be gained to the whole of the Application Land, as was the case throughout (and before) the period 15 December 1991-15 December 2011. Most of the fencing, however, remains. I shall say a little more about the 2012 works in describing the component parts of the Application Land.

27. Public access to the Application Land is and has at all material times been gained from Station Road at a point about halfway along the road frontage of the Wooded Area. (There is a metal vehicular gate leading into the Horse Field from Station Road, which is kept locked for private access only). That is the starting point of a long-distance public footpath which leads all the way to Wellington via Telford. It is known as the Hutchison Way, so christened after the late Mr David Hutchison, a former Chief Executive of the Council who was a keen walker and supported the enhancement of the local footpath network. The creation of the Hutchison Way was a millennium project, and the metal gate bearing that name at the point where the footpath joins Station Road[24] was erected in or around 2000. Previously there was neither a gate nor a fingerpost at that entrance; now there are both. The footpath leading from it through the Application Land, however, was of long standing. It appeared on the definitive map

[23] As shown in the photographs at O19-31.
[24] As seen on the bottom photograph on A204.

and statement for the area (relevant date 1 September 1965) from the outset. There is a copy of the relevant part of the map at p171 of the Registration Authority's inquiry bundle. As that map is drawn at a very small scale and difficult to read, I directed the Registration Authority to supply a larger scale map showing the routes of any footpaths across the Application Land, which was duly supplied and can be seen at p 171A of that bundle (a copy of which forms Appendix D to this Report). As can be seen the legal route of the Hutchison Way runs diagonally in a south-westerly direction before turning southwards into and through the Horse Field and beyond.

28. At the entrance and exit to the Horse Field there used to be stiles, but these were replaced with kissing gates at the northern end, by the Council's countryside management team in or about 2008 and at the southern end, by the Objector in February 2012. The inquiry heard much evidence to the effect that the route of the Hutchison Way as fenced by the Objector in February 2012 is closer to the hedgerow between the Horse Field and the Round Field than the route which people used to follow through the Horse Field; and (which the Objector accepted) that the hedgerow had been cut back, on both sides, in the course of the works. The footpath (whatever its correct legal alignment) crosses a watercourse though which water flows towards the hedgerow. A plank bridge has been placed across it along the fenced route, and the Applicant's evidence was that there had been a plank bridge (with, at a time or times in the past 20 years, a handrail) across it further to the east. A plank has been placed where on the Applicant's case the former bridge was. It was possible on the site visit to gain access to the Horse Field from the fenced route through a breach in the fencing close to the northern kissing gate. The ground was soft underfoot; the Horse Field suffers from waterlogging from time to time and was described in evidence as "boggy".

29. Other features to note in the Horse Field for the purposes of understanding the evidence in due course are: the pond approximately in the middle of the southern half of the field;[25] a group of blackthorn bushes in the south-eastern corner (by which there were remnants of an old post and barbed wire fence); an oak tree between the pond and the Station Road frontage; some rough patches of weeds/nettles, which had been cut down

[25] As marked on the map at Appendix B.

prior to the site visit; (at the time of the site visit) scattered fungi; and an old wooden post towards the centre.

30. There are no other formally established public rights of way across the Application Land except for a short section of the public footpath[26] running south to Church Aston which cuts across the westernmost tip of the Application Land: see Appendix D. There are, however, a number of de facto paths. One forms an alternative route from the Station Road pedestrian gate to the Horse Field, straight ahead into the Wooded Area and turning at a right angle towards the northern entrance. This, the inquiry was told, was created by the Council in error for the legal route during resurfacing work in 2008. In early 2012 the Objector created another, leading from that path through the Wooded Area to the north-south public footpath crossing the westernmost tip of the Application Land.

31. The Wooded Area is well vegetated but, according to the consensus of the evidence, rather less densely vegetated than it was before the 2012 works. At the eastern end near the gate, more particularly on the southern side, a considerable amount of clearance work was done in 2006/7 by what was described in evidence as a partnership between local Heart of England in Bloom volunteers, the Council's environmental maintenance and countryside management teams, Newport Town Council and others. After clearance they planted bulbs on the southern side of the path and native primroses and other trees and plants on the northern side. According to the evidence the land on the northern side used to slope downwards towards the site of the former railway line but the incline was filled in, whether in the late 1980s or early 1990s is unclear. The northern boundary of the Horse Field is not straight; before joining the eastern boundary of the Round Field it curves southwards and westwards. The small part of the Wooded Area which projects southwards between the Round Field and the Horse Field north of the entrance to the Horse Field was referred to by several of the Applicant's witnesses as having been particularly overgrown and a favourite spot ("hot spot") for children and more particularly youths to spend time. To distinguish it from other parts of the Wooded Area I shall refer to it as "the Copse area" (an expression borrowed from one of the Applicant's witnesses).

[26] Referred to in evidence as a bridlepath, but shown as a footpath on the definitive map.

32. The Application Land is adjoined on its northern side by a recycling centre and the Springfields Industrial Estate. To the west are Millwood Mere and the Baddely's Wells pumping station. Other fields surround it to the south. Part of the hedgerow along the south-western and southern sides of the Round Field had been removed to give direct access to the field to the south,[27] but those fields have been divided again by the 2012 fencing.

33. Towards the eastern end of the southern boundary of the Round Field, in the remaining section of hedgerow, there is a gap which was temporarily blocked by fencing in February 2012. The gap is at or near the southern end of the line marked "path (um)" which runs roughly parallel to the eastern boundary of the Round Field on the map at Appendix B. There is today no visible path on the ground in that alignment, nor can one be seen on the aerial photographs, although some of the Applicant's witnesses recalled the existence of such a path during one or more periods when the land was fallow. What is discernible on the ground are worn paths along the eastern side of the Round Field, set in from the hedgerow, and the north-western side of the Round Field. The path on the eastern side can be seen on the aerial photographs at O355, 357, 358 and 359 and the Google earth map at O360. The 2010 aerial photograph at O402B and the 1995 aerial photograph at A307 show that path clearly and to my mind also show the path along the north-western side in part at least. The margins between the cultivated area of the Round Field and the field boundary are several metres wide on those sides, but narrow on the other sides. After walking southwards down the eastern side of the Round Field, it is possible either to exit through the gap in the hedgerow and follow a short well beaten path to join the Hutchison Way, or to carry on round the boundary of the Round Field past the pumping station and exit by Millwood Mere.

34. The Round Field had been ploughed but no new crop had been sown at the date of the site visit. It was uneven underfoot but quite possible, if not particularly comfortable, to walk across.

[27] Between August 2000 and September 2003, it would appear from the aerial photographs at O358 and 359.

V. The Applicant's evidence

35. The following is a summary of the oral evidence given by the Applicant's witnesses in the order in which they were called. Except where otherwise stated, I accept their evidence.

36. It was the evidence of all these witnesses that no one had challenged their use of the Application Land or done anything to prevent them from having access to it until the fencing was erected in February 2012; and that they had never been given permission to use it. Their evidence on those points was not challenged by the Objector[28] and I shall not refer to it in each of the individual summaries of evidence that follow.

Mr Kenneth Broad

37. Mr Broad had completed an evidence questionnaire and made a written statement.[29] He gave his address as Manor Court, Church Aston, Newport, where he had lived for almost 42 years. Prior to that he had lived at 12 Springfield Avenue, Newport. He had become aware of the Application Land about 46 years ago, but only began to use it when he moved to Manor Court. He began to use it spasmodically for cross-country training and then more regularly with the formation of the largely Newport-based Wrekin Orienteers. Its members, including Mr Broad himself, had achieved great success in national and international competition. He found the Round Field in particular very useful for training and would run round it several times or take it in as part of a larger circuit. He would not run across an arable crop; when the field was not set-aside he would use it after the crop was taken, or stick to the headland. The path across the Horse Field could also be used as part of a circuit. If horses were there you would not go in and upset them. But if you went off the footpath it didn't seem to matter; no one challenged you. He had probably given up using the land for running about 5 years ago due to a knee injury. His last British Championship victory was about 10 years ago. Generally speaking, there had been a decline in local orienteering activity since the 1970s.

[28] Subject to the issue as to whether the clearing and planting of the area around the Station Road entrance (paragraph 31 above) was permissive, as to which see paragraph 296 below.
[29] A63-69.

38. In cross-examination Mr Broad did not dissent from the sequence of uses of the Round Field that were put to him: dairy and fodder growing purposes prior to 1992; then wheat, barley and maize for cattle fodder until 1998; winter wheat and barley from 1998 to 2003; set-aside until 2008; then rape and wheat crops until 2012. It was "absolutely right" that people did not trample on the crops. They were "fair minded" and would not damage a farmer's crop. If there was a "bit of greenery coming through" people might go on the tractor tramlines. The Newport Running Club would follow the tramlines. There had been a well-trodden route around the north-western and eastern sides of the Round Field since 1991 (as shown on the aerial photographs at O307, O355, O357 and O358). It had been created by use. It was "absolutely correct" that the majority of people he saw on the Round Field were using that route. Dog walkers could use it all year round and they were "people of habit". Mr Broad confirmed that the predominant use of the Application Land was walking with or without dogs. More people used the Round Field during the set-aside years because there was nothing to stop them. You could see paths everywhere then.

39. In chief he said that he had seen parents with young children picnic in the Wooded Area or on the edge of the Horse Field but not in the Round Field except during set-aside. He had seen frisbee played around the edge of the Horse Field and football in the Horse Field. Photography was mainly in the Wooded Area but he had seen pictures being taken on the Horse Field. He had seen bird watching in the Wooded Area and cycling through the Wooded Area. In cross-examination he said he might only have seen one or two picnics; he had seen a ball being kicked about in the Horse Field fewer than a dozen times, when there were no horses there. He would say that the Horse Field was used less than the other parts of the Application Land. The horses were not tethered and people chose to give them a "sensible, very wide berth". If he saw the horses near to the entrance to the field he would probably go another way. Typically he had seen 2 horses on the field rather than more. When asked whether he had seen people feeding the horses he replied "We'd just walk through the place". He accepted Mr Edwards's description of kite flying on the Application Land as "pretty rare". He had seen it in the Horse Field, probably when there were no horses; kite flyers would not go into the Wooded Area or traipse over the Round Field. Mr Broad agreed in cross-examination that prior to February 2012, apart from the area which had been

cleared and planted with bulbs, plants and shrubs by the Rotary Club, Newport-in-Bloom team and other public-spirited individuals in about 2006 and the worn track from the Station Road gate, the Wooded Area was substantially overgrown (as shown on the top photograph at A204) and was not well used by anyone. No one trampled on the planted area.

40. In recent years Mr Broad has used the Application Land for walking rather than running and fortnightly rather than 2 or 3 times a week. He has taken his grandchildren for nature walks and cycle outings. He accepted Mr Edwards's characterisation of that recent pattern of use as following the paths and now and again stopping to point out something interesting. He has seen others with children do the same kind of thing.

41. I think Mr Broad's memory was or may have been at fault in some respects. First, his evidence that the Newport Running Club followed the tractor tramlines was unsupported by any other evidence and inconsistent with the evidence of Mr Thacker, a member of the Club, as to their use of the land.[30] Secondly, no other witness mentioned kites being flown in the Horse Field; all the other evidence of kite flying related to the Round Field, after harvest or during set-aside. Similarly no one else mentioned picnics, frisbee or football in the Horse Field. If he did see those activities there it must have been on rare and unusual occasions (or perhaps before 1991). I also think that his description of the Round Field during set-aside as having "paths everywhere" was overstating the position. The only specific non-perimeter path which other witnesses said came into being over the Round Field was one north-south path as on the Appendix B map.

Mr Stephen Davies

42. Mr Davies had made a written statement and attached some photographs.[31] He had lived at 4 Springfield Avenue, Newport (10 minutes' walk from the Application Land) for about 36 years, but only known and used it since 2005 when he and his parents acquired a dog, which they had until the end of 2010. He would regularly walk the dog

[30] Paragraph 133 below.
[31] A81-91.

in the company of two elderly ladies, typically following a route that involved entering the Application Land from Millwood Mere, walking to the Station Road entrance to meet them, then doubling back to follow the path by the hedgerow along the eastern side of the Round Field before leaving the Application Land. That was a commonly used route. The Application Land was a good place for socialising with other walkers and dog walkers.

43. He did not really use the Hutchison Way. He would not take his dog into the Horse Field in case she got over-excited by the horses, but he had gone into the Horse Field to take photographs, for example those of the horse and foal and of the buzzard.[32] His hobbies were photography and bird watching and he had pursued them on the Application Land both when dog walking and without the dog. The majority of his exhibited photographs were taken from or near the margins of the Round Field and Horse Field, but the ink cap mushroom[33] was taken about halfway into the Wooded Area. He had to go in and rummage round to find the fungi. There was a "kind of route" east-west through the Wooded Area before the official track was laid in February 2012, which he had seen people use, but it was not as well used as the other paths. He had seen people wander through there, but reasonably infrequently. The area would not appear trampled because most people would not wander at will; those who did would go in different places and not create a path.

44. In addition to dog walking and taking his camera to the Application Land he would cycle there about once a month, following whatever path he wanted.

45. When the Objector fenced the land in February 2012, it dissuaded quite a lot of people from using what Mr Davies regarded as legitimate footpaths. He was able to climb over the fence, but children and elderly dog walkers were prevented from using the paths they had been using for years. The alignment of the paths in the Round Field was much the same after arable use resumed in 2008 as before during set-aside. He drew a sketch plan[34] of the "legitimate paths" to which he referred; one ran from the Station

[32] At A85 and A89.
[33] A91.
[34] A82A.

Road entrance across the north-western side of the Round Field to Millwood Mere, the other southwards from that route along the eastern side of the Round Field.

Mrs Bronwen Jones

46. Mrs Jones had completed an evidence questionnaire and made a written statement.[35] She had lived at 6 Station Court, Newport with her husband and, now, their baby daughter for a year; she had also lived there from 1980 to 2008 (save for university term times between 1999 and 2002). She had played there as a child with her older brother: hide and seek up to about 1990, and sledging in or around the early 1990s. There had been a slope in the north-east corner of the land, to the right of the Station Road entrance, that had since been filled in. She remembered a lot of snow when she was young. As a child she had been "all over" the land but would not trample on the crops. The family had had a dog which died in 1997 that they walked on the land and from 2001-2004 she and her husband-to-be had walked his family dog there. She remembered following the dogs through the hedgerow to retrieve them from the Horse Field when they had run off in the Round Field. She could not remember there being more than 2 horses at any one time. From 2002-2004 her husband had had a power kite which they had taken to the Round Field when there were no crops.

47. Currently Mrs Jones was taking her daughter to the Baby Group at Church Aston Church Hall via the Application Land, from the Station Road entrance along the northern side of the Round Field or down the eastern side of the Round Field. She would not take her daughter into the Horse Field. Now she was a mother with a buggy she did tend to stick to the paths, unlike when she was a child.

[35] A179-184.

Mrs Carol Murphy

48. Mrs Murphy had completed an evidence questionnaire and made a written statement; she exhibited a number of photographs taken around the Station Road entrance "before" and "after" the improvements, and produced a note on the project.[36]

49. Mrs Murphy had lived at Beech Mount, 17 Station Road, Newport for 40 years. That property was in the ecclesiastical parish of Church Aston and her family "used the facilities and events offered by our local village Church Aston", accessed via the bridle path west of the Application Site. Her children had played on the Application Land but were grown up and had left home by 1992. She walked on the land, taking the headland routes that most people did. She had a particular interest in looking at birds in the Wooded Area and the hedgerow between the Round Field and Horse Field. Other bird watchers were mainly seen there. It was a pleasure just to be there, looking at the changing seasons and the crops and ploughing and sowing and management of the fields. It was like returning to her farming roots. She used to forage for blackberries, sloes and damsons to make gin in the hedgerow between the fields, before it was cut back. Other people too used to walk along either side of the hedge and step off the path to pick the fruits. While she was a teacher at Newport Junior School she had taken pupils to do drawing and painting near the entrance.

50. Mrs Murphy had been heavily involved in the project to beautify the Station Road entrance to the Application Land as a Heart of England in Bloom volunteer. The footpath had been named Hutchison Way as a tribute to the late David Hutchison, former chief executive of the Council and a keen walker. A specially made gate bearing the name was erected in 2000. Later, in 2006-7, the area by the gate had been cleared of scrub, weeds and unwanted saplings and planted with thousands of crocuses and other bulbs and native primroses. In 2012 they had been dug up by the fencing contractors and the area had become neglected and overgrown. The top photograph on A204 illustrated how unmanaged and overgrown the path from Station Road had been before the improvements. Now there were two paths towards the Horse Field, one (the straight one) a desire path and the other the legal route going off to the left. It had been

[36] A201-214A.

agreed with Andrew Careless of the Council's countryside management team that both should remain.

51. The volunteers had had a good working partnership with the Council and other bodies. The Council had a philosophy of encouraging working partnerships with local residents to enhance areas and give them a sense of ownership. It had provided £10,000 cash, a "2 for 1" offer on the bulbs, the trees, and the services of Council employees. It was very difficult to answer whether the Council had given formal consent to the project.

Mrs Linda Fletcher

52. Mrs Fletcher had completed a questionnaire and made a written statement.[37] She had lived at 32 Station Road, Newport for 13 years and used the Application Land about once a week in summertime. She knew the Horse Field as the Black Butts field, its historic name in the 1830s tithe records. She was the archivist of Newport History Society and had mapped the medieval ridge and furrow in the Black Butts field and had it registered on the Shropshire sites and monuments record.[38] She had looked for finds of historical interest on the Application Land, as she did whenever she went out and saw disturbed ground such as molehills. She had stuck to paths in the Round Field so as not to disturb the crops but wandered further from the path in the Horse Field. She had found a lead spindle whorl dated between Roman and medieval times on a molehill near the pond. The tenant of the Round Field, Mr Bubb,[39] had a good relationship with the History Society and permitted metal detecting on many of his fields, including the Round Field.

53. The horses had not always been in the Horse Field when she was looking there. The last couple of years they had come and gone; that might have been the reason for a surge in fungi in 2011. Horses did not bother her. She used to stroke them and feed them grass. She had never met their owner. She had picked fungi on the Horse Field and taken photographs of the frogs and plants in the pond. The pond had been dry in 2011, enabling her to get into the middle and take interesting photographs, but

[37] A117-134.
[38] A122-123.
[39] See paragraph 181 below for his evidence.

enormous in 2012. She did not see others around the pond. She used to pick sloes and elderflowers from the hedgerow between the two fields, usually on the western side. There had always been a plank bridge across the ancient brook in the Horse Field, in the place where people had put planks recently.

54. She and her husband used to go for walks along Hutchison Way or to Church Aston via the north-western edge of the Round Field. She had used the same paths for jogging. Every time they went they saw dog walkers and children on bikes. She had gone on the inaugural Hutchison Way walk in 2007.

55. Her son Richard, currently aged 26, had told her that as a teenager about 10 years ago he used to hang out with his friends in the Wooded Area north of the Horse Field entrance (the Copse area). She did not know what he had got up to. She had heard lads shouting and talking in that area and picked up litter left behind.

Mr Luke Yarrington

56. Mr Yarrington had completed a questionnaire and made a written statement.[40] He had lived at 8 The Dale, Church Aston since 2001 and made various uses of the Application Land from then onwards. His use was twice or three times a day, each for 30 minutes to an hour, possibly longer at weekends. One of his activities was astronomy. When it was dark he would look at stars from all over the land; you could see the North Star, and the Milky Way looking south from the old railway line across the Round Field. During the set-aside period, or the couple of weeks when there was stubble, you could stand where you liked on the Round Field. He had had a dog for most of the time and walked it on the land. He had picked blackberries, sloes, elderberries, damsons and haws from the hedgerow between the two fields; there were also large numbers of sloes in the south-eastern corner of the Horse Field. He had picked oak leaves from the oak trees in the Horse Field and the hedgerow. He had also foraged for fungi: the Horse Field was the best but there were some round the headlands of the other fields too. He had taken photographs: he usually had a camera with him. He also went specifically to see and photograph what was there, which entailed walking round the Horse Field and

[40] A281-288.

through the woods and around the tractor tracks. There was something to photograph there, because people were less likely to have trampled on it: wildflowers such as poppies, field pansies, shepherd's purse, camomile and ox-eye daisies, and insects such as hoverflies, dragonflies, butterflies and ladybirds.

57. In his statement, Mr Yarrington had said that there were three paths skirting the edges of the Round Field and one through the Horse Field which were already in use by the local community when he arrived, and that he generally stuck to the paths although he made more use of the Round Field when it was fallow or after harvest and used the whole of the Horse Field which was available all year round. He exhibited a photograph of his friend Pete and family walking through the stubble in the Round Field, [41] captioned "*A family out walking in the Folly Field* [his name for the Round Field] *taken in August 2011. I am including this as evidence for other people aside from myself using the proposed village green site. This also shows that when the land is not under a crop that it is used more extensively than at other time* [sic] *of the year*". His statement contained the sentence: "*There are a number of regularly travelled footpaths which allow me to meet up with other users of the field many of which have become firm friends, and get some much needed exercise as well as unwind after a day's work*". In oral evidence Mr Yarrington said that use of the paths was not the predominant use of the land. Not only he, but other people, followed the tractor tracks around the Round Field. One man jogged on the tractor tracks. The ploughed field was less muddy than the paths. Bikes, he agreed, were ridden on the paths. His wife tended to stick to the paths when on foot but had schooled her horse in dressage on the Round Field when it was not in arable use. Kite flying had not been occasional; a lot of people had flown kites on the Round Field. You saw people letting off fireworks "all the time over there" (modified to every week in October and November each year). Children were always over there playing in the woods, summer or winter.

58. Mr Edwards submitted that Mr Yarrington's oral evidence should be treated with a little caution as it had the tone of exaggeration. I agree. Other witnesses acknowledged that kite flying was not a frequent pastime and the evidence offered no support for his assertion that fireworks were let off on the Application Land at all, let alone as often as

[41] A284.

he said. His evidence was at odds with the generality of the evidence in as much as he denied that use of the paths was the predominant use of the land. I am sceptical about his claim to have made extensive use of the tractor tracks. I note that unlike other witnesses he produced no nature photographs taken by him in the tractor tracks or anywhere else on the Application Land.

Mr John Rudd (the Applicant)

59. The Applicant had made a written statement.[42] He had lived at 11 Town Wells Mews, Newport for 9 years and previously at 8 Vineyard Road, Newport (outside the Claimed Neighbourhood) for 18 years. He had lived in or around Newport all his life and known the Application Land for about 40 years as "the fields near the Hutchison Way". He and his wife had begun to use the land to take their children over to visit his mother in Church Aston (they are now aged 38, 35 and 22). Over the years they had used the land for walking and his sons had used it for cycling. They had had a dog in the earlier years, before 1991. He had used the Application Land perhaps twice a week.

60. He had always been aware of others using the land: walkers, dog walkers, cyclists, horse riders, naturalists, joggers, kite fliers, photographers, picnickers. He had seen kites flown on the Round Field occasionally, when there was stubble, not when the crops were growing. The ground would be flat until ploughed again, which was not always immediate. By picnics he meant that he had seen children and young families eating sandwiches in the Wooded Area, not regularly. Naturalists had been all over the land. He had seen horses ridden on the paths and also crossing the Round Field but not when the crops were as high as 4 or 5 feet. People were always taught to keep to paths in the country when crops were growing but it was "like a maze" with "paths all over"; people made their own paths. He had seen many people pick blackberries and sloes in the Horse Field, including in the south-eastern corner, and done so himself with his grandchildren. He had seen lots of people feeding horses inside the Horse Field as well as over the fence.

[42] A245-246.

61. He had decided to submit the Application as a result of the Council's intention to develop the area. Asked in cross-examination if he had seen the Claimed Neighbourhood map at A40 before, he replied "possibly." He said he "would not have a clue" why the northern boundary had been drawn so as to exclude Avenue Road South and houses on the opposite side of Avenue Road. He had "no idea whatsoever" why it had been drawn as it had.

62. I do not accept the Applicant's assertion that the Round Field was like a maze with people making their own paths all over it when crops were growing. No other witnesses made any such suggestion and it is inherently improbable. Nor do I believe that horses were ridden through crops of any material height save perhaps on an exceptional occasion.

Mr Gregory Toland

63. Mr Toland had made a written statement.[43] He had lived at 12 Silverdale Close, Church Aston for 16 years and previously at 22 Springfield Avenue, Newport. He had used the Application Land for about 27 years. He had 4 children (born in 1979, 1981, 1983 and 1985) who had used the area for general recreation including flying kites. In oral evidence he said that he was a keen astronomer and had taken photographs all over the Application Land (not something he had mentioned in the statement). According to the statement, he and his wife had continued to walk the paths after their children had left for university. In cross-examination he accepted that the paths were well-used but denied that he, or the majority of walkers, kept to them. The distances the paths covered, he said, were insufficient for a typical ramble so he and others would zigzag up and down the tractor tracks among the crops.

64. He had also used the land with the Scouting movement, while a Cub/Scout leader at Church Aston Scout Group between 1990-1996, when the weather was suitable. They did "dump walks" (leading children to a distance away and letting them find their own way back). They did not generally go into the Horse Field as horses and boys did not mix but they roamed the whole of the rest of the site. He could not recall many crops

[43] A351-353.

during that period, although he did not dispute the Objector's evidence as to the sequence of crops. They did mini-orienteering and astronomy and made kites. They were taught how to go around and through crops, and were taught specifically to go among the crops and investigate them. They set up 10-12 man tents and camping equipment there in preparation for going on a camp, which they did several times a year, on 1-3 meet nights prior to each camp (about 20 times a year in total).

65. I am afraid that I formed the impression that in his anxiety to help the Applicant's cause by demonstrating off-path use, Mr Toland was embroidering his evidence as he went along to the point of implausibility. The explanation for allegedly zigzagging up and down the tractor tracks made no sense; walkers who wanted a longer ramble than around the field perimeter had plenty of longer distance paths extending beyond the Application Land to choose from, including the Hutchison Way, which would have offered more variety and interest. Nor do I accept his evidence about the Cubs/Scouts being taught to go among the crops and practising camping on the Application Land 20 times a year, which is contradicted by the evidence of the former Cubs/Scouts who recalled only tracking/trail-laying around the paths and said they were taught to keep out of the crops: Mr Nicholas and Mr Ellarby.[44]

Mr Dan Nicholas

66. Mr Nicholas had completed a questionnaire and made a written statement exhibiting some photographs he had taken.[45] He was 22 years of age and had lived all his life at 15 Juniper Row, Church Aston, Newport except during university terms. He had been taken to the Application Land on family walks when he was in a pushchair. As he grew older his family and friends would play hide and seek in the hedgerows. Later on he spent hours in the fields with his parents' binoculars watching birds (such as bullfinches and skylarks) and learning about insects, mammals and trees. These experiences had inspired him to study environmental science at university. Between the ages of 4 and 16 he had taken part in other activities on the Application Land. These included playing frisbee on the Round Field at times when there were no crops growing; den-

[44] Paragraphs 67 and 140 below.
[45] A215-228.

building in what he described as the "thicket" north of the entrance to the Horse Field (i.e. the Copse area); pond dipping in the Horse Field; bike riding; and kite flying.

67. He had also been involved in the Scouts between the ages of 7 and 13/14. They had used the Application Land paths for tracking.

68. Since returning from university in 2010 he had found new ways to use the Application Land. He had got a dog about 18 months ago and took it for daily walks around the land like many other people, making new friends in so doing. He had picked damsons and sloes, out of which he had made jam and gin respectively, from each side of the hedgerow between the fields. He had picked fungi in the Horse Field (and produced some waxcaps for the inquiry by way of illustration). There were hundreds of them around for a couple of weeks in the autumn. He had tried his hand at photography and had twice used the post in the Horse Field for "planking".[46]

69. Mr Nicholas wrote and spoke eloquently about the pleasure that could be derived from looking at the fields when walking on the paths. Viewing, he said, was part of the enjoyment and an important use of the land.

Mrs Charmaine Briscoe

70. Mrs Briscoe had completed a questionnaire and made a written statement.[47] She had moved to 11 Oak Avenue from another part of Newport 17 years ago and started making use of the Application Land at the same time. Her husband was from Church Aston and knew the fields from childhood. They used to just walk around it for exercise and pleasure until July 1997, when they got a dog and increased their usage to twice daily. In 1999 they had a son, followed in 2006 by twin daughters. They took them on their walks in baby carriers or buggies; the paths around the fields were wide enough to accommodate a double buggy. When she first went for daily dog walks the paths had been just wide enough to walk on but they had moved out further as the space between the hedgerow and the cultivated area had grown. You could go all the way

[46] As photographed by his elder brother: A221.
[47] A57-62.

round the Round Field and there was a path straight through as well, which had ended at the gap that had been blocked by fencing in 2012. One of the twins had a developmental disorder and had learned to walk around the paths as the softer ground was less damaging when she fell. They observed nature and visited the horses on their family walks. They mainly stuck to the paths but after harvest they allowed the children to stray off the paths and run more freely. She could not say how long the interval between harvest and ploughing used to be, or in which years there had been no arable crops. If there were crops visible they would not go off the paths. By "visible" she meant anything above the surface that was not obviously a weed.

71. Mrs Briscoe had been a registered child minder for 5 years between 2001 and 2006. She had gone to the Application Land at least once a week and often daily with the children she minded, whose ages ranged between 2 months and 11 years. They explored the Wooded Area, did bark rubbings, collected leaves, observed wildlife, rode scooters and bicycles, kicked balls and played catch. Mainly they went to the Wooded Area where there was much more to see and do, but they also used the Round Field. If there were no crops they could have free rein. The relevant part of the Wooded Area was on either side of the path coming in from the Station Road entrance. There was vegetation on either side (as in the top photograph on A204) but children in long trousers and wellingtons could go into it to look for insects. There had been a worn path through the Wooded Area on more or less the same alignment as the present engineered track, with extensive vegetation on either side. They had played with balls in the Round Field. Even when it was ploughed they would go on if they wanted to.

72. Her daughter was particularly keen on the horses. When the twins were younger they would go to the Horse Field 4-5 times a week and would not stick to the path. She had seen a man feeding the horses by the Station Road gate but did not know who he was.

73. She had occasionally seen football played and kites flown on the Round Field. She had seen sketching perhaps twice in the Horse Field and in the Wooded Area by the junction between the paths. She had seen picnics now and again and had one with her own children a couple of times.

Mrs Patricia Coulthard-Jones

74. Mrs Coulthard-Jones had written a statement jointly with her husband Mr Alan Coulthard-Jones.[48] They had lived at 4 Granville Close, Newport for 33 years. In their statement they wrote:

> "*We have known this area of land [the Application Land] for all of the 33 years we have lived in Newport and know part of it as the Hutchison Way and part of it as right-of-way walks through and around all the adjoining agricultural fields.*"

They had been told about the area by other dog walkers when they moved in and used it ever since on a weekly, sometimes daily, basis to walk their own dogs. They also took their grandchildren along on the walks. Mr Coulthard-Jones had done most of the dog walking before 2008 when Mrs Coulthard-Jones retired. They made full use of all the footpaths to vary their walks, including regular use of the well-worn paths around the north-western and eastern sides of the Round Field. Mrs Coulthard-Jones agreed in cross-examination that the passage from their statement quoted above reflected their use and that of other people.

75. According to the statement they used the Horse Field whenever there were no horses on it. Mrs Coulthard-Jones said in chief that that was not entirely true, she would put the dog on the lead and walk through if the horses were at the other end of the field. If the horses were no in the field; she would wander round to look at the pond. Quite often there were no horses in the field; they came and went. They were old and did not move very much. Sometimes they came to the pond and she would pat them. In cross-examination she said that she "had to stick to what we put" regarding use of the Horse Field in the absence of horses. She said that she had used to enjoy climbing the stile and walking through the Horse Field, using the former plank bridge to cross the brook. She did not like the fenced off path and since the 2012 works she had climbed the fence to wander the field and leapt over the brook.

[48] A317.

76. Mrs Coulthard-Jones's oral evidence about use of the Horse Field was not just inconsistent with her statement, but self-contradictory. If she had gone to the pond when there were no horses there, how could she have patted them at the pond? I do not think that her evidence about the horses being old and not moving very much had any foundation. It does not tally with the evidence of Mr O'Brien, their owner, about the kind of horses he kept there (breeding mares and horses being trained for driving),[49] or with the photographs of some of the horses in evidence, and no other witness for the Applicant suggested any such thing. Further, she was alone in saying that the horses were often not in the field.

Mrs Janet Clarke

77. Mrs Clarke had made a written statement.[50] She had since August 1993 lived at 18 Station Court, Newport with her husband and sons (then aged 5 and 3). They had at first visited the Application Land as a family to walk round, and she had sometimes taken the boys to pat the horses in the Horse Field after school. Initially she had introduced them from the other side of the stile. From 1995 onwards her sons and their friends from Station Road and Pen-y-Bryn Way had had bikes and gone to the land on their own to ride their bikes on the paths and play. They built dens and brought back blackberries. As they grew older they would take their bikes for longer treks beyond the Application Land. They had also used the Application Land for cross-country training. She and her husband had continued to use the land for walking, sometimes to link into the wider path network.

78. In 1993 there had been a path right around the Round Field and a distinct hedge with a gap in the line of the path that had crossed the field (according to an old map) before arable use began. A similar route had been re-established during set-aside; there had been several paths cross-crossing the Round Field during that period. The hedge on the southern boundary had begun to disappear about 5 or 6 years ago and the adjacent path went with it. In the last 4 years when there were arable crops the hedge had not been re-established; the tractor lines ran across the boundary into the next field. The margins

[49] See paragraph 163 below.
[50] A303-306.

around the edge were wider, an area you could access rather than a path as such. She could recall 2 or 3 years during the mid 1990s when the use of the Round Field was for grass for silage. It sounded about right that cereal crops were grown from 1998 until set-aside. She was not as law-abiding as some; she might take a short cut across the field when it was just coming into crop but generally would not use it when under cultivation.

79. The Horse Field was her favourite part. It was a lovely classic meadow which she liked to explore. You could just stand still and listen to birdsong, or see dragonflies skimming the pond. She had particularly used it in 2005 when she had an eye operation and went daily for a month or so while recuperating. There had been 1 or 2 horses, occasionally 3. She had never seen Mr or Mrs O'Brien. Since going back to work her use had reverted to weekends. She had no dog and was not a regular walker. She produced a photograph of the Horse Field taken in March 2001 which showed the old handrail for the original plank bridge. In 1993 there had been no gate on Station Road, no fingerpost and no defined path in the Horse Field, only a "semblance of a path" between the stile and the bridge, mainly because the horses came to the stile. It was much less open than now. The only way you could tell that it was a public footpath was from the existence of the stile and she had checked with a neighbour that it was, thinking that the Landranger map must be incorrect. In cross-examination she agreed that the horses had been predominantly present over the years and that parents with young children and dogs would have been wary of entering the Horse Field, suggesting that less use was made of the path in the Horse Field than of that on the other side of the hedgerow.

80. She had had no reason to go into the Wooded Area on either side of the path. She had been aware of, but not involved in, the clearance and planting of the area by the entrance.

81. Mrs Clarke pointed out on a map the roads bounding the Claimed Neighbourhood. Wellington Road was one of the main routes into town; it had been the main route in prior to the bypass. Audley Avenue was a busy road with a bus gate at the end of it;

Avenue Road was also busy. Where the High Street met Upper Bar was where the 20mph speed limit began.

Mr John Coombes

82. Mr Coombes had completed a questionnaire and written a statement.[51] He had lived at 4 Queens Drive, Newport for 20 years and at 1 Queens Drive for the previous 18 years. He had started using the Application Land for walks with his children (now aged 38 and 36), often to collect fruit or hedgerow samples. The family were keen makers of wine and jam. There had been blackberries in the overgrown area where the bulbs were subsequently planted. He had used the land for access to Church Aston when running or cycling at least once a week ever since. They usually kept to the footpaths as often there were crops being grown. Every time he used it he had seen someone else walking or walking a dog, especially first thing in the morning. When he first arrived he recalled there being another path across the Round Field, which he sketched on a plan[52] as leading diagonally from the north-eastern corner to a point around the middle of the southern boundary. If there was something growing in the field he would use the track by the hedgerow.

Mrs Gill Ashley

83. Mrs Ashley had completed a questionnaire and made a written statement.[53] She had been a resident of Pen-y-Bryn Way, Newport since 1985, living first at No 53 and then at No 2. She and her husband had throughout that period had a dog and taken it to the Application Land for walks. Prior to 2006 Mrs Ashley had done most of the dog walking, as her husband worked long hours; from 2006 Mr Ashley had taken over responsibility as her mobility was impaired. Mrs Ashley herself had worked night shifts and sometimes took the dog just round the corner to the football field, but if she had more time she would go to the Application Land, up to twice a day. She did not confine herself to the Application Land but used the footpaths across it as part of longer walks, heading towards the bypass and places such as Pitchcroft Lane and Aston Hill.

[51] A311-315.
[52] A312A.
[53] A289-297.

She gained access to the Application Land by the Station Road gate or by Millwood Mere. Sometimes she liked to sit down on the grass to the right of the Station Road entrance, and perhaps read a book or pick pussy willows, before heading home or continuing on her way. She described a route southward along the eastern edge of the Round Field, following the hedgeline, and two routes from the Millwood Mere entrance, one going eastwards along the north-western edge of the Round Field and the other southwards around the western and southern edges of the Round Field. She had taken elderly ladies with dementia (her mother and a neighbour) to walk the pathways to enjoy the countryside. During her walks she had watched skylarks, geese, rabbits, a heron, and bats flying at dusk; picked blackberries and elderflower along the hedgerow in the Round Field; and met and talked to other dog walkers. There were always other people dog walking and socialising on the Application Land.

84. There had been no significant changes to the Application Land during the past 27 years other than changes of crops. The footpaths had remained the same throughout her years of using them. When there were crops in the Round Field, the pathways were always used. After harvest, people could go on the stubble and play with dogs (as her family did). On two or three occasions she had seen young ladies with ponies coming from the direction of the pumping station and cantering over the stubble. She had also seen parents and children fly kites, perhaps 6 to 8 a year, and two or three times she had seen springer spaniels being trained. She had never taken notice of how long the stubble was there. In her questionnaire she had ticked picnics and bonfire parties as activities she had seen on the land. Asked in cross-examination how often she had seen picnics she referred to only one occasion, when she and her young niece had eaten sandwiches by the hedgerow at the bottom of the Round Field on the day they saw the geese take off for the winter. She was vague about "bonfire parties", saying it was "probably not very frequent... I think they did it in the wood..." She had seen tents in the Wooded Area to the left of the path but did not know if they belonged to children or the homeless.

Mrs Patricia Anne Grubert

85. Mrs Grubert had completed a questionnaire and written a statement.[54] She had lived at 1 Granville Close, Newport for 30 years, and made use of the Application Land ever since. To begin with she had walked there with her two daughters; by 1991, the elder had left home and the younger was attending college. Subsequently, she and her husband had gone to walk the dog and socialise with others whom they met on their walks. They had had cocker spaniels for about 25 years. They entered the Application Land via Station Road or by the pumping station. While she was working, they went before 8am and after 6pm.

86. Throughout the time she had known the land, the Horse Field had been used for grazing horses and the Round Field for agriculture, mainly arable but for a few years set-aside and, once, cattle. There had been no change to the hedgerows and footpaths around the fields. She had quite often walked in the Horse Field, although never when the horses were in foal, or there was ragwort, or it was flooded (as it was 4 or 5 years ago, when a heron came). The dogs had been accustomed to horses before she got them. She had seen the owner of the horses getting bales of hay out from his van, but rarely in the field. She would stick to the path unless she saw something she was interested in, when she would leave her husband holding the dogs and wander off to have a look. In the Round Field she kept to the path, which was well walked but a bit rough; you could walk right round the perimeter, or carry on out of the Round Field to Pitchford Lane. Sometimes she was accompanied by friends on her walks; they would admire the scenery, watch birds, take photographs and enjoy the fresh air. She exhibited two photographs taken during the 2009/10 winter,[55] one taken in the Round Field, captioned "Walking the dogs January 2010 permissive footpath". She said that a lot of people took their children to play around, especially in the holidays, mainly in the Round Field, obviously not when there were crops there. They would run around and play ball. A few times, she had seen people sitting having a picnic on warm summer evenings in the Round Field near the entrance to Hutchison Way.

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[54] A147-155.

[55] A149.

Mr Alan Goulding

87. Mr Goulding had completed a questionnaire and made a written statement.[56] He had lived at 41 Pen-y-Bryn Way, Newport for almost 31 years. About 25 years ago he had begun to use the Application Land. Initially he and his wife had taken their children (a son and a daughter, now aged 36 and 33) to visit the horses in the Horse Field and watch the wild rabbits; since 2007, they had taken their four grandchildren to the same spot (as shown in the photograph of June 2009 at A325, namely, outside the vehicular gate on Station Road). This, he said, showed what a special place the area was for local families. They would sometimes go to the entrance stile opposite the Wooded Area to do the same thing. They never took the children into the field when the horses were there, "obviously"; horses could get jealous of each other when being fed.

88. They had also made use of the footpaths to walk his daughter's labrador and a friend's collie, and occasionally taken friends and relatives for a walk along Hutchison Way. Now that he and his wife were retired, they found themselves using the footpaths more often. They could take advantage of a short cut to Church Aston village and further along the Hutchison Way towards Telford and other local destinations. Many others used the Application Land for dog walking; there were often people stopping to talk along the paths, particularly when their dogs met. Several neighbours in his street used the paths and fields to exercise their dogs on a daily basis. He had also seen photographers, bird watchers and cyclists. Naturalists took photographs of flowers and fungi, which they walked over the Horse Field to take, and birds in the hedges around the Round Field.

89. The purposes for which the Application Land had been used over the past 25 years were, in the case of the Horse Field, the grazing of horses and, in the case of the Round Field, agriculture and public rights of way. He could recall no changes to the hedgerows or the footpaths crossing or bordering the site prior to February 2012. He never sought permission to go on the land as he thought it was a public right of way.

[56] A323-329.

90. Mr Goulding was not cross-examined.

Mr John David Gittus MBE

91. Mr Gittus had made a written statement, to which he exhibited a number of photographs.[57] He had lived at 37 Wellington Road, Newport for 40 years. When he arrived from Banbury he was an elite orienteer, and he used the Application Land and other nearby land for training runs, sometimes with his young sons. He was instrumental in setting up the Wrekin Orienteers. That use continued until 1998 when he had an operation on his leg. To become an elite orienteer, one had to push oneself to the limit. It was useful in training to practise getting over obstacles such as stiles as quickly as possible, and to run on broken ground. There was no really rough terrain on the Application Land. After the crop was harvested he would run across the Round Field a couple of times; if it was ploughed, he would run across the furrows; when there were crops there, he might run down the tramlines but more often than not he went around the edge. When it was set-aside he would just cross it. The Wrekin Orienteers would run across the field in winter and on the footpaths at other times.

92. He had organised fun runs in the area in 1978 and again in 1999 and 2002. In 1999 the route passed through the Horse Field over the stiles.

93. Although no longer able to run, Mr Gittus frequently walked through the fields, taking his grandchildren when they visited. He had taught his UK-based grandson to ride his mountain bike along the paths. His other grandchildren lived in the Philippines and were fascinated by British wildlife. He had been involved in clearing and planting the gateway area and produced a photograph dated May 2008[58] of what he described as a kind of "opening ceremony" following resurfacing of the path by the Council, attended by Mr Hutchison's widow. Before clearance the land had been heavily overgrown, with fallen branches and a lot of rubbish, but of interest to youngsters making dens. People did not walk on the flowers, but once they had died down there was no reason why they should not go there. There was no "firm line" path through the Horse Field.

[57] A135-145.
[58] A140.

When people saw the state of the stile at the northern end they would deviate round it. Also the drainage gully widened out towards the western hedge and it could get very boggy, causing people to vary their routes. There had been a plank bridge across the gully which the Council had moved over towards the hedge when they put up their fencing. Someone had rebuilt it where it used to be.

94. He had seen a lot of people using the land for walking, running, cycling, bird watching and photography. He had assumed that there was a permissive footpath around the north-western and eastern margins of the Round Field because so many people had used it. Over the years its position had varied slightly, it seemed to have moved further in from the hedge. He was very annoyed when a path he had used for many years was obstructed by a metal gate at the western end (but was not one of the people who removed it).

Mrs Jayne Overal

95. Mrs Overal had completed a questionnaire and made a written statement.[59] She had lived at 25 Mulberry Close, Church Aston, Newport since 2009 and before that, at 25 Wallshead Way, Church Aston from 1991-1996 and 2006-2009. Between 1996-2006 she had moved south with her husband, who served in the Army. They had two sons, born in 1999 and 2003.

96. Before 1996 she used the Application Land to walk with her nephew (born in 1991) and her dog. They entered by Millwood Mere and "rambled through" the Wooded Area. She did not recall a specific path through that area. There was a "sort of path" going in the opposite direction, around the Round Field.

97. From 2006 onwards, her main reason for going to the Application Land had been to walk her dog. In her written statement she had said this:

[59] A229-233.

"*When I and my family make use of the area we generally stick to the paths and my children play in the wooded area. Our use varies depending on the time of year. I walk the area twice a day with my dog all year round, but my children use the wooded area and the footpaths for bike riding and kite flying when the weather is fine.*"

98. In cross-examination she said that she now had a gate from her back garden into the south-western corner of the Round Field, and did not stick to the paths more than 50% of the time; even when the crops were growing, she would walk the dog along the tractor tracks or follow it into the field. She had been brought up on a farm. Pressed with the inconsistency, she said it was the position that she did generally stick to paths. She repeated that she did not recall a worn path through the woodland, which she agreed had been pretty overgrown; "not like the other ones on the field". But she had not used the area recently, although her younger son still played there with friends. Her sons had made dens in the Wooded Area by the entrance to the Horse Field (the Copse area). That had been so heavily overgrown that "you had to fairly dig in to get there".

99. She could only remember seeing 2 horses in the Horse Field, but had not counted them. She agreed that there were generally horses present and untethered. She said that when her sons were older she had taken them over the stile into the Horse Field to feed and pet the horses; she had never seen their owner. There had never been a set path in that field. They had walked between the two stiles, but not where people walk now; the hedge had grown right out over the field and sheltered the horses, and the plank across the stream had been set further into the field.

100. The family had flown kites on the Round Field when there were no crops there ("probably occasionally") and she had seen others kite flying from her back garden but would not like to hazard a guess as to when. She had seen picnics and drawing/painting around the junction of the pathways but only on occasion.

101. By reference to a copy of the A40 map of the Claimed Neighbourhood, she indicated that Church Aston lay within the blue edging as far north as Station Road and Grenville Road.

Mr James Healey

102. Mr Healey had completed a questionnaire and made a written statement.[60] He had lived in Newport since he was 3 years old and in the vicinity of the Application Land from 1989-1996 (at the Lea, The Spinney, Church Aston) and since April 2009 (at 7 The Dale, Church Aston). He knew it as "the Station Road fields".

103. The land use had changed to its current form during the construction of the bypass. Since then the general layout of footpaths had remained the same, while the type of crops had varied. To his knowledge, the paths used by the public comprised the path running south of the Wooded Area from the pumping station along the north-western boundary of the Round Field on to Station Road and paths around the other edges of the Round Field. From childhood, he had understood that there were no restrictions on access to the land, and had presumed on the basis of the agricultural use that a local farmer owned it. He described it in his statement as providing "obvious and convenient links between [the] area of Church Aston within which we reside and the south-eastern boundary of Newport".

104. He had used the land to walk to and from Burton Borough School between September 1989 and July 1994, along the path between the pumping station and Station Road. He could not remember whether the Round Field had been in arable cultivation at that time; sometimes there had been crops, at other times just grass. Between 1989 and 1996 he had used the same route at weekends to get to Newport and had gone jogging round the paths and, he said, through the tractor tracks. He also said that he had "run to and fro between the north and south boundaries through the mid-point of the Round Field"; you bumped into dog walkers and other things on the edges of the field.

105. When he came back in April 2009 he had two daughters, born in 2005 and 2007, and two dogs. Since then he had used the Application Land to walk the dogs at least once a week. He used to enter south of the pumping station and walk around the edge of the Round Field, exiting near the south-eastern corner. The dogs ran freely over the field. He would take his daughters with him and while walking they would do other

[60] A157-161.

activities: pick hedgerow fruit and play hide and seek. They played hide and seek in the Wooded Area just north of the Horse Field entrance (the Copse area) (where he had himself occasionally played as a boy); it was a lot less dense now than it used to be. They also played it in the Wooded Area north of the Round Field. It was pretty overgrown but good for hide and seek. He had not used it for any other purpose or seen anyone else use it for any other purpose. He did not recall any path prior to that made by the Council. When the crops were high, they would "dive in" them.

106. Every month or so he took them to visit the horses in the Horse Field; they would approach the horses from outside if they were close to the boundary, but if the horses were absent (as they occasionally were), or at the far end of the field, they would go in. He would not take the dog in when the horses were there. He had not realised that there was a formal path through the Horse Field.

107. In early 2012 the Council had blocked off the accesses by the pumping station. They had also fenced around the northern perimeter of the Round Field and closed the gap in the hedge at the south-eastern corner. That gap had since been reinstated.

108. Burton Borough School took pupils from Newport and Church Aston, the catchment area extending as far as Twiston to the west and Muxton to the south. The same was true of the Grammar School and the Girls' High School.

109. I have doubts as to whether Mr Healey ever jogged through the tractor tracks; I think that he may have been jumping on to the bandwagon set rolling by previous witnesses who had mentioned doing that (not always convincingly as discussed above). But the at first sight slightly odd reference to running to and fro between the north and south boundaries may have been a reference to the "path (um)" line on the Appendix B map.

Mr Tim Wiggin

110. Mr Wiggin had completed a questionnaire and written a letter.[61] He had lived at 2 The Crescent, Church Aston, Newport for 15 years, during which he had used the Application Land for walking with family and walking the dog acquired about 10 years ago. He walked the dog twice a day, first thing before work and after 5pm. The Horse Field had always been used for grazing, the Round Field for arable crop rotation. He had 2 daughters, now aged 16 and 14. He had taken his dog and his daughters into the Horse Field. They would walk through, keeping to the worn path. He had seen the owner of the horses in the field, perhaps every 3 months, feeding them and every so often cutting down thistles and nettles. He had also seen another man feeding the horses. It took perhaps 30 minutes to feed them. When the harvesting of crops permitted, Mr Wiggin and his family accessed a wider area than the footpath in the Round Field. The area was used very extensively by the local community. He had seen it used for walking, cycling, ball games, bird watching and picking damsons and sloes. Asked where he had seen ball games, he said he had seen a football kicked about on the path at the north of the Round Field, 2 or 3 times a summer, since about 5 years ago.

Mr Gavin Edwards

111. Mr Edwards had completed a questionnaire and made a written statement.[62] He had lived at 50 Church Aston, Newport for the last 10 years and 63 Springfield Avenue, Newport for 21 years prior to that. He had known the Application Land for 42 years. As a boy he had played hide and seek and made dens in the Wooded Area. It began to get quite overgrown but was “a nice place to muck around in”. By 1991 he was aged 24 and just walking there. The Wooded Area was pretty much overgrown with a “vague track” running through it. He would go in there “for access, getting where I needed to go wherever that was”. In the early 1990s he would kick a ball about in the Round Field with his younger cousins in late July/August when there were no crops or when it was fallow; the period between crops was “a matter of weeks if that”. They

[61] A269-274.
[62] A103-108.

made kites to fly there and they went pond dipping in the Horse Field. He had seen others do that recently. His nephew had done it. In his statement he listed, as activities carried out on the land by relatives and others over the 42 years he had known it: meeting friends, playing football, kite flying, family picnics, den making, children's games, school educational activities, dog walking, walking (including along the Hutchison Way), bike riding, running, bird watching, photography, drawing and painting, horse riding, blackberry picking and community activities. He did not provide details of when during that period, or where on the land, or how frequently, and was not asked to by either advocate.

Mr Ray Benbow

112. Mr Benbow had completed a questionnaire and made a written statement.[63] He had lived at Thornton House, Springfields since 1984. He had owned a dog until 2008 and walked it twice a day (three times a day at weekends). He had used the paths along the north-western and eastern boundaries of the Round Field but had also gone into the Wooded Area and to the Horse Field to feed the horses. He had never seen the owner of the horses in the field, only parked outside throwing in hay.

113. He would respect the farmer, but when the Round Field was set-aside or harvested or ploughed or before the crop was sown there was no harm in going on there. He had no compunction walking across the field when crops were up to 18 inches high. Crops were resilient. He had helped on a farm when he was a boy and was not afraid to use the field for recreation. There had not been a well worn path along the eastern edge in 1984 or 1991. He recalled a path from top to bottom of the field; he could not say what happened to it. His daughter used to run across the field doing cross-country training. The local running club might stick to paths but they were not serious athletes like his daughter. He and his son had experimented with a kite there.

[63] A49.

Mr Brian Richards

114. Mr Richards had made a written statement.[64] He had lived at 1 Highfield, Church Aston, Newport since December 1984. He was a member of Church Aston Parish Council and confirmed the accuracy of the depiction of the boundary of that parish on A39.

115. When Mr Richards moved to Church Aston he had a daughter aged 9 and two dogs. They had used the Application Land for dog walking at least once daily since arrival. They had used it for playing with their daughter and, recently, with her two children (currently aged 6 and 8). They lived a short drive away and came a couple of times a month to play. The Copse area between the Round Field and Horse Field was good for dens and fascinated them. It had also been fun to play in the Wooded Area to the north until the 2012 clearance. When they went over there Mr and Mrs Richards tended to keep to the pathways, but the little ones went over the fields. The dogs ran all over the land and the little ones enjoyed throwing balls for them. His "feeling" was that despite the crops, the Round Field was available about 50% of the time, from August to February. The ground was still firm after planting. They allowed the dogs and children to run on the field until the crops became apparent.

116. They had met many other local residents enjoying recreational use of the land including for walking, cycling, running and bird watching. For the majority of the time, people went around the perimeter. Occasionally they went over the land with dogs or children. Asked by Mr Edwards whether walking across the field was exceptional rather than the rule, he replied "probably".

Mr Robert Edge

117. Mr Edge had made a written statement.[65] He had lived at 12 Station Road, Newport for 37 years and started to use the Application Land about 30 years ago. His main activity had been daily dog walking but he had also used it for general walking and bird

[64] A243-244.
[65] A319-320.

watching. He would walk with the dog through the Station Road entrance, down the path into the Horse Field, feed the horses apples, and then go completely around the Round Field, watching for birds all the way. When there were no crops, he had walked over the Round Field and in springtime he had sat there looking for skylarks and tried to find their nest. He had also looked for cuckoos in the south-eastern corner. In 1997, following a heart attack and a period of not using the Application Land much, he had started jogging and cycling there and gone to the Application Land every day for exercise. By then he no longer had a dog. His use had trailed off 5-7 years ago. There had been obvious worn paths all the way around the Round Field which he would use for walking, jogging and cycling. He had jogged across the middle when the field was clear. He had also taken his nieces and nephews to play frisbee and fly a mini-kite.

118. While the Round Field had been used for general pastimes, the Horse Field had always been used for grazing horses and for walking across. So far as he could remember there had always been horses in the Horse Field, save for odd days. He had been aware that there was a path on the western side, but had often walked into the field to pet or feed the horses. He took them windfall apples in autumn and grass at other times. The Wooded Area on the way to the Horse Field had been overgrown with vegetation including brambles; you had to fight your way through. He had not walked through the woodland belt; he used the path on the edge of the Round Field. But he had cycled through it.

119. He had not seen proper picnics with tablecloths, but he had seen people stopping for a snack when on a walk. He himself had taken crisps, sandwiches and a flask when bird watching.

Mr Brian Dredge

120. Mr Dredge had completed a questionnaire and made a written statement to which he exhibited some photographs of the headland path in the Round Field.[66] He had lived at 9 Station Court, Newport for 29 years. He had first became aware of the Application Land when his son-in-law began to use it for running/jogging in the late 1980s. Since

[66] A93-101.

then he, his wife, their daughter and son-in-law, and their three grandchildren had used it, on an irregular basis, for walking, exercising his daughter's dog, and photography. It was a very pleasant area to spend a short while, wandering around or through on the way to adjacent fields or beyond to Pitchcroft Lane or Chetwynd Aston.

121. Generally when he was on the land he was aware of others using it for playing, dog walking, and socialising. By "playing" he meant that he had seen teenagers in both parts of the Wooded Area, passing time by climbing trees and investigating, not formal games. There had been one occasion some time ago when a person was painting in the "thicket" by the entrance to the Horse Field.

122. Over time the path around the Round Field had "worked across" further into the field as the headland had become broader. For many years the main path across the field had run in a north-south direction further out from the hedge; it had been ploughed up and disappeared, he would say 4 years ago.

Mr Trevor Pocock

123. Mr Pocock had completed a questionnaire and written a statement jointly with his wife, Mrs Catherine Pocock.[67] They had lived at 11 Station Court, Newport for the past 14 years. Prior to that they had resided elsewhere in Newport and were already aware of walks across the Application Land. They began to use them about 13 years ago for regular walks. The Hutchison Way was, obviously, the main path from Station Road, but there was also a path you could take through the Wooded Area as a short cut, or you could go round the Round Field and out to the other fields beyond. After their children had all left home, around 2000, their main use was for a Sunday afternoon walk down the Hutchison Way to Church Aston or Chetwynd Aston. But for the period October-December 2011 they looked after their daughter's dog and used the land more prolifically, 3 times a day. Also Mr Pocock had worked from home for the past 7 years and gone out for lunchtime walks. Since the fencing off in 2012 he used the Hutchison Way less often; it was very boggy if you stuck to the path. But it was still possible to use the headland path in the Round Field.

[67] A235-242.

124. When walking on the land they had been aware of others using it for strolling, jogging, dog walking, horse riding, cycling, picking wild fruits from hedgerows, observing wildlife and photography. While dog walking, meeting and socialising with fellow dog walkers was a bonus. Mr Pocock had memories of occasionally seeing little family groups eating on the Wooded Area just inside the gate and on the Round Field after harvest. People did not walk on the area which had been newly planted in 2006/7. There was a well defined path through it.

Mr Paul Evans

125. Mr Evans had completed an evidence questionnaire and made a written statement.[68] He and his family had moved to 4 The Crescent, Church Aston, Newport on 13 September 2000, and begun to use the Application Land daily for dog walking. He had, however, known the land for 56 years, having lived in Newport all his life. He and his wife also walked on the land with their grandchildren when they visited. They had picked wild fruits there in season. Access was gained from Hutchison Way or the bridle path from The Folly.

126. The land lay where Newport, Church Aston and Chetwynd Aston met and was a hub for socialising between people from those three places. The Church Aston people came from The Close, Hillside, The Dale, all the housing developments off The Folly. The Newport people came from Station Road, Station Court, Pen-y-Bryn Way, Grenville Avenue and the significant Ashworth Way housing estate including Beech Close, Juniper Row, Walnut Close - the southern edge of Newport.

127. He had seen it used for many varied activities such as walking, jogging, cycling, and playing. Over the years he had seen drawing/painting perhaps 3 or 4 times, predominantly in the north-east corner but once by the pumping station, and football in the middle of the Round Field before it was formally cultivated.

128. In his statement Mr Evans had written that the Horse Field had been used continuously throughout the last 12 years to graze horses. He had also written that his family's use

[68] A109-114.

of the land had never been stopped or restricted; rather it had been "fully and openly accommodated with all footpaths being retained and maintained to allow free and safe passage".

129. Mr Evans was not cross-examined.

Mrs Ruth Nicholas

130. Mrs Nicholas had completed a questionnaire and written a statement.[69] She had lived at 15 Juniper Row, Newport since 1988. During that time the Application Land had always been used for farming purposes (arable or grazing) and the footpaths had always been as they are; the lack of vegetation on them showed how widely they were used.

131. She had two sons (the younger being Dan Nicholas,[70] the elder born in 1987). As they grew up the family had used the Application Land for walks, cycling, bird watching, kite flying, hide and seek, ball games, fruit picking, nature walks and wild flower identification. Now she went for daily walks and had recently jogged round the paths in preparation for the "Race for Life". Since January 2011 they had used it for dog walking. She knew from her sons' involvement in the Scouts that they used the land for activities such as trail-laying and tracking. They would have flown kites in the Round Field, around 1996/7, not in the Horse Field to aggravate the horses. Hide and seek was around the wooded area close to the old railway track. When the boys built dens in the mid 1990s the vegetation had been much thicker; the trees had been thinned out when the fencing was erected. The boys played in the wooded belt to the north-west of the Round Field. It had been pretty overgrown. She could not remember if there had been a worn path, only hidey holes for dens. Ball games were on the Round Field from 1995 onwards. They were not encouraged to go in to the crops in case of causing damage.

[69] A337-343.
[70] See paragraph 66 above.

Mr Tom Clarke

132. Mr Clarke had written a statement.[71] He had lived with his parents[72] and brother at 18 Station Court, Newport since 1993 when he was 5 years old. He, his brother and their friends from Pen-y-Bryn Way used to play on the Application Land. Their "base" was among some tall trees where pathways met near the Horse Field entrance (the Copse area). The thick canopy gave them a feeling of privacy. They built igloo-shaped dens there, climbed the trees there and further west by the pumping station, and rode their bikes around the paths. There was a nice little area for skids by the pumping station. They saw other boys' bases in the woodland over the years. They had bases in the Round Field as well, burrowed through the crops and created mazes. They would go into the Horse Field and stroke and feed the horses. They developed an affinity with one particular horse in about the mid 1990s, which they gave a name. It was there for about 5 years. They met the owner, who knew they were sad when it left. During his teenage years he ran "endlessly" around the Round Field, doing cross-country and 1500m distance training. He belonged to Telford Athletics Club and participated in the Duke of Edinburgh Award Scheme. He also used to walk the dog around the Round Field. In cross-examination he said that he hung out with his friends until 2003. The Application Land was the first place they went to play, from the age of 7, as it was closest to home; later they also went further afield.

Mr Colin Thacker

133. Mr Thacker had completed a questionnaire and made a written statement.[73] He had lived at 6 Pinewoods, Church Aston, Newport for 22 years and begun to make use of the Application Land about 16 years ago with his dog, although he had known of it for some 27 years. He now used the land for running to keep fit. About once a week he would run from Millwood Mere, along the north-western boundary of the Round Field and down its eastern boundary by the hedgerow towards the public footpath and the bypass. He also belonged to the Newport & District Running Club and ran across the

[71] A309-310.
[72] His mother was Mrs Janet Clarke, see paragraph 77 above.
[73] A253-259.

land with them. They would enter from Station Road, run across to the pumping station and on to The Folly. When he used the land he stuck to the paths.

134. He had been aware of others using the land to walk, walk dogs and ride horses; the compactness of the paths showed how very regularly the land was used. The farmer had encouraged use by ensuring the paths were not ploughed up and keeping a wide verge between field edge and crop. There had been no changes to the footpaths during his period of use. He had seen no other recreational activities on the Application Land, nor was he aware of any community activities there. He had seen horses ridden on the north-western side of the Round Field near the pumping station and hoof prints along the eastern side. He had only seen horses 2 or 3 times, probably a few years back.

Mrs Alison Pay

135. Mrs Pay had made a written statement.[74] She had lived in Newport for 38 years, the last 26 of them at 13 Highfield, Church Aston. She referred to the Application Land as "the fields by the pumping station". She first became aware of it when the family moved to their present address and immediately began to use it with her 7-year old twin daughters: walking, riding bikes, exploring the hedgerows, visiting the horses and the pond in the Horse Field, taking an occasional picnic in the summer and sledging in the winter. As the girls grew older they would go to the land with their school friends from Station Court and Pen-y-Bryn Way to ride bikes and climb trees, exactly where she was not sure. There were always people about, walking, running or with dogs. The girls also used the land as members of the Church Aston Brownies and Guides, to learn about nature and collect materials for art work. Even now they would walk around the land when they visited home, reminiscing about their youth, and taking her 2-year old grandson.

136. As a diabetic for the past 8 years Mrs Pay had done a lot of walking on the land to control her blood sugar levels. Her husband usually joined her. They incorporated it into longer circular routes. When there were crops in the Round Field they would stick to paths, but not after harvest. When there were no crops she would take a diagonal

[74] A345-347.

route across the land; she had also used the tractor tracks. She had orientereed in the past, although not on this land, and disliked going back the same way as she went, preferring to take a circular route. She remembered a maize crop being grown once only: that was the latest crop to be harvested. Other crops were harvested earlier in the year and in the winter the ground was frozen and very suitable for walking.

137. She had also met and got to know other people from the neighbourhood of the site. To her, a neighbourhood was a collection of houses with a school, and a village shop; the big stones by the Mere, the Bypass and the Wellington Road identifying Church Aston made it feel like her local area. She could not recall when they were put there, perhaps 13 or so years ago. There had used to be a village shop in Church Aston and there was a school, village hall, church and church hall. Now the local shop was the 8-8 Premier store in Springfield.

138. She had not appreciated that the Objector owned the land until recently, thinking it belonged to the Marsh family. She had never sought permission to use it and had taken the wide headlands as sign of active encouragement of public use.

Mrs Susan Ashton

139. Mrs Ashton had completed a questionnaire and made a written statement.[75] She had lived at 26 Pen-y-Bryn Way, Newport for nearly 10 years. Before that she had lived in Wallshead Way, Church Aston from 1972 to 1996, and then on the northern side of Newport until 2002. She had used the Application Land for walking, cycling and jogging since 1972 (except for 1996-2002) and felt safe there as a woman on her own. She had enjoyed making friends with the horses, bird watching and looking for nuts and berries. Since April 2010 she was retired and walked her 2 dogs there twice a day. The community had used the land unhindered for 40 years so far as she was aware. She knew it as “the Horse Field” and “the dog walking fields”. When the horses were not in the Horse Field she would walk round it and stand at the edge of the pond. In her questionnaire she had said that she jogged and speed-walked the paths; she should have added cycling. In answer to Mr Edwards she said that when the crops were not in the

[75] A41-48.

field she would "criss-cross" to take more steps. She would use the paths when she could not go anywhere else because there were crops or horses in the field. She would not dream of walking across crops. She had mentioned seeing bonfire parties in her questionnaire but that was off the Application Land. She had also ticked drawing and painting but had only seen one artist.

Mr Will Ellarby

140. Mr Ellarby had written a short statement.[76] He had lived at 33 The Smithfield in Newport since 2007. Previously he lived at 4 Station Court from the age of 3 in 1983 until 1998, returning to the area in 2003. As a child between the ages of 8/9 and 11/12 (i.e. up to about 1991/2) he had played with other children from Station Court, Pen-y-Bryn Way and further afield building forts and bases in the part of the Wooded Area just north of the Horse Field entrance (the Copse area). When he was smaller his father had taken him tobogganing where there used to be an incline by the recycling centre. He had ridden his bike around the edges of the fields. He had also used the land with the Cubs (1988-90) and Scouts (1990-96) from Church Aston, tracking and trail-laying. They would do that in the summer as often as they could, at least monthly. The Scout leader would not let them injure the crops in the Round Field; they were taught to keep out. They would go over the path in the Horse Field. As Cubs/Scouts they never went in the Copse area (although the Beavers did things there and had a rope swing).

Written evidence

141. The Applicant also relied on a body of written evidence of user, in various formats. First, there were a number of witness statements (some accompanied by questionnaires), of which the salient points can be summarised as follows.

[76] A321.

Mrs Rosamund Barsley[77]

142. Mrs Barsley wrote that she had lived at 5 Queens Drive, Newport for 28 years, and used the Application Land with her family during that period for walking, daily dog walking, cycling, nature watching and collecting blackberries, damsons, sloes and nuts from the hedgerows. They had generally stuck to the paths and headlands, but between harvest and planting of the next crop they would walk across the stubble. Her children and grandchildren had been allowed to run round and fly kites. They had played in the Wooded Area. There was a diversity of wildlife to observe and most walks with the grandchildren turned into nature trails. Daily she saw others using the land for dog walking, cycling, horse riding and socialising. Schoolchildren from Church Aston used the paths to walk to school (mainly Burton Borough School).

143. The Horse Field had always been used for horses/livestock and the Round Field for wheat, oil seed rape and winter barley (save for 2002-2007). Mr Bubb[78] had kindly left wide field margins to make walking round the field boundaries easier.

144. In a supplemental statement she wrote that she had agricultural qualifications and experience and wished to dispute Mr Bubb's witness statement to the extent that he claimed to have sprayed or fertilised the crops as often as every 3 weeks. She also attached a map on which she had marked the paths she used on a regular basis.[79] Crossing the Application Land, these were along the western, north-western and eastern edges of the Round Field and the western edge of the Horse Field, and the path leading to those paths from the Station Road entrance. She said that after Mr Bubb had ploughed up some footpaths in September 2008, some of the local residents had asked "if the unofficial footpaths could be made official". Mr Andrew Careless, the Council's footpaths officer, had supplied the necessary application forms and Mrs Barsley and another had collected over 60 user statements to support the application; however, Mr Bubb had assured them that they could continue to walk the unofficial footpaths so long as no damage was done to crops, and the matter was pursued no further. Unfortunately Mrs Barsley was unable to give evidence as she was out of the country, and it was not

[77] A299-302D.
[78] The farmer who has grown crops on the Round Field since 2008; see paragraph 181 below.
[79] A302D.

clear whether the "unofficial footpaths" intended to be the subject of an application for official recognition had included any across the Application Land.

Mr Gary Cooper[80]

145. Mr Cooper wrote that he had used the Application Land since 1978 (when he was 14). He had played there within the confines of the Country Code (including keeping off crops). During the past 20 years, when living at 15 Greenacres Way, Newport and formerly Meadow Road, he and his wife had used the pathways for walking/cycling at least monthly and his children had played there. The Wooded Area allowed for less rigorous adherence to the pathways, as did the Round Field when stubble. They had seen others dog walking, cycling, jogging and playing with children in similar fashion.

Mr Charles Corfield[81]

146. Mr Corfield (a Church Aston Parish Councillor) wrote that he had lived at 15 Highfield, Church Aston, Newport since 1978. The Application Land was an ideal area to take the family dog for a walk and let it off the lead for a run. His office overlooked the Application Land and he had seen walking, running, cycling, kite flying, bird watching, blackberry picking and children playing on it (which part(s) he did not say). Mr Marsh[82] had given Mr Corfield express approval to use the land. Generally he and his family stuck to the paths but after harvest there was more extensive use.

Mr Stuart Evans[83]

147. Mr Evans wrote that he had lived at 14 Silverdale Close, Church Aston since 1996. He had used the Application Land as part of his regular running route about 3 times a week for the past 16 years, and been aware of others using it for walking.

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[80] A71-74.
[81] A75-79.
[82] The former tenant of the Round Field: see paragraphs 193-194 below.
[83] A115-116.

Mr Craig Henderson[84]

148. Mr Henderson wrote that he had lived at 60 Wallshead Way, Church Aston, Newport since 1990. In subsequent years he and his family had used the area for walking, dog walking, cycling, kite flying, picnics, fruit picking and feeding the horses, as had other people. In his questionnaire Mr Henderson wrote that during the past 4 to 5 years "the farmer has always left the areas used for walking, cycling etc free from crops in order for this to continue".

Mrs Marion Horrocks[85]

149. Mrs Horrocks wrote that she had lived at 40 Ashworth Way, Newport since 1990. She and her husband had used the Application Land over the years for walking, sometimes with a dog; socialising with other walkers; playing games with their children; teaching their children about nature; learning about wild fruits and nuts; bird watching; stargazing; photography; running; relaxation. She and her family generally stuck to the paths and hedgerow edges or used headlands and the Wooded Area. Others used the Application Land for the same activities.

Mr Paul Ibbetson[86]

150. Mr Ibbetson wrote that he had lived at 14 Station Court, Newport for nearly 22 years. He had walked a dog there daily up to 2006, there were a large number of regular dog walkers who had become friends. His children had played and flown kites there and been taken to see the horses; he had picked sloes and damsons. They generally stuck to the paths unless the Round Field was fallow, which it had sometimes been. The Horse Field had always been used to keep up to 4 horses. He was aware of others using the land for walking, dog walking, cycling, jogging, seasonal fruit picking and as a short cut between Church Aston and Newport.

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[84] A163-168.
[85] A169-178.
[86] A331-336.

Mr Colin Meadows[87]

151. Mr Meadows wrote that he had lived at 9 Highfield, Church Aston, Newport for 27 years. He had used the Application Land almost daily as a footpath to Newport High Street and for exercising family pets. It was a meeting place for regular dog walkers. He used to stick to the already formed paths unless the farmer had ploughed over them. Another use was to take his grandchildren to see the horses in the field.

Mrs Grace Meadows[88]

152. Mrs Meadows's statement was in identical terms to that of Mr Meadows, who is presumably her husband.

Mrs Kathy Mills[89]

153. Mrs Mills wrote that she had lived at 3 Station Court, Newport for 30 years. In the early years her children had played on the Application Land, sledged in the railway cutting and collected damsons, and walked through to infant school or to visit friends. She had taken the Church Aston Beavers through the land for nature walks. She had been involved in the Newport-in-Bloom group's project to clear and plant the entrance area and in the maintenance of the road frontage. Currently, she regularly walked the paths crossing the land with her grandson. She was aware of many others walking, dog walking and jogging there.

Mrs Pauline Stansfield[90]

154. Mrs Stansfield wrote that she had lived at 7 the Close, Church Aston, Newport for 19 years. She and her family had used the Application Land for dog walking and bird watching, as did others. They generally stuck to the paths and were careful to avoid encroaching on any cultivated land. She had always thought the Application Land to be

[87] A185-188.
[88] A189-193.
[89] A195-200.
[90] A247-251.

farm land with public rights of way. The farmer had always kept the pathways and field margins open for public use.

Mrs Helen Taylor (nee Pay)[91]

155. Mrs Taylor[92] wrote that she had lived at 13 Highfield, Church Aston from 1986 (when she was 7) until 2000. Her parents had taken her and her twin sister to the Application Land to look for insects, birds and animals in the bushes, trees and grass. They frequently incorporated the area in walks. She and her sister had spent many hours playing in the area by the Horse Field with friends from Station Court, Pen-y-Bryn Way and The Spinney, building dens, climbing trees, riding bikes on the paths and chatting, building snowmen and sledging. As Brownies and Guides they had gone on nature walks and tracking through the area.

Mrs Susan Thacker[93]

156. Mrs Thacker[94] wrote that she had lived at 6 Pinewoods, Church Aston, Newport for 22 years. She had used the Application Land for walking with (or without) a dog and to appreciate the wildlife. She stuck to the paths. She was aware of others walking, walking dogs and riding horses.

Mr Gary Stuart Wade[95]

157. Mr Wade wrote that he had lived at Station Cottage, Station Road, Newport for 2 years and previously at High Meadows and Avenue Road South, Newport. He and his family had used the Application Land over the past 18 years for running, walking, cycling, dog walking and educating the children in nature. Others had used it for similar activities and for orienteering events and metal detecting. They generally used the headlands or played in the Wooded Area.

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[91] A349-350.
[92] Mrs Alison Pay's daughter: see paragraph 135 above.
[93] A261-262.
[94] Presumably Mr Colin Thacker's wife: see paragraph 133 above.
[95] A263-267.

Mr Phil Walker[96]

158. Mr Walker wrote that he had lived at 9 Queens Drive, Newport for 40 years, for the first 30 years of which he and his family had used the Application Land for walking, jogging and cycling. He had been aware of others using it for dog walking photography and bird watching.

Mrs Louise Yarrington[97]

159. Mrs Yarrington[98] wrote that she had lived at 8 The Dale, Church Aston, Newport for 14 years. She had used the Application Land over the past 16 years for horse riding, dog walking, foraging for wild food, socialising with friends, astronomy, spotting and teaching her nephews and niece about wildlife, photography, and kite flying. She generally stayed on the footpaths and headlands on the Round Field during the growing season although she had used the whole of the Round Field when it was fallow and after harvest. She had always used the whole of the Horse Field.

160. Secondly, there were a number of evidence questionnaires completed by residents of the Claimed Neighbourhood who had not given oral evidence or made written statements.[99] It is not practicable to summarise their contents in this Report, but Appendix E includes a table giving their names, addresses, claimed user periods and claimed activities. The data is of very limited assistance because neither the questions nor the answers make any distinction between the different parts of the Application Land, or between use of paths and off-path use; or between different years or times of year. The question "How often do/did you use the land?" is not designed to elicit information about the relative frequencies of use for each of the various activities specified.

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[96] A355-356.
[97] A275-280.
[98] Presumably Mr Luke Yarrington's wife see paragraph 56 above.
[99] Collected at A359-444.

161. Thirdly, the Applicant relied on a large number (248) of completed "evidence cards"[100] which local residents had been encouraged to fill in and send directly to the Registration Authority in support of the Application. Addressees were asked whether they were in favour of the Application and if so, for what sports and pastimes they had used the Application Land, and for what period, and of what area they considered themselves to be inhabitants. Again, it is impracticable to summarise their contents in this Report. The parties very helpfully produced an analysis by household of the activities claimed in the cards (and other letters sent to the Registration Authority): Appendix F to this Report. Although their figures (unsurprisingly) did not exactly tally, they were reasonably close and I have not undertaken the same exercise by way of checking the figures. (It should be noted that among the persons who sent cards and letters to the Registration Authority were persons who later gave oral evidence or supplied written statements or fuller questionnaires for the Applicant, so there is an overlap between the categories of evidence relied on by the Applicant.) Of course the evidence cards gave no indication of the part(s) of the Application Land on which, the periods during which, or the frequency with which, activities had taken place.

VI. The Objector's evidence

162. The following is a summary of the oral evidence given on behalf of the Objector in the order in which it called its witnesses. Except where otherwise stated, I accept their evidence.

Mr Edward O'Brien

163. Mr O'Brien had made a statutory declaration.[101] He had held annual grazing licences of the Horse Field, and kept horses there most of the time, since 16 August 1993. He took them off only when the field was waterlogged, which happened fairly regularly when the storm drain filled up: perhaps several times a year. This year had been "unbelievably bad". Between 1 April and 31 October he also had use of another field and divided his horses between the two fields. That had been the case for 8 or 9 years.

[100] Collected at A469-595.
[101] O107-111.

The average number of horses he had had was 3 or 4 adults; sometimes there were also foals, which he took off at 6 months old. Most of his horses had been mares, from which he bred, but some he trained up for driving, one at a time. He did not breed foals every year. It was over 3 years since there had been a foal on the field. In 2011 he had had 6 adults, and a donkey (on the other field).

164. In his statutory declaration Mr O'Brien had said that he or his wife visited the field twice a day to feed the horses, once at approximately 11am and once at approximately 6pm. In oral evidence he said that they ate grass during the summer, although mares in foal might be given extra corn (a process that could take up to 2 hours). At other times of year they would be fed hay. That involved tossing hay over the vehicular gate from the layby on Station Road. He would take someone with him (his wife or someone else) to do that. That was done in the evenings. But the horses still had to be checked every day, twice a day, even when they were eating grass. They could not be checked when they were fed in the winter, it was too dark. Mrs O'Brien would go in the daytime to check them when he was at work; she would call them over to the gate and give them carrots. It might take her 20 minutes to check them. He had to pass the land on his way home from work.

165. If the mares were in foal he might attend more than twice a day, perhaps hourly. There were other tasks to do, such as clipping the horses' feet. He would spend time weeding the field; it could take 5-6 hours a day to pull the ragwort, over 1-3 weeks in late July/early August. He had spent time walking round the field checking the fences, which children used to pull down. The recent replacement of the old barbed wire fencing with the new wooden fencing was "the best thing that had ever happened to the field"; he did not need to check or repair that yet. There used to be a shelter but he had to take it down about 4 years ago; it was vandalised and full of cider cans.

166. He had seen members of the public walking through the field; they had come over the stile at one end and gone out at the other end. They had never bothered the horses. He assumed they had not wanted to go near them. 90% of dog walkers had put their dogs on the lead; on occasions he had seen dogs run off and the owners stand on the path calling them. The path was not much worn. The horses ate the grass. There had been

a plank bridge and there used to be a handrail up to about 10-12 years ago. The old bridge had become rotten and unusable. Another handrail had been put up with the new bridge but it only lasted a couple of days. People did still walk through the field since the fencing was put up. The access points had not changed.

167. He had never seen any activities other than walking with or without dogs in the Horse Field (except for one lady collecting manure a long time ago). It was possible to walk round the field, but he had not seen many people do it. Football would be impractical. People could look at wildlife, or take photographs, or go pond dipping, or pick sloes in the western hedgerow or the south-eastern corner; but he had never seen anyone do any of those things. Up to August each year he allowed patches of thistles to grow to attract goldfinches.[102] Those were a partial restriction to access. There were also nettles. In years when there was less rain the pond was a mudbath, not a pond. He had never been in the Wooded Area or the Round Field.

168. He had seen people feeding his horses, but never from inside the field. Mainly they were on the other side of the fence at the southern end. He would warn them it was dangerous, if the horses were pushing and shoving for carrots. He had occasionally seen them fed from the Station Road gate. If he saw children in the field he would ask them not to go near the horses; if they got kicked, he would be in trouble. He had no recollection of Mr Tom Clarke befriending his horse.[103] Some years ago a girl from the pub had cut the manes and tails and hind leg feathers of his horses and he had pinned up home-made notices in plastic folders on the gateposts asking people not to touch his horses. He could not recall when; his memory was "c**p".

169. At one point in his evidence he forgot that the southern stile had been replaced by a kissing gate but he explained that by saying that he had not had horses on the field much this year and moreover had not needed to check the new fencing.

170. The Applicant's counsel were very critical of the quality of Mr O'Brien's evidence, but I do not think fairly so. Mr O'Brien struck me as somewhat impatient with the process,

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[102] In areas indicated by blue hatching on the plan at O111.

[103] See paragraph 132 above.

someone who preferred to paint with a broad (and colourful) brush than to concern himself with minutiae, but I do not think that he was dishonest or that his memory was as bad as he (I suspect with a touch of irony) professed. With the possible exception of the evidence given by Mr Clarke that he had met the owner of the horses who knew he and his friends were sad about the departure of their favourite horse, I can see no necessary conflict between Mr O'Brien's evidence and that of the Applicant's witnesses and am not sure exactly what parts of his evidence I am invited to reject as not credible. If it is that he saw no local inhabitants doing anything in the Horse Field other than walk through, no witness for the Applicant claimed to have encountered him in the Horse Field when he/she was doing something else. It seems entirely probable that at times when Mr O'Brien was in the field, even people who might have thought of doing something else would have tended to walk straight through, out of courtesy or of fear that he would object.

171. If it is that he spent any time in the field tending to his horses or pulling ragwort or cutting thistles or checking fences, the answer must be that those were tasks which had to be done by a responsible horse owner and on the balance of probabilities he did them and took time in doing them. The implication of some of the Applicant's witness evidence that all he really ever did was to stand outside the field throwing in hay seems the less credible (and is contradicted by the evidence of Mr Wiggin[104]). If it is that he asked children in the field not to go near his horses, or that he put up notices on the gateposts, regrettable as it is that those assertions were only made oral evidence when it was too late for them to be put to the Applicant's witnesses, I do not think that the Applicant's witness evidence disproved either assertion. I am not making a finding that Mr Clarke did not meet the owner and express his sorrow at the horse's departure; it was not put to him in cross-examination that he did not. But Mr Clarke's account was insufficiently detailed for me to conclude on the basis of it that Mr O'Brien was not telling the truth when he said he asked children in the field to keep away from his horses. That encounter could have taken place off the field, and/or after the horse in question had departed, making it redundant to warn Mr Clarke and his friends off; and they were well into their teens by the time it departed, rather than children. It would not follow from that one encounter having slipped Mr O'Brien's mind that he never

[104] Paragraph 110 above.

asked any children to keep away from the horses, or that the incident with the girl from the pub did not occur.

Mr Alan Slater Fox

172. Mr Fox had made a statutory declaration.[105] He had a BSc Hons degree in valuation surveying and was a Member of the Royal Institution of Chartered Surveyors. He had held the post of Service Delivery Manager within the Objector's property department since 2008, running the estates and investments business unit with responsibility for all properties in the Borough. Before 2008 he had been employed as a surveyor, managing and selling properties, with no responsibility for the Application Land. He would have become aware of the Application Land in 2008. He lived some 20 miles away from Newport.

173. Mr Fox had in late March 2012 given instructions to Mr Rob James to conduct surveillance of the use of the Application Land, by visiting it every 2 hours between 8am and 6pm over a number of days and making records of his observations of use on those visits. [Mr James's evidence is summarised at paragraphs 178-180 below.] No previous surveillance had been undertaken. Mr James could not attend on Easter Sunday (8 April) so Mr Fox went instead, at 8.30am, 12.30pm, 3.30 pm and 6pm. He parked on the Springfield industrial estate and walked to the Station Road entrance to the Application Land, followed the Hutchison Way through the Horse Field, then turned west into the Round Field and went up the worn path on the eastern side and along the northern side to the pumping station. In chief he said that he had a clear view of the whole site, but in cross-examination accepted that it was not possible to see through the hedge between the fields at all points or through the Wooded Area to the left of the Station Road entrance. His visits lasted about 15 minutes each. He took his dog with him. The weather was "typical Bank Holiday weather"; it rained in the morning and was overcast all day. The ground was not dry but not waterlogged. There were horses in the Horse Field and the rape crop had been planted.

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[105] O9-50.

174. On each visit, he marked up a plan before leaving the Application Land to show the number of persons he had seen, their locations, and what they were doing. He had not noted their directions of travel. The plans[106] show that in all he noted 5 walkers (3 with dogs) on the pathway near the Station Road entrance, and 1 walker (with dog) on each of the Horse Field fenced pathway and the trodden path along the east side of the Round Field. He saw no other activities and no "off path" use.

175. Mr Fox confirmed that fencing had been erected around the perimeter of the Application Land on 17 February 2012, as marked on the plan at his Exhibit "ASF6".[107] It was done to protect the land for development purposes. The Hutchison Way was fenced to demarcate the public footpath. He did not agree in cross-examination that it was unduly restrictive or had changed the pattern of public use.

176. The fencing had been vandalised and had to be repaired on an ongoing basis. Mr Fox produced a series of photographs of the fencing taken by Barry Lowe Surveyors on his instructions on 20 February 2012, some showing damage.[108] The southern perimeter of the Round Field had been fenced off, but a gap had been made so it was possible to enter from the southern end of the Horse Field by the time of the surveillance exercise.

177. He produced a further series of photographs taken by Barry Lowe Surveyors on 9 May 2012[109] to show the rape crop.

Mr Robert Matthew James

178. Mr James had made a statutory declaration.[110] He had a BSc Hons degree in architectural technology and design and had been employed as an architectural technician prior to setting up his own practice, RMJ Architectural Services, in March 2012. At the end of March 2012 he had received instructions from Mr Fox to conduct surveillance of the use of the Application Land, by visiting every 2 hours between 8am

[106] O14-17.
[107] O18.
[108] O19-31.
[109] O32-50.
[110] O51-106.

and 6pm over a number of days and observing and recording the use made of it. He visited the Application Land at 8am, 10am, 12pm, 2pm, 4pm and 6pm on Monday 2, Tuesday 3, Wednesday 4, Thursday 5, Friday 6, Saturday 7, Monday 9, Monday 16 and Tuesday 17 April 2012 (except for 10am on 6 April). 6 April was Good Friday and 9 April was Easter Monday. He explained that he would park his car on the industrial estate road, and walk down Station Road to the Hutchison Way entrance. He would turn left into the Horse Field and go down to the bottom, then go up to and along the top of the Round Field, and return to his car by means of either Spring Gardens or the Hutchison Way entrance. He would record his observations from memory when he got back to the car.

179. He produced copies of the plans which he had marked up on each visit.[111] This he did by placing a cross on the map to indicate the position in which he had seen a person (or persons), with a key describing how many people, and of what sex, and whether they were accompanied by a dog or dogs. When he saw no one, he wrote "nothing to report" (which was the case on 3 April at 12pm and 6pm, 5 April at 4pm, 6 April at 4pm, 7 April at 8am, 12pm and 4pm, 9 April at 4pm, 17 April at 12pm and 6pm; and at 4pm on 4 April and 6pm on 7 April his only observation was of dog walkers off the Application Land). On each of the other occasions, he noted having seen between 1 and 5 people on the land, sometimes together, sometimes separate, in all but one case accompanied by a dog or dogs. He said he did not witness anyone doing anything other than walking along "the linear routes identified on the map". Of the 84 people in total he noted having seen on the Application Land,[112] he seems to have located 38 on the path along the north side of the Round Field, 6 on the new path through the Wooded Area, 3 at the entrance to the Horse Field, 3 on the Horse Field fenced path, 11 on the path near the Station Road entrance, 2 on the southern perimeter of the Round Field, 1 on the western perimeter of the Round Field, and 20 on the north-south route across the Round Field shown as a path on the OS base map used by him (i.e. the 'path (um)' line on the Appendix B map) but not on the ground (I surmise in error for the eastern margin of the Round Field). He said that there were horses in the Horse Field on his visits.

[111] O55-106.
[112] I am counting the 'family' observed at 2pm on 6 April as 4 people.

180. In cross-examination, he accepted that he had no experience of surveillance as such, and that he had simply followed Mr Fox's instructions. He accepted that it had been cold in the mornings, that it had rained every day except on 5 April and that there had been very little sunshine on most days. He had not taken a note of the conditions on the Application Land. He conceded that it was difficult to see people through the hedgerow between the two fields and through the Wooded Area by the Station Road entrance.

Mr Michael John Bubb

181. Mr Bubb had made a statutory declaration.[113] He had farmed the Round Field, together with the fields adjoining it to the south and west and other pieces of land, as shown edged green and red on the plan exhibited to his statutory declaration,[114] since 24 September 2008. He had had no involvement with the Round Field prior to that date. He described himself in his statutory declaration as a sub-tenant of Mr G Marsh (and subsequently, Mr Marsh's executors).[115]

182. Since September 2008 he had grown crops on the Round Field, as follows:

2009 - rape
2010 - winter wheat
2011 - winter wheat
2012 - rape

183. Rape was harvested at the end of July, weather permitting. In 2009, the straw was chopped with a combine and left on the ground; in 2012, it was baled. That was done a few days after harvest. The land was immediately then cultivated to a depth of 400 mm to loosen the soil in preparation for the next crop and to germinate weeds. After cultivation it was left alone for 4 or 5 weeks, before being sprayed with Roundup to kill the weeds. 3 or 4 days later, the land was drilled to create a tilth and plant the next

[113] O4-8.
[114] O8.
[115] In fact, the documents produced by Mr Christopher Jones (paragraph 195 below) show slightly more complicated arrangements.

crop's seed in the ground. From then until spring, the concerns were to control weeds and pests. September, October and November were busy months in that regard; December and January were quieter. The crop would be sprayed every 3 weeks in September-November, but not at all in December and January. However, it was still necessary to check the crop during those months for damage by pigeons, rabbits, or slugs. In February fertilizer was applied and a 3-week spraying programme was commenced. This continued until harvest. This summer, the field had been harvested at the end of July/beginning of August and cultivated in August with a view to planting winter wheat. However, the current plan was to sow potatoes next spring.

184. The normal window for harvesting winter wheat was early August to mid September. It was sown in September or October. There was an interval of only about 3 or 4 weeks between harvesting the 2010 crop and drilling the 2011 crop. The regime was otherwise the same as for rape.

185. Germination of crops depended on moisture and temperature but took on average 2-3 weeks. Wheat was slower to grow than rape. It reached 3-4 inches in the autumn but "did not really move until April". Thereafter, it grew very rapidly, up to 2 to 3 feet by June. Rape would reach 4 to 5 inches in the autumn, hold over in December and January and then start growing again in February. Growth between March and May was very rapid, up to 4 feet tall. Rape was a very dense crop. From May until harvest it was a tangle of very strong stems and impenetrable. Before May, it was possible to walk up and down the tractor tracks. Wheat was different; it only grew to 3 feet and it was possible to traverse the tractor tracks at any stage.

186. Mr Bubb said that he had not himself carried out the spraying and fertilising of the Round Field, but he had heard of no problems with members of the public while it was being done. He imagined that they would hold back until they saw where the tractor was going. Fertilising would take only about 10 minutes, spraying not much longer. It could be any time of the day, between 7am and 7pm. It could be at weekends, but preferably not on Sundays.

187. Mr Bubb probably only visited the field himself once every 4 or 5 weeks. It was, however, inspected by an agronomist every 2 weeks or so (except in December-January). Had he seen any significant crop damage, he would have reported it. Mr Bubb had never seen or received a report of damage to the crops from trespass, which he would not have welcomed. When he did visit, he would sometimes drive and sometimes walk around looking for problems such as damage, lack of growth, or evidence of nutrient shortage. He would go along the tramlines or into the middle of the crop. His visits would last about 20 minutes. He had quite often visited at weekends.

188. He would not worry about people going on the field during the 5 week interlude following cultivation, when nothing was growing and no damage could be done. During the winter the crops were quite hardy, but he would not condone their being walked on. He had seen no evidence of people walking through his crops and "would have had a word" if he had seen it being done. He had not seen or had reports of any individual human footprints in the crops. There had been no signs of concentrated or repeated human footfall, to which he would have taken exception. There was a 6m-wide margin of grass on the north-west and east sides of the field and part of the southern side, which the public frequently used. There was a narrow strip of grass around the remainder of the perimeter, as there was around virtually all the fields he farmed. The hedge had been removed from the rest of the southern boundary, and tractors could go straight through to the next field until the fence went up in 2012. The stewardship scheme obliging him to keep the wide strips uncultivated had now come to an end, but he proposed to keep mown strips (albeit narrower). The public had been "just great"; they had stuck to the footpaths and there had been no issue. There had been just one dispute, when he ploughed across a footpath (not on the Application Land), but he had put it right very quickly. The strips around the Round Field were not public footpaths, but he had decided to let people carry on round there because it was harmless. Had he owned the land he would not normally have been so accommodating, but it was not his and the path walkers were there before him.

189. He had never seen anyone do anything other than walk (with or without a dog) around the perimeter of the Round Field: no picnics, kite flying, blackberry picking, ball games or other sports or pastimes.

190. Mr Bubb was asked some questions, in cross-examination and by me, about other types of crop said by the Objector to have been grown in the Round Field during the 20 year period.[116] Silage was, he said, basically grass. It would be sown in August/September or in March/April and left to grow until a cut was taken with a forage harvester. 2 or 3 cuts would be taken in a year. It depended on the species of grass whether it was replaced after one year or left for 2 to 3 years (the norm). Maize was sown in May because of the risk of frost damage, and harvested in September/October. Spring wheat was planted in February/March. Winter barley was sown in September/October and harvested in mid-July, the day after the Newport Show. Spring barley was sown in spring and harvested in mid-August.

191. Silage grew long quickly and would be wet to walk in without tall wellingtons. Barley was like wheat; you could walk along the tractor tracks any time. Maize was uncomfortable to walk among along the tractor tracks; it would grow up to 5 or 6 feet, although more vertically than rape. Maize stubble was strong and high and could be left for up to 3 months if followed by a spring crop.

192. Tractor tracks were about 12 inches wide and consisted of bare earth. They were sprayed but wild flowers would "pop up". If people were so inclined they could go along the tracks to take a look.

Written evidence - Mr Christopher John Jones

193. The Objector also relied on a statutory declaration made by Mr Christopher John Jones.[117] He had been involved with 20ha of farm land on both sides of Station Road, including the Round Field, as agent for Mr G E Marsh of Middle Farm since before 1998.

[116] See the summary of Mr Jones's evidence, at paragraphs 193-195 below.
[117] O112-354.

194. The land was formerly part of Middle Farm, Chetwynd Aston and farmed in-hand by Mr Marsh until his retirement and the subsequent sale of the farm in 1998. The land was used for cattle grazing and the growing of fodder crops until the construction of the Newport bypass (A518) in 1992 and subsequent severance of the land from Middle Farm. From then until 1998 the land was used for the arable rotation of grassland for silage production; wheat (feed); barley (feed); and maize. Following the sale of Middle Farm it was retained by Mr Marsh and let to other farming businesses on a series of tenancies and licence agreements.

195. Mr Jones exhibited a series of such tenancy and licence agreements. Not all related to the Round Field. Those that did were as follows:-

- A farm business tenancy agreement between Mr Marsh and E J Stokes & Son for a term from 30 November 1998 to 29 September 2000.[118] The tenant was required by clause 4.1(b) and Schedule 1[119] to use the land for arable purposes only throughout the term. Mr Jones said that Mr Stokes had recently informed him that winter wheat was the 1999 harvest and winter barley the 2000 harvest on the land west of Station Road.

- A farm business tenancy agreement between Mr Marsh and H Timmis (Farms) Ltd for a term from 30 September 2000 to 29 September 2002.[120] Use of the land was similarly restricted, but Mr Jones had been unable to contact the tenant to check what crop was grown.

- A series of farm business tenancy agreements between Mr Marsh and J H Thomas & Sons dated 6 March 2003, 11 June 2004, 1 October 2004, and 8 September 2010,[121] under which the holding was required to be used for set-aside purposes only or (from 1 October 2004) for growing arable crops or set-aside. Mr Jones said that he had been recently informed by Mr Thomas that the land was used for set-aside until September 2008. Set-aside was the agricultural

[118] O120-138.
[119] The Round Field is erroneously identified as OS 8917 instead of |OS 8817 in that schedule.
[120] O139-161.
[121] O162-199; 291-309.

practice whereby an area of arable land (not including permanent pasture) was temporarily put to fallow as part of an arable rotation. A strict list of management rules had to be complied with, including keeping the land in good agricultural and environmental condition, maintenance of soil fertility and soil structure, adhering to cross compliance, the control and management of weeds, and cutting all of the green area (excluding buffer strips) each year. During the set-aside period the land was topped by Mr Marsh in accordance with the set-aside rules.

- Two licence agreements between J H Thomas & Son and J M Bubb & Sons for terms from 1 October 2008-30 September 2009 and 1 October 2009-30 September 2010, conferring the right to grow and harvest an arable crop only.[122] The attached plans[123] showed in red the "6 metre Buffer Strips on cultivated land" around the perimeters of the fields which Mr Bubb referred to in his evidence as required by the stewardship scheme to be left uncultivated (clause 4.1 (j) of the licences imposed an obligation on the licensee to comply). In the Round Field the strip extended along the entire north-western and eastern boundaries and continued part of the way along the southern boundary.

- A licence agreement between Mr Marsh and J M Bubb & Sons for a term from 1 October 2010-30 September 2011 granting the right to grow and harvest a cereal crop in some of the land including the Round Field and containing a like clause regarding buffer strips.[124]

- A licence agreement between Mr Marsh's executors and J M Bubb & Sons for a term from 25 September 2011-24 September 2012, conferring the right to grow and harvest a cereal crop but making no reference to the buffer strips.[125]

[122] O319-336.
[123] O327, 336.
[124] O337-345.
[125] O346-354.

VII. The law

196. In addition to the requirement that qualifying use must have been continuing at the time of the application, the criteria for registrability in section 15(2) can be broken down into the following elements, each of which must be satisfied on the evidence:

- a significant number of
- the inhabitants of any locality, or any neighbourhood within a locality
- indulged ... in lawful sports and pastimes
- as of right
- on the land
- for a period of at least twenty years.

That said, sight should not be lost of the fact that - as Lord Hoffmann put it in *Oxfordshire* at paragraph 68 - there is a (single) clear statutory question which has to be answered in each case on its own particular facts: have a significant number of the inhabitants of a locality or neighbourhood indulged in [sc. lawful] sports and pastimes [sc. as of right] on the relevant land for the requisite period?

"a significant number"

197. The meaning of "a significant number of the inhabitants" was addressed by Sullivan J in *R(Alfred McAlpine Homes Ltd) v Staffordshire County Council (McAlpine Homes)*[126]*,* as part of the *ratio decidendi* of that decision. He said that it did not mean a considerable or substantial number, because a neighbourhood might have so limited a population that a significant number of its inhabitants could not properly be so described:

> *"...whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask*

[126] [2002] 2 PLR 1, at paragraph 71.

the question: significant for what purpose? In my judgment the correct answer is …: that what matters is 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."

198. Under the 1965 Act definition of a class c town or village green as originally enacted,[127] the user had to have been predominantly by the inhabitants of the relevant locality: *Paddico (267) Ltd v Kirklees Metropolitan Borough Council ("Paddico")* [2011] EWHC 1606 (Ch), upheld by the Court of Appeal [2012] EWCA Civ 262 on that point. No predominant user requirement is to be read into the amended version of section 22 of the 1965 Act: *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) ("the *Warneford Meadow* case"), or by analogy into section 15. The High Court held that there was no implicit requirement for most of the users to have lived in the relevant locality or neighbourhood. The provision was clear in its terms: so long as a significant number of the inhabitants of the locality or neighbourhood were among the recreational users of the land, it did not matter that many or even most users came from elsewhere.

"the inhabitants of any locality, or of any neighbourhood within a locality"

Locality

199. Vos J held in *Paddico* that "locality" was to be understood in both the 1965 and 2006 Acts as meaning an administrative district, or an area within legally significant boundaries. The Court of Appeal agreed but took a more restrictive view in that they (unlike Vos J) rejected a conservation area as a possible locality despite its having legally significant boundaries; it was not a community, and its boundaries were not defined by reference to any community of interest on the part of its inhabitants (paragraphs 29, 62). So legally significant boundaries are necessary, but not sufficient, to constitute a locality. An administrative area such as a civil or ecclesiastical parish will clearly count, but no guidance was given either way as to the status of electoral

[127] See paragraph 6 above.

wards. In *R(Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P&CR 573 ("*Laing Homes*"), Sullivan J had in passing cast doubt on whether an electoral ward qualified as a locality.

Neighbourhood

200. The concept of a "neighbourhood" is more flexible than that of a "locality", having no connotation of legally recognised boundaries. This was confirmed by Lord Hoffmann in *Oxfordshire*:[128]

> " *'Any neighbourhood within a locality' is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries.*"

201. Lord Hoffmann went on in the same paragraph to disagree with the obiter dictum of Sullivan J in *Cheltenham Builders* that "neighbourhood within a locality" meant a neighbourhood lying wholly within a single locality, saying that such an interpretation would introduce the kind of technicality which the amendment to section 22 of the 1965 Act was clearly intended to abolish, and there was nothing in the context to preclude the phrase being construed as meaning "neighbourhood within a locality or localities".[129] The point was not argued before the Judicial Committee, but Lord Hoffmann's obiter dictum might be considered to carry more weight and was accepted as correct by Sullivan LJ in *Paddico.*[130] Moreover, the High Court and a majority of the Court of Appeal held in *Leeds Group plc v Leeds City Council* ("*Leeds Group*")[131] that "neighbourhood" could be read as meaning "neighbourhood or neighbourhoods", and that the challenged registration had been justified by evidence of qualifying use by a significant number of the inhabitants of each of two separate neighbourhoods adjoining the claimed green. In considering whether the two neighbourhoods were "within a locality", the High Court rejected an argument that a "locality" in that context

[128] At paragraph 27.

[129] Applying section 6(c) of the Interpretation Act 1978, which provides that in any statute, the singular includes the plural unless the contrary intention appears.

[130] At paragraph 23.

[131] [2010] EWHC 810 (Ch); [2011] Ch 363.

is limited in size to an area which is not too big for the claimed green to have served as a recreational facility for a broad spread of its inhabitants.[132]

202. However, Sullivan J made the following further obiter remarks in *Cheltenham Builders,* which Lord Hoffmann did not disapprove:[133]

> *"For the reasons set out above under 'locality', I do not accept the defendants' submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."*

203. What the judge had said earlier about "locality"[134] (before going on to conclude that it meant a legally recognised administrative area) was that *"... at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a 'locality' ... there has to be, in my judgment, a sufficiently cohesive entity that is capable of definition*". He went on to quote Carnwath LJ saying in *Ex p. Steed* "*... it should connote something more than a place or geographical area – rather, a distinct and identifiable community, such as might reasonably lay claim to a town or village green ...".* In that case, the "locality" claimed by the applicants had been defined by a red line on a plan which the judge described as *"for the most part arbitrary in topographical terms*", bisecting individual houses and gardens and cutting across streets and an area of open space. There was no suggestion that the area so delineated was a distinct and identifiable community; it seemed to have been defined solely upon the basis that it should be drawn so as to include the user witnesses' homes. The defendant registration authority's acceptance of it as a "locality" was a fatal flaw in its decision to register the claimed green.

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[132] At paragraph 90. The contrary argument was not pursued on appeal.
[133] At paragraph 85.
[134] At paragraphs 43-47.

204. A neighbourhood does not need to have legally defined boundaries, but it does need to have defined boundaries. An argument to the contrary was rejected in the *Warneford Meadow* case. The judge said that to qualify as a neighbourhood, an area must be "*capable of meaningful description*" and must have "*pre-existing*" cohesiveness.[135] According to Judge Behrens in *Leeds Group*, the cohesiveness issue should be approached in the light of "neighbourhood" being an ordinary English word, and of judicial dicta to the effect that Parliament's intention in introducing the "neighbourhood" alternative was clearly to avoid technicalities and make registration of new greens easier.[136]

The registration authority's role

205. In *Laing Homes*, the question arose whether the applicants could put forward a candidate locality for the first time at the inquiry itself. The non-statutory inspector had taken the view that properly interpreted, the form prescribed by the 1969 Regulations (Form 30) did not require an applicant to identify or commit himself to any particular locality, and the judge agreed.[137] He subsequently quoted from the inspector's report as follows:

> *"It is clear from the scheme of the Act and the Regulations that the question of what is the relevant 'locality' (or if appropriate 'neighbourhood within a locality') in the section 22 sense is a matter of fact for the registration authority to determine (albeit in accord with correct legal principles) in the light of all the evidence, which may indeed contain a number of conflicting views on the topic …"*

The judge expressed agreement with that passage also.[138] He said that:

> "*Form 30 is not to be treated as though it is a pleading in private litigation. A right under section 22(1) is being claimed on behalf of a section of the public.*

[135] At paragraph 79.
[136] At paragraph 103.
[137] At paragraphs 136-137.
[138] At paragraphs 142-143.

The registration authority should, subject to considerations of fairness towards the applicant and any objector to, or supporter of, the application, be able to determine the extent of the locality whose inhabitants are entitled to exercise the right in the light of all the available evidence."

206. However, an applicant for registration under section 15(1) and the 2007 Regulations *is* required to identify, by description or by reference to a map, the area relied upon as the "locality" or "neighbourhood within a locality" a significant number of the inhabitants of which have used the land for recreation (see part 6 of Form 44).[139] There is no case law as to whether the registration authority can, without formal amendment of the application in that regard, register land on the basis of a different locality or neighbourhood from that specified by the applicant.

"indulged in lawful sports and pastimes"

207. "Lawful sports and pastimes" is a composite class which includes any activity that can properly be called a sport or pastime: *Sunningwell,* at pp 356-357. There is no requirement for organised sports or communal activities to have taken place; solitary and informal kinds of recreation, such as dog walking and children playing (whether by themselves or with adults), will suffice. Lord Hoffmann expressly agreed with what Carnwath J had said in *Ex p. Steed* about dog walking and playing with children being, in modern life, the kind of informal recreation which may be the main function of a village green. Nor is it necessary for local inhabitants to have participated in a range of diverse sports and pastimes. The majority of the House of Lords in *Oxfordshire* held that the rights to which registration as a town or village green gives rise are rights to indulge in all kinds of lawful sports and pastimes, however limited the number of activities proved to have taken place during the period of user leading to registration. However, in *Lewis*,[140] Lord Walker rejected the possibility of land qualifying for registration on the basis of a bonfire every Guy Fawkes Day; that, he said, would be "*far too sporadic to amount to continuous use for lawful sports and pastimes*".

[139] See paragraph 19 above.
[140] At paragraph 47.

208. In the *Warneford Meadow* case[141] the court interpreted the word "lawful" as meant to exclude any activity which would be illegal in the sense of amounting to a criminal offence, such as joy-riding in stolen vehicles or recreational use of proscribed drugs. A submission that all tortious activities were also excluded was rejected, on the basis that if that were so, no land would qualify for registration since all "as of right" use is trespassory in character, and that could not have been the legislative intention. It may be that sports and pastimes which are likely to cause injury or damage to the landowner's property do not count as "lawful", whether or not they involve the commission of a criminal offence: see the obiter dictum of Lord Hope in *Lewis,* at paragraph 67. However, the case he cited in support of that proposition was *Fitch v Fitch,*[142] where the court held that a customary right to play at lawful games and pastimes in a field did not entitle local people to trample down the grass, throw the hay about, and mix gravel through it so as to render it of no value - conduct which would seem to amount to the modern day offence of criminal damage.

"as of right"

209. Indulgence in lawful sports and pastimes on the land which is the subject of the application must have been "as of right" throughout the period of user relied on. In *Sunningwell* it was held that use is not "as of right" unless it is *nec vi, nec clam, nec precario*, translated by Lord Hoffmann[143] as meaning not by force, nor stealth, nor the licence of the owner; and that it is irrelevant whether the users believe themselves to be entitled to do what they are doing, or know that they are not, or are indifferent to which is the case. Lord Hoffmann said that:

> *"The unifying element in these three vitiating circumstances [i.e. vi, clam, and precario] was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right - in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."*

[141] At paragraph 90.
[142] (1797) 2 Esp 543.
[143] At p 350.

210. He then referred to *Dalton v Angus & Co* (1881) 6 App Cas 740, 773 where Fry J had rationalised the law of prescription (the acquisition of rights by user) as resting upon acquiescence. At pp352H-353A he said that the English theory of prescription is concerned with "*how the matter would have appeared to the owner of the land*". At p.357D he said that user might be "*so trivial and sporadic as not to carry the outward appearance of user as of right.*"

nec vi

211. The core meaning of "*vi*" is by physical force. But there is a line of authority, starting in private easement cases, to the effect that use does not have to involve force to be *vi;* it is enough for it to be contentious. Lord Rodger endorsed the principle in *Lewis*[144] (albeit obiter), observing that in Roman law (where the expression originated) "*it was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it*". The earlier authorities were reviewed and applied in *Betterment Properties (Weymouth) Ltd v Dorset County Council*.[145] The fundamental question is whether a reasonable user would have known that the landowner was objecting to and contesting his use of the land, whether by the erection of suitably worded notices or by alternative means.

nec precario

212. Permission can be express (in writing or oral), or it can be implied from the landowner's overt conduct. In *Beresford*, the House of Lords refused to rule out the possibility of an implied licence to use land for lawful sports and pastimes as a matter of law. Lord Bingham said at paragraph 5:

> *"I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, or record,*

[144] At paragraphs 88-90.
[145] [2010] EWHC 3045 (Ch); [2012] EWCA Civ 250.

that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use."

Lord Rodger at paragraph 59 said:

"I see no reason in principle why, in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant circumstances".

Lord Walker said at paragraph 83:

"In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends on the landowner's permission."

213. The House of Lords stressed, however, that permission cannot be implied from mere inaction on the part of a landowner with knowledge of the use to which his land is being put; that is acquiescence or tolerance which will not prevent the use being as of right.[146] There must be "*a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass*" (per Lord Walker at paragraph 75). Acts by which a landowner facilitates use (such as mowing grass, or leaving in place seating which spectators can use - the facts of *Beresford* itself) are not sufficient.

[146] See paragraph 6 per Lord Bingham, paragraph 59 per Lord Rodger and paragraph 79 per Lord Walker.

Pre-existing right

214. Land is not used "as of right" for sports and pastimes if the users already have a statutory or other legal right to use it for those purposes.[147] In such a case their use is referable to their existing right, not the acquisition of another one. It is "by right", or "of right".

Concurrent user by landowner

215. In *Laing Homes,* the claimed green had been used for growing a hay crop by a licensee of the landowner in more than half of the 20 years relied on. Sullivan J held that the land did not qualify for registration because the recreational users had always given way to the licensee when carrying out his agricultural activities, and so had not used the land in such a manner as to suggest to a reasonable landowner that they were exercising or asserting a right to use it for lawful sports and pastimes.[148] "*From the landowner's point of view, so long as the local inhabitants' recreational activities do not interfere with the way in which he has chosen to use his land – provided they always make way for his car park, campers or caravans, or teams playing on the reserve field, there will be no suggestion to him that they are exercising or asserting a public right to use his land for lawful sports and pastimes*". He took a similar approach in *Lewis*, where the inspector had advised that recreational users who had "*overwhelmingly deferred*" to golfers using the land claimed as a green - a former golf course - had not used it as of right. The Court of Appeal[149] endorsed his decision, holding that it was not sufficient for use to be *nec vi, nec clam, nec precario;* it must also be such - both in amount and in manner - as to give the outward appearance to the reasonable landowner that the local inhabitants were asserting a right to use the land for sports and pastimes. If they adjusted their behaviour to accommodate the landowner's competing activities, they would give the impression that they were not asserting any such right.

216. The Supreme Court unanimously allowed Mr Lewis's appeal, and held that the former golf course ought to be registered as a green. They overcame what the Court of Appeal

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[147] *Beresford* at paragraphs 3, 9.
[148] Paragraphs 82-86.
[149] [2009] 1 WLR 1461.

had perceived to be an insuperable obstacle to registration in such a situation, namely that it would confer on local inhabitants a priority over the landowner's own use of the land which they had not asserted or enjoyed during the 20 year period, by holding that the rights of recreation which the local inhabitants would acquire would be restricted.[150]

Following registration:

> "*To the extent that the owner's own previous use of the land prevented their [local inhabitants'] indulgence in such activities in the past, they remain restricted in their future use of the land*" (per Lord Brown at paragraph 101);
>
> "*the owner remains entitled to continue his use of the land as before. If, of course, as in Oxfordshire, he has done nothing with his land, he cannot complain that upon registration the locals gain full and unqualified recreational rights over it.*" (per Lord Brown at paragraph 105);
>
> "*... where it is feasible, co-operative, mutually respecting uses will endure after the registration of the green. Where the lands have been used by both the inhabitants and the owner over the pre-registration period, the breadth of the historical user will be, if not exactly equivalent to, at least approximate to that which will accrue after registration*" (per Lord Kerr at paragraph 115).

217. It followed that the conduct of local inhabitants in abstaining from interference with the owner's activities was not inconsistent with their using the land in the way in which they would use it if they already had the rights which registration as a green would confer. At paragraph 76 Lord Hope said:

> *"Of course the position may be that the two uses cannot sensibly co-exist at all. But it would be wrong to assume, as the inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use of the land as of right for lawful sports and*

[150] See, in particular, paragraphs 70-75 per Lord Hope, 99-105 per Lord Brown and 114-115 per Lord Kerr.

pastimes. It is simply attributable to an acceptance that where two or more rights co-exist over the same land there may be occasions when they cannot practically be enjoyed simultaneously."

Deference can be attributed to courtesy, civility and common sense rather than to an acknowledgement that the local inhabitants have no rights and will acquire none.[151]

218. This approach, which the Supreme Court considered not to be inconsistent with anything said on the subject of rights in *Oxfordshire,* enabled the land to be registered without infringing the basic prescriptive principle of equivalence described by Lord Hope at paragraphs 71-72 in these words:

> *"... the theme that runs right through all of the law on private and public rights of way and other similar rights is that of an equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other. In Dalton v Angus & Co Fry J, having stated at p 773 that the whole law of prescription rests upon acquiescence, said that it involved among other things the abstinence by the owner from any interference with the act relied on 'for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the act being done' (my emphasis). In other words, one looks to the acts that have been acquiesced in. It is those acts, and not their enlargement in a way that makes them more intrusive and objectionable, that he afterwards cannot interfere to stop. This is the basis for the familiar rule that a person who has established by prescriptive use a right to use a way as a footpath cannot, without more, use it as a bridleway or for the passage of vehicles.*
>
> *In White v Taylor (No 2) [1969] 1 Ch 160, 192 Buckley LJ said that the user must be shown to have been 'of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed' (again, my emphasis). That was a case in which it was claimed, among other things, that sheep rights had been established by*

[151] Paragraphs 36, 77, 94-96, 106.

prescription at common law. But I think that this observation is consistent with the approach that is taken to prescriptive rights generally."

219. The first issue formulated by the parties for the decision of the Supreme Court was put as follows:[152]

"Where land has been extensively used for lawful sports and pastimes nec vi, nec clam, nec precario for 20 years by the local inhabitants,[153] is it necessary under section 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging?"

220. Lord Hope's answer was "no" (paragraph 67), given in light of the following analysis of the structure of section 15(4) (which would be equally applicable to section 15(2) or 15(3), because it focuses on the 20 year period).

"The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word 'lawful' indicates that they must not be such as will be likely to cause injury or damage to the owner's property: see Fitch v Fitch (1797) 2 Esp 543. And they must have been doing so 'as of right' that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see Beresford paras 6, 77), the owner will be taken to have acquiesced in it - unless he can claim that one of the three vitiating circumstances [i.e. vi, clam and precario] applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way - either because it has not been asked, or because it has

[152] See paragraph 53.
[153] It was phrased in that way because the inspector had found as a matter of fact that the land had been "extensively used by non-golfers for informal recreation such as dog walking and children's play": paragraph 10.

been answered against the owner - that is an end of the matter. There is no third question".

221. Properly to understand what Lord Hope was saying in paragraph 67 requires reference back to *Beresford*, paragraphs 6 and 77 where Lord Bingham and Lord Walker had quoted with approval what Lord Hope himself had said in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035, 1043:

> *"Where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance."*[154]

In paragraph 6, Lord Bingham also quoted from the judgment of Parker LJ in *Mills v Silver* [1991] Ch 271 (a case concerning a prescriptive claim to a private easement) at p. 290:

> *"The true approach is to determine the character of the acts of user or enjoyment relied on. If they are sufficient to amount to an assertion of a continuous right, continue for the requisite period, are actually or presumptively known to the owner of the servient tenement and such owner does nothing that is sufficient..."*

222. In *Lewis,* Lord Walker[155] looked at some of the earlier authorities relied on by the respondents, and concluded that he had

> *"no difficulty in accepting that Lord Hoffmann was absolutely right in Sunningwell to say that the English theory of prescription is concerned with 'how the matter would have appeared to the owner of the land' (or if there was an absentee owner, to a reasonable owner who was on the spot)."*

[154] In the law of Scotland "tolerance" is used as a synonym for "permission": *Beresford*, paragraph 6.
[155] At paragraphs 30-36.

At paragraph 75, Lord Hope again reiterated that "*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*".

223. *Laing Homes* was not said by the Supreme Court in *Lewis* to have been wrongly decided. Lord Walker addressed the decision at paragraphs 22-28, in conjunction with the elliptical remarks on the subject made by Lord Hoffmann in *Oxfordshire* at paragraph 57 (*"No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so 'as of right'. But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 [of the 1965 Act] if in practice they were not."*). Lord Walker thought that what Lord Hoffmann had in mind when composing the first sentence might have been:

> *"not concurrent competing uses of a piece of land, but successive periods during which recreational users are first excluded and then tolerated as the owner decides. An example would be a fenced field used for intensive grazing for nine months of the year, but left open for three months when the animals were indoors for the worst of the winter".*

224. He continued:

> "*Whether that is correct or not, I see great force in the second sentence of the passage quoted. Taking a single hay crop from a meadow is a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring. Fitch v Fitch (1796) 2 Esp 543 is venerable authority for that. That is not to say that Laing Homes was wrongly decided, although I see it as finely-balanced. The residents of Widmer End had gone to battle on two fronts, with the village green inquiry in 2001 following a footpaths inquiry two or three years earlier, and some of the evidence about their intensive use of the footpaths seems to have weakened their case as to sufficient use of the rest of the application area.*"

225. There was no other mention of grazing in *Lewis*. It was, however, the case in *Sunningwell* that there had been low level grazing on the application land (by a handful of horses according to the inspector's report).

"on the land"

226. In *Cheltenham Builders*[156] Sullivan J said that the applicants:

> "*had to demonstrate that the whole, and not merely a part or parts of the site had probably been used for lawful sports and pastimes for not less than 20 years. A common sense approach is required when considering whether the whole of a site was so used. A registration authority would not expect to see evidence of use of every square foot of a site, but it would have to be persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years*".

227. The House of Lords held in *Oxfordshire*[157] that there is no requirement for land to be grassed or conform to the traditional image of a town or village green in order to qualify for registration. Any land can be registered as such provided that it has been used in the appropriate manner for a sufficient period.

228. The land which was the subject of the application for registration under consideration in *Oxfordshire* had been described in the inspector's report (quoted by Lord Hoffmann at paragraph 1 of his speech) as follows:

> *"About one third... is permanently under water ... This part ... is usually called 'the reed beds'. [They] are inaccessible to ordinary walkers since access would require wading equipment. The other two thirds ('the scrubland') ... are much drier and consist of some mature trees, numerous semi-mature trees and a great deal of high scrubby undergrowth, much of which is impenetrable by the hardiest walker ... The scrubland is noticeably less overgrown at the southern end and*

[156] At paragraph 29.
[157] Paragraphs 37-39, 115, 124-128 (Lord Scott dissenting at paragraphs 71-83).

there is a pond and wet areas in the central eastern part of the scrubland. Throughout the dry parts of the scrubland there are piles of builders' rubble, up to about a yard high, which are mostly covered in moss and undergrowth. The [land is] approached from the east by a bridge ... over the canal. From the bridge a track ... leads along the northern edge of the reed beds and gives access to a circular path around the scrubland. Off this circular path there are numerous small paths through the undergrowth. Some peter out after a few yards. Some lead to small glades and clearings. I estimate that a total of about 25% of the surface area of the scrubland is reasonably accessible to the hardy walker."

229. At the non-statutory inquiry, the applicant for registration sought to amend the application to exclude the reed beds, but the inspector decided that the landowner was entitled to a determination of the status of all the land. He found that the scrubland had been proved to have been used for lawful sports and pastimes but that the reed beds had not.[158] The registration authority asked the High Court for guidance on whether land could have become a green even though by reason of impenetrable growth only 25% of it was accessible for walkers. Lightman J refused to do any more than give guidance "*of the broadest kind*". He said:[159]

> "*There is no mathematical test to be applied to decide whether the inaccessibility of part of the land precludes the whole being a green. The existence of inaccessible areas e.g. ponds does not preclude an area being held to be a green. It is to be borne in mind that section 22 of the 1965 Act for the purposes of the Act defines 'land' as including 'land covered by water'.[160] Greens frequently include ponds. They may form part of the scenic attraction and provide recreation in the form of e.g. feeding the ducks or sailing model boats. Further overgrown and inaccessible areas may be essential habitat for birds and wildlife, which are the attractions for bird watchers and others. In my view in a case such as the present the registration authority must first decide on a common sense approach whether the whole of the land the subject of the application was used*

[158] Paragraphs 30-32.
[159] [2004] Ch 253, at paragraph 95.
[160] Cf section 61 of the 2006 Act: see paragraph 4 above.

for the 20-year period for the required recreational purposes. For this purpose it is necessary to have in mind the physical condition of the land during the relevant period. The physical condition can change. If the land was clear during the periods of qualifying user, the fact that it later became heavily overgrown is irrelevant. If any substantial part of the land by reason of its physical character has not been so used, then that part may not have become a green or part of a green and consequently the whole of the land may not be so registered. In such a situation the second question arises whether the remainder of the land satisfies the requirement and, if it does, the remainder is registrable. If the whole of the application land is not a green, it is still open to the registration authority to find that part or parts are a green. The availability of this alternative may save the registration authority from any temptation to strain its finding of fact on the first question to safeguard the existence of a green."

230. When the case reached the Court of Appeal, Carnwath LJ quoted from that paragraph without comment.[161] What Lord Hoffmann said was that he for his part would be very reluctant to express a view on the inspector's conclusions without inspecting or at least seeing photographs of the site.[162] He continued:

"If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flowerbeds, borders and shrubberies on which the public may not walk".

"for a period of at least twenty years"

231. There must be evidence of qualifying use for a period of at least twenty years. That does not mean that any particular individuals must have used the land for the full period of twenty years. Guidance as to how to approach the evidence of witnesses who can

[161] [2006] Ch 43, at paragraph 114.
[162] Paragraph 67.

only claim shorter periods of use is to be found in *McAlpine Homes*.[163] In a case where relevant circumstances have changed during the twenty years (such as ownership of the land, or its physical condition, or where gates have been locked, or fences erected) more caution will have to be exercised in taking account of evidence of recreational use during one part of that period when considering what was happening at other times. Sullivan J went on to say that while the written evidence had to be treated with caution because it was not subject to cross-examination, the inspector was entitled to conclude, having looked at the totality of it, that it was largely consistent with and supportive of the oral evidence given by the applicant's witnesses to the effect that many local people had been using the land for informal recreation for more than 20 years without permission or objection.

Highway-type use

232. In *Laing Homes*[164] Sullivan J held that there was another ground for quashing the decision to register the land as a green. The land in question comprised three adjacent fields totalling 38 acres. In 2000, a couple of months before the village green registration application, an inspector appointed by the Secretary of State had confirmed modification orders made in 1999 adding to the definitive map of public rights of way maintained under Part III of the Wildlife and Countryside Act 1981 a number of footpaths three of which ran around the edges of the three fields. That was on the basis that there was sufficient evidence of user of the routes, which were discernible on the ground, over a period of 20 years or more prior to 1998, to satisfy section 31 of the Highways Act 1980. That section provides:

> *"(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."*

[163] At paragraphs 73-74.
[164] At paragraphs 90-110.

233. Sullivan J said:

> *"102... For obvious reasons, the presence of footpaths or bridleways is often highly relevant in applications under s22(1) of the [1965] Act: land is more likely to be used for recreational purposes by local inhabitants if there is easy access to it. But it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way - to walk, with or without dogs, around the perimeter of his fields - and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.*
>
> *103. Dog walking presents a particular problem since it is both a normal and lawful use of a footpath and one of the kinds of 'informal recreation' which is commonly found on village greens. Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog's owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?*
>
> *104. The landowner is faced with the same dilemma if the dog runs away from the footpath and refuses to return, so that the owner has to go and retrieve it. It would be unfortunate if a reasonable landowner was forced to stand upon his rights in such a case in order to prevent the local inhabitants from obtaining a right to use his land off the path for informal recreation. The same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields: see per Lord Hoffmann at p.358E of Sunningwell. I do not consider that the dog's wanderings or the owner's attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.*"

"107... the inspector considered whether the whole, and not merely the perimeter of the fields was being used, but he did not deal with the issue raised in the claimant's analysis: how extensive was the use of the fields if the use of the footpaths around their boundaries for walking and dog walking was discounted, such use being referable to the exercise of public rights of way, and not a right to indulge in informal recreation across the whole of the fields.

108. I accept that the two rights are not necessarily mutually exclusive. A right of way along a defined path around a field may be exercised in order to gain access to a suitable location for informal recreation within the field. But from the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted."

"110... the inspector ... does appear to have relied upon the extensive use of the perimeter footpaths as such, for general and dog walking, in reaching his conclusion that there was abundant evidence of the use of the whole of the fields for lawful sports and pastimes for the 20-year period. To Laings, as a reasonably vigilant, and not an absentee, landowner those walkers would have appeared to be exercising public rights of way, not indulging in lawful sports and pastimes as of right."

234. Those passages were expressed in terms sufficiently wide to cover highway-type use where no rights had been established, and in *Oxfordshire* Lightman J certainly embraced the approach of discounting pedestrian recreational use of a track traversing a claimed green which would have appeared to a reasonable landowner to be referable to use as a public highway to cases where no public right of way had yet accrued or might

ever accrue.[165] He went so far as to make declarations on the subject (his declarations (ix) and (x)). He said this:

> *"102. The issue raised is whether use of a track or tracks situated on or traversing the land claimed as a green for pedestrian recreational purposes will qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. If the track or tracks is or are of such a character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to user as a green. The answer is more complicated where the track or tracks is or are of such a character that use of it or them can give rise to such a presumption. The answer must depend how the matter would have appeared to the owner of the land: see Lord Hoffmann in Sunningwell at pp 352H-353A and 354F-G, cited by Sullivan J in Laing at paras 78-81. Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).*

[165] See paragraphs 102-105 of his judgment.

103. Three different scenarios require separate consideration. The first scenario is where the user may be a qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a green or for both. The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to (e.g.) an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track e.g. fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights.

104. The second scenario is where the track is already a public highway and the question arises whether the user of the track counts towards acquisition of a green. In this situation, the starting point must be to view the user as referable to the exercise (and occasional excessive exercise) of the established right of way, and only as referable to exercise as of right of the rights incident to a green if clearly referable to such a claim and not reasonably explicable as referable to the existence of the public right of way."

235. The third scenario (paragraph 105) was where a way was presumed dedicated after 20 years' use before the expiry of the 20 year period relevant to the green claim. Lightman J said that it would be inappropriate retrospectively to view the user before the presumed dedication as taking place against the background of the existence of a public right of way.

236. In the Court of Appeal, Carnwath LJ expressed reservations about the appropriateness of the courts' commenting on such matters, as involving evaluation of evidence – issues of fact and degree for the decision maker – rather than questions of principle. However, he did not "*question the common sense*" of many of the points made by Lightman J on this subject, and agreed that the question was "*how a reasonable landowner would have interpreted the user made of the land*".[166]

237. The House of Lords set aside Lightman J's declarations (ix) and (x) and declined to express any view on the issues they concerned. Oxford City Council's attempt to persuade them to declare that all recreational pedestrian use of tracks traversing a claimed green should be discounted in assessing the amount of use for lawful sports and pastimes of the land was unsuccessful. Lord Hoffmann said this:[167]

> "*Lightman J made a number of sensible suggestions about how such evidence might be evaluated and the judgments of Sullivan J likewise contain useful common sense observations; for example, on the significance of the activities of walkers and their dogs (R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573, 598-599). But any guidance offered by your Lordships will inevitably be construed as if it were a supplementary statute. There is a clear statutory question: have a significant number of the inhabitants of a locality or neighbourhood indulged in sports and pastimes on the relevant land for the requisite period? Every case depends upon its own facts and I think that it would be inappropriate for this House in effect to legislate to a degree of particularity which Parliament has avoided.*"

238. In *DPP v Jones* [1999] 2 AC 240, the House of Lords gave consideration to what activities could lawfully be carried out on a highway. The particular activity in issue was peaceful protest, but looking at the position more broadly,[168] Lord Irvine of Lairg LC concluded that:

[166] See paragraphs 116-117 of his judgment.
[167] At paragraph 68: see also paragraphs 102, 112, 147.
[168] At pp 254-257.

> "*the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on ... Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass.*"

He rejected a test limiting lawful use of the highway to what was incidental or ancillary to the right of passage, saying that ordinary and well accepted activities such as sketching, taking a photograph, children playing, having a picnic or reading a book would not qualify if that were the test.

VIII. The case for the Objector

239. Mr Edwards submitted on behalf of the Objector that the burden of proving qualifying use during the whole of the period 15 December 1991-15 December 2011 rested on the Applicant, and had not been discharged in respect of any of the Application Land.

240. Two points of principle arose. First, the Applicant was required to demonstrate use of the Application Land such that it could sensibly be said that the whole of the land had been used for lawful sports and pastimes for the whole of the qualifying period: see *Cheltenham Builders* at paragraph 29, and *Oxfordshire* per Lightman J at paragraph 95 and Lord Hoffmann at paragraph 67. The position had to be considered from the perspective of a reasonable landowner. Inaccessible or unused parts could be integral to the enjoyment of the whole, as in Lord Hoffmann's flowerbed example, but that was not the case here.

241. Secondly, the use of the Application Land had to have been for activities that properly fell to be considered as lawful sports and pastimes. Use which would be perceived by a reasonable landowner as attributable to use of an actual or potential public right of way was to be excluded from qualifying use for section 15 purposes. See *Oxfordshire* per Lightman J at paragraphs 96-105, especially 102-105. Where a public highway existed, recreational use was to be presumed to be referable to use or excessive use of the

highway. Ambiguity was to be resolved in favour of use as a public right of way. Sullivan J in *Laing Homes*, at paragraphs 102-105 (especially paragraphs 103-104 concerning dog walking) set out a sensible pragmatic approach. Paragraphs 105-109 explained what was wrong with the approach adopted by the inspector in that case; it was as a matter of law incumbent on the inspector and the Registration Authority in this case to undertake the analysis that he had failed to carry out, namely to consider what element of use had been attributable to use of actual or potential public rights of way and discount it. Lawful use of a footpath embraced a very broad range of activities other than walking: see *DPP v Jones*, per Lord Irvine at pp 254-257. The taking place of such activities should also be attributed to the actual or potential existence of a highway.

242. In the present case, the substantially unchallenged evidence for the Objector was that for a substantial part of the qualifying period the Round Field (with the exception of strips along the north-western and eastern boundaries) had been used for a cycle of arable cultivation. The process of active arable cultivation between land preparation and harvest had taken up a very substantial part of each year when it was so used.

243. Particularly on the Round Field when in arable cultivation, but in respect of all of the Application Land, it was plain that the overwhelming majority of users had confined themselves to paths, many as part of a wider walk or circuit extending to paths on adjoining land. The use relied on by the Applicant was to an overwhelming extent attributable in the eyes of a reasonable landowner to use of actual or potential public highways. The Applicant's oral and written evidence accorded in that regard.

244. So far as concerned the Horse Field, it was of course crossed by a legally recognised public footpath in a north-south direction, with access at either end (formerly by means of stiles, now by means of kissing gates). Use which had taken place in the Horse Field was almost exclusively to walk across the field along an alignment which might or might not have accorded precisely with the definitive legal route of the footpath, but (if not) was parallel to it. There was an issue about the exact position of the legal route, given the small scale of the definitive map. Use of a north-south route across the field

should be attributed to use of the public footpath, which is how a reasonable landowner with knowledge of the existence of the highway would have seen it.

245. The Horse Field had been used by Mr O'Brien for keeping at least two horses for the whole of the qualifying period. Although they were taken off from time to time (especially when the land was waterlogged), the Applicant's own evidence demonstrated that they were predominantly present. Their presence was a disincentive to access for a large number of local inhabitants, and the evidence was that those who did enter the Horse Field generally confined themselves to the route of the public footpath or a route approximating to it.

246. The Woodland Area had been completely overgrown, save for a modest informal path running east-west and the path from the Station Road entrance to the junction with the paths around the Round Field and across the Horse Field. Even after the area to the south of the entrance was cleared and planted in 2006-2007 it was not actively used. Save for some evidence of children's play, the area off the paths had been largely impenetrable and not penetrated during the qualifying period.

247. Use of paths (formal and informal) for walking, dog walking, jogging and orienteering fell to be discounted as lawful sports and pastimes. Cycling, although not legally permitted on a public footpath, and the limited amount of horse riding which had taken place, would be viewed by any reasonable landowner as attributable to the use or excessive use of those paths as public rights of way rather than independent lawful sports and pastimes. Other activities which were ancillary or incidental to use of public rights of way, or part of the wider lawful use of public rights of way as expounded in *DPP v Jones*, were also to be excluded, including:

(a) blackberry picking along either side of the hedge separating the Round Field from the Horse Field;

(b) stopping to take photographs or observe wildlife on or off the paths;

(c) sitting on or adjacent to the paths for wildlife observation, rest or contemplation;

(d) straying off the paths to observe an interesting feature e.g. a pond or to search for historic artefacts;

(e) playing with children on the paths, or even if this involved straying off the paths;

(f) walking dogs even in cases where either the dog or the owner strayed off path (see *Laing Homes*).

248. Once all those activities were excluded, there was manifestly an insufficiency of activity which might properly be considered as lawful sports and pastimes and sensibly generate a conclusion that the whole of the Application Land had been used throughout the qualifying period for lawful sports and pastimes.

249. Evidence of individuals who chose to walk through and over the Round Field when in crop (such as those engaged in orienteering) was exceptional. That many individuals would choose to walk up and down tractor "tram lines" rather than use the well worn tracks was wholly unrealistic and inconsistent with (a) the overwhelming amount of the evidence given for the Applicant and (b) common sense and normal experience of how most people behave.

250. Evidence of kite flying, picnics, painting/sketching, sledging, dog training, scout and guide activities and ball games was scant. The planting of bulbs and flowers in 2006/7 (if it was a lawful sport or pastime at all) was done with the express or implied permission of the Objector. There was some evidence of boys building dens and "hanging out" in a small part of the Wooded Area adjacent to the Horse Field entrance, but it related only to the early years of the qualifying period.

251. Petting and feeding of the horses largely took place from outside the Application Land, and was in any event discouraged by Mr O'Brien. Insofar as it took place on the Application Land, that was in large measure from the Hutchison Way path and would fall to be considered as incidental to use of the path. Moreover, in law it was not a qualifying use. It was not a "use of land" for lawful sports and pastimes, but use of a private chattel kept on the land.

252. In summary, the limited range of activities which might be considered as lawful sports and pastimes was insufficient in frequency and extent and too localised to provide any proper or sensible evidential basis to conclude that the Application Land or any sensible part of it had been used throughout the qualifying period for lawful sports and pastimes. On this basis alone the Application had to fail.

253. *Lewis* was not relevant. The question of peaceful co-existence between lawful sports and pastimes and activities by the landowner or its tenants did not arise. Most of the use relied on was a different type of activity from lawful sports and pastimes (footpath use). There was little evidence of use of the Round Field when it was not in crop, and for much of the qualifying period the public were effectively physically excluded from, and refrained from using, most of it. That was a critical difference from *Lewis*, where the land had been used for lawful sports and pastimes throughout the 20 year period. In the present case, it could not be said of the Round Field that it had been used throughout the qualifying period for lawful sports and pastimes. There was a world of difference between a momentary pause to let a golfer take a shot, and a stretch of months when the public were physically excluded from and refrained from entering the land because of the use made of it by the landowner.

254. It was accepted that, on the authorities as they now stand, an electoral ward can be a "locality" and a neighbourhood can be divided between two localities.

255. However, no qualifying neighbourhood had been identified in this case. The principles governing the identification of a qualifying neighbourhood were as follows:

(a) a neighbourhood was not "any area of land that an applicant for registration chooses to delineate upon a plan" (*Cheltenham Builders*, paragraph 85);

(b) a qualifying neighbourhood had to 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 Judge Waksman QC in *Warneford Meadow*, paragraph 79).

Whether or not a "neighbourhood" had been demonstrated was entirely fact-sensitive. A surprising feature of the present case was the total absence of any evidence whatsoever to demonstrate that the Claimed Neighbourhood was a neighbourhood. The area was not identified by name and there was no evidence of cohesiveness. Its boundaries were random and in places cut directly through neighbouring houses within a street.

256. The invitation to find for the Applicant on the basis of a different neighbourhood or neighbourhoods should be rejected, for three reasons.

257. First, there was no power for a registration authority to consider an alternative neighbourhood or locality from that advanced by an applicant in his application form for the purposes of section 15. The 2007 Regulations required the applicant to pin his colours to a particular mast, in contrast to the 1969 Regulations: see part 6 of Form 44. This case was to be distinguished from *Laing Homes* for that reason.

258. The dicta of Judge Waksman QC in the *Warneford Meadow* case, at paragraph 79,[169] did not assist the Applicant. As in *Laing Homes*, the application under consideration was made under the 1965 Act and 1969 Regulations. The judge was therefore not considering whether in the context of a section 15 application, a registration authority had power to register the land on the basis of a different neighbourhood from that advanced by the applicant. Moreover, as was apparent from paragraph 10 of the judgment, it was not contended before the judge by the claimant that there was no power for the inspector to "find a different qualifying neighbourhood". The question arising here was not argued or determined in that case.

259. Secondly, even if there was such a power, it would be unfair for it to be exercised in this case. In *Laing Homes* the issue was the existence of a "locality", a straightforward

[169] See paragraph 275 below.

question of law. Here it was the existence of a "neighbourhood", a matter of fact and evidence. The burden was on the Applicant to adduce the necessary evidence to prove that the section 15 criteria were met. It was highly prejudicial to the Objector to adduce a new case at the conclusion of the inquiry, when it was too late for the Objector to respond through cross-examination and evidence of its own. In *Laing Homes* (see paragraphs 144-145), the alternative locality had been put forward fairly and squarely in the course of the inquiry to allow scrutiny by the objector.

260. Thirdly, there was no evidence to support the newly advanced neighbourhoods.

IX. The case for the Applicant

261. In closing submissions on behalf of the Applicant, Miss Grogan and Mr Stedman Jones divided the test for registrability of the Application Land into five parts, as follows:

(a) whether user by the local inhabitants was significant in terms of numbers and extent;

(b) whether the area marked out by the Applicant, or any other material area, constituted a neighbourhood for the purposes of section 15(2);

(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 continued for a period of not less than 20 years up to the date the Application was made.

262. As to (a), the user of the Application Land by the 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. The high number of written evidence cards, questionnaires, letters and emails sent to the Registration

Authority and included in evidence in addition to the live evidence of over 30 individual users illustrated that a significant number of members of the public used the land. It was clear from the case law that determining what was "significant" was a matter of impression for the decision-maker (*McAlpine Homes*). Any consideration of user that might be referable to recreational use as a town or village green was a matter of degree to be determined by the decision-maker on the facts of each specific case (*Oxfordshire*). The courts have been loath to issue prescriptive guidance other than to point out that the key test is how the local inhabitants' use of the land would have appeared to the reasonable landowner (*Laing Homes, Oxfordshire*). But when compared to some of the leading cases (*Cheltenham Builders*, *Oxfordshire*), the numbers involved in the Save Newport Campaign were impressive.

263. The inquiry heard evidence from witnesses who had used the Application Land for all manner of different sports and pastimes, which had involved user of all parts of the three different areas on the land: the Wooded Area, the Horse Field and the Round Field. The Wooded Area was used for dens, tracking with the cubs and scouts, nature observation, reading, and fungi foraging. The Horse Field had been used to its fullest extent, with no clear path on the field until the Objector erected its fencing in 2012 (best illustrated in the photograph at A143 top). Many activities were reported as going on here, such as horse patting and pond dipping. The inquiry heard much evidence of the use of the Round Field for flying kites. Evidence was also heard of uses of all areas of the land such as walking, dog walking, playing with children, running and jogging (enjoyed by 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; 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, cycling/tricycling/BMX/ Mountain biking; snowball fights, football and ballgames; frisbee; astronomy; drawing and painting; picnicking; and socialising which, again, was enjoyed by almost everyone.

264. What emerged clearly in the evidence was significant use of varied kinds 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 (tramlines) that traversed the Round Field.

265. The Objector's evidence on user was weak. Mr Fox's survey was unreliable because his instructions had not ensured that a suitably rigorous methodology was followed. His evidence was unrepresentative of the relevant period because the character of the land had been changed by the Objector's erection of fencing to cordon off and, in the words of several witnesses, "corral" the public down the Hutchison Way and onto the Application Land from particular access points. Mr James's work could only be described as ineffectual. He accepted that he had no expertise in surveillance and 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, or the direction in which the people he had seen were coming or going, 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, 86, over the course of 10 cold and predominantly wet days in April over the Easter holidays.

266. Mr O'Brien's evidence could not 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 was not accepted by the Applicant or corroborated by a single other witness, the signs, even on his own account, did not refer to the land or its use.

267. 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 might have been grown and harvested on the Round Field. He painted a picture of co-existence where he did not expect the public to keep off the field because they had been using it first.

268. Mr Edwards's attempt 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

along Hutchison Way was 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 as "occasional" in nature. However, "occasional" uses added up to many people with many diverse interests using the land in many different ways. The user could not all be reduced to walking, with nature observations and so on being characterised as "opportunistic". Witnesses had said that they made trips specifically to look at wildlife and indulge in other activities. While walking and dog walking could be referable to use as a right of way, they could, on the authorities, be referable to use as a town or village green instead.

269. As to limb (b) of the test, a neighbourhood within a locality need not be a recognised administrative unit but must not be any area arbitrarily delineated on a map. The Registration Authority must instead be satisfied that the proposed area had a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be devoid of meaning (*Cheltenham Builders*, paragraph 85). However, "cohesiveness" should be seen in the context of the introduction by amendment of the new "neighbourhood within a locality" limb, which was drafted with "*deliberate imprecision*" (*Oxfordshire*, paragraph 27 per Lord Hoffmann). The "cohesiveness" threshold was a relatively low one; the purpose of the amendment was, in part, to make registration simpler for local residents. "Neighbourhood" carried an easily understood, ordinary meaning, which was 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". See *Leeds Group* at first instance, paragraphs 99 and 103, where Judge Behrens said that Sullivan J's references to cohesiveness had to be read in the light of what Lord Hoffmann said in *Oxfordshire*, the overall purpose of the Act and the plain meaning of the word. The relevant part of his judgment was approved by Sullivan LJ in the Court of Appeal. Sullivan J also confirmed that where a town or village green served two neighbourhoods sufficiently, that too would suffice to satisfy the neighbourhood requirement (paragraph 27).

270. The Claimed Neighbourhood consisted of a composite of the southern part of Newport and Church Aston and was hemmed in by four roads, namely Wellington Road to the west and the north, Audley Avenue to the north and the east, Avenue Road to the east

and the Bypass. The inquiry had heard various witness evidence on "neighbourhood". Bronwen Jones gave evidence of her Baby Group, which was based in Church Aston and she used to cross the Application Land from Newport South to attend with two friends. 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. Jayne Overal pointed to Church Aston on the map, its borders, and amenities. 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.

271. However, in light of the evidence, the Applicant proposed a slight modification to the logic described in the statement of John Pay[170]. Instead of following the statistical boundary at the north-westernmost corner of the proposed neighbourhood, which was "quirky", a small revision should be made so that the boundaries continued to follow the natural borders provided by the main roads of Audley Avenue and Avenue Road. The Applicant accepted that this would be a more natural and appropriate boundary for the neighbourhood as proposed. The 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 (which also serves inhabitants of South Newport);
- the Newport Running Club which assembles at Audley Avenue;
- Cubs, Scouts, Brownies and Girl Guide Groups.

272. The Applicant's primary case was that the Claimed Neighbourhood met the requisite legal criteria but it was open to the Registration Authority to be flexible, and there were two further possible alternative neighbourhoods, either of which would meet the requirements set out in the cases.

[170] A35. See paragraph 21 above.

273. The first possibility would be 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. Notwithstanding this, and the fact that the arguments for its existence overlapped (as attested to by a number of the witnesses including Bronwen Jones, Janet Clarke, Alison Pay and Tom Clarke) those for the first proposed neighbourhood, Church Aston clearly fulfilled the requirements of cohesiveness in that:

- residents said they lived in/were from Church Aston;
- it had its own Village Hall;
- it had its own Church and Church hall;
- it had its own Baby Group, Cubs, Scouts, Brownies, Running Club and assorted other associations and clubs; and
- its borders were marked by the Church Aston stones.

274. The second possibility would be to suggest that the Application Land was used by significant numbers of the inhabitants of two neighbourhoods, Church Aston and South Newport, as in *Leeds Group*.

275. In post-inquiry written submissions, the Applicant's counsel expanded on the question whether a registration authority had power to register a town or village green on the basis of an alternative "neighbourhood" from that identified in the application form. They drew attention to the fact that in the *Warneford Meadow* case, the neighbourhood relied on in the 1965 Act application was the "Divinity Road neighbourhood", which was an area bordered by four roads containing 890 dwellings. The definition of the Divinity Road neighbourhood was later amended to include Warneford Meadow itself. The inspector found the relevant neighbourhood to be a smaller area within the Divinity Road neighbourhood, i.e. the Hill Top Road neighbourhood. The landowners did not argue in their judicial review claim that it was not open to the inspector to find a different qualifying neighbourhood. At paragraph 79, commenting on the definition of "neighbourhood", Judge Waksman QC said:

"... under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application. See Model Entry 18. And that can be amended to take account of the adoption of an Inspector's recommendation to base the registration upon a different neighbourhood than that claimed. See Regulation 7(2)." (counsel's emphasis).

Although the question whether an inspector had the power to recommend an alternative neighbourhood was not fully argued before the judge as it was not in issue, that statement was a strong indication that there was a power to recommend and register an alternative neighbourhood.

276. By analogy, the courts had concluded that an inspector had power to recommend that only part of a proposed village green was registered (*Oxfordshire*). Lord Hoffmann said that it was hard to see how the registration of only part of the land claimed without amendment would cause prejudice to anyone. The same principles applied to a recommendation that the neighbourhood be constituted differently. Sullivan J in *Laing Homes*, at paragraph 143 held that a registration authority was entitled to determine the extent of a locality in light of the available evidence, subject to considerations of fairness. The issue was at heart one of fact and if the evidence supported an altered or different neighbourhood from that claimed then it should be within the inspector's discretion to make a recommendation on that basis.

277. As to limb (c) of the test, Miss Grogan and Mr Stedman Jones submitted that "as of right" meant that 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): see *Lewis.* The test was objective and the subjective viewpoint of any particular user mattered not: *Beresford*, paragraph 3, per Lord Bingham. An implied permission could not be imputed to "*equivocal*" behaviour": paragraph 7. Implied permission could only be granted through overt conduct, such as charging for entrance or asserting ownership by excluding people from the land completely from time to time: paragraphs 83, 85 per Lord Walker.

278. The evidence to the inquiry plainly showed that the Application Land had been used *nec vi* and *nec clam*. The only issue was whether the user of the land was *nec precario*. No evidence was produced to suggest that any express permission had been granted by the Objector or anyone else for the public to use any of the land. With regard to the suggested implied permission arising from the Newport in Bloom project, this support for local regeneration did not amount to the sort of overt conduct necessary to defeat a claim. The situation was at worst analogous to the sorts of maintenance and improvement efforts that were described in *Beresford* as not amounting to an implied permission.

279. As to limb (d) of the test, the inquiry heard overwhelming evidence of a wide range of lawful sports and pastimes (as explained in *Sunningwell*) being carried out on the Application Land by the local inhabitants. The list was impressive: walking/dog walking, running/jogging, cycling, photography, bird watching, nature observation, ball games, kite flying, picnicking, horse patting/petting, drawing/painting, pond dipping, orienteering, astronomy, hide and seek, frisbee, fruit picking, socialising, and horse riding.

280. As a matter of principle, horse-patting should be considered to come within the class of lawful pastimes. Pleasure could be derived from it. Horses, as chattels or personalty, differed from land, or realty. Trespass was only committed if the act went beyond "general conduct": see Clerk & Lindsell on Torts, p 1178 and *Collins v Wilcock* [1984] 1 WLR 1172 per Goff LJ.

281. As to limb (e), user for a 20 year period, case law suggested that the proper assessment of whether user of land amounted to user which was referable to recreational use as a town or village green was how it would appear to the reasonable landowner. The depth and breadth of usage of the Application Land by the local inhabitants of South Newport and Church Aston could not have failed to appear to the objective reasonable landowner as referable to use as a town or village green.

282. The Objector had suggested that the existence of crops on the Round Field had meant that the public was necessarily unable to use it as a town or village green. That could not be right, for three reasons.

283. First, the periods when the Round Field had been used as grassland or lain fallow accounted for approximately half of the relevant period. In the early period, the field had been used as grassland as part of the dairy farming of Mr Marsh. In the mid-1990s, it appeared that it had been used for growing grass for silage and then for other fodder crops. Then again between 2002-2008, the field had been put in set-aside.

284. Secondly, Mr Bubb's evidence 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. In any event there was use of the tractor tracks through the crops.

285. Thirdly, the evidence in Mr Jones's report was vague or misleading. For example, from the aerial photograph at O402a it was apparent that when winter wheat was being grown on the rest of the land, the Round Field was covered in grass.

286. The Objector's arguments about interrupted use merely amounted to a contention that the Application Land was being used by two co-existing groups for different purposes. This was the classic situation of give and take and co-existence referred to by Lord Hoffmann in *Oxfordshire* and examined in detail in *Lewis.* See per Lord Hope at paragraphs 74-75. The local inhabitants deferred to the farmers and their crops as any decent persons would defer to other activities engaged in at the same time. They were rightly respectful of the farmer's livelihood but were not temporarily or permanently excluded from the Round Field. Mr Bubb was aware of the public using the Round Field in all manner of ways and did not stop them doing so.

X. Findings and conclusions

287. Although the Objector, as it was entitled to do, put the Applicant to proof in respect of each and every element of the criteria for registrability (set out in paragraph 196 above), it will be apparent from the above summary of the parties' cases that in respect

of certain matters there was not (and on the evidence could not have been) any, or any significant, conflict. I shall address those first, before turning to the issues which lie at the heart of the dispute between the parties.

Land

288. The Application Land is plainly all "land" within the broad meaning of section 15 (paragraph 227 above). The fact that the Horse Field includes a small pond and sometimes becomes waterlogged is of itself no bar to registration. "Land" is defined to include "land covered by water" (paragraph 4 above) and Lightman J in *Oxfordshire* expressly contemplated that the existence of a pond would in principle be consistent with registration and could indeed provide recreational opportunities (paragraph 229 above).

Lawful sports and pastimes

289. Equally, almost all of the activities relied upon by the Applicant (as listed in paragraphs 263, 279 above) I would accept as capable of qualifying as "lawful sports and pastimes" within the meaning of section 15, subject to the following caveats.

290. First, activities which may qualify as lawful sports and pastimes may not do so, if the manner and context in which they are carried on are such that they would appear to a reasonable landowner to be referable to the exercise of an existing public right of way or the potential establishment of a new public right of way (see paragraphs 232-237 above). Sullivan J and Lightman J focused on walking (with or without dogs), but similar considerations would apply to horse riding and cycling, capable of giving rise to deemed dedication as a bridleway or restricted byway if the conditions in section 31 of the Highways Act 1980 (paragraph 232 above) are satisfied; and to other kinds of exercise on foot such as jogging or running. Ancillary or associated activities may also be disqualified on this basis applying the approach of Lord Irvine in *DPP v Jones* (paragraph 238 above).

291. Secondly, activities which may qualify as lawful sports and pastimes may not do so, if they are carried on in a way or in circumstances which involves the commission of a

criminal offence (paragraph 208 above). The example given by Mr Edwards was of cycling on a public footpath, which is not a specific statutory offence (unless made so by a byelaw) but depending on the circumstances could amount to a public nuisance. However, that could not apply to a route unless a public right of way on foot only had come into legal existence over it, which has not been established in respect of any path on the Application Land other than the Hutchison Way and the north-south footpath to Church Aston (see Appendix D). Another example would be the use of motorised vehicles contrary to section 34 of the Road Traffic Act 1988 or the riding of horses through the growing crops in such a manner as to result in the commission of criminal damage. On the evidence, those are hypothetical examples.

292. Thirdly, I have grave reservations as to whether unauthorised interference with another person's livestock, however well intentioned and apparently benign, is a "lawful pastime" within the contemplation of the legislature. Livestock are valuable, and they may be nervous or temperamental or vulnerable. Interference with them may lead to their being injured or causing injury to someone else. I do not think that a legislative policy to encourage, condone or reward acts with such potentially harmful effects is to be imputed to Parliament. Moreover I am not persuaded that unauthorised interference with others' livestock does not "go beyond generally accepted standards of conduct"[171]; a paddock or field is not a petting zoo and the owners may reasonably take exception to it. *Collins v Willcock;* cited on behalf of the Applicant, is concerned with trespass to the person. People are social beings, able to communicate and interact in a rational and civilised manner. Animals are not. They do not understand or subscribe to generally accepted standards of conduct as to physical contact.

As of right

293. If it was proved that a significant number of the inhabitants of the Claimed Neighbourhood had indulged in lawful sports and pastimes on the Application Land for at least the 20 year period from 15 December 1991 to 15 December 2011, there would on the evidence be no difficulty for the Applicant in passing this particular test. All parts of the Application Land were freely open to public access throughout (and before) that period, from the Hutchison Way and the other public footpath featuring on the

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[171] See paragraph 280 above.

definitive map which cuts across its westernmost tip (see Appendix D) and through the gap in the hedge on the southern boundary of the Round Field near the south-eastern corner. Prior to February 2012 the Hutchison Way was open to the remainder of the Horse Field and of the Wooded Area and there was no fence or like barrier between the Wooded Area and the Round Field.

294. There was no evidence of any attempt by the Objector or any tenant, sub-tenant or licensee of the Round Field or the Horse Field to prevent, prohibit, restrict, or resist public access to the Application Land beyond the footpaths, by notice or otherwise. Mr O'Brien's notices did not refer to entry on the land, only to touching his horses. In other words there was nothing to render any otherwise qualifying user *vi*.

295. Nor do I perceive any basis for finding the activities of members of the public on the Application Land during the period 15 December 1991-15 December 2011 *clam.* A reasonable landowner on the spot would have been aware of them.

296. As to whether user was *precario*, the only activity which the Objector contended was done with permission was the clearance and planting work around the Station Road entrance to the Hutchison Way "in partnership with the Council".[172] I think that the parties may have been at cross-purposes on that matter. The Applicant seems to have understood the Objector to be suggesting that it somehow rendered all recreational user of the Application Land permissive (which on the authority of *Beresford* it plainly would not have done: paragraphs 212-213 above) by encouraging public access, whereas all the Objector was submitting as I understood it was that the clearance and planting activities themselves, if and insofar as relied upon as lawful sports and pastimes, could not count because the Council as a "partner" in and funder of the project must be taken to have consented to the activities it entailed. I think that must be right, but so far as I can see the Applicant is not relying on those activities as counting towards the claim (they were not listed as such in closing submissions) and there is no issue between the parties.

[172] Paragraph 51 above.

297. The only evidence of express permission for activities on the Application Land tendered to the inquiry was of Mr Bubb's allowing metal detecting[173] and Mr Corfield receiving Mr Marsh's approval to use the land.[174] Those isolated incidences of consent would have no impact on the remaining body of user for which no permission was given, expressly or by implication.

Neighbourhood within a locality

298. I turn, then, to the real issues between the parties, beginning with "a significant number of the inhabitants of a locality or a neighbourhood within a locality". The first question is whether the Applicant succeeded in showing on the balance of probabilities that the Claimed Neighbourhood is a "neighbourhood within a locality" within the meaning of section 15. For the reasons which follow, I find that it is not.

299. The Claimed Neighbourhood is divided between two electoral wards, Church Aston and Lilleshall and Newport South. The boundary between the two wards in fact bisects the Application Land itself, separating the Horse Field (Church Aston and Lilleshall) from the Round Field and Wooded Area (Newport South).[175] But "neighbourhood within a locality" means "neighbourhood within a locality or localities" (paragraph 201 above), and the Objector conceded that an electoral ward is a "locality" although there may have been some scope for a contrary argument (paragraph 199 above).

300. The difficulty for the Applicant lies in whether the Claimed Neighbourhood is a "neighbourhood" as a matter of fact and evidence. It will be recalled that the Applicant himself disavowed any understanding of why the boundary was drawn as it was[176] - not a promising start. It is true that that was said specifically in the context of the northern end of the Claimed Neighbourhood where - although the boundaries were said to be formed by Avenue Road and Audley Avenue - an irregularly shaped bite had, as it were, been taken out of the area which would have been so bounded. As can be seen at A40/Appendix C to this Report, the blue line depicting the alleged boundary bisects streets, dividing one side from the other (as in Granville Avenue or Avenue Road) and

[173] Paragraph 52 above.
[174] Paragraph 146 above.
[175] See A39.
[176] Paragraph 61 above.

one house from the next adjoining house (again, in Granville Avenue, between 15 and 13 and between 12 and 10) where inspection indicates that there is no relevant difference between the properties on opposite sides of the line. In *Cheltenham Builders* Sullivan J described that as a hallmark of arbitrariness, inconsistent with the requisite quality of cohesiveness. It is not surprising that the Applicant sought belatedly to rationalise the position by asking the Registration Authority to redraw the boundary so as to eliminate some of the anomalies.

301. However, I consider that his problems run much deeper. Two questions arise. First, what (if any) are the unifying factors which bind together the two areas of which the Claimed Neighbourhood was described in the Applicant's own submissions as a "composite" (the southern part of Newport and Church Aston)? Secondly, what (if any) are the factors which distinguish them from the remainder of Newport? As to the first, in *Leeds Group* the inspector was held to have erred in finding there to be a single composite neighbourhood instead of two separate ones. There were indications in the evidence that Church Aston had a separate identity: the use of the name in addresses, sometimes however in conjunction with Newport, sometimes not; the references by some witnesses to using the land for going from Newport to Church Aston and vice versa (e.g. the Applicant himself, Mr Goulding, Mr Healey);[177] references to "Church Aston village", the existence of a separate administrative structure, the Parish Council; the stones labelled "Church Aston" to which Mrs Pay drew attention.[178] As against that, there was evidence of sharing of facilities and cross-membership of associations and groups such as the Church Aston Baby Group (Mrs Jones); Mrs Murphy's use of "the facilities and events offered by our local village Church Aston" despite living in Station Road; Mr Ellarby joining the Church Aston Scout troop despite living in Station Court.

302. On such evidence on the topic as was before the inquiry, I do not think that it is possible to find on the balance of probabilities that there is a single neighbourhood comprising Church Aston and the adjoining part of Newport (as edged blue on the A40 map or at all). But neither do I think it would be possible to conclude on the balance of

[177] Paragraphs 59, 88,103-104 above.
[178] Paragraph 137 above.

probabilities that Church Aston is a separate neighbourhood in its own right with clearly established boundaries. It was an unusual feature of this application that the witnesses eschewed giving any direct evidence of their perceptions and experiences touching on the neighbourhood issue. Typically, in a contested neighbourhood case, most if not all of the applicant's witnesses squarely address the topic of what makes their claimed neighbourhood a neighbourhood. Here none did. Mrs Pay addressed the meaning of "neighbourhood" but her evidence undermined, rather than supported, the case for the Claimed Neighbourhood.[179] Mrs Clarke referred to the four roads surrounding the Claimed Neighbourhood and described them as busy.[180] But I do not think that being surrounded by four roads, even busy ones, can be sufficient in and of itself to render an area a neighbourhood although it may be one of the factors contributing to an area having the necessary cohesiveness. It would denude the expression "neighbourhood" of meaning if every area surrounded by four busy roads qualified as one. In this particular case, none of the roads (apart from the bypass) is of such a nature as to constitute a barrier or disincentive to passage from one side to the other. Historical and social characteristics as well as geographical characteristics must be taken into consideration in determining if an area is objectively identifiable as a discrete neighbourhood distinct from adjoining areas: whether the area has a name, what community facilities and shops it has, whether estate agents sell properties by reference to its name and/or characteristics, the style and date of housing in the area, and connections between street names are all mentioned in *Leeds Group*[181] as factors to be taken into account in what does not purport to be an exhaustive list. It is clear that the Claimed Neighbourhood does not have a name and that it now has only one shop (the Springfield Stores) but no other matters were addressed in evidence.

303. As to the second of the two questions, from looking at the area on maps and on the ground I have to say that I see no obvious justification for dividing Newport along the blue line as drawn on A40 (or as proposed to be modified). Given the origins of the line as a tool for reporting census statistics,[182] that is perhaps unsurprising. I note that the Applicant's submission that the Registration Authority could find there to be a separate neighbourhood of South Newport (the balance of the blue-edged area on the A40 map

[179] Ibid.
[180] Paragraph 81 above.
[181] At paragraph 104.
[182] See A35: paragraph 21 above.

after removal of Church Aston) was unsupported by any arguments for hiving it off from the rest of Newport to the east, west and north as well as Church Aston to the south. Why, for example, split the Audley Avenue Industrial Estate and incorporate only part in the eastern end of the Claimed Neighbourhood? Why include three schools serving the whole of Newport (and for that matter Church Aston and settlements further afield - see the evidence of Mr Healey)[183], namely Burton Borough Secondary School and the Newport Junior and Infant Schools, but leave out the Newport Girls High School, Adams Grammar School, Moorfield Primary School and St Peter & St Paul's RC Primary School? Why include the Methodist and United Reformed churches but leave out the Anglican and Roman Catholic churches? Newport is a compact market town, not a sprawling conurbation like the City of Leeds. I note that in the "evidence cards" at A469 and following,[184] the statement "I consider myself to be an inhabitant of ....." tended to be completed by insertion of "Newport" or "Church Aston" not "South Newport".

Whether the Registration Authority has power to grant the Application on the basis of a different neighbourhood than the Claimed Neighbourhood

304. The Applicant relies on *Laing Homes* and the *Warneford Meadow* case as authority for the proposition that the Registration Authority has power, without any further amendment of the Application, to register the Application Land on the basis of use by the inhabitants of a different neighbourhood or neighbourhoods from that relied on by him in the amended Application and throughout the inquiry.

305. In my opinion those cases are distinguishable from the present situation and do not provide authority for that proposition. Both cases concerned applications under the 1965 Act and 1969 Regulations. As explained above, at paragraph 205, the 1969 Regulations as interpreted by Sullivan J in *Laing Homes* did not require an applicant to identify or commit himself to any particular locality (or under the 1965 Act as amended, any particular neighbourhood); there was no place in the prescribed application form for him to do so. That was the reasoning which underpinned his

[183] Paragraph 108 above.
[184] See paragraph 161 above.

(obiter) view that it was for the registration authority to determine the relevant locality/neighbourhood in the light of all the available evidence. That reasoning no longer holds good. The 2007 Regulations require by regulation 3 that the application be made in the prescribed form and that form (Form 44) unequivocally makes it mandatory for every applicant to identify and commit himself to a particular locality or neighbourhood, defined by name or (where that would be insufficiently certain) by a map. There is no longer any need or justification for registration authorities to seek to find a locality or neighbourhood for the applicant. The identity of the locality/neighbourhood is one of the essential ingredients of the criteria for registrability which the applicant must prove. Lord Hoffmann clarified in *Oxfordshire* that it is not for the registration authority to find evidence or reformulate the applicant's case; it is entitled to deal with the application and the evidence as presented by the parties (paragraph 11 above). For a registration authority to come up with an alternative locality or neighbourhood after the conclusion of the inquiry would be to reformulate the applicant's case, not to deal with the application as presented by the applicant. Absent a formal (re)amendment of the application, I advise that it is not open to a registration authority to determine a section 15 application on the basis of an alternative locality/neighbourhood. Here, the Applicant did not apply to re-amend the Application and did not even produce a map or maps depicting the alternative alleged neighbourhoods of Church Aston and South Newport which the Registration Authority was being asked to consider.

306. It is true that in the *Warneford Meadow* case, Judge Waksman QC expressly contemplated in passing that an inspector could recommend registration on the basis of a different neighbourhood from that claimed, and a registration authority could act on the recommendation, in the case of an application under the 2006 Act and the 2008 Regulations (which like the 2007 Regulations require identification of a locality/ neighbourhood by the applicant). But not only was he not deciding the point, he had not even heard any argument on it. The contrast between the position under the 1969 and 2007/2008 Regulations was not put to him. The case before him was a 1965 Act case and based on *Laing Homes*, it was accepted that there had been power in that case to register on the basis of a different neighbourhood from that advanced by the applicant.

307. In any event, even if I am wrong and a registration authority does have power to register on the basis of a alternative locality/neighbourhood from that claimed in the application, it cannot be fair to the objector to exercise that power when the first mention of that alternative is made after the evidence has all been heard and the objector has closed its case. An objector must be entitled to conduct its case on the basis of the way in which the applicant's case is put before and during the inquiry. It cannot be expected to cross-examine, call evidence and make submissions on possible alternative areas as a precaution. In *Laing Homes* the new locality was put forward by the applicant on the first day of the inquiry. Being an ecclesiastical parish with legally defined boundaries, there was no doubt about its existence or extent, and the objector did not need to seek an adjournment to deal with it. The existence and extent of a neighbourhood is a matter of fact and evidence and the late raising of a new neighbourhood is capable of causing prejudice. Once the evidence and the objector's case are closed that prejudice is irremediable. Fairness to the parties is the predominant requirement in handling an application for registration of land as a green: see per Lord Hoffmann in *Oxfordshire* and Sullivan J himself in *Laing Homes* in this very context.[185]

308. Finally, I accept Mr Edwards's submission that even if the Registration Authority has in principle the power to grant the Application on the basis of other neighbourhoods, and even if it would not be unfair to the Objector to do so, the evidence before the inquiry does not establish the existence of a neighbourhood of Church Aston or South Newport.

Significant number

309. The question whether there has been use by a significant number of inhabitants can only sensibly be asked by reference to a specific locality or neighbourhood. If I had taken the view that the Claimed Neighbourhood was a neighbourhood for section 15 purposes, I would on the evidence have advised that as a matter of impression, sufficient numbers of its inhabitants used the Application Land during the period 15 December 1991-15 December 2011 to signify that it was in general use by the local

[185] Paragraphs 11 and 205 above.

community for informal recreation (the *McAlpine Homes* test: paragraph 197 above), subject however to the Objector's contentions that:

- The majority of such use falls to be discounted as lawful sports and pastimes, pursuant to the principles discussed at paragraphs 232-238 above regarding highway-type use.
- The balance of the user was insufficient to generate a conclusion that the Application Land was used for lawful sports and pastimes throughout the period 15 December 1991-15 December 2011.

Character and amount of the user

310. It was common ground between the parties that:

- The proper test of whether user of land was referable to use as a town or village green was how it would have appeared to the reasonable landowner.
- Any consideration of use that might have been referable to use as a town or village green was a matter of degree to be determined by the decision-maker on the facts of each specific case.

I agree that those propositions flow from the cases, in particular, *Laing Homes, Oxfordshire* (at all levels), and *Lewis*.[186]

311. On the basis of the totality of the oral, written and documentary evidence (including photographs) tendered to the inquiry (but giving little weight to the written statements and evidence questionnaires and cards of witnesses who did not attend for cross-examination save insofar as supported by documentary evidence)[187] I make the following findings of fact.

The Round Field

[186] See paragraphs 220-222 above.
[187] See paragraphs 160-161, 231 above.

312. The Applicant does not dispute that Mr Bubb has farmed the Round Field pursuant to licence agreements[188] since September 2008, and grown, in successive seasons, rape, winter wheat, winter wheat, and rape. On the basis of Mr Bubb's evidence as to the cycle of cultivation, which I accept, that means that in each of the seasons 2008/2009, 2009/2010, 2010/2011 and 2011/2012, a crop had been planted in September/October, grown in the autumn to a height of several inches, resumed growth in the spring and continued to grow until harvest in late July (2009 and 2012) or early August - mid September (2010 and 2011), with a period of 3-7 weeks before the next crop was planted during which the land was cultivated and sprayed. On the basis that germination took 2-3 weeks, the maximum time between harvest and the next crop becoming apparent in 2009, 2010 and 2011 would have been in the order of 3 months (2009) and 2 months (2010 and 2011).

313. It was also common ground that the Round Field was in set-aside from September 2002-September 2008, meaning that it was put to grass and kept cut and in good condition.

314. In the years between December 1991 and September 2002, the Applicant did not concede that any particular crops had been grown, although his witnesses accepted the generality of the proposition that arable crops had been grown in some at least of those years. There is no good reason to disbelieve the information in Mr Jones's statement about winter wheat being grown in 1998/1999[189] and winter barley in 1999/2000.[190] On Mr Bubb's evidence. harvest would have taken place in early August-mid September in 1999 (with the next crop being planted in September/October) and harvest would have taken place in mid-July in 2000. There is no specific information about the growing of crops in 2000/2001 and 2001/2002 but there would have been no reason for H Timmis (Farms) Ltd to have entered into a farm business tenancy agreement to grow arable crops and then left the land fallow, so on the balance of probability I find that arable crops of some kind were grown in each of those years.

[188] As particularised by Mr Jones: see paragraph 195 above.
[189] I do not think the aerial photograph at O402A can be interpreted as showing the field down to grass in 1999 as the Applicant suggested. The time of year is unknown and may have followed harvest.
[190] The aerial photograph at O356 supports this.

315. From 1992-1998 Mr Jones's evidence is that there was a rotation of silage, wheat (feed), barley (feed) and maize. Mrs Pay recalled one maize crop, which on Mr Bubb's evidence would have been sown only in May and harvested in September/October. Spring barley or wheat would have been in the ground for a similar period. Mrs Clarke recalled 2 or 3 years when silage was grown in the mid 1990s; I shall take it as 3 in the Applicant's favour.

316. On that basis, in 10 out of the 20 years preceding the Application arable crops were grown in the Round Field and in at least 5 (probably more) of those years a crop was grown which was planted in the autumn and not harvested until the following summer.

317. I find that throughout the entire 20 year period preceding the Application, it was possible for members of the public to walk all the way round the perimeter of the Round Field, and that they did so, although the paths along the north-western and eastern sides were much more well-used and, consequently, worn. The evidence was that the paths along those sides moved further into the field over the years. That was particularly so after Mr Bubb created 6m wide buffer strips in compliance with the stewardship scheme requirements but may possibly have begun during the set-aside period. The only other prominent worn path on the field during the 20 year period preceding the Application was the north-south path in the alignment marked "path(um)" on the plan at Appendix B to this report, which re-appeared every time the land was not cropped for a substantial period (as in the set-aside years and possibly during the silage years) but was ploughed up and disappeared whenever arable crops were grown.

318. The paths around (and, when present, the path across) the Round Field were used as walks in themselves and as parts of longer circular walks around the area by members of the public, mostly (in the nature of things) local inhabitants.

319. I find that throughout the period 15 December 1991-15 December 2011, use of the paths was by far the predominant use of the Round Field by members of the public, both during periods when the field was under a crop and periods when it was not. The principal activities by members of the public on the Application Land as a whole,

according to the Applicants' own oral and written evidence, including the table of activities at Appendix F to this Report, and the Objector's evidence, were walking and dog walking, and I find that the preponderance of that use took place on the Round Field paths; the same is true of cycling, running, jogging and socialising. I find that nature observation in its various forms, photography, and fruit picking (from the hedgerow between the fields) took place to a very large extent from, or just off, the Round Field paths. I further find that all of the activities on, from and just off the Round Field paths would have appeared to a reasonable landowner to be referable to use as a public right of way and hence should not count as qualifying user for the purposes of a section 15 application such as this one. I refer in particular to:

- Mr Broad's confirmation that the predominant use of the Application Land was walking and dog walking and the majority of people seen on the Round Field were using the north-western and eastern paths (paragraph 38 above).
- Mr Davies's evidence about "legitimate paths" (paragraph 45 above).
- Mrs Murphy's evidence about most people taking the headland routes (paragraph 49 above).
- Mr Goulding's evidence that the purposes for which the Application Land had been used were horse grazing (the Horse Field) and agriculture and public rights of way (the Round Field) (paragraph 89 above).
- Mr Richards's evidence that walking across the Round Field (as opposed to round the perimeter) was exceptional rather than the rule (paragraph 116 above).
- Mr Evans's reference to use of the land having been fully and openly accommodated with all footpaths being retained and maintained (paragraph 128 above).
- Mr Henderson's equation of the areas used for recreational activities with the headlands (paragraph 148 above).
- Mrs Stansfield's evidence that she had always thought the Application Land to be farm land with public rights of way (paragraph 154 above).

Those selected references express what is implicit in most of the other witnesses' evidence. A reasonable bystander (or landowner) observing the Application Land over

the 20 year period would have perceived the manner in which it was being used as farm land with public rights of way rather than town or village green type use.

320. I do not accept that there was any but the most occasional use of the remainder of the field during the time between the planting and harvest of arable crops. I have rejected as greatly exaggerated, if not wholly untruthful, the evidence suggesting widespread use of the tractor tracks/tramlines by members of the public. There was minimal evidence of people walking or riding across, or playing in, crops themselves. Almost universally the Applicant's witnesses claimed to have respected and avoided the crops; and that was consistent with the experience of Mr Bubb, who neither saw nor received reports of damage caused by, or even signs of, trespass. I think that what most people meant by keeping out of the crops was keeping off the cultivated area from at latest the time when the crops began to grow visibly (as Mrs Briscoe put it).

321. There is a question as to whether, when witnesses said that they kept out of crops, they meant to refer to the silage crops as well. I think that they probably must have kept out when the grass was long; most people would have appreciated that it was of value to the farmer and that its value would be diminished or destroyed if they trampled over it. However, it is fair to say that that particular point was not addressed in evidence.

322. No doubt members of the public (again, in the nature of things, mostly local inhabitants) did use the Round Field more extensively, in terms of both area and activities, during periods when there were no crops growing: particularly during the set-aside years, but also after harvest in other years. On the balance of probability, any significant use of the Round Field for kite flying, picnics, informal ball games, running around chasing dogs, and the like took place during these periods, rather than taking place when the field was under crop but on or adjacent to the paths. General references in the evidence to activities of that kind on the Application Land (i.e. when no time or place is specified) are in my view more likely to be attributable to the Round Field during these periods than to the Horse Field or the Wooded Area. The Horse Field had horses in it for most of the time and also had a tendency to bogginess, as well as patches of thistles and nettles, all of which were deterrents to pursuing pastimes of those kinds. The Wooded Area had particular attractions for people who wanted to

pursue pastimes out of others' way; rummaging for fungi like Mr Davies, or hanging out with other teenage boys like Mr Clarke, or playing hide and seek like Mr Healey's children but the drier and more open aspects of the Round Field would have more pulling power for dog walkers who could let their dogs off the lead, for children who could run around, and for the minority of walkers like Mrs Pay who found sticking to paths restrictive.

323. Were those activities, in those times, enough to render the Round Field registrable as a green? I think not, for the following reasons.

324. First, there was quite a lot of evidence that although these activities took place all over the Round Field when there were no crops, they were still relatively infrequent. When pressed in cross-examination, most witnesses accepted that kite flying, picnics, ball games, and horse riding were in truth only occasional. It is also to be recalled that letting dogs run off the lead is not inconsistent with right of way use.[191]

325. Secondly, I think that on the evidence and as a matter of inherent probability, the vast majority of users of the Round Field would have carried on their usual pattern of activity in the usual way: whether dog walkers ("people of habit" in Mr Broad's words), or joggers/runners or walkers with their own favourite circuits. Many of them would have had limited time available for their activities.

326. Thirdly, especially in the years when rape or winter wheat or winter barley was grown, the window for alternative activities all over the Round Field was quite restricted. Even if the number of local inhabitants using the whole field for recreation during those weeks had been extensive enough to satisfy the *McAlpine Homes* test, which I am not satisfied on the evidence was more probable than not, I do not think that where use is limited to 2-3 months out of 12 in at least 5 years of the material 20 year period, it can properly be said that "a significant number of the [relevant inhabitants] indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years". Simply as a matter of fact, I think that the breaks in user are too long and numerous for that to be the case. Indeed I think that even if that had been the position in one year only out

[191] Paragraph 233 above.

of the relevant 20 years, the result would be the same. It can perhaps be tested in this way: if a claimed 20 year user period had begun in September and a month later use had ceased until the following August while an arable crop was grown and harvested, would a court say that the period September-August was to be counted towards a section 15 claim? I do not think so.

327. Another way of arriving at the same result would be to say that the local inhabitants would not have appeared to a reasonable landowner to be asserting a right to indulge in lawful sports and pastimes all over his land, because their use was not of such amount and in such manner as would reasonably be regarded as being the assertion of a public right and Lord Hope's "first question" (*Lewis*, paragraph 67: see paragraphs 220-222 above) would have been answered adversely to the users.

328. I agree with Mr Edwards's submission that *Lewis* is distinguishable on its facts. It was concerned with concurrent competing uses by local inhabitants for recreation and by the golfers all year round, not with sequential uses. See paragraph 223 above. The kind of use made of the field by Mr Bubb (and certain of his predecessors) was not "*low level agricultural activity*" and to my mind is an example of "*the position* [being] *that the two uses cannot sensibly co-exist at all*" (see paragraph 217 above).

329. For all those reasons, I advise that (leaving aside the neighbourhood issue) the Round Field is not registrable.

The Horse Field

330. As mentioned above (and as acknowledged by the vast majority of the Applicant's witnesses), there were at least two untethered horses in the Horse Field for almost all of the 20 year period preceding the Application, and the Horse Field is prone to bogginess and has patches of thistles and nettles in it which Mr O'Brien allows to grow unchecked in the spring and summer months to attract goldfinches. The recreational uses to which it could be put were, accordingly, constrained. Walking through it between the stiles/kissing gates was of course referable to the exercise of an established public right of way (being part of the Hutchison Way) and following that route (with or without a

dog) cannot be relied on in support of the Application. Nor can any activity ancillary or reasonably incidental to use of the route as a right of way. It may well be that people did not follow the exact legal alignment of the footpath. As Mr Edwards submitted, the small scale of the definitive map means that there is room for doubt about its precise alignment and in any event, the ground conditions meant that people varied their routes (per Mr Gittus). The evidence of most of the Applicant's witnesses was that there was not really a worn path in the Horse Field and Mr O'Brien agreed; the aerial photographs show none. But I do not think that it follows that people who went into the field were wandering all over it in a manner suggestive to a reasonable landowner of town/village green type use. There was a fair amount of evidence of people just walking through, so the explanation for the lack of a worn path must lie elsewhere; in the ground conditions and/or the necessity to vary the route to avoid getting too wet, and/or a preference among some users for the drier alternative route on the other side of the hedgerow in the Round Field, which gave access to the rest of the Hutchison Way.

331. Quite a few witnesses admitted to staying out of the field when the horses were there, or near the entrance, or to keeping their dogs or children away from the horses and agreed that others would be similarly cautious. Some uses of the Horse Field other than walking through were seasonal, or sporadic (e.g. collecting fungi or sloes). There was little concrete evidence of pond dipping. Mrs Fletcher said that she did not see others around the pond. As for visiting and/or feeding the horses, those activities could of course be carried on from outside the field altogether (over the Station Road vehicular gate, the two pedestrian entrances, or the fence along the southern side of the field); or from the path; or from elsewhere inside the field. General references in evidence to those activities cannot be taken as references to off-path use in the field. Even if constituting a lawful pastime (which I doubt: paragraph 292 above), I cannot find on the evidence that they were carried on to a sufficient degree to warrant registration either alone or in combination with the limited amount of nature observation, photography, pond dipping, fruit or fungi collection and wandering around of which some witnesses gave oral evidence to the inquiry, along with the evidence of highly individual pursuits such as Mrs Fletcher's historical searches and Mr Nicholas's planking. In reality I think that the attraction of the Horse Field for individuals like Mrs Clarke was that the field was peaceful and quiet and could be enjoyed in solitude.

There were no references in evidence to socialising on the Horse Field in contrast to the paths on the Round Field.

332. Having discounted user referable to the exercise of the public right of way through the Horse Field, I am not satisfied on the balance of probability that there was sufficient user of the field for lawful sports and pastimes throughout the 20 year period 15 December 1991-15 December 2011 to justify registration.

The Wooded Area

333. There are two legally established footpaths through the Wooded Area: the beginning of the Hutchison Way and the short length of the north-south footpath crossing the westernmost tip of the land (Appendix D). Use of those routes must be discounted accordingly. So must use of the alternative route from the Station Road entrance to the northern entrance to the Horse Field, as that would appear to a reasonable landowner to be highway-type use. Evidence of use of the Wooded Area fell into two main categories: walking through, and children's play/teenagers "hanging out". As to the former, there was a divergence of evidence as to whether there was some sort of east-west beaten track through the area north of the Round Field. Given the evidence that the Wooded Area was generally very overgrown, if not in places impenetrable, prior to the clearance of 2006/7 around the Station Road entrance and the further clearance in February 2012, I think that on the balance of probability there was such a route, or else the minority of adult witnesses who spoke of walking and more particularly cycling through it would have been unlikely if not unable to have done so. That would have appeared to a reasonable landowner to be path-type use. I do not find that there was any appreciable amount of general wandering around in the area.

334. The area was unsuitable for most other activities. It is unclear when seasonal sledging on the incline came to an end, but it must have been early in the 20 year period, if not before. There was a small amount of evidence of picnicking, in the sense of people sitting down to have a snack, near the gate, and Mrs Ashley read her book there, but none of that would add up to satisfying the *McAlpine Homes* test. Does the evidence of children's play and of the "hot spot" for activity by teenagers and children in the Copse

area make all the difference? On balance, I think not. Mr Edwards rightly pointed out that most of the first-hand evidence of such activity given orally at the inquiry had related to the early years of the period (or before), and in any event the 2006/7 clearance of the Copse area had diminished its attractiveness before the end of the period. Most of the other, including the written, evidence of children's play specified no particular location and could have related to the Round Field when not under crop, and was unspecific as to dates.

General remarks

335. I should make clear that while I accept the evidence of Mr Fox and Mr James, as to their observations during the "surveillance" exercise in April 2012,[192] and have taken it into account, I have given it no weight in arriving at my findings and conclusions regarding use of the Application Land during the period relevant to the Application. I regard it as consistent with and broadly supportive of the conclusion I have independently reached on the remainder of the evidence that the preponderant public use of the Application Land was use of the paths, particularly in the Round Field. But given the circumstances, including the time of year, the weather, and the changes in layout and ambience of the land following the Objector's 2012 works, I did not think it safe to draw any direct inferences from it as to the pattern or volume of user during the material period.

336. I should also make it clear that while I have said that there has been use of paths in the Round Field and Wooded Area which a reasonable landowner would have attributed to use as a public right of way, I am making no findings one way or the other as to whether the conditions for the acquisition of public rights of way over any of the routes in question have been satisfied. That is no part of my function or that of the Registration Authority.

[192] Paragraphs 172-180 above.

XI. Recommendation

337. My overall conclusion on the totality of the evidence presented at the inquiry is that the Applicant has failed to prove his case and that none of the Application Land qualifies for registration as a town or village green under section 15(2) of the Commons Act 2006. It has not been shown that a significant number of the inhabitants of any locality or any neighbourhood within a locality indulged in lawful sports and pastimes as of right on the Application Land or any part of it for a period of at least twenty years, and continued to do so at the time of the Application.

338. In particular:

(a) I have found that the Claimed Neighbourhood is not a 'neighbourhood' within the meaning of the statute;

(b) I advise that the Registration Authority has no power to substitute a different neighbourhood or neighbourhoods for the Claimed Neighbourhood, alternatively that to do so would be unfair to the Objector, and in any event the evidence does not establish any alternative neighbourhood or neighbourhoods;

(c) I have found that the predominant recreational user of the Application Land during the material period was user of paths such as to have appeared to a reasonable landowner to be referable to the exercise of existing, or the potential acquisition of new, public rights of way, and that user did not qualify as lawful sports and pastimes for the purposes of the Application;

(d) I have found that there was insufficient use of the Application Land for lawful sports and pastimes.

339. My recommendation is that the Registration Authority should reject the Application for the reasons set out in this Report.

Ross Crail
New Square Chambers
Lincoln's Inn
18 January 2013

IN THE MATTER OF AN APPLICATION FOR THE REGISTRATION AS A TOWN OR VILLAGE GREEN OF LAND AT STATION ROAD, NEWPORT

INSPECTOR'S REPORT

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