COMMONS ACT 2006 – SECTION 15

APPLICATIONS FOR THE REGISTRATION OF LAND
WHICH IS CLAIMED TO HAVE BECOME A TOWN OR VILLAGE GREEN

TOP FIELD KING'S WORTHY

F I N A L R E P O R T

SUMMARY

I recommend that Applications VG 262 and 267 be rejected for the reasons summarised here and set out in full below.

I conclude that both TVG Applications should be rejected for the reasons set out above. In summary, these are:

(i) sufficient user of the requisite quality has not been established for the relevant periods in either case; and/or

(ii) such user as there was would, predominantly, have carried the appearance of path user rather than a clear assertion of TVG rights for the relevant periods; and/or

(iii) Areas 2 and 3 are subject to Trigger Events under Schedule 1A to the Growth and Infrastructure Act 2013 which mean that they are not eligible for registration.

Accordingly, I recommend that Applications VG 262 and VG 267 be rejected.

INTRODUCTION

1.1. I am instructed to advise Hampshire County Council, the Commons Registration Authority ("CRA") for the purposes of the Commons Act 2006 ("CA 2006") as to the disposal of two Applications under s.15 of the Act to register land at King's Worthy as Town or Village Green ("TVG").

1.2. The Regulatory Committee of Hampshire County Council, having taken the advice of Mr Vivian Chapman QC, decided on 20th April 2016 that it was necessary to hold a public inquiry. Although I was not asked to consider that procedural point, I should make it clear, in the light of certain representations made by Mr Webster, on behalf of the Objector, that I agree that it was essential to hold the inquiry, which has enabled me to make clear recommendations to the CRA as to the disposal of the Applications. I

chaired the public inquiry from 19th to 23rd September at Sparsholt College, reconvening for closing submissions at The Guildhall in Winchester on 18th October. I inspected the application land in company with an officer of the CRA and representatives of the parties, including their advocates, on 23rd September having undertaken a limited informal visit on my own previously.

THE APPLICATIONS AND THE APPLICANT

2.1. The first Application, numbered TVG 262, was received by the Council on 13th May 2013. It sought the registration of an area of land described as Top Field King's Worthy. It was formed of a roughly rhomboid area of land surmounted by two triangles to the north east and north west. The land was bounded by a disused railway line (the "Watercress Line") to the south, the main Southampton to London line to the west and vacant land and the rear gardens of properties on Springvale Road to the east. The northern triangles were formed, in part, by a small estate served off Laburnum Drive and Ilex Close to the north east and Hookpit Farm Lane to the north. The Application Form 44 and the supporting statutory declaration were signed by a Mrs Mary Mould.

2.2. In accordance with legislative provisions introduced by the Growth and Infrastructure Act 2013 ("GIA 2013"), to which I shall turn in detail below, the CRA investigated the planning history of the Application land. GIA 2013 suspends the right to apply for TVG registration during periods of time when certain "trigger events" have occurred, the effect of which has not yet been

cancelled by “terminating events”. The subsequent occurrence of a trigger event, after an application has been made, however, does not invalidate the application.

2.3. Officers discovered that the north western triangle was the subject of a grant of full planning permission, dated February 2013, for housing development. This permission was extant. In accordance with the 2013 Act, the Applicant was advised on 27th September 2013 that it would not be possible to progress the Application in relation to the area of land with planning permission since it was subject to a trigger event, but that the Application would be considered in relation to the remainder of the land.

2.4. There was then a considerable amount of procedural correspondence as to who should be treated as the Applicant for TVG 262. In short, the Top Field Action Group (“TFAG”) applied to be joined as co-applicant. They were represented by Mr Paul Wilmshurst of Counsel who made written submissions in support of Mrs Mould’s application. Mr Chapman QC gave Directions on 27th July 2016 for the conduct of the public inquiry. In his Directions document, he indicated that he proposed to use his inherent powers of management to direct that TFAG should represent the Applicant for the purposes of the public inquiry, rather than adding the Group as a further applicant. He made provision for application to be made to vary this direction. Mr Webster, whilst enquiring at the outset of the inquiry as to the extent of TFAG’s local interest, did not make such an application. Mr Wilmshurst confirmed that he was,

indeed, instructed by TFAG and that he was prepared to liaise with Mrs Mould where necessary. He also said that Mrs Mould would be called in due course to give evidence, which she was. I should like to record my thanks to Mrs Clarke of TFAG for her courtesy and good organisation during the inquiry, which greatly assisted everyone in their tasks. I am also most grateful to Counsel for both parties for providing helpful written closing submissions and an agreed bundle of authorities. Mr Wilmshurst's Closing Submissions were expressed to be those of TFAG, endorsed by the Applicant, Mrs Mary Mould[1].

2.5. On 22nd July 2015, Ms Seeliger, the Senior Map Review Officer of the CRA, wrote to the person then acting as the contact for the Application, explaining that further planning circumstances had come to light which meant that some extra land had been subject to a trigger event. In the meantime, however, there had been a 'terminating event' and the upshot was that a small area of land within the north western triangle, previously excluded, could form the subject of an application. Accordingly, Application TVG 267 was made in respect of that small area of land on 19th August 2015.

2.6. Plans of the respective Application sites are appended to this report. Examination of these reveals that the whole of the VG 267 Application Site is contained within the land comprised in the VG 262 Application Site. Application 267 relies upon the same evidence as Application 262. Save for the fact that the two Applications were submitted and registered on different dates, they therefore overlap. Specifically, Application 267 raises no issues

[1] Paragraph 1

for consideration over and above those issues raised by Application 262, save for the fact that the relevant period is different.

2.7. Area 262 is some 18.8 ha in size. Area 267 is much smaller, measuring, I estimate, about a quarter of a hectare. During the inquiry, we adopted the convention of referring to the roughly rhomboid area in the centre, together with land in the south west corner of Application 262 and the land comprised in Application 267 collectively as "the Main Field", the northern triangle as "Area 1", the northern part of the eastern triangle as "Area 2" and the southern part of the eastern triangle as "Area 3". These areas are sketched on the plan appended to this Report and I adopt this terminology throughout.

2.8. Mr Wilmshurst raised the question of whether or not there was a third application. I made clear that I have been instructed to hold an inquiry and advise as the disposal of Applications VG 262 and 267 and that I attributed the time lag in registering Application 262 to the period elapsing before the CRA received answers to the relevant planning enquiries for the purposes of the GIA 2013. Nevertheless, to try and achieve clarity, I suggested to Mr Wilmshurst that he should speak to my instructing solicitor, Mr Austin, about the issue as I considered it only fair that the Objector (and, indeed, the CRA) should know what the Applicant / TFAG's position was. Mr Austin attended the inquiry on 20th September and permitted Mr Wilmshurst to view the relevant files of the CRA. Mr Wilmshurst formally accepted on behalf of TFAG and Mrs Mould that the relevant twenty year period for VG 262 is October 1993 to

October 2013. Following his inspection of the files with Mr Austin, Mr Wilmshurst did not raise the point again and there was no mention of it in his Closing Submissions. I consider that he was right not to raise it as I have seen no evidence to support a putative third application. In view of my findings of fact, it seems to me that the point is of no practical interest in any event.

OUTLINE OF THE CASE FOR REGISTRATION

3.1. Both Applications described the VG 262 area of land as *"Top Field"* and were made under s.15(2) CA 2006. The relevant Locality or Neighbourhood was specified as *"The Parish of King's Worthy"*, in particular the areas known locally as *"Hookpit Farm"* and *"Springvale"*. Reference was made to an annotated street map showing four entry points, roughly speaking at the north, north east, south east and south west points of the land. The marked points are, respectively, numbered 1,2,3,4 and are positioned at the western end of Hookpit Farm Lane, the south of Ilex Close, just to the north of the dismantled railway at the boundary with a small cul de sac of houses off Springvale Road and south of the dismantled railway at the corner formed by two fields.

3.2. The *"Justification"* section described Top Field as *"an important area of undeveloped natural landscape with a mixture of undergrowth, interwoven with clear paths reflecting regular use, and a large open flat area. The entire area is readily accessible to residents of the parish of King's Worthy. … The principal access point is a heavily-used path which leads off Hookpit Farm Lane … These access points are clearly visible to the casual observer and*

since they are entirely open there is no suggestion that force or secrecy is required or used in order to gain access to the land. Additionally a number of houses back directly onto the land and many of these have gates allowing free and ready access to the land". The statement continued: *"the land is used freely and openly on a daily basis by varying numbers of King's Worthy residents for a variety of lawful activities. The most common usage is dog walking but as can be seen from the witness statements attached to this application a number of other lawful activities also takes place on the land."* It was said that *"free and open usage of the land"* was continuing and had gone on for more than twenty years. The justification went on to say that there was *"no evidence to suggest that at any time had there been signage suggesting that the land was private or the user conditional on the owner's permission."*

3.3. The Applications were supported by the required statutory declarations and submitted with some undated photographs of the land and its access and 124 evidence questionnaires. 48 further questionnaires were submitted later. The questionnaires are in a pre-printed standard form which is typical of many such applications. They contain an *"Important Notice"* in bold type at the top, in the following form:

> *"**The object of this questionnaire is to reach the truth of the matter whatever that may be. You are requested to answer the questions as accurately as possible and not to withhold any information, whether for or against the application."***

They were accompanied by a map with the whole of the original Application 262 land coloured in and respondents were invited to mark their homes on the plan and to sign, name and date it. The questions about user are phrased generally by reference to *"the land".*

3.4. The contents of the questionnaires dealing with duration, types of user, beliefs about ownership and permission / fencing / signage were summarised in tabular form by Miss Seeliger. I invited the parties to review this summary with the object of producing an agreed document before the end of the Inquiry. They did so and I append the finally agreed document to this Report. In doing so, I should stress that I accept Mr Webster's submissions as to the reduced weight to be given to the contents of this document and the forms themselves, compared with the oral evidence of witnesses at the inquiry. I exercise this caution on three principal bases:

(1) the imprecise nature of many of the questions in the form – an important point being the absence of any invitation to respondents to consider specific areas of the Application land;

(2) the apparent absence of any legal advice as to the nature of the s.15 CRA 2006 requirements; and

(3) the clarification and concessions which were made by live witnesses and by Mr Wilmshurst during the course of the Inquiry as a result of examination by Counsel and my own questioning. The questionnaires are broadly similar in nature and content to the evidence in chief given

by witnesses in support of the Applications and I therefore regard the elucidation given at the Inquiry as highly relevant to my consideration of the extent to which the questionnaires can be regarded as probative.

OUTLINE OF THE OBJECTIONS TO REGISTRATION

4.1. The land in question is owned by Drew Smith Limited, a property development company based in Southampton. Objections to the Applications were submitted on its behalf on 27th January, 29th March and 4th April 2016. The grounds of objection, in summary, were as follows:

"

- *the applicant and supporters have not provided evidence to demonstrate that the whole of Top Field has been used for lawful sports and pastimes between October 1993 and October 2013, the qualifying period and, even if such use had occurred, there are interruptions to that use which prevent registration;*

- *these interruptions include agricultural use – evidence has been provided by the farmer of the growing of barley, rape seed, wheat and oats, supported by documentary evidence, including payments by the Rural Payments Agency;*

- *any use causing damage to the crops would not qualify for village green use;*

- *reliance is placed on expert evidence which purports to show the land under arable cultivation for periods of time during which the users claim the land was being used for lawful sports and pastimes;*

- *the objector provides evidence that signage renders the use not 'as of right';*

- *reference is made to a Definitive Map Modification Order for highway use around the perimeter of the field;*

- *arguments are set out referring to the effects of trigger events relating to planning permission and a local plan review."*

Pursuant to the Directions for the Inquiry given by Mr Vivian Chapman QC, Mr Webster put in an amended summary of the Objector's legal submissions. In short, he submitted that:

(a) the burden of proof rests on the Applicant;

(b) Application VG 267 is pointless;

(c) certain parcels[2] within VG 262 are subject to trigger events and, as such, ineligible for registration;

(d) the Applicant has not established sufficient qualifying user for the whole 20 year period 1993 – 2014, especially having regard to the agricultural use of the land between 1993 and 1999;

(e) interruption between 1993 and 1999;

(f) main or only user was path-based;

(g) prohibitory signs in around June 2010;

(h) locked gate in 1990s on Hookpit Farm Lane access means that user did not qualify and user based on access via gaps in fencing/hedgerows did not qualify either;

[2] Identified on the plan at tab 6 of the Objector's Bundle and attached to this Report as Appx ?

(i) supporting evidence imprecise as to location, especially in relation to the northern part of the site, the development of which for housing was completed in around 2014;

(j) claimed neighbourhood/locality unclear.

With the exception of (j), these points were examined and/or developed in evidence and submissions on behalf of the Objector at the Inquiry.

HISTORY AND DESCRIPTION OF THE APPLICATION LAND

5.1. Despite the fundamental disagreement between the Parties as to the proper outcome of the Applications, a considerable amount of important evidence is not in contention.

5.2. The inquiry heard evidence from Mr Nigel Bright, of Hookpit Farm, who had also prepared a signed Witness Statement. Much of his evidence was unchallenged and it is helpful in explaining some of the history of the land in question. Mr Bright's father bought the land the subject of the original Application 262 in 1962. It appears, from the Land Registry information which I asked to be produced, that there were probably two separate titles at that time, HP647224 and HP385054, the former corresponding to the northern triangles and the eastern part of the site (Areas 1,2 and 3), the latter to the central and south western parts (the Main Field). Mr Bright Senior used the land for a few years for grazing cattle, then sold it. There was a grazing licence

of some or all of the land to another farmer from 1966 to c.1985. After a further sale, the land came, in 1992, into the ownership of a company which eventually became the developer Gleeson Homes (Southern) Ltd. Mr Bright stated that he occupied the land pursuant to a tenancy from 1985, though he had commenced some work on site in 1984. No documentary evidence relating to this tenancy was produced. Since Mr Bright spoke of *"the land"* generally, I am not certain whether his 1985 tenancy was of the whole of the Application land or just the Main Field. Mr Bright said that he had not been prepared to take on a fencing obligation as the previous occupier had experienced difficulties keeping the public off the land. His predecessor's experience also made Mr Bright decide against keeping animals on the land when he took over control. Between September 1991[3] and September 2012, Mr Bright rented an area of some 15.37 acres or thereabouts, which was then comprised in title number HP385054. This arrangement was the subject of a written tenancy agreement, a copy of which was produced to the inquiry at my request. Unfortunately the tenancy plan is reproduced in black and white but it is clear from the size of the land in question and the uncoloured plan that the area which was let was the Main Field (known by Mr Bright as "Green Hill"[4]). He gave evidence, supported by records prepared for and by the Ministry of Agriculture Fisheries and Food "MAFF"), that he grew crops on this area for the first part of his tenancy, to c. 2000 when he put the land into set aside.

[3] Mr Bright's witness statement said *"in or about 1985, until 2013"*.

[4] The acreage tallies with the 6.85 hectares referred to in his later MAFF returns

This part of Mr Bright's evidence was not challenged by Mr Wilmshurst and he made a formal concession on 22nd September 2016 as follows:

> *"In the matter of an application to register 'Top Field', Kingsworthy as a new TVG.*
>
> *Upon considering the evidence given at the public inquiry*
>
> *And upon taking advice*
>
> 1. *The Applicant and TFAG accept the evidence given to the inquiry by Mr Bright (including his oral evidence) on the issue of the crops grown on the land during the relevant period".*

This evidence was corroborated by a series of aerial photographs, which were the subject of expert evidence given by Ms Christine Cox MA MCIFA FSA.

5.3. Both titles comprising Application Site 262 were transferred to the Objector on 11th February 2013. It is common ground that the central part of Main Field was ploughed in summer 2014. There has not been another cut since then.

5.4. <u>Application under s.53 Wildlife and Countryside Act 1981</u>

5.4.1. On 8th December 1997, an application to modify the Definitive Map by the addition of public footpaths over parts of the original Application Site 262 was made by King's Worthy Parish Council. The claimed route was described in the application as running *"from Hookpit Farm Lane to Hookpit Farm Lane around field"; thereafter, it* coincides roughly with the inner boundary of the Application 262 land and includes a loop in the south eastern

corner. I explained to the advocates that I intended to take the s.53 material into account and gave them the chance to address me about it. I bear in mind that the material is written only, but it does offer interesting contemporaneous insights into the physical state and user of the land leading up to and during the first half of the relevant TVG period.

5.4.2. This application was publicised and investigated by Hampshire County Council as Highway Authority in the normal way. Gleesons, the then owner, objected on 14th May 2001, on the basis that the land had been fenced when they bought it and re-fenced twice by them but that *"vandalism by trespassers keeps damaging the fences to gain unauthorised access"*.

5.4.3. The Footpath officer wrote a report recommending that the modification be made. She stated that Mr Bright had been the tenant since 1975[5]. Summarising his statement, the report states:

> *"He turned the land to arable, as the previous owner had kept horses and the fences were repeatedly cut by local people which meant that the horses were often escaping. Mr Bright has been quite happy with an unofficial path running around the field and has never tried to stop people walking there as he wishes to maintain good relations with the local people. He recalls that he left a gap around the field for people to walk along*

[5] This appears to have been an error, quite possibly a typing mistake – 1975 instead of 1985

as he knew that people would insist on walking there and did not want his crops damaged. To his knowledge the field has been fenced by the landlord several times, these fences have then usually been torn down or cut through. The landlord erected a large fence and gate after a problem with travellers. The landlord has never told him to stop people from walking, however he considers the fences to be proof of the landlords intentions. A few years ago someone from the Ramblers Association telephoned Mr Bright to ask about the path around the field. He told them that as far as he was concerned it was an unofficial path but that he did not want it to become a Public right of Way.

Previous to this, Mr Bright's father owned the field and appears to have been quite happy with people using the path around the field."

The report stated that there was a considerable body of local evidence covering the period 1972 to 1992, when the existence of a public footpath was called into question by Gleeson's predecessors, who fenced the entrance from Hookpit Farm Lane. The Officer reports having seen *"a pair of large metal gates"* at the road end of the path down from Hookpit Lane. The wire stretched across it had been cut, she said, but the gates were padlocked.

5.4.4. Her conclusion was that 17 users had used the route for a continuous 20 year period, 1972 to 1992, with remaining users having, between them, *"a substantial period of use"* and that the footpath should be added to the Definitive Map. At a meeting of

the Regulatory Committee of Hampshire County Council, members accepted their officer's recommendation and resolved that the necessary Order under s.53 Wildlife and Countryside Act 1981 be made. This was done on 26th April 2005 but the Order was never submitted to the Secretary of State for confirmation. Accordingly, the Order did not take effect. Whilst the officer's recommendation was based upon her conclusions concerning user between 1972 and 1992, her report is useful for my purposes insofar as it includes her descriptions of the land and photographs taken in the course of her investigations in the late '90s/early'00s.

5.4.5. The s.53 application was supported by many questionnaires and statements from local people. Unsurprisingly, they all attested to using the linear routes in question for recreational and dog walking purposes and, to some extent, to get from one part of the village to another. Several forms also referred to use of the paths by horse riders and cyclists. The questionnaire forms originated from Hampshire County Council and the preamble to the form makes it clear that there were accompanying notes, to be read before completing it and that the information might be used at a public inquiry. In this respect, the questionnaires differ from the TVG questionnaires,

which benefited from no accompanying legal advice whatsoever.

5.4.6. Several of the questionnaires and accompanying statements make reference to the metal gates and/or wire at the Hookpit Farm Lane entrance. For example, Christine Player explained that, in around 1995, there was an incursion onto the field by travellers and that the gate and fence were erected after their eviction. She said that the wire only lasted a few days before it was cut. A Mrs Prosser, who lived overlooking the field in Tudor Way, and had a back garden gate onto it, said much the same about the gate and fence, adding that her husband had rung the owners to tell them, but that they did nothing about it.

5.4.7. The report was accompanied by a series of photographs dated 16th August 2001. These show the Hookpit Farm Lane access with closed gates and the line of a path around the perimeter of the field, of varying width, in places worn through to the chalk substrate which underlies the land. Other photographs show a narrow but clear route through overgrown hedge/wooded vegetation, towards the dismantled railway line, a little way east of the south western access point shown on the TVG application plan. Photograph 12 in the series shows a path line *"running across field next to broken fence line facing north"*. This point

was about a third of the way into VG 262 land, working from the east. The area to the right is shown in the photograph as waist/shoulder high vegetation, while the area to the left is green, but flat. Photograph 13, taken looking east, shows a "*junction paths, more or less south of point 12. An old fence post is visible, together with some large, scrubby bushes, seasonal vegetation – probably thistles, ragwort and rosebay willow herb – and a clear grass path through the vegetation, with signs of wear in the foreground"*. Photograph 15 shows the *"most easterly path as marked on maps and claimed"*. This shows a grass path through waist high seasonal vegetation, probably ragwort, with a strong row of trees on the eastern boundary.

5.5. Ordnance Survey Maps

5.5.1. At my request, Ms Seeliger helpfully made available to the inquiry copies of relevant OS extracts. She produced versions for the following years:1997, reprinted with corrections in 2000, revised for selected change in 2004 and reprinted with minor change in 2005. Each version includes a dashed line running broadly along the route of the perimeter path as applied for in the s.53 application – ie. running along the eastern boundary of Area 3 but otherwise generally following the boundary of the

Main Field. The Key denotes such a line as a *"path"*, which is different from one of the categories of Public Rights of Way.

5.5.2. Documents INQ12 and 13 are OS revisions dating respectively from 1990 and 1974. The earlier extract contains no path markings on the site, whereas the 1990 one shows a dashed line in the same position as the later extracts, marked *"Path (um)".*

5.6. Planning History

5.6.1. Enquiries were made of the Local Planning Authority ("LPA"), Winchester City Council, prior to registering Application VG 262, as explained above. Unfortunately, the information did not all emerge at once, which made the handling of the TVG Application unnecessarily complicated. Nevertheless, the planning history is not complicated.

The Development Plan

5.6.2. 5.6.2 The LPA adopted the Winchester District Local Plan Review ("WDLPR") in July 2006. Policy RT 5 provides as follows:

> *"RT5 - Planning permission will be granted for improvements in recreational land and facilities and land is reserved for the provision of new facilities within the areas listed in paragraph 9.26*

and defined on the Proposals and Inset Maps. Schemes should be designed to accommodate shortfalls of children's play and sports facilities identified in the area, and have regard to any relevant proposals in the District Open Space Strategy.

9..27 Where recreational land deficiencies are less significant, proposals are contained in the Winchester District Open Space Strategy only. The Strategy provides annually updated details of the facilities in each parish and in Winchester. It identifies where the provision is inadequate and suggests improvements to meet present and future needs. The City Council will work with the Parish Councils to secure these smaller scale improvements.

9.28 All children's play facilities should be within easy reach of the housing areas they serve, and make provision for children of all ages. They should be located so that there is no need to cross an obstacle, such as a major road. There are areas that would benefit from additional equipped play areas, should suitable opportunities arise, and such provision will be encouraged."

Map 12 is an inset map of King's Worthy. It shows the RT5 designation covering the eastern portion of Site 262,[6] broadly speaking, covering Areas 2 and 3 and the eastern edge of Area 1. The LPA adopted a local Plan Part 1 – Joint Core Strategy in 2013. At my request, the Core Strategy Policies Map was produced. This carries forward Inset Map 12 from the 2006 WDLPR 2006. This annotation is consistent with the printed notes which appear on the version of the 2006 Plan in the Objector's Bundle, which indicate that certain policies other than

[6] OB p.161

RT.5 have expired. There is no such note against RT.5. I am therefore satisfied that it has been saved under the provisions of the Planning and Compulsory Purchase Act 2004 and remains part of the development plan. Strictly speaking, the reasoned justification is not saved, but it is still permissible to use it as an aid to construing and applying the policy.[7] There is no adopted Neighbourhood Plan. Therefore, the relevant parts of the *"development plan"* for the purposes of Schedule 1A to CA 2006 in this case comprise Policy RT.5 and Inset Map 12.

Planning Permissions

5.7. The planning history is set out in Mr Holmes' Supplementary Statement and is not factually contentious.

5.8. Application 05/01662/OUT sought outline permission for 25 affordable dwellings on land off Hookpit Farm Lane. It was granted on 13th August 2008. Application for approval of reserved matters had to be made within 3 years (ie. by 12th August 2011). In the meantime, Application 11/01383/OUT was made under s.73 Town and Country Planning Act 1990 to extend time and planning permission was issued on 29th March 2012, subject to a condition that application for approval of reserved matters was to be made within 3 years (ie. by 28th March 2015).

[7] R (oao Cherkley Campaign Ltd.) v Mole Valley DC [2014] EWCA Civ 567.

5.9. The Objector made a full application 12/01912/FUL on a slightly larger site for 25 affordable dwellings. The LPA resolved to grant permission subject to a s.106 Agreement. The Agreement was completed on 8th February 2013 and permission was issued on the same day. (The previous two permissions had also had associated s.106 Agreements but these are not material for TVG purposes). This permission was implemented on 5th April 2013 and the housing development was completed about a year later. It occupies Area 1. Mr Holmes summarised the rationale for the Agreement as making provision for an area of land to the south of the development site to be transferred to the LPA or the Parish Council in compensation for development on RT.5 land. The eastern part of the development site indeed overlaps the RT.5 designation, so this explanation seems reasonable. The Recitals make reference to the generation of a *"General Open Space requirement a Play Area requirement, the dedication of a Public Footpath and a Landscape Buffer"*. These areas are marked on Plan 1.[8]

5.10. The Agreement provides for the Open Space Area demarcated on Plan 1 (at the south east/east of the Site 262, straddling Areas 2 and 3) to be transferred, though subject to the proviso that if planning permission be granted on land edged blue[9] prior to the transfer, then *"the precise area and location of the Off-Site open space land may change such change in area and location to be agreed between the Council and the Owners"*. The LPA was granted an

[8] P.1087 in CRA Bundle *"Copies of Correspondence"*.

[9] My version of Plan 1 is uncoloured.

option, exercisable by 8th August 2014. The Option was exercised on 30th July 2014. Thereafter, the transfer was to be made by the later of:

(a) 3 months after service of notice certifying that the 25th dwelling; or

(b) 30 months after the Commencement date (ie. October 2016).

The Owners (i.e. the trustees of the Objector's Retirement Benefit Scheme) also covenanted to maintain the off Site Open Space Land for 5 years from the Commencement Date (ie. from April 2013).

5.11. Schedule 3 of the Agreement makes provision for the agreement, by April 2013, of a detailed route for the Public Footpath between Hookpit Farm Lane and a Point E, lying on the southern boundary of the Application 262 Site, at the western corner of Area 3. No later than March 2014, they were obliged to have marked out and constructed the Public Footpath. They were also obliged to dedicate the Public Footpath, though no timetable for dedication was specified. Again, if the further planning permission was granted, then there was provision for the detailed location of the Public Footpath to change.

5.12. Subsequent residential Applications include other parts of the Application VG 262 Site. One of these is subject to appeal against the LPA's refusal. Another achieved a resolution to grant in September 2015 but s.106 negotiations are still underway so no planning permission has been issued.

5.13. I asked Mr Holmes some questions about the implementation of the s.106 provisions, as a result of which, further information was submitted during the adjournment. Mr Holmes also explained that, when the Objector bought the site in 2013, it applied to divert the unconfirmed Public Footpaths. This is, in my experience, not unusual in a development situation and it helps to explain:

(a) the contingent nature of the s.106 obligations concerning the Public Footpath; and

(b) the fact that the post-adjournment correspondence on this aspect which includes contemporaneous emails and notes, reveals that Hampshire County Council's Map officers were involved in discussions on the point between the LPA and the Objector. It perhaps also helps to explain why the Public Footpath has not been constructed or dedicated yet.

5.14. The later planning history, specifically, the outstanding s.106 negotiations and planning appeal, also help to explain why the transfer of Public Open Space land has not yet occurred.

WITNESSES ON BEHALF OF THE APPLICANT

Nicholas William Bell, Crowded House, 126A Springvale Road, King's Worthy SO23 7RB

6.1. Mr Bell is aged 60 and a solicitor by profession. He has lived in Springvale Road at his present address since September 1988. Mr Bell made a witness statement, signed on the 28th August 2016.

6.2. In September 1989, Mr Bell's civil partner, Mr Perrin, had moved into the property and Mr Perrin's son Tristan, who was born on 12th September 1982, used to come and stay at weekends. In 1994, Tristan had moved in permanently. He explained that Tristan and a friend of his would play in the field behind the house. Initially there was not much of a hedge at the back of their garden, just a post and wire fence and access to the land was easy for the children. Mr Bell said that he would often go and find the boys on the fields; they would be playing football or on their bikes. He said that frequently he would not have to go further than what he described as *"the initial wooded area"* to find them and they would be in the middle of the field there. He said that every time he went up there, there were several other local people walking their dogs and other children playing, people picking fruit or just walking. He would be there at least once a week and sometimes more often. In the mid-'90s, they had planted a Leylandii hedge at the rear boundary. This grew quite quickly but one tree never grew properly because that is where the children passed from the garden to the land at the rear. After Tristan came to live with them in 1994, up until 2005, when he moved out, he would go and play with his teenage friends in the field. In particular they had built a tree house about 50 metres into what Mr Bell called *"the field"* - ie. about 50

metres behind the Leylandii hedge boundary. He said that they frequently went well beyond that into the field and took their bikes with them.

6.3. In 2004 Mr Bell had taken up running and used the land behind the house for training. He would generally keep to the footpaths when doing this activity. He gained access from the back garden and also from Hookpit Farm Lane. He said that whenever he had been on the land he would have seen many other local residents using the field for various purposes. His last competitive race was in October 2013 so that was probably when he last trained there. Mr Bell stated that at no time during his 25 plus years' use of Top Field had he ever seen any notices forbidding entry to the field or use of it. He had never been challenged or asked to explain why he was there or asked to leave the field. He said that he was certainly there weekly on average. He described the areas as *"for the most parts scrubland"*. He said that he only remembered the area immediately behind their garden being cleared a couple of times over the years. He stated that when clearing took place it was not complete but there was always scrub remaining. He commented on the statements of Graham Hutton, Robert Johnson and Mrs Steventon-Baker submitted on behalf of the Objector, saying that those people live further away from the site and he felt that he was in a better position to know what was going on there.

6.4. Mr Bell stated in his witness statement that he did not recall during the early days of his knowledge of the site that there were any crops growing in the field.

6.5. Cross-examined by Mr Webster, he confirmed that he could not recall any arable crops. He acknowledged that he could remember ploughing but not crops. Specifically asked whether he could remember the yellow flowers of oil seed rape, he said that nothing that he saw on the land looked cultivated to him, everything always looked wild. The location of his house was clarified and the planting of the hedge was confirmed as having happened in the mid-1990s. Mr Webster put to Mr Bell in some detail the pattern of crops which he said had been planted throughout most of the 1990s but Mr Bell confirmed that he could not remember any of them. Mr Webster put to him that after the 1990s, the land had been set aside and nothing cut. Mr Bell said that he recalled the land being tended, that is tidied, on a number of occasions and that he agreed that the field was allowed to go to seed from one year to another but there was a single cutting of the vegetation each year. When Mr Webster put to him that the land was not nice for people to take a leisurely walk on, Mr Bell said that there were people there, including a lot of children using the area as a play space with adults. He said that the land was more pleasant when it was tended but that the majority of people there were children who treated the area as a haven. He confirmed that the central area of the field was in use and that berry picking happened there.

6.6. Mr Bell was asked many questions by Mr Webster about the aerial photographs upon which the Objector's expert witness Ms Cox had prepared a report. Mr Bell is not an expert in the interpretation of aerial photography and

since Ms Cox dealt in expert detail with those photographs, I do not propose to summarise those parts of the cross-examination, which were not conclusive. I have adopted a similar approach with other witnesses. Nevertheless, Mr Bell confirmed that many, although not all, users of the land stuck to the footpaths around the field. Speaking of his own running practice, he said that he mainly used the footpaths but because he needed also to practice on uneven ground he would sometimes *"cut across the field"* and he saw others there too. When I asked him where he did this, he indicated a central line which he had marked on the Plan attached to his witness statement going roughly north/south across the middle of the Main Field.

6.7. Both advocates and I sought to clarify with Mr Bell the position of the tree house which Tristan had made. On the plan attached to his witness statement, the tree house was marked as item 2 in a position quite near the perimeter path in Area 2. The gap in the hedge at the rear of 126A Springvale Road was also shown on the boundary of the Area 2. It became apparent that these two markings had been placed by Mr Bell in error and that in fact the boundary fence/Leylandii hedge was some way to the east of the Application Site boundary and that therefore the tree house was also outside the Application Site.

6.8. Mr Bell confirmed that his normal entry point onto the land was through his rear fence although he said that Tristan would sometimes enter the site with

his friends from Ilex Close. He confirmed that the rear boundary of their property had been initially put in by their builder and that they had then planted the Leylandii rather than the owner of the Application land having done those things. When asked whether or not he had seen a chain across the gate at Hookpit Farm Lane in 1998 he said that he was not using it then. He confirmed that in fact he had not used that access between the years of 1992 and 2001.

6.9. In re-examination, Mr Bell confirmed that mostly he saw children playing on the land and that his stepson would be there with a large number of other children in an area that he described as *"up towards the field"*. When he went there to fetch the children he saw other children, dog walkers and berry pickers. He himself did not pick berries but he said that there were various points at which this happened in the *"rectangle"* behind his house and beyond into the *"shrub area on the 2011 photograph*". He said that children were not deterred by the land being uneven; that there were lots of bikes including on the rougher ground; that the scrub growing there was part of the challenge for them. He found it difficult to compare the condition of the land now with how it was prior to 2000 as it was a long time ago but he did not think that there was any significant difference.

6.10. He confirmed that the main entrance points to the land were Hookpit Farm Road and Ilex Close although he said that there was another way off Tudor Way.

Summary of my Findings

6.10.1. Mr Bell was doing his best to assist the Inquiry but he was clearly confused when making his witness statement about the location of the tree house relative to the Application Site. I am satisfied that this was an honest mistake on his part but I do think that it was a significant error which will have affected his understanding of the areas in question relative to the Application Site. Since his evidence was that the tree house and that area was the focus of much of Tristan and his friends' play, I do regard this as a significant limitation on his evidence with regard to user of the Application land. However, I do not believe that that confusion affects Mr Bell's recollection of his own use of the perimeter paths and the occasional cutting through the Main Field for his own training purposes. His failure to remember crops in the Main Field is problematic, taken with other evidence before the inquiry, and may suggest that his visits there were infrequent before 2001 or that his memory of that period is poor.

6.11. **Tristan Perrin,** 19 Winchester Street, Overton, Hampshire RG23 3HR. Mr Perrin made a written witness statement, signed on 28th August 2016. He was born on 12th September 1982 and after his parents separated he went to live with his father in 1994. He described himself as permanently resident

from 1994 when he was 12 until the age of 15 although he did not actually move out of his father's house until he was 18 which would have been in 2000/1. He had also annotated a plan which was attached to his witness statement showing the tree house in much the same position as on Mr Bell's plan.

6.12. When questioned about the position, he said that he did not think that the plan was very good although he confirmed that he had put the markings on it. Other markings showed areas where he said that there was a bike track and mounds and playing areas; these were respectively to the west and to the south/south east of the Main Field, as well as in Area 1. He confirmed the boundary arrangements at his father's property in the same terms as Mr Bell. He described the tree house as being about 50 metres from the boundary with the gardens. He said that initially he and his friends would play just in that area but as time went on they went further and further *"into the field";* they did not necessarily keep to the footpaths and frequently played football there and rode bikes. There were, he said, about 10 or 12 friends with whom he would play on the land.

6.13. When cross-examined, he explained that they *"rode around"* on bicycles and they used a line between Ilex Close and the old railway line to the south. He said that he could not remember there being crops on the land but confirmed that if crops had been present he would not have ridden his bicycle through them. He said, *"that it was just human nature and you do not do that"*. He

also agreed that it was not sensible to ride across a ploughed field and he said that they had ridden outside on the perimeters and from Ilex Close to the fence at the old railway line. He said that most of his playing time on the land was spent on the land between the perimeter track and Hookpit Lane, closer to the houses, and that they did not play north of the perimeter track because that was *"brambly."* Rather, they played to the east of the perimeter fence as well as using the track to the railway line which I have described. Otherwise they stuck to the paths. He said that they might ride around the fields but not regularly. He saw loads of dog walkers and other people, mainly keeping to the perimeter paths.

6.14. In re-examination, he expanded that, whilst people stayed mainly on the perimeter paths, they would on occasions wander for a few metres off if a dog or a child ran off the path. He said that there were dog walkers, runners, people who would kick a ball around, bike riders, joggers and elderly people just walking. He said that these were sticking to the paths which were narrow so that they would walk about 6 foot either side of paths. That might extend to a 20 foot radius if retrieving a ball from the bushes.

6.15. He explained to me that from the age of about 15, as he and his friends were becoming older and more independent, they would use the top part of the field as *"a meeting point"*. Sometimes they would stay and do activities on the land but sometimes they would depart and go off elsewhere for their activities.

Summary of my Findings

6.15.1. I consider that Mr Perrin was doing his best to assist the Inquiry but that he was confused about positions of some features, in particular the location of the tree house. When he was asked about the markings of all the features on the plans, it was clear to me that he was muddled about their positions. I regard that as a limitation on the accuracy of his evidence although he was firm and clear on his use of the route between Ilex Close and the railway line and the use of the perimeter paths. Mr Perrin's inability to remember crops in the Main Field was problematic and may suggest that his visits there were limited during his residence between 1994 and 2000/1 or that his memory of that period is poor.

Mr Will Driscoll, 10 Eling Close, Winchester SO22 6NG

6.16. Mr Driscoll made a signed witness statement dated 5th September 2016. He lived at Arezzo, Hookpit Farm Lane, King's Worthy SO23 7NA from September 2001 to September 2015. He was born in 1990 so he was living in the locality during his teenage years. He explained in his witness statement that between the years of 2002 to 2008 he used Top Field *"almost daily for recreational purposes"*. He said that the fence that was in place at the entrance at Hookpit Farm Lane was *"simply a frame by the time we moved in in September 2001 and many people used that footpath"*. He said in his statement that from the family home they could see people walking along this

path. He became friendly with other boys in the area and he explained that they began to build jumps for BMXs *"over on the far side"*. He said in his statement and later confirmed under cross-examination that he was referring to the south-west corner of the Main Field and that the BMX activity moved there in around 2004 because it was known that the housing development was coming to Area 1 where they had initially made BMX jumps. He said in his witness statement that he also used the Main Field in the middle of the footpaths to practice rugby kicking, especially in the summer after the farmer had cut the grass. He said that there were never any signs there to prevent that activity and he had never seen any signage in the years that he used it other than planning application notices.

6.17. As he became older, he explained, Top Field was a place of privacy for him from his parents where he could go, for example to have a *"crafty cigarette"*. He was therefore very open to requests to walk the family dog on the land. He said that he used to cut across the field so that he did not have as far to walk.

6.18. Mr Driscoll attached to his witness statement the standard map with some annotations on it showing the areas of his activities. This shows his rugby area and the new BMX jumps inside the perimeter paths.

6.19. Under cross-examination he said that the move from BMX jumps in Area 1 to the south-western part of the Main Field occurred around 2004. He said that before 2004 he was doing dog walking, playing with kites and practising his rugby. He would access the land off Hookpit Farm Lane, cutting across *"six*

times out of ten" rather than on the path. He said that he threw a ball into the *"fallow field"* for the dog. He also made fire pits, had parties and engaged in under-aged smoking and drinking which he described as *"all the things you shouldn't do but I did"*. For rugby practice he described walking to *"the centre of the field"* and kicking the ball. He had done stunt kite flying but his kite did not last very long. He said that once the growing season started on the field in about March, then that would have impeded ordinary activity. He agreed that there were brambles and that the land had the nature of heathland; he described cutting his legs on vegetation and he agreed that that part of the site was not compacted like the perimeter paths. He accepted the proposition that that part of the site would only have been suitable for a hardy walker and said that he was sure that many others had used the perimeter paths rather than the heathland area.

6.20. In the years 2010 to 2011, he explained, he would cut across the fields from his girlfriend's house at Woodham's Farm to the south-west of the site below the dismantled railway line and that area continued to be a dog walk. He would use it to get to and from his girlfriend's once or twice a week and accepted that that was a transit use. By this time he was around 20 years of age.

6.21. In re-examination he said that he could see out of his house to the path though he subsequently clarified in answer to me that he could not see from his house as far as the perimeter path or indeed anywhere inside the

Application site boundary. In re-examination he said that there was less activity on the land off the paths in winter and that most activity took place in Spring/Autumn. He said that he did not use Areas 1, 2 or 3. He said that there were footpaths from many points onto the land but that he personally never used the same route. He explained that he was often intoxicated and therefore his paths would not have formed a desire line.

6.22. I asked some questions about the construction of the BMX jumps. Mr Driscoll told me that there had been quite a few of his friends who had made the jumps with him. They would dig out a gap, take earth and raise banks either side of the gap. They then packed this down and rode bikes over it, shaping and angling the construction. They normally used shovels and sometimes a wheelbarrow. There were no mechanical tools involved and they used the bikes to bed the earth in. They made pits which were 2ft to 3ft deep but they also made use of natural gradients. He said that the mounds got progressively bigger and they had take-off and landing ramps. The bikes used were not motorised. He clarified in further answers to Mr Webster that he agreed that making the BMX ramps must have damaged the land and he volunteered that *"in hindsight I shouldn't have done it"*.

Summary of my Findings

6.22.1. Mr Driscoll was a forceful witness but I found him less than fully helpful on all points. He was not always careful in paying

attention to details; for example, he initially gave the impression that he could see the site from his house whereas upon my checking this, it became clear that he could not in fact see the site at all from his house and all that he could see was Hookpit Farm Lane. Also I asked him why he had made no reference to rugby practice in the questionnaire which he had filled in earlier when rugby practice featured quite prominently in his oral evidence but he was not able to give any explanation for the earlier omission. He did say in answer to Mr Webster that he had not been aware when he did his questionnaire of *"the severity of the situation and that I would be giving evidence to a public inquiry"*.

Mrs Mary Mould, 3 Brooke Close, King's Worthy, Winchester SO23 7PG.

6.23. Mrs Mould is 54 years old and has lived at Brooke Close since June 2005. Before that she lived at Cundell Way, King's Worthy from August 1992 until June 2005. She explained that both addresses are within walking distance of the Application Land. She stated in her witness statement, which she made on 30th August 2016, that she and her family had made use of the whole space over the years. She said that the area was *"great in the snow and ice for exploration and investigation and during the whole year for outdoor time"*. She described the centre of the field as often having had long grasses and pathways trodden throughout. She said that, until the land was rough

ploughed, there was always a pathway down the centre of the field and that they would walk a figure of eight in various directions as well as around the perimeter depending on the entrance which they took – Hookpit Farm Lane, Ilex Close or from the disused railway track. She did not recall ever having been prevented from entering and said that there is a multitude of pathways through the perimeter areas allowing access to the field.

6.24. When the affordable housing development was underway, a footpath was maintained off Hookpit Farm Road along the edge of the building site. She did not recall ever having seen signs preventing pedestrian access to the field. She said that there are other people using the field, walking dogs, children playing/flying kites. They also often see people jogging around the perimeter path. She said that when the central pathways were usable, there were often mattresses and other den making materials left where children would use the area during evenings and weekends. In her witness statement she said that she could not remember the space being used for crops in all the years that she had lived close by - that is, since 1992.

6.25. In her oral evidence in chief she confirmed that she was content for TFAG and Mr Wilmshurst to represent her. She is the Applicant.

6.26. Cross-examined about crops in some detail by Mr Webster, she staunchly maintained her belief that there had never been crops on any part of the site. She agreed that she could not have used a cropped area and when it was put to her that there had been cropping she said, *"at that period there may have*

been more peripheral use but it would be wrong for me to assume anything about 1998/1999".

6.27. In re-examination she also confirmed, *"clearly I would not have gone into it"* if there had been managed crops on the land. She had a dog from 1998 to 2000 and then the family obtained another dog in 2010 so she explained to me that there was therefore a 10 year period between 2000 and 2010 when the family had no dog. Asked about the state of the land by Mr Webster, she explained that the long grasses were part of the pleasure of using the land. She said that when the family had dogs they would take them every few days on the field; when they did not have a dog, their visits were not so frequent. At one time she had owned a horse and she used to ride it around the perimeter but not regularly.

6.28. In re-examination she confirmed that the perimeter paths had always been well trodden but that there were other paths through the long grass, mainly one path although there were others at other times. She and her family had found the track through the long grass there rather than having made it themselves. In terms of children's play and kite flying, she said that when grasses are long those activities take place on the paths; if short then she would see people doing those things *"anywhere and everywhere"*.

6.29. I asked Mrs Mould about her use of the areas outside the Main Field. She said that Area 3 had shrubs on it and was more heavily covered therefore it was not possible to run around there. Turning to the south-western corner of the Main Field, she confirmed that there were the *"lumps and bumps"* there for bike riding and that there was an access track from the railway line. She said that they took their children up there with their bikes and used the lumps and bumps. On the subject of her inability to remember crops, she told me that she could not put a date on when she could clearly recall how she used the Main Field. Turning to Area 2, she said that you could get into the field from there and that it was a part which they had used for walking mostly without a dog to get through to the field. The use of that area, she said, had varied, being used more after the building works in Area 1.

Summary of my Findings

6.29.1. I conclude that Mrs Mould was generally doing her best to assist the Inquiry but that the reliability of her recollections concerning the earlier part of the period is problematic in view of other evidence which the inquiry has received in relation to cropping there. When challenged on the point, she said that her use of the land would have been greater in the period from 2000 onwards, but this qualification had not been made in her witness statement or orally in chief.

Mrs K Mead, 8 Maple Drive, King's Worthy, Winchester SO23 7NG.

6.30. Mrs Mead has lived at this address since 1988 with her husband and their three children, two of whom still live with them. Mrs Mead made a witness statement, signed on 30th August 2016. In her witness statement she described the Application Site as the *"primary green space for walks and other activities throughout the period from 1993 to 2013"*. She said that activities included nature walks, collecting leaves and twigs, flying kites, riding bikes and playing with remote controlled flying toys. She described those activities as taking place over the whole of the field and all the year round. She said that at no time was the field used for crops but that parts of it would simply be overgrown with grasses and wild flowers which she said was attractive, while other parts would tend to be used for football and become trampled flat.

6.31. She continued in the witness statement that during the same period they also visited the field with friends who had dogs and the children and the dogs could run around safely together across the whole field. She said that when the children took their bikes up there they would use the paths through the scrub in the middle of the field and not be confined to the path with their parents. There was a figure of eight bike track in the middle of the field which one of her sons and many other children and teenagers used until the field was ploughed up in 2014. There were a few white winters in those years 1993 to 2003 and in the later 2000s; she described the field on those occasions becoming *"a playground for the whole community with snowmen and snowball fights"*. In snow it was also safer to use the field as a route to other parts of the village and to school because it was less slippery than the pavements.

6.32. By 2003 her children were aged 15, 13 and 7 and she said that during the decade 2003 to 2013 they have continued to use the field in different ways. Her husband foraged for sloe berries from the blackthorn bushes at the far end of the field from Hookpit Farm Lane making sloe gin as Christmas presents. For herself it was and continues to be a *"safe bolthole"* to walk and wander around with a friend when things become too much for her. In her oral evidence Mrs Mead elaborated that particularly when she had been a teacher, she had suffered from stress and found the land very helpful during those times. Then she would visit the field with friends, going across and through the fields and she would see children playing with balls. Her own children, when they were teenagers between the years 2000 and 2009, would go to the field to relax with friends and sunbathe. Her youngest child, born in 1996, has used the field more than the rest of the family. From around 2002 he used to go there for adventurous play and, apart from ball games, the most frequent use of the field by him and his friends has been for BMX cycling.

6.33. She described in her witness statement how generations of children and teenagers had built what are referred to as *"the jumps"*. In the 1990s there had been jumps in Area 1, but in more recent years they had been rebuilt further into the field. She said that the jumps had occasionally attracted nuisance in the form of mini-motorbikes but that, by and large, the area had been use by local young people for biking. Her youngest son used the field as

a general gathering place and from around 2008 they had constructed makeshift shelters and shared picnics using disposable barbeques.

6.34. Mrs Mead produced three photographs. One is of a friend of her children taken in 2009 sleeping in a plastic chair, described as *"after playing football"*. Then there was a photograph taken in 2013 of her youngest son riding a BMX bike on an area which looks as though it has been built up. The third photograph shows her son in spring 2016 flying over the BMX jumps on his bike.

6.35. Cross-examined about crops, Mrs Mead described it as strange she could not recall crops, especially oil seed rape because she is allergic to that. She could therefore only conclude that she could not have been there then and she agreed that her use must have been more intensive later in the period. She said that she remembered flying kites there one Christmas but she did not put a date on that. She agreed that she could not remember ploughed earth in the central area but said that if she had been using the perimeter she would not necessarily have noticed this and she stated that their use was mainly around the periphery of the field. She was adamant that she would not have walked on crops. She agreed with Mr Webster that it is difficult to remember accurately things which took place 20 years ago and she added that she was at that time teaching full time and not making intensive use of the area. She said that the natural regeneration which had occurred since 2000 is how she remembers the land.

6.36. In 1996 her mother-in-law moved to Springvale Road and she would sometimes walk with the children to visit their grandmother there. Asked about her evidence of the figure of eight with the assistance of the aerial photographs, she accepted that there was no figure of eight in the photographs from 2010 onwards although there was one in 2005. She confirmed that, when referring to use in the centre of Main Field, specifically tents and shelter, she was describing the after effects of camping rather than actually seeing it; although her son and his friends had taken a tent once, they did not stay out all night. She did say, however, that they lit barbeques and so on up there. She stated that activity in the lumps and bumps area had been going on since 2004 but that there had been more of that recently. Sometimes other boys would come and flatten the constructions and they would then be built up again.

6.37. Mrs Mead confirmed that there were no sloes or brambles in the middle of the field and that fruit picking had just taken place off the footpath. She described her access via Hookpit Farm Lane saying that she had never been unable to get up that track. When the contents of the footpath officer's report were put to her, she said that she found it difficult to believe that the gate was locked between the years of 1993 to 2001 for the whole period. She said that they had also used Ilex Close to get onto the land.

6.38. In re-examination she explained that tall grasses on the site were about waist height and that the area towards the east of Area 1 was less accessible than that to the west.

Summary of my Findings

6.38.1. I found Mrs Mead to be a fair witness who was doing her best to assist the inquiry. She readily agreed that her inability to remember crops indicated that her use of the land must have occurred predominantly during the latter half of the relevant period. She was very clear indeed that neither she nor her family would have walked on crops. She was also precise when describing her own walking activity and the activities of her children in the latter period in the overgrown areas and making use of the BMX lumps and bumps. I think that her memories of being on the land were vivid, but that she was not able to be so precise about dates. She was not always present when her children were using the land, so those parts of her evidence were hearsay or based on deduction.

Mr Tim Brown MBE, 6 Firs Crescent, King's Worthy, Winchester SO23 5NP.

6.39. Mr Brown made a witness statement signed on 30th August 2016 with an annotated map attached to it. Mr Brown is 61 years old and has lived at Firs Crescent from November 1994. He has two grown up children and three

grandchildren none of whom live in King's Worthy. Firs Crescent is about two minutes' walk from the Site and Mr Brown said in his statement that they started using the land as soon as they moved in to their house. He listed, with the aid of the annotations on his map, the family activities that they undertook: walks, picnics, blackberry picking, sloe picking, dog walking, admiring nature through the spring and summer months and occasionally at other times. On his map he marked blackberry picking on the inside of the perimeter towards the north-east and picnics on the perimeter path on the south, then more fruit picking – sloes - on the western perimeter area. He showed den building and camping inside the perimeter with BMX biking to the north of the dens in the western area and camping just south-east of the centre of the Main Field. The entry points are noted at Hookpit Farm Lane, Ilex Close and from the disused railway track at the south-eastern corner of Area 3 and towards the south-western area near Woodhams Farm.

6.40. His own use had included training runs in the spring and summer and he used to walk a dog there too. He said that his wife uses the field for family walks, picnics and blackberry/sloe picking. His son had learned to ride his BMX bike on the field and occasionally went camping and playing adventure games with friends there. His daughter would sit on the field and chat to friends while listening to music; she also enjoyed fruit picking and picnics. They now use the field with their children and grandchildren.

6.41. He said that the majority of their use of the field occurred on the path around it during the late 1990s and early 2000s but that they did walk across the centre, stopping in the middle to admire the views. He described this route as good short cut to the field near Woodhams Farm from where you could walk to the farm shop. He had seen others using the field for activities including painting views and children building dens and making the BMX circuit. He had never been stopped from using the field. He recalled the metal gate being put up on Hookpit Farm Lane but said that there was a large gap left at the side where walkers were able to get into the land. He had never seen any signage restricting the use of the field until very recently. He said in his written statement that he did not recall ever having seen crops being grown on Top Field. In the late 1990s he said that there were a couple of years when the centre of the field was ploughed *"for some reason but that is all"*. He added that this ploughing did not stop the use of Top Field and the path around it was still there.

6.42. Mr Brown was asked about access up Hookpit Farm Lane and he explained that there were several offcuts where you could get into Area 1 and that he sometimes went there. He said that the access track was not gated for as long as 1992 to 2001; the gate fell down but in any event there was a gap to the left of the gate where walkers could go and that route was still used as an access all the time by everyone. He was adamant that the gate was put there to deter travellers, it having been put up following a traveller incursion. That, he said, was the message which was being given by the landowners to the

rest of the world. There was much detailed discussion of the precise arrangements at the gate; Mr Brown said that the padlock on the gate was broken within a couple of days of its being put there. There was some damage to a mesh fence and forced entry through it to the right of the gate but he described the fence as *"pretty flimsy and the kids had kicked balls at it"*. In any event he was clear that the main point of access was to the left where there was this gap which was big enough for walkers to traverse. He said that he did not recall seeing any signs prior to those associated with the development a year or so ago. He had owned a dog between the years of 1994 and 2001 and walked it on the land daily, although he said that he would probably have noticed more about the land when he was running rather than dog walking because his attention would have been taking up with looking after the dog.

6.43. Mr Brown recalled the land being ploughed a couple of times but mostly he said he remembered it covered in long grasses where he had thrown things for his dog and his children thought that that was funny. He was asked to comment on many of the aerial photographs and he disputed that they showed crops or were as he remembered the land in the years up to 2000. From 2012 when the land was in set-aside, however, he said that his strongest memory was of tall plants with purple flowers. He did not recall those plants being cut or the cuttings being left on the ground annually. He agreed that access was reasonably easy in the winter to this area and that the ground was a bit uneven. He contrasted the surface there with that of the perimeter track.

He stuck to the perimeter paths for dog walking and training but he said that if people were playing they would go to the centre. In the first half of the period, he had only occasionally walked to the centre and he agreed that this was similar to the pattern of user by other people. Occasionally he saw people in the middle and, when pressed to explain what occasional meant, he agreed that a fair summary of the position was that prior to March 2013 when the development of Area 1 started there was a well-worn path which was well used. Occasionally people would use the middle of the field.

6.44. Describing the fruit on the land, he said that there were sloes along the railway line to the west and blackberries along the southern boundary and on the north-east corner. Before the development of Area 1, there were also a lot of blackberries there. He said that picnics had occurred on or around the path. He had gone to the disused railway line to the south partly to get access to other areas and partly to let the dog off the lead. Finally, he confirmed that he did not walk across the land when it was ploughed and that he would not dream of walking across land with crops on it.

6.45. In re-examination he said that he had used the land virtually every day in the summer but not so much in the winter. However, later on he said that he had been there a minimum of once a fortnight. He had seen people playing occasionally in the centre and said that when this centre part of the land was overgrown children could hide in there. He could not say what they were doing; there might be half a dozen of them to 20 or 30, although occasionally

some children had been doing things that they should not. He was asked to give a picture of a typical day in terms of numbers, but he found that difficult; there were some days when he saw some children and some days not, maybe 4 to 12 children.

6.46. I asked Mr Brown about the evidential conundrum that there is a large amount of independent contemporaneous evidence of cropping and yet there were witnesses such as him who were saying that they had never seen it but had been there regularly. He was unable to help me with that difficulty, simply repeating that he never saw crops. He said that he could tell the difference between grass and oil seed rape but not between grass and wheat but stated that everything that he saw there looked like long grass; he reaffirmed that this applied from 1995 to 2013 and to the whole of the area inside the perimeter paths. In terms of the children misbehaving he said that sometimes he had seen them smoking or looking at naughty magazines.

Summary of my Findings

6.46.1. I found Mr Brown's evidence to be variable in its reliability. When asked about the evidence of cropping in the first half of the period, he became very defensive and at this point I found his evidence to be much less helpful than it was on other points such as the detailed description of the gate at Hookpit Farm Lane. I conclude that he has a good memory of that part of the site but I find it difficult to attribute weight to his evidence

concerning the state of the Main Field during the earlier part of the period in the light of other contemporaneous evidence. He was so adamant about the absence of crops in answer not only to Mr Webster but also to me, that I must treat his evidence generally with some caution as a result.

Mr Graham Mack, 32 Cundell Way, King's Worthy SO23 7NP

6.47. Mr Mack had made a witness statement signed on the 29th September 2016 with an annotated map attached to it. Mr Mack is 67 years of age and has been retired for 7 years. Prior to that he worked in the construction industry and from May 1973 until May 1989 he was employed by AJ Dunning & Sons Limited whose subsidiary company purchased the Top Field as part of a parcel of land including the Hook Farm development. Mr Mack has lived on the Hookpit Farm Estate with his wife since May 1980, initially in Maple Drive, and since August 1984 at Cundell Way. They have three children who were born between the years of 1982 and 1987.

6.48. Works to construct the Hookpit Farm Estate were completed in 1984 and during construction there was a site compound towards the northern part of Area 1 which Mr Mack had marked on his map. He said that Dunnings had cleared the compound at the end of the project but done nothing else and there was certainly no fencing at that time.

6.49. Throughout his residence at King's Worthy he and his family used the field for recreational purposes within the field and as a route to other areas of the village. He said that he could not remember a time when it was not possible to access the field on foot from Hookpit Farm Lane or from the disused railway line to the south. With their children in the 1990s, Mr and Mrs Mack used the field for a variety of activities including kite flying, mountain and BMX bike riding and picnics. Their daughter had a pony from 1998 to 2005 and rode it from Woodhams at the south of the land across the field towards their house on many occasions. Their youngest son created BMX jumps in the area to the south-west inside the perimeter walk, in around 1999 and 2000. Others from the village used the field for various recreational pursuits, mostly walking but others for picnics, bike riding and model aircraft flying. Between the years of 1998 and 2012, the Macks had a dog and they used the field daily as part of several circular routes. Since losing the dog, Mr Mack has continued to use those routes as part of his daily exercise routine.

6.50. During the 1990s he recalled a traveller camp being in the field for a couple of months and from the year 2000 apparently a number of students would come to camp near to the BMX area at the end of the summer term. He had never seen any signs informing him who owned the land since Dunnings departed.

6.51. Cross-examined, Mr Mack explained that since his retirement in 2010 he had done more walking. He explained that he did a variety of walks around the village between 3 to 10 miles each time. He marked on his plan where he had

walked previously, down Hookpit Farm Lane around the western perimeter of the Main Field, then up from the south-west corner back to the north-east corner, re-joining Hookpit Farm Lane. More recently he had done a variety of longer walks involving a circuit around the application site and sometimes going on to further destinations as well. He described the perimeter paths as being a trodden area up to around 10 metres wide and he said that he would stick to the established paths. When he used to cross the Main Field he said that there had been various paths or tracks although they were not paths as such, just areas where the vegetation was lower and trodden down; he had only done this occasionally. He had stopped crossing the Main Field in 2014 when it was deep ploughed.

6.52. Mr Webster asked him a series of questions about crops and the only crop that Mr Mack could remember was oil seed rape which, according to the Cropping Records, was on the land in 1994 and 1999. Mr Mack clarified that the time when he had been daily on the field was much more from the late 1990s and early 2000s into the rest of that decade when they had a dog rather than earlier. Previously he estimated that he would have gone about 50 times a year. He readily agreed that he would not have walked through a standing crop, though he said that, whilst he might have walked across a ploughed field, he could not remember actually having done that here. He confirmed that the BMX area and south western corner was close to the perimeter path.

6.53. In re-examination he spoke about remembering his daughter riding a horse across the field in the early 2000s together with another local friend of hers, Catherine Martin. He did not believe that they had followed any particular route but that they just cut across. I permitted cross-examination on this point which had emerged afresh during re-examination and he confirmed to Mr Webster that the horse riders were simply coming to visit the Macks and that they crossed the field in order to do so. He only saw them doing this a couple of times in the summer.

Summary of my Findings

6.53.1. I found Mr Mack to be a witness who was genuinely seeking to help the Inquiry. As with other witnesses who had no or limited memories of crops, however, the contemporaneous evidence before the inquiry about crops must limit the weight which I am able to give to his evidence in relation to the earlier part of the period. I found him to be clear and as precise as could reasonably be expected in relation to the second part of the period.

Mr Colin Plant, 6 Maple Drive, King's Worthy, SO23 7NG

6.54. Mr Plant made a witness statement signed on the 5th September 2016 and appended an annotated plan to it. He is 56 years of age, married with two children born in 1999 and 2001. He and his family have lived at 6 Maple Drive

since November 2001 and before that they lived at 13 Maple Drive from July 1994. They therefore live very close to the top of the field. He and his family have been using the field and the paths, he said in his written statement, since they moved there in 1994 for walking. In particular they went to and from the disused railway line, using the established paths through the trees at principal accesses 3 and 4. They had also used that same route for cycling in both directions and flown kites from the centre of the field before it became overgrown, been star gazing at night and berry picking. Since 2007 Mr Plant had been a Beaver Scout leader and during that time he had used the field with the Beavers for a number of activities comprising hikes, using the disused railway line and nature rambles; with the Cub section he had been to the Main Field when it was used for cycling and cycle races around the outer paths. He believed that both Scouts and Cubs had used the Main Field for wide games using as much of the field as they can. He had also seen other people using it for walks, cycling including the BMX cycling on the track. During this time he had not been stopped or challenged by anyone.

6.55. He recalled an old gate at the entrance to the track off Hookpit Farm Lane but said that there was a path around the gate and he did not remember any signs stating that the land was private property or asking people to keep out. He did recall a new gate and fence being added to the Hookpit Farm Lane entrance in later years around 2004. He stated in his written statement that he has not seen any planted crops or grazing farm animals on the field.

6.56. In cross-examination Mr Plant confirmed that he had said in his questionnaire made in 2015 that he was an occasional user and he confirmed that. He said that the period 1994 to 1999 was a quieter period of his use following the birth of his first child. His memory of the field was of its being purely meadow grass which was cut occasionally, despite Mr Webster taking him through the various aerial photographs and Cropping Records for the 1990s. Mr Plant's conclusion was that either the photographs were not of crops or that he must have been on the land later than the 1990s. In particular, he felt that he would have remembered had he seen oil seed rape since his wife has an aversion to it. He said that he had consulted the Ordnance Survey maps and found that there were paths marked on those maps around the Main Field perimeter paths with three off-shoots to Hookpit Farm Lane and to the railway line at the south. He used to take a route across the land to the railway line walk and thence to the Scout Hut and he also used that as a route to other facilities such as the recreation ground. He said that he would definitely have been there from the early 2000s or when his children were small. There was a baby born in 2000 and activities would have been a mix of walking, cycling and kite flying during that period. They would occasionally have walked in the middle but normally on the paths. Kite flying was not that regular and was dependent on the condition of the surface, in particular the height of the grass. Conditions would only have been suitable a couple of times a year he thought, similarly star gazing is something that he would only have done a couple of times. He picked berries in the hedgerows especially up the Hookpit Lane

entrance path and especially before the houses were built on Area 1. There were also berries down the path and at the top of Ilex Close. He said that he would occasionally go past the BMX area. In the last 2 or 3 years, he had seen what he described as a *"so called camp."* He had noticed groups of children and youngsters going there; the last time he had seen a large group, they were on the perimeter path walking around the field and he said that it would not have been safe to walk in the middle of the field at night. He confirmed that he had never seen any signs.

6.57. In re-examination he gave more detail, particularly about Areas 2 and 3. Area 3, he said, had become more bushy recently. He had seen other people there but could not say how often; he thought that he went there about once a month at most. He said that there were two main paths through that area, both running off the perimeter path. He had also seen where people were making their own paths but that those might only be there for a short time. He estimated that he had seen other people walking on these small paths 1 in 3 or 1 in 5 of every time that he visited. He recalled Area 2 always being fairly bushy.

6.58. Cross-examined again by Mr Webster on the new Area 2 and 3 points, he said that he thought that the small paths were in the nature of private access tracks to people's homes.

Summary of my Findings

6.58.1. My assessment of Mr Plant was that he was doing his best to assist the Inquiry although he appears to have been confused about the dates when he started using the land, having regard to the other contemporaneous evidence. When that was put to him, he fairly conceded that this probably meant that his recollections relate to the latter part of the period. In other respects I found his evidence to be clear and careful.

Mr David John Woolford, 10 Sycamore Drive, King's Worthy SO23 7NW

6.59. Mr Woolford made a witness statement signed on 4th September 2016. He has lived at 10 Sycamore Drive with his wife and son since January 1984, about 300 metres from the Application Site. He retired in October 2015 at the age of 59 from his post as Principal Land Surveyor with Hampshire County Council after 41 years spent surveying land and property all over Hampshire and elsewhere. Until 1992 the family used the land regularly for dog walking but their dog died in that year and thereafter they used it only up to about 10 times a year for walks. Between the years 2007 and 2009 Mr Woolford was ill and was unable to walk but after an operation in December 2009 he recuperated by walking the Main Field nearly every day from late January to April 2010. He met people on the field whenever he was walking there; they were flying kites in the middle area away from the trees, berry picking around the edges, exercise running/jogging, usually along the paths, playing children's games and on occasions there were birthday parties all over the

field, including the centre. There was cycling on the paths and areas for BMX. He also witnessed dog walking. The activities were seasonal but people continued to go there even in the snow walking their dogs or for their own exercise.

6.60. He had never seen any signs at the site nor had he been prevented from entering the area by barriers or fences. He had never seen any crops or cultivation on the site and it was always scrub with a plethora of wild flowers and thistles. He said that it was cut very rarely, not annually, and then left to regenerate. There were paths through and around the field plus areas where the scrub was not so dense where people were able to sit on the grass and play games in the middle area of the field.

6.61. Mr Woolford attached to his witness statement an annotated plan showing the approximate lines of paths walked; in addition to the perimeter paths he showed two principal routes across the Main Field forming a triangle just to the right of centre with the base along the southern perimeter track.

6.62. Mr Woolford dealt in chief in some detail with the areas of his activities and what he had seen others doing. On each point he made it clear that between 1993 and 2010 he found it very difficult to be precise because he was not there a great deal; in 2005 to 2006, he tried to walk each day but was by that stage becoming ill and therefore it was difficult. Summarising, he said that he most often walked round the Main Field but occasionally went across it when crops were not there, in particular to watch birds. He added that in his

experience as a surveyor, land once it has been cropped can be left fallow and ploughed up afterwards in the autumn or in spring. If land had not been ploughed it would have been possible to walk across it. He stated that he did not remember walking over the Application land when it had been ploughed, though in the 2000s he had certainly walked across it after it had been flailed. He was unable to be precise about where he had seen kite flying during the relevant period although he had seen it before 1993. He said that he had seen runners going across the site but, again, he could not say how often. He described Area 1 prior to its development as having contained low scrubby grassland, more dense next to Hookpit Farm Lane. He said that people walked across there all the time, either round the perimeter or across that land. Area 3, he said, was similar in appearance to Area 1; he had seen dog walkers and children there although, again, he could not specify how often.

6.63. Cross-examined, Mr Woolford said that the top western bit of the Application land was quite densely wooded. He stated that he had walked up to the edge of the chain-link railway fence at the edge of Application Site 267, but that it was not easy. He confirmed that despite discussion of *"tracks"* in the context of the Objector's aerial photographs, the main track is the perimeter path and that that is where most people walk. Mr Woolford produced a Google Earth photograph from around 2006 to 2007 on which he discerned pathways or lines going across the main field. There was considerable, somewhat speculative, discussion about the Objector's aerial photographs. Although Mr Woolford as a surveyor was used to looking at such photographs, he is not an

expert in their interpretation and I do not consider it necessary to summarise that part of the cross-examination.

Summary of my Findings

6.63.1. Mr Woolford was a clear witness who was doing his best to assist the Inquiry but for much of the material period his knowledge of the land was somewhat limited. He readily acknowledged that and therefore was unable to be very precise about the details of what other people had been doing on the land when he was there.

Mr Noel McCleery, 2 Hookpit Farm Lane, King's Worthy

6.64. Mr McCleery has lived at King's Worthy since 2009. When he moved there he became aware that the Main Field was *"widely used by residents as a recreational area"*. He made a witness statement, signed on 2nd September 2016. He described the Field as a *"mixture of grass and scrubland"*. He stated that the path around the field was and remains used and still is used by many people, adding that there were other paths through the middle of the field which he and many others used as a variation until it became impassable due to being ploughed in June 2014. In addition to walking, he observed the area being used all year round for activities including jogging, horse riding, motor cycle riding on tracks through the field, kite flying, model aircraft flying and

cycling by young children under supervision. During the summer months he saw picnicking by families and overnight camping by young people on various parts of the field.

6.65. He attached a plan to his witness statement showing paths in a cross-shape over the Main Field and he stated that he walked these, the perimeter paths and other paths, most notably leading to the disused railway access in the south-east corner and around the south-west corner outside the perimeter track.

6.66. Cross-examined, Mr McCleery confirmed that he was a member of TFAG and that TFAG exists to prevent development on the field but he disagreed that he was *"over egging his evidence"*. He accepted that he uses and used the perimeter path more often than the centre although he said it was difficult to say how often he walked across the Main Field; sometimes he would walk across, sometimes he would throw his ball in for the dog and go in with him looking for it. He agreed that there was ample space to exercise and play with the dog around the perimeter paths. The height of vegetation, he said, varied in different parts; in places it was less than a foot high. He said that about half of the field was in that lower bracket although in answer to me he clarified that the shorter areas tended to be right towards the centre and it was denser on the perimeter path so that it was quite difficult to access although there were places where you could get through. He agreed that certain photographs which were shown to him by Mr Webster showing waist high or even shoulder

high vegetation were scenes that he recognised. He said that he had often walked up Ilex Close to Area 2 and that there were two main tracks through it, both of which he had used on numerous occasions. He said he had sometimes used a track in Area 3 which joined up with the old railway although he did not think that he had walked off tracks in these areas.

6.67. *Summary of my Findings*

6.67.1. Mr McCleery was only able to speak of the last 4 to 5 years of the 20 year period. He was keen to stress his use of the middle part of the Main Field but he was not able to be very precise about the details of where or how often he had walked there. I note also that he did agree with Mr Webster that most of his activity on the land had taken place on the perimeter paths. He rejected Mr Webster's suggestion that he was over egging his evidence because he was part of TFAG and there is no basis for finding that this was the case. Nevertheless, I found him to be relatively imprecise on the details of the key points that he was keen to make.

Mr Mervyn Edwards, 18 Ilex Close, King's Worthy, Winchester SO23 7TL

6.68. Mr Edwards made a witness statement, dated 29th August 2016. He is a member of TFAG. He and his wife have lived at Ilex Close since December

2000. He stated that their property backs onto Top Field and they have a gate onto Top Field in order to maintain their rear fence and hedge. They had regularly used the field since about 2005 for leisure pursuits including walking, cycling, photographing wildlife – Mr Edwards is a skilled amateur photographer – walking the neighbour's dog, activities with grandchildren – kite flying, cycling, trainspotting and organised walks. Their main methods of access were at points 1A, 2 and 4. Their activities were mainly undertaken during summer months but may have occurred throughout the year. There was no time when access to the field was prevented and they had seen no signs other than ones prohibiting motorcycles which were erected in 2015. Mr Edwards had never seen a crop in the field although he had seen the farmer using a tractor and mower to keep the grass and scrub under control. In later years that had become infrequent and the scrub, grass and Goldenrod were allowed to get out of control until in June 2014 the field was roughly ploughed. Until then, the surface of the field was reasonably flat.

6.69. Mr Edwards submitted a second statement entitled "An Alternative Assessment of Aerial Photographs of Top Field". He explained in that statement that he is a retired chartered engineer and that he is a Licentiate of the Royal Photographic Society and he holds a credit assessment by the Photographic Alliance of Great Britain. He had examined the aerial photographs contained in the Objector's material submitted to the Inquiry and additional photographs obtained from Google Earth to which he had applied enhancement techniques to ascertain whether there had been traces of leisure

use on the land over the period of the claim. In short, he had picked up a number of paths and tracks showing in several of the photographs. He acknowledged that some of the 1990s photographs appeared to show the field under active cultivation. The aerial photographs also showed the BMX track in the south-western corner and he deduced that that could be seen extending from around 2002 to 2007. He noted a distinctive figure of eight track almost certainly made by bicycles in 2005 and that, by that stage. the field was in an uncultivated state, covered in rough grass and additional poor quality scrub over a large area of the site. He attached an aerial image dated 2008 from Google Earth showing that the field had been recently mown and pointing up *"numerous paths traversing the field"* including a path from the northern access point to the south-western BMX area. He noted that the site thereafter continued under rough grassland rather than active cultivation. He commented on some of Ms Cox's conclusions noting that she admitted in her report leisure use for part of the period as being likely to have occurred by means of bicycles. He said that a *"sinuous joint track"* which Ms Cox thought likely to have been made by motorcycles was more probably, in his opinion, made by bicycles and he therefore disagreed with her conclusion about that. He queried Ms Cox's definition of cropping since he did not consider the mowing of scrub to constitute cropping. Finally, he confirmed that the use of the BMX area in the south-eastern corner had been ongoing for many years, stating *"the BMX brigade have even constructed a camp with tables and chairs under the canopies of the trees which cannot be seen from the air., The extent*

of this activity demonstrates continuous use of this area since about 2004 when the track first became apparent; even the farmer has acknowledged this activity by no longer managing the area. This is a tacit agreement, the use of this area for leisure use."

6.70. Cross-examined, Mr Edwards explained that he was not an expert on aerial photography but that he did consider himself expert as a photographer. Also, as a retired engineer, he was used to plans and maps and so on. This was his first appraisal of aerial photography. He agreed that several of the Objector's aerial photographs showed agricultural use between the years of 1993 and 1999 though he said that he did not consider that there was a substantial perimeter path until 2002. Mr Edwards confirmed that his own use had been mainly walking and cycling round perimeter paths. He said that he would explore occasionally in the centre if he had seen interesting plants. He did occasional dog walking for his neighbours. When his grandchildren, who are now 12 and 8, were younger, they used the land often. They lived in Chandlers Ford at that time. Mainly in the spring, summer and autumn and they would look at interesting things on the periphery of the site in the hedges and they used the BMX area. He agreed that the line of the paths in the photographs coincides with where the Edwards family mainly went except for occasional kite flying trips which would only happen once or twice a year because of the need for the right weather conditions and the right length of grass.

6.71. He agreed that after the field was cut in August or September, the cuttings were left on the ground and he said that there would be sprigs of dry vegetation sticking up in lines, parts of which were prickly, especially the Goldenrod. He did not bother walking across the land when the vegetation was higher and the vegetation would typically get to about adult waist height. He had produced a photograph of his grandchildren aged probably about 3 or 4, and the vegetation was higher than their heads; that was typical. He said that the central area was not very inviting unless he saw an interesting plant or flower. People mainly walked on the footpath when they were on the field though the BMX area was where the children mainly congregated as he thought that nowhere else was more interesting for children. However, if children just wanted to have fun in a field, they would go to the site to do that.

6.72. In re-examination he explained that the grass around the perimeter was kept short by people walking it. After the deep ploughing in 2014 there had been a change in the way that people used the land because it was so deep and rough that it was virtually impossible to walk into the centre. Therefore people stopped using it because they could not access it. He had not generally seen very much activity by other people in the centre of the field; a few years ago he had seen a lad with a radio aeroplane but he had not seen him for a long time and he said that he had not really seen anyone else in the centre of the field. He is usually there between 10 o'clock and 11 o'clock in the mornings, taking a turn around the field for exercise.

6.73. I asked Mr Edwards some questions about Areas 2 and 3. He described Area 2 as having much bigger trees now and much more overgrown generally than it had been in the earlier 2000s. He said that he had purely used that area to access Top Field and he described it as very prickly and overgrown with some little paths through it. Area 3, he said, was pretty overgrown and he did not think that he had seen people going into it because it was so rough, though there was the odd path used for access to the peripheral path.

Summary of my Findings

6.73.1. Generally I found Mr Edwards to be an extremely helpful and reliable witness. He gave his evidence clearly, carefully and very fairly and I feel able in consequence to give it considerable weight.

Mrs Rosemary Margaret Clarke, 16 Ilex Close, King's Worthy, SO23 7TL

6.74. Mrs Clarke is 68 years old and is a retired headmistress. She has lived in King's Worthy since 1985, initially at Cundell Way until 1993 when she moved to Ilex Close. Mrs Clarke made a witness statement, signed on 31st August 2016 and appended a map on which she had sketched her accesses and areas of activity. The Field is directly behind her house and her garden gate opens onto the Application Site as do the gates of all the other houses that back onto the site in this area. She had accessed the field from Ilex Close, Hookpit Farm Lane, the disused railway line, Woodhams Farm, and

Springvale Road depending on her route. On each occasion she had been able to access without restriction, she had never been challenged nor had she seen any fencing. She described in her witness statement one day seeing a *"flimsy A4 notice"* saying *"Private Property"* but that had disappeared by the next day.

6.75. She did not remember any crops being grown on the field and she had only seen grass cut on a couple of occasions when it was several feet high; the grass was not used but left to rot. However she did not really use the land until 2006 when she retired. Between her retirement and 2013 she used to walk her dog almost daily and sometimes twice a day on the land. She had seen children riding their bikes through the middle of the field and she met many other dog walkers on most days, also encountering cyclists, runners, walkers, bird watchers, horse riders and children playing. Every summer it seemed, she said, *"a rite of passage for teenagers to camp on Top Field"*. She made a number of written comments on the Objections and the statements in support but I shall not summarise those as most of these points were taken up with the witnesses by Mr Wilmshurst on Mrs Clarke's behalf.

6.76. In cross-examination, Mrs Clarke agreed that she was the Chair of TFAG which is a group with about 100 members. When asked whether that role had coloured her evidence, she said *"I am not sure that's true"*. Mr Webster discussed with Mrs Clarke various matters concerning conversations between the group and the Objector's representatives. He also asked Mrs Clarke why

TFAG had not produced witnesses who had contributed to the Parish Council's application for a section 53 Modification Order. Mrs Clarke explained that TFAG had not had access to the list, so they did not know who those people were. The questionnaires for the TVG application were simply passed to people who expressed interest. Many people had not been prepared to take part in a formal Inquiry. The Parish Council had also declined to be involved. Five of the inquiry witnesses were members of TFAG - Mrs Clarke, Mr Edwards, Mrs Mould and Mr McCleery and one other. None of those who had simply submitted written evidence were members of the group.

6.77. Turning to her user evidence, Mrs Clarke clarified in cross-examination that the tracks in Area 2 to which she referred were between the trees and wide enough for one person but with tree cover above them. One could go from Ilex Close to the perimeter path on these small tracks or walk further south behind the houses on Tudor Way. She generally stayed on the tracks but occasionally deviated from them. Asked about her recollection of crops, she said that she could not remember any at all from 1993 when she moved there. She accepted that she hardly ever went there at this time but said that her house was close by and she could not remember seeing or smelling any crops such as oil seed rape. She explained that from 2006 onwards, since the land had been in set-aside, there were areas in the centre where the rosebay willowherb and goldenrod did not grow, that areas of growth were not uniform and there were places where one could get through the vegetation. These

were not tracks and they were not worn through to the soil. She agreed that walking on the perimeter paths was more pleasant and easier with children and elderly people and was indeed where most people walked. She qualified this by saying that if one had an animal that ran off one would go and find it off the path. Children on the other hand, she said, liked to be *"off-piste"* and she had seen many of them on bikes or walking in the central area. She agreed that many children would have been making for the BMX area.

6.78. Re-examined, she said that she did have a positive memory of making some use of Area 2 in the 1990s but she was unable to be precise about that and she had no recollection of using Area 3 then.

Summary of my Findings

6.78.1. I found Mrs Clarke to be a clear and helpful witness who was undoubtedly seeking to assist the Inquiry. Whilst I understand why Mr Webster put points to her about balance as a result of her role within TFAG, I am quite satisfied that her evidence was objective and was not coloured by the undoubtedly strong views which she holds about the Objector's development proposals for the area.

6.78.2. Turning to the substance of her evidence, she was properly cautious about giving any detailed evidence prior to 2006 and she is therefore only able to speak with authority as to the final

quarter of the relevant period. She did that clearly and my overall impression of what she said was that although the majority of user was concentrated around the perimeter paths, there was a certain amount of straying off them, especially by children and animals, and that the central Main Field, although covered with long vegetation, was clearly passable in places.

Mr Colin Cossburn, Le Vallon, Hookpit Farm Lane, King's Worthy SO23 7NA

6.79. Mr Cossburn made a witness statement signed on 1st September 2016 and appended a map showing a number of routes, including the perimeter paths, the Hookpit Farm Lane access and two paths across the Main Field. Mr Cossburn did not attend the inquiry.

6.80. He and his wife have lived at their present address since 1980 and their house is some 50 metres from the Hookpit Farm Lane entrance track. He said that the family had used the land for exercise, collecting blackberries, kite flying and gathering wild flowers. Throughout the period of their residence, he described taking a monthly stroll across the field but it is not entirely clear whether or not the frequency of user was monthly throughout his residence.

6.81. He stated that Top Field had, during his 36 years of living there, *"been home to horses, cows and cereal crops for intermittent and irregular periods"*. Nevertheless, what he described as the *"infrequency"* of agricultural activities had led to at least two periods when travellers have taken up residence. He did not give dates for these events. He was clear, however, that Area 2 had never been cropped and he noted that this absence of agriculture had enabled

the area to become heavily covered in scrub and larger native species such as blackthorn, elder and hawthorn.

Summary of my Findings

6.81.1. As Mr Cossburn did not attend the inquiry, I cannot give this statement the weight which I might otherwise have done. In particular, it is generalised with regard to dates and areas and there was no opportunity to clarify matters with him. I note, however, that he appears to remember crops at some point.

Mr Leigh Henderson, La Croix, Mortimer Close, King's Worthy, SO23 7QX

6.82. Mr Henderson made a witness statement, signed on 3rd September 2016. He has lived at his current address, about one mile away from the land, since 1993. Prior to 1993, he lived elsewhere in King's Worthy, about 400 metres away. He stated that, as a lifelong long-distance runner, he had trained several times per week since moving to King's Worthy, primarily using footpaths and bridleways on a circuit which included the Application Site. Whilst there, he used the perimeter paths and observed various people camping in the central area and occasionally people walking dogs around the central area also. He remembered the land being ploughed in 2014 but did not remember any crops. Nor had he seen any barriers except gates onto Hookpit Farm Lane, which he said seemed to be designed to prevent vehicular traffic rather than pedestrian access.

Summary of my Findings

6.82.1. As Mr Henderson did not attend the Inquiry, it was not possible to obtain any more detail of his generalised picture; therefore I can only give this evidence limited weight.

Mrs Christine Player, The Cedar House, Avington, Winchester SO21 1DE

6.83. Mrs Christine Player made a witness statement signed on 7th September 2016. She stated that she moved to King's Worthy in 1979 with her husband and two daughters. From her home at 4 The Pastures, she used to walk her dog to Hookpit Farm Lane and then across the fields along the disused railway line. She had no difficulty gaining access to the Application Land. In 1984 the family moved to 3 Tudor Road which backs on to Area 2 or 3. She used to walk round or through the field every day until December 2004. She trained her gun dogs on the rough triangle behind her house and met many people walking their dogs. She said that her children used to walk home from King's Worthy primary school, meeting her at the end of the Bishops Way path so that they did not have to cross Springvale Road. They had picnics there and in the summer she would collect blackberries from the bottom of her garden. She described an incursion by travellers in 1995 and said that during their presence she was deterred from walking round the field. She noted the creation of the BMX area. She moved out of the locality in December 2004.

Summary of my Findings

6.83.1. It is unfortunate that Mrs Player did not attend the inquiry, so it was not possible to explore, in particular, her evidence about Areas 2/3 in the earlier part of the period. Mrs Player completed a s.53 questionnaire in March 2001 and it would also have been useful to discuss that with her, especially as she referred in it to Mr Bright's ploughing practices. In the circumstances, I can only give limited weight to her evidence to this inquiry.

Mr Malcolm Robertson, Pilgrim House, 4 Laburnum Drive, King's Worthy, SO23 7LR

6.84. Mr Robertson made a witness statement, signed on 4th September 2016. He has lived at his current address since May 1999 and the property adjoins the Application Land. He and his family took their dog for daily walks on the field around the perimeter as well as across the field when crops were not being grown. He remembered crops being grown for the first couple of years. The field gave access to walks through to the wider Woodhams Farm area via the disused railway line. Mr Robertson's children spent time playing on the land and he remembered their friends creating the BMX track which they enjoyed between the years of 2002 and 2004. The family's dog died in 2013 but they continue to use the Application Land for walks, photography and bike rides.

Summary of my Findings

6.84.1. Once again because this was simply a written statement it was not possible to seek greater detail of the general pattern of use

which Mr Robertson describes. I therefore accord it less weight than oral evidence. I note his recollection of crops in his early years. Mr Robertson also produced three photographs representing the years 2006 through to 2010, but without the opportunity to discuss with him where the photographs were taken, they are not of great assistance although they do help to form a pattern showing a distinct difference between the perimeter path and the much taller vegetation in the centre of the main field.

Mr Anthony Stephens, Willow End, The Pastures, King's Worthy, SO23 7LX

6.85. Mr Stephens made a witness statement, signed on 1st September 2016. He is 69 years of age, and retired. He and his wife have lived at their present address since May 1998. Previously they lived in another village. They had used the land for leisure walking, casual bird watching and dog walking. Mr Stephens said that his first impression of the land was of an unmanaged field which formed a lovely wildlife habitat. Their general route on the land would tend to be around the perimeter as the centre part was overgrown and they would sometimes approach the site from the old railway line. He had seen many other leisure walkers, dog walkers, joggers and children playing along the footpaths over the 18 years that he had been using the land. He had noticed signs of it being used by youngsters, possibly in the late evenings, as the remnants of camp fires and motor cycle and bike tracks could be seen. He

had never experienced any difficulty in gaining access to the land since they arrived in 1998. He had never seen any crops growing in the field.

Summary of my Findings

6.85.1. Because Mr Stephens did not attend the Inquiry I must give this statement less weight than evidence which was tested orally. I note that he does not remember seeing any crops growing in the field but it is clear from contemporaneous evidence that there would have been crops there in May 1998 when Mr Stephens arrived and that he was making deductions about evening activities which he did not witness.

Mr David Witts, 6 Frampton Way, King's Worthy SO23 7QE

6.86. Mr Witts made a witness statement, signed on 29th August 2016. He is aged 57 and lives in Frampton Way with his wife and son. Their daughter also lived there but has now left for University. They moved to this address in July 1993 and prior to that lived outside the locality. Their home is approximately three quarters of a mile away from the Application Land, from which it is accessed via the old railway path. They had used the land irregularly while resident in the village, probably about 7 or 8 times each year, for recreational walks and picking blackberries and sloes in season. Sometimes it had been a walk in its own right, sometimes it provided a route to other, longer walks. Most of their walking had been confined to the edges of the field. At no time had they been

prevented from entering the land. During their walks, they had met other people walking or blackberrying, exercising dogs, riding bikes, kite flying etc. Dog walkers and other walkers would be on the paths but kite flyers and a father teaching his son to ride a bicycle were on what is described as the *"unploughed part of the field towards where the old railway junction is located"*. They had seen children using the BMX track and his daughter, while at secondary school and college, used the field to meet friends in the summer holidays and hold informal parties and camp. They had never seen any crops being grown.

Summary of my Findings

6.86.1. Again, because this was purely a written statement, I cannot give it as much weight as the oral evidence. In particular, it was not possible to clarify the unploughed part of the field to which Mr Witts referred.

Mrs Iris Males, 124, Springvale Road, King's Worthy SO23 7RB

Mrs Males made a witness statement, signed on 7th September 2016. She has lived at her current address since 2005 with her family. She said that their house backs onto *"the wooded area leading to Top Field"* and that there is a path there which they have used to access the field since their arrival in February 2005. Once on the field, they have undertaken a variety of activities including: dog walking around and across the field twice a day until it was

ploughed in 2014, whereupon they had to stick to paths; sons riding bikes across the middle section; kicking a ball; picking blackberries; cutting foliage for flower arranging; kite flying /rocket launching, although this had been made harder as a result of the 2014 ploughing; litter picking. Bike riding had declined in the last two to three years as her boys are less interested in it now. She said that they had seen dog walkers, many of them regulars, cyclists, walkers, horse riders, young people camping and others flying kites and picking blackberries. She had never been prevented from using the land or seen signs or gates to prevent them from entering it. She said that she could think of *"at least 5 access points for the general public"*, as well as many other private ones from back gardens.

6.87. Mrs Male attached three photographs: two of the family dogs exercising on Top Field in December 2007 and one from February 2013 of the family launching a rocket.

Summary of my Findings

6.87.1. It is a pity that Mrs Males did not attend the inquiry, as this short statement contained a great deal of information and it would have been useful to clarify details as to precise locations and quantum of user. I note, also, that she draws a distinction between using the path through land at the rear of her house, which is very close to Mr Bell's house at No. 126A, and the area which she calls Top Field itself. It appears to me that, by Top

Field, she means the area known to the inquiry as Main Field, rather than Areas 2 or 3, but it is impossible to be certain. As a written statement only, I must give this evidence less weight than the oral evidence.

Mrs Norma Patricia Parsons, The Firs, Hookpit Farm Lane, King's Worthy

6.88. Mrs Parsons spoke as a member of the public rather than for either the Applicant or the Objector. She and/or her husband had filled in two questionnaires but she did not speak about these. She had known the land for some 13 years and used it in 2003; she described herself as an occasional user. She did not, however, want to elaborate on that and said nothing further of relevance to the determination of the TVG applications.

FURTHER DOCUMENTARY EVIDENCE PRODUCED IN SUPPORT OF THE APPLICATIONS

7.1. I have described above the Application materials and referred to the questionnaires which have been summarised in the agreed, appended schedule. I have explained why I consider it necessary to treat these questionnaires with caution. Generally speaking, they corroborate the evidence of the witnesses who gave oral evidence, in terms of accesses to the land and activities undertaken there. Some refer to notices and fencing, especially in the most recent period, once Area 1 was being developed. By the very nature of the forms, however, specific locational and temporal details are

not usually given. Moreover, all the maps attached to the questionnaires show the whole of the original Application VG 262 site, rather than the reduced version, let alone the VG 267 site. Therefore there is the possibility that some of the claimed activities might have taken place outside the Application Sites which I am considering.

7.2. The main activity cited is walking, with or without dogs, but respondents generally do not say whether this walking occurred on the perimeter or other paths or tracks, or comprised more general roaming. Other activities which feature regularly in the forms are jogging, berry picking, bicycle riding / BMX play, nature watching / study, train watching, enjoying views, kite flying, photography, sitting. Several respondents mention having witnessed horse riding.

7.3. During the adjournment before the final day of the inquiry, Mrs Clarke submitted some newsletters of a group called "Worthys Conservation Volunteers", dating from July 2006, July 2008, July 2009 and July 2011. Mr Webster did not object to this material being submitted late, but there was, of course, no chance to examine its provenance or contents with Mrs Clarke or the other witnesses.

7.4. The letters report the following events: a botanical survey and plant recognition study on 20th July 2006; a butterfly field study and survey on 20th July 2006; a butterfly field study on 18th and 25th July 2009; and a butterfly

field study on 17th July 2011. The 2006 letters were written by Mr Edwards, who gave evidence, as summarised above. The others were written by Gail Alexander. They record visits made by groups of varying sizes – the 2006 letter has a photograph of 11 people; the 2008 publication refers to a *"select group of four"*; there were 6 in 2009; in 2011, the letter says, "*We were a slightly more informal and larger group of people and children than in previous surveys"*. The 2006 photograph shows the group standing on the perimeter path, listening to the leader (presumably Mr Edwards), who stands a little way into the vegetation adjoining the path.

7.5. One of the 2006 letters states that *"Before the session there had been some discussion between Michael Edwards and the farmer, Nigel Bright of Hookpit Farm, to seek his tacit approval for the meeting. Much of Top Field is leased from the owner-developers by Hookpit Farm as set aside land and is cut on an annual basis. Normally the cut would have been made in late June or early July but Nigel Bright has seemingly and kindly delayed this work to suit our needs."* The letter also reports that *"Towards the end of the afternoon we did a brief survey of the scrub wood at the eastern end of Top Field"*. Evidently Mr Edwards returned to the land on his own to *"enlarge the coverage and produce an overview photographic record of Top Field."*

This letter continues with a description of the area, as follows:

> *"Most of the Top Field was the Hill Field of Hookpit Farm and a small section near the Mid-Hants Railway was probably a part of Vikes' holding. Subsequent changes in land use in the 20th century isolated the field, which then became stranded between two*

railways and substantial housing developments. Currently the land is part of a developers' land-bank and the centre flat area is farms as set-aside by Hookpit Farm. Consequently it is understood that little or no intensive use of this land has been made for several decades, apart from one annual cutting. Development plans are in hand for peripheral parts of the site but the meadow area is currently designated for eventual use by the village as recreational land for dog-walking and the like.

This land-use history has resulted in the development of a diverse meadow-land flora which is attractive to both local residents and to a great variety of insect life including many species of butterfly and countless grass-hoppers.

There are very substantial areas of Canadian Goldenrod and Rosebay Willowherb across the site and especially on the rough land adjacent to Hookpit Farm Lane. This overabundance would diminish if the field were even more sympathetically managed.

There are also fair numbers of Ragwort plants but these are a positive asset as they attract Cinnabar moths and other interesting insects. As the field is not grazed and not suitable for horse-riding, no action would require taking despite its presence attracting possible adverse comment.

Several well-grown Buddleia bushes are dotted about thus further improving the potential for a wide variety of Butterflies.

The field is about 9 hectares in extent (about 22 acres) with a substantial area sloping off at the northern edge down to Hookpit Farm Lane. This area is part of an ongoing housing development plan. The set aside land tapers off along a line a little west of the rear boundary of the properties bordering Springvale Road, and here the tall meadow area, partly marked out by wooden posts hidden in the grass, is somewhat overgrown and dotted with scrub species such as Hawthorn. It seems likely that this eastern area was last cut some years ago, it at all recently (sic)*. Below this point the field degenerates into a considerable area of scrub woodland which then melds into the back gardens of adjacent properties. There is also a considerable amount of scrub over to the south eastern corner of the field and bordering the old Mid-Hants railway line.*

Scrub areas consist largely of Hawthorn, Buckthorn, Blackthorn, Dogwood and other local hedgerow species mingled with Elder, Sallow and some Hazel. Many of the trees and scrub bushes are

well grown and present a fairly impenetrable thicket much used by birds and other fauna. Local home-owners are known to use the thicket for recreational purposes going to and from the field and also for gathering in-season blackberries and the like.

Provision is due to be made for the designation of already well-used paths as official footpaths for recreational purposes including dog walking.

The flora of Top Field, both in the set-aside area, and elsewhere is interesting but contains no rare of unusual species. This is not unexpected in relatively recent meadow land somewhat isolated from similar fields and grassland seed banks. It is however of considerable value as an attractive recreational resource and will in due time, and with due care, develop an even more varied and interesting flora."

7.6. The subsequent letters are much less detailed and do not contain any description of the state of the land or deal with the question of permission.

7.7. As I have said above, I was impressed with Mr Edwards' oral evidence. I found him to be a witness who was conspicuously careful, accurate and fair. I therefore give considerable weight to the 2006 newsletters since they offer a useful contemporaneous description of the land. I nevertheless bear in mind that some of the statements contained in them are hearsay, that Mr Edwards is a relatively recent resident / user (resident from 2000 but only using the land regularly from 2005) and is not an expert botanist, which limitations are relevant to his comments about the intensity or otherwise of use of the Main Field in previous decades and user by neighbouring residents of the scrub areas.

OBJECTOR'S WITNESSES

Mr Nigel Bright, Hookpit Farm, Hookpit Farm Lane, King's Worthy, SO21 2RP

8.1. As set out above, Mr Bright and his father both farmed the land for many years. Mr Bright Junior took a yearly agricultural tenancy in or about 1985 and this tenancy continued until 2013. He also said in his witness statement, signed on 22nd January 2016, that immediately prior to his occupation, the land had been used for cattle by a previous tenant but the local residents who liked to use the field for dog walking would often cut the barbed wire. Mr Bright recalls that on one occasion there were three or four incidents of this in one day. As a result, he used the land only for arable purposes from about 1985 to 2013, growing various crops consisting of wheat, barley, rape seed oil and later on setting-aside the land. He visited the land about 20 times a year to attend to tasks such as ploughing, feeding and harvesting. There was the odd occasion when he was called to the land because a youngster on a motorbike was making mischief. Apart from that his only knowledge of members of the public using the land during his tenancy was when locals used to walk around the perimeter. He stated that he was aware that Gleesons and Dunnings, as owners during his tenancy, would maintain and replace secure fences around the perimeter. He explained the procedures for arable use of the land as follows. In the autumn the ground would be prepared for the season ahead. The crop would usually grow through the spring and the harvest would take place in July and August, although this pattern would

change depending on what he was growing. Rape seed would be harvested in September, barley in spring and wheat in winter.

8.2. Mr Bright enclosed with his witness statement his Crop Records which he was obliged to submit to the Ministry and I shall return to those later. He said that there was usually no evidence of activity by local people other than the tracks where they could walk around the perimeter. The land would either be ploughed and muddy or thick with crop deterring people from using it. Very rarely, he said, someone might have damaged a small amount of the crop but it was largely intact every year. He stated that certainly the land was not being used generally for leisure purposes and had it been, he would have been unable to farm it successfully for arable crops.

8.3. Having reviewed his records, which he produced in evidence, he was able to confirm that between the years of 2002 and 2013 he set-aside the land. He also stated that every year during the period of set-aside he would visit to mow and maintain the land and, apart from the occasional nuisance caused by a youth on a motor cycle, he was not aware during this set-aside period of any leisure use of the land.

8.4. In oral evidence in chief, Mr Bright confirmed that the records from 1993 to 1999 were *"the definitive records"* and that they were accurate. He was asked about the statement which he made in connection with the section 53 footpath application, summarised above in an extract from the Footpath Officer's Report. In that statement he said that he knew that the field had been fenced

by the landlord several times and that these fences had usually been torn down or cut through and furthermore that the landlord had erected a large gate and fence after the traveller problem. He said in that statement that the landlord had told him never to stop people from walking but he added that he considered the fences to be proof of the landlord's intentions. Speaking personally he had said, *"I have been quite happy with an unofficial path running around the field and have never tried to stop people walking there as I wish to maintain good relations with the local people"* and he added in that statement that he told a representative of the Ramblers' Association that as far as he was concerned the route was an unofficial path. That earlier written statement was signed and dated 15th May 2001. In his oral evidence to the Inquiry, Mr Bright added that he deliberately did not take on responsibility for re-fencing the land when he became the tenant because he was aware that the fencing had been torn down so many times in the past. He also explained that after 2001 when the land went into set-aside he regarded himself as still farming, the set-aside being part of his legally required 8% of such land.

8.5. In cross-examination, Mr Bright clarified that he had taken over the land in September 1985 and that he signed the tenancy at Michaelmas in that year. Prior to that he had started to clear the land in 1984, it having previously been let to a grazier whose name he could not remember. When Mr Bright became personally involved with the land again in 1984 he found that people had broken down the fences. The land had been grazed from 1966 to 1984. He also confirmed that he had not had a tenancy of Areas 2 and 3 during the

relevant period and had carried out no agricultural activities on them. Questioned about his record keeping, Mr Bright confirmed that he had filled in the fields data sheet himself and that it reflected the fact that 5.53ha of land inside the perimeter paths was sown with Barley and a 0.66 hectare area inside the demise was rough ground. Using the 1993 aerial photograph as a guide, Mr Bright pointed out that his tenancy extended to include the south-western corner of the Application Site but he explained that he had not farmed that part of the land and had therefore not included it within his IAX return to the Ministry of Agriculture Fisheries and Food. The colouration shown on the aerial photograph for the 20th March 1993 clearly reflected that.

8.6. Mr Bright was adamant, when explaining about his crop rotation, that the time during which stubble would have been in the ground was limited to one month in general and possibly an extra week or so depending on the weather. He was also very clear that during the 1990s it was principally him doing the work on the land rather than employees. He said that he would have visited the land on average 20 times a year to carry out various farming tasks.

8.7. Asked about the statement he made in connection with the s.53 application in 2001, Mr Bright said that he had been happy with the arrangement as described in that statement, i.e. people walking on a perimeter path around the field. He said *"if they walked round outside that produced no inconvenience to me if they didn't damage crops"*. He stated that he *"interfered with anyone who went on the crop when I saw them"*. I asked Mr Bright whether people did

or could have walked or cycled or thrown balls for dogs without causing damage to crops and Mr Bright replied that he could quite easily tell if such things had happened. In the extreme he said that one would see a pathway whereas a single incursion would produce a line of bent plants. He added that it would be very strange for people accurately always to follow a tractor line. In answer to Mr Wilmshurst, Mr Bright explained that he worked predominantly during the hours of daylight on the land although occasionally during harvest times he would work at night. He recalled having worked on the land at weekends although he could not any longer specify precisely which weekends. Asked about Areas 2 and 3, he initially said that he could really only comment on the Main Field area but he did agree that he had seen some dog walkers on those areas – *"probably one or two if I was there for an hour or two, although I can't swear to that"*.

8.8. Mr Bright said that the Hookpit Farm Lane entrance had been gated and locked twice. He agreed that that area was specifically fenced to prevent traveller access and he clarified in answer to me that the *"hippie incursion"* was predominantly in Area 3 and slightly in the eastern part of Area 2. He thought that the gating had also been intended to prevent the creation of a public right of way. He said that the gate had been put there by the landlord. He explained that it was this action which he had in mind when saying in his s.53 statement and earlier in his oral evidence that he understood that no public right of way could accrue if there was let or hindrance and he interpreted this conduct as let or hindrance. He stated that within a few years

the gate was pulled down. He concluded that, as far as he was concerned, people went round the outside of the field which was no trouble to him.

8.9. Questions were put to him about the central area of the land, firstly from the period 1993 to 2000 and then in respect of the period 2000 to 2013. Dealing with the first period, he said that occasionally he caught children on the cropped area as he had described earlier. A more common problem was motorbikes but during the 1990s, he said, *"we farmed quite happily. Everyone walked round the edge and all was happy"*. He said that problems in the 1990s with motorbikes were rare and were usually confined to the period when there was stubble on the land. Mr Bright said that he did not have much of a problem with children playing in the crops during this period – it was confined to a few times a year. Turning to the latter period, he agreed that there had been problems with motorbikes when the land was in set—aside with people complaining and the police attending. He had been involved in trying to deal with these problems on occasions. Mr Wilmshurst asked many questions about the cropping although he prefaced this by saying that he did not question the fact that Mr Bright had filled in the forms properly and correctly. After detailed cross examination on the potential for members of the public to mistake various crops for grass, Mr Bright concluded that he found such an idea *"remarkable"*. He said that the land had been ploughed every year up to 2000 and he found it *"strange"* that people would not have recognised that. Some of the crops, he agreed, would look like grass in their early stages but

he explained that they would quickly grow and that it would become obvious that they were crops rather than simple grass. He also confirmed that he was quite certain that the area which he seeded each year covered the full extent of the area inside the perimeter track. Asked about the ease of walking through stubble, he said that it would be possible although *"extremely uncomfortable"*. He said that walking would be easier on the perimeter path and he reiterated that he had not seen people trespassing on the crops. Dealing with the 2000 to 2013 period, he agreed that his visits to the land were less frequent during this period than previously and he stated again that people *"tended to walk in the worn area on the outside"*. He saw people in the middle but *"very rarely, just walking"*. He agreed that he was legally required to mow the land and that it would have been possible to walk across the central area once it had been mown.

8.10. Re-examined, Mr Bright confirmed that the King's Worthy area is and was predominantly comprised of arable land cropped with cereals. Mr Bright described oil seed rape as having a cabbagy smell, a distinctive flower and growing into *"a complete tangle"* which was very difficult to get through. Asked if there was anything distinctive about it and whether people would know of it if they were living close by, he said that people do sometimes complain about it.

Summary of my Findings

8.10.1. I found Mr Bright to be a clear and helpful witness who was doing his best to assist the Inquiry. He had a good and detailed recollection of the land for the whole of the period 1993 to 2013 and indeed before that. Insofar as he gave expert evidence about farming practice and the appearance of crops, I take into account his long experience as an arable farmer and give this evidence considerable weight.

Mr Alastair Wilson BSC (Hons), MSC, MRICSFAAV

8.11. Mr Wilson is a Chartered Surveyor specialising in rural practice. He has 17 years' professional experience advising farmers and landowners in Hampshire and Southern England. He is a partner at BCM and prior to joining that firm he worked in Winchester with James Harris and Savills. BCM are a specialist rural asset management business based near Winchester, managing over 75,000 acres of land in Hampshire and surrounding counties. In his witness statement, which was signed on 7th September 2016, he explained that he had been instructed by the Objector to assess and interpret the agricultural records forming part of Mr Bright's evidence. In view of Mr Wilmshurst's acceptance during the cross-examination of Mr Bright that the agricultural records had been accurately completed, I shall not summarise the detailed explanation of the forms in question which Mr Wilson gave in his oral evidence. He made a summary of the contents of the records and his assessment of what would have happened in practice on the land which was not the subject of challenge

in cross-examination although he readily accepted that he had not been present on the land at the time. I now set out that summary.

8.12. The crops disclosed by the records are as follows:

> 1993 Winter Barley, 1994 Winter Oil Seed Rape, 1995 Winter Wheat, 1996 Winter Wheat, 1997 Winter Oats, 1999 Winter Oil Seed Rape, 2000 – 2012 natural regeneration.

Mr Wilson explained that there were no records for 1998 which are available but he made the assumption, having taken into consideration the crop rotation for the rest of the period, that it would be *"fair to assume that the crop for harvest in 1998 would be Winter Barley as this crop is commonly used before entering into a break crop of Winter Oil Seed Rape"*. He described the processes of cultivation for these crops which were broadly speaking similar and would have entailed the land being ploughed, prepared and drilled in September each year then sown at the end of September with plants emerging to a height of around 5cm about two weeks after drilling in each case. Different crops would grow to different heights and thicknesses as follows:

> Winter Barley 60-70cm; Winter Oil Seed Rape 100-130cm; Winter Oats 60-70cm.

Winter Barley would have been ready for cropping by late July although depending on seasonal conditions it might not have ripened until early August. In Mr Wilson's unchallenged opinion the crop would have been extremely thick by late July which would have meant that people were unable to walk through it unless by trampling. After harvest, Winter Barley, straw would be left in rows for baling, bales then being stacked in the fields for a few days before removal. Winter Oil Seed Rape would, in Mr Wilson's unchallenged opinion, be extremely thick and come into a bright yellow flower by late May/June, with people unable to walk through the crop unless by pushing their way through and causing damage. All crops would have been sprayed periodically through the growing season but Rape would have been desiccated using a herbicide in preparation for harvest in July. That process of desiccation usually takes 10 to 14 days and the crop would have been ready to harvest in late July/early August. After harvest, there would have been residual stubble of some 15-20cm which, in Mr Wilson's unchallenged opinion, would have limited any activity taking place on the land. This would normally have been left until sowing of Winter Wheat in September. Winter Wheat would, by June/July, be extremely thick, meaning that people could not walk through it unless by trampling, similar to Winter Barley. By August Winter Wheat would be ready for combining, though depending on seasonal conditions it might not ripen until mid to late August. Harvesting and baling would have been similar to the process for Barley. After removal of bales, the common practice is to subsoil the tramlines to reduce compaction before cultivating and drilling the next crop.

Winter Oats would also be extremely thick by June or July with people unable to walk through that crop in Mr Wilson's unchallenged opinion unless by trampling, as for Barley and Wheat. By August, Winter Oats would be ready for combining though depending on seasonal conditions the crop might not ripen until mid to late August. After harvest, the baling process would have been similar to that for Wheat and Barley and, once again, subsoiling tramlines would have been likely.

8.13. Mr Wilson explained that during the period of natural regeneration between 2000 and 2012, there would still have been a requirement for set-aside land to be managed. Under this system the vegetation would have been allowed to grow through the year, following which it would be cut in August or September. Vegetation would have included self-seeding blackthorn bushes, small saplings, grass tussocks and weeds which would have grown in some places to 1.5 metres high and would have included a thick ground cover of brambles.

8.14. Mr Wilson's expert opinion, as I have said, was not directly challenged by Mr Wilmshurst, although he pointed out and Mr Wilson agreed, that he had not visited the land between 1993 and 2013 and that he had not been familiar with Mr Bright's particular farming practices at the time that he made his statement. He accepted that he was not an expert on aerial photography and I have therefore not summarised the comment which he made on the aerial photographs since the expert Ms Cox dealt with that evidence in detail.

8.15. Mr Wilson defended his conclusion that the land would not have been available for recreation during the relevant periods, saying that he had reached this view based on the farming records as well as his review of the photographs and that he had firmly formed the opinion that the land had been cropped for agricultural purposes.

Summary of my Findings

8.15.1. Mr Wilson gave expert opinion evidence rather than direct historical evidence. Nevertheless I found his evidence to be responsibly compiled and delivered and as I have said, there was no challenge to the conclusions which he reached from the cropping records. I recognise that he is not an expert in aerial photography and I prefer to deal with the aerial photography on the basis of the expert evidence of Ms Cox which I summarise later in this Report.

Mrs Judith Steventon Baker, 11 Churchill Close, King's Worthy, SO23 7PD

8.16. Mrs Steventon Baker made a witness statement, signed on 19th January 2016. She has lived in the locality since January 2008 and has been a Parish Councillor since May 2010. In her witness statement she said that she had, on several occasions, visited the land and walked along the perimeter path. On such visits she said she had only ever seen other people walking around the perimeter and had never seen anyone using the middle area at all. The

only activities that she had ever seen were people either walking alone or with dogs around the perimeter. She had noted on one occasion that children had built a den in one corner of the land. She had not seen or heard any fireworks, suggesting large gatherings on the land. She said that she had seen evidence of livestock on the land in the past and when asked about this by Mr Wilmshurst she said that the evidence that she saw consisted of cow pats although questioned further she deferred to the farmer, that is Mr Bright's, recollections on the presence of animals on the land. She does not live right next to the land, her house being on the opposite side of the valley. She also elaborated in cross-examination that her visits to the land would have been confined to between 2 and 5 occasions, especially when she had visitors, and these trips would have taken place around 3 o'clock in the afternoon. The duration of these trips would have been 45 minutes to about an hour and a half. She had not been into Areas 1, 2 or 3, although she thought that there was a pathway running down through 3 to the old railway line.

8.17. In re-examination, when asked why she walked the perimeter path and not elsewhere, she replied that she had asked the neighbour where she walked her dog and that was the answer.

Summary of my Findings

8.17.1. This witness clearly has not had a close association with the land. Her visits have been limited and she does not live overlooking the site. In some respects her recollections seemed

a little unclear, particularly in the matter of livestock. Accordingly I give this evidence limited weight.

Mr Graham Hutton, 1A Meadowland, King's Worthy, SO23 7RJ

8.18. Mr Hutton made a witness statement, signed 22nd January 2016. Mr Hutton has lived about 5 – 10 minutes' walk away from the land for over 30 years. He had been a Parish Councillor and then a District Councillor for many years, resigning on health grounds around 2003/4. Throughout his time as a Councillor, constituents would approach him with questions regarding the status of the land, whether it was private or whether the public were entitled to full access. He received complaints about the fencing or gating of the land. When Area 1 was being developed he recalled that Gleesons had put a wire fence around the land and notices informing the public that it was private and they should not trespass. He arranged meetings with Gleesons and the local people in conjunction with the Parish Council during which he made clear that the land was private and that the public were not entitled to free access. He remembered the central part of the land being rented by Mr Bright and that land being used for many years for crops and/or for animal grazing. He had walked around the perimeter of the land and picked blackberries from the bushes surrounding it, particularly in 2004/2005 and 2007 whilst recuperating from his health problems. He used to walk the perimeter regularly. At no point during any of his visits had he seen anyone in the centre of the land and he

had only seen others walking around the perimeter picking berries or children using the edge of the land as an informal play area. He had never heard or seen any firework displays on the land.

8.19. In cross-examination, he explained that his house was over the hill and does not have a view of the land, although he said that it is clear enough to hear or be aware of what is going on there. He said that he had used the land extremely frequently, starting before 2002 and that he had been married to a lady called Glenys Hutton who was a dog walker. Prior to the breakdown of their relationship they had sometimes walked the perimeter of the land together and later on he would walk alone, sometimes taking the dogs with him. Mrs Hutton completed a s.53 evidence form in October 1996, appended to which was a plan showing her pattern of walking as being around the perimeter of the land.

8.20. Mr Wilmshurst asked him about Areas 2 and 3. He described the top, by which he meant the southern, end of the site as including a *"mish mash of footpaths, official or not"*. He said that there had been *"considerable use of that land mainly because nobody seemed interested in it and it was very good for blackberries"*. In answer to me he said that the mish-mash of footpaths goes further off the site as well. As well as the s.53 route, he said, there were further footpaths, going to and from Tudor Way; No.2 Tudor Way, for example, had a gate onto Top Field and there were others too. Then he said the footpaths went further afield from there. He had used the mish-mash himself

sometimes. He described how Gleesons had fenced Area 1 when they were developing it and said that there had not been any fencing in the southern part of the site. At Hook Farm Lane he had not been aware of fencing initially but then saw heavy fencing with a pair of gates, he having become aware of that when somebody cut a hole in the gate; he agreed that that had been quite an issue in the locality. He also said that probably prior to 2000 there had been a low fence around the central portion of Top Field and he described the perimeter path as being quite wide and of variable width. He recalled there being a strip of land fenced off.

8.21. In re-examination he clarified this by saying that he remembered there having been a tethered pony or donkey for a short time but said that he did not remember many farm animals – a few cattle and crops there. He said that the Gleeson's fencing around Area 1 had not been secure for any length of time because it was opened with bolt cutters repeatedly. He said that the fencing or gates at the northern part of the site at Hookpit Farm Lane were only secure for a very short time because people were keen to maintain access. He believed that steps had been taken once or twice to repair or replace the fence.

Summary of my Findings

8.21.1. Mr Hutton clearly had long memories of the site but I gained the impression that his association with it had probably varied over time, peaking at a period in the early 2000s when development

of the land was under discussion and then in the mid-2000s when he was using the land regularly for his own recuperation. His evidence about animals and fencing was not entirely clear and I cannot therefore give that great weight. He was fairly clear in his descriptions of Area 3 and the mish-mash of paths there, although I got the impression that his recollection of the perimeter path and usage of that area were firmer than his memories of Area 3.

Mr Robert Johnston, 6 Bentley Close, King's Worthy, Winchester SO23 7LG

8.22. Mr Johnston made a witness statement, signed on 19th January 2016. He has been a Parish Councillor since 2002 and a member of Winchester City Council from 2002 to 2006. He has lived in King's Worthy with his wife since 1976. They had a dog between the years of 1984 and 2014 and he would walk the dog at weekends. He was therefore very familiar with the site. In his witness statement he described how the locals would stay on the established path around the perimeter. He states that he recalls crops growing and cattle grazing on the land roughly between 2000 and 2005 although he did say in his statement that he was not entirely sure about the date. He described many blackberry bushes around the edge of the site and said that locals would go berry picking there but there were no such bushes in the middle of the land. He said that he was aware that cyclists used the perimeter path. He described in his witness statement there being a fence all around the perimeter of the

land, especially along the backs of three houses in Springvale Road[10], Dill Dawn, West Ridge and Trevone. He said in his statement that he remembered being informed that the owners of the land at the time, who were Gleesons and/or Milfords, had contacted the owners of those three properties because they were fly-tipping and installing gates so as to have access onto the path. After receiving notice from the owners, the fly-tipping stopped and the gates were removed. He had been contacted by some of the residents living in properties backing onto the land and he therefore spoke to the owners who gave him the impression that their purpose in contacting residents was not only to stop the fly-tipping but also to advise them that the land was privately owned and not for use as a public open space. He was contacted by a resident about a gate having been installed by Gleesons and they told him that this had been done to prevent public access. He assumed that people had been granted access to walk around the perimeter. He had witnessed notices on the land informing the public that it was private and that access was not permitted.

8.23. In cross-examination he was asked about the mish-mash of paths over Area 2. He said that Area 2 had always been overgrown, much as it is now. On being shown some of the aerial photographs he agreed that there appeared to be tracks there which he suspected had been made by *"children playing in that area"* - odd children rather than many of them - and not playing in the centre. Overall, however, his impression was of remarkably few people in that area.

[10] Actually Tudor Way

He surmised that people would not go there; he did not go there because of the risk of losing the dog or being scratched by thorns. His visits would have occurred between 9am and 11am and 4pm to 6pm. Asked about his blackberrying, he said that he did this on the western boundary and that the path ran up to the bushes. The path there was 2 – 3 metres wide. He described the fence which he had seen next to the perimeter path as being about 70cm high and said that he had understood from a previous owner that it was to delineate where the farm was and the track was. Apart from people walking on the track and the cyclists whom he had seen on the track, he said that there had been motorcycles on occasions which had led to complaints, but that he saw very few people, whether on the track or in the mish-mash area. He agreed that there was a mish-mash of little paths also in Area 3 but he described that part as being *"overgrown scrub"*; he did not use those paths. He said that this was the area where there had been the complaint about dumping garden waste. He was asked about the fencing at Hookpit Farm Lane access and said that the owners had attempted to put fences in that area and at the access point off Woodham's Farm Lane in order to establish ownership and prevent liability. He said that he was told that this was their purpose. The gate at Hookpit Farm Lane was demolished almost at once and he denied that there was a gap to the side of it. He said that that gate had restricted access to the perimeter land at that point although there were other accesses such as Woodham's Farm Lane and from the disused railway line. He said that he believed Gleesons had sent letters saying that

they would fence the entire site but that they did not then do that. He was unable to give a clear date but he thought it was around 2006. He himself had not seen the letter. He was asked whether or not he was in favour of the development of the land and replied that he had voted for the planning application having listened impartially to the arguments and weighed the pros and cons.

8.24. He clarified in re-examination that the fencing which he had seen was just inside the perimeter path from the northern central point round to about 5 o'clock on that line.

Summary of my Findings

8.24.1. I considered Mr Johnston was doing his best to help the Inquiry although his association with the land both as user and as a local politician had been lengthy and he was not always able to be entirely clear about precise dates. I found the evidence of his own user to be based on very clear recollections. When asked about Areas 2 and 3 which he had not used personally, his recollections were less clear.

Ms Ruth Hopkins, Persimmon Homes, Knowle Road, Camberley.

8.25. Ms Hopkins made two witness statements, an informal one, signed and dated 22nd January 2016, then a formal one, signed and dated 9th September 2016.

She was employed by Gleesons from February 2005 until December 2014, firstly as Strategic Land Manager and then as Strategic Land Director. Sometime before her appointment, Gleesons had acquired the company Portman New Homes whose portfolio included the Application Land. It was being promoted as strategic land as part of an adjacent development. During Gleesons' period of ownership the land was leased to Mr Bright. She stated that at no time did Gleesons give any member of the public permission to go onto the land and she described the use of perimeter paths as being *"at Mr Bright's discretion"*. In June 2010 she and a colleague, Mr Horwood, a technical manager, visited the land in order to erect signs informing the public that it was private. She produced two photographs of these signs which, she explained in cross-examination, she had kept upon leaving Gleesons. She also produced a map showing where the signs had been erected. There was a northern sign which she described as being just inside the perimeter track and this was at a point between 12 and 1 o'clock on the perimeter path to the south of the track coming down from Hookpit Farm Lane. The second sign was fixed to a tree in the south-western corner of the site near the perimeter track rather than in the extreme point of the land in that area.

8.26. In her second witness statement she gave a little more detail, explaining in particular that the rationale for locating the signs was to ensure that they were visible to anyone entering the boundary of the Gleesons' ownership.

8.27. In her oral evidence in chief she explained that it had been a little unclear at that stage whether or not Gleesons owned the perimeter path itself and that she had therefore placed the signs inside the path. The south western sign she described as being to capture the attention of children who might have been playing there. The original idea was that the signs should be checked annually but this was not in fact done.

8.28. In cross-examination, she explained that she had checked the position by reference to the Land Registry plan and that she was therefore clear that she had placed the signs on Gleesons' land. The signs were made of corrugated plastic, white with black printing and the wording was, *"There is no right to roam on this land nor any public right of access and there is no intention of the Owners to Dedicate it as such or as a Right of Way"*. She did not accept that the northern sign could easily have fallen down; she said that she and Mr Horwood had dug a hole for the post to which it was fixed and that this had taken about 30 minutes using a shovel. Nor did she think that the sign which was fixed to the tree with string would easily have come down in the wind; she said it would have taken a *"strong gust of wind"* to bring it down. She agreed, however, that they could have used larger print and a less flimsy attachment.

Summary of my Findings

8.28.1. Ms Hopkins was a clear and careful witness who was doing her best to assist the Inquiry and, aided by her own record keeping, was able to present a clear recollection of her actions.

Mr Neil Holmes Director of Quayside Architects Ltd, The Studio,141 Burgess Road, Southampton SO16 7AA, Mr Holmes prepared two witness statements and provided the supplementary material to which I have already referred in the planning history. Quayside Architects were instructed by Drew Smith in August 2010 and have been providing planning and architectural services for a period of some 5 to 6 years since then. During that period he had visited the site some 4 to 5 times each year. In cross-examination he revised this to say at least 4 to 5 times a year and possibly 6 or 7. When visiting the site he said that he would normally go to the part south of Area 1 and walk all or part of the main perimeter footpath. During those visits, he described frequently, if not invariably, encountering members of the public walking the circular route around the perimeter, usually accompanied by dogs. He added that in the autumn members of the public were frequently picking berries along the footpath or track. On his initial visits between 2010 and 2012 – that is prior to the development of Area 1 – he observed children and teenagers in that area and their footpaths/BMX cycle routes through the scrub there; on one occasion there was a tent in the north-eastern corner of that area. He described that area close to Hookpit Farm Lane as being convenient for play, accessible and screened, though the on-site scrub, he said, prevented extensive use for

recreation or play. During his 20 – 25 visits, he had never observed a member of the public on the Main Field inside the perimeter footpath. He described that central area as being *"unsuitable for recreational activities due to long grass/vegetation or uneven surface. From mid-summer the central area of Top Field was difficult to access because of the long grass and high Goldenrod"*. He had taken a number of photographs in 2010 and 2012 which he exhibited to his first witness statement, signed on 25th January 2016. Accompanying these photographs was an annotated aerial photograph of the Application Land showing the points at which the pictures were taken. There were three on or adjacent to Area 1, one of which appears to have been taken on the track towards the site from Hookpit Farm Lane, three photographs roughly between 10 or 11 o'clock and 1 o'clock on the perimeter path, and one on a small worn path inside Area 3 at the south-eastern former of the Application Land. All of these photographs showed worn or clear paths with tall vegetation either side, which looks like Goldenrod and Rosebay Willowherb, together with long grass and, in the background, large hedges/scrub. Mr Holmes described there being a BMX cycle track in the south-west corner of the site but he said that he had never seen it in use. He explained that planning permission 12/01912/FUL required the diversion of a claimed right of way which ran through Area 1 and around the perimeter of the Main Field. He had examined the s.53 application material and noted that Mr and Mrs G Luing were the only footpath claimants to have made statements in support of the village green application[11] and that they had stated *"most of the*

[11] In fact there was at least one more, Mrs Player

field was fenced off with posts and wire, it was farmed (arable)". Mrs Malphus who had also completed a s.53 form stated that the claimed route *"runs alongside cultivated field – around edge … whenever the field had crops growing there was a strip left by the edge for us to walk on"*. Mrs Linda Banks had said *"the edge of the field has been a recognised walk for many years; the farmer did not object as long as his crops were undisturbed"*.

8.29. Mr Holmes summarised the planning history which I have dealt with in more detail above. He also recorded that a village green action group had been formed following public consultations by Drew Smith on potential residential development in September 2013 and he produced photographs of signs which TFAG had put up appealing for assistance in support of the village green application. The sign said, *"If you have used Top Field for recreational or other purposes over the last 20 years please can you fill in a questionnaire"* and then there were details about how to download the questionnaire.

8.30. Mr Holmes' second witness statement, which was made on the 7th September 2016, simply details the planning history which I have set out above and produces extracts from the development plan to which I have already referred.

8.31. In his oral evidence, Mr Holmes considered what potential forms of development might come within local plan policy RT5. He said that, in his opinion, it was a wide ranging policy which could embrace playing fields, gyms, public open space or informal green space. Asked whether the designation could include built development and open space, he explained

that they had considered early on in the process a scout hut, from which I infer that he considered that a built recreational development would come within the ambit of the policy. He confirmed that when Drew Smith first became involved with the land they decided to apply to divert the public right of way which the Council had resolved to make through the s.53 process although, as noted above, the Order was never confirmed. Mr Holmes said that the developers could not take the risk that it might be confirmed because the routes were inconsistent with their layout and therefore they agreed a diversion.

8.32. Turning to the public open space requirements under the s.106 Agreement, he explained that an area broadly covering Areas 2 and 3 of the Application Land had been managed for ecological mitigation purposes since 2014 but confirmed that no land has yet been transferred to Winchester City Council pursuant to the s.106 Agreement. The landscape buffer has been planted to the south of Area 1. The ecological management has meant that scrub clearances have taken place on Areas 2 and 3. He said that there had been two such clearances. In the course of these, they had cut through footpaths running up to Ilex Close. He said that Drew Smith had pegged out the potential footpath line but that the pegs had been removed, he assumed by local residents.

8.33. In cross-examination he said that although he could not claim never to have seen anybody playing in Areas 2 and 3, there were very few. He denied that he would have been distracted, saying that, on the contrary, he was

interested in looking at routes to the Ilex Close area. He described the little paths in Area 2 as very limited and becoming more limited daily. He also referred Mr Wilmshurst to the photo location plan to which I have referred above which shows five or six distinct lines within Areas 2 and 3 comprising in the main a north/south route with three main accesses to the perimeter path coming off it, the north/south route running down the back of the houses on Springvale Road. He said that he had visited the land at about 9 o'clock in the morning or lunch time or on his way home. He had also visited at weekends and indeed walked his own dog round the site. It was put to him that he was not giving impartial evidence because of his client's interest in getting the land developed and he said, *"I wouldn't say that I'm impartial but I have a professional qualification, I always give my professional opinion and my evidence is not tainted"*.

Summary of my Findings

8.33.1. For reasons which I have explained, I have not set out the whole of Mr Holmes' evidence here and much of what he said has been distilled into the planning summary. Clearly he has had a considerable interest in this site since 2005 although he has not been regularly on the land. I bear in mind however that he is professionally involved in appraising land and I therefore give considerable weight to his observations while on site

undertaking his various activities. I also note his frankness when tackled on the question of his own impartiality.

Ms Christine Cox, MCIfA FSA

8.34. Ms Cox is a professional aerial photographic interpreter. Her qualifications comprise a BA Honours degree in archaeology from the University of Liverpool, an MA in aerial photographic interpretation from the University of Sheffield and membership of the Chartered Institute for Archaeologists. She is a Fellow of the Society of Antiquaries of London. She has over 30 years' professional experience in the interpretation of aerial photography. She was asked to obtain and prepare a report on authenticated aerial photographs spanning the years 1992 to 2013 which she did. Her report is dated 22nd January 2016. Although this is described in the inner title page as a draft report and there are one or two omissions such as the name of her client, it became clear in her evidence that substantively this was a complete report and she was happy to endorse and speak to its contents. She explained in her oral evidence in chief that she is experienced, amongst other things, in looking at cropping. In her report and oral evidence, she explained the process by which she examines such photographs; she obtains authenticated pairs of aerial photographs and the stereoscope enables her to look at them in a magnified form which also projects them to some extent in 3D. She demonstrated this machinery and process during the Inquiry and invited me to use it. I must confess that I had difficulty in seeing all that Ms Cox could

clearly see, but of course she is an expert and I am not. I am quite satisfied as to her expertise and her skill in particular in being able to examine aerial photographs much more closely than the lay viewer can.

8.35. In the report and in her oral evidence under cross-examination, Ms Cox made it clear that she was using the term *"The Site"* to mean the red line area of the Application. She agreed, however, that her focus had been on the Main Field.

8.36. By the time that Ms Cox was called to give evidence, the inquiry had heard evidence from Messrs Bright and Wilson and Mr Wilmshurst had accepted, on behalf of his client, that the cropping records were accurate. Therefore he did not dispute Ms Cox's general conclusions about the evidence of cropping as corroborated by the aerial photographs. In her report Ms Cox summarised her findings as follows:

> *"Date authenticated aerial photographs demonstrate that during the 1993-2013 timescale of this claim, the land use on the majority of the site has been as follows:*
>
> ***1993-1999*** *(observed in 1993, 1994, 1996, 1997, 1998 and 1999 from aerial photographs).*
> *The land use over the majority of the site was arable agriculture. The site was observed in different stages of cultivation of a cereal crop and once under bare plough soil.*
>
> ***2002 and 2004***
> *The majority of the site was under managed grass in 2004. In 2005 the land use was the same, with a newly visible area of disturbance in the south west of the site.*
>
> ***2005***
> *In 2005 the site was under managed grass, with a newly visible figure of eight shaped small track which was worn*

to substrate in the south of the site. This indicates likely leisure use over this part of the site only.

2007

In 2007 the majority of the site was cultivated and there was little vegetation visible on the site, with very well defined lines where cultivation had taken place. In this year, the triangular area at the far southwest part of the site was left under grass, with visible disturbance within this area where the substrate was exposed. This marks the first observation of the separation of this area from the majority of the site. In 2007 there was only a faint trace of the former figure of eight shaped track residual as a tonal difference in the surface and this track or any other part of the majority of the site was obviously not in use for leisure purposes, excluding the possibility of the 'triangle' area in the south west.

2010

In 2010 the majority of the site is under rough grass with a path encircling the site which now passes to the north of and separates the 'triangle' area from the majority of the site. There is no sign of leisure use or bicycle tracks on the majority of the site and the area of disturbance in the 'triangle' is still visible.

2011 and 2012

In 2011 the majority of the site is under rough grass. This is the first occasion of observation of a sinuous track in the centre of the site which likely overlies a worn access path which traverses the site from east to west. The track and path are still visible in 2012. No other observations of such features have been made in previous years. This feature is a trial or similar motorcycle track and in this location would not constitute a lawful sport or pastime.

2013

In 2013 there is a newly developed area and area of exposed substrate in the north of the site, and newly visible worn paths along the north perimeter of the site as a consequence of this nearby change in land use.

I conclude that, based on my observations of the land from aerial photographs that the majority of the

site was under arable cultivation for cereal crops between 1993 and 1999*.*

From 2002, the site was under managed grass.

Traces of disturbance likely associated with leisure use were observed in the south west 'triangle' area of the site in 2004 and persisted until last observed in 2013.

A small figure of eight shaped track was visible in 2005 in the south of the site, but not on any occasion of observation thereafter.

In 2010 the perimeter path was observed to take a different route in the south of the site to run to the north of the 'triangle area'.

Between 2011 and 2013 a sinuous motorcycle track, which does not constitute a lawful leisure use, and access was observed in the centre of the site.

There has always been an established network of paths around the site between 1993 and 1999. The path network around the outside of the site persists beyond this date to 2013.

No pedestrian ingress into the site or leisure activities on the site, have been observed during the period of cropping to 1999 and beyond.

The access and cropped area have always been separate and well defined and the path network firm and visible around the outside of the majority of the area of the site.

I have observed no directional paths across or into the majority of the site prior to 2011. In 2011 an item or vehicle was visible in the centre of this track.

No people have ever been observed on the site.

I conclude that the site has not shown traces of leisure use over the entirety (indeed the majority) of the period of this claim, and was in arable cultivation up to and including 1999."

In her oral evidence, Ms Cox considered carefully the figure of 8 which appeared in the 2005 photograph. She explained, both on the basis of her scrutiny with the stereoscope and also her own recreational experience as a motor biker, that she had no doubt that this mark was made by motorbikes. She therefore disagreed with Mr Edwards on this point. Her conclusion is consistent with Mr Bright's evidence about biking on the land at this time.

8.37. Mr Wilmshurst asked Ms Cox many questions about Areas 2 and 3. It became clear that these areas had not been the focus of her written report and that in order to do full justice to Mr Wilmshurst's questions she needed to study them carefully with the stereoscope. Mr Webster was initially reluctant for this line of questioning to proceed but I indicated that I would welcome hearing Ms Cox's answers on these points and therefore I arranged for her to work in a separate room where she would have no contact with anybody involved in the Inquiry and she agreed to undertake the further work. She returned on the following day, 23rd September, to present her findings in a subsequent report.

8.38. Before summarising the results of those researches, it is right that I should record some other answers which she gave in cross—examination about limitations on the use of aerial photography generally. Included in the authorities bundle was an article by Ms Cox in the Rights of Way Law Review. This article is called Aerial Photographs as Evidence. Ms Cox readily agreed

with Mr Wilmshurst that the decision maker must be careful about using aerial photography for a number of obvious reasons: firstly, because it only offers a snapshot in time, secondly because it may be affected by environmental features such as dryness. Therefore aerial photography must be interpreted within certain parameters and it is important to integrate it with any other evidence which is available. Ms Cox however confirmed that she had deliberately not examined other people's witness statements except to the extent necessary to take instructions from the legal team. She also confirmed that she had visited the site but only after she had made her initial interpretation in her first report. She accepted that, depending on environmental factors, there might be ephemeral types of use which would not be revealed in aerial photography. She later explained that the soil conditions affecting this particular site, namely a shallow and fragile topsoil over a chalk substrate, mean that marks on the land would show up quite easily and not a great deal of footfall would be needed; in her words *"traces would be discernible pretty quickly because chalk is very responsive"*. These answers were given in re-examination in the context of a discussion as to whether or not marks and tracks which she discerned in Areas 2 and 3 as a result of her further work were attributable to human beings or animals. She could not give a definitive answer about all the markings, although some of the small tracks and markings which she discerned did appear to link up with the perimeter tracks which she found to be more suggestive of human than animal activity.

8.39. She was asked in great detail about the accesses to the site over the course of the years. As I have set out above, the application material indicated four principal access points. No.1, on Hookpit Farm Lane, is a little to the west of the track which is not shown as a principal access on the Application plan but is discernible in all the aerial photographs except the very recent ones and which was described by the witnesses. For the purposes of convenience during Ms Cox's cross-examination, that track became known as access point 1A.

8.40. In summary, Ms Cox's analysis of the aerial photographs indicated that the only consistently visible access point was the track at 1A. From time to time there were signs visible which she thought might have indicated access at points 1 or 2, but points 3 and 4 as delineated on the Application Plan were heavily vegetated throughout, although she did flag up in her initial report some tracks or routes in the vicinity of Area 3. Her subsequent work confirmed that and indeed indicated ephemeral tracks in the same area which tended to vary from year to year as to their precise position but were broadly speaking in the same area.

8.41. To summarise her considered evidence on Area 2, she again discerned fluctuating levels of track making in that area, within a consistent general pattern of a movement to link up with the perimeter path. She explained that generally speaking she is cautious before delineating any markings on aerial photographs.

8.42. Mr Wilmshurst suggested to Ms Cox that her detailed researches indicated that people had been meandering in Areas 2 and 3, but she firmly rejected that idea. She said *"No. The pattern establishes and re-establishes along the same lines and evidence for crossing the hedge boundary is at pretty much the same places. In areas where tracks are not visible, areas vegetate quickly. It is not evidence of meandering or random crossing."* That answer was given in the context of questions spanning the years 1996 to 2007. Ms Cox acknowledged that meandering is exactly the sort of activity which might not show up in aerial photography and she said that she had thought about that very carefully but here she considered the topsoil and substrate conditions to be relevant as explained above. I asked her what she thought certain dark patches in Area 3 in 1996 were and she considered it likely that they were brambles or similar *"hard brown vegetation";* at any rate she was clear that they were a natural feature.

8.43. Concluding, in answer to Mr Wilmshurst's proposition that taken together the photographs revealed that there had been significant signs of leisure use in Areas 2 and 3 during the relevant period, Ms Cox said *"Areas 2 and 3 contain evidence of people walking, likely for leisure use, and connecting with established tracks. In the latter years there is also evidence of two-wheeled vehicular use."*

Summary of my Findings

8.43.1. I have summarised considerably a great deal of oral evidence which Ms Cox gave, particularly under cross-examination. I give more weight to the considered answers which she gave in relation to Areas 2 and 3 after her further work with the stereoscope. On the first occasion when she was being asked about those areas she was not using the instruments and was simply looking at the aerial photographs unaided. Generally I was very impressed with Ms Cox's expertise and the care with which she gave her evidence. She readily acknowledged the proper parameters and limitations of the evidence on which she was commenting and conscientiously engaged with cross-examination and questions from me. I have no doubt that she was well aware of and faithfully discharged her duty to the inquiry as an expert witness. I accordingly give her evidence great weight, although bearing in mind the proper limitations to be placed on this type of evidence.

ACCOMPANIED SITE VISIT

9.1. I made an accompanied site visit on 23rd September together with representatives of the parties and Ms Seeliger of the CRA. We entered the

site from Hookpit Farm Lane, walking through the new development access road in Area 1 and going through the kissing-gate at the top of that development. From there we started to walk along the current route of a perimeter path. In due course we circumnavigated the whole of this path, making many diversions off to examine other parts of the site and features but ultimately returning to the kissing-gate. The line of the route through the development we observed is different in some respects from the line of the track which ran, prior to the development of Area 1, from Hookpit Farm Lane up to the perimeter path, but we were able to identify the location of the former gate. We explored Area 2, cutting through long grassy vegetation with increasing amounts of scrub as we went eastwards towards the mature boundary hedge line. To the east of the hedge line we discovered, in some instances, back garden fences of properties in Springvale Road, several of which had gates. We noticed several piles of garden waste and other rubbish behind the back fences and these gates. We were able to walk down towards the southern extent of Ilex Close where there is a stile.

9.2. Moving southwards along a rough path which we found running down the back of the rear fences, we came to a very overgrown area with self-seeded woodland which we followed eastwards until we came to the back of Mr Bell's property on Springvale Road. We identified the tree in this area where the children's treehouse was in former times. The whole of this area was very wooded, though the trees and undergrowth were somewhat spindly and it was

relatively straightforward in most places to work one's way through. There were no obvious clear paths in the area behind Mr Bell's house.

9.3. Working back westwards, we picked up a very rough trail which took us back to the perimeter path. At about this point we noticed some old wooden fence posts which were initially difficult to see. With some burrowing in scrubby areas, we found a line of 12 such posts extending roughly in a large arc a little way to the east of the perimeter path. Some of the fence posts had remnants of wire in them and we found one which had clearly been a straining post.

9.4. Moving southwards along the perimeter path, we were able to scan the whole of the Main Field and Areas 2 and 3 from the perimeter path. Accessing Area 3 was very difficult owing to the amount and prickly nature of the scrubby vegetation. We worked our way down to Access point 3, through a small worn path towards the railway line. I observed that the wear on this path revealed the chalk substrate underneath the topsoil. At this point we also encountered some old concrete posts, some with remnants of wire, and subsequently we continued to pick up some of these as we worked westwards to the north of the railway line. We crossed the old railway line and walked down to Springvale Road and back up again.

9.5. Then we re-entered the site and proceeded along the perimeter path in a westerly direction until we reached roughly Access point 4. At this point it was possible to move south and cross the railway line again and see where access had been taken from the field to the south. There were one or two

apparent routes into the Application Land at this point and, as I have said, some remnants of a concrete post and wire fence in this area.

9.6. Roughly west of this point the paths appeared to divide, giving one a choice of pursuing a route to the north of a clump of trees or of walking down towards the south-western tip of the Application Land. I walked both routes. Walking to the south-west corner, I was able to divert off the path and inspect an area of mounds and pits which had clearly been excavated and worn by bicycles. These constructions were white in colour, reflecting the underlying chalk. They were of considerable size. When I stood in the pits of the excavations they came up to about my shoulder height. I therefore estimate that they were well over three feet deep at their extremity. I noted the clump of trees which on the western side face out towards the perimeter path on the inside of the boundary. Vegetation which borders the railway line. Much of this vegetation included brambles. I was unable to identify the precise tree where Miss Hopkins stated that she had erected the sign but I could see the general area where her photograph appears to have been taken on the edge of the clump of trees. A worn path in the grass continues northwards in a clockwise direction and we pursued this, diverting, as far as we were able, into area VG267 which is extremely heavily vegetated. It was very difficult to walk in this area and the ground in places was somewhat uneven, apparently because of a certain amount of building material and debris there.

LEGAL FRAMEWORK

10.1. The Applications in question have been made under s.15(2) CA 2006.

10.2. Section 15, since 30th September 2013, has provided as follows:

> *"**15 Registration of greens***
> *(1) Any person may apply to the commons registration authority to register land to which this Part applies 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.*
>
> *(3) This subsection applies where –*
> *(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
> *(b) they ceased to do so before the time of the application but after the commencement of this section; and*
> *(c) the application is made within the relevant period.*
>
> *(3A) In subsection (3), 'the relevant period' means –*
> *(a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b);*
> *(b) in the case of an application relating to land in Wales, the period of two years beginning with that cessation.*

(4) This subsection applies (subject to subsection (5)) where –

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

(b) they ceased to do so before the commencement of this section; and

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

(5) Subsection (4) does not apply in relation to any land where –

(a) planning permission was granted before 23 June 2006 in respect of the land;

(b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and

(c) the land –

(i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or

(ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public or those purposes.

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied –

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land 'as of right'.

(8) The owner of any land may apply to the commons registration authority to register the land as a town or village green.

(9) An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land.

(10) In subsection (9) –
'relevant charge' means –
(a) in relation to land which is registered in the register of title, a registered charge within the meaning of the Land Registration Act 2002 (c.9);
(b) in relation to land which is not so registered –
(i) a charge registered under the Land Charges Act 1972 (c.61); or
(ii) a legal mortgage, within the meaning of the Law of Property Act 1925 (c.20), which is not registered under the Land Charges Act 1972;

'relevant leaseholder' means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted."

10.3. CA 2006 was amended by GIA 2013 which added s.15C and Schedule 1A. As explained above, the Schedule operates to suspend the right to make an application under s.15 during certain periods which are initiated by trigger events and which continue until such time as a terminating event might occur. By virtue of s.16(4) GIA 2013, this is the case, irrespective of whether the trigger event occurred before or after the coming into force of the new provisions.

10.4. S.15C(1) and (2) provides as follows:

> *" (1) The right under section 15(1) to apply to register land in England as a town or village green ceases to apply if an event specified in the first column of the Table set out in Schedule 1A has occurred in relation to the land ("a trigger event").*
>
> *(2) Where the right under section 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again only if an event specified in the corresponding entry in the second column of the Table occurs in relation to the land (" a terminating event ").*

Schedule 1A provides as follows:

Trigger events	*Terminating events*
1. An application for planning permission in relation to the land which would be determined under section 70 of the 1990 Act is first publicised in accordance with requirements imposed by a development order by virtue of section 65(1) of that Act.	*(a) The application is withdrawn* *(b) A decision to decline to determine the application is made under section 70A of the 1990 Act.* *(c) In circumstances where planning permission is refused, all means of challenging the refusal in legal proceedings in the United Kingdom are exhausted and the decision is upheld.* *(d) In circumstances where planning permission is granted, the period within which the development to which the permission elates must be begun expires without the development having been begun.*
2. An application for planning permission made in relation to the land under section 293A of the 1990 Act is first publicised in	*(a) The application is withdrawn.* *(b) In circumstances where planning permission is refused, all means of*

Trigger events	*Terminating events*
accordance with subsection (8) of that section.	*challenging the refusal in legal proceedings in the United Kingdom are exhausted and the decision is upheld.* *(c) In circumstances where planning permission is granted, the period within which the development to which the permission relates must be begun expires without the development having been begun.*
3. A draft of a development plan document which identifies the land for potential development is published for consultation in accordance with regulations under section 17(7) of the 2004 Act.	*(a) The document is withdrawn under section 22(1) of the 2004 Act.* *(b) The document is adopted under section 23(2) or (3) of that Act (but see paragraph 4 of this Table).*
4. A development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the 2004 Act.	*(a) The document is revoked under section 25 of the 2004 Act.* *(b) A policy contained in the document which relates to the development of the land in question is superseded by another policy by virtue of section 38(5) of that Act.*
5. A proposal for a neighbourhood development plan which identifies the land for potential development is published by a local planning authority for consultation in accordance with regulations under paragraph 4(1) of Schedule 4B to the 1990 Act as it applies by virtue of section 38A(3) of the 2004 Act.	*(a) The proposal is withdrawn under paragraph 2(1) of Schedule 4B to the 1990 Act (as it applies by virtue of section 38A(3) of the 2004 Act).* *(b) The plan is made under section 38A of the 2004 Act (but see paragraph 6 of this Table).*
6. A neighbourhood development plan which identifies the land for potential development is made under section 38A of the 2004	*(a) The plan ceases to have effect.* *(b) The plan is revoked under section 61M of the 1990 Act*

Trigger events	*Terminating events*
Act.	*(as it applies by virtue of section 38C(2) of the 2004 Act).* *(c) A policy contained in the plan which relates to the development of the land in question is superseded by another policy by virtue of section 38(5) of the 2004 Act.*
7. A development plan for the purposes of section 27 or 54 of the 1990 Act, or anything treated as contained in such a plan by virtue of Schedule 8 to the 2004 Act, continues to have effect (by virtue of that Schedule) on the commencement of section 16 of the Growth and Infrastructure Act 2013 and identifies the land for potential development.	*The plan ceases to have effect by virtue of paragraph 1 of Schedule 8 to the 2004 Act.*
8. A proposed application for an order granting development consent under section 114 of the 2008 Act in relation to the land is first publicised in accordance with section 48 of that Act.	*(a) The period of two years beginning with the day of publication expires.* *(b) The application is publicised under section 56(7) of the 2008 Act (but see paragraph 9 of this Table).*
9. An application for such an order in relation to the land is first publicised in accordance with section 56(7) of the 2008 Act.	*(a) The application is withdrawn.* *(b) In circumstances where the application is refused, all means of challenging the refusal in legal proceedings in the United Kingdom are exhausted and the decision is upheld.* *(c) In circumstances where an order granting development consent in relation to the land is made, the period within which the development to which the consent relates must be begun expires without the development having been*

Trigger events	*Terminating events*
	begun.

The Objector in this case relies on the trigger events mentioned in paras 1, 4 and 7 in the Schedule.

10.5. I shall now set out the general principles which apply to the determination of a s.15 application.

10.6. The process of determination involves simply applying the law to the facts; there is no discretion, nor are land use merits material.

10.7. The burden of proving that land has become a TVG lies on the applicant, on the balance of probabilities. In Beresford v Sunderland City Council [2003] UKHL 60, Lord Bingham quoted Pill LJ in R v Suffolk CC ex parte Steed (1996) 75 P&CR 102 at 111:

> *"it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green..."*

continuing:

> *"It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met."*

Although Beresford was, in several respects, criticised and held to be wrong by the Supreme Court in the subsequent case of R (Barkas) v North Yorkshire County Council [2015] 1AC 195, this element of the decision was not disapproved.

10.8. It is necessary, in order to achieve registration under CA 2006, for all the relevant elements to be established.

. ***"A Significant Number of the Inhabitants of any Locality, or of any Neighbourhood within a Locality"***

10.9. None of the terms in this element of the requirements is defined in CA 2006. The phrase is, however, lifted from the Commons Registration Act 1965, as amended by Countryside and Rights of Way Act 2000, in which form it was the subject of consideration in a number of authorities.

10.10. *"Significant number"* was considered in R (oao) McAlpine Homes Ltd v Staffordshire County Council [2002] EWHC 76 by Sullivan J. (as he then was). He said (para 71):

> *"... In my judgment the inspector approached the matter correctly in saying that 'significant', although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, 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 the question: significant for what purpose? In my judgment the correct answer is provided*

by Mr Mynors on behalf of the council, when he submits 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."

The learned Judge summarised the matter as being *"one of impression"* for the inspector. He also stated that evidence of earlier periods could be relevant to findings about later periods, in the absence of evidence to indicate that there was a material change in circumstances, as could evidence that the claimed land was accessible, for example by way of public footpaths leading to it. Written evidence, where consistent with and supportive of oral evidence, could be regarded as corroborative of it, subject to the obvious caveat that written evidence must be *"treated with caution"* because it is not subject to cross examination.

10.11. As Sullivan LJ, the same judge said in Leeds Group v Leeds City Council [2011] EWCA Civ 1447 that there must be use of such an amount and in such a manner as would reasonably be regarded as the assertion of a public right. Lords Hope and Walker in R (oao Lewis) v Redcar and Cleveland BC [2010] AC 70 adopted a similar approach at paras 36 and 67.

10.12. Whilst not a simple 'numbers question', it is for the Applicant to demonstrate *"significance"* in relation to the chosen locality and only qualifying user counts for these purposes. The essence of this requirement is, like the *"as of right"* requirement, that the landowner should have it brought home to him that TVG rights are being asserted over his land. Carnwath J (as he then was) observed in R (oao Steed) v. Suffolk CC (1996) P & CR 463 at 476 that the different elements of the definition *"took colour from one another"* and that, whilst they

are separated out for the purposes of analysis, they must combine in the decision maker's overall assessment of the facts. As Lord Carnwath, the judge returned to this idea in Barkas at paragraph 61, where he said that *"the tripartite test cannot be applied in the abstract. It needs to be seen in the statutory and factual context of the particular case. It is not a distinct test, but rather a means to arrive at the appropriate inference to be drawn from the circumstances of the case as a whole; this includes consideration of what Lord Hope has called "the quality of the user", that is whether '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' …....Where there is room for ambiguity, the user by the inhabitants must in my view be such as to make clear, not only that a public right is being asserted, but the nature of that right."* This passage is also relevant to the question of path user, considered below.

10.13. A *"locality"* was interpreted in the pre-2000 Act caselaw as an area known to law, or some recognised administrative division of the county: see MoD v Wiltshire County Council [1995] 4 AER 931; R (oao Laing Homes Ltd) v Buckinghamshire County Council [2004] 1P&CR 36.

10.14. The question of the meaning of "locality" in the first limb of the definition was considered in Adamson v Paddico (267) Ltd v Kirklees MBC [2012] EWCA Civ 262. The applicant argued:

(a) that "locality" in the first limb was not confined to a single locality; and

(b) that localities did not have to be “administrative districts” or “areas within legally significant boundaries”.

The Court unanimously rejected these submissions. The subsequent judgments of the Supreme Court did not consider questions of locality or neighbourhood, solely being concerned with the issue of delay in the context of an application for rectification of the Register. Therefore any chosen locality must be an area of recognised administrative significance and certainty.

3.1 Mr Wilmshurst clarified during the inquiry[12] that the Applications were being pursued on the basis of the Civil Parish of King’s Worthy. Mr Webster accepted that this area is capable of constituting a Locality for the purposes of s.15 and, furthermore, that no point relating to the *“spread and fit”* of user evidence relative to the administrative area was being taken. It was established that the Civil Parish has existed throughout the twenty year period, with the result that no temporal locality question arises in this case. I therefore approach the Applications on the basis that, if I am satisfied that all the other relevant statutory tests are met, there is a qualifying Locality to which TVG rights could attach.

“Indulged in lawful sports and pastimes”

[12] Day 3 21.9.16

10.15. *"Lawful Sports and pastimes"* ("LSP") was held by Lord Hoffmann in R v Oxfordshire County Council ex parte Sunningwell Parish Council [2000] *AC 335, 356 H, to be a "single composite class"*. He continued:

> *"Class C is concerned with the creation of TVGs after 1965 and in my opinion sports and pastimes includes those activities which would be so regarded in our own day. I agree with Carnwath J, in R v Suffolk County Council, ex p. Steed (1995) 70 P&CR 487, 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green."*

10.16. There are limits to the principle, however. If user is referable to formal or informal paths, it may, in some instances, not found TVG registration, although the presence of footpaths on the relevant land is not necessarily fatal to a claim. This point was considered in some detail by Sullivan J in Laing, at paras 102-110 and by Lightman J at first instance in Oxfordshire [2004] EWHC 12, at paras 96-105. It is a question of fact, the decisive factor being how matters would have appeared to the reasonable landowner, with the benefit of the doubt being given to the landowner in ambiguous cases such that inferences should be drawn in favour of footpath user rather than TVG user. As noted above, in Barkas, Lord Carnwath generalized the principle relating to ambiguity articulated by Lightman J in the context of paths. In the House of Lords in Oxfordshire, Lord Hoffmann described the comments on paths in the earlier first instance judgments as *"sensible"* but declined to offer any guidance of his own, as he was keen to stress that each case depends upon its own facts. He did opine, without deciding, that the fact that the land in that case (urban scrub) was intersected with paths and clearings occupying only 25% of

the land in question would not be inconsistent with a finding that there was recreational use of the scrubland as a whole. He drew an analogy with a public garden, where as much as 75% of the area might consist of flowerbeds etc. on which the public might not walk[13].

10.17. In this case, as in Laing, there have been applications under s.53 Wildlife and Countryside Act 1981 to register public footpaths over parts of TVG Application Site 262. There are also other areas of the land where the question arises as to whether or not the presence of local inhabitants would have had the appearance of TVG user. I therefore set out here extensive extracts from the judgments in Laing and Oxfordshire (at first instance) because the observations which they contain are highly relevant to several of the issues raised by Application 262. In the final analysis, however, I must decide what appearance the user would have given to a reasonable landowner as a matter of overall impression on the evidence which I have heard and read, as well as my understanding of the land itself gained from my site visit.

10.18. In Laing, Sullivan J said:

> *"102 As noted above, the Footpath Order confirmed the existence of footpaths all around the perimeters of each of the three fields (the paths cut across the south western corners of Fields 1 and 3). For obvious reasons, the presence of footpaths or bridleways is often highly relevant in applications under s.22(1) of the Act: land is more likely to be used for recreational purposes by local*

[13] Paras 67-68

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 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 Thus 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 (making allowance for the fact that dogs off the lead may stray, see 10.18) 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.

*109 I do not suggest that it will be necessary in every case where a footpath crosses or skirts an application site under the Act to distinguish between the exercise of a right of way and the use of a site for informal recreation. The footpath may be lightly used as such and the evidence of non-footpath use may be substantial. But the present case is most unusual in that there were recently confirmed footpaths around the perimeters of all three Fields. These footpaths were not lightly used. The Footpath Inspector had concluded that there was "unchallenged evidence of considerable weight that their routes have been in such use as would satisfy section 31 of the [Highways Act] 1980 ". The Claimants drew the Inspector's attention to *600 evidence from one of GAG's witnesses "that the majority of people in the fields stuck to the boundary footpaths" (10.16).*

110 It is no accident that the Inspector's list of activities in para.14.25 commenced with dog walking and general walking (i.e. without dogs). On any view of GAG's evidence set out by the Inspector in Ch.7 of his Report these were the principal activities throughout the 20-year period. A number of the other activities were very occasional, such as kite flying, or of limited duration, e.g. use by the Cub Scouts appears to have ceased in 1987 (7.67)…"

10.19. Lightman J's analysis is as follows:

"102 The issue raised is whether user 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 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 use as a Green. The answer is more complicated where the track or tracks is or are of such a character that user 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 pages 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).

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.*

105. *The third scenario is where there has been a longer period of user of tracks referable to the existence of a public right of way and a shorter period of user referable to the existence of a Green. The question which arises is the effect of the expiration of the 20 year period required to trigger the presumption of dedication of a public highway on the potential existence after the full 20 years qualifying user of a Green. During the balance of the latter 20 year period the user of the path will prima facie be regarded as referable to the exercise of the public right of way (cf. paragraph 104 above). The question raised is whether the user during the previous period should likewise be so regarded because the presumed dedication as a public highway dates back to the commencement of the 20 year period of user of the way. In a word, does the retrospective operation of the dedication as a public highway require that the user of the path throughout the 20 year period giving rise to the dedication should be viewed retrospectively as taking place against the background of the existence throughout that period of a public footpath? In my judgment the answer is in the negative. Over the period in question the user of the path was in fact "as of right"*

> *and not "of right". It is totally unreal to view user as taking place against the background of the existence of a public right of way at a time before that right of way came into existence. Where a public right of way comes into existence during the period of potentially qualifying user for the existence of a Green, in determining whether the qualifying user is established it is necessary to have in mind that at least some of the user must have been referable to the potential (and later actual) public right of way. But that does not mean that acts of user may not also or exclusively be referable to qualifying user as a Green. I do not think that anything said by, let alone the decision of, Sullivan J in Laing should be read as to the contrary effect. The question must in all cases be how a reasonable landowner would have interpreted the user made of his land."*

10.20. Both Counsel referred me to the case of Radley Lakes. The very experienced inspector there drew from the caselaw the same decision-making principles as me. His impression on the evidence of that case was that tracks around a lake were lakeside walks which could be combined to form a circuit. Interestingly, he continued that he did not think that this perception was affected by *"the fact that people could and did sometimes wander off the side of path to pick blackberries, picnic, sit by the lake, watch birds on the lake……".* The inspector's impressions in that case are in no way binding on me but I note this practical application of the Laing/Oxfordshire judicial observations. I have read the Reply served by the applicant/Claimant in judicial review proceedings which I understand were launched. Since the Claim was not pursued, I do not consider that I can draw any useful guidance from that pleading.

10.21. After the close of the inquiry, the case of R (Alloway) v Oxfordshire County Council [2016] EWHC 2677 (Admin.) was heard and judgment was given by Patterson J. This was a judicial review where the role of the Court was limited to reviewing the inspector's application of the law and his reasoning. Therefore the Judge did not draw her own conclusions on the facts. She referred to the caselaw set out above and concluded that the inspector's (and hence the Registration Authority's) approach was lawful in the context of his factual findings. In that case, a *"grass meadow"* was used by its owner throughout the relevant period for *"low level agriculture*", with an annual hay crop being taken and, at one stage, a small number of dry cattle grazing. The inspector's findings about user were therefore set in the context of his overall impression that *"neither use significantly impeded the other".* There was a PROW running between two gates on one side of the field and an informal perimeter path which linked with the PROW. The inspector found that the bulk of the land was used for general recreation, albeit in the form of walking or jogging round one or other path, whilst dogs and children went all over the land and others indulged in other forms of recreation. The inspector deducted user attributable to the PROW and other path user when people had entered by one gate and left by another as part of a longer walk, but not their mere perimeter walking. Patterson J stressed the importance of reading the inspector's report as a whole and noted the distinction between that case and Laing, where perimeter paths had recently been added to the Definitive Map and PROW.

10.22. Trips to and from school, work or to conduct other daily business, such as shopping, do not constitute LSP.

10.23. Whilst it is an essential prerequisite of qualifying user that it must, effectively amount to trespass (*"as of right"*, which is explained below), user which is unlawful in other respects does not count. The Supreme Court considered this point in Lewis, Lord Hope[14] applying to statutory new greens the common law principle established in Fitch v. Fitch (1797) 2 Esp.54 that user must not be such as to be likely to cause injury or damage to the owner's property. Mr Wilmshurst submitted that in none of the reported cases has it been suggested that damage to crops and/or grass amounts to criminal damage. He is right that this point has not been considered in those terms in the reported TVG cases but the point does not need to be resolved in order to determine these Applications. That is because it is, in my opinion, quite clear from Lord Hope's judgment that the presence of physical damage is, in principle, sufficient to take user outside the class of qualifying LSP, irrespective of the (probably theoretical) question of criminal liability. Trespass is actionable without proof of special damage, so the application of Fitch to the registration of new statutory greens by prescription is entirely consistent with the law as it has developed since Sunningwell. I therefore reject Mr Wilmshurst's submission that the argument that user which causes physical damage cannot be LSP is *"absurd"* and *"runs contrary to the theory of prescriptive rights".*[15]

[14] With whom Lords Brown and Kerr expressly agreed
[15] Opening Submissions para. 38

10.24. The issue of lawfulness arises in two respects in this case; firstly, in relation to any user over cropped parts of Application Site 262, secondly, with regard to use by non-motorised cycles in the area of *"lumps and bumps"* in the south west of the land. It was, rightly, not suggested by Mr Wilmshurst that use by motorised cycles could qualify.

10.25. Whilst it is a matter of fact and degree and it is not necessary to demonstrate qualifying user for the whole period over every square inch of the land, nevertheless the Applicant must demonstrate, on the balance of probabilities, that the whole of the land has been subject to qualifying user. Common sense must be applied: R (oao Cheltenham Builders) v. South Gloucestershire [2003] EWHC 2803 (Admin) and Lightman J at first instance in Oxfordshire [2004] Ch.253, both of which were endorsed by Lord Hoffmann in Oxfordshire in the House of Lords,[16] as noted above.

"*For a period of at least 20 years … (b) continue to do so at the time of the application"*

10.26. Qualifying user must be demonstrated throughout the period. Therefore, in principle, any interruptions, eg. by reason of displacement by the objector's regular activities, prevent the running of time. This principle was explored, in the context of dual user, by the Supreme Court in Lewis. The relevant periods here are 1993 to 2013 for VG 262 and 1995 to 2015 for VG 267. Nothing turns on the precise dates within those years but I note that the earlier Application

[16] At para 68

was not registered until October 2013, although it was initially submitted in May.

10.27. The Supreme Court held in Lewis that there is no *"additional question"* to be asked as to whether or not it would have appeared to a reasonable landowner that the inhabitants were asserting a "*right to use the land for their recreational activities"*, but they did not overrule Laing[17], which was a case involving low level agricultural activity, comprising the annual taking of a hay crop from the land for many years. They directed attention to *"the quality of the user during the 20 year period ... 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 (Beresford paras 6 and 77), the owner will be taken to have acquiesced in it – unless he can claim that one of the three vitiating circumstances applied"*.[18] This question is one of fact and degree. The reaction of informal users to use of the land by the owner and his licensees is an important part of the overall circumstances which must be considered in relation to nature and quality of user. In terms of the inferences to be drawn, although there is not a freestanding *"additional question"*, nevertheless, the principle subsequently enunciated by Lord Carnwath in Barkas about ambiguity must be borne in mind when considering the quality of user in the round. Mr Webster made written submissions in closing on dual user but, in fact, Mr Wilmshurst did not advance the argument that this case falls within the

[17] See eg. per Lord Walker, para 28
[18] Per Lord Hope at para 67.

"give and take" principle enunciated by the Supreme Court in Lewis. In my view, he was right not to do so. Mr Wilmshurst did, in his Closing Submissions, counsel *"considerable caution"* with regard to Laing in relation to what Sullivan J said there about deference, specifically in relation to low level agricultural activities comprising the taking of an annual hay crop. In view of the concessions about crops, this case is distinguishable from Laing in respect of the level of agricultural activity on much of Main Field for a significant part of the relevant period. Their Lordships noted the fact that there had been a footpath claim previously in Laing and did not overrule it, treating it as a decision on its own facts. Nor did the Supreme Court disapprove Sullivan J's approach either to decision making in general or footpaths in particular.

"As of Right"

10.28. In Sunningwell, the House of Lords held that the test for a new green equated to that for prescription: user nec vi, nec clam, nec precario – not by force, not by stealth and not by permission. What matters is not the state of mind of the users, but the outward appearance of their user, judged by the yardstick of the reasonable landowner.

10.29. In Lewis, Lord Rodger commented as follows:

> *"87.The basic meaning of that phrase is not in doubt. In R v Oxfordshire County Council Ex p Sunningwell Parish Council [2000] 1 AC 335 Lord Hoffmann showed that the expression 'as of right' in the Commons Registration Act 1965 was to be construed as meaning nec vi, nec clam, nec precario. The parties agree that the position must be the same under the*

> *Commons Act 2006. The Latin words need to be interpreted, however. Their sense is perhaps best captured by putting the point more positively: the user must be peaceable, open and not based on any licence from the owner of the land. …….. ……The opposite of 'peaceable' user is user which is, to use the Latin expression, vi... But it would be wrong to suppose that user is "vi" only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts "vis" was certainly not confined to physical force. 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. ……*
>
> *89. .English law has interpreted the expression* in much the same way…. "

10.30. User will be *"vi"* if undertaken in the face of prohibition by the owner. Signs banning access without permission may prevent user from being *"as of right"*: Lewis[19] and Taylor v Betterment Properties (Weymouth) Ltd and Dorset CC [2012] EWCA Civ 250.[20] where the Court of Appeal approved Morgan J's formulation of the relevant question at first instance as follows:

> *"Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user."*

10.31. I accept Mr Wilmshurst's submission that relevant factors when considering the adequacy of the landowner's actions include:

[19] Per Lord Rodger at para 88
[20] Paras 27ff

a) the wording of the signs
b) the location of the signs
c) the size of the signs
d) the number of signs
e) the length of time that users had used the land (as an aspect of reading the sign in its proper context)
f) the effect that the signs had on users of the land (as a way of judging the effectiveness of the message communicated and in certain cases
g) the lack of any further steps taken.

Decisions in rights of way cases are clearly relevant to some extent because they apply the same *"nec vi"* criterion, but, once again, Mr Wilmshurst was right to point out that the context is different and that these differences have been recognised in the recent Supreme Court TVG cases, especially Lewis and Barkas. These principles are relevant to my consideration of the evidence relating to signs, fencing and oral challenges.

10.32. User which was permitted will be *"precario"*: Implied permission is a well-established principle in other areas of law where it is necessary to decide whether or not user is as of right and, although the Supreme Court in Barkas overruled Beresford, they did not hold that it would no longer be lawful to imply permission in relevant factual circumstances.

APPLYING THE LAW TO THE FACTS – MY FINDINGS

11.1. Drawing together the threads of all the evidence which I have read, heard and summarised above, I am able to reach the following firm findings.

Use of the Main Field

11.1.1. I am in no doubt that Mr Wilmshurst's concession that the cropping records accurately evidence the presence of crops on Main Field during these 8 years was rightly made. Mr Bright's oral evidence was corroborated by his contemporaneous records. Mr Wilson's professional review and interpretation of those records was clearly sound. The aerial photography helped, together with Mr Wilson's expert assumption based on crop rotation, to establish that the land was cropped in 1998, despite the absence of a record for that year. Moreover, several of the questionnaires / statements in support of the 1991 s.53 application referred to walking round the edges of crops / a farmed field.[21] I also accept the expert explanations given by Mr Bright and Mr Wilson of the procedures involved and the appearance and growing habits/condition of the different crops.

11.1.2. I am satisfied, therefore, that the majority of the Main Field area was in use as arable land between the years of 1993 and harvest-time 2000. To the extent that it is relevant, I am

[21] Eg. Janet Aldus, Yvonne Cooper, Patricia and Raymond Duckett, Prof. and Mrs R Hedley, Mr Kirby, Mr Malphus, Christine Player, Mrs D Prosser, Elsie Singleton

also satisfied that Mr Bright was farming the land in the same way between the years of 1985 and 1993. This was his unchallenged evidence and Ms Cox stated in her first report that she had examined a pair of photographs dated April 1992 which showed the site under a cereal crop. Again, there was no challenge to this part of Ms Cox's evidence.

11.1.3. When I say the *"majority of the Main Field"*, I mean the area which was cropped until 2000 and was thereafter in set aside. The difference is apparent when comparing Ms Cox's photographs from March 2012 with those from June 2013.[22] I am satisfied from the photographic evidence, the MAFF records and all the oral evidence of witnesses, that the south-west corner of the Main Field, including and to the south-west of the clump of trees in that area, the Application VG 267 land and Areas 1, 2 and 3 were not cropped at any time from 1985 onwards.

11.1.4. Mr Bright stated that, apart from some isolated occasions when he found children playing, he did not encounter either trespassers or damage in his crops. People walked round the edge *"and all was happy";* this description is consistent, not only with his own evidence to the Highway Authority in connection with the s.53 application, but also the evidence of

[22] See Annex to Ms Cox's Main Report.

many of the supporters of that application, and the overall conclusion of the Footpath Officer at that time. On those odd occasions when he encountered anyone, he *"interfered with them".* I accept that, had there been persistent entries onto his crops, he would have realised from physical signs. Moreover, the evidence in support of the Application did not establish that people regularly went onto the land when it was being actively cultivated during the years 1993 to 2000 (or before). On the contrary, the Applicant and others[23] said in their witness statements that they did not recall crops being grown on the land at all, including the years 1993 to 2000. Several witnesses, whilst they were unable to recall crops on the land, said that they would not have gone onto the land if crops had been there.[24]

11.1.5. As I have signalled above in my summarised findings for each witness, I have decided, in view of the clear evidence as to the presence, condition and growth patterns of crops on the greater part of the Main Field, that I cannot attribute weight to evidential claims to have been using this area regularly for LSP during the period 1993 to 2000. Either witnesses were confused about dates and were describing the condition of the land from 2000 to 2014, or they were not

[23] Statements of Applicant, Brown, Clarke, Mead, Perrin, Woolford, Plant, Males.
[24] Eg. Perrin ; ; Mead; Mack

present or, at any rate, not regularly present during the earlier period, or they simply cannot remember the earlier part of the 20 year period accurately and have cast back their recollections of the land from 2000 onwards. Mr Webster's suggestions to Mr Bright and Ms Cox, to the effect that people might have been confused about the nature of vegetation or unable to see crops due to long grasses at the edges were rejected. I do not find such explanations credible; even though some crops might initially have borne a superficial resemblance to grass, regular users would have seen them in a mature state too. Moreover, as I have said, many of the s.53 questionnaires and statements from local people said that they did see them. My findings as a result of hearing the witnesses on this point are so clear that I conclude that I must read the TVG questionnaires in the light of them, although I note that at least one questionnaire does refer to the farmer's not objecting to her walking round, so long as crops remained undisturbed[25]. The Application 262 site is large and twenty years is a long time. Most questionnaires are imprecise about location and time; exploration of the evidence at Inquiry, however, has established a clear position.

[25] Linda Banks

11.1.6. In view of these findings of fact, I do not need to resolve the argument between Counsel as to whether or not user which causes damage to crops can constitute LSP. For completeness, however, I record that, in my view, it cannot. Irrespective of whether or not such activities constitute criminal damage, they would fall foul of the principle in Fitch v Fitch, endorsed by the Supreme Court in Lewis when articulating its principle of *"give and take"*.

11.1.7. The evidential position in relation to Main Field during the latter period, 2000 to 2014, is different, since the system of management under set-aside was different. Again, I accept the evidence of Messrs Bright and Wilson as to practice there. Management was minimal but there was an annual cut in the late summer. Thereafter, the cuttings and stubble were left to break down and return into the earth naturally during the autumn and winter. In the spring, vegetation would grow up again, maturing to waist / shoulder height before cutting. Given the minimal intervention by Mr Bright, I accept that growth would have been much less regular than in the case of a cropped field; some patches would have been thinner and more accessible than others and a certain amount of scrub would have developed in places. The character and appearance of the central area would have been very

different from that of a formal, cropped field. It would have been consistent with the description of this area given by all the Applicant's and some of the Objector's witnesses, which confirms me in my conclusion that they were, in fact, describing the physical state of affairs during the latter two thirds of the relevant period. Nevertheless, the aerial photographs for the years 2002, 2004, 2005, 2007, 2010, 2011, 2012 and 2013, together with some of the other photographs, such as those of the Footpath Officer from August 2001, Mr Edwards' photograph in the July 2006 Volunteers' Newsletter and Mr Holmes' photographs from July / September 2010 /12, clearly indicate that there remained a distinct path area around the edges of the central part of the Main Field where long vegetation did not grow. I deal with that area when considering the defence of path use, which is relevant to all parts of the Application Sites.

11.1.8. With regard to the cropped part of the Main Field, which forms the greater part of VG Application 262, however, my findings about:

(a) the presence of crops; and

(b) the absence of regular incursions into them,

are fatal to the claim insofar as it relates to that area. The relevant period of cropping spans seven out of the relevant twenty years. That is a substantial portion of the required period of user. During that time, user for LSP (assuming, for the moment, contrary to my opinion, that children's games within crops can constitute LSP) was insufficient to indicate to the reasonable landowner that the cropped area was *"in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers"* (the test set out in McAlpine). User was merely *"trivial and sporadic"* (in Lord Hoffmann's words in Sunningwell) and was not of such an amount and in such a manner as would reasonably be regarded as the assertion of a public, TVG right (the approach taken by the Court of Appeal in Leeds and the Supreme Court in Lewis and Barkas). The presence of local people on the land was attributable, in the vast majority of instances, to their use of paths running around the cropped area, as the Parish Council and its supporters claimed in the s.53 application, launched in 1997 and finally determined by the Highway Authority in 2005. I turn to the further implications of that user in the next section. Logically, however, the fact that the Applicant / TFAG have failed to demonstrate on the balance of probabilities that there was significant requisite user of the central area of the Main

Field, gives rise to a free standing defence of insufficiency of user in relation to that portion of the Application TVG 262 land which does not depend upon my application of law in relation to path user, although it is consistent with it.

11.2. Perimeter Paths

11.2.1. There was a great deal of evidence of the use of the paths around the perimeter of Main Field for walking, dog walking and jogging. Other uses associated with the paths included cycling/teaching children to ride bikes, horse riding, fruit picking, enjoying views, observing nature, picnics, trainspotting and sitting/relaxing. Many witnesses[26] said that they and/or many others whom they saw stuck mainly to the footpaths around the field, apart from retrieving dogs which had wandered off and the extreme south-western corner of the Main Field, where the BMX *"lumps and bumps"* were. These impressions were in line with the evidence of the aerial photographs as interpreted by Ms Cox, as well as other photographic evidence, such as the 2001 pictures appended to the Footpath Officer's report on the s.53 application, the Worthys Conservation Volunteers photograph from 2006, Mr

[26] Bell , Perrin, in relation to the Main Field , although most of his user was elsewhere (see below under Areas 2 and 3); Driscoll, although he described his own off-path activities (see below); Brown ; Edwards ; Mack ; Plant ; Woolford ; McCleery; Stephens ; Witts ; Bright ; Steventon Baker ; Hutton ; Johnson ; Holmes.

Robertson's photograph of his dog from 2006/7 and Mr Holmes' 2010/12 photographs, all of which show a well-worn perimeter track or tracks.

11.2.2. The OS maps have consistently shown perimeter paths, albeit not as formal Public Rights of Way ("PROW"), since 1990. Mr Plant consulted OS maps and found paths marked on them, which he used.

11.2.3. Lastly, it is, in my view, highly significant that the Highway Authority made a Map Modification Order in 2005, after a lengthy public process, in response to an application made in 1997 by the Parish Council.

11.2.4. What would the reasonable landowner have concluded from all this evidence? In my view, the evidence clearly demonstrates that, during Mr Bright's tenancy, if not before, the establishment/use of a predominant track around the Main Field, accessed from Point 1A on Hookpit Farm Lane, with a loop in the south-eastern corner and a link to the route of the dismantled railway, was tolerated so long as there was no interference with his agricultural activities. The Highway Authority reached the conclusion in 2005 that these routes were of long standing and should be added to the Definitive Map and Statement as Public Footpaths, on the basis of

contemporaneous local evidence. Although the legal basis of the officer's recommendation related to user between the years of 1972 to 1992, the supporting evidence covered the period up to 1997 and 2001, when evidence was collected. The landowner made representations during the process and would have been aware of this body of evidence, which was in the public domain. The fact that the Order was not submitted for confirmation does not detract from the significance of the claim being made by the Parish Council and local people or the Authority's conclusion.

11.2.5. Against this background, I consider that the reasonable landowner would have been entitled to attribute walking and jogging to the establishment/enjoyment of a PROW, rather than the unequivocal assertion of TVG rights. I take Mr Wilmshurst's point, which he advanced by reference to Lightman J's third category of user (both for recreational activities and as footpaths) and the Radley Lakes case, that recreational user can occur on the line of a path, whether or not formal PROW exist or merely appear to be in the course of being established. Identifying the relevant Lightman category in a particular case is a matter of fact and impression. As set out in Laing and Oxfordshire at first instance, however, too strict an approach should not be taken

and the landowner is entitled to the benefit of any doubt. Thus, retrieving errant dogs from land adjoining the path was regarded by Sullivan J as having the appearance of being incidental to footpath user, rather than an assertion of TVG rights. Picking berries en-route, pausing to admire the view or watch trains, sit down or have a picnic are not, in themselves, activities which are inconsistent with footpath user, nor should they have rung TVG alarm bells in the mind of an owner. Such activities are either incidental to the use of a public footpath (whether extant or in the course of being established) and / or not inconsistent with a right of passage and, to an extent, connected with it. As a matter of highway law, therefore, they fall within the extent of highway rights as articulated by the House of Lords in DPP v. Jones [1999] 2 WLR. 625. Nor is the use of a footpath by children for cycling or learning to ride a bike necessarily inconsistent, even if a PROW is not, formally, a bridleway[27]; there is no evidence in this case that such user constituted a danger to pedestrians. In any event, this track has not, in law, been formally recognised as a public footpath and use by cyclists and / or horse riders could reasonably have been taken as the assertion of bridleway rights, rather than unequivocal TVG user. Most, though not quite all, path use was recreational,

[27] See discussion at p.[2]-10098/2, paragraph 2-065.2 of the Highways Encyclopaedia

according to the witnesses, but the Court of Appeal held in Dyfed County Council v. Secretary of State for Wales (1990) 59 P&CR 275 that there is no rule of law that use of a highway for recreational walking is incapable of leading to a deemed dedication. Transit use of the land to get to and from other parts of the village for school trips or social calls does not qualify as LSP.

11.2.6. Applying the principle enunciated by Lord Carnwath in Barkas, the landowner should not, in equivocal circumstances, be taken to have acquiesced in the establishment of a TVG. In Lightman J's formulation, the benefit of the doubt on these matters is to be given to the landowner. The context in which recreational activities took place here is important. The facts that, for 8 years of the relevant period, the Parish Council – democratically elected representatives of the local inhabitants – were pursuing a footpath claim under s.53 and that in 2005, the County Council, which is charged with responsibility for PROW, decided that it was justified, are highly relevant when considering how matters would have appeared to the landowner. As in Laing, the residents have *"gone to battle on*

two fronts"[28] and, in my view, this must be borne in mind when considering the overall objective impression here. Moreover, as a matter of fact, it is clear from Mr Bright's and other people's evidence to the Highway Authority on the s.53 application and his evidence to this inquiry that there was a *"tacit arrangement"* in relation to perimeter paths. Interestingly, I note that this is exactly how Mr Edwards referred to matters in the July 2006 Volunteers' newsletter[29] and at least one respondent to the questionnaire described the situation in similar terms.[30] This set of circumstances is very different from those facing the inspector in Allaway. The judgment in that case established no new principles and Patterson J referred, in particular, to the distinction on the facts before her from those in Laing, where perimeter paths had recently been added to the Definitive Map, on the application of local residents. As I have noted above, Lord Walker also regarded that feature of Laing as significant. On that point, the situation in the latter part of the period here bears striking similarities with Laing. Moreover, there was never any cropping in Allaway, which is another important difference.

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28 *Per* Lord Walker in Lewis v. Redcar at para.28

29 Para. 7.5 above

30 Linda Banks "Additional Information" section

11.2.7. Whilst witnesses referred to use, whether by themselves or others, of the central part of the Main Field for a number of TVG-style, rather than PROW-style activities, some of these were infrequent or one-off activities such as: kite flying, for which the necessary combination of ground and weather conditions seldom coincide;[31] camping at the end of the summer term;[32] horse riding[33] ; Driscoll's rugby practice, as to which no details were given of frequency and which did not feature at all in his questionnaire; snow games; unquantified use for cub / scout *"wide games"* [34]. Some used the land as a short cut / to avoid Springvale Road, which is not qualifying user. Some witnesses referred to crossing the Main Field off the perimeter paths and sometimes encountering children playing there with or without bikes, and making dens. It was difficult to form a clear impression of the frequency or precise position of these activities, although I accept that Mr Woolford's Google Earth image from 2006/7 and Mr Edwards' one from 2008 show some lines across the central part of the

[31] Plant (para.6.56); Edwards (para 6. 70); Woolford could not say where in period, though saw it pre-1993 (para 6.67); ; Mead – one undated Christmas (para 6.34); Driscoll's kite soon broke (para.6.19); McCleery (2009 onwards only). Therefore where gave any particulars in relation to their own kite flying, the evidence was limited. I bear this in mind when considering general descriptions of others having seen kite flying.

[32] Clarke; Mead whose son did not actually camp, who saw signs which he took to indicate camping rather than actual camping; Plant, the scoutmaster, who was deprecatory about the signs of *"camping"* he saw .

[33] Applicant –kept a horse "at one time" and rode it but "not regularly" and, in any event, round the perimeter track, not in the middle ; Mack para.6.58 - daughter rode from stable to Macks' house across field "a couple of times in the summer". Other witnesses' references to horses were general and unquantified / undated

[34] para. 6.53

Main Field which could indicate user of an informal nature. These images, however, were not clearly related to the generalised evidence about user in the central area and I cannot make any meaningful deductions from them about type and level of user.

11.2.8. In conclusion, whilst I accept that the Applicant / TFAG have established, on balance, that there were some off-path recreational activities of different kinds on the central area of the Main Field after 2000, they have not presented a clear picture of their extent, either geographically or temporally. Such activities will have been seasonal – dependent on the weather and the state of the vegetation. At times, after the annual cut, when Mr Bright was obliged to leave the stubble and cut vegetation on the land in order to meet the requirements for set-aside, the land would have proved unattractive and uncomfortable for some people and some activities.

11.2.9. By contrast, my firm impression is that the majority of recreational activity occurred on or associated with the clear perimeter paths. It is logical to deduce, from the clarity and persistence of the track in all relevant photographs, that this is where the majority of feet went, not only in the years 1993

to 2000, but for the rest of the relevant period as well. The fact that the northern route of the perimeter moved south after the development of Area 1 in 2013 does not detract from my findings. Although the line changed, the principle or pattern of user did not and the change of route only applies to a small part of the relevant periods – a few months in the case of Application VG 262 and just over two years in the case of Application VG 267. Whilst I have already concluded that the central, cropped area does not qualify for registration in any event, I have analysed path user as the role of the paths is, to some extent, relevant when considering the position on other parts of the land because of the importance of these paths when objectively assessing the overall impression of what was going on at the site upon the mind of the landowner.

11.3. South Western *"Lumps and Bumps"* Area

11.3.1. The south western corner of the Main Field was not used for growing crops. Mr Bright explained this in his oral evidence and it is also quite clear from the aerial photography.

11.3.2. There was a clear consensus among the majority of witnesses for both parties that this part of the land was developed as an informal BMX playground during the 2000s. As Mr Driscoll explained and other witnesses alluded to, there

was an earlier BMX patch in Area 1 but the activity moved when it became clear that Area 1 was likely to be developed.

11.3.3. Mr Driscoll described how the BMX jumps had been made. It is clear, both from his explanation and my site visit, that there was considerable disturbance of the ground, albeit that only hand tools were used. Moreover, repeated riding over the obstacles served to compact the ground further and thus to maintain and/or extend the features. The resulting construction would, in my view, rule out use of the area in question for agriculture or any other purpose without a significant amount of levelling and filling. Whilst I have found that this part of the land was never used for agriculture during the period, the fact that the construction has rendered such use impracticable, in my view infringes the *"give and take"* principle derived by the Supreme Court in Lewis v Redcar from Fitch v Fitch, whether or not the construction or use of the lumps and bumps amounted to one or more criminal offences. Transforming the character of this patch of land and rendering other use impracticable, does not, in my opinion, constitute LSP.

11.3.4. Even if a different view were taken as to the character of this user, the evidence is that it only got going for the second half

of the relevant period. No evidence was given which clearly established recreational use in this area before c.2004. I therefore conclude that the Applicant / TFAG have failed to establish requisite user of this area on the balance of probabilities.

11.4. North Western Corner: VG Application 267 Land

11.4.1. This area abuts the railway line to the north-west and Hookpit Farm Lane to the north. It is now bounded to the east by the edge of the housing development on Area 1 and runs down towards the perimeter path. It was impossible to discern its south eastern boundaries on site and none of the witnesses suggested that this ever had been possible. As explained above, this Application is the product of a rather convoluted procedural process.

11.4.2. The only witness who specifically referred to his use of this part of the land was Mr Woolford, who said that he had reached the railway fence, but that this had not been easy. I attempted a similar feat from the direction of Hookpit Farm Lane on my unaccompanied site visit, but turned back as the embankment was steep and vegetated and I was not, on that occasion, dressed for the task. I asked the parties' representatives at the formal site visit whether they wished me to inspect that area

formally but they did not think that this was necessary. As I have said, the area was pretty impenetrable from the other side – i.e. from the rest of the Application VG 262 land, as it was heavily overgrown with long grass and scrub. Suitably attired this time, however, I ventured some way in and found what appeared to be remnants of builders' rubble, coinciding with an area of disturbed ground visible on the 2013 aerial photograph, covering the southern part of the VG 267 and part of the VG 262 land.

11.4.3. In common with the rest of the Main Field, the aerial photography discloses a clear and persistent perimeter path in the vicinity of the VG 267 site. The Application 267 land itself contains considerable tree cover and scrubby/shrubby vegetation in all the photographs except the 2013 one to which I have already referred. There is no reason to conclude that the condition of vegetation in this area of land was materially different during the relevant periods from its condition at the time of my site visit, when it was pretty well impassable.

11.4.4. Given the almost total absence of any mention of this area of land in the oral evidence, the lack of differentiation between different areas in the questionnaires, which are relied on to support both applications, and the aerial photography, I have no

basis for concluding that the Applicant / TFAG have demonstrated requisite user to establish a good claim to the VG 267 land.

11.4.5. With regard to Application VG 262, which overlaps in this area with VG 267, my finding means that the Applicant / TFAG have failed to establish requisite user in relation to this part of the site on the balance of probabilities.

11.5. Areas 2 and 3

11.5.1. Although the part of the Application 262 site was divided into northern (2) and southern (3) sections for convenience during the Inquiry, there is no evidence to suggest that they have ever, in practice, been separated on the ground. They have exhibited the same general characteristics of rough, uncultivated land, vegetated by long grasses and wild / naturalised flowers such as rosebay willowherb and golden rod, together with scrubby and bushy growth, including brambles and sloe bushes. As Ms Cox's detailed examination of the photographs revealed, the degree of vegetation and, to some extent, patterns discernible on the ground varied over the years. My general impression of the areas from all the evidence is that they were of a rough, scrubby character. I regard the description of this part of the site

in the Volunteers' Newsletter of 2006 as accurate for that date and likely to be broadly representative of the entire period.

11.5.2. As Messrs Bell and Perrin demonstrated, there is scope for confusion as to where the Application Site ended and other rough ground, further to the east, started. A certain amount of that family's activities and the activities of Mr Perrin's teenage friends, must therefore be discounted because it occurred outside the Application site in a wooded rectangular area which we were able to identify, in general terms, on the accompanied site visit. There were other houses, further south along Springvale Road, which did not abut the Application Site and there may have been scope for confusion here too, especially in the case of questionnaire-fillers or the makers of statements who did not attend the Inquiry. Mrs Males described using this area to gain access to Top Field, rather than as part of the Field itself, although I cannot tell where she thought the boundary lay as she did not give oral evidence.

11.5.3. Many witnesses spoke of going onto Areas 2 and 3 and some referred to seeing others on them. Parts of the s.53 route as shown on the Order map go through Area 3 and Area 2 is bounded by another part of that route. The precise locations of the perimeter paths have clearly been subject to some variation,

but Area 3 appears to have been bordered to east and west by tracks until about 2010, when the aerial photographs cease to show the eastern route because vegetation along the backs of houses in Springvale Road is so much more dense.

11.5.4. Several witnesses[35] to this Inquiry and the s.53 process spoke of using the Application 262 land to get to and join up with the wider footpath network at or near Point 3, where they would connect to the disused railway line.

11.5.5. Mr Plant, for example, gave a clear description on the basis of his knowledge of the land for virtually the entire period, though I bear in mind that his user was predominantly after 1999. He described two main paths through the area running off the perimeter path. He also saw smaller paths which people made, but, he said, those would be there for a short time only. From time to time, he would see people on them. He remembered Area 2 as being fairly busy.

11.5.6. Mrs Clarke's description of Area 2 (from c.2006 as a regular user) was similar - very small tracks between and under trees leading to the perimeter path or further south behind the houses on Tudor Way. In the main, she stayed on the tracks.

[35] Plant , Woolford ; McCleery ,2009 onwards only, Cossburn – Area 2 overgrown).

11.5.7. Mrs Player said, in her written statement, that she had trained her gundogs on the *"rough triangle"* and created many pathways, apparently between 1984 and 2004, behind her house on Tudor Way. Unfortunately, as I have said, she did not attend the Inquiry so it was not possible to explore with her matters such as precise dates and position.

11.5.8. Mr Hutton described a *"mish mash"* of overgrown paths in Area 3, which had been used considerably and was good for blackberries; he thought that some children played there, but not many.

11.5.9. Mr Johnson referred to gates in the back fences of three houses on Tudor Way and said that the owners had intervened to stop fly tipping behind their back fences.

11.5.10. Mr Holmes' impression on his visits from c.2005 onwards was of a little activity in Areas 2 and 3, but I bear in mind that his visits were relatively infrequent.

11.5.11. Ms Cox made an exhaustive examination of the aerial photography for Areas 2 and 3. Her conclusion was that there was *"evidence of people walking, likely for leisure use, and connecting with established tracks."*

11.5.12. Putting together all the evidence specifically relating to Areas 2 and 3, I am inclined to agree with Ms Cox's overall conclusion, though I think that there was probably some use of parts of Area 2 for informal play during the early part of the period by Mr Perrin and his friends, spilling out from the area behind Mr Bell's house and the Ilex Way entrance. Taken as a whole, however, the evidence does not establish a clear pattern of independent, communal recreational user. By *"independent"*, I mean other than as a route to or from the perimeter paths on the Main Field. By *"communal",* I mean of a general nature, rather than routes associated with individual houses, whose owners created small ways through the vegetation to the Main Field or in order to dump garden rubbish. I conclude that there were fluctuating amounts of use during the relevant period, but, bearing in mind that it is for the Applicant / TFAG to demonstrate qualifying user for the whole of the period, I conclude, on the balance of probabilities, that they have failed to do so.

11.6. CONCLUSIONS ON USER

11.6.1. I have concluded, in relation to the whole area in question, that the Applicant / TFAG have not demonstrated on the balance of probabilities, that a significant number of local inhabitants have indulged in LSP on the Application sites for the relevant 20 year periods.

"As of Right"

12.1. In view of my findings that significant qualifying user has not been demonstrated, it is, strictly speaking, unnecessary for me to decide whether or not user was as of right.

12.2. For the sake of completeness, I shall record my findings on this point.

Permission – *"precario"*

12.3. Irrespective of whether or not Mr Bright could, as the tenant rather than the freehold owner of the land, have given permission to use the land, the evidence clearly indicates toleration, rather than proper consent on his part. This was the conclusion reached in relation to the perimeter paths by the Footpath officer and it must have been accepted by the Highway Authority. Any tacit toleration by Mr Bright certainly did not extend any further than the paths. I therefore discount *"precario"* as an issue. Mr Webster did not seek to rely on any such contention.

Fences/Locked Gate – *"Vi"*

12.4. The Objector relied on the blockage (to use a neutral term) of the northern end of Access 1A. In the light of the approach of the Courts, especially as set out in Betterment, I reject this defence. Evidence about the position at Hookpit Farm Lane was contentious, though I note that the Footpath Officer took 1992 as the date upon which the right of way from Hookpit Farm Lane was first

called into question. This gate was dealt with in greatest detail by Mr Brown and I found his evidence on this point clear and convincing. There was a gate there from 1992, but it fell down at some point (though I note the Footpath officer's photograph of a padlocked gate in 2001). There was also a gap to one side. He considered that the gate was there primarily to deter travellers. This general picture was broadly consistent with much of the other evidence. In any event, whatever the state of play at this access point, there was no evidence to suggest that Accesses 2, 3 or 4 were ever blocked during the relevant period. There was no clear evidence as to Access 1 being used at all and I discount it for practical purposes. Although on the site visit we found remnants of fencing to the east of the Main Field which probably accorded with the recollections of some longer standing residents and Mr Bright's evidence about his predecessor's fencing, I do not have clear evidence of a sustained effort to prevent user by fencing.

Signs – *"vi"*

12.5. Ms Hopkins was the only witness to give clear evidence about signs. Mrs Clarke was the only user who remembered a signs, apart from those erected fairly recently in connection with the development of Area 1. Her recollection was that it was *"flimsy"* and was only in position for about a day. The developer's signs round Area 1 signs are not relevant, and I only mention them to draw the contrast with Ms Hopkins' signs.

12.6. I accept Ms Hopkins' evidence that she and a colleague erected two signs in June 2010, one towards the north of the Main Field and one on a tree in the south west corner.

12.7. The wording of the signs was, in my view, sufficient to make it clear that the owner did not acquiesce in TVG user. However, it appears that the signs were only there for a short period of time. They did not make an impression on those users who gave evidence. There were only two signs on a large site and they were made of what appears to have been fairly flimsy plastic. One was nailed to a post. The other was tied to a tree. Ms Hopkins said that the original intention had been to check the signs annually, but this was not done. In my view, this effort fell well short of meeting the Betterment test of determined, proportionate action to contest and endeavour to interrupt use.

12.8. I therefore have no hesitation in concluding that, had I found the necessary user to have occurred, I would not have recommended rejection of the Applications on the basis of signs.

Oral Challenge – *"Vi"*

12.9. Although the Applicant/TFAG's witnesses did not recall ever having been challenged by Mr Bright, I have concluded that this is because they were not coming into conflict with him during the period when he says that he was challenging people on the land – that is, when he was growing crops there. I have no reason to doubt his evidence that he saw off the odd children whom he found in his crops at this period. Such incursions into the central part of the

Main Field during the period 1993 – 2000 would, therefore, not have qualified. As I have said, however, I do not find that there was the requisite level of physical user during those years in any event, so the question of oral challenges is academic.

TRIGGER EVENTS

13.1. The Objector relies, if necessary, on paragraphs 1, 4 and 7 in Schedule 1A to GIA 2013. If my findings as to the sufficiency and quality of user are accepted, there will be no need to consider potential defences under these provisions, but I deal with them for the sake of completeness. I have summarised the principles of the legislation and set out Schedule 1A above.

13.2. Paragraph 1

13.2.1. The Objector's argument is that land which is included in the s.106 Agreement associated with Planning Permission 12/01912/FUL falls within the definition of *"An application for planning permission in relation to the land which would be determined under s.70 of the 1990 Act …"*

13.2.2. I reject this argument. A s.106 Agreement is a separate legal instrument from a planning permission. It is a contract entered into under s.106 of the 1990 Act, rather than an application determined under s.70 of that Act.

13.2.3. The land which is required under the Agreement to be devoted to the purposes of Open Space / ecological mitigation and transferred either to the LPA or the Parish Council lies outside the planning application site. The planning application site was Area 1. The land the subject of the s.106 covenant lies within the VG 262 land. It formed part of what is colloquially known by planning practitioners as *"Blue Land"* (in contradistinction to the *"Red Land"* of the planning application) – that is, other land, outside the application site, within the control of the applicant for permission. In this case, because of the contingent and flexible nature of the covenant, the open space land has, not yet even been identified. I therefore have no doubt that the s.106 Agreement land is unaffected by paragraph 1 of Schedule 1A.

13.3. Paragraphs 4 and 7

13.3.1. These paragraphs apply where land is identified for potential development either:

(a) in a development plan adopted under the Planning and Compulsory Purchase Act 2004 ("PACPA") (paragraph 4); or

(b) in a development plan adopted under the 1990 Act which continues to have effect by virtue of Schedule 8 to PACPA (paragraph 7).

13.3.2. In this case, Areas 2 and 3 of VG Application 262 are identified on Inset Map 12 within the WDLPR, which was adopted under the 1990 Act, for recreational development as set out in Policy RT5. The map designation was carried forward into the Core Strategy Policies Map, adopted under PACPA 2004. Moreover, I am satisfied that Policy RT5 was saved by direction of the Secretary of State under Schedule 8 to the 2004 Act, for the reasons I have set out above.

13.3.3. In principle, therefore, Trigger Events apply to Areas 2 and 3 by virtue of Paragraphs 4 and 7. Mr Wilmshurst disputes this conclusion on the basis that Policy RT5, which favours the granting of planning permission for *"improvements in recreational land and facilities"* and which has *"reserved"* land *"for the provision of new facilities"*, is not inconsistent with use of the land for LSP. He submitted that paragraphs 4 and 7 of Schedule 1A to GIA 2013 should be construed by reference to the statutory objective of preventing the stalling or stopping of development. If I am in doubt, he invites me to examine the Parliamentary materials in Hansard to resolve such doubt. He said, in answer to my question, that the paragraphs should be read to mean: *"identifies land for potential development <u>which is inconsistent with a TVG</u>*". (emphasis added).

13.3.4. In my view, the words of paragraphs 4 and 7 are clear; all that is required is the *"identification"* of land for *"potential development"*. *"Development"* is not defined in GIA 2013 or CA 2006, but it is defined in s.55 TCPA 1990. In the absence of any other definition in the 2013 Act, and given the dependency of Schedule 1A on that Act, I consider that the word should be construed as set out in s.55. S.55(1) provides that, subject to the rest of the section and unless the context requires otherwise, *"development"* means: *"the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land"*. By s. 56(2), certain operations or uses are excluded from the definition; paragraph (e) excludes the use of any land for the purposes of agriculture or forestry. Recreational operations or uses are not excluded.

13.3.5. Policy RT5 identifies the relevant land, inter alia, for *"the provision of new facilities"*. It makes a policy statement directed to the granting of planning permission. As Mr Holmes pointed out, the provision of new recreational facilities might take many forms. I do not accept the premise of Mr Wilmshurst's submissions that all such development would necessarily be consistent with TVG status. On the Lewis v Redcar principle, TVG rights, if I had found them to have been established as a

matter of fact, would have been for the inhabitants of the locality (as opposed to the wider public) to use the land for unstructured, informal recreation. Policy RT5 would be broad enough in scope to permit formal sports uses – possibly including pitches, requiring operational development for their installation, together with ancillary facilities such as floodlighting, pavilions, toilets and car parking. The reasoned justification refers to evidenced deficiencies in recreational land which could, in principle, include deficiencies in sports pitches. Other recreational uses could include indoor sports/leisure. The identification in the development plans is thus, in my view, clearly for *"development"* within the meaning of Schedule 1A. Whilst I do not accept that Mr Wilmshurst's construction is right, because it requires words to be read into the statute, in any event the development envisaged by the policy in this case is capable of being inconsistent with TVG rights.

13.3.6. Strictly speaking, since I consider the statutory words to be clear, I do not need to consult Hansard. I have, nevertheless, done so. The principle of the provisions, as explained on behalf of the Government, was that TVG registration should not *"cut across decisions taken in the democratically accountable planning system"*. To prevent planned recreational development, directed to meeting the specific needs of the

community as assessed by the LPA, on the merits-neutral basis of TVG registration, would, in my opinion, run contrary to the intention of Parliament, insofar as it is discernible from the extracts produced.[36]

CONCLUSIONS

14.1. I conclude that both TVG Applications should be rejected for the reasons set out above. In summary, these are:

(i) sufficient user of the requisite quality has not been established for the relevant periods in either case; and/or

(ii) such user as there was would, predominantly, have carried the appearance of path user rather than a clear assertion of TVG rights for the relevant periods; and/or

(iii) Areas 2 and 3 are subject to Trigger Events under Schedule 1A to the Growth and Infrastructure Act 2013 which mean that they are not eligible for registration.

Accordingly, I recommend that Applications VG 262 and VG 267 be rejected.

MORAG ELLIS QC

[36] Authorities Bundle TAB 38.