

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS THE
FIELD AND THE COPSE, CLAVERHAM, NORTH SOMERSET AS A TOWN OR
VILLAGE GREEN PURSUANT TO SECTION 15 COMMONS ACT 2006
AND IN THE MATTER OF APPLICATION REF: NSCTVG006

ADVICE

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6 June 2017

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Executive Summary

- (1) There has been no 'Trigger Event' within section 15C Commons Act 2006, and the Council should proceed to consider the application;
- (2) The Council should consider the application on the basis of alternative amendments put forward by the Applicants, namely that the relevant 20 years use has been by a significant number of the inhabitants of the neighbourhood of Claverham Ward in the locality of the civil parish of Yatton; and the inhabitants of the neighbourhood of Claverham in the parish of Yatton and Claverham;
- (3) Claverham Ward is a neighbourhood and the civil parish of Yatton is a locality for the purposes of section 15(2) Commons Act 2006;
- (4) Any use of the land the subject of the application that reasonably appeared to the landowner to be lawful by reason of the existence of public footpaths running across the land should be disregarded in assessing whether the requirements of section 15(2) Commons Act 2006 are satisfied;
- (5) The evidence shows that a significant number of the inhabitants of Claverham Ward used the land as of right for lawful sports and pastimes for twenty years prior to the Application;
- (6) The Council should therefore register the land as a Town and Village Green for the inhabitants of Claverham Ward.

Instructions

1. I have been instructed by North Somerset Council, ('the Council') a registration authority under the provisions of the Commons Act 2006, to advise them as to whether they should register land at and known as The Field and the Copse, Claverham, North Somerset ('the Land') as a Town or Village Green. The Land is a large open field bounded to the West by a public highway called Streamcross, and to the South by the Northern boundaries of houses fronting on to the public highway Chestnut Drive. 'The Copse' part of the description refers to a small wooded area in the North East corner¹.

The Application

2. On the 22nd. December 2014 Mr. Clive Fletcher, Ms. Sarah Chidwick and Ms. Teresa Moore applied to the Council to register the Land as a

¹ When I refer to the location of documents in these footnotes, I am referring to their location in the Applicants' bundle and Objectors' bundles respectively at the Inquiry. The Applicants' bundle references are e.g. [6/2] meaning page 2 of tab 6. The corresponding Objectors' bundle reference would be [O6/2]

Town or Village Green ('TVG') pursuant to section 15(2) Commons Act 2006. That provision requires the Applicant to demonstrate that the relevant recreational use of the land has continued for twenty years until the date of the application.

3. The justification for the application (section 7 of the Application document) referred to use of the Land 'as of right' by the residents of Claverham for recreational purposes for over 40 years. The application form required the applicants to specify the locality or neighbourhood within a locality in respect of which the application was made (section 6). As originally typed, that stated:

'On the edge of the village of Claverham, within the parish of Yatton'.

The applicants sought to amend this in early 2015, and that description was struck out, and the following written:

"The area bounded by Streamcross, Lower Claverham, Jasmine Lane, High Street, Bishops Road as far as Court de Wyde School, Claverham Road to Hollowmead and back to Streamcross, within the village of Claverham within the parish of Yatton at Claverham."

4. The application was supported by a statutory declaration from Ms. Moore verifying the facts set out in the application form. It also exhibited a number of statements in support of the application, some 45 statements from local residents indicating recreational use of the Land by themselves and others for various periods of time. One piece of real evidence annexed is a photograph said to date from before 1950 showing Lt. Col. Eberle, the owner of Claverham House, a large house adjacent to the Land on the other side of Streamcross, cutting a ceremonial ribbon. It was said that this showed the Colonel donating a corner of the field in question to the children of Claverham as a play

area. If that is so there is no evidence of such a play area extant on the Land, and I have not been made aware of any formal documentation from the parish or local authority which evidences a change in status of that particular piece of land. The likelier possibility is that this relates to the present day Broadcroft Play Area, which appears to have been on part of the field not conveyed to Messrs. Burnett's predecessor in title in 1949² and may have been owned by Lt. Col. Eberle at that time³. There is however a degree of speculation in this.

Objections

5. The application having been duly made, the Council advertised it and asked for comments and objections. An objection to the application dated 25th. March 2015 was received from Mr. Nicholas Burnett and Mr. Peter Burnett, the freehold owners of the land. That objection comprised a letter of that date and a statement of objections dated 31

² See [O4/24]

³ See also Mrs. Bushell's letter referred to at para. 8

March 2015. The letter took a number of technical objections to the application, namely that:

- The Applicants had failed to attach a map showing the extent of the neighbourhood relied upon;
- The reasons given to support the finding of a TVG (Application section 7) were irrelevant);
- Section 9 of the application form had not been completed;
- The statutory declaration in support of the Application wrongly stated that the applicant is the owner of the land, whereas Messrs. Burnett were the owners.

It asked that the application be dismissed for these reasons.

6. The Statement of Objections took issue with the merits of the application. The objections were that:

- A locality or neighbourhood within a locality had not been identified;

- The usage did not demonstrate recreational usage by a 'significant number' of residents;
- The extent of the usage was not such as to demonstrate the existence of a right rather than occasional acts of trespass. The objectors asserted that such a level of usage must be demonstrated during each year of the 20 year period relied upon;
- The acts relied on were not 'lawful sports and pastimes';
- The usage (if any) was limited to specific areas, tracks or hedgerows;
- The usage was not 'as of right';
- The usage had not been carried on for at least 20 years.

7. The Statement of Objections annexed a number of witness statements from professionals engaged in surveying or inspecting the Land on behalf of a pending or intended application for planning permission in respect of it. Those statements (which related to the latter part of 2014) asserted that there had been no or very limited public use of the Land,

and I will consider them in due course. Mr. Peter Burnett had also annexed a written statement in which he said that his father had bought the Land in 1946, it passing through this family to Nicholas and Peter Burnett in 1999. The Land had been let for grazing for cattle and hay making throughout that period; and for the past 24 years the cattle of Andrew Hunt, a local farmer, had been grazing there.

8. The Council also received a letter of objection from Mrs. C. Bushell.

Mrs. Bushell made the point that: 'In 1949 a play area was opened on land donated to Claverham residents by Long Ashton District Council and land around the play areas designated as a village green. Photographs of this event are in existence. Why would anyone want another village green?'

9. Yatton Parish Council wrote on 13 March 2015 supporting the application. Besides commenting on the value of a TVG they said this:

'The village has a need for open spaces and historically the land has been enjoyed without let or hindrance as part of land owned by Claverham House dating back to the early 20th. Century.'

10. The Council rejected the technical objections to the application by letter from the Council to Mr. Peter Burnett dated 27 May 2015.

11. On 6 September 2015 the applicants sought to amend section 6 of the application to provide a description of the relevant neighbourhood or locality as follows:

'The neighbourhood of Claverham Ward within the locality of Yatton Parish'.

The Council responded to the effect that the Inspector would consider the merits of such an amendment at the non-statutory inquiry, and would advise the Council accordingly. At the inquiry I was given an amended page of the application. Section 6 had been amended to

strike out the description of the area by street boundaries, and instead stated:

“Within the village of Claverham, within the Parish of Yatton and Claverham.”

Mr. Bennett, counsel who appeared for the Applicants at the Inquiry, submitted that I should consider each wording, and treat each in the alternative. I deal with those applications below.

12. The letter also enclosed a further 26 witness statements, and five further statements from those who had already given evidence. A video of evidence showing the use of land was also made available.

13. On 12 August 2015 the Council resolved that a non-statutory inquiry be held to gather evidence and report its conclusions for the Planning & Regulatory Committee (which is the Council Committee with delegated authority to decide such applications).

Planning Matters

14. As is not uncommon with TVG applications, the application itself arose in the context of the public becoming aware of the possibility of the Land being developed, it appears for housing. Before the non-statutory inquiry could be organised, the landowners raised a specific and further objection to the application, namely that by virtue of section 15C of the Commons Act 2006 (inserted into the 2006 Act as an amendment by the Growth and Infrastructure Act 2013) and a change in the use of the Land by virtue of its designation as a sporting, cultural and/or community facility or as a Strategic Open Space. I advised on this issue in writing on 3 February 2016, and I refer to my written advice.

15. For ease of reference I shall note my conclusion, which was this. The landowners relied upon the adoption in March 2007 of the North Somerset Local Replacement Plan and the publication by the Council in

February 2013 of the Consultation Draft of the Sites and Policies Plan.

Each plan designated the Land for the purpose of Public Open Space as a 'Cultural and Community Facility'. According to section 15C such a designation will be a trigger event if it amounts to a 'proposed development', and development in this context refers to a change of planning use. The objectors' case is that the Land is agricultural land (which has certainly been an historic use) and if it is now to be designated as a Cultural or Community Facility or Public Open Space, then that will be in planning terms a 'proposed development'. Whilst this is something of a surprising consequence – that the designation of land as public open space in the planning system might have the effect of preventing its registration as a TVG and hence as a public open space, that appears to be the technical effect of the legislation.

However, if the Land is already being used for these designated purposes, and that use is lawful, then it will be the case that the designated use is not a 'proposed development'. It follows that if the

Land already had an appropriate planning use as a community facility, the suspensory effect of section 15C would not be engaged. The issue here is whether the Cultural and Community Facility/Public Open Space designation for a use proposed by these two plans was already a planning use in existence in 2007 and 2013. If so, then the plan would not indicate a proposed development.

16. The Council have in these circumstances of substantial factual dispute instructed me to hear evidence in order to advise them as to whether they should accept or reject the application for registration of the Land as a TVG. My role is that of an advisor to the Council; it is for the Council to make a decision whether or not to register the Land as a TVG having considered the contents of this advice.

The Inquiry

17. I held an Inquiry on the 8 to 10 November 2016 at Claverham Free Church, at which I have heard evidence from those persons who have wished to be heard, both lay and expert, and I have had the benefit of a site view (accompanied by interested parties) of the Land, and of the various surrounding areas and those areas said to constitute relevant localities and/or neighbourhoods for the purposes of the application.

18. At the conclusion of the Inquiry it appeared to be a matter of potential relevance as to the planning use of the Land on 1 July 1948, which was the date of the commencement of the Town and Country Planning Act 1947. I directed that each party might serve further written submissions and evidence relating to this issue. The Applicants served further documents on 17 December 2016 and the landowners served their documents on 22 December 2016.

The Issues

19. Section 15(2) of the Commons Act 2006 provides that:

“(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.”

It is no minor matter for a landowner to have land registered as a TVG.

The burden lies on the Applicant to prove each and every element or part of this definition. If any element is not proven, then the application must be refused – see R v Suffolk County Council ex p Steed [1997] 1

EGLR 131 at 134 (according to Pill LJ.)

20. The Applicant proves each part of the definition by establishing it by reference to the evidence that is before the Inquiry, and demonstrating the fact on the balance of probabilities; in other words by showing that it is more likely than not that each element of the definition, as applied to its case, has been made out. As I indicate when I set out my summary of the parties' closing submissions below, Mr. Bennett submitted that the Council should not be wary of granting TVG status, but view it (in the circumstances) as a positive act. My advice to the Council is that it is a matter of fact whether each element of the definition is satisfied or not, and the Applicants must prove that in respect of each part of the test.

21. The Council must have regard to the evidence that has been adduced. I have considered the oral evidence of witnesses; the written statements of persons who have not attended the Inquiry; evidence of historic documents; photographic and DVD evidence, and what I have seen on

the Land and surrounding areas in coming to my recommendation. As far as the evidence of witnesses is concerned, I have tended to give greater weight to evidence where the witness is able to attend the Inquiry and be cross-examined. This is because when evidence is tested in such a way it is easier to see its strengths and weaknesses, which is particularly important where (as here) historic recollection is being relied upon and challenged.

22. In seeking to establish whether the elements of section 15(2) are made out, the Authority is concerned simply with what happened in the 20 years preceding the application. It is not concerned with whether it would be generally beneficial or disadvantageous to register or refuse to register the Land as a TVG. The function of the Authority is not the same as that which arises on an application for a planning application, which requires the Authority to make a value judgment as to whether it is appropriate for a material development to take place, in the light of

appropriate planning policy. To put it another way, the test here relates to what happened in the past 20 years, unlike planning decisions which concern what is proposed to happen in the future.

The Land

23. The Land is substantially a grassed field of 2.38 hectares, broadly rectangular in shape with the longer sides the east and west boundaries; the shorter the north and south. The western side is bounded by a public highway, Streamcross. The southern boundary is formed by the rear gardens of houses on Chestnut Drive. The eastern boundary is formed by a ditch and hedge line separating the Land from a field to the east. That field was referred to by some in evidence as 'Dunster's Field' and Claverham High Street lies to the east of it (running roughly in a north-south direction). The ditch was referred to by some as the Tannery Ditch. The northern boundary is a hedge line substantially separating the Land from a field to the further north.

24. The Land is higher to the north than to the south, and slopes regularly and gently southwards (although is broadly level along the route of the footpath running from east to west across the Land). This inclination is to an extent material given that the evidence on behalf of the Applicants was challenged on the basis that it was exaggerated evidence of use, and evidence of use was in part given by those who lived in housing on Chestnut Drive, on the southern boundary of the Land.

25. The boundary feature along the west to Streamcross is generally formed by thick hedging which is not penetrable. There is a gated entrance to the Land opposite Claverham House, with what appears to be an old 'public footpath' sign in the hedge. To the south is a gated vehicular access. As the boundary to Streamcross approaches Chestnut Drive the hedge ends and the continuing boundary is formed by

concrete post-and-wire fencing, which continues along Chestnut Drive. The fencing appeared stock-proof to me. Where it meets the housing on Chestnut Drive, the southern boundary is formed by garden fencing. There is an access leading to the land at its south east corner running from Chestnut Drive, through what amounts to an alleyway next to 23 Chestnut Drive. There is an informal and slightly difficult access across the ditch about half way along the eastern boundary. Further north there is a bridge over the ditch broadly opposite Claverham House, and a kissing gate'. That is at the other end of the public right of way leading from the western boundary. The copse is in the north east corner of the Land. The northern boundary is formed by a hedge and brambles. There is an agricultural gate leading to the adjoining field to the north. Although it was suggested to some witnesses that there used to be an access to the Land in the south west corner (at the junction of Chestnut Drive and Streamcross) none was visible to me on the site visit.

26. I should also mention some other items that were referred to in evidence. First, within the Land about half way along the western boundary is a feeding manger for the cattle. Towards the southern end of the western boundary is a cattle trough. There are dog waste bins erected by the local authority on the corner of Streamcross and Chestnut Drive, but they are on the verge to the public highway, outside of the hedging bounding the Land. The footpath LA21/10/10 continued eastwards through Dunster's Field, meeting the public highway at the High Street, by the Scout hut.

Existing public rights across the land

27. There are two public rights of way running through the Land. They are footpaths, and are shown on the definitive map⁴. One, marked LA21/10/10, runs directly from Streamcross to the bridge over the

⁴ See [6/2]

Tannery Ditch opposite, by and through the kissing gate. The second runs from that bridge southwards parallel to Tannery Ditch on the eastern boundary and running to the alley at Chestnut Drive. It is marked LA21/13/20. I infer from the absence of any contrary information, the presence of the historic public footpath sign at Streamcross, and the fact that the route of LA21/13/20 southwards of Chestnut Drive is shown on the definitive map⁵ is shown running through buildings that appear to have been constructed in the 1960s, that these footpaths have been in existence throughout the period of use relied on to establish the existence of a Town or Village Green. The footpaths are shown as tracks on the historic OS maps⁶.

Evidence

28. In the following section of this advice I shall summarise the oral evidence that I heard, first on behalf of and supporting the Applicants,

⁵ See [6/2]

⁶ See [O4/188] (OS map from 1884-5)

and then on behalf of and supporting the Objectors. This is not intended to be a transcript of the evidence that I have heard, but a sufficient précis so that the Council and any other interested party can follow my reasoning when I give my advice in respect of each of the issues, and overall.

Evidence - Applicants

Dr. Gary Barker

29. Dr. Barker and his family (Mrs. Barker and three children) have lived at Chestnut Drive since 2007. Their house overlooks the Land and they have played there with their dog throughout that period. They did not stick to the registered footpaths. They have seen widespread informal use by the local community, seeing the south west corner of the land from their lounge, and elsewhere on the land from their first floor bedroom window. The childrens' use included playing Frisbee, playing in dens in the Copse, having picnics and picking blackberries. They

played with a flying toy on the land in January 2008, and a model glider and radio controlled aircraft in 2012 and 2013. Typically, dog walkers would do a circuit of the land, with a deviation to clear up after the dog, or to talk to friends or other dog walkers. They said that their neighbours and work colleagues had confirmed such use.

30. A hay cut was taken once a year. A few cattle were left in the field from May; they might be in one of the other two adjacent fields (in which case use would not be affected) or on the land, in which case because they were few in number they would simply be avoided.

31. Dr. Barker produced two DVDs demonstrating usage of the Land by a time lapse camera set up in his upstairs window. Dr. Barker had edited them, and they showed everyone who was on the Land though the hours of daylight on the two days. The first day was the 2nd November 2015; the second the 30 September 2015.

32. I have approached the evidence of the DVDs with caution. By the time that they were taken the application had been made and objected to, and an Inquiry was pending. There is no evidence that what is shown on the DVDs was stage managed, and having heard Dr. Barker I find that it recorded genuine use of the Land on each day. I do have a concern that given the publicity given to the application this might have had the effect of increasing the level of use.

33. Notwithstanding these cautions, I am of the view that the DVDs demonstrate a noticeable level of recreation on the Land, predominantly for dog walking but also for more general walking and to a very limited extent what looks like play. A substantial amount of the use shows people passing along the east-west footpath (the access to the north-south footpath is not readily visible) but in my view just as much shows people walking around the Land off of the path, both with

dogs, on lead and off, and without dogs. The DVD is also material in that it shows the view that Mr. Barker had of the Land from his upstairs window, and corroborated his evidence.

34. Cross-examined, he accepted that the access to the site from the alleyway to the east of their house was quite overgrown. He thought that most public usage was gained by walking up Streamcross to go to the right of way. He thought that a significant number of people would be in the middle of the Land, which is where he and his children went. The middle could get very wet in a dip which is on the route of the public right of way.

35. He tended to see people walking on the western side of the Land, not the eastern side. They could only see people from their lounge when they are a distance away from the public right of way number LA21/13/20.

Carolyn Baker

36. Mrs. Baker has lived on Franklins Way since 1984. She told me that she had walked a dog over the Land on most days. On some occasions her trip, around the Land and elsewhere in the area could take between half an hour and an hour. If she was simply going around the Land it would take her 20 minutes. Mrs. Baker uses the Land when there are cattle there, and they were never a problem. Rather surprisingly I thought, she told me that sometimes you have to push the cattle out of the way. To do that at any time, especially when accompanied with a dog, must be foolish in the extreme. She has seen children playing rugby, playing in the Copse and playing hide and seek in the long grass. She met other dog walkers very frequently. They are people from Claverham.

Clive Fletcher

37. Clive Fletcher has lived on Chestnut Drive since 1989, and over that period he has played on the Land with his children, and has seen other children playing there, paddling on part of the Land when it was flooded, and people walking there. Mr. Fletcher produced some photographs showing his children playing on the Land in snow and in sun, probably taken in about 1992.

38. Cross-examined, Mr. Fletcher told me that most people would walk onto the Land by way of the footpaths, but then cross the Land at different angles. His children would go into the Land after the farmer had cut the grass and made hay bales. There were cattle on the Land for quite a part of the year. People would walk around them. Sports tended not to take place in the winter, because the Land is too wet.

39. The dog walkers go all over the field, and do not always pick up their mess. He told me that it was unusual for him to look on the Land and not see someone in it. They may be on the path. It is mainly dog walkers who use the Land. He accepted that they use the public right of way as much as they use the rest of the Land.

Carole Perrott

40. Mr. & Mrs. Perrott moved to Chestnut Drive in October 1982. From the outset Mrs. Perrott was aware of people walking their dogs around the Land, often in the morning, at lunchtime and at four and later in the afternoon. The routes varied, depending on where the cows were on the Land. The Land tends to be well used because dogs would be let off the leash for a run. In 1982 the field at the end of Chapel Lane could be used for walking dogs but it is now used for crops. Dogs are not allowed in the play area adjacent to Broadcroft. Mrs. Perrott's children born in 1985 and 1993 regularly played on the

Land. She has seen kite flying, archery, cricket and Frisbee play, all sorts of ball games and more recently remote controlled helicopters and planes⁷.

41. Popular times for recreational use of the Land are before work and in the evenings. – when children come home from school. There is 7 day a week use, but it is not used 24 hours a day. The cows gather where their food is, on the North West corner. People avoid the cows if they gather. About a half of the walkers do a circuit, coming along part of the way around the field and they then go diagonally across in a South West to North East direction.

Susan Toogood

42. Mrs. Toogood has lived at Claverham House, Streamcross since 2012 but before that lived at Hollowmead, Claverham from 1984. Her family

⁷ Photos at [5-29] onwards.

had throughout that time, but more frequently from 2012, walked around the Land. She accepted however that her witness statement was really describing the use of the field from 2012 onwards. She has seen the public exercising their pets, children playing, joggers running around the field, kite flying, model aircraft flying, and blackberry picking. The majority of people who use the Land have dogs. People keep out of the farmer's way when he is cutting hay.

Jo Summers

43. Ms. Summers lives at Claverham Road and has lived in Claverham from 1972 to 1982, returning on 2001. Between 1975 and 1982 she walked through across and to the edges of the Land with the family dog, on and off the footpaths. Between 1982 to 2001 she used the Land for family and dog walks when visiting. Otherwise Ms. Summers' mother would exercise the dogs there when her father was away. They lived in Franklins Way. Since 2001 Ms. Summers and her children play there at

weekends and during the holidays. She has often seen other school age children walking their dog from 4.30 pm onwards and again in the early evening, especially in the summer months. Ms. Summers has had a dog since 2009 and walks her dog on the land 5 to 6 times a week all year round. She described the Land as a meeting space for dog-walking villagers. She described walking around the perimeter and the footpaths when the grass was long. When it was cut in May or June the only obstacle was the cattle. This was how she thought that most people used the area. Ms. Summers produced photographs of her dog on the land which showed snow (in Winter 1980-1) and the wet area in the middle of the Land.

44. Cross examined, she said that she would probably avoid the field altogether if she thought the herd was nervous or jumpy. Until she became involved in the application, she did not know where the public

rights of way were. She could not recall seeing a beaten path through the grass where the ROW is shown.

Teresa Moore

45. Mrs. Moore had very helpfully annotated a plan describing the attributes of the Land⁸, and readily conceded that she herself neither used the Land a great deal, neither did her property overlook it.

Laura Parsons

46. Mrs. Parsons moved into Chestnut Drive in 1994. The Land was used for people walking dogs and for children to play on. Originally their garden was separated by a chain link fence from the Land. They planted Leylandii for greater privacy. Mrs. Parsons walks her dogs on the Land every day as did most dog owners in the village. Her three children, now teenagers, played there regularly. The local Beaver and

⁸ 2-38(a)

Cub Scout troop used the Land on a regular basis. The Copse was used by teenagers as a den or meeting place. Most people exercised their dogs around the perimeter of the land.

47. Cross-examined, Mrs. Parsons said she was aware of the footpath. In her view the footpaths were used as much as the rest of the Land. All of the Land is used every hour every day.

48. Mrs. Parsons does not have direct access to the Land from her house, and now the Leylandii are grown her immediate view of the Land is obscured. I considered that she was ready to assert heavy use without really considering historical use, to the extent that she denied that the use shown on the DVDs produced by the Applicants was typical.

Anne Berry

49. Mrs. Berry has lived on Streamcross since 1979. She walks her dogs twice a day on the Land. When she walks to the village she travels directly from the footpath entrance on Streamcross to the footpath entrance by Chestnut Drive. Others she sees walking their dogs walk along the northern edge of the Land, and do not keep to the footpath. If the Land is wet, she still walks there, and walks through any cattle on the Land. If there were cattle on the Land the dogs would stay on the lead.

Roger Wood

50. Mr. Wood is a parish councillor who has lived at the High Street since 2000. His children and grandchildren used the Land for games. He handed me a letter from the Parish Council dated 13 March 2015 which stated its support for the application. The letter stated that:

"The land has been a long standing strategic open space within North Somerset Council's development plans and it is considered that it should remain so.

The village has a need for open spaces and historically the land has been enjoyed without let or hindrance for many years as part of land owned by Claverham House dating back to the early 20th. Century."

51. Cross examined, he accepted that there are other available public open spaces in the village. He described his usage as just ambling around the Land. He would take a rugby ball or a football, and normally pass from the High Street/scout hut entrance to Dunster's Field eastwards to the Streamcross entrance.

Barry Straughton

52. Mr. Straughton and his family have lived on Dunsters Road since 1987.

They have owned dogs for most of that time, and used the Land to exercise them on most days, once or twice a day depending on the weather. Their usual walk was around the perimeter of the land. The Land was used by immediate residents, and some from further afield. Other usages made by them of the land were jogging, often with dogs; children playing in the wet and snow; blackberrying; and for games by the Cubs and Scouts, Mr. Straughton and his wife both being involved with the Scout group. When there were cattle on the Land the dog would be on the lead. He knew where the public rights of way ran by reason of the Ordnance Survey maps, but did not stick to those routes.

Rosie Barker

53. Miss Barker's family moved to Chestnut Drive in 2007, and she would use the land for play with friends, family and with their dog. She

witnessed many other people using the Land, mainly for dog walking, children playing and blackberry picking. She accepted that as she grew up (now being in her late teens) she tended to use the Land less. She produced a video made by her with some friends in 2009 which showed them play-acting on the land.

Nigel Cooper

54. Mr. Cooper lives on Bishop's Road and moved there with his family in 1984. He and his family used the Land for dog walking and socializing with neighbours. As a dog walker he both walks the perimeter and traverses the Land. He played on the Land with his children (they are now grown up) and with the children of friends. They picked fruit there and went strolling. He told me that his wife trains guide dogs for their first 12-14 months, and they go on to the Land, in addition to the two dogs they have. The dogs are exercised in several places on the Land.

55. Cross-examined, he did not recall that until recently there was an entrance in the south west corner of the land. In his view the footpath system is not the major public usage of the Land as there were other ways of getting around. It was a destination in itself.

56. Mr. Cooper accepted that it is from time to time particularly wet land. The wettest area was in the general area of the footpath. His children thought that it was an opportunity to lark about in puddles. He accepted that some avoid it, while others walk through it.

57. He accepted that he used the Land a couple of times a week, and that from time to time he would walk his dogs elsewhere— Cadbury Camp, King's Down, Cleve Woods - having large dogs that require a lot of walking. When cattle are on the Land he still uses it, and has no problem. His dogs run off the lead, and are well trained. His guide dogs would be on a lead if there were cattle about.

Sarah Chidwick

58. Mrs. Chidwick moved to Chestnut Drive with her family in 2003. She has used the Land on a daily basis, as she put it, to exercise her dogs and children. She considered that there was little available alternative, other spaces being run down, broken, or forbade dogs. She and her family would use the whole of the Land. The cattle when present did not prevent recreation. She has seen others flying kites, walking dogs, bike riding, flying model aircraft, foraging for berries, as well as general play. She has kept the access at Chestnut Drive clear with a hedge-trimmer and lawnmower, and did not consider that its condition would be a deterrent to use. People do not appear to follow the line of the public rights of way. They go around the circumference, skirting around mud, or cattle.

59. Her kitchen is at the back of her house, and she told me that she has a clear view of the Land. Whilst she is not there all the time, she does see a lot of activity there. School children play there outside of school hours.

60. Mrs. Chidwick told me a little about Claverham itself. There is no public house because it was a quaker village. It has a High Street with a pizza parlour and a hairdressers. There is a small church on the corner of Jasmine Lane and a Catholic Church nearby. The scout group is for Claverham and Yatton. The guides are in Yatton.

Lucy Perrott

61. Miss Perrott lives with her parents at Chestnut Drive and confirmed their evidence that she played on the Land as a child. She noted that when cattle are on the Land it was not as welcoming for play, but still useful for dog walking and other exercise. She had not witnessed any

change in the public's use of the land over time. She did not think that the growing hay had any effect on the use of the Land.

Gina Ryall

62. Ms. Ryall has lived on Dunsters Road since October 1996 and has used the Land for jogging and keeping fit, bird watching and picking fruit over a period of 6 or 7 years. The Land was well used for dog walkers, singly and in groups, and people play football or Frisbee. She has seen informal cricket on the Land, and knows that the scouts and cubs use it. People would use the whole area. She accepted that she had not visited so much recently in the last year or two. Since 2010 she only goes on to the land a couple of times a year. Public usage appears to have remained as before.

Kathy Headdon

63. Mrs. Headdon's family moved to a house on High Street in 1993. When they bought their house the vendors told them that the Land was the place for dogs to be walked and children to play. She then had young children and dogs. They used the Land daily (when they were not away from Claverham) for dog walking and (in season) picking blackberries, gaining access from Chestnut Drive. They would use the whole of the Land. The livestock when present did not interfere with their use of the site, although they would be given a respectful berth. That part of the Land to the north is significantly flooded in the winter, but that did not stop their use of it. She considered that more use was made of the Land than the Dunster field to the east, because it had easier access (via Chestnut Drive) and was more level. Mrs. Headdon described the small footbridge on the public footpath across the ditch as 'perilous'.

Charlotte Bembridge

64. Mrs. Bembridge has lived with her family on Chestnut Drive since 2005 and since then picked blackberries and sloes on the Land, and walked her grandmother's dog there. Since 2008 she has played in the snow there, paddled on the land when wet, and walked with her children there; and since 2009 has played football, Frisbee, and climbed trees in the copse. She sees dog walking on the Land most days; children play there. She described the Land as being in constant use by the whole community. The Land was visible from her property, and she produced photographs showing children on the Land.

Paul Barker

65. Paul Barker has lived on Dunsters Road since May 2010. He uses the Land for jogging and keeping fit. As well as blackberrying, he is a member of the Yatton and Congresbury Wildlife Action Group (YACWAG) and goes on to the Land to watch wildlife there. The Land is

surrounded by trees and hedges and attracts buzzards. He has seen jogging and running on the Land, as well as football and Frisbee. He confirmed that the scouts and cubs use the Land for activities and games. He told me that he would almost always use Dunster's Field as well as the land. He would run around the Land in a figure of 8.

Susan and Stephen Gibert

66. I heard from Susan and Stephen Gibert. Mr. & Mrs. Gibert have lived on Claverham Road since 1999, with four children then under eleven. Their children foraged for blackberries on the Land. After acquiring a dog in 2007 they took it for walks on the Land, walking through it four or five times a week. They see up to four or five dogs on the Land at the same time. Mrs. Gibert's usual route is between the Streamcross entrance and the kissing gate at the east, but she does not walk directly between them. Occasionally she will leave by Chestnut Drive. Her dog is on a long lead and does not interfere with or be bothered

by cattle. Mrs. Gibert told me that when the grass is long there are several paths – one around the side; a couple across the middle. As far as the contention that the Land floods was concerned, she said that on some years the Land does flood, and that it might be every year. The wet part is on the route of the public footpath between the two fields. It is not very deep. If you had wellingtons on you could walk through it.

67. Mr. Gilbert told me that when he goes on to the Land he might walk in through any of the three gates depending on his route. If the walk was weather dependent he would go straight through but if the weather was not atrocious, he would tend to walk around both fields (the Land and Dunster's Field) and do a figure of eight. He had never thought the fields were so muddy he should not go in.

Evidence - Objectors

Peter Burnett

68. Mr. Peter Burnett together with his brother Mr. Nicholas Burnett are the freehold owners of the Land. The Land was bought in 1946 by Mr. Burnett's father, and on his death in 1969 the use of the Land passed to his mother, according to Mr. Burnett in trust. On her death in 1999 the Land passed to Peter and Nicholas.

69. Mr. Burnett referred (in his Statement of Objections⁹) to a recent travel survey submitted to the planning authority as part of an objection to a local planning application. From the information supplied Mr. Burnett inferred that the adult population of Claverham village numbered (on one yardstick) about 1095, and on another about 920. This may be material evidence when one comes to consider the issue as to whether

⁹[O1/5]

a 'significant number' of inhabitants of the relevant neighbourhood or locality used the Land for lawful sports and pastimes. On any view the village is relatively small.

70. The Land had, since 1949, been used by farmers on annual cattle grazing licences. Mr. Burnett produced a licence from 2005¹⁰, from Messrs. Burnett to Mr. A. J. Hunt of Brook Farm, Claverham, which permitted him to graze the Land from 1 February to 31 December 2005, and to take a single crop of grass. Part of the farmer's obligations was a promise or covenant:

'Not to permit any trespass on the [Land] but not to obstruct any rights of way used or enjoyed over the [Land] prior to the Date of Agreement'.

¹⁰ [O2/51]

71. Mr. Burnett said that his brother (who is presently unwell and could not give evidence) would attend the Land two or three times a year to check the water supply and the Land generally. Mr. Burnett had checked the Land for the past two or three years. They never had any issues with the Land. Mr. Hunt had not been in breach of the terms of his grazing agreement and he had no issues with the Land save that he had to ask people to keep their dogs under control and to collect dog mess from the footpaths. Grazing took place from early Spring until November. No one had been given permission to use the land for recreational purposes.

72. Mr. Burnett and his brother were approached by a promoter who asked for permission to put in an application for planning permission both on the Land and the adjacent Dunster's Field. They agreed. There was a pre-application public consultation in November 2014 and certain groundworks took place in October 2014. It was this action (according

to Mr. Burnett) that prompted the locals to stop the planning application by issuing a Town or Village Green application.

Evidence from witnesses not attending

73. I shall summarise this evidence individually but shortly, first by reference to the Applicants' supporters.

74. Zita Gough has lived on Chestnut Drive since 1994. She has two children, then 6 and 4. Her children played on the Land and she could see them from the house. The Land has been used throughout the day and evening by dog owners exercising their pets. The Land is part of her walking route and she walks there three or four times a week.

75. Diane and Tony Gumm have lived on Chestnut Drive since 1995. They have carried out dog walking, social walking, blackberry and sloe

picking there. They have seen children play in the flood waters annually.

76. Pauline Harding has lived at Streamcross since 1978. She has walked her dog usually twice a day through the land, with her dog usually off of the lead. If the Land is wet she keeps to the edge but not otherwise. She meets friends who are walking their dogs there several times a week. Children play ball games, fly kites and model airplanes there.

77. T & J Scott have lived on Chestnut Drive since 1977. They have walked a dog on the Land throughout. They have seen it used for dog walking, children playing football, Frisbee, and making dens in the Copse, as well as jogging, walking, kite flying, golf practice and blackberrying.

78. David Singleton first came to the village in 1982 to see his in-laws. They walked on the Land and exercised their dogs there. He moved to

Claverham Road in 2001 and walked the Land with his two young children, both on and off the path. They would also pick blackberries, fly kites, play with a ball, make snowmen and play in the Copse. Since 2009 he has relied on it for exercise, and tends to walk wherever he sees others walking.

79. Deborah Tidy moved to Chestnut Drive with her family in 1995. They have since then used the Land for all sorts of outdoor activity. Many residents of Claverham use the Land for a variety of outdoor pursuits, especially dog walking.

80. David Bax has lived on Claverham Road since 1978 and walks the public footpaths. In season he picks blackberries and elderflower. When no cows were present he would let his dog run off the lead.

81. Eileen Bax also lives at Claverham Road, and with her children has regularly made use of the open space. The school playground was once available as a safe play area but has been closed due to vandalism.

82. Geoffrey and Toni Bland have lived on Hollowmead since 1979 and from the mid 1980s they exercised their dog on the Land, and have seen children playing on the Land and others exercising their dogs.

83. TR Brooks who has lived on Dunsters Road has walked his or her dog on the Land, and seen others do the same.

84. Betty Brown has lived on Chestnut Drive since November 2006. She has on many occasions walked on the Land, and picked blackberries and played ball games with her grandchildren.

85. Timothy Brunton has lived on High Street since 2002. He used the Land for dog walking, walking with his child, most days and at weekends.

86. Mary Burrige has lived at Hollowmead since April 1975 and has seen people walking there with and without dogs, picking blackberries; making snowmen; children playing football and other activities and people exercising, when she has passed by.

87. Neil & Karen Chappell have lived in the village since 1986. They have walked their dog there throughout, and have played with their children there.

88. Diane & Edward Clode have lived in Claverham since 1986 and used the footpaths as a nature trail when their children were small, and along with many other residents to walk their dogs.

89. Simon & Laura Cockram have lived at Streamcross since 2010 but have known the village since childhood. They refer to the cubs and scouts using the Land in the 1980s; walking their dog since 2010; families taking their children for walks on the Land when flooded during wet weather; seeing people jogging, kite flying, and playing football.

90. Simon Compton has lived at Streamcross since 1994 and has both walked on and walked his dog on the Land, and seen others doing so.

91. KF and K Cook have lived on Dunsters Road since 1998. They have walked and played with their childrens' dogs on the Land, and played with their grandchildren on the Land. Villagers exercise their dogs there.

92. MJ and JA Cox have lived on Whitehouse Road since 2002. They have walked their dog on the Land and pick blackberries. They have seen children playing on the Land and in the Copse.

93. John and Jane Dare have lived at Streamcross since 2001. They walk their dog over the Land; walk there, and have seen others do the same. They have seen children play ball games there.

94. Mr. & Mrs. J. Deacon have lived in Chestnut Drive since 1969. They say the Land has been used by ramblers, dog walkers (frequently), scout and cub groups, and the Copse has been used as a play area by local children. The Land has been used for kite flying, aircraft flying and football. Mr. Deacon was a cub scout leader who retired in 1997 and the Land was used on pack nights for the troop. He comments that the playground on Broadcroft Avenue is too small for general recreational activities, and close to allotments and sheltered housing.

95. Timothy Deacon has lived in Claverham since the 1970s. The residents have used the Land for dog exercising, walking and other outdoor activities. He referred to kite flying, model aircraft flying and use by local clubs such as the scouts and cubs.

96. Mr. & Mrs. J. Fox have lived on Claverham Road since 2008. They use the Land daily to walk their dogs. They have jogged over the Land. Other people have picked blackberries, gone jogging, walking with and without dogs, children playing and running around.

97. Sally Gilbert has lived at Claverham Road since 2005. She has used the Land for walking the dog and her children have played on the Land with ball games etc., and others have been seen doing the same.

98. Derek Green has lived at Claverham Road since 1999. For the last ten years he has carried out dog walking on the Land. He has also undertaken kite flying with his grandchildren, and snowman building. He has seen football and jogging there.

99. Linda and Andrew Haigh have lived at Dunster Road since 1994. Their children played ball games with their friends, and played in the Copse. They picked blackberries and flew kites, and had picnics on the land. The scouts and cubs used the Land regularly in the summer months. Dog walkers frequently used the Land.

100. Derek and Beryl Hancock have lived at Dunsters Road for forty years. In the earlier years they walked their dog there; in more recent years they walked on the Land. Others have throughout walked their dogs, using the entire Land, not simply the marked footpaths.

Youngsters have fun in the Copse and the Land generally. Regarding scout and cub use, they say this:

"After speaking with local farmers to ensure that the fields will be free of animals (and muck spreading) the local cub scout and scout troops have used the fields without let or hindrance for such activities as nature gathering, tracking and 'wide games'. This being the only area within Claverham that such activities may take place.'

101. Andrea and Brian Harwood have lived at Orchard Court since 2006 and for twelve years before that in Cleeve. They have walked through the Land several times a month since 2003, 'geocaching' since 2012, dog walking since 2013 and foraging in the autumn. Children build dens, play in the Land when it is waterlogged, and play ball, Frisbee and tag.

102. Judith Holbrook has lived at Dunsters Road since 2005, and uses the Land for ball games, picking blackberries and sloes. Others use the Land for dog walkers, joggers, birdwatchers and children making dens in the Copse.

103. Helen & M. Hopkins have lived at Dunsters Road since 1976. They walked their dog as a family for more than twelve years, and flew kites and picked blackberries with their children up to the 1990s. They still walk there for recreation. They see others doing the same.

104. Mark Hudson and Katy Fletch have lived on Streamcross since 2010. Ms. Fletch lived at Chestnut Drive for twenty years before. The activities carried out are dog walking on a daily basis; playing football in the summer; hide and seek in the Copse; ball games; children playing in the flooded area; kite flying; snowmen; and playing in the

long grass. They have seen others do the same according to the seasons.

105. The Jarrett Family have lived at Whitehouse Road since 1993.

They have carried out dog walking; walking with children; paddling in the pools that appear in the winter; and picking sloes. They have seen children playing with snowmen, dog walking, football, kites and jogging.

106. Mary & Mr. Kesby have lived at Chestnut Drive since 1971. They

have carried out dog walking, blackberry and sloe picking, kite flying, boomerang throwing and picnicking. They have seen children Frisbee throwing, making snowmen, jogging and children playing.

107. S & CG Lloyd have lived at Chestnut Drive since 1986. They have seen children playing on the Land, kite flying, jogging, picking blackberries and children playing in the floodwater.

108. M. Long has lived on Clavenham Road since 1972. She described walking through the Land with her children, dogs and grandchildren.

109. Bill & Maddie Mclsaac have lived at Claverham Park since 2006. They have walked and their children have played on the Land. They have seen dog walking, photography and nature spotting on the Land.

110. S & DE Meek have lived at Dunsters Road since 2008; Mr. Meek's parents lived there from 1978. The Land is used all year round by dog walkers. They have seen people jogging around the Land. Mr. Meek practices his golf. Children play in the long grass. Their daughter played on the Land from 1983.

111. David and Louise Mills have lived at Parnell Cottage since 1982.

They use the paths for dog walking almost every day. His children played there and used the paths to go to school.

112. Chris Moore husband of Theresa Moore moved to Streamcross in 1990. They would walk through the Land with their young children.

They accompany friends walking with dogs on the Land.

113. Zoe Paterson moved to Claverham Road in 2014. She has walked her dog and played games including football and ball games with her child and friends on the Land. Others walk their dogs and children play on the Land.

114. Pauline & M Payne have lived on Dunsters Road since 1975.

They have used the Land for mushroom picking. Their children and

grandchildren play on the Land and the Copse with friends. There are always people walking or walking their dog on the Land.

115. Sal Pearson has lived on High Street since 2007. Besides collecting manure, she takes her grandchildren on to the Land for recreation. She has seen others walk on, play on and enjoy the area.

116. P & A Rawles have lived at Chestnut Drive since 1967. They have gone dog walking and blackberry picking on the Land. They see dog walking every day.

117. T Rhys-Davies has lived at Dunster Road since 1988, walking weekly on the Land during dry weather. Others have been seen walking pets, playing games such as Frisbee and ball games, and picking fruit.

118. Linda and Robert Rideout have lived on Dunster Road since 1990. They walk on the Land, with pets and children, walking around the perimeter.

119. G & A Sheppard have lived at Hollowmead Close since 1984 but knew the Land before. They played on the Land – kite flying, tree climbing, rounders and football - with their nieces and nephews.

120. Christine & Brian Smith have lived at Streamcross since 2004. They have exercised their dog on the Land three times daily for the past ten years. They have seen dog training; children playing in the stream and flood water; the cub pack using the Land and blackberrying.

121. BJ & P Sullivan have lived at Claverham Park since 1976, using the land for dog walking and blackberrying. Their children played there as did others.

122. Chris, and Robert Toogood have lived at Streamcross since 2012 and walk the Land for exercise. They see much dog walking, children playing, joggers jogging, kite flying model aircraft flying and blackberry picking.

123. I turn next to set out the objectors' evidence from those witnesses who were not called to give evidence. Many of these were persons who were present on site for the purpose of carrying out preliminary work in respect of the proposed housing development on the Land and Dunster's Field in 2014. 'The site' appeared from the context to refer to the Land.

124. Aaron Stokoe, a geo-environmental engineer was on the site for an hour on 17 July 2014 when he did a walk over the entire site, and six hours on 6 November 2014 to conduct soakaway testing. On the first occasion he saw a couple walking a dog on the right of way. On the second four or five people came on to the site, all bar one walking dogs and all adhering to the right of way save for a deviation to see what Mr. Stokoe was doing.

125. David Stoddart attended the site on 22 May 2014 to conduct an access feasibility report, and was on the site for an hour. This was done from the public highway rather than the Land. He did not see anyone on the public footpath or the site.

126. Julie Roughley carried out a topographical survey on the site over 4 and 5 September 2014 and carried out road surveys on 8 January 2015. She did not recall seeing anyone on the site.

127. M J Reeve visited the site on 29 September 2014 to conduct a soil and agricultural land survey. He was on the site for three hours. He saw one walker on the public right of way the Land, but no-one on the way that crosses Dunster Field.

128. Mark Dreissig who is the Senior Urban Designer at Turley, a planning consultancy, gave evidence of those from the business who attended the site. Angela Jacobs, urban designer, visited the site for an hour on 30 September 2014 to photograph and record the physical constraints of the site. She saw a girl walking a dog and two walkers, all on the public footpath. Katy Neaves took photographs on the site for half an hour on 14 October 2014. She saw one dog walker entering the site from the North but did not see whether he remained on the footpath.

129. Matthew Loak is an assistant ecologist at FPCR Environment and Design Ltd. He identified those employees who visited the site. Ben Lansbury conducted a habitat survey on the site for three hours on 16 July 2014. He saw one person walking her dog on the public footpath. Steve Roe and Cerri Rapsey visited the site on 30 July 2014 to survey bats. Their survey started at 8.45 pm and lasted for three hours. They saw no members of the public. Dale Cooper visited the site on 22 August 2014 to set up acoustic monitoring equipment on Streamcross. He saw no members of the public using the site. Mr. Cooper and Joss Bennatt carried out a bat survey on the site from 7.40 pm to 23.15 pm on 26 August 2014. They saw no members of the public. Alex Saunders and Cerri Rapsey carried out a bat survey on 23 September between 6.45 pm until 10pm and on 24 September from 5 am to 7 am, seeing no members of the public. Miss Saunders also visited the site on 10 October 2014 to deploy acoustic equipment at 1 pm and did not see any member of the public there.

130. Neil Lewis, the Project Manager of Gladman Developments, visited the site on 17 July and 28 October 2014, firstly for an hour from 11.30 am and secondly for ten minutes on 28 October 2014. He did not see any member of the public on the site on either visit.

131. Clare O'Hanlon said that she and Jennifer Coppock of Carter Jonas, surveyors, carried out a site inspection for 35 minutes on 23 October 2014. No one else was seen on the site.

132. Nicholas Burnett said that he visited the Land 4 to 5 times a year for the past 40 years. During his visits he saw an occasional person on the footpath but never saw anyone using the site for any other purpose. He has never been aware that the Land was used for any purpose other than agricultural.

Evidence – documentary

133. The Applicants referred to correspondence with the Council relating to the status of the Broadcroft Play Area. It is subject to a restrictive covenant to use the land as a public playing field for the purpose of organised games and a childrens playground only and for no other purpose without the prior consent of the Minister of Housing and Local Government and the National Playing Fields Association. The council let the land to Yatton Parish Council for 125 years from 1st April 1987, and this lease restricts use to a children's playing space and public playing fields for the purpose of organised games only and for no other purpose whatsoever.

134. There are public notices by the entrance to the area which prohibit dogs and horses from the Broadcroft Play Area.

135. I have been supplied with an interesting history of this Land with reference to historic nineteenth century maps¹¹. However that evidence, interesting though it is, is not material to the application.

The 1948 documents

136. I have been sent the documents of title relating to the Land back to 4 November 1949, and associated conveyancing documents. They are all consistent with the use of the Land as agricultural land. It also shows the development of the land around Claverham.

137. It appears (from the conveyance of 8 November 1949¹²) that the land conveyed was part of a piece of land formerly known as 'Broadcroft', OS 570. The plan annexed to the conveyance, assuming that it was accurate to the date of the conveyance, (it is a hand drawn plan to 1/2500 scale, probably traced from the Ordnance Survey) does

¹¹ [4/21]

¹² [4/20]

not show any housing or highway in the location of Chestnut Drive. It does however show a track running in the location of footpath LA21/10/10.

Final Submissions

138. Mr. Daniel Bennett of counsel, who appeared for the Applicants, submitted that the Authority should be astute not to create new 'loopholes' for landowners to avoid the operation and effect of section 15 of the Commons Act.

139. He submitted that the relevant neighbourhood was either Claverham Village or (if different) Claverham Ward, and the locality is Yatton Parish, and the both had been in existence with their current boundaries for more than 20 years. He referred me to Leeds Group v. Leeds City Council [2010] EWHC 810 (Ch) and [2010] EWCA Civ 1438 which he submitted indicated that this statutory requirement should be

interpreted flexibly. As far as the requirement of the inhabitants to come from a 'neighbourhood' was concerned, the existence of a neighbourhood had to be considered on the basis that the term was drafted to relax the pre-existing requirement of inhabitants falling within a 'locality' – according to the comments of Lord Hoffmann in Oxfordshire County Council v. Oxford City Council [2006] 2 AC 674 at paras. 24 to 27.

140. Mr. Bennett submitted that there is no need for precision or excessive concern over boundaries to the locality given that those outside the locality are still able to use the land. He further submitted that the Authority should approve the application if it considered that any neighbourhood or locality might be satisfied by the use established, suggesting that Claverham Ward should be considered as a locality if need be. To do otherwise would be to apply the technical approach deprecated by Lord Hoffmann in the Trap Grounds case.

141. Mr. Bennett then submitted that the test for whether a significant number of inhabitants use the Land is whether their use signifies to the landowner that the use of the land is in general use by the local community for informal recreation rather than occasional use by individuals as trespassers, citing the comments of Sullivan J. in *R v. Staffordshire County Council ex p. McAlpine* [2002] EWHC 76 (Admin).

On the evidence supplied to the inquiry, both those who gave evidence orally and those who gave written evidence, the Authority should accept their honesty and their evidence. The usage that was demonstrated by the evidence was that of typical informal recreation, whether dog walking, children playing, seasonal use such as making snowmen or enjoying the pond that appears on the Land, or more organised use such as use by the scouts and cubs.

142. Mr. Bennett dealt with the existence of public footpaths across the land by submitting that some people did not know that they existed, or where they were (Jo Summers); that use of the Land for simply traversing the land was minimal as the footpath did not take people anywhere any faster than journey by pavement; and that the evidence was evidence of use of all of the Land, and not simply the routes traversed by the footpaths.

143. He stressed that the absence of the grazing farmer from the witnesses called by the Objector indicated that the Objector's case was and was known to be weak.

144. The use of the Land for grazing by cattle was not an obstacle to the registration of the TVG in law, and on the evidence did not prevent the use of the land for informal recreation. The periodical existence of a wet area on the Land did not prevent recreational use, and in fact was

an attraction for some young locals who wanted to play in it. The cutting of the grass crop once a year did not interfere with the use of the Land (save for the minimal period when the Land was being cut) and the public respected the growing grass (by which he meant that they did not despoil it).

145. On the evidence there is no basis for suggesting that such recreational use as occurred was not 'as of right'. The use was open, it was not carried out under the landowner's permission, and it was not carried on by force.

146. Dealing with the argument that the application cannot proceed by reason of the operation of section 15C, Mr. Bennett repeated the Applicants' submissions made prior to my written advices on the matter.

147. The objector, represented by Mr. Gavin Collett of counsel, submitted first that a 'trigger event' within section 15C of the Commons Act 2006 had occurred, and that the Authority could not accede to an application to register the Land whilst that Trigger event still subsisted. The second objection was that the Applicants had not established the necessary elements entitling registration under section 15(2) of the Act.

148. Dealing with the first issue, Mr. Collett made a number of points.

To take these in order:

(1) A lawful change of use for planning purposes cannot occur through acquiescence;

(2) The purpose of the amendment to section 15 was to allow potential building developments to proceed and not to be prohibited by TVG applications; section 15C should therefore be given a wide construction;

(3) Even if there has been a material change of use of the Land for planning purposes for more than ten years, and such use included or comprised public open space use, such use may have become immune from enforcement but it is nonetheless not lawful. It follows that it is not to be regarded as a current lawful use for the purposes of section 15C of the Commons Act 2006. Enforcement action at the notorious Dale Farm travellers' encampment (where unlawful use was enforced against notwithstanding its long existence) demonstrates this;

(4) In any event, the new designation alters the primary use of the land from agricultural to recreational use and it therefore amounts to a potential change of use, or development.

149. Turning to the substantive application, Mr. Collett made no submissions on the proposed amendments to the application. He contended that:

(1) The burden lies on the Applicants to identify a locality or qualifying area within a locality. The neighbourhood must have a sufficient degree of cohesiveness to be such. He accepted that Claverham Ward was sufficiently well defined to be a neighbourhood, but made no factual submissions as to whether that area had sufficient cohesiveness.

(2) The relevant use must be 'of such amount and in such manner as would reasonably be regarded as being the assertion of a public right' citing the dictum of Sullivan LJ in Leeds Group v Leeds City Council [2011] 2 WLR 1010 (at [26]) and of Lord Hope in R v. Redcar & Cleveland BC oao Lewis [2010] 2 AC 70 to that effect. Only 21 people spoke in support of the application, and that is only 4-5% of the number of residents.

(3) Usage of the public footpaths must be excluded from the consideration of usage of the land for lawful sports and pastimes, because such usage is 'by right' and not 'as of right'. Indeed the

matter goes further in that the pathways are not delineated, and may be obstructed (by water or cattle). In these circumstances any reasonable landowner would give persons on the land considerable latitude before they might think that their usage of the land, if walking or dog walking, was not referable to the public footpath.

- (4) Registration would be inconsistent with agricultural use; in particular with the taking of a grass crop. The extent of the uses and the facts in general are the same as were considered by Sullivan J. in R v. Buckinghamshire County Council ex p Laing Homes [2004] 1 P&CR 35 or at the least very similar to it, and for the same reasons (inconsistency with established use; interruption by landowner's use; inadequacy of usage relied upon) the application should fail.

The Trigger Event

150. Turning first to the existence of a trigger event under section 15C, I refer first to my earlier advices on the issue¹³. In summary, it was this. If it was established on the facts that the usage carried out on the Land in planning terms for at least ten years prior to the publication of the 2007 draft plan included use of the Land for public recreation, as well as agriculture, then the publication of the draft plans showing the land as being used as a Community Facility for the purposes of public open space would not amount to 'potential development' as required by section 15C because use consistent that description would not indicate a material change of use. Mr. Collett has raised a number of challenges to that view, and I consider them next.

151. The first point, that a lawful change of use cannot arise through acquiescence, seems to me to be technically correct if it is a reference

¹³ Dated 17 February 2016 and 3 May 2016.

to the theoretical basis of the doctrine of prescription¹⁴ but not I think a material point. It is the case that the statutory test under section 15 of the Commons Act 2006 does not rely on prescription, but a similar statutory basis of long use (see R v East Sussex County Council oao Newhaven Ports [2014] QB 186 – overturned in the Supreme Court but not on this point, that the common law doctrine of prescription was not applicable - per Richards LJ at [13]). The relevance of acquiescence as it appeared to me was that *long use* was relevant both to a doctrine of prescription, or acquiescence, and to the passage of time that renders a changed use lawful under statutory provisions. But long use applies to the doctrines in different ways. For TVGs long use, if it is of the quality required by section 15, can create a TVG; for the Town and Country Planning Act if it amounts to a material change of use, it may become immune to enforcement action. It therefore seemed and seems

¹⁴ It refers to paragraph 9 of my advice of the 3 May 2016

sensible to consider both factual issues of long use at the same hearing.

152. Turning to the second point, I accept that the purpose of the statutory amendment was to prevent TVG applications from being made for the purpose of hindering development. The relevance of this is that when one is considering what section 15C means, a Court may have regard to the mischief that the provision was designed to cure. The oddity of its application is that the sort of event that the amendment was intended to prevent local inhabitants from making a TVG application was a development that was inconsistent with public recreational use. As I indicated in my first advice, the wording of the amendment, by referring to 'potential development' would appear to suspend the right to apply to a TVG where the planning or 'trigger' event makes it more likely that a planning permission consistent with public open space use would be granted. That is likely to be an

unintended consequence of the legislation, but one urged by the Objectors.

153. However, where the meaning of a statutory provision is clear, there is neither need nor indeed entitlement to have regard to the perceived mischief or purpose of the Act to interpret it. Here the meaning is clear; it refers to the trigger event indicating a future change of lawful planning use. It follows that there is no basis for interpreting the amendment so as to suspend the right to make a TVG application where the event does not amount to a potential development of land.

154. Mr. Collett's third point is that a material change of use that has by the passage of time become unenforceable is not a 'lawful' change of use until planning permission is granted, or a Certificate of Lawful Use or Development has been granted under section 191 Town and

Country Planning Act 1990. I do not agree with this contention. Section 191(2) provides:

“(2) For the purposes of this Act uses and operations are lawful at any time if--

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.”

This makes it plain that the effect of an inability to enforce the planning breach under section 173 of the 1990 Act renders the change of use lawful.

155. I have also considered the point Mr. Collett makes concerning the Dale Farm litigation. Mr. Collett made an assertion concerning the facts of that case, but did not cite authority. The litigation concerning

Dale Farm is long and convoluted, but it came to an end with the decision of the Court of Appeal in R v, Basildon District Council oao McCarthy [2009] LGR 1013. That report, and the decision appealed from, set out the legal history of the site in detail. It is evident that the travellers did not seek to challenge the enforcement notices served by Basildon District Council on the basis that they were immune from enforcement by reason of the lapse of time. It follows that these events do not justify or support the proposition that an unlawful change of use rendered unenforceable by lapse of time remains unlawful. I would also note that part of the recommendations of the report by Lord Carnwath which led to many parts of the 1990 Act being enacted was that such unenforceability should lead to the development becoming lawful¹⁵. The effect of a Certificate of Lawful Use is to establish the planning use with certainty and unchallengeably. It therefore provides a

¹⁵ See 'Enforcing Planning Control' (1989) HMSO – see Ch. 7 para. 3.4(v)(vi); 3.9; 3.13 and 3.17.

guarantee for the landowner (or prospective purchaser). The absence of such a certificate does not mean that the existing use is unlawful.

156. Mr. Collett's last point is that even if the current use is a mixed use, the proposed use does not mention agriculture. Therefore it is said the development plan contemplates something happening on the land which is inconsistent with agricultural use; and that is a proposed development within the wording of the statutory provision. For the reasons I outlined in my earlier advice, I do not consider this to be correct. There is nothing in the draft development plan that indicates that local planning authority intend that anything should happen on the Land that is inconsistent with the mixed use of the land for agriculture and public recreation. I therefore do not consider that the designation of the Land as Cultural and Community facilities, or Public Open Space in the plans amounts to or contemplates any 'proposed development' of the Land.

157. My advice to the Authority to reject Mr. Collett's contentions does not however decide the matter. It remains for the Authority to consider whether there has been at the relevant time any mixed use of the Land. I will deal with that issue after I have considered my findings on the historic use of the Land.

Amendment of the Neighbourhood/Locality

158. A registration authority has a discretion to allow an amendment of an application, and should permit an amendment to an application if the amendment can be made without prejudice to any person who might oppose the application – see the comments of Lord Hoffmann in Oxfordshire County Council v. Oxford City Council *supra*. at [61].

159. In the present case I can see no reason against allowing the amendment proposed by the Applicants to Section 6 of their

application (see paragraph 11 above) and indeed Mr. Collett did not suggest any. In the circumstances I advise the Authority to permit the amendments sought. There is no reason of principle why an amendment should not be allowed in the alternative when it comes to asserting a neighbourhood or locality (see the Leeds Group case where such an approach appears to have found favour with the Inspector and both courts that considered it) although consistently with the comments of Lord Hoffmann in the Oxford City Council case the basis of the claim must be put forward by the Applicant; and if the number of versions of potential localities or neighbourhoods became so numerous that reasonable and fair consideration became difficult, such an amendment would not be permitted (indeed it might be difficult to see how an applicant could properly affirm the factual basis of the application in such circumstances). But that is not the position here. I therefore advise the Council to consider the application on the alternative bases that the claimed green relates either to 'the village of

within the Parish of Yatton and Claverham'¹⁶; or that it relates to 'the neighbourhood of Claverham Ward within the locality of Yatton Parish.'¹⁷

Neighbourhood/Locality

160. I agree with Mr. Bennett that more recent legal authority on the application of the requirement that a significant number of the inhabitants come from a 'neighbourhood within a locality' has demonstrated a view that this should be interpreted in a non-technical manner (see Leeds Group v Leeds County Council [2011] Ch 363 at paras. 21 and 22 per Sullivan LJ). However, contrary to Mr. Bennett's submission, I do not consider that the Authority can be pro-active in finding a neighbourhood or locality that would satisfy the statutory requirement if the details given in the application do not. The Authority is obliged to consider whether the case is made out on the basis that it

¹⁶ [1-6A]

¹⁷ [1-16]

is put forward by the applicant (see the comments of Lord Hoffmann on Oxfordshire County Council v Oxford City Council *supra.* at para. 61).

That principle must apply to the application as amended. I therefore consider the two alternative areas that the alleged green is said to relate to, in the alternative.

161. A neighbourhood must be an area of cohesiveness, and not simply a line drawn on a map (per Sullivan J in South Gloucestershire County Council ex p. Cheltenham Builders [2003] EWHC 29803 Admin.). Perhaps more generally, and to beg the question of definition, it must be an area that a reasonable person would recognise as a neighbourhood. It need not have strict boundaries (per Lord Hoffmann in Oxfordshire County Council v Oxford City Council at [27]).

162. In the amended application by e-mail¹⁸ the Applicants rely on Claverham Ward as a neighbourhood. This means that the area so designated must have an element of cohesiveness. The ward is shown on a plan provided by the Applicants¹⁹. In practical terms, the Ward of Claverham encompasses the village of Claverham. It also extends northwards to the former Great Eastern railway line running between Nailsea & Backwell and Yatton, and slightly beyond it at the vicinity of Bridge House Farm, which I note is on Claverham Drove. To the west is the more substantial village and civil parish of Yatton; to the east is the village of Cleeve, on the A370. For all practical purposes the electoral ward seems to me to encompass the village of Claverham and outlying land associated with it. I have no doubt that Claverham, and by association this electoral ward, is properly to be considered a 'neighbourhood' as well as a locality in law. The description of Claverham in the Turley Associates report gives a flavour of the area:

¹⁸ [1-16]

¹⁹ [5-3]

"Local Facilities

Para. 2.33 Claverham has a primary school, café (which sells basic goods), take-away, allotments, Scout Hall, village hall (with satellite Post Office). There is a bus stop located within walking distance of the site with a bus route linking Claverham and Yatton."²⁰

It follows that whether the neighbourhood is described as Claverham Ward or the village of Claverham, either is capable of being and is a neighbourhood for the purpose of the application.

163. The amended application describes Claverham as being 'within Yatton Parish' or in the locality of 'the Parish of Yatton and Claverham'. A locality is an area 'known to the law' – see the comments of Harman J in Ministry of Defence v Wiltshire County Council [1995] 4 All ER 931. Yatton is a civil parish constituted under the Local Government Act 1972. As far as I have been made aware from the documentation in the

²⁰ [A4/99]

application, there is no 'Parish of Yatton and Claverham', whether civil or ecclesiastical. Indeed Mr. Bennett did not argue for an existence of a Parish of Yatton and Claverham²¹. Had it been necessary I would have advised the Council that the reference to the Parish of Yatton and Claverham²² should have been construed as a reference to the civil parish of Yatton, Yatton and Claverham being the two relatively large population centres in it, and the application having been filled in without legal assistance.

164. But in any event, I am of the view that Claverham Ward is capable of being either a neighbourhood or a locality; and Parish of Yatton is a locality. The factual issue is therefore whether the statutory test has been made out by the use of the Land by a significant number of the inhabitants of Claverham Ward over the relevant period.

²¹ See his written closing submissions at para. 7.

²² At [1-6A]

The Effect of the existence of Public Rights of Way across the land

165. This is a very important element of the present application. The difficulty that arises is broadly speaking this. Town and Village Greens are created when the public, or a portion of the public, uses land for recreation in such a manner and to such an extent and period as one would expect the landowner to step in and stop it, if he did not agree to the public having such a right. If he does not step in, but acquiesces in the exercise of the right, then it is fair that the right that the public have purported to exercise should be recognised as a legal right. The difficulty is that if the public already have a limited right to be on the land, at what point should the landowner be obliged to recognise that the public's use goes beyond that limited right? Although this is a question that can only be answered on the particular facts of any case, the Courts have helpfully laid down some principles.

166. In Oxfordshire County Council v. Oxford City Oxford City Council

[2004] Ch 253 Lightman J said this:

"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."

167. Applying those principles to the present case, the points to bear in mind are, first, that there are two extant footpaths across the Land, which have been in existence throughout the twenty year period. This is the second scenario considered by Lightman J, and the presumption is therefore to consider that use of the tracks is prima facie not referable to the existence of a green; or to use more technical language, not 'as of right'. Use of the Land that is not on the route of the footpath would not be covered by this exception. If it is reasonably apparent that the use goes off the footpath, then that use might count towards the Applicant's case. Further, rights of way are generally rights to pass from A to B; they are not rights of recreation. But a person might combine the two. Mr. Bennett submitted that where a right of way was being used for recreational purposes that use should count towards the statutory test, but that is in my view wrong in principle. A jogger running along a footpath does so lawfully, and his activity being by an existing right, and not as if of right, does not count towards the use of

the land as a village green. Equally if a person walks along a footpath kicking a ball as he does so, that is a lawful use of the footpath. I apply these principles to the facts when I consider whether the use has been 'as of right'.

168. Secondly, the footpaths do not run along defined tracks; that is to say that there are no made up or indeed any worn tracks to show those using the rights of way and the landowner where the footpaths run²³. It follows that some degree of deviation from the path is likely to be tolerated or acceptable before a landowner might understand that some greater right than the right to use the footpath was being asserted. On the other hand the route on both footpaths run directly between the points of entry and exist to the Land, so it should be apparent when someone was wandering where they should not.

²³ See the aerial photographs at [O5-1] to [O5-9]

169. Thirdly, Mr. Collett made the point that people might lawfully divert from the footpath if there were cattle in the way, or if the way was waterlogged. I do not consider that for present purposes it matters whether the public would have a right to deviate in such circumstances. In my view if they were to deviate a reasonable farmer would consider that they were exercising their right to use the footpath, so I concur with Mr. Collett's approach here.

170. Fourthly where the person using the footpath has a dog with him, a reasonable farmer or landowner will not insist that the dog stays on the lead, unless there is good reason for this. Cattle in the field might be one such. And if the dog runs off and the member of the public has to leave the footpath to retrieve him, then again a reasonable farmer would consider that to be part of use of the path, nothing more.

Lawful Sports and Pastimes

171. There was no real dispute between the parties as to the extent to which the activities carried on on the Land by local inhabitants were 'lawful sports and pastimes'. Such activities need not be organised but can be informal and include recreational behaviour such as dog walking (see the comments of Lord Hoffmann in R v. Oxfordshire County Council ex p. Sunningwell Parish Council [2000] 1 AC 355).

172. The evidence of those who carried on lawful sports and pastimes can be divided up in various ways. Mr. Collett pointed out that the number of witnesses who recounted usage from their own observation going back the full twenty year period was limited. Whilst that is true as a matter of fact, it is an inevitable consequence of the passage of time and people. If the quantity of people evidencing the use of the site at any particular time changes in a way that might require

explanation, that might indicate that some event has happened which has affected the number of people using the land for recreation.

173. Before considering the particular activities relied upon I consider the quality of the oral evidence that I have heard. In general I found the witnesses to be truthful, and doing their best to recall past events. Some (Clive Fletcher, Carole and Robert Perrott, Jo Summers, and Charlotte Burbidge) had the benefit of photographs to assist their recollection and gave evidence that was more nuanced and reliable as a result. Of the others, I would say that Jo Summers, Kathy Headdon, and Paul Barker were in my view particularly impressive witnesses, who gave their evidence with plain care, making concessions where they felt they ought to be made and sticking to their evidence otherwise. The other witnesses giving evidence on behalf of the Applicants were generally reliable.

174. I assess the evidence of the Applicant's witnesses against the contrary evidence put forward on the Objectors' behalf. The witnesses whose statements were produced by the Objector were not of great assistance in resolving the disputes as to use. I refer to Mr. Kent's evidence below. As far as the various employees or agents of the developer are concerned, they were present on the site for the purpose of carrying out their engaged function, which did not involve the observation of the public on the site. They were present on the site for in the main short period of time on limited occasions. Even were their recollections to be accepted as accurate, they would not disprove the contrary evidence of the Applicants' witnesses.

175. The Objectors asserted that the presence of cattle on the Land, and the waterlogging of part of the Land would have precluded the use of substantial portions of the land from time to time; and the evidence of the Applicants witnesses should be considered weakened

because they did not refer to or accept this. With one exception (Carolyn Baker, whose evidence on the point I found surprising) all of the witnesses who were challenged on the point dealt with it in much the same way – the cattle when present on the Land were not a problem as people were sensible, both when walking by, and when controlling their dogs. When there was a waterlogged part of the Land it was regarded by children as an inducement to play as much as an obstacle. So as a matter of fact I do not consider that either factor imposed a restriction on the public use of the Land.

176. The oral evidence demonstrated a number of recreational activities. The main usage was dog walking over the land, both by the witnesses and more generally. Most of those who came to give evidence stressed that the usage was over the Land generally rather than sticking to the footpaths. Of those who gave written evidence some did not refer to the routes taken by dog walkers, whilst others

indicated that they walked the footpaths. It seems to me likely that details were not given because they were not asked to consider the point, whereas for those who gave oral evidence the point was put at the forefront of their evidence.

177. Many of those who gave evidence also referred to children playing on the Land, either with a ball, occasionally cricket or hide-and-seek. That is unlikely to have been a use that occurred on the footpaths. Other witnesses referred to children playing on the land, or playing with a Frisbee. There is reference also to kite flying and model aircraft flying on the land. More seasonal usages were blackberry or sloe picking, which appear to have been restricted to the hedgerows at the northern and eastern boundaries of the site, and paddling through the pond that appears on the line of the footpath at times of particularly heavy rainfall. Insofar as the paddling was simply part of a journey then that would be part of the lawful use of a footpath. But

insofar as it was not (and I deal with this when considering the 'significant number of inhabitants' point below) all of these activities amount to pastimes.

178. A number of witnesses referred to the use of the land for 'wide games' and associated activities by the local cub and scout pack. This would be an organised and periodic use of the land for sports and pastimes.

Factual Use

179. It was apparent to me on my site visit that there has been little substantial new residential building within Claverham Ward in the relevant twenty year period. Nor does there appear to have been any significant alteration in the availability of recreational open space available for inhabitants within walking distance during that period. Perhaps I should say more accurately that no evidence of any such

alteration or change has been put before me, although it did seem to me that the local authority play area at Broadcroft Avenue must have been refurbished relatively recently. That is the area that contains play equipment suitable for young children, and a prohibition against taking dogs on to the play area.

180. One point of significance is that there appears to have been no event in the relevant period of twenty years that would tend to increase or decrease the use that was made of the Land during the relevant twenty year period. The points of access have remained the same; the use of the land by the landowner or his agent has remained the same; and the size of the neighbourhood has remained the same, there being no substantial residential building in the neighbourhood for that period. The Turley Associates Report in connection with the proposed development stated that²⁴:

²⁴ Para. 2.27 [O4/98]

“The village saw significant growth in the 1970s, which included the development along Chestnut Drive and Dunsters Road. By the end of the 1970s the area south of the site and to the east were developed.”

The inference to be drawn from the evidence as a whole is that the public recreational use of the Land is likely to have remained relatively constant during the twenty year period. I can and should therefore infer that the level and manner of use of the land is likely to have remained relatively constant over the twenty year period in question.

Usage ‘as of right’?

181. In order for recreational use to count towards the statutory test it must be of the appropriate quality, which the statute described as being user ‘as of right’. This means that it is not by way of permission,

force or contentiousness or secrecy. None of these were put forward strongly by the Objectors, although issues of permission and contentiousness did arise.

182. Permission relates to the use of the Land as a right of way, as discussed above. To the extent that the recreational use of the Land might have been considered to be a lawful use of the right of way, the use is regarded as being 'by right' or by permission, and not 'as of right' or without permission. Insofar as the reasonable landowner might reasonably have thought that the recreational use was part and parcel of use of the right of way, then it should not (in my view) be taken into account in considering whether the statutory test has been satisfied.

183. The question thus arises – what sort of use of the right of way falls within its lawful use? In DPP v. Jones [1999] 2 All ER 257 Lord Irvine considered that the public could use the highway for any

reasonable purpose provided that it did not amount to a nuisance to the landowner would be a lawful use of the highway – see 265c-e.. Of course, the use has to be on the highway – a use that was plainly off of the highway would not fall within its scope. In my view whether any particular activity amounts to a reasonable purpose for which the highway may be used is a question of fact. The highway here is a footpath running through agricultural land. It is not a made up pavement in an urban street. As Lord Irvine indicated²⁵, where one has a narrow footpath or bridleway crossing private land, a test of reasonable use would be narrowly construed. In the present case the use is likely to be ancillary to a right of passage. Kicking a football along the footpath is lawful; sitting down to have a picnic or having a game of football on the path is not. Flying a kite from the path would not be lawful because it would in fact amount to an obstruction of the narrow path.

²⁵ At p. 164c

184. As far as the cub and scout use of the Land is concerned, Derek and Beryl Hancock's letter²⁶ might give one the impression that the cub and scout pack were seeking permission from the farmer for the use of the field for their purposes. However it appears to be quite specific; not that they were seeking permission to be there, but that they were checking that the farmer's use of the field was not inconsistent with the use they intended to make of the Land. This is not evidence of the seeking of permission, but of 'give and take' between potentially inconsistent uses of the public and the landowner or his agent, and that does not amount to permissive use – see R v. Redcar & Cleveland Borough Council; ex p. Lewis [2010] AC 70.

185. The presence of cattle and the 'deference' of the public to the cattle, or the short period when the grass was being mown, does not

²⁶ See para. 100

necessarily prevent the use of the public from being 'as of right'. To the extent that the judgment of Sullivan J. in R v. Buckinghamshire County Council ex p Laing Homes [2004] 1 P&CR 35 suggested to the contrary, it cannot stand against the comments of Lord Hoffmann in Oxfordshire County Council v. Oxford City Council [2006] 2 AC 674 at [57] as discussed by Lord Walker in R v. Redcar & Cleveland Borough Council ex p. Lewis (No. 2) [2010] 2 AC 70 at [21] to [28].

186. Nor do I accept Mr. Collett's submissions that the Laing Homes case is a good guide as to whether the test set out in section 15(2) is satisfied as a matter of fact. As Lord Walker pointed out in Redcar and Cleveland, the result in Laing Homes might have been justifiable on its special facts – in particular when viewed against the assertions made by local inhabitants in respect of the previous planning application.

A significant number of the inhabitants of a locality.

187. What is a 'significant number' of the inhabitants of any given neighbourhood is a question of fact. It is a sufficient number to indicate that the land is being used by the inhabitants of the particular neighbourhood, and more than occasional trespassing – according to Sullivan J. in R v. Staffordshire County Council ex p. McAlpine Homes [2002] EWHC 76, and sufficient to indicate to a landowner that a public right is being asserted, according to Lord Hope in Redcar and Cleveland (at para. [67]).

188. The landowner to whom the fact of recreational user has to be brought home is a reasonable, hypothetical landowner, not or at least not necessarily the actual landowner, who may be absent or not paying attention to his land. In the present case the landowner has for the relevant period and beyond let the land for agricultural grazing and grasskeep. Mr. Peter Burnett was unable to give me any real assistance

as to the use made by others of the land because of his absence from it. In fact no representative of the owner or the tenant could or did give satisfactory evidence of the public use of the land.

189. Mr. Kent's written evidence was perfunctory and really amounted to little more than saying that he intervened if the public were seen to interfere with his cattle. The absence of reported difficulty demonstrates only that there was no difficulty as regards concurrent agricultural and public use, whatever that public use comprised; not that there was no recreational public use. I bear in mind also that there were three fields that the cattle grazed in and the evidence was that they grazed one field at a time; the grazing was not year-round, being in fact from April to November; and Mr. Kent would have been on the Land only when delivering his cattle to the site, removing them from it, or attending to them for provision of food or other need. The evidential weight of the contractual provision requiring the licensee to prevent trespass on the

licensed premises is I think very slight. My conclusion is that there is little contrary evidence to rebut such evidence of recreational use as has been put forward by the applicants and on their behalf.

190. Whether there is qualifying user by a 'significant number of inhabitants' is a matter of fact and impression arising from the evidence as a whole. In my view this requirement is satisfied here. My reasons in coming to this conclusion are:

(1) The number of witnesses from Claverham giving evidence as to use of the Fields for sports and pastimes, and the evidence they gave as to use not only by themselves and their families, but by others was significant in relation to the size of the adjoining neighbourhoods. I come to this view whilst disregarding the evidence of those whose usage of the Land might reasonably be considered attributable to the use of the public footpaths running across it.

(2) Mr. Collett criticised the source of the witnesses as coming substantially from the houses bordering the Land. Taking Streamcross and Chestnut Drive as the highways bordering the Land, nine out of nineteen live witnesses live on those roads, as do seventeen out of forty eight witnesses²⁷ who did not attend the Inquiry. I do not consider this as surprising or inconsistent with use by inhabitants of the neighbourhood as a whole, for a number of reasons. First, one would expect those living closest to open land to make the greatest use of it. Secondly, especially as regards those living in Chestnut Drive, the Land or part of it is in constant view. They will be in a position to know what sort of use is being made, and more likely to give relevant evidence for that reason. Thirdly, those who are likely to be adversely affected by a proposed development are more likely to be motivated to give evidence so as to prevent it. This is related to, but not the same point as, the

²⁷ Not strictly accurate in that some letters were written on behalf of more than one person; but the proportion is broadly accurate.

argument that such people will be motivated to exaggerate or fabricate their evidence. That I do not consider that the locals have exaggerated or fabricated their evidence does not mean that they are no more keen to give it than the average inhabitant. I think it likely that they are more keen, and that to an extent explains their willingness to give evidence. But in any event, there is no statutory requirement that the users be spread evenly or in any way throughout the chosen neighbourhood – see per Patterson J in R v. Oxfordshire County Council oao Allaway [2016] EWHC 2677 at para. [69] - which appears to be the thrust of Mr. Collett's contention here.

- (3) The number of written statements from inhabitants of Claverham indicated significant recreational usage. Their tenor supports the contention that the Land has been in general recreational use for the relevant period;

(4) The location of the Land in close proximity to the centre of Claverham, and the general ease of access, means that it is a likely inference that local inhabitants would have known of the Fields; and access was easy;

(5) The existence of historic public rights of way traversing the Land; and the fact that the rights of way are part of a local footpath network leading to and around Claverham, and being convenient for dog walking (there are no styles or gate that would preclude or substantially inhibit the walking of dogs, for example) use of those rights of way for access to school or to the village facilities, would lead to a general knowledge of the Fields, their character and their availability for recreational use in the neighbourhoods. It is to be inferred that locals would have used an accessible recreational facility that was familiar to many of them.

(6) I think it likely that the use of the Land would have increased significantly with the construction of housing at Chestnut Drive, and

to the west of High Street. It appears from the Turley Report (and consistent with the architectural style) that this would have been completed by the 1970s. Again consistently with what I could see of the neighbourhood there has been little significant subsequent residential construction.

(7) There is an absence of alternative open space of a similar nature within easy walking distance of the centre of Claverham. Turley Design's report stated at para. 2.45²⁸:

"Open Spaces

There is a small park and areas of amenity open space within the residential areas of Claverham, behind properties on Chestnut Drive, Streamcross, Claverham Road and Broadcroft Avenue. There is also a network of public footpaths connecting Claverham to the surrounding countryside."

As far as I could see both from the Report and my own view of the area, these amenity areas appear to be very small and limited

²⁸ [O4/102]

indeed. The small park appears to be a reference to the area immediately to the north of the village hall, and as I have commented it seems to me to be a facility that is really a play area for young children rather than a park as would be properly understood.

191. I therefore conclude that the recreational use of the Land to be properly taken into account (that is, disregarding the use that might be attributable to footpath use) is by a 'significant number' of inhabitants of the relevant locality or neighbourhood.

For a period of Twenty Years

192. For the reasons I have set out above, it seems to me highly likely that the levels and patterns of use of the Land that were found to exist before 2014 had in fact been carried on for the previous 20 years. But there is also other evidence that tends to show that this is so.

193. Besides the direct oral evidence of those who witnessed or took part in lawful sports and pastimes going as far back as 1994 (Carolyn Baker, Clive Fletcher, Carole Perrott, Susan Toogood, Jo Summers, Laura Parsons, Anne Berry, Barry Straughton, Nigel Cooper, Kathy Headdon), there exists the specific evidence of a number of witnesses that the cubs and scouts have used the Land for their purposes for at least that period, probably significantly longer. Laura Parsons who has been present since 1994 refers to the local Beaver and cub scouts using the Land on a regular basis; Barry Straughton refers to it since 1984, both he and his wife being involved with the scout group; Gina Ryall who has lived on Dunsters Road since 1996 knows the cubs and scouts use it; Paul Barker has been familiar with the Land since 2010; Simon and Laura Cockram refer to cubs and scouts using the land in the 1980s; Mr. & Mrs. Deacon give evidence of the land being used on pack nights; They have lived at Chestnut Drive since 1969 and Mr. Deacon

retired as a cub scout leader in 1997. Linda and Andrew Haigh who have lived at Dunster Road since 1994 say that the scouts and cubs use the Land regularly in the summer months. Derek and Beryl Hancock have lived in Dunster Road since about 1976 and talk of the cubs and scouts using the Land 'without let or hindrance'. Christine and Brian Smith have lived at Streamcross since 2004 and have seen the cub pack using the Land.

194. This evidence tends to show that the Land has been used by the local cubs and scout pack for many decades. If that is so, then it seems to me undoubtedly the case that the local community would have become aware that this land was generally available for public use, or would have perceived that this was so. In the absence of any restriction imposed on use by the farmer or landowner, it is likely that recreational use would increase over time. This is also consistent with the comment of Mrs. Headdon that when she and her family purchased their house

(on High Street) in 1993 the vendors told them that the Land was the place for dogs to be walked and for children to play. I accept that as an accurate recollection, which indicates a general perception in the community by that time that the Land was available for public recreation.

195. I would note also the evidence of Gina Ryall. It is often the case (in my experience) that witnesses tend to recall with clarity what is recently the case, and then assume that this has been the case for the past 20 years, which leads them into error. Ms. Ryall's evidence was quite specific – although living on Dunsters Road since 1996, her use has varied. She has not used the Land a great deal in the past two years, but used it substantially for the six or seven years before that. This evidence too corroborates my view that the usage of the Land has remained broadly constant over the relevant period of twenty years.

The Trigger Event – Agricultural and/or Recreational Use

196. In the light of the evidence that I have heard it is my view that certainly since the late 1970s, the Land has been in use both for agriculture and for public recreation. The public recreation has not been ancillary to the agricultural use. I am of the view that by 1997 and since then the use of the Land for planning purposes has been both for agricultural and recreational usage, and that the 2007 and 2013 Plans did not amount to Trigger Events for the purpose of section 15C of the Commons Act 2006. It follows that the Application was properly considered by the Council.

Conclusion

197. I conclude that The Applicants have established that the Land the subject of the application should be registered as a Town or Village Green pursuant to section 15(2) Commons Act 2006. The Land has

been used by the inhabitants of Claverham Ward in the locality of the parish of Yatton.

198. If there are any questions arising from this Advice which the Council would wish me to answer I would be happy to do so.

199. Lastly, I would like to express my thanks to the officers of North Somerset Council who ensured that the Inquiry ran smoothly and to time, and in particular to Ms Emma Anderson; to all of those who provided the excellent venue for the Inquiry and its very welcome facilities; to Mr. Bennett and Mr. Collett - I am very grateful to them for their helpful legal and factual submissions; and to the members of the public who attended the Inquiry to give evidence.

Leslie Blohm Q.C.

5th. June 2017

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