IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS CATSHILL MARSHES, CHURCH ROAD, CATSHILL, BROMSGROVE, WORCESTERSHIRE AS A TOWN OR VILLAGE GREEN

REPORT

of Miss Ruth Stockley

19 February 2013

Worcestershire County Council

County Hall

Spetchley Road

Worcester

WR5 2NP

Ref: FM/273/2012/02/AH

Application Number: 273/2012/02

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REPORT

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1. INTRODUCTION

1.1 This Report relates to an Application ("the Application") made under section 15(1) of the Commons Act 2006 ("the 2006 Act") to register land known as Catshill Marshes, Church Road, Catshill, Bromsgrove, Worcestershire ("the Land") as a town or village green. Under the 2006 Act, Worcestershire County Council, as the Registration Authority, is required to register land as a town or village green where the relevant statutory requirements have been met. The Registration Authority instructed me to hold a non-statutory public inquiry into the Application, to consider all the evidence and then to prepare a Report containing my findings and recommendations for consideration by the Authority.

1.2 I held such an Inquiry over 3 days, namely between 5 December 2012 and 7 December 2012 inclusive, and I also undertook an accompanied site visit on 7 December 2012.

1.3 Prior to the Inquiry, I was invited to make directions as to the exchange of evidence and of other documents. Those documents were duly provided to me by both Parties which significantly assisted my preparation for the Inquiry. The Applicants produced a bundle of documents containing their supporting witness statements, evidence questionnaires and other documentary evidence in support of the Application and upon which they wished to rely, which I shall refer to in this Report as "AB1". They also produced a bundle of additional documents containing additional statements, questionnaires and documentary evidence which I shall refer to as "AB2". The Objector produced two bundles of documents containing the written evidence in support of its Objection, which comprised sworn statutory declarations and other documentary evidence upon which it wished to rely, which I shall refer to as "OB1" and "OB2". I have read all the documents contained in the bundles and taken their contents into account in this Report.

1.4 I emphasise at the outset that this Report can only be a set of recommendations to the Registration Authority as I have no power to determine the Application nor any substantive matters relating thereto. Therefore, provided it acted lawfully, the Registration Authority would be free to accept or reject any of my recommendations contained in this Report.

2. THE APPLICATION

2.1 The Application was made by Ms I. P. Frazer, Mr Michael Dobbins and Mrs Judith Sturgess, the Chair, Treasurer and Secretary of Catshill Marshes Action Group respectively, of 310 Stourbridge Road, Catshill, Bromsgrove, Worcestershire B61 9LH ("the Applicants"). It is dated 9 May 2012, and the Registration Authority's

validated date of receipt is 10 May 2012.[1] Part 5 of the Application Form states that the Land sought to be registered is usually known as "*Catshill Marshes – Land off Church Road / East of Stourbridge Road*", and its location is described as "*Catshill – Bound by:- M5 on north, Chadcote Way, Bourne Ave & Mayfield Close on east, Stourbridge Road on west, Church Road & Marsh Way on south*". A map was submitted with the Application attached to the accompanying Statutory Declaration which showed the Land subject to the Application shaded.[2] In part 6 of the Application Form, the relevant "locality or neighbourhood within a locality" in respect of which the Application is made is stated to be "*The village of Catshill, In the Parish of Catshill and North Marlbrook, Within the District Council of Bromsgrove Within the County Council of Worcestershire*".

2.2 The Application was made on the basis that section 15(2) of the 2006 Act applies, which provision contains the relevant qualifying criteria. However, I consider later in this Report whether the Application should be considered on the alternative basis that section 15(3) of the 2006 Act applies. The justification for the registration of the Land is set out in part 7 of the Form. The Application is verified by a Statutory Declaration in support made on 9 May 2012. As to supporting documentation, evidence questionnaires, witness statements, photographs, maps and other documents were submitted with the Application, all of which are contained in the Applicants' bundle.

2.3 The Application was advertised by the Registration Authority as a result of which an Objection dated 5 July 2012 was received made by CALA Management

[1] The Application is contained in AB1 at tab 1 page 1.
[2] At AB1 tab 1 page 11.

Limited, supported by a witness statement, which was subsequently supplemented by a letter dated 11 October 2012 ("the Objection").[3]

2.4 I have been provided with copies of all the above documents in support of and objecting to the Application which I have read and the contents of which I have taken into account in this Report.

2.5 Having received the Application and the Objection to it, the Registration Authority determined to arrange a non-statutory inquiry prior to determining the Application which I duly held.

2.6 At the Inquiry, the Applicants were represented by Mr Paul Wilmshurst of Counsel, who attended the first day of the Inquiry only, and by Mr Philip Sharp of 62 Wildmoor Lane, and the Objector was represented by Mr Douglas Edwards, Queen's Counsel. Any third parties who were not being called as witnesses by the Applicants or the Objector and wished to make any representations were invited to speak, and one additional person did so.

3. THE APPLICATION LAND

3.1 The Application Land is identified on the map submitted with the Application on which it is shaded.[4]

3.2 It is an irregular shaped parcel of land measuring 6.6 hectares in area (16.37 acres). It is bound by the M5 motorway to the north, residential estates to the east,

[3] The Objection is at OB1 pages 1-15.
[4] At AB1 tab 1 page 11.

Church Road to the south and the rear of properties on Stourbridge Road to the west. Battlefield Brook runs north to south through the Land. The Land is open and undeveloped, and is heavily overgrown in places. There are worn paths evident, particularly on the eastern side of the brook, as identified on the Plan of footpaths and access points at AB1 tab 5 ("the Footpath and Access Points Plan"), which Plan also identifies the various access points onto the Land.

4. THE EVIDENCE

4.1 Turning to the evidence, I record at the outset that every witness from both Parties presented their evidence in an open, straightforward and helpful way. Further, I have no reason to doubt any of the evidence given by any witness save as indicated below, and I regard each and every witness as having given credible evidence to the best of their individual recollections.

4.2 The evidence was not taken on oath.

4.3 The following is not an exhaustive summary of the evidence given by every witness to the Inquiry. However, it purports to set out the flavour and main points of each witness's oral evidence. I assume that copies of all the written evidence will be made available to those members of the Registration Authority determining the Application and so I shall not rehearse their contents herein. I shall consider the evidence in the general order in which each witness was called at the Inquiry for each Party.

CASE FOR THE APPLICANTS

Oral Evidence in Support of the Application

4.4 **Ms Imir Frazer**[5] is one of the three Applicants and is the Chair of Catshill Marshes Action Group. She was heavily involved with the Application. The Action Group was set up in February 2011. It has a total of some 8 members. It is particularly concerned over any potential development of the Land as that would remove the rights of local people to use it. The Group is an informal one and does not have a constitution. She was involved in the collation of the evidence. Short questionnaires were handed out to people living in the areas nearest the Land asking how people had used the Land and after replies were received, a public meeting was held that was attended by villagers to determine what activities would be specified on the evidence questionnaires in questions 16, 18 and 23, although each question allowed additional activities to be added. The boxes that were ticked in response to question 23 concerning activities that had been seen taking place on the Land were ticked as standard. Hence, although on her form "rounders" was ticked as standard as having been seen, she had not personally seen that activity on the Land. She acknowledged that others may have been in the same position where they had not themselves seen all the activities ticked on their own signed forms. Similarly, "sledging" was completed as standard as having been seen on each questionnaire in response to question 22, as were other responses, which were completed as a result of the discussions at the public meeting.

4.5 She has lived at 310 Stourbridge Road since 1998. Prior to then, she lived in Catshill between 1981 and 1991. Her two Children played on the Land with their friends and made dens on it between 1981 and 1987 after when they both moved

[5] Her written evidence is at AB1 tab 6 number 4.

away from home, but that was outside the relevant 20 year period. She owned a dog from 1983 and 1995, and her or her Daughter walked her dog round the eastern part of the Land occasionally whilst living in Catshill, but that was also outside the relevant period. When she went onto the Land with her Children, she walked the dog and would "*just use the paths*". She then accessed the Land at Access Point 3 as shown on the Footpath and Access Points Plan at AB1 tab 5, walked a circular route along the well worn paths on the south eastern part of the Land near to Access Point 3, and then returned to Access Point 3. Her Children and the dog wandered off the paths, but not far away from them, but she remained on them. In those years, the areas of the Land off the paths were rough in places, but other areas were not. There were brambles off the paths in some areas.

4.6 Since 1998, she has accessed the Land via her garden gate. There has always been a gate on the rear boundary of her property leading onto the Land. Her use of the Land since 1998 has been on the western side of the brook, and she tended to stick to the well worn paths, namely the paths shown on the Footpath and Access Points Plan. Those paths are also shown on the 1993 aerial photograph.[6] The alignment of the path shown on that aerial photograph on the western side of the brook is as she recalled it. They were definite paths on the Land which were quite clear on the ground. The condition of the Land then became much rougher as it was not managed by the Landowner. Even in 1998, the Land beyond the paths was heavily overgrown. That level of overgrowth was consistent from 1998 save that local residents removed some of the brambles in order to access the Land. She generally stuck to the paths. Either side of the paths, the Land was not impenetrable, but it was pretty overgrown in parts.

[6] At AB1 tab 4 letter O.

The vegetation shown alongside the path on the Objector's 1995 photograph[7] was generally representative of the condition of most of the Land on either side of the paths on both the eastern and western sides of the brook. Some areas were impenetrable where the vegetation was overgrown and where there are large brambles. However, there are other parts of the Land which are quite open. The less overgrown parts comprised approximately 20% to 30% of the Land whilst the remainder was quite overgrown. There were worn paths on the Land to the rear of Bourne Avenue that had been created by users. Walkers and dog walkers used those paths. Generally speaking, the paths were well used. She accepted that the most consistent use of the Land was along the worn paths. She is aware of badgers being on the Land as they came into her garden. She has used the Land since 1998 particularly for nature watching and also for blackberry picking when in season. When nature walking, she accessed the Land from her garden gate and walked onto the path along it in a northerly direction to meet the path running along the Land's perimeter at the northern end. She did not tend to walk off the path as the Land was by then very overgrown, particularly with nettles, but with a clear path through. The vegetation died back during the winter months when she did not stick to the paths as often as the Land was then more accessible, but there are quite distinct well worn paths on the Land. It has been completely cleared recently. The blackberry bushes she used were along the fence line outside her property and further to the south. Many of the bramble bushes on the Land are located close to the worn paths, and it was not necessary to stray far off the worn paths to pick blackberries on the western side although it was necessary to stray further on the eastern side. The eastern side has not been subject to the clearance works to date. She has not had a dog since 1995. She has

[7] At OB1 page 104 top photograph.

used the Land since 1998 around 5 or 6 times a year. She only went onto the eastern side of the Land within the last 12 months for the purposes of the Application.

4.7 Her Grandchildren have played on the Land when visiting whilst she stood at her gate to watch them. They live in Kent and have never lived in Catshill. She has seen other children playing on the eastern part of the Land where it is more open and some play down by the area of the brook, but she has not seen a lot of children playing on the Land. She recalled a child kite flying on the Land on one occasion along the eastern edge close to Access Points 8 and 9. She has not seen any organised sports on the Land, nor has she personally seen rounders being played on the Land or anyone drawing and painting on the Land. The community activities she had seen on the Land were during the 1980's outside the qualifying period save for one bonfire on the eastern side in the late 1990's. She has seen many other local residents walking on the Land, with and without dogs, both using the well-worn paths and also walking off them. The predominant use of the Land is for dog walking. The dog walkers tend to stick to the worn paths in general, but she recalled one lady on one day walking off the path and along to the stream. Apart from that one lady, the other dog walkers she has seen using the Land were on the paths when she saw them.

4.8 She did not see any signs or fencing on the Land until January 2012, and her use of the Land has never been challenged. She acknowledged that a sign is in place next to the locked gate leading onto the Land in the north west at the top of the private service road in front of her house. She did not dispute that such sign had been in place since September 1997, but stated that she had never seen it herself prior to January 2012 as she never looked in that direction when she was driving and she did not walk

along that route. She had become aware of a sign on Church Road approximately 4 or 5 years ago, but she did not take much notice of it. She did not dispute that it had also been erected in September 1997, removed, and then replaced in 1998. She had never seen any signs erected elsewhere around the Land, namely in the other 3 locations contended by the Objector marked at points C, D and E on the Plan at OB1 page 64, but she did not dispute the Objector's evidence that those signs had been erected in 1997 either. The locations identified as D and E on that Plan were at access points onto the Land, but many people had not seen them. Her particular use of the Land had generally been confined to the western side nearest to her house. She further acknowledged that the day after the erection of the notices on 9 September 1997, one local resident, namely Mrs Rachel Kennedy of 64 Bourne Avenue, had telephoned the Solicitor whose details were on the signs expressing concerns over being able to walk her dog on the Land having seen one of the signs.[8] Such sign had therefore come to the attention of a local resident within one day. That resident would have been likely to access the Land from the eastern side. A similar telephone call had been made by one Mr Keith Westwood of 330 Stourbridge Road around that time,[9] so she acknowledged that the sign at the top of the service road must have come to his attention. She did not dispute that the notices erected at points C, D and E on the Plan at OB1 page 64 remained in situ for approximately 10 days, and that the notices at points A and B remain in situ. As to their wording, she agreed that they stated "PRIVATE LAND No Trespassing" followed by the details of Mr Riley's Solicitors,[10] but pointed out that many people had walked on the Land for a long period of time.

[8] The letter referring to that telephone call is at OB1 page 122.
[9] The relevant letter is at OB1 page 123.
[10] A photograph of the notices is at OB1 page 69.

4.9 She was aware that heras fencing had been erected along the Land's Church Road frontage on 23 January 2012 in order to deter entry where clearance works were taking place. However, people from the eastern side could still use the Land. She acknowledged that if heras fencing is erected across an access point to land, it is obvious that it is being used to prevent access to such land.

4.10 **Mr Philip Sharp**[11] has lived at 62 Wildmoor Lane since May 1987. He has used the Land from 1987 onwards. He has 3 Children born in June 1977, March 1978 and November 1985. He and his family regularly walked their dog on the Land between 1987 and 1992, and thereafter, they continued to visit the Land to walk, and for his Children to play and to collect grasses and dandelions for their rabbits and guinea pigs. The family also enjoyed the wildlife on the Land, including the fish in the brook and the various birdlife, and from 1999 until 2004/2005, they took their pet ferret to the Land on a lead. They generally accessed the Land at Access Point 8 from the end of Mayfield Close, walked along the path around the balancing pond and went to the area of the brook. They walked around the Land on a circuit, mostly on the eastern side. They would "*mostly*" be on the paths, but not exclusively. On occasions, they walked across the former log bridge that was removed as part of the Land's clearance in 2012 and walked on the western side. He has used all the paths shown on the Footpath and Access Points Plan save those close to the motorway and along the rear of the Stourbridge Road houses. They picked blackberries from the Land around 2 or 3 times each season. He and his family used the Land around 6 times a week until 1999. His Children left home around 2006. From 2005 onwards, he has visited the Land around twice a month to walk and to look at the wildlife as part of his walk. He

[11] His written evidence is at AB1 tab 6 number 46.

has also used the Land for kite flying on approximately 4 occasions, which was possible to do on the eastern side of the Land but not on the western side due to the overhead cables. He "*occasionally*" saw others using the Land to walk their dogs and from time to time he saw children playing on the Land. When he was using the Land 6 times a week until 1999, on average he would see one or two people each time. He was usually on the Land early in the morning and sometimes in the evening during the summer and at variable times at weekends. He saw more children on the Land at weekends than during the week. He assumed that many of the people he saw using the Land stuck to the paths given the worn tracks that were created. The children tended to be off the paths and they tended to head for the brook where they had created dens in 2 locations. He has never seen rounders being played on the Land nor anyone painting on the Land. He had seen a bonfire on the event on two occasions in the early 1990's. He had not seen any community events on the Land post 1992. The most predominant uses of the Land have been dog walking by adults and playing by children.

4.11 The Land was much less overgrown when he first knew it 1987. He used the Land in a very different way then when it was much easier for children and dog walkers to access and to disperse across the Land. The western side became more overgrown with brambles and nettles. There was a greater volume of people accessing from the eastern side which curbed some of the vegetation there from growing totally wild. In the earlier years, there were quite extensive areas that were open. By the mid to late 1990's, the vegetation was around 12 inches high in the central eastern areas. It became more overgrown towards Church Road. Between 2000 and 2010, there were only a few areas that remained open. On balance, less numbers of people used the

Land as it became more overgrown. As it became more overgrown, there was an increased use of the paths.

4.12 His use of the Land was never challenged. Around late 1997, he saw a sign on Church Road stating that the Land was private and giving a contact address. He subsequently saw a similar notice near the access gate off Stourbridge Road close to the motorway bridge. He did not see any other notices, and assumed that those he had seen applied only to the western part of the Land. He continued to use the Land after seeing the signs. He and his family accessed the Land from the end of Mayfield Close, namely Access Point 8. Within the last 8 years, a locked gate was erected at that location. However, there remained a clear gap at the side which enabled pedestrian access and there was no sign on the gate so he assumed that he was free to continue to enter the Land at will.

4.13 He is the author of the Footpath and Access Points Plan. The Access Points and the Footpaths shown were identified from photographs. It is not intended to be to scale. The 1993 aerial photograph[12] shows the defined paths on the southern part of the Land. People had created worn paths on the Land as of 1993. The 1995 photograph[13] shows the vegetation growth at the side of that worn path. The 1999 aerial photograph[14] shows the paths that currently exist having been created on the area of the Land to the rear of Bourne Avenue where the paths have formed a loop around that area. The worn paths have been created through use. Adults have "*generally stuck to the paths*".

[12] At AB1 tab 4 letter O.
[13] At OB1 page 104 top photograph.
[14] At AB2 tab 8.

4.14 **Mrs Laurie Elliott**[15] has lived at 24 Woodrow Close since 1988, but she also lived in Catshill as a child in the 1960's when she regularly played on the Land. Since 1988, she has used the Land daily to walk her dogs. She has always had a dog throughout the relevant 20 year period. Her two Children, born in 1989 and 1992, accompanied her and ran around on the Land. Since 1988, she has accessed the Land mainly from Access Point 9, but also from Access Points 1 and 2, and from Access Points 3 and 8 occasionally. During the summer, she tended to keep to the paths as much of the Land was overgrown. During the winter months when the vegetation had died back, she walked through the trees and by the brook on the eastern side. However, she did not see others using that route. She usually used the eastern side. She had not been on the western side for over 10 years as that area became too overgrown. Her general route during the summer was to walk from Access Point 9 to Access Point 2 and to follow a circuit round the worn paths. It was too overgrown to go anywhere else in the summer months or to leave the paths when the vegetation could reach shoulder height. The Land off the paths was not impenetrable during the summer, but you would be likely to sustain a few scratches and nettle stings if you walked off them.

4.15 She has seen children making dens at the area where the ditch is located near to Access Point 9, but not for the last 5 or 6 years. She has seen children playing hide and seek all over the Land at weekends during the summer. Most weekends she saw 2 or 3 children playing in the brook. Question 23 of her evidence questionnaire relating to activities she had seen on the Land was already completed for her. She had seen children playing bat and ball games on the Land in the late 1990's, particularly during

[15] Her written evidence is at AB1 tab 6 number 19.

the summer months, in the triangular area surrounded by the paths to the rear of Bourne Avenue. She had also seen children fishing in the brook 2 or 3 times a year. She has picked blackberries from the Land from the bushes between Access Point 9 and Access Point 1 whilst she was on the path, and has seen others blackberry picking in the season. She has seen children kite flying on the Land, but not often. There have been bonfires on the Land, but she has not attended them. She never saw any signs at Access Point 9, but she was aware of the notice on Church Road erected around 10 years ago as she had driven past it. It was unclear which part of the Land it referred to. It did not affect her use of the Land.

4.16 **Miss Alison Garth**[16] has lived at 73 Mayfield Close since 1993. She has used the Land weekly since then, particularly for walking and bird watching. She has also picked blackberries from the Land when in season. She has only accessed the Land via Access Point 8. From there, she has followed the paths on the eastern side down to the brook. She usually used the eastern side, but used the western side to pick blackberries which she accessed via a fallen tree over the brook. She then followed a route up the side of the brook where there were blackberry bushes. She walked along the worn paths mainly, but would go off the paths around 3 or 4 times each month if and when she saw something of interest. Around the early 2000's, a gate was erected at the bottom of Mayfield Close to discourage fly tipping, but a gap for pedestrians was left. She has never seen any notices stating that the Land was private and her use of the Land has never been challenged. She occasionally drives down Church Road but has never walked there. She only saw the notice there during the last 12 months. She had not seen the notice at the gate near Stourbridge Road as she does not go there.

[16] Her written evidence is at AB1 tab 6 number 26.

She acknowledged that it was clear that the notice meant that people should stay off the Land.

4.17 She has seen others using the Land, predominantly dog walkers and children playing. The circuit of worn paths on the eastern side has been created by use. Dog walkers "*predominantly*" followed the paths, although some went off them. She has seen children's dens on the Land which the children generally head to. She has also seen children fishing with nets around 3 or 4 times a year, and kite flying around twice a year in the area between Access Points 1 and 2. There was a bonfire on the Land in the early 1990's, but she has not seen any community celebrations on the Land.

4.18 **Mr Douglas Evans**[17] has lived at 28 Woodrow Close since 1982. He has used the Land from 1983 onwards for walking, dog walking and nature watching. He uses it daily to exercise his 2 boxer dogs that he has had for the last 10 years, and prior to that he always had a dog during the relevant 20 year period. He has also used the Land with foster children of different ages whom he helped to look after and their friends for nature walks, to fish in the brook and to go blackberry picking over the last 22 years. He also used the Land for kite flying with one of the children. They used the eastern side of the Land only. He accesses the Land via Access Point 9 through the back of the garages. He does not keep to the paths with his dogs, but goes onto the grassy areas and throws balls around for the dogs. Access Point 9 does lead onto a worn track which goes south to a circuit of worn paths which have been created through use. A number of local residents walk their dogs on those worn paths, which

[17] His written evidence is at AB1 tab 6 number 20.

Access Points 1, 2 and 3 also lead to. That circuit of paths has always been there since he has known the Land. In general, dog walkers use the paths while their dogs run around on the Land. He has seen others using the Land, mainly during the evenings and at weekends, and children playing there mainly in the summer months when they make dens amongst the bushes and trees. The predominant uses of the Land are dog walking and children playing. He has never seen any notices on the Land until the clearance took place and his use of the Land has never been challenged.

4.19 Catshill Village is a thriving community with its own local shops, a library, 5 pubs, 2 schools, a Village Hall, numerous churches and other community facilities.

4.20 **Mrs Maxine Hanlon**[18] has lived in Catshill since 1974, namely at Woodrow Close from 1974 to 1984, at Brookside Drive from 1984 to 1988, at Stourbridge Road from 1988 to 1992, at Bourne Avenue from 1992 to 1997, at Birmingham Road from 1997 to 2004, and at her current address, 6 Brookside Drive, from 2004 onwards. Whilst she lived at Stourbridge Road, she accessed the Land from the gate in her rear garden. Her 2 Children, born in 1972 and 1975, played on the Land with their friends then on the western side near to the house, mostly during the summer months. The Land was not as overgrown then. They were aged 20 and 17 respectively by 1992. There were worn paths on the western side at that time which she used. When at Bourne Avenue, she accessed via Access Points 2 and 3. Her Children had left home then, but she had a dog that she walked on the Land daily around the circuit of paths on the eastern side. She did not use the Land much whilst she lived at Birmingham Road as it was too far away. The Land is primarily used by those living closest to it.

[18] Her written evidence is at AB1 tab 6 number 39.

Since 2004, she has used the Land to walk her dog and with her Grandchildren, aged 12, 7 and 3, around 3 times a week. She looks after the youngest 3 days a week and her Daughter's dog 3 times a week. She accesses via Access Point 9, and has used the eastern side. She uses the circuit of worn tracks down to the brook to the rear of Bourne Avenue when she has her Granddaughter. When she is dog walking, she walks along the paths, but also off them and all over the Land. She acknowledged that the paths had been created due to people continually walking on them, and that her use of the Land involving going off the path and into the overgrowth was not typical of the use made of the Land by others. She has also accessed the Land via Access Point 2 and then walked in a southerly direction off the path towards Church Road. She took that route recently with her Granddaughter. In re-examination, she stated that she walked only to around Access Point 3. She has been aware of the notice at Church Road since 2004, and acknowledged that she ought to have answered "yes" to question 31 in her evidence questionnaire that related to notices. She has also seen the sign at Bourne Avenue, but could not recall since when. She ignored the signs. She understood their meaning, but continued to use the Land as it had always been used.

4.21 The Land is used frequently, particularly for dog walking and for children to play. It has become more overgrown over the years, but the numbers of people using it have remained constant. There were annual community bonfires on the Land, but they were during the 1980's.

4.22 **Mrs Judith Sturgess**[19] has been the Secretary of the Catshill Marshes Action Group for approximately 2 years and has lived at 52 Bourne Avenue since 1965. She

[19] Her written evidence is at AB1 tab 6 number 15.

was involved with handing out the evidence questionnaires. She was unable to explain why some of the questionnaires had a standard answer already typed in to question 31 relating to notices on the Land whereas others did not.

4.23 She and her Husband regularly walked on the Land when they first moved to the area, and their 3 Children, born in 1968, 1970 and 1971, subsequently played on the Land with their friends, fished in the brook and camped out overnight during the early 1980's. The youngest was 21 by 1992, and their use of the Land was prior to 1992. During the 1980's, the Land was cultivated. Once that ceased, it gradually became overgrown with brambles from the early 1990's. When her Children were young, many children played on the Land.

4.24 Their Grandchildren now play on the Land and she goes with them. She and her Husband had a dog from 1985 until 2001 which they walked on the Land at least twice a day. They used the footpaths and also walked up to the northern part of the Land that was not as overgrown as at present, went down to Church Road, sometimes via the worn path, and walked on the western side. The vegetation that was typically on either side of the path leading to Church Road as of 1995 is that shown on the Objector's photograph.[20] From around 1997 when the dog became older, they just walked on the eastern side. Post 2001, she has continued to walk on the Land on the eastern side to pick daffodils, to go blackberry picking in the season, and to take her Grandchildren to see the ducks. She has used the Land probably once every couple of months since 2001. There are currently worn paths on the Land. The circular route of paths on the eastern side has always remained as it is at present save that it is a bit

[20] At OB1 page 104 top photograph.

more overgrown around its outskirts. The worn track leads close to the brook. However, when they walked the dog in that area, they also walked off the paths. At the present time, the area off the paths is not impenetrable save in the area towards Church Road. She follows the paths at present, but goes off them such as to pick daffodils. She has have mainly accessed the Land via her private gate at the rear of her property. She has attended community bonfire parties on the Land which ceased in the late 1980's, but her neighbours had private family bonfires on the Land up until around 1995/1996. She has seen many people using the Land for dog walking and children playing on the Land. She can see the Land from her house. She has seen children sledging down the western side up until the early 1990's. After then, the Land became overgrown with brambles. She saw a lady sketching on the Land on one occasion around 10 years ago.

4.25 Their use of the Land has never been challenged, and she has never seen any notices on the eastern side of the Land. She has seen the sign on Church Road when she has driven past which conveyed to her that the Landowner did not want people to go onto the Land, but she continued to use the eastern side where she never saw a sign. Despite having seen that sign, she had answered "no" to question 31 of her questionnaire as she was merely responding to the part of that question that she had not seen any fencing on the Land rather than that she had also not seen any notices. She accepted in cross examination that her answer to that question in her questionnaire was possibly misleading. Heras fencing was erected on the Land around 23 January 2012, including near to her house.

4.26 **Mr Michael Dobbins**[21] is the treasurer of Catshill Marshes Action Group. He was involved with the collection of the evidence questionnaires. He was unable to explain why some of the questionnaires, namely those completed in October 2011, had a different standard typed answer to question 31 than those completed in November 2011 and subsequently. He had answered in question 31 in his questionnaire that he was unaware of any notice on the Land attempting to discourage access despite having taken a photograph of the notice on Church Road in October 2011.[22] His explanation was that as the Land is separated by the stream, he had always understood it to be split and that the notice only applied to the western side. However, he accepted that he ought to have expanded his answer in his questionnaire as his answer was possibly misleading.

4.27 He has lived at 17 Woodrow Close since 1973 which has a good view of the Land. He has used the Land on both sides of the brook since 1973. His 2 Sons, born in 1971 and 1974, used the Land until around 1988 by when they had grown up. He has used the Land himself to walk his dogs, and to watch the buzzards and other birds and the wildlife. He had a dog between 1973 and 1986, and then had his Mother's dog from 1990 until 1995. When dog walking, he tended to walk on the paths whilst the dog ran around. His interest in bird watching commenced around 1993, and he has used the Land 2 or 3 times a week since then for walking and for bird watching. His means of access has been via Access Point 9. He uses the paths for his nature observation, but does not tend to stay on them. Instead, he walks all over the Land trampling down the undergrowth. The vegetation on the Land varies from year to year. The western side grew to 3 or 4 metres high before the recent clearance. The

[21] His written evidence is at AB1 tab 6 number 25.
[22] At AB1 tab 4 photograph 47.

eastern side has remained relatively as it is now over the last few years. He took the photographs in October 2011 and October 2012 produced by the Applicants.[23] They were taken to show the difference in the condition of the Land over 12 months, namely that it became a little more overgrown in places but nothing else changed. The Land's condition has not affected his use of the Land. He has no difficulty in treading down a few brambles. When he has gone out on the Land on his own, he has not seen many other people using the Land as he tends to go into the "*wilder parts*". He has seen children playing on the Land and people walking on the Land with their dogs. He has seen people using the Land from his bedroom window. He and his neighbours had bonfires on the Land in the 1970's and 1980's. He is not aware of any community activities on the Land from 1992 onwards. In the early 2000's, a locked gate was erected at the end of Mayfield Close, but a walkway was left open to one side allowing pedestrian access to the Land. He has never seen any notice at that access nor on the Land to indicate that it was private. His use of the Land has never been challenged and he has never been given permission to use it.

Written Evidence in Support of the Application

4.28 In addition to the evidence of the witnesses who appeared at the Inquiry, I have also considered and had regard to all the written evidence submitted in support of the Application in the form of additional witness statements, evidence questionnaires (including those submitted at the Inquiry) and other documents contained in the Applicants' Bundles. However, whilst the Registration Authority must take into account all such written evidence, I and the Authority must bear in mind that it has not been tested by cross examination. Hence, particularly where it is

[23] At AB1 tab 4.

in conflict with oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to such cross examination.

CASE FOR THE OBJECTOR

Oral Evidence Objecting to the Application

4.29 **Mr Peter Horridge**[24] is a chartered town planner acting on behalf of both the Riley family in relation to the part of the Land to the east of the brook and Land & Leisure Limited in relation to the area to its west. His first visit to the Land was in 1983 when it was not cultivated. In June 1995, he advised the Rileys to take steps to protect the part of the Land they owned on the eastern side of the brook from a village green claim as he was of the view that it was vulnerable to such claims. He attended the Land in August 1995 in connection with a boundary dispute on the eastern part when he recalled that it was partly overgrown with some trodden paths. He next attended on 10 April 1997 in connection with the development potential of the Land when he walked round the western part and noted it to be overgrown in places. He did not recall seeing anyone on the Land on that occasion.

4.30 In 1997, he advised both the Rileys and Land and Leisure Limited on the erection of appropriate signs on the Land. Five locations for the signs were identified which were perceived as the most obvious access points onto the Land. They were chosen as they ensured a sign on the frontages of the Land to public roads and were also the most obvious places from where it was known that the public had tried to enter. The sign at location E on the Plan was on the boundary of Mr Riley's land. The signs were ordered from Signs Express and were duly erected on 9 September 1997 at

[24] His statutory declaration is at OB1 tab 5.

those five locations.[25] They each stated "Private Land. No Trespassing. Hawkins & Co Solicitors Dudley." and were equipped with anti-vandal nuts and protective films. On that date, he recalled seeing trodden paths on the eastern part and that other areas were overgrown.

4.31 He returned to the Land on 15 September 1997 when he discovered that two of the signs that had been erected on the eastern side of the bridge on Church Road and at the entrance from the garage court on Bourne Avenue/Chadcote Way respectively had been turned round and a third on the northern boundary of the eastern part had been removed. He turned the two signs that had been turned round back to face the correct direction and advised Mr Riley to search for the missing sign. However, by 19 September 1997, all 3 of the signs erected on the eastern part of the Land had been removed and Mr Riley was unable to find them. The other sign on the western side of the bridge on Church Road had also been removed by that date, but that was retrieved. The only sign then remaining on the Land was that erected at Stourbridge Road. He reported the removal of the signs to the police. The sign on the western side of the bridge on Church Road was re-erected on 24 April 1998. The Land therefore had the benefit of signs positioned at its only 2 frontages with the public highway and at its only interfaces with where the public have rights of access. The Land appears on the ground to an outside observer as a single parcel of land with no demarcation between the two landholdings. He was thus of the view that the two signs were sufficient to demonstrate that the Land as a whole was privately owned. None of the three signs removed from the eastern part of the Land were replaced. Mr Riley was concerned at having incurred the cost of erecting 3 signs on his Land for signs that were all

[25] Shown on the Plan at OB1 page 64.

removed within a very short period of time and that such was likely to recur if he paid for the provision and installation of new signs for which he was offered no discount from the providers of the signs.

4.32 He lives in Bromsgrove and drove past the Land around once every couple of weeks when he took the opportunity to satisfy himself that the two signs remained in situ. He attended the Land again on 26 April 2006 to assess its development potential. He entered via the access point on Stourbridge Road from where he attempted to walk as far onto the western part of the Land as possible, but the overgrowth and brambles made much of the western part of the Land inaccessible. He marked on his Plan the extent to which he was able to walk onto the Land.[26] He has not attended the Land frequently since 2006.

4.33 **Dr Rachel Gordon**[27] is a professional ecologist. She carried out a site inspection and habitat survey of the Land on 2 August 2010. The Land was then unmanaged and predominantly comprised areas of tall ruderal vegetation, including bramble and nettle. The area to the west of the brook was particularly overgrown. She noted evidence of some access on the eastern part of the Land in the vicinity of Bourne Avenue, which trodden paths are visible on the aerial photograph she produced.[28] Those paths did not go any further west than the brook. No paths were apparent on the western side of the Land save for a linear strip along the houses, but it was not continuous. Much of the remainder of the Land was "*largely impenetrable and undisturbed*". It was possible to access the Land via entrance points around the periphery, but due to the highly overgrown nature of the Land, access within it was

[26] By means of the red arrows on the Plan at OB1 page 64.
[27] Her statutory declaration is at OB1 tab 4.
[28] At OB1 page 23.

limited to short transects in those areas where it was possible to make inroads through the vegetation. Much of the central area comprised established and continuous bramble cover. She referred to photographs she had taken of that visit.[29] They showed the extent of the vegetation cover at that time on different parts of the Land, including either side of the paths. The nature of the vegetation on the Land is such that it would not have had the chance to grow if people had walked on it. It flattens very easily. Moreover, the brambles would have to have been stamped down and so access through them would be obvious. Notably, the pathways that were on the Land were very clear.

4.34 She undertook a second habitat survey on 11 March 2011 following the clearance of a number of narrow passages into the vegetation made by the Objector to facilitate further surveys. A pair of secateurs was still essential to allow access through much of the Land. She referred to photographs she had taken of that visit showing the extent of the vegetation.[30]

4.35 No evidence of use of the Land was noted during either of the surveys other than a small number of trodden paths in the vicinity of Bourne Avenue. She was on the Land for the surveys for approximately 3 hours and 4 hours respectively. She has been on the Land on 5 occasions in total, and she has only met someone there once when there were some dog walkers on the eastern part.

[29] At OB1 pages 24-27 photographs A-G.
[30] At OB1 pages 27-31 photographs H-P.

4.36 **Mrs Charlotte Lewis**[31] is an architect who was appointed by the Objector to appraise and analyse the Land and its surroundings in order to inform a residential development feasibility proposal. She first visited the Land on 30 July 2010 for that purpose with Mr Bellamy of the Objector Company. She was particularly interested in the Land's constraints, such as levels and gradient, cables on the Land, services on the Land, vegetation and anything of relevance to a development appraisal. Their access to the Land was restricted by extensive overgrown vegetation, so they were only able to walk around the perimeter of the Land gaining views into it as identified on the plan of her route shown by the unbroken yellow line on her Plan at CL2.[32] The blue markings on that Plan show the areas where the Land was particularly overgrown and access was restricted. She took photographs of that visit. She visited the Land again some weeks later when she gained limited access to the eastern part and noted some trodden tracks in that area. However, she was still unable to gain access to the brook from there due to the significant level of overgrowth.

4.37 **Mr Garth Riley**[33] is the owner of the eastern part of the Land. He lives in reasonably close proximity to the Land and has regularly driven past it along Church Road. However, he has only gone onto the Land "*infrequently*". The Land was last used for pasture in 1976. In 1995, Laing Homes commenced the development of Marsh Way adjacent to the eastern boundary of the Land. Due to their encroachment on the Land, he took various photographs in July 1995.[34] They show the overgrown condition of that part of the Land at that time. It was obvious when the development of Marsh Lane took place that people were using the Land to walk on the paths.

[31] Her statutory declaration is at OB1 tab 9.
[32] At OB1 page 160.
[33] His statutory declaration is at OB1 tab 7.
[34] At OB1 pages 104 & 105.

However, they would have to stick to the tracks due to the overgrown condition of the Land.

4.38 As to signage, the erection of signs on the Land was initially prompted by Mr Horridge around 1995. The matter was not taken further until 1997 as he was then involved with trying to find a house for his Mother and so signage on the Land was not a priority for him at that particular time. He met with Mr Horridge in April 1997 following which it was decided to erect 5 signs on the Land, 3 of which would be on his part of the Land. He paid £612.65 to Signs Express for the production and erection of the signs on the Land. He agreed with the 5 suggested locations for the signs as they were the points from which people would be most likely to attempt to access the Land. The signs were erected on 9 September 1997. He was then advised by Mr Horridge in a letter dated 18 September 1997 that two of the signs had been turned to face the other way and the third had been removed. As a result, on 19 September he walked the length of the brook on the Land to seek to retrieve the missing sign but could not locate it. He recalled the overgrown condition of the Land at that time. During that time, he did not see anyone else on the Land. The remaining two signs on his part of the Land had also been removed by that date. He decided not to proceed with acquiring new signs as he had already incurred the costs of providing and erecting signs once, only for them to be removed shortly afterwards. He was concerned that that would merely recur. He therefore relied upon the signs erected and retained on the western part of the Land.

4.39 Around 1997, he received several requests from members of the public who, having seen one of the signs, sought permission to walk their dogs on the Land. He

was happy to give that permission as it is not his intention to stop people using the Land to walk their dogs. He has never sought to fence his part of the Land as it would not be viable to do so and fencing would also be easy to break. The overgrown condition of the Land had caused official complaints in relation to vegetation overhanging the footway along Church Road at various times, including from Worcestershire County Council, and such complaints were duly attended to.[35]

4.40 **Mr Daniel Forrester**[36] is employed by the Objector Company. His first visit to the Land was on 30 March 2012 following clearance of part of it by the Objector. He recalled seeing the "Private Land" signs at Church Road and Stourbridge Road. He was on the Land for approximately 2 hours and did not see anyone else on the Land at that time. He next visited the Land on 13 August 2012 for around 1½ hours when he again saw no one on it. Much of the Land was in an overgrown state and not accessible. His most recent visit to the Land was on 9 October 2012 to carry out a photographic survey. He was there for around 3½ hours and saw no one on the Land apart from a security guard contracted by the Objector. The photographs show the dense vegetation and the extent of overgrowth causing many parts to be impassable. All 3 of his site visits were undertaken during ordinary working hours. He has also sourced 3 aerial photographs of the Land from 1999, 2005 and 2010, together with aerial photographs from August 1992. The photograph taken in 1999 shows dense vegetation covering the Land with significant areas of overgrowth extending across it. It also shows evidence of some trodden paths to the east of the brook. The 2005 and 2010 photographs show increasing vegetation growth.

[35] See OB1 pages 139, 141 and 142.
[36] His statutory declaration is at OB2 tab 12.

4.41 He produced updated Plans to the Inquiry on which he had identified the location of each of the local inhabitants who had submitted an evidence questionnaire in support of the Application, including those additional questionnaires produced at the start of the Inquiry. From those Plans, he suggested that it was apparent that virtually all those who claim to have used the Land for recreational purposes live around its perimeter. From his researches, the estimated population of Catshill Ward in 2010 was 4621 with estimated households of 1837. On that basis, he calculated that only 3.75% of households in the Ward have attested to using the Land for recreational purposes, and only 2.52% of the households within the Parish of Catshill and North Malbrook.

4.42 **Mr Michael Robson**[37] is a Director at Cerda Planning Limited. He attended a meeting on the Land on 27 July 2011 to discuss issues relating to trees and ecology. The District Council's Tree Officer in attendance brought a scythe with him which he used to clear a route for us to walk around the Land as in places the brambles, nettles and undergrowth on the Land were over 1.5 metres high. Due to the density of the vegetation, they walked in single file and had to hold back brambles and other vegetation in places whilst the Tree Officer was at the front with a scythe. The route they took is identified on the Plan at MR1.[38] Much of the remainder of the Land was impenetrable by foot because of the dense undergrowth and brambles. His visit lasted approximately 2 hours. During that time, he saw no one else on the Land.

[37] His statutory declaration is at OB1 tab 10.
[38] At OB1 page 164.

4.43 **Mr Darren Wright**[39] is a Director of the Objector Company. He attended the Land on 19 January 2012 for a meeting prior to the western part of the Land being cleared. The clearance works were undertaken for the purpose of developing the Land for residential purposes for which planning permission had been obtained. They entered the Land from the locked gate at Stourbridge Road and attempted to walk along the northern boundary, but it became impassable after approximately 130 metres due to the density of scrub. They then accessed the Land from Church Road, and walked approximately 160 metres into the Land to the west of the brook at which point it became impassable due to dense bramble and undergrowth. There were signs in place at both those access points which were clearly visible.

4.44 The clearance works commenced on 23 January 2012 when heras fencing was erected to prevent unauthorised access during the clearance works and to secure the Land for health and safety reasons. The two locations of that fencing are identified on the Plan at DW1,[40] namely along the open boundary next to the garage block on Chadcote Way and along the southern boundary of the Land at Church Road. Those locations were chosen as they were the two apparent points of open entry onto the Land. He visited the Land on 3 February 2012 to assess the progress of the works. On 30 September 2012, he was notified by ecologists of the vandalism of 2 badger gates on the Land. They had to be reinstalled and fulltime security engaged.

4.45 **Mr Reuben Bellamy**[41] has been the Planning Manager for the Objector Company since August 2003. His first visit to the Land was in July 2008 for a meeting to consider the development potential of the Land. They met at the southern

[39] His statutory declaration is at OB2 tab 13.
[40] OB2 page 749.
[41] His statutory declaration is at OB1 tab 11.

boundary of the Land on Church Road where the "Private Land" sign was visible. The Land was so visibly overgrown in that area that they did not access from there. They then went to the eastern side where they entered the Land via the garage court and walked into the Land along well trodden paths. It was his view that the area to the rear of Bourne Avenue was clearly used where there were trodden paths that were easy to use. They did not go onto the western side of the brook, but it was apparent that the area to the west was fairly overgrown. His next visit was on 11 February 2009 when he and the Objector's Area Land Director entered the Land from Stourbridge Road. The sign was in place. They were only able to walk a little way into the Land because it was overgrown. There were no noticeable trodden paths on that part of the Land nor did he see anyone during that visit. He next visited the Land in July 2010 to meet an architect, Mrs Charlotte Lewis. Due to the dense overgrowth, they walked round the perimeter of the Land. He visited the Land again in March 2011 when he took photographs. Both signs were still in situ. Prior to his visit, a JCB had been used to clear the vegetation on the Land to facilitate survey works which enabled him to walk over most of the Land, following the JCB tracks. That was the first occasion when he was able to walk over the Land properly. Prior to that, parts of the western side of the Land had become impenetrable whilst other parts you could only get into if you forced your way through the vegetation. He referred to the Plan produced by Mr Stone, an Assistant Surveyor, on which he identified the densely vegetated areas of the Land when he surveyed the Land in November 2010, which Plan was also relied upon by the Applicants.[42] He acknowledged that the Objector accepted that there were well trodden paths on the eastern side. He did not see anyone on the Land during that visit.

[42] At OB1 page 94 and at AB2 tab 6.

4.46 He has attended meetings with the Catshill and North Malbrook Parish Council in 2010 relating to the development of the Land. On no occasion has the Parish Council expressed any concern that the development of the Land would result in the loss of land currently enjoyed by local inhabitants for recreational purposes. On 7 February 2011, a public exhibition was held to publicise the Objector's development proposals for the Land. It was very well attended in that 223 members of the public were present and 110 left feedback comments. Responses to the feedback form referred to concerns over traffic, flooding, ecology, noise, air quality, privacy, loss of outlook and the overgrown nature of the Land, but only one person stated that she had used the Land. A planning application for the residential development of the Land was submitted by the Objector in April 2011. Outline planning permission was granted on 13 January 2012 and reserved matters approval on 23 August 2012. As part of the objections to the planning application, only 3 letters raised any concerns about the potential loss of a local recreational area that had been used by local people, despite many of those who have submitted evidence questionnaires in support of the Application having objected to the planning application.

Written Evidence Objecting to the Application

4.47 In addition to the evidence of witnesses who appeared at the Inquiry, I have also considered and had regard to all the written evidence submitted in support of the Objection in the form of additional statutory declarations which are contained in the Objector's Bundle. However, in relation to such written evidence, I refer to and repeat my observations in paragraph 4.28 above that whilst such written evidence must be taken into account, I and the Registration Authority must bear in mind that it has not

been tested by cross examination. Hence, particularly where it is in conflict with any oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to cross examination.

THIRD PARTY EVIDENCE

4.48 During the Inquiry, I invited any other persons who wished to give evidence to do so. One individual did so and his evidence was made available to be subject to cross examination.

4.49 **Mr John Doidge**[43] has lived at 312 Stourbridge Road since 2001. Prior to that, he lived at different houses in Mayfield Road from 1997, and prior to 1997, he lived in Birmingham. He used the Land from 1997 onwards regularly for activities such as walking, nature watching, blackberry picking and to check its performance as a Co2 absorbing ecosystem. The established ecosystem occupying the Land rapidly removes carbon dioxide from the air. It is important that it continues to perform that function. The Land should not be destroyed by the proposed residential development but should be preserved.

5. THE LEGAL FRAMEWORK

5.1 I shall set out below the relevant basic legal framework within which I have to form my conclusions and the Registration Authority has to reach its decision. I shall then proceed to apply the legal position to the facts I find based on the evidence that has been adduced as set out above.

[43] His written evidence is at AB1 tab 6 number 3.

Commons Act 2006

5.2 The Application was made pursuant to the Commons Act 2006. That Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.

5.3 The Application seeks the registration of the Land by virtue of the operation of section 15(2) of the 2006 Act. Under that provision, land is to be registered as a town or village green 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.*"

In the alternative, the Applicants seek the registration of the Land by virtue of the operation of section 15(3) of the 2006 Act. Under that provision, land is to be registered as a town or village green where:-

> "*(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
>
> *(b) they ceased to do so before the time of the application but after the commencement of this section; and*
>
> *(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).*"

5.4 Therefore, for the Application to succeed, it must be established that:-

(i) the Application Land comprises "land" within the meaning of the 2006 Act;

(ii) the Land has been used for lawful sports and pastimes;

(iii) such use has been for a period of not less than 20 years;

(iv) such use has been as of right;

(v) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality; and

(vi) either that:-

- such use continued at the time of the Application; or
- such use ceased prior to the time of the Application but after 6 April 2007 and the Application is made within 2 years of the date of the cessation of the use.

Burden and Standard of Proof

5.5 The burden of proving that the Land has become a village green rests with the Applicant. The standard of proof is the balance of probabilities. That is the approach I have used.

5.6 Further, when considering whether or not the Applicant has discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in ***R. v Sunderland City Council ex parte Beresford***[44] where, at paragraph 2, he noted as follows:-

"*As Pill LJ. rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111 "it is no trivial matter for a landowner to have*

[44] [2004] 1 AC 889.

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

Hence, all the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on a balance of probabilities.

Statutory Criteria

5.7 Caselaw has provided helpful rulings and guidance on the various elements of the statutory criteria required to be established for land to be registered as a town or village green which I shall refer to below.

Land

5.8 Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration.

5.9 However, it was stated by way of *obiter dictum* by the majority of the House of Lords in ***Oxfordshire County Council v. Oxford City Council***[45] that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered.

[45] [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.

Lawful Sports and Pastimes

5.10 It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[46] that "*lawful sports and pastimes*" is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children's play.

5.11 However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way. In ***R. (Laing Homes Limited) v. Buckinghamshire County Council***[47], Sullivan J. (as he then was) noted at paragraph 102 that:-

> "*it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.*"

A similar point was emphasised at paragraph 108 in relation to footpath rights and recreational rights, namely:-

> "*from the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would*

[46] [2000] 1 AC 335 at 356F to 357E.
[47] [2003] EWHC 1578 (Admin).

vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted."

5.12 More recently, Lightman J. stated at first instance in ***Oxfordshire County Council v. Oxford City Council***[48] at paragraph 102:-

"*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).*"

He went on area paragraph 103 to state:-

"*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*

[48] [2004] Ch. 253.

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."

The Court of Appeal and the House of Lords declined to rule on the issue since it was so much a matter of fact in applying the statutory test. However, neither the Court of Appeal nor the House of Lords expressed any disagreement with the above views advanced by Lightman J.

Continuity and Sufficiency of Use over 20 Year Period

5.13 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: ***Hollins v. Verney***.[49]

5.14 Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would

[49] (1884) 13 QBD 304.

have appeared to the landowner: ***R. (on the application of Lewis) v. Redcar and Cleveland Borough Council***.[50]

Locality or Neighbourhood within a Locality

5.15 A "*locality*" must be a division of the County known to the law, such as a borough, parish or manor: ***MoD v Wiltshire CC***;[51] ***R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC***;[52] and ***R. (Laing Homes Limited) v. Buckinghamshire CC***.[53] A locality cannot be created simply by drawing a line on a plan: ***Cheltenham Builders*** case.[54]

5.16 In contrast, a "*neighbourhood*" need not be a recognised administrative unit. Lord Hoffmann pointed out in ***Oxfordshire County Council v. Oxford City Council***[55] that the statutory criteria of "*any neighbourhood within a locality*" is "*obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries*". Hence, a housing estate can be a neighbourhood: ***R. (McAlpine) v. Staffordshire County Council***.[56] Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must be an area which has a sufficient degree of cohesiveness: ***Cheltenham Builders*** case.[57]

5.17 Further clarity was provided on that element recently by HHJ Waksman QC in ***R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and***

[50] [2010] UKSC 11 at paragraph 36.
[51] [1995] 4 All ER 931 at page 937b-e.
[52] [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.
[53] [2003] EWHC 1578 (Admin) at paragraph 133.
[54] At paragraphs 41 to 48.
[55] [2006] 2 AC 674 at paragraph 27.
[56] [2002] EWHC 76 (Admin).
[57] At paragraph 85.

Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council[58] who stated:-

> "*While Lord Hoffmann said that the expression was drafted with "deliberate imprecision", that was to be contrasted with the locality whose boundaries had to be "legally significant". See paragraph 27 of his judgment in Oxfordshire (supra). He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality… but, as Sullivan J stated in R (Cheltenham Builders) Ltd v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application.*"

Significant Number

5.18 "*Significant*" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers: ***R. (McAlpine) v. Staffordshire County Council***.[59]

[58] [2010] EWHC 530 (Admin) at paragraph 79.
[59] [2002] EWHC 76 (Admin) at paragraph 71.

As of Right

5.19 Use of land "*as of right*" is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[60] that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

5.20 "Force" does not merely refer to physical force. User is *vi* and so not "*as of right*" if it involves climbing or breaking down fences or gates or if it is under protest from the landowner: ***Newnham v. Willison***.[61] Further, Lord Rodger in ***Lewis v. Redcar*** stated that "*If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being vi…user is only peaceable (nec vi) if it is neither violent nor contentious*".[62]

5.21 "Permission" can be expressly given or be implied from the landowner's conduct, but it cannot be implied from the mere inaction or acts of encouragement of the landowner: ***R. v. Sunderland City Council ex parte Beresford***.[63]

6. APPLICATION OF THE LAW TO THE FACTS

Approach to the Evidence

6.1 The impression which I obtained of all the witnesses called at the Inquiry is that they were entirely honest and transparent witnesses, and I therefore accept for the most part the evidence of all the witnesses called for each of the Parties.

[60] [2000] 1 AC 335.
[61] (1988) 56 P. & C.R. 8.
[62] At paragraphs 88-90.
[63] [2004] 1 AC 889.

6.2 I have considered all the evidence put before the Inquiry, both orally and in writing. However, I emphasise that my findings and recommendations are based upon whether the Land should be registered as a town or village green by virtue of the relevant statutory criteria being satisfied. In determining that issue, it is inappropriate for me or the Registration Authority to take into account the merits of the Land being registered as a town or village green or of it not being so registered.

6.3 I shall now consider each of the elements of the relevant statutory criteria in turn as set out in paragraph 5.4 above, and determine whether they have been established on the basis of all the evidence, applying the facts to the legal framework set out above. The facts I refer to below are all based upon the evidence set out in detail above. In order for the Land to be registered as a town or village green, each of the relevant statutory criteria must be established by the Applicants on the evidence adduced on the balance of probabilities.

The Land

6.4 There is no difficulty in identifying the relevant land sought to be registered. The map submitted with the Application shows the Land shaded and is the definitive document on which the Land that is the subject of the Application is marked. The Land has defined and fixed boundaries, and there was no dispute at the Inquiry nor in any of the evidence adduced that that area of land comprises "land" within the meaning of section 15 of the 2006 Act and is capable of registration as a town or village green in principle, and I so find.

Relevant 20 Year Period

6.5 Turning next to the identification of the relevant 20 year period, that is dependent upon whether section 15(2) or section 15(3) of the 2006 Act is the relevant provision. The Applicants requested at the Inquiry that the Application be considered under both provisions in the alternative and the Objector confirmed that it had no objection to that course in principle. I propose to therefore so consider the Application accordingly.

6.6 For the purposes of section 15(2), the qualifying use must continue up until "*the time of the Application*": see section 15(2)(b). Hence, the relevant 20 year period is the period of 20 years which ends at the date of the Application. The Application Form is dated 9 May 2012, as is the accompanying Statutory Declaration. The Application is stamped by the Registration Authority as having been validly received on 10 May 2012. It follows that the relevant 20 year period for the purposes of section 15(2) is May 1992 until May 2012.

6.7 Alternatively, for the purposes of Section 15(3), the relevant 20 year period is the period of 20 years which ends at the date of the cessation of the use as of right. The Applicants did not advance a specific date for such cessation; the Objector contended that it is 23 January 2012 when heras fencing was erected on the Land.

6.8 The unchallenged evidence of Mr Wright was that heras fencing was erected on the Land at two locations on 23 January 2012, namely along the open boundary next to the garage block on Chadcote Way around the eastern edge of the Land and along the southern boundary of the Land abutting Church Road. He pointed out that the fencing was erected to secure the Land and to prevent access to it during the

clearance works. Ms Frazer acknowledged that such fencing was erected on that date and that it was obvious that it was intended to prevent access to the Land. Mrs Sturgess also confirmed that heras fencing was erected on the Land on that date. It seems to me that the effect of such fencing was to prevent access to a significant part of the Land, which was indeed its very purpose. Its erection would therefore, in my view, have the effect of terminating the qualifying use of the Application Land at that point in time, namely on 23 January 2012.

6.9 From the evidence, it does not seem to me that there was any other matter that occurred post 6 April 2007 which would have had the effect of terminating the qualifying use nor was there any submission to that effect for the purposes of section 15(3). Therefore, I find that the relevant 20 year period for the purposes of that provision is January 1992 until January 2012.

Use of Land for Lawful Sports and Pastimes

6.10 Turning next to whether the Land has been used for lawful sports and pastimes, it is apparent from the evidence adduced in support of the Application that some recreational activities have taken place on the Land. By far the most common activity referred to in the evidence, though, was dog walking on the Land, and most of the witnesses who gave oral evidence of their use specifically expressed the view that the predominant use of the Land by adults has been for dog walking, namely Ms Frazer, Mr Sharp, Miss Garth, Mr Evans, Mrs Hanlon, Mrs Sturgess and Mr Dobbins. In addition, references were made in the oral and written evidence to other activities including general walking, children playing on the Land, blackberry picking, bird and other wildlife watching, nature observation and kite flying. No formal or organised

games or activities were referred to as having taken place on the Land, and the community events referred to were held prior to the qualifying period. Nonetheless, informal activities which are in the nature of an informal sport or informal pastime are capable of amounting to lawful sports and pastimes within the meaning of the statutory criteria. I find that each of the above activities which were referred to most commonly in the Applicants' evidence, albeit to different extents, amount to lawful sports and pastimes for that purpose. I further accept the evidence of the Applicants and their witnesses that such activities have, as a matter of fact, taken place on the Land. Indeed, I note that the Objector acknowledges that some of those activities have taken place on the Land, particularly in terms of walking on the worn paths that have been formed.

6.11 However, as noted in paragraph 5.14 above, in order for that element of the statutory criteria to be established, the Land must have been used for qualifying lawful sports and pastimes to such an extent and with such a degree of frequency throughout the relevant 20 year period to show the landowner that rights were being asserted. It is insufficient for the qualifying use to have been merely sporadic in nature.

6.12 In identifying the qualifying use to enable it to be assessed, I have already found that the various informal recreational activities referred to by the Applicants were lawful sports and pastimes in principle. Nonetheless, certain of the activities relied upon in the Applicants' evidence must be discounted from the qualifying use.

6.13 Firstly, it is necessary to discount any use of the Land carried out outside the relevant 20 year period. Although such use may be relevant as an indicator as to the extent of the use within that period, and I have taken that factor into account, I am unable to regard such use as part of the qualifying use itself. Thus, I have excluded the recreational uses of the Land referred to in the evidence above that were undertaken prior to January 1992. I have also taken the same approach with the written evidence.

6.14 Secondly, I have discounted the evidence of use where it has not been established that the user was an inhabitant of the area of Catshill at the time of his or her use of the Land. There was no suggestion that any of those who gave evidence of their own personal use, whether orally or in writing, were not inhabitants of Catshill. However, the position is less clear in relation to the use of the Land by others who were merely seen making use of the Land but who have not themselves provided direct oral or written evidence in support of such use. Given that the burden of proof is on the Applicants and that each element of the statutory criteria must be strictly proved on the balance of probabilities, I am unable to assume that they were all from Catshill. It is unknown, for example, to what extent those others using the Land who were not identified were merely visitors to the area, such as visiting family and friends there. Therefore, although I accept that a material number of those seen on the Land by others are likely to have been from the area, and I have assessed the evidence accordingly, I cannot accept that they all were. In addition, I have discounted the use of those where it is known that they were not inhabitants of Catshill at the relevant time, such as that by Ms Frazer's Grandchildren who lived in Kent but played on the Land when they visited.

6.15 Thirdly, and of particular significance in this case, it is necessary to discount the use of the Land that was more akin to the exercise of a public right of way than to the exercise of recreational rights over a village green for the detailed reasons set out in paragraphs 5.11 and 5.12 above. That includes walking both with and without dogs, where the walk was of such a nature that it would suggest that the user was exercising a right of way over specific routes rather than exercising a recreational right over the Land generally. In my view, a material amount of the use of the Land for dog walking and for general walking as well as for activities ancillary to such must be discounted from the qualifying use for that reason.

6.16 In that regard, it is clear from the evidence that worn and recognised tracks have been formed on the Land through usage. The Applicants produced the Footpath and Access Points Plan that identifies the evident paths on the Land, including those which existed prior to the 2012 clearance works. Those identified paths are consistent with those shown on various aerial photographs as referred to in the evidence above and, in terms of existing paths, are consistent with what I saw on the ground during my site visit. They were also referred to frequently in the oral evidence as having been used.

6.17 The very nature of those paths makes it clear that they have been regularly used. Moreover, that was confirmed by the oral evidence I heard. I note in particular the following. Ms Frazer's use of the Land during the relevant period has been on the western side where she has "*tended to stick to the well worn paths*" as shown on the Footpath and Access Points Plan. Mr Sharp referred to being "*mostly*" but not exclusively on the paths. Mrs Elliott stated that she tended to keep to the paths during

the summer but not as much in the winter. Miss Garth walked along the worn paths mainly, but went off them if and when she saw something of interest. Mrs Sturgess has walked both on and off the paths. Further, in relation to such use of the Land by others, Ms Frazer acknowledged that the most consistent use of the Land was along the worn paths. Mr Sharp stated that adults using the Land have "*generally stuck to the paths*". Miss Garth noted that dog walkers "*predominantly*" followed the paths, although some went off them. Mr Evans pointed out that a number of local residents walked their dogs on the worn paths. From such evidence, the clear impression I gained was that the worn paths on the Land were particularly well used and, indeed, that their use was the predominant use of the Land.

6.18 That is further confirmed by the condition of the remainder of the Land which, as an unmanaged site, has become extremely overgrown over the years. That is illustrated by the photographs I have seen produced by both the Appellants and by the Objector as referred to in the evidence above. The oral evidence as to the condition of the Land by both Parties was also to a similar effect. In terms of the Applicants' evidence, Ms Frazer pointed out even in 1998, the Land beyond the paths was heavily overgrown. Although parts of the Land were quite open, they comprised only approximately 20% to 30% of the Land whilst the remainder was quite overgrown. Mr Sharp referred to the gradual change in the Land from when he first knew it in 1987, noting that as it became more overgrown, there was an increased use of the paths. Mrs Sturgess confirmed that the vegetation shown on either side of the paths in some of the photographs was typical. On behalf of the Objector, a number of witnesses referred to the overgrown nature of the Land during their visits to it, particularly during the latter part of the relevant period. The overgrowth was such as

to prevent them walking far onto the Land. In particular, I note and accept the evidence of Dr Gordon, a professional ecologist, who in 2010 and 2011 surveyed the Land. She acknowledged the trodden paths, but noted that much of the remainder of the Land was not only "*largely impenetrable*" but also "*undisturbed*". She described her difficulties in making inroads into the vegetation and pointed out that it would have been apparent had those areas been used with any degree of regularity. Similarly, Mr Robson described in some detail his visit to the Land in 2011 where the District Council's Tree Officer used a scythe to clear a route as they walked in single file having to hold the vegetation back which was in places over 1.5 metres high. Such evidence was consistent with my observations of the Land on the site visit, taking into account the clearance works over part of the Land in the beginning of 2012.

6.19 I accept the evidence of witnesses who stated that they had also walked off the paths. Nonetheless, the impression I gained from the evidence was that regularly walking off the paths was only carried out by a few individuals and by children rather than by users generally. Hence, Mrs Elliott described the route she took off the path during the winter months and pointed out that she had not seen others using that route. Moreover, she indicated that in the summer, although the Land off the paths was not impenetrable, a user would be likely to sustain a few scratches and nettle stings in the process. Mrs Hanlon uses the worn tracks but also walks off them, and she acknowledged that her use of the Land involving going off the paths and into the overgrowth was "*not typical*" of the use made by others of the Land. Similarly, Mr Dobbins who walks off the paths stated that he had not seen many others using the Land as he tends to go into the "*wilder parts*".

6.20 Taking all the above into account, I find that a significant amount of the use of the Land has involved use of the defined and worn tracks, which use has been more akin to the exercise of a public right of way rather than the exercise of recreational lawful sports and pastimes over a village green. Such use must therefore be discounted from the assessment of the extent and frequency of the qualifying use of the Land for lawful sports and pastimes.

6.21 In addition, it is necessary to go on to consider the extent of other activities on the Land which were merely ancillary to the exercise of a right of way and thus would not appear to the landowner to be anything more than part of the purported exercise of a public right of way. In that regard, I take into account the observations of Sullivan J. in ***Laing Homes*** when he noted at paragraph 103 in relation to dog walking that:-

> "*Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog's owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?*"

In relation to a dog owner straying off a footpath to retrieve his dog, he stated at paragraph 104:-

> "*I do not consider that the dog's wanderings or the owner's attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.*"

He also indicated that "*the same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields*".

6.22 That issue was specifically considered by Mr Vivian Chapman QC appointed as an inspector at a non-statutory town or village green inquiry in relation to land at Radley, Abingdon, Oxfordshire which was referred to on behalf of the Objector.[64] He noted at paragraph 305 of his report the observations of Lightman J. in the ***Oxfordshire*** case set out at paragraph 5.12 above and stated:-

> "*It seems to me that the heart of the guidance given by Lightman J is that all depends on whether the use would appear to the reasonable landowner as referable to the exercise of a right of way along a defined route or referable to a right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous, it should be ascribed to the lesser right, i.e. a right of way.*"

He then went on at paragraph 306, having found that the use of the tracks in question had the objective appearance of the exercise of rights of way, to state:-

> "*I do not think that this perception is affected by the fact that people could and did sometimes wander off the side of path to pick blackberries, picnic, sit by the lake, watch birds on the lake and allow their children to paddle or pond-dip and their dogs to swim in the lake. To my mind, this is just the way in which an unfenced public right of way along a lakeside is inevitably used. There must be many public footpaths crossing open land where the public have stepped off the path to pick blackberries, to picnic on the banks of a lake*

[64] His report is in the Objector's Bundle of Reports at tab 2.

or river or to watch wildlife. No one could suggest that this type of activity elevated the public right of way and its margins into an elongated stretch of TVG."

6.23 I respectfully concur with Mr Chapman QC's observations. If footpath users step off a footpath from time to time to undertake ancillary activities to the exercise of a right of way, such as stopping to pick blackberries or to watch wildlife or to observe something of interest, such use would not indicate to the reasonable landowner that the user was no longer purporting to exercise a right of way but, rather, the exercise of recreational rights over a wider area of land.

6.24 Applying those matters to the evidence, it is my view that a number of the other activities referred to by users as having been carried out on the Land were uses that were ancillary to and an inherent part of the exercise of a right of way rather than the exercise of recreational rights over the entire Land. As to blackberry picking, I find from the evidence that a material amount of that use of the Land occurred from the paths themselves. Ms Frazer stated that many of the bramble bushes on the Land are located close to worn paths and that it was not necessary to stray far off the worn paths to pick blackberries on the western side. On the eastern side, Mrs Elliott has picked blackberries from the bushes between Access Point 9 and Access Point 1 whilst she was on the path. It also seems to me that much of the nature watching and bird watching carried out on the Land was carried out so as to be ancillary to the exercise of a right of way. Hence, Ms Frazer used the Land for nature watching whilst walking on the paths. Miss Garth, a bird watcher, described walking along the worn paths mainly and then going off them when she saw something of interest.

6.25 Consequently, it is my view that a significant element of the use which has occurred on the Land has been referable to the exercise of public rights of way rather than to the exercise of recreational rights over the Land, and that such elements of the use must be discounted from the qualifying use.

6.26 In doing so, I note that there are also a number of evidence questionnaires and written statements in support of the Application which refer to the carrying out of similar activities on the Land. However, in the absence of cross examination of such witnesses, it is unclear whether their references to dog walking and general walking are references to their use of the worn paths or to walking elsewhere on the Land, and whether or not their references to other activities are incidental to their use of the paths. Given the burden of proof on the Applicants, I cannot assume that such uses are not referable to the exercise of public rights of way. Moreover, given that some of the responses to some of the highly material questions in some of the questionnaires were already pre-printed, that factor further reduces the weight I am able to attribute to the questionnaires.

6.27 Having discounted such uses, it is my view that the evidence establishes only a limited amount of qualifying use of the Land for lawful sports and pastimes. There remains some use of the Land for walking other than along paths, but the impression I gained is that such was by a few individuals on a sporadic basis rather than by the wider community. Children's play has taken place on the Land during the relevant period, but I find from the evidence that such use has also been relatively limited. No individual gave evidence of their own use of the Land when they had been a child

during the relevant period. Moreover, such play seems to have been focused on the brook and a few dens and during the summer months. I heard very limited evidence as to ball games or similar being carried out on the Land. Other uses were very occasional, such as the odd incident of kite flying that was referred to. Moreover, community events have not taken place on the Land during the qualifying period.

6.28 Consequently, taking the evidence in its entirety, I find that the qualifying use of the Land for lawful sports and pastimes has been no more than sporadic in nature during either of the relevant 20 year periods and insufficient to indicate to a reasonable landowner that recreational rights were being asserted over the Land. It follows that I therefore find that it has not been established on the balance of probabilities that the Land was then used for lawful sports and pastimes to the extent and for the frequency required to establish that element of the statutory criteria.

Locality or Neighbourhood within a Locality

6.29 I turn next to the relevant locality or neighbourhood within a locality for the purposes of section 15(2) and section 15(3). The Applicants confirmed at the outset of the Inquiry that the area being relied upon for the purposes of the Application was one of three alternative localities, namely the electoral ward of Catshill, the ecclesiastical parish of Catshill or the area of Catshill Parish Council.

6.30 Each of those areas is an established administrative area with identifiable boundaries. They are recognised administrative areas that are known to the law, and I find that each of them amounts to a locality within the meaning of the statutory

criteria. In so finding, I note that there was no dispute that each of those areas is capable of being a locality in law within the meaning of section 15 of the 2006 Act.

Use by a Significant Number of the Inhabitants of a Locality

6.31 Turning to whether the Land has been used by a significant number of the inhabitants of any of the three localities relied upon, for the reasons given above in relation to the extent and frequency of qualifying user over either of the 20 year periods, I find that it has accordingly not been so used for lawful sports and pastimes throughout either of the relevant 20 year periods.

6.32 In addition, in order to establish that element of the statutory criteria, I accept the Objector's submission that there must be a reasonable geographical spread of users across the locality rather than the users being confined to a particular part of the locality. The user must have been of such a nature to bring it to the attention of the reasonable landowner that a right of recreation was being claimed by the inhabitants of the particular identified locality, namely by that identified local community. Thus, it seems to me that it is not merely the number of users that are significant, and I have addressed the extent of the use above, but also their geographical distribution. The number of inhabitants whose use is proven must be distributed in such a way as to indicate that the right is vested in the locality claimed and not simply a part of it.

6.33 Applying that to the evidence, I find that the requisite geographical distribution of users has not been established. Instead, it seems to me that the users of the Land during either of the relevant 20 year periods have been from the households and streets in closest proximity to the Land, and that such an area represents only a

part of the wider locality. That is apparent from the Objector's Plans showing the spread of users in relation to each of the three alternative localities. There are large parts of each of those localities from which no one is identified as having used the Land. It is my impression that the Land had not been used by the inhabitants of any of the identified localities, but rather by the inhabitants of only a part of each of those localities. For that additional reason, I find that that element of the statutory criteria has not been established on the balance of probabilities.

Use as of Right

6.34 Turning next to whether the use has been as of right, there was no suggestion in any of the evidence that any of the use was by stealth. On the contrary, it was carried out openly during daylight hours and without any element of secrecy. The use of the Land has thus been *nec clam*.

6.35 As to whether it was with permission, there was evidence that express permission was given to a couple of individuals who had written to Mr Riley's Solicitors shortly after the erection of the notices on the Land in September 1997 seeking permission to walk their dogs on the Land. Hence, their personal use of the Land thereafter was not "as of right" and must be discounted from the qualifying use. Nonetheless, there was not otherwise any evidence of permission having been given, either expressly or impliedly, and so the majority of the use of the Land has been *nec precario*.

6.36 Instead, the real issue between the Parties on this element of the statutory criteria is whether the use of the Land was not as of right as it was with force, namely

vi, due to the erection of the signs in September 1997. As noted in paragraph 5.20 above, the requirement that the use be without force in order to be "*as of right*" does not merely require the use to be without physical force, such as by breaking down a fence. It must also not be contentious. As stated by Lord Rodger in ***Lewis***[65]:-

> "*it would be wrong to suppose that user is "vi" only where it is gained by employing some kind of physical force against the owner…It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi.*"

6.37 Applying that principle, the factual circumstances surrounding the signs is largely undisputed. The Applicants confirmed to the Inquiry that there was no dispute that the five notices referred to by the Objector were erected in September 1997 in the locations referred to by the Objector. There was also no challenge as to the wording of the notices nor that two of them remain in situ to date, namely at Church Road and at Stourbridge Road. Further, the Objector did not dispute that the other three notices were removed by persons unknown after a very short period of time and were not replaced.

6.38 Instead, the issue is whether those factual circumstances amount to the user being *vi* from September 1997 onwards.

6.39 In my view, the wording of the signs was clear. They were informing people that they were not to use the Land. They were so understood by individuals who saw

[65] [2010] UKSC 11 at paragraph 88.

them, namely the two individuals who sought permission immediately thereafter, and I note that their meaning was not disputed by any the Applicants' witnesses who had seen them save that they understood them to apply only to the western part of the Land given the removal of the other three signs from the eastern side. There was no suggestion that the signs were ambiguous or meant something other than people were not to use the Land or that their meaning was not understood.

6.40 In terms of their locations, it is also my view that the five locations selected where the signs were originally erected were sufficient in number to inform people that they were not to trespass on the Land. In addition, the signs were located around the Land in locations which represented the most likely points of public access, including on the frontages of the Land to public roads, and they were adequately visible in terms of size and location. Hence, when they were erected on 9 September 1997, it seems to me that had the signs remained in situ, the user thereafter would have been *vi*.

6.41 The issue then arising is whether, in the particular circumstances, the failure to replace the three removed signs prevented the user from being a contentious one. I am of the view that had only two signs been erected in the first instance in their current locations, that would have been insufficient in number to prevent the user of the Land being as of right. Such signs may reasonably not have come to the attention of those using only the eastern part of the Land and not accessing or leaving from Stourbridge Road or Church Road. Thus, the question is whether the removal of the other three without replacement resulted in the use not being *vi*.

6.42 Of relevance to that question is Lord Justice Patten's judgment in ***Betterment Properties (Weymouth) Ltd v. Taylor***[66] where he stated at paragraph 60:-

> "*It seems to me that there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. In these circumstances is the landowner to be treated as having acquiesced in that user merely because a section of the community (I am prepared to assume the minority) were prepared to take direct action to remove the signs?*"

He then goes on at paragraph 63 to state:-

> "*It would, in my view, be a direct infringement of the principle (referred to earlier in the judgment of Lord Rodger on Redcar (No. 2)) that rights of property cannot be acquired by force or by unlawful means for the Court to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way. If the steps taken would otherwise have been sufficient to notify local inhabitants that they should not trespass on the land*

[66] [2012] EWCA Civ 250.

then the landowner has, I believe, done all that is required to make users of his land contentious."

6.43 Applying that approach, it seems to me that by erecting appropriate signs, the Landowners had indicated that the use of the Land was contentious. Mr Riley had incurred material expense in paying for the provision and erection of signs on his part of the Land whereafter he found that all three of the signs were apparently forcibly removed within a mere 10 days. He had good reason to suspect that if he again paid out such money for new signs, they would again be removed within a short space of time. In those circumstances, it is my view that it was reasonable for him to take the approach of not purchasing new signs. I also take into account that there remained two signs in situ at the two interfaces of the Land with the public highway. Thus, I find that the Landowners had done all that was required of them as of September 1997 to make the use of their Land thereafter contentious and accordingly *vi*.

6.44 It follows that, in my view, the Land has not been used as of right throughout either of the relevant 20 year periods.

Continuation of Use & Making of Application

6.45 The final element of the statutory criteria is whether the qualifying use continued up until the date of the Application under section 15(2) or whether the Application was made within 2 years of the date of the cessation of the use under section 15(3).

6.46 As to section 15(2), the Application is dated 9 May 2012. For the reasons given in paragraph 6.8 above, it is my view that the use ceased on 23 January 2012. Therefore, section 15(2) cannot be relied upon.

6.47 However, under section 15(3), the Application was made within 2 years of the cessation of the use and so that particular element of section 15(3) is satisfied.

7. CONCLUSIONS AND RECOMMENDATION

7.1 My overall conclusions are therefore as follows:-

7.1.1 That the Application Land comprises land that is capable of registration as a town or village green in principle;

7.1.2 That the relevant 20 year period is May 1992 until May 2012 under section 15(2) or is January 1992 until January 2012 under section 15(3);

7.1.3 That the electoral ward of Catshill, the ecclesiastical parish of Catshill and the area of Catshill Parish Council are all qualifying localities;

7.1.4 That the Application Land has not been used for lawful sports and pastimes throughout the relevant 20 year period to a sufficient extent and continuity to have created a town or village green;

7.1.5 That the use of the Application Land for lawful sports and pastimes has not been carried out by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period;

7.1.6 That the use of the Land for lawful sports and pastimes has not been as of right throughout the relevant 20 year period; and

7.1.7 That the use of the Application Land for lawful sports and pastimes did not continue until the date of the Application under section 15(2), but the Application was made within 2 years of the date of the cessation of the use under section 15(3).

7.2 In view of those conclusions, it is my recommendation that the Registration Authority should reject the Application and should not add the Application Land to its register of town and village greens on the specific grounds that:-

7.2.1 The Applicant has failed to establish that the Application Land has been used for lawful sports and pastimes to a sufficient extent and continuity throughout the relevant 20 year period to have created a town or village green;

7.2.2 The Applicant has failed to establish that the use of the Application Land has been by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period; and

7.2.3 The use of the Application Land for lawful sports and pastimes has not been as of right throughout the relevant 20 year period.

8. ACKNOWLEDGEMENTS

8.1 Finally, I would like to thank the Applicants and the Objector for providing all the documentation to me in advance of the Inquiry and for the very helpful manner in which the respective cases were presented to the Inquiry. I would also like to thank all the witnesses who attended the Inquiry as they each gave their evidence in a clear, succinct and frank manner. I would further like to express my gratitude to the

representatives from the Registration Authority for their significant administrative assistance prior to and during the Inquiry.

8.2 I am sure that the Registration Authority will ensure that both Parties are provided with a copy of this Report, and that it will then take time to consider all the contents of this Report prior to proceeding to reach its decision.

RUTH A. STOCKLEY

19 February 2013

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