IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN IDENTIFIED IN THE APPLICATION AS 'LIMMERHILL FIELD' AT WOKINGHAM, BERKSHIRE.

– APPLICATION NUMBER WOK - 2 –

INSPECTOR'S REPORT AND RECOMMENDATION TO THE COMMONS REGISTRATION AUTHORITY – WOKINGHAM BOROUGH COUNCIL

INTRODUCTION

1. I am instructed on behalf of Wokingham Borough council (WBC) in its capacity as the commons registration authority (CRA) to advise on an application to register an area of land sometimes known as "Limmerhill Field" as a new town or village green (TVG).

2. In an application dated 24th May 2015 which was submitted to the CRA on 8th June 2015, Lynn Forbes of 3 Gull Close, Wokingham,RG41 3TW ('the Applicant') applied to WBC to register the application land (AL) as a new town or village green. WBC stamped the application, made on Form 44, as received and it was given reference WOK-2. The application was stated to be made pursuant to s15(3) of the Commons Act 2006 ('CA 2006') with qualifying use having ceased on 30th September 2014. The application has marked in brackets after that date the words "with the erection of fencing".

3. On 12th June 2015 Mrs Woodward of legal services wrote to the Applicant on behalf of the Commons Registration Officer explaining that the application had not been duly made because of several defects that needed correction so that the application would comply with the requirements of the Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) Regulations 2007 ('the Regulations'). They were:

    - That the application should contain a statutory declaration with a map of the AL attached marked by means of distinctive colouring on an Ordnance Survey (OS) map to a scale of 1:2500 and marked as an exhibit to the application referred to in the statutory declaration.

    - That section 10 on Form 44 had not been completed listing all documents that she intended to rely upon in the application and that would need to be done.

    - That the application should be put in order by Friday 26th June 2015.

4. The Applicant then submitted amending paperwork by 20th June 2015 and by 7th July 2015 the CRA confirmed that had been received and further enquiries were being made as to whether any trigger events in s15C CA 2006 had occurred. On 16th July 2015 the CRA wrote further to the Applicant advising that a page was missing from her re-sworn statutory declaration and asking that the missing page be supplied. That appears to have been done towards the end of July and then on 17th August 2015 the CRA wrote to the Applicant advising that the land was not affected by any trigger event under s15C and so the application would now be formally served upon the landowner (who had been informally advised of it) and advertised locally inviting any objections to be made by 2nd October 2015. The landowner was duly notified by letter dated 17th August 2015.

5. Only one objection statement was received by the CRA by 2nd October 2015 which was from the landowner, Monopro Ltd ('the Objector'). The objection statement received was settled by the Objector's solicitor and took numerous points in objection to the application. The Objector also submitted a 'Further Objection' to the application in an email of 23rd November 2015 and this material was made available to the Applicant at the same time as the original objection statement on 11th December 2015 and a response sought by 1st February 2016. I note that the Applicant sought further time for a response and mentioned that their legal representative would not see the objection statement until 18th December 2015. The CRA declined an extension of time and the Applicant in fact submitted her response to the objections by 22nd January 2016.

6. The Applicant's submissions in response are dated 1st February 2016 (albeit submitted on 22nd January) and were drafted by counsel. In paragraph 5(a) of those submissions, an application is made to amend the boundary of the AL to exclude the curtilage of Bottel Farmhouse in response to observations made in the objection statement. Following correspondence confirming the intention to hold this non-statutory public inquiry, directions were issued on 13th June 2016 within which the Applicant was directed to submit a compliant map by 27th June 2016 and for any objections to the amendment to be received by 11th July 2016. The Applicant submitted an amended map of the AL in an electronic format on 21st June 2016. Unfortunately this map had been reduced upon copying and so the CRA asked the Applicant by email on 27th June 2016 to supply a compliant map, as previously directed, by return. On 29th June 2016 the Applicant supplied two further maps one of which was an OS map to the correct scale. However, the outline of the AL as hand drawn on this amended map differed from the original AL map in that the red outline now included land in the title of the property known as Applegate (situated on the northern boundary of the AL). The CRA wrote to the Applicant on 4th July 2016 seeking clarification and the Applicant explained that this inclusion of Applegate land was unintentional and a new map was submitted the same day. In directions of 8th August 2016 it was confirmed

that the application to amend the application to the new AL map was granted in light of the Objector indicating that no prejudice would be caused by such an amendment.

7. Unfortunately it then transpired that the owner of Applegate and the Objector had been in negotiations for some time regarding a small triangular shaped area of land on the northern border between the AL and Applegate; that Applegate was to have the benefit of ownership of this land and although an application had been made to HMLR, no alteration of the Applegate boundary had yet been registered. The effect of this was that the area in question would fall within the outline of the AL as identified on the recently amended plan. This gave rise to a further request dated 11th August 2016 by the Applicant to amend the plan again with a new version of the application map submitted on 15th August 2017. The Objector again indicated that no prejudice would be caused by such an amendment and the newly amended map was formally adopted as the AL map in directions issued on 8th September 2017. That map was the application map used at the public inquiry and is annexed to this recommendation for the avoidance of doubt.

8. The map shows the AL delineated by a red outline. The locality or neighbourhood within a locality in respect of which the application is made is described as "The neighbourhood of Woosehill Estate within the locality of Evendons West Ward. Alternatively the neighbourhood of Elizabeth Park, Barkham Road and Folly Court within the localities of Evendons East and Evendons West wards." While the Form 44 shows that the box is ticked at Section 5 to include a map of the locality and/or neighbourhood within a locality, none was actually attached. This does not affect the compliance of the application with the Regulations as a map is not compulsory and the description of the locality or neighbourhood within a locality may be by words alone. The application was accompanied by supporting information (such as bus timetables and photographs) including a series of maps.

Amongst the maps at Section 5 is a map showing Wokingham Town Council's Evendons East and West wards which together comprise WBC's Evendons ward.[1]. The application was supported by the prescribed statutory declaration, after some amendment, and 30 completed evidence questionnaires.

9. Directions were issued on 13th June 2016, 8th August 2016 and 8th September 2016 dealing with all matters for preparation of the public inquiry (PI) and the requests for amendments of the AL map. All parties complied with directions and I was very grateful to the parties for the strenuous efforts made to agree a comprehensive inquiry timetable.

10. At the opening of the PI the Applicant made an application to amend the locality or neighbourhood within a locality upon which the application was based. Her advocate presented her case on the basis that the users of the AL over the 20 year period had come from the locality of Evendons West ward of Wokingham Town Council, or alternatively from the neighbourhood known as Woosehill within the locality of Evendons Ward of WBC. In due course, it was clarified that the map representing the neighbourhood newly contended for by the Applicant was contained in the Applicant's bundle for the PI[2]. This application to amend was granted on the basis that the Objector did not find it caused any prejudice or unfairness to them. As the PI progressed a further query was raised as to the newly identified neighbourhood and whether some of it fell outside of the ward of Evendons of WBC. This gave rise to an application made at the end of the PI to further amend the application for the locality within which the neighbourhood of Woosehill is located to simply WBC rather than the ward of Evendons within WBC. The application to amend in this way remains outstanding.

[1] AB Volume 5

[2] At AB Vol 5 Tab 2 Map a).

11. In the application to amend at the end of the PI, the Applicant also sought to amend the relevant qualifying period, which had been identified in the original application as running from 30th September 1994 to 30th September 2014. The amendment sought was that the relevant period should in fact be 18th September 1994 to 18th September 2014. This arose because in the written evidence of Sarah Gee for the Objector[3] it was stated that the fencing erected in 2014, which the Applicant says ended the use of the land as of right, had been erected by 19th September 2014 and there were photos of Heras panels erected on the land on that date. There was also evidence that by 23rd September 2014 some of the Heras panels had been knocked over[4] and the reasonable inference the landowner drew was that this had been likely to have been done by users of the land who had expressed their unhappiness at having their access blocked[5] (although there was no suggestion this was done by any person giving evidence to the Inquiry or known to them). Understandably, this gave rise to an application to amend the period applied for to run from the slightly earlier date of 18th September 1994 so that the relevant period of use would have ended by the 19th September 2014, thereby avoiding any question arising about the impact of the raising of the fencing on use during the period or of the action to take it down. The Objector made submissions to oppose such an amendment to the application and the decision of whether to allow such an amendment remains to be decided.

12. The public inquiry was held at WBC's offices on Monday 12th until Tuesday 20th December 2016. An accompanied site visit was undertaken on the morning of the final day of the PI.

[3] OB1 at page 427 paragraphs 6 to 8.

[4] OB1 at page 440.

[5] OB1 at page 433 note the objections received and the "tirades of abuse" suffered by the fencing contractors.

13. At the public inquiry the Applicant was represented by Dr Bowes of Cornerstone Barristers and the Objector, by Douglas Edwards QC of Francis Taylor Building. I am extremely grateful to both these experienced advocates for the helpful way in which they conducted their respective cases and the great assistance they offered me throughout the inquiry. I must also extend my great gratitude to Mrs Woodward, my instructing solicitor from WBC, who arranged the inquiry and gave me exemplary administrative assistance throughout. I am also very grateful to the Objector's team who arranged the accompanied site visit undertaken on the morning of Tuesday 20th December.

14. As noted above at paragraphs 10 and 11, the Inquiry proceeded on the basis of two alternatives on locality or neighbourhood within a locality. The application to amend the relevant qualifying period and locality within which the neighbourhood of Woosehill sits, submitted on the final day of the PI, remain outstanding. The Objector did not oppose any amendment of the neighbourhood locality but did resist the amendment of the period. The advocates agreed that the correct way to deal with the outstanding applications to amend was to consider the statutory criteria for the s15(3) application first and then move on to consider the applications to amend if the substantive application might be recommended for granting.

15. In coming to my recommendation I have had regard to all the evidence submitted to the public inquiry, both written and oral and to the law that I have been directed to by the parties' advocates.

Housekeeping notes

16. There are minor matters of housekeeping to introduce at this stage. To make the reading of this report more accessible, I have used abbreviations for terms and phrases frequently occurring and those are as follows:

AL	Application Land (also referred to simply as 'the land')
AB	Applicant's bundle.
ASB	Applicant's supplemental bundle of statutory declarations handed up during the PI.
EQ	Evidence questionnaire
OB	Objector bundle.
NH plan	Plan at AB Volume 5 Tab 2 Map a).
CA 2006	Commons Act 2006.
LSP	Lawful sports and pastimes.

17. I have referred to the woods that are situated to the immediate north west of the AL as Foxhill Woods. That is the name by which that area seemed to be most commonly referred to but I apologise if some regard this as a misnomer or if the title should actually be Fox Hill Woods.

18. It is important to introduce in advance of the witness evidence the 2014 footpath application. This refers to numerous evidence forms which were submitted to the CRA in 2014 to modify the definitive map to reflect their belief that the worn paths on the AL had become public rights of way. Such an application can result in what is known as a Definitive Map Modification Order (DMMO) to add such public footpaths to the definitive map. The evidence forms submitted in support of the application for a DMMO were made by many of the same witnesses as appeared at the PI in this application for a TVG. As these evidence forms were

signed by those completing them with a statement of truth, they are relevant material in considering to what extent they support or conflict with the current application.

19. On 14th December 2016, the third day of the Inquiry, the Applicant via her witness, Dr Rex Lucas sought to admit further evidence to the PI in the form of an expert report on aerial photography from Mr Bud Young. It had only been possible to obtain his report on 13th December 2016. The short report only concerned two images; February 1996 and March 1998. The Objector, while noting with some understandable dissatisfaction the application to admit rebuttal evidence so late in the proceedings, ultimately indicated that their own expert could deal with this late evidence in her own oral evidence later in the Inquiry and raised no objection to the evidence being admitted. The application was granted and so this material is referred to, particularly in the record of the oral evidence from Miss Christine Cox below.

The relevant statutory requirements

20. Section 15(3) of the 2006 Act enables any person to apply to register land as a TVG in a case where subsections 2, 3 or 4 applies.

Section 15(3) applies where -

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

21. It is not in dispute that user *'as of right'* ceased before the application was made and that the application to register was made within one year of the cessation of such use.

22. One then looks at the various elements of the statute.

'a significant number'

23. *'Significant'* does not mean considerable or substantial. What matters is that the number of people using the application land 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[6].

'of the inhabitants of any locality'

24. Where first used in section 15(3)(a) of the CA 2006 Act the term *'locality'* is taken to mean a single administrative district or an area within legally significant boundaries. This emerges very clearly from what Vos J (as he then was) said at [97(i)/(ii)] in *Paddico (267) Ltd v Kirklees Metropolitan Council [2011] EWHC 1606 (Ch)* whose findings on locality were affirmed on appeal at [2012] EWCA Civ 262. In short, village green rights must be asserted by reference to a particular locality.

25. In reference to locality, it is worth mentioning that in *Paddico* at first instance (see [106] at [2011] EWHC 1606 (Ch)) Vos J thought that a Conservation Area could be regarded as a locality since it had legally significant boundaries. However, he rejected this outcome on the facts of the case as (a) the area had not been

[6] R *(McAlpine) Staffordshire CC [2002] EWHC 76 at [71] (Admin)*

designated as such for the whole of the relevant 20 year period, and (b) users had not been predominantly from such area. Sullivan LJ rejected this finding on appeal; [2012] EWCA Civ 262 at [29].

'or of any neighbourhood within a locality'

26. A neighbourhood is a more fluid concept. The expression *'neighbourhood within a locality'* need not be a recognised administrative unit. A housing estate can be a neighbourhood[7]. However, a neighbourhood cannot be any area drawn on a map: it must have a degree of (pre-existing) cohesiveness[8]. In the *Warneford Meadow* case at [79] HH Judge Waksman QC said that the area *'must be capable of meaningful description in some way'*.

27. The statutory test is fulfilled if a significant number of the users come from any area which can reasonably be called a neighbourhood even if significant numbers also come from other neighbourhoods. The view I take is that the claimed neighbourhood must be an area which is cohesive, identifiable and recognisable as a community in its own right. There must, I think, be something about the claimed neighbourhood (or at least its core area) which distinguishes it from the surrounding areas. Only the inhabitants of the relevant neighbourhood have recreational rights over the land.

28. It is also clear from the authorities that the expression 'neighbourhood' can mean either a neighbourhood or neighbourhoods and the neighbourhoods concerned do not have to be located within a single locality[9].

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[7] *McAlpine*

[8] R *(Cheltenham Builders Ltd) v South Glos DC [2003] EWHC 2803 para 85*

[9] *Leeds Group PLC v Leeds City Council [2010] EWCA Civ 1438* at [26] and [56-7] and *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* at [27]

'have indulged as of right'

29. The traditional formulation of the requirement that user must be *'as of right'* is that the user must be without force, secrecy or permission. The landowner must be in a position to know that a right is being asserted and he must acquiesce in the assertion of the right. In other words, he must not resist or permit the use.

30. The nature of the inquiry is the use itself and how it would, assessed objectively, have appeared to the landowner. One first has to examine the use relied upon and then, once the use has passed the threshold of being of sufficient quantity and suitable quality, to assess whether any of the vitiating elements of the tripartite test applied, judging the questions objectively from how the use would have appeared to the landowner. In short, the use must be to a sufficient extent since use which is *'so trivial and sporadic as not to carry the outward appearance of user as of right'* should be ignored[10].

31. The issue of *'force'* does not just mean physical force. Use is by force if it involves climbing or breaking down fences or gates or if it is contentious or under protest.

32. Use that is secret or by stealth will not be use *'as of right'* because it would not come to the attention of the landowner.

[10] R *v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 AC 335, 375D-E*

33. *'Permission'* can be express e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can also be implied but not by inaction[11].

'in lawful sports and pastimes'

34. The expression 'lawful sports and pastimes' ('LSP') form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user 'as of right' (see *Sunningwell at p.356F-357E*). It becomes necessary in some cases to distinguish between the use of paths or tracks as putative public rights of way rather than as qualifying LSP.

35. The law under this head was addressed by Lightman J in *Oxfordshire County Council v Oxford City Council*[12] and in R *(oao Laing Homes Ltd) v Buckingham County Council*[13] and in the *Oxfordshire* case[14]. There is also a very helpful analysis in the TVG report of Vivian Chapman QC in *Radley Lakes*[15] who said that the main issue in such cases is whether the use would appear to a 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, then it shall be ascribed to the lesser right, i.e. a right of way.

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[11] R *(Beresford) v Sunderland City Council [2004] 1 AC 889 at* [5]

[12] [2004] Ch 253 at [102/3]

[13] [2004] 1 P&CR 36 at [102-110]

[14] [2006] 2 AC 674 at [68].

[15] (13/10/2007) at [304-305]

36. The decision in *Laing Homes*[16] requires me to discount user which would suggest to a reasonable landowner that users believed they were exercising a public right of way which would include situations (a) where a dog off the lead roams freely outside the footpath whilst its owner remains on the footpath; (b) where owners are forced to retrieve their dogs which have run away from the footpath; or (c) where walkers casually or accidentally stray from the paths without any intention of going onto other parts of the application land. I should also mention *Dyfed CC v Secretary of State for Wales* [1989] 59 P&CR 275 at 279 where it was said that there is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way.

'on the land'

37. The expression *'on the land'* does not mean that the registration authority has to look for evidence that every square foot of the land has been used. Rather the registration authority needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land had been used for LSP for the relevant period. The registration authority also retains a discretion to register part only of the application land if it is established that part but not all of the land has become a new TVG.

'for at least 20 years'

38. The relevant period in this case, subject to the decision on the Applicant's application to amend is either 30th September 1994 – 30th September 2014 or 18th September 1994 – 18th September 2014.

PROCEDURAL ISSUES

[16] At paras. 102-105

39. The regulations which deal with the making and disposal of applications by registration authorities outside the pilot areas[17], such as WBC, make no mention of the machinery for considering the application where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.

40. In *Regina (Whitmey) v Commons Commissioners*[18] Waller L.J suggested[19] that where there is a serious dispute, the procedure of *'conducting a non-statutory public inquiry through an independent expert'* should be followed *'almost invariably'*. However, the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by judicial process. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs. However the registration authority must act impartially and fairly and with an open mind.

41. The only question for the registration authority is whether the statutory conditions for registration are satisfied. In its determination there is no scope for the application of any administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the application land as a TVG on account of the fact that it has been long enjoyed by locals as a public open space of which there may be an acute shortage in the area.

[17] SI 2008/1960

[18] [2004] EWCA Civ 951

[19] At paragraph 62

42. The onus lies on the applicant for registration and there is no reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.

43. The procedure is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The 2007 Regulations follow closely the scheme of The Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under section 13 of the 1965 Act. In a small number of pioneer authorities The Commons Registration (England) Regulations 2008 apply. WBC is not a pioneer authority.

44. The prescribed procedure is very simple: (a) anyone can apply; (b) unless the registration authority rejects the application on the basis that it is not *'duly made'*, it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the registration authority then proceeds to consider the application and any objections and decides whether the statutory criteria are met and thus whether to grant or to reject the application.

45. It is clearly no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be *'properly and strictly proved'*[20].

<u>CONSEQUENCES OF REGISTRATION</u>

[20] (R *v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p.111 per Pill LJ and approved by Lord Bingham in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, at para 2)

46. Registration gives rise to rights for the relevant inhabitants to indulge in LSP on the application land. Upon registration the land becomes subject to (a) section 12 of the Inclosure Act 1857, and (b) section 29 of the Commons Act 1876. Under section 12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede *'the use or enjoyment thereof as a place for exercise and recreation'*. Under section 29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any *'disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green'*. Under both Acts development is therefore prevented and the land is effectively blighted from a landowner's perspective.

SUMMARY OF ISSUES

47. It is incumbent on the Applicant to strictly prove each and every qualifying requirement as set out in the statutory criteria above. For convenience, I summarise here the issues which had been raised by the Objector by the start of the PI, but these should not be viewed as the hurdles that the Applicant has to overcome because those are statutory. The Objector simply brings to the CRA's attention matters which they believe preclude the CRA from registering the AL as a new TVG. The summary given here is not intended to do full justice to the points that the Objector set out but simply to contextualise the following discussion of the evidence heard by the inquiry.

48. The Objector's legal summary identified the following as points that would be examined at the PI:

- Whether use that has taken place is not qualifying LSP but more in the way of use referable to a public right of way (PROW).

- Whether use of the land for LSP, if established, had been continuous throughout the whole period.

- Whether use of the land has been as of right or whether use has been forcible i.e. not *nec vi*.

- Whether any qualifying LSP has been by a significant number of inhabitants of a locality or a neighbourhood within a locality.

<u>THE APPLICATION LAND</u>

49. The AL is a small site at about 16 acres. It is made up of two fields which are separated by a 'stream'. Although we have referred to it as a stream throughout the Inquiry (and I continue to do so here), it is actually a drainage channel which has an unknown number of springs feeding into it along the course of the channel. The northern field is considerably smaller than the southern and both fields slope down towards the stream.

50. The Objector helpfully prepared a map[21] which shows the four access points through which all access is claimed to have taken place. These are referred to throughout this report by the numbers on that map.

51. The history of the land is not entirely clear but what is known of it in the years before the claimed period is provided by the evidence of Mr Beasley[22], Mr Agar-Hutty[23] and Mr Palterman[24]. It is sufficient to record that it was agricultural land throughout the 1980s owned along with the farmhouse by a Maud Barrett. She

[21] OB2 at page 811C

[22] OB1 at page 326

[23] OB1 at page 522

[24] OB2 at page 578a

permitted George Mullins and Anne Newman, local thatchers, to use the land for an annual hay crop throughout the 1980s. In the latter half of that decade, sheep were kept there for a period over the winter months and were taken off before the spring lambing. Mrs Barrett died in 1988 and left the farm to George Mullins and Anne Newman. As far as we know they continued to use it for an annual hay crop. Then in 1991 George Mullins passed away and left his share of the farm to Anne Newman. In 1992, Anne Newman sold the farmhouse and retained the land that is now the AL in this application. After that time Robert Palterman has maintained the land by annual topping until 2013. Anne Newman died in 2012 and the land was sold by auction to Monopro Ltd in February 2014.

SITE VISIT

52. It must be borne in mind that in a s15(3) application such as this where the claimed period has ended at least two years before the Inquiry, the site visit can only assist in giving an impression of the layout and nature of the land and does not assist in forming an impression of any use during the claimed period.

53. I visited the land accompanied by the parties on the morning of Tuesday 20th December 2016 when we spent the morning walking the land and the immediate environs. We viewed the AL itself, entering at access point 1 and taking in all the major features as discussed in the evidence including the pylon, the boundaries, the stream and access point 4 and then walked up Limmerhill Road and viewed the exterior of that boundary of the land and the other access points. On the day of the site visit the weather was unusually sunny and fair with bright sunshine and no rain.

54. Outside of the AL, at the south east corner of the land lies the Leathern Bottel pub and there are a small number of houses and gardens along the southern boundary with two plots of apparently unused land between the houses and near

the south west corner. On the western boundary is the small housing development at Blandford Drive to the north of which is the land of Mr Agar-Hutty which is similar terrain to the AL with grassland and mature trees, shrubs and hedgerows. The western boundary curves towards the north east as the land becomes more heavily wooded and leads into Foxhill Woods which borders the north west corner of the AL. The woods give way at the northern boundary of the land to the residential development which is set in the triangle of the furthest northern part of Limmerhill Road. The border with the housing runs for the majority of the northern border of the AL and is made up of mature trees and hedgerow and then there is a short stretch of trees and thinned out hedgerows leading into the north east corner. The eastern boundary of the AL is bordered by Limmerhill Road which is an unadopted roadway with a tarmac surface.

55. On the land itself at access point 1 there is a locked metal gate and I was able to view the old gatepost and there is a smaller post next to it and I could discern that if there had been a break in the fencing between the two, or if any fencing present had been broken or trodden down there, it would have been possible to enter through a narrow gap. On emerging from the tree cover into the field, the ground at this south east corner was muddy and rough but not impassable. Immediately to the left is the old piggeries area which has very rough ground surrounding it and we did not explore that in any detail. From the entry point, the land slopes away gently towards the stream.

56. Here, and throughout the AL, there are many mature trees on the boundaries and one or two in the AL itself. There are numerous species of trees and shrub and I observed elder, hawthorn and bramble in the hedgerows with oak and birch trees amongst others I could not identify.

57. The southern boundary was overgrown with bushes and bramble which in places was several feet thick and then in other places was considerably thinner so that it was possible to see through to the properties south of the AL on the Barkham Road. In the places where the hedgerow was thin there were many traces of old fencing or wires, some rusted and fresher barbed wire and various posts of wood, metal and concrete. I could see the area at the back of Folly Thatch Cottages where signs had been pushed over and there is recent tape (which may have been electrical) strung across a large gap. Further along the boundary the hedge and trees become very thick. The ground in the southern field is generally very rough and full of tussocks. On the day of the visit it was muddy but not very slippery.

58. The western boundary is also thick with trees and hedgerow however these are well maintained and there were no gaps apparent to me on this border at all. There is continuous fencing on this boundary of post and barbed wire which could be seen to have been repaired in places. I was unable to gain any impression of how old those repairs may have been or what had occasioned them.

59. The fields become wet and increasingly boggy as you approach the stream from either side. At the western end of the stream there was a very wide area of wet mud which was fairly impassable without losing one's wellies into it. That wet area seem to narrow as you progress easterly along the course of the stream but remained difficult to walk on for about half of the length of the stream. The copse area was also wet and muddy and a small pond is visible through the thick trees around it. Next to the copse there is now a circular fence which I understood is a school area for the current tenant's horses.

60. The stream is banked by mud and brambly overgrowth for most of its length. It has varying widths; some places are perhaps only a quarter of a metre wide with some parts, closest to the western end, perhaps a metre and a half to two metres wide. This is difficult to gauge because the overgrowth is so thick. It did not

appear to have any flow on the day we were there and there was duckweed type growth on most of the surface.

61. I examined the area that had been access point 4 which is now blocked off by two Heras fence panels in concrete blocks covering the actual opening into Foxhill Woods and there is recent post and wire fence that has been erected across that boundary and either side of where the opening would have been. The track into the woods was wide and looked worn. The ground there was damp and well covered with leaf fall.

62. Along the whole of the northern boundary it was possible to see still in the ground the area where the thick border of bramble and bracken had been cut back. This was clearly several metres deep before being cleared and I understand that the track through this wide overgrowth into access point 4 had been on a curve which had led out from the woods in a south west direction.

63. In the north east corner of the AL the stream appears to sink in to the ground presumably to a culvert which will then carry it towards the Emm Brook and there was some material on the ground at the most eastern point of the stream which appeared to have been put down to make it easier to traverse the area. The ground in this corner was very wet although passable in wellies. At the far north eastern corner is a new metal gate and I believed this was in the position that access point 3 is at on the AL map. Then moving down the field along the eastern border, there is at first a length where the hedgerow is thin and there is new stock proof fencing made up of post and wire. This covers the area which appeared to me to correspond to the access point 2 on the map where it is possible to see where there may have been a broad worn track into the field from the Limmerhill Road. After this as you move further along the eastern edge, the shrubs and grass thicken to become a deep border that runs down to the south east corner. There

is a circle of Heras fencing about half way along this boundary and I understand that had been left on the land to protect the horses from a large hole in the surface there. There is a worn path that runs along the eastern edge of the AL but I understand this was not there during the claimed period and is not a path that was claimed in the footpath application.

64. We walked up Limmerhill Road and I observed the verge outside the AL. This is made up of trees of all sizes and maturity, a great deal of overgrowth on the ground many of bramble and bracken but with many other species visible. There are a multitude of old posts along the verge at various places some of which are still in the ground but many wooden remnants are now suspended in the tangled overgrowth. There were numerous remnants of barbed wire. Some was rusted and clearly many years old while there were other lengths still running between posts which retained its silver coating. The vegetation along the whole of the length was thick and fairly impenetrable. I was not able to gain any clear impression of the ditch except in one or two places where it was possible to push the end of a stick down through the plants. I could not feel any bottom of the ditch and my impression was that it may have been quite deep originally but was filled out with overgrowth now. There were one or two places where it was possible to see that barbed wire had been previously cut and then repaired by re-winding but it was not possible to tell when this may have occurred.

65. We walked up Limmerhill Road and into Foxhill Woods a short distance to view the woods side of access point 4. This was unremarkable. There was a clear pathway that led into the woods from the road and the path curved round to lead to the woods' side of access point 4. The ground was marshy but well covered with leaves and the path was clear enough to walk through without any real obstruction except the odd overhanging thin branch.

WITNESS EVIDENCE

66. Although I will endeavour to summarise the evidence that I heard, what follows is not intended as a verbatim account, or even a complete account, of the evidence given by the witnesses at the public inquiry. It is simply a summary of some of the more salient issues dealt with in the evidence, particularly those that form the basis of my recommendation. The summary is intended to be a sufficient account of the evidence for the registration authority to understand the reasoning behind my conclusions. I have taken the evidence in the order in which the witnesses appeared at the Inquiry.

APPLICANT'S WITNESS EVIDENCE;

WITNESSES WHO GAVE ORAL EVIDENCE

PETER PATTISON

67. Mr Pattison submitted a witness statement to the PI dated 25th October 2016[25]. He had completed an EQ dated 6th July 2016. He had also submitted a statutory declaration dated 28th November 2016[26]. He has lived at Willow Cottage on Limmerhill Road since April 1987. Willow Cottage is close to the north of the AL. Mr Pattison's written evidence is that he did not use the land himself but his children played there, and he accompanied them, in the late 1980s to the early 1990s which is outside the relevant period depending on when their use in the 1990s stopped. He believed they did this about weekly. He described having seen a wide range of activities taking place on the land but he does not describe what these were other than dog walking. He noted that his daughter had enjoyed practising her photography there as she got older. He had often seen others using the land over the period but did not know them or where they came from. In his EQ he stated that his use had dated from 1987 to 2015 but in his witness

[25] AB 2 @ 3PQ

[26] ASB

statement and statutory declaration he said use had continued until fences were erected in 2014. In his EQ map he indicated that the whole of the AL had been used for leisure activities. Mr Pattison does not appear to have submitted any evidence to the footpath application. There were eight photographs attached to his EQ which appear to depict use of his garden before there was any fence or boundary on to the AL. In any event they were dated for outside the relevant period.

68. In his evidence in chief Mr Pattison said that his children had continued to use the land when they went to university so that their use had actually continued until the late 1990s. He did not say how often they would have used the land actually during the period but as he referred to their having gone to university, it seems most likely that their use became occasional rather than the weekly frequency he had stated in his written evidence.

69. He identified the area for blackberry picking to be along the north hedgerow but also in other places on the east and west sides alongside the worn paths. He said that his children had played around the stream area of the AL collecting newts and tadpoles and that the area around the stream was very boggy. He had mainly seen neighbours children on the land but said that many others came from surrounding areas particularly when sledging. He assumed these were locals because they were on foot but accepted that they might have driven and parked nearby. He had assumed that they were locals walking to the field.

70. Under cross examination Mr Pattison accepted that his property appeared to be excluded from the claimed neighbourhood within a locality as shown on the NH plan. This means that while Mr Pattison's evidence cannot be taken to support the application which is being made for registration by the local inhabitants of Woosehill in the locality of WBC, he would be considered a local inhabitant of the

locality of Evendons West Ward of the Wokingham Town Council and his evidence is relevant to that extent.

71. He accepted that his children were aged 16 and 14 at the start of the period but said that he thought they had both continued to use the land; his son for riding his bike and sledging, his daughter for photography both during and after her university years. He accepted that he had not mentioned photography or bike riding in his EQ when asked about his immediate family's use. In answer to my questions Mr Pattison was clear that his son had used the land as an adult for kite flying, Frisbee and tobogganing but accepted that the children's use had certainly diminished as they got older.

72. In relation to use of the AL by others, Mr Pattison agreed that dog walking and walking was the predominant use of the land over the span of a whole year although children's use was higher in good weather and school holidays. He accepted that his use with his son for sledging was very infrequent. When they did do this they would walk down Limmerhill Road on the hard surface and tae the toboggan into the field from the road. He noted that he thought there would be up to 60 people there with children when it did snow enough for tobogganing. He did not give any evidence as to when the tobogganing occasions were but agreed that they would not have been more than once or twice a year.

73. Mr Pattison recalled a bench placed on the southern boundary of the AL. He thought this had been put in prior to 2010. He recalled it as sturdy and having been there for several years. He thought it was gone by 2014. He recalled walkers and tobogganists resting on it.

74. There were eight photographs attached to Mr Pattison's EQ and statutory declaration and they had been marked as "Photographs depicting Peter Pattison playing with his children circa 1985 – 1990". They are clearly all taken on a single occasion from land at the north of the AL which gives a view south west across the AL. There are remarks on the photos which Mr Pattison explained had not been added to the images by him and it was not clear how they had come to be there. In any event, I have disregarded those remarks. Mr Pattison also explained that the title was incorrect as he had only moved to the property in 1987 and so the photos could not pre-date that event.

75. Mr Pattison was asked about the fencing on Limmerhill Road which he recalled as always having been in some state of deterioration with some lengths robust and others non-existent. He said he thought the landowner did not mind people using the land but did not expand on that further. He did not accept that the nature of the AL meant it was not possible to play ball games on it but did concede there had been less of that since about 2000.

76. In answer to my questions. Mr Pattison confirmed that he would not use the land except with his children. When I asked about their use as they got older and into the period, he relied most heavily upon his daughter's use of the land for practising her photography and said that she would do this a lot. I did not find those answers credible because of the lack of any photographic evidence from her endeavours and also because in his EQ he did not mention at all her use for photography. I do not doubt that she may have used the land in this way occasionally but I did not accept that it would have been at the volume suggested.

77. I found Mr Pattison's evidence vague as to periods of use and activities he had seen taking place. Although Mr Pattison has lived by the AL throughout the period I do not think his or his family's use throughout that period was any more

than occasional. It seemed clear to me that he may have used the land much more when his daughter in particular was young but that use seems more likely to have ended by the start of the period; the chief activity he describes his daughter doing is playing with friends and den building and I do not accept that she would have still been doing those things aged 14. There was clearly at least one snowfall shown in the photographs when they were using the north of the land but this was outside the period. There may have been occasions of tobogganing when his adult son went on to the land but there was no evidence about the frequency of this. He had seen others using the land for walking and dog walking daily and agreed that was the predominant use he witnessed but did not give details of whether this was on or off paths or where people were going or whether he recognised them.

78. Mr Pattison appeared to give evidence honestly according to his best recollection. He was somewhat defensive under cross examination but made candid concessions about the children's diminishing use as they got older. I found he was reticent in answering questions on the extent of his family's use during the relevant period and my impression was that it would not have continued into the relevant period for more than a few years and even that use would be infrequent. His adult children would have used the land occasionally on visits home. This was at odds with his EQ evidence which was that his use had continued until 2015. Rather than Mr Pattison being able to offer detailed evidence of use for the whole period, his oral evidence generally did not confirm his written evidence and rather revealed that there had been no sustained use of the land for any period of time except occasional use probably early in the relevant period.

<u>LYNN FORBES</u>

79. Ms Forbes is the Applicant for registration of Limmerhill Field as a new town or village green. She made a witness statement dated 24th October 2016[27] and this was later sworn as a statutory declaration on 17th November 2016[28]. She completed an EQ on 24th May 2015[29]. She had completed an evidence form in the footpath application dated 8th May 2014[30]. She has lived at 3 Gull Close since February 1986. Gull Close is north of the AL with several roads lying between them. She describes her twice daily use of the land as being largely walking with dogs augmented by her children who would be engaged in various leisure activities such as exploring the flora and fauna, tobogganing, flying kites and picking blackberries. These activities are described in the context of the walking of the dogs rather than separate occasions. Ms Forbes describes the friendships she has formed out of the dog walking community she has encountered on the AL.

80. At paragraph 3 of her statement Mrs Forbes describes the Woosehill neighbourhood as being bordered by "Reading Road, Limmerhill Road, Barkham Road and the Woosehill Buttercups/Evergreens Estate and Chestnut Avenue". Unfortunately it is not possible to plot any line around an area according to that description. Reading Road to the north east of the area is a clear line which does join Barkham Road which then runs west until it meets Limmerhill Road which runs north and west around the AL. So these three roads could make three sides of an area. However, Chestnut Avenue does not join Reading Road. There is no Buttercups Estate on the map but if this refers to the network of roads named after flowers this is much further to the north west of Chestnut Avenue. Also the network of roads named after trees which could be the Evergreens Estate covers an area to the east of the land which joins Barkham Road to the east of

[27] AB 2 Tab F

[28] ASB

[29] AB 2 Tab F

[30] OB2 at page 669.

Limmerhill Road. I could not divine what was intended as the neighbourhood boundary from the description.

81. In her evidence in chief Ms Forbes was asked to clarify the claimed neighbourhood within a locality with which the application is concerned. She did so by reference to the NH plan[31] adding further clarification that the AL is included in the neighbourhood claimed despite there being an area of the AL in the southwest corner of the map which had "dropped off the page". However, under cross examination Ms Forbes appeared to equivocate about the neighbourhood being claimed. She gave confusing evidence about whether the red line on the NH plan corresponded to her perception of the neighbourhood being claimed, at first disagreeing that it represented her perception of it and then later stating that it did but that the AL and the triangle at the top of the map should also be included (presumably to include the properties off Limmerhill Road). She accepted that she had been legally advised while drawing up the NH plan. On returning to this topic later, Ms Forbes did not accept that she had made substantial alteration to the definition of the neighbourhood within a locality being claimed although she did ultimately accept that there had been an addition to the area claimed which could be seen from the different orientation of the eastern boundary of the claimed neighbourhood on the original NH plan[32] and the updated NH plan as produced for the PI[33]. Her evidence on this was highly confused. Nevertheless there was no application to further amend any boundary as set out on the NH plan. What is delineated by the red line on the plan remains the Applicant's case as representing the neighbourhood of Woosehill as applied for in the alternative to the locality of Evendons West Ward of Wokingham Town Council.

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[31] AB 5 Tab 2 Map a).

[32] OB 2 at page 811b

[33] AB5 Tab 2 Map a)

82. Ms Forbes' EQ mentions photographs attached to the application but she clarified in her oral evidence that she was referring to the photographs of others and that there were none of her own which were missing.

83. Her witness statement recorded that she used two different routes to arrive at the land from her home. She put the frequency of her use at twice daily. In her EQ she stated the frequency of her use through the period as weekly initially increasing to twice daily. Her evidence form to the footpath application in 2014 states her use as twice daily for recreation and through passage and describes a route from Foxhill Woods to either Smiths Walk (access points 2 or 3) or the Leathern Bottle (access point 1). The plans attached to her EQ and footpath evidence form show very similar lines which broadly correspond to the worn paths visible on the later aerial images.

84. Under cross examination, Ms Forbes accepted that she represented the Limmerhill Walking Group (LWG) in the footpath application which was made in December 2014 after fencing had been put up to stop public access to the AL. She acknowledged evidence that she had written to one of the landowners in terms that described the footpath use as having been permissive[34] and explained that she had always understood that the farmer who carried out the annual hay cut of the AL had given permission for use.

85. She agreed that a specialist consultant had considered the footpath application and had not indicated that it was inappropriate in any way and that LWG members, the Wokingham Town Council and Barkham Parish Council all agreed that the relevant application to make was to seek a modification to the Definitive Map to record and reflect the long use of the paths on the land by the public. She did

[34] OB1 at page 252

point out in re-examination that they had supported the DMMO application on the basis of her presentation and not due to any independent research undertaken.

86. In reviewing the aerial photography available and particularly that in the report of Ms Cox[35], Ms Forbes very reluctantly accepted that those for the later years in the relevant period showed much clearer evidence of paths than those from the early part of the period. She ventured that she thought this was because more houses were built in the area but could not give further detail of what had been built or where.

87. Ms Forbes accepted in cross examination that the landowners had erected fencing around the AL by 19th September 2014 as this became clear from the Objector's internal correspondence[36]. She did not dispute these dates or that therefore use as of right could not have taken place up until 30th September 2014. It was this evidence that appeared to trigger the application to amend the period submitted at the end of the Inquiry.

88. In several instances of communication between Ms Forbes and the new landowner, she had mentioned on more than one occasion that the previous landowner had given permission for the use of the land. Ms Forbes explained that she had been confused about this. She had though the farmer who annually took the hay cut was the owner and she thought he had given permission. She confirmed that she had not spoken to him directly about that.

89. In terms of use of the AL she had seen by others, Ms Forbes did accept that ramblers and cyclists in particular seemed to use the land as part of a wider route;

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[35] For convenience the images were enlarged and provided by O in a separate folder simply marked 'Aerial Photographs' which were supplied to all parties and the witnesses at the PI.

[36] OB1 at pages 433, 436 & 437.

they would enter in the north west corner and leave at any of access points 2, 3 or 1. She noted that the woods to the north are popular. She herself used the land as a through route sometimes but she was also clear that at other times she was using the land as a destination in itself for leisure and that these times were roughly equal. She readily accepted that the majority of use of the AL was for walking with or without dogs.

90. She was asked about her use through the whole period. She explained that she had a dog in 1994 and thought that s/he had died in the early 2000s. She then mentioned getting her next dog in 2008 or 2009. She agreed that there were about 5 or 6 years when she did not have a dog but she said that she continued to walk the land at the same frequency with friends or with children.

91. I am able to draw out of her evidence that she states her use of the AL was daily and she says this was for the whole period. She used different routes and access points to arrive at and leave the land. Although she had noted use by scout groups and ramblers in her written evidence, she accepted that these were occasional. She described the bicycle use she had seen as use of the land as passage use, coming in usually from Foxhill Woods, using the worn paths and leaving by any of the other access points. She described other activities recorded in her written evidence such as horse riding and kite flying as occasional. She accepted that the blackberry picking could be done a step away from the worn paths. She was not explicit that her use was of the worn paths themselves but I find that her footpath evidence form, signed by a statement of truth, is evidence for that and, particularly in her witness statement, she describes the great enjoyment she derived from walking her dogs with others and so I find it most likely that she was doing this on the worn paths with others who did so.

92. I found Ms Forbes to be generally a straight forward witness on the whole. She was evasive at times under cross questioning and she did not appear to have

grasped the importance of clearly identifying the locality or neighbourhood within a locality for her application. I have no doubt that she gave an honest account of her use and experience of the land on the whole. There were two points on which I doubted whether she was being truthful. One was when she responded in cross examination about den building with her children. Mr Edwards pointed out that her sons were aged 14 and 16 at the start of the period and put to her that they would have moved beyond den building and hide and seek by that time. She replied that they would have continued to build dens at that age and she said "we still go there and build dens even now". Aside from this patently not being the case because there has been no access to the land for two years, the answer just didn't ring true. The other point of her evidence which seemed surprising was that she said that she walked the land every day when she didn't have a dog. I was surprised that she did not at least note a change in the frequency of her use for these years but I do accept that she may have continued daily walking for exercise.

HEATHER WRIGHT

93. Mrs Wright gave a witness statement dated 25th October 2016[37] and then reiterated that content in a statutory declaration of 17th December 2016[38]. There are nine photographs attached to her statements. She did not submit an EQ to the Inquiry but did submit an evidence form to the footpath application[39]. Mrs Wright has lived on Limmerhill Road for four years and before then lived in the Woosehill area for the previous 12 years so that her use of the land was from 2001 to 2014.

94. There are 9 photographs attached to Mrs Wright's witness statement of which 7 are of snow play showing numerous others doing the same. The other two show

[37] AB 2 Tab W

[38] ABS

[39] OB 2 at page 726

walkers on the land. One show 4 people on the path in the southern part of the land below the stream and the other appears to be a person walking west o the northern perimeter path.

95. In her witness statement she describes her use as walking on tracks with some seasonal use for blackberry picking and snow play. From 2001 to 2012 she would use the land every one or two months and then from 2012 when she moved to Limmerhill Road that increased to weekly use. She would arrive at the land via access point 4 or 2.

96. She noted that the tracks remained available even during the height of the annual hay crop.

97. She explained it had been a therapeutic space for her after suffering some trauma a few years ago. She regularly saw others using the AL as she can see out on to it from her house but had only once bumped into someone she knew there.

98. In her footpath evidence form Mrs Wright details using the land to go from Limmerhill Road up to Foxhill Woods but at a frequency of 20 times per year rather than weekly. The attached plan shows use broadly corresponding to the worn tracks.

99. In her oral evidence Mrs Wright said that her use was usually part of a wider route either on a very long walk or one encompassing Foxhill Woods to the north of the AL. She confirmed that when she saw others using the land, which was often, they would be using the worn paths.

100. Under cross examination Mrs Wright agreed that the impression she had from the aerial photos was that it appeared there was greater use in later photos but that she didn't know if this was the case. She did recall there had been a bench near the boundary with the Leathern Bottle but could not remember how long it had been there or when it was removed.

101. Mrs Wright was a straightforward witness who was helpful and clear about her use of the land. I was very grateful for her assistance to the Inquiry.

WILLIAM GARWOOD

102. Mr Garwood completed a witness statement dated 24th October 2016[40] the contents of which were reiterated in a statutory declaration dated 23rd November 2016[41]. He also completed an EQ dated 9th May 2015[42] with the assistance of Dr Lucas, who was also a witness for the Applicant. He does not appear to have submitted an evidence form in the footpath application.

103. Mr Garwood has lived at Gable Cottage on Limmerhill Road since 2003 and used the land once or twice a week since that time until about 2011. Before then he was very familiar with the land, his family having lived at Gable Cottage since 1964, but as he worked and lived elsewhere his use then was very occasional. When using the land he would see others typically walking their dogs and would sometimes recognise one or two people as local inhabitants.

[40] AB2 Tab G

[41] ABS

[42] AB2 Tab G

104. He agreed that his use was of the worn tracks at the perimeter and alongside the stream in the middle of the AL and that the blackberries could be picked from the path or from close by to it.

105. He would access the land via access point 4 or 2. He said h would go up into the woods sometimes.

106. Mr Garwood clearly recalled the annual hay cut and explained that he tended to stay off the land during the period of cutting and the hay lying on the ground which might be a period of two weeks. He did not seem to do this out of necessity but rather preference as he did not feel there was any risk of the tractor driver not being able to see walkers. The hay was cut by a tractor pulling a large cutting device.

107. Mr Garwood was an honest and reliable witness and I was very grateful to him for coming to the Inquiry to give his evidence.

DR REX LUCAS

108. Dr R Lucas submitted a witness statement dated 23rd October 2016[43] and the contents of that were repeated in his statutory declaration of 28th November 2016[44]. He provided an EQ dated 25th May 2015[45]. He had previously submitted an evidence form in the footpath application dated 15th May 2014[46]. Dr R Lucas lives at Applegate on Limmerhill Road. His property is contiguous to the AL at the northern border.

[43] AB2 Tab L

[44] ABS

[45] AB2 Tab L

[46] OB2 at page 687.

109. Dr Lucas states that he used the field from 1995 and although some fencing had been erected in September 2014, he continued to use the field until further fencing stopped up access in March 2015. There were three distinct periods of use during which the frequency of his use changed from once or twice a week between 1995 and 2000, to once or twice a month between 2000 – 2009 and then generally once or twice at weekends thereafter until 2015. He described meeting many other dog walkers over the years nearly all of whom came from Woosehill.

110. He would use all four access points to go onto and leave the land. His footpath evidence form describes using the worn paths to get from Barkham Road to Foxhill Woods, for use of the paths themselves from his house and back to it and also as a route from Barkham Road to his house as an alternative to walking up Limmerhill Road. I could gain no impression of how his different uses were shared across the frequency of his use and so in an effort to treat his evidence as fairly as possible, I apportion them equally to a third each.

111. He relates that although his view was that he had never had permission to use the AL, he had visited the then owner in 2011 accompanied by a neighbour of his. He met with Miss Newman who owned the field and Mr Beasley who assisted her with it. He relates that when the use of the field by the public arose in the conversation, they had indicated that they "were not bothered by it".

112. I noted some conflict between Dr Lucas' evidence form to the footpath application and his EQ for the TVG application, particularly on the attached plans. The former depicts clear use of the network of worn paths and the latter shows much more diffuse use of the whole of the land including the worn paths. In the former he states that his purpose in using the worn paths is exercise for himself and his dog. He describes seeing other dog walkers. There is no mention

at all of any other leisure activities either by himself or other users although the form asks that witnesses should answer fully keeping back no relevant information. Yet in his EQ he relates much broader leisure use of the field rather than just walking. Mr Edwards dealt with the evidence to the footpath application at length in cross examination. Dr Lucas conceded that there was a discrepancy and acknowledged that much of his non-track use when dog walking was related to throwing the ball for his dog. He agreed that if he did not have a ball with him then he would stick to the worn tracks. His view of this was that the 2014 evidence form was not accurate because if he took a ball out with the dog half of the time then on those occasions he would not stick to the tracks so that the representation that he had given of his track use in 2014 was inaccurate by 50% because for that time he would not stick to the tracks with the dog but would go all over the field in throwing the ball and his dog retrieving it. That was an admission that concerned me and I treat his evidence with some degree of caution because of it.

113. He also accepted that some of his use of the field was as a through route to his garden rather than walking up Limmerhill Road. He also agreed that the predominant use of the AL in 2014 was by dog walkers.

114. On being asked about the meeting with Miss Newman in 2011 Dr Lucas agreed that he had understood her to have expressed contentment regarding the dog walkers using the field and that this was probably equivalent to her giving consent. He recalled how he was relieved to find that she and Mr Beasley didn't seem to mind the dog walking use as he had never been quite sure what the owner would think about that.

115. Dr Lucas' evidence appeared to be contradictory in relation to his use of the worn paths. He appeared keen to give the impression that his use of the land had not

been confined to the paths but under cross examination it became clear that in fact his use was most often of the paths with his dog but that he regarded the time he spent retrieving his dog or the ball thrown, was 'off path' use of the land as a whole. He explained the conflict to the Inquiry with his footpath evidence form on the basis that as the footpath application was concerned with public use of the tracks, he did not think his other leisure activities were relevant to that application. His evidence on this issue felt disingenuous and my impression was that he was aware of the legal significance to the TVG application of his use having been on the worn tracks rather than of wider areas of the land and that he was trying to disguise that. What Dr Lucas appears to be describing here is essentially track use with the kind of off track diversion necessitated by retrieval of the dog or the ball.

DR ERIKA LUCAS

116. Dr E Lucas gave a witness statement dated 23rd October 2017[47], the contents of which were reiterated in her statutory declaration of 28th November 2016[48]. She completed an EQ dated 3rd May 2015[49]. She had also completed an evidence form for the footpath application dated 15th May 2014[50]. Dr E Lucas has lived with her husband Dr R Lucas as described in his evidence previously.

117. Dr E Lucas describes her own use of the AL. She has walked her dog there most weekdays since moving to their property in October 1995. She describes socialising on the land and various activities with her children such as picking sloes and blackberries and sledging when snowy. During the relevant period there were informal dog training sessions on the land. She also describes her community at length and the social interchanges between residents of Woosehill and

[47] AB2 Tab L

[48] ABS

[49] AB2 Tab L

[50] O2a t page 690

Limmerhill Road. She describes the land and her experience of it with great affection in terms of her enjoyment of the landscape and wildlife.

118. In cross examination Dr E Lucas was asked about the conflict in her evidence to the footpath application, where she described the use of the paths by dog walkers as having been permitted by the landowner, and her EQ where she states that no permission was ever given for such or any use. She explained that she had drawn an inference of permission from Dr R Lucas' description of the meeting with Miss Newman in 2011 but the inference had been hers and not what he had told her.

119. It was also put to Dr E Lucas that her evidence of use of the land was practically identical between her EQ and evidence form to the footpath application except that in the 2014 application she signed a statement of truth to say that her use was of the paths whereas in her witness statement she states "We did not keep to the beaten tracks but walked freely"[51] and signed a statement of truth to that effect. She dealt with this by way of stating that her evidence in 2014 was addressed only to the paths because that was what that form was about and that her use hadn't been solely of the paths but had included path use. Whereas the whole of her use was relevant to the current TVG application. She either did not grasp or did not deal with the fundamental conflict between the two evidence forms; one attesting to continuous use of the worn tracks as rights of way and one attesting to use of the whole of the AL specifically not confined to the tracks.

120. I found Dr E Lucas' response on the difference between her evidence to the footpath application and her evidence in this application unsatisfactory. Her evidence is directly contradictory and it was clear to me that in one of those instances she had been deliberately misleading despite signing a statement of truth.

[51] Paragraph 8

On that basis I find that I cannot rely upon her evidence at all to assist in formulating my recommendation.

JAN NORBURY

121. Mrs Norbury submitted an undated witness statement[52] and an EQ dated 20th March 2016. A statutory declaration was completed dated 23rd November 2016 [53]. Paragraph 14 is amended but otherwise this is identical to the witness statement. She did not appear to have submitted an evidence form to the footpath application. She lives at 4 Rowan Close which lies close to the east of the AL. She has lived there with her family since September 1985 to date so has been a user of the AL throughout the relevant period. She describes using the land with her family for ball games, den building, picnics, quiet reflection and exploring the pond life in the brook in the middle of the land and the flora generally.

122. In her evidence in chief Mrs Norbury confirmed her written evidence as to her use of the field. She clarified that when kicking a ball with children, this tended to be along the most northern worn path leading up to the woods. When she had enjoyed picnics as described in her witness statement at paragraph 6, these would be by the stream in the middle of the field.

123. In cross examination Mrs Norbury confirmed that her use of the field with her own children would be outside of the relevant period but she explained she had grandchildren born throughout the early 2000s (five of them) and she would use the land with them as she had with her own children when they stayed with her.

[52] AB2 Tab N

[53] ABS

124. Her recollection of the tracks was that there had been perimeter worn paths since she started to use the land in the mid 1980s. She was very clear that even in the years that it is not clearly discernible from the aerial photography, the northern perimeter track was always well established and accessible. There has not been a time when she could not use that path to go up into Foxhill Woods since she moved into her property. She stated that the route she describes in her written evidence, accessing the field at point 2 and leaving it through point 4 to go up into the woods, was the majority of her usage at the start of the period until the mid-2000s. It was part of a larger circuit walk that she would customarily use which emerged from the woods and led them back down through the various roads to her home. She believed that the paths crossing the land via the stream were more recent. She agreed that the use of the AL had intensified with the additional development of housing in the area and she recalled this intensification in the increased frequency with which she would encounter other users on the field or in the woods.

125. Mrs Norbury agreed that by the start of the relevant period she no longer used the land with her own children. Her own dog had passed away by then so she accepted that she had not used the AL for dog walking during the period. Her use up until the mid 2000s was her own use for walking particularly in the evenings after work. Her use beyond her own walking then started again with her grandchildren from about 2004 and then increased significantly from about 2008/2009 when she spent a lot of time in the summer in the AL with her granddaughters aged 3 and 5. She recalled that there seem to be more people on the land from about 2003/04 and when she saw others they would generally be walking dogs on the perimeter paths and throwing balls for dogs to retrieve. She accepted that she couldn't really help with what other tracks were worn by this time as her use was generally of the top track and by the stream.

126. Mrs Norbury was a straight forward helpful witness. I found her responses candid whether she thought they would assist the application or harm it. She had good recall of the different phases of her use of the land which related to the whole of the relevant period. I was very grateful to Mrs Norbury for her assistance.

SALLI SCOTT

127. Ms Scott gave a witness statement dated 23rd October 2016[54], the contents of which were reiterated in a statutory declaration dated 30th November 2016[55]. She had completed an EQ dated 8th December 2015[56]. She does not appear to have submitted an evidence form to the footpath application. Ms Scott lives at 63 Dorset Way which is about 400 metres to the north of the AL and close to the east of Foxhill Woods. She has lived there since 2003. She identifies the boundaries of Woosehill as being Barkham Road, Reading Road, Simons Lane, Bearwood Road which encompasses Limmerhill Meadow (by which Ms Scott refers to the AL) and Fox Hill (which may be a reference to the woods only but this was not clear). She explains that before moving to her current home, she lived with her family off Old Woosehill Lane where they still live. Despite growing up in the area, Ms Scott stated that she didn't use the AL before 2003 but that the access to the land and Foxhill Woods had been important factors in her decision making when buying a house.

128. In her oral evidence Ms Scott told the Inquiry that she used all of the tracks across the AL and that her use was generally on those worn tracks but that kite flying or ball retrieval would take her off the paths. She explained that her use of the land would have been daily with her dog since 2003 and then from 2011 when her daughter was born, she would use a cross country buggy and similarly walk the

[54] AB2 at Tab S

[55] ABS

[56] AB2 at Tab S

land daily. She agreed under cross examination that this use of the field was generally part of a wider route encompassing the woods and her route from and back to her house. She confirmed that her husband had used the field occasionally to cycle round and this would be done on the perimeter path.

129. Ms Scott was a straight forward witness who reiterated much of the evidence of other witnesses and emphasised the richness of the AL and it positive contribution to many local people's lives. My impression was that her use and that of her family was of the worn paths at both the perimeter and across the field, as part of a wider route, with some leisure activity on occasion taking place off those paths in the field such as the kite flying or exploring the wildlife of the copse.

LYNN ROSSI

130. Ms Rossi gave a witness statement dated 23rd October 2016[57], the contents of which were reiterated n a statutory declaration dated 17th November 2016[58]. She completed an EQ dated 11th May 2015[59]. She submitted an evidence form to the footpath application dated 13th April 2014[60]. She has lived at 10 Swallow Way since 2010 which is part of what is known locally as the 'Birds estate' which lies close to the north of the AL. Ms Rossi estimates this a quarter of a mile from the AL. From 1996 until 2010 she lived at 12 Linnet Walk which is slightly more northerly on the same contained network of roads with bird's names. She estimates that was one third of a mile from the AL.

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[57] AB2 Tab R

[58] ABS

[59] AB2 Tab R

[60] OB2 at page 682

131. Ms Rossi describes the neighbourhood as bounded by Bearwood Road, Reading Road, Simons Lane and Barkham Road although she describes this as Limmerhill.

132. She describes her use as walking with friends only once every two months or so and occasional horse riding on the worn tracks before 2007. Then she started a walking group once a week in which, on several occasions, she would include the perimeter of the AL in the 4-5 mile walk. From 2010 her use was daily, at least once, while walking with her dog as part of a wider route. In her evidence in chief she clarified that she would use the AL as a destination when photographing wild flowers there but I gained no impression of the frequency of this.

133. Ms Rossi gave evidence that the annual hay cut had only ever been carried out in the southern half of the AL. In examining the aerial photography images Ms Rossi did not accept that the images for 14.09.1996 or 04.09.2003 could be accurate because she felt they showed mowing lines in an area of the field which was very boggy and she felt the worn tracks would be much clearer in the images. She was reluctant to accept the indication from the images that the entire AL had been subject to the hay cut rather than just the southern half.

134. Ms Rossi was an honest witness whose footpath evidence form and EQ were entirely consistent. She was somewhat defensive under cross examination and did not accept the inferences being put to her from the aerial images, at one point seeming to suggest that the photographs may have been altered. Otherwise she was clear in her recollection of the land during her use and that not only was her use generally of the worn tracks, either with the dog or when riding across the land, but that what she had seen of others use also appeared to be of the worn tracks. I was grateful for her assistance.

PAUL CHRIMES

135. Mr Chrimes gave a witness statement dated 23rd October 2016[61] the contents of which were reiterated in a statutory declaration dated 24th November 2016[62]. He completed an EQ dated 5th July 2015[63] which has three photographs attached. He does not appear to have completed an evidence form for the footpath application. Mr Chrimes lives at 165 Barkham Road which lies close to the AL at about 600 metres to the east. He has lived there since 1996 with his family including their successive dogs.

136. Mr Chrimes use of the field would be at least once every weekend until fencing was erected. Access was generally gained at point 1. He describes, like many of the witnesses, having seen others using the field in the same way, for dog walking. He states that the majority of the time the AL was the destination of these walks rather than being part of a wider route. His use would be of the worn tracks which run around the perimeter but also those that cross the land. Occasionally he would continue his walks up into Foxhill Woods.

137. In his oral evidence he clarified that he usually entered the AL at access point 2 and would either walk a circuit at the perimeter or cross the field using the worn tracks by the stream, Occasionally he might go and explore the pond in the copse. Generally, he said, his use was of the paths and this was the same for the others he saw using the land. He said that he has seen use that was not on the paths such as picnics and tobogganing. He related the frequency of this as not as frequent as he would see dog walkers on the paths but that he had seen off path use more than once.

[61] AB2 Tab C

[62] ABS

[63] AB2 Tab C

138. Others he encountered were not known to him but he said that once or twice he would recognise someone local amongst users.

139. In cross examination Mr Chrimes stated that his principle use of the land was for dog walking. He did not accept that there were no worn paths in the earlier years of the relevant period, e.g.in 1998, as the aerial images tended to suggest. He recalled that there was a clear perimeter path in 1998 as he was using it then. He did accept that these had become much more pronounced in the later years of the period.

140. He explained that he had not tended to use the access point at 1 because he found this area generally wet and boggy and difficult to traverse. He said that there were similar conditions at the western end of the stream too.

141. Mr Chrimes was a straight forward witness and I was very grateful to him for coming and sharing his recollection of the land with the Inquiry. His use was weekly from 1996 to the end of the period and, unusually this was only occasionally part of wider route taking in the woods. He was clear that he walked the worn tracks and others he saw walking also used the tracks.

PETER MERCER

142. Mr Mercer gave a witness statement dated 23rd October 2016[64] the contents of which were reiterated in a statutory declaration dated 30th November 2016[65] He completed an EQ dated 1st September 2015[66] which attached three photographs.

[64] AB2 Tab M

[65] ABS

[66] AB2 Tab M

He had provided an evidence form to the footpath application dated 21st March 2014[67]. He has lived at 22 Kestrel Way since 1988 which lies in the network of roads named after birds close to the north of the AL. He identifies his neighbourhood as Woosehill which is bounded by Reading Road, Buttercups Estate (Barkham Road), Simons Lane and Limmerhill Road.

143. Mr Mercer explained his use as being weekly at the start of the period when he had young children. As his family grew that use stayed fairly constant until he acquired a dog in 2004 whereupon his use of the AL became daily in order to exercise his dog. He describes how his knowledge of other users of the AL grew over the period until by the end of the relevant period he recognised the majority of dogs or their owners that he encountered on the land.

144. In his evidence form for the footpath application, Mr Mercer described his route as being from "Limmerhill Road all around the field to Foxhill Woods" and that his use of the worn paths would vary depending on the water level under foot.

145. In his oral evidence Mr Mercer explained that when he first knew of the land, when visiting his sister who lived in Woosehill, he only knew of access point 1 which was via a gap next to the gate behind the Old Leathern Bottel pub. In time he became aware of the entrance at 2 and then later still at 3 where he found access much easier and so he would use that from then on. In the period up until he was walking his dog in 2004 he could not recall whether he used the worn paths or not. He only recalled following his son around the land.

[67] OB2 at page 651

146. From 2004 he described having a more settled pattern of use which was to enter the land at points 2 or 3 and then do one or two laps of the AL sometimes cutting across to the stream area depending on his own energy and what exercise the dog needed.

147. In cross examination Mr Mercer confirmed that his use of the AL from 2004 tended to be use of the worn paths both at the perimeter and those running across to the stream in the middle. He was reluctant t agree that there were increased numbers f users f the land after 2004 and explained that he had no fixed reference point for this as you see different people and numbers of them depending on what time you go on the land.

148. I found Mr Mercer a helpful witness who was candid when he could not remember details about his use or what he observed on the land. My impression was that his use was of the worn tracks in the field after 2004 but I could gain no impression of whether it was of the tracks or not until then.

149. In his evidence in chief, Mr Mercer said that on his EQ the marks at the edge of the plan represented the access points he recalled. When asked about the one corresponding to access point 4 he said that he did not usually use that one when he was with his dog because they would be going around the field and back home. This was in direct contradiction to his footpath evidence form which detailed his use of the AL as part of a wider circuit which was usually to walk the field on the way up to Foxhill Woods and then to return via the field. This was not explored further in evidence and so I was unable to form a clear impression of whether his use was of the AL as a destination in itself or whether it was as part of a wider circuit as stated in his footpath evidence form. Due to his contradictory evidence on this point, I find I cannot rely on his evidence in relation to the second phase of his use from 2004 to 2014.

ROSIE BILLING

150. Mrs Billing gave a witness statement dated 23rd October 2016[68] the contents of which were reiterated in her statutory declaration of 28th November 2016[69]. She had completed an EQ dated 15th September 2015[70] and had previously submitted an evidence form to the footpath application dated 24th September 2014[71]. She has lived at 25 Riding Way since 1992 which is to the north west of the AL in the network of roads named after counties. She moved to her current address from another Woosehill property that her and her husband bought in 1981. She describes her neighbourhood as being bounded by Reading Road, Old Woosehill Lane, Barkham Road, Bearwood Road, Simons Lane and Scots Drive.

151. The use that she describes in her written evidence starts many years before the relevant period for this application. However, she distinguishes her use of the AL as that corresponds to the period when she would regularly take an afternoon walk around Foxhill Woods leading into the AL where she would head across the field via the stream and then walk around the perimeter and back up into Foxhill Woods. She recalls taking children to fly their kites there in the 1990s and that it was a good place for tobogganing.

152. In her oral evidence Mrs Billing confirmed that she had seen ballgames, picnics, bike riding and kite flying on the land and she recalled the annual hay cut although she had never actually seen this being done.

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[68] AB2 Tab B

[69] ABS

[70] AB2 Tab B

[71] OB2 at page 616.

153. It was clear that Mrs Billing had long knowledge of the land and that she came to the Inquiry to give evidence as honestly as her recollection allowed. However, in one or two matters I found her evidence self-contradictory on key issues. One example of this was her evidence on her use for kite flying on the land. When asked about this in her evidence in chief, she said that, with her friends and family, they had done a lot of kite flying and had seen a great deal of that by others too. However, when asked about this in cross examination she estimated they had done this once or twice a year only. That might be accounted for simply by an unusual application of the phrase "a lot". However, there were other anomalies; notably Mrs Billing gave clear evidence in chief that she had not stuck to the worn paths at all but had used the whole of the AL. She also stated that this was the norm as far as she recalled it and that others she saw using the land did not stick to the worn pathways or tracks. This directly contradicted the evidence form she had signed as part of the footpath application which stated that she used specific footpaths on the AL daily from 1990 until the date of the form. When this was quite properly put to her in cross examination at the Inquiry she declined to answer, commenting instead on the manner in which the question was posed. She then clarified by saying that the dog would have been off the lead and retrieving balls from wherever they were thrown. Asked where she would have thrown the ball from, she agreed it would have been from the worn path. She later accepted that her use would generally have been of the worn paths when playing with the dog.

154. I want to be clear that I make no criticism of Mrs Billing here. She has known the land for many years and was asked about many details of her use over a long period. However, the contradictions in her answers in relation to her use of the tracks and the kite flying meant that I could not rely on her evidence on those issues in such a way as to assist in my recommendation.

NEIL HODGSON

155. Mr Hodgson provided a witness statement which was unsigned and undated[72]. He had provided an EQ dated 19th May 2015 which had 18 photographs attached[73]. He completed a statutory declaration dated 23rd November 2016[74] addressing the access points into the AL. He had previously provided an evidence form to the footpath application dated 22nd March 2014[75]. He has lived at 33 Kestrel Way since 1981 which lies to the north east of the AL in the network of roads named after birds. He defines his neighbourhood as Woosehill which is bounded by Barkham Road, Reading Road, Simon's Lane and Limmerhill Road and includes the AL and Foxhill Woods.

156. In his witness statement, statutory declaration and EQ Mr Hodgson describes using the land on an almost daily basis throughout the relevant period. He states that he used the AL for walking with dogs, often as part of a wider route including Foxhill Woods. He would use the perimeter worn tracks. He relates how when his children were young they would forage for blackberries, fly kites and model aeroplanes and watch for deer or other wildlife there. However, as Mr Hodgson's children were aged 6 and 4 in 1981 and their last child was born in 1985, it was not clear to what extent that use continued during the relevant period between 1994 to 2014. In his oral evidence Mr Hodgson confirmed that the model aeroplanes use with his children was before the relevant period as was the kite flying although he has flown kites there within the last ten years with his grandchildren and this would have been before the land was fenced off.

157. In his footpath evidence form of 2014 Mr Hodgson is quite clear that he uses the perimeter path around the AL on almost a daily basis for either dog walking or

[72] AB2 Tab H

[73] AB2 Tab H

[74] ABS

[75] OB2 at page 631

personal exercise. He confirmed this in his oral evidence to the Inquiry explaining that he would use the tracks although he spent a good deal of time off the paths while retrieving a dog toy or playing with the children. However, when he would walk on his own he would not stick to the tracks. In cross examination he agreed that his main activities on the land during the relevant period was dog walking and blackberry picking from the perimeter track. What he saw others doing was also generally people walking on tracks with their dogs and/or children and carrying toys and using those during the walk.

158. His statutory declaration addresses each access point. He was aware of all four as detailed on the Objector's map[76]. He comments that he very rarely used access point 1 but did use points 2, 3 and 4 daily and they were all present and available throughout the period. He did not accept that any fencing had been present with the purpose of excluding people from the land or that there had been any damage to such fencing by users of the land.

159. Mr Hodgson was a clear and helpful witness and I was very grateful for his assistance to the Inquiry.

SALLY TUCKER

160. Mrs Tucker submitted a witness statement dated 25th October 2016[77] the contents of which were reiterated and expanded upon in her statutory declaration of 23rd November 2017[78]. She had provided an EQ dated 17th May 2015[79] with 12 different photos attached showing use of the AL, some of which are within the

[76] OB3 at page 811C

[77] AB2 at Tab T

[78] ABS

[79] AB2 at Tab T

relevant period. She had previously provided an evidence form to the footpath application dated 25th March 2014[80] with three photos attached showing use in 1991. She has lived at Limmer Cottage since 1990. Her property adjoins the AL at the northern boundary.

161. In her written evidence Mrs Tucker recalls the distinct phases of her family's use; initially with their children (1990 – 1996) then grandchildren (2007 – 2013), then later with their dog (2008 – 2011) and later when their daughter's dog would visit (2011 – 2014). Throughout the period Mrs Tucker described having enjoyed practising her photography on the AL.

162. In her evidence to the footpath application Mrs Tucker states that she uses the worn tracks on the AL as a through route from Foxhill Woods (which she calls Limmerhill Woods) to Smiths Walk (opposite access point 2) or to Limmerhill Road. She states she has used the paths in this way from 1991 until 2014.

163. There is no mention of the frequency of her use in any one period in her statements. She is unhelpfully vague about this in both her footpath evidence form where she answers Q3(b) as "numerous – too many times to count" and in her EQ where she answers Q13 regarding how often she used the land as "randomly".

164. In her evidence in chief Mrs Tucker incorrectly indicated that her original witness statement and statutory declaration were in exactly the same form. She gave further evidence about the wire mesh that she described as having been trodden into the ground at access point 4; she found it helpful as it can be a very slippery

[80] OB2 at page 640

area when wet so she thought it provided some traction at those times. It was on the woods side of the access point and she did think that she had seen this very early on in the period.

165. She clarified that when her family had played ball games in the field it tended to be on the eastern side where she found it was drier than the western side. She said that although they had flown kites with their own children she thought she would only have done this a couple of times after 1994 as they did not do it with their grandson. She gave further details of other use described in her written evidence such as geocaching which broadly involves downloading coordinates and going out to find items that have been hidden in the environment. She was very clear that her use of the AL had not been confined to the worn tracks although when she first ad a rescue dog, then they did tend to stick to the tracks.

166. In cross examination Mrs Tucker was defensive when points contradicting her previous evidence were put to her. At first this was in relation to the differences between the wording of her original witness statement and her statutory declaration which she appeared not to have noticed before. Her response was dismissive of this as being unimportant because the substance had not differed. She did explain that her Father had been seriously unwell when she was preparing her statutory declaration and my impression was that her earlier incorrect answer was simply inadvertent and not intended to mislead. There was also a photograph attached to her EQ showing some children at play. This had been labelled as 1991 in one place and then as 2012 in another. She confirmed that she had been the one who labelled the photographs. She made no account of the difference between the two labels and simply stated that the correct label was for 1991. This rather changed the status of the photograph from one potentially representing LSP during the relevant period to a much less significant piece of surrounding evidence of the years outside the relevant period. That difference seemed to be lost on Mrs Tucker.

167. Mr Edwards for the Objector moved on to ask Mrs Tucker about the conflict between the evidence she had given to the footpath application and that given in her EQ, specifically looking at the difference between the two marked plans she had completed with them. Mrs Tucker did not accept that there was any incompatibility between them. Her evidence was that in the footpath application she had been asked to mark the routes that she walked and that she had done this. That evidence form did not contain questions about her other activities on the land and so she had not included detail of that. Later, in this application for a TVG, she had been asked about her leisure use of the land rather than her walking routes. She said these were different and this is why the plans for the footpath application and the TVG application are so different. One reflects the routes she used and one reflects the wider use she made of the AL.

168. Mrs Tucker was asked about the periods of her use and she clarified that her use of the field with her children would only be for a short time into the relevant period because at that time her daughter was already aged 12. From 2007 she thought that her use with her grandson might have been for a couple of days once every four to six weeks.

169. It was put to her that the grass in the growing season would have been too long to really play ball games on it so that this would largely be related to play while walking on the worn tracks. Mrs Tucker did not accept this and her evidence was that they would be able to kick a ball through the long grass areas and had done so.

170. She was understandably asked detailed questions about the meeting with Mrs Newman, the previous landowner, and Mr Beasley that had been described in Dr

R Lucas' evidence. Her recollection differed to his, which I found to be perfectly normal. She recalled that Mr Beasley had been speaking on behalf of Miss Newman, which he was explicit about, and that the dog walking issue only arose as a conversational filler with Mrs Tucker commenting that it was nice that people could use the AL to walk their dogs. She thought that Mr Beasley simply acknowledged that the dog walking use was the status quo. He was neither positive nor negative about it but indicated that he was aware of it. She thinks that he made some reference to it being very costly to fence the field so nothing would be done about that use. It was more that he didn't care than that he was indicating consent to that use. The purpose of the visit was completely unrelated to that issue in any event.

171. Mrs Tucker was a witness with long experience of the land and I was very grateful to her for coming to the Inquiry to assist at a difficult time of family illness. I found the differences between her evidence and Dr R Lucas' about the meeting in 2011 completely understandable as individual witnesses' recollection of the same events often differs significantly.

172. I found her evidence on the differences between her plan in the footpath application and that in the TVG application more difficult to reconcile. I recognise what was said about one being concerned with routes and the other with leisure use but there is a central conflict between the two; I do not believe that she could have meant that was using the paths up until 2014 with a frequency too numerous to mention but also using the whole of the land at a random frequency so I cannot reconcile the two positions taken. The routes on the plan in 2014 were clear and defined. I found it surprising that Mrs Tucker could adopt such clear lines in 2014 when in 2015 her description of her use reflects such widespread activity and her EQ plan shows no defined track use at all. In analysing her use for the purposes of my recommendation I have tried to carefully unpick what she described in order to discern whether her use would have been

referable to walking on a right of way or to use as a village green to the reasonable landowner. In the first period when she used the AL with her children I have attributed 1994 to 1996 as recreational use, chiefly with her daughter but I could not form any impression of the frequency of this. There is then some use across the whole period for photography by Mrs Tucker which is recreational use but my impression was that this was not frequent. Then there is use with their grandson from 2007 to 2013 and for dog walking during that time. I have found this to be most likely to be use of the worn paths. This is because Harry was a very small child for much of this period (aged two to eight) and for much of the clement weather the grass would have been tall, so while I have no doubt that there would have been ambulatory play during these walks, I think it is most likely that with a dog and a young child, and in light of the photographic evidence, the use would have been of the tracks on the whole for this period. She gave evidence that this use would have been once every four to six weeks.

173. Unfortunately that is as far as I can crystallise the evidence she gave. This means that for the period 1994 to 2007 I cannot gain any impression of whether her use was on the worn paths or off or of what frequency it was. This means that I don't have enough information about her use of the land and cannot make any assessment of how her use would have appeared to the reasonable landowner.

DAVID RATTUE

174. Mr Rattue submitted a witness statement dated 23rd October 2016[81] the contents of which were reiterated in a statutory declaration dated 2nd December 2016[82]. At the start of the PI, he submitted a supplementary statutory declaration dated 2nd December 2018 addressing the access points on to the land. He had completed an

[81] AB2 Tab R

[82] ABS

EQ dated 30th November 2015[83] and he had previously submitted an evidence form to the footpath application dated 11th April 2014[84]. He has lived at 32 Flamingo Close since 1982 which lies close to the north of the AL in the network of roads named after birds. He describes Woosehill as being bordered by Reading Road, Bearwood Road, Simons Lane and Barkham Road with the AL and Foxhill Woods as the western boundary.

175. He describes his use as primarily for dog walking twice a day but with other activities such a blackberry picking, observing wildlife and tobogganing.

176. In his evidence form for the footpath application he describes his use of the land as being for circular walks with the dog twice daily. His plan shows several different routes on the land[85] and he agreed in oral evidence that these broadly corresponded to the worn tracks that can be seen on later aerial images. His statutory declaration describes his customary route as entering the land at access point 3, walking the land with his dog and friends and then leaving the land at access point 2, although he notes he may also exit at any of the four access points.

177. In cross examination, Mr Rattue accepted that at weekends his use of the AL would be part of a much longer walking route which might encompass Foxhill Woods. He described that his use would generally be of the worn paths except to retrieve his dog, or more usually the toy that he had thrown for his dog which his dog then failed to retrieve. He would then return to the track (Mr Rattue, not his dog necessarily).

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[83] AB2 Tab R

[84] OB2 at page 672

[85] OB2 at page 674.

178. I found Mr Rattue a straightforward helpful witness and I was very grateful for his assistance.

TINA HEAFORD

179. Ms Heaford provided a witness statement dated 26th October 2016[86] the contents of which were reiterated in a statutory declaration dated 30th November 2016[87]. She did not provide an EQ and does not appear to have completed an evidence form to the footpath application. She has lived at 20 Swallow Way since 1997 although in her oral evidence she suggested that she had used the land before then, since 1992. She describes Woosehill as the area bounded by Foxhill Woods, Limmerhill Road, the Emm Brook and Barkham Road.

180. In her written evidence Ms Heaford described her use of the AL as being for twice daily walks with children and her dog during which they enjoyed picking the wild berries growing in the hedgerows.

181. In her oral evidence she said that at weekends or when the children were with her she would use the AL as part of a wider walk encompassing Foxhill Woods but generally her daily walks with the dog were confined to the field. She did not clarify how often the children are with her.

182. In cross examination Ms Heaford explained that she did not have a dog for 3-4 years during the period so would not have used the land daily then. Later, she explained that her recollection of enjoying a bench in the AL was in the northwest corner close to access point 4. She said she had not noticed the bench near the

[86] AB2 Tab H

[87] ABS

southern boundary because she tended only to use about half of the length of the southern half of the field because she was not sure of the boundaries there. However she appeared to immediately contradict this evidence by saying that she had followed the perimeter path along the southern boundary while avoiding the pylon at all times.

183. Her view was that the worn tracks around the land were well worn by 1997 and that use of them had increased over time but she did agree that the aerial images do not demonstrate the worn tracks during the early part of the 1990s and she accepted this would be due to intensification of use over the period.

184. I have found Ms Heaford's evidence difficult to interpret as she made several self-contradictory statements. In her evidence in chief she told me that she did not stick to the tracks because her children and dog liked to roam widely across the land but then in her next answer she said that when walking with the dog she would generally stick to the tracks. Then later, she stated that she had never used more than half of the southern part of the AL beyond the stream because she preferred to stay away from the pylon. This contradicted her own earlier answers about having used the perimeter tracks so it was surprising that she had not mentioned her exclusion of half of the southern part of the AL in those earlier answers. Ms Heaford also explained under cross examination that she had not had a dog for 3-4 years during the period. Again, I found it surprising this had not arisen in earlier answers about the frequency of her use. In the course of her evidence I became confused about the period that she had used the land. Her written evidence and oral evidence in chief seemed to correspond in stating that she had used the AL since moving to Swallow Way in 1997 but then during cross examination she implied she had known and used the land from 1992.

185. I have taken Ms Heaford's evidence in the round and used a pragmatic interpretation from the totality of the evidence she gave: That for the whole period of her use she tended to confine her use of the AL to the north land above the stream and half of the southern part of the land only (i.e. not using the most southern perimeter track). Her use was divided between that confined to the tracks and use of the whole of the remaining area of the land in roughly equal portions. Her frequency was twice daily, according to her evidence, from 1997 to the end of the relevant period save for a 4 year period when she did not own a dog i.e. use for 13 years out of the potential 17 years of use from when she moved to Swallow Way. Her use was as part of a wider circuit on the weekends. She agreed that use of the land had increased over time but she did not expand on when that had occurred.

JULIE FRENCH

186. Mrs French submitted a witness statement dated 29th October 2016[88] the contents of which were reiterated in a statutory declaration dated 23rd November 2016[89]. She had completed an EQ dated 9th September 2015[90]. She had previously provided an evidence form to the footpath application dated 29th April 2014[91]. She has lived at The Ridings on Limmerhill Road since March 2011 and prior to this she lived about a mile away in the network of roads named after flowers to the north of the AL from 1999. She describes her neighbourhood as Woosehill which extends from the north of the AL and down to Woosehill Lane.

187. In her witness statement she describes using the AL for much of the relevant period for leisure including ball games, walking, jogging, kite flying and sledging.

[88] AB2 Tab F

[89] ABS

[90] AB2 Tab F

[91] O2 at page 758.

The frequency of her use from 1999 to 2011 is described as weekly and then 2-3 times per week from 2011. In the summers the AL formed part of the return route from school for her and her children where they would play for a while before heading home. In her EQ it is stated that she used the land from 2002 until 2012 from her previous address rather than from 1999, although in her evidence to the footpath application the period of use is said to be from 2009. In cross examination she said she did not know why she had put 2002 on her EQ as she was sure it as from 1999, she also did not know why she had put 2009 on her footpath evidence form. In her EQ the frequency of use is put at weekly whereas in her footpath evidence this is stated to be about 200 times per year (which is broadly equivalent to 3-4 times per week).

188. Mrs French's EQ states that the previous owner of the AL had granted the community full access and the new owner had restricted that. In her evidence in chief, she explained that a neighbour had told her this when she first moved to Limmerhill Road. She also explained that her use of the AL was sometimes part of a longer route. She thought that at times she used the worn paths but when with friends with dogs or children, they tended to dictate off track use.

189. She thought she would take her children to the field about twice a week to play ball games although they were born in 2002 and 2004 so this would not have been until later in the period. She confirmed this in cross examination by explaining she thought this use had been from when her youngest was 5 years old and he is now aged 12. She could not account for why she had omitted this use from her EQ and did not accept that she had exaggerated her frequency of use.

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190. When giving evidence on her use with her sons for ball games Mrs French at first said this was in the south west quarter of the AL but then in cross examination, when this was challenged because of the gradient of the land and it's tendency to

be wet, she stated that she had been confused about the map and had meant to say that the ball games had taken place in the south east corner instead of the south west. It was put to her that this was another change of her evidence (in addition to omitting frequency of use for ball games). However, my impression on this particular point is that this was a genuine mistake and that Mrs French had not meant to mislead the Inquiry as to where the ball games were played. She recalled that particular area as having been regularly cut and so suitable for ball games much of the time although she agreed that the image from the Limmerhill Walking Group Facebook page showed grass that would be too long for kicking a ball in.

191. Her footpath evidence form tells us that she would enter the land at access point 4 and leave at access point 1. However, her witness statement[92] suggests that she accessed via access point 2 and left by access point 4. On either account she entered and left the land at different points. In the same paragraph she states that that for three months of the year her use once a day was part of the route home so that this would be A – B type use although there would be play along the way.

192. I have found Mrs French's evidence of limited assistance. I have no doubt about her honesty and that she came to the Inquiry to assist but there were several matters where her evidence was contradictory and she could not assist with why this was. The start of her use of the AL was either 1999, 2002 or 2009 on her own written evidence. The frequency of her use varied from once per week to 3-4 times per week. For seven years, she told the Inquiry, she had taken both her boys to play ball games in the field twice a week but this was not mentioned at all in her EQ completed in 2015 and only in passing in her witness statement. These inconsistencies lead me to treat her evidence with caution. Her hand drawn plans both to this Inquiry and the footpath application are consistent and show use of

[92] Paragraph 5

the worn tracks. Therefore I place weight upon those as demonstrating her pattern of use of the land. I cannot attribute more than the 2009 – 2014 period to her use as that is the shortest period of her use according to her own evidence and corresponds to when her youngest son became 5 years old which is when she thought she had started playing ball games on the land. I can draw no clear conclusion of the frequency of her use and so I believe it is fair to attribute the level at which Mrs French herself estimated her use, which was weekly.

BOBBIE LUDLOW

193. Mrs Ludlow provided a witness statement dated 23rd October 2016[93] the contents of which were reiterated in her statutory declaration dated 23rd November 2016[94]. She submitted an EQ dated 25th November 2015[95]. She had previously submitted an evidence form to the footpath application dated 2nd May 2014[96]. She has lived at Somerset Close since 1999 which lies to the north west of the AL in the network of roads named after counties. She lived in the area as a child and used the land then but that use pre-dates the relevant period for the purposes of this application. Her relevant use dates from the time she moved back to Wokingham to her current address in 1999.

194. In her written evidence she describes using the AL for running, walking, kite flying with her son and seasonal use such as collecting tadpoles, blackberry picking and tobogganing. From 1999 to 2006 this use has been twice a week for running and a weekend walk with family. Since getting her dog in 2006 and returning to work she has used the land twice a day at weekends.

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[93] AB2 Tab L

[94] ABS

[95] AB2 Tab L

[96] OB2 at page 658

195. Her EQ records her frequency of use as twice a day from 1999 to 2015. This conflicts with her witness statement[97].

196. In her evidence for the footpath application, Mrs Ludlow remarks that she uses the AL to enter the land at from Foxhill and uses it as a route to Barkham Road. Her plan shows distinct footpath routes. She records the frequency of her use as twice each day but that is for a period of 1981 until 2014. This conflicts with the evidence in her witness statement as above.

197. In her oral evidence she confirmed that she had moved away from Wokingham in 1988 and then moved to Somerset Close in 1999. In the 1980s she would have accessed the AL at point 2 via a worn track. She recalls that there were no obstructions to access then and she did not recall fencing on Limmerhill Road then.

198. She confirmed that her use of the land twice a week from 1999 for running had been part of a wider circuit that included Foxhill Woods. Similarly, when walking with her husband and son, they would walk to the land via the Foxhill Woods, enter the land at point 4 walk a circuit and then go back out at point 4. This conflicts with her footpath evidence form. She stated that the use for kite flying had been extremely short lived only being for a couple of months at weekends following one Christmas that her son has got a kite as a present. Collecting tadpoles at the copse had also been only on two or three occasions over the whole period when her son had been studying the life cycle at primary school. She confirmed that her use would have been on the worn tracks. She saw a barbecue taking place only once. She confirmed that they had regularly taken a picnic into the south west area of the AL and had frequently seen others do the same. In

[97] Paragraph 8

terms of the cycles she had seen using the AL, this had always been across the northern worn track with bikes entering from the woods and going along the top of the AL to join Smiths Walk. She had not seen bikes on any part of the south of the AL.

199. In cross examination, Mrs Ludlow readily accepted that her evidence to the footpath application had been largely inaccurate; she had not lived in the area for the period she claimed use for and she had not used at the frequency she claimed even when she was in the area.

200. Mrs Ludlow also accepted that neither on her EQ nor on her husband's EQ (Simon Ludlow gave written evidence[98] but did not attend the PI) did it detail picnics as being an activity that their family carried out themselves. She said this was an error on both their parts to omit it from their activities because they did do this regularly. She could not account for why this had been left out of both her and her husband's sworn statements. She did agree that these picnics would have been part of the normal family walks at the weekend.

201. In terms of the worn paths, Mrs Ludlow recalled that the outside perimeter path was well worn when they moved to Woosehill in 1999 but did not recall that for her earlier period of use. She did not accept that the worn paths had increased in prominence since 1999.

202. I found Mrs Ludlow's evidence difficult to follow. Both her written evidence to the Inquiry and previously to the footpath application included long periods of use before 1994. More concerning to me was that she readily accepted that her

[98] Witness statement at AB Tab L dated 23rd October 2016, EQ at same Tab dated 5th November 2015 and evidence to footpath application at OB2 page 660.

evidence to the footpath application was wholly inaccurate but with no explanation of why that had been. There were also the conflicts in her evidence to this Inquiry such as the critical issue of the frequency of her use which she described in her EQ as twice a day but made clear in her witness statement and oral evidence that her use from 1999 to 2014 had come nowhere near that level. It is also inexplicable that the picnicking that she says was regular for her family had not been mentioned at all in her EQ. I was also unable to gain a clear impression of the route that she would use across the AL in that at times she described a circuit use but on her footpath evidence form she describes this but also crossing the land from Foxhill Woods down to Barkham Road These defects in the evidence mean that other than recording that she used the AL on the tracks between 1999 to 2014 at an unknown frequency and route, I find I cannot rely on Mrs Ludlow's evidence further than that.

ROBIN KENNEDY

203. Mr Kennedy submitted a witness statement dated 26th October 2016[99]. He had provided an EQ dated 26th November 2015[100]. He also completed a statutory declaration dated 23rd November 2016[101]. He has previously submitted an evidence form to the footpath application dated 22nd May 2014[102]. Mr Kennedy has lived at 4 Blandford Drive since 1998. This is located immediately south west of and within a few metres of the boundary with the AL.

204. In Mr Kennedy's witness statement he describes his use of the land as once or twice per month. He would generally access the land at access point 1. His use initially was mainly for walking but he recalls star gazing and seeing the deer in the

[99] AB2 Tab JK

[100] AB2 Tab JK

[101] AB2 Tab JK

[102] OB2 at page 684

field. He says that after 2000 he had children and would then use the land for seasonal recreation such as exploring the tadpoles, sledging and blackberry picking. He states that he identifies his neighbourhood as that of Limmerhill and Woosehill.

205. In his evidence in chief, Mr Kennedy was asked to elaborate on the frequency with which he saw others doing various activities in the field, such as kite flying, ball games and picnicking. He said that these tended to be occasional apart from kite flying which was infrequent. He did say that these activities took place off the worn paths.

206. In cross examination Mr Kennedy was asked if he was aware that he lived outside both the locality and the neighbourhood within a locality as put in the application. He did not answer that question but commented that he lived in a parish that covers the area.

207. He was asked about the reasons for changing his statement between submitting the witness statement and the statutory declaration. He examined that he wade to make the point about which neighbourhood he identified with clearer. He had discussed that issue with Dr Lucas and he felt it needed better explanation.

208. He was asked about his footpath application evidence form and he confirmed that his answers then were accurate and that remained his use until the end of the period. His form for that application details that he uses the land for circular walking accessing it from access points on Limmerhill Road and Foxhill Woods. He had crossed out the part of the evidence form where it asks where the witness was walking ‘to’ and ‘from’.

209. I found Mr Kennedy an extremely straightforward witness and I was grateful to him for coming to the Inquiry to assist. Having checked the position, I do find that unfortunately Mr Edwards is correct in that Mr Kennedy's home falls neither in the locality nor the neighbourhood within a locality as applied for. This means that while his evidence is of contextual interest, it cannot directly support the application made on behalf of the local inhabitants of the locality or neighbourhood within the locality.

APPLICANT'S WITNESS EVIDENCE; WITNESSES WHO DID NOT GIVE ORAL EVIDENCE

210. I turn to deal with the witnesses for the Applicant who submitted written evidence but did not give oral evidence to the public inquiry. I approach this evidence with considerable caution because I have not seen them, some of the written evidence is rather imprecise and the Objector has not had any opportunity to test the evidence by cross examination. However, I give appropriate weight to this evidence.

211. There are statutory declarations from six further witnesses. There are 83 further EQs representing 71 households. Of those EQs eight contain a plan showing activity on any other part of the land except the worn tracks.

OBJECTOR'S WITNESS EVIDENCE

212. As with the Applicant's evidence, I have recounted the Objector's witnesses in the order in which they appeared at the PI.

SARAH GEE (NEE DANGOOR)

213. Mrs Gee submitted a statutory declaration dated 9th November 2016[103] and a further statutory declaration dated 29th November 2016 which simply deals with an error in the earlier statutory declaration. Then a witness statement was submitted dated 15th December 2016 which contained one exhibit and a second witness statement dated 20th December 2016 which contained one exhibit. Both of these latter statements were handed up at the Inquiry and copies supplied to the Applicant and the CRA.

214. Mrs Gee had previously provided a witness statement under her maiden name, Sarah Dangoor and this was dated 2nd October 2015 and appeared at Appendix 7 in the Objector's original objection statement[104]. It has four photographs of Heras fencing and five aerial images attached. This is referred to in Mrs Gee's statutory declaration at paragraph 6. This statement assists in that it gives the background to other witnesses' involvement with the land such as David Rumsey, Kelly Gilmour (the current tenant) and Andrew Beasley (an executor of the vendor estate).

215. Mrs Gee is a Property Investment Executive at Monopro Limited, a company registered as the freehold owner of the AL. Her written evidence gives the background to her involvement with and knowledge of the land. Monopro bought the AL at a property auction in February 2013 with completion in March 2013. That means that the majority of the relevant period for the TVG application occurred before Monopro were involved with the land at all. She gives the background to the placing of Heras fencing at the gaps in the hedgerows of the AL which were admitting trespassers in September 2014. Mrs Gee initially stated in her the witness statement of 2nd October 2015 that this took place on 19th September 2014 but corrected this in her oral evidence to 18th September 2014. She explained that in fact she had received an email about the Heras fencing being

[103] OB1 at page 426

[104] OB1 at page 76

in place on 19th September 2014 so that it was reasonable to infer that it had actually been erected no later than the 18th. She also gives detail about the recent use of the AL for the grazing of horses by the current tenant but as this arrangement didn't start until early in 2015 it is outside of the relevant period of use considered in this application.

216. Her initial statutory declaration makes reference to the locality the Applicant pursued in the context of the application requiring a significant number of the inhabitants of a locality or neighbourhood within a locality to have used the land. Her witness statement of 15th December 2016 updated the information about numbers of households and population within the Evendons West ward of Wokingham Town Council. Her further statement of 20th December 2016, which the Objector's advocate asked her in her evidence in chief if she could prepare, updates that information further in response to the Applicant's further application to amend the locality within which the neighbourhood of Woosehill is located to be WBC rather than the ward of Evendons within WBC. With qualifications, this gives a population figure for Woosehill to 6833 and 2621 households[105].

217. In cross examination Mrs Gee accepted that from the time she was visiting the land in 2014, access points 2, 3 and 4 were clear but she did not recall there being a gap by the gate at access point 1. She agreed that it was not her evidence that the leisure activities described generally by the Applicant's witnesses would have been impossible in the long grass, she conceded that very determined walkers and ball players could do so even when the grass was long if they were very determined.

218. She estimated that her visits to the land before the current tenant of the land had erected a complete run of fencing early in 2015 were only once when she had

[105] S Gee witness statement dated20.12.16 at paragraph 4.

taken the video that forms part of her evidence[106] and then on one more occasion when she had met the Applicant on the site. When she had been there before the 2015 fencing, her recollection was that she had only seen walkers using the perimeter path. She accepted that she had only been on the land during business hours on a working week day.

219. In relation to paragraph 16 of her first statutory declaration[107] in which she states that from local press articles t suggested to her that use had been akin to use of putative footpaths rather than of a village green, it was put to her that the Inquiry had heard evidence of people using it as a destination in itself and that this was not unusual or implausible which she agreed was the case.

220. She did not accept that other amenity areas with green spaces where dogs and ball games are allowed are too far from the area to be accessed by the local community, nor that there would be a need for people to cross a main road to access those spaces depending on where they were coming from. She gave the Emm Book as an example of a beautiful public space that could be accessed via the footpaths from Woosehill and many people would not have to cross a main road to reach that. In re-examination it was confirmed by reference to the NH plan that there are footpaths leading from Woosehill Lane to the Emm Brook.

221. Mrs Gee was a straightforward witness who I found entirely reliable. Her direct experience of the land is limited but my impression was that she did not try to minimise that or exaggerate her experience of it in any way. She was very clear about the limitations of her evidence and her role in collating information relating to numbers of inhabitants of the claimed neighbourhood within a locality.

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[106] OB1 at page 431a

[107] OB1 at page 428

BRAD AGAR-HUTTY

222. Mr Agar-Hutty provided a statutory declaration dated 8th November 2016[108]. He is the owner of a strip of contiguous land to the west of the AL, of which the most southern part of the site saw some development during the period and which leads back into Foxhill Woods at the most northern end. Mr Agar-Hutty lived on the southern part of the site in 1991 when he was aged 11. His father owned the land at that time and sold a portion of the southern part in 1997. Mr Agar-Hutty inherited the remainder of the land in 2013. Until 2013 he visited it about once per week and his Father would visit every couple of weeks in the summer to tend the land.

223. Mr Agar-Hutty has experienced cutting of his barbed wire fence and destruction of his northern fencing during the period. Occasionally he would see dog walkers on his land and he would ask them to leave. He has experienced increasing incursion on to his land throughout the period of 2009 onwards after he returned from University with fences being cut and destroyed and a tree house built by trespassers in one of his oaks.

224. He recalled that between 1993 to 1998 his Father's assistant, Bill Dance, would shoot rabbits on the AL and he used to go and watch him do this. E dint recall ever seeing people on the AL at that time and doesn't recall the worn paths from then. In later years when he has seen anyone on the AL he has seen people walking usually with dogs on the worn tracks.

[108] OB1 at page 522

225. In cross examination when asked about his use of the AL as a route on his way back from school, Mr Agar-Hutty recalled that there had been roll-out type fencing on the eastern edge of the AL at some point but he couldn't be certain about where that was. He thought there might have been some obstruction at access point 2 in 1991/92 but he couldn't recall the detail of it. On further questioning, he thought that the roll-out fence was present at access point 2 but that it had been pushed down so one could easily get over it. He did not recall barbed wire fencing anywhere but on his Father's boundary on the west of the AL. He accepted that he could not e certain about the fencing at access point 2 and couldn't definitely say that those who were sure there had been none were wrong.

226. Mr Agar-Hutty robustly rejected the evidence of other witnesses that kites had been flown on the AL. He thought that would be irresponsible because of the presence of the pylon and he was sure he had never seen that taking place on the AL at all. He accepted that a determined ball player could kick a ball in the AL but thought that it would very quickly get covered in mud from the boggy areas of the field and also it might be covered in dog mess (having mentioned in his written evidence that dog mess had been a problem on their own land). He agreed that people could have picnics in the spring or summer possible but he though the length of the grass would preclude it at most times of the year. His recollection was that from Easter time the grass was fast growing but conceded that people might take mats and eat there. His recalled that he had generally seen people who were using the worn tracks. He accepted that there was nothing t stop people wandering wherever they will but his experience was mostly of people walking near his boundary with the AL and this was on the worn track on the west side of the AL. He didn't recall seeing people in the body of the field but thought they tended to be at the top and would disappear off into the woods. His impression of what he sees when visiting his land now is that about 50% of the time he will see someone passing near his boundary or hear them shouting to their dog or occasionally will find a dog that has strayed from the AL into his land on its own.

He agreed that he would not hear or see people who were not passing near his boundary although he noted that visibility is clear from his land because it is higher ground and he can see most of the eastern side of it except in the south west corner by the pylon.

227. Mr Agar-Hutty recalled his access on to the land as being by access point 2 and that when he entered the land, the stream in the middle would be hard on his right and he would cross that and go up into the woods and back to his land that way. He did not use access point 4 and he did not recall any opening there. He thought that this would have been completely inaccessible because of the thick bramble hedges and hawthorns and that this would have been so right up until 1997. He admitted that he could not account for the difference between his recollection and others' evidence about this point. He thought that if there had been an access point there he would have used it as it would have been easier than climbing over the barbed wire fence bordering his land. He accepted that he has seen the opening at point 4 since the mid-2000s when he drove up that way to try and catch whoever was messing about with one of his containers. So he accepts that it was there by that time but doesn't think it was there in the 1990s. He also did not recall any access point at 3. He only recalls trees and hedges there even as late as 1996.

228. I found Mr Agar-Hutty a helpful and honest witness who gave his evidence to the best of his recollection. I was also very grateful for the accommodation he showed a few days after he had come to the PI in allowing two of us from the CRA on to his land as part of the site visit.

CHRISTINE COX MA MCIFA FSA

229. Miss Cox gave expert evidence for the Objector. She submitted a report dated 10th November 2016[109]. She had also had the opportunity to view the Applicant's new evidence from Mr Bud Young as admitted on Day 3 of the PI[110].

230. In Mr Young's report he suggests that there are paths visible on the ground which are superimposed by yellow lines in his photoplan for February 1996. Miss Cox had carefully considered these but did not feel they could be identified as pedestrian paths with any confidence as they were extremely faint. She could not conclude they were paths with any established use. Her interpretation of the February 1996 image was that any use of such tracks, if present, was extremely light. She remarked that the image for February 1996 was very clear and in high resolution and amenable to good analysis of small features so that the faintness of the lines in the image suggests very light use. In cross examination Miss Cox clarified that when comparing Mr Young's February 1996 image with her June 1996[111] analysis, she did not think that they had identified the same wear as denoting an access point but she agreed that she thinks there is a worn entry point in that general area.

231. Miss Cox was asked to comment in her evidence in chief on the second photoplan in Mr Young's report where he identifies paths which again are superimposed as yellow lines on to the original March 1998 image. She agreed that there are lines visible on the image at these locations but she did not find these to be worn sufficiently to warrant evaluation as regularly waked routes. She noted that these lines are at the edge of the land where the agricultural use meets the grass verge and may reflect the edge of the tractor markings at the site. She conceded that

[109] OB1 at page 370

[110] Report by Mr Young of 13th December 2016 admitted to the PI on 14th December 2016 upon the Objector indicating that their own expert would be able to deal with it in oral evidence. Copies circulated to all parties.

[111] OB1 at pages 384-385

alongside the stream she could see the lines on the image that Mr Young was referring to but to her mind these were not definite enough to denote regular pedestrian use.

232. Miss Cox explained that the August 2003 image[112] is the first in which she recognises established worn paths at the perimeter and alongside the stream reflecting the routes in the footpath application. She did not see evidence of anything but the lightest off path use and she would have expected to see that if leisure activities were taking place. She noted that this image was from before the land was cut in the annual hay crop and I understood that to mean that activity on the land would show up well.

233. Miss Cox went though her report demonstrating that from the change of land use recorded in 2003, the images through the following years continue to reflect that change and the worn paths at the perimeter and alongside the stream become increasingly pronounced.

234. Asked to comment on the evidence of any track use at access point 4 in the 1990s, Miss Cox noted that she had observed various thicknesses of vegetation in that area between 1991 and 1999 and that it had appeared to have been cleared at one point but the first time she could observe clearly defined access is 2003. This is shown on her annotated image for August 2003[113].

235. In cross examination Miss Cox agreed that concentrated use shows better on aerial images than diffuse use but she did not accept that regular leisure use would

[112] OB1 at page 395

[113] OB1 at page 395, see point 22 and commentary on age 394.

not show on the images unless it was only very occasional. She accepted that some use across other areas that is not reflected in the aerial images couldn't be ruled out completely and stated that what her evidence provides is a picture of cumulative use over many years and here that was of agricultural use over the whole period and path bound use in later years.

236. It was put to her that some paths may not show up well on the images depending on how the sun fell on them at the time of the photograph. Miss Cox accepted this to a limited extent. She explained that sun tends to show relief from the ground surface but that what can be seen n the images here is tonal differences in the paths between the ground and the vegetation which aren't dependent on the direction of the sun.

237. She accepted without reservation that the effect of taking the annual hay cut could be to effectively disguise those paths from the aerial picture and that whereas long grass shows off track use well, short grass would not show that clearly. However, she noted that if the off track use is habitual she would expect to see paths forming to reflect the fanning out from the access points but she has see no indication of that in these images.

238. Miss Cox did not venture an opinion of whether the use of the worn tracks after 2003 denoted use by a significant number. She explained that it only shows consistent use but that it is not possible to make any estimate of the numbers repeatedly using those tracks.

239. Her finding on the image of September 1991[114] of light access in the north east corner of the AL was put to her and Miss Cox immediately accepted that this could be from pedestrian use; she saw a light toned area which appears to run along the route of a relief drain and then along the stream. She felt that agricultural access may be more likely but agreed that pedestrian use couldn't be ruled out. She was pressed as to whether pedestrian access in at access point 4 could be actually ruled out for the 1990s but declined to be drawn further than her conclusion that if there were consistent use of that access point it would have shown in the imagery and it did not. That was only to say it was not present in any great number whereas occasional use may have taken place.

240. In the June 1993 image, Miss Cox agreed that while there was no continuous discernible perimeter path, it was possible to see a solid line at the eastern boundary of the AL which could have been produced by pedestrian access via access point 2 or 3 and walking along that side of the AL but she could not venture further to give any impression of numbers of frequency of such use. She was clear that at that stage there is no indication of sufficient use to communicate to a landowner that people are using the land for recreation. Here is no evidence of recreation across the body of the AL at all and what there is shows agricultural use with a small gap in the boundary in the north east corner and some intermittent linear features at the edge of the site.

241. Miss Cox rejected the suggestion that the features she had observed in the images from 1993 were consistent with those identified by Mr Young in 1996. She accepted that what she had identified as bushes in the September 1996 image[115] could be a different kind of item (identified by Mr Young as chicken coops). She commented that this was the kind of issue that would usually be dealt with in a

[114] OB1 at page 379 - 380

[115] OB1 at page 387

meeting of experts and she would have liked that opportunity to debate with Mr Young. She did not agree that these having been identified as bushes rather than manmade structures was significant; she explained that the focus of her analysis had been on entrances, exits and paths.

242. Mr Young's second photoplan of the March 1998 image compared to her evaluation of that image[116] was put to Miss Cox at length in cross examination. She was clear that her view differed to Mr Young's in that she did not find the evidence of paths at the perimeter or elsewhere to be well enough defined to record as paths. She had noted the possible use in the north west corner and other than that she did not find any clear joined up well worn paths. She accepted that perimeter use via access at access point 2 or 3 at a lesser intensity than in later years could not be ruled out but she did not see evidence of that at this time. She did concede in relation to the August 1998 image that she can consistently see the relief drain line in the north east corner of the AL from the 1991 images and this could indicate some access into the land from that time.

243. Miss Cox was a straightforward and helpful expert witness and I was very grateful for her assistance to the Inquiry.

JEREMY FARMER

244. Mr Farmer submitted a statutory declaration dated 11th November 2016[117]. His partner, Sarah Jackson, had also submitted a statutory declaration[118]. Mr Farmer has been a tenant of 1 Folly Thatch Cottages since just before the end of the relevant period in July 2014. The house is on the Barkham Road and lies on the

[116] OB1 at page 388-389

[117] OB1 at page 416

[118] OB2 at page 576

southern border of the AL. He generally occupies the Cottages at weekends, tending to stay nearer to his work during the week.

245. His written evidence recounts the fact that walkers would cross the private land of their property to access the AL from Barkham Road. This was despite signage on the fence with the AL facing towards their property warning that there was no public access there. He believed this signage had been put up by the owner of the house. He also used to walk his dog on the AL. His experience was that there were others who walked their dogs on the AL using the worn paths that he has identified on the plan attached to his statutory declaration [119]. He recalls this use particularly in fair weather He did not see anyone else using the land for other activities.

246. In cross examination he accepted that he could mainly view the eastern side of the AL from the house and also there must have been a sufficient number of walkers trespassing across the house's land to warrant the owner having erected the signage.

247. Mr Farmer was a straightforward witness whose assistance to the Inquiry was appreciated.

ANDREW BEASLEY

248. Mr Beasley submitted a statutory declaration dated 9th November 2016[120]. He has very long experience of the land since first going there with his Uncle, George Mullins and his business partner, Anne Newman. They both worked in the local

[119] OB1 at page 424

[120] OB1 at page 326

area as thatchers. From the time Mr Beasley was aged 9 he would go to the AL at weekends and holidays and do odd jobs for George and Anne. He thinks this involvement started in about 1973.

249. In the period this Inquiry is concerned with Mr Beasley had suffered the bereavement of his Uncle George in 1991. George and Anne had inherited the AL and the adjoining farmhouse in 1988. The farmhouse had never been occupied since they inherited it and it was sold after George’s death in 1992. Until then Mr Beasley had visited the farm 2 or 3 times each week but after 1992 this became less frequent.

250. In his statement Mr Beasley explains that it had been customary for George and he to tend to the hedges, fencing and boundaries around the land after the annual hay cop had been cut each year. This was done until shortly before George’s death in 1991. George was known as a proactive caretaker of his clients’ farms and this applied to ensuring their land was kept free of trespassers. Towards the end of his life, George had endeavoured to keep to this standard at Bottel Farm despite no one living in the farmhouse then. He did this by digging the ditch on the eastern border of the land with Limmerhill Road deeper than it had previously been and reinforcing the barbed wire that was along that boundary.

251. Mr Beasley recalls an electricity company removing part of the fences in the mid 2000s to access their equipment on the land. They were supposed to replace the fences removed but didn't do so and at that time Anne, who was by then sole owner, didn't want to take any action to prevent trespassers accessing the land through the gaps created.

252. His written evidence then gives a detailed recounting of the work done on the sections of fences, wires and hedgerows around the AL.

253. In cross examination, Mr Beasley was asked a great deal about his involvement with the land before the relevant period. He recalled that there was not any access point up at access point 2 or 3 in the years before 1991 but in any event, when he was using the land with George and Anne, they would access the land via the entrance by the farmhouse and only very occasionally through the gate at access point 1. He agreed that the annual maintenance of the boundaries had never involved a complete replacement of the fencing around the land but had been upkeep and maintenance of what had already been put up which also included tending the hedgerows which Mr Beasley described as being 10 feet thick in some places. He accepted that the general maintenance carried out annually was just aimed at securing the boundaries, it was not robust enough to contain cattle, as an example. He agreed that his involvement with the boundary maintenance ended when George died in 1991.

254. Mr Beasley did not accept that the fencing at access point 2 would have simply failed on its own after the annual maintenance had stopped, when the evidence of Mr Hodgson was put to him. Mr Beasley believed that the barbed wire fence would still have lasted many years and that if there was a gap there it was due to being cut or trodden down.

255. Mr Beasley was clear that there was no natural gap at access point 4 when he was on the land. Until 1991 that area was either fenced or bounded by very thick hedgerow and maintained. He accepted that he had no need to go into the woods there and so he would never have tested whether he could push his way through the hedgerow. He could imagine it was physically possible but thought it unlikely

that anyone would want to do that. He accepted that he could not say for definite that the way at access point 4 was not open in 1994 because he didn't know that.

256. In his oral evidence Mr Beasley addressed the evidence of Dr Rex Lucas and Mrs Tucker of the meeting with himself and Anne Newman in 2011. Mr Beasley's impression of the meeting was that the visitors were only concerned with persuading Anne to object to the application to station caravans on land nearby. He doesn't recall any discussion about the dog walking on the AL. He also believed that if it had arisen and Anne had made any comment on it, she would have indicated that she was not happy with it but wasn't prepared to take any action to stop it. He was certain she would not have given any impression that she was happy for such trespassing to continue.

257. I asked Mr Beasley if he recognised the description of the land as set out in Mr Hodgson's evidence at paragraph 9 of his witness statement[121] in which Mr Hodgson describes many family events in the AL such as parties and Easter egg hunts. He did not recognise that at all.

258. I found Mr Beasley a clear witness who assisted with the background and history of the AL and I was grateful to him for coming to the Inquiry to give his evidence.

DISCUSSION

259. The application was supported by 18 witnesses from 17 households who came to give oral evidence at the inquiry. Of those I was unable to derive any assistance from two a dealt with in the section on witness evidence. That leaves 16 live

[121] AB2 at Tab H

witnesses from 16 separate households. Of the 16 live witnesses for the Applicant, five could speak about the whole period of claimed use i.e. from 1994-2014, four for a period of over 15 years, six in the 10 to 15 year period with the remaining two having used the land for less than 10 years. There are 83 further EQs representing 71 households.

260. All the ingredients of s15(3) of the CA 2006 have to be met before the application land can be registered. I turn first to the primary issue in the case as identified by both parties' advocates in their closing submissions.

SUFFICIENCY OF USE AS OF RIGHT FOR LSP FOR A CONTINUOUS PERIOD OF 20 YEARS

261. In closing, both parties have directed me to the particular authorities of *Sunningwell*[122], *Trap Grounds*[123], *McAlpine Homes*[124], *Dyfed*[125], *Lewis*[126], *Laing Homes*[127] and *Allaway*[128] in analysing the question of sufficiency of user. Although these are the authorities I have been directed to upon this particular point, I draw my approach from the wide range of the authorities contained in the parties' authorities bundle as a whole, save as follows. The Objector invites me to consider the helpful analysis of Vivian Chapman QC in *Radley Lakes*[129] although

[122] R *v Oxfordshire county Council ex p Sunningwell Parish Council* [2000] 1 AC 335

[123] *Oxfordshire County Council v Oxford City Council & Anr* [2004] EWHC 12 (Ch) and I have also derived assistance from the two later stages of this case at [2005] EWCA Civ 175 and [2006] UKHL 25. This is referred to by parties in submissions as simply 'Oxfordshire'. I use the name of the land concerned only to avoid any confusion with any other case involving Oxfordshire County Council.

[124] R *(McAlpine) Staffordshire CC [2002]* EWHC 76 at [71] (Admin)

[125] *Dyfed County Council v Secretary of State for Wales* (1990) 59 P & CR 275

[126] R *(oao Lewis) Redcar and Cleveland BC* [2008] EWHC 1813 (Admin)

[127] R *(Laing Homes Ltd) v Buckinghamshire CC* [2003] EWHC 1578

[128] R *(Allaway) v Oxfordshire County Council* [2016] EWHC 266 (Admin)

[129] Report of 13th October 2007; OB Vol 3 Tab E.

the Applicant says this cannot be followed with any confidence as it is inconsistent with the approach in *Allaway* and suggests that in light of that decision, *Radley Lakes* would now be considered to be wrong. I am not sure I agree with this submission but to avoid any question that I have strayed into error by relying upon an outdated recommendation, I have not relied upon *Radley Lakes*. Similarly, the Applicant at one stage referred me to *Gadsden*[130] and the Objector expressed some disquiet since that work has not been updated since 2012 and therefore does not take account of several leading authorities. Therefore I have not used *Gadsden* in this recommendation.

262. From the authorities I remind myself of the relevant principles underlying the assessment of sufficiency of use. The requisite use which the Applicant must establish is "*use for at least 20 years of such amount and in such manner as would reasonably be regarded as being the assertion of a public right*"[131]. In order to discern whether the use made of the AL was qualifying use of LSP, it is necessary to consider whether the use of worn tracks at the perimeter and across the AL would have appeared to the reasonable landowner to be use referable to putative rights of way or as use for general recreational purposes which would sustain a claim to a new TVG[132].

263. *Sunningwell* contains a very helpful summary of the historical background to the law of village greens, founded as it is in prescription and as it had developed to that point (which pre-dated the Commons Act 2006). It reminds us that the key to a claim in prescription is to establish the requisite quality of use for the 20 year period from which a dedication of the land may be inferred; users must use the land without secrecy, force or permission, as if they were entitled to do so, so that a reasonable landowner observing that use would perceive the assertion of a

[130] *Gadsden on Commons and Greens* 2nd Edition, Edward Cousins & Richard Honey, Sweet & Maxwell, January 2012

[131] Lord Hope in *Lewis* at para 67.

[132] Sullivan J in *Liang Homes* paras 98 – 110 approved in *Trap Grounds by Lightman J* at paras 96 - 105

public right. By the acquiescence of the landowner in such circumstances, an inference could be drawn that there was an intention to dedicate the land to that use. The effect of the Commons Registration Act 1965 was to ensure that where inhabitants of a locality could establish that they had indulged in LSP as of right for not less than 20 years, the land *would* be registered as a TVG (rather than that it *could* be). In commenting on his agreement with Lord Carnwath's comments in a previous case[133] that dog walking and playing with children were the kind of informal recreation which may be the function of a village green, Lord Hoffman observed that it may be the case that such user is so trivial and sporadic as not to carry the outward appearance of user as of right. I draw this point out because sometimes it can be mistaken that the test for sufficiency of user, in addition to being as of right, is that it must simply be more than sporadic and trivial. That is not correct. The test is whether it would have appeared to the reasonable landowner to be the assertion of a public right and whether s/he then acquiesces to such use. Lord Hoffman's remark is simply a reminder of this and that if the use is too sporadic or trivial it is unlikely to be of a quality that would put a landowner on notice of the assertion of a public right.

264. *Dyfed*, which was decided many years earlier, had established that walking on a footway purely for recreation was capable of giving rise to the possibility of deemed dedication in the absence of rebuttal evidence so that there is no bar to the recognition of a public footpath arising by prescription for simple walking for pleasure (or 'pure walking' as it was referred to in the judgment). I make this point because the written evidence of many of the Applicant's witnesses as given to the footpath application was relevant to this Inquiry particularly in cross examination. It is important to note that I have not had sight of the footpath application made in 2014. I have just been referred to a number of the evidence forms given in support of that application by a number of the witnesses that gave oral evidence to the Inquiry, namely Ms Forbes, Mrs Wright, Dr R Lucas, Dr E

[133] R *v Suffolk CC ex p Steed* (1995) 70 P & CR 487 at 503

Lucas, Ms Rossi, Mr Mercer, Mrs Billing, Mr Hodgson, Mrs Tucker, Mr Rattue, Mrs French, Mrs Ludlow and Mr Robins. I have also not had sight of the decision on the application to modify the definitive map. The Applicant did not present any evidence or make any submissions that what have been referred to here as worn tracks or paths are not capable of deemed dedication so as to be added to the definitive map.

265. *McAlpine* deals with the requirement that the LSP over a 20 year period must be by a *significant* number of the inhabitants of any locality or neighbourhood within a locality. It was found that the term 'significant' must be construed in its ordinary sense and that it did not necessarily mean a considerable or substantial number. The issue of whether the evidence shows use by a significant number of local inhabitants is very much one of impression for the Inspector and that what remains essential is that the number of users for LSP must be such as to signify to the landowner that it is in use by the local community for informal recreation.

266. The *Trap Grounds* case dealt explicitly with the relevance of potential for existence of public rights of way on land subject to an application to register a TVG. Towards the end of the case Lightman J offers guidance on what account should be taken of user by local inhabitants of paths over which public rights of way on foot may at some future date come into existence, when determining whether qualifying user of the land has been established.

267. It is made clear that the crux of the matter remains how the matter would have appeared to the landowner. The complexity of the analysis is well acknowledged:

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

268. The question had been dealt with earlier that year in *Laing Homes*. In that case there was a public right of way (PROW) running around the perimeter of the application land. It was also a case in which walking including dog walking was the principal activity taking place. Again, the particular difficulty of discerning the quality of the user was highlighted. In particular the decision provides helpful guidance as to how the off-path use by dogs while being walked by owners predominantly using the paths should be viewed:

> "Dog walking presents a particular problem since it is both a normal and lawful use of a footpath and one of the kinds of "informal recreation" which is commonly found on village greens. Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog's owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?...The landowner is faced with the same dilemma if the dog runs away from the footpath and refuses to return, so that the owner has to go and retrieve it. It would be unfortunate if a reasonable landowner was forced to stand upon his rights in such a case in order to prevent the local inhabitants from obtaining a right to use his land off the path for informal recreation. The same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields: see *per* Lord Hoffmann at 358E of Sunningwell . I do not consider that the dog's wanderings or the owner's attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation."

269. *Lewis* deals mainly with the issue of deference and it is relevant to my consideration in relation to the low level of agriculture on the AL in the single annual hay crop which it was common ground had generally been taken from the AL throughout the period. Lord Walker notes with approval Lord Hoffman's observation in *Trap Grounds* that this kind of activity is not incompatible with informal recreation taking place.

270. *Allaway* is a recent case in which the decision to register a village green was sought to be reviewed by the landowner and the High Court rejected the grounds for such a review and upheld the CRA's decision to adopt the Inspector's recommendation for registration. In the recommendation the Inspector had taken into account a great deal of walking with and without dogs on the perimeter worn path and had found that it had the quality of LSP. He also found that, having discounted the use of the PROW on the AL and those using the worn path in a manner referable to a putative PROW, that left the bulk of the walkers using the land in a manner that he found would have signified to the reasonable landowner that a public right for informal recreation was being asserted across the whole of the land. He draws a distinction between those walkers who enter the land and walk a circuit/s and then leave by the same exit as demonstrating LSP and those who enter and exit by different access points to be discountable as demonstrating PROW type use. His conclusion on the facts before him was that the reasonable landowner would have and in fact did have notice that rights for informal recreation were being asserted by the local community for the whole of the land throughout the period. The case gives a very helpful and up to date rehearsal of the relevant principles and the Applicant, understandably, relies upon it heavily in her submissions.

271. The decision in that case as excerpted in the judicial review decision in *Allaway* appears to be completely consistent with the guidance of Lightman J in *Trap Grounds,* particularly in his comment quoted above, that recreational walking on a

defined route may or may not appear to be use referable to a putative PROW or the assertion of rights to informal recreation on the land. How the use would appear to the objective landowner remains the key consideration.

272. Against that legal background, I consider the evidence in the case.

273. As is common in these type of Inquiries, there was a great deal of evidence that dog walking was the predominant use of the land whether witnesses had taken part in it or witnessed it.

274. Mr Pattison, whose evidence I found vague in many respects, was clear that over the span of a year, dog walking was what people used the land for most and in cross examination he agreed that what he had seen others doing was dog walking on the perimeter track. Mr Garwood recalled that he would typically see others walking their dogs. Dr R Lucas agreed that in 2014 the predominant use of the land was for dog walking and described having met many dog walkers on the land in his period of use. Mrs Norbury recalled that when she met others on the land they would generally be walking dogs. Mr Chrimes describes seeing others walking dogs on the land. Mr Mercer described how his knowledge of other walkers and their dogs grew after acquiring his own dog in 2004. Mr Hodgson's main activity n the land was for walking his dog and that was mostly what he recalled other users doing. Mr Rattue described his use as primarily for dog walking and stated that he generally walked with others with their dogs. Mrs Heaford's use was for walking her dogs and with her children. Mrs French who doesn't own a dog walks the land with her two friends who walk theirs there. Mrs Ludlow uses the land to walk her dogs. Mrs Gee for the Objector did not see many using the land but the people she did see were walking dogs. Mr Agar-Hutty recalled that when he has seen people on the land other than those working, they have been walkers usually with dogs. Mr Robins recalls seeing the odd dog walkers on the land from the early

1990s. Mr Farmer has never seen anyone use the land for anything other than dog walking barring Mrs Gilmore.

275. This evidence coupled with the aerial photography report of Mrs Cox[134] makes it plain that the predominant use of the AL is for walking with dogs.

276. The next question to determine is how that user would have appeared to the reasonable landowner. Is it qualifying LSP so that the application satisfies the requirement for user as of right, or is it of a different quality that would not signify to the landowner that local inhabitants were asserting village green rights?

277. Discerning how the use of the AL would have appeared to a reasonable landowner has been no easy task in this application. The evidence leads me to the conclusion that the overwhelming majority of the use described in support of the application was of walking on the AL with or without dogs on the worn paths particularly those at the perimeter and either side of the stream. My review of the written evidence submitted by those that did not attend the Inquiry in the form of EQs supports that conclusion with the clear majority of plans (75 out of 83) showing the worn paths as the use described, and usually only the perimeter path itself. The evidence of the live witnesses that supported this conclusion was that summarised above and the following further particular points:

278. Ms Forbes in essence acknowledged that she used the AL as "through passage" as noted on her footpath evidence form about 50% of the time. That means that on her highest case, recalling that she noted no change of frequency to twice daily even when she didn't have a dog, evidence I found surprising, she was using the

[134] OB1 at page 370

AL as a destination once a day throughout the period and as a through route once a day. Based on her footpath evidence form and her evidence of her enjoyment of walking with others, it is most likely that she was doing so on the worn paths. Therefore 50% of her use should be discounted as a reasonable landowner would have perceived this kind of 'transit' use to be referable to the assertion of a PROW and not LSP.

279. Mrs Wright told us that her use was of the worn paths and this was demonstrated on her footpath evidence plan. Her walks on the AL were usually part of a wider route encompassing the woods or part of a very long walk and this was consistent with her footpath evidence form which stated that she used the AL to go from Limmerhill Road up to Foxhill Woods. She used access points 4 and 2. She had observed others using the land and they would also be on the worn tracks. She told the Inquiry that for the majority of the period of her use which dated from 2001 to 2014, she would cross the land in this way weekly although her footpath evidence form suggests that it may have been no more than about every other week. In any event, that use should be discounted as being referable to a PROW.

280. Mr Garwood recalled that his use was of the worn paths and this was demonstrated on his EQ plan. He would sometimes go up into the woods from the AL. Therefore a proportion of his use was of the worn paths from a point outside of the land to another point outside of the land. We are not able to assess what proportion because his evidence does not go that far. This introduces an ambiguity as to how his use would be perceived because sometimes he would use the land for transit type use and sometimes he would not.

281. Dr R Lucas initially described his use in terms of using the whole of the AL but under cross examination it became clear that his habit was actually to use the worn paths with frequent diversion to retrieve his dog or the ball he had thrown. He

agreed that without a ball he would stick to the worn paths. This appears to be use as described by Sullivan J in *Laing* which would be referable to PROW use rather than to the assertion of TVG rights. He also described others' use as being of the tracks. He used all four access points and his use included passage use to get to his house from Barkham Road, as a route from Barkham Road to Foxhill Woods and just as use from his house into the field to use the paths and back to his house. Therefore over the period of his use he would have come onto the land and left it by different access points. As with Mr Garwood, sometimes he would have used the land to pass from one point outside the land to another and thus there is ambiguity as to the correct position.

282. Mrs Norbury was clear that her use from the start of the period until the mid-2000s was of track use, specifically arriving at the AL at access point 2 and walking on the worn path over the stream to take her up to the northern edge of the land and out into the woods at access point 4. This was part of a wider circular walk she undertook 2 or 3 times per week.

283. Ms Scott gave evidence that daily from 2003 until the end of the period her use was of the worn paths at the perimeter and alongside the stream. This was walked as part of a wider route which would encompass the woods with occasional off path recreation.

284. Ms Rossi's evidence was that from 1996 until about 2007 her use was infrequent at once every two months or so. When she did walk on the land it was on the worn paths, up from Limmerhill Road and into Foxhill Woods and then on to a longer walk. Therefore for the majority of the period her use was infrequent, on worn tracks and arriving and leaving the land by different access points.

285. Mr Mercer's evidence was that he walked on the AL weekly from 1994 to 2004. For that first ten years he could not recall whether he used the worn tracks or not. That means it is ambiguous as to how his use would have appeared to a reasonable landowner.

286. Mr Hodgson's evidence was clear. He used the worn perimeter path on the AL on an almost daily basis as part of a wider route including Foxhill Woods. He would enter at access point 3, walk the northern track and progress up into the woods at access point 4; he would later re-enter by access point 4 and then leave the land by access point 2. Thus he is walking on the defined tracks and entering and leaving by different points.

287. Mr Rattue gave evidence that he walked on the land twice daily on the worn tracks. He would generally enter by point 2, that being closest to his home and after walking on the paths, he would exit by point 3 or another of the four points.

288. Mrs Heaford would use the land twice daily from 1997 to the end of the period except for 4 years when she did not use the land. Half of her use was on-track use. At weekends she would enter by access point 3 and then exit up into the woods by point 4. She would then re-enter at point 4 and leave by access point 3. That means that on two weekend walks her use would be on the worn paths and part of a longer walk where she and her family would enter by one point and leave by another and then do the same in reverse. Her week day use would have been on the tracks 50% of the time although with no information about where she would access and leave the land there is an ambiguity that should be resolved according to *Trap Grounds* as above.

289. Mrs French's evidence, which I treated with some caution, was that her use was of the worn paths between 2009 – 2014 on a weekly basis entering and leaving the land by different access points. Three months of each year the use was as part of a route from school to home.

290. Mrs Ludlow's evidence was that from 1999 to 2014 she used the AL on the tracks but for an unknown frequency and route. This means that it is ambiguous how a reasonable landowner would have perceived her use and that is resolved according to *Trap Grounds* by inferring that it would have been understood as no more than the assertion of a PROW.

291. All of the above use, save for Ms Forbes', should be discounted as it is either user which is clearly referable to the assertion of a PROW or it is ambiguous as to what the correct position is so that as *per Trap Grounds* it must be discounted. Ms Forbes' user should be discounted by 50%. When one looks at what user is left which might support a recommendation for registration it is demonstrably not sufficient.

292. Discounting the use referable to a potential PROW leaves the evidence of just five witnesses One of those witnesses could only speak of very infrequent use during the relevant period and then only for a few years. Two could speak of their use for the whole period and two could speak of use for over 15 years. That is against a background where the other written evidence is not generally supportive of evidence of LSP as opposed to PROW use.

293. I do recognise that there was evidence of some activities taking place on the land occasionally. Much of this was far too infrequent or on single occasions that it

could ever amount to LSP, such as scout group and ramblers use (Ms Forbes), sword swinging (Mrs Wright), golf driving (Dr R Lucas).

294. There is the seasonal use described by all of the live witnesses of sledging, tobogganing, snowman building and snow play generally. I accept this evidence entirely. However, on its own I do not believe that this activity would amount to the assertion of village green rights to the reasonable landowner, even where there were said to be up to 60 people on the land on one day of snow. It must be recalled that there is the evidence of Mr Garford[135] who helpfully provided estimates from the Met Office that in a period from 1981 to 2010 the average snow lying days in any given year in the area would have been no greater than 1.6. The more location specific evidence from the Wokingham Climatological Station at Emmbrook estimated the days of snow lying on the ground at 9am as being 1% of days between 1994 and 2014. That evidence was unchallenged by the Applicant although in her oral evidence Ms Forbes said she recalled it as more. I believe that upon a reasonable landowner observing such activity it would be recognised for what is experienced by landowners across the south east of England as a brief en masse trespass on the very rare occasion of snow thick enough to support sledges and the building of snowmen.

295. The evidence of blackberry picking and the exploration of the copse by the stream I accept could be qualifying LSP but here but I do not think this can be distinguished from the use of the worn paths that is referable to PROW use. In this case the brambles holding the fruit and the copse itself must have been very close to the paths as I observed from the aerial photographs and from my experience of the land itself on the site visit where I found the copse in particular to be only a short stride away from the bank of the stream whereas I had expected there to be more distance between them from my impression from the photography. Also witnesses agreed that blackberry picking would be done from the paths (Mr Garwood, Mrs Heaford). Not a single witness made any reference

[135] OB Vol 2 at page 798

to cutting across the land to get to the best blackberries e.g. in the brambles on the western edge of the land, so that this use seems to me to be entirely incidental to the putative PROW use and falls squarely within the range of lawful activities a person might naturally do on a public highway as envisaged by Lord Clyde in *DPP v Jones*[136]. I make a similar finding in relation to the picnicking described by many witnesses. My impression from the witnesses was that this was much more in the way of people pausing on their walks to enjoy some refreshment in the open air rather than trips into the land for the purpose of picnics.

296. There is also the expert evidence of Mrs Cox and Mr Young to be taken into account. I accept the Objector's submission based upon the expert evidence that had there been LSP across the whole of the land, particularly in the period up to 2003, it would have shown up in the range of photographs available in that period. It was common ground that there had been an annual hay crop taken from the land in the majority of years in the period. This provides literally fertile ground for the recording of even moderate off-track use but the images do not disclose it.

297. I can only attach limited weight to the report of Mr Young as the report was obtained late in proceedings and so was not subject to the usual questions from the Objector, whether in cross examination or that might have been posed in writing prior to the Inquiry. Mrs Cox commented that she would have liked to have debated some of Mr Young's conclusions with him.

298. There are other reasons to attach only limited weight to Mr Young's report. Firstly, he has estimate the land as "sensibly flat"[137]. It is not. That means that some of Mr Young's conclusions will be based upon a mistaken premise. Other

[136] *DPP v Jones* [1999] 2 AC 240 at 279E

[137] Paragraph 12

than this he appears to conclude that there are some emerging perimeter paths in 1998 north of the stream and some discontinuous lines forming to the immediate south of the stream and at the southern boundary. This at best suggests that there is some evidence of track use at this time. If accepted that is likely to be nascent evidence of use referable to a PROW rather than any evidence of LSP across the whole of the land. His photoplans do not disclose any use of the whole, or any area off the tracks, for LSP like activity.

299. Furthermore, I accept the submission of the Objector[138] that much evidence that might have given rise to LSP, when the evidence was tested, was actually attributable to the incidental use of the paths such as retrieving dogs and balls, bike and horse riding, etc. I also accept what is said by the Objector about children's play. My impression from the evidence was that there would have been some qualifying LSP going on off the tracks such as Mr Pattison's daughter's den building in the very early years, kite flying and ball games that spread out further than the track use across wider areas. However, this is not of a quality or quantity to have put the landowner on notice of the assertion of village green rights across the whole of the land.

300. Therefore I find that the Applicant has failed to prove that it is more likely than not that there has been LSP in such quality and quantity for the 20 year period spanning 1994 to 2014 and as such the application cannot be recommended for registration as a new TVG.

301. Ordinarily I would now go on to consider the other issues in the case such as the number of users and whether those are significant in the context of the locality or neighbourhood within a locality. However, in this case the Applicant has made

[138] Closing submissions at paragraph 19.

applications to amend both the neighbourhood within a locality and the period of the application and further considerations may bring issues from that application into play to no useful end. Unless either party, or those instructing me, indicate that there is a reason to give a formal decision on any further statutory requirement against the background of the finding I have already made that LSP has not been established for the requisite period of sufficient quality and quantity, then I refrain from further observations.

RECOMMENDATION

302. I recommend that the CRA should reject the application to register the application land as a new town or village green for the reasons set out in this report.

Felicity Thomas

18th September 2017

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN IDENTIFIED IN THE APPLICATION AS 'LIMMERHILL FIELD' AT WOKINGHAM, BERKSHIRE.

– APPLICATION NUMBER WOK - 2 –

APPENDIX 1

Enc: Annex 1: Application map as adopted in directions of 8th September 2016 and used at PI